DUE PROCESS AND TITLE IX: CONSIDERING COMPULSORY, LIVE CROSS-EXAMINATION IN CAMPUS SEXUAL ASSAULT ADJUDICATIONS

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INTRODUCTION

Title IX of the Education Amendments Act of 1972 was enacted to address sex-based discrimination in education programs that receive federal funding. The Department of Education Office for Civil Rights, which has primary enforcement responsibility for Title IX, has published regulations which provide schools with a procedural framework for determining whether sex-based discrimination has occurred and resolving formal complaints.[1] The application and scope of these regulations have been shaped by federal policy guidance and judicial decisions.[2]

In recent years, Title IX has received considerable public attention, particularly with respect to its protections against sexual harassment and sexual violence on college campuses. The recent surge in media interest resulted in part from a report prepared by the White House Task Force to Protect Students from Sexual Assault, which revealed the systemic nature and prevalence of campus sexual assault in the United States.[3] The report cited research indicating that one in five women is sexually assaulted while in college, often by an acquaintance, classmate, friend or boyfriend.[4] Although the prevalence

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1. *See* 34 C.F.R. §§ 106.44, 106.45 (2020).

2. For a timeline of significant court rulings and federal policy guidance affecting how schools respond to student allegations of sexual harassment, see *A Timeline of Rulings, Regulations About Student Sex Assault*, AP NEWS (May 15, 2017), https://www.ap.org/explore/schoolhouse-sex-assault/a-timeline-of-rulings-regulations-about-student-sex-assault.html.

3. Frank R. Baumgartner & Sarah McAdon, *There's Been a Big Change in How the News Media Covers Sexual Assault*, WASH. POST (May 11, 2017), https://www.washingtonpost.com/news/monkey-cage/wp/2017/05/11/theres-been-a-big-change-in-how-the-news-media-cover-sexual-assault/.

4. WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE 6 (Apr. 2014) (citing CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (Nat'l Inst. of Just., U.S. Dep't of Just. (2009))). More recent surveys estimate that the figure is closer to one in four. *See* Nick Anderson et al., *Survey Finds Evidence of Widespread Sexual Violence at 33 Universities*, WASH. POST (Oct. 15, 2019),

estimate is considerably lower for men, roughly 7% of males report experiencing sexual assault while in college as well.[5] The risk of sexual assault is significantly higher among lesbian, gay, bisexual, and transgender students.[6] In the past several years, student awareness of campus reporting procedures has increased,[7] yet only an estimated 15% of victims contact university-provided programs or resources.[8] Many students do not report sexual misconduct because of a fear that they will not be believed or because the misconduct does not seem "serious enough."[9] Research suggests, however, that the long term effects of sexual harassment are very serious, even for those victims who do not suffer immediate physical harm. Students who experience sexual harassment often withdraw socially, suffer from declined academic performance, and have an increased risk of depression, substance abuse, self-harm, eating disorders, post-traumatic stress, personality disorders, and suicide.[10] As media coverage increasingly focused on the extent and severity of campus sexual harassment, rather than occasional high-profile cases, the federal government adopted policies meant to confront the problem. The public discourse surrounding these new policies has become hyper-partisan, "with Democrats overwhelmingly focused on the victims of sexual assault and Republicans overwhelmingly focused on the victimization of those accused of it."[11]

In 2011, the Obama administration promulgated new Title IX enforcement policies through publication of a Dear Colleague Letter in an effort to strengthen

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https://www.washingtonpost.com/local/education/survey-finds-evidence-of-widespread-sexual-violence-at-33-universities/2019/10/14/bd75dcde-ee82-11e9-b648-76bcf86eb67e_story.html.

5. DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND MISCONDUCT ix (rev. ed. 2020), https://www.aau.edu/key-issues/campus-climate-and-safety/aau-campus-climate-survey-2019.

6. Andrew M. Seaman, *Campus Environment Tied to Sexual Assault Risk for LGBT People*, REUTERS (Mar. 29, 2017), https://www.reuters.com/article/us-health-lgbt-college-assault/campus-environment-tied-to-sexual-assault-risk-for-lgbt-people-idUSKBN170351 (citing Robert W.S. Coulter & Susan R. Rankin, *College Sexual Assault and Campus Climate for Sexual- and Gender-Minority Undergraduate Students*, 35 J. INTERPERSONAL VIOLENCE 1351 (2020)).

7. CANTOR, *supra* note 5, at 77.

8. *Id.* at 58. For the purposes of the survey, students were presented with a list of campus-specific programs and resources which included the Title IX office, victim services office, health services, etc.

9. Greta Anderson, *Sexual Misconduct at Elite Universities Surveyed*, INSIDE HIGHER ED (Oct. 15, 2019), https://www.insidehighered.com/news/2019/10/15/underreporting-remains-top-issue-universities.

10. AM. ASS'N OF UNIV. PROFESSORS, COMM. ON WOMEN IN THE ACAD. PRO., *Campus Sexual Assault: Suggested Policies and Procedures* (Nov. 2012), https://www.aaup.org/report/campus-sexual-assault-suggested-policies-and-procedures.

11. Caroline Kitchener, *How Campus Sexual Assault Became So Politicized*, ATLANTIC (Sept. 22, 2017), https://www.theatlantic.com/education/archive/2017/09/how-campus-sexual-assault-became-so-politicized/540846/.

protections for complainants and call attention to "schools' responsibility to take immediate and effective steps to end sexual harassment and sexual violence."[12] The letter required[13] colleges and universities receiving federal funding to, *inter alia*, lower the standard of proof to a preponderance of the evidence, implement appeals processes, and prescribed a specific timeframe for investigations.[14] The letter also "strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing."[15] Although the guidance made clear that "[p]ublic and state-supported schools must provide due process to the alleged perpetrator,"[16] the changes were perceived by many as a threat to due process protections for accused students.[17]

In an effort to "restore fairness and due process" to the Title IX process,[18] the Trump administration rescinded the Dear Colleague Letter and announced its intention to start a "transparent notice-and-comment process" to "replace the current approach with a workable, effective, and fair system."[19] The

12. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ. 2 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter Dear Colleague Letter]; *see also* Memorandum from Catherine E. Lhamon, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf [hereinafter Questions and Answers on Title IX].

