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Maintaining the Delicate Balance Between Due Process and Protecting Reporting Students from Re-traumatization During Cross-Examination: Title IX Investigations in the Wake of the Trump Administration's Proposed Regulations

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Comments

Maintaining the Delicate Balance Between Due Process and Protecting Reporting Students from Re-traumatization During Cross- Examination: Title IX Investigations in the Wake of the Trump Administration's Proposed Regulations

Lauren Bizier*

INTRODUCTION

According to a 2019 survey, over thirteen percent of college students surveyed across thirty-three universities reported experiencing "nonconsensual sexual contact by physical force or inability to consent" on campus.¹ Consequently, in 2020's social

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1. DAVID CANTOR ET. AL, REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT vii (Jan. 17, 2020), [https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_\(01-16-2020_FINAL\).pdf](https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/Revised%20Aggregate%20report%20%20and%20appendices%201-7_(01-16-2020_FINAL).pdf) [<https://perma.cc/XR6L-EETW>]. This Comment will refer to colleges and

climate, a desire to protect victims and survivors is at an all-time high, particularly on college campuses where sexual assault and harassment are major concerns. Meanwhile, there is ongoing tension concerning how to ensure that those accused of sexual assault are subject to fair disciplinary proceedings on college campuses.²

In November 2018, the Trump Administration's Secretary of Education, Betsy DeVos, published a Notice of Proposed Rulemaking (NPRM) document in which the Department of Education (ED) proposed major changes to Title IX enforcement.³ Secretary DeVos proposed a new requirement that in response to formal sexual assault and harassment complaints, universities must conduct live hearings and allow the respondent's advisor to cross-examine the reporting student.⁴ In the press release, Secretary DeVos cited concern over respondents' Fourteenth Amendment due process rights as a driving force behind the proposed regulations.⁵

universities interchangeably. Where "institution" is used, it refers to both colleges and universities.

2. See *New Title IX Regulations Are Coming. FIRE's Newest Report Shows Why Reform is Desperately Needed*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Dec. 11, 2019), <https://www.thefire.org/new-title-ix-regulations-are-coming-fires-newest-report-shows-why-reform-is-desperately-needed/> [<https://perma.cc/JC6B-3YE4>] ("Today, 87% of institutions receive a D or F grade for their failure to protect the due process rights of students accused of sexual misconduct.").

3. See *generally* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter *Nondiscrimination on the Basis of Sex*].

4. *Id.* at 61474 ("For institutions of higher education, the recipient's grievance procedure must provide for a live hearing. At the hearing, the decision-maker must permit each party to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross examination at a hearing must be conducted by the party's advisor of choice."). This Comment will refer to the alleged victim of a sexual harassment on college campuses as the "reporting student," and the student accused of sexual harassment as the "respondent" due to the negative connotations derived from "victim" and "accused." Reporting students and respondents may be male or female; however, for purposes of this Comment, reporting students will be assigned female pronouns and respondents, male pronouns.

5. See *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEPT EDUC. (Nov. 16, 2018), <https://www.ed.gov/news/press-releases/secretary->

In order to effectively address cases involving sexual assault and harassment, adjudicators must tread lightly when managing the delicate balance between protecting the due process rights of the respondent and protecting reporting students from improper questioning.⁶ Accordingly, the issue of sexual assault is a major cause for concern on college campuses because schools are called upon to adjudicate disciplinary proceedings for complaints involving students or faculty.⁷ Sexual assault complaints illuminate two competing issues. On one hand, there is concern that reporting students will be re-traumatized by Title IX proceedings.⁸ On the other hand, there is considerable concern about the due process rights of respondents, particularly surrounding the possibility of self-incrimination that could affect

devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all [<https://perma.cc/DP3J-QQTS>]; see also *New Federal Regulations Limit Due Process, Free Speech Rights on Campus*, FOUND. FOR INDIVIDUAL RTS. EDUC. (May 5, 2011), <https://www.thefire.org/fire-new-federal-regulations-limit-due-process-free-speech-rights-on-campus/> [<https://perma.cc/TS2A-K7KW>] (criticizing the Dear Colleague Letter claiming that it disregarded the rights of respondents).

6. See Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 635 (2018) ("They must create and maintain disciplinary systems that provide for both Title IX protections for complainants and appropriate procedural due process protections for respondents.").

7. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61465 ("The proposed regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to treat complainants and respondents equally, giving each a meaningful opportunity to participate in the investigation and requiring the recipient to apply substantive and procedural safeguards that provide a predictable, consistent, impartial process for both parties . . .").

8. See Ass'n of Indep. Colls. & Univs. in Massachusetts, Comment on Proposed Rule to Amend Regulations Implementing Title IX of the Education Amendments of 1972, 7 (Jan. 23, 2019) <https://www.regulations.gov/document?D=ED-2018-OCR-0064-7715> [<https://perma.cc/W8UD-D87S>] [hereinafter Ass'n of Indep. Colls. Comment] ("Proceedings featuring cross-examination are widely perceived as having the purpose of intimidation and embarrassment, rather than truth-seeking, and risk re-traumatizing complainants. The risk of re-traumatization is likely to be exacerbated in cases where the parties are represented by zealous advocates."); see also Am. Council on Educ., Comments on the Department of Education on Proposed Rule Amending Title IX Regulations, 10 (Jan. 30, 2019) <https://www.acenet.edu/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf> [<https://perma.cc/JZ6V-D7YJ>] [hereinafter Am. Council on Educ. Comment].

future potential criminal proceedings.⁹ Balancing those competing issues becomes even more difficult in light of the institution's duty to provide both students with equal access to education.¹⁰

