

**Comment on Proposed Title IX Rulemaking  
Docket No. ED-2018-OCR-0064, RIN 1870-AA14  
Nondiscrimination on the Basis of Sex in Education Programs or Activities  
Receiving Federal Financial Assistance  
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## I. Introduction

The Department of Education’s Office of Civil Rights’ now-withdrawn 2011 Dear Colleague letter caused educational institutions to abandon due process mandates that most Americans believe are central to the equitable investigation and adjudication of allegations of sexual misconduct. These mandates include the rights of complainants and respondents to attend hearings where they can ask questions of each other and adverse witnesses.

Previous guidance also caused educational institutions to tilt the scales of justice in favor of complainants by: (a) implementing training programs that instructed Title IX adjudicators to approach cases in a “trauma-informed” fashion; (b) restricting the role of lawyers for the accused; (c) denying accused students access to evidence; (d) reducing the standard of proof to the preponderance of evidence rather than the higher standards many schools had in place prior to issuance of the guidance; and (e) allowing complainants to appeal when panels returned not-responsible findings.

The resulting one-sided system has triggered a wave of lawsuits in both state and federal courts filed by respondents. It also has earned criticism from countless experts, including groups of law professors at Harvard Law School, Penn Law School, and Cornell Law School.<sup>1</sup> Even the Association of Title IX Administrators observed that “some pockets in higher education have twisted the [2011 guidance] and Title IX into a license to subvert due process.”<sup>2</sup>

As Secretary DeVos remarked, “Every survivor of sexual misconduct must be taken seriously. Every student accused of sexual misconduct must know that guilt is not predetermined. These are non-negotiable principles.”<sup>3</sup> Translating these principles into policy was bound to arouse passions. That a proposed rule of this length would generate criticism is hardly surprising; we criticize some of its components ourselves. We worry, however, that much of the criticism has seemed directed at proposals that do not exist, falsely maintaining that the Department’s goal is something other than procedures that will be fair for all.

In the past several years, an idea has taken root that responding to the scourge of sexual assault on campus requires a process biased against accused students—and that, therefore, creating fairer adjudication procedures will harm campus survivors of sexual assault. This mindset contradicts

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<sup>1</sup> See Elizabeth Bartholet et al., “Rethink Harvard’s Sexual Harassment Policy,” *Boston Globe*, Oct. 15, 2014 (“Harvard has adopted procedures for deciding cases of alleged sexual misconduct which lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation”); Open Letter from Members of the Penn Law School Faculty, Feb. 18, 2015, (“We do not believe that providing justice for victims of sexual assault requires subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses [http://online.wsj.com/public/resources/documents/2015\\_0218\\_upenn.pdf](http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf); Brief of Amici Curiae Cornell Law School Professors in Support of Petitioner-Appellant John Doe, *Doe v. Cornell University*, No. 526013 (N.Y. App. Div. filed Mar. 25, 2018) (“This Court has an important role to play in ensuring that Cornell and other educational institutions...honor their commitments to provide important procedural protections, like the one at issue here, to students involved in campus sexual assault proceedings”), <https://kcjohnson.files.wordpress.com/2018/03/cornell-law-profs-amicus-brief.pdf>.

<sup>2</sup> ATIXA, 2017 Whitepaper: *Due Process and the Sex Police*, <https://www.ncherm.org/wp-content/uploads/2017/04/TNG-Whitepaper-Final-Electronic-Version.pdf>.

<sup>3</sup> Betsy DeVos, U.S. Sec’y of Educ., Prepared Remarks on Title IX Enforcement (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

longstanding Anglo-American principles of due process and fairness. In the end, such beliefs will frustrate the interests of survivors as well: no one can have confidence in a system that fails, at a structural level, to treat both sides fairly.

Perhaps the proposed rule's most valuable characteristic is its close alignment with the emerging body of case law on this issue. The Department has developed regulations that commendably follow the path already set by dozens of federal judges, appointees of Democratic and Republican administrations alike. Grounding campus Title IX procedures more closely in the law will benefit all parties, including colleges and universities.

Our comment focuses on the areas of the proposed regulations that most directly deal with previous court decisions. We also commend other sections of the proposed rule, such as its reminder that Title IX regulations should not require an institution to restrict rights that students would otherwise enjoy under the Constitution.

## II. Comments to Specific Proposed Rules

### **Proposed Section 106.8(d): Application**

[Fed. Reg. p. 61946, columns 1-2]

**Comment:** Subsection 106.8(d) states that Title IX policy and grievance procedures apply to sex discrimination “against a person in the United States.” This new language tracks the Title IX statute, which begins “No person in the United States . . .”

There has been substantial controversy over whether this proposed section's use of the phrase “located in the United States”<sup>4</sup> would deny Title IX protections to students participating in study abroad programs through their U.S.-based university. Though the Department's intent is not entirely clear, we consider the better interpretation to be one that includes under the auspices of Title IX those students who are studying abroad through a U.S.-based institution.

We believe any interpretation of “person in the United States” in the narrower sense may be too literal. Title IX should protect individuals enrolled at a U.S. institution and studying abroad if that program is organized and wholly controlled by that institution. In these types of programs, the student is required to travel abroad in order to pursue the educational opportunity and the school's professors and staff who work in the program are employees of that university. By removing Title IX protections from these types of study abroad programs, equal access to education will be denied to potential victims.<sup>5</sup>

**Recommend:** Proposed section 106.8(d) should interpret Title IX to protect students participating in study abroad programs organized and wholly controlled by their U.S.-based university. We do not, however, recommend Title IX be construed so broadly as to encompass a study abroad program also

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<sup>4</sup> Fed. Reg., p. 61482, column 2.

<sup>5</sup> *King v. Board of Control of Eastern Mich. University*, 221 F.Supp.2d 783 (E.D. Mich. 2002) (holding Title IX had extraterritorial application to study abroad programs and students were persons in the U.S. because the harassment, even though initiated abroad, undermined student's education at EMU as a whole).

attended by students from schools other than the school to which the complaint has been made. This move would seem a step too far, and is justified by the impracticality of interviewing witnesses and collecting evidence at a remote location where students come from all over the world.

**Proposed Section 106.30: Definitions: Sexual harassment**

[Fed. Reg. p. 61496, column 3]

**Comment:** Section 106.30’s proposed definition of “sexual harassment” outlines when an institution is liable under Title IX for mishandling sexual harassment. The provision limits conduct for which a school’s response is required to: (1) quid pro quo harassment; (2) serious forms of sexual harassment that “that jeopardize[] a person’s equal access to an education program or activity;”<sup>6</sup> and (3) criminal sexual assault.

Though some misinformed 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 itemized in incorporated regulation 34 CFR 668.46(a).

Subsection (2), which limits itself to unwelcome sexual conduct that is “severe, pervasive, and objectively offensive,” has proven to be the most controversial of the definitions. But this definition, from the Supreme Court’s decision in *Davis v. Monroe*, has three advantages: (1) it provides greater clarity and consistency for colleges and universities; (2) minimizes the risk that federal definitions of sexual harassment will violate academic freedom and the free speech rights of members of the campus community;<sup>7</sup> and (3) recognizes that the Department’s job is not to write new law. If stakeholders desire a more expansive definition of sexual harassment, they should direct their concerns to Congress.

More importantly, despite claims that the rule’s definitions prohibit schools from responding to misconduct outside the scope of these definitions, the Department “emphasizes” that schools retain the discretion to use their own broader definitions of proscribed conduct that do not fall within the school’s Title IX obligations to address and provide supportive measures, or by “investigating the allegations through the recipient’s student conduct code.”<sup>8</sup>

**Recommend:** The Department should use the comment process to reassure stakeholders that the intent of the rule is not to allow institutions to ignore obvious instances of sexual harassment that “den[y] a person equal access to the recipient’s education program or activity.” This would be helpful because some comments have incorrectly suggested that the proposed rule would have shielded Michigan State during the Larry Nassar scandal<sup>9</sup>— the Department should reassure the public that it does not intend to let universities “off the hook,” and that, in any event, schools are free to expand upon the rule’s definitions through their own conduct codes.

