Comments of Concerned Lawyers and Due Process Advocates in Support of Fundamental Fairness for All Parties in Title IX Grievance Proceedings

Department of Education Notice of Proposed Rulemaking

Docket No. ED–2021–OCR–0166, RIN 1870–AA16

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Submitted September 9, 2022

EXECUTIVE SUMMARY

The Administration's proposed Title IX regulations would undo the substantial progress achieved by the 2020 regulations. They also fly in the face of hundreds of court decisions that, time and again, have told colleges and universities that they must treat students fairly—that the era of kangaroo courts is over.

We[1] fear that these changes will encourage colleges and universities to return to the worst abuses of the last decade, procedures that Judge José Cabranes of the Second Circuit Court of Appeals recently noted "have been compared unfavorably to those of the infamous English Star Chamber."[2]

This Comment identifies three structural concerns with the proposed regulations and discusses specific provisions that revoke rights essential to a fair process for both parties. It pays particular attention to the rights of respondents, because the proposed regulations disproportionately target them and the attorney signatories to this Comment have extensive experience in representing respondents in particular.

Overarching Structural Concerns

Three areas of structural concern with the Department's proposed regulations include: 1) the revocation of existing rights, 2) generation of greater ambiguity, and 3) indifference to gender discrimination and prevailing case law. These issues are linked and would bend the college grievance processes back toward injustice.

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[2] *Vengalattore v. Cornell Univ*., 36 F.4th 87, 114 (2d Cir. 2022).

1. Revocation of Existing Rights

The proposed regulations systematically revoke or erode a uniform set of rights based on established principles of fairness and a strong body of case law.

The proposed regulations:

- **Revoke the right to a written complaint** when there will be a formal grievance process.
- **Undermine the presumption of innocence** by allowing for interim punishments without effective procedural protections.
- **Revoke the right to present expert witnesses**.
- **Revoke the right to receive a full record of the evidence** compiled in the college's investigation and the right to meaningful input on the college's relevance determinations.
- **Revoke the right to cross-examine witnesses** and the other party through an advisor.
- **Revoke the right to see and hear live witness testimony**.
- **Revoke the right to an independent decisionmaker**.
- **Revoke the right to a final written decision** that identifies the provisions under which the respondent is charged and explains how those provisions apply to the facts presented.
- **Revoke the equal-rights guarantee** that inequitable treatment of *either* complainant or respondent may constitute gender discrimination.
- **Severely undermine the right to appeal**.

The proposed regulations would allow colleges to return to pre-2020 practices that led to hundreds of lawsuits by accused students—many of which resulted in decisions that cracked down hard on biased college disciplinary procedures. The Department has also failed to explain why the government is proposing to *revoke existing rights* and sometimes—in a strangely Orwellian turn—outright denies that it is making any changes at all. Most confusingly, the Department appears to propound a new efficiency standard that has already been rejected by the courts as a "depart[ure] from the normal sense of the safeguards that are necessary to ensure fairness."[3]

2. Generating Greater Ambiguity

One of the Department's primary justifications for its decision to revoke numerous rights provided by the current Title IX regulations is the purported "need for greater clarity on how to ensure that complaints of sex-based harassment are resolved in a prompt and equitable manner."[4] Since when, one might rightly wonder, have *rights* gotten in the way of *clarity*? And indeed, the proposed regulations would provide less clarity, repeatedly substituting mushy (and thus bias-inviting) standards where there once were bright-line rules.

[3] Transcript of Oral Argument, *Doe v. Univ. of the Scis.* (19-2966), at 34:59-35:09, https://www2.ca3.uscourts.gov/oralargument/audio/19-2966_Doev.UniversityOfTheSciences.mp3.
[4] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390, 41392 (July 12, 2022) (to be codified at 34 C.F.R. § 106).

The proposed regulations would, for example:

- **Replace a bright-line rule against imposing interim punishments** before adjudication (except for emergencies) with ambiguous references to "supportive measures" that would inevitably permit severe interim punishments.[5] The Department proposes to grant Title IX coordinators "substantial discretion" to impose these interim punishments, if the coordinator deems the action "reasonable," "necessary," and/or "least restrictive of the respondent's access . . . while still ensuring nondiscriminatory access for the complainant."[6]

- **Replace a bright-line rule allowing the parties "an equal opportunity to inspect and review any evidence** obtained as part of the investigation that is directly related to the allegations raised in a formal complaint,"[7] with an ambiguous instruction for colleges to "provide *either* equitable access to the *relevant* and not otherwise impermissible evidence[ ] or [to] . . . the same written investigative report that accurately summarizes this evidence."[8] If the college provides a report, a party can obtain access to the evidence only by requesting it. (How does the Department think economically disadvantaged students who can't afford counsel would do navigating such highly formalized, byzantine rules?) And even then, unlike with the current regulations, the student will receive only evidence deemed "relevant," with no way of knowing what was excluded and no input on the relevance determination.

- **Replace a bright-line rule requiring schools to allow the parties 10 days to review the investigative report** before a hearing with ambiguous institutional flexibility to set "reasonable timeframes" and ensure both parties have "reasonable opportunity" to review and respond.[9] Anyone knows that the word "reasonable" can hide a multitude of sins—which seems to be the Department's goal with this rule.

Not only do the proposed regulations create *greater confusion* where they propose to create "clarity," but the Department has recommended changes that flagrantly defy judicial concerns on fair process.

3. Indifference to Gender Discrimination and Prevailing Case law

The proposed regulations would eliminate the only provision that explicitly tells schools that their biased treatment of a respondent may constitute sex-based discrimination. That is especially puzzling given recent developments in the case law. Since the 2011 Dear Colleague letter, the courts have issued a resounding 75 decisions against colleges on gender discrimination under Title IX.

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[5] *See generally* 87 Fed. Reg. 41390 (stating without adequately defining "supportive measures" throughout the proposed regulations).
[6] 87 Fed. Reg. at 41422, 41448.
[7] 34 C.F.R. § 106.46(e)(6)(i).
[8] 87 Fed. Reg. at 41498.
[9] 87 Fed. Reg. at 41501.

These cases have tended to have three things in common:

- **Deficient process leading to colleges wrongly disciplining male respondents**—in one case, ignoring texts from an accuser on the night of the incident where she said she needed to come up with a "good lie."[10]

- **Procedural irregularities suggesting possible gender bias against male respondents.** As the Ninth Circuit observed, "[A]t some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding despite the [college's] protests otherwise."[11] The Second, Sixth, Seventh, Eighth, and Tenth Circuits have reached similar conclusions when confronted with irregularities such as an investigator downplaying a pro-complainant witness's effort to blackmail another witness; Title IX coordinators making decisions predicated on sex stereotypes or selectively pursuing complaints by females against males; and ignoring a local prosecutor's request to delay adjudication due to concerns about the accuser's truthfulness.

- **Clear pressure to crack down on campus sexual assault amounting to colleges feeling pressure to discriminate against male respondents and find them guilty by any means necessary.** The Second Circuit recognized the problem as far back as 2016: "There is nothing implausible or unreasonable about the . . . suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that [the college] turned a blind eye to such assaults."[12]

These cases have made clear that what is needed is not more "clarity"—but simply more *rights*. The 2020 Regulations gave those rights. The Department's proposed regulations would take them away.

Specific Provisions that Revoke Procedural Rights

Although the Department gets a few things right, the proposed regulations are a major setback for due process in Title IX cases on college campuses. Below are some of the highlights, which are developed further in the body of this Comment:

Where the Department got it right:

- **§ 106.8 *Administrative requirements*.** We support the proposed requirements that colleges adopt and publish their nondiscrimination policy and grievance procedures; train their officials on how to discharge their responsibilities and serve impartially; avoid reliance on sex stereotypes; and make their training materials publicly available.
- **§ 106.11 *Application of regulations*.** We support this provision's notice that Title IX

[10] *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 209 (D. Mass. February 28, 2017).
[11] *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 941 (9th Cir. 2022); *accord Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 950 (9th Cir. 2020).
[12] *Doe v. Columbia Univ.*, 831 F.3d 46, 58 (2d Cir. 2016).

protections apply to all "conduct that occurs under a [college]'s education program or activity," including off-campus allegations.[13] The current regulations, applying language from *Davis v. Monroe County Board of Education*,[14] caused confusion.

- **§ 106.45(b)(1), (3)-(6)** ***Grievance procedure requirements.*** Generally, we support the efforts proposed in these subsections to set clear procedural guideposts and ensure reliable outcomes, especially subsection (b)(5), which replaces language prohibiting schools from restricting parties' ability "to discuss the allegations under investigation or to gather and present relevant evidence" with the requirement to take reasonable steps to protect privacy without restricting ability to obtain and present evidence.[15] We are, however, concerned that some schools could return to the "gag rule" policies that they had before the 2020 regulations.
- **§ 106.46(e)(6)(iii)** ***Unauthorized disclosures in sex-based harassment grievance procedures.*** We support this provision "to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures," provided it is applied equitably.[16]
- **§ 106.46(f)(3)** ***Relevancy determinations.*** We support the requirement that a decisionmaker ask all "relevant and not otherwise impermissible" questions submitted by the parties, including credibility questions.[17] The devil, of course, will be in the details of what a decisionmaker considers "relevant."
- **§ 106.46(g)** ***Recording live hearing procedures.*** We support this provision regarding the recording aspect of any live hearing, but we note that the Department does not propose extending a similar right to recordings or transcripts to students subjected to the (far less fair) single-investigator process.

Where the Department needs to provide clarification:

- **§ 106.2** ***Retaliation definition.*** This definition of "retaliation" is a welcome addition to the proposed regulations that the Department should clarify also applies to retaliation against a *respondent*.
- **§ 106.2** ***Hostile environment harassment definition.*** The current regulations use the *Davis* definition of "hostile environment harassment," which led many colleges to adopt a problematic, two-track system for adjudicating Title IX complaints—some complaints would be handled under the Title IX policy, while others would be handled under the general student conduct code (and with significantly reduced rights). The Department should clarify its intent to end this pernicious practice.
- **§ 106.44(h)** ***Emergency removal.*** This provision regarding emergency removal seems consistent with the current regulations. The Department, however, should more clearly define the scope of a college's emergency removal criteria regarding a complainant's "physical health and safety" as opposed to mere "health and safety"[18]—which would leave open a potentially significant loophole relating to mental health (as opposed to

[13] 87 Fed. Reg. at 41571.
[14] 526 U.S. 629 (1999).
[15] 87 Fed. Reg. at 41469.
[16] 87 Fed. Reg. at 41577.
[17] 87 Fed. Reg. at 41578.
[18] 87 Fed. Reg. at 41451-41452.

physical safety) that could be used to justify unnecessarily severe interim suspensions.

- **§ 106.44(k)(3)(vii)** ***Confidentiality of informal resolution records*****.** The proposed regulations require that any record obtained solely through the informal resolution process is kept confidential, unless its disclosure is required by law. This provision needs clarification. A ban on the use of information obtained through an informal resolution process only makes sense for proceedings such as settlement negotiations and only regarding information such as written or oral discussions and admissions. The exclusion of information like records, which inevitably would have been obtained in the grievance investigation if the informal process had not been attempted, does not make sense.
- **§ 106.44(k)(3)(viii)** ***Informal resolution facilitator as witness.*** If a college resumes grievance procedures, the proposed regulations allow a previously involved informal resolution facilitator to serve as a witness in subsequent proceedings. This provision needs clarification. What possible reason could exist for allowing an informal resolution *facilitator*, and not the *information* from an informal resolution *process*, to be involved in a formal proceeding? Additionally, allowing a facilitator to serve as a witness in subsequent proceedings would almost certainly have a significant chilling effect on any informal resolution process.
- **§ 106.45(b)(7)** ***Impermissible evidence*****.** The proposed regulations would set out three categories of evidence that would be impermissible in the grievance procedures, regardless of whether the evidence is relevant. This provision largely retains prohibitions from the current regulations, but the Department should clarify that consent to turn over information is not selective; limitations on disclosure of prior sexual conduct or interests applies to both parties; nothing prohibits respondents from offering clearly exculpatory contextual information; the prohibition on questions and evidence about sexual interests and prior sexual conduct is not broadened to apply to all grievance procedures; and nothing requires schools to exclude "relevant" evidence.
- **§ 106.45(g)** ***Evaluating allegations and assessing credibility*****.** The proposed regulations require that colleges have a process for assessing the credibility of parties and witnesses, "to the extent that credibility is in dispute and relevant."[19] It is hard to imagine when, in Title IX proceedings, credibility would *not* be "in dispute and relevant." The Department should therefore clarify that this provision is not a loophole to avoid assessing credibility at all.
- **§ 106.45(h)(5)** ***Prohibition on discipline*****.** In contrast to the current regulations, which are clear and strike a sensible balance regarding discipline for false statements, the Department's proposed substitute language is not so clear—particularly given its explanation that the change means a college "must not discipline a person for making a false statement based solely on a determination . . . that the person's . . . statements were not supported by the evidence."[20] There should be consequences for false statements made knowingly or in bad faith, even though such consequences should not automatically follow from the determination regarding responsibility alone.
- **§ 106.71** ***Prohibition on retaliation*****.** The Department suggests revisions to the prohibition on retaliation that would build on the current regulations and clarify what types of conduct constitute prohibited retaliation. We support this provision, provided

[19] 87 Fed. Reg. at 41482-41483.
[20] 87 Fed. Reg. at 41490.

that the Department clarifies that the prohibition on retaliation applies to protect respondents as well as complainants.

Where the Department got it wrong:

- **§ 106.2 *Complaint definition*.** In contrast to the current regulations, which require a signed and written complaint to the Title IX office or another designated person or office, the proposed regulations: (1) allow the complaint to be oral or written; (2) remove the signature requirement; and (3) allow the complaint to be made to a college, not to a specified employee or the Title IX Coordinator. This is insufficient for fair process. A written complaint is necessary to allow school officials to make informed preliminary assessments; reporting to a "college" could mean reporting to a professor or employee with no training in how to accurately record or report a complaint; and letting a school official (rather than the complainant) draft a complaint opens the door to smoothing out unwieldy but potentially telling inconsistencies.
- **§ 106.2 *Definition of "relevant."*** The Department explains that its proposed definition is combining the current regulations' concept of "directly related" with "relevant," saying that the distinction caused confusion. That isn't true, and the proposed fix is even more confusing: it first defines "relevant" as "related," then says "relevant" means information that "may aid" the decisionmaker. How this clears things up, we do not pretend to understand. We thus propose that the Department use the definition in the Federal Rules of Civil Procedure: "Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence."[21] If it works for every federal court in the country, it should work for the Department.
- **§ 106.44(g) *Supportive measures*.** The Department addresses a college's obligation to offer the parties supportive measures during the pendency of a grievance procedure. The current regulations seek to balance the rights of the complainant and respondent in the pre-adjudication period by providing an array of non-punitive, supportive measures. But the proposed regulations would end that balance. Indeed, they would actually *encourage* schools to impose interim punishments on respondents for undefined and potentially lengthy periods. Colleges will have "substantial discretion" to indefinitely suspend or "burden a respondent" based solely on a complainant's allegation.[22]
- **§ 106.44(f)(6) *Extra-procedural process*.** The proposed regulations would require a Title IX coordinator to "take appropriate prompt and effective steps outside of a [college]'s grievance procedures, when necessary, to ensure that sex discrimination does not continue or recur."[23] The Department should clarify that Title IX coordinators do not possess independent authority to conduct a one-person investigation and impose punishment. As written, the proposed regulations imply that a Title IX coordinator may determine, before any grievance process has occurred, that a school "must impose disciplinary sanctions on a respondent to effectively end the sex discrimination and prevent its recurrence."[24] Such a determination is not consistent with the presumption of

[21] Fed. R. Civ. P. 401.
[22] 87 Fed. Reg. at 41447-41451.
[23] 87 Fed. Reg. at 41446.
[24] 87 Fed. Reg. at 41447.

innocence or basic fairness.

- **§ 106.44(i)** ***Informal resolution*****.** The informal resolution option maximizes the autonomy given to the complainant while allowing colleges to focus on what they do best—educating, counseling, and mentoring students—rather than attempting high-stakes adjudications of alleged criminal conduct. Therefore, the Department should retain this provision as written in the current regulations, rather than—as the proposed regulations would have it—give colleges discretion to refuse informal resolution even when both parties want it.
- **§ 106.45(b)(2)** ***Conflicts of interest/bias*****.** The proposed regulations would eliminate the current regulations' prohibition on the decisionmaker being the same person as the Title IX coordinator or investigator. By allowing greater bias to intrude upon the grievance process, the Department explicitly states that the current system of impartiality and objectivity is too "burdensome for some schools" and that the Department, therefore, intends to encourage greater implementation of the single-investigator model.[25]
- **§ 106.45(f)** ***Complaint investigation*****.** This section is supposed to be a detailed guide for colleges "to ensure an adequate, reliable, and impartial investigation of sex discrimination complaints."[26] The Department, however, resurrects problematic language in its proposed regulations. The biggest problem with this provision is its reliance on an inadequate and unclear definition of "relevance," as discussed at § 106.2. Under the proposed regulations, relevance determinations are made before all the evidence is gathered and the parties may only access a "description" of evidence that has already been determined "relevant."[27]
- **§ 106.45(h)(1)-(3)** ***Determinations of sex discrimination.*** The proposed regulations remove the requirement to use the same standard of proof for complaints against students and employees, with a lower preponderance of the evidence standard for complaints against students. The appropriate distinction is between individual harassment/discrimination and institutional discrimination. Anything else suggests that the Department is comfortable with a system where it is harder to prove a sexual misconduct allegation against a professor.
- **§ 106.46(e)(4).** ***Expert witnesses*****.** The proposed regulations depart dramatically from the current regulations by granting schools discretion to exclude expert witnesses. The Department does not identify when expert witnesses would be "necessary" or "helpful" and subtly discourages allowing expert witnesses by encouraging colleges to "consider whether an expert witness would impede a prompt resolution to the grievance procedures."[28] Granting colleges discretion to prohibit expert witnesses will lead them to do so, even on issues such as toxicology or interpreting SANE reports, where college decisionmakers cannot—to put it mildly—be presumed to have expertise.
- **§ 106.46(e)(6)** ***Access to evidence*****.** The proposed regulations require colleges to "provide either equitable access to the relevant evidence or to the same written investigative report that accurately summarizes this evidence."[29] The Department's proposed language in this section is extraordinarily problematic. Specifically, the Department:

[25] 87 Fed. Reg. at 41467.
[26] 87 Fed. Reg. at 41461.
[27] 87 Fed. Reg. at 41481-41482.
[28] 87 Fed. Reg. at 41497.
[29] 87 Fed. Reg. at 41480.

- Allows schools to determine relevance without giving the parties the underlying evidence.
- Requires additional procedures for parties to obtain the underlying evidence associated with a report.
- Does not specify that a report should include any documentary evidence and does not even *address* oral evidence.
- Appears to allow schools, which grant parties access to the evidence, the discretion to avoid providing or even generating an investigation report at all.
- Does not explain the removal of a specific timeframe for the parties to review the evidence.

If this deficiency list appears lengthy, that is because it is. This section revokes important rights that the parties currently possess and raises major concerns about fairness of the process.

- **§ 106.46(f) *Eliminating live hearings*.** The Department proposes not just to revoke the right to cross-examination, but the right to a live hearing at all. The Department frames its deprivation of rights as a "choice" between two competing grievance models—"single investigator" or "live hearing with full cross-examination." But courts have repeatedly made clear that there *is* no choice—a fair process requires a live hearing with meaningful real-time questioning, which rules out a single-investigator model.
- **§ 106.46(h) *Determinations of sex discrimination*.** The Department claims that its proposed changes to this section will "improve overall clarity" and provide a "more useful explanation of how a recipient reached its determination."[30] Unfortunately, the Department fails in its stated goal and, instead, restores ambiguity to a system that is so often marred by a lack of fair process. The Department proposes reorganizing the requirements from the current regulatory provision at § 106.45(b)(7) into §§ 106.45(b)(2), 106.45(h), and 106.46(h). Current §106.45(b)(7) sets forth a template for precise and reasoned decision; the Department proposes to substitute it for something much more amorphous. Specifically, the Department proposes to:
  - Substitute the requirement to identify the "allegations potentially constituting sexual harassment as defined in § 106.30,"[31] with the less precise "description of the alleged sex-based harassment."[32]
  - Revoke the right to a responsibility determination based on identified charges, specific factual findings, and specific conclusions correlating the facts to the charges,[33] and instead allow a general "determination as to whether sex-based harassment occurred."[34] This would, in practice, not make schools show their work. "The evidence shows there was harassment" would be enough of an explanation.
  - Substitute the requirement to provide a *rationale* for any sanctions and responsibility finding with mere *identification* of any disciplinary sanctions. Again—no need to show one's work. What, one wonders, might the Department

[30] 87 Fed. Reg. at 41511.
[31] 34 C.F.R. § 106.45(7).
[32] 87 Fed. Reg. at 41511.
[33] *See* 34 C.F.R. § 106.45(7) (requiring "(C) Findings of fact supporting the determination"; "(D) Conclusions regarding the application of the recipient's code of conduct to the facts;" and "(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility").
[34] 87 Fed. Reg. at 41511.

be trying to achieve by requiring schools to explain themselves *less*?

- **§ 106.46(i)** ***Restricted appeal rights*****.** The Department proposes to dramatically restrict the right to appeal. The proposed regulations require a procedural irregularity, new evidence, or bias that "would change"[35] as opposed to merely "affect"[36] the outcome of a matter. The proposed change in language would make successful appeals virtually impossible and likely require a reversal of the decision without remand. These restrictions are in addition to already paltry grounds for appeal that exist in the current regulations, as neither iteration of the regulations include anything about the weight of evidence or clearly erroneous/arbitrary results.

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If the Department's new regulations go into effect without any changes, they will have an enormously negative impact on how Title IX cases are handled—taking us back to the "bad old days," but not the ones famously mentioned by Assistant Secretary for Civil Rights Catherine Lhamon. We hope that this comment, which is based on our collective and extensive experience in these cases, will encourage the Department to rethink some of its most concerning proposed changes.

[35] 87 Fed. Reg. at 41511.
[36] 34 C.F.R. § 106.46(i).

INTRODUCTION

This comment is divided into three sections. First, we identify three areas of foundational concern with how DOE has structured the proposed regulations (Section I). Second, we discuss specific provisions that revoke rights essential to a fair process for both parties, even as they disproportionately target the rights of respondents (Section II). Third, we discuss the legal and evidentiary shortcomings of the Department's rationale for stripping the right to cross-examination (Section III).

I. FOUNDATIONAL CONCERNS

In 700 pages, the proposed regulations offer much to welcome, and we are heartened by the Department's continued commitment to eradicating sex-based discrimination in university academic or athletic programs. Given our backgrounds, however, our focus in this Comment is on proposed changes that impact how universities will be required to conduct their internal processes, including disciplinary processes, to address complaints of sexual harassment or assault. The proposed regulations suffer from three foundational flaws that would all but ensure universities will handle Title IX adjudications in a less fair manner than they have in the past two years. These flaws, moreover, are linked, and so would have a cumulative effect in bending university grievance processes toward injustice.

- *First*, the Department revokes or erodes—often with little or no explanation, much less justification—a wide array of procedural protections that have safeguarded both student complainants and student respondents over the past two years.

