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Novel Perspectives on Due Process Symposium: Do the Proposed Title IX Regulations Protect or Undermine Due Process?

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DO THE PROPOSED TITLE IX REGULATIONS PROTECT OR UNDERMINE DUE PROCESS?

*Michelle J. Anderson**

Due process for those accused of sexual misconduct on college campuses has arisen as an area of increased concern. Many scholars focus on whether the (usually) male students accused of sexual assault and harassment get a fair shake in the quasi-judicial disciplinary proceedings mandated by Title IX, the federal civil rights law that prohibits sex discrimination in educational institutions.

For example, dozens of law professors from Harvard and the University of Pennsylvania have denounced their institutions' disciplinary procedures to address campus sexual assault, arguing that they fail to grant accused students due process.¹ The rhetoric around this issue has escalated over time. Yale Law Professor Jed Rubenfeld argued that campus adjudication of sexual assault is "inherently unreliable and error-prone."² Harvard Law Professor Janet Halley then argued that campus sexual assault adjudications "are taking us back to pre-Magna Carta, pre-due-process procedures."³

Strong words. Some of the loudest voices in the debate on campus sexual assault now focus on the rights of those accused of sexual assault instead of those victimized by it. This was not always the case. The focus for many

* President of Brooklyn College. This essay is based on comments that the City University of New York submitted in response to the November 2018 Department of Education's proposed regulations to implement Title IX.

1. See, e.g., Elizabeth Bartholet et al., *Rethink Harvard's Sexual Harassment Policy*, BOS. GLOBE (Oct. 14, 2014), <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html> [<https://perma.cc/3CYJ-JHXS>]; Open Letter from Members of the Penn Law School Faculty (Feb. 18, 2015), <http://media.philly.com/documents/OpenLetter.pdf> [<https://perma.cc/F6Q5-9DQV>]; Joseph Cohn, *Campus Is a Poor Court for Students Facing Sexual-Misconduct Charges*, CHRON. HIGHER EDUC. (Oct. 1, 2012), <http://chronicle.com/article/Campus-Is-a-Poor-Court-for/134770> [<https://perma.cc/C3R8-FSH4>]; Nancy Gertner, *Sex, Lies and Justice*, AM. PROSPECT (Jan. 12, 2015), <http://prospect.org/article/sex-lies-and-justice> [<https://perma.cc/RRC8-34HB>].

2. Jed Rubenfeld, Opinion, *Mishandling Rape*, N.Y. TIMES (Nov. 15, 2014), <http://www.nytimes.com/2014/11/16/opinion/sunday/mishandling-rape.html> [<https://perma.cc/EUG3-6P58>].

3. David G. Savage & Timothy M. Phelps, *How a Little-Known Education Office Has Forced Far-Reaching Changes to Campus Sex Assault Investigations*, L.A. TIMES (Aug. 17, 2015), <http://www.latimes.com/nation/la-na-campus-sexual-assault-20150817-story.html> [<https://perma.cc/DKU5-GA9H>].

years was on the incidence of campus sexual assault and how frequently campuses failed to respond to it.⁴

Sexual harassment and sexual assault are both serious problems on college campuses.⁵ According to research by the Association of American Universities, 26.1 percent of senior females, 6.3 percent of senior males, and 29.5 percent of seniors identifying as transgender, genderqueer, non-conforming, or questioning have experienced penetration or sexual touching by physical force or incapacitation since entering an institution of higher education.⁶ About 60 percent of both female and male college students experience some form of sexual harassment.⁷ Sexual harassment and sexual assault are both associated with impaired academic outcomes, including “lower academic efficacy, higher stress, lower institutional commitment, and lower scholastic conscientiousness.”⁸

Moreover, sexual assault disproportionately harms women; 84 percent of sexual assault and rape victims are female.⁹ That gender bias has legal implications for colleges. In 1972, Congress enacted Title IX,¹⁰ which states: “[n]o person in the United States shall, on the basis of sex, be excluded from

4. See, e.g., Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945 (2004).

5. One-fifth to one-fourth of female students are victims of attempted or completed rape while in higher educational institutions. BONNIE S. FISHER ET AL., U.S. DEP'T OF JUSTICE, *THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN* 10 (2000).

6. DAVID CANTOR ET AL., THE ASS'N. OF AM. UNIVS., *REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT* xiii (2015).

7. CATHERINE HILL & ELENA SILVA, AM. ASS'N. OF UNIV. WOMEN EDUC. FOUND., *DRAWING THE LINE: SEXUAL HARASSMENT ON CAMPUS* 18 (2005).

