September 12, 2022

By Electronic Delivery

Miguel Cardona
Secretary
U.S. Department of Education
400 Maryland Ave SW
Washington, DC 20202

RE: ED-2021-OCR-0166-0001, Title IX Notice of Proposed Rulemaking

Submitted By: John Ketcham[1]

Dear Secretary Cardona,

I respectfully submit this letter as a means to bring to the Department of Education's ("Department") attention several deficiencies in the proposed rule ("Proposed Rule") to Title IX of the Education Amendments of 1972 ("Title IX") that was announced on June 23, 2022.[2] In my view, the Proposed Rule severely erodes essential due process protections provided under the current rule, enacted in 2020 ("2020 Rule"), placing recipients, respondents, and, in certain instances, even complainants at serious risk of injury. Weakening these protections offers few superseding benefits to victims of sex discrimination, raises substantial statutory authority and federalism concerns, and will require that recipients commit immense resources to ensure compliance with expansive new preventative and proactive mandates. Some of the Proposed Rule's provisions appear arbitrary and capricious in light of the Education Amendments' plain text, which prohibits that any person, "on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."[3]

The overwhelming incentives for a recipient to demonstrate compliance with the Proposed Rule's mandate, found in Section 106.44(a), to "take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects,"[4] combined with the weakening

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[2] U.S. Dep't of Ed., *The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment* (June 23, 2022), https://www.ed.gov/news/press-releases/us-department-education-releases-proposed-changes-title-ix-regulations-invites-public-comment.
[3] 20 U.S.C. § 1681.
[4] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41420 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

of the 2020 Rule's due process protections for the accused, substantially increase the risks of unfairness in Title IX investigations. Despite the Department's laudable intention to eliminate sex discrimination, the Proposed Rule sets a standard of proactive elimination and prevention that is as unattainable as it is idealistic, rendering recipients never able to know with certainty whether they have done enough to comply. And in recipients' desire to retain federal funding, many will likely err on the side of demonstrating compliance in visible ways, such as through findings of responsibility.

No material change in circumstances has taken place to warrant an overhaul of the 2020 Rule, which took effect only on August 14, 2020.[5] That marked the first notice-and-comment rulemaking process to affect Title IX since 1997 and the first "full" rulemaking since 1975.[6] In the mere two years since, institutions have expended considerable time and resources ensuring training and compliance with provisions they believed were durable, the result of a yearslong notice-and-comment process. The 2020 Rule's requirements have not proven unworkable or given rise to adverse or unintended consequences such as to justify a wholesale revision.

Indeed, the 2020 Rule is the product of a careful balance, requiring recipient institutions to provide supportive measures to complainants, regardless of whether a formal complaint is filed.[7] It was effectuated in the light of over 124,000 public comments and in response to Title IX grievance proceedings that had repeatedly failed to afford respondents with basic due process protections necessary to ensure fair and impartial adjudications.[8] Its robust and clearly defined procedural safeguards did not come at the expense of denying or attenuating the benefits of recipients' programs or activities to victims of sexual harassment. Yet the Department now proposes to eliminate, weaken, or make optional most of the 2020 Rule's due process protections, seemingly for little reason except a change in presidential administration.

The Proposed Rule's requirements, especially insofar as they call for addressing and preventing of all instances of sex discrimination through, for instance, mandatory reporting requirements for recipients' faculty and staff, will substantially increase the

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[5] *See* U.S. Dep't of Education, *Title IX Final Rule Effective Friday, August 14, 2020*, (Aug. 13, 2020), https://content.govdelivery.com/accounts/USED/bulletins/29a1ee2.

[6] Fisher Phillips, *Title IX – Will Everything Old Be New Again?*, (June 1, 2021), https://www.fisherphillips.com/news-insights/title-ix-will-everything-old-be-new-again.html.

[7] *See* 34 C.F.R. 106.44(a) ("A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.").

[8] R. Shep Melnick, *Analyzing the Department of Education's final Title IX rules on sexual misconduct*, BROOKINGS INST. (June 11, 2020), https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/.

burdens of compliance. Coming on the heels of a comprehensive rulemaking process, these proposed obligations compound the risks of confusion for students, faculty, and Title IX Coordinators and staff. Recipients will likely respond to the Proposed Rule's new mandates by significantly increasing scarce institutional resources to Title IX offices and compliance consultants. These expenditures will no doubt fall unevenly; small and lesser-capitalized institutions will feel the weight of compliance most forcefully.

The Proposed Rule's prospective expansion of the breadth of recipients' responsibilities would likely change ordinary campus life across the United States in so a dramatic way as to question whether the Department has the statutory authority to impose these mandates. Under well-established Supreme Court precedent, Congress must "speak clearly if it wishes to assign to an agency a decision of vast 'economic and political significance.'"[9] Mere weeks ago, the Court held that the Environmental Protection Agency did not have the authority to resolve a major policy question absent clear statutory authority.[10] Yet the Department nonetheless wishes to tempt fate—and certainly invite extensive legal challenges—by proposing a rule that may well extend beyond Congress's grant of authority under the Education Amendments of 1972.

Indeed, in 1974, when Congress mandated that the Secretary of Education prepare and publish regulations implementing Title IX, it made clear its intent that the Department create "with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports."[11] Since then, Congress has not provided the Department a clear statement authorizing the Department to regulate recipients in such an all-encompassing way. More still, Congress has signaled nothing between the enactment of the 2020 Rule and today that would justify changes contemplated by the Proposed Rule.

Regardless of the ultimate resolution of legal challenges that are sure to arise, they will no doubt contribute to an environment of needless uncertainty that serves no one. Students, faculty, administrators, leaders of recipient institutions, and Title IX Coordinators and staff would not benefit from the whiplash caused by sweeping changes so soon after the 2020 Rule. Should the Proposed Rule take effect largely as drafted, it would signal to stakeholders that they should expect a new round of notice-and-comment rulemaking every time a new administration takes control of the Executive Branch from a different political party than its predecessor. To achieve its inclusive and anti-discriminatory aims, Title IX requires settled expectations, not a staging ground for Washington's interminable political struggles.

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[9] *See, e.g.*, Utility Air Regulatory Group (UARG) v. EPA, 573 U.S. 302, 324 (2014).
[10] West Virginia v. EPA, 142 S. Ct. 2587, 2607–09 (2022); *id.* at 2624 (Gorsuch, J., concurring) ("As the Court details, the agency before us cites no specific statutory authority allowing it to transform the Nation's electrical power supply. Instead, the agency relies on a rarely invoked statutory provision that was passed with little debate and has been characterized as an 'obscure, never-used section of the law.' Nor has the agency previously interpreted the relevant provision to confer on it such vast authority; there is no original, longstanding, and consistent interpretation meriting judicial respect.") (internal citations omitted).
[11] Sex Discrimination Act of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484.

