

Comment of the Foundation for Individual Rights and Expression in
Opposition to the
Department of Education’s Proposed Regulations on Title IX Enforcement

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

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Introduction

The Foundation for Individual Rights and Expression (FIRE)¹ writes to offer our analysis of the Department of Education’s proposed Title IX regulations. FIRE has been a leading advocate for student and faculty rights at institutions of higher education since our founding in 1999.

Two of the core constitutional rights that FIRE defends are free speech and due process.² There is no doubt that universities are both morally and legally

¹ Formerly known as the Foundation for Individual Rights in Education, FIRE recently changed its name to reflect its expanded mission of protecting free expression beyond colleges and universities. Because colleges and universities play a vital role in preserving free thought within a free society, FIRE continues to place a special emphasis on defending the individual rights of students and faculty members on our nation’s campuses, including freedom of speech, freedom of association, due process, legal equality, religious liberty, and sanctity of conscience.

² Title IX policy also has profound implications for academic freedom. The provisions in the proposed regulations that adversely affect free speech and due process also threaten academic

obligated to respond to known instances of sex-based discrimination in a manner reasonably calculated to prevent its recurrence. There is also no doubt that public universities are bound by the Constitution to abide by the First Amendment³ and provide meaningful due process to accused students and faculty.⁴ Therefore, FIRE has consistently fought overzealous enforcement of Title IX that violated student and faculty rights.⁵

FIRE has long held the view that institutions can effectively combat sex-based discrimination without infringing on student and faculty expressive and procedural rights, and that the Department of Education’s policies and regulations must alleviate—rather than exacerbate—potential tensions between those goals.

As President Biden has recognized, access to higher education is critical for Americans. Indeed, in a speech as Vice President in 2012, now-President Biden declared “[i]t is very important for our national interest to get every qualified person into college.”⁶ He continued, “The single most important thing for our nation is to have the best-educated population possible.”⁷ The repercussions of being expelled from an institution of higher education can have profound lifelong consequences, foreclosing professional opportunities and ending careers before they have begun. The stakes are therefore extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student’s ability to receive an education is curtailed unjustly.

freedom to the extent that they apply to cases where the respondent is faculty member. Accordingly, our criticisms of those provisions should be read broadly to also apply in the context of faculty rights.

³ *Healy v. James*, 408 U.S. 169, 180 (1972).

⁴ See, e.g., *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 633 (6th Cir. 2005); *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961) *abrogation on other grounds recognized by* *Walsh v. Hodge*, 975 F.3d 475 (5th Cir. 2020).

⁵ Harvey Silverglate, Letter to the Editor, *Specialized Assault Board Idea ‘Myopic,’* HARVARD CRIMSON, (Sept. 20, 2002), <https://www.thecrimson.com/article/2002/9/20/specialized-assault-board-idea-myopic-to> [<https://perma.cc/N7FB-QVBK>].

⁶ *Biden discusses access and affordability in higher education during FSU visit*, FLA. STATE UNIV. NEWS (Feb. 6, 2022, 3:35AM), <https://news.fsu.edu/news/university-news/2012/02/06/biden-discusses-access-and-affordability-in-higher-education-during-fsu-visit> [<https://perma.cc/MXG2-M8ZF>].

⁷ *Id.*

The Department’s regulations must protect the rights of complainants and the accused alike. Every complainant has the legal right to have their complaints handled properly from beginning to end, and every accused party is legally entitled to procedures that deliver on the promise of fundamental fairness. It is against this principle of fairness to all that the Department of Education’s policies and regulations must ultimately be measured—and it is by this measure that the current regulations shine and the proposed regulations, in many ways, fall short.

Executive Summary

The Department’s proposed regulations are an improvement over guidance documents issued from April 4, 2011, through September 22, 2017, but represent a significant step backwards from the current Title IX regulations finalized on August 6, 2020.

While the proposed regulations maintain some important provisions from the 2020 regulations and make some modest improvements at the margins, many aspects of the proposed regulations threaten to significantly roll back essential free speech and due process protections central to the current regulations.⁸ These changes are accordingly unconstitutional. The proposed regulations are also subject to invalidation under the Administrative Procedures Act (APA), which does not tolerate regulations that are insufficiently justified, contrary to a constitutional right, or otherwise not in accordance with law.

Aspects of the proposed regulations which undermine or violate student and faculty constitutional rights and are subject to invalidation pursuant to the APA, include, but are not limited to, the following:

- Abandoning the definition of student-on-student harassment required by the current regulations. That the definition closely tracks the definition announced by the U.S. Supreme Court’s ruling in *Davis v. Monroe County Board of Education*. The current regulations track the *Davis* definition to ensure that efforts to address sexual harassment do not result in violations of constitutionally guaranteed free speech rights.

⁸ Throughout the comment the regulations currently in effect will be referred to as “the 2020 regulations” or “the current regulations” while the pending regulations subject to this comment shall be referred to as “the proposed regulations,” the “the 2022 proposed regulation,” “the proposal,” the “newly proposed regulations,” or the “notice of proposed rulemaking (NPRM).”

- Requiring institutions to police all sexual speech of all students from the date of their matriculation until they have graduated. Two factors combine to make this so. First, as noted above, the proposal would abandon the Supreme Court’s definition of student-on-student harassment for a less stringent definition. Second, in direct conflict with Title IX, it would extend the Department of Education’s authority to require institutions to take action on complaints that occur anywhere in the world at any time—even in contexts over which the institution has no control over the alleged harassment and no way to competently investigate the accusations.
- Requiring institutions to issue gag orders on the parties and their advocates that prevent them from disclosing “information and evidence obtained solely through the sex-based harassment grievance procedures.”
- Revoking the current regulatory requirement that accused students must be offered an opportunity to have a live hearing to contest the allegations against them.
- Eliminating the right to a live hearing to contest claims, and thus also eliminating the right to cross-examination.
- Allowing a single investigator to investigate and adjudicate complaints, dramatically increasing the odds that one person’s bias, subconscious or otherwise, permeates the process. Such a system increases the likelihood of error and the likelihood that accused students will be unfairly deprived of their access to educational opportunities or benefits.

No federal regulation may require or authorize institutions of higher education to violate the constitutional rights of students or faculty.⁹ Nor may federal regulations demand or permit private institutions of higher education to ignore binding legal precedent.

Provisions in the proposed regulations that are in conflict with judicial authority must be changed to avoid setting institutions of higher education on an unwinnable collision course with the judiciary. As over 200 rulings favorable to respondents since 2011 demonstrate, the judiciary has grown increasingly

⁹ See, e.g., *Quincy Cable TV, Inc. v. FCC*, 768 F.2d 1434, 1438 (D.C. Cir. 1985) (holding federal agency rules “fundamentally at odds with the First Amendment . . . can no longer be permitted to stand”); see also *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575–76 (1988) (observing that courts will “not lightly assume that Congress intended to infringe constitutionally protected liberties or usurp power constitutionally forbidden it.”).

impatient with the cavalier manner with which educational institutions are disregarding the rights of accused parties when it is politically convenient to do so.¹⁰

FIRE also questions the wisdom, necessity, and justification for replacing the 2020 Title IX regulations, which have been in effect for less than 2 years. For much of that time, many students were absent from campus due to COVID-19. Given the short and unusual tenure of the current regulations, it is impossible to believe that the Department has already amassed sufficient data to demonstrate a need for this comprehensive overhaul. Institutions operating under the framework required by the current regulations have not proven incapable of meeting the needs of complainants or of accused students. The proverbial sky has not fallen as critics of the regulations hyperbolically predicted.¹¹ Indeed, when the current regulations were issued, they were largely praised for their balance by feminist legal scholars including Harvard Law professors Jeannie Suk Gersen¹² and Janet Halley¹³, as well as Lara Bazelon, the director of the University of San Francisco Law School's Criminal Juvenile Justice and Racial Justice Clinical Programs.¹⁴ The editorial boards of

¹⁰ See KC Johnson, *The Biggest Enemy of Campus Due Process from the Obama Years Is Back*, NATIONAL REVIEW (June 1, 2021), <https://www.nationalreview.com/2021/06/the-biggest-enemy-of-campus-due-process-from-the-obama-years-is-back/> [<https://perma.cc/E38Q-SP7X>] (“While courts typically defer to colleges and universities in academic-discipline cases, there have been 200 decisions favorable to students accused under Title IX since the Obama administration’s policy change. Federal appeals courts covering 29 states from Vermont to Alaska have issued rulings making it easier for wrongly accused students to sue their universities for gender discrimination.”).

¹¹ See, e.g., Nicole Bedera, *Trump’s New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That’s the Point*, TIME (May 14, 2020), <https://time.com/5836774/trump-new-title-ix-rules> [<https://perma.cc/DW7U-CAJ2>].

¹² Jeannie Suk Gersen, *How Concerning are the Trump Administration’s New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations> [<https://perma.cc/EY3X-9BCH>].

¹³ Michael Powell, *Trump Overhaul of Campus Sex Assault Rules Wins Surprising Support*, N.Y. TIMES (June 25, 2020), <https://www.nytimes.com/2020/06/25/us/college-sex-assault-rules.html> [<https://perma.cc/92SX-WAGF>].

¹⁴ Lara Bazelon, *Opinion, I’m a Democrat and a Feminist. And I Support Betsy DeVos’s Title IX Reforms.*, N.Y. TIMES (Dec. 4, 2018), <https://www.nytimes.com/2018/12/04/opinion/-title-ix-devos-democrat-feminist.html> [<https://perma.cc/P6CC-G3PS>].

*The Los Angeles Times*¹⁵ and *The Washington Post*¹⁶ similarly lauded the 2020 regulations for the thoughtful way they rectified injustices caused by prior policies promulgated by the Department of Education’s Office for Civil Rights (OCR).

If implemented, the shift away from the Supreme Court’s standard defining student-on-student harassment, coupled with the numerous ways that the proposed regulations allow institutions to eliminate due process protections that the current regulations require, will lead to yet another spike in expensive-to-defend Title IX litigation—most of which would be avoided if schools were instead required to comply with the current regulations’ protections for free speech and due process.

The Department should let the current regulations take root—or, at the very least, make only modest changes, with a focus on defending rather than violating student and faculty free speech and due process rights.

Analysis

As drafted, the proposed 2022 regulations offer many amendments to the 2020 regulations that significantly threaten the free speech and due process rights of students and faculty at institutions of higher education, while keeping some important aspects of the current regulations and offering modest improvements to a few existing provisions.

FIRE compared the current Title IX regulations with the proposed regulations and found that the substantial majority of the proposed revisions are entirely incompatible with free speech and due process. However, there are similarities between the proposed regulations and those in effect today that FIRE supports because of their importance to preserving due process protections. With respect to some of those provisions, we have identified ways the language can be modified to better protect free speech and due process rights.

¹⁵ Editorial, *Betsy DeVos hits the reset button on campus sexual harassment rules*, L.A. TIMES (May 8, 2020), <https://www.latimes.com/opinion/story/2020-05-08/betsy-devos-trump-title-ix> [<https://perma.cc/2EXF-SVQ3>].

¹⁶ Editorial, *What Betsy DeVos’s new Title IX changes get right — and wrong*, WASH. POST (Dec. 14, 2018), https://www.washingtonpost.com/opinions/what-betsy-devos-new-title-ix-changes-get-right--and-wrong/2018/12/14/a8d485e2-fee8-11e8-ad40-cdfd0e0dd65a_story.html [<https://perma.cc/3ENV-CKET>].

This comment will address key provisions in the order they are presented in the proposal itself, except in a few instances where multiple non-consecutive provisions directly implicate the same rights. For example, multiple sections indicate when institutions must send notices to parties and describe what the notices must contain. For the Department’s convenience, in those instances, this comment will combine the discussion of each section that is relevant to the topic under a single heading.

Overarching Freedom of Speech Concerns

It has been five decades since the U.S. Supreme Court ruled that the First Amendment applies in full force at America’s public colleges and universities. In *Healy v. James*, the Supreme Court held that “the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.”¹⁷ In so holding, the Court rejected the idea 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.”¹⁸ Further, these protections apply even to highly offensive speech on campus: “[T]he mere dissemination of ideas — no matter how offensive to good taste — on a state university campus may not be shut off in the name alone of ‘conventions of decency.’”¹⁹

In recognition of the importance of First Amendment protections for students and faculty, OCR stated in 2003:

OCR has consistently maintained that schools in regulating the conduct of students and faculty to prevent or redress discrimination must formulate, interpret, and apply their rules in a manner that respects the legal rights of students and faculty, including those court precedents interpreting the concept of free speech. OCR’s regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected

¹⁷ 408 U.S. 169, 180 (1972); *see also* *Rust v. Sullivan*, 500 U.S. 173, 200 (1991) (“[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government’s ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.”); *Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) (“With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities.”).

¹⁸ *Healy*, 408 U.S. at 180.

¹⁹ *Papish v. Bd. of Curators of the Univ. of Mo.*, 410 U.S. 667, 670 (1973).

under the First Amendment. . . . OCR interprets its regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles.²⁰

Despite the 2003 statement’s commitment to the contrary, the current proposal prescribes “speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment.”²¹ The root of the problem stems from how the proposed regulations define “hostile environment harassment” because the definition does not comply with the standard set forth by the Supreme Court.

The Significant Due Process Problems

In a concurring opinion published four days before the Department released the unofficial draft of the proposed regulations, Judge José Cabranes of the United States Court of Appeals for the Second Circuit issued a stern warning about the lack of due process that has become synonymous with how colleges and universities adjudicate Title IX complaints prior to the 2020 regulations. The concurrence captures a growing recognition by courts that in the decade or so since the issuance of the April 4, 2011 Dear Colleague Letter, campus sexual misconduct proceedings were overwhelmingly so devoid of basic due-process protections that they “compared unfavorably to those of the infamous English Star Chamber.”²² Judge Cabranes makes the point compellingly:

[T]his case describes deeply troubling aspects of contemporary university procedures to adjudicate complaints under Title IX and other closely related statutes. In many instances, these procedures signal a retreat from the foundational principle of due process, the erosion of which has been accompanied — to no one’s surprise — by a decline in modern universities’ protection of the open inquiry and academic freedom that has accounted for the vitality and success of American higher education.

²⁰ Gerald A. Reynolds, Assistant Sec’y for Civ. Rts., Off. for Civ. Rts., U.S. Dep’t of Educ., Dear Colleague Letter: First Amendment (July 28, 2003), <https://www2.ed.gov/about/offices/list/ocr/firstamend.html> [<https://perma.cc/VLA6-DT7M>].

²¹ *See id.*

²² *Vengalatorre v. Cornell Univ.*, 36 F.4th 87, 114–15 (2d Cir. 2022) (Cabranes, J., concurring) (citations omitted).

This growing “law” of university disciplinary procedures, often promulgated in response to the regulatory diktats of government, is controversial and thus far largely beyond the reach of the courts because of, among other things, the presumed absence of “state action” by so-called private universities. Thus insulated from review, it is no wonder that, in some cases, these procedures have been compared unfavorably to those of the infamous English Star Chamber.

[The] allegations, if supported by evidence, provide one such example of the brutish overreach of university administrators at the expense of due process and simple fairness. His allegations, if corroborated, would reveal a grotesque miscarriage of justice at Cornell University. As alleged, Cornell’s investigation ... denied him access to counsel; failed to provide him with a statement of the nature of the accusations against him; denied him the ability to question witnesses; drew adverse inferences from the absence of evidence; and failed to employ an appropriate burden of proof or standard of evidence. In other cases and other universities the catalogue of offenses can include continuing surveillance and the imposition of double jeopardy for long-ago grievances.

There is no doubt that allegations of misconduct on university campuses — sexual or otherwise — must, of course, be taken seriously; but any actions taken by university officials in response to such allegations must also comport with basic principles of fairness and due process. The day is surely coming — and none too soon — when the Supreme Court will be able to assess the various university procedures that undermine the freedom and fairness of the academy in favor of the politics of grievance. In sum: these threats to due process and academic freedom are matters of life and death for our great universities. It is incumbent upon their leaders to reverse the disturbing trend of indifference to these threats, or simple immobilization due to fear of internal constituencies of the “virtuous” determined to lunge for influence or settle scores against outspoken colleagues.²³

Judge Cabranes further notes:

²³ *Id.*

Elsewhere, I have criticized the “specialized inquisitorial procedures that universities have developed for sexual-misconduct cases.” José A. Cabranes, *For Freedom of Expression, for Due Process, and for Yale: The Emerging Threat to Academic Freedom at a Great University*, 35 Yale L. & Pol’y Rev. 345, 353 (2017). These procedures can deprive the accused of various rights, including the right to a public hearing or the complete record of a private hearing, the right to have counsel speak on the accused’s behalf, the right to friendly witnesses, the right to confront and cross-examine adverse witnesses, and the right to the presumption of innocence until proven guilty. *Id.* at 355; see also José A. Cabranes, *The New ‘Surveillance University,’* Washington Post (Jan. 11, 2017) (describing the adoption of university surveillance and reporting regimes which can be used as “tool[s] for policing the teaching and research of the professoriate”). Even short of formal discipline, such lack of due process may inflict reputation harm, particularly where rules of “confidentiality” make it effectively impossible for an accused to respond publicly to damaging pronouncements by managers of the university grievance system.²⁴

The Department’s tacit, and in some instances explicit, approval of policies that curtail tried and true methods of ensuring fair adjudication of complaints has contributed mightily to the problem—a fact that a growing number of courts are addressing. Indeed, multiple courts have explicitly cited the Department’s policies that undermine due process as a factor supporting an inference that institutions violated Title IX by running roughshod over the rights of accused students—an overwhelmingly male population—in order to avoid Departmental sanctions. For example, writing for the United States Court of Appeals for the Seventh Circuit, then-Judge Amy Coney Barrett explained:

The [April 4, 2011, Dear Colleague] letter and accompanying pressure gives John a story about why Purdue might have been motivated to discriminate against males accused of sexual assault.²⁵

Justice Barrett is not alone in her view that pressure from the Department of Education to limit due process rights might be contributing to a hostile environment for male students in violation of Title IX.²⁶ This trend of opinions

²⁴ *Id.* at 114 n.3 (Cabranes, J. concurring).

²⁵ *Doe v. Purdue*, 928 F.3d 652, 669 (7th Cir. 2019).

²⁶ See, e.g., *Doe v. Univ. of Denver*, 1 F.4th 822, 835–36 (10th Cir. 2021) (“Title IX plaintiffs challenging the outcome of a sexual-misconduct proceeding will rarely have direct evidence or

demonstrates that the Department must require schools to treat complainants and respondents fairly, or the policies themselves will violate Title IX. A Title IX regulation that incentivizes institutions to adopt policies that might violate Title IX is legally and morally wrong.

Moreover, any time an institution introduces a procedural defect into the grievance process, it introduces the potential for an erroneous outcome.²⁷ Even one procedure that violates due process can invalidate the outcome of a grievance process, which will in turn undermine the Department’s goals of eliminating sex discrimination and ensuring that sex discrimination is promptly and effectively redressed. Successful legal challenges against a defective grievance process will only correct the defective procedures themselves. Litigation over procedural deficiencies delays the just resolution of the underlying sex discrimination claim. In addition, rehashing the events of alleged sex discrimination both in the grievance process and in court does not ensure prompt and effective redress of the claims, but instead requires the parties to relive those events multiple times.