13. It should be noted at the outset that the Dear Colleague Letter was not issued pursuant to formal notice-and-comment rulemaking, and therefore did not amend applicable law. However, it was issued as a "significant guidance document." *See* Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3439 (Jan. 25, 2007).

14. Dear Colleague Letter, *supra* note 12, at 10–13.

15. *Id.* at 12.

16. *Id.*

17. *See e.g.*, 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/ (reporting on an open letter signed by Penn Law School professors criticizing the OCR policy guidance as "subordinating so many protections long deemed necessary to protect from injustice those accused of serious offenses"); Eugene Volokh, *28 Harvard Law Professors Condemn Harvard's New Sexual Harassment Policy and Procedures*, WASH. POST (Oct. 15, 2014), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2014/10/15/28-harvard-law-professors-condemn-harvards-new-sexual-harassment-policy-and-procedures/; Gordon Finley, *Rescind "Dear Colleague" Letter*, Opinion, WASH. TIMES (May 29, 2017), https://www.washingtontimes.com/news/2017/may/29/letter-to-the-editor-rescind-dear-colleague-letter/.

18. *President Donald J. Trump is Working to Protect Students from Sexual Misconduct and Restore Fairness and Due Process to Our Campuses*, TRUMP WHITE HOUSE (May 6, 2020), https://trumpwhitehouse.archives.gov/briefings-statements/president-donald-j-trump-working-protect-students-sexual-misconduct-restore-fairness-due-process-campuses/.

19. Susan Svrluga, *Transcript: Betsy DeVos's Remarks on Campus Sexual Assault*, WASH. POST (Sept. 17, 2017), https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/.

Department of Education released its final Title IX regulation in May 2020. The changes, which mandate a presumption of innocence and impose a live hearing and cross-examination requirement, signal a "shift toward adopting procedural safeguards typically reserved for criminal trial in the setting of educational disciplinary hearings."[20]

The proposed rule relied heavily[21] on a decision issued by the Sixth Circuit Court of Appeals in which the court held that, when credibility is in dispute and material to the outcome of a campus disciplinary hearing, constitutional due process requires some form of cross-examination.[22] The final rule suggested that the decision in *Doe v. Baum* represented a judicial trend toward providing greater procedural protections for students accused of sexual misconduct.[23] However, this characterization neglects the significant number of federal district and appeals court decisions which have issued conflicting opinions.[24] In *Haidak v. University of Massachusetts-Amherst*, the First Circuit Court of Appeals rejected the categorical rule announced in *Baum.*[25] The First Circuit further stated that questioning by a neutral fact finder may satisfy due process requirements in the context of a campus sexual misconduct hearing.[26] Thus, the First Circuit conflicts with the Sixth Circuit, as well as the current Title IX regulations.

This Note argues that, in redefining the minimum due process required in Title IX university disciplinary hearings, the final rule does not fully consider judicial precedent and fails to take into account the potential adverse effects of direct cross-examination. Part I will provide a brief history of the development of Title IX and how judicial interpretations and federal policy guidance have shaped protections for students against sexual violence and harassment on college campuses. Part II will then examine how courts have applied constitutional due process in the context of disciplinary hearings in public

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20. Hannah Walsh, Note, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1788 (2020).

21. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61476 (proposed Nov. 29, 2018) ("Indeed, at least one federal circuit court has held that in the Title IX context cross-examination is not just a wise policy, but is a constitutional requirement of Due Process.").

22. Doe v. Baum, 903 F.3d 575, 584 (6th Cir. 2018).

23. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,311 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

24. Hunter Davis, Comment, *Symbolism Over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX*, 27 MICH. J. GENDER & L. 213, 226–28 (2020).

25. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69 (1st Cir. 2019).

26. *Id.* ("[W]e have no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation.").

institutions of higher education. This section will focus on two recent appellate court decisions that conflict on the question of whether a student accused of sexual misconduct is entitled to cross-examine his accuser and witnesses during a live hearing. Part III will evaluate the cross-examination mandate contained in the current Title IX regulation. This section will also consider the Biden administration's plan for how colleges should respond to reports of sexual misconduct and suggest alternative means for protecting the due process rights of accused students.

I. BACKGROUND

A. History of Title IX

Title IX, proposed as part of the Education Amendments of 1972,[27] was designed to prohibit sex-based discrimination in the American education system.[28] It provides that "no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program . . . receiving Federal financial assistance."[29] Although policy guidance and federal courts have since interpreted Title IX to protect transgender students from sex-based discrimination,[30] the legislation was originally intended to ensure equal educational access for female students and educators.[31] The scope of Title IX has continued to evolve in response to judicial decisions and implementing federal policy guidance and regulations.

B. Judicial Interpretation and Private Enforcement

Although Title IX was enacted to prohibit sex-based discrimination in all educational institutions receiving federal funding, the Supreme Court narrowed the scope of its protections in *Grove City College v. Bell* to only those programs which receive *direct* federal funds.[32] Grove City College, a private liberal arts

27. *See* Education Amendments of 1972, Pub. L. No. 92-318, 86 Stat. 235.

28. Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L. J. 487, 495 (2012).

29. 20 U.S.C. § 1681 (2018).

30. *See e.g.*, Adams v. Sch. Bd., No. 18-13592, 2019 U.S. App. LEXIS 7664 (11th Cir. Mar. 14, 2019); Dear Colleague Letter on Transgender Students from Catherine E. Lhamon, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ. (May 13, 2016), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf; *but see* Dear Colleague Letter from Sandra Battle, Acting Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ. (Feb. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201702-title-ix.pdf.

31. Penny Venetis, *Misrepresenting Well-Settled Jurisprudence: Peddling "Due Process" Clause Fallacies to Justify Gutting Title IX Protections for Girls and Women*, 40 WOMEN'S RTS. L. REP. 126, 132 (2018).