Congress enacted Title IX of the Education Amendments of 1972 to prohibit discrimination based on sex in educational facilities.¹¹ Title IX provides that "[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."¹² Congress's primary objectives in passing Title IX were to avoid the use of federal funds to support discriminatory educational purposes and to provide individuals with equal access to education.¹³ Title IX applies to all educational programs and activities that are overseen by recipients of federal funding.¹⁴ Therefore, all primary schools, secondary schools, colleges, and universities that receive federal funding must comply with Title IX or, if the institutions do not comply with Title IX requirements, risk losing their federal financial assistance.¹⁵

In *Cannon v. University of Chicago*, the Supreme Court of the United States (the Court) established that individuals can bring private causes of action to hold schools accountable for discrimination under Title IX.¹⁶ Twenty years later, in *Davis v. Monroe County Board of Education*, the Court held that under Title IX, schools could be held liable for student-on-student sexual harassment where the schools were "deliberately indifferent to sexual harassment, of which they have actual knowledge."¹⁷

9. See Casey McGowan, *The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, And Coerced Confessions*, 66 EMORY L.J. 1175, 1188–90 (2017).

10. See 20 U.S.C. § 1681(b) (2018).

11. § 1681(a).

12. *Id.*

13. See *Cannon v. U. of Chi.*, 441 U.S. 677, 704 (1979).

14. See § 1681(a).

15. See § 1681(c); see also *Complaint Processing Procedures*, U.S. DEPT OF EDUC.: OFF. FOR C.R., 3 (Nov. 2018), <https://www2.ed.gov/about/offices/list/ocr/docs/complaints-how.pdf> [<https://perma.cc/92ZG-BA8X>]. While Title IX applies to all schools that receive federal funding, this Comment will focus on Title IX on college campuses.

16. *Cannon*, 441 U.S. at 717.

17. *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

Congress designated the responsibility of handling Title IX cases to the ED.¹⁸ In dealing with these cases, the ED strives to balance both the rights of reporting students and the Fourteenth Amendment due process rights of respondents.¹⁹ In an attempt to achieve this balance, the ED has proposed rulemaking that would transform university Title IX investigations into quasi-judicial proceedings.²⁰ These proposed proceedings, however, will make it increasingly difficult for universities to balance respondents' due process rights and protect the rights of the reporting students to have their claim adjudicated.

In the 2018 NPRM, the ED proposed a requirement that all colleges and universities conduct their Title IX investigations through a live hearing, allowing the students' advisors to conduct cross-examination of the opposing student.²¹ That change would fundamentally alter many Title IX investigations.²² Currently, most institutions use either investigative models or a hybrid investigative and hearing model to handle Title IX complaints.²³ These models have the effect of lessening the potential trauma that students may endure when engaging in a Title IX proceeding by

18. See § 1681; see also *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, *supra* note 5.

19. See Ruth Lawlor, *How the Trump Administration's Title IX Proposals Threaten to Undo #MeToo*, WASH. POST (Feb. 4, 2019, 6:00 AM), <https://www.washingtonpost.com/outlook/2019/02/04/how-trump-administrations-title-ix-proposals-threaten-undo-metoo/> [https://perma.cc/E4JU-DJH5]. A national conversation regarding how sexual violence allegations are handled was spurred by headline-making rape cases such as the Brock Turner case in 2015. The #MeToo movement hit the mainstream media in 2017, when Harvey Weinstein, a prominent Hollywood producer, was accused by numerous women of sexual harassment and sexual assault. Women across the United States began speaking out against high profile men who they allege were engaging in sexual misconduct.

20. See *Nondiscrimination on the Basis of Sex*, *supra* note 3, at 61462.

21. See *id.* at 61474.

22. See Andrew Kreighbaum, *Sharp Divide Over Trump Administration's Title IX Overhaul*, INSIDE HIGHER ED (Nov. 19, 2018), <https://www.insidehighered.com/news/2018/11/19/devos-sexual-misconduct-rule-criticized-survivor-advocates> [https://perma.cc/7D6T-534H].

23. See ASS'N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TITLE IX: GOLD STANDARD PRACTICES FOR RESOLUTION OF ALLEGATIONS OF SEXUAL MISCONDUCT ON COLLEGE CAMPUSES 15–17 (2014) (explaining the different types of models for hearings, including the investigative and hybrid investigative models).

separating the parties as much as possible and not treating the process like a criminal trial.²⁴ In contrast, the proposed change will require both students to engage in a hearing, which will likely be traumatic for at least one of them, and be subject to cross-examination, which is often adversarial and intimidating.²⁵

The ED should not require that colleges conduct a live hearing and cross-examination in Title IX investigations because colleges are not equipped to properly handle difficult evidentiary rulings that are necessary to both safeguard due process rights of respondents and protect reporting students from trauma. In both the civil and criminal systems, cross-examination is usually conducted by the opposing party's counsel.²⁶ Cross-examination is limited in scope to the subject matter of the direct examination and the witness's credibility.²⁷ The questions asked under cross-examination may be in the form of leading questions, which are often adversarial and involve the opposing counsel attempting to discredit the witness's testimony.²⁸ In a sexual assault case, cross-examination gives the opposing party the opportunity to present a defense that either the parties engaged in consensual sexual intercourse, or that no sexual intercourse occurred.²⁹ Where the respondent claims that he is being falsely accused, he may direct his counsel to show the reporting student had an ulterior motive for making an accusation.³⁰ In cases of sexual assault, decision-making regarding the due process rights of a respondent, as well as weighing the probative value of certain evidence and the danger of harm or unfair prejudice to any victim, has traditionally been

24. *See id.* at 15.

25. *See* Ass'n of Indep. Colls. Comment, *supra* note 8, at 3–4, 7.

26. *See* FED. R. EVID. 611.

27. *Id.* 611(b).

28. *Id.* 611(c).