- *Second*, the Department then replaces these revoked rights with ambiguous provisions that are misleadingly marketed as providing greater "clarity" in the regulatory process.

- *Third*, the Department all but entirely overlooks widespread, recent judicial concerns over possible gender bias in the treatment of male respondents, thus exposing institutions to a wave of litigation if they have to implement the regulations as proposed.

1. Revocation of Rights

Under the current regulations, respondents are presumed innocent, and cannot (absent an emergency removal with required safeguards) be disciplined until the college has completed its grievance process. They also are entitled to a detailed written notice of the allegations against them. Both respondent and complainant are then required to receive a chance to review and respond to all evidence directly related to the complainant's allegations, "including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility." Both parties also are given specific time frames (10 days) to review any draft investigation report and file as well as any final investigation report and file. Adjudication includes a live hearing with adjudicator(s) who were not also the investigator(s) and during which the advisor for each party can cross-examine the other party and witnesses. Decisions must be based on a reasoned written analysis of the charged violations, the facts, and whether the facts satisfy the elements of the charges. And both parties have a meaningful right to appeal.

It is disappointing to see the Office for *Civil Rights* propose new regulations that would systematically revoke or erode a uniform set of rights which the federal Title IX regulations have guaranteed to students (and university employees) for the past two years; regulations which were solidly based on established principles of fairness and a strong body of case law. And yet the proposed regulations almost surgically target all of those rights—from the very start until the very end of the process.

The proposed regulations:

- revoke the right to a written complaint in instances when a formal grievance process will proceed;
- undermine the presumption of innocence, to which the Department still pays lip service, by allowing for interim punishments without effective procedural protections
- revoke the right to present expert witnesses;
- revoke the right to receive a full record of the evidence compiled in the institution's investigation, and the right to meaningful input on the institution's relevance determinations;
- revoke the right to cross-examine witnesses and the other party through an advisor;
- revoke the right for a live opportunity to see and hear the accounts of the other party and witnesses;
- revoke the right to a final decisionmaker separate from the person who conducted the investigation;
- revoke the right to a final written decision that identifies the code provisions under which the respondent was charged and explains how those provisions apply to the facts presented in the case;
- revoke the protections provided by the explicit confirmation that inequitable treatment of either complainant or respondent can constitute gender discrimination
- erode the right to appeal.

Under the proposed regulations, a respondent could be charged based on a complaint that was delivered orally, and for which his college had no specific details. Within a day of the allegations, the Title IX coordinator could suspend him (i.e. remove him from his dorm room and stop him from taking classes without any remote option) for the pendency of the grievance process, even though he was guaranteed a presumption of innocence and there had been no finding of responsibility. His case could then be assigned to a single investigator, who would meet separately with the respondent, his accuser, and perhaps a handful of witnesses—but would share with him only some unspecified kind of summaries of these meetings, with no requirement to include parties' or witnesses' actual words or the questions the investigator asked. The parties would not necessarily be given access to, or made aware of, information obtained during the investigation that related to the allegations because the investigator/decision-maker might unilaterally decide to exclude that information as impermissible or irrelevant. The respondent could then be found responsible without an opportunity for his advocate to ask questions of the accuser or for himself to even observe the testimony of the witnesses. The college document informing him of his finding would not need to identify any specific section of the campus disciplinary code that he violated but could merely find him responsible for "sex-based

discrimination." And even if he uncovered some new exculpatory evidence or a procedural irregularity by the single investigator, his appeal would be denied unless he could show that this additional material *would* have changed the outcome of his case, a nearly impossible standard to meet.

Under the current regulations, and substantial judicial authority, each step of the proposed grievance process outlined above would be inconsistent with Title IX. The proposed regulations would allow universities to return to practices that resulted in hundreds of lawsuits by unfairly-treated accused students and scores of court decisions concluding that rampant procedural flaws, against a backdrop of pressure from the Department to crack down on sexual misconduct, supported allegations of allegations of gender bias in violation of Title IX.

Stakeholders and the public alike might have expected detailed justifications for the breathtaking scope of these procedural revocations. Instead, the Department declines to explain—because it cannot—why the federal government should *revoke* rights that already exist (as would occur if the proposed regulations are adopted in their current form). For some matters (interim punishments, heightened appeals standards), the Department misleadingly denies that it is making changes at all. For others, the Department theorizes on why the rights should not have been extended in the first place. And much of this theorizing is unconvincing. The Department has an unfortunate tendency to cite cases (*Haidak v. University of Massachusetts* is a good example[37]) to bolster specific portions of its rights-revocation agenda but then ignore conclusions from the very same cases if they contradict other elements of the proposed regulations.

At most, the Department justifies its proposals by offering hollow assertions about "reweighing" matters and schools' purported need for a more efficient approach, since "postsecondary institutions vary greatly in terms of size, resources, and expertise."[38] Two years ago, responding to a claim along similar lines from a university lawyer during oral argument, Judge Paul Matey of the Third Circuit Court of Appeals observed that "efficiency is an unusual term to use, though, when we're talking about processes that surround deprivations of rights, whether they occur in contract or are established in some sort of positive law."[39] Judge Matey wondered what grounds existed for the courts to "depart from the normal sense of the safeguards that are necessary to ensure fairness and instead apply . . . a standard of efficiency."[40]

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[37] The Department, for instance, cited *Haidak* to justify revoking a right to direct cross-examination, but ignored the First Circuit's statement that live hearings are required: "We agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant—that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'. . . [Moreover:] "When a school reserves to itself the right to examine the witnesses, it also assumes for itself the responsibility to conduct reasonably adequate questioning. A school cannot both tell the student to forgo direct inquiry and then fail to reasonably probe the testimony tendered against that student." *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69-70 (1st Cir. 2019).

[38] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41,500 (July 12, 2022) (to be codified at 34 CFR Part 106).

[39] Transcript of Oral Argument, *Doe v. Univ. of the Scis.* (19-2966), at 34:34-34:52, https://www2.ca3.uscourts.gov/oralargument/audio/19-2966_Doev.UniversityOfTheSciences.mp3.

[40] *Id.* at 34:59-35:09.

2. "Clarity" is in Fact Ambiguity

The Department provides two primary justifications for its decision to revoke numerous rights provided by the current Title IX regulations: a need to broaden the scope of Title IX coverage from that offered in the existing regulations; and a stated "need for greater clarity on how to ensure that complaints of sex-based harassment are resolved in a prompt and equitable manner."[41] Yet over and over again, the proposed regulations replace *clear* provisions with *ambiguous* ones. Some examples:

Criteria for imposing interim punishments **(§ 106.44(g)).** The current regulations create a clear rule: universities cannot impose interim punishments before the adjudication occurs, except under the procedures and criteria supplied in the provision for emergency removal. The proposed regulations, by contrast, allow and even encourage interim punishments, so long as the school characterizes them as "supportive" measures. The Department would grant "substantial discretion" for Title IX coordinators to impose interim punishments, as long as the coordinator deems the action "reasonable," "necessary," and/or "least restrictive of the respondent's access to the program or activity while still ensuring nondiscriminatory access for the complainant"—all terms that the Department leaves undefined.[42] Respondents have a paper right to appeal, but without defined criteria that right is meaningless, and universities can proceed apace if a reviewing university official deems the interim punishment to be "reasonable."[43]

Access to Evidence **(§ 106.46(e)(6)(i)).** Under the current regulations, parties receive "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation."

The proposed regulations replace that clear, bright-line rule with ambiguity, allowing a college to "provide *either* equitable access to the *relevant* and not otherwise impermissible evidence, or it must provide the parties with the same written investigative report that accurately summarizes this evidence."[44] [emphasis added] If the college provides a report, a student party can obtain access to the evidence only by requesting it. And even then, unlike with the current regulations, the student will receive only evidence deemed "relevant," with no way of knowing what was excluded and no input on the relevance determination. On this point, the Department ambiguously states that "evidence [that] is related to the allegations but is not helpful for determining whether the alleged sex discrimination occurred . . . would not qualify as relevant."[45]

Opportunity to Review the Evidence **(§ 106.46(e)(6)(ii)).** The current regulations require that schools allow the parties ten days to review the investigative report before proceeding with the

[41] 87 Fed. Reg. at 41392.
[42] 87 Fed. Reg. at 41422; 41448.
[43] 87 Fed. Reg. at 41422.
[44] 87 Fed. Reg. at 41498.
[45] 87 Fed. Reg. at 41419.

grievance hearing. The proposed regulations replace that clear, bright-line rule with ambiguity, removing "specific timeframes and instead permit[ting] a postsecondary institution flexibility to set reasonable timeframes for ensuring that parties have a reasonable opportunity to review and respond to evidence."[46] (Again, this provision presumes schools producing only the evidence they deem "relevant," without giving the parties a meaningful opportunity to challenge the relevance determinations.) The length of this "reasonable opportunity" to review the evidence is left wholly undefined.

Whatever other justifications might exist for all of these changes, providing greater clarity is not one of them.

Given what we know from university procedures and practices between the Dear Colleague letter of 2011 and the adoption of the 2020 regulations, ambiguity in the regulations is likely to tilt the process once again toward complainants. The Seventh Circuit acknowledged as much earlier this year, noting that "as a practical matter—when school officials have to make decisions in real time—the best course will be to err on the side of taking reactive and preventative measures to ensure compliance with Title IX."[47]

3. Indifference to Judicial Concerns with Gender Discrimination Against Male Respondents

The proposed elimination of one additional provision of the current regulations deserves special mention. §106.45(a) states that "[a] recipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under Title IX." The Department proposes eliminating this provision, on grounds that it is "redundant," even though no other provision of the proposed regulations explicitly informs universities that their treatment of a *respondent* could constitute discrimination on the basis of sex.[48]

The elimination of this provision is especially puzzling given developments in the case law. As of the submission of this comment, there have been 75 court decisions (since issuance of the 2011 Dear Colleague letter) unfavorable to colleges and universities involving accused student claims of gender discrimination under Title IX.[49]

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[46] 87 Fed. Reg. at 41501.
[47] *C.S. v. Madison Metro. Sch. Dist*., 34 F.4th 536, 545 (7th Cir. 2022).
[48] 87 Fed. Reg. at 41463.
[49] The list at time of submission includes:

1. *Doe v. Princeton Univ*., 30 F.4th 335 (3d Cir. 2022)
2. *Doe v. Regents of the Univ. of Cal*., 23 F.4th 930 (9th Cir. 2022)
3. *Doe v. Univ. of Denver*, 1 F.4th 822 (10th Cir. 2021)
4. *Doe v. Regents of the Univ. of Minn*., 999 F.3d 571 (8th Cir. 2021)
5. *Doe v. Oberlin Coll*., 963 F.3d 580 (6th Cir. 2020)
6. *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020)
7. *Doe v. Univ. of Ark. – Fayetteville*, 974 F.3d 858 (8th Cir. 2020)
8. *Doe v. Univ. of the Scis*., 961 F.3d 203 (3d Cir. 2020)
9. *Doe v. Purdue Univ*., 928 F.3d 652 (7th Cir. 2019)
10. *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018)
11. *Doe v. Miami Univ*., 882 F.3d 579 (6th Cir. 2018)

12. *Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)
13. *Unknown Party v. Ariz. Bd. of Regents*, 2022 U.S. Dist. LEXIS 156290 (D. Ariz. August 30, 2022)
14. *Doe v. State Univ. of N.Y. Purchase Coll.*, 2022 WL 2972200 (S.D.N.Y. July 27, 2022)
15. *Doe v. Dordt Univ.*, 2022 U.S. Dist. LEXIS 128584 (N.D. Iowa July 20, 2022)
16. *Doe v. Trs. of Dartmouth Coll.*, 2022 WL 2704275 (D.N.H. July 12, 2022)
17. *Doe v. Texas Christian Univ. & Victor J. Boschini*, 2022 U.S. Dist. LEXIS 91384 (N.D. Tex. April 29, 2022)
18. *Doe v. Columbia Univ.*, No. 1:20-cv-05019, (S.D.N.Y, Apr. 6, 2022), ECF No. 73.
19. *Doe v. Syracuse Univ.*, 2022 2022 WL 798058 (N.D.N.Y. March 16, 2022)
20. *Doe v. Del. State Univ.*, 2022 WL 613361 (D. Del. March 2, 2022)
21. *Doe v. Univ. of Tex. Health Sci. Ctr.*, 2021 WL 5882625 (S.D. Tex. December 13, 2021)
22. *Doe v. Embry-Riddle Aeronautical Univ., Inc.*, 2021 U.S. Dist. LEXIS 213380 (M.D. Fla. November 4, 2021)
23. *Doe v. Board of Trustees of the University of Illinois*, 2:20-cv-02265 (C.D. Ill. Sept. 23, 2021), text order.
24. *Moe v. Grinnell College*, 556 F. Supp. 3d 916 (S.D. Iowa August 23, 2021)
25. *Doe v. New York University*, 2021 WL 3292591 (S.D.N.Y. August 1, 2021)
26. *Doe v. Hobart & William Smith Colls.*, 546 F. Supp. 3d 250 (W.D.N.Y. June 25, 2021)
27. *Doe v. Washington & Lee Univ.*, 2021 U.S. Dist. LEXIS 74222 (W.D. Va. April 17, 2021)
28. *Doe v. Syracuse Univ.*, 457 F. Supp. 3d 178 (N.D.N.Y. 2020)
29. *Doe v. Rensselaer Polytechnic Institute*, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020)
30. *Doe v. Am. Univ.*, 2020 U.S. Dist. LEXIS 171086 (D.D.C. September 18, 2020)
31. *Feibleman v. Trs. of Columbia Univ. in N.Y.*, 2020 WL 3871075 (S.D.N.Y. July 9, 2020)
32. *Doe v. Colgate Univ.*, 457 F. Supp. 3d 164 (N.D.N.Y. April 30, 2020)
33. *Doe v. Univ. of Me. Sys.*, 2020 WL 981702 (D. Me. February 20, 2020)
34. *Doe v. Haas*, 427 F. Supp. 3d 336 (E.D.N.Y. December 9, 2019)
35. *Harnois v. Univ. of Mass. at Dartmouth*, 2019 WL 5551743 (D. Mass. October 28, 2019)
36. *Doe v. Quinnipiac Univ.*, 2019 U.S. Dist. LEXIS 115089 (D. Conn. July 10, 2019)
37. *Doe v. Grinnell College*, 473 F. Supp. 3d 909 (S.D. Iowa July 9, 2019)
38. *Doe v. Rhodes Coll.* No. 2:19-cv-02336 (W.D. Tenn. June 14, 2019), ECF No. 33.
39. *Doe v. Syracuse Univ.*, 2019 U.S. Dist. LEXIS 77580 (N.D.N.Y. May 8, 2019)
40. *Noakes v. Syracuse Univ.*, 369 F. Supp. 3d 397 (N.D.N.Y. 2019)
41. *Norris v. Univ. of Colo., Boulder*, 362 F. Supp. 3d 1001 (D. Colo. 2019)
42. *Jia v. Univ. of Miami*, 2019 U.S. Dist. LEXIS 23587 (S.D. Fla. Feb. 12, 2019)
43. *Oliver v. Univ. of Tex. Sw. Med. Sch.*, 2019 U.S. Dist. LEXIS 21289 (N.D. Tex. Feb. 11, 2019)
44. *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597 (S.D. Miss. 2019)
45. *Powell v. Mont. State Univ.*, 2018 WL 6728061 (D. Mont. Dec. 21, 2018)
46. *Doe v. Rider Univ.*, 2018 U.S. Dist. LEXIS 7592 (D.N.J. Jan. 17, 2018)
47. *Doe v. Syracuse Univ.*, 341 F. Supp. 3d 125 (N.D.N.Y. 2018)
48. *Doe v. Brown Univ.*, 327 F. Supp. 3d 397 (D.R.I. 2018)
49. *Doe v. Univ. of Miss.*, U.S. Dist. LEXIS 123181 (S.D. Miss. July 24, 2018)
50. *Werner v. Albright* Coll., No. 5:17-cv-05402 (E.D. Pa. May 2, 2018), ECF No. 25
51. *Elmore v. Bellarmine Univ.*, 2018 WL 1542140 (W.D. Ky. Mar. 29, 2018)
52. *Doe v. Univ. of Or.*, 2018 WL 1474531 (D. Or. Mar. 26, 2018)
53. *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573 (E.D. Va. 2018)
54. *Schaumleffel v. Muskingum Univ.*, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018)
55. *Gischel v. Univ. of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio 2018)
56. *Doe v. Pa. State Univ.*, 2018 WL 317934 (M.D. Pa. Jan. 8, 2018)
57. *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195 (D. Mass. 2017)
58. *Saravanan v. Drexel Univ.*, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017)
59. *Doe v. Univ. of Chi.*, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017)
60. *Rolph v. Hobart & William Smith Colls.*, 271 F. Supp. 3d 386 (W.D.N.Y. 2017)

While these opinions are quite fact-specific, three common elements have emerged, with the Eighth Circuit perhaps most clearly articulating the template: "A decision that is against the substantial weight of the evidence and inconsistent with ordinary practice on sanctions may give rise to an inference of bias, although not necessarily bias based on sex. External pressure on a university to demonstrate that it acted vigorously in response to complaints by female students may support an inference that a university is biased based on sex, although not necessarily in a particular case. [The male respondent's] complaint alleges both: a dubious decision in his particular case taken against the backdrop of substantial pressure on the University to demonstrate that it was responsive to female complainants."[50]

First, a troubling number of male respondents have presented at least plausible (and often, much more than plausible) evidence that their college or university wrongly disciplined them. To offer just a few examples: Oberlin found a student responsible on grounds that the accuser was incapacitated, even though the only evidence before the panel (the complainant's statement that she wasn't sober) did not fit the college's definition of incapacitation. The Sixth Circuit observed that "one could regard this as nearly a test case regarding the College's willingness ever to acquit a respondent sent to one of its hearing panels during the 2015-16 academic year."[51]

In a case involving a graduate student at UCLA, physical evidence contradicted many of the accuser's claims but the university nonetheless returned a finding of responsibility on a single, narrow count. The Ninth Circuit acknowledged the university's claim that the outcome showed a careful parsing of the evidence—while drily noting that an "alternative explanation might be that, when confronted by a claim that lacked merit, the University rushed to judgment in issuing the two-year interim suspension and then sought out a way to find the accused responsible for

61. *Doe v. Trs. of the Univ. of Pa.*, 270 F. Supp. 3d 799 (E.D. Pa. 2017)
62. *Mancini v. Rollins Coll.*, 2017 U.S. Dist. LEXIS 113160 (M.D. Fla. July 20, 2017)
63. *Doe v. Ohio State Univ.*, 239 F. Supp. 3d 1048 (S.D. Ohio 2017)
64. *Neal v. Colo. State Univ.-Pueblo*, 2017 U.S. Dist. LEXIS 22196 (D. Colo. Feb. 16, 2017)
65. *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336 (S.D. Fla. 2017)
66. *Collick v. William Paterson Univ.*, 2016 WL 6824374 (D.N.J. Nov. 17, 2016)
67. *Doe v. Bd. of Regents of the Univ. Sys. of Ga.*, No. 15-cv-04079-SCJ (N.D. Ga. Apr. 19, 2016), ECF No. 40
68. *Prasad v. Cornell Univ.*, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016)
69. *Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016)
70. *Marshall v. Ind. Univ.*, 170 F. Supp. 3d 1201 (S.D. Ind. 2016)
71. *Doe v. Washington & Lee Univ.*, 2015 U.S. Dist. LEXIS 102426 (W. Va. Aug. 5, 2015)
72. *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748 (D. Md. 2015)
73. *Doe v. Salisbury Univ.*, 107 F. Supp. 3d 481 (D. Md. 2015)
74. *Harris v. St. Joseph's Univ.*, 2014 U.S. Dist. LEXIS 65452 (E.D. Pa. May 13, 2014)
75. *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014)

In addition, two Second Circuit decisions involving staff and faculty address discrimination under Title IX against male respondents: *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019); *Vengalattore v. Cornell Univ.*, 36 F.4th 87 (2d Cir. 2022).

[50] *Doe v. Univ. of Ark. - Fayetteville*, 974 F.3d 858, 865 (8th Cir. 2020). The Department, disingenuously, cited only the due process section of this decision, where the court ruled in favor of the university.

[51] *Doe v. Oberlin Coll.*, 963 F.3d 580, 588 (6th Cir. 2020).

something in order to justify its earlier actions."[52]

Amherst College refused to reconsider a finding of responsibility against an accused student despite text messages from the complainant on the night of the incident indicating her search for a "good lie" after a sexual encounter with her roommate's boyfriend, and contradicting her later claims of having contacted an outcry witness right after her roommate's boyfriend left the room.[53]

Comments from a host of prominent figures concede a disturbing excess in wrongful findings of responsibility against respondents. In 2014, University of Maine Dean Robert Dana recognized that federal pressure made inevitable a rush to judgment on individual allegations: "I expect that that can't help but be true. Colleges and universities are getting very jittery about it."[54] In late 2020, former OCR lawyer Jackie Gharapour Wernz admitted, "We did see some bad cases in the Obama era, cases where it basically didn't matter what evidence there was. The college was going to find against the defendant, the male defendant, no matter what. I think the schools felt pressure under the Obama guidance."[55] In July 2022, ATIXA president Brett Sokolow recalled "that the problem of biased outcomes was real. Educational institutions railroaded those accused of sexual violence and harassment (mostly cisgender men) in numbers that should terrify any reasonable person."[56]

Second, courts have repeatedly expressed concern with procedural irregularities suggesting possible gender bias against male respondents. As the Ninth Circuit explained earlier this year, "[A]t some point an accumulation of procedural irregularities all disfavoring a male respondent begins to look like a biased proceeding despite the [university's] protests otherwise."[57] Last year, in denying the University of Denver's motion for summary judgment, the Tenth Circuit held that "'disturbing procedural irregularities' can certainly lower the threshold for how much additional evidence of sex bias is needed to make a case worthy of a jury's time and consideration."[58] The Second Circuit has ruled that "clear procedural irregularities" against a male respondent "will

[52] *Doe v. Regents of the Univ. of Cal*., 23 F.4th 930, 939 (9th Cir. 2022).
[53] *Doe v. Amherst Coll*., 238 F. Supp. 3d 195, 209 (D. Mass. February 28, 2017).
[54] Tovia Smith, "Some Accused of Sexual Assault on Campus Say System Works Against Them," NPR (Sept. 3, 2014, 3:31 AM), https://www.npr.org/2014/09/03/ 345312997/some-accused-of-campus-assault-say-the-system-works-against-them.
[55] Richard Bernstein, "Biden's Pushing Ahead to the Obama Past on Campus Rape. He'll Need Good Luck with That," *Real Clear Investigations,* https://www.realclearinvestigations.com/articles/2020/12/15/bidens_pushing_ahead_to_the_obama_past_on_campus_rape_hell_need_good_luck_with_that_126353.html
[56] Brett Sokolow, "More Flexible Title IX Regulations Pose New Dilemmas," *Inside HigherEd,* https://www.insidehighered.com/views/2022/07/12/flexibility-title-ix-regs-blessing-and-curse-opinion?utm_source=Inside+Higher+Ed&utm_campaign=a0efa932fb-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fcbc04421-a0efa932fb-198217881&mc_cid=a0efa932fb&mc_eid=b9d1a6cadc
[57] *Doe v. Regents of the Univ. of Cal*., 23 F.4th 930, 941 (9th Cir. 2022); see also *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 950 (9th Cir. 2020).
[58] *Doe v. Univ. of Denver*, 1 F.4th 822, 832 (10th Cir. 2021).

permit a plausible inference of sex discrimination."[59] The Sixth,[60] Seventh,[61] and Eighth[62] Circuits have reached similar conclusions.

