FACE.

Families Advocating for Campus Equality

CALL TO ACTION:
SUBMITTING COMMENTS ON POTENTIAL CHANGES TO TITLE IX RULES

The following sections provide background information on the Department of Education's Office for Civil Rights' (OCR) rationale for specific sections of the 2020 Title IX Regulations (Rules). These transformative Rules were issued through a rulemaking process that considered all perspectives and "generated more public participation than any other rulemaking in Title IX history."[1]

The information provided below is neither exhaustive nor is it necessary for you to consider or even read in submitting your comments to OCR. Its purpose is only to provide context and suggestions should you need inspiration or require information about the applicable Rules. The footnotes provide additional resources, court decisions, and more detailed explanations you may find helpful.

The issues and Rules are listed below in the order in which we believe to be their importance. However, it is often most impactful to focus on those issues that most affected you or your student's Title IX experience, and/or policies or procedures that would have generated a more accurate or equitable result.

RULES COVERED

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

1. LIVE HEARINGS §106.45(b)(6)(i):

At post-secondary institutions,[2] *the Rules call for a live (not public) event where the parties and decision-makers can see and hear each other while questions are asked and answered in real time.*

There is considerable opposition to this and other Rules, particularly by victim advocates. Some argue the procedures required by the Rules are burdensome, could be traumatic for a complainant, and will deter their reporting. Others insist detailed rules are unnecessary because wrongful allegations are extremely rare and the disciplinary process is merely "educational," not adversarial.

At least one court has disputed the argument that a Title IX disciplinary process is not adversarial:

> [A] member of the Hearing Panel[] told me . . . he views this as an "educational" process for the student, not a punitive one. This testimony is not credible. Being thrown out of school, not being permitted to graduate, and forfeiting a semester's worth of tuition is "punishment" in any reasonable sense of that term.[3]

In fact, OCR took great care to listen to victim advocate concerns, and, as explained in the next few sections below, minimize any potential trauma that may be suffered when parties are questioned by advisors during a live hearing.

2. CROSS-EXAMINATION §106.45(b)(6)(i):

a. With several limitations

The Rules strive to treat both parties in a Title IX dispute equally. To that end, the Rules require schools to permit "cross-examination" in real time on behalf of both the complainant and the respondent. However, several constraints limit the process to what would be more accurately characterized as "verbal questioning":

*(1) Questions must be asked by a party's "advisor." **§106.45(b)(6)(i)**;*

*(2) Questions must be pre-approved by a school official before they are asked. **§106.45(b)(6)(i)**;*

*(3) Schools have the discretion to otherwise restrict an advisor's participation. **§106.45(b)(5)(iv)**; and*

*(4) Parties must be allowed to be in separate locations, provided they and decision-maker(s) can see and hear each respond to their questions. **§106.45(b)(6)(i)**.*

*In effect, subsections **(b)(6)(i)** and **(b)(5)(iv)** act together to limit an advisor's irrelevant, aggressive, or offensive questioning:*

> [T]hose conducting the hearing must screen each cross-examination question to ensure that it is both relevant and civilly presented. Almost all questions about either party's prior sexual behavior are off-limits. Those who conduct the hearing must follow their state's rape shield laws and respect the confidentiality of the parties' health and education records.[4]

Although victim advocates would have us believe this "cross-examination" is equivalent to the adversarial process seen in a courtroom, the above limitations and accommodations undermine any such comparison.

Even so, FACE fully supports the requirements that questions be asked by a party's advisor, as well as the Rule that parties can choose to be in different rooms and visible only by video. These limitations may improve the effectiveness of questioning while lessening the likelihood the parties will be traumatized by being questioned.

b. Consistent with case law

The Rule's cross-examination mandate is consistent with preexisting case law in several jurisdictions in which courts have held schools must facilitate some form of cross-examination when the credibility of the parties is at issue.[5] *Cross-examination is particularly essential in the Title IX sexual misconduct context because credibility*

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[2] Elementary through secondary schools "may, but need not" hold live hearings with cross-examination. *§106.45(b)(6)(ii).*

[3] *Doe v. Univ. of Notre Dame*, No. 3:17-cv-298, 2017 WL 1836939, at *34-35 (N.D.Ind. May 8, 2017), *vacated by request of the parties after settlement*, No. 3:17-cv298, 2017 WL 7661416 (N.D.Ind. Dec. 27, 2017).

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

[5] *Doe v. Baum (Univ. of Mich.)* 903 F.3d 575, 578 (6th Cir. 2018); *Powell v. Montana State Univ.*, No. 2:17-cv-15 SEH, Docket 134, p. 21 (MT Dec. 21, 2018) ("[i]f a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399-402 (6th

usually is the predominant – if not the only - issue in these typically two-party disputes.

c. Ineffectiveness of written questions

Prior to the Rules, many schools allowed a party's questions to be asked only by an investigator who interviewed each party separately. This practice eliminated the opportunity for decision-maker(s) to observe their responses and make credibility assessments.[6] *Importantly,* ***§106.45(b)(6)(i)*** *expressly permits the parties' advisors to ask questions that challenge a party's credibility; only when questions are asked in real time and in decision-makers' presence are decision-makers able to observe a witness's demeanor and thereby assess their credibility.*

There has been and will continue to be significant opposition to this Rule. Opponents will suggest schools must be permitted to have parties submit written questions in advance to be asked only by a school official. Unfortunately, under that practice FACE students frequently encountered situations in which some or all of their submitted questions were never asked or were reworded to undermine their effectiveness. Even when responses may have revealed a witness's faulty memory or possibly false testimony, follow-up questions were ignored.

According to one court, such a process inhibits respondents' ability to defend themselves: [7]

> That all questions must be proposed in writing and are asked of witnesses only at the discretion of the Hearing Panel does not permit a robust inquiry in support of a party's position. The stilted method does not allow for immediate follow-up questions based on a witness's answers and stifles John's presentation of his defense to the allegations.[8]

Because school officials understandably are reluctant to ask difficult questions of complainants (even though they owe a duty of care to both parties), our experience shows that pre-submitted written questions are never an effective alternative to cross-examination, especially when a school official has the unbridled discretion to refuse to ask them.[9]

d. Weighing the respective interests

In weighing the school's burden of providing cross-examination, the U.S. Sixth Circuit Court of Appeals has recognized that, in comparison to the risks of an erroneous finding of responsibility on the life of a respondent, "providing Doe a hearing with the opportunity for cross-examination would have cost the university very little." [10]

Of course, both parties are entitled to their education, and their respective interests also must be weighed. Here, on one side we have the potential destruction of a respondent's life, career goals, and the resulting trauma. On the other hand, we have the requirement that a complainant answer questions about his/her allegations from a remote location by video to minimize any trauma. In weighing these burdens, we are confident this Rule successfully provides a practical, balanced solution.

Cir. 2017) ("[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser."); *Doe v. Univ. of Southern Calif. (USC),* 28 Cal.App.5th 26 (2nd Appl. Dist., Div. 7, 2018) (granting Doe's writ because private university did not allow cross-examination during Title IX disciplinary proceeding); *Doe v. Claremont McKenna Coll.*, 25 Cal.App.5th 1055, 1070 (2nd Appl. Dist., Div. 1, 2018) (same); *Doe v. the Univ. of Colo., Boulder*, No. 1:18-cv-02243-LTB, 2019 WL 764568, *15 (D.Colo. Feb. 21, 2019) (refusal to dismiss due process claim because "lack of a full hearing with cross-examination provides evidence" supported that claim.); *Oliver v. Univ. of Tx. Southwestern Med. Sch.*, No. 3:18-CV-1549-B, 2019 WL 536376, *13 (N.D.Tex. Feb. 11, 2019) (refusing to dismiss due process claim in part because university did not provide Doe with an opportunity to cross-examine accuser in "live hearing."); *Doe v. Univ. of Mich.*, 325 F.Supp.3d 821, 828-29 (S.D.Mich. July 6, 2018); *Doe v. Marymount Univ.*, 297 F.Supp.3d 573, 584 (E.D.Va. Mar. 14, 2018) (refusing to dismiss private school Title IX claim in part because Doe was denied right to cross-examine accuser); *Doe v. Alger (James Madison Univ.)*, 228 F.Supp.3d 713, 730 (W.D.Va. 2016).