29. *Id.* 412 (blocking many types of evidence about the victim in civil and criminal proceedings involving sexual assault, but which allows evidence of consent in section (b)(1)(B)).

30. *Id.* 404(b)(2); *see also* Sarah Zydervelt et al., *Lawyers' Strategies for Cross-Examining Rape Complainants: Have We Moved Beyond the 1950s?*, 57 BRIT. J. CRIMINOLOGY 551, 555, 561–62 (2017) (discussing strategies lawyers use in cross-examination of rape complainants, including suggesting ulterior motive).

reserved for learned trial judges.³¹ Many campus administrators lack the knowledge or expertise to make those kinds of important rulings.

Thus, as will be explained further below, compelling universities to comply with the new regulation that requires cross-examination to be allowed during live hearing will unduly burden colleges and deter sexual assault complaints. Instead, universities should be able to question a reporting student (instead of allowing the respondent's advisor to perform the questioning), screening the questions so as to preserve rape shield protections, but still asking questions that probe the complainant's credibility.³² This method protects reporting students from the trauma they would likely endure if they had to participate in live cross-examination.³³ For many reporting students, university disciplinary proceedings are the chosen alternative to the court system because they can avoid traumatic questioning utilized in a criminal proceeding.³⁴ As courts have stated, school disciplinary hearings are not supposed to emulate criminal proceedings and a respondent's due process rights in a Title IX investigation are not, and should not, be the same as a defendant's due process rights in a criminal proceeding.³⁵

Part I of this Comment discusses the background of Title IX interpretation throughout its history. Part II will analyze how the proposed cross-examination requirements will burden universities, impact due process, and run the risk of re-traumatizing reporting students and deterring future complaints. This Comment will conclude by discussing the possible implications of the proposed rule becoming final.

31. See Nondiscrimination on the Basis of Sex, *supra* note 3, at 61475; Ass'n of Indep. Colls. Comment, *supra* note 8, at 8.

32. See, e.g., *Hadiak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 68–69 (1st Cir. 2019).

33. See Meg Garvin et al., *Allowing Sexual Assault Victims to Testify at Trial via Live Video Technology*, NAT'L CRIME VICTIM L. INST.: VIOLENCE AGAINST WOMEN BULL., Sept. 2011, at 1, 4, <https://law.lclark.edu/live/files/11775-allowing-adult-sexual-assault-victims-to-testify> [<https://perma.cc/Q8E7-J3QY>].

34. See *id.* at 4.

35. *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1971) (holding that "[d]ue process does not invariably require the procedural safeguards afforded in a criminal proceeding").

I. THE EVOLUTION OF INTERPRETATION: FROM NON-BINDING GUIDANCE TO BINDING RULEMAKING

The ED is a federal administrative agency that falls under the executive branch's power.³⁶ Any legislative rule that an administrative agency seeks to promulgate is subject to the Administrative Procedure Act's notice and comment rulemaking requirements.³⁷ Agencies can avoid these requirements, however, where they merely make statements of policy or interpret their existing rules.³⁸ In the past, the Office for Civil Rights (OCR) has released letters that clarify the proper interpretations of Title IX.³⁹ These letters contained non-binding guidance which merely interpreted the existing Title IX rules, not subjecting the guidance to the notice and comment rulemaking procedures.⁴⁰ However, institutions regarded the letters as if they had the force of law because they feared losing their funding.⁴¹

36. *An Overview of the U.S. Department of Education*, U.S. DEP'T EDUC. (Sept. 2010), <https://www2.ed.gov/about/overview/focus/what.html> [<https://perma.cc/4K77-FWNU>].

37. Administrative Procedure Act § 2, 5 U.S.C. § 553(b) (2018).

38. § 533 (b)(3)(A).

39. See Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, U.S. Dep't of Educ. Office for Civil Rights 2 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/F9KX-6CTV>]; U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE ii (April 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/BDX9-XW38>] [hereinafter 2014 Q&A].

40. § 553 (b)(3)(A).

41. Sheridan Caldwell, Note, *OCR's Bind: Administrative Rulemaking and Campus Sexual Assault Protections*, 112 NW. U. L. REV. 453, 475. The Obama Administration's Assistant Secretary for the OCR, Catherine Lhamon, made it clear that the agency was serious about punishing institutions for noncompliance, stating "[d]o not think it is an empty threat" at a gathering of university administrators. Jeannie Suk Gersen, *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, NEW YORKER (Feb. 1, 2019), <https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault> [<https://perma.cc/Q5QX-RZC6>]. The OCR went as far as to post a shame list of institutions that were noncompliant with Title IX. *Id.*

A. *The Obama Administration's Guidance: "Dear Colleague Letter" and "Q&A"*

In 2011, the OCR published the *Dear Colleague Letter on Sexual Violence* (Dear Colleague Letter), which focused on including sexual violence in the definition of sexual harassment.⁴² The letter recommended that educational institutions employ the preponderance of the evidence standard in sexual harassment investigations.⁴³ Additionally, the OCR "strongly discouraged" the cross-examination of complainants during Title IX investigations.⁴⁴ A few years later, in 2014, the Obama Administration published further guidance on a school's responsibilities under Title IX.⁴⁵ The *Questions and Answers on Title IX and Sexual Violence* (Q&A) detailed a school's specific responsibilities corresponding with different situations of sexual assault.⁴⁶ This included the school's responsibilities in student-on-student sexual assault, faculty-on-student sexual assault, sexual assault between members of the same sex, and sexual assault where the perpetrator is not affiliated with the university.⁴⁷ The Obama Administration's changes to Title IX guidance were met with support and led to the creation of a White House Task Force to Prevent Sexual Assault.⁴⁸

42. Ali, *supra* note 39, at 3. The Dear Colleague Letter also emphasized the importance that colleges and universities designate a Title IX coordinator to ensure that the institution carries out its Title IX obligations. *Id.* at 7.