Proposing regulations that strip the accused of due process protections mirroring those required by numerous courts—less than two years after the

even strong circumstantial evidence sufficient to overcome a school’s ‘anti-respondent, not anti-male’ argument. But here John has marshaled enough evidence to satisfy his burden of showing that . . . the University’s explanations of its conduct were pretextual.”); *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940, 948 (9th Cir. 2020) (“[W]e consider first the allegations of background indicia of sex discrimination, namely, the pressure that the University faced concerning its handling of sexual misconduct complaints and gender-based decisionmaking against men in sexual misconduct disciplinary cases.”); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 209–10 (3d Cir. 2020) (siding with a plaintiff who alleged the university “limited procedural protections afforded to male students like [Doe] in sexual misconduct cases.”) (citation omitted); *Doe v. Baum*, 903 F.3d 575, 586 (6th Cir. 2018) (“When viewing this evidence in the light most favorable to Doe, as we must, one plausible explanation is that the Board discredited all males, including Doe, and credited all females, including Roe, because of gender bias.”); *Doe v. Miami Univ.*, 882 F.3d 579, 593 (6th Cir. 2018) (“Taken together, the statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University supports at the motion-to-dismiss stage a reasonable inference of gender discrimination.”).

²⁷ See, e.g., *Doe v. Regents of Univ. of Cal.*, 23 F.4th 930 (9th Cir. 2022); *Doe v. Tex. A&M Univ. – Kingsville*, No. 2:21-CV-00257 (S.D. Tex. Nov. 5, 2021); *Doe v. N.Y. Univ.*, No. 1:20-CV-01343-GHW, 2021 WL 1226384 (S.D.N.Y. Mar. 31, 2021); *Doe v. Coastal Carolina Univ.*, 522 F. Supp. 3d 173 (D.S.C. 2021); *Feibleman v. Trustees of Colum. Univ. in City of N.Y.*, No. 19-CV-4327 (VEC), 2020 WL 882429, at *1 (S.D.N.Y. Feb. 24, 2020); see also *Schwake v. Ariz. Bd. of Regents*, 967 F.3d 940 (9th Cir. 2020); *Doe v. Univ. of the Scis.*, 961 F.3d 203, 209 (3d Cir. 2020); *Doe v. Perdue Univ.*, 928 F.3d 652 (7th Cir. 2019); *Doe v. Wash. & Lee Univ.*, No. 6:19-CV-00023, 2021 WL 1520001 (W.D. Va. Apr. 17, 2021); *Doe v. Am. Univ.*, No. 19-CV-03097 (APM), 2020 WL 5593909 (D.D.C. Sept. 18, 2020).

adoption of the current regulations enacted to bring federal enforcement in line with judicial authority—is the very definition of arbitrary and capricious. Changes must be made to the proposed regulations to adequately protect the rights of accused parties and thus properly protect the rights of all as Title IX requires.

Section-by-Section Analysis

Proposed Section 106.2: Definitions

The proposed 2022 regulations define “programs and activities” so broadly that entities lacking any connection to education fall within the plain language of the terms. The terms “program or activity and program” are defined collectively as:

Program or activity and program means all of the operations of –

(1) (i) A department, agency, special purpose district, or other instrumentality of a State or local government; or

(ii) The entity of a State or local government that distributes such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2) (i) A college, university, or other postsecondary institution, or a public system of higher education; or

(ii) A local educational agency (as defined in 20 U.S.C. 8801), system of vocational education, or other school system;

(3) (i) An entire corporation, partnership, other private organization, or an entire sole proprietorship -

(A) If assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(B) Which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(ii) The entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) Any other entity that is established by two or more of the entities described in paragraph (1), (2), or (3) of this definition, any part of which is extended Federal financial assistance.

This proposed definition is overbroad in multiple ways. First, subsections 1(i)-(ii) have no nexus to education at all. Nor does subsection (4). Subsection (3) also doesn't require a nexus to education, given that subsections (3)(i)(A) and (3)(i)(B) are separated with the word "or." *The Department must address this problem because the regulations may lawfully govern only entities properly within the Department's authority to regulate. The Department should not revise the 2020 definition of "program or activity." Alternatively, it should use clearer language to ensure the terms are cabined to only include those activities and programs related to K-12 or postsecondary education and related activities.*

The proposed regulations define "hostile environment harassment" as follows:

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 that includes consideration of the following:

- (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (ii) The type, frequency, and duration of the conduct;
- (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
- (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
- (v) Other sex-based harassment in the recipient's education program or activity.

This definition does not match the one required by the Supreme Court.

In *Davis v. Monroe County Board of Education*, the only time the Supreme Court of the United States has addressed student-on student harassment, it established and limited institutional liability in Title IX lawsuits:

[F]unding recipients are properly held liable in damages only where they are deliberately indifferent to sexual harassment, of which they have actual knowledge, that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.²⁸

In contrast, the proposed definition would require institutions to police speech that is “sufficiently severe or pervasive” (emphasis added). Replacing the severe “and” pervasive prongs of *Davis* with severe “or” pervasive is a significant change that is not permitted under *Davis*. Indeed, the *Davis* opinion discussed the importance of requiring severity and pervasiveness over the course of three paragraphs:

Whether gender-oriented conduct rises to the level of actionable “harassment” thus “depends on a constellation of surrounding circumstances, expectations, and relationships,” *Oncala v. Sundowner Offshore Services, Inc.*, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved Indeed, at least early on, students are still learning how to interact appropriately with their peers. It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

The dissent fails to appreciate these very real limitations on a funding recipient’s liability under Title IX. It is not enough to show, as the dissent would read this opinion to provide, that a student has been “teased,” or “called . . . offensive names,” Nor do we contemplate, much less hold, that a mere “decline in grades is

²⁸ 526 U.S. 629, 651 (1999).

enough to survive” a motion to dismiss. . . . We trust that the dissent’s characterization of our opinion will not mislead courts to impose more sweeping liability than we read Title IX to require.

Moreover, the provision that the discrimination occur “under any education program or activity” suggests that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity. Although, in theory, a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the inevitability of student misconduct and the amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment. By limiting private damages actions to cases having a systemic effect on educational programs or activities, we reconcile the general principle that Title IX prohibits official indifference to known peer sexual harassment with the practical realities of responding to student behavior, realities that Congress could not have meant to be ignored.²⁹

In the past, the Department has claimed that using the severe “or” pervasive formulation is consistent with *Davis*.³⁰ But “or” and “and” are not functionally equivalent and using the disjunctive formulation is inconsistent with *Davis*. The difference alters what conduct is actionable harassment, and which speech is protected.

A recent case from Harvard University demonstrates the danger of defining harassment using the “severe or pervasive” formulation contemplated in the proposed rules. Harvard’s Office for Dispute Resolution found anthropology professor John Comaroff responsible for sexual harassment which it deemed “severe,” but not pervasive. Harvard sanctioned Comaroff by placing him on unpaid administrative leave and prohibiting him from teaching required courses or taking on any new graduate student advisees through the next academic year. Comaroff’s offense? He reasonably “warn[ed] Kilburn not to

²⁹ *Id.* at 651–53. (citations omitted).

³⁰ DEP’T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES v–vi (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/HKX6-XPLP>] (rescinded Aug. 26, 2020); see Dep’t of Educ., Off. for Civ. Rts., OCR Letter to Educators and Stakeholders (Aug. 26, 2020), <https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf> [<https://perma.cc/3EKP-CJFG>].

travel with her same-sex partner to Cameroon, where lesbians are frequently the target of rape.”³¹ Students must be told about these dangers so they can take appropriate measures to protect themselves. Had Harvard also been required to prove the conduct was pervasive, Professor Comaroff likely would have avoided sanction.

The Department must not adopt a definition of hostile environment harassment that uses the “sufficiently severe or pervasive” formulation or a similar variant, and must instead keep the current regulations’ “severe and pervasive” requirements established by the Supreme Court.

The proposed definition of hostile environment harassment is also insufficient because it does not require the speech or conduct in question to be targeted at the complainant on the basis of sex. In the commentary accompanying the proposed regulations, the Department explains this change as follows:

A hostile environment can occur even if the harassment is not targeted specifically at the individual complainant. For example, if a group of students or a teacher regularly directs sexual comments toward a student, a sex-based hostile environment may be created for others in the classroom.

The Department’s explanation for not requiring that conduct target the complainant on the basis of sex is arbitrary and capricious in violation of the

³¹ Aaron Sibarium, *This Harvard Professor Was Found Guilty in the Press. Court Records Tell a Different Story*, WASH. FREE BEACON (Aug. 19, 2022, 4:59 AM), <https://freebeacon.com/campus/this-harvard-professor-was-found-guilty-in-the-press-court-records-tell-a-different-story> [<https://perma.cc/9AYB-D9SR>].

Administrative Procedures Act.³² It also violates the APA because it is at odds with First Amendment jurisprudence.³³

Speech that is not directed at a complainant is especially likely to be protected under the First Amendment. In *Rodriguez v. Maricopa Community College District*, for example, the United States Court of Appeals for the Ninth Circuit held that a professor’s emails did not constitute unprotected expression, in part because the communications—while potentially deeply offensive to Hispanic faculty—were not targeted at the complainants.³⁴ *To comply with the First Amendment, the proposed definition of hostile environment must be revised to add the requirement that the conduct in question target the complainant on the basis of sex.*³⁵

³² The Supreme Court has made clear that it “requires final rules to ‘articulate a satisfactory explanation for [the] action including a rational connection between the facts found and the choice made.’” This in turn allows courts “to assess whether the agency has promulgated an arbitrary and capricious rule by ‘entirely fail[ing] to consider an important aspect of the problem [or] offer[ing] an explanation for its decision that runs counter to the evidence before [it].” *Little Sisters of the Poor Saints Peter & Paul Home v. Pennsylvania*, 140 S. Ct. 2367, 2383 (2020) (citing *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 43 (1983) (internal quotation marks omitted)). Courts will readily invalidate an administrative action, including a final rule when an agency’s requirements under the APA are not met. *See e.g., District of Columbia v. United States Dep’t of Agric.*, 496 F. Supp. 3d 213, 257 (D.D.C. 2020), appeal dismissed, No. 20-5371, 2021 WL 1439861 (D.C. Cir. Mar. 23, 2021) (vacating final rule that limited waivers of work requirements on which receipt of food assistance from Supplemental Nutrition Assistance Program could be conditioned); *Nat’l Women’s L. Ctr. v. Off. of Mgmt. & Budget*, 358 F. Supp. 3d 66 (D.D.C. 2019) (vacating Office of Management & Budget’s stay of pay data collection through employer information reports).

³³ The Department of Education is bound by the requirements set forth in the APA, which establishes a uniform set of standards for formal rulemaking and also defines the scope of judicial review. *See* 5 U.S.C. § 500 *et seq.* The APA instructs courts to invalidate an agency’s action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,” “contrary to constitutional right, power, or immunity,” “in excess of statutory jurisdiction, authority, or limitations, or short of statutory right,” or “without observance of procedure required by law.” 5 U.S.C. § 706(2)(A–D).

³⁴ 605 F.3d 703, 710 (9th Cir. 2010) (“Kehowski’s website and emails were pure speech; they were the effective equivalent of standing on a soap box in a campus quadrangle and speaking to all within earshot. Their offensive quality was based entirely on their meaning, and not on any conduct or implicit threat of conduct that they contained.”).

³⁵ 20 U.S.C. § 1681 (“No person in the United States shall, 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”); *see, e.g., Frazer v. Temple Univ.*, 25 F. Supp. 3d 598, 614 (E.D. Penn. 2014) (“To establish actual notice for purposes of a hostile education environment under Title IX, the prior action by Cerett must have been directed at Plaintiff or some other similar victim because of her sex.”).

The proposed regulations also instruct institutions to consider “(iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent.” This factor must be modified. *Davis* imposes liability upon institutions only for failing to address conduct where the “recipient exercises substantial control over both the harasser and the context in which the known harassment occurs.”³⁶ The Court could not have been clearer:

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX’s prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. **The statute’s plain language confines the scope of prohibited conduct based on the recipient’s degree of control over the harasser and the environment in which the harassment occurs.**³⁷

While the proposed regulations require institutions to consider the context in which the alleged harassment occurs, they do not make clear that Title IX only requires institutions to take action in cases where the alleged misconduct occurred in a context over which the institution exercises substantial control.

The Department must clarify that when it states that institutions must consider “[t]he location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent,” those factors are dispositive. To have authority pursuant to Title IX, an institution must always have control over the respondent and the context in which the alleged misconduct occurred. When the alleged misconduct occurs on its property in the United States, it is reasonable to presume an institution has control over the context. An Institution may also have control over the context of an allegation that occurs off its property—for example, when students are traveling for school-sponsored activities. Making this clarification is necessary to bring the language into compliance with Davis and the plain language of Title IX.

Another way the proposed definition is broader and thus covers more expression than *Davis* permits is, where it merely requires the speech to “den[y] or limit[] a person’s ability to participate in or benefit from the recipient’s education program or activity,” whereas the Supreme Court’s standard requires conduct to effectively deprive victims of equal access to the educational opportunities or benefits the school provides. Commenting on an

³⁶ *Davis*, 526 U.S. at 645 (emphasis added).

³⁷ *Id.* at 644 (emphases added).

October 2010 “Dear Colleague” letter that used a formulation similar to that which the Department of Education now proposes, the National Coalition Against Censorship noted that “[t]he term ‘interfere with’ is so open-ended as to include innocuous comments that are clearly protected speech, and makes the response of the hearer the critical issue, ignoring the requirement in *Davis* that the speech be ‘objectively offensive.’”³⁸ Indeed, the term “limits” is similarly so vague and open-ended that it ironically poses no limit at all on the speech that is prohibited.

Notably, the Department’s proposed language has already been severely criticized by the United States Court of Appeals for the Eleventh Circuit. In *Speech First v. Cartwright*, a First Amendment challenge was brought against a University of Central Florida anti-harassment policy which uses language substantially similar to that of the proposed regulation.³⁹ As set forth by the Eleventh Circuit:

The policy states that “[i]n evaluating whether a hostile environment exists, the university will consider the totality of known circumstances, including, but not limited to” the following factors:

- The frequency, nature and severity of the conduct;
- Whether the conduct was physically threatening;
- The effect of the conduct on the complainant’s mental or emotional state;
- Whether the conduct was directed at more than one person;
- Whether the conduct arose in the context of other discriminatory conduct or other misconduct;
- Whether the conduct unreasonably interfered with the complainant’s educational or work performance and/or university programs or activities; and
- Whether the conduct implicates concerns related to academic freedom or protected speech.⁴⁰

³⁸ COMMENTS BY THE NATIONAL COALITION AGAINST CENSORSHIP ON FEDERAL ENFORCEMENT OF CIVIL RIGHTS LAWS PROTECTING STUDENTS AGAINST BULLYING, VIOLENCE AND HARASSMENT TO THE UNITED STATES COMMISSION ON CIVIL RIGHTS (May 27, 2011), <http://www.eusccr.com/11.%20National%20Coalition%20Against%20Censorship.pdf> [<https://perma.cc/2RGL-RFML>].

³⁹ *Free Speech, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022).

⁴⁰ *Id.* at 1115. Arguably, the University of Central Florida’s policy proscribes slightly less speech than the policy proposed by the Department now. UCF’s policy requires the speech to “unreasonably interferes with, limits, deprives, or alters the terms or conditions of education

While the court only needed to rule on associational standing and preliminary injunction issues and not on the constitutional law claims directly, Judge Stanley Marcus offered a blistering critique of the policy in his concurrence:

I join fully in Judge Newsom’s opinion for this Court. The University of Central Florida’s discriminatory-harassment policy almost surely violates the First Amendment. It is grievously overbroad, and it is a content- and viewpoint-based restraint on free speech.

[...]

A discriminatory-harassment policy that assumes the most popular idea or the idea that least “interferes with, limits, deprives, or alters the terms or conditions of education” is the correct one is plainly at odds with the First Amendment and our notion of free speech.⁴¹

While Judge Marcus’s words are not yet binding law in the Eleventh Circuit, the Department of Education would be unwise to ignore his warning. If the Department departs from the *Davis* standard, that provision will fail a constitutional challenge.

The only way to ensure that the Department’s definition of “hostile environment harassment” can avoid invalidation on judicial review as being unconstitutional (not to mention arbitrary and capricious or contrary to a constitutional right in violation of the APA) is for the Department to use a definition that tracks all elements of the *Davis* standard precisely, including the requirement that the conduct in question “effectively denies a person equal access to the recipient’s education program or activity.”

For the sake of consistency, and to avoid confusion, section 106.45(h)(3) of the proposed regulations, which deals with remedies, should similarly be amended to avoid language about access to educational programs and activities being “limited.” In establishing a Title IX Coordinator’s responsibilities once the

(e.g., admission, academic standing, grades, assignment); employment (e.g., hiring, advancement, assignment); or participation in a university program or activity (e.g., campus housing), when viewed from both a subjective and objective perspective” whereas the Department’ proposal requires merely that the alleged conduct “limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”

⁴¹ *Id.* at 1129 (Marcus, J., concurring).

institution has concluded that sex discrimination occurred, the proposed section states:

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).

The paragraph should be fixed by simply eliminating the words "limited or."

The proposed regulations and accompanying explanations attempt to justify the Department's departures from the *Davis* standard by mistakenly characterizing it as applying only in the context of "private actions for monetary damages." But the court in *Davis* did much more than set a liability standard. The Court acknowledged this plainly when it stated:

Here, however, we are asked to do more than define the scope of the behavior that Title IX proscribes. We must determine whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages.⁴²

And that is not the only part of the opinion that emphasizes that the court also addressed the limits of what Title IX itself proscribes. In its discussion on the limits of Title IX's reach, the Court was explicit:

The language of Title IX itself—particularly when viewed in conjunction with the requirement that the recipient have notice of Title IX's prohibitions to be liable for damages—also cabins the range of misconduct that the statute proscribes. **The statute's plain language confines the scope of prohibited conduct . . .**⁴³

In other words, Justice Sandra Day O'Connor and the four justices joining her to form *Davis*'s majority—Justices John Paul Stevens, David Souter, Stephen Breyer, and Ruth Bader Ginsburg—understood that they were

⁴² *Davis*, 526 U.S. at 639.

⁴³ *Id.* at 644.

setting the liability standard and “defin[ing] the scope of the behavior that Title IX proscribes.”

The opinion offers further evidence that it was defining “student-on-student” harassment with students’ free speech rights in mind. As FIRE’s then-executive director explained:

Authored by Justice Anthony Kennedy, the dissent in *Davis* warned of “campus speech codes that, in the name of preventing a hostile educational environment, may infringe students’ First Amendment rights.” Kennedy noted that “a student’s claim that the school should remedy a sexually hostile environment will conflict with the alleged harasser’s claim that his speech, even if offensive, is protected by the First Amendment.” Kennedy also warned that “[t]he majority’s test for actionable harassment will, as a result, sweep in almost all of the more innocuous conduct it acknowledges as a ubiquitous part of school life.”