District courts have also raised concerns about procedural irregularities plausibly revealing gender bias—whether in the improper exclusion of exculpatory evidence (TCU[63], Texas Southwestern Medical School[64], University of Mississippi[65]); or the improper inclusion of purportedly inculpatory evidence (Washington & Lee University[66]); or the investigator's failure to grapple with an accuser's "major inconsistencies" (American University[67]) or to downplay the efforts of a pro-complainant witness to blackmail another witness in the case (Dordt University[68]); or the investigator's choosing to "entangle[] herself" in a parallel criminal investigation (Colgate University[69]); or the Title IX decisionmakers "making decisions based on sex stereotypes" (Washington & Lee University[70], Grinnell College[71]); or selectively pursuing complaints by females against males while ignoring males' complaints about females (Syracuse University[72], Embry-Riddle Aeronautical University[73]); or the grievance committee allegedly making a decision to expel before considering the male student's response to new evidence (Arizona State University[74]); or allegedly treating the parties' comparable levels of intoxication in different ways (Stony Brook University[75]); or the improper destruction of hearing committee and interview notes (Quinnipiac University[76], Dordt University[77]); or allegedly treating the two parties differently in responding to and reviewing evidence (University of Colorado[78]); or inexplicably ignoring a local prosecutor's request to delay adjudication due to concerns about the accuser's truthfulness (Xavier University[79]).

This case law shows both the extent of the abuses that occurred before adoption of the 2020 regulations and the concerns courts had about lack of fair process toward male respondents. One court perceptively summarized the issue: "[I]nstitutions of higher education must avoid

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[59] *Menaker v. Hofstra Univ.*, 935 F.3d 20, 33 (2d Cir. 2019).
[60] *Doe v. Oberlin Coll*., 963 F.3d 580, 586-587 (6th Cir. 2020).
[61] *Doe v. Purdue Univ*., 928 F.3d 652, 669 (7th Cir. 2019).
[62] *Doe v. Regents of the Univ. of Minn*., 999 F.3d 571, 579 (8th Cir. 2021).
[63] *Doe v. Texas Christian Univ. & Victor J. Boschini*, 2022 U.S. Dist. LEXIS 91384, *23 (N.D. Tex. April 29, 2022).
[64] *Oliver v. Univ. of Tex. Sw. Med. Sch.*, 2019 U.S. Dist. LEXIS 21289, *56-57 (N.D. Tex. February 11, 2019).
[65] *Doe v. Univ. of Miss*., 2018 U.S. Dist. LEXIS 123181, *12-13 (S.D. Miss. July 24, 2018).
[66] *Doe v. Washington & Lee Univ*., 2021 U.S. Dist. LEXIS 74222, *43-44 (W.D. Va. April 17, 2021).
[67] *Doe v. Am. Univ*., 2020 U.S. Dist. LEXIS 171086, *24 (D.D.C. September 18, 2020).
[68] *Doe v. Dordt Univ*., 2022 U.S. Dist. LEXIS 128584, *47-53 (N.D. Iowa July 20, 2022).
[69] *Doe v. Colgate Univ*., 457 F. Supp. 3d 164, 172 (N.D.N.Y. April 30, 2020).
[70] *Doe v. Washington & Lee Univ*., 2021 U.S. Dist. LEXIS 74222, *41-46 (W.D. Va. April 17, 2021).
[71] *Doe v. Grinnell College*, 473 F. Supp. 3d 909, 927-930 (S.D. Iowa July 9, 2019).
[72] *Doe v. Syracuse Univ.*, 457 F. Supp. 3d 178, 195-96 (N.D.N.Y. 2020).
[73] *Doe v. Embry-Riddle Aeronautical Univ., Inc.*, 2021 U.S. Dist. LEXIS 213380, *11-19 (M.D. Fla. November 4, 2021).
[74] *Unknown v. Ariz. Bd. of Regents*, 2019 U.S. Dist. LEXIS 221425, *38-41 (D. Ariz. December 26, 2019).
[75] *Doe v. Haas*, 427 F. Supp. 3d 336, 356 (E.D.N.Y. December 9, 2019). The Department, curiously, cited only the due process section of this decision, where the court ruled in favor of the university.
[76] *Doe v. Quinnipiac Univ*., 404 F. Supp. 3d 643, 662-663 (D. Conn. July 10, 2019).
[77] *Doe v. Dordt Univ*., 2022 U.S. Dist. LEXIS 128584, *58-9 (N.D. Iowa July 20, 2022).
[78] *Norris v. Univ. of Colo*., 362 F. Supp. 3d 1001, 1012-1013 (D. Colo. February 21, 2019).
[79] *Wells v. Xavier Univ*., 7 F. Supp. 3d 746, 751 (S.D. Ohio March 11, 2014).

depriving students accused of sexual assault of the investigative and adjudicative tools necessary to clear their names even when there are no due process requirements. A student adjudicated guilty of sexual assault by a college or university experiences significant direct and collateral consequences, consequences that are not unlike a criminal conviction. It follows that colleges and universities should treat sexual assault investigations and adjudications with a degree of caution commensurate with the serious consequences that accompany an adjudication of guilt in a sexual assault case. If colleges and university do not treat sexual assault investigations and adjudications with the seriousness they deserve, the institutions may well run afoul of Title IX."[80]

That so many colleges seemed indifferent to basic procedural fairness should have given the Department pause in its efforts to dramatically lower the procedural floor which it will require of colleges moving forward. But the proposed regulations provide no evidence of the Department having grappled with this issue at all.

Third, courts have expressed concern that multifaceted pressure to crack down on campus sexual assault has created an atmosphere in which colleges have gone so far in the other direction as to discriminate against male respondents. The Second Circuit recognized the problem as far back as 2016: "There is nothing implausible or unreasonable about the Complaint's suggested inference that the panel adopted a biased stance in favor of the accusing female and against the defending male varsity athlete in order to avoid further fanning the criticisms that Columbia turned a blind eye to such assaults."[81]

Sometimes, as in the Second Circuit's Columbia case, or in cases at New York University,[82] Lynn University,[83] and American University,[84] that pressure came from campus activists. Sometimes, as in cases at UCLA[85] or the University of Arkansas,[86] it came from state legislatures. Sometimes, as in a case at Amherst College,[87] it was created by the accuser. Sometimes, that pressure came from the federal government itself. In cases at the University of Michigan,[88] Oberlin College,[89] Syracuse University,[90] or Hobart and William Smith Colleges,[91] it came from the Office for Civil Rights, which was simultaneously investigating other aspects of the school's Title IX grievance process. Other cases cited a more generalized federal pressure for universities to "prove that [they] took complaints of sexual misconduct seriously."[92] That pressure most clearly took the form of threats to withhold federal funds from universities that did not adhere to the terms of the 2011 Dear Colleague letter and 2014 "Questions and Answers" guidance, as well as publication of lists of universities under OCR investigation.

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[80] *Doe v. Marymount Univ.*, 297 F. Supp. 3d 573, 584 (E.D. Va. March 14, 2018).
[81] *Doe v. Columbia Univ.*, 831 F.3d 46, 58 (2d Cir. 2016).
[82] *Doe v. New York University*, ECF 1:20-cv-06770, No. 34 (S.D.N.Y., 1 Aug. 2021), pp. 46-8.
[83] *Doe v. Lynn Univ., Inc.*, 235 F. Supp. 3d 1336, 1341-1342 (S.D. Fla. January 19, 2017).
[84] *Doe v. Am. Univ.*, 2020 U.S. Dist. LEXIS 171086, *27-30 (D.D.C. September 18, 2020).
[85] *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 937 (9th Cir. 2022).
[86] *Doe v. Univ. of Ark. – Fayetteville*, 974 F.3d 858, 863 (8th Cir. 2020).
[87] *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 223 (D. Mass. February 28, 2017).
[88] *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).
[89] *Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020).
[90] *Doe v. Syracuse Univ.*, 2019 U.S. Dist. LEXIS 77580, *21-22 (N.D.N.Y. May 8, 2019).
[91] *Doe v. Hobart & William Smith Colls.*, 546 F. Supp. 3d 250, 271 (W.D.N.Y. June 25, 2021).
[92] *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018).

Although only one court has held that external pressure, even from the federal government, could suffice for an accused student to claim gender discrimination against his school, [93] dozens of courts have identified that issue as a component of a plausible gender discrimination claim. As then-Judge Amy Coney Barrett explained for the Seventh Circuit in a 2019 opinion, "The [Dear Colleague] letter and accompanying pressure gives [the accused student] a story about why [his university] might have been motivated to discriminate against males accused of sexual assault."[94] And four U.S. Appeals Courts have cited the words or actions of Assistant Secretary Lhamon herself as factors that contributed to a male accused student's plausible allegation of gender discrimination against his university.[95]

Finally, universities' increasing willingness to defend these lawsuits (sometimes successfully,[96] other times less so[97]) on grounds that unfairness in their Title IX grievance processes comes from *pro-victim* rather than *gender-based* bias further supports the concern that schools will not implement fair procedures on their own. Nor does the record of 2011-2017 give us much confidence in the general fairness of schools in this area.

The combination of the Department revoking numerous rights without justifying the decision, replacing the withdrawn rights with ambiguous guidance, and eliminating the current regulations' reference to discrimination against respondents despite dozens of courts exploring the issue suggests proposed regulations that are hostile to the concept of fairness.

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[93] *Collick v. William Paterson Univ.*, 2016 U.S. Dist. LEXIS 160359, *35, fn 13 (D.N.J. November 17, 2016).

[94] *Doe v. Purdue Univ.*, 928 F.3d 652, 669 (7th Cir. 2019). See also *Doe v. Univ. of Denver*, 1 F.4th 822, 831 (10th Cir. 2021); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 210 (3d Cir. 2020); *Doe v. Regents of the Univ. of Minn.*, 999 F.3d 571, 578 (8th Cir. 2021); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020); *Doe v. Miami Univ.*, 882 F.3d 579, 594 (6th Cir. 2018).

[95] *Vengalattore v. Cornell Univ.*, 36 F.4th 87, 109, (2d Cir. 2022) (citing "DoE's publication of a list of schools suspected of failing to adopt prompt and equitable sexual misconduct grievance procedures [and] its addition of Cornell to that list" during Assistant Secretary Lhamon's first stint running OCR); *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 937 (9th Cir. 2022) (citing "an April 2014 White House report and the June 2014 Senate testimony by then-Assistant Secretary of Education Catherine Lhamon, both warning that schools violating Title IX could lose federal funding"); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 213 (3d Cir. 2020) ("An official from DoEd's Office of Civil Rights ('OCR') warned that '[s]ome schools still are failing their students by responding inadequately to sexual assaults on campus. For those schools, my office [in DoEd] and [the] Administration have made it clear that the time for delay is over.' (statement of Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ.). That official cautioned that OCR was 'committed to using all its tools to ensure that all schools comply with [T]itle IX so campuses will be safer for students across the country.' To ensure compliance, OCR put all of 'a school's federal funding . . . at risk if [the school] could not show that it was vigorously investigating and punishing sexual misconduct.'") (internal citations omitted); *Doe v. Purdue Univ.*, 928 F.3d 652, 668 (7th Cir. 2019) (citing "statement of Catherine Lhamon, Assistant Secretary for Civil Rights, U.S. Dep't of Educ.[:] '[S]ome schools still are failing their students by responding inadequately to sexual assaults on campus. For those schools, my office and this Administration have made it clear that the time for delay is over.'").

[96] *Brown-Smith v. Bd. of Trs.*, 2021 U.S. Dist. LEXIS 125056, *35 (D. Colo. July 6, 2021) ("As troubling as it may be that UNC is apparently willing to embrace the explanation of anti-respondent bias, that bias is neither illegal nor discriminatory when it comes to Title IX's prohibition on gender discrimination.")

[97] *Doe v. Regents of the Univ. of Minn.*, 999 F.3d 571, 579 (8th Cir. Minn. June 1, 2021) (While the circumstances here also give rise to a plausible inference of bias in favor of sexual assault victims rather than against males, "[s]ex discrimination need not be the only plausible explanation or even the most plausible explanation for a Title IX claim to proceed." Schwake, 967 F.3d at 948; see Columbia Univ., 831 F.3d at 57.)

II. SPECIFIC PROVISIONS

In this section, we provide comments on specific provisions of the proposed regulations. For ease of reference, we reproduce the relevant sections on which we are commenting, and then offer our remarks.

1. § 106.2 (Definitions)

a. *Complaint*

> *Complaint* means an oral or written request to the recipient to initiate the recipient's grievance procedures as described in § 106.45, and if applicable § 106.46.

In contrast to the current regulations, which require a signed and written complaint to the Title IX office or another designated person or office, the proposed regulations: (1) allow the complaint to be oral or written; (2) remove the signature requirement; and (3) allow the complaint to be made to a "recipient," not to a specified employee or the Title IX Coordinator.

As justification for the changes, the Department cites testimony of unidentified "stakeholders" alleging that the current regulations "created an onerous and cumbersome process for a complainant," thereby "generally discourag[ing] individuals from making complaints," even though "the current regulations permit a complainant to file a formal complaint by email and using a digital signature." The Department makes clear that "[t]his revised definition of 'complaint' would recognize that a person may seek to make a complaint in a variety of ways and would allow both oral and written complaints, while also no longer requiring a signature."[98]

This definitional change is problematic and the justifications for it, with respect, are absurd. A written complaint is necessary to allow school officials to make preliminary assessments on whether and how to proceed. And school officials—and respondents—can assess credibility by seeing if the complainant's story changes over the course of the process; allowing a complaint whose specifics pass into the ether robs all participants of an opportunity to evaluate consistency over time.[99]

The same problems arise with allowing the complaint to originate not with a report to the Title IX office or a designated official or office, but to many people in the university's employ. Even if they receive generalized Title IX training, a physics professor or a janitor might well not be sufficiently trained to record the accuser's original story so it can be measured against subsequent versions. (To the extent the Department worries that complainants might not understand that they need to file a report with the Title IX office, requiring more training for students and employees, and ensuring complainants know where to go or are directed to the right

[98] 87 Fed. Reg. at 41409.

[99] For the importance of being able to measure credibility and shifting versions of events, *see, e.g., Doe v. Oberlin Coll.*, 963 F.3d 580, 587 (6th Cir. 2020) ("Likewise remarkable—in a proceeding in which the credibility of accuser and accused were paramount—was the failure of the hearing panel even to comment on the flat contradiction, expressly noted by [the investigator] at the hearing, between what Roe told him during his investigation and what she said during the hearing, regarding whether Doe "asked" for oral sex. And of a piece was the Appeals Officer's failure even to acknowledge the importance of [another student's] statement as impeachment evidence regarding Roe's claims. Procedural irregularities provide strong support for Doe's claim of bias here") (citation omitted).

place if they go to someone else, would be the better option.) And the complaint *should* be signed. The *Purdue* case—where the university allowed the complaint to be written in the accuser's name by a university official—shows the problems with unsigned complaints; the university ultimately was sued due to alleged bias by the office that wrote up the complaint.[100]

There are occasions in the Title IX process where the rights of the two parties might come into conflict. But in this area, the burden on the complainant (to the extent there even is a burden) is de minimis; and the threat to the respondent from not being able to access a written version of the original complaint is significant.[101]

The Department should retain the current version of the regulations in this area.

b. *Relevant*

> *Relevant* means related to the allegations of sex discrimination under investigation as part of the grievance procedures under § 106.45, and if applicable § 106.46. Questions are relevant when they seek evidence that may aid in showing whether the alleged sex discrimination occurred, and evidence is relevant when it may aid a decisionmaker in determining whether the alleged sex discrimination occurred.

The Department explains that it is combining the current regulations' concept of "directly related" with "relevant," saying the distinction caused confusion. Yet the Department's own description of the rationale for this change is, itself, confusing. The proposed definition is arguably inconsistent—it first defines relevant as "related," then says relevant is information that "may aid" in determining if sex discrimination is occurred.

The Preamble muddies the waters further: "If a question or evidence is related to the allegations but is not helpful for determining whether the alleged sex discrimination occurred, that question or piece of evidence would not qualify as relevant."[102] What could this passage justifiably mean, other than exclusion of specifically impermissible topics? How can something be "related to the allegations" but "not helpful"?

We agree that it is useful to include a definition of relevance, but the definition should be clear and accurate. We would suggest adopting the definition in Fed. R. Civ. P. 401: "'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be

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[100] *Doe v. Purdue Univ.*, 928 F.3d 652, 669-670 (7th Cir. 2019) ("It is plausible that Sermersheim and her advisors chose to believe Jane because she is a woman and to disbelieve John because he is a man. The plausibility of that inference is strengthened by a post that CARE put up on its Facebook page during the same month that John was disciplined: an article from *The Washington Post* titled 'Alcohol isn't the cause of campus sexual assault. Men are.' Construing reasonable inferences in John's favor, this statement, which CARE advertised to the campus community, could be understood to blame men as a class for the problem of campus sexual assault rather than the individuals who commit sexual assault. And it is pertinent here that Bloom, CARE's director, wrote the letter regarding Jane to which Sermersheim apparently gave significant weight.")

[101] There is, of course, no requirement that a complaint be written a certain way or contain certain elements. The complaint can be as simple as "I was sexually assaulted on June 2d." It's then up to the Title IX office to tease out the facts and have the complainant that affirm them or affirm the facts that will form the basis of a notice of allegations.

[102] 87 Fed. Reg. at 41419.

without the evidence." The Department should also retain the requirement of giving directly related information so parties can meaningfully participate in relevance determinations, and caution schools to apply the definition consistently as between the parties (e.g., relevant evidence can be exculpatory or inculpatory).

Going beyond the definition of relevance itself, we are particularly concerned with other provisions that use the definition to revoke or limit the parties' current rights to present and receive evidence. As discussed further below, the current regulations recognize that determinations of relevance should await the gathering of *all* the evidence, and that parties need access to the underlying evidence in order to have meaningful input into the determination of what is relevant. In the Preamble to the current regulations, the Department explained the regulatory requirements regarding the gathering of and access to evidence as follows:

> The investigator is obligated to gather evidence directly related to the allegations whether or not the recipient intends to rely on such evidence (for instance, where evidence is directly related to the allegations but the recipient's investigator does not believe the evidence to be credible and thus does not intend to rely on it). The parties may then inspect and review the evidence directly related to the allegations. The investigator must take into consideration the parties' responses and then determine what evidence is relevant and summarize the relevant evidence in the investigative report. The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under § 106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).[103]

The Department further noted:

> The Department is sensitive to commenters' concerns regarding the parties sharing irrelevant information, as well as relevant information that is relevant but also highly sensitive and personal, as part of the investigative process. This concern, however, must be weighed against the demands of due process and fundamental fairness, which require procedures designed to promote accuracy through meaningful participation of the parties. The Department believes that the right to inspect all evidence directly related to the allegations is an important procedural right for both parties, in order for a respondent to present a defense and for a complainant to present reasons why the respondent should be found responsible. This approach balances the recipient's obligation to impartially gather and objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence, with the parties' equal right to participate in furthering each party's own interests by identifying evidence overlooked by the investigator and evidence the investigator erroneously deemed relevant or irrelevant and making arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.[104]

[103] 85 Fed. Reg. at 30026, 30249.
[104] *Id.* at 30303.

The current distinction between the evidence that is "directly related" to the allegations and the evidence that is determined to be relevant to the case, and the requirement that the parties be given access to all directly related evidence, is critical to fair proceedings and should be retained. Both parties should be able to present their positions on relevance, and they "will not have a robust opportunity to do this if evidence related to the allegations is withheld from the parties by the investigator."[105]

c. *Retaliation*

> Retaliation means intimidation, threats, coercion, or discrimination against any person by a student, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part, including in an informal resolution process under § 106.44(k), in grievance procedures under § 106.45, and if applicable § 106.46, and in any other appropriate steps taken by a recipient in response to sex discrimination under § 106.44(f)(6).

This is a welcome addition to the proposed regulations. Yet while the Department makes clear that retaliation against a person who "made a complaint" is forbidden, it provides no equivalent prohibition on retaliation against the respondent. While it seems that the respondent probably is covered by the general sections (retaliation prohibited against anyone who "participated . . . in any manner in an investigation"), since "made a complaint" is specifically included in this section, "responded to a complaint" should be as well. Otherwise, this provision would be inequitable.

d. *Hostile environment harassment*

> Hostile environment harassment. Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry…

The Department is proposing to substitute this for the definition of harassment that the Supreme Court articulated in *Davis*.

In the wake of the current regulations' use of the *Davis* definition, many universities adopted a two-track system for adjudicating sexual harassment/misconduct complaints, handling some under policies designed to comply with the Title IX regulations and others under policies with significantly reduced rights. At a minimum, the Department should now bring that pernicious practice to an end. We are, therefore, concerned with the statement that "some stakeholders indicated that because the current regulations do not cover many forms of conduct that may

[105] *Id.* at 30304.

cause a hostile environment based on sex in their program or activity, they created or repurposed alternative disciplinary policies to address such conduct. Such stakeholders would have discretion under the proposed regulations to keep in place policies and procedures they adopted in reliance on the 2020 amendments or to change course so long as they meet their obligations."[106] This creates a potential loophole that would allow universities to deny even the reduced procedural protections that the proposed regulations require. Moreover, if the Department believes there are "forms of conduct that may cause a hostile environment based on sex" that would not be covered by the broadened definition of sexual harassment that the Department intends to impose, it should explain what those might be. The regulations (including definitions) should ensure basic fairness and procedural protections for all disciplinary proceedings involving "forms of conduct that may cause a hostile environment based on sex."

Although the proposed regulations disclaim any desire to target the First Amendment rights of professors or students, there are many examples from recent litigation in which courts have looked skeptically at university anti-harassment policies that applied a definition of harassment mirroring that the Department seeks to reimpose.[107]

e. *Supportive measures*

> *Supportive measures* means non-disciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to:
>
> (1) Restore or preserve that party's access to the recipient's education program or activity, including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment;

We will discuss the significant problems with this major revision of the regulations below. For the purposes of the definition section, we urge the Department to retain the definition provided by the current regulations. As set forth below, the current regulations represented an effort to balance between the need to support a complainant and the need to ensure that a respondent, presumed innocent, is not punished unless and until found responsible after a fair proceeding. Colleges and universities should not be given new powers to impose interim measures that—regardless of the purported "reasons" for imposing them—are clearly punitive in effect, including one-party no-contact orders, forced removals from dorms or classes, or interim suspensions.

In cases involving genuine threat, schools already have the option of pursuing an emergency removal under § 106.44 (h). To call interim punishments "supportive services" redefines the

[106] 87 Fed. Reg. at 41397.
[107] *See*, e.g., *Speech First, Inc. v. Cartwright*, 32 F.4th 1110, 1113 (11th Cir. 2022); *Meriwether v. Hartop*, 992 F.3d 492, 498 (6th Cir. 2021); *Perlot v. Green*, 2022 U.S. Dist. LEXIS 116819, *3 (D. Idaho June 30, 2022).

latter phrase beyond recognition and is not consistent with the presumption of non-responsibility that the Department says it wants to retain.