43. *Id.* at 11.

44. *Id.* at 12. The Trump Administration's proposed rule requires an opportunity for cross-examination to be conducted by both parties, Nondiscrimination on the Basis of Sex, *supra* note 3, at 61473, whereas the Obama Administration's OCR strongly opposed the parties engaging in cross-examination. Ali, *supra* note 39, at 12.

45. 2014 Q & A, *supra* note 39, at ii.

46. *Id.*

47. *Id.* at 2–3, 5, 9.

48. *The Story of Our Movement*, It's ON US <https://www.itsonus.org/history/> [<https://perma.cc/85G3-Y6P7>] (last visited Feb. 26, 2020). The White House Task Force to Prevent Sexual Assault led to the creation of "It's on Us" a non-profit organization whose movement swept across colleges and universities with the motto that "It's on us to prevent stop sexual assault."

B. *The Trump Administration Withdraws Obama-Era Guidance*

In June 2017, the Trump Administration asked for public comments concerning ways in which the ED could alleviate federal regulatory burdens.⁴⁹ Ninety-six percent of the comments received supported the Obama Administration's Title IX guidance.⁵⁰ Nevertheless, the ED withdrew the Obama Administration's 2011 Dear Colleague Letter and the 2014 Q&A in September of 2017.⁵¹ In the ED's press release, Secretary DeVos expressed her discontent with the Obama Administration's Title IX guidance, stating, "the era of rule by letter is over."⁵² The Secretary's comment implies that she believes notice and comment rulemaking is the proper procedure by which the government should interpret Title IX.⁵³ This is likely because guidance can easily be changed or rescinded by another administration that disagrees with it, whereas rules promulgated by agencies through notice and comment rulemaking are difficult to amend or repeal because those processes also require notice and comment rulemaking.⁵⁴

The same day that the Obama Administration's guidance was withdrawn, the ED issued a *Question and Answer on Campus Sexual Misconduct* which would act as interim guidance while the Department engaged in rulemaking procedures.⁵⁵ The interim guidance remains in place until the final rules are published in the Code of Federal Regulations.⁵⁶

In November 2018, the ED published an NPRM to amend regulations implementing Title IX and received over one hundred

49. Evaluation of Existing Regulations, 82 Fed. Reg. 28431, 28431 (June 22, 2017).

50. Nancy Chi Cantalupo, *Dog Whistles and Beachheads: The Trump Administration, Sexual Violence, and Student Discipline in Education*, 54 WAKE FOREST L. REV. 303, 357 (2019). Professor Cantalupo read and coded all the comments submitted and wrote a report on her findings. *Id.* at 356.

51. *Department of Education Issues New Interim Guidance in Campus Sexual Misconduct*, U.S. DEP'T EDUC. (Sept. 22, 2017), <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct> [<https://perma.cc/ZQ83-K9LS>] [hereinafter *Press Release 2017*].

52. *Id.*

53. *Id.*

54. 5 U.S.C. § 551(5) (2018).

55. *Press Release 2017*, *supra* note 51.

56. *See id.*

thousand comments in response.⁵⁷ The NPRM stated that the proposed regulations would "clarify and modify Title IX regulatory requirements."⁵⁸ A primary objective of the proposed rules is to ensure due process protection for respondents.⁵⁹ The ED claimed that its decision to clarify Title IX interpretation was partly due to criticism that the Obama Administration's guidance "pressured schools and colleges to forgo robust due process protections."⁶⁰

The proposed rules would make numerous changes to Title IX enforcement in college disciplinary proceedings.⁶¹ Some of the changes drew harsh criticism expressed through the comment period.⁶² For instance, a controversial change proposed in section 106.45(b)(3)(vii) requires that all colleges and universities covered by Title IX provide for a live hearing in their grievance procedure.⁶³ Further, this change allows each parties' advisor to cross-examine the opposing party and witnesses.⁶⁴

II. CROSS-EXAMINATION IS NOT IN THE BEST INTEREST OF THE UNIVERSITY OR ITS STUDENTS

The primary purpose of a university is to provide its students with an education. Title IX furthers that purpose by making

57. Simone C. Chu & Iris M. Lewis, *What Happens Next with Title IX: DeVos's Proposed Rule, Explained*, HARV. CRIMSON (Feb. 27, 2019) <https://www.thecrimson.com/article/2019/2/27/title-ix-explainer/> [<https://perma.cc/VPK7-KDW9>]. The comments on the NPRM have yet to be officially analyzed to determine whether they mostly supported or opposed the proposed changes. *Id.*

58. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61462.

59. *See id.* at 61463.

60. *See id.* at 61464. Despite the ED's claim that it was driven by criticism of the Obama Administration's guidance, the sincerity of this claim is in doubt because the Trump Administration has publicly announced its intention to undo any of President Obama's accomplishments. Perry Bacon Jr., *Is Trump Delivering on His Promises to Reverse Obama's Policies?*, FIVETHIRTYEIGHT, (Jan. 31, 2018, 6:00 AM), <https://fivethirtyeight.com/features/is-trump-delivering-on-his-promises-to-reverse-obamas-policies/> [<https://perma.cc/RQB2-QH39>].

61. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61462.

62. *See* Ass'n of Indep. Colls. Comment, *supra* note 8.

63. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61476.

