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Cover Page Footnote

Mr. Emerson graduated with honors from the University of Georgia School of Law and was a member of the *Georgia Law Review*. He was a civil trial attorney in Dallas, Texas for over 25 years. Presently, he is a professor of law at Western Carolina University.

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WILL DUE PROCESS BE RETURNED TO ACADEMIC SUSPENSION?: AN ANALYSIS OF ACADEMIA'S REJECTION OF THE TITLE IX FINAL RULE

Andrew F. Emerson, Esq.[+]

In 2011, the Department of Education ("DOE") under the Obama administration issued its Dear College Letter ("DCL") ordering publicly funded educational institutions to undertake aggressive actions to deter what was deemed an epidemic of sexual violence on college campuses. DOE subsequently aggressively enforced the directives of the DCL with scores of costly investigations of college disciplinary systems and threatened withdrawal of federal funding for institutions that failed to respond to sexual harassment claims aggressively. Hundreds of lawsuits followed in the wake of the DCL's issuance. Specifically, the flood of litigation was initiated by males contending they were briskly expelled, suspended, or otherwise disciplined upon collegiate tribunals' findings of guilt on claims of sexual harassment. The lawsuits portrayed collegiate systems that readily found accused males responsible on claims of sexual harassment through denial of fundamental due process rights and predetermined conclusions that equated the claim of sexual harassment with guilt on the charge. The majority of these lawsuits resulted in recognizing the deprivation of rights for the accused males in the universities' rush to judgment on sexual harassment claims. In May 2020, the DOE, under the Trump administration, released its Title IX Final Rule comprehensively addressing all aspects of publicly funded educational institutions' obligations in responding to claims of sexual harassment. The Final Rule's eighty-two sections created a procedural framework for adjudicating Title IX sexual harassment claims based solely on the determination of the factual validity of the complainant's allegations. Academia has unceasingly opposed the Final Rule from its original November 2017 publication for public comment. Repeatedly, the charge is made that the Final Rule will inevitably unleash a pandemic of sexual violence against collegiate women.

Joseph Biden campaigned for the presidency with a commitment that the Final Rule would be swiftly and surely rescinded. Accordingly, President Biden issued an executive order in March 2021 as the administration's first step in eradicating the Final Rule. However, the Final Rule has proved to be a law immune to swift elimination. A series of lawsuits seeking to overturn the Final Rule failed. Moreover, the Biden administration's actions have acknowledged that the Final Rule can only be rescinded and replaced through compliance with

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the Administrative Procedures Act and its public comment requirement. DOE has indicated a proposed replacement or drastic revision of the Final Rule will be published for public comment in April 2022. Thus, the Final Rule will likely remain an enforceable law throughout 2022. The public comment period will inevitably be contention as the Final Rule is one of the many issues on which America is deeply divided.

This article undertakes a history from the 1972 enactment of Title IX through the present setting forth the administrative, legislative, and judicial events that have led to the nation's deep division over the role of government in pronouncing and enforcing permissive sexual practices on college campuses. It concludes with considering the motivations underlying academia's consistent hostility to the Final Rule.

INTRODUCTION

On May 19, 2020, the Department of Education released its Title IX Final Rule comprehensively addressing all aspects of publicly funded educational institutions' obligations in responding to sexual harassment.[1] The Final Rule creates a procedural framework for adjudications of Title IX sexual harassment claims predicated exclusively upon determinations of the factual validity of the complainant's allegations.[2]

Academia has unceasingly opposed the Final Rule from its original November 2017 publication for public comment.[3] Opposition to the Final Rule has reflected two common themes. Academia initially contends the Final Rule would inevitably result in a pandemic of sexual violence against women enrolled in colleges and universities. It further laments the Rule's implementation of a "one size fits all" system that eliminated discretion in fashioning a Title IX disciplinary system that would best serve a school's unique characteristics, resources, and needs.

The Obama administration pursued a laudable goal of limiting the incidence of sexual assault on college campuses.[4] Equally commendable was the zealous pursuit of justice for collegians that are victims of sex crimes. The nine years preceding implementation of the Final Rule had witnessed unfortunate tactics adopted by educational institutions in pursuing such policies. The period was

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1. Nondiscrimination on the Basis of Sex in Education, 34 C.F.R. § 106 (2020) [hereinafter the "the Final Rule" or "Rule"] (official statutory Title IX and codification — The Education Amendments of 1972, 20 U.S.C. §1681(a) (2018)).

2. § 106.

3. *See infra* notes 225, 232, 278–84 and accompanying text (reviewing summary of the public comments offered by academia to the Final Rule and responses of the academe's representatives). Use of the terms "academia" or "academe" throughout the article is not intended to reference opposition to the Final Rule by each institution of higher education. The terms reference the great majority of responses to the Final Rule forthcoming from publicly funded universities and colleges. *See e.g.*, *infra* notes 277–353 and accompanying text (respectively discussing the opposition to the Final Rule of the American Council on Education, as a representative of numerous colleges and universities and the Association of Title IX Coordinators). There is undeniably a distinct minority that applauds the Final Rule. Neither should reference herein to the conduct of campus disciplinary tribunals be taken to preclude those select schools that sought to preserve fairness in adjudicating sexual harassment claims over the course of time herein reviewed.

4. Alison Solin, *Colleges and Students are Better off now that Obama era "Dear Colleague" Letter Rescinded*, PAC. LEGAL FOUND. (Sept. 9, 2020), https://pacificlegal.org/colleges-students-better-off-now-that-obamas-dear-colleague-letter-rescinded/ (observing that seeking to deter sexual harassment is a worthy pursuit, but not at the expense of suppressing free speech and deprivation of due process rights).

marked by the rise of Title IX collegiate disciplinary systems frequently conceived to issue predetermined findings of guilt for male students accused of sexual harassment.[5] Males adjudged responsible for Title IX violations systematically received attendant penalties of suspension or expulsion from the institution. The collegiate adjudications were customarily swift and unaccompanied by a reasoned explanation of the decision.

Former and suspended male students, with means sufficient, soon responded with lawsuits brought against the universities and their employees coordinating or dispensing the Title IX verdicts.[6] The early cases initiated a wave of litigation resulting in over six hundred similar legal proceedings between 2012 and 2020.[7] Customarily identified by the pseudonym "John Doe,"[8] the plaintiffs sought reinstatement with judicial declarations vacating the campus disciplinary rulings that had branded them sexual predators. The allegations of the John Doe lawsuits revealed collegiate systems that equated the filing of the Title IX complaint with the male's guilt. Similarly emerging from the John Doe allegations was a portrait of disciplinary proceedings that consistently afforded the accused male only little semblance of due process in the investigation and rendition of final determinations on the Title IX complaints.[9] The wave of John Doe lawsuits culminated in 2018 through 2020 with a series of federal appellate court decisions. Several of the federal circuits reprimanded educational institutions for conducting proceedings with deprivations of due process. Ironically, the federal opinions recognized reverse gender discrimination against males in the campus sexual harassment proceedings as plausible claims under Title IX.[10]

Among numerous influences leading to academia's distaste for the Final Rule was the gradual but dramatic evolution of thought among a distinct sector of the intelligentsia that rejected axioms of American thought. The emerging

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5. *See infra* notes 73–92, 166–206, and accompanying text (reviewing the collegiate Title IX adjudicatory systems during the period of 2011 through 2017).

6. *See infra* notes 93–95, 220–21 & accompanying text (reviewing the history of the John Doe lawsuits and judicial responses to requested relief).

7. *See Title IX Legal Database*, TITLE IX FOR ALL, https://www.titleixforall.com/title-ix-legal-database/ (last visited Aug. 29, 2021) [hereinafter *Title IX Database*] (providing a comprehensive data base itemizing Title IX litigation since 2013). *See also Campus Due Process Litigation Tracker*, FIRE, https://www.thefire.org/research/campus-due-process-litigation-tracker/ (last visited Aug. 29, 2021) [hereinafter FIRE] (tracking due process cases arising against educational institutions arising from Title IX disciplinary proceedings).

8. The hundreds of lawsuits brought by aggrieved males are herein referenced as the "John Doe Lawsuits" and plaintiffs in the lawsuits identified collectively as "John Does." The anonymous term was employed to protect the privacy of the individual plaintiffs. A litigant's request to employ an anonymous name requires a rebuttal of a presumption of the openness of judicial proceeding, with a required showing of the following by the litigant: "(1) fear of severe harm, and (2) that the fear of severe harm is reasonable." Doe v. Kamehameha Schs./Bernice Pauahi Bishop Est., 596 F.3d 1036, 1043 (9th Cir. 2010).

9. *See infra* notes 76–92, 162–206 and accompanying text.

10. *See infra* notes 137–38, 154–59 and accompanying text.

philosophy abandoned long-standing principles defining lawful sexual interactions between men and women.[11] Never before would non-violent acts or speech, such as an attempt to hold hands on a date, a post-date email expressing the sexual attractiveness of the individual, or a telephone call requesting a second date have been deemed potential sexual harassment.[12] Over decades, the ideology resulted in a significant change to college campuses through the Office for Civil Rights ("OCR").[13] The OCR's success was aided by a judiciary that progressively deferred to the agency's ever-expanding definition of its jurisdictional authority. Deference to the OCR was complimented by courts' historical reluctance to intervene in colleges and universities' internal administration. While this emerging ideology has impacted the culture of college campuses primarily through Title IX campus offices, it is only one of numerous factors that led to campus injustices over a decade. By no means do academics walk in lockstep with this new perception of appropriate sexual interaction.

Section I will briefly review the administrative pronouncements and judicial decisions that transformed Title IX into the primary federal tool to redress perceived sexual misconduct on college campuses. Section II will examine OCR's enforcement methods in securing compliance with the 2011 Dear Colleague Letter and the resulting emergence of collegiate disciplinary systems fiercely devoted to sexual harassment investigations and adjudications with all too frequent predetermined outcomes. Section III chronicles the ensuing wave of John Doe litigation by aggrieved males, the Trump administration's revocation of the Dear Colleague letter, and the growing trend of judicial intervention to redress collegiate disciplinary systems' injustices. The remedial principles underlying the Final Rule's creation of a quasi-judicial system for campus adjudications and summaries of the Rule's resulting provisions will be reviewed in Section IV. Section V will review academia's response to the regulations and the concerted efforts to repeal or substantially modify the Final Rule. Section V additionally considers the Final Rule's future viability as controlling law in the face of the executive, legislative, and litigants' attempt to render it a nullity.[14] This article concludes with a Section examining the

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11. *See infra* notes 33–36 and accompanying text.

12. *See* Jacob Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 CALIF. L. REV. 881, 892–95 (2016) (tracking resulting legislation requiring publicly funded universities to include in reporting of sexual criminal activity incidents that would not be considered crimes in a jurisdiction); *infra* notes 45–50 and accompanying text (tracing the Office of Civil Rights subsequent notice to universities of sexual harassment including unwelcome conduct or speech and the consequences of outlawing acts and speech never before deemed harassment).

13. The Office for Civil Rights was created in 1979 by the Department of Education Organizations Act. Pub. L. No. 96–88, § 203, 93 Stat. 668, 673 (1979) (codified at 20 U.S.C. § 3413 (2018)).

14. *See*, *e.g.*, Laura Meckler, *Biden Directs Fresh Review of Title IX Rule on Campus Sexual Assault,* WASH. POST (Mar. 8, 2021, 6:23 PM), https://www.washingtonpost.com/education/biden-title-ix-campus-sexual-assault/2021/03/08/1fce95f2-7fa9-11eb-9ca6-54e187ee4939_story.html

motivations underlying academia's rejection of the Final Rule and forces at play on college campuses leading to the widespread opposition. Meaningful analysis of the academe's opposition to the Final Rule requires revisiting historical events in an environment ripe for the colleges' commitment to systems of injustice in Title IX adjudications.

I. THE ENACTMENT & HISTORICAL EXPANSION OF TITLE IX CULMINATING IN THE 2011 DEAR COLLEAGUE LETTER

A. The Origins & Evolution of Title IX

Title IX of the Education Amendments of 1972 prohibits federally funded educational institutions from engaging in sexual discrimination: "[n]o 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."[15]

Title IX's minimal legislative history sufficiently indicated the law's fundamental purpose was to promote gender equality in educational opportunities for institutions receiving federal funding.[16] In the wake of Title IX's enactment, judicial decisions soon emphasized that gender equality in education included equality of opportunity in schools' athletic programs.[17] A 1974 amendment to Title IX, sponsored by Senator Javits, codified the legislative intent for gender equality in athletic opportunities in Title IX.[18] However, nothing in the legislative history or language of Title IX suggested that the statute's prohibition of gender discrimination was intended to redress sexual harassment or sexual violence on college campuses.[19]

(reviewing President Biden's March 8th instruction for Department of Education to review the Final Rule as a first step in unraveling the regulations).

15. 20 U.S.C. § 1681(a) (2018). The legislative enactment and entire statutory scheme of Title IX is cited as follows: Pub. L. No. 92-318, 86 Stat. 373, 373–375 (1972) (codified as amended at 20 U.S.C. §§ 1681–1688 (2018)). The Supreme Court of the United States has described the law as a contract whereby federal funding of educational institutions is conditioned on the institution's agreement not to discriminate. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998).

16. Paul M. Anderson, *Title IX at Forty: An Introduction and Historical Review of Forty Legal Developments that Shaped Gender Equity Law*, 22 MARQ. SPORTS L. REV. 325, 326–27 (2012) (citing 117 CONG. REC. 406–07 (1971) (statement of Sen. Birch Bayh) (stating that the proposed Title IX language was "taken from Title VI of the 1964 Civil Rights Act" as "educational opportunity should not be based on sex, just as we earlier said it should not be based on race, national origin, or some of the other discriminations").

17. Anderson, *supra* note 16, at 329 n.17 (citing Brenden v. Indep. Sch. Dist. 742, 477 F.2d 1292, 1298 (8th Cir. 1973)).

18. Education Amendments of 1974, Pub. L. No. 93-380, § 844, 88 Stat. 484, 612 (codified at 20 U.S.C. § 1681 (2018)) (requiring HEW ("Health, Education, and Welfare") issuance of Title IX regulations that offered "reasonable provisions considering the nature of particular sports").

19. *See* KC JOHNSON & STUART TAYLOR, JR., THE CAMPUS RAPE FRENZY, THE ATTACK ON DUE PROCESS AT AMERICA'S UNIVERSITIES 154 (2017) (ebook) (citing ESTIMATING THE INCIDENCE OF RAPE AND SEXUAL ASSAULT 154–55 (Candace Kruttschnitt, William D. Kalsbeek

Subsequent decades have witnessed Title IX's emancipation from its original moorings, directly outlawing gender discrimination in educational opportunities. A stream of administrative agency advisory interpretations on Title IX's scope and implementation, coupled with judicial deference to such pronouncements, has transformed Title IX into something of far greater consequence than a mere proscription on sexual discrimination in education. Title IX evolved into an all-encompassing license for the issuance and enforcement of federal directives concerning lawful sexual activity on college campuses.

The initial expansion of Title IX beyond the parameters of gender discrimination occurred in the decade after its enactment. The Supreme Court's 1979 recognition of an implied private cause of action for victims of Title IX discrimination was premised upon furthering the statute's stated goal of affording meaningful protection for victims of gender discrimination.[20] However, *Cannon's* recognition of an implied private cause of action constituted a significant step in the growth of the statute's coverage in light of the 1977 federal district court opinion in *Alexander v. Yale University*.[21] The court in *Alexander* concluded that Title IX's ban on gender discrimination in education encompassed a prohibition on "sexual harassment" occurring in the faculty-student context.[22] The recognition of sexual harassment's proscription under Title IX laid the foundation for a dramatic expansion of the statute's coverage two decades later.[23] The interpretation of Title IX as a prohibition on teacher-student harassment[24] portended the statute's ultimate role in empowering the OCR to define and police lawful sexual behavior in academia.[25]

& Carol C. House eds., 2014)); R. Shep Melnick, *The Strange Evolution of Title IX*, 36 NAT'L AFFS. 19, 20 (2018), https://www.nationalaffairs.com/publications/detail/the-strange-evolution-of-title-ix (discussing the shift in Title IX's focus over time). *See also* MARTHA MATTHEWS & SHIRLEY MCCUNE, TITLE IX GRIEVANCE PROCEDURES: AN INTRODUCTORY MANUAL 8–9 (1976) (outlining a laundry list of possible grounds for the filing of grievances under Title IX with no inclusion of sexual harassment); Vinson v. Taylor, 760 F.2d 1330, 1333 n.7 (D.C. Cir. 1985) (Bork, J., dissenting) (discussing the absurd outcomes resulting from interpretation of Title VII's prohibition on gender discrimination as prohibiting sexual harassment).

20. Cannon v. Univ. of Chi., 441 U.S. 677, 704–07 (1979).

21. Alexander v. Yale Univ., 459 F. Supp. 1, 4–5 (D. Conn. 1977), *aff'd*, 631 F.2d 178 (2d Cir. 1980) (refraining from a determination of whether Title IX created a private cause of action).

22. *Id.* at 3–4 (plaintiff alleging reduction of a student's grade based upon her rejection of a professor's proposed quid pro quo involving sexual demands).

23. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997) (pronouncing through OCR that Title IX included the affirmative obligation of a university to deter a "hostile environment" of sexual harassment even when attributable to student-on-student discrimination).

24. *See* Ellen Frankel Paul, *Sexual Harassment as Sex Discrimination: A Defective Paradigm*, 8 YALE L. & POL'Y REV. 333, 345–59 (1990) (reviewing the anomalies in classifying sexual harassment as sexual discrimination).

25. *See infra* notes 35–50 and accompanying text. The concept of sexual harassment as a strand of gender discrimination was conceived by Catherine McKinnon, a prominent feminist writer who served as adviser to the plaintiffs in the Alexander case. *See* Tyler Kingkade, *How a Title IX Harassment Case at Yale in 1980 Set the Stage for Today's Sexual Assault Activism*,

While judicial decisions were critical in Title IX's expansion, the statute's ultimate role as a dominant star in the constellation of educational law was the product of "bureaucratic sex creep."[26] In 1980, the newly created Department of Education ("DOE") and its OCR were delegated authority to implement regulations in the furtherance of Title IX and issue guidelines for interpretation.[27] OCR aggressively assumed the oracle's role on all matters Title IX. Over decades it issued numerous letters to federally funded institutions, providing guidance on implementation and clarifications that consistently expanded both the scope of Title IX's coverage and the corresponding statutory obligations of publicly funded universities.[28] When confronted with cases implicating Title IX interpretations, courts ultimately accepted the agency's pronouncements as authoritative.[29]

The OCR's aggressive expansion of Title IX's jurisdiction found additional support in two legislative acts. The 1990 adoption of the Clery Act,[30] as amended and supplemented by the Violence Against Women Act of 2013 ("VAWA"), constituted the primary legislative acts premised upon the assumption of a pandemic of sexual misconduct against college coeds and the necessity for dramatic governmental intervention.[31] As amended by VAWA,

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HUFFINGTON POST (June 10, 2014, 1:15 PM), https://www.huffpost.com/entry/title-ix-yale-catherine-mackinnon_n_5462140.

26. *See* Gersen & Suk, *supra* note 12, at 884–85 (2016) (defining "bureaucratic sex creep" as "the steady expansion of regulatory concepts of sex discrimination and sexual violence to the point that the regulated area comes also to encompass ordinary sex").

27. *See id.*

28. *See* Melnick, *supra* note 19, at 21–22 (tracing the extended history of OCR's jurisdictional expansion of Title IX using agency's clarification and guidance letters and avoiding the issuance of proposed regulations that would be subject to public comment). *See also* Gersen & Suk, *supra* note 12, at 897–99 (citing OCR's 1997 guidance letter as the critical publication in OCR's transformation of Title IX from legislation merely regulating the duties of the schools to a law authorizing issuance of directives on students' sexual conduct).

29. *See* Melnick, *supra* note 19, at 21 (tracing the deference of federal courts to OCR's numerous administrative pronouncements on the scope and compliance requirements of Title IX). *See generally* Chevron U.S.A. Inc. v. Nat. Res. Def. Council, Inc., 467 U.S. 837, 843–44 (1984) (requiring federal courts in their interpretation of an unclear statute, to defer to any "reasonable interpretation" of the statute issued by an administrative agency that was delegated authority to enforce the statute).

30. Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, 20 U.S.C. § 1092(f) (2018) [hereinafter the "Clery Act"]. Mandatory reporting of criminal activity is covered in subsection (f). The Clery Act was originally enacted as part of the Student Right-to-Know and Campus Security Act of 1990, Pub. L. No. 101-542, 104 Stat. 2381 (codified, as amended, in scattered sections of Title 20 of the United States Code), which amended the Higher Education Act of 1965, Pub. L. No. 89-329, 79 Stat. 1219 (codified, as amended, in scattered sections of Title 20 of the United States Code). In 1992, the Clery Act was amended to require the development and implementation of specific policies and procedures to protect the rights of sexual assault survivors. *See* Higher Education Amendments of 1992, Pub. L. No. 102-325, § 486(c), 106 Stat. 448, 621-22 (codified as amended at 20 U.S.C. § 1092 (2012)).

31. *See* Gersen & Suk, *supra* note 12, at 892–97 (observing VAWA's vague definitions of criminal sexual offenses and resulting expansion of reportable crimes under the Clery Act). VAWA

the Clery Act required federally funded schools to provide the DOE with statistics on the incidents of criminal acts and the steps being taken by schools to address these acts.[32] However, VAWA's vague definition of reportable "sexual assault" to include "dating violence, domestic violence, and stalking" required Cleary Act reporting as "criminal acts" occurrences that were not designated crimes in the jurisdictions where the respective schools were located.[33] Clery Act reports from 2010 through 2014 suggested a dramatic increase in sexual assault on college campuses, thus supporting the OCR's depiction of rampant sexual violence and the necessity of heightened vigilance in addressing acts that had never been conceived as criminal conduct in redressing sexual harassment.[34]

The OCR's continued expansion and redefining of conduct encompassed by the prohibition on sexual harassment found support in select feminist writings. Catharine MacKinnon's works exemplified feminist publications urging that sexual misconduct could no longer be restricted by the *mens rea* and *actus reus* defining rape or other sex crimes. Instead, the female's subjective feelings of being violated in the aftermath of sexual intercourse were primarily determinative of misconduct.[35] This obfuscation of the elements of sexual

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expired and the Reauthorization Act of 2019 failed to secure congressional passage., *VAWA Faces Hard Road Ahead*, AM. BAR ASS'N (Aug. 26, 2020), https://www.americanbar.org/content/dam/aba/administrative/government_affairs_office/aug20-wl-pdf.pdf (identifying the difficulties in attempts to secure congressional renewal of VAWA). As of March 2021, VAWA has yet to secure Senate reauthorization. Susan Davis, *House Renews Violence Against Women Act, but Senate Hurdles Remain*, N.P.R. (Mar. 17, 2021, 5:14 PM); *Coed*, *YourDictionary.com*, https://www.yourdictionary.com/coed (last visited Dec. 21, 2021) ("A coed is defined as a female student.").