[6] This should be distinguished from the 'single investigator model' discussed in section 4., in which the investigator also acts as a decision-maker.

[7] Though they are fewer in number than males, FACE has been contacted by female as well as LGBTQ+ respondents.

[8] *Doe v. Univ. of Notre Dame,* 2017 U.S. Dist. LEXIS 69645, p. 25 (N.D.Ind. May 8, 2017) (using original court-filed version), *vacated by request of the parties after settlement in Doe v. Univ. of Notre Dame*, 2017 WL 7661416 (N.D.Ind. Dec. 27, 2017).

[9] *Doe v. Baum (Univ. of Mich.),* 903 F.3d 575, 582 (6th Cir. 2018) ("written statements cannot substitute for cross-examination."); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401–02 (6th Cir. 2017) (complainant did not appear; requiring accused to submit questions through investigator or decision-makers was insufficient).

[10] *Doe v. Baum (Univ. of Mich.)* 903 F.3d 575, 582 (6th Cir. 2018); *see* also, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400, 403 (6th Cir. 2017) ("finding of responsibility for a sexual offense can have a lasting impact on a student's personal life, in addition to educational and employment opportunities") (internal quotation marks and citations omitted).

3. PARTICIPATION OF ADVISORS §106.45(b)(5)(iv):

a. Importance of advisors

This Rule requires that a student's "advisors" be permitted to attend all interviews, meetings, and hearings. The importance of this Rule cannot be overstated. As we at FACE know, before the Rules were issued respondent advisors were known as "potted plants" because they often were forbidden to speak at all even to their clients, and, as a result, were unable to help represent the respondent's interests.[11]

> [T]he accused student is essentially on his own. The actual presentation of the student's side of the case is left to the student himself, but with severe limitations. As noted, while he is permitted to have a lawyer or advisor present, those folks can't really do anything. They can't talk with the accused; they can't ask questions; they can't even pass notes to the accused. They are only permitted to consult with the students during breaks, given at the Hearing Panel's discretion.[12]

Most college and university students have no idea whether or how to collect evidence, secure witnesses, or access and review the school's evidence against them - and, in any event, they believe their school will treat them fairly and fully represent their interests as well as the complainant's. During a hearing, the Rhode Island district court succinctly expressed the respondent's predicament:

> He's a junior in college without a right to counsel, without a list of what he can and can't do. How is he supposed to know he's supposed to bring the witnesses in?[13]

A Massachusetts district court similarly criticized Amherst's treatment of a respondent because no one had "advised him to conduct his own investigation," and in fact, the respondent "believed a confidentiality policy prevented him from" doing so "or even seeking emotional support from other students." [14]

b. It's no longer academic

This Rule is also consistent with developing case law, as more and more courts recognize school disciplinary cases are no longer limited to academic issues. For example, a district court in Colorado found the respondent had sufficiently pled a due process claim "given the fact that the conduct of which he was accused in his University proceeding could also give rise to possible criminal culpability":

> More recently, it appears that the overwhelming majority of academic discipline lawsuits arise from sexual misconduct allegations that in most cases could also be the basis of a felony prosecution. There is a fair question, not addressed by Defendant, whether this context—wherein a plaintiff is accused of conduct which may form the basis for criminal prosecution—changes the *Mathews v. Eldridge* calculus in a manner requiring more than minimal notice and an opportunity to respond. Indeed, the Supreme Court's classic statements about due process emphasize the need for "notice and opportunity for hearing appropriate to the nature of the case"[15]

Similarly, the U.S. Seventh Circuit Court of Appeals found the respondent had "pleaded facts sufficient to state a claim under both the Fourteenth Amendment and Title IX," and remanded the case to the district court,[16] *in part because*

> John's circumstances entitled him to relatively formal procedures: he was suspended by a university rather than a high school, for sexual violence rather than academic failure, and for an academic year rather than a few days. Yet Purdue's process fell short of what even a high school must provide to a student facing a days-long suspension."[17]

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[11] Note that it is unlikely for complainants to be equally prejudiced by silent advocates, as explained in section 3.c., below.

[12] *Doe v. Johnson & Wales Univ.,* No. 1:18-cv-00106 (D.R.I. May 14, 2018) *Transcript of Motion to Dismiss Hearing* at 26-27.

[13] *Id.*

[14] *Doe v. Amherst Coll.*, 238 F.Supp.3d 195, 212 (D.Mass. 2017). The latter was the result of schools' practice of issuing 'gag orders.'

[15] *Doe v. DiStefano (Univ. of Colo., Boulder),* 18-cv-1462, 2018 WL 2096347 (D.Colo. May 7, 2018); *see also, Oliver v. Univ. of Texas-Southwestern Med. School,* 18-cv-1549 (N.D.Tex. Feb. 11, 2019) ("What is known to be 'clearly established' law . . . is that students who face permanent expulsion for misconduct violations are owed more formalized and stringent process than what the Supreme Court held was required . . . where a 'student is also facing criminal charges stemming from the incident in question' representation by counsel is necessary"); *see also*, *Flaim v. Medical College of Ohio*, 418 F. 3d 629 (6th Circuit 2005) ("Because Flaim's case is a disciplinary expulsion, rather than an academic one, we conduct a more searching inquiry.")

[16] *Doe v. Purdue Univ.,* 928 F. 3d 652, 670 (7th Cir. June 28, 2019).

[17] *Id.,* at 663.

c. Asymmetry Runs Both Ways

At least one Title IX consultant has claimed "[t]here's this huge asymmetry between male responding parties who can afford lawyers and female reporting parties who can't." [18] *This is a spurious assumption; a large percentage of FACE students are from middle class, minority, and underserved communities and unable to afford even the most basic attorney representation. There is no basis to believe complainants are any less able to afford an attorney.*

On the other hand, even without the assistance of an attorney, the complainant effectively is represented by experienced school administrators, and in some cases, the school's general counsel may be present or serving in an advisory role. A California appellate court noted this exact disparity in both support and expertise in a case at University of California at Santa Barbara (UCSB):

> Moreover, John's counsel was not allowed to actively participate in the hearing . . . The Committee, however, permitted UCSB's general counsel to actively participate and to make formal evidentiary objections. This unfairness is magnified when UCSB's general counsel is allowed to make formal evidentiary objections . . . A student, whose counsel cannot actively participate, is set up for failure because he or she lacks the legal training and experience to respond effectively to formal evidentiary objections.[19]

It is thus especially critical that respondents have an advisor who is able to communicate with, guide them in acquiring evidence and witnesses, and speak on their behalf at interviews, meetings, and hearings. As the California appellate court recognized in the UCSB case, most students are young and unsophisticated in mounting a defense, and many are not even aware of the need to do so.

d. Limitations

In accommodating victim advocate concerns, OCR included ***§106.45(b)(5)(iv),*** *allowing a school to "establish restrictions" on an advisor's participation, as long as any restrictions apply to both parties. This caveat is reasonable, provided the authority to restrict an advisor's participation is exercised judiciously.*

Unfortunately, the required pre-approval of questions by a decision-maker discussed above ***(§106.45(b)(6)(i))****, together with the decision-maker's ability to restrict the advisor's participation, may negate the necessary spontaneity of cross-examination. Further, whether the question is asked at all relies solely upon the school official's neutrality in interpreting the question's relevance.* [20]

It remains to be seen whether schools will take advantage of these limitations to the extent students are unreasonably denied the assistance of their advisors. The parties must be permitted to consult with advisors during all interviews, meetings, and hearings. Advisors also must be able to question witnesses on their behalf, and ensure their positions are fully represented. Consequently, it's important that we strongly oppose any limitations or disparity in a respondent's access to expert assistance.