64. *Id.*

institutions responsible for providing equal access to education.⁶⁵ However, the proposed live hearings and cross-examination requirements may have an adverse effect on a university's overall educational atmosphere and ability to further the purpose of equal access to education.⁶⁶ Participation in a live hearing will likely cause more stress and tension for all parties involved. This includes the witnesses, reporting parties, and respondents, all of whom are likely to be students. Furthermore, in addition to the stress that accompanies the life of a typical college student, those involved in live hearings will also have to balance the pressure associated with hearing preparation as well as coping with mental and emotional trauma. Moreover, Title IX disciplinary proceedings will become much more complicated for colleges and universities to manage considering the complex evidentiary rules required to properly administer cross-examination.⁶⁷

A. Live Hearings and Cross-Examination Will Place an Undue Burden on Universities

Requiring live hearings and cross-examination increases the likelihood that institutions will be noncompliant with Title IX because their faculty and staff do not have adequate training and experience to conduct such hearings.⁶⁸ Hearing boards are typically comprised of students, faculty, and administrators.⁶⁹ Furthermore, a 2014 study revealed that hearing board members receive an average of sixteen hours of training per year.⁷⁰ The hearing board's training generally covers a review of school policies, code of conduct review, sexual assault training, and the fundamentals of due process.⁷¹ However, despite that training,

65. See 20 U.S.C. § 1681(a) (2018) ("No person . . . on the basis of sex, shall be denied benefits of, or be subjected to discrimination under any educational program or activity receiving Federal financial assistance . . .").

66. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

67. See Angela F. Amar et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Sexual Assault*, 29 VIOLENCE & VICTIMS 579, 584 (2014) (discussing schools' hearing boards personnel compositions and training); see also *supra* text accompanying notes 26–31.

68. See Amar, *supra* note 67, at 584.

69. *Id.*

70. *Id.*

71. *Id.*

most hearing board members do not have a law school education and are not adequately trained in the complexities of evidentiary rulings and procedures that are involved in the legal system.⁷² Therefore, the proposed rule's requirement that institutions utilize live hearings will burden most institutions because they are not equipped with individuals that are qualified to serve as hearing board members.⁷³ Specifically, most institutions will lack the ability to properly manage cross-examination. If the proposed rule is finalized and given the force of law, to comply with Title IX, colleges and universities will have to scramble to obtain qualified lawyers to train or participate as hearing board members. As a result, institutions will incur significant financial costs to comply with Title IX. These costs may include additional training from legal experts or hiring qualified attorneys to manage disciplinary hearings.⁷⁴

In Title IX disciplinary procedures, both parties are generally afforded the opportunity to have an advisor to guide them through the process. Historically, these advisors have played a limited role, attending hearings and taking notes, and were not allowed to advocate for the student during the hearing.⁷⁵ Instead, these advisors had the role of providing moral support and advising the student during preparation and breaks.⁷⁶ Typically, advisors are fellow students, professors, parents, and lawyers.⁷⁷ Requiring that students have advisors who will take an active role in cross-examination will exacerbate the inequities between students with disparate financial resources.⁷⁸ There are some students who, due to their lack of financial resources, will only have access to an advisor appointed by the school (who may not be an attorney), a parent, or a fellow student, while other students may be able to

72. *See id.*

73. *See id.*

74. *See id.*

75. *See Office of Investigations and Civil Rights Compliance, Advisors and the Role of Advisors*, U. OR., <https://investigations.uoregon.edu/advisors-and-role-advisors> [<https://perma.cc/XC6C-6XHV>] (last visited on Nov. 23, 2019).

76. *See id.*

77. *See id.*

78. *See Ass'n of Indep. Colls. Comment, supra* note 8, at 9.

afford a private attorney.⁷⁹ This disparity sparks debate over whether schools should be required to provide an equally capable attorney to the student who cannot afford one. Managing this disparity will become a major source of tension for universities through these proceedings, as universities are not equipped to handle due process issues in the way the court system can. If the ED seeks to transform university Title IX investigations into quasi-judicial proceedings, then due process will become even more of an issue than it already was under the previous guidance. The inequity among students' abilities to procure a capable advisor to assist in the proceedings will likely cause further concerns about due process on both sides of the investigation.

B. Cross-Examination is Not Required to Satisfy a Respondent's Right to Due Process in an Institutions' Disciplinary Hearing

In the criminal setting, a defendant is afforded the greatest due process protections because he or she is at risk of losing his or her right to liberty.⁸⁰ The Court has yet to decide what level of due process protection is required in college disciplinary hearings.⁸¹ Instead, in private university settings, students' rights are viewed as contractual in nature.⁸² Therefore, private universities are only required to provide students with the process that they have published in their student handbooks.⁸³ In contrast, public universities are responsible for providing their students with basic due process protections.⁸⁴ Accordingly, public university students cannot be suspended without notice or opportunity to be heard.⁸⁵

The Fourteenth Amendment applies to the states and, consequently, to public state universities.⁸⁶ The Fourteenth Amendment states that "[no] state shall deprive any person of life,

79. *See id.*

80. *See* U.S. CONST. amends. V, XIV, § 1.

81. *Due Process on College Campuses*, FOUND. FOR INDIVIDUAL RTS. EDUC. (Apr. 9, 2019), <https://www.thefire.org/issues/due-process/> [<https://perma.cc/75-NDXE>].

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

liberty, or property, without due process of law."⁸⁷ Thus, universities must provide some level of due process to their students in disciplinary hearings because respondents have liberty or property interests at stake.⁸⁸ The consequences of a college disciplinary hearing may be severe—suspension or possible expulsion.⁸⁹ Nevertheless, there is no express constitutional right to a college education.⁹⁰ Considering that students do not face criminal sanctions in school disciplinary proceedings, it follows that they need not emulate criminal proceedings.⁹¹ Therefore, respondents' due process rights in a Title IX investigation are not, and should not, be the same as a defendants' due process rights in a criminal proceeding.⁹²

Moreover, the Court has held that due process rights differ outside of the typical criminal and civil legal system.⁹³ In *Matthews v. Eldridge*, the Court established a three-part balancing test for determining whether an individual has received due process during administrative proceedings.⁹⁴ First, the court must consider the private interest at stake.⁹⁵ In college disciplinary proceedings, the private interest is access to an education at a particular university.⁹⁶ Second, the court considers the effect on the private interest in the event of an erroneous deprivation, as well as the

87. U.S. CONST. amend. XIV § 1.

88. See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988) (citing *Goss v. Lopez*, 419 U.S. 565, 574–75 (1975)).

89. See Fred Thys, *Boston Federal Appeals Court Rules Boston College May Suspend Student Accused of Sexual Assault*, WBUR (Nov. 20, 2019), <https://www.wbur.org/edify/2019/11/20/boston-college-sexual-assault-john-doe-case-appeal> [<https://perma.cc/8P3X-SHG2>].