32. Gersen & Suk, *supra* note 12, at 892. VAWA's amendment to the Clery Act expanded the definition of sexual criminal acts to include noncriminal acts, with the following explanation:

> Although we recognize that these incidents may not be considered crimes in all jurisdictions, we have designated them as "crimes" for the purposes of the Clery Act. We believe that this makes clear that all incidents that meet the definitions in [VAWA] must be recorded in an institution's statistics, whether or not they are crimes in the institution's jurisdiction.

Violence Against Women Act, 79 Fed. Reg. 62,752, 62,764 (Oct. 20, 2014) (codified at 34 C.F.R. § 668 (2015)) (expired).

33. Gersen & Suk, *supra* note 12, at 892 (quoting 20 U.S.C. § 1092(f)(1)(F)(iii) (2013)).

34. Clery Act reports for the period of 2012 through 2014 included aggregated sexual assaults on college students between 4,558 and 5,335. JOHNSON & TAYLOR, *supra* note 19, at 46 (citing *Campus Safety and Security*, U.S. DEP'T OF EDUC. OFFICE OF POSTSECONDARY EDUC., https://ope.ed.gov/campussafety/#/ (last visited Sept. 16, 2021)). Cristina Marcos & Julie Grace Brufke, *House Passes Bill to Renew the Violence Against Women Act*, THE HILL (Mar.17, 2021, 05:20 PM), https://thehill.com/homenews/house/43720-house-passes-bill-to-renew-violence-against-women-act/ (noting the House passage of a bill to renew VAWA that had expired in 2019).

35. TAYLOR & JOHNSON, *supra* note 19, at 20 (quoting CATHARINE A. MACKINNON, *A Rally Against Rape*, *in* FEMINISM UNMODIFIED; DISCOURSES ON LIFE AND LAW 81, 82 (1987)). Harvard Law Professor Jeannie Suk Gersen has reviewed the OCR's continuing efforts to familiarize collegians with revised concepts of Title IX sexual harassment. Suk summarizes OCR's efforts at redefining acceptable sexual conduct in the following terms:

violence would ultimately leave collegiate disciplinary tribunals with largely unfettered discretion in determinations of guilt on complaints of Title IX sexual harassment.[36]

B. The 2011 Dear Colleague Letter

The OCR's Dear Colleague Letter ("DCL") of 2011 was a comprehensive demand for publicly funded universities to declare war on a wave of sexual violence.[37] Its nineteen pages offered in exacting details the programs and tactics to be immediately adopted by the universities to eradicate rampant campus sexual assault. OCR's portrayal of the epidemic of sexual violence was premised upon the assertion that twenty percent of women attending college were victims of actual or attempted sexual assault.[38] The legitimacy of the DCL's unqualified claim that one out of five collegiate women are victims of an attempted or completed sexual attack has been roundly criticized, mainly on the basis that the supporting surveys readily classified many instances of lawful sexual conduct as "assaults."[39] The one in five statistic has been further

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> We are giving young people the idea that the unhappiness that they have about their relationships is a matter to be taken up with the authorities. . . . In this very large continuum of unpleasant interactions that can happen, at some point you draw a line and say, ''These are consensual, these are not consensual."

Wesley Yang, *The Revolt of the Feminist Law Profs*, CHRON. HIGHER EDUC. (Aug. 7, 2019), https://www.chronicle.com/article/the-revolt-of-the-feminist-law-profs/. *See also*, Melnick, *supra* note 19, at 30–31 (describing the common practice of collegiate Title IX coordinators and their staff in conducting campus sessions with students devoted to educating on new concepts of acceptable and unacceptable sexual conduct and appropriate discourse on sex). A second strand of long-held feminist thought was destined to be a central premise of the Title IX sexual misconduct in the era of the Dear Colleague Letter (2011-2017). *See* Edward Greer, *The Truth Behind Legal Dominance Feminism's Two-Percent False Rape Claim Figure*, 33 LOY. L.A. L. REV. 947, 947–48 (2000). Legal Dominance Feminism (LDF) posits that women do not lie when making accusations of sexual violence. *Id.* at 948. By 2000, LDF was widely accepted with scores of academic articles premised upon the theory's validity. *Id.* at 949 & n.11 (listing articles premised upon the assertion that less than 2 percent of rape accusations were false).

36. *See infra* notes 47, 107, and 147 and accompanying text (alleging 100 percent findings of guilt for males on at least one Title IX count for certain designated semesters at Miami University of Ohio and Oberlin College).

37. Letter from Russlyn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for Civil Rights, to Title IX Coordinators (Apr. 4, 2011) (rescinded 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104_pg3.html/. *See generally* NAT'L SCH. BDS. ASS'N, *OCR Investigation Tool Kit: Cooperation, Advocacy and Asserting the District Point of View*, at 2, https://cdn-files.nsba.org/s3fs-public/06-Silverman-session-OCR-Guidance-summary-FINAL-Paper.pdf/ [hereinafter "DCL"] (noting that between 2009 and 2015 the OCR issued twenty-eight guidance letters prefaced with the introduction "Dear Colleague").

38. *See* DCL, *supra* note 37, at 2.

39. *See* TAYLOR & JOHNSON, *supra* note 19, at 49 (observing the Campus Sexual Assault Study ("CSA"), cited as support in the DCL, included as reportable "sexual assault," women's responses of having "experienced 'rubbing up against you in a sexual way' or "'had intimate encounters while even a little bit intoxicated.'").

undermined by the observation that such a rate of sexual violence would require a rate of 400,000 to 500,000 assaults per year in order to attain the required total of two million victims of the ten million total women attending college during a four to five year period.[40]

The DCL proceeded to list numerous mandates and practices to be immediately implemented by publicly funded educational institutions in redressing sexual violence. Notably, the DCL's multiple directives were cast in mandatory terms and were aggressively enforced as de facto law for six years.[41] Despite its many mandates, the letter was never subjected to the Administrative Procedure Act's ("APA")[42] required procedures for an agency's enactment of binding regulations.[43] The DCL culminated the OCR's ascendancy as a final word on acceptable sexual conduct on campus. OCR's subsequent relentless enforcement of the DCL's directives would reveal the agency's deep commitment to broadening the parameters of illicit sexual behavior to encompass lawful sexual activity on campus.[44]

Predictably, the DCL's articulation of sexual prohibitions was nebulous and open-ended. Sexual harassment included: "unwelcome conduct of a sexual nature…" including "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical behavior of a sexual nature."[45] Further

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The wording of similar campus surveys continued after issuance of the DCL and has been similarly critiqued. *See*, *e.g.*, Greg Piper, *The Massive New Campus Sexual-Assault Survey Has One Giant Design Flaw,* COLLEGE FIX (Sept. 22, 2015), https://www.thecollegefix.com/the-massive-new-campus-sexual-assault-survey-has-one-giant-design-flaw/ (observing an Association of American Universities survey including sexual relations while "incapacitated" defined with the conclusory tautology "incapacitated due to drugs or alcohol"); Ashe Schow, *Five Myths and Outright Lies About Campus Sexual Assault*, MINDING THE CAMPUS (Aug 31, 2018), https://www.mindingthecampus.org/2018/08/31/five-myths-and-outright-lies-about-campus-sexual-assault/ (noting that surveys of collegiate women concerning sexual assaults on collegiate women frequently do not inquire concerning sexual assaults, but inquire concerning "unwanted behaviors").

40. TAYLOR & JOHNSON, *supra* note 19, at 46.

41. *See* Larry Alexander et. al., *Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault* [hereinafter *Law Professors' Open Letter*], 1–2 (May 16, 2016), http://online.wsj.com/public/resources/documents/Law-Professor-Open-Letter-May-16-2016.pdf (criticizing the DCL and numerous other OCR letters as cast in mandatory terms of "must" or "shall" despite never having constituted enforceable regulations)

42. 5 U.S.C. § 551–59 (2018).

43. Sheridan Caldwell, Note, *OCR's Bind, Administrative Rulemaking and Campus Sexual Assault Protections*, 112 NW. U. L. REV. 453, 463–73, 486 (2017) (concluding the DCL mandates were not enforceable regulations due to OCR's failure to fulfill the APA's required publication and period for public notice and comment). *See also*, Janet Napolitano, *"Only Yes Means Yes": An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 YALE L. & POL'Y REV. 387, 394 (2015) (criticizing the OCR's issuance of the DCL with its mandates for adjudication of sexual harassment without preliminarily affording notice and period for public comment).

44. *See* Gersen & Suk, *supra* note 12, at 930 (observing "[t]he conduct classified as illegal by the sex bureaucracy has grown substantially, and indeed, it plausibly covers almost all sex students are having today.").

45. DCL, *supra* note 37, at 3.

obscurity was added with the DCL's inclusion of a footnote adding the following:

> Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature. The Title IX obligations discussed in this letter also apply to gender-based harassment.[46]

The OCR's all-encompassing and ill-defined statement of "sexual harassment" left college disciplinary panels and single investigators in Title IX adjudications to render subjective determinations concerning the propriety of students' actions and words.[47] OCR's all-encompassing definition of sexual misconduct was in direct contradiction of the Supreme Court's definition of Title IX sexual harassment as "harassment that is so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[48]

One could only ponder the parameters of "unwelcome." Would this include an attempt to hold hands after a date that the female concluded had not gone well? If a social meeting was to end with a kiss, must the male initially seek affirmative consent? If the couple was engaged in a "hookup" proposed by the female, was the male required to intermittently pause and obtain verbal confirmation for more intimate physical contact? The DCL offered no guidance in defining "consent" to sexual activity. The obscurity of the term led to a proliferation of "affirmative consent" requirements at universities nationwide.[49] The OCR's letter included no text reconciling the forbidden "unwelcome verbal content" with the Constitution's guarantee of freedom of speech.[50]

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46. DCL, *supra* note 37, at 3 n.9.

47. *See*, *e.g.*, Doe v. Oberlin Coll., 963 F.3d 580, 587–88 (6th Cir. 2020) (allegation of 100 percent of accused on Title IX claims were found responsible on at least one count during the school year with judge's opinion observing "one could regard this as nearly a test case regarding the College's willingness ever to acquit a respondent sent to one of its hearing panels during the 2015–16 academic year").

48. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 632 (1999).

49. Jake New, *The 'Yes Means Yes' World*, INSIDE HIGHER ED. (October 17, 2014), https://www.insidehighered.com/news/2014/10/17/colleges-across-country-adopting-affirmative-consent-sexual-assault-policies (observing 800 schools' adoption of an affirmative consent requirement).

50. *See FIRE Response to OCR 'Dear Colleague' Letter on Universities' Obligations Regarding Sexual Harassment and Sexual Assault*, FIRE (Apr. 4, 2011), https://www.thefire.org/fire-response-to-ocr-dear-colleague-letter-on-universities-obligations-regarding-sexual-harassment-and-sexual-assault/. FIRE articulated the significant issues raised by the DCL by its open-ended definition of sexual harassment in the following terms:

> While the concerns about sexual violence emphasized in the letter and concerns about free speech may seem unrelated, it is important to understand that overly broad, vaguely constructed campus definitions of sexual harassment have served as a major justification for abuses of student free speech rights for over two decades. Unless sexual harassment

The DCL was remarkable in its exclusive focus on affording comfort and redress to the student complaining of sexual harassment when contrasted with its deafening silence on procedural guarantees owed one accused of sexual harassment in the adjudication of the claim. Equitable, aspirational phrases such as "prompt, thorough, and impartial" and "opportunity for both parties to present witnesses and other evidence" were sprinkled throughout the DCL.[51] However, the letter offered no specifics on the implementation of procedures to accomplish such equality. The DCL devoted two sentences in nineteen pages to the rights of the accused.[52] Previous OCR guidance documents had included entire sections articulating the accused's rights in the ultimate determination of guilt or innocence on a harassment claim.[53]

The DCL departed from the Supreme Court's pronouncement of "actual knowledge" of sexual harassment as triggering the school's obligation to respond to sexual harassment and substituted an affirmative duty on the schools' part to pursue a campaign to eliminate the underlying causes of supposed pervasive sexual violence.[54] The Supreme Court's "actual knowledge" requirement as a condition precedent to the school's duty to respond to a claim of sexual harassment was expanded to include constructive knowledge.[55] The DCL's near-exclusive concern with the accuser in sexual harassment adjudications, with the accused as an afterthought, is illustrated by the following omissions, guiding principles, and excerpts:

> Nothing in the letter requires that a live hearing be held on the charges. If a hearing is held, the accused and the accuser's school is strongly encouraged by OCR to not allow cross-examination by each other in the school's adjudication of the claim of sexual violence.[56]

> is properly defined, it is FIRE's experience that such vague regulations too often serve to excuse the punishment of protected speech.

Id.

51. *See* DCL, *supra* note 37, at 5, 9.

52. *See id.* at 5.

53. *See* Kelly Rice, *Understanding the Implications of the 2011 Dear Colleague Letter: Why Colleges Should Not Adjudicate On-Campus Sexual Assault Claims*, 67 DEPAUL L. REV. 763, 774, 775 n.113 (2018) (contrasting the DCL with earlier OCR guidance documents devoting entire sections to the rights of the accused).

54. *See* DCL, *supra* note 37, at 4 & n.12 (distinguishing Davis v. Monroe Cnty. Bd. Of Educ., 526 U.S. 629 (1999)).

55. DCL, *supra* note 37, at 4 & n.12. The Supreme Court had refused to recognize constructive knowledge as the basis for the school's liability in a private action under Title IX:

> [W]e conclude that it would "frustrate the purposes" of Title IX to permit a damages recovery against a school district for a teacher's sexual harassment of a student based on principles of *respondeat superior* or constructive notice, *i.e.*, without actual notice to a school district official.

Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 285 (1999).

56. DCL, *supra* note 37, at 12.

A school's grievance procedures must use the preponderance of the evidence standard to resolve complaints of sex discrimination.[57]

1. The school is not required to afford parties the right to retain an attorney to participate in any aspect of the proceeding. In the event the school elects to allow a party to retain counsel, the other party additionally must be afforded the right to counsel.[58]
2. The school's duty to conduct a Title IX investigation is not required to await completion of the police investigation.[59]
3. The school is encouraged to have an appeals process. In the event of an appellate process, both parties must be allowed the right of appeal of the findings or remedy.[60]
4. Schools may be required to respond to student-on-student sexual harassment that occurs off the campus, or outside the education program or an activity of the school.[61]
5. Resolution of the claim should be done expeditiously with an average period of 60 days for investigation.[62]
6. "Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant."[63]

The DCL's fallacious justification for a preponderance of the evidence standard was its analogy to the evidentiary standard in Title VII civil proceedings.[64] The rationale failed to address the Supreme Court's conclusion that a higher standard of proof is required when reputational damage of this magnitude would flow from a verdict of guilt.[65]

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57. DCL, *supra* note 37, at 11.

58. DCL, *supra* note 37, at 12.

59. DCL, *supra* note 37, at 10.

60. DCL, *supra* note 37, at 12.

61. DCL, *supra* note 37, at 4.

62. DCL, *supra* note 37, at 12.

63. DCL, *supra* note 37, at 12.

64. DCL, *supra* note 37, at 11 & n.26 (referencing to the preponderance of the evidence standard in Title VII proceedings).

65. *See Professor's Open Letter*, *supra* note 41, at 2 & n.22 (citing Addington v. Texas, 441 U.S. 418, 424 (1979)) (observing that a low standard of evidence has been deemed inappropriate in a proceeding involving damage to reputation). *See generally* Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 62 & n.59 (2013) (citing congress and others that have concluded that the standard must be higher for such disciplinary proceedings); Gersen & Suk, *supra* note 12, at 901 (observing the preponderance of the evidence standard as being wholly an invention of the OCR unveiled in the DCL).

II. THE OCR'S MULTI-YEAR ENFORCEMENT OF THE 2011 DEAR COLLEAGUE LETTER

A. The OCR's Crusade of Enforcement of the 2011 Dear Colleague Letter through Collegiate Investigations, Publication, & Threats of Withdrawal of Public Funding from Education Institutions

OCR immediately commenced a multi-year crusade of coerced compliance with the DCL's many directives to federally funded educational institutions. The agency's devices for pressuring campus compliance included threats, humiliation, and myriad interventions on campus. Complaints to the OCR alleging a school's lack of vigilance in addressing sexual harassment readily triggered an extended and costly OCR investigation of the institution.[66] By 2016, the average investigation lasted 963 days.[67] The OCR published systematic lists of those schools under investigation.[68] Many of these OCR investigations ended with consent decrees requiring schools to adopt tactics of questionable legality in the ongoing crusade to redress alleged sexual harassment on campus.[69] The OCR's Sword of Damocles in pressuring the school's compliance was the agency's power to withdraw federal funding from an educational institution.[70] Furthermore, the DCL's mandate for a campus Title IX coordinator would ultimately spawn vast Title IX bureaucracies on many campuses that frequently were headed by former OCR staff.[71]

B. The Educational Institution's Responsive Title IX Adjudicatory Systems

Schools predictably responded by creating Title IX adjudicatory models heavily slanted in favor of the Title IX complaining party and correspondingly

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66. *See Title IX Sexual Assault Investigation Tracker*, CHRON. HIGHER EDUC., http://projects.chronicle.com/titleix/ (updated to include all investigations and reporting 2014 through 2020). *See also* Tyler Kingkade, *There Are Far More Title IX Investigations of Colleges Than Most People Know*, HUFFPOST (June 16, 2016, 4:49 p.m.), https://www.huffpost.com/entry/title-ix-investigations-sexual-harassment_n_575f4b0ee4b053d433061b3d (noting the OCR had approximately 315 investigations in process or scheduled to commence as of June 2016).

67. Emily Yoffe, *The Uncomfortable Truth About Campus Rape Policy*, ATLANTIC (Sept. 6, 2017), https://www.theatlantic.com/education/archive/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/.

68. Yoffe, *supra* note, 67.

69. *See*, *e.g.*, *Law Professors' Open Letter*, *supra* note 41, at 3; Katie Jo Baumgardner, Note, *Resisting Rulemaking, Challenging the Montana Settlement's Title IX Sexual Harassment Blueprint*, 89 NOTRE DAME L. REV. 1813, 1817 (2016) (reviewing the consent decree with the University of Montana requiring adoption of "sexual conduct of an unwelcome nature" as school's sexual harassment standard and OCR contention that the adopted language was a "blue print" for universities generally).

70. *See* Yoffe, *supra* note 67. *See also* Nancy Gertner, *Sex Lies and Justice*, AM. PROSPECT, Winter 2015, at 32, 34–35, https://prospect.org/justice/sex-lies-justice/ (noting OCR's Assistant Secretary's warning to college administrators that the withdrawal of funding was not "an empty threat").

71. Gersen & Suk, *supra* note 12, at 904–05.

increased the number of Title IX adjudications that culminated with a determination of guilt.[72] Inevitable conclusions of the accused's responsibility for sexual harassment quelled any notion of dispensations of justice.[73]

Numerous colleges adopted the OCR's favored "single investigator model" as the means for the ultimate determination of Title IX claims.[74] Employment of the single investigator model dispensed with considerations of conflict of interest or impartiality of the judge inherent in the university's Title IX coordinator serving as both advisor to the complainant and the designated single investigator.[75] The single investigator model vested in one individual the power to investigate the Title IX claim, prepare any findings of fact, and render an ultimate verdict on the Title IX complaint.[76]

The system left the accused with no guarantees concerning the extent of notice and hearing he would be afforded before issuance of a ruling that could result in suspension or expulsion from the college. There would be no live hearing on the claim. Thus, there would be no occasion for receiving testimony under oath from either party. The absence of a hearing additionally dispensed with testimony under oath, the presentation of defense witnesses, cross-examination of witnesses supporting the Title IX claim, or confrontation of the Title IX complainant.[77] The single investigator would determine whether an actual

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72. *See* JENNIFER C. BRACERAS, INDEP. WOMEN'S FORUM, TITLE IX, SEXUAL MISCONDUCT, AND DUE PROCESS ON CAMPUS 1 (2020), http://www.iwf.org/wp-content/uploads/pdfs/Policy_Focus_Title_IX_Sexual_Misconduct_and_Due_Process_on_Campus.pdf (outlining universities' adoption of specific practices that "stack the deck" against the Title IX accused through deprivations of procedural rights. resulting in increased disciplinary rates).

73. *See infra* note 120–23 and accompanying text (summarizing the nature of injustices of many collegiate Title IX proceedings in Brandeis University opinion of United of States District Judge Dennis Saylor, issued in 2016).

74. LINDA M. WILLIAMS ET. AL., NAT'L INST. JUST., RESPONDING TO SEXUAL ASSAULT ON CAMPUS: A NATIONAL ASSESSMENT AND SYSTEMATIC CLASSIFICATION OF THE SCOPE AND CHALLENGES FOR INVESTIGATION AND ADJUDICATION 34 (2020), https://www.ncjrs.gov/pdffiles1/nij/grants/254671.pdf (2020 survey of over 900 higher education institutions reflecting employment of various adjudicatory systems including panels, single investigator, or sole person systems).

75. *See*, *e.g.*, Gertner, *supra* note 70 (surveying Harvard's Title IX judicial system in which the Title IX Coordinator servers as the single investigator with the Title IX office additionally serving as counselor to the complainant); Ilana Frier, *Campus Sexual Assault and Due Process*, 15 DUKE J. CONST. L. & PUB. POL'Y 117, 130 (2020) (noting many critics of the single investigator deem the system as readily susceptible to human bias).

76. *See* Djuna Perkins, *Behind the Headlines: An Insider's Guide to Title IX and the Student Discipline Process for Campus Sexual Assault*, BOST. BAR J. (July 8, 2015), https://bostonbarjournal.com/2015/07/08/behind-the-headlines-an-insiders-guide-to-title-ix-and-the-student-discipline-process-for-campus-sexual-assaults/ (reviewing investigator report format as including factual findings followed by application of school's misconduct policy rules to the facts).