I. Proposed Redefinition of "Sexual Harassment" to "Sex-Based Harassment"

The 2020 Rule's prohibition of sexual harassment includes quid pro quo conduct, acts of sexual violence, and hostile environment harassment, defined as behavior that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."[12] This language, adopted almost verbatim from the Supreme Court's 1999 case *Davis v. Monroe County Bd. of Ed.*,[13] hews closely a standard that is both workable and well-established.[14] Adopting the Supreme Court's definition provides Title IX investigators and adjudicators with a corpus of caselaw to help draw factual parallels and guide decision-making, if necessary. The standard's lack of a subjectivity requirement appropriately and wisely avoids questions about the complainant's subjective state of mind, which may be inordinately sensitive or unreasonable.

By contrast, the Proposed Rule's re-definition of hostile environment harassment, as "unwelcome sex-based conduct that is sufficiently severe *or* pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies *or limits* a person's ability to participate in or benefit from the recipient's education program or activity,"[15] is both less clear and more likely to lead to Title IX investigations for allegations that lack merit.

Introducing the complainant's subjective understanding opens the door for heightened sensitivity and unreasonable expectations to be used as a sword against prospective respondents, consuming scarce institutional resources along the way. In a higher education setting, students should feel free to voice their ideas and opinions without fear of reprisal; an exclusive objectivity requirement protects free inquiry—a cornerstone of higher education in particular—by subjecting the conduct to the scrutiny of general societal standards of decency. To be clear, objectivity does not imply unanimity. A purported act of sexual harassment is not overlooked under the 2020 Rule simply because

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[12] 34 C.F.R. 106.30(a).

[13] 526 U.S. 629, 651 (1999) (defining harassment as behavior that is "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities").

[14] *See, e.g.*, Deborah L. Brake, *School Liability for Peer Sexual Harassment after Davis: Shifting from Intent to Causation in Discrimination Law*, 12 HASTINGS WOMEN'S. L.J. 5, 34 (2001) ("By replacing the legal inquiry into intent and animus with a more objective search for causation, Davis represents a welcome move toward a more workable and theoretically sound approach to discrimination.").

[15] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41410 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) (emphasis mine).

some people would not find such conduct offensive; a reasonable person of ordinary sensitivity would have to object before a finding of responsibility can be made.[16]

Should the Proposed Rule take effect, students who wish to avoid a Title IX investigation for offending unusually sensitive peers will be discouraged from speaking forthrightly. In state-operated institutions, this is particularly problematic, given that the First Amendment operates to protect students' rights of free speech and association.[17]

Moreover, the proposed change from a conjunctive to a disjunctive condition within the definition—from "severe, pervasive *and* objectively offensive" to "sufficiently severe *or* pervasive"—will likely increase the likelihood of unsubstantiated or poorly substantiated claims, especially when combined with the subjectivity requirement. This will sweep into Title IX Coordinators' offices one-off instances of sex-related conduct that may be objectionable, but would not necessarily rise to the level of hostile environment harassment to a reasonable person.

Consider an example: one female college student calls another a sex-related insult, such as the "C" word or "whore." Such a gender-specific insult might lead to a cognizable claim of sex-based harassment by meeting the Proposed Rule's requirement of severity alone. By contrast, such one-off conduct would likely not meet the definition of sexual harassment under the 2020 Rule, given its requirement that severe conduct also be persistent. In the emotionally fraught moments in which postsecondary students sometimes find themselves, it is unfathomable to subject the insulting student to a Title IX investigation for a single instance of youthful imprudence, much less threaten to deprive the recipient of federal funding.

II. Grievance Initiation

In the 2020 Rule, Title IX grievance procedures begin only after the filing of a formal complaint, a written document signed by the Title IX Coordinator or submitted by a complainant, that alleges sexual harassment and requests that the recipient investigate the allegation.[18] The formality of such a request, far from being a needless hindrance or disempowerment for victims of sexual harassment, places them squarely in a position of decision-maker.

Proposed Section 106.45 would eliminate the 2020 Rule's requirement that the recipient initiate its grievance procedures only after receiving a formal, written, and signed

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[16] *See, e.g.*, Jennings v. University of North Carolina, 482 F.3d 686, 696–700 (4th Cir. 2007) (finding that a student had alleged sufficient facts to support a finding of sex-based harassment against a soccer coach who made repeated inappropriate sexual comments to his players).
[17] *See* Healy v. James, 408 U.S. 169 (1972) ("Yet, the precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, '[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'" (quoting Shelton v. Tucker, 364 U.S. 479, 487 (1960))).
[18] 34 C.F.R. 106.30.

complaint of sexual harassment. Further, Section 106.2 of the Proposed Rule eliminates the term "formal complaint" and defines "complaint" as "any oral or written request to the institution to initiate the institution's grievance procedures." The writing and signature requirements should be retained, as they necessarily require deliberation and informed action that an oral request may not replicate. Allowing for an oral complaint would likely reduce the degree to which complainants consider the factual circumstances of the alleged sex discrimination and the consequences of initiating the recipient's grievance procedures before making such a request.

Also left unclear in the proposed Section 106.2 definition is whether it is necessary that complainants use the exact phrase "initiate the recipient's grievance procedures," or whether synonymous approximations—"start an investigation" or "look into this matter of sex discrimination"—would also achieve the same effect. Clarity on this matter is especially critical to give recipients the confidence of knowing that they are satisfying the Department's requirements.

Further, proposed Section 106.2's definition of "complainant" extends the 2020 Rule to encompass "a person other than a student or employee who is alleged to have been subjected to the alleged sex discrimination and who was participating or attempting to participate in the school's education program or activity." This provision sweeps so broadly as to include spectators at recipients' sports games or visitors during open house campus tours, parties well beyond the original intent of the Congress that enacted the Education Amendments of 1972, which sought to ensure that female students achieve equal access to recipients' educational programs and activities, particularly those that are sports-related.