4. SINGLE INVESTIGATOR §106.45(b)(7)(i):

a. Important prohibition

This section prohibits schools' use of what is known as a 'single investigator model,' in which one Title IX official both investigates and determines, recommends, or participates in a responsibility decision. The Rule's prohibition is meant to prevent confirmation bias and is consistent with several court decisions.[21]

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[18] Andrew Kreighbaum, *New Uncertainty on Title IX,* Inside Higher Ed (Nov. 20, 2018), *quoting* Brett Sokolow, president of The Association of Title IX Administrators (ATIXA), https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say .

[19] *Doe v. Regents of Univ. of Calif. (UCSB),* 28 Cal. App. 5th 44, 59-60, (2nd Appl. Dist., Div. 6, Oct. 9, 2018).

[20] Section 106.45(b)(6)(i) unhelpfully provides that advisor must be permitted to question a party "notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings . . ."

[21] *Doe v. Univ. of Mich.*, 325 F.Supp.3d 821, 828 (E.D.Mich. July 6, 2018) ("private questioning through the investigator," deprived respondent "of a live hearing and the opportunity to face his accuser."); *Doe v. Penn. State Univ.*, 336 F.Supp.3d 441, 449 (M.D.Pa. Aug. 21, 2018) (insufficient that investigator had "filtered," "paraphrased," and "directed some questions from Mr. Doe to Ms. Roe during the interviews," because it was "unclear whether any of Mr. Doe's questions went unasked or unanswered, and

The exclusion of a single investigator model is extremely important to respondents and we strongly support this Rule. One court found "obvious" the "dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review." [22] *This is especially relevant because before the Rules, "[a]bout one-third of the schools targeted by OCR [had] adopted" the single investigator model.*[23]

b. Precludes credibility assessment

The single investigator model clearly precludes the ability of either the decision-maker(s) or the opposing party's advisor to discover inconsistencies, observe a witness's demeanor, or assess credibility. And though the investigator may ask questions of one party that were proposed by another, there is no opportunity for either party to know:

(1) what initial or follow-up questions were asked by the investigator,

(2) the manner in which those questions were asked, or

(3) whether and how the other party responded.[24]

A Pennsylvania district court found this method unacceptable, because testimony against the respondent was "filtered" by the investigator, appeared "only in paraphrased form, with virtually no actual quotes," and "no indication of how" the statements had been edited.[25] *The single investigator model prohibition must remain in effect.*

5. NOTICES §106.45(b)(2)(i)(A); (b)(2)(i)(B); (b)(5)(v):

a. Notice before any interview

The Rules require a school to provide written notices to parties at every stage of the process, including detailed notice of the allegations. ***(b)(2)(i)(B).*** *Case law supports the additional notice requirements of this section.*[26]

b. Details required

Notices must provide specific details such as "the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment . . . and the date and location of the alleged incident." ***(b)(2)(i)(B).***

c. Adequate time to prepare

According to subsection ***(b)(5)(v)****, schools also must provide "written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate." This important provision precludes the not infrequent practice of investigators interrogating students before they are aware of the allegations against them, a situation with which FACE students have been confronted, but that courts thankfully have found unacceptable.*[27]

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unclear whether (or how) those questions were rephrased."); *Doe v. Claremont McKenna Coll.,* 25 Cal.App.5th 1055, 1072-73 (2nd Appl. Dist., Div. 1, 2018) (*all* decision-makers "must make credibility determinations, and not simply approve the credibility determinations of the one Committee member who was also the investigator."); *Doe v. Miami Univ.,* 882 F.3d 579, 601, 605 (6th Cir. Feb. 9, 2018) (court found "legitimate concerns" raised by the investigator's "alleged dominance on the three-person [decision making] panel," because "she was the only one of the three with conflicting roles.")

[22] *Doe v. Brandeis Univ*., 177 F. Supp. 3d 561, 573 (D.Mass. 2016).

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

[24] *Doe v. Univ. of Mich.,* 325 F.Supp.3d 821, 828 (E.D.Mich. July 6, 2018) (E.D.Mich. July 6, 2018).

[25] *Doe v. The Penn State Univ. (III),* 336 F. Supp. 3d 441, 450 (M.D.Pa. Aug. 21, 2018).

[26] *Doe v. Univ. of Southern Calif.,* 246 Cal.App.4th 221, 248 (2nd Appl. Dist., Div. 5, 2016) (failure to provide notice of charges, access to evidence, opportunity to be heard before decision-makers); *Doe v. Quinnipiac Univ.,* 404 F.Supp.3d 643, 650-51 (D.Conn. July 10, 2019) (inadequate time to review evidence before hearing); *Doe v Brown Univ*., 166 F.Supp.3d 177, 195 (D.R.I. Feb. 22, 2016) ("Again, 'reasonable length of time' is vague, yet the Court finds that Plaintiff's allegation that he was given only four days to respond to 80 pages of evidence, including medical records, may be a breach of this term.").

[27] §106.45 (b)(2)(i)(B). *Doe v. Univ. of Mississippi*, 361 F.Supp. 597 (S.D.Miss. Jan. 16, 2019) (accused not provided with specifics regarding allegations); *Doe v. Rector and Visitors of George Mason Univ.,* 149 F.Supp.3d 602 (E.D.Va. Feb. 25, 2016) (institution failed to provide sufficient notice of all factual allegations).

6. ACCESS TO EVIDENCE §106.45(b)(5)(iii), (vi), (vii):

a. Inculpatory and exculpatory access

Prior to the Rules, parties routinely were denied or given very limited access to evidence and witness statements, including the statement of their accuser.[28] *If a student was permitted to review evidence, a common practice was for schools to require the review to occur in a school location under the watchful eye of a school official who would preclude the student from obtaining copies, taking photos, and sometimes even from taking copious notes.*[29] *This was not only indisputably unfair, in a supposed search for the truth it was nonsensical.*

The current Rule requires students to be informed of and permitted to access all evidence "directly related to the allegations," though it neglects to explain what "directly related" encompasses. ***§106.45(b)(5)(vi).*** *And importantly, this Rule requires disclosure of both inculpatory and exculpatory evidence, whatever its source and whether or not the school intends to use that evidence.* ***(b)(5)(vi)****.*

b. Investigation report required

The Rules also helpfully require the school to create and disseminate to the parties a thorough investigative report at least ten days before any hearing. ***(b)(5)(vii).*** *It's helpful that subsection* ***(b)(5)(iii)*** *requires a school to "ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence."* ***(b)(1)(iii).***

Both the Rules and case law now mandate the disclosure to the parties of all school-acquired evidence.[30] *It's critical that respondents, in particular, continue to have access to evidence to allow them to respond fully to allegations of sexual misconduct.*

7. SEX DISCRIMINATION §106.45(a); BIAS (b)(1)(iii); EQUAL TREATMENT (b)(1)(i), (iii):

According to these Rules, parties must be treated equitably and without discrimination regardless of their sex or status as a complainant or respondent. The Rules and are "designed to restore or preserve [the parties'] equal access to the recipient's education program or activity." ***(b)(1)(iii)****. Section* ***106.45(a)*** *provides that unfair treatment of a respondent, whatever their sex or gender, may "constitute discrimination on the basis of sex under Title IX."*

These provisions are consistent with case law that has found the differential treatment of similarly-situated students of different genders (along with other indicia of bias), could constitute sex discrimination, as the Second Circuit Court of Appeals concluded:

> Against this factual background, it is entirely plausible that the University's decision-makers and its investigator were motivated to favor the accusing female over the accused male, to protect themselves and the University from accusations that they had failed to protect female students

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[28] *Doe v. The Penn State Univ. (III),* 336 F. Supp. 3d 441, 450 (M.D.Pa. Aug. 21, 2018) ("all of the testimony offered in this matter - Mr. Doe's, Ms. Roe's, and the witnesses' - was filtered by Mr. Peters through his Investigative Packet. That testimony appears only in paraphrased form, with virtually no actual quotes, with no indication of how Mr. Peters edited the individuals' statements").