77. *See* Rachel Russell, Editorial, *Single Investigator Model for Sexual Misconduct Threatens Civil Liberties for All Students*, REVIEW (Nov. 3, 2015), http://udreview.com/editorial-single-investigator-model-for-sexual-misconduct-threatens-civil-liberties-for-all-students; *see also Law Professors' Open Letter*, *supra* note 41, at 5 (observing the necessity of restoration of due process rights in the collegiate Title IX systems with restoration of rights such as cross-examination,

investigation would occur before the rendition of a judgment.[78] The direction and thoroughness of any investigation that did occur were determined by the single investigator. Determining the accuser's credibility could amount to nothing more than an interview by a sympathetic Title IX coordinator serving as an advisor to that party.[79] The selection of individuals to be interviewed as possessing knowledge relevant to the claim was discretionary. The single investigator's ultimate authority in shaping a narrative of events was symbolized by the final report with a summation of facts, applicable prohibitions, and ultimate declarations or recommendations to a committee as to the accused's guilt or innocence.[80]

There were numerous other troubling practices frequently arising in the institutions' Title IX adjudications.[81] The accused male had no assurance of finality when a single investigator or disciplinary panel issued a "not responsible" verdict for the alleged sexual harassment.[82] The accuser could readily appeal the "not responsible" ruling to a collegiate appellate panel requesting a reversal and rendition of guilt. Thus, an appellate reversal and pronouncement of guilt could occur without a live hearing or any revelation of new facts justifying the reversal.[83] Moreover, a determination of the accused's responsibility on the Title IX claim could occur with the respondent never having been provided a written complaint specifying the particular allegations of sexual harassment or the specific incidents giving rise to the claim.[84] The accused had no guarantee of being allowed to review a collegiate investigator's report or view conclusions of fact contained in the report.[85] Investigations and

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assistance of counsel, and access to evidence); *see generally* Gertner, *supra* note 70 (observing the specific deprivations of due process for accused students in Harvard's single investigator model).

78. *See* Gertner, *supra* note 70.

79. Gertner, *supra* note 70.

80. *See* Perkins, *supra* note 76.

81. *See Law Professors' Open Letter*, *supra* note 41, at 1–6 (outlining with specificity the violations of free speech and deprivation of due process that characterized publicly funded universities enforcement of the DCL).

82. Doe v. Baum, 903 F.3d 575, 580 (6th Cir. 2018) (adjudicating investigator's decision of not responsible reversed on appeal to collegiate panel); Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 612-13 (E.D. Va. 2016) (reviewing university disciplinary panel's decision of not responsible after a ten-hour evidentiary hearing reversed on appeal)

83. *See*, *e.g.*, *Baum*, 903 F.3d at 580, 588 (6th Cir. 2018) (reversing district court dismissal of John Doe case wherein university reversed and rendered verdict of guilt with Title IX accused afforded no hearing, or occasion to call witnesses or cross examine).

84. *See*, *e.g.*, Doe v. Univ. of S. Cal., 200 Cal. Rptr. 3d 851, 854–55, 870 (Cal. Ct. App. 2016) (university appeals panel affirming issuance of accused's suspension when Title IX accused provided letter with name of complainant, date and code sections allegedly violated, but containing nothing describing factual basis of charges).

85. *See*, *e.g.*, Doe v. Purdue Univ., 928 F.3d 652, 656, 658–59 (7th Cir. 2019) (reversing district court's 2017 dismissal of certain title IX claims and Section 1983 claim with the accused initially provided no copy of the investigator's report contained the factual findings).

ultimate decisions on the Title IX charge were frequently made by personnel with a decided bias against males.[86]

The severity of bias experienced by males in the Title IX proceedings was epitomized by the factual allegations in two John Doe lawsuits against William Patterson University and Yale. The schools' receipt of Title IX complaints resulted in the accused's handcuffing and arrest with no preliminary attempts to contact the males for response nor initiation of any in-depth investigation to examine the validity of the claims.[87] Many campus rulings are issued without consideration of critical evidence such as emails, Facebook posts, and telephone calls by the accuser or accused.[88] The complainant was on occasion assisted by numerous advisors, including coaching if required to testify.[89] The accused was furnished with one advisor.[90]

The factual settings accompanying the Title IX claims frequently contributed further uncertainty to the validity of numerous claims. The accuser and accused had commonly engaged in significant alcohol consumption.[91] A recurring scenario included the parties involved in a consensual sexual relationship

86. *See*, *e.g.*, Doe v. Trs. of Univ. of Pa., 270 F. Supp. 3d 799, 822–25 (E.D. Pa. 2017) (denying motion to dismiss Title IX selective enforcement claim when suspended student alleged with sufficient particularity a university disciplinary system with heavy bias in favor of female students alleging sexual harassment); Doe v. Brown Univ., 210 F. Supp. 3d 310, 342 (D.R.I. 2016) (observing that pursuant to training received on Title IX adjudications, one panel member wholly disregarded all post-encounter evidence in support of accused's innocence). *See also* JOHNSON & TAYLOR, *supra* note 19, at 168 (observing the inherent female bias among college administrators in decisions on claims of sexual harassment).

87. Collick v. William Paterson Univ., No. 16-471, 2016 U.S. Dist. LEXIS 160359, at *7–15 (D.N.J. Nov. 17, 2016), *aff'd in part and remanded in part*, 699 Fed. App'x 129 (3d Cir. 2017); First Amended Complaint at 13–15, Doe v. Yale Univ., No. 3:15-CV-01608 (D. Conn. May 18, 2016).

88. Bethany Corbin, *Riding the Wave or Drowning?: An Analysis of Gender Bias and Twombly/Iqbal In Title IX Accused Student Lawsuits*, 85 FORDHAM L. REV. 2665, 2682 & n. 114 (2017) (citing numerous John Doe cases with allegations of Title IX verdicts of guilt in collegiate proceedings with accuser denied preliminary review of the school's investigator's report, precluded from presenting of documentary evidence in defense, and with no opportunity to cross-examine the accuser).

89. Corbin, *supra* note 88, at 2682.

90. Corbin, *supra* note 88, at 2682.

91. *See*, *e.g.*, Doe v. Baum, 903 F.3d at 578–79; Doe v. Ohio State Univ., 239 F. Supp. 3d 1048, 1061–62 (S.D. Ohio 2017), *reconsideration granted in part,* 323 F. Supp. 3d 962 (S.D. Ohio 2018); Prasad v. Cornell Univ., No. 5:15-cv-322, 2016 U.S. Dist. LEXIS 161297, at *7–*10 (N.D.N.Y. Feb. 24, 2016); *see also* John P. Barry & Edna D. Guerrasio, TITLE IX REPORT, THE ACCUSED (Prokauser's Educ. Grp. ed., 2017) https://prfirmpwwwcdn0001.azureedge.net/prfirmstgacctpwwwcdncont0001/uploads/060e65822b0ffc23c6e036dc63e6c757.pdf (surveying 130 Title IX lawsuits with alcohol consumption or use of drugs present in 56.9% of the cases); Yoffe, *supra* note 67 (surveying many that work with campus sexual assault describing sexual harassment charge frequently arising from a "consensual sexual encounter, well lubricated by alcohol, and end up with divergent views of what happened").

preceding the alleged incident, with the relationship in some instances having continued after the alleged sexual assault.[92]

III. THE JOHN DOE LAWSUITS, JUDICIAL RESPONSE, & THE 2017 REVOCATION OF THE 2011 DEAR COLLEAGUE LETTER

A. The Predominance of Judicial Restraint & Deference to the Universities Title VII Disciplinary Systems (2012–2017)

The initial wave of John Doe lawsuits commenced in 2012, responding to the suspensions and expulsions issued as penalties attendant to findings of guilt in the Title IX campus proceedings.[93] The most frequently employed claims, separately or in tandem, were Title IX reverse gender-discrimination and Section 1983 actions premised upon deprivations of due process.[94] An array of alternative state law claims and requested equitable relief were frequently included in the John Doe complaints.[95] The judiciary had historically afforded colleges and universities tremendous discretion in structuring and executing campus disciplinary proceedings.[96] The general doctrine of academic deference was historically premised upon the judicial perception that America's educational institutions were largely cloistered from a capitalist system's more sinister temptations. Universities were pursuing a noble calling in their dedication to educating America's youth.[97] This academic deference doctrine encompassed numerous spheres of collegiate decision-making immune from judicial oversight.[98]

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92. *See*, *e.g.*, Doe v. Purdue Univ., 281 F. Supp. 3d 754, 759 (N.D. Ind. 2017), *rev'd and remanded*, 928 F.3d 652 (7th Cir. 2019).

93. *See supra* notes 7-8 and accompanying text for use herein of the term "John Doe lawsuits"; *see generally Title IX Legal Database*, *supra* note 7; *FIRE*, *supra* note 7.

94. *See* Samantha Harris & K.C. 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, 68 (2019); *see generally Title IX Legal Database*, *supra* note 7; *FIRE*, *supra* note 7. Section 1983 is a claim for state or local government actions under color of law in violation of the Constitution. 42 U.S.C § 1983 (2018).

95. *See* Harris & Johnson, *supra* note 94, at 68–69.

96. Harris & Johnson, *supra* note 94, at 107 (referencing "the deference that once was routine for all campus disciplinary decisions, even if some procedural problems beset the college adjudication"). *See generally* William E. Thro, *No Angels in Academe: Ending the Constitutional Deference to Public Higher Education*, 5 BELMONT L. REV. 27 (2018).

97. *See*, *e.g.*, Keyishian v. Bd. of Regents of Univ. of State of N.Y., 385 U.S. 589, 603 (1967) ("Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned.").

98. *See*, *e.g.*, Rodney A. Smolla, *Fisher v. University of Texas: Who Put the Holes in "Holistic"?*, 9 DUKE J. CONST. L. & PUB. POL'Y 31, 31–32 (2013) (tracing the historical judicial deference to universities' decisions on affirmative action and admissions); Scott A. Moss, *Against "Academic Deference": How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 5–6 (2006) (tracing historical academic deference in hiring and promotion decisions of educational institutions).

The judiciary's traditionally benign neglect in scrutinizing the academe prevailed in the 2015–17 adjudications of the John Doe lawsuits.[99] Despite the potential penalties of suspension or expulsion and the stigma of sexual misconduct, most courts did not view Title IX disciplinary proceedings as quasi-criminal proceedings.[100]

1. The Frequent Summary Dismissals of Plaintiffs' Title IX Discrimination Claims Through Catch-22 Pleading Requirements

Scores of the John Doe, Title IX, reverse gender discrimination claims failed to survive the pleading stage, with the frequent granting of the educational institutions' motions for dismissal based on failure to state a claim on which relief could be granted.[101] These courts adopted a test for the sufficiency of a Title IX claim, specifically requiring factual allegations constituting a prima facie case of a Title IX violation.[102] This rigorous test left the plaintiff in a "catch-22 position," as the specific facts supporting Title IX discrimination are primarily found in the lawsuit's discovery phase.[103] In contrast, a distinct minority of federal courts adopted a less rigorous Title IX pleading standard requiring only a plausible inference of gender discrimination arising from the factual allegations.[104] This relaxed pleading standard allowed for further evidence of bias to be found in the course of discovery.

Most federal courts employed a second, equally imposing obstacle for the John Doe plaintiffs in responding to the universities' inevitable Rule 12(b)(6) motions. Courts repeatedly dismissed Title IX claims by concluding the John

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99. *See* Emily D. Safko, Note, *Are Campus Sexual Assault Tribunals Fair?: The Need for Judicial Review and Additional Due Process Protections in Light of New Case Law*, 84 FORDHAM L. REV. 2289, 2305–10 (2016) (surveying John Doe lawsuits and concluding predominant reluctance of courts to intervene and redress abuses in the Title IX proceedings).

100. *See*, *e.g.*, Marshall v. Ind. Univ., 170 F. Supp. 3d 1201, 1209 (S.D. Ind. 2016) ("A disciplinary hearing in an educational setting is neither a criminal or quasi-criminal hearing. . . . As such, the rights afforded to criminal defendants in a criminal trial do not apply."); *accord* Doe v. Cummins, 662 Fed. App'x. 437, 451 (6th Cir. 2016) (observing the due process afforded accused in disciplinary proceeding need not be equivalent to that afforded the defendant in a criminal proceeding).

101. *See* Corbin, *supra* note 88, at 2665, 2697 & n. 221 (providing results of 2017 survey of federal district court cases confirming the clear majority of Title IX reverse discrimination claims were dismissed at the pleading stage); *see generally* Fed. R. Civ. P. 12(b)(6) (defense of failure to state a claim upon which relief can be granted).

102. Corbin, *supra* note 88, at 2669–70.

103. Corbin, *supra* note 88, at 2695.

104. *See* Doe v. Brown Univ., 166 F. Supp. 3d 177, 186–90 (D.R.I. 2016); Doe v. Salisbury Univ., 12 F. Supp. 3d 748, 768 (D. Md. 2015); *see also* Doe v. Wash. & Lee Univ., No. 6:14-cv-00052, 2015 U.S. Dist. LEXIS 102426, at *1, 20–29 (W.D. Va. Aug. 5, 2015) (denying Rule 12(b)(6) motion finding plausible pleading of Title IX reverse discrimination with allegations of federal pressure brought to bear on university regarding Title IX enforcement, as supported by statements by university personnel regarding and circumstantial evidence that could be interpreted as university representatives reflecting gender bias in proceeding).

Doe factual pleadings of acts, statements, or statistics offered in support of Title IX gender bias merely reflected a "pro-victim" bias.[105] This "pro-accuser bias" vs. "gender bias" distinction resulted in a Rule 12(b)(6) dismissal of a Title IX reverse discrimination claim that included factual allegations recounting the university president's public statement expressing sympathy for the survivor of sexual assault prior to any investigation or adjudication of the claim against the accused males.[106] The pro-victim bias served as one district court's rationale for granting Rule 12(b)(6) motions despite the plaintiff's inclusion of statistics reflecting a university's finding of guilt on every Title IX claim filed against a male student on campus.[107] Given the daunting Title IX pleading requirements, the male plaintiff found guilty in the collegiate proceeding could allege specific instances of erroneous conduct by a disciplinary panel but have his Title IX claim summarily dismissed based on a failure to plead facts demonstrating wrongdoing was "caused" by gender discrimination.[108]

2. The Initial Reluctance of Courts to Recognize Significant Due Process Rights for the Accused in the Campus Investigations and Adjudications

In the initial years of the John Doe lawsuit filings, the great majority of federal district courts were similarly unwilling to find the accused in the campus Title IX proceeding vested with extensive constitutional procedural due process rights. The constitutional sufficiency of "notice and hearing" afforded is "flexible" in nature.[109] Specifically, the procedural due process owing one threatened with a governmental taking of a property or a liberty interest is determined by applying a three-factor test outlined in *Mathews v. Eldridge*.[110]

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105. *See* Harris & Johnson, *supra* note 94, at 93–94 & nn. 293-300 (citing Sahm v. Miami Univ., 110 F. Supp. 3d 774 (S.D. Ohio 2015) (recognized as a high point of the pro-victim bias theory with over 30 decisions subsequently following the reasoning of *Sahm* through 2019)).

106. *See* Austin v. Univ. of Or., 205 F. Supp. 3d 1214, 1224, 1232 (D. Or. 2016) (granting Rule 12(b)(6) motion of complaint recounting university president's depiction of the accuser as a "survivor" and observing that, as a father, he was appalled at the alleged conduct), *aff'd*, 925 F.3d 1133 (9th Cir. 2019).

107. Doe v. Oberlin Coll., No. 1:17 CV 1335, 2019 U.S. Dist. LEXIS 55703, at *16, *18 (N.D. Ohio Mar. 31, 2019) (pleading 100 percent of respondents were found guilty on at least one count of Title IX harassment), *rev'd and remanded*, 963 F.3d 580 (6th Cir. 2020).

108. *See*, *e.g.*, Doe v. Univ. of Cincinnati, 173 F. Supp. 3d 586, 603 (S.D. Ohio 2016) (refusing to allow accused to cross-examine or be represented by counsel at disciplinary hearing failed to show such was attributable to gender discrimination and claim dismissed); Johnson v. W. State Colo. Univ., 71 F. Supp. 3d 1217, 1226 (D. Colo. 2014) (allegation that disciplinary conduct undertaken by female panel members was allegedly taken against male, but not against female who engaged in same conduct dismissed as not showing such disparity was attributable to gender discrimination).

109. U.S. CONST. amend. XIV; Mathews v. Eldridge, 424 U.S. 319, 335 (1976) (noting the extent of notice and hearing to be afforded varies from case to case based upon a three-factor analysis).

110. *Mathews*, 424 U.S at 335. The three-factor test used in determining the extent of the "notice" and "hearing" to be afforded is the following:

Courts frequently prefaced their analysis of John Doe Section 1983 claims with proclamations that the collegiate tribunals were not courts of law and Title IX proceedings were not quasi-criminal.[111] Accordingly, the Title IX accused was guaranteed minimal rights bearing no relationship to due process guaranteed a criminal defendant.[112] Judicial decisions readily concluded that the common collegiate practices, including denial of a live hearing on the claim, denial of cross-examination or the calling of witnesses, and denial of confrontation of one's accuser, did not constitute violations of due process for the Title IX respondent.[113] Neither did a violation of due process occur when a verdict of guilt rested on hearsay evidence, with the victim impact statements admitted into evidence before any determination of guilt or innocence on the Title IX claim.[114]

B. Initial Signs of Judicial Awareness of Bias and Deprivations of Due Process in the Title IX Disciplinary Proceedings

During 2015 through 2017, a cadre of federal and state courts perceived the Title IX campus adjudications as matters of grave concern. This judicial minority recognized that Title IX determinations were of far greater consequence than decisions on allegations of academic misconduct. Decisions on John Doe claims forthcoming from this minority of courts viewed the campus Title IX proceedings as quasi-criminal given the life-altering consequences for the accused adjudged a sexual assailant.[115] The judicial oversight exercised by this minority resulted in declarations of violation of substantive or procedural due process when presented with common practices of Title IX tribunals that disadvantaged the accused male. These practices included a de facto shifting of the burden of proof requiring the Title IX respondent to disprove the Title IX

> [f]irst, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id.

111. *See* Marshall v. Ind. Univ., 170 F. Supp. 3d 1201, 1209 (S.D. Ind. 2016).

112. Doe v. Cummins, 662 Fed. App'x at 446–49 (6th Cir. 2016) (observing the Title IX hearing need not constitute a full-scale adversarial hearing, and due process analysis should not focus on whether the accused be afforded the constitutional rights guaranteed in a criminal trial).

113. *See* Doe v. Baum, 227 F. Supp. 3d 784, 797–98 (E.D. Mich. 2017), *rev'd*, 903 F.3d 575 (6th Cir. 2018).

114. *Cummins*, 662 Fed. App'x at 447–48.

115. *Cf.* Doe v. Regents of the Univ. of Cal., No. 37-2015-00010549-CU-WM-CTL, 2015 Cal. Super. LEXIS 23139, at *1–2 (Cal. Super. Ct. Oct. 1, 2015) (reversing disciplinary panels finding of guilt on basis of deprivation of rights associated with criminal proceedings).

claim[116] and the de novo appellate reversal and rendition of a guilty verdict on the Title IX claim.[117]

Some of these courts were careful to limit their findings of due process violations to the facts presented in the case.[118] In contrast, other courts' rulings implicitly constructed a framework of constitutional due process rights readily applicable to the accused in all Title IX proceedings. The latter courts' expansive decisions collectively recognized the Title IX respondent's fundamental rights to include: (i) written notice of the complainant's charge and the alleged events made the basis of the claim; (ii) the opportunity to review the evidence before any hearing on the complaint; (iii) the retention of legal counsel in defense of the claim; and (iv) a live hearing on the Title IX charges with the occasion to cross-examine, confront and examine one's accuser, call defense witnesses and introduce other evidence.[119]

Ironically, the most detailed articulation of rights to be afforded the Title IX accused came from a federal district court decision describing the elements of "basic fairness" in a private university's adjudication of a sexual harassment claim.[120] Federal District Judge F. Dennis Saylor, in *Doe v. Brandeis University*, partially denied the school's Rule 12(b)(6) motion to dismiss the case.[121] The 89-page opinion initially identified the governmental policies underlying the continuing inequities:

> In recent years, universities across the United States have adopted procedural and substantive policies intended to make it easier for

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116. Memorandum and Order at 23, Mock v. Univ. of Tenn. at Chattanooga, No. 14-1687-II (Tenn. Ch. Ct. Aug. 4, 2015) (reversing disciplinary tribunal's conclusion of guilt on court's finding of due process violation in effectively requiring the accused bear the burden of proof to disprove the claim of rape).

117. *See* Doe v. Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 622 (E.D. Va. 2016).

118. *Id.* at 622–23 (emphasizing the procedural narrowness of the ruling and disclaiming any declaration of a particular form of notice that must always be given by all public universities).

119. Memorandum and Order, *supra* note 116, at 23 (reversing disciplinary tribunal's conclusion of guilt on court's finding of due process violation in effectively requiring the accused bear the burden of proof to disprove the claim of rape); Regents of the Univ. of Cal., 2015 Cal. Super. LEXIS 23139, at *1–2 (utilizing a criminal proceeding paradigm in reversing the university's tribunals finding of guilt on Title IX claim, citing multiple due process violations such as denial of the right to confront or cross examine the accuser, not recognition of Doe's right to invoke the right against self-incrimination and ordering a withdrawal of all findings and penalties against the male); Neal v. Colo. State Univ. Pueblo, No. 16-cv-873-RM-CBS, 2017 U.S. Dist. LEXIS 22196, at *62 (D. Colo. Feb. 16, 2017) (Federal magistrate finding numerous due process violations in university Title IX proceeding including "*[l]ack of formal or evidentiary hearing*, including the right to (i) question Plaintiff's accuser (the Complainant), (ii) question the other persons who [the Title IX coordinator] had interviewed, and (iii) present evidence and witnesses in support of Plaintiff's defense.").

120. Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 601 (D. Mass. 2016). The sexual harassment claims in Brandeis occurred in the context of a Title IX campus proceeding with a male complainant and male respondent. *Id.* at 569.

121. *Id.* at 617–18.