III. Mandatory Reporting

Section 106.44(c) of the Proposed Rule would introduce a new requirement for mandatory reporting of sex discrimination, thereby transforming most recipient employees into mandatory reporters in order to receive federal funding. At postsecondary institutions, employees with responsibility "for administrative leadership, teaching, or advising" would be obligated to report all instances of possible sex discrimination to the Title IX Coordinator, including information received from third-parties or even from sources like social media. Such reporting would be done regardless of whether the purported victim of sex discrimination consents to initiate a grievance or wishes to inform the recipient's Title IX Coordinator. In turn, the Coordinator would be required to take effective steps to investigate and correct for the purportedly discriminatory behavior.

In the Proposed Rule's zeal to eliminate any and all possible sex discrimination, it disempowers victims of sex discrimination—the very parties Title IX seeks to protect—from proceeding as they see fit. Postsecondary students are adults, who should be treated as such, capable of weighing the various considerations and deciding for themselves the best avenue forward. Instead, the Proposed Rule would take away the ultimate decision of whether to proceed with a grievance away from purported victims and thus would

discourage them from seeking out the advice and assistance of trusted recipient employees, such as their favorite professor or advisor.

The obligation to report likewise eliminates any possibility that these employees could render independent, unbiased, objective advice, for fear of running afoul of the Proposed Rule—they could not in good faith agree to listen to a troubled student without reporting any discriminatory allegations that might come out of the conversation. The chilling effect on such communication would stunt the healing and building of solidarity among survivors of sex discrimination, likely adding to the trauma that victims experience. Consequently, this would impair the reacquisition of a sense of control necessary for a full recovery. Indeed, according to the Obama-era White House Task Force to Protect Students from Sexual Assault, "[S]urvivors need someone who is supportive, respects their choices, and can provide information (particularly about what is happening with a legal case). Survivors are most willing to return to crisis centers where they have felt a sense of control."[19]

Neither is the proposed mandatory reporter requirement necessary to eliminate sex discrimination. In fact, a literature review by Professors Kathryn J. Holland and Lilia M. Cortina of the University of Michigan and Jennifer Freyd of the University of Oregon found "limited research to support assumptions regarding the benefits of compelled disclosure. In fact, some evidence suggests that these mandates may carry negative consequences: silencing and disempowering survivors, complicating employees' jobs, and prioritizing legal liability over student welfare."[20] If implemented, proposed Section 106.44(c) would therefore largely serve as a performative signal of a superficially more active approach to sex discrimination.

Neither has mandatory reporting been shown to be effective in other domains, such as instances of child abuse, that would justify optimism about the Proposed Rule's potential benefits. For example, a 2017 study in the American Journal of Public Health that assessed the effectiveness of mandatory reporting on rates of child abuse found that reporting policies were not correlated with increased identification of at-risk children.[21] Rather, mandatory reporting produced—as might be expected—more reports by non-professionals that were less likely to be substantiated. The greater number of reports, however, did not produce a higher rate of validated cases of child abuse. According to Dr. Michal Raz, a University of Pennsylvania physician and historian of medicine, "The goal of mandatory reporting is to identify children at risk, and intervene to prevent further

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[19] WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, KEY COMPONENTS OF SEXUAL ASSAULT CRISIS INTERVENTION/VICTIM SERVICE RESOURCES 2 (2014), https://www.justice.gov/archives/ovw/page/file/910266/download.

[20] Kathryn J. Holland, Lilia M. Cortina & Jennifer J. Freyd, *Compelled Disclosure of College Sexual Assault*, 73 AM. PSYCH. 256, 265 (2018), https://dynamic.uoregon.edu/jjf/articles/hcf2018.pdf.

[21] Grace W. K. Ho, Deborah A. Gross & Amie Bettencourt, *Universal Mandatory Reporting Policies and the Odds of Identifying Child Physical Abuse*, 107 AM. J. PUB. HEALTH 709, 709 (2017), https://pubmed.ncbi.nlm.nih.gov/28323475/.

harm. It is not to create more reports."[22] The Department should not invite replicating this problem to sex discrimination on recipient campuses via the proposed Section 106.44(c).

Amending the Proposed Rule to eliminate the mandatory reporting requirement, or, in the alternative, to limit the scope of the obligation only to recipient employees in administrative and leadership positions, would preserve the ability of victims to initiate grievance procedures when they feel ready, seek out the advice of trustworthy instructors, and likely result in better results in ending sex discrimination.

IV. Applicability Outside the United States

The Proposed Rule's Section 106.11 would eliminate the 2020 Rule's duty to respond upon "actual knowledge" of sexual harassment and replace this language with "an obligation to address a sex-based hostile environment under its program or activity, even if the sex based harassment occurred outside the recipient's education program or activity or outside the United States." This proposed change has no statutory basis in the text of the Education Amendments of 1972. And the Supreme Court has established a legal presumption that, absent specific language to the contrary, Congress "intends its statutes to have domestic, not extraterritorial application."[23]

On a practical level, such language imposes a crushing burden on recipients to seek out any and all information about potential sex discrimination that occurs not only on its campus, but even in faraway places, where it would be unreasonable to expect such close monitoring. When read in conjunction with the Proposed Rule's redefinition of "sex" to include sexual orientation, gender identity, and sex characteristics in proposed Section 106.10, this would effectively impose progressive American standards regarding sex, gender, and discrimination on those in other countries who may not share such attitudes.

In response, recipients will refrain from offering horizon-expanding study abroad programs, one purpose of which is to expose students to cultures and countries vastly different from the United States. Many countries, for example, treat men and women differently on the basis of sex for religious, cultural, and historical reasons, and the law in such places often reflects or enshrines disparate treatment. The World Bank's most recent *Women, Business and the Law* report, for example, found that, "Worldwide, 2.4 billion women of working age (15–64 years) from 178 economies across all regions still do not have the same legal rights as men."[24] In particular, women's full inclusion in economic life lags significantly in the regions of the Middle East and North Africa, South Asia, Sub-Saharan Africa, and East Asia and the Pacific.[25]

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[22] Michal Raz, *Preventing Child Abuse: Is More Reporting Better?*, PENN LDI BLOG, (Apr. 10, 2017), https://ldi.upenn.edu/our-work/research-updates/preventing-child-abuse-is-more-reporting-better.
[23] Small v. United States, 544 U.S. 385, 388–89 (2005).
[24] WORLD BANK, WOMEN, BUSINESS AND THE LAW 2022 10 (2022).
[25] *Id.* at 17.