8. VICTORIA L. BANYARD ET AL., *ACADEMIC CORRELATES OF UNWANTED SEXUAL CONTACT, INTERCOURSE, STALKING, AND INTIMATE PARTNER VIOLENCE: AN UNDERSTUDIED BUT IMPORTANT CONSEQUENCE FOR COLLEGE STUDENTS* 11 (2017). Moreover, about 31 percent of rape victims and 7 percent of sexual battery victims across nine schools experienced worsened schoolwork or grades. CHRISTOPHER KREBS ET AL., BUREAU OF JUSTICE STATISTICS, *CAMPUS CLIMATE SURVEY VALIDATION STUDY FINAL TECHNICAL REPORT* 113 (2016). About 8 percent of rape victims and 2 percent of sexual battery victims dropped classes or changed their schedules. *Id.* at 114. Additionally, about 11 percent of rape victims and 4 percent of sexual battery victims wanted to drop classes or change their schedules. *Id.*

9. Kathryn Casteel et al., *What We Know about Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Jan. 2, 2018, 10:30 AM), <https://projects.fivethirtyeight.com/sexual-assault-victims/> [<https://perma.cc/UD3X-SMU2>]. Sexual assault disproportionately harms lower income individuals as well. *Id.* 44 percent of sexual assault and rape victims who participated in a recent survey came from families making less than \$25,000 per year. *Id.* When one compares the victimization data between the lowest and highest income individuals, the comparison is even more extreme. Indeed, according to the survey, people with household incomes of less than \$7,500 experience 12 times the victimization rate as those with household incomes greater than \$75,000. *Id.* At the same time, people of color and immigrants victimized by sexual assault may be less likely to report their experiences to authorities for cultural, social, and legal reasons, including fear of entanglement in bureaucracy, cultural conditioning against questioning authority, and pressure to protect those who engage in sexual misconduct. See Gayle Pollard-Terry, *For African American Rape Victims, A Culture of Silence*, L.A. TIMES (July 20, 2004), <https://www.latimes.com/archives/la-xpm-2004-jul-20-et-pollard20-story.html> [<https://perma.cc/8FHV-FCYC>].

10. Education Amendments of 1972, Pub. L. No. 92-318, §§ 901–07, 86 Stat. 235, 373–75 (codified as amended at 20 U.S.C. §§ 1681–86 (2012)).

participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance”¹¹

In 2011, under the Obama administration, the U.S. Department of Education’s Office for Civil Rights (OCR) issued guidance in the form of a “Dear Colleague Letter” on Title IX.¹² In the letter, OCR reaffirmed that “sexual violence[] interferes with students’ right to receive an education free from discrimination.”¹³ OCR required that schools “take immediate and effective steps to end . . . sexual violence.”¹⁴ OCR stressed the need for equal treatment of both the accuser and accused, demanding “[a]dequate, reliable, and impartial investigation of complaints.”¹⁵ It also affirmed that Title IX requires schools to adopt and publish grievance procedures, including specific timeframes, which must deliver to students a “prompt and equitable resolution.”¹⁶

In part because of the Dear Colleague Letter, colleges and universities stepped up their efforts to take the issue of sexual assault seriously. But pushback against these efforts was swift and strong, led in part by the law professors mentioned above, as well as parents of those accused of sexual assault.¹⁷ When the Trump administration took the White House, there was bound to be a reversal in course.

Early in her tenure, the new Education Secretary Betsy DeVos rescinded the Obama-era Dear Colleague Letter and convened a listening tour to discuss the impact of Title IX enforcement on students, families and institutions.¹⁸ In addition to meeting with victims’ rights advocates, DeVos made a point to interview “[s]tudents who have been falsely accused and disciplined under Title IX”¹⁹ and men’s rights advocates.²⁰

Thereafter, DeVos issued new proposed regulations to implement Title IX.²¹ These regulations strongly favor the accused over the accuser. Consistent with what the Trump administration has done with other civil

11. 20 U.S.C. § 1681(a).

12. Dear Colleague Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t Educ. Office for Civil Rights (Apr. 4, 2011) (withdrawn), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [<https://perma.cc/ES5B-QUH5>].

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *See supra* note 1 and accompanying text.

18. *See Secretary DeVos to Host Title IX Listening Sessions*, U.S. DEP’T OF EDUC. (July 12, 2017), <https://www.ed.gov/news/press-releases/secretary-devos-host-title-ix-listening-sessions> [<https://perma.cc/2VBQ-WDQ3>].