In response, Justice O’Connor’s majority opinion was very careful to “acknowledge that school administrators shoulder substantial burdens as a result of legal constraints on their disciplinary authority.” Addressing Kennedy’s concerns, O’Connor reassured the dissenting justices that it would be “entirely reasonable for a school to refrain from a form of disciplinary action that would expose it to constitutional or statutory claims.” The careful standard laid out in *Davis* was purposefully designed to impose what O’Connor characterized as “very real limitations” on liability, in part as recognition of the importance of protecting campus speech rights.⁴⁴

It is simply inconceivable that that the Supreme Court set an exacting standard for civil damages because that is necessary to avoid placing institutions under pressure to violate student rights, yet did not intend the same careful threshold to govern federal enforcement of Title IX. After all, if the threat of losing a lawsuit might incentivize campus administrators to overreact, certainly the looming threat of agency investigation and the possible loss of federal funding

⁴⁴ Robert Shibley, *Why the Supreme Court’s Davis standard is necessary to restore free speech to America’s college campuses: Part I*, FIRE (Oct. 14, 2019), <https://www.thefire.org/why-the-supreme-courts-davis-standard-is-necessary-to-restore-free-speech-to-americas-college-campus-part-i> [<https://perma.cc/M5JJ-UAZX>].

would put exponentially more pressure on administrators to punish student expression.

In the 23 years since *Davis* was decided, many courts have recognized that the decision draws the appropriate line between speech that is protected and actionable discriminatory conduct.

The *Davis* standard has repeatedly protected the First Amendment rights of students.⁴⁵ Courts have routinely struck down university anti-harassment policies as vague or overbroad when those policies failed to include the elements ultimately set forth in *Davis*.⁴⁶

Most recently, in May, a federal district court issued a preliminary injunction against enforcement of the University of Houston’s anti-discrimination policy, citing *Davis* in holding that the plaintiffs “will likely succeed on the merits because the [] policy does not comport with the standard adopted by the Supreme Court.”⁴⁷ That decision came on the heels of the United States Court

⁴⁵ See, e.g., *Nungesser v. Colum. Univ.*, 244 F. Supp. 3d 345, 366–67 (S.D.N.Y. 2017) (holding student accused of rape could not invoke Title IX to “censor the use of the terms ‘rapist’ and ‘rape’” by the alleged victim of the crime on the grounds that the accusation bred an environment of pervasive and severe sexual harassment for the accused student); *B.H. ex rel. Hawk v. Easton Area Sch. Dist.*, 725 F.3d 293 (3d Cir. 2013) (holding school district could not invoke Title IX to prohibit students from wearing “I <3 boobies” bracelets intended to increase breast cancer awareness); cf. *Felber v. Yudof*, 851 F. Supp. 2d 1182, 1188 (N.D. Cal. 2011) (dismissing Title VI claim because other students’ criticisms of Israel and support for Hamas and Hezbollah in school plaza is pure political speech and expressive conduct that does not suffice to create a hostile environment).

⁴⁶ *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court’s invalidation of university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down former sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question “objectively” created a hostile environment, it provided “no shelter for core protected speech”); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents, N. Ky. Univ.*, No. 96-135, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stan. Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring “harassment by personal vilification” policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

⁴⁷ See *Speech First, Inc. v. Khaton*, No. H-22-582, 2022 WL 1638773 at 2* (S.D. Tex. May 20, 2022).

of Appeals for the Fifth Circuit’s 2020 opinion in *Speech First v. Fenves*, where the court cited *Davis* as grounds for vacating a district court order mooting a challenge to an allegedly overbroad anti-harassment policy and Bias Response Team:

Whether *Davis* may constitutionally support purely verbal harassment claims, much less speech-related proscriptions outside Title IX protected categories[,] has not been decided by the Supreme Court or this court and seems self-evidently dubious.⁴⁸

The *Davis* standard is not just the constitutionally required standard, it also effectively protects the rights of victims of discriminatory student-on-student harassment. Over the years, plaintiffs have successfully used the *Davis* standard to hold institutions accountable for their deliberate indifference to student-on-student harassment.⁴⁹

Moreover, OCR historically has also explicitly rejected the idea that a different standard for harassment applies when a court determines liability in lawsuits against schools as compared to when it determines a school has violated Title

⁴⁸ 979 F.3d 319, 337 n. 16 (5th Cir. 2020).

⁴⁹ See, e.g., *Niesen v. Iowa St. Univ.*, No. 4:17-cv-201-RAW, 2017 U.S. Dist. LEXIS 221061 (S.D. Iowa Nov. 3, 2017) (denying motion to dismiss student’s Title IX claim for retaliation that she experienced after reporting an alleged sexual assault because the university did not respond to her complaints about the retaliation); *S.K. v. N. Allegheny Sch. Dist.*, 168 F. Supp. 3d 786, 797–98 (W.D. Pa. 2016) (holding plaintiff adequately pleaded Title IX claim where bullying of plaintiff had grown to the point where it “was its own sport” and principal never punished the harassers); *T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 365 (S.D.N.Y. 2014) (denying school district’s motion for summary judgment on students’ Title VI claim for anti-Semitic harassment in part because a reasonable jury could find that a “handful of assemblies . . . could not have plausibly changed the anti-Semitic sentiments of the student harassers”).

Interestingly, in its comment criticizing the current regulation’s departure from the 2011 Dear Colleague Letter, the Victim Rights Law Center argued that the letter’s policies were necessary because, in their eight years of advocacy before it was issued, “VRLC attorneys practiced in an arena characterized by untrained adjudicators, unreliable and variable standards, and unaddressed complaints of sexual assault and rape.” To support this contention, VRLC included a footnote (n.2) with a lengthy string cite of cases. In every one of those cases, however, the court cited the *Davis* decision to allow a student’s lawsuit alleging that the institution had been deliberately indifferent to unlawful discriminatory harassment to proceed. These cases further demonstrate that the *Davis* standard is effective in holding institutions accountable under Title IX. See VICTIM RIGHTS LAW CENTER, PUBLIC COMMENT BY THE VICTIM RIGHTS LAW CENTER ON THE DEPARTMENT OF EDUCATION’S PROPOSED REGULATIONS REGARDING TITLE IX OF THE EDUCATION AMENDMENTS OF 1972 (Jan. 14, 2019), <https://victimrights.org/wp-content/uploads/2021/06/Comment--Finalized-for-Distribution--1.14.19.pdf> [https://perma.cc/AFN3-M4FJ].

IX for its own enforcement purposes. The Department’s 2001 Revised Sexual Harassment Guidance explained: “[S]chools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action. A multiplicity of definitions would not serve this purpose.”⁵⁰

Multiple cases cite *Davis* to strike down overbroad anti-harassment policies, protect students’ free speech rights, and hold institutions accountable when they are deliberately indifferent to unlawful, discriminatory student-on-student harassment. These cases demonstrate that the lines set in the case work properly to protect the rights of all. The case does not set an impossibly high standard that allows harassing behavior to run amok on campuses.

Given the *Davis* standard’s effectiveness and the Department’s declarations that “schools benefit from consistency and simplicity in understanding what is sexual harassment for which the school must take responsive action” and that a “multiplicity of definitions would not serve this purpose,” the Department cannot adequately justify the proposal to abandon *Davis* for a less speech-protective standard. Forcing institutions to consider a multiplicity of definitions—particularly the overbroad definition contemplated by the proposed regulations—will foreseeably lead to confusion that will result in violations of students’ free speech rights.⁵¹ *Accordingly, in addition to being unconstitutional, and thus in violation of the APA, supplanting the Davis standard is also arbitrary and capricious. To avoid this problem, the current regulations’ definition should remain unchanged.*⁵²

⁵⁰ DEP’T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES vi (Jan. 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/HKX6-XPLP>] (rescinded Aug. 26, 2020); see Dep’t of Educ., Off. for Civ. Rts., OCR Letter to Educators and Stakeholders (Aug. 26, 2020), <https://www2.ed.gov/policy/gen/guid/fr-200826-letter.pdf> [<https://perma.cc/3EKP-CJFG>].

⁵¹ Because the proposed regulations use a definition of hostile environment harassment that is broader than what *Davis* requires, section 106.6(d)(1)(ii)’s directive that schools must train all employees on “[t]he scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment” will lead to confusion. Employees must not be trained to presume they can proscribe more speech than is permitted to under the First Amendment.

⁵² Another way a definition *could* violate *Davis* is by incorporating examples of speech it explicitly proscribes as creating a *de facto* hostile environment. For example, if the regulations were to be amended to say that misgendering someone through improper pronoun use or the utterance of a particular slur, in and of itself—even in a single instance—were automatically sufficient to create a hostile environment, such a position would contradict *Davis*. This is true even though both examples might be part of a pattern and practice that in its totality meets all the prongs of *Davis*. The final regulations must avoid this problem by avoiding listing examples

Proposed Sections 106.2 and 106.71: Retaliation

The current regulations prohibit institutions from taking adverse action against individuals “for the purpose of interfering with any right or privilege secured by Title IX . . .” Proposed section 106.2 would define retaliation as “intimidation, threats, coercion, or discrimination against any person by the recipient or by a specific individual affiliated with the recipient, including a student, an employee, or a person who provides aid, benefit, or service on behalf of the recipient.” In proposed section 106.71, the department seeks to require institutions to prohibit peer retaliation against complainants or other participants in a Title IX proceeding.

If the Department continues to maintain that it has the authority under Title IX to prohibit peer retaliation,⁵³ it must clarify precisely what is and is not prohibited. As it stands, peer “coercion” or “discrimination” must be carefully defined, else the provision is ripe for abuse. Without further guidance, it’s entirely foreseeable that recipients will declare that mere criticism against, or ostracism of, an individual filing a claim or participating in a Title IX procedure is coercive or discriminatory.

For example, suppose the president of a student organization is accused by another member of that student organization of sexual misconduct, and formal

of speech that automatically create a discriminatory hostile environment. While setting the right definition of hostile environment harassment is necessary to protect freedom of speech, it is not in itself sufficient. To do so, the final regulations must also keep the deliberate indifference standard and actual knowledge requirement as set forth in the current regulations and required by *Davis*. Doing so is important because in cases concerning student-on-student or faculty on student harassment, the adequacy of the institution’s response to situations regarding which it has actual knowledge must ultimately determine whether it must suffer consequences. If the regulations were to impose strict liability for the fact that harassment had occurred in the first place, or if the actual knowledge requirement was omitted, institutions would be under tremendous pressure to unconstitutionally crack down on protected activity *before* it crossed any constitutional lines.

⁵³ See *Niesen v. Iowa St. Univ.*, No. 4:17-cv-201-RAW, 2017 U.S. Dist. LEXIS 221061 (S.D. Iowa Nov. 3, 2017); *Doe v. Univ. of Tenn.*, 186 F.Supp.3d 788 (M.D. Tenn. 2016); *Feminist Majority Found. v. Hurley*, 911 F.3d 674 (4th Cir. 2018). *But see also Feminist Majority Found.* 911 F.3d at 720 (Agee, J. concurring) (criticizing majority’s rationale for upholding a peer retaliation claim as “goal-oriented analysis,” noting the court “lack[ed] binding authority or even persuasive circuit-court authority to support the viability of such a claim,” and observing the majority “instead cite[d] a district court decision to hold that a plaintiff can pursue a retaliation claim based on a funding recipient’s deliberate indifference to peer retaliation”),

grievance procedures ensue. Suppose further that many members of the group have personal knowledge contradicting the complainant's account, find the complainant untrustworthy, and systematically exclude the complainant from group activities: They remove the complainant from group messages and decline to tell the complainant of group meetings or events. That exclusion may be uncomfortable for the complainant, and limit the complainant's access to activities falling under the purview of an institution, but such exclusion is protected by the right to freedom of association.⁵⁴ Put simply, neither the Department nor funding recipients can force students to be friendly with one another.

In *Brooks v. City of San Mateo*, the United States Court of Appeals for the Ninth Circuit declined to find that peer ostracism, even in the employment context, constitutes retaliation. This rationale, in a case that arose under Title VII, highlights the limitation on the government's power to force individuals to associate with one another, and is thus, especially instructive in the present context:

Because an employer cannot force employees to socialize with one another, ostracism suffered at the hands of coworkers cannot constitute an adverse employment action. *See Strother*, 79 F.3d at 869 (“[M]ere ostracism in the workplace is not enough to show an adverse employment decision.”) (citing *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal.App.3d 590, 615, 262 Cal.Rptr. 842 (Cal.Ct.App. 1989)). Indeed, holding an employer liable because its employees refuse to associate with each other might well be unconstitutional: “The First Amendment prevents the government, except in the most compelling circumstances, from wielding its power to interfere with its employees’ freedom to believe and associate.” *DiRuzza v. County of Tehama*, 206 F.3d 1304, 1308 (9th Cir. 2000) (quoting *Rutan v. Republican Party of Ill.*, 497 U.S. 62, 76, 110 S.Ct. 2729, 111 L.Ed.2d 52 (1990)).⁵⁵

If this is true in the employment context, it is even more obviously true in the context of college students. Vague prohibitions on “coercion” and “discrimination” in peer retaliation cases will inevitably lead institutions to violate their students’ First Amendment rights to freedom of speech and

⁵⁴ *See, e.g., Janus v. Am. Fed’n of State, Cty., & Mun. Emps., Council 31*, 138 S. Ct. 2448, 2463 (2018) (“The right to eschew association for expressive purposes is likewise protected.”).

⁵⁵ 229 F.3d 917, 929 (9th Cir. 2000).

freedom of association, leading to absurd results. *The Department must clarify the language. The Department should also expressly state that non-frivolous cross-complaints do not constitute peer retaliation.*

Section 106.6(b): The Effect of State, Local, or Other Requirements

In addition to Department of Education regulations on Title IX, institutions must be mindful of other sources of law that may govern their legal obligations or limit their ability to take certain actions. When different sources of law contradict each other, it can be difficult for institutions to determine which authority to follow. Section 106.6(b) seeks to address this concern. It states:

(b) Effect of State or local law or other requirements. 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.

FIRE generally agrees with the position expressed in section 106.6(b) that where other sources of law provide broader protections against sex discrimination that do not contradict the final regulations or violate other constitutional rights, those authorities must also be followed. However, this general rule has important exceptions that the 2022 regulations should articulate.

First, the proposal should clarify that constitutional considerations always take precedence over regulatory and statutory considerations when there is a conflict. Second, the regulations should be amended to clarify that states and other authorities may also provide greater free speech and due process protections. We propose section 106.6(b) be revised to read (proposed changes in bold):

(b) Effect of State or local law or other requirements. The obligation to comply with this part is not obviated or alleviated by any State or local law or other requirement, **unless compliance with a particular provision would violate a constitutional right or federal law. Should any provisions in this part be deemed unlawful, recipients are relieved only of their obligations under those provisions pursuant to the severability clauses herein.** Nothing in this part would preempt a State or local law that does not conflict with this part and that provides greater **free speech or due process protections, or greater** protections against sex discrimination.

Alternatively, the Department could simply delete the phrase, “and that provides greater protections against sex discrimination” from section 106.6(b), so it would instead read:

(b) Effect of State or local law or other requirements. 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.

If the Department truly believes that Title IX policy must be equitable, and thus fair for all, its declaration that the regulations set the floor, rather than the ceiling, of rights must apply equally to rights intended primarily to benefit complainants and those intended to primarily benefit the accused.

Proposed Section 106.6(d): Constitutional Protections

FIRE is pleased to see that the Department expressly states in its NPRM that the language in section 106.6(d) will not be changed. This plain declaration that Title IX enforcement will be conducted within a framework that recognizes the essentiality of constitutional rights is an important component of the proposed regulations.

Under the current regulations, section 106.6(d) declares nothing in the proposed regulations requires an educational institution to:

- (1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution;
- (2) Deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution; or
- (3) Restrict any other rights guaranteed against government action by the U.S. Constitution.

This language is not only helpful, but necessary in light of numerous examples of institutions violating students’ due process rights in campus Title IX adjudications.⁵⁶

⁵⁶ See, e.g., *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018); *Doe v. Alger*, 228 F. Supp. 3d 713 (W.D. Va. 2016); *Doe v. Rector & Visitors of George Mason Univ.*, 149 F. Supp. 3d 602 (E.D. Va. Feb. 25, 2016).

FIRE strongly supports retaining this language as a carryover from the current regulations, as its removal would improperly signal to institutions that the Department’s Title IX regulations take precedence over constitutional rights.

Proposed Section 106.8(d): Training

FIRE generally supports the Department’s proposed section 106.8(d), which covers training requirements in Title IX, given the need to ensure students’ due process and First Amendment rights are understood and protected throughout the grievance process. Nevertheless, FIRE is concerned the constitutionally suspect grievance procedures required or authorized elsewhere in the proposed regulations will require institutions to seek out ill-advised training to implement them.

In particular, section 106.8(d)(1)(ii) provides that recipients must conduct training on “[t]he scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment.” Given that the Department has not adopted the definition of student-on-student harassment articulated in *Davis*, as FIRE discusses in this comment, institutions will be required to provide misleading training that has the potential to instruct “[i]nvestigators, decisionmakers, and other persons who are responsible for implementing the recipient’s grievance procedures or have the authority to modify or terminate supportive measures” in procedures and definitions that contradict judicial authority.

While proposed section 106.8(d)(2)(iii) requires training on “[h]ow to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias,” more clarity is needed to prohibit training that introduces bias into the grievance process. Further clarification is especially necessary given that too many institutions have used—or are still using—training materials that merit concern. For example, in 2011, Stanford University used materials that trained student jurors in sexual misconduct cases to believe that “act[ing] persuasive and logical” is a sign of guilt and that taking a neutral stand between the parties is the equivalent of siding with the accused.⁵⁷ That is the opposite of “avoid[ing] . . . bias.”

⁵⁷ *Stanford Trains Student Jurors That ‘Acting Persuasive and Logical’ is Sign of Guilt; Story of Student Judicial Nightmare in Today’s ‘New York Post,’* FIRE (July 20, 2011), <https://www.thefire.org/stanford-trains-student-jurors-that-acting-persuasive-and-logical-is-sign-of-guilt-story-of-student-judicial-nightmare-in-todays-new-york-post/> [<https://perma.cc/95Z6-Z2NX>]; see also Excerpted Pages from Stanford Dean’s Administrative Review Process Training Materials, 2010–2011, (2010),

Harvard Law School professor Janet Halley analyzed the bias present in her institution's 2014 training materials on the effect of trauma while detailing the complexities of campus sexual assault.⁵⁸ She explained that the 2014 training provided to Harvard personnel handling sexual harassment:

is 100% aimed to convince them to believe complainants, precisely *when* they seem unreliable and incoherent. Without disputing the importance of the insights included in this section of the training, one can ask: precisely what do they prove? Surely not a claim that, *because* a complainant appears incoherent and unreliable, she *has* been assaulted.⁵⁹

FIRE appreciates the importance of training first responders, including investigators, on how trauma may impact complainants so that those initial contacts elicit vital information without discouraging complainants from coming forward. But training that suggests those involved in disciplinary processes should treat factual inconsistencies in a complainant's account as proof that the alleged event took place is at odds with fundamental fairness and common sense. Therefore, FIRE proposes the Department explicitly limit trauma-informed training to exclude decisionmakers.

Excluding decisionmakers from potentially biased training is especially important given that the Department proposes to return to a single-investigator model in which a single individual both investigates and adjudicates a claim. To train a single person to serve as a counselor to an alleged victim and later as an objective arbiter of the complainant's claims will lead to legal challenges based on bias, especially if trauma-informed training provided instruction on how to weigh the evidence in favor of a particular party.