> victims of sexual assault to make and prove their claims and for the schools to adopt punitive measures in response. That process has been substantially spurred by the Office for Civil Rights of the Department of Education, which issued a "Dear Colleague" letter in 2011 demanding that universities do so or face a loss of federal funding. [citation omitted]. The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable. Whether the elimination of basic procedural protections—and the substantially increased risk that innocent students will be punished—is a fair price to achieve that goal is another question altogether.[122]

Thereafter, the opinion proceeded to call for a return to Title IX adjudications characterized by sole consideration of the individuals before the collegiate tribunal and ultimate determinations of guilt or innocence premised upon impartial factual findings as to the validity of the claim.[123] Such a model of legitimate adjudications was contrasted with the developing trend of Title IX collegiate proceedings conducted with predetermined outcomes:

> If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor an outcome, and a fair and neutral fact-finder not predisposed to reach a particular conclusion.[124]

C. The Department of Education's Revocation of the 2011 Dear Colleague Letter and Issuance of Interim Guidelines

On September 22, 2017, Secretary of Education DeVos announced the Dear Colleague Letter's ("DCL") revocation with an accompanying issuance of interim guidelines ("the Interim Guidelines") for educational institutions' adjudication of sexual assault claims.[125] The Interim Guidelines were issued in the format of "Q&A on Campus Sexual Misconduct"[126] in a September 7th speech. Secretary DeVos had provided notice of the imminent issuance of the Interim Guidelines and revocation of the DCL, articulating the following justification for ending the injustices of the DCL in the following terms:

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122. *Id.* at 572.

123. *Id.* at 573.

124. *Id. See also* The New Title IX Rules, Off. Student Affs., Coll. of N.J., https://titleix.tcnj.edu/policy-procedures/new-tix-regulations/ (reflecting the original 60 day period for public comment on the Final Rule was twice extended and ultimately concluded on Feb. 25, 2020).

125. U.S. DEP'T OF EDUC. OCR, Q&A ON CAMPUS SEXUAL MISCONDUCT, at 1, 2 (2017), https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf?utm_content=&utm_medium=email&utm_name=&utm_source=govdelivery&utm_term= [hereinafter INTERIM GUIDELINES].

126. INTERIM GUIDELINES, *supra* note 125.

> [L]et me be clear at the outset: acts of sexual misconduct are reprehensible, disgusting, and unacceptable. They are acts of cowardice and personal weakness, often thinly disguised as strength and power . . . One assault is one too many. One aggressive act of harassment is one too many. One person denied due process is one too many . . . There is no way to avoid the devastating reality of campus sexual misconduct: lives have been lost. Lives of victims. And lives of the accused . . . We need to remember that we're not just talking about faceless "cases." We are talking about people's lives. Everything we do must recognize this before anything else. . . [T]he truth is that the system established by the prior administration has failed too many students. Survivors, victims of a lack of due process and campus administrators have all told me that the current approach does a disservice to everyone involved.[127]

The Interim Guidelines offered great discretion to the universities in voluntarily crafting their existing adjudicatory systems to afford greater due process rights to the accused and equal treatment of the parties.[128] The most significant change brought by the Interim Guidelines was the elimination of the DCL's mandatory preponderance of the evidence standard, thereby permitting substitution of the higher standard of proof of "clear and convincing evidence."[129] Other areas where the Interim Guidelines opened the door for schools to pursue equality of treatment for the parties to the sexual harassment adjudications includes: (i) eliminating the DCL's discouragement of cross-examination; (ii) inclusion of a mandatory provision for a hearing examination of witnesses, including a right of the accused or panel to cross-examine the accuser if the case rested on credibility; (iii) the elimination of the DCL's proposed time frames for resolving sexual harassment claims on campus; and (iv) a rejection of the DCL's opposition to employing voluntary mediation and related voluntary resolution methods.[130]

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127. Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 7, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/ [hereinafter *DeVos Prepared Remarks*].

128. INTERIM GUIDELINES, *supra* note 125, at 3–5; Akin, Gump, Strauss, Hauer, & Feld, L.L.P, *Title IX Litigation Alert* (Sept. 27, 2017), https://www.akingump.com/a/web/60603/aoiUY/title-ix-the-department-of-education-issues-new-guidance-for-tit.pdf. Akin Gump made the following observations concerning the INTERIM GUIDELINES:

> [i]n light of the 2017 interim guidance, colleges and universities should examine their existing Title IX policies and procedures to ensure that they do not afford rights or opportunities to complainants that are not available to respondents . . . Colleges and universities now have more flexibility in key aspects of their Title IX procedures such as the applicable standard of proof, the timing of complaint resolution, and the potential for increased use of informal resolution methods in cases of sexual assault.

Id.

129. INTERIM GUIDELINES, *supra* note 125 at 5.

130. INTERIM GUIDELINES, *supra* note125, at 3–5.

The Interim Guidelines also lessened the defined circumstances giving rise to the school's affirmative obligation to respond to sexual harassment. The redefining of the triggering event(s) for a response to sexual harassment tracked the Supreme Court's pronouncement: "when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists, and the school must respond."[131] The Department of Education simultaneously announced that proposed permanent regulations to replace the Interim Guidelines would be issued for public comment in compliance with the APA's public notice requirement.[132] The Secretary specifically announced, "[t]he era of rule by letter is over . . . Our interest is in exploring all alternatives that would help schools meet their Title IX obligations and protect all students."[133]

The Interim Guidelines' general tenor was directed at ensuring that parties to the sexual harassment adjudications be afforded the same rights in the investigatory and adjudicatory phases.[134] In responding to the Interim Guidelines on behalf of multiple universities, the American Council on Education made clear that schools would not make fundamental changes to the existing modus operandi in campus investigations and adjudications of sexual harassment claims.[135] The schools' decisions to continue with the existing sexual harassment justice systems was an unfortunate sign that the frequent predetermined outcomes and deprivations of procedural rights were not wholly attributable to OCR pressure exerted in compelling DCL compliance. Rather, the schools were to manifest a continuing devotion to the DCL's vision of moral consequentialism in which sexual harassment on campus was deterred by visiting injustice on the accused.

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131. INTERIM GUIDELINES, *supra* note 125, at 1 & n.3 (citing *Davis*, 526 U.S. at 631).

132. INTERIM GUIDELINES, *supra* note 125, at 1.

133. *DeVos Prepared Remarks*, *supra* note 127.

134. INTERIM GUIDELINES, *supra* note 125, at 2 ("In regulating the conduct of students and faculty to prevent or redress discrimination, schools 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."); *DeVos Prepared Remarks*, *supra* note 127.

135. PETER MCDONOUGH & SARAH SPREITZER, *U.S. Department Education Office for Civil Rights Withdraws 2011 Dear Colleague Letter, Confirms Intention to Issue New Title IX Regulations, and Issues Interim Guidance in the Form of a Q&A*, 5 (Am. Council on Educ. ed., 2017) https://www.acenet.edu/Documents/Issue-Brief-Title-IX-QA-2017.pdf. The American Council on Education, representing approximately 1700 universities, stated:

> In the short run, not much is likely to happen to how institutions handle campus sexual assault cases. Our country's colleges and universities have given intense and sustained attention to sexual misconduct on their campuses. No institution will back off its commitment to preventing sexual harassment and assault from occurring in the first place, and to handling cases that do occur with compassion for the survivor and fairness to both parties.

Id.

D. The Decided Increase in Judicial Intervention to Redress the Injustices of the Campus Tribunals (2018-2020)

1. Increased Judicial Intervention to Redress the Injustices of the Collegiate Sexual Harassment Adjudications

The period of 2018 through 2020 witnessed a dramatic increase of judicial intervention redressing injustices in universities' Title IX proceedings. This judicial assumption of heightened oversight as to the legality of the Title IX proceedings was attributable to a series of federal circuit courts of appeals decisions reviewing and reversing district courts' summary dismissals of John Doe Title IX and Section 1983 claims for deprivations of due process.[136]

2. The Judiciary's Easing of the Standard for Plausible Pleading of Plaintiffs' Title IX Reverse Discrimination Claims

The Sixth Circuit Court of Appeals' 2018 decision in *Doe v. Miami University*[137] was a landmark case in easing the rigorous pleading requirements of Title IX reverse discrimination that had resulted in systematic Rule 12(b)(6) dismissals of John Doe claims.[138]

Understanding the significance of the *Miami University* decision requires considering classifications of factual pleadings historically employed in John Doe lawsuits to establish gender bias and causation of an erroneous outcome caused by gender bias. Among the primary categories of factual pleadings offered in support of John Doe reverse discrimination claims are the following:

i. The institution discriminated against accused males by modifying and/or adopting adjudicatory systems that were gender-biased or applied the systems in a gender-biased manner as a response to pressure exerted by the federal government;[139]

ii. Statements by university officials that overtly reflected gender bias or gave rise to a reasonable inference of gender bias in the handling of the sexual misconduct claims against males;[140]

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136. *See generally infra* notes 186–206 and accompanying text.

137. Doe v. Miami Univ., 882 F.3d 579, 604–05 (6th Cir. 2018).

138. Fed. R. Civ. P. 12(b)(6); *see supra* Section III.A.(1) (reviewing the stringent Title IX pleading standard employed by courts in the initial years of the John Doe lawsuits).

139. Eric Rosenberg, *Title IX Claims and Representing the Accused*, ROSENBERG & BALL 1–2, 11 (Oct. 30, 2017), https://www.rosenbergball.com/wp-content/uploads/2018/08/Eric-Rosenbergs-Title-IX-Paper-for-2017-CLE.pdf.

140. *Id.* at 11, 13, 24.

iii. Statistical patterns arising from investigation and adjudication of sexual misconduct claims giving rise to an inference of gender bias against accused males;[141]

iv. Evidence of adoption of gender-biased conduct by employees in the course of the disciplinary proceeding;[142]

v. The university's disregard of its own designated procedures in the course of the disciplinary hearing; and [143]

vi. Language adopted by the university reflecting gender-based bias.[144]

Substantial discretion is vested in federal judges in determining the sufficiency of the factual assertions of Title IX gender discrimination in rulings on the universities' Rule 12(b)(6) motion. Thus, during the initial years of the John Doe lawsuits, the majority of federal judges exercised this substantial discretion in repeatedly concluding that no plausible pleading of reverse discrimination was established by complaints pleading factual allegations of discrimination falling within these categories.[145] For example, courts would frequently refuse to draw the inference of gender bias or causation of an erroneous outcome in the disciplinary proceeding from factual allegations falling in such categories.[146]

The *Miami University* decision lessened the burden of plausibly pleading reverse discrimination in its willingness to draw inferences of gender discrimination and erroneous outcomes attributable to gender bias from factual pleadings instead of speculating on alternative non-gender based inferences from the factual pleadings. The court readily inferred that the plaintiff had sufficiently pled a reverse gender discrimination claim with the following factual allegations: (i) assertions that a series of procedural defects during the university's investigation and hearing on the claim hindered the plaintiff's ability to mount a defense; (ii) the pressure exerted by the OCR on the university to more vigorously redress sexual misconduct; and (iii) statistical evidence that

141. *Id.* at 18–19.

142. *Id.* at 11, 13–14, 21.

143. *Id.* at 11–14, 21.

144. *Id.* at 12.

145. *See supra* notes 101-04 and accompanying text (reviewing cases in which courts did not infer gender bias from the factual allegations, but rather interpreted such factual pleadings against the John Doe plaintiff).

146. *See supra* notes 105-07 (reviewing federal district court's employment of the pro-victim bias in analyzing the sufficiency of Title IX reverse discrimination claims).

Four distinct claims of Title IX reverse discrimination had developed, and the Miami decision affirmed the district court's dismissal of two of these Title IX claims. *See* Doe v. Miami Univ., 882 F.3d 579, 589–92 (6th Cir. 2018). The most successful of the four categories of Title IX claim asserted in John Doe complaints is the "erroneous outcome" theory in which it is contended that gender-discrimination caused an erroneous outcome in the Title IX disciplinary proceeding. *See id.* at 592–94. The Miami University decision reversed the district court's dismissal of the Title IX claim in finding sufficient pleading of facts supporting the causation element. *Id.*

during the period 2011-2014, ninety percent of all sexual misconduct claims where the party was found responsible were against individuals with male first names.[147] The court also rejected the long trend of undermining the factual sufficiency of Title IX pleadings by characterizing claims of gender bias as mere victim bias.[148] The Sixth Circuit did not adopt the Second Circuit's "minimal plausible inference test." Still, it departed from the prevailing rigid standard in finding inferences of gender bias from an expanded field of factual pleadings deemed sufficient to support the plaintiff's claim.[149]

In their applications of the pleading analysis of *Miami University*, federal district courts in the Sixth Circuit more readily found a plausible pleading of reverse discrimination in the John Doe lawsuits.[150] The Sixth Circuit, in subsequent decisions, reaffirmed *Miami University's* easing of the burden for the pleading of Title IX reverse discrimination in John Doe complaints.[151] The Sixth Circuit's 2020 decision in *Doe v. Oberlin College* reversed the district court's Rule 12(b)(6) dismissal of a Title IX erroneous outcome claim.[152] Specifically, the court found a viable claim of gender discrimination was present when the complaint included allegations of (i) the school's failure to follow their own deadlines in carrying out the disciplinary hearing; (ii) procedural

147. *Id.* (observing additionally that during the 2013 fall semester and 2014 spring semester one hundred percent of males charged were found responsible for sexual misconduct).

148. *Id.* at 593–94. *See supra* notes 105-07 (reviewing employment by federal district courts of the pro-victim bias inference).

149. *See id.* at 588–89 (foregoing adoption of Second Circuit standard requiring a viable pleading of gender discrimination to only allege "specific facts that support a minimal plausible inference" of gender bias). Doe v. Columbia Univ., 831 F.3d 46, 55–56 (2d Cir. 2016). Admittedly, the Second Circuit's *Columbia* standard for pleading the Title IX case is ostensibly a more forgiving standard than that articulated in the Miami University decision. However, as between the two standards, the determination of the plausibility of the Title IX claim remains highly fact intensive and largely dependent on factors beyond merely whether the *Columbia* or *Miami University* standard is applied. *See* Rosenberg, *supra* notes 139-44 (articulating, as counsel who successfully argued plausibility in Miami University, various cases and pleading considerations in plausibly pleading the reverse discrimination claim and responding to a motion for summary judgment). The likelihood of the Title IX claim surviving the pleading stage is dependent on the ability of the plaintiff's counsel in drafting a complaint that persuasively weaves the given facts into a portrait of plausible gender bias coupled with the great discretion vested in the federal district judge in the relative weight to afford factual pleadings of gender bias.

150. *See*, *e.g.*, Gischel v. Univ. of Cincinnati, No. 1:17-cv-475, 2018 U.S. Dist. LEXIS 230847, at *4 (S.D. Ohio June 26, 2018); Schaumleffel v. Muskingum Univ., No. 2:17-cv-463, 2018 U.S. Dist. LEXIS 36350, at *49–50 (S.D. Ohio Mar. 6, 2018). Various federal district courts outside the Sixth Circuit additionally were influenced and implicitly adopted the *Miami* standard in evaluating the sufficiency of Title IX claims. *See*, *e.g.*, Doe v. Marymount Univ., 297 F. Supp. 3d 573, 583–84 (E.D. Va. 2018).

151. *See* Doe v. Baum, 903 F.3d 575, 585–86 (6th Cir. 2018) (reversing district court's dismissal of Title IX claim and affirming a plausible Title IX erroneous outcome claim when allegations of John Doe's denial of cross-examination, rejection of testimony by all male witnesses and finding credibility of all female witnesses in the disciplinary proceeding, and pressure exerted on the university by an OCR investigation into the school's handling of sexual harassment claims).

152. Doe v. Oberlin Coll., 963 F.3d 580, 586–88 (6th Cir. 2020).

irregularities, including the disciplinary panel's failure to even comment on the wholly contradictory testimony of the female accuser; (iii) a verdict of guilt unsupported by evidence; and (iv) the pressure exerted on Oberlin by an OCR investigation of the College's sexual harassment practices.[153]

Between June 2019 and September 2020, four federal circuits issued decisions that reflected the adoption of *Miami University's* Title IX pleading standard.[154] These circuit court decisions expanded the range of factual allegations deemed sufficient to plead gender bias plausibly. Each of the appellate decisions resulted in the reversal of a federal district court's Rule 12(b)(6) dismissal of a John Doe Title IX claim against an educational institution. The circuit court cases included the Seventh Circuit's decision in *Doe v. Purdue University,*[155] the Third Circuit's decision in *Doe v. University of Sciences,*[156] the Ninth Circuit's opinion in *Schwake v. Arizona Board of Regents*,[157] and the Eighth Circuit's ruling in *Doe v. University of Arkansas – Fayetteville*.[158] Each of these four decisions found sufficient factual pleading of the Title IX reverse discrimination claim with a factual allegation of OCR pressure exerted on the institution when joined

153. *Id.* at 587.

154. *See infra* notes 155–158 and accompanying text (reviewing series of Federal Circuit Court of Appeals decisions that have followed the Miami University decision in easing the standard for pleading the plausible Title IX claim).

155. Doe v. Purdue Univ., 928 F.3d 652, 668–70 (7th Cir. 2019) (alleging (i) the school was threatened with a withdrawal of federal funding absent a showing of zealous pursuit of those charged with sexual harassment; (ii) the accused was denied the opportunity by the panel to present his defense witnesses at the hearing; (iii) the panel reached the verdict of guilt without having read the investigator's report and having received no sworn testimony from the accuser; (iv) the dean of students and panel members on panel believed accuser without ever having personally heard her accusations; and (v) university center published position that all sexual assault is a problem attributable to men as a group).

156. Doe v. Univ. of Scis., 961 F.3d 203, 210 (3d Cir. 2020) (alleging (i) the school had abrogated the procedural rights of males in response to the DCL and federal officials' encouragement; (ii) the school refused to investigate three female students for the same disciplinary violation with which Doe was charged; and (iii) the disciplinary panel refused to consider Doe's defense of incapacity despite his substantial alcohol consumption at the time of the incident).

157. Schwake v. Arizona Bd. of Regents, 967 F.3d 940, 948–51 (9th Cir. 2020) (alleging (i) the school was pressured by an OCR investigation; (ii) the investigation of the claim was one-sided as no consideration was given to Doe's version of events and the investigator failed to interview defense witness and evidence referred by Doe; and (iii) university officials involved in the disciplinary proceeding violated rules of confidentiality and privilege by publicly discussing the proceeding).

158. Doe v. Univ. of Ark. – Fayetteville, 974 F.3d 858, 863–66 (8th Cir. 2020) (alleging (i) the finding of guilt against Doe was against the substantial weight of the evidence; (ii) the committee's inexplicably light penalty upon a finding of sexual assault; (iii) the exertion of pressure on the University, from multiple sources, including an OCR investigation and press reports, to redress campus sexual assault; and (iv) inclusion on Doe's educational record of a notation concerning a disciplinary record for prior sexual assault).

with a series of other factual allegations supporting an inference of gender bias.[159]

The relaxing of Title IX pleading requirements forthcoming from the *Miami University* decision and its appellate progeny in other circuits have not been accepted in all quarters. The First and Tenth Circuits issued recent opinions reflecting adherence to the more rigorous pleading requirements for Title IX reverse discrimination claims previously representing the majority position among federal district courts.[160] Other federal appellate courts, such as the United States Court of Appeals for the Fifth Circuit, have yet to issue definitive opinions on the standards to prevail in judging the plausible pleading of the Title IX reverse discrimination claim.[161]

3. Judicial Recognition of Expanded Due Process Rights Owed to the Accused in the Campus Title IX Proceedings

The two-year period also witnessed a widespread judicial departure from the earlier majority position that concluded that the accused was owed only limited due process rights in the collegiate adjudications.[162] The recognition of extended due process rights for the accused was the product of a series of federal circuit court of appeals decisions.[163] In some instances, the recognition of increased due process rights came from the same federal appellate decisions that had eased the pleading requirements on John Doe reverse discrimination claims.[164] The recognition of increased due process rights constitutionally guaranteed to the accused was the product of a new judicial perception of the relative weight of the accused's "private interest[s]," the "risk of erroneous deprivation" of such interest, and the schools' burden to provide additional rights to the accused.[165] The expansion of procedural rights encompassed both constitutional due process rights in Title IX hearings at public universities and procedural rights

159. *See supra* notes 155-58 (including summations of the factual pleadings deemed to support gender bias in each of the four appellate decisions).

160. *See* Doe v Univ. of Denver, 952 F.3d 1182, 1197 (10th Cir. 2020); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 73–75 (1st Cir. 2019).

161. *See* Pet. For Cert., at 1, Rossley v. Drake Univ., 979 F.3d 1184 (8th Cir. 2020), *cert. denied*, 141 S. Ct. 1692 (2021) (petition for writ of certiorari identifying circuit court of appeals decisions herein reviewed as reflecting the split on Title IX pleading requirements, but noting no additional circuits' decisions as implicated in this division denied on March 22, 2021).

162. *See supra* Section III.A.(2) (discussing the previous majority position in judicial decisions considering the procedural due process rights due to the accused in the Title IX proceeding).

163. *See supra* Section III.D.(3) (reviewing the significant decisions recognizing expanded due process rights for the Title IX accused during period of 2018 through 2020).

164. *See*, *e.g.*, Doe v. Purdue Univ., 928 F.3d 652, 663–64 (7th Cir. 2019); Doe v. Baum, 903 F.3d 575, 585–86 (6th Cir. 2018).

165. *See supra* note 110 and accompanying text (reviewing the three-prong test of Mathews v. Eldridge in determinations of constitutionally guaranteed procedural due process).

contractually guaranteed the accused in sexual harassment adjudications at private universities.[166]

The landmark 2018 decision in *Doe v. Baum*[167] was a logical extension of the accused's right of cross-examination earlier articulated in *Doe v. University of Cincinnati*.[168] The Sixth Circuit decision in *University of Cincinnati* had recognized the necessity of a live hearing, with an examination of the accuser, if the Title IX panel's ultimate determination turned on the accuser's credibility.[169] The *Cincinnati* decision concluded that due process requirements were met with the disciplinary panel conducting the accuser's cross-examination.[170] The *Baum* decision expanded the duty to test the accuser's credibility in concluding that due process included the right of the accused or his agent to examine the Title IX complainant.[171] The *Baum* decision reflected a growing judicial recognition of a constitutionally mandated procedure directed at ensuring Title IX determinations were premised upon legitimate findings of fact. Federal district courts in the Sixth Circuit soon extrapolated the rationale of *Baum* in expanding the accused's right to examination of witnesses. More specifically, these courts expanded the scope of the accused's due process rights to include cross-examination of all adverse witnesses in the Title IX adjudication with accompanying "access to exculpatory evidence necessary to engage in meaningful cross-examination."[172]

Baum was equally significant in redressing two other inequities that regularly characterized the Title IX proceedings. The court's recognition of the right of cross-examination in Title IX cases was, by implication, the death knell for universities' widespread employment of the single investigator model.[173] Secondly, no longer would the Sixth Circuit tolerate a collegiate appellate panel

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166. *See infra* notes 200–05 and accompanying text (reviewing the 2020 Third Circuit decision recognizing the procedural rights of the Title IX accused in private university disciplinary proceeding that were contractually created by university in student handbook's representation of fairness in disciplinary proceedings).