90. Derek W. Black, *The Constitutional Right to Education Is Long Overdue*, CONVERSATION (Dec. 4, 2017, 11:08 PM), <http://theconversation.com/theconstitutional-right-to-education-is-long-overdue-88445> [<https://perma.cc/RR9J-BEKE>]; Jessica Campisi, *Should the U.S. Constitution Guarantee a Right to Education?*, EDUCATIONDIVE (Nov. 30, 2018), <https://www.educationdive.com/news/should-the-us-constitution-guarantee-a-right-to-education/543243/> [<https://perma.cc/ZU44-W549>].

91. See *Farrell v. Joel*, 437 F.2d 160, 162 (2d Cir. 1971).

92. See *id.*

93. See *Matthews v. Eldridge*, 424 U.S. 319, 334 (1976).

94. See *id.* at 335

95. See *id.*

96. See Black, *supra* note 90. The ability to attend a university and obtain a higher education is the American Dream because for many Americans, higher education is the exclusive avenue to a middle- or upper-class lifestyle.

value of any additional procedural safeguards.⁹⁷ In these cases, the respondent is at risk for possible suspension or expulsion; it has historically been assumed that a property right exists under such circumstances for purposes of a due process analysis.⁹⁸ It is also relevant that the suggested procedural safeguard—cross-examination—is not the only method available to probe witness credibility in a college disciplinary proceeding.⁹⁹ Third, the court will consider the potential burden on the government, which here is the public university.¹⁰⁰ As previously discussed, cross-examination will likely cause an undue burden on universities.¹⁰¹ Further, cross-examination will likely deter students from reporting sexual assaults, which will be discussed in the next section.¹⁰² The *Matthews* balancing test, when applied to Title IX disciplinary proceedings, suggests that the respondent's due process rights will not be violated without the addition of cross-examination.¹⁰³ Therefore, the ED's position that cross-examination is necessary to protect the due process rights of respondents is not supported by the *Matthews* balancing test.¹⁰⁴

The issue of whether respondents have the right to cross-examine the reporting student in college disciplinary hearings has been litigated in the federal courts multiple times in the last few years.¹⁰⁵ The circuits are split on the issue.¹⁰⁶ In 2018, the Sixth Circuit heard *Doe v. Baum*, where it held that a student accused of sexual misconduct at a state institution is entitled to cross-examine the reporting student.¹⁰⁷ The Sixth Circuit's decision is directly in

97. *Matthews*, 424 U.S. at 335.

98. See *Gorman v. Univ. of R.I.*, 837 F.2d 7, 12 (1st Cir. 1988).

99. See Susan D. Friedfel et al., *Circuit Split on Student's Due Process Right to Cross-Examination in Title IX Matters*, NAT'L L. REV. (Aug. 18, 2019), <https://www.natlawreview.com/article/circuit-split-student-s-due-process-right-to-cross-examination-title-ix-matters> [https://perma.cc/8WQV-4NEZ] (noting that a school can forgo cross-examination in lieu of an independent factfinder).

100. *Matthews*, 424 U.S. at 335.

101. See *supra* part II subsection A.

102. See *infra* part II subsection C.

103. See *Matthews*, 424 U.S. at 335.

104. See *id.*

105. For examples, see Friedfel, et al., *supra* note 99.

106. *Id.*

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

line with the proposed rule.¹⁰⁸ In contrast, the First Circuit in *Hadiak v. University of Massachusetts-Amherst* declined to follow the Sixth Circuit's holding in *Doe v. Baum*, instead holding that constitutional due process does not entitle a respondent to directly cross-examine the reporting student in a college disciplinary hearing.¹⁰⁹ The First Circuit reasoned that an institution that chooses to question the reporting student in place of the respondent must "sufficiently probe the credibility of the accuser and the accusations."¹¹⁰ The First Circuit discussed *Doe v. Baum* in its decision, stating that the Sixth Circuit went "one step further than we care to go, announcing a categorical rule that the state school had to provide for cross-examination by the accused or his representative in all cases turning on credibility determinations."¹¹¹ The First Circuit decision in *Hadiak* provides a reasoned rationale for implementing an alternative to cross-examination.¹¹² The contrasting decisions of the First and Sixth Circuits have created confusion in other jurisdictions.¹¹³ Further, they add to the narrative surrounding the proposed rule, though it is yet to be seen whether the ED will take *Hadiak* into consideration.¹¹⁴

Many institutions utilize a hybrid investigative and hearing model to conduct their Title IX investigations.¹¹⁵ For example, this model could involve one staff member conducting an investigation while another conducts a review of that information and offers a resolution; then, if necessary, a hearing is conducted.¹¹⁶ Another suggested method is having written questions exchanged between the parties,¹¹⁷ which can achieve the goal of protecting a respondent's right to due process by allowing him to question his accuser, while at the same time preventing any unnecessary harm

108. *Baum* reflects the proposed rule by holding that the respondent is entitled to cross-examination. *See id.* at 578; Nondiscrimination on the Basis of Sex, *supra* note 3, at 61474.

109. *See* 933 F.3d 56, 71 (1st Cir. 2019).