<https://d28htnjz2elwuj.cloudfront.net/pdfs/bb4ff4c3aff9d3b2450c44e9ec2f28f1.pdf>
[<https://perma.cc/C6Q8-SW87>].

⁵⁸ Janet Halley, Commentary, *Trading the Megaphone for the Gavel in Title IX Enforcement*, 128 HARV. L. REV. F. 103, 109–10 (Feb. 18, 2015), <https://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2> [<https://perma.cc/LP79-6MFV>].

⁵⁹ *Id.* at 110; see also Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/5XNZ-DXMJ>] (“At many schools, including Middlebury College and the University of Pennsylvania, investigators and adjudicators have been trained to ‘start by believing’ the complainant rather than to start from a position of neutrality.”).

Bias in the disciplinary process comes at a cost for all involved, including the complainant. As FIRE has observed, unfair procedures “damage the credibility of campus proceedings and diminish public confidence in their results.”⁶⁰ Without procedural fairness, the outcome of a proceeding is more likely to be overturned by either the institution or a court, forcing the complainant to go through the process repeatedly. Complainants, respondents, and institutions all benefit when the institution gets it right the first time.

The proposed regulations also distinguish between “any person who facilitates an informal resolution process” and those who function within a formal grievance process. The proposed regulations provide the following in section 106.8(d)(3):

In addition to the training requirements in paragraph (d)(1) of this section, all facilitators of an informal resolution process under § 106.44(k) must be trained on the rules and practices associated with the recipient’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.

The Department explains this change in the NPRM as follows:

Proposed § 106.8(d)(3) would set special training requirements for facilitators of an informal resolution process under proposed § 106.44(k), including the core elements included in training for all employees under proposed § 106.8(d)(1), as well as training on the rules and practices associated with the recipient’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias. Proposed § 106.8(d) would not require facilitators of informal resolution to be trained on the recipient’s grievance procedures or on prejudgment of the facts at issue because a facilitator is not responsible for implementing the recipient’s grievance procedures and is not engaged in factfinding, so training on those topics would not be appropriate for a facilitator of an informal resolution process in the way it would be for a decisionmaker or investigator.

FIRE does not support this distinction. While the informal resolution process itself might not implicate due process concerns given that facilitators are not

⁶⁰ Joe Cohn, *Problematic Mississippi Campus Sexual Assault Bill Clears Hurdle*, FIRE (Jan. 31, 2017), <https://www.thefire.org/problematic-mississippi-campus-sexual-assault-bill-clears-hurdle> [<https://perma.cc/U9JB-V3BW>].

conducting a grievance process outlined in section 106.45, or in fact-finding, FIRE believes that facilitators should have sufficient understanding of the due process and First Amendment protections to which the parties are entitled. This is especially necessary given that either party may at any time withdraw from the informal resolution process, which may result in the initiation of the formal grievance process. A facilitator who understands both the formal grievance procedures, as well as the informal resolution process, will better guide the parties through the process in a way that leads to a fair and equitable result for everyone involved.

Proposed Section 106.8(f): Recordkeeping

The proposed regulations require recipients to maintain certain records for a period of “at least seven years.” These recordkeeping requirements include documenting the informal resolution process or the grievance procedures for each complaint of sex discrimination and the resulting outcome, records documenting actions the recipient took for “each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified,” all training materials, which must be made publicly available on its website or upon request if the recipient does not maintain a website, and “[a]ll records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57.”

FIRE supports this section given its similarity to the current regulations. We appreciate the Department’s decision to continue to include the requirement that institutions make training materials described in section 106.8(f)(3) available to the campus community, the courts, OCR, and the public for review to ensure recipient’s compliance. *Removal of this section, or otherwise loosening these recordkeeping provisions, would pose significant harm to ensuring transparency and accountability of an institution’s Title IX procedures.*

Proposed Section 106.44: Mandatory Reporting

The policy proposed in section 106.44 requires employees, including faculty members, to report potential misconduct even against the wishes of the alleged victims of the misconduct. If the Department maintains the proposal’s overbroad definition of what constitutes harassment nearly all employees will become speech and sexuality police, which will in turn undermine students’ ability to develop trusting relationships with faculty members who would otherwise be afforded discretion.

Current section 106.44 states that a recipient with “actual knowledge” of sexual harassment in its education program or activity must respond promptly in a manner that is not deliberately indifferent. Actual knowledge is imputed to an institution when notice of an allegation is given to the institution’s Title IX Coordinator or any official who has the authority to institute corrective measures. The current regulations allow higher education institutions to determine for themselves which of its employees are required to report allegations of sexual harassment to the institution’s Title IX Coordinator or to another official who has the authority to institute corrective measures.

Proposed section 106.44 takes a different approach. It abandons the “actual knowledge” requirement in the current regulations and changes which employees must report to the recipient’s Title IX Coordinator. Proposed section 106.44 states that recipients must require:

Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity to notify the Title IX Coordinator when the employee has information about a student being subjected to conduct that may constitute sex discrimination under Title IX.

Many faculty members across the country have raised objections to similar proposals requiring them to report allegations of sexual harassment to their institution.⁶¹ Requiring faculty to report sexual harassment or other sexual misconduct can undermine the trust and relationship between faculty and student. Providing an institution with the latitude to decide for itself which of its employees must report is a better way to balance competing interests. Victims must be allowed to discuss their experiences with a trusted faculty member without fear that they will be forced into a Title IX investigation against their will.⁶² A narrow exception to the general rule that institutions

⁶¹ See, e.g., Janet Halley, *Harvard’s New Sexual Harassment Policy Must Change*, WBUR (Nov. 14, 2014), <https://www.wbur.org/cognoscenti/2014/11/14/sexual-harassment-harvard-university-janet-halley> [<https://perma.cc/P6G9-G5JY>] (“There are many other reasons for concern about the current moment of overreach. Chief among them: Women’s quest for sexual autonomy is undercut by protectionist images of our sexuality, mandatory reporter requirements, and the newly robust obligation of schools to pursue sexual harassment claims even when the alleged victims don’t want them to.”)

⁶² See Kathryn J. Holland, Jennifer J. Freyd, & Elizabeth A. Armstrong, *Mandatory Reporting Is Exactly Not What Victims Need*, CHRON. HIGHER EDUC. (Jul. 22, 2022), <https://www.chronicle.com/article/mandatory-reporting-is-exactly-not-what-victims-need> [<https://perma.cc/264S-27AS>].

should be allowed to decide for themselves which employees are designated as mandatory reporters is with respect to journalism faculty. *The Department should require institutions to make journalism faculty confidential employees so that they can interact with the subjects of articles while maintaining their confidence.* If journalists (including editors) are unable to maintain the confidence of their sources, many people will refuse to talk to them and freedom of the press will suffer.

Broadening the category of employees who must report information that may constitute harassment to the Title IX Coordinator is designed to make sure that institutions receive actual knowledge of potential issues, given that actual knowledge is only imputed to institutions when either the Title IX Coordinator or any official who has the authority to institute corrective measures is aware of allegations. But this proposed rule change is the equivalent of a “see something, say something” policy that will increase the number of unsubstantiated, unverifiable, or otherwise frivolous allegations. With an obligation to report anything that the employee believes *may* constitute sex discrimination, it is foreseeable that employees will believe themselves required to forward *all* information to the institution’s Title IX Coordinator, however frivolous or out-of-context. They will feel compelled to vastly over-submit to the Title IX Coordinator, jamming up the system, simply to protect themselves from running afoul of their institution’s reporting requirements. The proposed change does not even require that the employees have a reasonable basis for believing the information about a student being subjected to conduct that may constitute sex discrimination under Title IX is reliable. The predictable deluge of complaints that will be generated by this policy change will divert resources and attention away from meritorious complaints. *The Department should abandon this proposed change.*

Proposed Section 106.44(a): Action by a Recipient to Operate its Education Program or Activity Free from Sex Discrimination

Institutions that have actual notice of conduct that may constitute discriminatory harassment are legally and morally obligated to take action that is not clearly unreasonable to address the conduct in light of the known circumstances.⁶³ Not doing so places institutions at risk of litigation or the potential loss of all federal funding.⁶⁴ While successfully eliminating

⁶³ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648–49 (1999).

⁶⁴ 20 U.S.C. § 1682.

discrimination should be the aim, institutions that reasonably pursue that goal, but fail, should not face liability.⁶⁵

Section 106.44(a), however, states:

(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.

This language overstates institutions' legal obligations. To correctly reflect the law, the paragraph should read (deletions struck through and additions in bold):

(a) General. A recipient must take prompt ~~and effective~~ action **reasonably calculated** to end any sex discrimination, **of which it has actual knowledge**, 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.

The dissent in *Davis* expressed its concern that if institutions were required to succeed in eliminating discrimination to avoid violating Title IX, they would predictably feel compelled to be heavy-handed in addressing potential harassment and to pay little regard to constitutional rights.⁶⁶ The majority addresses this concern by noting that institutions don't have an obligation to succeed; rather, they are merely obligated to respond in a manner that is not clearly unreasonable.⁶⁷

The language in section 106.44(a) unlawfully shifts from the deliberate indifference standard which requires institutions to take actions reasonably calculated to address allegations to a standard that requires their actions to be "effective." This change will place institutions under great pressure to violate

⁶⁵ *Davis*, 526 U.S. at 648–49. (“We stress that our conclusion here . . . does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. . . . *The dissent erroneously imagines that victims of peer harassment now have a Title IX right to make particular remedial demands.* . . . [C]ourts should refrain from second guessing the disciplinary decisions made by school administrators,” who “must merely respond to known peer harassment in a manner that is not clearly unreasonable.”) (emphasis added) (citations omitted).

⁶⁶ *Davis*, 526 U.S. at 682–83.

⁶⁷ *Id.* at 648–49.

student and faculty free speech and due process rights because the prospect of losing all federal funding is a much greater danger than the consequence of losing a private lawsuit from an individual whose civil liberties were violated.

The Department must not require institutions to be “effective” to avoid putting all of their federal funds in jeopardy and must instead require them to take actions “reasonably calculated to end any sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects.”

Proposed Section 106.44(g): Supportive Measures

In order to appropriately address sexual misconduct, the rights of both student complainants and those they accuse must be protected. To meet their legal and moral obligations under Title IX, institutions must provide fair and equitable treatment to all parties. Accordingly, FIRE has supported proposals that provide resources and remedies to complainants unless those proposals undermine due process rights for the accused. By providing these measures, both the current and proposed regulations ensure that discrimination based on sex does not prevent students from pursuing an education.

In sections 106.44(g) of the proposed regulations, “upon being notified of conduct that may constitute sex discrimination under Title IX,” Title IX Coordinators are required to “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.”

While the proposed regulations set forth constitutional guidelines for what may and may not be punished under Title IX, they do not preclude institutions from addressing conduct that does not meet its standard in non-punitive ways. Helpfully, the proposed regulations provide a definition of “supportive measures” in section 106.2:

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; or

(2) Provide support during the recipient's grievance procedures under § 106.45, and if applicable § 106.46, or during the informal resolution process under § 106.44(k).

Further, as provided in 106.44(g)(1), supportive 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.

Recipient institutions should have a robust system for responding to reports of sexual misconduct even when those who come forward are not comfortable filing an official report or pursuing disciplinary charges against the alleged perpetrator. Providing supportive measures—not only to those who file formal complaints, but also to those who choose not to pursue formal complaints—is a helpful way of ensuring potential complainants have continued access to educational opportunities without threatening due process. *These measures must not be punitive, as no determination has been made of the validity of the accusation. But that need not prevent schools from taking supportive measures to aid those students.*

FIRE supports the proposed provisions on supportive measures, which are substantially similar to the current regulations. *Removing these provisions, or otherwise amending them to be punitive or to have a punitive effect, would pose significant due process concerns.*

Proposed Section 106.45(a)(2)(iv): Third Party Complaints

Section 106.45(a)(2) sets forth the people who may file formal Title IX complaints, with subsection (iv) addressing third party complaints. Read together, the two provisions state:

(a) (2) Complaint. The following persons have a right to make a complaint of sex discrimination, including complaints of sex-based harassment, requesting that the recipient initiate its grievance procedures:

[...]

(iv) With respect to complaints of sex discrimination other than sex-based harassment, any student or employee; or third party participating or attempting to participate in the recipient's education program or activity when the alleged sex discrimination occurred.

Third party complaints are rife with opportunities for abuse, and the Department should consider ways to limit the circumstances under which third party complaints may be initiated. For example, the Department might require a third party complainant to have firsthand knowledge of facts giving rise to the complaint as a prerequisite for filing a complaint. Without such a requirement, institutional resources could be squandered by third parties bombarding institutions with speculative complaints. Just as courts preserve limited judicial resources by establishing standing requirements, so too should institutions reserve their attention for well-founded allegations. *The Department should help institutions preserve their resources by establishing standing requirements for third party complaints.*

FIRE also recommends that the Department revise the language in subsection (iv) to clarify what it means by “complaints of sex discrimination other than sex-based harassment.” Without additional information regarding the circumstances the Department intends to address with this provision, the potential for misapplication is significant. All stakeholders would benefit from additional clarity.

Proposed Section 106.45(b)(2): The Single-Investigator Model

The Single-Investigator Model's Incompatibility with Due Process

Compounding the problems introduced by eliminating the right to a live hearing, discussed below, the proposed regulations allow campuses to employ the so-called “single investigator model,” in which one person serves as the

investigator, fact-finder, and disciplinarian.⁶⁸ Section 106.45(b)(2) states that an institution’s grievance procedures must:

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 respondents generally or an individual complainant or respondent. **The decisionmaker may be the same person as the Title IX Coordinator or investigator . . .** [Emphasis added.]

Placing the authority to perform each of these functions in the hands of one person is a recipe for injecting bias—subconscious or otherwise—into an already fraught process.

FIRE is not alone in arguing that the proposal’s return to the single-investigator model is misguided. As victims’ rights advocate S. Daniel Carter recently told *The Chronicle of Higher Education*, the single-investigator model “allow[s] a single person to be in charge of everything, with no oversight until you get to the appeal. I think that’s crazy.”⁶⁹ Harvard Law School professor Janet Halley described her objection to the proposal’s single investigator provision as follows:

One of the dangers is that a person develops views about what’s going on in a case, and that colors what they ask and what they hear . . . The fact that a single investigator makes a decision from which appeal can only be taken on limited grounds — I just don’t even understand how a person could sleep at night with that kind of power.⁷⁰

Alexandra Brodsky, an attorney specializing in victim’s rights advocacy at Public Justice, told *The Chronicle of Higher Education*, “I’ve heard complaints

⁶⁸ Such power in a single individual can even taint the appeal process. *See, e.g., Doe v. Grinnell Coll.*, 473 F. Supp. 3d 909, 924 (S.D. Iowa 2019) (“A reasonable jury could conclude that, even though the Policy does not explicitly prohibit consultation between the appeals officer and an adjudicator, such consultation detracts from the appeals officer’s independence. A reasonable jury could further conclude that Doe did not receive a fair and impartial review of his appeal and this lack of an impartial review casts doubt on the accuracy of the outcome of the disciplinary proceeding.”).

⁶⁹ Tom Bartlett, *The Proposed Title IX Change That Worries Some Experts*, CHRON. HIGHER EDUC. (July 26, 2022), <https://www.chronicle.com/article/the-proposed-title-ix-change-that-worries-some-experts> [<https://perma.cc/7X3T-PRLV>].

⁷⁰ *Id.*

about this not just from respondents but from victims as well.”⁷¹ Brodsky expressed concern that a complaint could be handled from top to bottom by “an investigator who believes certain rape myths that could cause him or her to unfairly dismiss a victim’s allegations.”⁷² In *Reason*, Brooklyn College professor KC Johnson labeled the proposed return to the single investigator model the “most alarming” aspect of the proposed regulations. As Professor Johnson explains: “The possibility of wrongful findings, almost always biased against the accused, dramatically increases under such a procedural regime.”⁷³ In *Simple Justice*, a blog focused on issues related to criminal defense, attorney Scott Greenfield offered this stinging critique of the single investigator model’s use in campus Title IX proceedings: “[T]here should be no question that the inquisitorial model, no matter how one characterizes the virtues of the inquisitor, invariably fails to provide the accused with a fair process.”⁷⁴

Courts share the concerns expressed by these attorneys and advocates. For example, as one federal judge wrote in criticizing Brandeis University’s use of a single investigator model:

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.⁷⁵

The United States Court of Appeals for the Third Circuit has similarly lambasted the single investigator model, noting its incompatibility with promises of fundamental fairness:

To be sure, the investigator listened to Doe during her two interviews with him. But [the University of the Sciences] did not provide Doe a real, live, and adversarial hearing. Nor did USciences permit Doe to cross-examine witnesses—including his accusers, Roe

⁷¹ *Id.*

⁷² *Id.*

⁷³ Robby Soave, *5 Ways Biden’s New Title IX Rules Will Eviscerate Due Process on Campus*, REASON (June 23, 2022, 4:35 PM), <https://reason.com/2022/06/23/title-ix-rules-cardona-biden-sexual-misconduct-campus/> [<https://perma.cc/2MAL-RH7M>].

⁷⁴ Scott Greenfield, *Can the “Single Investigator” Model Ever Be Fundamentally Fair?*, SIMPLE JUSTICE (Apr. 6, 2020), <https://blog.simplejustice.us/2020/04/06/can-the-single-investigator-model-ever-be-fundamentally-fair> [<https://perma.cc/JCG8-Z9TA>].

⁷⁵ *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D. Mass. 2016).

1 and Roe 2. As we explained above, basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive these procedural protections. Thus, Doe states a plausible claim that, at least as it has been implemented here, the single-investigator model violated the fairness that USciences promises students accused of sexual misconduct.⁷⁶

While the Third Circuit leaves open the possibility that a single investigator model could be implemented fairly, FIRE is unfamiliar with any instance where that model came anywhere close to providing rudimentary procedural protections, much less adequate protections. That it does not allow for cross-examination and consolidates authority in one person's hands are not collateral problems caused by the model; they are its main features. The flaws in the model are structural to its nature, and they are catastrophic.

Even the Department recognizes the perils of incorporating multiple roles of the Title IX process into one person. Proposed section 106.44(k)(4), requires that “[t]he facilitator for the informal resolution process must not be the same person as the investigator or the decisionmaker in the recipient’s grievance procedures.” The NPRM smartly explains, “The Department proposes adding this provision to further protect against any improper access, consideration, disclosure, or other use of information obtained solely through the informal resolution process, or conflict of interest, in the event a party terminates informal resolution and the complaint proceeds to grievance procedures” FIRE believes that just as it is prudent to separate the roles of “facilitator” and “investigator or the decisionmaker” in the informal grievance process, it is also necessary to separate the roles of the Title IX Coordinator, investigator, and fact-finder in the formal process. It defies common sense to only prohibit the comingling of roles in the informal process, and the Department’s proposal to do so is therefore arbitrary and capricious. The Department must be consistent and must prohibit institutions from utilizing the single investigator model.