19. *Id.*

20. Anna North, “*This Will Make Schools Less Safe*”: *Why Betsy DeVos’s Sexual Assault Rules Have Advocates Worried*, VOX (Nov. 16, 2018, 12:50 PM), <https://www.vox.com/policy-and-politics/2018/11/16/18096736/betsy-devos-sexual-assault-harassment-title-ix> [<https://perma.cc/U7UJ-CXCE>].

21. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposal].

rights statutes, the regulations severely limit the reach and scope of Title IX. Their biggest limitations include the following:

- The proposed Title IX regulations narrow the definition of sexual harassment. Under the Department of Education's prior guidance, the definition was sexual conduct that was "sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school."²² The proposed regulations change the "or" to an "and," and define actionable sexual harassment as "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity."²³
- The proposed regulations require colleges to dismiss complaints regarding behavior that occurs outside their own "education program or activity."²⁴ Because the vast majority of educational programs and activities happen on campus, the regulations essentially limit Title IX coverage to behavior that occurs on campus. As they mandate, "[i]f the conduct alleged by the complainant . . . did not occur within the recipient's program or activity, the recipient must dismiss the formal complaint with regard to that conduct."²⁵
- The proposed regulations limit institutional liability to circumstances in which there is actual knowledge of a complaint of sexual misconduct. Previous Department of Education guidance indicated, "[a] school is responsible for addressing harassment incidents about which it knows or reasonably should have known."²⁶ The "knew or should have known" standard applies to harassment under Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Americans with Disabilities Act of 1990.²⁷ The proposed regulations, however, change the standard from "knew or should have known" to require "actual knowledge"²⁸ of allegations of

22. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civil Rights, U.S. Dep't Educ. Office for Civil Rights (Oct. 26, 2010) (withdrawn), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf> [<https://perma.cc/C4XJ-4HZG>].

23. Proposal at 34 C.F.R. § 106.30.

24. Proposal at 34 C.F.R. § 106.44(a).

25. Proposal at 34 C.F.R. § 106.45(b)(3).

26. Dear Colleague Letter, *supra* note 22.

27. *See Harassment*, U.S. Equal Emp't Opportunity Comm'n (last visited Oct. 7, 2019), <https://www.eeoc.gov/laws/types/harassment.cfm> [<https://perma.cc/22FU-F2V4>] (stating that "[t]he employer will be liable for harassment by non-supervisory employees or non-employees over whom it has control (e.g., independent contractors or customers on the premises), if it knew, or should have known about the harassment and failed to take prompt and appropriate corrective action").

28. Proposal at 34 C.F.R. § 106.44(a).

harassment reported to a “Title IX Coordinator or any official of the recipient who has the authority to institute corrective measures,”²⁹ which, at most institutions, is limited to the president.

Although there are serious concerns with each of these limitations, this essay will focus on due process, since cries of a lack of due process gave rise to the regulations themselves.

To be sure, some requirements in the proposed regulations are fair, equitable, and essential to due process. For example, the requirements for published procedures, notice of allegations, equitable treatment of complainant and respondent, equal opportunity to present witnesses and evidence, an objective assessment of the facts, a prohibition on conflicts of interest, the training of decision-makers and other employees involved, and reasonably prompt timeframes are all appropriate and necessary.³⁰

However, the proposed regulations mandate grievance procedures that are prohibitively complex and burdensome. Their innumerable requirements are unfair, both to complainants and to institutions of higher education. Myriad minute requirements dictate college behavior, overwhelmingly in ways that favor (predominately male) respondents over (predominately female) complainants.

Many of the ideas for heightened process in grievance procedures in favor of respondents came from law professors teaching in resource-rich institutions.³¹ In cases of alleged sexual misconduct, they argued that colleges should be required to provide students accused of sexual misconduct with full adversarial hearings, the right to an attorney, and the right to confront and cross-examine their accusers.³² However, underfunded colleges and universities across the country, the vast majority of which have no law schools attached to them, do not have the resources to carry out the regulations’ complex mandates, which would expose them to heightened Title IX liability compared to their better-funded counterparts.