[29] *See,* for example, *Doe v. Alger (James Madison Univ.)*, 175 F.Supp.3d 646, 651 (W.D.Va. 2016) (court did not specifically hold the conditions under which the student was forced to review evidence for his appeal were inadequate, but in a later decision found "there were significant anomalies in the appeal process that show, especially when viewed collectively, that Doe was denied a meaningful opportunity to be heard during the appeal." 228 F. Supp. 3d at p. 731. A federal magistrate later recommended an award of $850,000 in attorney's fees on behalf of the accused student, later lowered by the district court to $574,180.03. *Doe v. Alger,* No. 5:15-cv-35, (W.D.Va. Sept. 27, 2018).

[30] *Doe v. Purdue Univ.,* 928 F. 3d 652 (7th Cir. June 28, 2019) ("withholding the evidence on which it relied in adjudicating his guilt was itself sufficient to render the process fundamentally unfair."); *Doe v. Regents of Univ. of Calif. (UCSB),* 28 Cal. App. 5th 44, 57 (2nd Appl. Dist., Div. 6, Oct. 9, 2018) ("Without access to the complete SART report, John did not have a fair opportunity to cross-examine the detective and challenge the medical finding . . . The accused must be permitted to see the evidence against him. Need we say more?"); *Doe v. Univ. of Southern Calif.,* 246 Cal.App.4th 221, 247 (2nd Appl. Dist., Div. 5, 2016) ("common law requirements for a fair hearing under [CA writ statute] do not allow an administrative board to rely on evidence that has never been revealed to the accused"); *See* also, *Doe v. Rhodes Coll.,* 19-cv-02336 (W.D.Tenn. June 14, 2019) ("Without warning or notice, the Title IX coordinator introduced additional evidence into the proceeding"); *Doe v. Marymount Univ.,* 297 F.Supp.3d 573, 584 (E.D.Va. Mar. 14, 2018) ("significantly, Doe and his attorney were not permitted to take verbatim notes and were not permitted to retain a copy of the [investigation] report.")

from sexual assault.[31]

For example, a Virginia district court refused to dismiss a Title IX claim against a private school in part because the "decision-making was infected with impermissible gender bias, namely [the adjudicator's] discriminatory view that males will always enjoy sexual contact even when that contact is not consensual." [32]

8. PRESUMPTION OF INNOCENCE §106.45(b)(1)(iv); (b)(5)(i); (b)(2)(B):

a. Innocent until proven otherwise

The Rules address the need for accused students to be presumed "not responsible" until evidence has been evaluated and a decision is reached. ***(b)(1)(iv).*** *Subsection* ***(b)(2)(B)*** *requires the school to notify the respondent that he/she "is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process."*

b. School bears burdens

Importantly, subsection ***(b)(5)(i)*** *makes it clear that any burdens of proof and of producing evidence rest solely on the school. Before these Rules some students felt they were forced to prove they had obtained consent to engage in sexual conduct with the complainant. "Believe the victim" and "trauma-informed" policies, such as those discussed in section 20. below, also may result in a presumption of a respondent's guilt.*

c. Decisions can be a neutral

Victim advocates have vehemently opposed any presumption of a respondent's innocence as an unfair advantage in what they believe should be an equal contest. Some also equate a 'not responsible' or 'no finding' decision to the conclusion the complainant is "lying."

Perhaps for these reasons, some school officials have been known to discourage a 'no finding' result or lean toward guilty decisions. But in a case against Boston College, for example, the First Circuit Court of Appeals found the school's policies may have been violated because

> an administrator interfered with the disciplinary panel's deliberations by telling the head of the panel, who indicated that the panel might choose to enter "no finding" (a result which would not have resulted in any discipline) rather than finding Doe "responsible" or "not responsible," that the Dean of Student discouraged panels from choosing "no finding" results.[33]

Though this is an important Rule, it could be difficult to discern when a decision-maker's finding the respondent responsible was due to either bias or a presumption of guilt. Even so, it's important to emphasize that decision-makers must be permitted to arrive at a neutral, "no finding" decision, precisely in cases that present a choice between two competing narratives, and are without independent evidence or witnesses.

9. SUPPORT MEASURES §106.44(a); 106.30, Definitions:

a. Both parties deserve support

These sections of The Rules allow supportive measures to be provided to both parties. Supportive measures may include "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, [and] increased security and monitoring of certain areas of the campus." ***§106.30.***

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[31] *Doe v. Columbia Univ.,* 831 F.3d at 56, 58 (2d Cir. 2016) (reversed lower court, case then settled.) *See* also, *Noakes v. Syracuse Univ.*, 369 F.Supp.3d 397, 415-416 (N.D.N.Y. Feb. 26, 2019) (gender bias sufficiently alleged due to gender-based assumptions by investigators, unwillingness to consider evidence of innocence, failure to question complainant's credibility and disregarding contradictions in her testimony, along with public pressure to more forcibly address sexual abuse.); *Doe v. Johnson & Wales Univ.,* No. 1:18-cv-00106 (D.R.I. May 14, 2018) (in denying the school's motion to dismiss, court could "find no reason at all as to why ... the result was [the accused's] expulsion. The only inference that one could draw from that considering all the facts is that gender played a role."); *Doe v. Alger (James Madison)* 228 F.Supp.3d 713, 730 (W.D. Va. 2016) (same).

[32] *Doe v. Marymount Univ.*, 297 F.Supp.3d 573, 585-86 (E.D.Va. Mar. 14, 2018).

[33] Ana Muñoz, "*Doe v. Boston College*: *The First Circuit Allows an Accused Student's Claims to Proceed to Trial, But Dodges the Big Questions,"* Boston Lawyer Blog (August 6, 2018), https://www.bostonlawyerblog.com/doe-v-boston-college-the-first-circuit-allows-an-accused-students-claims-to-proceed-to-trial-but-dodges-the-big-questions/

The provision of supportive services is important to both parties; complainants, whether or not they file a formal complaint, may desperately need course adjustments, changes in housing, and no-contact orders. Similarly, because respondents might be ejected from campus housing before any finding of responsibility, as well as denied class attendance and isolated from or shunned by friends, they too may be desperately in need of emotional and/or academic support.

b. Courts recognize the trauma of wrongful findings

Few can comprehend the emotional repercussions of an innocent student wrongfully accused of sexual misconduct unless they or someone close to them has had such an experience. The consequences of a Title IX disciplinary proceeding, even if a student is eventually found not responsible can be debilitating.

As a result, the majority of FACE students admit to having considered suicide; these innocent students are bewildered and embarrassed that they could be the target of such a vile accusation, panic-stricken that they could actually be found responsible, and despondent due to a realization that it does not always matter if they "do the right thing"—life can be cruel and their life ruined through no fault of their own.