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<sup>6</sup> Fed. Reg., p. 61467, column 3.

<sup>7</sup> This problem can be seen in controversies over the University of Montana “blueprint,” which, under the more expansive definition used between 2011 and 2018, required the monitoring of campus speech. See FIRE, “Departments of Education and Justice: National “Blueprint” for Unconstitutional Speech Codes,” <https://www.thefire.org/cases/departments-of-education-and-justice-national-requirement-for-unconstitutional-speech-codes/>.

<sup>8</sup> Fed. Reg., p. 61475, column 2.

<sup>9</sup> This type of bad-faith criticism is exemplified by some comments in Anna North, “‘This Will Make Schools Less Safe’: Why Betsy DeVos’ Sexual Assault Rules Have Advocates Worried,” *Vox*, Nov. 16, 2018, <https://www.vox.com/policy-and-politics/2018/11/16/18096736/betsy-devos-sexual-assault-harassment-title-ix>.

**Proposed Section 106.44(a): Recipient’s response to sexual harassment**

[Fed. Reg. p. 61497, column 1]

**Comment:** Proposed section 106.44(a) provides safe harbors for recipients and describes what is required to prevent them from being “deliberately indifferent” or “clearly unreasonable.” It requires actual knowledge of alleged harassment by the recipient, and that the alleged violation be “in an education program or activity of the recipient against a person in the United States.”

Title IX itself defines “program or activity” as “all of the operations of” a “recipient,”<sup>10</sup> and Title IX regulations provide that “program or activity” includes “any academic, extracurricular, research, [or] occupational training.”<sup>11</sup> The Department relies on the Supreme Court decision in *Davis v. Monroe* for the commonsense proposition that “recipients must be held liable only for conduct over which they have control.”<sup>12</sup> The Department construes “off campus” rather broadly:

In determining whether a sexual harassment incident occurred within a recipient’s program or activity, courts have examined factors such as whether the conduct occurred in a location or in a context where the recipient owned the premises; exercised oversight, supervision, or discipline; or funded, sponsored, promoted, or endorsed the event or circumstance.<sup>13</sup>

Whether off-campus conduct falls within “program or activity” is a fact-specific inquiry for which it is impossible to draw a bright line. In attempting to clarify the extent of a school’s obligation to address off-campus allegations the Department points out that whether or not the alleged event occurred on campus is not a controlling factor: “program or activity does not necessarily depend on the geographic location of an incident (e.g., on a recipient’s campus versus off of a recipient’s campus).”<sup>14</sup>

The Department, for instance, explicitly cites *Farmer v. Kansas State University* to note that allegations of assault at an off-campus fraternity are covered by Title IX, at least where the school “devotes significant resources to the promotion and oversight” of the fraternity.<sup>15</sup> Other case law cited by the Department includes within the scope of “program or activity” such places as “university libraries, computer labs, and vocational resources . . . campus tours, public lectures, sporting events . . .”<sup>16</sup> But

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<sup>10</sup> 20 U.S.C 1681 (a).

<sup>11</sup> 34 CFR 106.2(h).

<sup>12</sup> Fed. Reg., p. 61466, column 3, citing, *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 644-45 (1999).

<sup>13</sup> Fed. Reg., p. 61468, column 1.

<sup>14</sup> Fed. Reg., p. 61468, column 1, citing *Rost ex rel. K.C. v. Steamboat Springs RE-2 Sch. Dist.*, 511 F.3d at 1121 n.1 (“We do not suggest that harassment occurring off school grounds cannot as a matter of law create liability under Title IX”).

<sup>15</sup> Fed. Reg., p. 61468, columns 1-2, quoting, *Farmer v. Kansas State University*, 2017 WL 980460, at \* 8 (D. Kan. Mar. 14, 2017) (“because ‘KSU allegedly devotes significant resources to the promotion and oversight of fraternities through its websites, rules, and Office of Greek Affairs. Additionally, although the fraternity is housed off campus, it is considered a ‘Kansas State University Organization,’ is open only to KSU students, and is directed by a KSU instructor. Finally, KSU sanctioned the alleged assailant for his alcohol use, but not for the alleged assault. Presented with these allegations, the Court is convinced that the fraternity is an ‘operation’ of the University, and that KSU has substantial control over student conduct within the fraternity.”).

<sup>16</sup> Fed. Reg., p. 61468, column 1, quoting, *Doe v. Brown University*, 896 F.3d 127, 132 n.6 (1st Cir. 2018).

the Department also cites a Tenth Circuit decision for the proposition “that harassment occurring off school grounds cannot as a matter of law create liability under Title IX.”<sup>17</sup>

Complaints alleging an assault by another student that occurred miles away from and was unrelated to any school program or activity, on the other hand, seem to create a line of demarcation.<sup>18</sup> Debates also exist with respect to whether the proposed rule allows non-students to file Title IX complaints at the school attended by the accused student. The Department and most courts generally say no:

Notably, there may be circumstances where the harassment occurs in a recipient’s program or activity, but the recipient’s response obligation is not triggered because the complainant was not participating in, or even attempting to participate in, the education programs or activities provided by that recipient.<sup>19</sup>

As an example, the Department cites *Doe v. Brown University*, in which the First Circuit found the complainant had “no plausible claim under Title IX” because she attended another school and “had not availed herself or attempted to avail herself of any of Brown’s educational programs and thus could not have been denied those benefits.”<sup>20</sup> The court observed she was allowed to file a claim under Brown’s student code of conduct.

*Brown University* is not alone in warning universities against subjecting students to sexual misconduct disciplinary proceedings that lack a jurisdictional nexus with the university. Two such decisions are *Doe v. Middlebury College* and *Doe v. Rensselaer Polytechnic Institute*.<sup>21</sup> In *Rensselaer Polytechnic Institute* the court determined the university lacked jurisdiction over the non-student plaintiff, then voided the university’s finding that the plaintiff had violated the university’s sexual misconduct code.<sup>22</sup>

In *Middlebury* the complainant was a non-student who accused the plaintiff of engaging in sexual misconduct “while on a study abroad program with the School for International Training (‘SIT’).”<sup>23</sup> The plaintiff was then subjected to a SIT investigation which ultimately cleared him of wrongdoing.<sup>24</sup> Yet when he returned to Middlebury College, he was subjected to an additional disciplinary proceeding in which Middlebury College found he engaged in sexual misconduct and expelled him.<sup>25</sup> The court enjoined Middlebury College from implementing the expulsion because “Middlebury’s policies did not

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<sup>17</sup> Fed. Reg., p. 61468, column 1, quoting *Rost ex rel. K.C. v. Steamboat Springs RE–2 Sch. Dist.*, 511 F.3d 1114, 1121 n.1 (10th Cir. 2008).

<sup>18</sup> For one such hypothetical, see the oral argument from U.S. Appeals Court Judge Stanley Marcus in *Koepfel v. Valencia College* [903 F. 3d 1220 (11th Cir. 2018)] at 49:30, available at <https://www.courtlistener.com/audio/38177/jeffrey-koepfel-v-district-board-of-trustees-of-valencia-college-florida/>. Because the harassment was undisputed, had occurred near campus, and had occurred shortly before the start of classes, the court ultimately sided with the college without addressing Judge Marcus’s hypothetical.

<sup>19</sup> Fed. Reg., p. 61468, column 2, citing *Doe v. Brown University*, 896 F.3d at 132-33.

<sup>20</sup> *Doe v. Brown University*, 896 F.3d at 132-33.

<sup>21</sup> *Doe v. Middlebury College*, No. 1:15-cv-192, 2015 U.S. Dist. LEXIS 124540 (D. Vt. Sept. 16, 2015); *Doe v. Rensselaer Polytechnic Institute*, No. 18-CV-1013 (N.D.N.Y. Nov. 6, 2017).