Instead of relying on the academic judgment of educational institutions, the proposed regulations impose multipart, impracticable obligations. To call the regulations onerous is an understatement. There are more than 100 requirements imposed upon institutions of higher education for the process of investigations and formal hearings.³³

29. Proposal at 34 C.F.R. C.F.R. § 106.30.

30. See Proposal at 34 C.F.R. §§ 106.45(b)(1)(i), (ii), (iii), (v), & (b)(3)(ii).

31. See, e.g., Jamie D. Halper, *Harvard Law School Faculty Call for Title IX Sexual Assault Policy Changes*, HARV. CRIMSON (Sept. 1, 2017), <https://www.thecrimson.com/article/2017/9/1/law-faculty-title-ix/> [<https://perma.cc/EL2S-Z9JA>]; Eugene Volokh, *Open Letter from 16 Penn Law School Professors about Title IX and Sexual Assault Complaints*, WASH. POST (Feb. 19, 2015), <https://www.washingtonpost.com/news/volokh-conspiracy/wp/2015/02/19/open-letter-from-16-penn-law-school-professors-about-title-ix-and-sexual-assault-complaints/> [<https://perma.cc/3AP9-EXEM>]; Rubinfeld, *supra* note 2.

32. Barcholet et al., *supra* note 1; Open Letter, *supra* note 1.

33. See Proposal at 34 C.F.R. §§ 106.8(b)(2)(ii)(c), 106.45(a)–(b)(7)(ii).

The sheer volume and detail of the many added requirements in the proposed grievance procedures are overwhelming. Many do little to nothing to enhance fairness or due process; at the same time, they add substantial complexity and cost, making compliance practically impossible, especially for under-resourced institutions.

For example, every written disposition in a student disciplinary proceeding resolving an allegation of sexual harassment must recite every procedural step that the Title IX officer took throughout the entire investigation, before the hearing was even held: “from the receipt of the complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.”³⁴ This is a level of detail in written dispositions not required of federal judges.

The proposed regulations additionally require that decision-makers’ written dispositions include: “[f]indings of fact supporting the determination,” “[c]onclusions regarding the application of the recipient’s policy to the facts,” “[a] statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any sanctions the recipient imposes on the respondent, and any remedies provided by the recipient to the complainant designed to restore or preserve access to the recipient’s education program or activity,” the procedures for appeal, and the permissible bases for appeal.³⁵ None of these possible features of written dispositions in disciplinary proceedings is objectionable on its own, to be sure. They are standard fare for lawyers and judges. But they should not each be required of a layperson—a college employee in student affairs, for instance, drafted to the role of decision-maker to help adjudicate one case—especially when most sitting trial court judges do not issue written decisions with this level of detail, and no one claims that due process was compromised. To impose these kinds of detailed requirements on colleges is arbitrary and unduly burdensome.³⁶

Many of the proposed requirements in the grievance procedures would not meaningfully advance the core fairness of the proceedings or the due process of the parties, but they would create an enormous administrative burden. They would be unwieldy, especially for public colleges and other lesser-resourced institutions. Many of them merit special attention.

1) Attorneys or Advisors

The proposed regulations require colleges to provide both the complainant and the respondent with attorneys or advisors who are able to function as attorneys for the mandated live hearing and mandated cross-examination

34. Proposal at 34 C.F.R. § 106.45(b)(4)(ii)(B).

35. Proposal at 34 C.F.R. § 106.45(b)(4)(ii)(C)–(F).

36. These requirements are not even required under the Violence Against Women Act or the Clery Act for determinations of equally or more serious student misconduct, such as assault, arson, or kidnapping. *See, e.g.*, Violence Against Women Act, 42 U.S.C. § 13,981 (1994).

process.³⁷ Low- and moderate-income students will ordinarily not have the financial resources to hire their own attorneys or advisors for these proceedings.

It will be extremely difficult for colleges to fulfill this mandate with internal staff—that is, to find college employees willing to function as actual attorneys in these cases, required to, for instance, cross-examine alleged sexual assault victims during live disciplinary proceedings. Colleges would instead be compelled to incur considerable expense to hire outside advocates for the hearings.

Under the proposed regulations, colleges would need either to hire actual attorneys or to hire lay advisors and train them on techniques for casting doubt on a student’s credibility, which is the function of cross-examination. Such hiring and training would be costly. Lesser endowed public colleges do not have the financial resources to hire attorneys or to hire and train advisors who would function as attorneys for both of the parties in each of these disputes.

If one party has hired an attorney, the college may also be required to hire a licensed attorney for the opposing party to ensure parity between them. Otherwise, if a lawyer questions one student and a non-lawyer advisor questions the opposing party, the financial disparity between them may result in inequality in the proceedings. Again, colleges would then have to incur significant expenses.