Recipients will spend more resources closely monitoring activities in foreign countries, especially in regions with poor track records of equal treatment. But many will likely curtail their study abroad programs to include only those countries that pose the least risk of running afoul of the Proposed Rule's expansive requirements. In particular, the Section 106.44(a) mandate to operate education programs free from prohibited sex discrimination at all times, regardless of whether recipients have actual knowledge, will limit students' opportunities to study in countries with different value and belief systems than the United States. Informed and willing students should not be deprived of opportunities to expand their horizons during so formative a time in their educational journey.

V. Evidentiary Issues

Section 106.45(b)(1)(vii) of the 2020 Rule requires recipients to use the same standard of evidence for formal complaints of sexual harassment against students as for those against employees. This logically treats allegations equally, regardless of the respondent's identity or relationship to the recipient. It appropriately requires that all complainants meet the same evidentiary burden, and simultaneously provides recipients with a degree of flexibility to select a standard of evidence that best comports with institutional priorities and resources.

By contrast, Section 106.45(a) of the Proposed Rule would remove the requirement for recipients to apply the same standard of evidence for all complaints of sex-based harassment, regardless of the respondent's identity, provided that the standard is used "in all comparable proceedings." The preface specifies that the Department interprets this phrase to mean that all allegations against a student may be investigated using one standard of evidence, whereas sex-based harassment allegations against recipients' employees or staff members may use another standard.[26] If enacted, this proposal would almost certainly lead many recipients to change their policies to require a clear and convincing standard for proceedings involving an employee as respondent, and a preponderance of the evidence standard for proceedings involving a student as respondent. At best, this proposed change in policy and procedure is inferior to the 2020 Rule; at worst, it is arbitrary and capricious.

First and most fundamentally, such an option creates double standards that undermine addressing sex discrimination in educational programs and activities. A claim that alleges identical facts against a student and an employee that leads to a finding of responsibility as to the former, but not as to the latter, would open the door to inconsistency and perceived unfairness.

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[26] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41486 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106) ("The Department's current view, informed by the input of stakeholders, 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.").

The Department's proposed rationale for this change, that "the difference in the relationships and obligations recipients have vis-à-vis students as compared to employees,"[27] makes little sense. While it may be true that recipients have different responsibilities to its employees as it does to students in many other areas, such as those established by employment contracts, allegations of sex discrimination generally or sexual harassment specifically call for a singular response. In assessing whether sex discrimination has occurred in connection with a recipient's education program or activity, the underlying alleged discriminatory *conduct* is at issue, not the *identity* of the respondent or the *relationship* of the respondent with the recipient.

In other proceedings, the burden of proof does not change merely on the basis of the accused's identity, occupational status, or relationship with an institution. In fact, such a different standard facially violates the foundational notion of equal protection of the laws, as students would be subject to a lesser degree of due process protection relative to employees.[28] Common sense and fundamental notions of fairness counsel that the burden of evidence should be determined by the nature of the law at issue—administrative, civil, or criminal—not the identity of the accused or his or her relationship with an institution.

Second, one rationale behind the suggested change—allowing recipients to abide by the obligations found in collective bargaining agreements ("CBA")[29]—fails to hold up to closer scrutiny. If recipients have agreed to CBAs that mandate the clear and convincing standard of evidence for allegations of sex discrimination generally or sexual harassment specifically, such an agreement signals that recipients have understood and accepted this standard as appropriate for the nature and gravity of such offenses. If the 2020 Rule's requirement that recipients use the same standard of evidence for all Title IX investigations implies that recipients are "forced" to use the clear and convincing standard per the CBA, that is a choice the recipient has willingly made. To the extent that this standard is problematic for some, it can be ameliorated by re-negotiating the CBA.

Third and relatedly, recipients' faculty and staff likely have better training and more knowledge about matters of sex discrimination than do students. While students' immaturity never excuses or justifies discriminatory conduct, incomplete cognitive development, especially for students under the age of 25, may nonetheless explain some

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[27] *Id.* at 41487.

[28] *See* Reed v. Reed, 404 U.S. 71, 75–76 (1971) ("The Equal Protection Clause of that amendment does, however, deny to States the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification "must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'" (quoting Royster Guano Co. v. Virginia, 253 U. S. 412, 253 U. S. 415 (1920)). While the principle of equal protection has been generally applied to state governments through the 14th Amendment, the federal government is bound by the same principle. *See* Bolling v. Sharpe, 347 U.S. 497, 499 (1954) (holding that the 5th Amendment's due process clause requires the federal government to abide by an equal protection principle).

[29] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41487.

student behavior.[30] The same cannot be said for faculty and staff: Simply put, they should know better. Trainings on sex discrimination, including sexual harassment, should put all recipient employees on notice that such behavior is unacceptable and intolerable. Therefore, subjecting allegations of sex-based harassment against employees and staff to a higher burden makes little practical sense.

That said, the Proposed Rule laudably preserves the 2020 Rule's general principle of permitting recipients to adopt a clear and convincing standard of evidence. Allowing for this standard—as opposed to simply mandating a uniform preponderance of the evidence standard—is beneficial, as it affords institutions with different capabilities and resources the ability to select a more demanding standard, one that should discourage unsubstantiated accusations from consuming Title IX Coordinators' time and efforts.

VI. Notice of Accusations

Under Section 106.45(f)(4) of the Proposed Rule, the recipient may provide a description, either orally or in writing, of the relevant evidence as part of the investigation of sex discrimination complaints.[31] This differs markedly from the 2020 Rule's requirement that both parties be granted 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 reply in reaching 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."[32]

If enacted, the Proposed Rule's change would lead to unfair, incongruous, and unreasonable outcomes. A written description alone, without the underlying evidence supporting the allegations and investigation, invites an opportunity for biased recordkeeping to impede the accused from responding meaningfully to the evidence. Recipients and their Title IX Coordinators, who, as mentioned earlier, have strong incentives to demonstrate compliance through findings of responsibility, would be given the ability to cherry-pick evidence they deem relevant, leading to potentially inaccurate and incomplete accounts of the factual bases for the allegations against respondents. Indeed, the 2020 Rule's guarantee of equal access is predicated upon remedying troubling situations that occurred prior to the institution of that rule.

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[30] Mariam Arain et al., *Maturation of the adolescent brain*, 9 NEUROPSYCHIATRIC DISORDER TREATMENT, 449, 451 (2013), https://www.ncbi.nlm.nih.gov/pmc/articles/PMC3621648/ ("It is well established that the brain undergoes a 'rewiring' process that is not complete until approximately 25 years of age. This discovery has enhanced our basic understanding regarding adolescent brain maturation and it has provided support for behaviors experienced in late adolescence and early adulthood.").