Courts have recognized the devastation a mistaken finding of responsibility can inflict on a student:

> The Supreme Court has already noted that a ten-day suspension is "a serious event"; Mr. Doe's year-long suspension, therefore, is correspondingly more grievous. And the potential damage to Mr. Doe's reputation is at least equally weighty, if not more so — after all, in addition to a tarnished disciplinary record, he is also facing the stigma of being labeled "responsible" for engaging in nonconsensual sexual intercourse.[34]

A Massachusetts district court acknowledged that a sexual misconduct finding "may permanently scar [a student's] life and career," as he or she would be "marked for life as a sexual predator." [35] *An Indiana court granted the respondent an injunction because the "disciplinary finding—even if determined to have been arbitrary or made in bad faith—would continue to affect him in a very concrete way, likely for years to come."* [36]

Whether schools will provide sufficient supportive measures to respondents to minimize their trauma is, of course, unknown. Even so, part of our narrative should emphasize the significant trauma and academic difficulties suffered by innocent students wrongfully accused and/or found responsible for sexual misconduct.

10. EVIDENCE COLLECTION §106.45(b)(5)(i), (iii), (b)(7)(ii)(B); & DISCLOSURE §106.45(b)(1)(x):

a. School must prove responsibility

The school must bear the burden of collecting evidence and proving the allegations. This is important not just for the burden of proof, but also with respect to evidence collection because some schools' collection of evidence has been selective, and respondent witnesses never interviewed. ***(b)(5)(i).***

b. Privileged information

Importantly, in response to victim advocates' concerns about disclosure of protected evidence to respondents, the Rules preclude unconsented-to access or disclosure of evidence that is privileged, such as "records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional . . . and which are made and maintained in connection with the provision of treatment to the party." ***(b)(1)(x).***

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[34] *Doe v. The Penn State Univ. et al. (III),* 336 F. Supp. 3d 441 (M.D.Pa. Aug. 21, 2018) (citations omitted). *See also*, *Doe v. Brown Univ.,* 166 F. Supp. 3d 177, 184 (D.R.I. 2016) (noting that allegations of campus sexual misconduct are often also "accusations that constitute serious felonies under virtually every state's laws"); *Furey v. Temple Univ.,* 884 F.Supp.2d 223, 247-48 (E.D.Pa. 2012) ("[e]xpulsion denies the student the benefits of education at his chosen school. Expulsion also damages the student's academic and professional reputation, even more so when the charges against him are serious enough to constitute criminal behavior. Expulsion is likely to affect the student's ability to enroll at other institutions of higher education and to pursue a career.")

[35] *Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561, 573, 607 (D.Mass. 2016)

[36] *Benjamin King v. DePauw Univ.,* 14-cv-70, 2014 WL 4197507 (S.D.Ind. Aug. 22, 2014) ("Successfully seeing this lawsuit to its conclusion could not erase the gap or the transfer; the question will still be raised, and any explanation is unlikely to fully erase the stigma associated with such a finding. Money damages would not provide an adequate remedy at that point; DePauw's disciplinary finding—even if determined to have been arbitrary or made in bad faith—would continue to affect him in a very concrete way, likely for years to come.")

Unfortunately, though the affirmative obligation to gather evidence is helpful, it alone would not have much impact on the degree to which schools collect or categorize evidence. However, the Rule requiring the school to describe its efforts to collect evidence in its written findings might encourage more effort. ***(b)(7)(ii)(B).***

c. 'Gag orders', etc.

Under the Rules, schools also are precluded from denying a student the opportunity to collect evidence, or under the previously common practice of imposing a "gag order," forbid them to speak with potential witnesses.[37] ***(b)(5)(iii).*** *This prohibition should resolve the difficulty many students experienced, and which one court concluded was unfairness "compounded by the fact that Doe was not permitted to contact the [witness] under JMU's policies and procedures, a prohibition about which he was repeatedly advised and threatened with severe consequences for violating."* [38]

d. Access to all evidence

Finally, as discussed above in section 5. above, under ***§106.45(b)(5)*** *the school has an obligation to disclose and provide access to all evidence collected by the school "directly related to the allegations," whether it tends to show innocence or guilt.*

11. EVIDENCE EVALUATION §106.45(b)(1)(i), (ii):

The Rules require schools to evaluate objectively both inculpatory and exculpatory evidence, and their evaluations cannot be based on a party's sex or status as a complainant or respondent. ***(b)(1)(iii).***

The proper categorization of evidence has been an enormous issue because self-selected groups like victim advocates and those who've been victims themselves are most likely to staff Title IX offices and subscribe to the guilt-presuming 'believe the victim' and 'trauma-informed' policies discussed in section 20., below.

The Rules helpfully require schools to "ensure that decision-makers receive training . . . on issues of relevance of questions and evidence." Regrettably, the Rules provide no standards or definitions to evaluate whether evidence is 'relevant' or reliable, and, as we've seen, this determination can be impacted by victim trauma myths that treat the wider context of the parties' relationship as 'irrelevant' to the alleged incident.[39]

Though subsection ***(b)(1)(ii)*** *specifies evidence must be evaluated objectively, leaving behind their guilt-presuming victim-centered and trauma-informed practices will be challenging for some Title IX officials.*

12. INFORMAL RESOLUTION §106.45(b)(9):

With consent of the parties, the Rules permit mediation or similar processes as an available process to resolve Title IX disputes. Any form of informal resolution of sexual assault cases was forbidden by previous guidance, on the assumption that it would be too traumatic for victims.

Many wrongful Title IX decisions against FACE students over the past several years have involved cases of misremembered or regretted drunken hook-ups; retribution for the end of, or refusal to engage in, a relationship; or used as an excuse for why the accuser had sex, was unfaithful to a partner, is failing classes, or violated religious beliefs.[40] *Because these alleged non-criminal incidents occur in educational environments, schools should respond with education and discussion, rather than the immediate commencement of an adversarial process. After all, education is what schools do best.*

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[37] Section 106.45(b)(3)(iii). This is an important change and one which may be easily enforceable because it is an expressly *prohibited* act, rather than an *affirmative* obligation.

[38] *Doe v. Alger (James Madison Univ.)*, 228 F. Supp. 3d 713, 731 (W.D.Va. 2016). A federal magistrate later recommended an award of $850,000 in attorney's fees on behalf of the accused student, lowered by the district court to $574,180.03. *Doe v. Alger,* No. 5:15-cv-35, (W.D.Va. Sept. 27, 2018).

[39] For example, by disregarding any consensual sex that occurred for months after the alleged sexual misconduct. Of course it is true that domestic violence victims may continue a sexual relationship or communication with their abuser despite the abuse. The difference here is between properly evaluating this fact as evidence and, under trauma-informed theories, discarding it as 'irrelevant' due to the mere *possibility* it is the result of trauma.

[40] Indeed, at FACE we've had cases where allegations were made after Christian, Muslim, and Mormon parents discovered their daughter had sexual relations.

13. FORMAL COMPLAINT §106.30:

a. Complainant retains control

To obligate a school to begin a Title IX process, the Rules require it have actual knowledge via a formal, signed complaint filed with an appropriate school official by a complainant "participating in or attempting to participate in the education program or activity of the recipient."