2) Cross-Examination

Under prior Department of Education guidance, direct cross-examination by attorneys or advocates was impermissible because it was understood to threaten complainants and deter legitimate reports of sexual harassment.³⁸ Under previous guidance, parties were permitted to submit questions to a neutral hearing officer who then would ask the questions of the parties.³⁹ Many courts have found that the parties received fairness and due process through this kind of questioning by a neutral hearing officer.⁴⁰

Under the proposed regulations, however, the questioning process would become direct and adversarial, involving the actual cross-examination of witnesses and parties.⁴¹ The complainant would be questioned, not by a neutral hearing officer or a neutral investigator, but directly by an attorney or a trained advocate for the respondent. The attorney or trained advocate would question parties and witnesses with the intent of undermining their stories or painting them as biased or themselves responsible for wrongdoing. This kind

37. Proposal at 34 C.F.R. § 106.45(b)(3)(vii).

38. Dear Colleague Letter, *supra* note 12.

39. *Questions & Answers on Title IX & Sexual Violence*, U.S. DEPT. EDUC. OFFICE FOR CIVIL RIGHTS § F-6 (2014) (withdrawn), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [<https://perma.cc/YB9C-S9P5>].

40. *See, e.g.*, *Haidak v. Univ. of Mass. at Amherst*, 299 F. Supp. 3d 242, 268 (D. Mass. 2018).

41. Proposal at 34 C.F.R. § 106.45(b)(3)(vii).

of probing by advocates may intimidate student witnesses, revictimize complainants, and deter them both from participating in investigations.

Moreover, under the proposed regulations, colleges may “not limit the choice of advisor.”⁴² Parties may therefore choose to have a parent or a classmate function as an advisor. The parent of a complainant or respondent would then have the authority to question their child’s accuser or alleged assailant. The best friend of the respondent could directly cross-examine the complainant, or vice versa. A legitimate fear of being questioned by the parent or best friend of the opposing party, or another individual partial to the opposing side, may deter victims from filing formal complaints and discourage witnesses from participating in hearings.

3) All Evidence Review

Under the proposed regulations, colleges must “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility”⁴³

Under the regulations, therefore, all evidence related to an incident that the investigator ever receives or obtains as part of the investigation must be turned over to both parties, no matter how irrelevant, inflammatory, distracting, or prejudicial. This kind of all evidence review would even include evidence related to the prior sexual history of the complainant or other witnesses that could not be relied upon in reaching a determination.

The proposed regulations are clear that the complainant’s prior sexual history would be excluded from the hearing itself.⁴⁴ However, if information about the prior sexual history of the parties or witnesses were somewhere in the evidence that the Title IX coordinator received during an investigation, as it often is, it would have to be disclosed to both parties as part of the all evidence review.

The disclosure of this kind of evidence could lead to the publication of sensitive and private materials of either party or non-parties, the public disparagement or harassment of either party or non-parties, and retaliation against either party or non-parties. The requirement that all evidence must be turned over to both parties would dissuade both witnesses and complainants from providing evidence to investigators, as they would recognize that evidence would be turned over to both parties, regardless of how the investigators assessed the evidence. The resultant withholding of information would decrease the accuracy of investigations.

The negative effects of an all evidence review would most commonly befall complainants. The scope of the mandated disclosure in an all evidence

42. Proposal at 34 C.F.R. § 106.45(b)(3)(iv).

43. Proposal at 34 C.F.R. § 106.45(b)(3)(viii).

44. Proposal at 34 C.F.R. § 106.45(b)(3)(vii).

review would be experienced as harassing itself, and would deter complainants from pursuing formal charges.

The proposed regulations mandate an unprecedented amount of evidence disclosure. They are broader than the scope of discovery in a civil case, which limits discovery to nonprivileged and relevant information, and allows for nondisclosure when the burden of discovery outweighs its benefits.⁴⁵ The proposed regulations are also broader than the disclosure required in criminal cases, where life and liberty are at stake, which requires the prosecution to provide the defendant with only exculpatory evidence,⁴⁶ rather than all the evidence ever collected in a case. The proposed regulations are both unprecedented and arbitrary.

4) Digital Evidence Review

Under the proposed regulations, prior to the completion of an investigative report, a college “must send to each party and the party’s advisor, if any, the evidence subject to inspection and review in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence”⁴⁷

The proposed regulations require that colleges must deliver all gathered evidence in digital format to both parties. Nothing of the sort has ever been required by the Department of Education under Title IX, and the Federal Rules of Civil Procedure do not require digital discovery in civil cases.⁴⁸ This is an unprecedented requirement.