[31] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41481.

[32] 34 C.F.R. § 106.45 (2020).

For example, in *Doe v. Purdue University*,[33] one noteworthy case from the Seventh Circuit Court of Appeals concerning an allegation of sexual assault on Purdue University's campus, a respondent was not allowed to see the investigatory report that contained the evidence charged against him; he could not present witnesses, nor could he adequately respond to evidence that he was prohibited from reviewing.[34] Two out of three members of Purdue's Advisory Committee on Equity, the body tasked with making a recommendation on a finding of responsibility, did not even read the investigative report.[35] Neither the investigator nor the advisory panel spoke with the accuser. They did not even receive a written statement by her. Nonetheless, the respondent was found responsible. In her decision, then-Judge Amy Coney Barrett wrote that the advisory committee members' failure to read the evidentiary report "suggests that they decided that John was guilty based on the accusation rather than the evidence."[36]

Worse still, an oral account of the relevant evidence would compound the risks of unfairness. Recipients undoubtedly maintain written records containing relevant evidence pertaining to the accusations and investigation, so there is no justification for withholding such records from respondents. Requiring that recipients simply hand over materials already in their possession would not represent a meaningful burden. Placing respondents at a disadvantage is the only conceivable reason why recipients would withhold these materials and provide an oral account, as respondents would be rendered less capable of meaningfully responding to the factual grounds of the allegations against them. Such a rule is squarely at odds with the American legal tradition's presumption in discovery proceedings, which affords both parties equal access to discoverable evidence.[37] Indeed, 75 years ago, the Supreme Court wrote, "Mutual knowledge of all the relevant facts gathered by both parties is essential to proper litigation. To that end, either party may compel the other to disgorge whatever facts he has in his possession."[38]

VII. Elimination of the Requirement for Live Hearing and the Opportunity for Cross-Examination and Allowance for the Single-Investigator Model

The Proposed Rule would render optional the 2020 Rule's requirement that the recipient's grievance procedure provide for a live hearing, instead allowing a new and minimum alternative to a hearing that merely "enables the decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is both in

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[33] 928 F.3d 652 (7th Cir. 2019).
[34] *Id.* at 659–70.
[35] *Id.* at 663.
[36] *Id.*
[37] *See* Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").
[38] Hickman v. Taylor, 329 U.S. 495, 507 (1947).

dispute and relevant to evaluating one or more allegations of sex discrimination."[39] While this proposal would represent a retrenchment of asserted government authority over recipients, it would nonetheless lead to serious questions over the fairness and accuracy of Title IX investigations. The influx of Title IX-related investigatory activity prompted by Sections 106.44(a) and 106.2, moreover, will make the federal government's influence felt more strongly on college campuses than ever before. It is critical, therefore, that due process protections adequately counteract the institutional pressure to hold students responsible for allegations of sex-based harassment, even where the recipient is unsure of who bears responsibility.

The Proposed Rule's "minimal requirements to ensure an equitable grievance procedure"[40] falls short of the rigor necessary to achieve uniformity, fairness, and equality. They lack the responsiveness and dynamism of a mandatory live hearing, in which the adjudicator can assess the credibility of witnesses in real time, including body language and other important indicia of reliability. Decision-makers tasked with making fair and impartial determinations of credibility benefit from such real-time assessments, in which both sides present their account of the events in question. This is especially important in situations of "he said/she said," where indications of trustworthiness are a major factor in the ultimate determination of responsibility. The Proposed Rule's allowance for individual meetings with interested parties and witnesses would not necessarily allow the decision-maker to assess credibility with the same quality and quantity of evidence as produced at a live hearing.

Accompanying the Proposed Rule's elimination of the requirement to hold a hearing is the concomitant right to cross examination by an advisor,[41] currently enshrined in the 2020 Rule.[42] In situations that often involve competing narratives, cross-examination provides adjudicators a unique and irreplaceable opportunity to assess the credibility of adverse witnesses in real-time. Complainants and respondents should have the opportunity to identify and contest inconsistencies in the other side's account. Because advisors, not alleged harassers, currently conduct cross-examinations, the risk of traumatizing victims of sexual harassment is minimized.

When the lack of a hearing is considered alongside the proposed Section 106.45(f)(4) rule that restricts access to the evidentiary record,[43] respondents would face an extraordinary challenge: They may never know the true nature of the allegations and evidence against them. As Judge Arthur Tarnow of the Eastern District of Michigan wrote in a 2018 opinion involving a plaintiff who alleged he was deprived due process in a Title IX investigation:

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[39] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41502 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).
[40] *Id.* at 41460.
[41] *Id.* at 41480–83.
[42] 34 C.F.R. § 106.45(b)(6)(i).
[43] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41481.

> Because of the University's method of private questioning through the investigator, Plaintiff has no way of knowing which questions are actually being asked of Claimant or her response to those questions. Without a live proceeding, the risk of an erroneous deprivation of Plaintiff's interest in his reputation, education, and employment is significant. Additional procedural safeguards would both assist the truth-seeking process and help to ensure the protection of Plaintiff's constitutional rights.[44]

Therefore, while the 2020 Rule should be preserved in its guarantee of a live hearing as well as access to the evidentiary record, a live hearing would at least allow respondents to learn about the allegations against them and to respond accordingly. Many universities already have protocols in place that provide for live hearings, especially after the 2020 Rule's requirement for such. Therefore, preserving the hearing requirement should cost recipients relatively little and would be well-justified in light of the additional assurance of fairness for the accused.