167. *Baum,* 903 F.3d at 578.

168. *See* Doe v. Univ. of Cincinnati, 872 F.3d 393, 400–07 (6th Cir. 2017) (recognizing a violation of the accused's due process rights in panel's failure to conduct a hearing in which the accuser's credibility could be assessed).

169. *Id.* at 402–05.

170. *Id.* at 406–07.

171. *Baum*, 903 F.3d at 578, 583 (including the Court's qualification that the right of the accused to examine might not apply in all situations as the circumstances of some hearings might require that only the accused's agent conduct the examination).

172. *See Harris & Johnson*, *supra* note 94, at 75 & n. 160 (citing Doe v. Ohio State Univ., 311 F. Supp. 3d 881, 889–93 (S.D. Ohio 2018); Nokes v. Miami Univ., No. 1:17-cv-00482, 2017 U.S. Dist. LEXIS 136880, at *37 (S.D. Ohio Aug. 25, 2017)).

173. *See Baum*, 903 F.3d at 580–86 (finding plausible claim of violations of due process in the university appellate panel's denial of hearing given recognized right of cross-examination of the accused in Title IX proceedings implicating credibility). *See generally* LINDA M. WILLIAMS ET. AL., *supra* note 74 (surveying university Title IX adjudicatory systems and concluding widespread use of the single investigator model).

engaging in de novo factual findings with reversals and renditions of guilt. The accused was now entitled to a live hearing with witnesses.[174]

Other contemporaneous Sixth Circuit decisions had reaffirmed commonly acknowledged rights for the accused, including: (i) determinations by an impartial fact-finder,[175] (ii) preliminary notice of the charges; (iii) specification of the incident or incidents forming the basis of the Title IX complaint; and (iv) a preliminary review of the evidence to be utilized in support of the claim.[176] In the *Miami University* decision, the Sixth Circuit had found a plausible claim for deprivation of procedural due process in the bias manifested by a panel member's alleged statement during the hearing, "I'll bet you do this [i.e., sexually assault women] all the time."[177]

The most significant decision of the 2019–2020 period in articulating a comprehensive framework of the Title IX accused's procedural due process rights was authored by then Judge Amy Coney Barrett in the Seventh Circuit's *Doe v. Purdue University* decision, issued in June 2019.[178] The Seventh Circuit reversed the district court's Rule 12(b)(6) dismissal of a Section 1983 claim for deprivation of constitutional rights, and a Title IX reverse discrimination claim asserted by a John Doe plaintiff.[179] Judge Barrett commenced with a detailed recounting of the alleged course of events that had culminated in the University's ultimate adjudication of guilt on the Title IX claim, resulting in the plaintiff's suspension, loss of a naval scholarship, and anticipated career in the Navy.[180] The disciplinary panel portrayed in the *Purdue* decision epitomized some of the more egregious adjudication practices emerging from various Title IX proceedings during the DCL era. As a threshold matter Section 1983 claims require the court to determine whether the plaintiff had incurred deprivation of a property or liberty interest sufficient to trigger due process protections.[181] The court initially applied the "stigma-plus" test, which required reputational damage from governmental action coupled with the loss of a legal right that the

174. *See Baum*, 903 F.3d at 581–82.

175. *See*, *e.g.*, Doe v. Ohio State Univ., 239 F. Supp. 3d 1048, 1071 (S.D. Ohio 2017) (quoting Doe v. Brandeis Univ., 177 F. Supp. 3d 561 (D. Mass. 2016), *reconsideration granted in part*, 323 F. Supp. 3d 962 (S.D. Ohio 2018)).

176. Doe v. Univ. of Cincinnati, 872 F.3d 393, 399–400 (6th Cir. 2017) ("While the exact outlines of process may vary, universities must 'at least' provide notice of the charges, an explanation of the evidence against the student, and an opportunity to present his side of the story before an unbiased decision maker.").

177. Doe v. Miami University, 882 F.3d 579, 601, 603 (6th Cir. 2018) (finding, however, no violation of due process based on allegation withholding of the investigator's file from the accused in violation of the school's policy).

178. Doe v. Purdue Univ., 928 F.3d 652 (7th Cir. 2019).

179. *Id.* at 670.

180. *Id.* at 656–58.

181. *Id.* at 659.

party had possessed before the reputational damage.[182] The stigma-plus requirement was fulfilled as Doe incurred damage beyond his label as one found guilty of a sexual offense.[183] Doe additionally incurred the loss of legal rights through the University's mandatory notification to the ROTC of the finding of responsibility for the sexual offense.[184] Specifically, the distinct legal rights affected included loss of the scholarship and permanent expulsion from the ROTC program.[185]

The court then reversed the district court's dismissal of Doe's Section 1983 claim, observing numerous plausible pleadings of due process violations in Doe's complaint.[186] Initially, the court noted the pleading of a viable claim of deprivation of due process with the allegation of Purdue having conducted a "sham" disciplinary proceeding wherein two of the three Title IX panel members had admittedly not read the investigator's report.[187] Thus, *Purdue University* essentially contended that the finding of Doe's guilt on the Title IX complaint was premised solely on the Title IX complaint of accuser Jane Roe, without the panel's knowledge or reference to any other evidence.[188] Additionally, Doe alleged a viable claim for deprivation of due process as the University denied him an opportunity for any preliminary review of the evidence to be used in support of the claim.[189]

A separate plausible claim of denial of due process was presented with Doe's allegation that the University had wholly failed to test Jane Roe's credibility as the accuser.[190] Roe's testimony was the sole evidence supporting her claim that she awoke, in Doe's bed, to discover she was the victim of nonconsensual sexual groping.[191] The disciplinary panel did not require Roe to attend the hearing.[192] Doe further alleged she was never questioned under oath, nor had the panel members even interviewed Roe.[193]

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182. *Id.* at 659–62 & n.2 (observing that the Seventh Circuit does not recognize a generalized property interest in pursuit of a higher education whereas the First, Sixth, and Tenth Circuits recognize education as a stand-alone property interest sufficient to trigger procedural due process). *See generally* James L. Buchwalter, Annotation, *Application of Stigma-Plus Due Process Claims to Education Context,* 41 A.L.R.6th § 2 (2020) (citing Bd. of Regents of State Colls. v. Roth, 408 U.S. 564 (1972)) (defining stigma plus as the requirement that a procedural due process claim for injury to reputation as cognizable only if joined with allegations of deprivation of anther liberty or property interest by the government).

183. *Purdue Univ.*, 928 F.3d at 661–62.

184. *Id.* at 662.

185. *Id.* at 663.

186. *Id.* at 663–64.

187. *Id.*

188. *Id.* at 664.

189. *Purdue Univ.*, 928 F.3d at 659 (observing that Doe was denied the occasion to read the investigative report or access any evidence relied upon by the panel).

190. *Id.* at 664.

191. *Id.* at 656–58.

192. *Id.* at 657–58.

193. *Id.* at 659.

Doe clearly put Roe's credibility in question with his denial of the alleged groping.[194] Doe's allegations confirmed the depiction of a sham proceeding with minimal attempts at providing him notice of the factual basis of the Title IX charge, followed by complete denial of an opportunity to present a defense.[195] The complaint included allegations that the panel refused to allow the testimony of Doe's roommate, who was present at the hearing.[196] The roommate had been in the room at the time of the alleged groping incident and would have refuted Roe's charge.[197] In concluding a review of the litany of alleged denials of due process, Judge Barrett found no need even to consider the panel's refusal to allow cross-examination of Roe.[198]

The *Purdue* decision exerted influence on federal circuit and district courts outside the Seventh Circuit with its framework of clearly defined due process rights to be afforded the accused in all Title IX collegiate proceedings.[199]

Finally, a significant array of procedural rights constitutionally guaranteed to the accused in the Title IX public university proceeding were extended to the private university in the Third Circuit Court of Appeals' May 2020 decision in *Doe v. University of Sciences*.[200] The decision reversed the federal district court's Rule 12(b)(6) dismissal of the John Doe complaint.[201] The *University of Sciences* opinion identified numerous plausible allegations of the school's violation of its contractual agreement with students to provide fair and equitable disciplinary proceedings.[202] Specifically, the University's Student Handbook represented that disciplinary proceedings would include identified procedures to ensure the hearing was conducted in an '"adequate, reliable, impartial, prompt, fair and equitable'" manner, with the further pledge to "'[s]upport complainants and respondents equally.'"[203] The court interpreted the agreement for "fair and equitable" treatment to minimally include a live, adversarial hearing with a right to confront the Title IX accuser and cross-examine adverse witnesses.[204] Thus, Doe asserted a viable breach of contract claim in alleging the University denied him such a hearing on the Title IX complaint.[205] *University of Sciences* had

194. *Id.* at 657.

195. *Purdue Univ.*, 928 F.3d at 657–58.

196. *Id.* at 658, 664.

197. *Id.*

198. *Id.* at 664 & n.4.

199. *See* Doe v. Univ. of Scis., 961 F.3d 203, 215 (3d Cir. 2020); Lee v. Univ. of N.M., 449 F. Supp. 3d 1071, 1126–27 (D.N.M. 2020); Doe v. Univ. of Conn., No. 3:20cv92, 2020 U.S. Dist. LEXIS 11170, at *6 (D. Conn. Jan. 23, 2020) (cases recognizing enhanced procedural rights for the accused including most prominently a right of cross examination if credibility is in issue).

200. Doe v. Univ. of Scis., 961 F.3d 203, 214 (3d Cir. 2020) (recognizing the right of examination for the accuser).

201. *Id.* at 205.

202. *Id.* at 215–16.

203. *Id.* at 206 (quoting student handbook of University of Sciences).

204. *Id.* at 215 (internal quotations omitted).

205. *Id.* at 216.

additional significance in its release after the issuance of the 2020 Final Rule in corroborating the principal procedural guarantees incorporated in the Rule.[206]

The recognition of increased due process rights for the accused was evident even in the First Circuit's decision in *Haidak v. The University of Massachusetts-Amherst*.[207] In *Haidak,* the Court ruled that the accused had no personal right to cross-examine the Title IX complainant.[208] However, the Court qualified this holding, stating that if credibility was in issue, and the prospect of severe penalties implicated in the proceeding, the disciplinary panel could not forego any testing of the accuser's credibility or merely presume the truthfulness of the accuser's allegations.[209] The *Haidak* opinion acknowledged that a neutral third party, including the disciplinary panel, could undertake the accuser's examination when credibility was an issue.[210] However, by electing to undertake the examination of the accused, the panel was obligated to conduct the inquiry in a responsible manner.[211] While not addressed by the Court, a single investigator's interview of the Title IX complainant, if consisting of the complainant's mere recounting of events, likely would not be constitutionally sufficient given the requirement of testing the accuser's credibility.[212]

Not every federal appellate decision in 2018–2020 continued expanding due process rights for the accused in the Title IX proceedings.[213] Some circuits, such as the United States Fifth Circuit Court of Appeals, have not fully articulated the

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206. *See infra* note 223 and accompanying text (noting May 2020 release date of Final Rule).

207. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 60 (1st Cir. 2019). *See* David Russcol, *First Circuit Decision in* Haidak v. University of Massachusetts *Includes Limited Progress for Due Process at Public Universities*, BOSTON LAWYER BLOG (Aug. 7, 2019), https://www.bostonlawyerblog.com/first-circuit-decision-in-haidak-v-university-of-massachusetts-includes-limited-progress-for-due-process-at-public-universities/ (describing the First Circuit's recognition of increased due process rights for the Title IX accused but distinguishing *Haidak* from other federal circuits delineation of more extensive due process rights).

208. *Haidak*, 933 F.3d at 69.

209. *Id.* at 72–73. *See* Samantha Harris, *In Flawed but Ultimately Helpful Ruling, First Circuit Recognizes Limited Right to Cross-Examination in Campus Disciplinary Proceedings*, FIRE (Aug. 8, 2019), https://www.thefire.org/in-flawed-but-ultimately-helpful-ruling-first-circuit-recognizes-limited-right-to-cross-examination-in-campus-disciplinary-proceedings/ (critiquing *Haidak* favorably in the First Circuit's recognition of examination of the accuser but noting the potential problems with a panel as opposed to an advocate conducting the questioning).

210. *Haidak*, 933 F.3d at 69.

211. *Id.* at 70.

212. *See id.* at 72–73. *See* Russcol, *supra* note 207 (noting the legal hazards posed for universities situated in the First Circuit in continuing with the single investigator model given the *Haidak* requirement for testing the accuser's credibility).

213. *See* Doe v. Univ. of Ark.-Fayetteville, 974 F.3d 858, 867 (8th Cir. 2020) (concluding no due process violation where student was adequately notified of charges against him by the accuser in her appeal of the Title IX decision at the university and concluding no shifting of the burden of persuasion to the accused occurred). The Tenth Circuit in its *University of Denver* decision did not engage in a substantive analysis of the rights to be afforded the Title IX accused in the private school proceeding due to the plaintiff's erroneous pleading of due process as applicable to a private university. Doe v. Univ. of Denver, 952 F.3d 1182, 1188 (10th Cir. 2020).

precise due process rights owed the accused in the Title IX proceeding.[214] In the final analysis, with the ruling in *Haidak,* there is a significant trend recognizing the accused's right to a hearing, notice of the charges, and some form of examination when credibility is in issue. The previous widespread practice of allowing all claims to be resolved by a single investigator is rejected by some courts or in other courts, severely restricted by the necessity of a hearing when credibility is implicated in resolving the Title IX claim.[215]

E. The Universities' Refusal to Pursue Voluntary Reform or Respond to the Increasing Judicial Criticisms of the Collegiate Adjudicatory Systems

The DOE's September 2017 revocation of the DCL and replacement with the Interim Guidelines afforded the educational institutions an opportunity to reform their adjudicatory systems.[216] Three recent yearly FIRE Due Process Surveys of fifty-three top academic institutions concluded with a 2019–2020 report. FIRE's surveys found little in the way of voluntary reform. Specifically, the institutions failed to pursue changes calculated to further equal treatment for parties to the Title IX proceeding or afford the accused greater procedural rights.[217] Particularly striking was the refusal of some institutions to implement judicially ordered revisions to remedy the unlawful deprivation of due process rights for the accused.[218]

As of October 2021 there have been over 700 lawsuits filed by students or faculty contending that their rights were violated in Title IX investigations or adjudications.[219] In a review of 298 John Doe lawsuits against educational institutions, as of August 2019, plaintiffs had received some form of judicial relief in 151 cases.[220] When measured yearly, the lawsuits were filed with

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214. *See* Harris & Johnson, *supra* note 94, 68–77 (tracing the trend of federal circuit decisions recognizing expanded due process rights in Title IX proceedings while cases addressing such rights continue to work their way through other court systems).

215. *See supra* Section III.D.(3) (discussing the judicial recognition of expanded due process rights for the Title IX accused including live hearings on the charge and live examination of parties and witnesses).

216. *See* INTERIM GUIDELINES, *supra* note 125.

217. *See Spotlight on Due Process, 2019–2020*, FIRE, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2019-2020/ (last visited Oct. 20, 2021) (surveying educational institutions' general failure to provide the accused due process rights in Title IX proceedings); *Spotlight on Due Process 2018*, FIRE, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2018/ (last visited Oct. 20, 2021); *Spotlight on Due Process 2017*, FIRE, https://www.thefire.org/resources/spotlight/due-process-reports/due-process-report-2017/ (last visited Oct. 20, 2021).

218. Harris & Johnson, *supra* note 94, at 111 (reporting the University of Michigan had implemented no provision for a right of cross-examination in Title IX adjudications nearly one year after the *University of Cincinnati* decision ruling and continued to largely leave decisions to a single investigator after the Baum decision).

219. *See Title IX Database*, *supra* note 7; FIRE, *supra* note 7.

220. Harris & Johnson, *supra* note 94, at 66.

increasing frequency through 2018.[221] The filing of new lawsuits has continued throughout 2020.[222] There is good reason to believe that the courts' growing activism will not diminish in redressing denials of due process and gender discrimination.[223] Class action certifications have recently been sought on behalf of males punished under the DCL regime.[224]

IV. PROPOSAL, PUBLIC COMMENT, & IMPLEMENTATION OF THE FINAL RULE & REVIEW OF ITS FRAMEWORK

A. The DOE's Compliance with the APA as a Precedent to the 2020 Publication of the Final Rule & the Widespread Opposition of the Academic Institutions

The DOE published its Proposed Final Rule for public comment on November 29, 2018.[225] The unofficial version of the Proposed Final Rule, with all accompanying documents, ran over 2033 pages.[226] The Proposed Rule included

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221. The frequency of the institution of John Doe lawsuits by year has been summarized as follows: (seven filings 2011–2012); (seven filings 2013); (twenty-five filings 2014); (forty-five filings 2015); (forty-seven filings 2016); (seventy-eight filings 2017); (seventy-eight filings in 2018). Jeremy Bauer-Wolf, *Title IX Lawsuits Have Skyrocketed in Recent Years, Analysis Shows*, HIGHER ED DIVE (Jan. 6, 2020), https://www.highereddive.com/news/title-ix-lawsuits-have-skyrocketed-in-recent-years-analysis-shows/569881/. *See also* Andrew Kreighbaum, *Title IX Court Decisions Make It Harder for Biden to Rewrite Rules*, BLOOMBERG (Apr. 5, 2021, 5:00 AM), https://www.bloomberg.com/news/articles/2021-04-05/devos-legacy-snags-biden-s-rewrite-of-college-male-bias-rules (observing fifty-nine John Doe lawsuits were filed in 2020).

222. *Title IX Database*, *supra* note 7.

223. The extent to which John Doe lawsuits will continue to be filed, based upon adjudications occurring after the May 2020 implementation of the Final Rule, is primarily dependent on the extent to which educational institutions forego efforts to circumvent the Final Rule so long as it remains in force, conform to the constitutional procedural requirements of controlling case law, and avoid the issuance of gender-based decisions.

224. *See* James Moore & Kursat Christoff Pekgoz, *The Unfairer Sex*, INSIDE HIGHER ED (Dec. 18, 2019), https://www.insidehighered.com/views/2019/12/18/men-are-banding-together-class-action-lawsuits-against-discrimination-title-ix (highlighting pending lawsuits seeking class action status).

225. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2018). *See also Secretary Devos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All,* U.S. DEP'T OF EDUC. (Nov. 16, 2018, 09:41 AM), https://content.govdelivery.com/accounts/USED/bulletins/21bcf5b.

226. The unofficial version of the Proposed Final Rule issued by DOE included a Fact Sheet, a Final Rule overview, a document detailing the major provisions of the Final Rules, and a document highlighting changes between the prior Notice of Proposed Rulemaking and the Final Rule Unofficial Version of Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance. U.S. DEP'T OF EDUC., *Title IX Regulations Addressing Sexual Harassment (Unofficial Copy)*, TITLE IX, https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf (last visited Oct. 22, 2021) [hereinafter the Unofficial Version]. The Proposed Final Rule, when published in the Federal Register, encompassed 38 pages. Nondiscrimination on the Basis of Sex in Education Programs or

extensive accompanying annotations explaining the justifications and rationale of the many regulations in the Final Rule.[227] The DOE's accompanying Fact Sheet listed the following Guiding Principles in the process of drafting of the Proposed Rule:

> Rulemaking Process: It is important to address this issue through notice-and-comment rulemaking rather than non-binding guidance. The Department looks forward to the public's comments, and has benefitted from listening sessions and discussions with students, schools, advocates, and experts with a variety of positions.
>
> Greater Clarity: The proposed regulation seeks to ensure that schools understand their legal obligations and that complainants and respondents understand their options and rights.
>
> Increased Control for Complainants: The Department recognizes that every situation is unique and that individuals react to sexual harassment differently. The proposed regulation seeks to ensure that schools honor complainants' wishes about how to respond to the situation, including increased access to supportive measures.
>
> Fair Process: The proposed regulation is grounded in core American principles of due process and the rule of law. It seeks to produce more reliable outcomes, thereby encouraging more students to turn to their schools for support in the wake of sexual harassment and reducing the risk of improperly punishing students.[228]

Opponents of the Rule, desiring to remain under the directives of the revoked DCL, pursued a preplanned strategy of publishing a plethora of public comments with DOE, repeatedly referencing the Rule's purported unfairness and lack of sensitivity to survivors.[229] Accordingly, DOE received tens of thousands of comments, characterized by harsh rhetoric and prophesying that the Final Rule would usher in an open season for sexual assailants on campuses.[230] Advocacy groups clamoring for the DCL's resurrection commenced preparations of

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Activities Receiving Federal Financial Assistance, 34 C.F.R. § 106 (2018). The Department of Education proceeded with the prescribed process for enactment of enforceable legislative rules in accordance with the notice and comment requirements of the Administrative Procedures Act, 5 U.S.C. § 553 (2018).

227. § 106.

228. *U.S. Department of Education Proposed Title IX Regulation Fact Sheet*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/proposed-title-ix-regulation-fact-sheet.pdf (last visited Oct. 22, 2021).

229. *See*, *e.g.*, *The State of Title IX*, KNOW YOUR IX, https://www.knowyourix.org/college-resources/hands-off-ix/ (noting advocacy groups' previous collection of 100,000 comments in support of "survivors" and "fairness") (last visited Oct. 22, 2021).