<sup>22</sup> *Doe v Rensselaer Polytechnic Institute*, No. 18-CV-1013.

<sup>23</sup> *Doe v. Middlebury College*, 2015 U.S. Dist. LEXIS 124540 \*2-3.

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

authorize a second investigation and de novo evaluation of the allegation of sexual assault after it had been decided in Plaintiff's favor by SIT."<sup>26</sup>

On the other hand, a recent lawsuit filed against Harvard involves an incident between a Harvard student and a non-Harvard student. The alleged wrongdoing occurred hundreds of miles away, and was unconnected to Harvard's educational mission, yet Harvard has insisted on adjudicating the complaint.<sup>27</sup> And, as seen in *Doe v. Middlebury*, *Doe v. Rensselaer Polytechnic Institute*, and *Doe v. Rector and Visitors of George Mason*,<sup>28</sup> Harvard is not alone in prosecuting allegations of sexual misconduct when complainants and/or respondents are not students. When this happens, state or federal courts are forced to annul disciplinary decisions that never should have been adjudicated through a Title IX process in the first place.

**Recommend:** We believe this section of the proposed rule recognizes appropriate limits on the Department's authority. A Title IX tribunal should not substitute itself for the criminal or civil justice systems.

In response to public comments, the Department should make clear that two types of allegations are not appropriate for Title IX adjudications. The first are cases involving alleged off-campus misconduct claims unrelated to any of the recipient's programs or activities and that in any other circumstance would be the sole province of the police. The second are those in which the complainant or respondent did not participate or attempt to participate in the recipient's education programs or activities.

Generally, practical considerations should determine whether off-campus facilities fall with Title IX protections: does the school have control over the property? Can it access and collect evidence? Are the parties and witnesses both students at the institution? Differences in university residential patterns might also account for differing responsibilities under Title IX. While much of the criticism of the Department on the off-campus issue has been unconvincing,<sup>29</sup> the Department should acknowledge these differentials in its response to comments, if only to reassure the public on this matter.

**Proposed Section 106.45(a): Discrimination on the basis of sex**  
[Fed. Reg. p. 61497, column 2]

**Comment:** According to proposed section 106.45(a), parties must be treated equitably and without discrimination on the basis of sex. Section 106.45(a) provides that unfair treatment may also constitute discrimination against a respondent.

This addition is welcome; in recent years, many federal courts have expressed concerns about how university treatment of respondents might run afoul of Title IX. As U.S. District Judge T.S. Ellis, III, explained in a case against Marymount University, "depriving students accused of sexual assault of the

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<sup>26</sup> *Id.*, \*12-13.

<sup>27</sup> *Doe v. Harvard University*, Case No. 1:18-cv-12462, D. Mass. See also Stephanie Ebbert, "Harvard student accused of rape far from campus sues university for investigating it," *Boston Globe*, December 8, 2018, <https://www.bostonglobe.com/metro/2018/12/08/should-harvard-investigate-alleged-rape-that-happened-nowhere-near-campus/3mlPW6GxXyljpwW2OU0q4K/story.html>.

<sup>28</sup> *Doe v. Middlebury College*, U.S. Dist. LEXIS 124540; *Doe v Rensselaer Polytechnic Institute*, No. 18-CV-1013; *Doe v. Rector and Visitors of George Mason University*, 149 F. Supp. 3d 602, 609 (E.D. Va. 2016).

<sup>29</sup> See, e.g. Dana Bolger, "Betsy DeVos's New Harassment Rules Protect Schools, Not Students," *New York Times*, November 27, 2018, <https://www.nytimes.com/2018/11/27/opinion/betsy-devos-title-ix-schools-students.html>.

investigative and adjudicative tools necessary to clear their names even when there are no due process requirements” can contradict Title IX’s promise of gender equity.<sup>30</sup> Proposed section 106.45(a) joins federal judges nominated by presidents of both parties in recognizing that unfair treatment of either side can, in some circumstances, rise to the level of gender discrimination.

There is a wide range of issues addressed by federal court decisions identifying plausible claims of discrimination by respondents (Appeals Court decisions in **bold**):

- The institution failed to investigate evidence that the complainant might also have committed sexual misconduct in the same case (***Miami University, Amherst College, Williams College, Drake University***);<sup>31</sup>
- The institution conducted a biased investigation in part to appease faculty, student, or media figures demanding that the school crack down on sexual assault (***Columbia University, Lynn University, Syracuse University, Hobart and William Smith Colleges, Cornell University***);<sup>32</sup>
- The institution employed a structurally unfair procedure and credited only female witnesses (***University of Michigan***);<sup>33</sup>
- The institution utilized biased training material (*University of Pennsylvania, University of Mississippi, Drexel University*);<sup>34</sup>
- The institution ignored a request from the local prosecutor to delay its adjudication process, allegedly out of fear of an OCR investigation (*Xavier University*);<sup>35</sup>
- The institution purportedly found all accused male students responsible for engaging in sexual misconduct (or) employed Title IX officials who were biased against male students (*University of Oregon, Penn State University, University of Cincinnati, Muskingum University, University of Chicago, Washington and Lee University*);<sup>36</sup>

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<sup>30</sup> *Doe v. Marymount University*, 297 F. Supp. 3d 573, 584 n.17 (E.D. Va. 2018).

<sup>31</sup> *Doe v. Miami University*, 882 F.3d 579 (6th Cir. 2018); *Doe v. Amherst College*, 238 F. Supp. 3d 195 (D. Mass. 2017); *Doe v. Williams College*, No. 3:16-cv-30184 (D. Mass. Apr. 28, 2017); *Rossley v. Drake University*, No. 4:16-cv-00623 (S.D. Iowa Oct. 12, 2018).

<sup>32</sup> *Doe v. Columbia University*, 831 F.3d 46 (2d Cir. 2016); *Doe v. Syracuse University*, 2018 U.S. Dist. LEXIS 157586 (N.D.N.Y. Sept. 16, 2018); *Rolph v. Hobart & William Smith Colleges*, 271 F. Supp. 3d 386 (W.D.N.Y. Sept. 20, 2017); *Doe v. Lynn University*, 2017 U.S. Dist. LEXIS 7528 (S.D. Fl. Jan. 19, 2017); *Prasad v. Cornell University*, 2016 U.S. Dist. LEXIS 161297 (N.D.N.Y. Feb. 24, 2016).

<sup>33</sup> See, e.g., *Doe v. Williams College*, No. 3:16-cv-30184.

<sup>34</sup> *Doe v. Baum*, 903 F.3d 575, 593 (6th Cir. 2018), request for en banc reconsideration denied.

<sup>34</sup> *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 14, 2018); *Saravanan v. Drexel University*, 2017 U.S. Dist. LEXIS 193925 (E.D. Pa. Nov. 24, 2017); *Doe v. University of Pennsylvania*, 270 F. Supp. 3d 799 (E.D. Pa. 2017).

<sup>35</sup> *Wells v. Xavier University*, 7 F. Supp. 3d 746 (S.D. Ohio 2014).

<sup>36</sup> *Doe v. University of Or.*, 2018 U.S. Dist. LEXIS 49431 (D. Or. Mar. 26, 2018); *Schaumleffel v. Muskingum University*, 2018 U.S. Dist. LEXIS 36350 (S.D. Ohio Mar. 6, 2018); *Gischel v. University of Cincinnati*, 302 F. Supp. 3d 961 (S.D. Ohio Feb. 5, 2018); *Doe v. Penn. State University*, No. 4:17-CV-01315, 2018 U.S. Dist. LEXIS 3184 (M.D. Pa. Jan. 8, 2018); *Doe v. University of Chicago*, 2017 U.S. Dist. LEXIS 153355 (N.D. Ill. Sept. 20, 2017); *Doe v. Washington and Lee University*, 2015 U.S. Dist. LEXIS 102426 (W.D. Va. Aug. 5, 2015).