Worse still, in place of a live hearing and in contrast to the 2020 Rule, the Proposed Rule expressly allows the decisionmaker to be the same person as the Title IX Coordinator or investigator.[45] The risks of unfairness associated with the single investigator model have long been established. Among others, the model substantially increases the possibility for bias and prejudice, allows for determinations of responsibility to be made on the basis of incomplete evidence, and hinders respondents from contesting the accusations against them. As Harvard Law School professors Janet Halley and Jeannie Suk Gersen, former federal judge Nancy Gertner, and University of San Francisco School of Law professor Lara Bazelon wrote in their comment letter for the Title IX Public Hearing of June 7–11, 2021:

> Essentially, the single investigator is asked to review his or her own work for its fairness, completeness, lack of bias, and neutrality. This is a fundamental breach of the norms of due process that require neutral and independent decisionmakers with a sufficient division of roles to provide a check on the fairness of each step in the process. The hearing requirement enhances the fairness and legitimacy of Title IX enforcement.[46]

As the professors rightly contend, for several reasons, allowing a Title IX Coordinator to serve as investigator and adjudicator sharply increases the chances for bias, incentives,

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[44] Doe v. Univ. of Mich., 325 F. Supp.3d 821, 827 (E.D. Mich. 2018).
[45] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41466.
[46] Letter from Janet Halley, Jeannie Suk Gersen, Nancy Gertner & Lara Bazelon to the Office for Civil Rights, Department of Education 9 (June 11, 2021), https://ocrcas.ed.gov/sites/default/files/storage/correspondence/202106-titleix-publichearing-comments/jsgersen.pdf.

and motivated reasoning to taint determinations of responsibility. Coordinators and their staffers cannot be said to represent a fair cross-section of American society. On average, they are more likely to enter the role at least partially based on a sensitivity to campus sexual misbehavior and a pre-commitment to eliminating sex discrimination.[47] These predilections render their impartiality inherently doubtful.

When coordinators are tasked with gathering evidence that forms the predicate of their determination of responsibility, the aforementioned partialities and incentives may lead many to skewed determinations of relevant evidence. For example, evidentiary incompleteness could result in at least three ways: (1) from a failure, whether intentional or not, to gather evidence that would tend to exonerate the respondent; (2) from deeming a potentially relevant piece of evidence irrelevant and therefore inadmissible; and (3) from seeking and deeming evidence that tends to support the complainant's allegations.

Coordinators might also automatically attribute inordinate trustworthiness to complainant's allegations, regardless of the evidentiary support for these claims, while not attributing the same degree of trustworthiness to respondents and witnesses that would tend to support non-responsibility. An incomplete and biased evidentiary record should not be the basis upon which students are suspended or expelled.

According to the scholarly literature on political psychology, "motivated reasoning" is a phenomenon whereby those who are inclined to dislike someone either ignore or discard information contradictory to their predisposition, while favoring those things that would achieve a desired end-state.[48] If a single investigator is predisposed to dislike or find responsible a respondent, she may be more likely, all else equal, to subconsciously ignore or discount evidence that would tend to oppose that negative disposition.

Relatedly, coordinators' very reason for being depends on compliance; demonstrating this through easily quantifiable and highly visible metrics, such as the number of determinations of responsibility, justifies the coordinator's job performance. Assessments of fairness and accuracy are more difficult to quantify, which necessitates that robust procedural safeguards assure fair process for all involved. Moreover, the consequences of non-compliance not only threaten federal funding for the recipient, but also the coordinator's job security. The immense incentives to maintain this funding and

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[47] *See, e.g.*, Peter Lake, *Compliance Crusader*, INSIDE HIGHER ED. (Aug. 11, 2016), https://www.insidehighered.com/views/2016/08/11/challenges-and-rewards-being-title-ix-coordinator-essay ("After spending just a little time with the team, it became clear: Title IX compliance team members want leadership and something to believe in that gives their Title IX work meaning and purpose. The Title IX coordinator is a coach because the team needs a coach. Title IX policies and procedures do not respond -- people do. The motivation of Title IX responders is decisive in Title IX compliance success. . . . What is truly important is bringing the spirit of Title IX alive on a campus committed to the pursuit of Title IX's mission.").

[48] *See* Thomas J. Leeper & Kevin J. Mullinix, *Motivated Reasoning*, OXFORD BIBLIOGRAPHIES (February 22, 2018), https://www.oxfordbibliographies.com/view/document/obo-9780199756223/obo-9780199756223-0237.xml.

coordinators' job security cast serious doubt on their ability to make accurate, unbiased, and fair determinations of responsibility.

The Department's likely response to these objections—that schools are not foreclosed from maintaining the 2020 Rule's hearings, cross-examination, and separate adjudicator model—does not hold up to the practical reality that a single investigator model, despite all its shortcomings, will likely be adopted by many, if not most, recipient institutions. Requiring the time and effort of a single person, rather than at least two people, achieves compliance with fewer labor hours, but at the cost of heightened risk of unfairness. When considered alongside the Proposed Rule's mandate to proactively address and prevent all forms of sex discrimination, regardless of actual knowledge, the single investigator model becomes still more attractive. The substantial expansions in investigatory activity that would result from the Proposed Rule, taken as a whole, will further push recipients to abandon hearings and adopt the single investigator model, simply to keep up with the volume of investigations.

In contrast to the Proposed Rule, the 2020 Rule's required due process protections are sufficiently rigorous to provide for consistent and standardized practices across jurisdictions. Americans overwhelmingly disapprove of allowing colleges and universities to create their own policies for handing sexual assault complaints. A 2020 Fairleigh Dickinson University poll revealed that 84 percent of a representative sample of American adults believe that all college students should be afforded the same legal protections, regardless of institution or location.[49] Yet the Proposed Rule would go against the overwhelming grain of public opinion and grant recipients a wider degree of discretion to craft grievance procedures lacking many of the current due process protections. This would lower the floor so far that institutions would vary greatly in their approaches to handling harassment allegations, leading to inconsistent results.

In some jurisdictions, provisions of the Proposed Rule cannot fully take effect, due to federal court rulings guaranteeing more substantial due process protections than the Proposed Rule's minimum. As the preamble notes, in *Doe v. Univ. of Cincinnati*,[50] the Sixth Circuit Court of Appeals held that where the credibility of the accuser, accused, or witnesses is at issue—implicating the vast majority of all Title IX investigations—the Due Process Clause requires that accused students receive a hearing and the right to cross-examination. In 2018, the same appellate court reaffirmed that holding in *Doe v. Baum*,[51] holding that accused students or their advisor must be given "an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder."[52] Therefore, recipients in states under the jurisdiction of the Sixth Circuit Court of Appeals—Michigan, Ohio, Kentucky, and Tennessee—automatically cannot choose from the options provided under the Proposed Rule.

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[49] Fairleigh Dickinson University, *Americans Unsure About Title IX Changes to Colleges and Universities but Support Fairness and Consistency*, (June 29, 2020), http://publicmind.fdu.edu/2020/200629/final.pdf.
[50] 872 F.3d 393, 401–02 (6th Cir. 2017).
[51] 903 F.3d 575 (6th Cir. 2018).
[52] *Id.* at 578.