110. *Id.* at 70–71; *see also* Friedfel, et al., *supra* note 99.

111. *Hadiak*, 933 F.3d at 69.

112. *See id.*

113. Friedfel, et al., *supra* note 99.

114. *Id.*

115. ASS'N FOR STUDENT CONDUCT ADMIN., *supra* note 23, at 16.

116. *See id.*

117. *See* Ass'n of Indep. Colls. Comment, *supra* note 8, at 6.

that could befall the victim.¹¹⁸ Similarly, another common method involves the respondent submitting interrogatories to a hearing board, which then reviews the questions and gives them to the reporting student and her advisor.¹¹⁹ This method allows for separation between the parties and for the reporting student to be able to answer in writing, rather than in a high-stress hearing proceeding. The hybrid model allows for the appropriate accommodations to be made for both parties, who are at risk of experiencing a great deal of trauma throughout the disciplinary proceedings.¹²⁰ The First Circuit decision in *Hadiak* supports the idea that universities may satisfy the requirements of the Constitution by using the hybrid method of asking the reporting student questions, so long as the university "reasonably probe[s] the testimony tendered against [the accused]."¹²¹

C. Cross-Examination May Re-traumatize Reporting Students and Deter Future Complainants from Coming Forward

Sexual assault victims do not all report in the same manner.¹²² Sexual assault victims may bring their allegations to either the university's Title IX office, the criminal justice system, or both.¹²³ Some victims do not want to seek any remedy for the wrong done to them. Other victims prefer to go through their university Title IX adjudication procedures, and may request to have the accused removed from any shared classes, dorm buildings, or from the

118. See Emily R. Dworkin et al., *Sexual Assault Victimization and Psychopathology: A Review and Meta-analysis*, 56 CLINICAL PSYCHOL. REV. 65, 68, 76, 79 (2017). This meta-analysis suggests that victims of sexual assault are at higher risk for substance abuse, anxiety, depression, and suicidality. *Id.* at 68. Thus, the alternative methods suggested can decrease the chances of a victim suffering additional trauma.

119. See, e.g., *Hadiak v. Univ. of Massachusetts*, 933 F.3d 56, 70 (2019) (suggesting that universities may satisfy due process by questioning the reporting student themselves, rather than allowing cross-examination).

120. See Brian A. Pappas, *Dear Colleague: Title IX Coordinators and Inconsistent Compliance with the Laws Governing Campus Sexual Misconduct*, 52 TULSA L. REV. 121, 136–137 (2016). The informal nature of the hybrid model gives institutions the ability to accommodate the multifaceted nature of the investigation process for all parties. See *id.* at 137.

121. See *Hadiak*, 933 F.3d at 70.

122. Mann, *supra* note 6, at 639.

123. See *id.*

school entirely.¹²⁴ Thus, a sexual assault victim has multiple avenues of redress from which she can choose to best fit the situation and presumably limit any trauma she may suffer going forward.

The mandate that cross-examination be permitted could re-traumatize the victim during proceedings, especially in cases where the parties are represented by zealous advocates.¹²⁵ The proposed rule allows the respondent's advisor to directly cross-examine the victim.¹²⁶ If the accused wishes to have a parent act as his advisor, there is a possibility that the parent will be too hostile during cross-examination because the parent's interests are so closely tied to the proceeding's outcome against their child.¹²⁷ That situation could lead to questioning that goes beyond the scope of what should be asked under cross-examination and may undermine the primary objectives of rape shield laws, as it is unlikely that the university decision-maker in the hearing will be able to control the parties in the same manner as a judge.¹²⁸ The university will have to manage the advocates and determine whether particular advocates should be allowed to participate in the proceedings. Further, because university hearing boards are not courts of law, they do not have subpoena power and cannot hold anyone in contempt. Such lack of authority creates a risk that the reporting student will endure more trauma during cross-examination in a school hearing than in a court of law.

The proposed rule states that complainants will be "safeguarded" against "invasion of privacy, potential embarrassment and stereotyping" by the rape shield protections afforded by Rule 412 of the Federal Rules of Evidence.¹²⁹ In the federal court system, Rule 412 is employed to protect victims of sexual assault from questions under cross-examination that are "offered to prove that a victim engaged in other sexual behavior" or "to prove a victim's sexual predisposition."¹³⁰ Many states have similar "rape shield laws" to protect victims of sexual assault

124. *See id.* at 640.

125. *See* Ass'n of Indep. Colls. Comment, *supra* note 8, at 7.

126. *See* Nondiscrimination on the Basis of Sex, *supra* note 3, at 61474.

127. Am. Council on Educ. Comment, *supra* note 8, at 10.

128. *See id.*

129. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61476.

130. FED. R. EVID. 412(a).

during trial.¹³¹ The goal of Rule 412 and state rape shield laws is to avoid victim re-traumatization.¹³² As such, the defendant generally cannot ask the victim about his or her sexual relations outside of the incident involved in the complaint.¹³³ Therefore, only a few specific instances which might otherwise be relevant will be excluded from evidence under Rule 412. But, Rule 412 can only go so far in protecting victims of sexual assault because in *criminal* cases where the exclusion of evidence would violate the defendant's due process rights, the evidence may be admitted.¹³⁴ In addition, Rule 412 has different standards regarding admissibility of evidence in criminal and civil cases; thus, there will likely be confusion at universities as to what standard should be used to determine the exclusion of evidence of prior sexual behavior or sexual predisposition.¹³⁵ If universities do not implement Rule 412, victims will not have adequate protection against traumatic questioning.