- The institution denied the accused student necessary statistical information to test allegations of gender discrimination (*Indiana University*).<sup>37</sup>

In an environment where university officials are unlikely to admit they discriminate against accused students, courts sometimes have operated by inference, as in a case at Johnson & Wales University. After examining the facts presented in the complaint, U.S. District Judge John McConnell could “find no reason at all as to why . . . the result was [the accused student’s] expulsion. The only inference that one could draw from that considering all the facts is that gender played a role.”<sup>38</sup>

It is true that, in the first few years after the 2011 Dear Colleague letter, some district courts suggested that policies biased against respondents did not violate Title IX.<sup>39</sup> But in recent years, federal appeals courts have identified multiple examples of universities plausibly discriminating against respondents in violation of Title IX. As an example, in *Doe v. Columbia*, the Second Circuit held that:

a defendant is not excused from liability for discrimination because the discriminatory motivation does not result from a discriminatory heart, but rather from a desire to avoid practical disadvantages that might result from unbiased action. A covered university that adopts, even temporarily, a policy of bias favoring one sex over the other in a disciplinary dispute, doing so in order to avoid liability or bad publicity, has practiced sex discrimination, notwithstanding that the motive for the discrimination did not come from ingrained or permanent bias against that particular sex.<sup>40</sup>

In *Doe v. Miami University*, the Sixth Circuit determined “statistical evidence that ostensibly shows a pattern of gender-based decision-making and the external pressure on Miami University” from the federal government could indicate that the university discriminated on the basis of gender against the accused student.<sup>41</sup> And in *Doe v. Baum*, the Sixth Circuit held that a combination of unfair procedures, including the University’s decision to disallow cross-examination before a live panel and the exclusive crediting of female witnesses, gave “rise to a plausible claim” of discrimination under Title IX.<sup>42</sup>

**Recommend:** The requirement that parties be treated equitably and without discrimination on the basis of sex is a positive step forward in combating sex discrimination against respondents, and will help ensure that Title IX is applied in a way that is equitable to both parties.

**Proposed Section 106.45(b)(1): Basic requirements for grievance procedures**  
[Fed. Reg. p. 61497, columns 2-3]

**Comment:** This section addresses courts’ concerns about how the processes often used by universities since 2011 have undermined confidence in the integrity of the Title IX disciplinary system.

The Department’s actions from 2011-2017 seemed to imply its policy was premised on a belief that creating one-sided procedures would increase the reporting of offenses to campus authorities. At

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<sup>37</sup> *Marshall v. Ind. University*, 2016 U.S. Dist. LEXIS 117675 (S.D. Ind. Aug. 31, 2016).

<sup>38</sup> *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018).

<sup>39</sup> *Bleiler v. College of the Holy Cross*, 2013 U.S. Dist. LEXIS 127775 (D. Mass. Aug. 26, 2013); *Sahm v. Miami University*, 110 F. Supp. 3d 774 (S.D. Ohio 2015); *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS 136880 (S.D. Ohio Aug. 25, 2017).

<sup>40</sup> *Doe v. Columbia University*, 831 F.3d at 58 n. 11.

<sup>41</sup> *Doe v. Miami University*, 882 F.3d at 593.

<sup>42</sup> *Doe v. Baum (University of Michigan)*, 903 F.3d at 593.

times this sentiment was explicit: Sen. Patty Murray has claimed, without evidence, that “the standard of proof guidance provided in the [2011] letter has led to more women and men coming forward about their sexual violence experiences.”<sup>43</sup>

However well-intentioned, multiple courts have noted that adjusting procedures to accommodate the perceived needs of complainants too often has had the effect of presuming the guilt of the accused. In *Doe v. Brandeis University*, U.S. District Judge F. Dennis Saylor observed,

It is not enough simply to say that such changes are appropriate because victims of sexual assault have not always achieved justice in the past. Whether someone is a ‘victim’ is a conclusion to be reached at the end of a fair process, not an assumption to be made at the beginning. Each case must be decided on its own merits, according to its own facts. If a college student is to be marked for life as a sexual predator, it is reasonable to require that he be provided a fair opportunity to defend himself and an impartial arbiter to make that decision. Put simply, a fair determination of the facts requires a fair process, not tilted to favor a particular outcome, and a fair and neutral fact-finder, not predisposed to reach a particular conclusion.<sup>44</sup>

In *Doe v. Regents of the University of California*, California’s Second Appellate District found it . . .

ironic that an institution of higher learning, where American history and government are taught, should stray so far from the principles that underlie our democracy. This case turned on the Committee’s determination of the credibility of the witnesses. Credibility cannot be properly decided until the accused is given the opportunity to adequately respond to the accusation. The lack of due process in the hearing here precluded a fair evaluation of the witnesses’ credibility. In this respect, neither Jane nor John received a fair hearing.<sup>45</sup>

**Recommend:** The critical subsections of proposed section 106.45(b)(1) are discussed below.

We welcome the Department’s decision to signify that the regulations are not referring to actual “Due Process” owed only by state or governmental entities, but to the specific due process-like procedures “provided under these proposed regulations,” thus ensuring equivalent protections to students at private as well as public colleges and universities.<sup>46</sup>

**Proposed Section 106.45(b)(1)(ii): Objective evaluation of all relevant evidence**

[Fed. Reg. p. 61497, column 3]

**Comment:** The proposed changes in this section that require “an objective evaluation of all relevant evidence” and “credibility determinations” not “based on a person’s status,” are welcome; too often, Title IX investigators—perhaps sympathetic to complainants—have seemed to engage in their investigations with a predetermined outcome.

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<sup>43</sup> Murray Press Release, Sept. 6, 2017, <https://www.help.senate.gov/ranking/newsroom/press/murray-urges-devos-not-to-undermine-campus-sexual-violence-survivors-instead-suggests-steps-devos-should-take-to-support-and-protect-survivors->.

<sup>44</sup> *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 573 (D. Mass. 2016).

<sup>45</sup> *Doe v. Regents of University of California*, 28 Cal. App. 5th 44, 61 (Cal. App. 2d Dist. October 9, 2018).

<sup>46</sup> Fed. Reg., p. 61472, column 3.

For instance, in *Sahm v. Miami University*, Miami’s investigator discouraged a student from testifying and presenting exculpatory evidence before the university’s Title IX tribunal. The investigator told the student that she should use Google to see how infrequently rape allegations were false. U.S. District Judge Susan Dlott found this conduct “troubling.”<sup>47</sup>

Meanwhile, in *Doe v. Amherst College*, the hired investigator failed to track down text messages sent by the complainant on the night of the incident, messages that contradicted the complainant’s story in multiple respects. When confronted with these texts during a subsequent deposition, the school’s investigator explained that the texts she considered relevant were only those that were written after the complainant had come to believe she was sexually assaulted.<sup>48</sup>

**Recommend:** The myopic sort of investigation currently conducted by some schools is unfair, and section 106.45(b)(1)(ii) will help ensure future investigations evaluate “all relevant evidence,” including that which is “both inculpatory and exculpatory.” It would be helpful, however, if the rule were to provide standards by which to evaluate whether evidence is “relevant,” reliable, or “reasonable” to rely upon, or examples of evidence that meets these criteria.

**Proposed Section 106.45(b)(1)(iv): Presumption of non-responsibility**  
[Fed. Reg. p. 61497, column 3]

**Comment:** The proposed rules address in subsection (b)(1)(iv) as well as (b)(2)(i)(B)<sup>49</sup> the need for accused students to be presumed innocent.

**Recommend:** This provision is welcome. Even under a preponderance standard an accused student should be presumed innocent, since a hypothetical adjudication that ended with a belief that each party was equally truthful would need to end in a not-responsible finding. Nevertheless, too often universities have maintained they’re not required to presume the respondent innocent;<sup>50</sup> in some cases, respondents have even claimed that their school placed the burden of proof on them.<sup>51</sup>

**Proposed Section 106.45(b)(1)(v): Reasonably prompt timeframes**  
[Fed. Reg. p. 61497, column 3]

**Comment:** This provision for “reasonably prompt timeframes,” correctly appreciates the difficulty that a “recommended” 60-day limit for adjudication posed for both complainants and respondents. Schools often spend far fewer than 60 days completing the adjudication process, often at the expense of allowing complainants and respondents adequate time to provide evidence.