2. § 106.8.

We support the Department's proposed retention of the requirements that recipients adopt and publish their nondiscrimination policy and grievance procedures; train their officials on how to discharge their responsibilities and serve impartially; avoid reliance on sex stereotypes; and make their training materials publicly available.

3. § 106.11.

> Except as provided in this subpart, this part applies to every recipient and to all sex discrimination occurring under a recipient's education program or activity in the United States. For purposes of this section, conduct that occurs under a recipient's education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and conduct that is subject to the recipient's disciplinary authority. A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States.

We support this provision. Here, the proposed regulations deliver on their promise of clarity.

§ 106.45(b)(3)(i) of the current regulations, applying language from *Davis*, requires colleges and universities to dismiss a complaint of sexual misconduct if the incident "did not occur in the recipient's education program or activity."

This provision has caused confusion and thus frustrated the interests of all stakeholders. It is entirely possible that some complainants chose not to move forward because they mistakenly believed either that the current regulations precluded universities from adjudicating off-campus allegations or that their college or university had voluntarily ceased to process off-campus incidents. (As stated in the Preamble to the current regulations, the Department never intended to categorically exclude off-campus conduct from Title IX coverage, and we are unaware of even one school that stopped adjudicating off-campus allegations.) For universities, the current regulations' mandatory dismissal provision created an awkward system requiring Title IX coordinators to parse—at an early stage of the process—which complaints fit the Department's definition of Title IX's coverage and which did not.

Respondents, meanwhile, frequently confronted "two-track" systems, in which alleged sexual misconduct occurring on campus or at a school-sponsored event would be handled under a Title IX process, with the protections mandated by the regulations, while essentially the same misconduct occurring at an off-campus apartment would be handled under a separate process, with few if any of those protections.

The proposed regulations eliminate uncertainty in this area and recognize the reality that off-campus sexual misconduct allegations involving students or school employees can and most

likely would impact either or both parties' access to the school's educational opportunities. Sexual misconduct, whether in a dorm or an off-campus apartment, can impact a complainant's access to education; false allegations or an erroneous finding of responsibility impair—or completely eliminate—a respondent's access. Unfair or unreliable procedures harm both parties.

As the proposed regulations give colleges and universities authority to eliminate a wide array of procedural protections, however, we urge the Department to reflect on the legacy of the "two-track" systems of 2020-2022. That many universities—including the most elite ones—chose the administratively and financially burdensome "two-track" approach testifies to their consistent unwillingness to provide fair Title IX procedures absent regulatory or judicial mandates. One court, confronting such an approach, expressed puzzlement that the university "decided that it would be best to maintain two parallel procedures solely to ensure that at least some respondents would not have access to new rules designed to provide due process protections such as the right to cross-examination that have long been considered essential in other contexts. . . . Such disregard for the inevitable administrative headaches of a multi-procedure approach certainly qualifies as evidence of an irregular adjudicative process," while "a school's conscious and voluntary choice to afford a plaintiff, over his objection, a lesser standard of due process protections when that school has in place a process which affords greater protections, qualifies as an adverse action."[108]

5. § 106.44 (a) *General.*

> A recipient must take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. To ensure that it can satisfy this obligation, a recipient must comply with this section.

As noted previously, we have concerns with the Department's decision to group everything under the heading of "sex discrimination," rather than to require colleges and universities to act promptly to address reports of sexual harassment under their disciplinary codes.

6. § 106.44 (f) Title IX Coordinator requirements.

> A recipient must require its Title IX Coordinator to take the following steps upon being notified of conduct that may constitute sex discrimination under Title IX: (1) Treat the complainant and respondent equitably.

While we agree that Title IX coordinators should continue to be required to treat both parties equally, we are concerned, as stated throughout this comment, that many of the proposed regulations' provisions seem to encourage colleges and universities to tilt the grievance process toward the complainant.

[108] *Doe v. Rensselaer Polytechnic Institute*, 2020 WL 6118492 (N.D.N.Y. Oct. 16, 2020).

7. § 106.44 (g) Supportive measures.

> Upon being notified of conduct that may constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party's access to the recipient's education program or activity. For allegations of sex discrimination, other than sex-based harassment or retaliation, a recipient's provision of supportive measures would not require the recipient, its employee, or other person authorized to provide aid, benefit or services on the recipient's behalf to alter the allegedly discriminatory conduct for the purpose of providing a supportive measure.
>
> (1) Supportive measures may vary depending on what the recipient deems to be available and reasonable. These measures may include but are not limited to: counseling; extensions of deadlines and other course-related adjustments; campus escort services; increased security and monitoring of certain areas of the campus; restrictions on contact between the parties; leaves of absence; voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative; and training and education programs related to sex-based harassment.
>
> (2) Supportive measures that burden a respondent may be imposed only during the pendency of a recipient's grievance procedures under § 106.45, and if applicable § 106.46, and must be terminated at the conclusion of those grievance procedures. These measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity. A recipient may not impose such measures for punitive or disciplinary reasons.

This provision is especially concerning. The phrasing of the definition assumes points at issue: that the typical complainant isn't safe and that the respondent—who is still presumed non-responsible—needs to be deterred. The section's practical effect almost certainly will be to encourage Title IX coordinators to impose interim punishments (including interim suspension from campus) for an undefined, and potentially lengthy, period of time.

The current regulations seek to balance the rights of the complainant and respondent in the pre-adjudication period. They require colleges and universities to both presume the respondent innocent. and provide a virtually unlimited array of non-punitive supportive measures for the complainant. In this respect, the regulations sought to make sure that complainants were adequately supported, but not at the cost of punishing respondents before a finding of responsibility after a fair proceeding. The presumption of innocence imposed no cost on colleges and universities.

The proposed regulations, by contrast, end that balance. They allow (and even encourage) schools to return to the pre-2020 era and impose interim punishments on respondents. Yet these punishments would occur *despite the institution being required to presume that the respondent had done nothing wrong*. Moreover, while the proposed regulations provide a temporal limitation to the interim punishments (they must cease when the grievance process ends), they offer no

limitations as to scope. Colleges and universities will be free to indefinitely suspend respondents based solely on the complainant's allegation.[109]

The proposed regulations claim to provide procedural protections for a respondent subjected to an interim punishment. None of these alleged protections, however, address the fundamental problem of how to reconcile the presumption of non-responsibility with a vision of Title IX that allows the presumed-innocent respondent to be punished before an adjudication.

First, the Department maintains that colleges "may not impose such measures for punitive or disciplinary reasons," and that the interim punishments can be "imposed only during the pendency of a recipient's grievance procedures." This is a distinction without a difference, as even the Department appears to concede, noting that the proposed regulations would allow "supportive measures that burden a respondent [that] include actions that a recipient has also identified as possible disciplinary sanctions."[110] Schools cannot justify measures that are *in effect* punitive and disciplinary by arguing that they were not imposing those measures for punitive or disciplinary *reasons*. Indeed, when University of Notre Dame officials insisted that its disciplinary process was educational, not punitive, a federal judge said flatly: "This testimony is not credible. Being thrown out of school, not being permitted to graduate and forfeiting a semester's worth of tuition is 'punishment' in any reasonable sense of that term."[111]

Consider a case from Sonoma State University—where a female M.A. student was suspended while the university investigated after a classmate claimed that she had mimicked masturbation during a classroom exercise. This interim punishment (or "supportive service," in the Department's preferred language) lasted 14 months—after which the university concluded that the female student had done nothing wrong. The student sued but lost, with the court granting qualified immunity on whether university students had a property interest under California law. But the court also found the student's "allegations unsettling. Taking the allegations of the complaint as true, plaintiff has raised serious questions about whether she was provided due process during the Title IX investigation and imposition of the 'interim remedy' of preventing plaintiff from attending class for 14 months while the inordinately lengthy investigation took place."[112]

Indefinite suspensions—or even other punishments that the Department contemplates in the proposed regulations, such as "involuntary changes in class [or] work"—pose a particular threat to graduate students, where an indefinite delay in their education can place them permanently behind their cohort or (for science students) force them to re-start their research once found not responsible. That was the fate of a graduate student at UCLA, a Chinese national on a student visa who was pursuing his Ph.D. in chemistry/biochemistry and who was suspended after an allegation from his ex-fiancé. Unlike the Sonoma case, the student eventually was found responsible and his suspension was extended to two years. A state court set aside the suspension

[109] It is not uncommon for grievance procedures to take months to come to conclusion, and that is even in matters where schools have used their non-Title IX processes and therefore avoid the hearings currently required under Title IX. So, an exclusion from campus during "the pendency" of a procedure could easily cause a year's suspension.
[110] 87 Fed. Reg. at 41449.
[111] *Doe v. Univ. of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, *34-35 (N.D. Ind. May 8, 2017) (opinion vacated at parties' request as part of settlement agreement – but still an entirely valid observation).
[112] *Doe v. White*, 440 F. Supp. 3d 1074, 1089 n.13 (N.D. Cal. 2020).

for a lack of evidence. But, as the Ninth Circuit later noted, "this relief came too late, and [the student] lost his student visa status."[113]

These cases illustrate the punitive effects of what the Department terms "supportive services." (A similar analysis could apply to respondents suspended from an "extracurricular or any other activity" based solely on an allegation. Such a decision could end the athletic or artistic career of a student who the college still nominally was presuming innocent.) And at minimum, an "interim" suspension of a student presumed non-responsible would harm that student financially, as the *Notre Dame* court pointed out.

The Department claims that it is proposing to modify § 106.44(g) to "require a Title IX Coordinator to offer supportive measures not only to a complainant, but also to a respondent, when necessary to accomplish the objective of ensuring that party's access to the recipient's education program or activity."[114] This is difficult to understand, given that the Department proposes to authorize measures that would *deprive* the respondent—and only the respondent—of access to education. To suggest that the proposal is "consistent with, and further clarifies, the definition of 'supportive measures' in current § 106.30" is simply not accurate.[115] As noted above, the Department proposes to allow respondents to collapse supportive measures with actions that could also be disciplinary sanctions. The current regulations specifically limit "[s]upportive measures" to services that are "*non-disciplinary, non-punitive*"; measures that are disciplinary or punitive (other than the narrow category of emergency removals) can be imposed only if a respondent is found responsible after a fair proceeding. Current §§ 106.30, 106.44(a).

Second, the Department claims that it wants to protect the rights of respondents: "The Department recognizes that by imposing supportive measures that burden a respondent, the recipient is potentially requiring the respondent to temporarily alter or forego access to the education program or activity during the pendency of grievance procedures. In view of this, the Department proposes requiring the recipient to provide the respondent procedural protections when imposing such measures."[116]

There are no meaningful "procedural protections" proposed.

The criteria the Department proposes for imposing interim punishments are most notable for their opacity. The interim punishment must be "appropriate," "reasonable," "fact-specific," and "no more restrictive than necessary to restore or preserve the complainant's access to the education program or activity."[117] The proposed regulations define none of these concepts. Indeed, the Department goes out of its way to indicate to schools that it will not look too closely at how they apply these amorphous concepts: "*A recipient has substantial discretion to offer supportive measures including, when necessary, measures that burden a respondent.*" The emphasis comes in the original.[118]

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[113] *Doe v. Regents of the Univ. of Cal.*, 23 F.4th 930, 934 (9th Cir. 2022).
[114] 87 Fed. Reg. at 41448.
[115] *Id*.
[116] 87 Fed. Reg. at 41449,
[117] *Id*.
[118] 87 Fed. Reg. at 41448.

Third, the Department proposes a right to a paper appeal of the interim punishment for the respondent—as well as a right to appeal for the complainant, apparently in cases where the school declines to impose an interim punishment. For a Department that professes a desire to avoid burdensome processes, a provision allowing complainants to appeal non-suspensions adds a lot of layers.

This paper appeal would go either to the Title IX coordinator or, if the Title IX coordinator imposed the interim punishment, to another employee. But this offers no meaningful protection: it simply means that two university employees, instead of just one, are exercising their "substantial discretion" to determine if the proposed amorphous criteria are satisfied. And the Department proposes no procedural protections regarding access to evidence or the presumption of non-responsibility as part of this paper appeal process. The college or university must allow this paper appeal to be filed in a "timely" manner—but, as with so much else in the proposed regulations, the Department offers no definition of what it or is not "timely" in this context.

To the extent that colleges and universities accept the Department's invitation to return to the era of interim punishments, they will run the risk of lawsuits from respondents, including claims based on due process, contract, and Title IX violations. "While it lasts," the First Circuit observed in its 2019 *Haidak* opinion, "a suspension more or less deprives a student of all the benefits of being enrolled at a university. The Supreme Court has held that a deprivation of this sort requires notice and a hearing," except in cases of emergency. The university in *Haidak* went beyond what the proposed regulations would require, allowing the respondent to provide a written response to the interim punishment, but the First Circuit found this procedure "insufficient to provide, by itself, due process in connection with a five-month suspension that ran through most of a semester." The conclusion: "When a state university faces no real exigency and certainly when it seeks to continue a suspension for a lengthy period, due process requires 'something more than an informal interview with an administrative authority of the college.'"[119]

The court also offered a broader point, with which the Department's discussion never grapples: "[W]hen the response leaves the matter turning on credibility, the interests at stake are as substantial as those implicated by an extended [pre-adjudication] suspension, and no perceived exigency exists, a university must do more than presume one version to be correct."[120] The Third Circuit made similar observations in a case involving breach of contract claims against a private university.[121] And fundamentally unfair procedures expose both public and private schools to Title IX liability.[122]

At its core, the Department's reconceptualized definition of "supportive services" cannot be reconciled with the presumption of non-responsibility. A recent case at Brown University illustrated the contradiction. Though it involved an off-campus incident that Brown charged under its "two-track" Title IX process, the current Brown procedures nonetheless promise something similar to the current regulations—that the respondent will "not be presumed

[119] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 71-73 (1st Cir. 2019).
[120] *Id.*
[121] *Doe v. Univ. of Scis.*, 961 F.3d 203, 214-15 (3d Cir. 2020).
[122] *Baum*, 903 F.3d at 585-87; *Doe v. Rhodes Coll.*, No. 2:19-cv-02336, Doc. 33, at 9 n.4 (W.D. Tenn. June 14, 2019).

responsible of any alleged violations unless so found through the appropriate student conduct hearing" and will have "an opportunity to offer a relevant response." (As in the current regulations, Brown's procedures also allowed for an emergency removal.) Despite the promised presumption of innocence, Brown imposed an interim suspension on the accused student, after a process more robust (a committee decision, followed by a paper appeal) than that envisioned by the proposed regulations. The court found that the university body responsible for deciding whether to impose interim punishments on the respondent "focused on the nature of the unproven allegations and removed him from campus and suspended him before performing any investigation of those allegations." The university's actions, the court concluded, "failed to afford [the respondent] a presumption that he was not responsible for the misconduct alleged."[123]

That the Department speaks of "*imposing* supportive measures" turns the concept on its head.[124] Given the lack of clarity in this provision in both the proposed regulations and the corresponding discussion, we fear that Title IX coordinators will embrace a suspend-first-ask-questions-later approach, if only to avoid complainants turning to OCR. We urge maintaining the current definition of supportive measures and allowing interim punishments only under the requirements for emergency removals.

8. § 106.44(f)(6)

> The Title IX Coordinator is responsible for offering and coordinating supportive measures.

This seemingly innocuous provision generated considerable—and confusing—discussion by the Department in the Preamble. The Department maintains that a Title IX Coordinator must take appropriate prompt and effective steps outside of a recipient's grievance procedures, when necessary, to ensure that sex discrimination does not continue or recur. In addition, under proposed § 106.44(f)(6), a Title IX Coordinator would be required, as appropriate, to take other prompt and effective steps in response to information about conduct that may constitute sex discrimination under Title IX regardless of whether the recipient has also initiated its grievance procedures or facilitated an informal resolution process for the parties."

The Department does not indicate how a Title IX coordinator can fulfill this mandate—reaching the determination that a respondent student's act amounted to sex discrimination—while also respecting the rights of the respondent.

It almost seems as if the Department were envisioning the Title IX coordinator functioning as a kind of super-single-investigator, with the ability to impose punishments wholly outside the grievance process. "[T]he recipient's Title IX Coordinator may have access to information, including past reports to the Title IX Coordinator, corroborating information such as video footage, visitor logs available to the recipient, or written documentation, and any other relevant information that suggest the conduct has impacted the complainant and other members of the recipient's educational community. A Title IX Coordinator may need to speak with the respondent, if known, and other students or individuals who may have witnessed the reported sex

[123] *Stiles v. Brown University*, No. 1:21-cv-00497, Doc. 30, at 5 (D.R.I., Jan. 25, 2022).
[124] 87 Fed. Reg. at 41422. Emphasis added.

discrimination or have information about the sex discrimination to determine what occurred or whether additional steps are necessary to ensure that sex discrimination does not continue or recur in its education program or activity."[125]

Gathering "corroborating information" such as "video footage" and "visitor logs" or "speak[ing] with the respondent, if known, and other students or individuals who may have witnessed the reported sex discrimination or have information about the sex discrimination to determine what occurred" is an investigation.

The Department continues, "[I]n all cases, when a recipient's response to sex discrimination is not effective to end the sex discrimination and prevent the recurrence of discrimination for the complainant or the recipient's broader educational community, under the proposed regulations, a Title IX Coordinator must reevaluate the recipient's response and implement other approaches."[126] This vague standard highlights the difficulties of conflating institutional discrimination with alleged student on student conduct. Because of that, the new provision gives the institution potential broad powers over an accused student in order to somehow prevent the continuance or recurrence of "discrimination."

This provision is especially troubling given the Department's intent to return to the Title IX coordinator the ability to function as a single investigator, either himself or herself or through his or her designee. The Department makes clear that this shadow investigation can, under certain (unclear) circumstances, blend over into a formal grievance process. As it explains, "When a recipient has not initiated its grievance procedures, a Title IX Coordinator may need to take non-disciplinary action to stop the discrimination, such as instituting restrictions on contact between the parties, barring a third party from visiting the recipient's campus, or other action consistent with the recipient's policies. In some cases, after taking these steps, a Title IX Coordinator may learn of additional incidents or obtain information that causes the Title IX Coordinator to revisit whether to initiate a complaint under the recipient's grievance procedures. *For example, if the Title IX Coordinator determines that the recipient must impose disciplinary sanctions on a respondent to effectively end the sex discrimination and prevent its recurrence,* the Title IX Coordinator would need to initiate the recipient's grievance procedures under proposed § 106.45, and if applicable proposed § 106.46, and would be able to impose sanctions only if there is a determination that the respondent violated the recipient's policy prohibiting sex discrimination."[127] [emphasis added]

How would a Title IX coordinator determine—before any grievance process has occurred—that the school "must impose disciplinary sanctions on a respondent to effectively end the sex discrimination and prevent its recurrence"? How would making such a determination be consistent with the presumption of innocence? And since the Title IX coordinator can serve as the single investigator himself or herself, this passage raises questions of basic fairness.

[125] 87 Fed. Reg. at 41446.
[126] *Id*.
[127] 87 Fed. Reg. at 41447.

The Department should clarify that § 106.44(f)(6) does not confer upon the Title IX coordinator independent authority to conduct a one-person investigation, or to impose punishment, whether described as a disciplinary sanction or a supportive measure.

9. § 106.44 (h) *Emergency removal.*

> Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

With one important exception, this provision echoes the comparable item in the current regulations. The Department, however, has broadened the scope of the emergency removal criteria—which, given the seriousness of the punishment, should be tightly defined—to change the "physical health and safety" reference in the current regulations to simply "health and safety." We note, however, that some complainant lawsuits have defined the concept of a threat to the complainant's mental health exceedingly broadly, in ways that courts have rejected.[128] OCR's wording appears to endorse the arguments of the unsuccessful litigants in those cases.

We also note that, as presently written, the proposed regulations would allow schools to bypass this section and its procedural protections for respondents entirely by simply characterizing an interim removal as a "supportive measure." As set forth above, no interim measure that has the effect of punishing or disciplining a still-presumed-innocent respondent should be imposed without robust procedural protections.

10. § 106.44(i)

> *Administrative leave.* Nothing in this part precludes a recipient from placing an employee respondent on administrative leave from employment responsibilities during the pendency of the recipient's grievance procedures.

The Department should require at least some pre-grievance hearing procedural protections for employees accused of sexual misconduct. The potential harm for an accused professor in such circumstances can be substantial—in effect, a public scarlet letter, even if they had done nothing wrong, with the possibility of being targeted by campus activists or others in the media if their grievance process does not end in termination.[129]

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[128] *Kollaritsch v. Mich. State Univ. Bd. of Trs*., 944 F.3d 613, 625 (6th Cir. 2019) (noting that one plaintiff based her Title IX claims against the university on allegations that she "could have encountered [respondent] at any time" due to his "mere presence ... on campus."); *Thomas v. Bd. of Regents*, 2022 U.S. Dist. LEXIS 85177, *41 (D. Neb. May 11, 2022) (noting that one complainant "alleges IEC initially refused to grant her an accommodation when she first decided not to file a formal complaint").

[129] *See, e.g.*, *Farzinpour v. Berklee College of Music*, 2022 U.S. Dist. LEXIS 122607, *10-12 (D. Mass. July 12, 2022).

Universities have been aggressive against their employees when faced with allegations of discrimination—sometimes too aggressive, as in a recent case at the University of Central Florida that involved allegations of racial discrimination.[130] Accused professors should have some chance of challenging a decision to place them on leave. These situations are particularly complicated involving placing on administrative leave a researcher who may be removed from his lab, removed as a principal investigator, barred from collaboration with other labs, and subject to NIH notice provisions.

11. § 106.44(i)

> *Discretion to offer informal resolution in some circumstances.* (1) At any time prior to determining whether sex discrimination occurred under § 106.45, and if applicable § 106.46, a recipient may offer to a complainant and respondent an informal resolution process, unless there are allegations that an employee engaged in sex discrimination toward a student or such a process would conflict with Federal, State or local law.

We welcome retention of this provision from the current regulations. The informal resolution option maximizes the autonomy given to the complainant while also allowing colleges and universities to focus on what they do best—educating, counseling, and mentoring students—rather than attempting high-stakes adjudications of alleged criminal conduct.

We are, therefore, puzzled why the regulations give universities discretion to refuse informal resolution even when both parties want it. At the very least, the Department should insert clarifying language suggesting that when both parties desire an informal resolution but the Title IX coordinator refuses, the university should issue a written justification as to why it is refusing to allow the informal resolution.

12. § 106.44k(3)(vii)

> That if the recipient initiates or resumes its grievance procedures under § 106.45, and if applicable § 106.46, the recipient or a party must not access, consider, disclose, or otherwise use information, including records, obtained solely through an informal resolution process as part of the investigation or determination of the outcome of the complaint; and

This provision needs clarification. It makes sense, as in settlement negotiations, not to allow use of written or oral discussions, admissions etc., that happen during the informal resolution process. But what justifies precluding use of records obtained during the informal resolution process, especially when those records inevitably would have been obtained in the grievance investigation if the informal process had not been attempted?