The Department’s Rationale for Allowing the Single-Investigator Model

In the NPRM, the Department explained its rationale for permitting institutions to use the single investigator model. At the June 2021 Title IX Public Hearing, the Department learned that “employing a single investigator from outside the recipient’s community, under the guidance of the recipient’s Title IX Coordinator, enabled some postsecondary institutions to have a highly

⁷⁶ *Doe v. Univ. of the Scis.*, 961 F.3d 203, 216 (3d Cir. 2020).

trained expert who could conduct an equitable investigative process without perceived institutional bias.” Some recipients stated that “they saw more students seeking institutional support and resolution of complaints.”

Small or under-resourced recipient institutions, according to the Department, believed that the single-investigator model would “help ensure prompt and equitable grievance procedures while reducing the number of personnel a recipient would need for each investigation and resolution.” Given the number of employees involved in grievance procedures, concerns were expressed that this would increase “the likelihood of the parties having to interact with those employees in the regular course of their participation in the recipient’s education program or activity,” that students would change majors, avoid courses or extracurricular activities to avoid interaction with employees who administered the grievance procedures, and that “students had found the procedures painful, and some had concerns about those employees knowing traumatic information about them.”

The Department, after receiving feedback, explained its current position:

[T]he single-investigator model, when implemented in conjunction with the other proposed measures designed to ensure equitable treatment of the parties as required throughout proposed § 106.45, and if applicable proposed § 106.46, can offer recipients an effective option for resolving complaints of sex discrimination in a way that ensures fair treatment of all parties and enables compliance with Title IX. 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.

Addressing its “earlier stated concerns about the reliability of fact-finding and overall fairness and accuracy of the grievance procedures,” the Department stated that those concerns “will still be effectively addressed by the other proposed requirements which clarify a recipient’s obligations and make it easier to achieve those obligations,” including all complaints of sex discrimination, not just sex-based harassment. These obligations, according to the Department, include the obligation to “treat the complainant and respondent equitably” under proposed sections 106.44(f)(1) and 106.45(b)(1),

“provide robust training and anti-bias requirements” under sections 106.8(d) and 106.45(b)(2), “objectively evaluate all relevant evidence” under section 106.45(b)(6), “review all evidence gathered to determine which evidence is relevant and what is impermissible” under proposed section 106.45(f)(3), “provide each party with a description of evidence that is relevant and not otherwise impermissible” under proposed section 106.45(f)(4)), “provide the right to appeal a complaint dismissal” under proposed section 106.45(d)), and, “if additional provisions are adopted as part of its grievance procedures, apply those provisions equally to the parties” under proposed section 106.45(i)).

Further, according to the Department, “[i]n 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.” In other words, “the recipient is not in the role of prosecutor seeking to prove a violation of its policy.” Instead, 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.”

The Insufficiencies of the Department’s Rationales for the Single-Investigator Model

None of the Department’s rationales withstand scrutiny. If the Department is concerned that students will want to have fewer interactions with those involved in their Title IX cases, it can require institutions to limit the other job duties of those employees responsible for the grievance proceedings. It can also allow institutions to pool resources to set up regional tribunals. The Department did not even consider that possibility, which could help small institutions with smaller budgets defray any costs associated with meeting constitutional obligations, in its Regulatory Flexibility analysis.⁷⁷ Neither of those solutions pose any threat to the fairness of proceedings, let alone in the fundamental and obvious way the single investigator does. That the use of a single-investigator model might cut costs because it requires fewer employees is an insufficient rationale for the model’s use.⁷⁸

The Department’s assertion that the single-investigator model will be fair because the proposed regulations also require the investigator to treat the parties equitably, evaluate the evidence objectively, review the admissibility of evidence, provide the parties with *summaries* of the evidence, provide a right to

⁷⁷ Regulatory Flexibility Act, 5 U.S.C. §§ 601–612.

⁷⁸ *Messeri v. DiStefano*, 480 F. Supp. 3d 1157, 1165 (D. Colo. 2020).

appeal, and permits (but does not require!) adopting additional protections, provided they are applied equitably to both parties, is similarly unpersuasive.

If any of those protections were remotely reasonable substitutes for the tried and true safeguards of due process—live hearings, the right to active assistance of counsel, the right to meaningful cross-examination, the right to continuous access to all of the evidence, the right to discovery, or the right to a jury trial—one would expect the criminal justice system to reflect that. But none of those protections exist in these proposed regulations. The regulations explicitly allow institutions to forbid the active representation by legal counsel. Live cross-examination, as discussed in greater detail below, is expressly not required when institutions use the investigator model.

It is plainly obvious that the investigator model guts due process and that consolidating that power in one person’s hands is especially dangerous because of how susceptible it is to introducing unchecked bias into the process. Institutions that are using the single investigator model are violating the parties’ right to a fair proceeding, in violation of due process and Title IX itself. Given the decisions and the inadequacy of the reasoning behind the change, allowing institutions to use the single investigator model is arbitrary and capricious. The fact that it also threatens constitutional due process rights subjects it to being invalidated in court under a constitutional challenge, but also pursuant to an APA challenge. *The Department should maintain the current regulations’ prohibition on the use of the single investigator model.*

Proposed Section 106.45(b)(3): Presumption of Innocence

Section 106.45(b)(3) of the proposed regulations provides that recipients must “[i]nclude 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.” This is substantially similar to the current regulations’ definition.

In FIRE’s 2021 Spotlight on Due Process report, we analyzed the policies of America’s top 53 universities.⁷⁹ Troublingly, we found that nearly two-thirds (62.2%) of those institutions did not explicitly guarantee students that they will be presumed innocent until proven guilty in campus disciplinary proceedings

⁷⁹ FIRE, SPOTLIGHT ON DUE PROCESS 2020–2021 (2021), <https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2020-2021> [https://perma.cc/QL6Z-APFP].

that are not covered by the current Title IX regulations. By contrast, as required by the current regulations, more than 90% of rated college's Title IX policies include a presumption of innocence.

The high rate of institutions including a presumption of innocence in its Title IX policies is a positive step forward, but additional requirements may further strengthen this fundamental protection. *FIRE, for example, supports adding a requirement that institutions must include a statement that a person's silence shall not be held against them. We urge the Department to add a provision to this effect.*

FIRE also urges the Department to include additional language to address consent policies that effectively shift the burden to respondents to prove that they obtained consent in the cases of alleged sexual misconduct. As one court put it, under a consent policy that placed this burden on the accused, "the ability of an accused to prove the complaining party's consent strains credulity and is illusory."⁸⁰

Some institutions use definitions of consent that recognize the validity of consent only if the tribunal concludes that it was clearly provided. Under these and similar formulations, when it is *unclear* whether consent was provided, the presumption is that it was not. Few institutions will acknowledge that these definitions of consent shift the burden of proof and nullify the presumption of innocence. *To address this concern, we urge the Department to expand upon the section by adding a sentence declaring: "It is the obligation of the recipient to prove every element of every alleged offense before the accused student may be found responsible and punished for committing an alleged offense."*

While FIRE welcomes the Department's language, we request these additions to prevent institutions from flipping the burden of proof onto respondents. *Keeping the requirement that institutions explicitly state that accused parties are presumed innocent is necessary to comply with due process. This provision must remain in the final regulations.* Accordingly, FIRE is thankful that the Department has not put it on the chopping block, as removing this important due process protection would present significant constitutional concerns.

Proposed Section 106.45(b)(6): Consideration of Evidence

Similar to the current regulations, the proposed regulations provide that:

⁸⁰ *Mock v. Univ. of Tenn. at Chattanooga*, No. 14-1687-II (Tenn. Ch. Ct. Aug. 10, 2015).

A recipient’s grievance procedures must . . . [r]equire 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[.]

Section 106.45(b)(6) requires institutions to review all relevant evidence, whether inculpatory or exculpatory. While this may seem obvious, courts are allowing legal complaints against universities to proceed in lawsuits over allegations that institutions’ Title IX proceedings violate the parties’ rights by failing to consider exculpatory evidence.⁸¹ These lawsuits are rife with allegations that universities have, in fact, ignored critical evidence, whether in a rush to judgment or simply because they use processes that do not provide appropriate avenues for the collection and review of evidence.⁸² This is an important protection in the current regulations.

We do not live in a world in which all complaints—of any type—have merit, nor do we live in one in which all allegations—of any type—are false. Sorting out the merits of individual cases requires reviewing all relevant evidence. FIRE supports this language and the due process protections it provides to parties. *Removal of this requirement from the proposed regulations, or removing the*

⁸¹ See, e.g., *Doe v. Dordt Univ.*, No. 19-CV-4082 CJW-KEM, 2022 WL 2833987, at *4 (N.D. Iowa July 20, 2022) (The undisputed evidence also supports that certain exculpatory evidence was not considered during the investigation, nor included in materials for the [Student Life Committee’s] review.”); *Doe v. Del. St. Univ.*, No. CV 20-1559-MN-JLH, 2022 WL 613361, at *3 (D. Del. Mar. 2, 2022) (denying a motion to dismiss where the institution’s Director of Title IX “did not include . . . evidence favorable to Plaintiff in the investigative file.”), report and recommendation adopted, No. CV 20-1559(MN) (JLH), 2022 WL 823580 (D. Del. Mar. 18, 2022); *Doe v. Tex. A&M Univ.–Kingsville*, No. 2:21-CV-00257, at *2 (S.D. Tex. Nov. 5, 2021) (granting temporary injunctive relief in a case where the plaintiff “was further prevented from offering evidence that the grand jury had no-billed the criminal complaint against him resulting from the same incident.”); *Doe v. Brown Univ.*, 166 F. Supp. 3d 177, 185 (D.R.I. 2016) (“Taking the facts in Doe’s Complaint as true and drawing all reasonable inferences in his favor, Brown ignored exculpatory evidence, including the victim’s own testimony in the Oct. 18 Complaint that she had in fact articulated consent.”); *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 606 (D. Mass. 2016) (allowing a lawsuit to continue where the “[accused student] then attempted, unsuccessfully, to submit additional evidence; the complaint alleges that after the reading of the summary, he supplied ‘additional facts, names of additional witnesses, and his sworn affidavit’ to [the dean], but that she ‘refused to refer any of John’s additional facts, witnesses, or affidavit to the Special Examiner for further consideration.’”).

⁸² See, e.g., *Doe v. Ohio St. Univ.*, 219 F. Supp. 3d 645, 663 (S.D. Ohio 2016) (“[I]t is plausible that Doe’s right to cross-examination was effectively denied by the Administrators’ failure to turn over critical impeachment evidence.”).

requirement to consider relevant exculpatory evidence, would pose considerable litigation risk to institutions as well as constitutional due process concerns already identified by federal courts, and thus would also be contrary to the judicial authority, and thus, arbitrary and capricious.

Proposed Section 106.45(b)(7)(iii): Rape Shield Provision

The proposed regulations include a robust rape shield provision, which prohibits institutions from admitting “[e]vidence 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.” Section 106.45(b)(7)(iii) further provides that: “[t]he 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.”

FIRE welcomes rape shield provisions in Title IX grievance processes. In our 2020 comment about the Department’s then-proposed regulations, we wrote, “[a]nother way the proposed rule could be improved would be to add a rape shield provision in the sections dealing with both grievance procedures and formal investigations at institutions of higher education.”⁸³ FIRE supports the rape shield provisions in the current regulations. It would be arbitrary for the Department to change the current regulations’ rape shield provision by eliminating it or the exceptions it provides. However, if the Department wishes to update this provision, it should do so by adding the third exception found in the Federal Rules of Evidence rule 412(b)(1)(C), which also allows fact-finders to consider evidence of sexual history when its “exclusion would violate the defendant’s constitutional rights.”⁸⁴

While both the current and the proposed regulations have similarities to Federal Rules of Evidence, the addition of the provision that states evidence cannot be used to “imply” a complainant’s consent is contradictory and could deny the accused of crucial exculpatory evidence during the adjudication

⁸³ FIRE, COMMENT OF THE FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION IN SUPPORT OF THE DEPARTMENT OF EDUCATION’S PROPOSED REGULATIONS ON TITLE IX ENFORCEMENT 46 (Jan. 30, 2020), <https://d28htnjz2elwuj.cloudfront.net/wp-content/uploads/2019/01/30173030/FIRE-Comment-Title-IX-Enforcement-Appendicies.pdf> [<https://perma.cc/Q5N4-L2NY>].

⁸⁴ Fed. R. Evid. 412(b)(1)(C).

process. It is difficult to reconcile allowing evidence “offered to prove consent with evidence concerning specific incidents of the complainant’s prior sexual conduct with the respondent,” but also stating “[t]he 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” This contradiction could lead to the denial of the accused’s right to a fair procedure.

The Department should keep the current regulations or, in the alternative, amend the proposed regulations to mirror the rape shield provisions in the Federal Rules of Evidence. Such a change would effectively protect the rights of the accused without subjecting alleged victims to unnecessary or irrelevant questions about his or her sexual history.

Proposed Section 106.45(c) and 106.46(c): Notice Requirements

The Department has created two distinct sets of notice requirements in the current regulations under section 106.45(c) and section 106.46(c) that govern how and what an institution must communicate to the parties at the start of their respective grievance processes.⁸⁵

Proposed section 106.45(c) provides that “[u]pon initiation of the recipient’s grievance procedures, a recipient must provide notice of the allegations to the parties whose identities are known.” This notice must include:

- (i) The recipient’s grievance procedures under this section, and if applicable § 106.46, and any informal resolution process under § 106.44(k);
- (ii) Sufficient information available at the time to allow the parties to respond to the allegations. Sufficient information includes the identities of the parties involved in the incident, the conduct alleged to constitute sex discrimination under Title IX, and the date and location of the alleged incident, to the extent that information is available to the recipient; and
- (iii) A statement that retaliation is prohibited.

⁸⁵ The proposed regulations provide one general process in section 106.45 that entails sex discrimination complaints under Title IX, and section 106.46 provides requirements specifically for grievance procedures for sex-based harassment involving postsecondary students.

Proposed section 106.46(c), however, is substantially similar to the current regulations. Proposed section 106.46(c)(1) provides that “[u]pon 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 “all of the information required under § 106.45(c)” and “[a]llegations potentially constituting sex-based harassment, including the information required under § 106.45(c)(1)(ii), with sufficient time for the parties to prepare a response before any initial interview.”

Proposed section 106.46(c)(2) provides that:

The written notice must also inform the parties that:

(i) The respondent is presumed not responsible for the alleged conduct until a determination of whether sex-based harassment occurred is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant evidence to a trained, impartial decisionmaker;

(ii) They may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;

(iii) They are entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and

(iv) If applicable, any provision in the postsecondary institution’s code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.

Proposed section 106.46(c)(3) provides that “[t]o the extent the postsecondary institution has legitimate concerns for the safety of any person as a result of providing this notice, the postsecondary institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately.” The proposed regulations further provide under section 106.46(c)(3) that “[l]egitimate concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.”

If students are not the accused parties under claims falling only under Section 106.45, then the fact that the notice requirement under Section 106.45 need not be in written form and that it contains fewer requirements as compared to the notice requirements in Section 106.46, does not raise due process concerns. But to the extent that Title IX covers cases involving faculty who are accused by non-students of sex-based discrimination, faculty should still be entitled to detailed, written notice that meets all of the requirements of 106.46's notice provision.

There are also valid reasons why a complainant would want sufficient written records for review, including the opportunity to prepare for any resulting investigation. Section 104.45's notice requirements should be brought in line with section 104.46's more robust requirements of written notice.

Proposed section 106.46 requires that institutions of higher education give respondents written notice of alleged wrongdoing. The notice requirements provide critical protections for respondents and address serious deficiencies in the adjudication process at many colleges and universities, where students are often expected to begin answering for alleged wrongdoing with very little information about the accusations they face. The regulations also require both complainants and respondents to have an opportunity to review all relevant evidence available at the time and available to the recipient. This means that each party will have a meaningful opportunity to prepare in advance of a hearing.

FIRE supports the Department's decision to carry over these crucial notice requirements from the current regulations because they provide critical protections for accused students and address serious deficiencies in the adjudication processes employed by many colleges and universities. The requirements of due process cannot be met at public institutions without providing the accused notice of the charges with enough detail to fully understand the allegations.⁸⁶ Adequate time to prepare is similarly crucial. Striking any of the important provisions found in section 106.46(c) would pose serious due process concerns.

The proposal also includes language about providing parties updated notice when additional allegations are brought to light in the course of an investigation.

⁸⁶ See *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (holding before a student could be suspended for ten or more days, the due process clause entitles the student, at a minimum, to notice of the charges against them and an opportunity to contest them).

Proposed section 106.45(c)(2) provides the following:

(2) If, in the course of an investigation, the recipient decides to investigate additional allegations about the respondent's conduct toward the complainant that are not included in the notice provided under paragraph (c)(1) of this section or that are included in a complaint that is consolidated under paragraph (e) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.

By incorporation, this additional notice also applies to proposed section 106.46(c). *FIRE supports most of this section, which is similar to the current regulations, but FIRE requests that this notice also be in writing so that all parties will have sufficient written records to review and that the Department abandon its proposal to revoke the current regulations' requirement that the parties be given 10 days to review an investigative report before a hearing. With those caveats, to avoid further due process implications, the Department must keep this section in the proposed regulations.*

Proposed Section 106.45(d)(1)(i-iv): Dismissal of Complaints

In contrast to the current regulations, the Department proposes revising section 106.45(b)(3) to provide institutions with discretion to dismiss allegations in a complaint of sex discrimination. FIRE believes that this level of discretion will lead to institutions unconstitutionally proceeding with formal grievance procedures that will threaten students' First Amendment rights.

Proposed section 106.45(d)(1) provides that “[a] recipient may dismiss a complaint of sex discrimination made through its grievance procedures under this section, and if applicable § 106.46, for any of the following reasons,” which includes the following:

- (i) The recipient is unable to identify the respondent after taking reasonable steps to do so;
- (ii) The respondent is not participating in the recipient's education program or activity and is not employed by the recipient;
- (iii) The complainant voluntarily withdraws any or all of the allegations in the complaint and the recipient determines that without the complainant's withdrawn allegations, the conduct that

remains alleged in the complaint, if any, would not constitute sex discrimination under Title IX even if proven; or

(iv) The recipient determines the conduct alleged in the complaint, even if proven, would not constitute sex discrimination under Title IX. Prior to dismissing the complaint under this paragraph, the recipient must make reasonable efforts to clarify the allegations with the complainant.

Granting this degree of administrative discretion will pose significant constitutional concerns given that subjecting students to investigations may function as a punitive measure or chill protected speech. FIRE supports the current regulations' dismissal requirements because they required institutions to use similar standards to those used by courts to evaluate motions to dismiss. Currently, after the institution concludes that the conduct alleged by the complainant falls short of the *Davis* standard—even if it were to be proven true—the institution is required to dismiss the formal complaint. This provision ensures that no complaint is ignored without institutions considering the sufficiency of the complaint, while simultaneously preventing institutions from conducting lengthy investigations into expression that is protected under the First Amendment. Lengthy investigations into protected speech violate the First Amendment.⁸⁷

Subparts (iii) and (iv) present particular constitutional concerns respectively when there is no longer a complainant or when the recipient has already determined that the conduct would not constitute sex discrimination under Title IX. Nevertheless, the broad discretion given to institutions to continue with the grievance procedures generally risks infringing on students' First Amendment protections, including under subparts (i) and (ii).