In an early example from the post-2011 Dear Colleague letter era, Vassar College completed its investigation, adjudication, and expulsion of an accused student in fewer than ten days. The haste was especially problematic given that the complainant had waited 364 days to file a complaint, with no

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<sup>47</sup> *Sahm v. Miami University*, 110 F. Supp. 3d at 778.

<sup>48</sup> *Doe v. Amherst College*, 238 F. Supp. 3d 195.

<sup>49</sup> Fed. Reg., p. 61498, column 1.

<sup>50</sup> *Doe v. University of Cincinnati*, aff’d sub nom. *Doe v. Cummins*, 662 Fed. Appx. 437, 447 (6th Cir. 2016).

<sup>51</sup> *Wells v. Xavier University*, 7 F. Supp. 3d 746.

allegations of subsequent harassment, and the hasty hearing denied to the respondent (a foreign national) sufficient time to ensure that his exculpatory witnesses would appear at the hearing.<sup>52</sup>

**Recommend:** Regulatory action is particularly important in this area because courts have shown more flexibility in granting colleges leeway to conduct rushed adjudications than they have with other procedural concerns. It is also helpful that the section mentions that “good cause” for delay “may include considerations such as . . . concurrent law enforcement activity,” as this element is becoming a more frequent dilemma for respondents.

**Proposed Section 106.45(b)(3)(vii): Live hearing and cross-examination**  
[Fed. Reg. p. 61498, columns 2-3]

**Comment:** The proposed rules require a “live hearing” at which cross-examination must be permitted and conducted by a party’s “advisor.” This requirement is consistent with the case law in several jurisdictions in which courts increasingly have stressed the importance of cross-examination in achieving fair adjudications of sexual assault allegations, particularly when credibility is at issue.<sup>53</sup>

The rationale for this requirement is twofold:

Not only does cross-examination allow the accused to identify inconsistencies in the other side's story, but it also gives the fact-finder an opportunity to assess a witness's demeanor and determine who can be trusted. So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.<sup>54</sup>

In *Doe v. University of Cincinnati*, the Sixth Circuit observed that cross-examination also benefits the decision-makers:

UC assumes cross-examination is of benefit only to Doe. In truth, the opportunity to question a witness and observe her demeanor while being questioned can be just as important to the trier of fact as it is to the accused. “A decision relating to the misconduct of a student requires a factual determination as to whether the conduct took place or not.” [] “The accuracy of that determination can be safeguarded by the sorts of procedural protections traditionally imposed under the Due Process Clause.” Few procedures safeguard accuracy better than adversarial questioning. In the case of

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<sup>52</sup> *Yu v. Vassar College*, 97 F. Supp. 3d 448 (S.D.N.Y. 2015).

<sup>53</sup> *Doe v. Baum (University of Michigan)* 903 F.3d at 578; *Doe v. University of Cincinnati*, 872 F.3d 393, 399-402 (6th Cir. 2017) (“[t]he ability to cross-examine is most critical when the issue is the credibility of the accuser.”); *Doe v. University of Southern California (USC)* \_\_\_ Cal.App.5th \_\_\_, 2018 (2nd Appl. Dist., Div. 7, 2018) p. 31 (using the original December 11, 2018 court-filed opinion) (decision-maker must be able to see witness respond to questions); *Doe v. Claremont McKenna College (CMC)* 25 Cal.App.5th 1055, 1070 (2nd Appl. Dist., Div. 1, 2018); *Doe v. University of Michigan*, No.2:18-cv-11776-AJT-EAS, Docket 30, (S.D.MI. July 6, 2018); *Doe v. Alger (James Madison University)*, 228 F. Supp. 3d 713, 730 (W.D. Va. 2016); *Lee v. The University of New Mexico*, Case 1:17-cv-01230-JB-LF, pp. 2-3 (D. NM. 2018); *Doe v. University of So. Miss.*, No. 2:18-cv-00153 (S.D. Miss. Sept. 26, 2018); *Doe v. Penn. State University*, No. 4:18-CV-00164, 2018 U.S. Dist. LEXIS 141423 (M.D. Pa. Aug. 21, 2018).

<sup>54</sup> *Doe v. Baum*, 903 F.3d at 581 (citations omitted).

competing narratives, “cross-examination has always been considered a most effective way to ascertain truth.”<sup>55</sup>

In *Doe v. Baum*, the Sixth Circuit reiterated that,

due process requires cross-examination in circumstances like these because it is ‘the greatest legal engine ever invented’ for uncovering the truth.<sup>56</sup> Not only does cross-examination allow the accused to identify inconsistencies in the other side’s story, but it also gives the fact-finder an opportunity to assess a witness’s demeanor and determine who can be trusted. [] So if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.<sup>57</sup>

In a case against Miami University, U.S. District Judge Michael Barrett addressed the school’s argument that cross-examination would only matter if the accused student could independently claim the complainant or other inculpatory witnesses would produce answers that would definitely help the accused student’s case. The university, the judge observed, missed “the point of cross examination,”

which allows the fact-finder to assess witness demeanor and responses in order to ‘assess the credibility of those who disclaim any improper motivations.’ If anything, [Miami’s] claim that no amount of cross-examination could have changed the minds of the hearing panel members arguably undercuts the fairness of the hearing.<sup>58</sup>

**Recommend:** Proposed section 106.45(b)(3)(vii) is consistent with both state and federal appellate and lower courts which have recognized the importance of cross-examination in cases that necessitate credibility judgments by a disciplinary panel—as most campus sexual misconduct cases do.

We are aware of concerns that questioning a complainant about his/her allegations could be re-traumatizing, but the proposed rules go a long way to ensure this possibility is minimized by allowing advisors and not parties to question an opposing party and parties to be situated in different locations while still being visible to each other and the decision-makers.

As the Sixth Circuit noted,

A case that “resolve[s] itself into a problem of credibility” cannot itself be resolved without a mutual test of credibility, at least not where the stakes are this high . . . One-sided determinations are not known for their accuracy.<sup>59</sup>

The interests of the respective parties must be weighed, and we believe this proposed rule is successful in reaching a balanced solution.

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<sup>55</sup> *Doe v. University of Cincinnati*, 872 F.3d at 401 (citations omitted), quoting *Board of Curators of the University of Missouri v. Horowitz*, 435 U.S. 78, 95 n.5, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) (Powell, J. concurring); *Watkins v. Sowders*, 449 U.S. 341, 349, 101 S.Ct. 654, 66 L.Ed.2d 549 (1981) (footnote omitted); and citing *Maryland v. Craig*, 497 U.S. 836, 846, 110 S.Ct. 3157, 111 L.Ed.2d 666 (1990) (“cross-examination ‘ensur[es] that evidence admitted against an accused is reliable and subject to the rigorous adversarial testing that is the norm of Anglo–American criminal proceedings”).

<sup>56</sup> *University of Cincinnati*, 872 F.3d at 401–02 (citation omitted).

<sup>57</sup> *Doe v. Baum (University of Michigan)* 903 F.3d at 578.

<sup>58</sup> *Nokes v. Miami University*, 2017 U.S. Dist. LEXIS 136880, at \*39, fn 10 (S.D. Ohio Aug. 25, 2017) (citation omitted).

<sup>59</sup> *University of Cincinnati*, 872 F.3d at 403 (citation omitted).