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[130] *See, e.g. In the Matter of the Arbitration between University of Central Florida Board of Trustees and The United Faculty of Florida,* https://legalinsurrection.com/wp-content/uploads/2022/05/Arbitrators-Award-and-Opinion-Charles-Negy-and-UCF.pdf. See also *Flor v. University of New Mexico,* 469 F. Supp. 3d 1143, 1147 (D.N.M. June 20, 2020), as a procedurally troubling example of interim university punishment that a court nonetheless declined to disturb.

The lack of clarity (a consistent theme throughout the proposed regulations) here causes problems: What if records are lost, and available only because of the informal resolution process? Or what if a party provides a record during the informal resolution process and then decides to withhold it during the formal process? Since the school and the other party do not have the power to compel production of evidence, would this mean that the parties are precluded from arguing that they know this evidence exists?

From the reverse direction, how would this provision function in a process where the Title IX coordinator chooses to serve as both the informal mediator and the single investigator? The Department doesn't say—but, realistically, how could such a person unlearn the information he or she had obtained during the informal resolution process?

13. § 106.44k(3)(viii)

> the informal resolution facilitator could serve as a witness for purposes other than providing information obtained solely through the informal resolution process.

This section, at minimum, needs clarification. What possible reason could exist for allowing the informal resolution facilitator to be a witness in a formal proceeding? If there is a justifiable reason, the Department should provide examples.

14. § 106.45.

§ 106.45 include "basic requirements" for all "sex discrimination" complaints. § 106.46 provides *additional* specific provisions for sex-based harassment cases involving a "postsecondary" student respondent or complainant. Our comments focus on what applies to sex-based harassment involving postsecondary students (e.g., parts of § 106.45 plus § 106.46), but *not* specifically on the reduced rights applicable to proceedings governed by § 106.45 alone.[131]

Before addressing the specific provisions of proposed § 106.45, we reiterate our concerns—discussed in detail above—about the Department's decision to remove the clear statement that a college or university could engage in gender discrimination by mistreating a respondent.

15. (b)(1)-(6)

> *Basic requirements for grievance procedures.* A recipient's grievance procedures must:
>
> (1) Treat complainants and respondents equitably;
>
> (2) Require that any person designated as a Title IX Coordinator, investigator, or decisionmaker not have a conflict of interest or bias for or against complainants or

[131] For the record, we note our concern with the fairness of one aspect of the proposed regulations for high school students: "Under proposed § 106.45(f)(4), the Department proposes requiring a recipient to, at minimum, provide the parties with a description of the relevant evidence as part of the investigation of all sex discrimination complaints. A recipient may provide this description orally or in writing." 87 Fed. Reg. at 41481. The fairness concerns with solely an oral "description" of the evidence are substantial.

respondents generally or an individual complainant or respondent. The decisionmaker may be the same person as the Title IX Coordinator or investigator;

(3) Include a presumption that the respondent is not responsible for the alleged conduct until a determination whether sex discrimination occurred is made at the conclusion of the recipient's grievance procedures for complaints of sex discrimination.

(4) Establish reasonably prompt timeframes for the major stages of the grievance procedures, including a process that allows for the reasonable extension of timeframes on a case-by-case basis for good cause with notice to the parties that includes the reason for the delay. Major stages include, for example, evaluation (*i.e.*, the recipient's determination of whether to dismiss or investigate a complaint of sex discrimination); investigation; determination; and appeal, if any;

(5) Take reasonable steps to protect the privacy of the parties and witnesses during the pendency of a recipient's grievance procedures, provided that the steps do not restrict the ability of the parties to obtain and present evidence, including by speaking to witnesses, subject to § 106.71; consult with a family member, confidential resource, or advisor; prepare for a hearing, if one is offered; or otherwise defend their interests;

(6) Require an objective evaluation of all relevant evidence, consistent with the definition of relevant in § 106.2—including both inculpatory and exculpatory evidence—and provide that credibility determinations must not be based on a person's status as a complainant, respondent, or witness;

For the most part, we support the provisions of proposed § 106.45 (b)(1)-(6), most of which are retained from the current regulations (although we incorporate our concerns about the definition of relevance, discussed above).

We do object to the provision in section (b)(2) that eliminates the current regulations' prohibition on colleges and universities combining the roles of investigator and decisionmaker. We discuss that below at pp. 52-57. We also note that the Department's mandate for fair treatment for each party needs to be more than lip service, particularly given the history of unfairness documented in the case law over the past few years. We support the proposed changes to subsection (b)(5), which replaces language prohibiting schools from restricting parties' ability "to discuss the allegations under investigation or to gather and present relevant evidence" with requirement of reasonable steps to protect privacy without restricting ability to obtain and present evidence, including by speaking to witnesses, subject to proposed § 106.71; to consult with a family member, confidential resource, or advisor; to prepare for a hearing; or otherwise to defend their interests." This seems like a reasonable balance between privacy rights, the importance of ensuring that neither party is harassed or retaliated against, and the need for a functioning grievance process.

16. (b)(7)

[A recipient's grievance procedures must:]

> Exclude the following types of evidence, and questions seeking that evidence, as impermissible (*i.e.*, must not be accessed, considered, disclosed, or otherwise used), regardless of whether they are relevant:
>
> (i) Evidence that is protected under a privilege as recognized by Federal or State law, unless the person holding such privilege has waived the privilege voluntarily in a manner permitted in the recipient's jurisdiction;
>
> (ii) A party's records that are made or maintained by a physician, psychologist, or other recognized professional or paraprofessional in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent for use in the recipient's grievance procedures; and
>
> (iii) Evidence that relates to the complainant's sexual interests or prior sexual conduct, unless evidence about the complainant's prior sexual conduct is offered to prove that someone other than the respondent committed the alleged conduct or is offered to prove consent with evidence concerning specific incidents of the complainant's prior sexual conduct with the respondent. The fact of prior consensual sexual conduct between the complainant and respondent does not demonstrate or imply the complainant's consent to the alleged sex-based harassment or preclude determination that sex-based harassment occurred.

This provision largely retains the prohibitions from the current regulations. But in light of the proposed regulations' removing so many other procedural protections, and based on scenarios we have seen in practice, we raise five points.

First, regarding privileged information: the Department should clarify that consent to turn over information should not be selective. If either party submits a record, the regulations should require them to submit the entire document. To take an obvious example, a complainant should not be allowed to produce a page or two of a SANE report and then refuse permission for the respondent or the university decisionmaker to see the remainder of the report on grounds of privilege. At the very least, the other party must be able to see the entire document, or text/email string, or data to engage in discussions of whether the material the party does not want to produce is relevant.

Second, the proposed regulations prohibit evidence that relates to the complainant's sexual interests or prior sexual conduct (except under limited circumstances), with "evidence related to the complainant's sexual interests" replacing evidence about the "complainant's sexual predisposition." The regulations should be consistent: limitations on disclosure of prior sexual conduct or interests should apply to *both* parties, not simply to the complainant. Consistent treatment is necessary to be "equitable." For instance, in a case at the University of Southern California, the school's investigator actively looked into *respondent's* prior history, including the respondent's dating history, and then used this information to cast doubts on his credibility. This

approach would never have been allowed with a complainant, and if it is not allowed with a complainant, then it should not be allowed as to a respondent.[132]

Third, we are concerned that—given the overall tilt of the proposed regulations toward restoring practices that unfairly deprived accused students of key procedural protections and the ability to defend themselves fully—Title IX coordinators might interpret these provisions to prohibit respondents from offering clearly exculpatory contextual information.

To take a particularly clear example: In *Doe v. Amherst College*, the complainant informed the college's investigator and hearing panel members that she texted a friend after the alleged assault to help address her trauma. No one asked her to produce the texts. The respondent's ex-girlfriend eventually tracked the texts down, and it turned out that the complainant was texting her alleged outcry witness both *before* and *after* the alleged assault, for the purpose of arranging a sexual liaison with this other male student.[133] These texts could be construed as "evidence that relates to the complainant's sexual interests." But their exclusion under circumstances like that of the Amherst case would be deeply unfair, since the texts could be offered to undermine the complainant's truthfulness.

Fourth, the Department appears to broaden the exclusionary rule. "In the current regulations, the prohibition on questions and evidence about the complainant's sexual predisposition and prior sexual behavior appears in the section about hearings but does not provide protection when the same evidence is presented in connection with an investigation. Instead, under the current regulations, when evidence related to a party's sexual predisposition or prior sexual behavior is directly related to the allegations, the Department stated that 'the recipient should allow both parties an equal opportunity to inspect and review such evidence to be able to prepare to respond to it or object to its introduction in the investigative report or at the hearing.' Id. at 30428. The Department is concerned that permitting the parties to review these types of evidence undermines the purpose of this protection. Disclosing evidence of a complainant's prior sexual conduct (beyond the narrow exceptions) or sexual interests could unnecessarily harm complainants and chill reporting even if questioning about that evidence is ultimately prohibited at a hearing. Consequently, the Department proposes moving the prohibition on questions and evidence about sexual interests and prior sexual conduct to § 106.45(b)(7)(iii), where it would apply to the entirety of the grievance procedures under § 106.45, and if applicable § 106.46."[134]

Under the current regulations, the respondent could see potentially excluded evidence—such as the type of text messages that undermined the complainant's allegations in *Amherst* (at least in cases, unlike *Amherst*, where the investigator performed a competent inquiry)—and then make an argument for their relevance. This proposed change closes the door to that right, further intensifying our concerns about the access to evidence issues raised by the Department's restrictive definition of relevance.

Finally, the Department writes that this provision "would set out three categories of evidence, including records, that would be impermissible (i.e., must not be accessed, considered, disclosed,

[132] *Doe v. University of Southern California*, No. 20STCP02150, order granting writ of mandate, (Los Angeles County Superior Court Dec. 13, 2021).
[133] *Doe v. Amherst Coll.*, 238 F. Supp. 3d 195, 214 (D. Mass. February 28, 2017).
[134] 87 Fed. Reg. at 41472.

or otherwise used) in the grievance procedures, *regardless of whether the evidence is relevant*."[135] [emphasis added] The Department therefore appears to concede that it is comfortable with a federal mandate that would require schools to exclude "relevant" evidence. Additional discussion would be useful to provide examples of just what type of "relevant" evidence the Department has in mind here.

17. § 106.45(f)

> *Complaint investigation.* A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:
>
> (1) Ensure that the burden is on the recipient—not on the parties—to conduct an investigation that gathers sufficient evidence to determine whether sex discrimination occurred;
>
> (2) Provide an equal opportunity for the parties to present relevant fact witnesses and other inculpatory and exculpatory evidence;
>
> (3) Review all evidence gathered through the investigation and determine what evidence is relevant and what evidence is impermissible regardless of relevance, consistent with § 106.2 and with paragraph (b)(7) of this section; and
>
> (4) Provide each party with a description of the evidence that is relevant to the allegations of sex discrimination and not otherwise impermissible, as well as a reasonable opportunity to respond.

This section resurrects language from the 2011-2017 period requiring "adequate, reliable, and impartial investigation of complaints." As we know from the record of that period, these boilerplate requirements were not sufficient to ensure that investigations actually *were* adequate, reliable, or fair. (Quoting ATIXA president Brett Sokolow again: "the problem of biased outcomes was real. Educational institutions railroaded those accused of sexual violence and harassment (mostly cisgender men) in numbers that should terrify any reasonable person."[136]) And the Department provides scant confidence in the Preamble of an interest to push universities toward fairness, given its push to revoke procedural protections required by the current regulations.

Regarding the specific items:

We support the requirement in (f)(1) that the recipient—and not the parties—bears the burden of gathering sufficient evidence to reach a determination.

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[135] 87 Fed. Reg. at 41419.

[136] Brett Sokolow, "More Flexible Title IX Regulations Pose New Dilemmas," *Inside HigherEd*, https://www.insidehighered.com/views/2022/07/12/flexibility-title-ix-regs-blessing-and-curse-opinion?utm_source=Inside+Higher+Ed&utm_campaign=a0efa932fb-DNU_2021_COPY_02&utm_medium=email&utm_term=0_1fcbc04421-a0efa932fb-198217881&mc_cid=a0efa932fb&mc_eid=b9d1a6cadc

Subsection (f)(2) retains the requirement that a recipient provide an equal opportunity for the parties to present fact witnesses and other inculpatory and exculpatory evidence, but says the fact witnesses and evidence must be "relevant" as defined. We have already set out our concerns with the proposed definition of relevant. In addition, this provision is problematic because relevance determinations should not be made until all the evidence is gathered. The right of parties to *present* evidence and witnesses should not be qualified by a premature assessment of what is and is not relevant. We will discuss the topic of expert witnesses, which has been moved to § 106.46, below.

Subsection (f)(3)-(4) would require the recipient to review all evidence gathered through the investigation and determine which evidence is relevant and which evidence is impermissible regardless of relevance, and then to give the parties a "description" of the evidence that has been determined to be relevant and not impermissible. We have already set out our concerns with the proposed definition of relevant and the provisions regarding impermissible evidence, above. We are particularly concerned with the proposal to revoke the parties' current right to access to evidence during the investigation stage. Under the current regulations, parties receive "an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation." § 106.45(b)(5)(iv). The Department now proposes to give the parties access only to a "description" of evidence that has already been determined to be relevant (and not impermissible). And while the Department would still require giving the parties a "reasonable opportunity to respond," they cannot meaningfully respond or challenge the relevance determinations if the underlying evidence is withheld. For the reasons noted in our discussion of the proposed definition of relevant, the current rules should be retained.

In this respect, we worry about the Department's comment regarding the training of investigators: "It would also apply the existing training requirement of § 106.45(b)(iii) on issues of relevance more generally because relevancy considerations are not limited to an investigative report and arise throughout an investigation."[137] This passage suggests that investigators will be making decisions about relevance on the fly, in real time, as they conduct the investigation. Yet there often is no way to tell if certain evidence will be relevant until all the evidence is in—in the Amherst case, for example, the accuser's texts with the other male student might not have seemed relevant until she said they related to an outcry witness.

18. § 106.45 (g)

> *Evaluating allegations and assessing credibility.* A recipient must provide a process that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex discrimination.

[137] 87 Fed. Reg. at 41429.

We discuss this provision in Section III. For now, we note that the Supreme Court more than 50 years ago celebrated the value of requiring "the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth."[138] In addition, in virtually every case involving alleged sexual misconduct, credibility *is* both in dispute and relevant. The determination of credibility is so important that the Department should not give schools a loophole *not* to assess credibility.

19. § 106.45 (h) ***Determination of whether sex discrimination occurred.***

> Following an investigation and evaluation process under paragraphs (f) and (g) of this section, the recipient must:
>
> (1) Use the preponderance of the evidence standard of proof to determine whether sex discrimination occurred, unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints, in which case the recipient may elect to use that standard of proof in determining whether sex discrimination occurred. Both standards of proof require the decisionmaker to evaluate relevant evidence for its persuasiveness; if the decisionmaker is not persuaded under the applicable standard by the evidence that sex discrimination occurred, whatever the quantity of the evidence is, the decisionmaker should not determine that sex discrimination occurred.
>
> (2) Notify the parties of the outcome of the complaint, including the determination of whether sex discrimination occurred under Title IX, and the procedures and permissible bases for the complainant and respondent to appeal, if applicable;
>
> (3) If there is a determination that sex discrimination occurred, as appropriate, require the Title IX Coordinator to provide and implement remedies to a complainant or other person the recipient identifies as having had equal access to the recipient's education program or activity limited or denied by sex discrimination, and require the Title IX Coordinator to take other appropriate prompt and effective steps to ensure that sex discrimination does not continue or recur within the recipient's education program or activity under § 106.44(f)(6).

§ 106.45(h)(1) requires the preponderance standard "unless the recipient uses the clear and convincing evidence standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints." It removes the requirement to use the same standard of proof for complaints against students as it would for complaints against employees. "The Department's current view, informed by the input of stakeholders,[139] is that allegations regarding sex discrimination by a student are comparable to allegations of other types of discrimination by a student, and that allegations of sex discrimination by an employee are comparable to allegations of other types of discrimination by an employee." With respect, the Department's perspective here makes no sense. The appropriate distinction is between

[138] *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).
[139] Nowhere in the 700 pages of the NPRM does the Department provide a list of the "stakeholders" that it consulted.

institutional discrimination and individual harassment/discrimination. Anything else suggests that the Department is comfortable with a system where it's harder to prove a sexual misconduct allegation against a professor than against a student.

The Department also provides no justification for allowing recipients to use a *lower* standard of proof for student-on-student allegations than in cases where a student accuses a professor.

More generally, the Department adds, "Some stakeholders made the point that the preponderance of the evidence standard is the typical standard applied to evidence in civil litigation."[140] And: "The preponderance of the evidence standard is commonly used in civil litigation, including in cases involving alleged discrimination in violation of civil rights laws, and the Supreme Court has applied a preponderance of the evidence standard in litigation involving discrimination under Title VII."[141]

The logical extension of this approach, of course, would be for the Department to ensure that each party to a Title IX grievance process possessed the same protections offered in civil litigation. "The Department acknowledges that in the civil litigation context, there are procedural safeguards, such as discovery, that help to ensure a fair process." But, of course, discovery isn't the only procedural safeguard associated with civil litigation. That list also includes (among other things) a live hearing in which each party can cross-examine adverse witnesses. Yet the same Department that justifies *requiring* the preponderance standard because it is used in the civil process also proposes *revoking* the rights to a live hearing and cross-examination even though those procedures are used in the civil process.

The Department's explanation for why it wants to require some elements of the civil litigation process but not others makes no sense: "Although the procedures may not be the same, it is the Department's current view that the proposed regulations include a number of key safeguards to ensure that a recipient's grievance procedures provide a fair process for all involved."[142]

If the civil process can be cited to diminish procedural protections that respondents currently possess, then the Department cites the rules of civil litigation. But if those rules would point to retaining current procedural protections for respondents, then the Department simply says its own proposals would provide a fair process. The common denominator is an effort to weaken the procedural protections that respondents currently have.

Finally, the Department maintains, "Use of a preponderance standard also equally balances the interests of the parties in the outcome of the proceedings by giving equal weight to the evidence of each party, and it begins proceedings without favoring the version of facts presented by either side."[143] As previously noted, we are concerned that the Department, while proposing to retain the presumption of non-responsibility in theory, undermines that presumption both through specific provisions (such as allowing "supportive measures" to include interim punishments) and comments such as these.

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[140] 87 Fed. Reg. at 41484.
[141] 87 Fed. Reg. at 41485.
[142] *Id*.
[143] *Id*.

20. § 106.45(h)(5)

> Not discipline a party, witness, or others participating in a recipient's grievance procedures for making a false statement or for engaging in consensual sexual conduct based solely on the recipient's determination of whether sex discrimination occurred.

The Department proposes removing current § 106.71(b)(2), which states that "[c]harging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute [prohibited] retaliation . . . provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith."

The current regulations are clear and strike a sensible balance, and the current language should be retained. There *should* be consequences for false statements made knowingly or in bad faith, but such consequences should not automatically follow from the determination regarding responsibility alone. The Department's proposed substitute is not so clear, particularly given its explanation that its proposed change means "a recipient must not discipline a person for making a false statement based solely on a determination from the recipient's grievance procedures that the person's allegations, arguments, or other statements were not supported by the evidence."[144]

If the Department is suggesting that a school cannot use evidence developed in the proceeding to support a finding of knowing false statement, that does not make sense. In this respect, we have in mind cases such as *Doe v. Amherst College* or *Oliver v. University of Texas Southwestern Medical School*, where evidence developed during the investigation could have supported subsequent claims that the complainant knowingly made false statements. Contrast to a case such as *Doe v. Boston College*, where the complainant appears to have made a false identification—but no evidence exists that she did so maliciously or even knowingly.

If the Department does not like the current language, it should at the very least rephrase and clarify its proposed substitute, perhaps along the following lines: a "recipient may not determine that a party or witness knowingly made a false statement or knowingly submitted false information based solely on the outcome of the proceeding."

Finally, "consensual sexual conduct" is a completely different topic from "false statements"; if the Department wants to address the former, it should do so in a separate provision and with more clarity.

21. § 106.46

In framing the discussion of proposed § 106.46, the Department concedes the importance of the procedural protections in the current regulations: "[S]ex-based harassment complaints subject to the provisions of proposed § 106.46 could, and often would involve a student respondent who faces a potential disciplinary sanction as a consequence of the grievance procedures. The

[144] 87 Fed. Reg. at 41490.

Department submits that the risk of disciplinary sanction of a student respondent necessitates affording additional procedural protections to ensure an equitable outcome."[145]

Unfortunately, the Department then proposes to revoke many of the "additional procedural protections" that have proven so useful in creating a fairer system since 2020.[146]

22. § 106.46(c)

> *Written notice of allegations.* (1) Upon the initiation of the postsecondary institution's sex-based harassment grievance procedures under this section, a postsecondary institution must provide written notice to the parties, whose identities are known, of…

We support most of the notice provisions in (c), which also incorporates requirements of § 106.45(c), including requirement of notice if new allegations are investigated (though we would urge that written notice be required in both this section and § 106.45). We do have concerns with the element of (c)(3) allowing delay of written notice, whose lack of clarity makes it open to abuse.

We support the requirement of sufficient notice of meetings, at (e)(1).

23. § 106.46 (e)(4)

> Has discretion to determine whether the parties may present expert witnesses as long as the determination applies equally to the parties;

Giving schools the discretion to exclude expert witnesses is a significant change from the current regulations, for which the Department provides no meaningful justification:[147]

> The Department proposes revising the requirement in current § 106.45(b)(5)(ii) that a recipient must provide an equal opportunity for the parties to present expert witnesses by permitting a postsecondary institution discretion to determine whether the parties may present an expert witness—provided that this determination applies equally to the parties. Under proposed § 106.46(e)(4), the postsecondary institution would be permitted to exercise this discretion by deciding to allow each party to use experts, to not allow any experts, or to use its own expert in lieu of experts presented by the parties. Following the implementation of the 2020 amendments, stakeholders urged the Department to amend the regulations to provide recipients with discretion to determine whether parties may present expert witnesses, as long as the opportunity to present or not to present experts is provided equally to the parties. The Department recognizes that expert witnesses would not have observed the alleged conduct (unlike relevant fact witnesses, which a party has a right to present under current § 106.45(b)(5)(ii) and proposed § 106.45(f)(2)) and may not be necessary or helpful to the recipient in determining whether sex-based harassment occurred. Thus, the Department's current position is that a postsecondary institution would be in the best position to identify whether a particular case might benefit from

[145] 87 Fed. Reg. at 41462.
[146] *Id.*
[147] 87 Fed. Reg. at 41497.

> expert witnesses. A postsecondary institution should also consider whether an expert witness would impede a prompt resolution to the grievance procedures due to the time that may be needed to hire an expert witness, for the expert witness to review the necessary information and formulate an opinion, and to arrange for the expert's attendance at any pertinent meetings or proceedings.

The Department does not identify when expert witnesses *would* be "necessary" or "helpful." Nor does the Department intend to prevent a university from precluding the parties from using experts, but reserve for itself that right. The proposed regulations do, however, subtly place a thumb on the scale to discourage allowing expert witnesses. Title IX coordinators, the Department maintains, "should also consider whether an expert witness would impede a prompt resolution to the grievance procedures due to the time that may be needed to hire an expert witness, for the expert witness to review the necessary information and formulate an opinion, and to arrange for the expert's attendance at any pertinent meetings or proceedings." (The Department cites no comments from stakeholders along these lines.) Otherwise, the passage quoted above describes what the Department *wants* to do (revoke the current right of each party to call expert witnesses) but does not explain *why* the Department believes that eliminating this right will facilitate the search for the truth.