Likewise, the 2020 Rule's provision of a hearing and cross-examination reduce the prospects for the type of litigation as at issue in *Baum* and similar cases, whereby those aggrieved by inequitable Title IX proceedings vindicate their right to fair procedure in federal court. A study conducted by United Educators, an insurance company that provides coverage for colleges and universities, found that between 2006 and 2010, the company paid out $36 million in 262 insurance claims related to sexual misconduct litigation; 72 percent of the payouts went to accused students who sued to protest their treatment by the university's investigation.[53] If the Proposed Rule takes effect, accused students aggrieved by relaxed due process protections will have a strong incentive to sue recipients for violations of Title IX and breach of contract. In consequence, insurance premiums for such liability protection will likely increase across the board.

These court cases also have the unintended consequence of harming meritorious complainants by forcing them to relitigate and rehash the painful experiences giving rise to their allegations. Victims of sexual violence are done a disservice when Title IX proceedings lack the procedural safeguards necessary to ensure legitimacy and finality.

In addition, it is worth noting that the Proposed Rule's elimination of the guarantees of a hearing, cross-examination, and separate adjudicator falls below even the "minimum requirements of due process" that are afforded to convicted criminals during parole and probation revocation hearings. The Supreme Court's decisions in *Morrissey v. Brewer*[54] and *Gagnon v. Scarpelli*[55] afford parolees and probationers the opportunity to be heard in person and to present witnesses and documentary evidence; the right to confront and cross-examine adverse witnesses (unless the hearing officer specifically finds good cause for not allowing confrontation); and a neutral and detached hearing body.[56]

While it is often said that Title IX investigations are not criminal proceedings and therefore do not necessitate the full panoply of due process protections available at trial, neither are parole revocation hearings. Both are administrative matters, yet the Constitution protects those already convicted beyond a reasonable doubt who are suspected of breaking the conditions of their release with greater procedural safeguards than those accused of sex-based harassment would be in a Title IX investigation under the Proposed Rule. The 2020 Rule, by contrast, does not give rise to this result. Indeed, the late Justice Ruth Bader Ginsburg, one of the nation's foremost champions of sex equality, criticized college grievance procedures that failed to provide the accused an adequate opportunity to be heard. In a 2018 interview, she said that standard due process protections should apply in higher education sex-related investigations: "We have a

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[53] ALYSSA S. KEEHAN, STUDENT SEXUAL ASSAULT: WEATHERING THE PERFECT STORM 1 United Educators (2011); Emily Yoffe, *The College Rape Overcorrection*, SLATE: DOUBLEX (Dec. 7, 2014, 11:53 PM), http://www.slate.com/articles/double_x/doublex/2014/12/college_rape_campus_sexual_assault_is_a_serious_problem_but_the_efforts.html.

[54] 408 U.S. 471 (1972).

[55] 411 U.S. 778 (1973).

[56] 408 U.S. at 472.

system of justice where people who are accused get due process, so it's just applying to [college sexual harassment investigations] what we have applied generally."[57]

VIII. Preemption

Section 106.6(b) of the Proposed Rule states, "The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement. Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater protections against sex discrimination." This language is ambiguous, will invariably lead to legal challenges, and raises significant federalism concerns.

Preemption can occur in one of three ways.[58] First, the language of a federal law may explicitly invoke an intent to supersede state law ("express preemption").[59] Second, a scheme of federal regulation can be so pervasive that it implicitly prevents states from further action, thus "occupying the field" of regulatory activity ("field preemption").[60] Finally, federal law implicitly preempts conflicting state law, either when it is impossible to comply with both laws ("conflict preemption"),[61] or when state laws pose an obstacle to federal purposes and objectives.[62]

The Proposed Rule does not fit neatly into any of these existing categories. It expressly announces that the obligation to comply with provisions of the Proposed Rule is not displaced by state or local laws or other requirements, but this does not necessarily satisfy the definiteness that express preemption requires.[63] The preamble attempts to explain that 106.6(b) would "make clear that all of the Title IX regulations would preempt State or local law," yet it continues that "the Title IX regulations preempt *any* State or local law with which there is a conflict."[64] An inconsistency arises in attempting to preempt *all* state and local laws and *only those* laws with which there is a conflict. In short, the proposed provision attempts to be an express preemption clause that borrows language

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[57] Jeffrey Rosen, *Ruth Bader Ginsburg Opens Up About #MeToo, Voting Rights, and Millennials*, ATLANTIC (Feb. 15, 2018), https://www.theatlantic.com/politics/archive/2018/02/ruth-bader-ginsburg-opens-up-about-metoo-voting-rights-and-millenials/553409/.

[58] *See generally* JAY B. SYKES AND NICOLE VANATKO, CONG. RSCH. SERV. FEDERAL PREEMPTION: A LEGAL PRIMER (2019).

[59] *See*, *e.g.*, Geier v. Am. Honda Motor Co., 529 U.S. 861, 881–82 (2000); Cipollone v. Liggett Group, Inc., 505 U.S. 504 (1992); Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 95–98 (1983).

[60] Gade v. Nat'l Solid Wastes Mgmt. Assn, 505 U.S. 88, 98 (1992); Rice v. Santa Fe Elevator Corp., 331 U.S. 218, 230 (1947).

[61] Fla. Lime & Avocado Growers v. Paul, 373 U.S. 132, 142–43 (1963).

[62] Hines v. Davidowitz, 312 U.S. 52, 67 (1941).

[63] *See* Will v. Michigan Dep't of State Police, 491 U.S. 58, 65 (1989) (stating that if "Congress intends to alter the 'usual constitutional balance between the States and the Federal Government,' it must make its intention to do so 'unmistakably clear in the language of the statute'" (quoting Atascadero State Hospital v. Scanlon, 473 U. S. 234, 242 (1985) and Dellmuth v. Muth, 491 U. S. 223, 228 (1989))).

[64] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41404–05 (proposed July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

from conflict preemption to establish a floor, while still allowing states to provide "greater protections against sex discrimination."[65]

But under the Proposed Rule, what would constitute a "conflict"? Put differently, what would provide "greater protections against sex discrimination" such as to avoid conflict preemption? Under existing definitions and tests for conflict preemption, such as impossibility to comply with both laws simultaneously, the Proposed Rule is ambiguous. If heightened due process procedures are *mandated* by state laws but are *permitted* by the Proposed Rule, does that constitute a conflict under the proposed Section 106.6?