Underfunded institutions of higher education do not have the resources to digitize all the evidence in each case and share it with the parties in an electronic format. A lot of the evidence in disciplinary cases is collected in hard copy, in printed form. A lot of evidence is digital already, but not in a consistent format for sharing on a group platform. It would be costly to digitize all physical documents and systematize the digital format of all disparate digital materials and then upload them all to a system to share with the parties. There would be no benefit to such an arrangement, while the financial costs to colleges would be substantial.

Moreover, the potential psychological costs of mandated digital review would be extreme. If all evidence in a case were provided to the parties in digital form, it could be easily and widely shared. Often in cases involving

45. FED. R. CIV. P. 26(b)(1) (“Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties’ relative access to relevant information, the parties’ resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.”).

46. *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (disallowing “suppression by the prosecution of evidence favorable to an accused” because it violates due process “where the evidence is material either to guilt or to punishment”).

47. Proposal at 34 C.F.R. § 106.45(b)(3)(viii).

48. *See, e.g., supra* note 45 and accompanying text.

sexual harassment or sexual assault, the email and text communication between parties is charged, unusual, or sexualized. If colleges must provide all evidence to both parties, there is no way to ensure that it would not be shared with others, for instance, on social media.

Sharing personal text messages or communications on social media can be traumatic, and it may expose sensitive information about the parties or non-parties. Once parties are made aware that all evidence collected will be provided to both parties in digital form, and there is a risk that one of the parties may have it leaked, publish in a newspaper, print it on flyers, email it, or post it on social media, complainants will be much less likely to file Title IX complaints. Potential leaks of sensitive information related to the case can also harm respondents, as well as non-parties, including witnesses who will be less likely to agree to participate in investigations. Digital transmission of all evidence collected in a case is a tool of potential harassment and mischief.

The regulations assert that institutions will somehow provide all the digital evidence “in an electronic format, such as a file sharing platform, that restricts the parties and advisors from downloading or copying the evidence”⁴⁹ The notion that there is a format that allows someone to view information digitally, but not copy it, is utterly fanciful. A cell phone can photograph a computer screen of evidence in less than a second for a ready, public post to social media.

5) Rules of Evidence Training

Under the proposed regulations, “[t]he decision-maker must explain to the party’s advisor asking cross-examination questions any decision to exclude questions as not relevant.”⁵⁰ The regulations require the decision-maker to explain the exclusion of certain evidence from the hearing to the party’s advisor or attorney. This requirement raises concerns regarding the training of both the decision-makers and the advisors.

In order to make the decision to exclude evidence, a decision-maker would have to be trained sufficiently in the rules of evidence for exclusion. The college would have a very hard time finding an internal staff member for this job. It would be nearly impossible to find a layperson with sufficient knowledge of evidence law to provide real-time responses and decisions to questions and objections in a live, formal hearing. Outside of law schools, almost no college employees would be appropriate for that duty. Most colleges would have to hire outside counsel or retired judges to serve as decision-makers in these hearings. Most public colleges, and many private colleges, simply will not have the resources to hire outside counsel or judges to conduct live hearings, nor will they have the resources to hire and train laypersons to function as judges in live hearings. These proposed regulations would be cost-prohibitive to lesser-resourced, public institutions.

49. Proposal at 34 C.F.R. § 106.45(b)(3)(viii).

50. Proposal at 34 C.F.R. § 106.45(b)(3)(vii).

6) Complexity and Safe Harbor

Overall, the grievance procedures in the proposed regulation are cumbersome and cost-prohibitive. Most colleges cannot afford to hire attorneys for both parties or to hire and train advisors who function as attorneys for both parties or to hire and train decision-makers who function as judges in each one of these disciplinary proceedings. Most colleges cannot afford to digitize all evidence and deliver it to the parties, and the risks of doing so are too great.

The requirements of direct cross-examination by attorneys or trained advisors for the opposing parties, all evidence review by both parties that includes evidence of the parties' and non-parties' prior sexual history, and digital evidence review that is easily copied and shared would open the door to alarming harassment. The proposed regulations would engender fear, especially on the part of complainants: fear of retaliation by the respondent or his friends, fear of being questioned by the respondent's attorney or trained advisor, and fear of embarrassment or trauma because all evidence would be shared electronically and could not be shielded from exposure on social media. These regulations would deter victims of sexual harassment from lodging formal complaints, discourage witnesses from participating in investigations, erode confidence in the disciplinary system, imperil the privacy rights of all involved, and degrade the educational mission of enhancing equal access to higher education.