This is another rule subject to much controversy. Its intent was to stem the tide of cases in which Title IX proceedings were pursued by a Title IX official or third party, despite and even in opposition to the alleged victim's wishes. The requirement of a formal complaint and an express decision to begin a grievance process attempts to remedy these situations.[41]

This Rule would have protected students like Zoe Katz at the University of Southern California, whose insistence that she was not a victim was ignored by the Title IX office; though Katz "repeatedly assured campus officials she had not been abused," she was dismayed that "university administrators told her they knew better." [42] *Ms. Katz later reported,*

> "When I told the truth," the young woman said, "I was stereotyped and was told I must be a 'battered' woman, and that made me feel demeaned and absurdly profiled."[43]

The Rule recognizes "the importance of respecting the 'autonomy' of" actual or alleged "targets of sexual harassment by giving them substantial control over when to file an initial report with the Title IX coordinator and whether to take the further step of lodging a formal complaint." [44]

b. Anyone can report misconduct

Finally, this Rule's requirement of a report made only to certain officials to commence the Title IX process is another provision that has generated significant controversy, despite the fact that:

1. *A school may designate as many "mandatory reporters" as it deems necessary.* ***§106.8****;* [45]
2. *A formal report can easily be made by telephone, email, or visit to the Title IX office located on every campus "and by any additional method designated by the recipient."* ***§106.30(a)****;*
3. *"Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment)."* ***§106.8(a)****; and*
4. *Supportive measures must be provided whether or not a formal complaint is filed.* ***§106.30(a).***

The only caveat is that a formal disciplinary process will not commence until a 'formal complaint' has been filed, but supportive measures must be provided in either case. ***§106.30****.*

Nevertheless, victim advocates and others have criticized this Rule as likely to decrease reporting of sexual offenses by deterring complainants from coming forward. Like certain other objections to the Rules, these fears do not seem justified given the above four provisions.

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[41] For example, the cases of Matt Booermeester at University of Southern California (Robby Soave, *Here Is Every Crazy Title IX Rape Case Betsy DeVos Referenced, Plus a Bunch More*, Reason.com (Sept. 7, 2017), https://reason.com/2017/09/07/devos-title-ix-example-cases- rape/), and Grant Neal at Colorado State University, Boulder (Kayla Schierbecker, *Athlete accused of rape by Colorado State – not his sex partner – is getting paid to drop lawsuit*, The College Fix (July 19, 2017), https://www.thecollegefix.com/athlete-accused-rape-colorado-state-not-sex-partner-getting-paid-drop-lawsuit/.)

[42] Robby Soave, *Here Is Every Crazy Title IX Rape Case Betsy DeVos Referenced, Plus a Bunch More*, Reason.com (Sept. 7, 2017), https://reason.com/2017/09/07/devos-title-ix-example-cases- rape/. A California Court of Appeal ruled for the respondent in *Booermeester v. Carry (USC)*, finding that Boermeester had been denied the right to a hearing at which he could cross-examine witnesses when the university sought to expel him over an alleged physical altercation between him and his girlfriend as reported by a third party. *Booermeester v. Carry (USC)*, 49 Cal.App.5th 682 (2nd Dist., Div. 8, 2020) The case is currently on appeal to the California Supreme Court.

[43] *Id.*, Robby Soave, *Here Is Every Crazy Title IX Rape Case Betsy DeVos Referenced . . .*

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

[45] "Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities."

14. ACCESS TO TRAINING MATERIALS §106.45(b)(10)(i)(D):

Students are entitled to access Title IX training materials under the regulations. This is important to discover whether schools are inappropriately training with unscientific and biased victim-centered or trauma-informed theories.

The Rules require schools to make these training materials publicly available. This will be helpful to both current and prospective students and their parents seeking to ensure school policies are fair and balanced.

15. ACCESS TO RECORDS & RECORDKEEPING §106.45(b)(10):

This section requires schools to "create" records concerning the disciplinary process, and requires them to "document the basis for its conclusion that its response was not clearly unreasonable, and document that it has taken measures designed to restore or preserve access to the recipient's educational program or activity." The Rule also requires all records of the Title IX disciplinary process to be retained and accessible to the parties for seven years.

This is a very helpful Rule, as many families have had the same experience as one student in a case in which the school official permitted the accused student to review and take notes from the file, but denied him the opportunity to "make or receive copies of any file materials." [46]

*As discussed in section 14., subsection **(b)(10)(i)(D)** also requires all training materials to be publicly available on the school's website or upon request. This is critical to discovering whether the school's training includes 'believe the victim' or unscientific trauma-informed policies, and also could be useful to potential students and their parents.*

16. DEFINITIONS OF MISCONDUCT §106.30:

a. Protecting access to education

The Rules divide sexual harassment into three categories: (1) quid pro quo, (2) "[u]nwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity," and (3) criminal sexual assault and other such offenses.

Though some uninformed commentators and advocates have claimed the Rules would not require a school to respond to allegations of rape, subsection (3) clearly sanctions all criminal sexual conduct.

The Rules' definition of "sexual harassment" is reasonable in that, except for quid pro quo and criminal offenses,[47] *it focuses on sexual conduct that jeopardizes a person's equal access to an education program or activity. Since the very purpose of Title IX is to protect students in their access to education, a prerequisite that the conduct affects such access would seem a given.*

b. No more sex police?

The Rule's definitions hopefully have and will continue to prevent schools from becoming intimately involved in regulating their students' sex lives.[48] *We believe this evolved at least in part due to the Obama administration's broad definitions of "sexual harassment":*

> unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.[49]

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[46] *Doe v. Alger (James Madison Univ.)*, 175 F.Supp.3d 646, 651 (W.D.Va. 2016) (court did not specifically hold the conditions under which the student was forced to review evidence were inadequate, but in a later decision found "there were significant anomalies in the appeal process that show, especially when viewed collectively, that Doe was denied a meaningful opportunity to be heard during the appeal." 228 F. Supp. 3d at p. 731. A federal magistrate later recommended an award of $850,000 in attorney's fees on behalf of the accused student, later lowered by the district court to $574,180.03. *Doe v. Alger,* No. 5:15-cv-35, (W.D.Va. Sept. 27, 2018).

[47] The assumption is that both quid pro quo and criminal offense per se impact the complainant's access to education.

[48] For the last several years schools have been treating under the category of "sexual misconduct" sex that is uncomfortable or regretted, or similar allegations that don't involve sex and are fleeting or one-time occurrences.

[49] Department of Justice, *Letter to University of New Mexico regarding Title IX and Title IV Investigation of the school*, p. 5, April 22, 2016, https://www.justice.gov/opa/file/843901/download, quoting withdrawn *2011 Dear Colleague Letter on Sexual Violence* U.S. Dept. of Ed., OCR, (April 4, 2011) *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

According to OCR's 2008 explanation, this very broad definition included student-on-student conduct such as

> sexual propositions or pressuring students for sexual favors; touching of a sexual nature; writing graffiti of a sexual nature; . . . displaying or distributing sexually explicit drawings, pictures, or written materials; performing sexual gestures or touching oneself sexually in front of others; telling sexual or dirty jokes; spreading sexual rumors or rating other students as to sexual activity or performance; or circulating or showing e-mails or Websites of a sexual nature.[50]

Schools interpreted the Obama administration's extremely broad definitions to include such often harmless conduct as asking too many times for sex, nine-second stares, fist bumps, and wake-up kisses, effectively requiring schools to police the sex lives of its students. In their article The Sex Bureaucracy, Harvard Law School professors Jacob Gersen and Jeannie Suk Gersen reported,

> These sex bureaucracies are not simply training students on the rules of rape, sexual assault, and sexual harassment. Make no mistake. They are instructing students on matters such as what is "sexy," what constitutes "great sex," what are "positive relationships," and the like. They are defining, instructing, advising, counseling, monitoring, investigating, and adjudicating on questions of sexual desire.[51]