Surely, it is not impossible to comply with both the Proposed Rule and a state law that mandates live hearings, the right to cross-examination, and an independent adjudicator. But to do so would substantially narrow the optionality that the Proposed Rule seeks to introduce. If the Department considers it essential to grant recipients discretion and options to fashion grievance procedures within the bounds of the Proposed Rule, then the removal of such optionality may constitute a conflict, even as the state-mandated procedures fall well within the Proposed Rule's realm of acceptability. A failure to address this issue would represent an arbitrary and capricious exercise of administrative authority, as it would effectively leave an amorphous standard open to varying judicial interpretations and potential for splits among the circuit courts of appeals.

Moreover, the Proposed Rule's language that non-conflicting state law provide "greater protections against sex discrimination" in order to survive preemption is likewise ambiguous and unclear. What, exactly, does this phrase mean? The preface does not expressly define, enumerate, or exemplify such greater protections, which will also likely contribute to nationwide litigation with potentially inconsistent results. It is uncertain whether such protections could encompass greater state-based due process guarantees for the accused.

For example, a state law that requires live hearings and cross-examination may provide "greater protections against sex discrimination" on the grounds that they are necessary to protect respondents, who are overwhelmingly male, from biases and presuppositions during sex-based harassment investigations.[66] These laws may be especially important to protect black male respondents from the risk of unfairness and prejudice. As Harvard Law School professor Janet Halley writes of her institution's Title IX office, it "has no mandate to ensure racial equality," but that "has not been thought important enough to

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[65] *Id.* at 41405.

[66] For example, according to UCLA's Public Accountability Reports, 83 percent of respondents in Title IX investigations were male between July 2016 and June 2017. Jerry Kang, UCLA PUBLIC ACCOUNTABILITY REPORT 7 (2017), https://ucla.app.box.com/s/w9dohh0jgfqc389z81c3wru1lfy5hwz8. Between June 2017 and June 2018, 89 percent of respondents were male. Jerry Kang, UCLA PUBLIC ACCOUNTABILITY REPORT 7 (2018), https://ucla.app.box.com/v/public-accountability-report-4.

monitor for racial bias."[67] Incidentally, this problem is so significant that Halley proposes "to reduce the Title IX Office to a compliance-monitoring role, and get it out of the business of adjudicating cases."[68]

This is not an academic exercise, as several states have already passed legislation that enshrines greater due process protections in university investigations than would be necessarily afforded under the Proposed Rule. Kentucky's recently passed HB 290, or the Kentucky Campus Due Process Protection Act, requires that state institutions of higher education provide, among other things: (1) the right to cross-examine adverse parties and witnesses; (2) reasonable, continuous access to the administrative file and evidence in the recipient's possession; and (3) an impartial hearing panel, as well as a ban on the single investigator model.[69] Still more difficult questions will arise under state laws worded in more general or abstract language. Article 129-B, Section 6443 of the New York Education Law, for example, named the "Students' Bill of Rights" ensures that students can make a "decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution."[70] Court challenges will likely arise as to whether these and similar laws conflict with the Proposed Rule, if enacted.

Finally, it is critical to consider the role of federalism in protecting individual rights. In general, states may provide more robust protections than are available under federal law. If the Proposed Rule were read in such a way as to conflict with laws like Kentucky's that mandate more rigorous process—and therefore invalidate such laws—this would turn federalism on its head. The Proposed Rule's provisions would serve more as a ceiling than a floor for the rights of accused students, despite the rule's superficial allowance for the protections these state laws seek to guarantee.

For these reasons and others, failing to address the above questions and concerns would represent an arbitrary and capricious agency action.[71] The definitions of "conflict" and "greater protections against sex discrimination" are subject to numerous interpretations so as to make these terms unreasonable in application.

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[67] Janet Halley, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. 103, 107–08 (2015), https://harvardlawreview.org/wp-content/uploads/2015/02/vol128_Halley_REVISED_2.17.pdf.
[68] *Id.* at 108.
[69] Kentucky Campus Due Process Protection Act, HB 290 (2022), https://apps.legislature.ky.gov/law/acts/22RS/documents/0159.pdf.
[70] N.Y. Educ. L. § 6443 (2022), https://www.nysenate.gov/legislation/laws/EDN/6443.
[71] *See, e.g.*, Motor Vehicles Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Ass'n, 463 U.S. 29, 43 (1983) ("Normally, an agency rule would be arbitrary and capricious if the agency has relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."); Loan Syndications v. SEC, 223 F. Supp.3d 37, 63 (D.D.C. 2016) ("Indeed, failure to address issues raised in comments may require a finding that the agencies acted in violation of the APA . . . .").

IX. Presumption of Non-Responsibility

Section 106.45(b)(3) of the Proposed Rule largely maintains the 2020 Rule's presumption of non-responsibility for the alleged conduct until a determination is made at the conclusion of the grievance procedure.[72] This is a salutary and critical preservation of a rule necessary to ensure fair proceedings. It conforms to a foundational principle of justice in the Anglo-American legal tradition,[73] with roots that extend throughout the Western tradition to Roman law.[74] Indeed, this principle is best understood as a fundamental precept of natural law, owed to every human being by virtue of inherent dignity, a rule of procedure that cannot be denied by any system of justice.[75]

In light of the aforementioned incentives that recipients and Title IX Coordinators have to demonstrate compliance and thereby retain federal funding, a presumption of non-responsibility, though alone insufficient, helps assure that respondents will be assessed based on the truth of the assertions levied against them. To eliminate such a presumption would render respondents vulnerable to severe consequences—suspension, expulsion, and social opprobrium—on baseless or unsubstantial grounds.

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In its 50-year history, Title IX has witnessed a dramatic expansion of the ability for women and girls to participate in educational programs and activities supported by federal funding. This occurred without the extensive investigatory and regulatory activity contemplated by the Proposed Rule. The issue of sexual harassment on college and university campuses is no doubt a vital issue, but the 2020 Rule addresses it in a considered and balanced way. In making its final rule, the Department should bear in mind the risks of overcorrection and the precedent it would set of overhauling Title IX every time a different political party occupies the White House.

Very truly yours,

John Ketcham

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[72] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. at 41488.

[73] 4 WILLIAM BLACKSTONE, COMMENTARIES *352 (announcing the canonical proposition that it is, "[B]etter that ten guilty persons escape, than that one innocent suffer").

[74] DIG. 22.3.2. (stating the principle of *Ei incumbit probatio qui dicit, non qui negat*, or "The burden of proof rests upon he who asserts, not he who denies.").

[75] *See, e.g.*, Joseph C. Cascarelli, *Presumption of Innocence and Natural Law: Machiavelli and Aquinas*, AM. J. OF JURIS. 229, 229–32 (1996).