32. *See* Grove City Coll. v. Bell, 465 U.S. 555 (1984).

college in Pennsylvania, refused to comply with the nondiscrimination requirements of Title IX, arguing that it consistently declined direct state and federal financial assistance.[33] However, a significant number of its students received federal financial aid through a program of the Department of Education.[34] As a result of its refusal, the Department of Education initiated proceedings to declare the college and its students ineligible to receive federal financial assistance.[35] Grove City College and four students brought a lawsuit in district court challenging these actions.[36] The Court ultimately concluded that although federal student financial aid constitutes financial assistance within the meaning of Title IX, its provisions were program specific, requiring only those programs receiving direct federal funds to comply.[37] In response to this and other decisions of the Supreme Court which "unduly narrowed or cast doubt upon the broad application of Title IX," Congress passed the Civil Rights Restoration Act, restoring liability to an entire school system or college, any part of which has accepted federal financial assistance.[38]

Although Title IX prohibits discrimination on the basis of sex in any education program or activity receiving federal funding, it does not specifically mention sexual harassment.[39] The first judicial recognition that sexual harassment constitutes a form of sex discrimination covered by Title IX came in *Alexander v. Yale University*,[40] in which female students at Yale alleged that the failure of the university to establish mechanisms and procedures to address complaints of sexual harassment denied equal educational opportunity.[41] Although the case was eventually dismissed, the court held that "academic advancement conditioned upon submission to sexual demands constitutes sex discrimination in education . . . ."[42] The Supreme Court endorsed this broad interpretation of sex discrimination in *Franklin v. Gwinnett County Public Schools*.[43] Citing precedent finding that sexual harassment constitutes a form of workplace sex discrimination with respect to Title VII, the Court held that a

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33. *Id.* at 559.

34. *Id.*

35. *Id.* at 561.

36. *Id.* at 561.

37. *Id.* at 573–74.

38. Civil Rights Restoration Act of 1987, 20 U.S.C. §§ 1687–1688 (2020).

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

40. *See* Alexander v. Yale Univ., 459 F. Supp. 1 (D. Conn. 1977), *aff'd on other grounds*, 631 F.2d 178 (2d Cir. 1980).

41. Monica L. Sherer, Comment, *No Longer Just Child's Play: School Liability Under Title IX for Peer Sexual Harassment*, 141 U. PA. L. REV. 2119, 2147 (1993).

42. *Alexander*, 459 F. Supp. at 8.

43. *See* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1992).

similar interpretation "should apply when a teacher sexually harasses and abuses a student."[44] Following *Franklin*, courts were seemingly more willing to apply the standards of Title VII to students who brought sexual harassment suits under Title IX.[45]

Franklin established that students who are subjected to sexual harassment by public school teachers and administrators may sue for monetary damages under Title IX.[46] However, doubt remained as to whether a school could be held liable for student-on-student sexual harassment. In *Davis v. Monroe County Board of Education*, the Court resolved this question and established the standard for determining when a school may be held liable in Title IX suits involving peer sexual harassment.[47] The Court held that schools may be held liable when officials are deliberately indifferent to misconduct of which they have actual knowledge and that is "so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit."[48] Although *Davis* made school boards liable for failing to address peer sexual harassment, it established a burdensome notice requirement and narrowed the judicial interpretation of what constitutes actionable harassment under Title IX.[49] Given its actual knowledge requirement, this standard has been criticized as creating an incentive for schools to insulate themselves from knowledge of sexual harassment by making it hard for students to report misconduct.[50]

C. Office for Civil Rights and Administrative Enforcement

The Department of Education Office for Civil Rights ("OCR"), which has primary enforcement responsibility for Title IX, has issued regulations and policy guidance for the purpose of instructing schools on how to investigate and resolve allegations of sexual harassment. In 2001, OCR issued revised policy guidance which sought to strengthen and clarify past guidance in light of the *Gebser* and *Davis* decisions.[51] The revised guidance contrasted private lawsuits

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44. *Id.* at 75. The Court relied on an earlier case, Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57 (1986), in which it held that a supervisor's unwelcome sexual advances created a hostile work environment in violation of Title VII.

45. RISA L. LIEBERWITZ ET AL., AM. ASS'N OF UNIV. PROFESSORS, THE HISTORY, USES, AND ABUSES OF TITLE IX 75 (2016), https://www.aaup.org/file/TitleIXreport.pdf.

46. *Franklin*, 503 U.S. at 75–76.

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

48. *Id*. at 633.

49. FATIMA GOSS GRAVES, AM. CONST. SOC'Y FOR L. AND POL'Y, RESTORING EFFECTIVE PROTECTIONS FOR STUDENTS AGAINST SEXUAL HARASSMENT IN SCHOOLS: MOVING BEYOND THE *GEBSER* AND *DAVIS* STANDARDS 9 (2008), https://www.nwlc.org/sites/default/files/pdfs/ACS%20Article.pdf.

50. *Id.* at 7; *see also* Melnick, *supra* note 39.

51. Off. for C.R., U.S. Dep't of Educ., Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties (2001), *available at*

for monetary damages and administrative enforcement of Title IX regulations, highlighting that "the Court limited the liability standards established in *Gebser* and *Davis* to private actions for monetary damages."[52] The Department of Education, by contrast, as the department responsible for ensuring compliance with the Title IX nondiscrimination mandate, applies a separate standard meant to evaluate the adequacy of school responses to complaints of sexual harassment.[53] The revised policy guidance clarified the ability of the OCR to apply a separate standard to "find a violation and seek corrective action in administrative enforcement of Title IX."[54] The guidance further emphasized the importance of ensuring "prompt and effective action calculated to end the harassment, prevent its recurrence, and, as appropriate, remedy its effects[,]" as well as "well- publicized and effective grievance procedures . . . to handle complaints of sex discrimination."[55] This policy guidance has often been criticized as failing to establish firm and consistent standards for addressing complaints of sexual harassment.[56]

In response to these concerns and growing awareness of the prevalence of the problem,[57] the Obama administration published a Dear Colleague Letter which sought to enforce Title IX and confront sexual misconduct on college campuses. In many respects, the letter rearticulated longstanding Title IX requirements, such as the requirements that schools establish prompt and equitable grievance procedures for resolution of sex discrimination complaints and designate an employee to coordinate compliance efforts.[58] The letter further stated that schools should "take proactive measures to prevent sexual harassment" and recommended that "schools implement preventive education

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https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf [hereinafter OCR Policy Guidance (2001)].

52. *Id.* at iv.

53. *See id.* at ii–iii.

54. Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 65 Fed. Reg. 66,092, 66,093 (Nov. 2, 2000). *See also* Hayley Macon et al., *Introduction to Title IX*, 1 GEO. J. GENDER & L. 417, 418–19 (2000) (explaining that "OCR may enforce its own interpretation of Title IX through administrative means, even if the discriminatory conduct" does not give rise to the implied private cause of action recognized in *Gebser*).

55. OCR Policy Guidance (2001), *supra* note 51, at iii.

56. *See* Grayson Sang Walker, Note, *Evolution and Limits of Title IX Doctrine on Peer Sexual Assault*, 45 HARV. C.R.-C.L. L. REV. 95 (2010).

57. A fact sheet released by the Department of Education Office for Civil Rights on the same date as the Dear Colleague Letter states that nearly 20% of women and about 6% of men on college campuses are victims of attempted or actual sexual assault. Off. of C.R., U.S. Dep't of Educ., Dear Colleague Letter: Sexual Violence Background, Summary, and Fast Facts (2011).

58. Dear Colleague Letter, *supra* note 12, at 6. *See also* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties, 62 Fed. Reg. 12034, 12040–45 (Mar. 13, 1997).

programs . . . ."[59] It also stated that if a school "does not come into compliance voluntarily, OCR may initiate proceedings to withdraw Federal funding . . . ."[60] This enforcement mechanism, coupled with efforts to increase awareness of sexual assault on college campuses,[61] proved effective and caused colleges and universities to implement practices intended to reduce sexual misconduct and sexual violence on campuses.[62] Although this guidance was met with approval from advocates for survivors of sexual assault, as well as many congressional Democrats, it also faced criticism as administrative overreach[63] and as a threat to due process protections for accused students.[64]

Critics asserted that the Dear Colleague Letter was not adopted according to notice-and-comment rulemaking procedures significantly broadened the definition of sexual harassment, and that the procedures for adjudication of sexual misconduct were weighted in favor of finding guilt.[65] The policy guidance articulated in the Dear Colleague Letter and clarified in a supplemental question-and-answer document was further criticized for maintaining that Title IX does not necessarily require a hearing to determine whether alleged misconduct occurred[66] and for instructing schools to use a preponderance of the evidence standard.[67] The letter also advised schools not to allow the parties to question each other directly during disciplinary hearings, citing concerns about re-traumatization.[68] The question-and-answer document

59. Dear Colleague Letter, *supra* note 12, at 14.

60. *Id.* at 16.

61. In 2014, the Department of Education released the names of fifty-five colleges and universities under investigation for potential violations of federal antidiscrimination law under Title IX. This was the first time that the Department of Education made such information public. Catherine E. Lhamon, the Assistant Education Secretary for Civil Rights, stated that the names were published to increase the transparency of enforcement efforts and to raise public awareness of civil rights. Jennifer Steinhauer & David S. Joachim, *55 Colleges Named in Federal Inquiry Into Handling of Sexual Assault Cases*, N.Y. TIMES (May 1, 2014), https://www.nytimes.com/2014/05/02/us/politics/us-lists-colleges-under-inquiry-over-sex-assault-cases.html?searchResultPosition=16.

62. Max Larkin, *The Obama Administration Remade Sexual Assault Enforcement on Campus. Could Trump Unmake It?*, WBUR (Nov. 25, 2016), https://www.wbur.org/edify/2016/11/25/title-ix-obama-trump.

63. Andrew Kreighbaum, *New Instructions on Title IX*, INSIDE HIGHER ED (Sept. 25, 2017), https://www.insidehighered.com/news/2017/09/25/education-department-releases-interim-directions-title-ix-compliance.

64. Melnick, *supra* note 39.

65. Plummer v. Univ. of Houston, 860 F.3d 767, 779–80 (5th Cir. 2017) (Jones, J., dissenting).

66. Questions and Answers on Title IX, *supra* note 12, at 25.

67. Dear Colleague Letter, *supra* note 12, at 11.

68. Sandra R. Levitsky et al., Opinion, *Why the Cross-Examination Requirement in Campus Sexual Assault Cases is Irresponsible*, WASH. POST (May 7, 2020), https://www.washingtonpost.com/opinions/2020/05/07/what-education-department-gets-wrong-its-rules-campus-sexual-assault/.

directed that all persons involved in a school grievance process must have training in handling complaints of sexual violence which should include, *inter alia*, information about the "effects of trauma and the appropriate methods to communicate with students subjected to sexual violence."[69] The document states that allowing a student accused of sexual misconduct to directly question a complainant would be traumatic and perpetuate the hostile environment which Title IX is specifically meant to address.[70] This "trauma-informed" approach is central to the way that many institutions of higher education now conduct investigations into allegations of sexual misconduct. The science[71] of trauma and its neurobiological impact in victims of sexual assault, however, has been called into question.[72] These criticisms led conservatives to denounce the Obama administration policy guidance as a "distortion of Title IX" and to call for greater due process protections in campus sexual assault adjudications.[73]

In September 2017, the Secretary of Education rescinded the controversial Dear Colleague Letter and announced plans to initiate a "transparent notice-and-comment process to incorporate the insights of all parties in developing a better way."[74] This announcement signaled a new approach to administrative enforcement. Whereas the Obama administration sought to hold schools responsible for taking proactive measures to "eliminate [sexual] harassment, prevent its recurrence, and address its effects,"[75] the Trump administration would seek to ensure "even-handed justice" by providing due process protections to students accused of sexual misconduct.[76]

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69. Questions and Answers on Title IX, *supra* note 12, at 21–22.

70. *Id.* at 31.

71. Research suggests that sexual assault causes stress chemicals to be released into the prefrontal cortex, which impairs rational thought and interferes with memory. This may also lead to passive responses, such as tonic immobility, collapsed immobility, or dissociation. For further explanation, see James W. Hopper, *Why Many Rape Victims Don't Fight or Yell*, WASH. POST (June 23, 2015), https://www.washingtonpost.com/news/grade-point/wp/2015/06/23/why-many-rape-victims-dont-fight-or-yell/; Shaila Dewan, *Why Women Can Take Years to Come Forward with Sexual Assault Allegations*, N.Y. TIMES (Sept. 18, 2018), https://www.nytimes.com/2018/09/18/us/kavanaugh-christine-blasey-ford.html.