Historically, institutions have not been required to follow evidentiary rules in disciplinary proceedings.¹³⁶ As long as institutions have not specified in their university handbook or other policies that the rules of evidence apply, they have the discretion to admit or exclude evidence as they see fit.¹³⁷ Given that most colleges and universities have traditionally not formally adhered to the Federal Rules of Evidence, it is highly unlikely that they are going to be able to correctly make difficult evidentiary rulings, particularly in regards to Rule 412, which the proposed rule requires institutions to follow.¹³⁸ As a result, cross-examination will be significantly more difficult to implement than the ED suggests.¹³⁹ Schools will find it difficult to maintain the delicate balance of making the proper evidentiary rulings and assessing the

131. See, e.g., 11 R.I. GEN. LAWS § 11-37-13 (1956); COLO. REV. STAT. § 18-3-407 (2017).

132. See FED. R. EVID. 412.

133. See *id.*

134. See FED. R. EVID. 412(b)(1)(C).

135. See *id.* 412(b)(1)–(2).

136. See *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 381 (Mass. 2000).

137. See *id.*

138. Nondiscrimination on the Basis of Sex, *supra* note 3, at 61476.

139. See Ass'n of Indep. Colls. Comment, *supra* note 8, at 3–4; see also Am. Council on Educ. Comment, *supra* note 8, at 8–9.

credibility of witness.¹⁴⁰ In criminal law, judges have a legal education, years of experience as attorneys, and time behind the bench to help them to make proper rulings to maintain that balance.¹⁴¹ Universities—no matter how much time and effort they put into training their staff—will not be able to properly preside over hearings with the skill and discretion of judges.¹⁴² University staff may be able to offer support to victims but "are colleges really suited or equipped to judge whether a student committed rape?"¹⁴³ The reporting students are harmed the most when the universities are unable to properly manage hearings because the institution will not be able to protect them from traumatic lines of questioning.¹⁴⁴

Sexual assaults are already substantially underreported.¹⁴⁵ Historically, sexual assault cases turn into a "he said, she said" battle. Potential reporters of sexual assault fear that they will be blamed for the assault, as their assailant claims that the sexual intercourse was consensual.¹⁴⁶ The "he said, she said" only worsens when alcohol is involved and one or both parties lacks memory of some of the events. On college campuses especially, alcohol is involved in many sexual assault claims.¹⁴⁷ Research shows that survivors who do not seek help report greater psychological distress

140. See Lisa Tenerowicz, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 680–81 (2001).

141. *Demography of Article III Judges, 1789-2017*, FED. JUD. CTR. <https://www.fjc.gov/history/exhibits/graphs-and-maps/age-and-experience-judges> [<https://perma.cc/4YDX-BE6K>] (last visited Feb. 27, 2020).

142. Robin Wilson, *Should Colleges Be Judging Rape?*, CHRON. HIGHER EDUC. (April 15, 2015), https://www.chronicle.com/interactives/assault_judging [<https://perma.cc/VM9A-YRBY>].

143. *Id.*

144. See Ass'n of Indep. Colls. Comment, *supra* note 8, at 7.

145. Chiara Sabina & Lavina Y. Ho, *Campus and College Sexual Victim Responses to Sexual Assault and Dating Violence: Disclosure Service, Utilization, and Service Provision*, 15 TRAUMA & ABUSE 201, 203 (2014). For example, studies have shown that reporting to police varied from 0–12.9% and reporting to campus authorities or other formal resources varied from 0–15.8%. *Id.*

146. Claire R. Gravelin et al., *Blaming the Victim of Acquaintance Rape: Individual, Situational, and Sociocultural Factors*, FRONTIERS PSYCHOL., Jan. 2019, at 1, 1.

147. See Antonia Abbey et al., *Alcohol and Sexual Assault*, 25 ALCOHOL RES. & HEALTH 43, 43–44, 45–48 (2001).

and symptoms of depression and PTSD.¹⁴⁸ Therefore, Title IX regulations should have a primary objective and effect of encouraging reporting so institutions can achieve their principal purpose of creating a safe educational atmosphere for all their students.¹⁴⁹

There is a great likelihood that requiring complainants to participate in live hearings and subject themselves to cross-examination will deter future complaints.¹⁵⁰ Cross-examination is adversarial and likely to be intimidating and embarrassing. Rule 412 cannot protect the reporting student from being intimidated or embarrassed outside of the scope of the rule.¹⁵¹ Therefore, cross-examination has a strong potential to be unnecessarily adversarial in the educational context, where there are other available processes that are not as traumatic to the reporting student or as likely to deter the student from utilizing the institution's disciplinary process.¹⁵²

CONCLUSION

Colleges and universities should not be required to hold live hearings and conduct cross-examination of witnesses during Title IX disciplinary proceedings. The ED is disillusioned in believing that cross-examination will by itself secure for respondents the current Administration's idea of due process rights. The ED can implement other procedures that are less adversarial and re-traumatizing than cross-examination. Irreparable harm will be brought upon colleges and universities throughout the nation because students will be discouraged from bringing complaints forward, in fear of judgment and shame. Furthermore, conducting proper cross-examination requires complex evidentiary rulings which in turn require legal experience and training, with which

148. Courtney E. Ahrens et al., *To Tell or Not to Tell: The Impact of Disclosure on Sexual Assault Survivors' Recovery Violence and Victims*, 25 *VIOLENCE & VICTIMS*, 631, 642 (2010).

149. *Background & Summary of the Education Department's Proposed Title IX Regulation*, U.S. DEP'T EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf> [<https://perma.cc/KQ2S-ZBXS>] (last visited Feb. 27, 2020).

150. See Mann, *supra* note 6, at 657.

151. See FED. R. EVID. 412.

152. Mann, *supra* note 6, at 657.

Title IX hearing board members are generally not equipped. It remains unknown whether the final rule will mirror the proposed rule. If the final rule is not significantly adjusted, colleges will be greatly burdened and complainants will be discouraged from reporting assaults, thus further promoting a culture where victims are silenced.