Worse still, under prior guidance whether or not the conduct was 'unwelcome' was interpreted subjectively according to the complainant: "Conduct is considered unwelcome if the student did not request or invite it and considered the conduct to be undesirable or offensive." [52] *This subjective interpretation did not consider any lack of intent on the part of the respondent, and was particularly problematic when applied to "sexual or dirty jokes" that are merely overheard by someone who finds them "unwelcome," or "unwelcome sexual invitations."* [53]

c. Non-Title IX conduct

More importantly, despite victim advocates' claims that the Rules' definitions somehow prohibit schools from responding to conduct outside their scope, the preamble emphasizes repeatedly that schools are entirely free to use their own codes and broader definitions of any proscribed conduct that may not fall within the school's Title IX obligations. Indeed, schools now see this opportunity as a loophole allowing them to pursue a complaint without complying with the Rules. However, they do so at their peril, because it has been suggested that choosing an unfair process may in itself indicate gender discrimination in violation of Title IX.

d. Benefits of the Rule

Subsection (2) undoubtedly will be the most contentious of the definitions, so in commenting we recommend emphasizing:

- *the preamble's discussion of a school's option to use its own, broader code of conduct;*
- *no longer are schools required to police the sex lives of students, but must address only sex discrimination which truly "denies a person equal access to the recipient's education program or activity;" and*
- *the definition's consistency with case law such as the actual knowledge standard which is also used for imposing private liability on a school.*

17. STANDARD OF EVIDENCE §106.45(b)(1)(vii):

The Rules allow schools to choose whether they require "clear and convincing evidence" or "the preponderance standard of evidence" for a finding of responsibility. In order to "ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment," the Rules also require that the

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[50] Withdrawn U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* (September 2008), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html.

[51] Jacob Gersen and Jeannie Suk Gersen, *The Sex Bureaucracy* 104 Cal. L. Rev. (2016), https://29qish1lqx5q2k5d7b491joo-wpengine.netdna-ssl.com/wp-content/uploads/2016/09/Gersen-and-Suk-37-FINAL.pdf.

[52] Withdrawn U.S. Department of Education, Office for Civil Rights, *Sexual Harassment: It's Not Academic* (September 2008), *available at https://www2.ed.gov/about/offices/list/ocr/docs/ocrshpam.html*.

[53] Eugene Volokh, *Justice Department: Any 'verbal … conduct of a sexual nature ' that any listener finds 'unwelcome' = 'sexual harassment' that universities must prevent*, Washington Post (May 2, 2016), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2016/05/02/justice-department-any-verbal-conduct-of-a-sexual-nature-that-any-listener-finds-unwelcome-sexual-harassment-that-universities-must-prevent/?utm_term=.c20caf3594c3.

same standard be used for both employees, faculty, and in other "formal complaints of sexual harassment."

There is of course an argument that the standard should be higher, particularly because these are often quasi-criminal or criminal allegations. Several courts have recognized the damages to reputations and future opportunities by a finding of responsibility for sexual misconduct. The U.S. Court of Appeals for the Sixth Circuit found a student accused of sexual misconduct

> may face severe restrictions, similar to being put on a sex offender list, that curtail his ability to gain a higher education degree . . . Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound.[54]

Similarly, the courts have observed that allegations of campus sexual misconduct are often also "accusations that constitute serious felonies under virtually every state's laws," [55] *and that a sexual misconduct finding "may permanently scar [the student's] life and career," because he would be "marked for life as a sexual predator."* [56]

A higher standard would also impress upon decision-makers that evidence must meet a specific threshold when determining guilt. This is particularly important because, as discussed above, victim-focused decision-makers consider a 'not responsible' or neutral 'no finding' as equivalent to finding the complainant is a liar. Moving the goalpost more toward a presumption of innocence conveys to decision-makers that this is not a zero-sum game, but a threshold of proof that must be reached.

18. EMERGENCY REMOVALS & IMPACT ON STUDENTS WITH DISABILITIES §106.44(c):

Schools may remove a student on an emergency basis provided "the recipient undertakes an individualized safety and risk analysis," and determines there is "an immediate threat to the physical health or safety of" other students. Under the Rule, students must be provided "with notice and an opportunity to challenge the decision immediately following the removal."

This subsection also addresses students with disabilities: the Rules "may not be construed to modify any rights under the Individuals with Disabilities Education Act." There are two aspects to the relationship between Title IX and disability issues:

- *First, students with Autism Spectrum Disorder, or language-based learning disabilities are highly vulnerable to a Title IX accusation. They often lack appropriate social skills, do not understand nonliteral language, and are terrified of persons with authority, quick to apologize for fear of "getting in trouble," and desperately want to "fit in."* [57] *These characteristics create a higher risk that autistic will be easily manipulated or their intentions will be misunderstood.*
- *Second, students with disabilities are not always able to understand the Title IX process or how to defend themselves, and often are unaware they are entitled to accommodations.*

Unfortunately, most of the available literature and school policies focus on complainant disabilities while entirely ignoring the needs of disabled respondents. Though the Obama administration's 2014 "Questions and Answers on Title IX and Sexual Violence" discussed the disability rights of complainants in the context of Title IX, it never even mentioned respondents who may be disabled and the additional difficulties they encounter in defending themselves.[58] *Furthermore, school policies may not mention a respondent's rights to disability accommodations,*

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[54] *Doe v. Miami Univ.*, 882 F.3d 579, 600 (6th Cir. 2018), *quoting Goss v. Lopez*, 419 U.S. 565, 574 (1975) (citations omitted).

[55] *Doe v. Brown Univ.,* 166 F. Supp. 3d 177, 184 (D.R.I. Feb. 22, 2016).

[56] *Doe v. Brandeis Univ.,* 177 F. Supp. 3d 561, 573, 607 (D. Mass. Mar. 31, 016).

[57] Take the case of disabled student Marcus Knight as a perfect example of how respondents' disabilities are overlooked and even ignored in Title IX disciplinary proceedings. Marcus's effort to greet another student with a 'fist bump' was misconstrued as a Title IX violation. Though the lower court found in favor of Knight, California's appellate court recently determined that Knight could not prevail because, though he was traumatized, he "was not in any real way suspended – that is, he was not barred from campus or from his classes," and the "only consequence he suffered was a written reprimand." Martha Phillips, *Saddleback College wins Title IX appeal against Marcus Knight*, Lariat Saddleback College (Mar. 10, 2021), https://lariatnews.com/news/saddleback-college-wins-title-ix-appeal-against-marcus-knight/.

[58] 2014 OCR *Questions and Answers on Title IX and Sexual Violence*, pp. 6-7, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

while they universally address the complainant's rights under the Americans with Disabilities Act.[59]

Even now, though the Rules do address these issues, they still do not adequately take into account the significant issues faced by respondents with disabilities. Protections for accused disabled students should extend to any disciplinary proceeding which could result in the temporary or permanent removal of disabled students' access to education.

Every notice of a complaint and student conduct code policy must discuss a respondent's rights to disability accommodations. Though every school policy includes a "statement of protection" addressing the rights of students with disabilities,[60] *many respondents with disabilities are not informed or aware that those rights under disability were available to them in the context of a Title IX disciplinary proceeding.*

For the disabled student, understanding the Title IX process often requires more than the communication of words; respondents with communication disabilities that are not readily visible are especially vulnerable and have suffered significantly as a result. Schools may have little or no effective communication between their Title IX and disability offices. Disabled students are therefore often not recognized by Title IX officials.

If this is an issue with which you've had experience, you should suggest OCR consult organizations such as the Council of Parent Attorneys and Advocates, Inc. at www.copaa.org for further assistance in learning about and accommodating the needs and rights of students with disabilities. Knowledgeable disability professionals can instruct on how clear communications, policies, and procedures can benefit the disabled student, ensure fairness and justice takes precedence, and ensure the federally protected rights of students with disabilities are honored.