To avoid exposing parties to such risks, the Department must either retain the language regarding dismissal in the current regulations or otherwise make such dismissals mandatory.

⁸⁷ See, e.g., *White v. Lee*, 227 F.3d 1214, 1226 (9th Cir. 2000) (holding an eight-month investigation into clearly protected speech, coupled with questioning and requests to produce documents, violated the First Amendment).

***Proposed Sections 106.45(f)(4), 106.46(c)(2)(iii), and 106.46(e)(6)(i-ii):
Access to Evidence***

Under section 106.45 (b)(5)(vi) of the 2020 regulations, parties in Title IX cases are entitled to an equal opportunity to inspect and review inculpatory and exculpatory evidence in the institution’s possession. That section of the current regulations reads:

(5) Investigation of a formal complaint. When investigating a formal complaint and throughout the grievance process, a recipient must—

(vi) Provide both 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, 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. Prior to completion of the investigative report, the recipient must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. The recipient must make all such evidence subject to the parties’ inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination;

Three sections in the proposed regulations would diminish the parties’ rights to access the evidence in Title IX cases. Section 106.45(f)(4) states:

(f) Complaint investigation. A recipient must provide for adequate, reliable, and impartial investigation of complaints. To do so, the recipient must:

[...]

(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.

Pursuant to this section, during the investigation of a complaint, the parties would not be entitled to access the actual evidence in the institution's possession. Instead, they are merely entitled to access "a description of the evidence."

Section 106.46(c)(2)(iii) covers the information institutions must provide the parties in the notices to them when a Title IX proceeding is initiated. That section reads:

(2) The written notice must also inform the parties that:

[...]

(iii) They are entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and

According to that provision, in the notice to the parties, the institution must notify them either that they may access the relevant evidence or an investigative report that accurately summarizes the evidence.

Finally, section 106.46 (e)(6)(i-ii) states:

(e) Complaint investigation. When investigating a complaint alleging sex-based harassment and throughout the postsecondary institution's grievance procedures for complaints of sex-based harassment involving a student complainant or a student respondent, a postsecondary institution:

[...]

(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;

Section 106.46 (e)(6)(i-ii) is the most convoluted of the three sections governing access to evidence. According to this section, once an investigation into a formal complaint involving a student has been initiated, the institution must provide each party or their advisor with “equitable access” to relevant information that is not otherwise impermissible. The institution can satisfy this burden by providing equitable access to the evidence itself, or to a “written investigative report that accurately summarizes this evidence.” If the institution chooses to offer the summary, they must also turn over the evidence itself, but only if it is actually requested by the party. Institutions are not required to let the parties know that they cannot be denied access to the actual evidence if they request it. There is no legitimate reason to provide the parties with anything less than equal, reasonable, continuous access to the evidence. Nor is there any good reason the Department should allow institutions to avoid giving parties adequate notice of their rights to access the evidence.

Moreover, even if the right to the evidence pursuant to the current proposal is triggered by a request from a party, institutions are only obligated to provide the parties “equitable access.” Since the term “equitable” may mean either “fair” or “equal,” the language could permit institutions to provide all parties equal, but inadequate, access to the evidence.

Courts have held that inadequate access to the evidence in Title IX proceedings violates due process. In *Doe v. Purdue University*, the United States Court of Appeals for the Seventh Circuit noted that the institution “withholding the evidence on which it relied in adjudicating [the accused student’s] guilt was itself sufficient to render the process fundamentally unfair.”⁸⁸ In *Averett v. Hardy*, the District Court for the Western District of Kentucky held that withholding exculpatory evidence until the day of the hearing violates due

⁸⁸ 928 F.3d 652, 663 (7th Cir. 2019).

process because it denies the accused an “opportunity to ‘respond, explain, and defend’” himself at his conduct hearing.⁸⁹

In order to satisfy due process requirements or promises of fundamental fairness, institutions must provide parties with equal, reasonable, and continuous access to the nonprivileged evidence in the institution’s possession and sufficient notice of that right. They should also grant the parties the right to make copies of that evidence with enough time in advance of the hearing so that they can adequately prepare their arguments. *Accordingly, the Department of Education must amend the language in each of the three sections pertaining to access to the evidence. Failure to do so would arbitrarily and capriciously deny the parties a fundamental right necessary to satisfy due process.*

Proposed Section 106.45(g): Evaluating Allegations and Assessing Credibility

Proposed section 106.45(g) states:

(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.

FIRE supports this language, but notes that provisions in the proposed regulations that allow institutions to forgo live hearings and bypass live, adversarial cross-examination when they choose to use an investigative model are incompatible with the laudable requirements of this section.

Proposed Section 106.45(j): Informal Resolution

The proposed regulations provide: “In lieu of resolving a complaint through the recipient’s grievance procedures, the parties may instead elect to participate in an informal resolution process under § 106.44(k) if provided by the recipient consistent with that paragraph.” Proposed section 106.44(f)(2)(ii) would require the Title IX Coordinator to notify the parties to any complaint of sex discrimination of any informal resolution process, if available and appropriate.

The Department explains in the NPRM that:

⁸⁹ No. 3:19-cv-116-DJH-RSE, 2020 WL 1033543 (W.D. Ky. Mar. 3, 2020).

a complaint would no longer be required before a recipient could offer to a complainant and respondent its informal resolution process under proposed § 106.44(k); instead, the informal resolution process could be offered and, if accepted, initiated by the recipient when it receives information about conduct that may constitute sex discrimination under Title IX even when no complaint is made.

Further, section 106.44(k)(i) provides that “[a] recipient has discretion to determine whether it is appropriate to offer an informal resolution process when it receives information about conduct that may constitute sex discrimination under Title IX or a complaint of sex discrimination is made, and may decline to offer informal resolution despite one or more of the parties’ wishes.” Section 106.44(k)(i) continues, “Circumstances when a recipient may decline to allow informal resolution include but are not limited to when the recipient determines that the alleged conduct would present a future risk of harm to others.”

FIRE supports the availability of an informal resolution process for parties because it provides complainants with broader options when deciding whether to proceed. But section 106.44(k)(i) grants institutions unbounded discretion to deny the parties the opportunity to have their cases resolved informally.

The Department must keep intact the parties’ ability to seek informal resolution processes when both parties agree. Recipient institutions should be allowed to deny the parties that right only when the recipient has a reasonable basis for determining that the respondent would present a future risk of harm to others. Indeed, if the institution is provided with full discretion regarding whether informal resolution is available, the complainant will be functionally limited to filing a formal complaint.

The fix to section 106.44(k)(i) is simple. *It should instead read: “Only when the recipient reasonably determines that the respondent presents an immediate risk of harm to others may it decline to allow informal resolution.”*

Limiting the institution’s discretion here respects the parties’ wishes by giving them a clear choice of available options to proceed. Under the proposed language in section 106.44(k)(i), institutions may fail to meet their legal and moral obligations under Title IX to provide fair and equitable treatment of all parties.

Since the parties may withdraw their consent to resolve disputes informally, FIRE also recommends that the Department add language prohibiting the parties from using statements their adversaries make against their own interest during the course of pursuing informal resolutions in subsequent formal campus procedures. Language to this effect will ensure that the parties can speak more freely in pursuit of informal resolutions without fear that their concessions are used against them should the parties fail to reach a resolution informally. It is for precisely this reason that statements made during settlement negotiations are inadmissible under Rule 408 of the Federal Rules of Evidence.⁹⁰

Proposed Sections 106.46(c) and (e): Written Notice in Advance of Being Interviewed

Section 106.46(c) of the proposed regulations states that:

(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:

(i) All information required under § 106.45(c); and

(ii) Allegations potentially constituting sex-based harassment, including the information required under § 106.45(c)(1)(ii), with sufficient time for the parties to prepare a response before any initial interview.

(2) The written notice must also inform the parties that:

(i) The respondent is presumed not responsible for the alleged conduct until a determination of whether sex-based harassment occurred is made at the conclusion of the grievance procedures under this section and that prior to the determination, the parties will have an opportunity to present relevant evidence to a trained, impartial decisionmaker;

(ii) They may have an advisor of their choice to serve in the role set out in paragraph (e)(2) of this section, and that the advisor may be, but is not required to be, an attorney;

⁹⁰ Fed. R. Evid. 408.

(iii) They are entitled to receive access to relevant evidence or to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section; and

(iv) If applicable, any provision in the postsecondary institution's code of conduct prohibits knowingly making false statements or knowingly submitting false information during the grievance procedure.

(3) To the extent the postsecondary institution has legitimate concerns for the safety of any person as a result of providing this notice, the postsecondary institution may reasonably delay providing written notice of the allegations in order to address the safety concern appropriately. Legitimate concerns must be based on individualized safety and risk analysis and not on mere speculation or stereotypes.

The proposed regulations provide under section 106.46(e)(1) that sufficient time to prepare means that recipients “[m]ust provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all meetings, investigative interviews, or hearings with sufficient time for the party to prepare to participate.”

FIRE supports most of the content of these provisions, which we note is similar to that of the current regulations. Due process at public institutions requires adequate notice of the charges with enough detail to fully understand the allegations.⁹¹ Adequate time to prepare is also crucial. *Removal of these important protections would pose significant constitutional concerns and would also be arbitrary and capricious. However, Section 106.46(c)(2)(iii) must be changed so the written notice informs the parties “[t]hey are entitled to receive access to relevant evidence and, if applicable, to an investigative report that accurately summarizes this evidence as set out in paragraph (e)(6) of this section.” Moreover, the Department should also require institutions that invoke proposed section’s 106.46(c)(3)’s permission to delay written notice based on legitimate concerns of campus safety, to record their justification for doing so in the investigatory record.*

⁹¹ See *Goss*, 419 U.S. at 579.

Proposed Sections 106.46(e)(6)(ii) and 106.46(g): Eliminating the Right to a Live Hearing

Of the many ways that the proposed regulations allow institutions to offer *fewer* due process protections to accused parties than permissible under the existing regulations, perhaps the most consequential and unjustifiable are sections 106.46(e)(6)(ii) and 106.46 (g). These sections authorize institutions to deny accused parties the right to a live hearing to defend themselves.

The current regulations do not permit institutions to forgo live hearings unless the parties consent to resolve complaints informally. Section 106.45(b)(6)(i) of the 2020 regulations state: “Hearings. (i) For postsecondary institutions, the recipient’s grievance process must provide for a live hearing.”

In contrast, section 106.46(e)(6)(ii) of the proposal reads:

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;

The right to a live hearing is also explicitly rejected in Section 106.46 (g) of the proposal: “A postsecondary institution’s sex-based harassment grievance procedures may, but need not, provide for a live hearing.”

FIRE’s research shows that when not required to provide a live hearing, the majority of institutions, regardless of their size, do not. Of the 50 surveyed institutions in FIRE’s 2021 Spotlight on Due Process report with non-Title IX sexual misconduct policies, 33 (66%) did not guarantee a meaningful hearing.⁹²

The right to a live hearing is absolutely necessary. In *Gorman v. University of Rhode Island*, the United States Court of Appeals for the First Circuit declared: “The interests of students in completing their education, as well as avoiding unfair or mistaken exclusion from the educational environment, and the

⁹² FIRE, *supra* note 79.

accompanying stigma are, of course, paramount.”⁹³ The court further wrote that “[a] charge of misconduct, which may easily be colored by the point of view of the witness, ‘requires something more than an informal interview with an administrative authority of the college.’”⁹⁴

Subsequent courts have since expanded on the bare minimum requirements in *Gorman*. In the context of discussing the right to cross-examination in a campus sex assault proceeding in *Doe v. Baum*, the United States Court of Appeals for the Sixth Circuit held “the university must allow for some form of live questioning in front of the fact-finder.”⁹⁵ Courts have similarly questioned the adequacy of hybrid models where an investigative report is given to decisionmakers without a live hearing. For instance, in *Prasad v. Cornell Univ.*, the United States District Court for the Northern District of New York wrote:

A reasonable factfinder could conclude that, absent extraordinary circumstances, the Reviewers and Dr. Murphy would have accepted the investigators’ report and conclusions at face value. The fact that Plaintiff had the opportunity to write to the Reviewers after reviewing only the investigators’ summary of the investigation provided little meaningful opportunity to challenge the investigators’ conclusions or their rendition of what witnesses purportedly stated.⁹⁶

There is simply no substitute for a live hearing when it comes to evaluating the credibility and testimony of witnesses, including the parties. Under an investigative model without live hearings, the parties can respond to only the investigator’s summary of the other parties’ and witnesses’ testimony. They must blindly rely on the accuracy of the summary and thus may never know if the witness disclosed a consequential detail that somehow never made it into the report. The investigative model also denies the fact-finder the ability to evaluate a witnesses’ demeanor during their direct testimony or when they are responding to challenging questions on cross-examination.

The right to a live hearing to adjudicate campus sexual misconduct cases is necessary even if conducting a live hearing adds to the administrative costs

⁹³ 837 F.2d 7, 14 (1st Cir. 1988).

⁹⁴ *Id.* at 13–14 (1st Cir. 1988) (quoting *Dixon v. Ala. St. Bd. of Educ.*, 294 F.2d 150 (5th Cir. 1961)).

⁹⁵ 903 F.3d 575, 583 (6th Cir. 2018).

⁹⁶ No. 5:15-cv-322, 2016 WL 3212079, at *16 (N.D.N.Y. Feb. 24, 2016).

institutions must bear. As the United States District Court of Colorado explained in *Messeri v. DiStefano*:

Requiring a hearing before a neutral arbitrator would also reduce the risk of error. . . A neutral decisionmaker would provide a fresh perspective on any credibility determinations and decrease the likelihood that a party would be erroneously found responsible. While such a requirement may increase the University's costs and administrative burden, the University does not contend, nor, in the Court's view, could it reasonably contend, that such costs outweigh Plaintiff's interest in avoiding being mistakenly expelled from the University and allowing him to more fully defend himself.⁹⁷

At least one federal court has concluded that denying a party a live hearing during an appeal violated the constitutional right to due process. In *Doe v. Alger*, the court noted:

[T]he appeal board effectively reversed the decision of the hearing board without any explanation whatsoever and without ever expressing a finding that Doe was responsible for sexual misconduct. It did so without hearing any live testimony, even though a new issue of credibility had arisen, and after considering additional evidence submitted by Roe, some of which was not even provided to Doe until after a final decision was made. Furthermore, Doe was not permitted to be present at the appeal hearing.⁹⁸

Explaining that James Madison University violated Doe's due process rights, the court wrote:

In short, Doe was given no opportunity to respond to some of the evidence (e.g., the social worker's statement), was hampered by the rules prohibiting contact with witnesses or limited by time constraints in responding to others (e.g., the allegations that Roe's roommate lied, and the new appeal statement, including the explanation of the voice-mail), and was not permitted to appear before the appeal board.⁹⁹

⁹⁷ 480 F. Supp. 3d 1157, 1164 (D. Colo. 2020).

⁹⁸ 228 F. Supp. 3d. 713, 730 (W.D. Va. 2016).

⁹⁹ *Id.* at 732.

The United States Court of Appeals for the Third Circuit concluded that the right to a live hearing also applied to expulsion hearings at private institutions that promised fundamentally fair proceedings:

We hold that USciences’s contractual promises of “fair” and “equitable” treatment to those accused of sexual misconduct **require 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.**¹⁰⁰

When the facts are in dispute, the Department of Education must not let institutions forgo live hearings unless both parties knowingly and voluntarily waive that right by opting to have the complaints adjudicated through informal procedures. It must also ensure that the right to a live hearing is extended through the appeals process, if new evidence or arguments are put before the decisionmaker(s). Public institutions that do not provide accused parties with the right to a live hearing when facts are in dispute violate the constitutional right to due process. Although some stakeholders have claimed that some postsecondary institutions were able to utilize a “highly trained expert who could conduct an equitable investigative process without perceived institutional bias,” allowing institutions to return to this process ignores the accused party’s constitutional rights. Additionally, as noted at footnotes 69-72 of this comment, some victims’ rights advocates have similarly rejected the single investigator model because some investigators could be predisposed against complainants.

The Department’s explanation for making live hearings optional focuses on why it believes live cross-examination is not necessary:

The Department’s tentative view is that any benefit that adversarial cross examination may have over other methods of live questioning is not sufficient to justify mandating that all postsecondary institutions permit adversarial cross-examination in every case, either as a matter of due process or fundamental fairness or of effectuating Title IX’s nondiscrimination mandate, in light of the considerable costs imposed by adversarial cross-examination, particularly in the context of allegations of sex-based harassment.

¹⁰⁰ *Doe v. Univ. of the Scis.*, 961 F.3d 203, 215 (3rd Cir. 2020) (emphasis added).

However, the Department does not discuss the actual cost of cross-examination during live hearings compared to other methods.¹⁰¹ Nor does it acknowledge that several federal courts have rejected the Department's view that the benefit of a live hearing with meaningful, adversarial cross-examination conducted in real time is dispensable. Because it is the judiciary's— and not the Department's—conclusions regarding what is necessary to satisfy the requirements of procedural fairness that must control, the Department's rationale for allowing institutions to forgo a live hearing and use the investigative model is unjustifiable and thus arbitrary and capricious.¹⁰² Moreover, because multiple courts have held there is a constitutional right to a live hearing in Title IX cases, the provision eliminating the right to a live hearing also violates the APA's prohibition on agency action that is contrary to a constitutional right.

Section 106.46 (e)(6)(iii): Unauthorized Disclosure of Information and Evidence

Section 106.46 (e)(6)(iii) violates the parties' free speech rights. It reads:

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.

This language imposes an unconstitutional gag order on the parties and their advocates. Such orders are both prior restraints and content-based restrictions on speech, and are therefore subject to strict scrutiny.¹⁰³ The United States

¹⁰¹ Critics have also raised the concern that cross-examination in Title IX cases could retraumatize the victims. However, the NPRM notes that during the prior rulemaking “the Department explained that any re-traumatization of complainants can be mitigated because cross-examination is conducted only by party advisors and the 2020 regulations contain other protections regarding the types of questions and evidence permitted and the ability to request that the live hearing occur with the parties in separate rooms.” The Department has not explained how those protections are insufficient to protect victims from trauma, or how the concern that cross-examination may be traumatizing outweighs the accused party's constitutional right to cross-examination.

¹⁰² The explanation for removing the requirement for a live hearing is also inadequate when applied to justify section 106.46(e)(6)(i) and section 106.46(f), the provision removing the requirement for live cross-examination.

¹⁰³ Erwin Chemerinsky, *Lawyers have Free Speech Rights, Too: Why Gag Orders on Trial Participants Are almost Always Unconstitutional*, 17 LOY. L.A. ENT. L. REV. 311, 313 (1997) (internal citations omitted).

Supreme Court has recognized that “prior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights.”¹⁰⁴ The Court also recognized that judicial orders requiring prior restraints are similarly suspect.¹⁰⁵ Executive branch gag orders, or executive branch rules requiring a third party to impose prior restraints on speech, will suffer the same skepticism.

Proposed section 106.46 (e)(6)(iii) is also contradicted by section 106.45 (b)(5) which requires institutions to:

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. . .

Speaking publicly about one’s case, including public comments about the evidence, or lack thereof, and any procedural irregularities, is often necessary to, or at the very least a legitimate method of, defending one’s interests.