72. *See e.g.*, Emily Yoffe, *The Bad Science Behind Campus Response to Sexual Assault*, ATLANTIC (Sept. 8, 2017), https://www.theatlantic.com/education/archive/2017/09/the-bad-science-behind-campus-response-to-sexual-assault/539211/; Ashe Schow, *The Junk Science Behind 'Trauma-Informed' Investigations*, DAILY WIRE (Aug. 23, 2019), https://www.dailywire.com/news/junk-science-behind-trauma-informed-investigations-ashe-schow.

73. REPUBLICAN NAT'L COMM., REPUBLICAN PLATFORM 35 (2016), https://prod-cdn-static.gop.com/media/documents/DRAFT_12_FINAL%5b1%5d-ben_1468872234.pdf.

74. Svrluga, *supra* note 19.

75. Dear Colleague Letter, *supra* note 12, at 4.

76. TRUMP WHITE HOUSE, *supra* note 18; *see also Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students*, U.S. DEP'T OF EDUC. (May 6, 2020),

In November 2018, following "more than a year of research, deliberation, and gathering input from students, advocates, school administrators, Title IX coordinators, and other stakeholders," the Department of Education released its proposed Title IX rule.[77] The stated purpose of the proposed rule was to provide clarity and improve schools' responses to sexual harassment.[78] The proposed rule received more than 124,000 public comments during the formal notice-and-comment process, requiring nearly a year and a half to review.[79] Despite opposition from advocacy groups and higher education associations, the final regulation maintained many of the proposed rules' controversial provisions.[80]

For example, the regulation establishes a definition of sexual harassment that is narrower than that used in previous guidance.[81] The final rule states that "sexual harassment involves 'unwelcome conduct' on the basis of sex determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies . . . equal educational access."[82] This definition aligns the federal standard with the *Davis* precedent, which laid out when schools may be held liable for monetary damages under Title IX in private lawsuits.[83]

The Dear Colleague Letter issued during the Obama administration, by contrast, defined sexual harassment broadly as "unwelcome conduct of a sexual nature" that is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."[84] It further explains that the "more severe the conduct, the less need there is to show a repetitive series of incidents to prove hostile environment . . . . Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe."[85] Secretary of Education Betsy DeVos

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https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students.

77. *Secretary DeVos: Proposed Title IX Rule Provides Clarity for Schools, Support for Survivors, and Due Process Rights for All*, U.S. DEP'T EDUC. (Nov. 16, 2018), https://content.govdelivery.com/accounts/USED/bulletins/21bcf5b.

78. *Id.*

79. Laura Meckler, *Betsy DeVos Poised to Issue Sweeping Rules Governing Campus Sexual Assault*, WASH. POST (Nov. 25, 2019), https://www.washingtonpost.com/local/education/betsy-devos-poised-to-issue-sweeping-rules-governing-campus-sexual-assault/2019/11/25/f9c21656-0f90-11ea-b0fc-62cc38411ebb_story.html.

80. *Id.*

81. *See* Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for C.R., Off. for C.R., U.S. Dep't of Educ. 3 (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf; *See also* OCR Policy Guidance (2001), *supra* note 51, at 2.

82. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,177 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

83. Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629, 649 (1999).

84. Dear Colleague Letter, *supra* note 12, at 3.

85. *Id.*

justified this redefinition as necessary to address overbroad Title IX enforcement that pressured schools to adopt fundamentally unfair harassment policies.[86]

Although the revised definition exempts *quid pro quo* sexual harassment and conduct that constitutes sexual assault, dating violence, domestic violence, or stalking from the "severe, pervasive, and objectively offensive" standard, it heightens the standard of proof for hostile educational environment claims.[87] This latter category would include, for example, gender-based commentary, stereotyping based on gendered characteristics,[88] as well as dissemination of sexually inappropriate photographs and videos.[89] Some critics have raised concerns that this narrowed government definition would allow schools to avoid responsibility for investigating reports of seemingly less severe instances of sexual harassment, which may subsequently escalate into more serious Title IX violations.[90] This could potentially have the effect of making college campuses less safe for women and would likely lead to fewer students coming forward to report harassment.[91] In response to these concerns, the Department of Education stated that it adopted the *Davis* standard for certain forms of harassment "such that free speech and academic freedom are not chilled or curtailed by an overly broad definition . . . ."[92]

The final regulation also limits the scope of schools' responsibility to respond to reports of sexual misconduct, requiring schools to respond only to complaints of sexual harassment that occurred in an education program or activity on school property, or in a location that is in use by an officially recognized student organization.[93] Moreover, a school may only be held liable for failing to act if it had "actual knowledge" of the reported misconduct.[94] An

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86. U.S. DEP'T OF EDUC., *supra* note 76.

87. *Quid pro quo* sexual harassment occurs when an employment benefit is conditioned upon participation in unwelcome sexual conduct. Hostile environment sexual harassment, a concept taken from the Title VII context, occurs when unwelcome sexual comments, advances, or similar conduct is sufficiently pervasive, severe, and objectively offensive that it effectively denies equal educational access. *See* 34 C.F.R. § 106.30(a).

88. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,179 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

89. *Id*. at 30,165–66.

90. *See* Meckler, *supra* note 79; *see also* Anna North, *Trump Administration Releases New Campus Sexual Assault Rules in the Midst of the Pandemic*, VOX (May 6, 2020), https://www.vox.com/2020/5/6/21203255/new-title-ix-rules-campus-sexual-assault-betsy-devos.

91. *See* North, *supra* note 90.

92. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,159–60 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (citations omitted).

93. *See* 34 C.F.R. § 106.44(a).