As we know from the pre-2020 regulations, granting universities the discretion to prohibit expert witnesses will lead them to do so, even on issues such as toxicology or interpreting SANE reports where university decisionmakers cannot be presumed to have expertise. A handful of cases demonstrate the problem.

In *Doe v. George Washington University,* the court concluded that the accused student was likely to succeed on the merits of his breach of contract claim in part because the university's appeals board improperly disregarded a toxicology expert's report from the respondent ("[T]he expert's opinion might have affected the panel's evaluation of [the complainant's] testimony. The expert opined that had Ms. Roe consumed the amount of alcohol to which she testified she may have experienced 'substantial motor impairment, total memory loss,' and other extremely serious symptoms.")[148]

In *Doe v. Ohio State University*, the court concluded that the accused student had plausibly alleged a due process violation after the university denied him the opportunity to present a toxicologist's expert report showing that the accuser, who claimed incapacitation, would not have been incapable of consent based on the amount of alcohol she allegedly drank. The court noted that "the value of allowing live expert-witness testimony here is also substantial," since the expert's "opinion went right to the heart of the case: whether Jane Roe was to be believed and whether she was too intoxicated to consent. Alcohol metabolism and the extent of impairment of human judgment and memory are not matters within the knowledge of lay persons. And the disciplinary board held Doe responsible for sexual misconduct because it found Jane Roe was significantly impaired by alcohol and could not consent. The risk of an erroneous result here was substantial given the key evidence [the expert] would have provided."[149]

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[148] *Doe v. George Washington Univ.*, 305 F. Supp. 3d 126, 132-133 (D.D.C. April 25, 2018). The court nonetheless denied the motion for a preliminary injunction on grounds that the student had not identified irreparable harm.
[149] *Doe v. Ohio State Univ.*, 311 F. Supp. 3d 881, 895 (S.D. Ohio April 24, 2018).

And in a case at UC-Santa Barbara, an accused student (identified in court filings as John Doe) challenged a finding of responsibility based partly on a claim that the complainant's memories were unreliable because she had improperly combined alcohol with the prescription drug Viibryd on the night in question. As a California appellate court described things in setting aside the university's finding, the UCSB Title IX grievance "Committee's rulings during the hearing placed John in a catch-22; he learned the name of the medication Jane was taking too late to allow him to obtain an expert opinion, but the Committee precluded John from offering evidence of the side effects of Viibryd without an expert."[150]

While allowing universities to exclude expert witnesses might disproportionately harm respondents, this change in the regulations also threatens complainants. First, as Ohio State and George Washington cases show, university unfairness risks dragging out cases for years, denying closure to all parties, including the complainant. In addition, complainants sometimes need expert witnesses to expose the truth. A recent complaint against the University of Cincinnati involving sexual assault allegations against a student ballet dancer featured allegations that the university refused to hear from the complainant's experts, who would have testified that the respondent's ballet moves were not natural elements of the dance.[151]

The Department should retain the current regulations' requirement that colleges and universities must allow the parties to present expert witnesses.

24. § 106.46 (e)(6)

> Must provide each party and the party's advisor, if any, with equitable access to the evidence that is relevant to the allegations of sex-based harassment and not otherwise impermissible, consistent with §§ 106.2 and 106.45(b)(7), in the following manner:
>
> (i) A postsecondary institution must provide either equitable access to the relevant and not otherwise impermissible evidence, or to the same written investigative report that accurately summarizes this evidence. If the postsecondary institution provides an investigative report, it must further provide the parties with equitable access to the relevant and not otherwise impermissible evidence upon the request of any party;
>
> (ii) A postsecondary institution must provide the parties with a reasonable opportunity to review and respond to the evidence as provided under paragraph (6)(i) of this section prior to the determination of whether sex-based harassment occurred. If a postsecondary institution conducts a live hearing as part of its grievance procedures, it must provide this opportunity to review the evidence in advance of the live hearing; it is at the postsecondary institution's discretion whether to provide this opportunity to respond prior to the live hearing, during the live hearing, or both prior to and during the live hearing

[150] *Doe v. Regents of University of California*, 2018 WL 4871163 (Cal. App. 2d Dist. October 9, 2018**).**
[151] *Roe, et al. v. University of Cincinnati*, No. 1:22-cv-00376, Doc. 1 (S.D. Ohio).

This section—which revokes important rights that student parties currently possess—raises major concerns. The Department's proposed language:

> (1) allows schools to determine relevance without giving the parties the underlying evidence;
>
> (2) with no apparent reason, makes parties jump through an extra hoop if they get a report and they want the underlying evidence (if schools possess the evidence, why not just provide it?);
>
> (3) does not specify that documentary evidence should be attached to the report, and does not address oral evidence at all;
>
> (4) appears to allow schools—if they do give access to the evidence—either not to generate an investigation report at all or to withhold it from the parties; and
>
> (5) does not explain the removal of a specific time-frame for the parties to review the evidence.

First: this section further compounds the problems with the proposed definition of relevance and limitation of access to information during the investigation, which we have addressed above. As noted above, we strongly urge the Department to retain the directly related/relevant distinction and the right of both parties to the information they need to effectively present their positions.

Second, the Department's sole justification for the change—financial pressure on schools—makes no sense. "*Postsecondary institutions vary greatly in terms of size, resources, and expertise*, and complaints of sex-based harassment also vary greatly in terms of the nature of the conduct alleged, the volume and format of the evidence, and in other ways. Proposed § 106.46(e)(6)(i) would give more flexibility to a postsecondary institution than the current regulations in the manner of presenting the evidence to the parties while ensuring that grievance procedures remain equitable and that the institution can meet its Title IX obligation to provide its program or activity free from sex discrimination." [emphasis added] The Department (p. 406) "tentatively views the requirement to convey the same universe of evidence in two different formats (an investigative report and access to the evidence) as unnecessary for ensuring that grievance procedures are implemented equitably and effectively, and as *increasing costs, burden, and delay* without providing a meaningful benefit to the parties."[152] [emphasis added]

But *there is no financial benefit to the institution,* because the student parties (after receiving the report) can still ask for the evidence. To the extent the Department is envisioning allowing schools not to have to prepare an investigative report, there still will need to be some mechanism for procedural summary and notice regarding relevant code provisions. And it would likely be more cost-effective for universities to provide transcriptions of interviews because there is free or low-cost transcription software available that can be used to generate a transcript from the audio recording and then easily reviewed and corrected for typographical errors in less time than it would take an investigator to type up the interview summary.

[152] 87 Fed. Reg. at 41500.

Third: The Department's statement that investigative reports and access to evidence are simply two different formats for conveying the "same universe of evidence" is simply wrong. Even apart from the fact that the Department proposes to deprive students of their current right to full access to evidence, an investigative report consists of an investigator's descriptions and characterizations of evidence, not the evidence itself. Parties need full access to evidence (not just evidence pre-screened for relevance) to ensure that the report is accurate and complete. If, as the Department proposes, the investigator can also be the decisionmaker, the problem is compounded – the investigator/decisionmaker possesses, and may be influenced by, information without giving the parties a chance to address it (or even know it exists).

Indeed, the "universe" of evidence from a report and from the actual evidence would be very different. In matters that we have handled since the 2020 regulations were promulgated but which were adjudicated under non-Title IX hybrid processes because they occurred off campus (involving processes to which we expect many universities to revert in Title IX matters as well if the proposed regulations are promulgated as is), single investigators have, in our experience, excluded relevant evidence, sometimes from experts, without any reasoning and without ever sharing the evidence or its existence with the other party, and these matters have then proceeded to truncated "hearing" processes where the panel adjudicating the issues relied solely on the written report of the investigator to make its determination without any knowledge that evidence had been excluded. We have often found as well when we have litigated these matters and gotten full discovery of the investigator's file that summaries of interviews in reports often leave out important details from interviews, actual word choice used by a witness or party in an interview, or evolutions of an account from interview to interview. We are concerned that the reduction in transparency sure to come about with the proposed regulations will lead to less reliable outcomes.

Fourth: we are troubled by the Department's silence on the obligation of school investigators to preserve *oral* evidence and provide it accurately and completely to the parties. As noted below, it makes no sense for the Department to propose requiring a recording or transcript of live hearings – where the parties are present – and not to require a recording or transcript of interviews conducted separately with parties and witnesses, where arguably providing transcripts would be more important.

Fifth: For cases involving live hearings, the proposed regulations would allow the school to decide whether to provide the opportunity to respond to the evidence prior to the hearing, during the hearing, or both prior to and during the hearing. This replaces a bright-line rule under the current regulations: 10 days to review. Without any real explanation for doing so beyond a generalized desire to grant schools more flexibility, the Department proposes removing specific timeframes.

25. § 106.46(e)(6)(iii)

> A postsecondary institution must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based harassment grievance procedures.

We support this provision, provided it is applied equitably to both parties.

26. § 106.46 (f)

> *Evaluating allegations and assessing credibility.*
>
> (1) *Process for evaluating allegations and assessing credibility.* A postsecondary institution must provide a process as specified in this subpart that enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment. This assessment of credibility includes either:
>
> (i) Allowing the decisionmaker to ask the parties and witnesses, during individual meetings with the parties or at a live hearing, relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing under paragraph (g) of this section subject to the requirements in paragraph (f)(3) of this section; or
>
> (ii) When a postsecondary institution chooses to conduct a live hearing, allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under §§ 106.2 and 106.45(b)(7) and follow-up questions, including questions challenging credibility, subject to the requirements under paragraph (f)(3) of this section. Such questioning must never be conducted by a party personally. If a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor who can ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor-conducting questioning. The advisor may be, but is not required to be, an attorney.

We have serious concerns, for multiple reasons, with this section.

As previously noted, the Department's justifications consistently evade the central issue: why should the Department *revoke* procedural protections that the 2020 regulations have guaranteed to students at every college and university for the last two years?[153]

The Department proposes not merely revoking the existing right to cross-examination, but the right to a live hearing altogether. We will further discuss the Department's perspective on cross-examination in Part III. But the Department does, at least, *attempt* to provide a justification for

[153] See, for instance, the Department's language: "It is the Department's tentative position that the relevant case law does not require a postsecondary institution to provide for a live hearing with advisor-conducted cross-examination in all cases, at least as long as it provides another live method of determining credibility." 87 Fed. Reg. at 41507. Colleges are *already* so required; the question is what justification exists for *revoking* the right. It certainly is not the custom in federal policy toward civil rights for the federal government to *revoke* rights that it previously recognized.

that part of its proposal, however unconvincing that justification might be. By contrast, the 700-page NPRM provides *no* justification for revoking the right to a live hearing

The Department presents itself as giving colleges and universities the "flexibility" to pursue one of two procedural paths. Here's the relevant section of the discussion:

> This assessment of credibility would include either: (i) allowing the decisionmaker to ask the parties and witnesses relevant and not otherwise impermissible questions and followup questions, including those challenging credibility, during individual meetings with the parties or at a live hearing before determining whether sex-based harassment occurred and allowing each party to propose to the decisionmaker or investigator relevant and not otherwise impermissible questions and follow-up questions, including questions challenging credibility that the party wants asked of any party or witness and have those questions asked during individual meetings with the parties or at a live hearing subject to the requirements in proposed § 106.46(f)(3); or (ii) when a postsecondary institution chooses to conduct a live hearing, allowing each party's advisor to ask any party and any witnesses all relevant and not otherwise impermissible questions under proposed §§ 106.2 and 106.45(b)(7) and follow-up questions, including those challenging credibility, subject to the requirements in proposed § 106.46(f)(3). Proposed § 106.46(f)(1)(ii) would retain the language from current § 106.45(b)(6)(i) that questioning at a live hearing must never be conducted by a party personally. In addition, under proposed § 106.46(f)(1)(ii), if a postsecondary institution permits advisor-conducted questioning and a party does not have an advisor who can ask questions on their behalf, the postsecondary institution must provide the party with an advisor of the postsecondary institution's choice, without charge to the party, for the purpose of advisor-conducting questioning, which is the same as the requirement in current § 106.45(b)(6)(i). The advisor may be, but is not required to be, an attorney.[154]

First: The Department's decision to frame the "choice" as between two competing grievance models—single investigator (*i.e.*, investigator-as-decisionmaker) or live hearing with cross-examination by the parties' advisors— by using (i) and (ii) in the text -- is inaccurate and misleading. There are, actually, three general models:

- The system mandated by the 2020 regulations (a live hearing with cross-examination by advisors);

- A process with a live hearing, where the parties are present but questions are asked by the school's decisionmakers. Courts that have allowed such an alternative have stressed that the parties must still have an opportunity for meaningful real-time questioning, even if through a panel rather than directly through their own advisors[155]; and

[154] 87 Fed. Reg. at 41502.

[155] Before the 2020 regulations, some universities employed a hybrid system in which the investigator prepared the report with a recommended finding, and then the panel made the ultimate decision, and could either have discretion to hear from the parties (or witnesses) or did hear from parties. We have concerns with the fairness of this type of system, but at least it includes a nominal check on the investigator.

- The single investigator model, in which no hearing of any type occurs. The parties do not see or hear each other's or witnesses' interviews, and the investigator also serves as the decisionmaker.

As discussed in more detail in Section III, the Department's review of case law ultimately focuses only on the question of whether the case law requires schools to allow *direct* cross-examination. The Department entirely fails to account for the judicial authority making clear that a fair process requires a live hearing with meaningful real-time questioning, including court holdings specifically rejecting a single-investigator model.

Courts stressing the need for a live hearing, whether or not direct questioning by parties or their advisors is required, include (but are not limited to): The First Circuit: "[W]e agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the appellant -- that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"[156] The Third Circuit: Notions of fairness "include providing the accused with a chance to test witness credibility through some form of cross-examination and a live, adversarial hearing during which he or she can put on a defense and challenge evidence against him or her."[157] The Fifth Circuit: "[W]e agree with the position taken by the First Circuit 'that due process in the university disciplinary setting requires 'some opportunity for real-time cross-examination, even if only through a hearing panel.'"[158] The Seventh Circuit: Procedural fairness requires "a hearing [to] be a real one, not a sham or pretense."[159] The Eighth Circuit: "[A] university 'must facilitate some form of cross-examination in order to satisfy due process' . . . [and q]uestioning by the panel could be insufficient in a given case."[160]

Representative court decisions specifically rejecting the single-investigator model (in addition to *Doe v. University of the Sciences*, cited above), include the following.

Evaluating Brandeis University's use of the single-investigator model, Judge F. Dennis Saylor, IV held, "The dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review, are obvious. *No matter how well-intentioned, such a person may have preconceptions and biases, may make mistakes, and may reach premature conclusions*."[161] [emphasis added] "If a college student," the court concluded, "is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision."[162]

In 2019, in a case involving the University of Southern California, a California appellate court held that in Title IX cases involving credibility, "the fact finder may not be a single individual with the divided and inconsistent roles occupied here by the Title IX investigator in the USC

[156] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019).
[157] *Doe v. Univ. of the Scis*., 961 F.3d 203, 214 (3d Cir. 2020).
[158] *Walsh v. Hodge*, 975 F.3d 475, 485 (5th Cir. 2020
[159] *Doe v. Purdue Univ*., 928 F.3d 652, 663, (7th Cir. 2019).
[160] *Doe v. Univ. of Ark. - Fayetteville*, 974 F.3d 858, 868 (8th Cir. 2020).
[161] *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 606 (D. Mass. March 31, 2016).
[162] *Id.* at 573.

system."[163] The court explained that "in USC's system, no in-person hearing is ever held, nor is one required. Instead, the Title IX investigator interviews witnesses, gathers other evidence, and prepares a written report in which the investigator acts as prosecutor and tribunal, making factual findings, deciding credibility, and imposing discipline. The notion that a single individual, acting in these overlapping and conflicting capacities, is capable of effectively implementing an accused student's right of cross-examination by posing prepared questions to witnesses in the course of the investigation ignores the fundamental nature of cross-examination: adversarial questioning at an in-person hearing at which a neutral fact finder can observe and assess the witness' credibility . . . [A] right of 'cross-examination' *implemented by a single individual acting as investigator, prosecutor, fact finder and sentencer, is incompatible with adversarial questioning designed to uncover the truth. It is simply an extension of the investigation and prosecution itself.*"[164] [emphasis added]

That same year, in one of the most detailed judicial discussions of the shortcomings of the single-investigator model, a California trial court set aside a finding of responsibility against a University of California-Santa Barbara (UCSB) student. The court expressed profound concerns about the unfairness of the single-investigator model in Title IX matters. The opinion cited "'record exclusivity' concerns because the investigator is the only person who has seen or heard the evidence." The court also worried about a "process of having the same person be the investigator and fact finder increas[ing] the risk of an erroneous deprivation of the interest in ascertaining the truth," since the single-investigator model provided no "forum or hearing where the complainant and the accused have the opportunity to directly or indirectly present questions to the other in front of the fact finder."[165]

The Department referenced some though not all of these cases in the Preamble. But it did not in any way discuss their holdings on the importance of live hearings or the unfairness of the single-investigator system. Instead, it compounds its evasion of the case law by claiming in the Preamble that it is satisfying case law requirements by providing "another live method of determining credibility": per the Department, "each permissible option for evaluating the allegations and assessing credibility under the proposed regulations would require that the questions posed be answered live, whether in individual meetings with the decisionmaker or investigator or at a live hearing."[166] To suggest that a private meeting between school officials and individual parties/witnesses is the equivalent of a live proceeding in which both parties participate is not true and is profoundly misleading. In the Third Circuit's words, rejecting a similar rationale by a university: "To be sure, the investigator listened to Doe during her two

[163] *Doe v. Allee*, 30 Cal. App. 5th 1036, 1061 (Cal. App. 2d Dist. January 4, 2019).
[164] *Id.* at 1068. Without referencing the *Allee* opinion, the Department obliquely responds to this point: "In conducting an investigation and reaching a determination, the recipient's responsibility is to gather and review evidence with neutrality and without bias or favor toward any party. That is, the recipient is not in the role of prosecutor seeking to prove a violation of its policy. Rather, the recipient's role is to ensure that its education program or activity is free of unlawful sex discrimination, a role that does not create an inherent bias or conflict of interest in favor of one party or another." 87 Fed. Reg. at 41467. This myopic view ignores how, in the single-investigator model, the investigator all but inevitably morphs into prosecutor, judge, and jury at various stages of the process.
[165] *Doe v. Regents of the University of California*, No. RG1888616, judgment granting petition for peremptory writ (Alameda County Superior Court, Feb. 22, 2019).
[166] 87 Fed. Reg. at 41507.

interviews with him. But USciences did not provide Doe a real, live, and adversarial hearing. Nor did USciences permit Doe to cross-examine witnesses—including his accusers, Roe 1 and Roe 2 . . . [B]asic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections."[167]

In 2014, the Obama administration hailed the single-investigator model as "innovative" and claimed that it "would encourage reporting and bolster trust in the process, while at the same time safeguarding an alleged perpetrator's right to notice and to be heard." The wave of court decisions focusing on the issue make clear that the model accomplishes neither of those goals.[168]

Second: The Department's "choice" is a fiction. According to a recently published study examining the Title IX grievance process at 381 colleges and universities in 2016—that is, before significant judicial or regulatory intervention started requiring schools to use fairer procedures—only one percent (four schools) allowed cross-examination, either directly or through an advisor.[169] The Foundation for Individual Rights, in a 2019-2020 survey of the disciplinary processes of 53 colleges and universities around the country, found a similar percentage: only one institution—the University of North Carolina—provided students accused of sexual misconduct with a meaningful right to cross-examination. (A second of the surveyed schools, the University of Michigan, would do so shortly thereafter—under court order.)

Even more troublingly, the FIRE survey discovered how, before adoption of the current regulations, colleges and universities abused the flexibility that OCR provided them to establish disciplinary structures that granted fewer procedural protections to students facing Title IX allegations than to those facing other disciplinary charges, even though a sexual misconduct allegation is almost always the most serious claim adjudicated in the campus grievance process. The FIRE survey, which covered policies on the eve of implementation of the 2020 regulations, found that that 42 percent (22) of the surveyed schools—Boston University, Brown University, Brandeis University, the College of William and Mary, Dartmouth College, Georgetown University, Lehigh University, MIT, NYU, Northeastern University, Princeton University, Stanford University, Tufts University, the University of California-Berkeley, UC-Irvine, UCLA, UC-San Diego, University of Pennsylvania, University of Rochester, USC, University of Virginia, and Washington University in St. Louis—provided students accused with general campus offenses a "meaningful hearing," but denied that right to students accused of sexual misconduct.[170]

In fact, before the 2020 regulations, many schools, including some of the nation's wealthiest universities—Harvard, the University of Michigan, Michigan State, USC—employed the single-investigator model. Harvard only abandoned the practice with the 2020 regulations; USC, Michigan State, and the University of Michigan did so after adverse court decisions. And even there, then-UM president Mark Schlissel publicly asserted that "U-M respectfully submits that

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[167] *USciences*, 961 F.3d at 216.
[168] *Not Alone: The First Report of the White House Task Force to Protect Students From Sexual Assault*, p. 14 (April 2014); https://www.justice.gov/archives/ovw/page/file/905942/download
[169] Kamaria Porter, et al. "Gender Equity and Due Process in Campus Sexual Assault Adjudication Procedures," *The Journal of Higher Education*, DOI: 10.1080/00221546.2022.2082784, p. 16.
[170] FIRE, *Spotlight on Due Process 2020*, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2019-2020/

the Sixth Circuit got it wrong."[171] Other research institutions—Boston College, George Washington University—moved toward the single-investigator model amidst adverse court decisions in lawsuits filed by accused students, almost as if they wanted to shield the institution from additional liability down the road.[172]

The Department's only attempt to explain its proposal to revive the "option" of the single investigator model is a near-incomprehensible statement that "although all postsecondary institutions, regardless of their size, type, administrative structure, and location, must comply with the requirements of Title IX, promulgating regulations that take into account the diversity of postsecondary institutions subject to Title IX would best ensure effective implementation of Title IX."[173] But the record of the 2011-2020 period is clear: if given the binary choice between a live hearing and a single investigator model, universities—regardless of size, type, administrative structure, resources, etc.—will overwhelmingly choose the latter unless case law precludes it. And to the extent the Department is suggesting that smaller schools would find the single-investigator model attractive for cost reasons, the Department provides no data on why this would be so. Regardless, a model that has led to unfair results and substantial litigation will not save money for anyone.

Third: The Department's elimination of the "middle ground" option noted above seems designed to pressure schools to adopt the single investigator model, even if they were not already inclined to do so. The proposed regulations incentivize schools not to provide live hearings by imposing the financial and administrative cost of preparing an audio file or a transcript only for schools that choose a live hearing model. The Department does not explain why it would require a recording or transcript of a live hearing (where the parties can see and hear the testimony of witnesses and the questions asked by the panel) but not of the single investigator's meetings—where the parties see and hear nothing outside of the questions asked in their own "meeting." A recording or transcript is *far* more important in the latter situation, and failure to require it compounds the concern we expressed above with the Department's failure to provide safeguards to ensure parties have accurate and complete access to oral evidence. Without such safeguards, even if an investigator undertakes to inform each party of what the other said in their interviews, the parties would be able to know and respond to only what the investigator chooses to convey.