Administratively imposed gag orders on students (or their advocates) prohibiting them from discussing their cases are far too common on college campuses.¹⁰⁶ In some instances, institutions have initiated disciplinary proceedings against students for discussing their cases publicly. Student Landen Gambill’s experience at the University of North Carolina at Chapel Hill illustrates why section 106.46(e)(6)(iii) must be eliminated. Gambill faced disciplinary charges after she publicly criticized the university’s handling of her allegation of sexual assault against a fellow student.¹⁰⁷ This should not happen; students must not face retaliation or punishment for complaining about how

¹⁰⁴ *Neb. Press Ass’n v. Stuart*, 427 U.S. 539, 559 (1976).

¹⁰⁵ *Alexander v. United States*, 509 U.S. 544, 550 (1993).

¹⁰⁶ Sara Ganim, ‘Gag Order’ against assault: School bully young accusers into waiving rights, lawyers say, USA TODAY (June 2, 2022 5:01 AM), <https://www.usatoday.com/story/news/education/2022/06/02/schools-students-federal-rights-rape-cases/9775181002> [<https://perma.cc/K739-BGKP>].

¹⁰⁷ Will Creeley, *Student Critic of University of North Carolina’s Sexual Misconduct Procedures Faces Discipline under Speech Code*, FIRE (Feb. 26, 2013), <https://www.thefire.org/student-critic-of-university-of-north-carolinas-sexual-misconduct-procedures-faces-discipline-under-speech-code> [<https://perma.cc/L5U7-EWP8>].

their grievances are handled. As the current regulations and prior guidance make clear, institutions must not violate the First Amendment in their pursuit of enforcing Title IX. *Section 106.45 (b)(5) is appropriate, but the gag order set forth in section 106.46 (e)6(iii) is arbitrary and capricious as well as unconstitutional. The unconstitutionality of the section also means that it is subject to being invalidated under the APA.*

Proposed Section 106.46(f): Evaluating Allegations and Assessing Credibility

Proposed section 106.46(f) offers radical changes that absolve institutions of their obligation under the current regulations to offer all accused parties the right to cross-examine their accusers and other adverse witnesses.

Section 106.45(b)(6)(i) of the existing regulations provides:

Hearings. (i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings. At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

The Department has a header on the top of each page of the existing regulations notifying the public that:

A Federal court order vacated the following language in 34 C.F.R. § 106.45(b)(6)(i): “If a party or witness does [not submit] to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.” *Victim Rights Law Center et al. v. Cardona* No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021), *appeals pending* (1st Cir.). The Department will no longer enforce this portion of the provision and any related statements in this document may not be relied upon.

In response to the court’s ruling in *Victim’s Rights Law Center v. Cardona*, where a federal court concluded that one provision prohibiting any use of prior statements from a witness who refuses to submit to cross-examination was unconstitutional, the Department provides the following in section 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 questions related to their credibility.

FIRE agrees with this proposed language. No party should be able to place statements that are supportive of their position into the record without allowing their adversary to cross-examine them, but the language struck by the District Court of Massachusetts also forbade fact-finders from considering statements against parties’ own interests if they refused to submit to cross-examination. The new language sets the right policy on this point and should not be altered in the final regulations.

The real problem with how the proposed regulations approach the right to cross-examination is that they make that right optional. Only when an institution chooses to provide a live hearing is cross-examination required. Section 106.46(f) states:

(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.

(2) Compliance with § 106.45(g). Compliance with paragraph (f)(1)(i) or (f)(1)(ii) of this section satisfies the requirements of § 106.45(g).

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

As noted above, and as multiple courts have concluded, live hearings with live cross-examination performed by a party's own advocate are essential to satisfy the requirements of due process in Title IX hearings where life-altering discipline is a possibility. The cases requiring cross-examination in a live hearing are plentiful and growing in number.¹⁰⁸ In *Baum*, the Sixth Circuit held:

Due process requires cross-examination in circumstances like these because it is “the greatest legal engine ever invented” for uncovering the truth. 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. So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.¹⁰⁹

¹⁰⁸ See *Messeri v. DiStefano*, 480 F. Supp. 3d 1157, 1165 (D. Colo. 2020) (“Without live adversarial questioning, Plaintiff cannot probe the witnesses' stories to test their memories or potential ulterior motives, or to observe the witnesses' demeanor.”); *Neal v. Colo. St. Univ.–Pueblo*, No. 16-cv-873-RM-CBS, 47 (D. Colo. Feb. 16, 2017) (“In light of the seriousness of Plaintiff's private interests at stake, and the foregoing legal authorities, the Board of Governors has not shown it is entitled to dismissal of the due process claim regarding Plaintiff's right to a hearing in which to question witnesses, present witnesses and present other evidence.”); *Lee v. Univ. of N.M.*, 449 F. Supp. 3d 1071, 1128 (D.N.M. 2020) (“When balanced against each other, the *Mathews v. Eldridge* factors set forth above suggest that Lee did not receive a ‘meaningful opportunity to be heard,’ *In re C. W. Mining Co.*, 625 F.3d 1240, 1244 (10th Cir. 2010), because UNM did not allow for any cross-examination in determining credibility, and because UNM's procedures unreasonably hindered Lee's ability to present a meaningful defense.”); see also *Doe v. Salisbury Univ.*, 123 F. Supp. 3d 748, 766 (D. Md. 2015) (“Plaintiffs allege numerous procedural defects, which taken together satisfy the first element of their erroneous outcome claim: (1) Plaintiffs were told that they would ‘have an opportunity to ask questions of the Investigator, Complainant and Witnesses’ at the Board's hearing (ECF No. 83–5), and yet ‘Plaintiffs were prohibited from asking many critical questions of witnesses....’ (Fourth Amended Complaint ¶ 29)”).

¹⁰⁹ *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018) (internal citations omitted).

The Sixth Circuit explained at length why the cross-examination must be live and conducted by an advocate aligned with the accused:

[T]he university offers four reasons why Doe’s claim is not as plausible as it seems. None do the trick. **First, the university contends that even if Doe did not have a formal opportunity to question Roe, he was permitted to review her statement and submit a response identifying inconsistencies for the investigator. As such, the university claims that there would have been no added benefit to cross-examination. But this circuit has already flatly rejected that argument.** In *University of Cincinnati*, we explained that an accused’s ability “to draw attention to alleged inconsistencies” in the accuser’s statements does not render cross-examination futile. *Id.* at 401-02. That conclusion applies equally here, and we see no reason to doubt its wisdom. Cross-examination is essential in cases like Doe’s because it does *more* than uncover inconsistencies — it “takes aim at credibility like no other procedural device.” *Id.* **Without the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test her memory, intelligence, or potential ulterior motives.** *Id.* at 402. **Nor can the fact-finder observe the witness’s demeanor under that questioning.** *Id.* **For that reason, written statements cannot substitute for cross-examination.** See Brutus Essay XIII, in *The Anti-Federalist* 180 (Herbert J. Storing ed., 1985) (“It is of great importance in the distribution of justice that witnesses should be examined face to face, that the parties should have the fairest opportunity of cross-examining them in order to bring out the whole truth; there is something in the manner in which a witness delivers his testimony which cannot be committed to paper, and which yet very frequently gives a complexion to his evidence, very different from what it would bear if committed to writing....”). **Instead, the university must allow for some form of live questioning in front of the fact-finder.** See *Univ. of Cincinnati*, 872 F.3d at 402-03, 406 (noting that this requirement can be facilitated through modern technology, including, for example, by allowing a witness to be questioned via Skype “without physical presence”).

That is not to say, however, that the accused student always has a right to *personally* confront his accuser and other witnesses. See *Miami Univ.*, 882 F.3d at 600 (noting that “even in the face of a sexual-assault accusation,” the protections afforded to an accused

“need not reach the same level ... that would be present in a criminal prosecution” (quoting *Univ. of Cincinnati*, 872 F.3d at 400)). Universities have a legitimate interest in avoiding procedures that may subject an alleged victim to further harm or harassment. And in sexual misconduct cases, allowing the accused to cross-examine the accuser may do just that. *See Univ. of Cincinnati*, 872 F.3d at 403. **But in circumstances like these, the answer is not to deny cross-examination altogether. Instead, the university could allow the accused student’s agent to conduct cross-examination on his behalf. After all, an individual aligned with the accused student can accomplish the benefits of cross-examination — its adversarial nature and the opportunity for follow-up — without subjecting the accuser to the emotional trauma of directly confronting her alleged attacker. Cf. *Maryland v. Craig*, 497 U.S. 836, 857, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (holding that where forcing the alleged victim to testify in the physical presence of the defendant may result in trauma, the court could use an alternative procedure that “ensures the reliability of the evidence by subjecting it to rigorous adversarial testing” through “full cross-examination” and ensuring that the alleged victim could be “observed by the judge, jury, and defendant as they testified”).¹¹⁰**

Courts have similarly offered sharp criticism of private institutions, though they are not bound by constitutional requirements of due process, for prohibiting live cross-examination. In *Doe v. University of the Sciences*, the Third Circuit was direct:

Basic fairness in this context does not demand the full panoply of procedural protections available in courts. But it does include the modest procedural protections of a live, meaningful, and adversarial hearing and the chance to test witnesses’ credibility through some method of cross-examination.¹¹¹

The Court reiterated the point:

We hold that USciences’s contractual promises of “fair” and “equitable” treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the

¹¹⁰ *Id.* at 582–83 (emphasis added).

¹¹¹ *Doe v. Univ. of the Scis.*, 961 F.3d at 215.

opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.¹¹²

In *Doe v. Brandeis*, the United States District Court for the District of Massachusetts was particularly detailed in its criticism of the private institution’s investigative model that, like the proposed regulations, did not require live cross-examination. The Court explained:

Brandeis did not permit John to confront or cross-examine J.C., either directly or through counsel. Presumably, the purpose of that limitation was to spare J.C. the experience of being subject to cross-examination. While protection of victims of sexual assault from unnecessary harassment is a laudable goal, the elimination of such a basic protection for the rights of the accused raises profound concerns.

In the famous words of John Henry Wigmore, cross-examination is “beyond any doubt the greatest legal engine ever invented for the discovery of truth.” 3 Wigmore, *Evidence* § 1367, p. 27 (2d ed. 1923). The ability to cross-examine is most critical when the issue is the credibility of the accuser. *See Donohue v. Baker*, 976 F.Supp. 136, 147 (N.D.N.Y.1997) (“[I]f a case is essentially one of credibility, the ‘cross-examination of witnesses might [be] essential to a fair hearing.’”)(quoting *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir.1972)).

Here, there were essentially no third-party witnesses to any of the events in question, and there does not appear to have been any contemporary corroborating evidence. The entire investigation thus turned on the credibility of the accuser and the accused. Under the circumstances, the lack of an opportunity for cross-examination may have had a very substantial effect on the fairness of the proceeding.¹¹³

The United States Court of Appeals for the First Circuit has also held that university disciplinary procedures require cross-examination:

[I]n this respect, we agree with a position taken by the Foundation for Individual Rights in Education, as amicus in support of the

¹¹² *Id.*

¹¹³ *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 604–05 (D. Mass. 2016).

appellant -- that due process in the university disciplinary setting requires “some opportunity for real-time cross-examination, even if only through a hearing panel.”¹¹⁴

The *Haidak* Court did not hold that the questions had to be posed by the accused’s advocate, permitting questions to be routed through the fact-finder, but it still demanded that institutions provide “real-time cross-examination.”

Providing recipient institutions discretion to deny students the right to live hearings and cross-examination is functionally equivalent to restricting its use. If institutions have the option to dispense with live hearings with cross-examination, many of them will. Of the 53 surveyed institutions in FIRE’s 2021 Spotlight on Due Process report, Title IX policies at 45 institutions (84.9%) provide parties with the ability to question witnesses, in real time, during a Title IX hearing, while only nine institutions’ (18%) non-Title IX sexual misconduct policies provide the same safeguard.¹¹⁵ This shows that when institutions are not required to offer live hearings with cross-examination, they overwhelmingly refuse to provide those basic protections. The point is further illustrated by Dartmouth University, which has two separate policies for addressing sexual harassment that occurs within the jurisdiction of Title IX, where the current regulations require institutions to offer cross-examination, and for addressing sexual harassment that occurs outside of the jurisdiction of Title IX. The only difference between the two policies: the non-Title IX harassment policy denies the parties the right to cross-examination.¹¹⁶

Further evidence that allowing institutions to forgo live, adversarial cross-examination will result in most institutions denying that right can be found in the 2019 written comment of the American Council on Education (ACE), submitted when the current regulations were pending. Speaking on behalf of its membership of over 1,700 colleges and universities, ACE wrote:

For example, the proposed rule would require a “live hearing” with direct cross-examination by the parties’ advisors. Such an approach—which will subject students to highly contentious, hostile, emotionally draining direct cross-examination in a courtroom-like atmosphere—has obvious drawbacks.¹¹⁷

¹¹⁴ *Haidak v. Univ. of Mass. – Amherst*, 933 F.3d 56, 69 (1st Cir. 2019).

¹¹⁵ FIRE, *supra* note 79.

¹¹⁶ *Id.*

¹¹⁷ AMERICAN COUNCIL ON EDUCATION, COMMENTS TO THE DEPARTMENT OF EDUCATION ON PROPOSED RULE AMENDING TITLE IX REGULATIONS 9 (Jan. 30, 2019),

Universities would not be fighting for the right to eliminate live hearings with cross-examination if they did not intend to exercise that option.

Given the extensive legal precedent, the language in section 104.46 (f)(1)(i), which is apparently the Department's attempt to have some mechanism for evaluating credibility in an investigative model, is entirely inadequate. While allowing a fact-finder to rule on relevancy and other objections before a question is posed may pass constitutional muster, there is no acceptable substitute for live, adversarial cross-examination.¹¹⁸ *FIRE does not object to the framework set forth for cross-examination as set forth in sections 104.46 (f)(1)(ii)-104.46(f)(3), but the Department must remove section 104.46 (f)(1)(i) and those sections that revoke the right to a live hearing.*

Proposed Section 106.46(f)(3): Evaluation of Questions

The proposed regulations provide clear instruction for evaluating questions and what limitations are permissible. Proposed section 106.46(f)(3) states that:

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

FIRE supports what is stated in proposed section 106.46(f)(3), but the Department should amend it to require factfinders to explain the rationale for excluding any question, not just those questions excluded based on relevance.

<https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> [<https://perma.cc/EHA3-FE23>].

¹¹⁸ We note earlier that the justification for removing live hearings because live cross-examination is unnecessary is inadequate because of the caselaw requiring live hearings. See *supra* notes 94–100, 102 and accompanying text.

Proposed Section 106.46(g): Recordings of Live Hearings

The proposed regulations state that “[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.” This language is retained from the current regulations. FIRE believes that it is important for transparency and accountability purposes, as well as for any appeal, that a record of a live hearing be made available to the parties.

This provision must remain in the final regulations to ensure that complainants and accused parties may effectively hold institutions accountable should they fail to meet their legal and moral obligations. These records are instrumental to both OCR and courts that would need to conduct more extensive discovery to evaluate claims in the absence of such records. It would threaten due process and make it easier for institutions to avoid accountability. There is no reasonable justification for allowing institutions to avoid the responsibility to maintain accurate accounts of formal proceedings. *Without sufficient justification for doing so, it would be arbitrary and capricious to cut this from the final regulations.*

Proposed Section 106.46 (h): Burden of Proof

The burdens of proof available to institutions in evaluating Title IX allegations are set forth in section 106.46(h):

(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.

In contrast, section 106.45 (b)(1)(vii) of the 2020 regulations requires institutions to:

[s]tate whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;

FIRE has consistently criticized the Department of Education’s April 4, 2011, “Dear Colleague” letter-era position, adopted without notice and comment in violation of the Administrative Procedure Act, that institutions must use the preponderance of the evidence standard when adjudicating Title IX cases. Given the high stakes, institutions should be using the clear and convincing evidence standard.¹¹⁹ Because of the seriousness of the allegations and the potential consequences of error for all parties, the use of the preponderance of the evidence standard is particularly inappropriate in the absence of robust procedural protections. Because the proposed regulations do not provide the right to a live hearing; allow a single investigator to serve as judge, jury, and executioner; allow institutions to forgo live, adversarial cross-examination by using the investigative model; do not give the parties the right to active participation of counsel throughout the process; and do not provide accused parties the right to reasonable continuous access to all non-privileged inculpatory and exculpatory evidence in the institution’s possession, the use of the low preponderance of the evidence standard is insufficient to protect the due process rights of accused parties.

We appreciate that the proposed regulations, like the current regulations, do not *require* institutions to use the preponderance of the evidence standard. However, allowing its use at all—especially in the absence of the procedural protections mentioned above—threatens due process and fundamental fairness. This is particularly true here, where institutions have been fighting for the authority to use the preponderance of the evidence standard.¹²⁰ *The*

¹¹⁹ Letter from Will Creeley, Dir. of Legal & Pub. Advoc., FIRE, to Russlynn Ali, Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ. (May 5, 2011), <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011> [<https://perma.cc/RLA6-Y8QD>].

¹²⁰ AMERICAN COUNCIL ON EDUCATION, *supra* note 117, at 18 (“The NPRM purports to offer institutions a choice: they may use either “preponderance of evidence” or “clear and convincing evidence” as the standard of proof in Title IX formal grievance proceedings. However, under

Department must either cure each of the other provisions that undermine procedural protections or require institutions to use the clear and convincing evidence standard.

Proposed Section 106.46(h): Requirement for a Written Opinion Outlining Rationale

The proposed regulations require the following:

(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.

(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.

FIRE is grateful that proposed section 106.46(h) is generally similar to the current regulations. *Removal of this section, or otherwise amending this*

the proposed rule, an institution that selects the preponderance of evidence standard must adopt it in all other campus proceedings that carry the same disciplinary penalty.”).

language to diminish parties' ability to understand the recipient's determination, would significantly impact the parties' ability to appeal, and OCR and the judiciary's ability to evaluate whether institutions handled cases appropriately, posing serious due process concerns.

Proposed Sections 106.46(h)(2)(i)(1)-(2): Appeals

Sections 106.46(h)(2)(i)(1)-(2) address the grounds by which a party may file an appeal. Those sections read:

(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.

(2) A postsecondary institution may offer an appeal equally to the parties on additional bases, as long as the additional bases are available to all parties.

FIRE agrees that institutions should be free to offer additional grounds for appeal, and thus we agree with section 106.46(h)(2)(i)(2)'s language that grants them that authority. We continue to disagree over the fairness of allowing complainants to appeal findings that the accused is not responsible,¹²¹ but

¹²¹ Press Release, Changes to Violence Against Women Act Would Threaten Student Due Process Rights, FIRE, (Oct. 31, 2011), <https://www.thefire.org/changes-to-violence-against-women-act-would-threaten-student-due-process-rights/> [<https://perma.cc/W2XE-YJLK>].

acknowledge that the Violence Against Women Act requires institutions to offer equivalent appellate rights.¹²²

FIRE also agrees that the three enumerated mandatory grounds for appeal set forth in sections 106.46(h)(2)(i)(1)(i-iii) are necessary, but recommends that the Department add a fourth enumerated ground for appeal: Parties should also have the right to appeal on the basis that the factfinder's conclusions are against the weight of the evidence. Without this established ground for appeal, parties might be denied the right to appeal on the straightforward grounds that the factfinder simply made the wrong decision.¹²³

Proposed Section 106.47: Assistant Secretary Review of Sex-Based Harassment Complaints

Section 106.47 provides an explicit statement that “[t]he Assistant Secretary will not deem a recipient to have violated this part solely because the Assistant Secretary would have reached a different determination than a recipient reached under section 106.45, and if applicable section 106.46, based on an independent weighing of the evidence in sex-based harassment complaints.”