A safe harbor provision in the proposed regulations underscores the mandatory nature of the detailed, innumerable requirements mapped out in the grievance procedures:

A recipient must follow procedures consistent with [the grievance procedures in] § 106.45 in response to a formal complaint. If the recipient follows procedures . . . consistent with § 106.45 in response to a formal complaint, the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under [T]itle IX.⁵¹

This key provision implies that a failure to follow the grievance procedures mandated in the proposed regulations could or would itself constitute discrimination under Title IX. This startling provision appears to imply colleges' automatic liability if they fail to follow the detailed procedures. Because the grievance procedures are so cumbersome, complex, and technically precise, they will be hard not to violate. The grievance procedures would thereby open colleges up to substantial liability.

Perversely, the complexity and cost of the grievance procedures in the proposed regulations would encourage many colleges to do everything in their powers to avoid formal disciplinary hearings. The proposed regulations create powerful incentives for institutional actors to try to persuade the parties to agree to informal resolution instead.

51. Proposal at 34 C.F.R. § 106.44(b)(1).

7) Informal Resolution

In contrast to the proposed regulations' complex, technical, and costly formal grievance procedures, the proposed regulations' informal procedures lack detail. They simply require notice of the allegations and the consequences of agreeing to informal process, and the parties' written consent.⁵² If a college provides the required notice and obtains the parties' written consent, its actions in an informal process would fall within the safe harbor provision of the regulations, which ensures that "the recipient's response to the formal complaint is not deliberately indifferent and does not otherwise constitute discrimination under [T]itle IX."⁵³ So while the formal grievance procedures open colleges up to considerable liability under Title IX due to the potential for technical violations of protocol, the informal resolution process insulates campuses from liability.

This insulation from liability creates a robust incentive for colleges to persuade the parties to agree to an informal resolution process. The problem is that the informal resolution process may be unfair to either complainants or respondents, and it may deny due process to either or both sides.

Under the proposed regulations, informal resolution can happen:

- Without any conflicts check to prevent bias on the part of mediators or institutional actors drafted to resolve the complaint informally,
- Without any training on sexual harassment of the institutional actors involved,
- Without any investigation by a neutral investigator of facts surrounding the allegation,
- Without any hearing by a neutral arbiter to determine those facts,
- With any possible informal process or outcome for either party as a result, and
- With a prohibition on returning to the formal adjudication process.⁵⁴

Informal resolution could potentially expose students on either side to a range of due process violations or unfairness, at the whim of the institution. Two examples suffice:

Example 1: A first-year student claims to have been sexually assaulted on campus by the quarterback of the college's celebrated football team. The first-year student lodges a formal complaint against the quarterback with the Title IX coordinator. College staff members are uncomfortable with the complaint and its potential for bad publicity, so they lean on the complainant and respondent to agree to an informal resolution of the situation. The parties agree, and the college president then asks the football coach to mediate. The coach takes the parties to a private room, yells at them that they are equally responsible for the situation, and demands that

52. Proposal at 34 C.F.R. § 106.45(b)(6)(i)–(ii).

53. Proposal at 34 C.F.R. § 106.44(b)(1).

54. See Proposal at 34 C.F.R. § 106.45(b)(6).

they apologize to each another. The complainant runs out of the room, highly distraught, and drops out of college as a result.

Example 2: A first-year student claims to have been sexually assaulted on campus by the quarterback of the college's celebrated football team. The first-year student lodges a formal complaint against the quarterback with the Title IX coordinator. College staff members are uncomfortable with the complaint and its potential for bad publicity, so they lean on the complainant and respondent to agree to an informal resolution of the situation. The parties agree, and the college president hires the complainant's aunt, an employee in the department of student affairs, to mediate. The staff member takes the parties to a private room, berates the football player, and tells him that he will be removed from the football team. The respondent runs out of the room, highly distraught, and drops out of college as a result.

These examples would have come out differently under the Department of Education's prior guidance on Title IX, which did not allow for this kind of informal resolution. They show how the practical result of establishing an informal resolution option with no requirements to protect the rights of the parties could erode the due process rights of either side. The proposed regulations delineate complex requirements in formal grievance procedures, which will powerfully encourage informal resolution of complaints, and which will, ironically, mean that parties have no guarantee of even minimal due process.