94. *Id.*

institution is deemed to have actual knowledge when notice of sexual harassment is received by the Title IX Coordinator or another official with authority to institute corrective measures on behalf of the school.[95] Earlier guidance required a school to respond to sexual harassment if "the school knows or should have known of the harassment,"[96] such as through a "reasonably diligent inquiry."[97] The updated regulation therefore heightens the previous standard. Although postsecondary institutions may decide which employees are mandatory reporters and which officials have authority to institute corrective measures,[98] critics have argued that the new heightened notice requirement incentivizes schools to remain unaware of possible harassment, thereby avoiding liability.[99]

The regulation also gives schools the flexibility to decide whether they will use a "preponderance of the evidence" or "clear and convincing" evidentiary standard to find students responsible in a Title IX proceeding.[100] Institutions are required to apply the same evidentiary standard to claims against employees and students.[101] As collective bargaining agreements and tenure rules constrain many schools to the use of a clear and convincing standard in faculty disciplinary hearings, this provision would require the same standard to be applied to students in sexual harassment proceedings.[102] The ACLU and others have argued that imposing a clear and convincing standard would "tip the scales against the complainant," frustrating the purpose of Title IX.[103] Among the more controversial aspects of the final rule are the requirements that postsecondary institutions conduct live hearings and allow direct cross-examination of both the complaining and responding parties, as well as witnesses.[104] Although earlier policy guidance did not prohibit live hearings, the Obama administration encouraged schools to adopt the "single investigator" model.[105] This model relies on a designated Title IX investigator to interview witnesses, collect evidence, make a final determination, and if necessary, recommend appropriate sanctions. The new rule effectively prohibits the single

95. 34 C.F.R. § 106.30(a).

96. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,039 (Mar. 13, 1997).

97. *Id.* at 12,042.

98. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,040 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

99. Melnick, *supra* note 39.

100. 34 C.F.R. 106.45(b)(1)(vii).

101. *Id.*

102. Melnick, *supra* note 39.

103. Letter from the ACLU to U.S. Dep't of Educ. (Jan. 30, 2019), *available at* https://www.aclu.org/letter/aclu-comments-title-ix-proposed-rule.

104. *See* 34 C.F.R. § 106.45(b)(6)(i).

105. Melnick, *supra* note 39.

investigator model, stating that the decisionmaker "cannot be the same person as the Title IX Coordinator or the investigator."[106] The Department of Education cites potential bias within the single investigator model and the importance of reliable fact-finding as justifications for separating investigation and decision-making roles in the Title IX grievance process.[107] During the notice-and-comment process, some commentators "suggested that ending the single investigator model would increase the number of people . . . involved in the process," potentially leading to re-traumatization for survivors and discouraging reporting.[108] The final rule responded to such concerns by stressing that complainants "retain control over deciding whether to participate in a grievance process" and may choose to resolve allegations through "informal resolution processes . . . without a full investigation and adjudication."[109]

The final regulation also states that postsecondary institutions "must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions . . . directly, orally, and in real time by the party's advisor of choice."[110] Citing recent decisions from the Sixth Circuit,[111] the Department of Education explained that "cross-examination is an essential pillar of fair process, and . . . is especially critical to resolve factual disputes between the parties and give each side the opportunity to test the credibility of adverse witnesses."[112] Critics contend that the adversarial nature of cross-examination perpetuates a hostile environment by allowing accused students to pose questions which may intimidate or retraumatize the complaining party.[113] The new regulations also raise concerns about unequal access to representation, as students with greater financial resources are more likely to have the means to hire highly-skilled attorneys experienced in attacking witness credibility.[114] Although the regulations require postsecondary institutions to provide a trained

106. 34 C.F.R. § 106.45(b)(7)(i).

107. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,368 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

108. *Id.*

109. *Id.* at 30,369.

110. 34 C.F.R § 106.45(b)(6)(i).

111. The final rule cited, *inter alia*, Doe v. Baum, 903 F.3d 575 (6th Cir. 2018) and Doe v. Univ. of Cincinnati, 872 F.3d 393 (6th Cir. 2017), which held that cross-examination must be provided in higher education disciplinary hearings, particularly where there are competing narratives and the credibility of the parties is of crucial concern. These cases will be discussed further in Part II.

112. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,311 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

113. *See* Kreighbaum, *supra* note 63; *see also* Dear Colleague Letter, *supra* note 12, at 12; Questions and Answers on Title IX, *supra* note 12, at 31.

114. Levitsky et al., *supra* note 68.

advisor "without fee or charge" to unrepresented students,[115] this is a heavy financial burden,[116] particularly for small liberal arts colleges facing weakening support from state and local governments and pandemic-related financial pressures.[117]

Furthermore, previous standards allowed accused students to respond in writing to investigative reports and to provide questions for the accuser.[118] This would seem to alleviate concerns that relevant facts and testimony would not be fully developed in the course of the investigation as each party would have an opportunity to draw attention to potential inconsistencies in the record.

II. DUE PROCESS AND TITLE IX

A. Due Process Standards

Although courts have considered due process in the context of school disciplinary proceedings, they have not settled on the amount of procedural process required.

The Fifth Amendment states that "no person shall . . . be deprived of life, liberty, or property, without due process of law."[119] The Due Process Clause of the Fifth Amendment provides protection against the federal government, and its application was extended to the states through the Fourteenth Amendment.[120] Although due process is often discussed in the context of the criminal justice system, the protections generally extend to non-criminal proceedings in which information revealed could be used against the provider in a separate criminal matter, such as a Title IX hearing.[121] However, campus sexual assault adjudications on college campuses have generally been held to require less process.[122]

Procedural due process fundamentally requires notice and an opportunity to be heard, but has also been held to be flexible, calling for "such procedural

115. 34 C.F.R. § 106.45(b)(6)(i).

116. *See* Aaron Bayer et al., *Conducting a Live Hearing with Cross-Examination Under the New Title IX Rules*, NAT'L L. REV. (May 26, 2020), https://www.natlawreview.com/article/conducting-live-hearing-cross-examination-under-new-title-ix-rules.

117. *See generally* Sarah Butrymowicz & Pete D'Amato, *Analysis: Hundreds of Colleges and Universities Show Financial Warning Signs*, HECHINGER REP. (Aug. 4, 2020), https://hechingerreport.org/analysis-hundreds-of-colleges-and-universities-show-financial-warning-signs/.

118. Kreighbaum, *supra* note 63.

119. U.S. CONST. amend. V.

120. *See* U.S. CONST. amend. XIV, § 1.

121. Manning Peeler, *Seeking Clarity in the Title IX Confusion: Cross-Examination Requirement in Title IX Hearings Under Due Process*, 10 WAKE FOREST J.L. & POL'Y 351 (2020).