FIRE agrees that the role of the Department in this area is not to second-guess the outcomes of proceedings, but to ensure that complaints are addressed using procedures that are fair. It is unlikely that Congress intended to give the Department the responsibility or authority to decide the merits of Title IX disputes *de novo*. *This provision should remain in substantially similar form in the final regulations to avoid fundamentally altering the Department's role in evaluating complaints it receives and potentially exposing private institutions to state action claims.*

¹²² 20 U.S.C. § 1092 (f)(8)(B)(iv)(III)(bb) (requiring the institutions to inform both the accuser and the accused to be informed of “the institution’s procedures for the accused and the victim to appeal the results of the institutional disciplinary proceeding”).

¹²³ *See e.g., Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (“The Special Examiner process, as set forth in the 2013-14 Handbook permitted an appeal on only four grounds: fraud, “denial of rights under this process,” “procedural error,” or “the claim of new evidence not previously available, which would have materially affected the decision.” Conspicuously absent from that list is the ability to appeal on the ground that the Special Examiner’s decision was not supported by the evidence, or that it was otherwise unfair, unwise, or simply wrong. The Special Examiner, for all practical purposes, had the first and only say in determining John’s guilt.”) (citations omitted).

Additional Concerns

Chevron Analysis and “Major Questions”

The proposed regulations will not be entitled to *Chevron* deference.

Courts typically follow a two-step test developed in *Chevron U.S.A, Inc. v. Natural Resources Defense Council* when interpreting a statute that a regulatory agency administers.¹²⁴ The first question in *Chevron* analysis is “whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress.”¹²⁵ If, however, the statute is deemed ambiguous or if it is deemed to be silent on the matter, courts will perform “step two” analysis and ask whether the agency’s interpretation is “based on a permissible construction of the statute.”¹²⁶ If a court finds the agency’s interpretation to be reasonable, the agency’s interpretation will be upheld.

However, “in extraordinary circumstances,” courts will not always assume an implicit delegation from Congress to fill gaps in statutes, and will invoke the “major questions” doctrine to strike agency actions.¹²⁷ This summer, in *West Virginia v. EPA*, the Supreme Court reaffirmed that the more significant action an administrative agency takes, without express statutory authority, the more scrutiny courts will apply to its actions. Important factors in determining whether to invoke this doctrine are “the ‘history and the breadth of the authority that [the agency] has asserted,’ and the ‘economic and political significance’ of that assertion.”¹²⁸ Courts will also consider whether Congress has attempted, and failed, to do what the agency is attempting to do.

The Department’s proposed regulations set forth an unprecedented expansion of the phrase “educational program or activity” to include not just what happens in and around campuses, but global coverage of every instance of sex discrimination with a scintilla of a relation to a recipient institution. Plus, if

¹²⁴ 467 U.S. 837 (1984).

¹²⁵ *Id.* at 842–43.

¹²⁶ *Id.* at 843.

¹²⁷ Kevin O. Leske, *Major Questions About the “Major Questions” Doctrine*, 5 MICH. J. ENVTL. & ADMIN L. 479, 482 (2016).

¹²⁸ *West Virginia v. EPA*, 142 S.Ct. 2587, 2608 (2022) (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

hostile environment harassment is ultimately defined to include pervasive speech that isn't severe, as the proposed regulations now state, nearly all speech pertaining to sex will need to be tracked, because one cannot establish whether pervasiveness is ever met if allegations aren't somehow catalogued in the earlier instances. When severity is also required, speech that isn't severe need not be tracked because even if it were to eventually become pervasive, its lack of severity would mean it would never become actionable. If institutions are to take action worldwide based on this broader definition, institutions would all of the sudden bear the responsibility of monitoring a broad swath of speech (not to mention sexual activity) occurring anywhere on the globe.¹²⁹

Whether under *Chevron* analysis or the “major questions” doctrine, several proposed sections, including proposed section 106.11, will likely be voided by courts because Congress has not authorized the Department of Education to require institutions to become the worldwide speech and sexuality police. It is highly unlikely that Congress would ever grant the Department this authority either.

Proposed Section 106.11 Fails Step One of Chevron

Contrary to plain statutory language limiting its application, the Department's proposed section 106.11 declares:

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*. [Emphasis added.]

Title IX's prohibition against discrimination based on sex, as enacted by Congress in 1972, is limited to just 37 words:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to

¹²⁹ Particularly to the extent these regulations encompass speech, a clear grant of authority from Congress is generally necessary before an agency may regulate areas falling within First Amendment protection. *See, e.g., Motion Picture Ass'n of Am., Inc. v. FCC*, 309 F.3d 796, 804–05 (D.C. Cir. 2002) (“One of the reasons why § 1 has not been construed to allow the FCC to regulate programming content is because such regulations invariably raise First Amendment issues.”); *cf., e.g., AFL-CIO v. FEC*, 333 F.3d 168, 178–80 (“courts will [] not lightly assume that Congress intended to infringe constitutionally protected liberties”) (quoting *Edward J. DeBartolo Corp. v. Fla. Gulf Coast Bldg. & Const. Trades Council*, 485 U.S. 568, 575 (1988)).

discrimination under any education program or activity receiving Federal financial assistance.¹³⁰

As discussed above, both the text of Title IX and Supreme Court precedent limit the scope of the statute to an institution’s “program or activity.” There are also geographical limitations on the statute’s scope. The key phrase for the purposes of this section is “in the United States.” Proposed section 106.11 fails step one of *Chevron* analysis because Congress explicitly limited the persons protected by Title IX to persons “in the United States.”

Since Congress has expressly spoken on the limits of Title IX, no agency departure from those limits will be upheld in court.

Proposed Section 106.11 Will Also Fail Under the Major Questions Doctrine

The expansion of Title IX’s reach set forth by Department’s proposed section 106.11 could fail under two separate rationales of the “major questions” doctrine. First, the Department is proposing a rule that is far outside the “history and the breadth of the authority” it has previously asserted.¹³¹ If enacted, proposed section 106.11 would require a seismic shift in the way that recipients are required to track claims of sex-based discrimination across the world. Paired with the unconstitutional definition of sex-based harassment proposed by the Department, educational institutions would be charged with tracking even minor instances of speech that, over time, could potentially create a hostile environment. A Title IX Coordinator in Oxford, Mississippi would be required to police an Ole Miss student’s speech in Oxford, England to comply with the proposed regulations. The proposed regulations are not only inconsistent with the text of Title IX, but also impose significant logistical and practical impossibilities for institutions.

Second, Congress has attempted, and failed, to pass legislation similar to proposed section 106.11. In 2021, Representative Debbie Dingell, along with five Congressional co-sponsors, introduced H.R. 5396, called the “Title IX Take Responsibility Act of 2021.” The bill sought to require educational institutions to address sex-based harassment “regardless of where the harassment occurs.” That the bill has not advanced and has merely six of the 435 members of the House of Representatives as sponsors demonstrates that there is little interest

¹³⁰ 20 U.S. Code § 1681.

¹³¹ *West Virginia v. EPA*, 142 S.Ct. at 2608 (quoting *FDA v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 159 (2000)).

from Congress in expanding the Department’s authority to regulate international speech.

The Department must revise proposed section 106.11 to follow the explicit limits placed on its authority by Congress, or risk losing litigation over the section.

The Department’s Estimated Costs and Regulatory Impact Analysis

The Department erroneously asserts that the proposed regulations will result in net cost savings to institutions. Courts “will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses.”¹³² While courts generally “review an agency’s cost/benefit analysis deferentially,”¹³³ a “serious flaw undermining that analysis can render the rule unreasonable.”¹³⁴ “A major error in the regulatory flexibility analysis” is potential grounds for overturning a regulation.¹³⁵

The Department’s regulatory impact cost projection is significantly off the mark, and therefore unreasonable, because it grossly underestimates the cost of the proposed regulations given that it has not at all factored in the well-documented cost of legal challenges to unconstitutional grievance procedures. According to the NPRM:

the Department estimates that the regulations would result in a discounted net cost savings to recipients of between \$9.8 million to \$28.2 million over ten years. These estimated cost savings arise

¹³² *City of Portland v. EPA*, 507 F.3d 706, 713 (D.C. Cir. 2007).

¹³³ *Am. Trucking Ass’ns, Inc. v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 254 (D.C. Cir. 2013).

¹³⁴ *Nat’l Ass’n of Home Builders v. EPA*, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *See also, California v. Bernhardt*, 472 F. Supp. 3d 573, 618 (N.D. Cal. 2020) (ruling “BLM’s compliance costs calculations arbitrary and capricious and insufficient under the APA.”).

¹³⁵ *Mid-Tex Elec. Co-op., Inc. v. FERC*, 773 F.2d 327, 341 (D.C. Cir. 1985) quoting *Small Refiner Lead Phase-Down Task Force v. U.S.E.P.A.*, 705 F.2d 506, 538 (D.C. Cir. 1983). *California Cattlemen’s Ass’n v. United States Fish & Wildlife Serv.*, 315 F. Supp. 3d 282, 287 (D.D.C. 2018) (a court “can consider compliance with [the initial regulatory flexibility requirements of the Regulatory Flexibility Act] under APA arbitrary and capricious review”).

largely from the additional flexibility that recipients would have to design and implement grievance procedures consistent with Title IX under proposed § 106.45, and if applicable proposed § 106.46.

Unfortunately, this “additional flexibility” for institutions in crafting grievance procedures will likely result in institutions formulating unconstitutional policies that are required or authorized by these proposed regulations, including the removal of live hearings; the return to endorsing a single investigator model; inadequate access to the evidence; the ability to circumvent live, adversarial cross-examination entirely by ditching live hearings; and the fact that the regulations extend institutions’ obligations to police the sexuality and speech of their students and employees worldwide using an overbroad definition of hostile environment harassment.

The litigation costs resulting from the Department’s past administrative actions that have required or authorized institutions to implement unconstitutional grievance policies are well documented. In a 2019 law review article, for example, Professor KC Johnson, a noted expert who tracks Title IX litigation, and Samantha Harris, FIRE’s former vice president for procedural advocacy, reviewed hundreds of judicial decisions weighing claims precipitated by institutional responses to alleged student sexual misconduct. Johnson and Harris found that despite their traditional deference to campus procedures, “courts have increasingly intervened” in litigation concerning student sexual misconduct, “perhaps startled by the indifference to fairness and the pursuit of truth of academic institutions that in all other capacities champion both concepts.”¹³⁶

After tracing the history of case law concerning student sexual misconduct and explaining the procedural changes on campus mandated by OCR’s 2011 Dear Colleague letter, the authors conduct a detailed analysis of recent rulings, providing readers with a close examination of the precedent as it continues to evolve, and an appendix listing relevant cases organized by their holding. According to their article:

Since the 2011 policy change, more than 500 accused students have filed lawsuits against their college or university, a wave of litigation that has continued even after the Department of Education rescinded the 2011 guidance in 2017. More than 340 of those lawsuits have been brought in federal court; colleges have been on

¹³⁶ Samantha Harris & KC Johnson, *Campus Courts In Court: The Rise In Judicial Involvement In Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS & PUB. POL’Y 49, 54 (2019).

the losing end of more than 90 federal decisions, with more than 70 additional lawsuits settled by the school prior to any decision.¹³⁷

United Educators, a firm that provides risk-management services and insurance to institutions, reviewed cases from 2011 to 2015 and calculated that the cost of defending claims averaged \$187,000 per case.¹³⁸ Institutions incurred more than \$200,000 in costs in 40% of these cases, which include the cost of hiring attorneys, settlement payments, and ancillary costs related to resolution of cases.¹³⁹

These proposed regulations similarly risk increased litigation costs associated with unconstitutional grievance policies. Professor Johnson recently predicted that the proposed regulations will likely produce litigation in several federal circuits. According to Professor Johnson:

Generally speaking, I'd expect a wave of litigation against universities in the Second, Third, Fourth, Sixth, Seventh, Eighth, Ninth and Tenth Circuits, each of which (largely as a response to university applications of the Obama-era Title IX policies that the current regulations revive) has in recent years adopted quite favorable pleading standards for accused students who claim that a school's excessively biased adjudication procedures constituted gender discrimination prohibited by Title IX.¹⁴⁰

Professor Johnson is not alone. A recent article published by the ABA stated: "The Biden administration is proposing changes in regulations governing universities' handling of sexual misconduct claims that could result in more lawsuits by accused students alleging a lack of due process."¹⁴¹

¹³⁷ *Id.* at 49.

¹³⁸ See Sarah Brown, *Lawsuits From Students Accused of Sex Assault Cost Many Colleges More Than \$200,000*, CHRON. HIGHER EDUC. (Aug. 11, 2017), <https://www.chronicle.com/article/lawsuits-from-students-accused-of-sex-assault-cost-many-colleges-more-than-200-000/> [https://perma.cc/S8M8-LWFD].

¹³⁹ *Id.*

¹⁴⁰ Colleen Murphy, 'A Wave of Litigation' Likely as Proposed Title IX Changes Roll Back Due Process Rights at Universities, *Observers Say*, LAW.COM (July 13, 2022), <https://www.law.com/2022/07/13/proposed-title-ix-changes-would-roll-back-due-process-rights-at-universities-causing-wave-of-litigation> [https://perma.cc/87ER-VSFV].

¹⁴¹ Debra Cassens Weiss, *Proposed Title IX changes could lead to uptick in suits by students accused of campus sexual misconduct*, ABA J. (July 19, 2022 3:23 PM), <https://www.abajournal.com/news/article/proposed-title-ix-changes-could-lead-to-uptick-in-suits-by-students-accused-of-campus-sexual-misconduct> [https://perma.cc/SDQ4-Q95Z].

Given how the proposed regulations contradict existing case law, including the departure from *Davis*, granting institutions the permission to ditch live hearings, permitting a single-investigator model, and revoking the right to cross-examination, the likelihood that institutions will get sued and lose lawsuits is significant. The Department must revise its cost estimate because it does not consider any of these factors.

The only way to keep litigation costs down is to require institutions to respect free speech rights and handle every complaint professionally and fairly. But, as catalogued in this comment, the proposal would impose an unconstitutional definition of hostile environment harassment, would require institutions to issue gag orders on the parties and their advocates, and would roll back many of the robust procedural protections guaranteed by the current regulations. The Department and institutions that follow the framework provided in this proposal will expose themselves to lawsuits they are unlikely to win.

After review of the Regulatory Impact Analysis included in the NPRM, FIRE believes that the Department must factor estimated costs of litigation associated with recipients' grievance procedures under the proposed regulations given the considerations the Department has already made regarding the estimated costs of investigations and adjudication. According to the Department:

At the IHE level, the Department assumes each investigation and adjudication would take 5 hours from a Title IX Coordinator, 8 hours from an administrative assistant, 5 hours each from two lawyers/advisors, 10 hours from an investigator, and 2 hours from an adjudicator. For other recipients, the Department anticipates a need for 2 hours from a Title IX Coordinator, 4 hours from an administrative assistant, 2 hours each from two lawyers/advisors, 1 hour from an investigator, and 2 hours from an adjudicator.

The Department must adjust its estimate for each position to factor in an estimated time spent preparing for and participating in litigation.

Conclusion

Effectively combating sex-based discrimination through enforcement of Title IX does not and may not require violating expressive or procedural rights. Unfortunately, the proposed regulations would make significant changes to the current regulations in ways that violate or authorize institutions to violate student and faculty free speech and due process rights.

Overbroad harassment codes and gag orders have no place at public colleges and universities bound by the First Amendment or at private institutions that promise robust free speech rights. But the Department’s proposal would require institutions to adopt a definition of hostile environment harassment broader than that required by the Supreme Court. The proposal’s imposition of a gag order on parties in Title IX proceedings is also incompatible with expressive rights. Extending institutions’ authority—more aptly, their legal obligation—to police expression and conduct that occurs beyond the borders of the United States and outside of the context of institutions’ programs and activities greatly exacerbates the threat to free speech.

The proposed regulation is similarly problematic from a due process perspective. Jettisoning the right to live hearings is a constitutional non-starter. Allowing institutions to compound that problem by allowing institutions to consolidate the roles of investigator, judge, and jury in the hands of one individual—despite multiple courts noting that the single investigator model is incompatible with basic notions of fundamental fairness—is equally unjustifiable. The same is true of the proposal’s language that absolves institutions that use the investigative model of their obligation to provide meaningful, live, adversarial cross-examination.

While FIRE appreciates that the proposal does not abandon every due process protection set forth in the current regulations, the overarching direction of the key changes in the 2022 proposal is to require or authorize institutions to provide fewer procedural safeguards. This approach is at odds with judicial trends, and will inevitably subject institutions to unwinnable lawsuits that will cost them significantly.

Too many critics of the Department’s 2020 approach have argued that by providing due process protections to the accused, the proposed regulations threaten the safety of complainants. FIRE does not agree that procedural protections put complainants at risk. Nor do many others, including the late Justice Ruth Bader Ginsburg. During a conversation with National Constitution Center President and CEO Jeffrey Rosen in February of 2018, Justice Ginsburg weighed in on the importance of restoring due process to these proceedings.¹⁴² In discussing the #MeToo movement, Rosen asked the Justice, “What about due process for the accused?” Justice Ginsburg responded:

Well, that must not be ignored and it goes beyond sexual harassment. The person who is accused has a right to defend herself

¹⁴² NATIONAL CONSTITUTION CENTER, *A Conversation with Justice Ruth Bader Ginsburg*, YOUTUBE (Feb. 12, 2018), <https://www.youtube.com/watch?v=sN7rhjPBFts>.

or himself. And we certainly should not lose sight of that, recognizing that these are complaints that should be heard. So, there's been criticism of some college codes of conduct for not giving the accused person a fair opportunity to be heard, and that's one of the basic tenets of our system, as you know. Everyone deserves a fair hearing.

Rosen asked follow-up questions. The exchange went as follows:

Rosen: Are some of those criticisms of the college codes valid?

Ginsburg: Do I think they are? Yes.

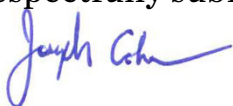
Rosen: I think people are hungry for your thoughts about how to balance the values of due process against the need for increased gender equality.

Ginsburg: It's not one or the other. It's both. We have a system of justice where people who are accused get due process, so it's just applying to this field what we have applied generally.

Justice Ginsburg's point is clear and persuasive: Due process for the accused and justice for victims must never be considered mutually exclusive. But the proposed rules mistakenly assume those rights are in tension and suggest that institutions should provide as few procedural protections as possible. That approach must be revisited if the Department wants to enact Title IX policy that will stand the test of time and respect the rights of victims and accused parties alike.

Thank you for your attention to FIRE's analysis and suggestions. If the Department has any questions regarding our input, please do not hesitate to contact us.

Respectfully submitted,



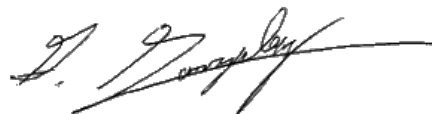
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