230. *See* DEPT. OF EDUC., *Rulemaking Docket Title IX of the Education Amendments of 1972*, https://www.regulations.gov/docket/ED-2018-OCR-0064 (last visited Oct. 22, 2021) (including all public comments on the Proposed Final Rule, many of which predict catastrophic consequences for college women should the Final Rule be enacted).

lawsuits to legally block the Final Rule when it was ultimately published as Law.[231]

Analysis of the 124,196 public comments on the Proposed Final Rule revealed vast numbers of educational institutions frequently registered blanket condemnation of the proposed regulations.[232] They were supplemented with particularized critiques of specific provisions in the Final Rule. Consistent objections were lodged to the following: (1) the mandatory live hearing on the sexual harassment complaint with required attendance of the accuser and accused; (2) guaranteed procedural rights for the accused, including the right to confront the accuser at the hearing and a reciprocal right of the Title IX parties to cross-examine through their designated advisors; and (3) assertions that DOE had exercised its administrative powers arbitrarily and capriciously in formulating the Final Rule's comprehensive directives.[233]

B. Implementation of the Final Rule in May 2020 & Its Framework

On May 19, 2020, DOE published the Final Rule after DOE had briefly extended the period for public comments.[234] The lawsuits challenging the Final Rule were expeditiously filed.[235] Remarkably, the ACLU's lawsuit, filed in conjunction with 18 state attorney generals, challenged the Final Rule as "arbitrary and capricious" despite DOE's consideration of over 124,000 public comments and inclusion of more than 2,000 pages of commentary explaining the respective regulation.[236] The Final Rule's commentary reflected heavy reliance upon judicial decisions articulating the need to incorporate due process rights into the campus adjudicatory systems. Additionally, the Final Rule included comprehensive explanations of DOE's decision not to incorporate various proposed changes in the public comments.[237]

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231. Jeremy Bauer-Wolf, *Ed Dept's Final Rules on Campus Sexual Assault Meet Opposition*, HIGHER ED DIVE (May 6, 2020, 06:54 PM), https://www.educationdive.com/news/title-ix-regulations-released/566248 (observing the lawsuits planned to challenge the Title IX Final Rule upon final enactment).

232. *See*, *e.g.*, Elina Arbo, *Columbia Joins National Coalitions of Universities Condemning Newly-Proposed Title IX Regulations*, COLUM. SPECTATOR (Feb. 4, 2019, 12:51 AM), https://www.columbiaspectator.com/news/2019/02/04/columbia-joins-national-coalitions-of-universities-condemning-newly-proposed-title-ix-regulations/.

233. *Id.*

234. Nondiscrimination on the Basis of Sex in Education, 34 C.F.R. §106 (2020).

235. *See* Greta Anderson, *Legal Challenges on Many Fronts*, INSIDE HIGHER ED (July 13, 2020), https://www.insidehighered.com/news/2020/07/13/understanding-lawsuits-against-new-title-ix-regulations (reviewing existing and anticipated litigation seeking injunctive relief to block implementation and declarations of invalidity of the Final Rule).

236. *The ACLU's Absurd Title IX Lawsuit*, NAT'L REV. (May 19, 2020), https://www/nationalreview.com/2020/05/the-aclus-absurd-title-ix-lawsuit (critiquing the ACLU's abandonment in the litigation pursuing preservation of due process rights and reverting to mere rhetoric in equating the accuser with the victim).

237. *See*, *e.g.*, 34 C.F.R. § 106 (2020). *See, e.g.,* DEPT. OF EDUC., *Title IX Regulations Addressing Sexual Harassment* (Unofficial Copy), at 845-82, https://www2.ed.gov/about/offices

The Final Rule admittedly does not attain perfection in the realization of its stated missions.[238] It nevertheless remains the case that the Final Rule represents a good faith effort to curb the continuation of collegiate justice systems of their de facto presumption of the guilt of the accused. The Final Rule reflects exhaustive research and in-depth analysis of the case law and literature, revealing the many irregularities and injustices in the systems prompted by the DCL.

This article does not exhaustively analyze every regulation included in the Final Rule. A summation of the Final Rule's structure is provided, commencing with the definition of sexual harassment and the parameters of educational institutions' duties in responding to sexual harassment. Thereafter, classification of the Rule's several sections governing filing a sexual harassment claim, along with the investigation, adjudication, and ultimate determinations on the complaint, are provided. The Final Rule is best characterized by the specificity its sections offer in providing uniformity and order to the disciplinary proceedings and affording equality of treatment to the parties.

1. Sexual Harassment Defined

Three categories of misconduct define sexual harassment:

1. Any instance of *quid pro quo* harassment by a school's employee;
2. any unwelcome conduct that a reasonable person would find so severe, pervasive, and objectively offensive that it denies a person equal educational access;
3. any instance of sexual assault (as defined in the Cleary Act), dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).[239]

/list/ocr/docs/titleix-regs-unofficial.pdf (last visited Nov. 29, 2021) [hereinafter Regulations Addressing Sexual Harassment] (providing the Department's reasoning in adopting a presumption of Non-Responsibility and responses to multiple public comments criticizing the presumption on numerous grounds).

238. One of the more objective critics of the Final Rule has summarized:

> They are not exactly as I would wish, but they clarify the rights of both victims and the accused in a way that is likely to lead to improvements in basic fairness. The suggestion that even the most controversial provisions of the regulations allow rape with impunity speaks to a disturbingly large gap between reality and rhetoric on the topic.

Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, THE NEW YORKER (May 16, 2020), https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations/.

239. *Summary of Major Provisions of the Department Of Education's Title IX Final Rule*, DEP'T OF EDUC. 1 (May 6, 2020), https://www2.ed.gov/about/offices/list/ocr/docs/titleix-comparison.pdf [hereinafter Summary of Final Rule]. Among the most constructive comments offered on the Proposed Final Regulations were submitted by Harvard Law Professors Jeannie Suk Gersen and Janet Halley in conjunctions with United States District Judge Nancy Gertner. Jeannie Suk Gersen et al., *Comment on Proposed Title IX Rule Making* (Jan. 30, 2019), http://etseq.law.harvard.edu/wp-content/uploads/2019/01/Comment-on-Proposed-Title-IX-

The definition of unwelcome conduct constitutes a rejection of the DCL's vague definition of sexual harassment.[240] Clause Two tracked the Supreme Court's definition of sexual harassment announced in *Davis v. Monroe County Board of Education*.[241]

2. The Scope of the School's Responsibility to Respond to Sexual Harassment

The Final Rule departed from the DCL's all-encompassing declaration of the universities responsibility to respond to sexual harassment.[242]

> 1. The institution is required to promptly respond in a manner that is not deliberately indifferent when it has actual knowledge of actionable Title IX sexual harassment in an education program or activity against a person in the United States.[243]
> 2. The Institution is required to respond to notice of sexual harassment or allegations thereof provided to an institution's Title IX Coordinator or any official . . . who has authority to institute corrective measures on behalf of the [institution], and "allows the institution to choose whether to have mandatory reporting for all employees, or to designate some employees to be confidential resources for college students to discuss sexual harassment without automatically triggering a report to the Title IX office."[244]

Rulemaking-Gersen-Gertner-and-Halley.pdf [hereinafter *SGH Comments*]. The *SGH Comments* approved of many of the regulations composed in the Final Rule but laid out in specific detail needed revisions to regulations and provided language to improve regulations. *Id.* For example, the *SGH Comments* offered proposed revisions to Clause Two of the definition of sexual harassment, observing the *Davis* court's definition did not encompass broader definitions of sexual harassment articulated in earlier Supreme Court decisions. *Id.* at 16. Additionally, the *SGH Comments* proposed broadening the language of Clause Two with substitution of the following language: "conduct that is sufficiently severe *or* pervasive that it effectively denies a person equal access to the recipient's education program or activity." *Id.* (emphasis in original). Additionally, the SGH proposed that the definition of "offensive conduct" be changed to an "objectively reasonable" standard. *Id.*

240. *Compare* the DCL's definition of sexual harassment, *supra* note 45 & 46 and accompanying text *with* 34 C.F.R. §106.30 (2020) (codifying the Final Rule's definition of sexual harassment).

241. Commentary accompanying 34 C.F.R. §106.30 (2020) (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 651 (1999)). *See also* Regulations Addressing Sexual Harassment, supra note 237 at 449.

242. *See, e.g.*, DCL, *supra* note 37, at 4 (obligating the school to responds to sexual harassment claims "that initially occurred off school grounds, outside a school's education program or activity.").

243. *See* 34 C.F.R. § 106.44(a) (2020).

244. *See* 34 C.F.R. §§ 106.8(a), 106.30(a) (2020).

3. "For all schools, notice to a Title IX Coordinator, or to an official with authority to institute corrective measures on the recipient's behalf, charges a school with actual knowledge and triggers the school's response obligations."[245]
4. The standard selected must be clearly published and will be applicable to all if the location is in use by an officially recognized student or institution organization, such as recognized fraternity or sorority housing or athletic housing.[246]
5. Colleges are only obligated to respond to reports of sexual harassment that occurred off-campus if the location is in use by an officially recognized student or institution organization. Examples would be recognized fraternity or sorority housing or athletic housing.[247]

Thus, the Final Rule rejected the previous (OCR) guidance documents that the school could, in some circumstances, be held responsible based upon a standard of merely "having reason to know" of sexual harassment.[248] The DOE's commentary to the Rules reflects the "actual knowledge" standard as a basis for the educational institution's duty to respond to sexual harassment is based upon the specific pronouncements of the Supreme Court decisions in *Gebser* and *Davis*.[249]

3. Title IX Initiation Procedures & Training of Title IX Personnel

The Final Rule, while authorizing reporting of sexual harassment by third parties, has included a requirement that the formal Title IX complaint be filed by the party claiming harassment or the Title IX coordinator. Additionally, the Rule restrained a decade of arbitrary practices in the investigation and determination of sexual harassment claims by imposing mandatory training requirements on investigators, decision-makers, and other university employees involved in the processing of the sexual harassment claim.

1. The "complainant" is defined as the individual alleged to have been victimized by sexual harassment.[250]
2. "*Formal complaint*" means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that

245. *See id.*
246. 34 C.F.R. § 106.45(b)(1)(vii) (2020).
247. 34 C.F.R. § 106.44(a) (2020).
248. *See supra* note 53 and accompanying text.
249. Regulations Addressing Sexual Harassment, *supra* note 237, at 25–30.
250. 34 C.F.R. § 106.30(a) (2020).

the recipient investigate the allegation of sexual harassment.[251]

3. The complainant, at the time of filing, "must be participating in or attempting to participate in the education program or activity of the school."[252]
4. Third parties are authorized to report sexual harassment.[253]
5. "Training of Title IX personnel must include training on the definition of sexual harassment in the Final Rule, the scope of the school's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias."[254]

The DOE's commentary to the Rule notes elimination of the OCR's "constructive knowledge" standard and restoration of an "actual knowledge" standard as a basis for the educational institution's duty to respond to sexual harassment. The Department's accompanying commentary notes the language mirrors the liability standard articulated by the Supreme Court in *Gebser* and *Davis*. Neither of those decisions inferred that a constructive knowledge standard should be imposed as the basis for triggering the school's duty to act.[255]

4. Investigations

The Rule additionally compelled equality of treatment for parties to the Title IX proceeding through inclusion of numerous, precise sections governing notifications to parties, free discovery of relevant facts, and objectivity in the adjudication of the claim.

1. Schools must provide for both parties to have an equal opportunity "to present fact and expert witnesses and other inculpatory and exculpatory evidence."[256]
2. Each party is afforded the right to select an advisor, which may or may not be an attorney.[257]

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251. *Id.*

252. *Id.*

253. *Id.* (distinguishing receipt of actual knowledge by the institution from those authorized to file a formal complaint).

254. Summary of Final Rule, *supra* note 239, at 3–5; *see also* 34 C.F.R. 106.45 (b)(1)(iii) (2020) (specifying required training for Title IX Coordinators, investigators, decision-makers and any person facilitating the reolution process under the Rule).

255. Regulations Addressing Sexual Harassment, *supra* note 237, at 25–30.

256. *See* 34 C.F.R. § 106.45 (b)(5)(ii) (2020).

257. *Id.* at (b)(5)(iv).

3. Written notice of interviews, meetings, or hearings must be provided to both parties.[258]
4. The school must send written notice to the parties of evidence directly related to the allegations within ten days to review and respond.[259]
5. An investigative report must be sent to the parties that fairly summarizes relevant evidence no later than ten days before a response is due.[260]
6. "The burden of gathering evidence and the burden of proof must remain on schools, not on the parties."[261]
7. "Schools must not restrict the ability of the parties to discuss the allegations or gather evidence (e.g., no 'gag order')."[262]
8. "Schools must dismiss allegations of conduct that do not meet the Final Rule's definition of sexual harassment or did not occur in a school's education program or activity against a person in the U.S. Such dismissal is only for Title IX purposes and does not preclude the school from addressing the conduct in any manner the school deems appropriate."[263]
9. "Schools may, in their discretion, dismiss a formal complaint or allegations therein if the complainant informs the Title IX Coordinator in writing that the complainant desires to withdraw the formal complaint or allegations therein, if the respondent is no longer enrolled or employed by the school, or if specific circumstances prevent the school from gathering sufficient evidence to reach a determination."[264]
10. "The Final Rule protects the privacy of a party's medical, psychological, and similar treatment records by stating that schools cannot access or use such records unless the school obtains the party's voluntary, written consent to do so."[265]

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258. *Id.* at (b)(5)(v).
259. *Id.* at (b)(5)(vi).
260. *Id.*
261. *Id*. at (b)(5)(vi).
262. *Id.* at (b)(5)(iii).
263. *Id*. at (b)(3)(i).
264. *Id.* at (b)(3)(ii).
265. *Id.* at (b)(5)((i); Summary of Final Rule, *supra* note 239, at 6.

5. Hearings on the Charges

The Rule, with its elimination of bias and arbitrary determination of the harassment claim through numerous strictures limiting the decision-maker's discretion and bias.

1. Postsecondary institutions must provide for a live hearing on the complaint with cross-examination.[266]
2. The single-investigator model is eliminated. Title IX coordinators or their employees, or the investigator of the alleged sexual misconduct, cannot decide the claim.[267]
3. Each party's advisor must be permitted to ask, in live time, "any party or witnesses all relevant questions," including challenges to credibility "and follow-up questions." Cross-examination must only be performed by the party's advisor and not by the party. If the party does not have an advisor, the school must select an advisor at no charge to the party, but the advisor does not have to be an attorney.[268]
4. The hearing must be conducted with the parties' physically present, or the school has the discretion for the parties and witnesses to appear virtually.[269]
5. Either party retains the right to have the live hearing with the parties located in separate rooms and provide, in such an event, the technology that would allow the parties to see each other.[270]
6. The school must make an audio, audio-visual recording, or transcript of the live hearing.[271]
7. Rape shield protections apply. Questions concerning the complainant's past sexual history are deemed irrelevant "unless offered to prove that someone other than the respondent committed the alleged misconduct or offered to prove consent."[272]

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266. 34 C.F.R. § 106.45(b)(6)(i) (2020).

267. 34 C.F.R. § 106.45(b)(7)(i) (2020) (providing the same person cannot be the decision-makers and the Title IX Coordinator). *See supra* notes 74-77 and accompanying text (describing the single investigator model during the regime of the DCI with consolidation of the investigative and decision-making functions in one person).

268. 34 C.F.R. § 106.45(b)(6) (2020).

269. *Id*. at (b)(6)(i) (providing no statement of a party or witness can be relied upon by decision-makers unless such party or witness is willing to submit to cross-examination at the hearing).

270. *Id.*

271. *Id.*

272. *Id.*

8. If a party or witness refuses to submit to cross-examination at the hearing, the decision-makers must not rely on the party or witnesses' statement in reaching an ultimate decision.[273]
9. The school can elect between a preponderance of the evidence standard or a higher standard of proof of the charges, such as "clear and convincing evidence" in the determination of sexual harassment claims. The standard selected must be clearly published and will be applicable to all if the location is in use by an officially recognized student or institution organization, such as recognized fraternity, sorority, or athletic housing.[274]
10. The decision-maker must issue a written determination. The written determination must include a determination of the decision-maker "regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, the rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant."[275]
11. "The written determination must be sent simultaneously to the parties, along with information about how to file an appeal."[276]

V. ACADEMIA'S OPPOSITION TO THE FINAL RULE, EFFORTS TO NULLIFY THE RULE & THE PROSPECTIVE FUTURE OF THE REGULATIONS

A. The Opposition of Academia to the Proposed Final Rule Educational as Reflected by the American Council on Education & ATIXA (2018)

The educational institutions' resistance to the strictures imposed by the Final Rule and their desire to maintain singular control over their Title IX systems developed under the DCL was encapsulated in the influential American Council of Education's public comments on the proposed Final Rule.[277]

> Imposing a legalistic process will increase significantly the amount of time that will be required to conduct a Title IX investigation and make

273. Id. at (b)(6).

274. Id. at (b)(6)(viii).

275. Id. at (b)(7)(i)–(ii).

276. Id. at (b)(7)(iii); Summary of Final Rule, *supra* note 239, at 7–8.

277. Ted Mitchell, *Statement by ACE President Ted Mitchell on Final Title IX Regulations*, AM. COUNCIL ON EDUC. (May 6, 2020), https://www.acenet.edu/News-Room/Pages/Statement-by-ACE-President-Ted-Mitchell-on-Final-Title-IX-Regulations.aspx [hereinafter *ACE Statement*]; *see generally About the American Council of Education*, AM. COUNCIL ON EDUC., https://www.acenet.edu/About/Pages/default.aspx (last visited Oct. 6, 2021) (confirming ACE represents approximately 1700 universities and colleges, along with numerous other educational associations).

> a determination of responsibility. Based on the process outlined by the [Proposed Rule], resolutions of sexual harassment and particularly campus sexual assault could easily take months and carry over from one semester or academic year to the next, leaving uncertainty and wariness for the parties and perhaps for the campus community.[278]

ACE returned to the repeated refrain that collegiate disciplinary procedures should not be patterned upon criminal court procedures. Particularly notable is the objection to the Rule's implementation of mandatory procedures designed to afford due process to the parties:

> A number of our specific concerns, such as the requirement for a live hearing with cross-examination or the mandate giving both parties the absolute right to inspect "all evidence…directly related" to the allegations, vividly illustrate our overarching concern that the [proposed rule] imposes highly legalistic, court-like processes that conflict with the fundamental educational missions of our institutions.[279]
>
> We repeat: Colleges and universities are not law enforcement agencies or courts. Unfortunately, the [proposed rule] consistently relies on formal legal procedures and concepts, and imports courtroom terminology and procedures, to impose an approach that all schools—large and small, public and private—must follow, even if these procedures, concepts, and terms are wildly inappropriate and infeasible in an educational setting.[280]
>
> Federal regulatory mandates will increase the costs of addressing sexual harassment on campus. For example, banning the "single investigator" model would force some institutions to hire additional personnel.[281]
>
> There are ways to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and any witnesses that do not involve a "live hearing" with cross-examination. For example, many institutions currently utilize procedures whereby neutral, experienced investigators interview the parties and witnesses, pose questions that are suggested by the parties (providing an effective substitute for

278. Letter from Ted Mitchell, President, Am. Council on Educ., to Betsy Devos, Sec'y, U.S. Dep't of Educ. 8 (Jan. 30, 2019), https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf.

279. *Id.*

280. *Id.*

281. *Id.* at 22.

> direct cross-examination), and make detailed factual findings for consideration by other individuals who serve as decision makers.[282]

While offering the faintest of praise to the Final Rule, ACE's comments are notable in their insistence on universities' retention of control over the sexual harassment adjudications. Equally significant are the objections to virtually every procedural right the Final Rule affords to the accused. ACE opposes rights of discovery, live hearings, the examination of witnesses, inclusion of a presumption of innocence, and the abrogation of the single investigator. Such a blanket objection requires a complete disregard of the 2018−2020 decisions from the federal circuit courts herein reviewed.

Neither was the rejection of the Final Rule by academia confined to the realm of university administrators, as reflected in ACE's comments. The American Association of Title IX Administrators ("ATIXA") offered numerous specific objections that collectively constituted a rejection of the entire framework of the Final Rule.[283]

B. Post-Publication Responses of Academia & Democratic Legislators to the Final Rule's Implementation (2020)

The Final Rule's publication predictably engendered concerted statements from Democratic legislators predicting a new era of campus sexual violence.[284] Required implementation of the Final Rule amid universities' grappling with the Covid-19 epidemic was exemplary of DOE'S insensitivity, according to Democratic senators.[285] ACE followed suit in characterizing the Final Rule as "the worst in regulatory overreach."[286] The Final Rule, it contended, would assuredly discourage sexual assault victims from reporting incidents of sexual assault and impose a "court-like framework" on Title IX proceedings.[287] ATIXA's public statements mirrored those of ACE in condemning the Final Rule. ATIXA's President lamented the "weakening [of] longstanding protections for victims/survivors" of sexual misconduct and the tragedy of converting "what have been historically informal school disciplinary processes

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282. *Id.* at 11.

283. *See* Association of Title IX Administrators (ATIXA), *Comments on the U.S. Department of Education's Notice of Proposed Rulemaking on Regulations Implementing Title IX* 31–33 (Jan. 28, 2019), https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2012/01/18120231/ATIXA-NPRM-Comments-FInal.pdf (opposing live questioning of witnesses and parties and opposing necessity of a live hearing or DOE's authority to mandate live hearings).

284. *See Murray, Democratic Senators Urge DeVos to Rescind Harmful Title IX Rule and Focus on Student Safety,* U.S. SENATE COMM. ON HEALTH, EDUC., LAB. & PENSIONS (June 4, 2020), https://www.help.senate.gov/ranking/newsroom/press/murray-democratic-senators-urge-devos-to-rescind-harmful-title-ix-rule-and-focus-on-student-safety/.

285. *Id.*

286. *ACE Statement*, *supra* note 277.

287. *ACE Statement*, *supra* note 277.

into adversarial, quasi-criminal legal proceedings with live hearings, evidentiary rulings and attorney-led cross-examination."[288]

C. The Failure of Multiple Lawsuits Seeking Nullification of the Final Rule

Sexual assault victim advocacy groups, eighteen state attorneys general, and the ACLU proceeded with filing four lawsuits commencing in June 2020, seeking to enjoin DOE's August 14th compliance date, and requesting ultimate declarations of the Rule's invalidity.[289] These lawsuits collectively failed to result in the issuance of any injunctive relief. Moreover, the extended opinions denying equitable relief portend little prospect that the Rule would be judicially overturned.