**Proposed Section 106.45(b)(3)(vi) and (vii): Restrictions on cross-examination**

[Fed. Reg. p. 61498, columns 1-2, top. 61499, column 1]

**Comment:** The rule offers three restrictions on the right to cross-examination. The first, in subsection (3)(vi), appropriately holds that the right to cross-examination does not apply to K-12 students, who have not reached an age of majority. The second—in subsection (3)(vii)—that the questioning must come from an attorney or an advisor, and not the respondent, reaches a reasonable balance between the university’s interest in encouraging more reporting and the respondent’s right to be able to defend himself.

The final restriction, also in subsection (3)(vii), excludes “evidence of the complainant’s sexual behavior or predisposition.” This proposed “rape shield” provision includes two exceptions derived from Federal Rule of Evidence 412 as applied to criminal cases. The first—that it can be admitted “to prove that someone other than the respondent committed the conduct alleged by the complainant”—seems self-evident. The second exception provides that evidence concerning the complainant’s sexual relationship with the respondent can be offered to prove consent.<sup>60</sup> This latter exception would have been applicable to cases such as *Doe v. Brandeis*, where the university interpreted each sexual act between the two students as occurring in a vacuum, as if they did not know each other, rather than in the context of an existing, exclusive, long-term relationship.<sup>61</sup>

Unfortunately, the rule excludes the third exception in Fed. R. Evid. 412—for cases in which “evidence whose exclusion would violate the defendant’s constitutional rights.” It also does not include the exception in civil cases, where Fed. R. Evid. 412 suggests that “the court may admit evidence offered to prove a victim’s sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party.”<sup>62</sup>

**Recommend:** The restriction in subsection (3)(vii), excluding “evidence of the complainant’s sexual behavior or predisposition,” deserves clarification in response to comment. Numerous lawsuits filed by accused students involve an area left vague by this section’s “rape shield” provision—cases where the complainant’s alleged motive was concealing a consensual sexual encounter with the respondent from her boyfriend, friends or parents, as alleged in complaints such as *Doe v. Swarthmore College* or *Doe v. Johnson & Wales University*.<sup>63</sup>

The Department should reassure the public that the goal in these motivation cases would not be to inquire into the *specifics* of the complainant’s sexual relationship with someone else, but it would be critical to the respondent’s defense to *establish* the existence of that sexual relationship. The Department should make clear that the well-intentioned rape shield provision would not preclude questioning about the existence of another relationship when relevant to a possible motive to conceal that relationship.

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<sup>60</sup> See, for example, *Doe v. Trustees of Boston College* 892 F.3d 67 (1st Cir. 2018)], where the university improperly encouraged favorable treatment of the student that Doe claimed actually committed the sexual assault.

<sup>61</sup> *Doe v. Brandeis University*, 177 F. Supp. 3d at 573.

<sup>62</sup> Fed. R. Evid. 412, [https://www.law.cornell.edu/rules/fre/rule\\_412](https://www.law.cornell.edu/rules/fre/rule_412).

<sup>63</sup> *Doe v. Swarthmore College*, complaint, No. 2:14-cv-00532; *Doe v. Johnson & Wales University*, No. 1:18-cv-00106 (D.R.I. May 14, 2018).

**Proposed Section 106.45(b)(3)(viii): Equal access to evidence**

[Fed. Reg. p. 61498, column 3]

**Comment:** Proposed subsection (b)(3)(viii) would require students be informed of and permitted to access all evidence collected by the school “directly related to the allegations,” whether or not it will be relied upon in the school’s investigation or adjudication. Presently, parties are routinely denied or given very limited access to evidence and witness statements, including the statements of their accuser.<sup>64</sup>

This subsection specifically requires disclosure of evidence on which the school may not rely. This provision is significant because it is commonplace for some schools to ignore or improperly characterize evidence as “irrelevant.” In *Doe v. Ohio State* (2018), U.S. District Judge James Graham noted that the respondent was denied the right to “effectively cross-examine” his accuser when OSU withheld information about the academic accommodation that the complainant received, because it showed his accuser had,

a motive to claim she was too drunk to remember the encounter: she was threatened with expulsion from medical school and might be able to remain in school if she claimed to be the victim of a sexual assault.<sup>65</sup>

The proposed rule merely codifies what numerous federal courts already have recognized: that “universities have perhaps, in their zeal to end the scourge of campus sexual assaults, turned a blind eye to the rights of accused students.”<sup>66</sup>

Subsection (b)(3)(viii) also appropriately recognizes that, for the right to cross-examination to be meaningful, schools must supply access to all evidence accumulated during the investigation.

**Recommend:** A fair adjudication process of a sexual assault allegation cannot occur without providing parties an opportunity to review all evidence collected so they can meaningfully cross-examine adverse witnesses. Defenders of the status quo presumably will object to this provision on grounds that it will convert the Title IX disciplinary process from an “educational” into an adversarial environment, discourage reporting, or retraumatize “victims.” But in *Doe v. Notre Dame*, U.S. District Judge Philip Simon observed,

When asked at the preliminary injunction hearing why an attorney is not allowed to participate in the hearing especially given what is at stake—potential dismissal from school and the forfeiture of large sums of tuition money—[the supervising university official] told me it’s because he views this as an ‘educational’ process for the student, not a punitive one.

Judge Simon correctly dismissed this position as “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.”<sup>67</sup>

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<sup>64</sup> *Doe v. University of Southern California* 246 Cal.App.4th 221, 248, 253, 200 Cal.Rptr.3d 851 (2nd Appl. Dist., Div. 5, 2016) (denied access to evidence).

<sup>65</sup> *Doe v. Ohio State*, 2018 U.S. Dist. LEXIS 68364, at \*25 (S.D. Ohio April 24, 2018).

<sup>66</sup> *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at \*30 (N.D. Ind. May 8, 2017).

<sup>67</sup> *Id.*, at \*34-5.

**Proposed Section 106.45(b)(4)(i): Determination regarding responsibility**

[Fed. Reg. p. 61499, column 1]

**Comment:** Proposed subsection (b)(4)(i) of 106.45 prevents use of the single investigator model and allows schools the option to use clear and convincing as an alternative to the preponderance standard of evidence. The proposed rule also notes that in order to “ensure that recipients do not single out respondents in sexual harassment matters for uniquely unfavorable treatment,”<sup>68</sup> the recipient may use preponderance (1) “only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction,” and (2) requires the recipient to “apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.” The Department recognizes the importance of this latter requirement for students who have little or no leverage:

to avoid the specially disfavored treatment of student respondents in comparison to respondents who are employees such as faculty members, who often have superior leverage as a group in extracting guarantees of protection under a recipient’s disciplinary procedures, recipients are also required to apply the same standard of evidence for complaints against students as they do for complaints against employees, including faculty.<sup>69</sup>

The Department also acknowledges a higher standard would be appropriate in cases involving sexual misconduct because of potential repercussions:

a finding of responsibility carries particularly grave consequences for a respondent’s reputation and ability to pursue a profession or career, a higher standard of proof can be warranted. Indeed, one court has held that in student disciplinary cases involving serious accusations like sexual assault where the consequences of a finding of responsibility would be significant, permanent, and far-reaching, a preponderance of the evidence standard is inadequate.

In 2018, a federal court<sup>70</sup> held that—given the lack of other procedural safeguards and the seriousness of the allegations—preponderance is not an appropriate standard for use in sexual misconduct cases. Judges in two other cases<sup>71</sup> have expressed concerns about the use of a preponderance standard to adjudicate Title IX complaints.

The most recent academic study on the issue, from UCLA professor John Villasenor, hypothesizes that—on the likelihood of error when using the preponderance standard—a typical Title IX tribunal will issue an erroneous finding of responsibility in cases involving an innocent student between 20 and 33 percent of the time.<sup>72</sup>

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<sup>68</sup> Fed. Reg., p. 61477, column 3.

<sup>69</sup> Fed. Reg., p. 61477, column 3.

<sup>70</sup> *Lee v. University of N.M.*, No. 1:17-cv-01230 (D.N.M. Sept. 20, 2018).