19. APPEALS §106.45(b)(5) §106.45(b)(1)(viii):

The Rules permit appeals by both parties "on the basis of (1) procedural irregularity, (2) new evidence, or (3) bias on the part of the investigators or decision-makers." [61] *The final version of the Rules allows "schools to decide 'whether severity or proportionality of sanctions is an appropriate basis for appeal,'" provided that the appeal option is open to both parties.*[62]

The difficulty with permitting appeals at all is that, unless there is a separate hearing for the appeal process, simply allowing a different official or panel to revisit and possibly reverse the decision of the original decision-makers seems to negate or undermine the impact of requiring a hearing with live testimony to assess credibility in the first instance. In what way is the appeal official or panel without a live hearing better positioned to determine the credibility of either party than the decision-makers, unless they unquestionably accept all of the decision-maker(s)' factual and credibility findings?

20. VICTIM-CENTERED POLICIES §106.45(b)(1)(iii):

Victim-centered and "trauma-informed" policies were originally intended to minimize victim re-traumatization and encourage reporting of sexual offenses,[63] *and, as mentioned above, are appropriate for interviewing potential victims. Unfortunately, their use beyond the interview has meant the accused students may not be presumed innocent.*[64]

"Trauma-informed" theories claim a complainant's inconsistent statements or his/her behavior that is inconsistent with having been assaulted are merely the typical "counterintuitive behavior" of someone having suffered trauma,

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[59] *See generally*, *Accommodating Students With Disabilities in the Title IX Process*, EduRisk (March 2017), which instructs schools to "Offer assistance in complaint filing instructions to qualified disabled students," but never mentions offering the same for respondents. https://www.eduriskssolutions.org/blogs/?Id=3277.

[60] *See*, for example, *The University of Iowa's policy, Chapter 7 "Disability Protection Policy and Accessibility Statement*, at https://opsmanual.uiowa.edu/community-policies/disability-protection-policy-and-accessibility-statement.

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

[62] *Id.*

[63] MacDonald, Heather, *The Campus Rape Myth*, City Journal (Winter 2008) ("'believe unconditionally' in sexual-assault charges") http://www.city-journal.org/2008/18_1_campus_rape.html.

[64] Kaminer, Wendy, '*Believe The Victim*'*? Maybe — But Protect The Rights Of The Accused, Too*, WBUR Boston (February 4, 2014), http://cognoscenti.wbur.org/2014/02/04/campus-sexual-assault-wendy-kaminer.

and thus can be evidence the incident occurred.[65] *Even if this constellation of "trauma" symptoms were based on neuroscience, their applicability to typical, non-criminal allegations of sexual misconduct on campuses is highly suspect.*

Though some of these theories support proper interview techniques, the difficulties with them are twofold: first, "traumatic" behavior is treated as evidence of trauma; and second, these theories have infiltrated the investigation and adjudication stages of campus disciplinary processes which should be approached with an open mind.

The regulations state that training materials "must not rely on sex stereotypes and must promote impartial investigations and adjudications." ***(b)(1)(iii).*** *However, simply precluding reliance on sex stereotypes and disregarding the fact that one party is a potential victim will not be enough; decision-makers are regularly instructed to ensure "victims of sexual violence are believed and that they're seen as credible"* [66] *and to be "very, very cautious in accepting a man's claim that he has been wrongly accused of abuse or violence."* [67]

According to the victims' rights campaign Start by Believing, "[w]e should believe, as a matter of default, what an accuser says" because "the costs of wrongly disbelieving a survivor far outweigh the costs of calling someone a rapist." [68] *This message glibly minimizes the impact of wrongful accusations, and erroneous findings of guilt as discussed in sections 9 and 17, above. Worse still, trauma-informed' training suggests inconsistencies in complainants' stories and conduct should be disregarded.*[69]

Though this section anticipates the use of victim-centered policies, the Rule would be more effective if it specifically precluded their use during investigations (aside from interviews) and adjudications. Theories that victims lie, falsify details, or behave inconsistently as a way of coping with trauma have only one purpose in the adjudication context, and that is to discredit any defense based upon a complainant's inconsistent behavior or statements.

Courts have not looked favorably on these theories. In a 2017 decision later affirmed by a California Court of Appeal, a superior court judge found that the school's administrative process failed to comply with the law because the disciplinary committee "improperly permitted [the Title IX investigator] to base his evaluation on what [he] understood to be the 'trauma-informed' approach." [70]

In Doe v. University of Mississippi, the court found the school's training materials created "an assumption . . . that an assault occurred": [71]

> [T]he training material . . . "advise[s] the panel members that 'victims' sometimes withhold facts and lie about details, question if they've truly been victimized, and 'lie about anything that casts doubt on their account of the event,'" and . . . it explains that "when Complainants withhold exculpatory details or lie to an investigator or the hearing panel, the lies should be considered a side effect of an assault."[72]

In Doe v. Brandeis University, District Court Judge F. Dennis Saylor observed, "Human memories are transient and subject to substantial modifications and degradation over time." He added that they are also

> readily susceptible to such factors as hindsight bias (that is, the influence of one's current perceptions, knowledge, and state of mind) and suggestibility (that is, the influence of suggestion, express and implicit, by others) . . . It is possible that [the complainant's] sexual assault training

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[65] For more information on the impact of trauma-informed policies on decision making, see Cynthia P. Garrett, *Trauma-Informed Theories Disguised as Evidence*, FACE (May 02, 2019).

[66] For example, the *Start by Believing* is a public awareness campaign designed by End Violence Against Women International to change the way the public "responds to rape and sexual assault in our communities." http://www.startbybelieving.org/.

[67] Young, Cathy, *Harvard Liberals Hate New Campus Sex Laws*, The Daily Beast (October 19, 2014), http://www.thedailybeast.com/articles/2014/10/19/harvard-liberals-hate-new-campus-sex-laws.html.

[68] *Start by Believing,* http://www.startbybelieving.org.

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

[70] *Doe v. Regents of Univ. of California,* "Notice of Order Awarding Attorneys' Fees," April 18, 2018, at p. 3, citing "Order of 11/15/17" at p. 26.

[71] *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, p. 20 (D. S.D. Miss., N.D. July 24, 2018) (using the original court filed version July 24, 2018.)

[72] *Id.*

had a suggestive effect on his memory, causing him to subconsciously reinterpret his memories.[73]

That this effect is exacerbated by "the passage of time," common with campus allegations, "increases the chance that eyewitnesses will adopt misinformation and that their memories will be altered." [74] When both parties are intoxicated, as they are in 78% of cases,[75] the likelihood of distorted memories is only increased.

The use of "trauma-informed" or "believe the victim" policies must be expressly addressed and restricted to the interview process; they should never be used in investigations or adjudications because they compromise objectivity, create presumptions of guilt, and result in the exclusion of otherwise relevant evidence.

END

Questions?

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The mission of FACE is to support and advocate for equal treatment and due process for those affected by inequitable Title IX campus disciplinary processes, and influence campus culture through outreach and education.

FACE is a 501(c)(3) tax-exempt organization.

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[73] *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 609 (D. Mass. Mar. 31, 2016).

[74] Henry Otgaar and Mark L. Howe (2017-10-02). *Finding the Truth in the Courtroom: Dealing with Deception, Lies, and Memories* (p. 13). Oxford University Press. Kindle Edition (emotionally valanced material is more likely to give rise to false memories than neutral material.)

[75] Confronting Campus Sexual Assault, p. 7, *EduRiskSolutions.org* (2015), https://www.edurisksolutions.org/.