On August 9th, United States District Judge John Koeltl of the Southern District of New York issued the first ruling in a forty-six page opinion. Judge Koeltl denied an application for an injunction to suspend the August 14th compliance date sought by the State of New York and New York City's Board of Education.[290] The Court concluded the plaintiffs failed to show a substantial likelihood of ultimately prevailing on their requested declaration that the Final Rule was unlawful in its creation or implementation.[291] Specifically, Judge Koeltl found no basis that DOE in enacting the Final Rule: (1) was arbitrary and capricious; (2) abused its discretion; or (3) exceeded its statutory authority.[292] Neither did the plaintiffs demonstrate that irreparable injury would occur if plaintiffs were required to comply with the August 14th deadline.[293]

Three days later, United States District Judge Carl Nichols of the D.C. Circuit followed suit in denying injunctive relief seeking suspension of the August 14th compliance date in an action initiated by seventeen state attorneys general and the D.C. attorney general.[294] Judge Nichols ultimately concluded that the plaintiffs had neither met the standard of demonstrating a likelihood of success on the merits, nor had plaintiffs established the element of "irreparable injury"

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288. Brett A. Sokolow, *New Federal Rules on Sexual Misconduct Will Only Make Things Worse*, LACROSSE TRIB. (Jan. 28, 2020), https://lacrossetribune.com/opinion/columnists/brett-a-sokolow-new-federal-rules-on-campus-sexual-misconduct-will-only-make-things-worse/article_a957f3ce-1754-5649-85ef-e486e828d258.html/.

289. *See*, *e.g.*, Emily Young, *The 2020 Title IX Regulations and the Lawsuits Against Them: An Analysis and Comparison*, THE FEMINIST MAJORITY FOUND. (Aug. 8, 2020), https://feminist.org/wp-content/uploads/2020/08/Title-IX-Lawsuits-Article-1.pdf/; Zoe Kirsch, *18 States and D.C. Sue DeVos to Block Changes to Title IX Sexual Misconduct Rules*, THE 74 (June 8, 2020), https://www.the74million.org/article/18-states-and-d-c-sue-devos-to-block-changes-to-title-ix-sexual-misconduct-rules/ (identifying four lawsuits seeking to overturn the Final Rule with accompanying analysis of the relief requested).

290. New York v. U.S. Dep't of Educ., 477 F. Supp. 3d 279, 287 (S.D.N.Y. 2020).

291. *Id.* at 294–303.

292. *Id.*

293. *Id.* at 303–05.

294. Pennsylvania v. DeVos, 480 F. Supp. 3d 47, 52 (D.D.C. 2020).

in the absence of injunctive relief.[295] Both of the lawsuits were dismissed in 2020 after the denials of injunctive relief.[296]

An ACLU-backed lawsuit initiated in a Maryland federal district court by four advocacy groups was dismissed in October 2020 based on the plaintiffs' lack of standing to challenge the Final Rule.[297] The only judicial relief granted has been the declaration of the invalidity of an evidentiary provision in the course of a federal district court decision that rejected a challenge to the entirety of the Final Rule.[298] In summarizing the failure of legal challenges to the Final Rule, the detailed opinions issued by Judges Koeltl and Nichols are particularly instructive. The DOE's diligence in complying with the Administrative Procedures Act and the exhaustive commentary and legal analysis accompanying the rules suggest that litigants seeking a declaration of the Final Rule's invalidity will face a steep climb.

D. Educational Institutions' Attempts at Circumvention of the Final Rule with the Failure of Litigation to Postpone the Rule's August 2020 Compliance Date

With the failure of lawsuits to delay implementation of the Final Rule, universities have pursued other means for circumventing compliance. Some universities have displayed "creativity" in recognizing a second category of "sexual harassment" purportedly not subject to Title IX coverage.[299]

The University of Illinois' defining of Title IX sexual harassment is illustrative in the school's creation of two disciplinary tracks —"sexual harassment" and "Title IX sexual harassment."[300] Conduct that university

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295. *Id.* at 52–68.

296. Greta Anderson, *N.Y. and Ed. Dept. Dismiss Title IX Rule Lawsuit*, INSIDE HIGHER ED. (Nov. 5, 2020, 03:00 AM), https://www.insidehighered.com/quicktakes/2020/11/05/ny-and-ed-dept-dismiss-title-ix-rule-lawsuit (reporting on the dismissal of the lawsuits brought by the State of New York and the ACLU and noting remaining litigation challenging the Final Rule).

297. Know Your IX v. DeVos, No. CV RDB-20-01224, 2020 U.S. Dist. LEXIS 194288, at *11–12, *27 (D. Md. Oct. 20, 2020).

298. Victim Rts. L. Ctr. v. Cardona, No. CV 20-11104-WGY, 2021 U.S. Dist. LEXIS 140982 (D. Mass. July 28, 2021) (invalidating, as arbitrary and capricious, the Final Rule's prohibition on the decision-maker at Title IX grievance hearing from relying on statement of party or witness who does not submit to cross-examination). *Accord* Women's Student Union v. U.S. Dep't of Educ., No. 21-CV-01626-EMC, 2021 WL 3932000, at *1 (N.D. Cal. Sept. 2, 2021) (dismissing challenge to the Final Rule based on standing).

299. Samantha Harris & Michael Thad Allen, *Universities Circumvent New Title IX Regulations*, NAT'L REV. (Sept. 7, 2020 6:30 AM), https://www.nationalreview.com/2020/09/title-ix-universities-circumventing-new-rules/ (reviewing procedures such as the University of Illinois and Arizona State University's creation of two tracks of adjudication, only one of which seeks compliance with the Final Rule). *See generally* Brett A. Sokolow, *OCR Is About to Rock Our World*, INSIDE HIGHER ED. (Jan 15, 2020), https://www.insidehighered.com/views/2020/01/15/how-respond-new-federal-title-ix-regulations-being-published-soon-opinion (ATIXA president observing the necessity of litigation challenging the Final Rule plus employment of "clever work-arounds" by the educational institutions).

300. Harris & Allen, *supra* note 299.

bureaucrats interpret as mere "sexual harassment" eliminates many of the Final Rule's procedural rights guaranteed to the accused.[301]

E. Analysis of the Final Rule's Endurance in Confronting Legislative Challenges, Executive Orders, & Other Efforts at Nullification

1. The Biden Administration's Commitment to Repeal or Significantly Weaken the Final Rule & the Executive Order of March 8th, 2020

Joseph Biden repeatedly vowed during the presidential campaign to dismantle the Final Rule and restore the DCL.[302] This commitment was representative of the Democratic Party generally.[303] President Biden's Executive Order of March 8, 2020,[304] was characterized by many as the Biden administration's opening salvo in the battle to eliminate or revise the Final Rule.[305] Included in the March 8th Order was the President's specific directive for Secretary of Education Miguel Cardona to, within 100 days, review the Final Rule for "consistency with governing law, including Title IX" and consistency with the administration's policy of affording all students "an educational environment free from discrimination . . . in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity."[306] The Order further intimated resort to imminent executive action to stay the Final Rule with instruction that Cardona consider remedies of suspension, amendment, or rescission of "agency action" inconsistent with the Biden administration's stated policy.[307]

One week after issuing the March 8th order, a prominent Title IX victims advocacy group implored Biden to suspend enforcement of the Final Rule

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301. Harris & Allen, *supra* note 299.

302. *See*, *e.g.*, *The Biden Plan to End Violence Against Women*, JOE BIDEN FOR PRESIDENT, https://joebiden.com/vawa/ (noting that a Biden administration would revoke the Title IX Final Rule and restore the DCL). *Accord* Robin Wilson, *How a Twenty Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. HIGHER EDUC. (Feb. 8, 2017), https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault/ (tracing integral role of Vice President Biden in the implementation of the 2011 DCL).

303. *See*, *e.g.*, Jeremy Bauer-Wolf, *115 House Democrats Ask Cardona to Reverse the Ed Dept's Title IX Rule,* K–12 DIVE (Mar. 3, 2021, 5:01 PM), https://www.k12dive.com/news/115-house-democrats-ask-cardona-to-reverse-the-ed-depts-title-ix-rule/596165/.

304. Exec. Order No. 14,021, 14 Fed. Reg. 13,803 (Mar. 11, 2021) [hereinafter March 8th Order] (titling the order as Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity).

305. *See*, *e.g.*, Collin Binkley & Aamer Madhani, *Biden Order Could Change How Colleges Handle Sexual Misconduct*, AP NEWS (Mar. 8, 2020), https://apnews.com/article/biden-policies-colleges-sexual-misconduct-42501afa9dcfc06602b7cc57b97080f4 (characterizing the order as a "…first step toward reversing a contentious Trump administration policy").

306. March 8th Order, *supra* note 304 (concluding with reference to commencement of a notice and comment period in conjunction with other remedies for elimination of the Final Rule).

307. March 8th Order, *supra* note 304.

immediately.[308] However, the following examination of various remedies for interim suspension of the Final Rule confirms that the Biden administration's sole lawful path for eliminating the Rule has always been replaced through the protracted process of legislative rulemaking by the DOE.[309] The many prognostications of the imminent demise of the Final Rule accompanying Biden's election were greatly exaggerated.

2. Executive Orders or OCR "Clarifications" as a Means of Carving Back the Final Rule

President Biden has displayed unprecedented enthusiasm for utilizing executive orders to eliminate many Trump administration's policies.[310] However, executive orders cannot be employed to override or nullify existing law.[311] The Final Rule, enacted following the notice and comment requirements of Section 553 of the APA, is binding law, commensurate statutes, and immune from nullification by executive order.[312] Neither can OCR issue guidance documents or interpretive pronouncements for purposes of amending or revoking the Final Rule.[313]

3. Statutory Override of the Final Rule—The Congressional Review Act & the Senate Filibuster

Initial predictions suggested that a Democratic majority in Congress would resort to the Congressional Review Act ("CRA") as a basis for repeal of the Final Rule.[314] The CRA requires submission of administrative regulations to both

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308. *See* Tyler Kingkade, *Activists Increase Pressure on Biden to Scrap DeVos' Title IX Rules*, NBC NEWS (Mar. 16, 2021, 12:00 PM) https://www.nbcnews.com/news/us-news/activists-increase-pressure-biden-scrap-betsy-devos-title-ix-rules-n1261017 (highlighting report of Know Your IX calling for immediate suspension of the Final Rule).

309. *See* 5 U.S.C. § 553 (2018) (providing for administrative rule making with notice and publication).

310. Christopher Hickey et. al., *Here Are the Executive Orders Biden Signed in His First 100 Days*, CNN (Apr. 30, 2021), https://www.cnn.com/interactive/2021/politics/biden-executive-orders/ (observing Biden's execution of more than 60 executive actions with 24 directed at eradicating Trump policies).

311. *See* Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 637 (1952) (Jackson, J., concurring) (observing the prohibition on a president's power to override duly enacted laws by resort to executive order).

312. Nat'l Mining Ass'n v. McCarthy, 758 F.3d 243, 250 (D.C. Cir. 2014) ("Legislative rules have the 'force and effect of law' and may be promulgated only after public notice and comment.") (citing INS v. Chadha, 462 U.S. 919, 986 n. 19 (1983)); Nat'l. Latino Media Coal. v. FCC, 816 F.2d 785, 788 (D.C. Cir. 1987) (holding that "a valid legislative rule is binding upon all persons, and on the courts, to the same extent as a congressional statute").

313. *See* Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 101 (2015) (holding that the APA "mandate[s] that agencies use the same procedures when they amend or repeal a rule as they used to issue the rule in the first instance").

314. The Congressional Review Act, 5 U.S.C. § 801 (2018).

houses of Congress and the Comptroller General.[315] The law's procedure for eliminating a final rule requires only a simple majority vote by both chambers on a joint resolution to disapprove, followed by the president's approval.[316] However, the Final Rule's abolition through the CRA ultimately was precluded by the statute's strict time deadlines, given the May 2020 implementation date.[317]

With the employment of the CRA time-barred, resorting to traditional congressional legislation to amend or replace the CRA has never constituted a viable option. Legislative procedures are tedious and time-consuming.[318] Moreover, Democrats would be precluded from securing a passage of such legislation in the Senate, given the power of Senate Republicans to block a final vote by resorting to the filibuster.[319] The recent, widespread support in the Democratic party to eliminate the Senate filibuster has been consistently thwarted by Senators Joe Manchin of West Virginia and Kyrsten Sinema of Arizona throughout the first six months of the Biden administration.[320]

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315. 5 U.S.C. § 801(a)(1)(A) (2018).

316. 5 U.S.C. § 801(b)(1)–(2), § 802 (2018) (setting forth the procedure for a congressional joint resolution under the Act and resulting elimination of a final rule in effect or preclusion of a final rule that has not taken effect). *See generally*, MAEVE P. CAREY & CHRISTOPHER M. DAVIS, CONG. RSCH. SERV., R43992, THE CONGRESSIONAL REVIEW ACT (CRA): FREQUENTLY ASKED QUESTIONS, (2020) (describing in detail all the sections of the CRA).

317. *See* 5 U.S.C. § 802 (setting forth time limitations for joint resolutions under the CRA). *See generally* Jackie Gharapour Wernz, *What Comes Next? Title IX Under a Biden Presidency*, JD SUPRA (Nov. 9, 2020), https://www.jdsupra.com/legalnews/what-comes-next-title-ix-under-a-biden-95583/ (reviewing the pros, cons, and time restrictions in prospectively utilizing the CRA to eliminate the Title IX Final Rule).

318. *See How a Bill Becomes a Law*, USHISTORY.ORG, https://www.ushistory.org/gov/6e.asp (tracing the procedure by which a bill ultimately is enacted into law and observing the constitutional framers intentionally created a legislative system requiring consideration and deliberation) (last visited Oct. 22, 2021).

319. *See* Molly E. Reynolds, *What is the Senate Filibuster, and What Would it Take to Eliminate It?*, BROOKINGS INST. (Sept. 9, 2020), https://www.brookings.edu/policy2020/votervital/what-is-the-senate-filibuster-and-what-would-it-take-to-eliminate-it/.

320. *See* Kyrsten Sinema, Opinion, *We Have More to Lose than Gain by Ending the Filibuster*, WASH. POST (June 21, 2021), https://www.washingtonpost.com/opinions/2021/06/21/kyrsten-sinema-filibuster-for-the-people-act/ (explaining Senator Sinema's reasoning in consistently opposing elimination of the filibuster); *Biden Lifts the Curtain*, WALL ST. J. (Mar. 25, 2021), https://www.wsj.com/articles/biden-lifts-the-curtain-11616711995 (covering Biden press conference in which he "toed the Democratic Line" in expressing his support for ending the Senate filibuster); Alexander Heffner, *Joe Manchin and Kyrsten Sinema are Holding American Democracy Hostage*, INDEP. UK (Mar. 5, 2021, 12:27 AM), https://www.independent.co.uk/voices/democrats-filibuster-krysten-sinema-joe-manchin-b1812727.html, (describing the necessity of a unanimous Democrat vote in the Senate to repeal the filibuster and protesting the obstacle created by Senators Manchin and Sinema).

4. Suspension of Enforcement of the Final Rule

President Biden's March 2021 raising the specter of suspension of the Final Rule has not proceeded to actual executive action as of July 2021.[321] The apparent decision to forego suspension of enforcement is prudent given the entirely predictable consequences that would follow. The results of nonenforcement would be disastrous for universities, thereby emboldened to forego live hearings or other procedures mandated by the Final Rule. Willful disregard of the Final Rule would inevitably increase the frequency of John Doe lawsuits. However, the Does would bear a far lesser burden as schools would be defending deliberate deprivation of legally mandated rights for the accused.[322]

5. The Limitations of Due Process and the Possible Effect of the Trump's Recasting of the Federal Judiciary

The recognition of expanded constitutional rights for the accused in *Baum* and subsequent federal appellate decisions limit the degree to which the Biden administration can carve back on fundamental procedural guarantees owed the accused and included in the Final Rule.[323] The Trump administration has likely materially altered the federal judiciary's prevailing jurisprudential philosophy with confirmation of over 220 Article III judges, including three associate justices of the Supreme Court, fifty-four circuit court judges, and 174 federal district court judges.[324] Admittedly, little empirical evidence exists on Title IX rulings by recent Trump appointments to the federal bench. Nevertheless, the enhanced vetting of prospective Republican judicial appointments may yield greater scrutiny on claims implicating rights owed the Title IX accused.[325]

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321. *See* Sokolow, *EO, EO, It's Off To Work We Go: How the Latest Biden Executive Order Will Impact the Title IX Field*, *infra* note 345 and accompanying text.

322. *See* Wernz, *supra* note 317. A significant federal decision was issued in November 2020, concluding that the Final Rule would be applicable to a proceeding in which the plaintiff sought redress for the university's disciplinary proceeding occurring prior to the Final Rule's implementation date of August 14, 2020 and both parties consented to proceeding under the new rule. Doe v. Rensselaer Polytechnic Inst., No. 1:20-CV-1185, 2020 U.S. Dist. LEXIS 191676, at *1, *40–41 (N.D.N.Y. Oct. 16, 2020).

323. *See* discussion *supra* Section III.C.(3).

324. John Gramlich, *How Trump Compares with Other Recent Presidents in Appointing Federal Judges*, PEW RSCH. CENTER (Jan. 13, 2021), https://www.pewresearch.org/fact-tank/2021/01/13/how-trump-compares-with-other-recent-presidents-in-appointing-federal-judges/ (observing Trump's unprecedented judicial confirmations in a four year presidential term, nearing Obama's confirmations in an eight year term). *See also*, Colby Itkowitz, *1 in Every 4 Circuit Court Judges is Now a Trump Appointee*, WASH. POST (Dec. 21, 2019), https://www.washingtonpost.com/politics/one-in-every-four-circuit-court-judges-is-now-a-trump-appointee/2019/12/21/d6fale98-2336-11ea-bed5-80264cc91a9_story.html.

325. *See generally* Jeffrey Toobin, *The Conservative Pipeline to the Supreme Court,* NEW YORKER (Apr. 10, 2017), https://www.newyorker.com/magazine/2017/04/17/the-conservative-pipeline-to-the-supreme-court (tracing the ascendency of the Federalist Society in Trump's judicial selections through vetting the judicial philosophy of prospective federal judicial appointments and

Recently the United Supreme Court denied *certiorari* on a case seeking reconciliation of divergent federal appellate rulings on the plausible pleading of the Title IX reverse discrimination claim.[326] If the Supreme Court granted *certiorari* on a case to clarify Title IX pleading requirements or due process owed in campus proceedings, an emerging conservative majority, including Justices Kavanaugh and Coney Barrett, would likely be receptive to arguments favoring the accused.[327]

6. DOE's Regulatory Replacement of the Final Rule through the APA with Notice & Publication

Replacement of the Final Rule by DOE's legislative rulemaking would be arduous, time-consuming, and would require retracing the procedural path that culminated in enacting the Final Rule.[328] The Biden Administration's only remedy of replacement through legislative rulemaking is a tribute to the Final Rule's precise drafting and meticulous compliance with the APA's procedures culminating in its 2020 enactment.[329]

7. The Biden Administration's 2021 Decision to Proceed with the APA's Publication, Notice, & Comment Procedure in Pursuing Replacement of the Title IX Final Rule

Announcements by the Department of Education, occurring after preparation of the foregoing review of options, confirms that the legislative rulemaking procedure will be exclusively pursued in seeking to eradicate the Final Rule. The administration's options merit review. Specifically, in April 2021, the

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creating lists of candidates confirmed as originalist from which Trump selected nominees.). *But see*, Ronald L. Feinman, *These 9 Justices Failed to Vote the Way Their Party Expected*, HIST. NEWS NETWORK (Oct 14, 2018), https://historynewsnetwork.org/article/170179 (reviewing judicial appointments from William Brennan through trough David Souter that adopted judicial philosophies contrary to that expected by the Republican administrations).

326. Rossley v. Drake Univ., 979 F.3d 1184 (8th Cir. 2020), *cert. denied*, No. 20-1083, 2021 U.S. LEXIS 1589 (2021).

327. *See supra*, notes 178–99 and accompanying text (reviewing then Seventh Circuit Judge Coney Barrett's opinion in *Purdue University*); *but see*, McKay Coppins, *Is Brett Kavanaugh Out for Revenge?*, ATLANTIC (May 13, 2021), https://www.theatlantic.com/magazine/archive/2021/06/brett-kavanaugh-supreme-court/618717/ (concluding that the effects of Justice Kavanaugh's confirmation hearing, with accusations of attempted rape, remains a mystery).

328. *See* Jessica Lee & Christina T. Pham, *Biden Administration Expected to Reverse DeVos's Title IX Regulations, Legal Experts Say*, HARV. CRIMSON (Jan. 20, 2021), https://www.thecrimson.com/article/2021/1/20/experts-on-title-ix-under-biden/ (noting Harvard law professor Jacob Gersen's observation that an administrative regulation would require compliance with the same process followed by the DOE in enactment of the Final Rule including the public notice and comment period, thus constituting an "onerous process" that would take years).

329. *See* Greta Anderson, *A Long and Complicated Road Ahead*, INSIDE HIGHER ED (Jan. 22, 2021), https://www.insidehighered.com/news/2021/01/22/biden-faces-title-ix-battle-complicated-politics-and-his-own-history (observing the Biden administration cannot simply summarily revoke the Final Rule given enactment of the Final Rule as a binding law).

Department issued a letter to "Students, Educators, and other Stakeholders" concerning future steps to be taken in furtherance of the directives of the March 8th Order.[330] The letter announced upcoming public hearings in which interested parties could participate in "sharing views" with the OCR in furtherance of Secretary Cardona's comprehensive review directed by the March 8th Executive Order.[331]

The more significant revelation in the letter was its announcement of intended future rulemaking with no accompanying suggestion of interim remedies to suspend or alter the Final Rule:

> *Notice of Proposed Rulemaking (Anticipated)*
>
> After hearing from the public and completing its review of the Department's current Title IX regulations and other agency actions, OCR anticipates publishing in the Federal Register a notice of proposed rulemaking to amend the Department's Title IX regulations. This notice will provide individuals, organizations, schools, and other members of the public with an additional opportunity to share insights and views through a formal notice-and-comment period.[332]

The conclusion that the Biden administration will pursue the APA's formal rule-making process to replace the Final Rule was subsequently confirmed by Secretary Cardona's testimony before the House Labor and Education Committee on June 24, 2021.[333] Congressman Frank Mrvan inquired about what the Department was doing to remedy the "disastrous effects" of the Final Rule's supposed weakening of protections for sexual harassment survivors.[334] In response, Cardona referred exclusively to the Department's present pursuit of the formal rulemaking process, making no mention of any contemplated interim remedies to be pursued.[335] The decision of the Biden administration to singularly pursue the APA's formal rulemaking process is a tribute to the precision in crafting the Rule's specific procedures to be followed in Title IX investigations and adjudications. The Final Rule's language precludes material dilution of its exacting directives by resorting to OCR "guidance documents."