Fourth: The vagueness of the Department's wording also leaves unanswered a host of questions for colleges and universities that choose to revive the single-investigator model. Does the Department contemplate a two-interview-per-person process with the right to submit additional questions in between? What if there are additional follow-up questions? What about a complicated case with multiple witnesses? What evidence must be provided to parties before they formulate questions for submission to the other party or witnesses? Since the Department is not requiring recording of the interviews, how will parties even know exactly what questions were asked and what the answers were? Why do the regulations refer only to the decisionmaker

[171] Alex Harring, "Judge Orders Schlissel to Court," *Michigan Daily*, May 10, 2019, https://www.michigandaily.com/government/judge-orders-schlissel-court-sexual-misconduct-investigative-policy-case/

[172] Jeremy Bauer-Wolf, "One Person As 'Prosecutor, Judge, and Jury'," *Inside HigherEd*, June 5, 2018, https://www.insidehighered.com/news/2018/06/05/george-washingtons-new-title-ix-processes-put-sexual-assault-cases-hands-single

[173] 87 Fed. Reg. at 41505.

"ask[ing] the parties and witnesses, *during individual meetings with the parties*"? [emphasis added] Is the Department suggesting that the single investigator could eschew individual meetings with witnesses? And if not, could individual parties be at a witness interview?

If, notwithstanding the absence of guidance from the Department, a school took seriously its obligation to give parties a meaningful opportunity to present their claims and defenses, that would require *at the least* a *series* of interviews, completely and accurately recorded, with opportunities to respond, and the right to ask follow-up questions until each person's statements were adequately probed. And all that would be vastly more cumbersome and less effective than a live hearing, where responses and follow-ups can occur in real time.

Having seen firsthand what can go wrong with poorly trained, biased, or incompetent investigators, we have grave concerns about a single investigator process, with no checks or balances through a live hearing or through cross-examination. By way of example, we have been involved in student proceedings where investigators have summarized interviews and omitted key information from a witness or party shared during an interview, or where they have attributed supposed statements or admissions made that were never made but have then refused to correct them, or where investigators have failed to follow up on the most basic information even though it is their obligation, not the students' to conduct a thorough and adequate investigation, or where they have failed to interview an obvious witness in the initial stages of an investigation and have thereby lost the ability to capture relevant information due to the passage of time, or where they have failed to follow up on, analyze or even consider the impact on credibility of an evolving narrative.

One final point from this section, applicable regardless of which model a school chooses. The Department proposes requiring the decisionmaker "to adequately assess the credibility of the parties and witnesses *to the extent* credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment." [emphasis added] This provides far too much of an out for schools. Whether or not a case hinges on credibility should be decided after all the information is gathered, tested, and evaluated—it should not be prejudged. And credibility—of both parties—is virtually always an issue, even when there are purported admissions on the record. As the *Baum* court explained, cross-examination at a live hearing is required if a school "has to choose between competing narratives to resolve a case."[174]

27. § 106.46(f)(3)

> *Procedures for the decisionmaker to evaluate the questions and limitations on questions.* The decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible under §§ 106.2 and 106.45(b)(7), prior to the question being posed, and must explain any decision to exclude a question as not relevant. If a decisionmaker determines that a party's question is relevant and not otherwise impermissible, then it must be asked except that a postsecondary institution must not permit questions that are unclear or harassing of the party being questioned. A

[174] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).

postsecondary institution may also impose other reasonable rules regarding decorum, provided they apply equally to the parties.

We support the requirement that the decisionmaker ask "all relevant and not impermissible" questions and follow-up questions submitted by the parties, including questions probing credibility (subject to our concerns about relevance determinations).

28. § 106.46(f)(4)

> *Refusal to respond to questions related to credibility.* If a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party's position. The decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to questions related to their credibility.

We support this section, which responds to the concerns expressed in the *Cardona* decision.[175] Indeed, the new wording is an improvement on the equivalent section of the 2020 regulations.

29. § 106.46(g)

> *Live hearing procedures.* A postsecondary institution's sex-based harassment grievance procedures may, but need not, provide for a live hearing. If a postsecondary institution chooses to conduct a live hearing, it may conduct the live hearing with the parties physically present in the same geographic location, but at the postsecondary institution's discretion or upon the request of either party, it will conduct the live hearing with the parties physically present in separate locations with technology enabling the decisionmaker and parties to simultaneously see and hear the party or the witness while that person is speaking or communicating in another format. A postsecondary institution must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

As noted above, for reasons that are unclear, the Department does not propose extending the right to an audio or audiovisual recording or transcript to students subjected to the single-investigator model. (Colleges and universities *may* provide the material but are not required to do so.) No conceivable justification exists for this. The Preamble repeatedly emphasizes that credibility has to be assessed "live," and then requires schools to give parties recordings or transcripts of a hearing that they attended (when it's too late to ask follow-up questions anyway) but *not* of a "meeting" they were not allowed to attend.

30. § 106.46(h)

> *Written determination of whether sex-based harassment occurred.* The postsecondary institution must provide the determination whether sex-based harassment occurred in writing to the parties simultaneously.

[175] *Victim Rights Law Ctr. v. Cardona*, 552 F. Supp. 3d 104, 132 (D. Mass. July 28, 2021).

(1) The written determination must include:

(i) A description of the alleged sex-based harassment;

(ii) Information about the policies and procedures that the postsecondary institution used to evaluate the allegations;

(iii) The decisionmaker's evaluation of the relevant evidence and determination of whether sex-based harassment occurred;

(iv) When the decisionmaker finds that sex-based harassment occurred, any disciplinary sanctions the postsecondary institution will impose on the respondent, and whether remedies other than the imposition of disciplinary sanctions will be provided by the postsecondary institution to the complainant and, to the extent appropriate, other students identified by the postsecondary institution to be experiencing the effects of the sex-based harassment; and

(v) The postsecondary institution's procedures for the complainant and respondent to appeal.

This represents a significant change from current requirements and raises major concerns. Current §106.45(7) sets forth a template for a precise and reasoned decision; the Department proposes to substitute something much more amorphous. Specifically:

- The current regulations require "(A) Identification of the allegations potentially constituting sexual harassment as defined in § 106.30." The Department proposes to substitute the less-precise "[a] description of the alleged sex-based harassment."
- The current regulations require "(B) A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held." The Department proposes to eliminate this, without explanation. The currently-required information provides an important safeguard, facilitating review of whether a school has in fact followed its procedures, as well as the equity, thoroughness and adequacy of the process.
- The current regulations require "(C) Findings of fact supporting the determination"; "(D) Conclusions regarding the application of the recipient's code of conduct to the facts;" and "(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility . . . ." Again, the Department proposes to substitute something much vaguer: "[i]nformation about the "policies and procedures that the [school] used to evaluate the allegations," and "[t]he decisionmaker's evaluation of the relevant evidence and determination as to whether sex-based harassment occurred." The Preamble acknowledges that its proposed § 106.46(h) "would remove the current reference to the postsecondary institution's code of conduct," but offers not a hint of explanation, much less justification. Taken together, these proposed changes

would revoke the existing right to a responsibility determination based on identified charges, specific factual findings, and specific conclusions correlating the facts to the charges, and would allow instead a general "determination as to whether sex-based harassment occurred." The vagueness of the language could result in free-floating findings of "sex-based harassment" wholly untethered from the original charges or the institution's code of conduct; i.e., a student could be found responsible for "sex-based harassment" without a demonstrated violation of the school's code, or at least without a precise explanation.

- The current regulations require, in (E), a rationale for any sanctions as well as the responsibility finding. The Department proposes to remove that right, requiring that "[w]hen the decisionmaker finds that sex-based harassment occurred," any disciplinary sanctions need only be identified, not explained.

The Department claims that its proposed changes will "improve overall clarity" and provide a "more useful explanation of how a recipient reached its determination."[176]

We fail to see how this could be so. Indeed, rather than improving "overall clarity," the change will restore the ambiguity that so often marred cases from the 2011-2020 period. Taken together, the Department is proposing to take away rights long established by case law, including rights to notice, application of correct policy/provisions, an opportunity to defend against specific allegations, and not to be found responsible for violations for which the student was not charged.

The Department should retain the wording of the current regulations.

31. § 106.46(i)

> *Appeals.* (1) A postsecondary institution must offer the parties an appeal from a determination that sex-based harassment occurred, and from a postsecondary institution's dismissal of a complaint or any allegations therein, on the following bases:
>
> (i) Procedural irregularity that would change the determination of whether sex-based harassment occurred in the matter;
>
> (ii) New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred or dismissal was made; and
>
> (iii) The Title IX Coordinator, investigator, or decisionmaker had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that would change the outcome of the matter.

Reacting to the Department's proposed revival of the single-investigator system, Clery Act expert Daniel Carter stated that the system increased the likelihood of errors. With wrongful findings more likely, students could always appeal, "but students shouldn't have to rely on an

[176] 87 Fed. Reg. at 41511.

appeals process, Carter said. 'Institutions should strive to get it right from the beginning,' he said."[177]

Given the heightened chances of wrongful findings, the Department should have been particularly sensitive to bolstering students' right to appeal. Instead, the reverse has occurred: the Department proposes to dramatically *restrict* the right to appeal. And it has done so without offering any justification at all for the change—indeed, it has mistakenly claimed (p. 446) that the proposed regulations retain "the current regulatory text" and the justification offered in the Preamble to the current regulations that appeals can be an "important mechanism to reduce the possibility of unfairness or to correct potential errors made in the initial responsibility determination."

This section retains the three general areas for appeal (procedural irregularity, new evidence, and conflict of interest/bias) from the current regulations. But (again: without explanation) the Department raises the threshold for what constitutes a viable appeal (emphasis added in each instance):

- *Procedural irregularity*. Current regulations: an "irregularity that *affected the outcome* of the matter." Proposed regulations: an "irregularity that *would change the determination*."

- *New Evidence*. Current regulations: new material "that *could affect the outcome* of the matter." Proposed regulations: new material "that *would change the outcome* of the matter."

- *Bias*. Current regulations: bias/conflict of interest that "that *affected the outcome* of the matter." Proposed regulations: bias/conflict of interest "that *would change the outcome* of the matter."

In the first two instances, which in our experience represent by far the most common grounds in appeals, the Department shifts from wording that *could* affect the outcome to wording that *would* change the outcome. On its face, the proposed change in language would make successful appeals virtually impossible; and would seem to require (in the rare occasions of a successful appeal) a reversal of the decision without remand. The criminal trial equivalent of the shift would be from an appeals court ordering a new trial under the current regulations to a judgment notwithstanding the verdict under the proposed regulations.

We reiterate: this change not only came without any explanation, but with a misleading statement that the Department was retaining the current regulations.

Finally, we remain concerned that the required grounds for appeal (as with the current regulations) do not include anything about weight of evidence or clearly erroneous/arbitrary results. The exclusion of this rationale in the proposed regulations is even more important than in the current regulations because the stripping of students' procedural protections would increase the likelihood of wrongful findings.

[177] Jeremy Bauer-Wolf, "Biden's Draft Title IX Rule Would Allow the Single-Investigator Model. Should It?," *Higher Ed Drive,* July 5, 2022, https://www.highereddive.com/news/bidens-draft-title-ix-rule-would-allow-the-single-investigator-model-shou/626407/.

Multiple federal courts, including two appellate courts, have found that illogical findings in Title IX proceedings could indicate gender bias: *e.g.*, *Doe v. Oberlin College* ("Doe's strongest evidence is perhaps the merits of the decision itself in his case . . . when the degree of doubt passes from 'articulable' to grave, the merits of the decision itself, as a matter of common sense, can support an inference of sex bias"[178]); *Doe v. University of Southern Indiana* ("In a sufficiently lopsided Title IX case, however, an erroneous outcome can support an inference of gender bias"[179]); and *Doe v. Texas Christian University* ("The first indicator of bias is the irrationality of the panel's decision . . . The most plausible explanation for the panel's decision is that the panel wanted to hold Doe responsible for *something*, regardless of what the evidence showed" [180]).

As Daniel Carter argued, "Institutions should strive to get it right." When a college's decision makes no sense, the school should have a way to make it right without forcing the student to go to court.

32. § 106.71

> *Retaliation.* A recipient must prohibit retaliation in its education program or activity. When a recipient receives information about conduct that may constitute retaliation, the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45. As set out in § 106.45(e), if the complaint is consolidated with a complaint of sex-based harassment involving a student complainant or student respondent at a postsecondary institution, the grievance procedures initiated by the consolidated complaint must comply with the requirements of §§ 106.45 and 106.46. Prohibited retaliation includes but is not limited to:
>
> (a) Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
>
> (b) Peer retaliation.

We support this provision, provided the Department clarify that the prohibition on retaliation applies to protect respondents as well as complainants.

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[178] *Doe v. Oberlin Coll.*, 963 F.3d 580, 587-588 (6th Cir. 2020).
[179] *Doe v. Univ. of S. Ind.*, 2022 WL 3152596 (7th Cir. 2022) (citing to *Doe v. Columbia University*: "When the evidence substantially favors one party's version of a disputed matter, but an evaluator forms a conclusion in favor of the other side (without an apparent reason based in the evidence), it is plausible to infer (although by no means necessarily correct) that the evaluator has been influenced by bias." 831 F.3d at 57 (2d Cir. 2016)).
[180] *Doe v. Texas Christian Univ. & Victor J. Boschini*, 2022 U.S. Dist. LEXIS 91384, *16-17 (N.D. Tex. April 29, 2022).

III. CROSS-EXAMINATION

Of the many procedural revocations the Department proposes, the only one it tries to justify in any meaningful way is the proposal to eliminate both parties' right to cross-examination through an advisor. The Preamble devotes several pages to discussing the relevant case law and a small number of scholarly articles on the topic. But the Department curiously minimizes the scope of the decisions it discusses to imply that holdings on both sides of the issue are consistent with its proposal to revive the single-investigator model as an option for the Title IX grievance process. And the Department never really grapples with the question of what would justify *revoking* an important, preexisting procedural protection.

Addressing the most important decision recognizing a right to cross-examination, *Doe v. Baum*, the Department oddly claims, "the Sixth Circuit did not consider whether examination by a neutral party (at either a live hearing or in separate meetings with the parties) would be sufficient to satisfy its view of constitutional due process."[181] It's hard to know what to make of this assertion: whether such watered-down alternatives were constitutionally acceptable was at the heart of *Baum*. Indeed, the entire case revolved around the accused student's challenge to the University of Michigan's single-investigator system, in which (to borrow the Department's wording) a "neutral party" had questioned the parties "in separate meetings." When the university's lawyer suggested this approach satisfied circuit precedent during oral argument, Judge Julia Smith Gibbons was dismissive: "Making findings based on interviews is not what I think of when I think of a hearing."[182]

The court's ultimate ruling was no less clear: "[I]f a public university has to choose between competing narratives to resolve a case, the university *must give the accused student or his agent an opportunity to cross-examine* the accuser and adverse witnesses in the presence of a neutral fact-finder."[183] [emphasis added] The court allowed some flexibility in the matter to avoid "procedures that may subject an alleged victim to further harm or harassment"—schools can hold the proceedings via Skype, or "allow the accused student's agent to conduct cross-examination on his behalf."[184] But nothing in *Baum* endorsed "neutral"-party questioning only, much less a single-investigator model.

Having incorrectly framed *Baum* as somehow consistent with a single-investigator model, the Department's handling of decisions that did not recognize a due process right to cross-examination fares little better. The Department correctly observes that "courts outside of the Sixth Circuit have generally held that even if there is a right to cross-examination in certain disciplinary cases, that right can be satisfied through indirect questioning—such as allowing parties to propose questions to be asked by a neutral actor—in both the public and private university setting."[185] Yet nothing in the primary appellate cases the Department cites is

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[181] 87 Fed. Reg. at 41506.
[182] Transcript of oral argument, *Doe v. Baum* (17-2213), at 18:21-18:27, https://www.opn.ca6.uscourts.gov/internet/court_audio/aud2.php?link=audio/08-01-2018%20-%20Wednesday/17-2213%20John%20Doe%20v%20David%20Baum%20et%20al.mp3&name=17-2213%20John%20Doe%20v%20David%20Baum%20et%20al.
[183] *Doe v. Baum*, 903 F.3d 575, 578 (6th Cir. 2018).
[184] *Id.* at 583.
[185] 87 Fed. Reg. at 41506.

consistent with the judiciary endorsing a policy of *revoking* a *preexisting* right to cross-examination.

The Department begins by citing the Eighth Circuit decision in *Doe v. University of Arkansas-Fayetteville* and the First Circuit's decision in *Haidak v. University of Massachusetts.* (*University of Arkansas* relied on *Haidak* for its holding on this point.[186]) *Haidak* did, as the Department suggests, reject the accused student's argument that the university denied his due process rights by not allowing him to personally cross-examine the accuser. But the First Circuit's concerns were primarily prudential—understanding "that courts generally find that an accused student has no right to legal counsel in school disciplinary proceedings," and therefore doubting the value of "student-conducted cross-examination," which would place the questioning in "the hands of a relative tyro" that might "lead to displays of acrimony or worse."[187]

The current issue before the Department, however, is not the issue that confronted the *Haidak* court—whether to *extend* a right to cross-examination to the student *himself*—but rather a quite different question: should *each* student in the Title IX grievance process *lose* the right to cross-examination conducted by their *advocate*? On this question, the *Haidak* court spoke as glowingly on the value of attorney-led cross-examination as the *Baum* court.

"Considerable anecdotal experience," the First Circuit observed, "suggests that cross-examination in the hands of an experienced trial lawyer is an effective tool. See California v. Green, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970) (noting that cross-examination is 'the greatest legal engine ever invented for the discovery of truth')."[188] It is difficult to interpret that passage as justification for the Department's decision to revoke the right to cross-examination through an advisor. Indeed, the Department's success in mandating advisor-conducted cross-examination—something every university in the country has equipped itself to apply since August 2020—suggests that the First Circuit's prudential concerns with court-mandated cross-examination were unnecessary. The record of the last two years shows that the court's prudential concerns could be and were addressed through the controls the regulations allowed and schools have put in place to ensure respectful, relevant, clear questioning.

Even as the Department proposes revoking the right to cross-examination, it appears to concede that due process cases can inform the analysis of what fair procedures should be. It then goes on, however, to maintain:

> Courts have also made clear that school disciplinary proceedings are not civil or criminal trials and, as such, the parties are not entitled to the same rights as parties in a civil trial or defendants in a criminal trial. See, e.g., Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 88 (1978) ("A school is an academic institution, not a courtroom or administrative hearing room."); Doe v. Univ. of Ky., 860 F.3d 365, 370 (6th Cir. 2017) (citing Cummins, 662 F. App'x at 446) (holding that "school disciplinary proceedings, while requiring some level of due process, need not reach the same level of protection that would be present in a criminal prosecution"); Nash v. Auburn Univ., 812 F.2d 655,

[186] *Doe v. Univ. of Ark.-Fayetteville*, 974 F.3d 858, 867 (8th Cir. 2020).
[187] *Haidak v. Univ. of Massachusetts-Amherst*, 933 F.3d 56, 68-69 (1st Cir. 2019).
[188] *Id.* at 68-69.

> 664 (11th Cir. 1987) ("Due process requires that appellants have the right to respond, but their rights in the academic disciplinary process are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial.").[189]

It is not clear why the Department chose these three cases for this point. *Horowitz* involved academic standards (poor performance by a medical student) and works against the Department's efforts to revoke procedural protections in Title IX cases, since the Supreme Court noted "the significant difference between the failure of a student to meet academic standards and the violation by a student of valid rules of conduct. This difference calls for *far less stringent* procedural requirements in the case of an *academic* dismissal."[190] [emphasis added] *Nash* similarly was an academic standards (cheating) case. Moreover, both *Horowitz* and *Nash* long predated *Davis*, and OCR's subsequent interpretation that *Davis* required schools to adjudicate peer sexual misconduct allegations.

University of Kentucky, at least, was a post-*Davis*, sexual misconduct case—but from the same circuit that subsequently produced *Doe v. University of Cincinnati* and *Doe v. Baum*, both of which made clear that due process required the very type of robust procedural protections that the Department is now proposing to revoke. That the Department would cite academic misconduct cases and an outdated Sixth Circuit case suggests a disingenuous decision to treat sexual misconduct as nothing more than garden-variety discipline, rather than what it is: (1) the most serious offense that colleges routinely adjudicate; and (2) the only offense for which the federal government provides detailed, specific procedural guidelines on how the adjudication process must work.

Despite acknowledging the relevance of a due process framework, the Department avoids anything approximating a *Mathews*-type analysis of whether the procedural protections associated with the current regulations should be revoked. To be sure, the Preamble repeatedly states that unspecified college and university "stakeholders" find the current procedural requirements burdensome. But similarly-situated stakeholders were saying the same thing in 2019 and 2020 during the notice-and-comment period—and yet every college and university in the country has been able to successfully implement the current regulations. The Preamble is bereft of any university stakeholder claiming the procedures associated with the current regulations were more burdensome than predicted; or that the university had supported the current regulations but found them too burdensome procedurally.

To the extent the Department employs a *Mathews*-type analysis on cross-examination, it comes in the traditional second factor—regarding the benefit of additional process to the student. In a bracing passage, the Department implies (albeit without saying so clearly) that a single investigator model might be *better* suited to ferreting out the truth than cross-examination, and therefore actually benefit a wrongly accused student.[191]

> The preamble to the 2018 NPRM and 2020 amendments, as well as the Baum court, referred to case law describing cross-examination as the greatest legal engine ever

[189] 87 Fed. Reg. at 41456-7.
[190] *Board of Curators of University of Missouri v. Horowitz*, 435 U.S. 78, 86 (U.S. March 1, 1978).
[191] 87 Fed. Reg. at 41507.

> invented for the discovery of truth. The Department recognizes, however, that while that statement is oft-repeated, notable research from the last several decades has called into question whether adversarial cross-examination is the most effective tool for truth-seeking in the context of sex-based harassment complaints involving students at postsecondary institutions.
>
> In particular, there is growing evidence to suggest that "adults who have been sexually victimized may be a particularly vulnerable group of witnesses overall," especially during cross-examination. Rachel Zajac & Paula Cannan, Cross-Examination of Sexual Assault Complainants: A Developmental Comparison, 16 Psychiatry, Psych., & L. S36, S38 (2009) (citations omitted). For example, sexual assault has been associated with low self-esteem and low self-confidence, which have been shown to increase a person's vulnerability to suggestion. Id. Adults who have been sexually victimized are also least likely to exhibit confidence, powerful speech, and perseverance in maintaining control of a verbal exchange, which are the attributes most favorable to adult witnesses. Id. (citations omitted).
>
> In addition, studies have found that information-gathering approaches such as questions asked in individual meetings instead of during a live hearing (sometimes described as inquisitorial procedures) are more likely to produce the truth than adversarial methods like cross-examination. These studies "suggested that inquisitorial procedures may result in the presentation of more accurate and less biased information." Mark R. Fodacaro et al., Reconceptualizing Due Process in Juvenile Justice: Contributions from Law and Social Science, 57 Hastings L.J. 955, 982, 982 n.165 (2006) (citing E. Allan Lind & Tom R. Tyler, The Social Psychology of Procedural Justice 25 (1988)); see also Christopher Slobogin, Lessons from Inquisitorialism, 87 S. Cal. L. Rev. 699, 711 (2014). Because non-adversarial information gathering approaches tend to reduce opportunities for bias, researchers have found that such methods are "most likely to produce truth." John Thibaut & Laurens Walker, A Theory of Procedure, 66 Calif. L. Rev. 541, 547 (1978).
>
> The Department recognizes that some courts, advocates, and legal scholars believe that advisor-conducted cross-examination is the most effective way, and in the view of some, the only way, to ensure the accuracy of witness testimony, especially in cases that hinge on credibility. After reevaluating the issue, however, including the case law and research discussed above, the Department's tentative position is that methods that require parties and witnesses to answer questions in a live format, other than advisor-conducted cross-examination during a live hearing, can provide an effective way to seek the truth in sex-based harassment cases involving postsecondary students and ensure that the parties have a meaningful opportunity to be heard.