<sup>71</sup> *Doe v. DiStefano*, 2018 U.S. Dist. LEXIS 76268, \*22–23 (D. Colo. May 7, 2018); *Doe v. University of Mississippi*, 2018 U.S. Dist. LEXIS 123181 (S.D. Miss. July 24, 2018).

<sup>72</sup> John Villasenor, “A probabilistic framework for modelling false Title IX ‘convictions’ under the preponderance of the evidence standard,” *Law, Probability and Risk*, Volume 15, Issue 4, Dec. 1, 2016, pp. 223–237.

<https://academic.oup.com/lpr/article/15/4/223/2549058>.

Some argue that campus Title IX adjudications resemble civil litigation, in which a preponderance standard is used. But this viewpoint overlooks the significant differences between the civil and campus systems, such as limited discovery, no testimony under oath, no rules of evidence, no public hearings, no active assistance of counsel, and no right to an independent adjudicator.

Similarly, the rule's exclusion of the single investigator model addresses concerns raised in several recent court decisions.<sup>73</sup> For example, U.S. District Judge Matthew Brann allowed a lawsuit against Penn State to proceed, writing,

In a case like this, however, where everyone agrees on virtually all salient facts except one—i.e., whether or not Ms. Roe consented to sexual activity with Mr. Doe—there is really only one consideration for the decisionmaker: credibility. After all, there were only two witnesses to the incident, with no other documentary evidence of the sexual encounter itself. As a result, in this Court's view, the Investigative Model's virtual embargo on the panel's ability to assess that credibility raises constitutional concerns.<sup>74</sup>

Judge Brann's comment captured the myriad difficulties with the single-investigator model. Beyond denying cross-examination by design, the model blends the investigative and adjudicative functions to such an extent that it dramatically increases the chances of incorrect findings.

**Recommend:** Elimination of the single investigator model by section 106.45(b)(4)(i) is a major step toward returning fairness and traditional due process-like protections to the campus system. As a California appeals court recently noted, the notion that a single individual could ensure the rights of the two involved students “ignores the fundamental nature of cross-examination” and was “incompatible” with any effort “to uncover the truth.” In such a system, the court continued, deficiencies in findings “are virtually unavoidable,” since the model “places in a single individual the overlapping and inconsistent roles of investigator, prosecutor, fact-finder, and sentencer.”<sup>75</sup>

In general, while the university might have an abstract interest in upholding discipline, its real interest should be “in securing *accurate* resolutions of student complaints,” because its educational mission would be stymied by ejecting “*innocent* students who would otherwise benefit from, and contribute to, its academic environment.”<sup>76</sup>

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<sup>73</sup> *John Doe v. University of Michigan, et al.*, Case No. 18-1177, \*p. 7 (E.D. Mich. July 6, 2018) (“private questioning through the investigator,” deprived the accused student “of a live hearing and the opportunity to face his accuser.”); *Doe v. Penn. State University*, No. 4:18-cv-164, Docket 27, 2018 U.S. Dist. LEXIS 141423 at \*12 (M.D. Pa. August 21, 2018) (court found it insufficient that the investigator had “filtered,” “paraphrased,” and then “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 unclear whether (or how) those questions were rephrased.”); *Doe v. University of Cincinnati*, 872 F.3d at 401–02 (complainant did not appear; insufficient to require accused to submit questions through investigator or decision-makers); *Doe v. Brandeis University*, 177 F. Supp. 3d at 573 (“obvious” the “dangers of combining in a single individual the power to investigate, prosecute, and convict, with little effective power of review”); *Doe v. Claremont McKenna College*, 25 Cal.App.5th at 1072-73 (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 University*, 882 F.3d at 601, 605 (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.”)

<sup>74</sup> *Doe v. Penn. State University*, No. 4:18-CV-164, 2018 U.S. Dist. LEXIS 141423 at \*12 (M.D. Pa. August 21, 2018).

<sup>75</sup> *Doe v. Ainsley Carry* (USC), No. B283406, at \*47 (2nd Appl. Dist., Div. 4, January 4, 2019).

<sup>76</sup> *Doe v. Penn. State University*, No. 4:18-CV-164, 2018 U.S. Dist. LEXIS 141423 at \*12.

**Proposed Section 106.45(b)(5): Appeals**

[Fed. Reg. p. 61499, column 2]

**Comment:** In the proposed rules, schools are permitted to allow appeals by both parties, though the complainant cannot appeal to request a different sanction, such as expulsion.

No federal court has ever ruled that complainants have a right, under Title IX, to appeal not-responsible findings. Before 2011, one OCR resolution letter had approved a school granting only the accused a right to appeal because “he/she is the one who stands to be tried twice for the same allegation.”<sup>77</sup> Two subsequent resolution letters made clear that Title IX did not require complainants be allowed to appeal not-responsible findings.<sup>78</sup>

Multiple lawsuits from respondents, moreover, have raised questions of fundamental fairness in how schools have administered appeals of not-guilty findings. At George Mason, the appeals officer improperly communicated with the complainant before overturning the not-guilty finding.<sup>79</sup> At James Madison, university procedures allowed the complainant to introduce new (and, it turned out, misleading) evidence without allowing the respondent a chance to rebut the material.<sup>80</sup> And at the University of Michigan, the Appeals Board made credibility judgments about the two parties without ever hearing from them.<sup>81</sup>

**Recommend:** Allowing complainants to appeal findings of not-responsible imports a form of double jeopardy into the campus Title IX process, raising concerns with fairness. Permitting complainants’ appeals also could affect integrity of credibility determinations because there is no assurance that such determinations will not be reconsidered on appeal; allowing a different official or panel to revisit and possibly change the decision of the original decision-makers seems to negate or undermine the benefits of requiring a hearing with live testimony to assess credibility in the first instance. These problems could be avoided by confining the right of appeal to respondents.

**Proposed Section 106.45(b)(7): Recordkeeping**

[Fed. Reg. p. 61499, column 3]

**Comment:** The proposed rule would require all records of the Title IX disciplinary process to be retained and accessible to the parties for three years. Critically, this provision would require schools to disclose the Title IX training materials used for adjudicators. Knowing they will need to share their training materials with complainants and respondents who requests it may discourage universities from utilizing training which oftentimes employs sex stereotypes.

In *Doe v. Ohio State University*, Judge James Graham expressed concerns about the one-sided contents of Ohio State’s training material, but also surmised that the university may have provided “training or

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<sup>77</sup> Skidmore College, OCR Complaint No. 02-95-2136 (Feb. 12, 1996).

<sup>78</sup> University of Cincinnati, OCR Complaint No. 15-05-2041 (Apr. 13, 2006) (“there is no requirement under Title IX that a recipient provide a victim’s right of appeal”) and Suffolk University Law School, OCR Complaint No. 01-05-2074 (Sept. 30, 2008) (“appeal rights are not necessarily required by Title IX, whereas an accused student’s appeal rights are a standard component of University disciplinary processes in order to assure that the student is afforded due process before being removed from or otherwise disciplined by the University”).

<sup>79</sup> *Doe v. Rector and Visitors of George Mason University*, 149 F. Supp. 3d 602.

<sup>80</sup> *Doe v. Alger*, (*James Madison University*), 228 F. Supp. 3d 713.

<sup>81</sup> *Doe v. Baum* (*University of Michigan*) 903 F.3d 575.

direction on [decision-makers'] role as fair and neutral judges." Without such training, he noted that the material presented to him "plausibly alleges the panel members had illegal prejudice to [respondents], which amounts to actual bias."<sup>82</sup>

Judges in lawsuits against the universities of Mississippi and Pennsylvania likewise have cited concerns with sex-biased training in their rulings. For example, in *Doe v. Brown University*, a critical question was why the university's Title IX tribunal discounted post-incident texts sent by the complainant that seemed to portray the incident in consensual terms. The decisive vote in the Brown tribunal, by a university associate dean, testified "it was beyond my degree of expertise to assess [the complainant]'s post-encounter conduct . . . because of a possibility that it was a response to trauma."<sup>83</sup> U.S. District Judge William Smith held that this testimony showed a failure of Brown's training, since "it appears what happened here was that a training presentation was given that resulted in at least one panelist completely disregarding an entire category of evidence."<sup>84</sup>

In a 2017 decision later affirmed by the 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."<sup>85</sup> Similarly, in *Doe v. University of Mississippi*, the court found the school's training materials created "an assumption . . . that an assault occurred," because it "advises":

(1) "that a `lack of protest or resistance does not constitute consent, nor does silence,'" (2) . . . "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 (3) . . . 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."<sup>86</sup>

Other courts have recognized the importance of the context of the parties' relationship in determining motivation in these cases, and have criticized the school's refusal to consider such evidence.<sup>87</sup> "Context" clearly includes the complainant's behavior and statements both before and after the alleged event.