122. Davis, *supra* note 24, at 221.

protections as the particular situation demands."[123] In *Mathews v. Eldridge*, the Supreme Court offers a balancing test which provides a helpful framework for determining the amount of process required in a particular context.[124] The Court held that determination of the specific dictates of due process requires consideration of three distinct factors: the private interest affected by official action; the risk of erroneous deprivation of such interest and the probable value of additional or substitute procedural safeguards; and the interest of the government, including the fiscal and administrative burdens that additional or substitute procedural requirements would entail.[125]

In applying the *Mathews* framework to sexual misconduct adjudications on college campuses, courts have emphasized the risk of diminished educational and employment opportunities for students expelled for sexual misconduct as well as social stigma.[126] Colleges and universities, by contrast, would ostensibly incur few additional costs and would not suffer any substantial burden by providing the opportunity for cross-examination.[127] Courts have also recognized a school's interest in protecting students from conduct that violates its values and in "balancing the need for fair discipline against the need to allocate resources toward promoting and protecting the primary function of institutions that exist to provide education."[128]

Because of the significant interest a student has in pursuing an education, courts have consistently held that due process is required in higher education disciplinary hearings.[129] Courts have disagreed, however, on the amount of process required, perhaps most notably on the question of whether a student accused of sexual misconduct has the right to directly cross-examine his accuser in Title IX adjudications.[130]

Cross-examination is an important due process protection which the United States Supreme Court has referred to as "the greatest legal engine ever

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123. Mathews v. Eldridge, 424 U.S. 319, 334 (1976) (citing Morrissey v. Brewer, 408 U.S. 471, 481 (1972)).

124. *Id.*

125. *Id.* at 335.

126. *See e.g.*, Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018); Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 66 (1st Cir. 2019); Gorman v. Univ. of R.I., 837 F.2d 7, 14 (1st Cir. 1988).

127. *See Baum*, 903 F.3d at 582.

128. *Haidak*, 933 F.3d at 66 (citing *Gorman*, 837 F.2d at 7).

129. *See e.g.*, Goss v. Lopez, 419 U.S. 565 (1975) (holding that a statute permitting suspension of a student without notice or hearing violated the due process clause of the Fourteenth Amendment); Jaksa v. Regents of Univ. of Mich., 787 F.2d 590 (6th Cir. 1986) (finding that suspension of a student for cheating implicated the due process clause); *Gorman*, 837 F.2d at 12 (explaining that "a student's interest in pursuing an education is included within the fourteenth amendment's protection of liberty and property").

130. *See* Doe v. Baum, 903 F.3d 575 (6th Cir. 2018); *but see Haidak*, 933 F.3d at 62.

invented for the discovery of truth."[131] It allows the trier of fact to assess witness credibility and may be used either as a means of clarifying witness testimony or calling attention to contradictions in the testimony of adverse witnesses. Following the release of the new Title IX regulations, cross-examination has taken on greater importance in the context of campus sexual harassment adjudications. The final rule, which mandates cross-examination in all campus sexual misconduct adjudications, describes cross-examination as an "essential pillar of fair process" and emphasizes its effectiveness and reliability as a fact-finding mechanism.[132] Critics of this requirement, however, have expressed concern that the adversarial nature of a live hearing with cross-examination will create a contentious atmosphere that threatens to retraumatize victims of sexual assault and may deter reports of sexual misconduct.[133] Scientific research related to the neurobiological effects of trauma has also called into question the usefulness of cross-examination because many victims of sexual assault experience impaired memory, particularly with respect to contextual and time sequencing information.[134] Thus, any inconsistency or inaccuracy in a complainant's narrative account of a traumatic experience may be the result of a physiological process rather than incredibility. Although OCR acknowledges these and other concerns in its discussion of the final rule, it asserts that the "truth-seeking function of cross-examination can be achieved while mitigating any re-traumatization of complainants" because the questioning is conducted by party advisors, may take place with the parties in separate rooms, and is subject to rape shield laws.[135]

In justifying the cross-examination requirement, OCR relies heavily on the Sixth Circuit decision in *Doe v. Baum*, which redefined what constitutes due process in the context of campus sexual assault adjudications.[136] However, the circuit courts have not established a consensus on this question.

131. Cal. v. Green, 399 U.S. 149, 158 (1970).

132. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,311 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

133. Levitsky et al., *supra* note 68; *see also* Open Letter from Mental Health Professionals and Trauma Specialists to Kenneth L. Marcus, Assistant Sec'y for C.R., Dep't of Educ. (Jan. 30, 2019).

134. James Hopper & David Lisak, *Why Rape and Trauma Survivors Have Fragmented and Incomplete Memories*, TIME (Dec. 9, 2014), https://time.com/3625414/rape-trauma-brain-memory/.

135. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,313.

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

III. CIRCUIT SPLIT

A. Sixth Circuit: Doe v. Baum, *903 F.3d 575 (6th Cir. 2018)*

In *Doe v. Baum*, a college senior who withdrew from the University of Michigan following a Title IX investigation which resulted in an adverse determination filed a lawsuit asserting that the university's disciplinary proceedings violated the Due Process Clause and Title IX. Baum argued that because the decision of the university rested on a credibility finding, the university was required to conduct a hearing and provide him with an opportunity to cross-examine his accuser and any adverse witnesses.[137]

The litigation stemmed from an investigation conducted by the University of Michigan in connection with allegations that the plaintiff committed sexual assault at a fraternity party when he had sex with a female student who reported that she was too drunk to consent.[138] The female student filed a sexual misconduct complaint, and the university started an investigation.[139] During the course of the investigation, the university interviewed twenty-three witnesses whose conflicting statements led the investigator to conclude that the evidence supporting a finding of sexual misconduct did not outweigh the contrary evidence.[140] The female student appealed the decision, and the Appeals Board determined that her description of events was more credible.[141] Facing expulsion, the accused student withdrew from the university and filed a lawsuit in federal district court, which dismissed his claims.[142]

Relying on its decision in *Doe v. Univ. of Cincinnati*,[143] the Sixth Circuit Court of Appeals held that when credibility is material to the outcome of a misconduct hearing, due process requires some form of cross-examination.[144] The court reasoned that because the value of adversarial questioning lies in its effect on the witnesses' demeanor, such questioning must be conducted live and in front of the hearing panel.[145] The court noted, however, that this does not mean the "accused student always has a right to *personally* confront his accuser and other witnesses," and acknowledged that educational institutions have a

137. *Id.* at 580.

138. *Id.* at 578–79.

139. *Id.*

140. *Id.* at 580.