CONCLUSION

The proposed regulations repeatedly articulate a false equivalence under Title IX between the complainant and respondent in a manner contrary to the text and purpose of Title IX.⁵⁵ For example, the beginning of the grievance procedures section states: “[a] recipient’s treatment of a complainant in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under [T]itle IX. A recipient’s treatment of the respondent may also constitute discrimination on the basis of sex under [T]itle IX.”⁵⁶

55. Title IX was designed to benefit those who are excluded from educational opportunities, not turn a blind eye to historic discrimination. *See, e.g., Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 639 (1999) (“It is Title IX’s ‘unmistakable focus on the benefited class,’ . . . rather than the perpetrator, that, in petitioner’s view, compels the conclusion that the statute works to protect students from the discriminatory misconduct of their peers”); *Cohen v. Brown Univ.*, 101 F.3d 155, 175 (1st Cir. 1996) (“Title IX and its implementing regulations protect the class for whose special benefit the statute was enacted It is women and not men who have historically and who continue to be underrepresented in sports, not only at Brown, but at universities nationwide”); *Williams v. Sch. Dist. of Bethlehem, Pa.*, 998 F.2d 168, 175 (3d Cir. 1993) (“[A]lthough [T]itle IX and the regulation apply equally to boys as well as girls, it would require blinders to ignore that the motivation for promulgation of the regulation on athletics was the historic emphasis on boys’ athletic programs to the exclusion of girls’ athletic programs”).

56. Proposal at 34 C.F.R. § 106.45(a).

While it is true that a school's treatment of a respondent could constitute sex discrimination under Title IX, under prior Department of Education guidance and case law, it would require unusual evidence of unfairness for a school to be found to violate a respondent's Title IX rights in its response to a single complaint.⁵⁷ The Department of Education now appears to disagree.

Its commentary to the proposed grievance procedures contends that "a respondent can be unjustifiably separated from his or her education on the basis of sex, in violation of Title IX, if the recipient does not investigate and adjudicate using fair procedures before imposing discipline."⁵⁸ This language once again suggests that a failure to follow the detailed grievance procedures in the proposed regulations could itself constitute a per se violation of Title IX.

On the one hand, the proposed regulations impose a deliberate indifference standard on institutional actions toward the complainant. As the regulations and commentary make clear, the complainant has no right to an investigation of sexual harassment that happens outside an education program or activity,⁵⁹ no right to an investigation if the complaint is not lodged with the Title IX coordinator or the president of the college,⁶⁰ no right to any particular "determination of responsibility,"⁶¹ and no right to "a particular sanction against the respondent."⁶² None of those things constitutes even a potential violation of Title IX under the proposed regulations.

On the other hand, the proposed regulations do not impose a deliberate indifference standard on institutional actions toward the respondent. Indeed, any deviation from a strict and onerous set of grievance procedures designed to protect respondents may violate Title IX itself. The safe harbor provisions clarify that, under the proposed regulations, the Title IX review by the Department of Education would focus on violations of the detailed grievance process in favor of respondents,⁶³ rather than on substantive outcomes for victims of sexual harassment.

The proposed regulations radically change the civil rights statute, turning Title IX on its head. They would both reduce liability, with respect to how campuses respond to complaints of sexual harassment and sexual assault, and expand liability, with respect to how campuses carry out a set of mandatory, detailed grievance procedures in favor of respondents. The proposed

57. *See, e.g.*, Press Release, Office for Civil Rights, Students Accused of Sexual Misconduct Had Title IX Rights Violated by Wesley College, Says U.S. Department of Education (Oct. 12, 2016), <https://www.ed.gov/news/press-releases/students-accused-sexual-misconduct-had-title-ix-rights-violated-wesley-college-says-us-department-education> [<https://perma.cc/C4GB-9ZRF>] (finding that "an interim suspension . . . imposed the same day as the college received the report against the student" and failure to ever interview the respondent violated Title IX).

58. Proposal at 61,472.

59. *See* Proposal at 34 C.F.R. § 106.44(a).

60. *See* Proposal at 34 C.F.R. § 106.30, § 106.44(a); *see also supra* note 29 and accompanying text.

61. *See* Proposal at 61,471.

62. Proposal at 61,478.

63. Proposal at 34 C.F.R. § 106.44(b)(1).

regulations would substantially diminish institutional liability for sex discrimination, which is the purpose of Title IX, while exposing institutions to unprecedented liability from accused students. The proposed regulations would undermine the very statute they are purportedly designed to carry out.

At the same time, the proposed regulations would create incentives for colleges to try to avoid the cumbersome and expensive procedures mandated by the formal grievance process and instead urge students to agree to undergo informal resolution, where they would be guaranteed neither due process nor basic fairness.