The impact of such biased training is manifest in a report issued by FIRE that observed: "An investigator who is trying to anticipate and counter defense strategies in the course of his/her investigation is not acting as a neutral fact-finder."<sup>88</sup>

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<sup>82</sup> *Doe v. Ohio State University*, 219 F. Supp. 3d 645, 659 (S.D. Ohio 2016).

<sup>83</sup> *Doe v. Brown University*, 210 F. Supp. 3d 310, 327 (D.R.I. 2016).

<sup>84</sup> *Id.* at 342.

<sup>85</sup> *Doe v. Regents of University of California*, "Notice of Order Awarding Attorneys' Fees," April 18, 2018, at p. 3, citing "Order of 11/15/17" at p. 26.

<sup>86</sup> *Doe v. University of Mississippi*, Civil Action No. 3:16-CV-63-DPJ-FKB, p. 20, 2018 U.S. Dist. LEXIS 123181 (D. S.D. Miss., N.D. July 24, 2018) (using the original court filed version July 24, 2018.)

<sup>87</sup> *Doe v. University of Notre Dame*, 2017 U.S. Dist. LEXIS 69645, at p. 23 (original court filed version on May 8, 2017) ("In a disciplinary matter concerning behavior in a long-term existing relationship, context matters, and the motive of the complainant (as it relates to credibility) bears more scrutiny than in some other cases.")

<sup>88</sup> Samantha Harris, "University of Texas 'Blueprint' for Campus Police Raises Fairness Concerns," *Foundation for Individual Rights in Education*, March 11, 2016. <https://www.thefire.org/university-of-texas-blueprint-for-campus-police-raises-fairness-concerns/>.

**Recommend:** This section’s provision for training that avoids sex stereotypes and instructs in due process is welcome, though we worry that universities will not implement it in good faith. In the few cases where a school’s entire training has become public, emphasis on fairness or the rights of a respondent has been perfunctory at best and wholly absent at worst. Instead, the apparent purpose of the training too often was to promote a sex-stereotypical belief that complainants should be presumed truthful.<sup>89</sup>

Therefore, we urge the Department to require colleges and universities to make public all Title IX training that adjudicators receive, rather than forcing a respondent to make a request for this material as part of his or her disciplinary process. This also will allow potential applicants to understand a school’s policy before committing to attend a university.

### III. Responses to Directed Questions

**Directed Question 4. Training.**<sup>90</sup> “The proposed rule would require recipients to ensure that Title IX Coordinators, investigators, and decision-makers receive training on the definition of sexual harassment, and on how to conduct an investigation and grievance process, including hearings, that protect the safety of students, ensures due process for all parties, and promotes accountability. The Department is interested in seeking comments from the public as to whether this requirement is adequate to ensure that recipients will provide necessary training to all appropriate individuals, including those at the elementary and secondary school level.”

**Response:** As previously noted, we have profound concerns about the fairness of the training material used in the college and university Title IX process, especially regarding the training items given to adjudicators. The rescinded 2014 guidance required all adjudicators in Title IX campus to receive training in “the effects of trauma, including neurobiological change.”<sup>91</sup> However well-intentioned, this mandate led too many institutions to use training that robbed the respondent of an ability to present a meaningful defense, by suggesting that virtually any piece of evidence was consistent with the complainant’s truthfulness or evidence of trauma.<sup>92</sup>

The proposed regulations take a step toward fairness by requiring institutions to provide all training materials, upon request, to the parties to a campus adjudication. We believe the preferable approach would be simply requiring schools to make public all training materials given to Title IX adjudicators. Hopefully, this increased transparency will encourage schools to abandon unfair training: as Justice Brandeis wrote, “Publicity is justly commended as a remedy for social and industrial diseases. Sunlight

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<sup>89</sup> KC Johnson and Stuart Taylor, “The Title IX Training Travesty,” *The Weekly Standard*, Nov. 10, 2017, <https://www.weeklystandard.com/kc-johnson-and-stuart-taylor-jr/the-title-ix-training-travesty>.

<sup>90</sup> Fed. Reg p. 61483 column 1.

<sup>91</sup> Office for Civil Rights, U.S. Dep’t of Educ., *Questions and Answers on Title IX and Sexual Violence* (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>92</sup> Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” *The Atlantic*, Sept. 8, 2017, <https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/> (“Assertions about how trauma physiologically impedes the ability to resist or coherently remember assault have greatly undermined defense against assault allegations. But science offers little support for these claims.”); KC Johnson and Stuart Taylor, “The Title IX Training Travesty,” *supra*, note 89.

is said to be the best of disinfectants.”<sup>93</sup> In case it does not, however, and training material continue to use sex stereotypes in a manner that prejudices respondents, we would urge the Department to take additional steps to ensure that universities train adjudicators in principles of due process, the presumption of innocence, and the need to remain open-minded and impartial.

**Directed Question 6. Standard of evidence.**<sup>94</sup> “In section 106.45(b)(4)(i), we are proposing that the determination regarding responsibility be reached by applying either a preponderance of the evidence standard or the clear and convincing standard, and that the preponderance standard be used only if it is also used for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. We seek comment on (1) whether it is desirable to require a uniform standard of evidence for all Title IX cases rather than leave the option to schools to choose a standard, and if so then what standard is most appropriate; and (2) if schools retain the option to select the standard they wish to apply, whether it is appropriate to require schools to use the same standard in Title IX cases that they apply to other cases in which a similar disciplinary sanction may be imposed.”

**Response:** As previously noted, given the seriousness of the allegations and concerns that the preponderance standard might unintentionally pressure disciplinary panels to return findings of responsibility, we believe that the clear and convincing standard is the most appropriate standard to use in Title IX cases. In 2018, several federal courts expressed concerns that preponderance was not the appropriate evidentiary standard for sexual misconduct allegations.

The 2017 interim guidance gave schools the option to use the clear and convincing standard; as far as we know, not a single institution did so. In the current environment, if schools have a choice between a higher and lower standard of proof, they will choose the lower one. Only a mandate from the Department will ensure a fairer standard.

**Directed Question 7. Potential clarification regarding ‘directly related to the allegations’ language.**<sup>95</sup> “Proposed section 106.45(b)(3)(viii) requires recipients to provide each party with an equal opportunity to inspect and review any evidence directly related to the allegations obtained as part of the investigation, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, and provide each party with an equal opportunity to respond to that evidence prior to completion of the investigative report. The ‘directly related to the allegations’ language stems from requirements in FERPA, 20 U.S. Code § 1232g(a)(4)(A)(i). We seek comment on whether or not to regulate further with regard to the phrase, ‘directly related to the allegations’ in this provision.”

**Response:** We worry that this provision will tempt universities to withhold relevant, exculpatory evidence from respondents, by defining the information as not “directly related to the allegations.” Institutions need to be saved from themselves on this matter. The rule should require them to share with both parties all evidence gathered in the investigation.

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<sup>93</sup> Louis Brandeis, “What Publicity Can Do,” in *Other People’s Money*, chapter 5, p. 92 (1932).

<sup>94</sup> Fed. Reg p. 61483 column 2.

<sup>95</sup> Fed. Reg p. 61483 column 2.