First of all, what the Department considers "some courts" includes the U.S. Supreme Court (celebrating the value of requiring "the witness to submit to cross-examination, the 'greatest legal engine ever invented for the discovery of truth")[192]; the First Circuit ("Considerable anecdotal experience suggests that cross-examination in the hands of an experienced trial lawyer

[192] *California v. Green*, 399 U.S. 149, 158, 90 S. Ct. 1930, 26 L. Ed. 2d 489 (1970).

is an effective tool")[193]; the Third Circuit ("'fair' and 'equitable' treatment to those accused of sexual misconduct require[s] at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers"[194]); and the Sixth Circuit ("Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted").[195]

If the Department believes that these courts have reached their opinions cavalierly or have failed to engage with relevant scholarship, it should say so directly.

For the "growing evidence" of the superiority of an "inquisitorial" approach to cross-examination, the Department cites four journal articles—published 8, 13, 16, and 44 years ago. The 2006 article explores issues related to juvenile justice—and thus has little relevance to analyzing procedures for allegations involving adults. The authors of the 1978 article admit that in developing their "theory," they "intentionally disregarded subject matter categories [such] as 'civil procedure,' 'criminal procedure,' and 'administrative procedure.'"[196] Does the Department similarly endorse disregarding administrative procedure?

In contrast to the impression that the Department leaves, Professor Slobogin's 2014 article, which focuses on the criminal justice system, "does not advocate abandoning the constitutionally required components of the American criminal justice system, but rather proposes a hybrid between pure adversarialism and pure inquisitorialism"—a model that sounds very much like the system created by the 2020 regulations.[197] Indeed, Professor Slobogin's model retains "the opportunity to confront one's accusers" and ensure that "both parties can still ask questions and call witnesses whom the judge does not call."[198] In what way does the Department consider this article an argument for *revoking* the right to cross-examination (or, for that matter, the right to call expert witnesses, another component of the proposed regulations)?

Unlike the Slobogin article, the Zajac & Canaan 2009 article does, at least, conform to the Department's apparent desire to weaken respondents' procedural protections. But it seems dubious that a single article, which starts from the premise that findings that have "focused on the effect of cross-examination questioning on the accuracy of children's event reports" might also be relevant to analyzing how adults perform under cross-examination, provides sufficient justification for revoking the rights of thousands of respondents who are, after all, presumed non-responsible.[199] Moreover, the Department's summary did not mention that Zajac & Canaan's concern came in part from what they see as the dangers of complex questioning confusing a witness ("many of the questions put to witnesses in this study were complex, ambiguous, or simply did not make sense").[200] Yet—unlike trials, which were the focus of Zajac & Canaan's

[193] *Haidak.* at 68-69.
[194] *Doe v. Univ. of the Scis*., 961 F.3d 203, 215 (3d Cir. 2020).
[195] *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).
[196] John Thibaut & Laurens Walker, A Theory of Procedure, 66 Calif. L. Rev. 541, 542 (1978).
[197] Christopher Slobogin, Lessons from Inquisitorialism, 87 S. Cal. L. Rev. 699, 702 (2014).
[198] *Id.*, at 714, 718.
[199] Rachel Zajac & Paula Cannan, Cross-Examination of Sexual Assault Complainants: A Developmental Comparison, 16 Psychiatry, Psych., & L. S36, S37 (2009).
[200] *Id.*, at S49.

research—the current Title IX grievance process requires the decisionmaker to screen each question for relevance before it is asked of witnesses.

If the Department had performed a *Mathews*-like analysis as to its decision, it would have needed to grapple directly with the nature of the interest at stake for the respondent. "Being labeled a sex offender by a university," the Sixth Circuit has recognized, "has both an immediate and lasting impact on a student's life. The student may be forced to withdraw from his classes and move out of his university housing. His personal relationships might suffer. And he could face difficulty obtaining educational and employment opportunities down the road, especially if he is expelled."[201]

As a reminder of the stakes at play—that in the real world, scant distinction exists between a finding of responsibility in a Title IX grievance process and being seen as a rapist or a "sex offender"—consider two recent filings, from different parts of the country, involving very different parties.

The first involves a criminal case in Texas, where a jury was considering a sexual assault charge against a former student at Texas A&M. Testimony in the case revealed that Texas A&M had expelled the student for a Title IX violation. Ignoring the judge's instructions, one of the jurors researched the issue and shared her results with her colleagues. According to another of the jurors,

> Once it became known based on the internet research that Title IX investigations meant university disciplinary proceedings against students accused of misconduct, another female juror . . . commented on testimony that [Doe] had been kicked out of Texas A&M University. This was critical in the deliberation, and to me. After being read the instruction by the Judge, the jury had used the white board in the jury room to do a timeline. Once we put the Title IX investigation information, obtained by our access to the internet, with [Doe] being kicked out of Texas A&M University because of the Title IX investigation, *the two jurors who had been a "lean" to "guilty" changed their votes to "guilty."*
>
> Because [Doe] had been kicked out of school as a result of the Title IX investigation, [extraneous witness's] testimony became more credible, and given how close in time the Title IX complaint by [extraneous witness] had been to the events testified to by [complainant], [the complainant's] testimony became credible enough for me to change my vote from "not guilty" to "guilty."
>
> Without the internet research the jury would not have connected the Title IX testimony we heard with that investigation's result of [Doe] being kicked out of Texas A&M University. The information together with the timeline and closeness of the events, specifically the Title IX investigation and the events as testified to by [the complainant]

[201] *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018) (citations omitted).

> and [extraneous witness] is the reason, I changed my vote from "not guilty" to "guilty."[202]

Here, in short, were jurors concluding that a *university* returning a Title IX finding of responsibility (in a process that predated the 2020 regulations and thus did not include attorney-directed cross-examination) was enough to change their votes to guilty on a *criminal* charge.[203]

Halfway across the country, another accused student faced a rape trial. But this student, Saifullah Khan, was acquitted by a Connecticut jury. Two members of the jury pool (one juror, one an alternate) gave interviews after the trial indicating that the issue was not the standard of proof, but the fact that the video evidence from the evening in question simply contradicted the accuser's story.[204] Yale nonetheless filed Title IX charges against Khan and expelled him. As the incident predated the 2020 regulations, Khan's lawyer could not cross-examine the complainant in the Yale proceeding.

Khan sued both Yale and his accuser, and recently a coalition of feminist legal advocacy groups (including Legal Momentum and National Women's Law Center) and organizations representing the interest of campus complainants such as Know Your IX filed an amicus brief on the accuser's behalf. Describing someone a jury had acquitted of rape, they opened their brief by asserting, "When Jane Doe was in college, the Plaintiff raped her."[205] Khan challenged the statement as defamatory, but the legal groups defended their accuracy. Khan was a rapist, they wrote, because he "was found responsible for sexual misconduct against Jane Doe by Yale University's University Wide Committee on Sexual Misconduct in November 2018, and subsequently expelled from Yale, after adjudication under Yale's Title IX/sexual misconduct procedure."[206]

Twelve random jurors in Texas and some of the nation's leading advocacy groups on behalf of campus complainants might not have much in common. But both admitted to viewing a Title IX finding of responsibility as the equivalent of deeming the student a rapist. Such an environment makes it all the more important that universities not get their judgments wrong, raising the stakes about the Department's proposal to strip from respondents like Khan the right to cross-examination.

Moreover, cross-examination does not merely benefit the respondent. "In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important

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[202] Doe v. Texas A&M University, Texas Supreme Court, No. 21-0531, Unopposed Motion to Dismiss for Want of Jurisdiction, June 30, 2022, https://search.txcourts.gov/SearchMedia.aspx?MediaVersionID=f8007b54-1490-4858-b50e-fc7df3d0c559&coa=cossup&DT=MOTION&MediaID=94e1a82e-9bd4-4813-bacf-2830b59e5c5d, pp. 3-4.
[203] Doe filed a motion for a new trial and eventually accepted a plea bargain.
[204] Robby Soave, "Juror in Saifullah Khan Yale Rape Case Says Acquittal Was Justified: 'I Think He's Innocent,'" *Reason*, March 12, 2018, https://reason.com/2018/03/12/saifullah-khan-yale-rape-juror/.
[205] Application of Legal Momentum, et al., June 17, 2022, in Saifullah Khan v. Yale University et al., Connecticut Supreme Court, SC 20505, https://appellateinquiry.jud.ct.gov/DocumentDisplayer.aspx?AppId=2&DocId=qIg2wdaGkywLFsHjxUajVA%3d%3d.
[206] *Id.*

to the trier of fact as it is to the accused."[207] Cross-examination also benefits the complainant. One important safeguard against universities sweeping sexual assault allegations under the rug is the ability of the complainant to question witnesses, through her advisor or lawyer, at a hearing.[208]

As a California appellate court recognized, the "primary characteristic" of due process "is fairness . . . When the accused does not receive a fair hearing, neither does the accuser."[209] Beyond that general observation, the unfair college and university Title IX grievance processes that marred the pre-2020 landscape (and which the proposed regulations would allow institutions to restore) often robbed complainants of finality—by forcing respondents into court to get fair treatment.

In the Khan case, the complainant testified before the Yale grievance process in November 2018. Since then, the case has proceeded from the U.S. District Court in Connecticut to the Second Circuit Court of Appeals to, currently, the Connecticut Supreme Court, which is addressing certified questions from the Second Circuit.[210] The complainant will still be in litigation more than four years after her Yale Title IX process ended.

In a 2014 case from the University of Kentucky, a complainant endured four separate grievance processes, with findings of responsibility in the first three overturned because the Title IX grievance panel handled things unfairly. When the fourth hearing ended with a finding of non-responsibility, the complainant sued the university. In 2020, the Sixth Circuit reversed the district court's opinion granting the university summary judgment; the case remains in litigation nearly eight years after the incident occurred.[211]

In the USCB case referenced above (p. 54) the complainant learned that a court had set aside the university's finding of responsibility in her case from a UCSB sexual assault advocate. *She* then went to court, seeking to vacate the order setting aside the finding. The effort ended, unsuccessfully, in June, when a California appellate court upheld a lower-court order denying the complainant's motion—more than four years after the complainant had initiated the Title IX process at her school.[212]

Whatever the merits of their original complaints, it is impossible to argue that the complainants in the Yale, University of Kentucky, or UCSB cases were well-served by Title IX processes that

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[207] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017).
[208] *Doe v. Trs. of Columbia Univ.*, 2022 U.S. Dist. LEXIS 153239, *29-30 (S.D.N.Y. August 25, 2022) (Complainant "Doe's first cause of action, what she calls a "systemic violation of Title IX," arises from Columbia's application of the 2019 GBM Policy, rather than the 2020 GBM Policy. ¶ 185. In particular, Doe alleges that Columbia had 'full autonomy to choose which Title IX policy to implement' and chose to apply the 'rescinded' 2019 GBM Policy despite the 'obvious inadequacy' of that policy. ¶ 180. This choice, Doe argues, allowed Columbia to deny her the use of expert witnesses and the ability to cross examine Roe and witnesses, and thereby resulted in a deprivation of her rights under Title IX").
[209] *Doe v. Regents of University of California*, 2018 WL 4871163 (Cal. App. 2d Dist. October 9, 2018).
[210] *Khan v. Yale Univ.*, 27 F.4th 805, 809 (2d Cir. 2022).
[211] *Doe v. Univ. of Ky.*, 971 F.3d 553, 555 (6th Cir. 2020).
[212] *Doe v. Regents of University of California*, 80 Cal. App. 5th 282, 282 (Cal. App. 1st Dist. June 24, 2022).

forbade the parties from a hearing with cross-examination and thus exposed the university to lawsuits down the road.

Since most of the court cases the Department cites involve the question of *extending*, not *revoking*, the right to cross-examination, in the end the Department attempts to justify revoking that right on grounds of its "considerable costs . . . *particularly* in the context of allegations of sex-based harassment."[213] But the Department never explains the "particularly" clause beyond citing to a few scholarly articles (at least some of which do not help the Department) and a few stakeholder comments in various listening sessions from people who had seemed to oppose cross-examination all along. In attempting to justify its position on cross-examination, the Department does not acknowledge the previously expressed positions of key figures in the current OCR critical of cross-examination or considered how those previously expressed opinions might have biased the Department's evaluation of the current regulations.[214]

We wonder if the Department might have better appreciated the value of cross-examination if it had conducted listening sessions with lawyers who represent respondents (while it met with FIRE and FACE, it appears[215] not to have reached out to lawyers who represent respondents)—or simply with criminal defense lawyers more generally. Cases that proceed to hearings with cross-examination tend to be the ones with the closest set of facts; whether or not cross-examination occurs can be the difference between the university discerning the truth and perpetuating an injustice. And, we note, cross-examination goes both ways, benefiting both parties.

In the end, we agree with Judge Saylor: "Our Constitution provides for a right of confrontation, a public proceeding in which you confront your accuser, the right of cross-examination. It's carved on the walls of this building how important the right of cross-examination is, and part of that, of course, is knowing the charge, knowing precisely what it is you're responding to . . . Most of these schools have this one-sided procedure. I don't understand how a college could set this up. I don't understand it."[216]

The Department should retain the right of both parties, through an advisor, to cross-examination The proposed regulations go well beyond the standard outlined in *Davis*, and modify the conception of Title IX obligations outlined in the 1997-2014 guidance and the 2020 regulations. The Department starts by redefining the focus of the regulations as "sex discrimination" rather than sexual harassment. Sex discrimination is not a defined term, but includes "sex-based harassment," which *is* defined. The Department appears to have collapsed the long-recognized

[213] 87 Fed. Reg. at 41507.
[214] Assistant Secretary Lhamon (https://twitter.com/CatherineLhamon/status/1257834691366772737?s=20); Deputy Assistant Secretary for Strategic Operations and Outreach Goldberg ("Keep Cross-Examination Out of College Sexual Assault Cases," *Chronicle Review*, Jan. 10, 2019, https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/).
[215] We say "appears" because the Department has elected not to publish the list of individual or group stakeholders with which it met.
[216] Doe v. Brandeis Univ., No. 1:15-cv-11557, 5 Oct. 2015, Tr. of Oral Arg., p. 8, at https://kcjohnson.files.wordpress.com/2020/05/brandeis-hearing-transcript.pdf.

distinction between the alleged misconduct of a *student* and what a *college or university* can be held liable for under Title IX:

> The Department's current view is that it is more accurate to frame the allegations against a respondent in the context of violating the recipient's prohibition on sex discrimination because this prohibition on sex discrimination is directly tied to the recipient's obligation under Title IX to operate its education program or activity free from sex discrimination. *A determination that the respondent violated the recipient's prohibition would amount to a determination that sex discrimination occurred, which in turn would obligate the recipient under proposed § 106.44(a) to take prompt and effective action to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.*[217] [emphasis added]

That view, in tandem with the removal or reduction of specific procedural protections, has far-reaching and serious implications. The Department uses it as justification to impose a near strict-liability standard on schools to "end," "prevent," and "remedy" discrimination. It resurrects and even intensifies the kinds of pressures that many courts recognized as creating an atmosphere of gender discrimination over the past decade, increasing school exposure to lawsuits from complainants (as discussed above). Overall, the provisions pressure schools to accommodate complainants at the expense of respondents' rights and to find responsibility, especially when facts are murky.

To the extent this is the Department's goal in organizing the proposed regulations in this fashion, it would be inconsistent not merely with *Davis* but with more recent Sixth Circuit holdings. In *Kollaritsch v. Michigan State University*, the court rejected Title IX claims by women who expressed fear of encountering their alleged assaulters. The court also held that an official who decided to set aside an initial expulsion decision and order a new investigation by outside counsel was entitled to qualified immunity. This official, the court noted, was "caught between [female student's] demand for judgment and punishment on one side and the accused male student's appeal for additional due process on the other."[218]

In this respect, the proposed regulations are notable for the dog that didn't bark. To the extent the Department demands that schools "end," "prevent," and "remedy" discrimination, it would seem that the proposed regulations also should push colleges and universities to crack down on *false* allegations of sexual assault. If "sex-based harassment" is "sex discrimination" by definition, then false accusations of harassment are as well. As the Second Circuit observed in a case involving an allegedly false allegation, the accusing student "did not accuse [the accused party] of just any misconduct; she accused him of *sexual* misconduct. That choice is significant, and it suggests that [his] sex played a part in her allegations. A rational finder of fact could therefore infer that such an accusation was based, at least in part, on [his] sex."[219] Yet the only references to false allegations in the Department's discussion comes in passages that appear to discourage universities from filing Title IX charges based on possibly false allegations.

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[217] 87 Fed. Reg. at 41420.

[218] *Kollaritsch v. Mich. State Univ. Bd. of Trs.*, 944 F.3d 613, 618 (6th Cir. 2019).

[219] *Menaker v. Hofstra Univ.*, 935 F.3d 20, 39 (2d Cir. 2019).

CONCLUSION

If the Department's new regulations go into effect without any changes, they will have an enormously negative impact on how Title IX cases are handled. The proposed regulations are conceptually flawed, and are filled with individual provisions that permit and, in some cases, encourage colleges and universities to return to the unfair adjudication procedures of days gone by.

ADDENDUM I

The Department has presented a series of Directed Questions:

Question 1. Interaction with Family Educational Rights and Privacy Act (FERPA) (proposed § 106.6(e)) Some aspects of the proposed regulations address areas in which recipients may also have obligations under FERPA, 20 U.S.C. 1232g, or its implementing regulations, 34 CFR part 99, 566 including, for example, provisions regarding the exercise of rights by parents, guardians, or other authorized legal representatives at proposed § 106.6(g); disclosure of supportive measures at proposed § 106.44(g)(5); consolidation of complaints at proposed § 106.45(e); description of the relevant evidence at proposed § 106.45(f)(4); access to an investigative report or relevant and not otherwise impermissible evidence at proposed § 106.46(e)(6); and notification of the determination of a sex discrimination complaint at proposed §§ 106.45(h)(2) and 106.46(h)(1). The Department is seeking comments on the intersection between the proposed Title IX regulations and FERPA, any challenges that recipients may face as a result of the intersection between the two laws, and any steps the Department might take to address those challenges in the Title IX regulations.

Answer: We express concern with many of the issues—supportive measures, access to evidence and the investigative report, question of relevance—raised in this question, though not in the context of FERPA. We recommend, however, that the Department make clear that disciplinary files constitute educational records under FERPA, and that colleges and universities cannot—as some have done[220]—withhold Title IX evidentiary files or hearing transcripts to obtain a litigation advantage as wrongly accused students are forced back to court.

2. Recipient's obligation to provide an educational environment free from sex discrimination (proposed §§ 106.44-106.46) The proposed regulations at §§ 106.44, 106.45, and 106.46 clarify the obligation of a recipient to respond promptly and effectively to information and complaints about sex discrimination in its education program or activity in a way that ensures full implementation of Title IX. The Department invites comments on whether there are additional requirements that should be included in, or removed from, the current and proposed regulations to assist recipients in meeting their obligation under Title IX to provide an educational environment free from discrimination based on sex. The Department also seeks comment on whether and how any of the proposed grievance procedures (or any proposed additions from commenters) should apply differently to various subgroups of complainants or respondents, such as students or employees, or students at varying educational levels.

Answer: We express our concerns with how the Department appears to be applying the "sex discrimination" concept at pp. 28, 32-34, and 71-72. The Department appears to be imposing a near strict-liability standard on schools to "end," "prevent," and "remedy" discrimination. It resurrects and even intensifies the kinds of pressures that many courts recognized as creating an atmosphere of gender discrimination over the past decade, increasing school exposure to lawsuits from complainants (as discussed above). Overall, the provisions pressure schools to accommodate complainants at the expense of respondents' rights and to find responsibility, especially when facts are murky.

[220] *Doe v. Univ. of Ark. - Fayetteville*, 974 F.3d 858, 868, (8th Cir. 2020).

3. Single investigator (proposed § 106.45(b)(2)) The Department is aware that, prior to August 2020, some recipients used a single investigator or team of investigators to investigate complaints of sex-based harassment and make determinations whether sex-based harassment occurred. The Department invites comments on recipients' experiences using that model to comply with Title IX and the steps taken, if any, to ensure adequate, reliable, and impartial investigation and resolution of complaints, including equitable treatment of the parties and reliable grievance procedures that are free from bias. The Department also invites comments on these issues from persons who were parties or served as an advisor to a party to a complaint that was investigated and resolved by a recipient using a single investigator model.

Answer: We express our concerns with the fundamental unfairness of the single investigator model at pp. 52-57, which also discusses relevant case law on the single investigator model that the Department ignores. Having seen firsthand what can go wrong with poorly trained, biased, or incompetent investigators, we have grave concerns about a single investigator process, with no checks or balances through a live hearing or through cross-examination. By way of example, we have been involved in student proceedings where investigators have summarized interviews and omitted key information from a witness or party shared during an interview, or where they have attributed supposed statements or admissions made that were never made but have then refused to correct them, or where investigators have failed to follow up on the most basic information even though it is their obligation, not the students' to conduct a thorough and adequate investigation, or where they have failed to interview an obvious witness in the initial stages of an investigation and have thereby lost the ability to capture relevant information due to the passage of time, or where they have failed to follow up on, analyze or even consider the impact on credibility of an evolving narrative.

4. Standard of proof (proposed § 106.45(h)(1)) a. To the extent commenters take the position that the clear and convincing standard would be appropriate when used in all other comparable proceedings, the Department invites comments on steps that recipients implementing that standard have taken to ensure equitable treatment between the parties. b. The Department invites comments on whether it is appropriate to allow a recipient to use a different standard of proof in employee-on-employee sex discrimination complaints, than it uses in sex discrimination complaints involving a student. c. The Department invites comments on whether it would be appropriate to mandate the use of only one standard of proof for sex discrimination complaints.

Answer: As we noted at pp. 43-44, the Department has offered scant rationale on why the position of the current regulations—institutions must use the same standard of proof for all adjudications of sex discrimination—should be abandoned. More generally, the Department's rationale for requiring preponderance for student-on-student allegations reflects its inconsistent application of civil procedures: If the civil process can be cited to diminish procedural protections that respondents currently possess, then the Department cites the rules of civil litigation. But if those rules would point to retaining current procedural protections for respondents, then the Department simply says its own proposals would provide a fair process. The common denominator is an effort to weaken the procedural protections that respondents currently have.