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330. Letter from Suzanne B. Goldberg, Assistant Sec'y for Civil Rights, U.S. Dep't of Educ., Office for C.R., to Title IX Coordinators (Apr. 6, 2021) https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf [hereinafter Letter from Goldberg] (titling the notice Letter to Students, Educators, and other Stakeholders re Executive Order). *See supra* notes 304-07 and accompanying text (reviewing the contents of the March 8th Order).

331. Letter from Goldberg, *supra* note 330, at 2 (referencing the March 8th Executive Order).

332. Letter from Goldberg, *supra* note 330, at 3.

333. House Hearing on Department of Education Priorities, CSPAN (June 24, 2021) https://www.c-span.org/video/?512743-1/house-hearing-department-education-priorities [hereinafter Dep't of Educ. Priorities] (recording questioning of Congressman Frank Mrvan from the 1st District of Indiana).

334. *Id.*

335. *Id.* (recording response of Dep't of Educ. Sec'y Miguel Cardona to questioning of Congressman Mrvan).

Additionally, given recent federal appellate decisions, the DOE is aware of the likely disastrous consequences of a wholesale elimination or suspension of the rights afforded to the accused under recent appellate decisions.[336] The clarity provided by the Final Rule effectively prevents the Biden administration from employing tactics to circumvent the legislative rulemaking process.[337]

VI. ANALYSIS OF THE MOTIVATIONS UNDERLYING ACADEMIA'S RESISTANCE TO THE FINAL RULE

A. Academia's Ostensibly Laudable Goals & Its Failure to Recognize Tragic Results

As noted at the commencement of this article, no one denies the merit of limiting the incidence of sexual assault on college campuses. Equally commendable is zealously pursuing justice for collegians that are victims of sex crimes.[338] Unfortunately, pursuing these objectives by depriving due process to those accused of sexual assault merely increases injustice, ultimately expanding the community of victims on college campuses. To the extent reflected by ACE and ATIXA, the academe's response turns a blind eye to 600 John Doe lawsuits and the repeated warnings of federal appellate courts concerning due process rights owed to the Title IX accused.[339] The remarkably similar depictions of Kafkaesque disciplinary proceedings reiterated by hundreds of collegiate males cannot be dismissed as anecdotal aberrations.[340] Unfortunately, the academe predominantly appears to deny the existence of any such defects in collegiate justice systems.[341] The forces and motivations underlying academia's resistance to the Final Rule's reforms merit further inquiry.

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336. *See*, *e.g.*, 34 C.F.R. § 106.45(b)(1) (2020) (providing in the Final Rule a 446-word delineation of the mandatory live hearing at postsecondary institutions and the procedures to be followed in the hearing).

337. *See* TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULE MAKING AND JUDICIAL REVIEW 1, 10 (2017), https://fas.org/sgp/crs/misc/R41546.pdf (observing "in order to amend or repeal an existing legislative rule, an agency generally must comply with the same notice-and-comment rulemaking procedures, outlined in § 553 of the APA, that governed the original promulgation of the rule").

338. Whether the number of sexual misconduct incidents is inflated does not detract from the pursuit to reduce the incidence of sexual violence on campus.

339. *See supra* notes 277–83 and accompanying text (reviewing Statements of ACE and ATIXA criticizing the Final Rule).

340. *See*, *e.g.*, Doe v. Oberlin Coll., 963 F.3d 580, 583–86 (6th Cir. 2020); Doe v. Univ. of Scis., 961 F.3d 203, 205–08 (3d Cir. 2020); Doe v. Purdue Univ., 928 F.3d 652, 656–58 (7th Cir. 2019). *See generally Our Stories*, FACE, https://facecampusequality.org/ourt-stories (last visited Oct. 10, 2021) (reporting personal accounts of the suffering endured by approximately 1,000 males and their families resulting from false Title IX accusations of sexual harassment).

341. Mitchell, *supra* notes 278–79 (reviewing Statements of ACE); Association of Title IX Administrators, *supra* note 283 (urging retention of the single investigator and lamenting the destructiveness of live hearings and examinations of the Title IX accuser in the face of federal

B. The Continuing Influence of Title IX Offices on College Campuses

Under the Obama administration, the OCR successfully established the sex bureaucracy on college campuses. The Title IX coordinator is now a campus fixture with expanded duties and supporting staff.[342] The permanence and influence of the expanded Title IX office are attributable to the desire for continued employment and the desire of Title IX officers to revise the rules governing acceptable sexual etiquette on campuses. Civil servants are certainly not immune from the human tendency to seek job security.[343] Moreover, many Title IX coordinators find vocational enthusiasm in their allegiance to the OCR's vision of educating collegians with a new paradigm of sexual politics freed from prevailing sexual mores and historic law defining sexual crimes.[344] The response of ATIXA to the Final Rule confirms that OCR's mission remained unfazed by the Trump administration.[345] The Title IX campus office remains an influential force that frequently and aggressively disseminates its message of new parameters for lawful sexual interaction.

C. Consideration of Academia's Cost Objections to the Final Rule, The Burden of Adherence with the Final Rule & Attendant Complexity in Judging Serious Legal Disputes

Objections concerning the costliness of implementing the Final Rule training and compliance with its many procedural requirements have validity. The

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circuit opinions concluding the Title IX accused is constitutionally owed a live hearing and examination of the accuser).

342. *See*, *e.g.*, Alison Somin, Opinion, *To Cripple the Abusive Campus "Sex Bureaucracy," Reign in the Title IX Coordinators*, THE HILL (July 31, 2020, 09:00 AM), https://thehill.com/opinion/education/509676-to-cripple-the-abusive-campus-sex-bureaucracy-rein-in-the-title-ix (describing enactment in 1975 of a single administrative regulation requiring one Title IX coordinator and the evolution of the one employee mandate reflected in extended Title IX offices at universities); Melnick, *supra* note 19 (noting the expansive Title IX staffs at Yale and Harvard and federal expenditures of more than $100 million with much dedicated to campus Title IX personnel).

343. *See*, *e.g.*, RONALD N. JOHNSON & GARY D. LIBECAP, THE FEDERAL CIVIL SERVICE SYSTEM AND THE PROBLEM OF BUREAUCRACY 154 (1994) (noting the 100-year growth in civil servant job security through rules and public unions facilitating and preserving a system characterized by promotion through time served versus productivity and creation of barriers to the dismissal of unproductive employees).

344. *See* Melnick, *supra* note 19, at 30 (describing Title IX campus workshops devoted to reeducating students with new concepts of acceptable and unacceptable sexual conduct and appropriate discourse on sex); Somin, *supra* note 342 (observing the practice of Title IX coordinators lecturing on appropriate sexual interaction); *see also* Yang, *supra* note 35 (describing the new vision of appropriate sexual conduct advocated by the OCR).

345. Brett A. Sokolow, *EO, EO, It's Off To Work We Go: How the Latest Biden Executive Order Will Impact the Title IX Field*, ATIXA (Mar. 8, 2021), https://www.atixa.org/blog/how-biden-eo-will-impact-title-ix/ (discussing impact of March 8, 2021 executive order and summarizing "President Biden is sending instructions for ED to huddle with its lawyers and those in the DOJ to try to figure out the most expedient way to wiggle out of or around the 2020 Regulations," and suggesting means to dilute the Final Rule's impact pending a final strategy).

various aspects of compliance with the Final Rule require attention to detail and substantially more expenditures than an informal disciplinary proceeding with few prescribed rules.[346] The Final Rule's process is time-consuming and requires additional costs to ensure all parties have equal access and participation in the school's investigation. The process further aims to ensure a strict division of the individual or staff investigating the Title IX claim from those charged with the claim. The same is true of coordinating and conducting live hearings with the examination of all relevant witnesses and subsequent preparation of detailed findings of fact supporting the ultimate decision of the Title IX claim. It requires far less effort and funding to determine Title IX claims through informal interviews with a single investigator who is unfettered by rules governing the investigation or the means for dispensing an ultimate verdict. Thus, resistance to the Final Rule and compliance with its numerous procedural requirements may well reflect resistance to departing with the familiar by many engaged in Title IX disciplinary proceedings. Abandoning a system of adjudication that one has become familiar with over several years is difficult. This is particularly true when the new system to be adopted is laden with multiple procedural requirements that include more steps on the path to procedural compliance.[347]

It is equally valid that many who are delegated the task of Title IX adjudications are fatigued with the whipsawing that has occurred and will likely occur again, with changing presidential administrations pursuing radically different agendas. Those charged with adjudicating Title IX claims on campus seek clarity and finality regarding the procedures and presumptions to be adopted in performing the mission.[348]

There is additional merit in the contention that Title IX panels should not be transformed into courts of law. Faculty members or other Title IX panel members rarely will have the legal training to deal with the complexities of resolving complex Title IX disputes. Determinations of consent, weighing the relative evidentiary value of recollections frequently clouded in alcoholic fogs, and the task of ferreting out the truth among two or more conflicting accounts illustrate the difficulties inherent in the assigned task. Neither should laypeople be called upon to resolve such disputes. This is not their chosen vocation, and

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346. *Summary of Final Rule*, *supra* note 239 (setting forth with specificity the Final Rule's many procedural requirements in the investigation and adjudication of a Title IX claim).

347. *See* Anderson, *A Long and Complicated Road Ahead, supra* note 329 (observing the fatigue and lack of certainty among those that are engaged with Title IX adjudications with the radical change of procedural guidance between the DCL and the Final Rule encompassed in the observation, "[w]e're tired…Don't give us one more thing to do this academic year. Let us get our students back to as close as we can to normal.").

348. *See*, *e.g.*, Jake New, *Must vs. Should*, INSIDE HIGHER ED (Feb. 25, 2016), https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance (reviewing colleges frustrations, during the DCL era, with OCR's contradictory positions on DCL directive as mandatory versus nonbinding guidance with senior vice president of ACE noting, "I think the challenge that colleges and universities have is the Department of Education is saying a large number of very different things about the guidance and what it means.").

the stakes are remarkably high. The ultimate decision could result in life-changing consequences for the accuser or the accused.

There are alternative means of resolving Title IX disputes short of invoking the criminal justice system or requiring implementation of the admittedly demanding procedures of the Final Rule. Some have written persuasively of establishing regional dispute centers where trained professionals could counsel victims, impartially investigate and adjudicate Title IX cases, and decide them with the privacy of an arbitration proceeding.[349] Perhaps an even more economical system could allow an initial hearing of the case by a collegiate tribunal analogous to a justice of the peace proceeding. However, both parties would reserve the right to appeal and secure a de novo hearing at the regional center with trained professionals. Such a system might result in cost savings by allowing early resolution to more straightforward cases such as where the parties stipulate to the events that occurred, or where overwhelming evidence supports a ruling.

D. The Faint-Hearted Collegiate Administrations

Ultimately, school administrators share much of the blame for the increased time and expenditures in complying with the Final Rule. Under the DCL, OCR was undoubtedly a force to be feared, given an unlimited investigatory budget and threatening the withdrawal of federal funding. Nevertheless, it was academia's election to appease the OCR by subjugating fairness to institutional preservation. Universities were repeatedly provided notice in federal decisions from 2016 through 2020 that their systems were inequitable and constitutionally deficient.[350] The ever-growing flood of John Doe lawsuits provided a warning that reforming campus Title IX systems to further equality of treatment and impartiality was advisable. Nevertheless, there was no demonstrable movement towards voluntary reform.[351] Nothing precluded educational institutions from

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349. *See* Gina Maisto Smith & Leslie M. Gomez, *The Regional Center for Investigation and Adjudication: A Proposed Solution to the Challenges of Title IX Investigations in Higher Education*, 120 PA. STATE L. REV. 978, 997–98 (2016).

350. *See supra* notes 115–24, 137–215 and accompanying text (reviewing numerous federal decisions during the 2016–2020 period observing constitutional deficiencies in DCL proceedings).

351. *Compare Spotlight on Due Process 2017*, *supra* note 217 (surveying disciplinary systems in fifty-three leading universities) *with Spotlight on Due Process 2019-2020*, *supra* note 217 (surveying disciplinary systems in fifty-three leading universities leading universities. The 2017 survey reviewed and graded the universities on ten separate elements of fundamental due process in Title IX proceedings such as whether the school required impartial fact finders and whether some form of cross examination was allowed in the proceeding. Forty-six of the fifty-three schools were graded at D and F as affording less than four out of ten elements of fundamental due process with seventy-three percent of the schools guaranteeing no presumption of innocence. In summarizing the 2019–20 survey, FIRE concluded the following, "Disappointingly, we did not see a significant change overall in the safeguards the rated universities guarantee students from 2017 through this year.").

initiating litigation seeking a declaration of the OCR's unlawful enforcement of the DCL as faux law.[352]

Unfortunately, recent events corroborate that college administrators are generally reticent to take courageous stands that would engender substantial opposition among vociferous elements of the student bodies or disapproval from governmental agencies charged with some aspect of educational oversight.[353]

E. The Role of Institutional Preservation

Understandably, universities are driven by self-preservation in their competition for funding, increased endowments, and student enrollment year.[354] The challenges confronted by educational institutions have been highlighted by COVID-19 and the resulting financial strain on universities.[355] Yet, the COVID-19 crisis may well have served a beneficial purpose in requiring universities to refocus upon their ultimate mission and making long-overdue changes in an antiquated system.[356] There was substantial evidence long before the pandemic that schools had ironically lost primary focus on the student in pursuit of increasing enrollment and funding.[357]

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352. *See*, *e.g.*, Amended Complaint at 4, Doe v. Lhamon, No. 1:16-cv-01158- RC (D.D.C. Aug. 15, 2016) (joining voluntarily as a plaintiff, Oklahoma Wesleyan University became only publicly funded university to challenge the legality of the DCL directives—case subsequently rendered moot with revocation of DCL).

353. *See*, *e.g.*, L.D. Burnett, *Right-Wing Trolls Attacked Me, My Administration Buckled*, CHRON. HIGHER ED (Oct. 15, 2020) (essay on cowardice of the corporate institution); Glenn Greenwald (@ggrewald), TWITTER (May 11, 2019, 09:29 PM), https://twitter.com/ggreenwald/status/1127385246087905280?lang=en (criticizing refusal of Harvard administration to support Dean of Harvard Law School in face of student protests over the Dean's legal representation of Harvey Weinstein); Dennis Prager, *The Cowards of Academia*, CREATORS SYNDICATE (Apr. 25, 2017), https://www.creators.com/read/dennis-prager/04/17/the-cowards-of-academia (lamenting the refusal of college administrators to demand free speech on campuses with the phenomena of student protests docking scheduled conservative speakers). *But see* Robert J. Zimmer et. al., *Report of the Committee on Freedom of Expression*, UNIV. OF CHI. COMM. ON FREE EXPRESSION (July 2014),
https://provost.uchicago.edu/sites/default/files/documents/reports/FOECommitteeReport.pdf (announcing University of Chicago President and committee's authentic commitment to diversity of thought and freedom of speech as primary values that will be preserved at the institution and responding to campus protests as some who would find speech disagreeable or wrong-headed).

354. *See*, *e.g.*, *More States Rely on Tuition Revenue to Finance Public Education*, ASS'N. AM. COLL. & UNIVS. (May 2018), https://www.aacu.org/aacu-news/newsletter/2018/may/facts-figures (observing that over half of public universities in fiscal year 2017 relied more heavily on student tuition that state and local appropriations as the source of operational funding).

355. *See*, *e.g.*, Dick Startz, *Coronavirus Poses Serious Financial Risks to US Universities*, BROOKINGS INST. (Apr. 21, 2021), https://www.brookings.edu/blog/brown-center-chalkboard/2020/04/21/coronavirus-poses-serious-financial-risks-to-us-universities/.

356. *See* Stephen Mintz, *The Crisis Higher Education Needs*, INSIDE HIGHER ED (Dec. 17, 2020), https://www.insidehighered.com/blogs/higher-ed-gamma/crisis-higher-education-needs/.

357. *See*, *e.g.*, Laura McKenna, *The Forgotten Student: Has Higher Education Stiffed its Most Important Client?*, ATLANTIC (Apr. 5, 2012), https://www.theatlantic.com/business/archive/2012/04/the-forgotten-student-has-higher-education-stiffed-its-most-important-

University administrations' reactions to the pressures of the OCR in pursuing DCL enforcement are symbolic of the "forgotten student" at educational institutions. College administrators elected to avoid the costly prospect of an OCR investigation or challenging the agency's illegal enforcement of mere "guidance letters" by sacrificing fairness to accused students in the disciplinary proceedings. The emotional damage and disruption of a secondary education visited on collegians who thereby suffered false verdicts of guilt on Title IX harassment claims was the price to be paid for fending off the OCR.

F. The Law of Rules for Just Title IX Adjudications

America's commitment to the "rule of law" is commonly summarized in Theodore Roosevelt's pronouncement that "[n]o man is above the law, and no man is below it."[358] The rule of law renounces subjective adjudications and rejects the parties' identity or affiliations as irrelevant to resolving a legal controversy. It pursues equality of treatment by ultimate reliance on fixed principles applicable to all societal members. Essential to the rule of law are rules dedicated to restraining a judge's unfettered discretion.[359] This preference for reliance on law and not human discretion is traceable to Aristotle:

> Rightly constituted laws should be the final sovereign; and personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.[360]

DCL's directives, ranging from the preponderance of the evidence to its vague definitions of prohibited speech and conduct, were designed to maximize the Title IX collegiate judge's maximum latitude in rendering a verdict on harassment claims. In contrast, the raison d'etre of the Final Rule, with its many procedural checks, was to quell the decision-maker's discretion that had led to the inequities of the Title IX systems. Injustice in adjudication, regardless of venue, is most prone to occur when the rule of law is abandoned.

Those that decide bona fide disputes, regardless of whether a trial court, regional Title IX adjudication center, or college disciplinary tribunal, are

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client/255445/ (documenting how universities have sacrificed and diminished the quality of classroom teaching with emphasis on faculty publication in the pursuit of institutional recognition and advanced rankings); Douglas Belkin & Scott Thurm, *Deans List: Hiring Spree Fattens College Bureaucracy—And Tuition*, WALL ST. J. (Dec. 28, 2012), https://www.wsj.com/articles/SB10001424127887323316804578161490716042814 (documenting the dramatic increase in hiring of university administrators vis a vis teachers and the dramatic costs increases attendant to the trend).

358. Theodore Roosevelt, Third Annual Address to Congress (Dec. 7, 1903).

359. *See* Antonin Scalia, *The Rule of Law as A Law of Rules*, 56 U. CHI. L. REV. 1175, 1176–77 (1989).

360. *Id.* at 1176 (quoting ARISTOTLE, THE POLITICS OF ARISTOTLE, BOOK III, ch. xi, § 19 at 127 (Ernest Barker trans., Oxford 1946)).

humans.[361] They are fallible and prone to make decisions premised upon their prejudices, personal beliefs, and life experiences. These errors in judgment are not acts of malice. They are manifestations of humans' limitations in rendering fair and impartial decisions absent rules to curb human imperfections. Entrusting Title IX adjudications to a "human honor system" with few legal safeguards and reliance on "trust me, I'll do the right thing" is a hazardous course.[362] This is confirmed by the hundreds of John Doe lawsuits and the judiciary's growing interventions herein reviewed. These legal limitations are particularly appropriate when life-changing penalties are in play. Perhaps there was only one actual check for college "deciders" who strayed from duty. That countervailing power came with those John Doe lawsuits that fortuitously landed on the benches of judges with an understanding of what was transpiring in the collegiate tribunals.

Discretion cannot be wholly removed from adjudications. Those that are hearing the Title IX cases are not solving math problems. Nevertheless, the Final Rule seeks to reform systems that too frequently rendered judgments that bore little or no correlation to evidence and denying fundamental procedural fairness. The many checks of the Final Rule serve not only the purpose of limiting discretion. Requirements, such as the mandatory preparation of a reasoned decision, compel the decision-maker to stop and reflect on whether the ultimate judgment was the product of a fair process based on the evidence presented.[363]

CONCLUSION

The ultimate goals of collegiate systems must be two-fold. No one would deny that sexual harassment, including rape and other violent acts, occurs on college campuses. The most frequent victims of sexual assault in America are women between the ages of 18 and 24.[364] An environment must prevail whereby victims can report such incidents without fear of not being taken seriously. Of equal importance is the maintenance of adjudicatory systems dedicated to objective determinations of sexual assault claims by impartial panels.

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361. *See* Smith & Gomez, *supra* note 349 at 997–98 (suggesting alternative means of resolving Title IX cases by those trained in the law as opposed to imposing the law of rules on untrained faculty of other collegiate personnel).

362. *See* Sokolow, *EO, EO, It's Off To Work We Go: How the Latest Biden Executive Order Will Impact the Title IX Field*, *supra* note 345 and accompanying text.

363. *See generally*, *Julia Ward Howe Quotes*, QUOTEHD, http://www.quotehd.com/quotes/julia-ward-howe-activist-the-strokes-of-the-pen-need-deliberation-as-much-as-the ("The strokes of the pen need deliberation as much as the sword needs swiftness.").

364. *Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013*, DEP'T OF JUST., BUREAU OF JUST. STATS. (2014), https://bjs.ojp.gov/content/pub/pdf/rsavcaf9513.pdf (demonstrating there is no evidence reflecting that the incidence of sexual assault is higher for women attending college that those not attending.); Charlene L. Muehlenhard et al., *Evaluating the One-in-Five Statistic: Women's Risk of Sexual Assault While in College*, 54 J. SEX RSCH. 546, 572 (2017) (validating the 1-in-5 statistic of incidence).

The Biden administration was prudent in its decision to forego interim measures and pursue replacement of the Final Rule with legislative rulemaking in compliance with the APA's notice and comment procedures. The resulting transparency in the legislative process with public comment will hopefully replace the Final Rule with legislation that preserves equality of treatment for parties and adherence to the due process owed in Title IX collegiate proceedings.