141. *Id.*

142. *Baum*, 903 F.3d at 580.

143. Doe v. Univ. of Cincinnati, 872 F.3d 393, 402 (6th Cir. 2017) (holding that cross-examination is "essential to due process in a case that turns on credibility" because it leads to reliable results).

144. Doe v. Baum, 903 F.3d 575, 583 (6th Cir. 2018).

145. *Id.* at 582–83.

legitimate interest in shielding victims from further harm that may result from cross-examination.[146]

Baum redefined what constitutes necessary due process in the context of campus sexual assault adjudications. In the wake of the *Baum* decision, colleges and universities within the jurisdiction of the Sixth Circuit revised their Title IX policies and disciplinary processes to conform with its cross-examination mandate.[147] In its final rule, the Department of Education cited the *Baum* decision as support for its live hearing and cross-examination requirements.[148] However, other circuit courts have rejected its reasoning.

B. First Circuit: Haidak v. University of Massachusetts-Amherst, *933 F.3d 56 (1st Cir. 2019)*

In *Haidak*, the First Circuit Court of Appeals declined to follow the Sixth Circuit in requiring cross-examination in Title IX adjudications. The court differentiated Title IX hearings from "jury-waived" criminal trials and expressed concern that student-conducted cross-examination would lead to "displays of acrimony or worse."[149]

The case involved a student, James Haidak, who was suspended from the University of Massachusetts at Amherst for physically assaulting a fellow student, Lauren Gibney, following an argument while studying abroad in Barcelona.[150] Gibney submitted a written complaint regarding the incident and the university opened an investigation.[151] Despite a no-contact order, Haidak and Gibney maintained contact, both over the phone and in person.[152] Although Gibney admitted to school officials that the communications from Haidak were welcomed and reciprocated, the university suspended Haidak for behavior that

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146. *Id.*

147. For a comprehensive discussion of the differing interpretations adopted by colleges and universities within the Sixth Circuit, see Bennett Leckrone, *The Education Dept. Would Let Students Question Their Rape Accusers. At Some Colleges, That's Already How It Works.*, CHRON. OF HIGHER EDUC. (Feb. 21, 2020), https://www.chronicle.com/article/the-education-dept-would-let-students-question-their-rape-accusers-at-some-colleges-thats-already-how-it-works/?cid=gen_sign_in.

148. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,327–28 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

149. Haidak v. Univ. of Mass.-Amherst, 933, F.3d 56, 69–71 (1st Cir. 2019).

150. It should be noted that the final rule imposes jurisdictional limitations, making Title IX regulations applicable only to sexual harassment that occurs against a person in the United States. 34 C.F.R. § 106.44(a). Thus, colleges and universities that receive federal funding are no longer required to take action with respect to sexual misconduct that occurs outside the United States, such as during participation in a study abroad program. For additional information regarding this change, see Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,205–06 (May 19, 2020).

151. *Haidak*, 933 F.3d at 61–62.

152. *Id.*

"represent[ed] a direct and imminent threat to . . . the safety of the university community."[153] Following a hearing in which a board comprised of four students and one staff chair considered the testimony and evidence submitted by each party, Haidak was found responsible for assault and failure to comply with the no-contact order.[154] Haidak was expelled from the university as a result of this finding.[155] He subsequently filed a complaint in federal court alleging due process and equal protection violations as well as a violation of Title IX.[156] Haidak argued that he was deprived of his constitutional due process rights as he was not permitted to cross-examine Gibney.[157] The district court dismissed his claims, and Haidak appealed.[158]

Rejecting the categorical rule announced in *Baum*, the First Circuit held that questioning by an independent and neutral factfinder may be sufficient in the context of campus disciplinary hearings to satisfy constitutional due process requirements.[159] However, the factfinder must engage in "reasonably adequate questioning" calculated to probe the credibility of the parties and witnesses.[160]

In declining to adopt the reasoning in *Haidak*, the Department of Education cites *Baum* and California appellate decisions as evidence of a "growing judicial consensus, that some kind of cross-examination should be permitted in serious student misconduct cases that turn on credibility."[161] However, *Baum* is not the consensus approach. In addition to the *Haidak* decision, a majority of circuit courts and federal district courts have held that the Due Process Clause does not necessarily require direct, adversarial cross-examination in university disciplinary hearings.[162] As the Supreme Court has not yet taken up this question, the Biden administration has considerable leeway to recalibrate the current Title IX rule to more effectively balance the due process rights of the accused and adequate protections for victims of sexual assault.

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153. *Id.*

154. *Id.* at 64.

155. *Id.* at 65.

156. *Id.*

157. *Haidak*, 933 F.3d at 66.

158. *Id.* at 60.

159. *Id.* at 69–70.

160. *Id.* at 60–70.

161. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,311 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

162. *See* Davis, *supra* note 24, at 228.

IV. ANALYSIS AND RECOMMENDATIONS

The Biden administration has criticized the new Title IX regulations as "roll[ing] back important protections for student survivors" and has signaled an intent to restore the guidance set forth in the 2011 Dear Colleague Letter.[163] The administration's plan, which entails student-led prevention education and enhanced training for administrators and staff on trauma-informed interview techniques, is aimed at changing the "culture surrounding campus rape and sexual assault."[164]

In March, President Biden issued the *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, which reaffirms the administration's commitment to equal educational access and directs the Secretary of Education to reevaluate all existing regulations, guidance documents, and policies related to Title IX.[165] The executive order instructs the Secretary of Education to review the regulations passed under the previous administration and authorizes him to "consider suspending, revising, or rescinding" any agency actions that are inconsistent with the policy set forth in the order.[166] In response, the Department of Education Office for Civil Rights published a letter to students, educators, and other stakeholders announcing a comprehensive review of the regulations implementing Title IX.[167] The letter further states that OCR anticipates publishing a notice of proposed rulemaking to amend the regulations.[168]

The Department of Education Office for Civil Rights recently released a question-and-answer document which provides guidance as to how the Biden administration interprets existing Title IX regulations and offers insight into potential changes.[169] The live hearing and cross-examination requirements remain intact, but the document explains that the impartial decisionmaker must determine whether each question is relevant and retains discretion to exclude

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163. *The Biden Plan to End Violence Against Women* (2021), https://joebiden.com/vawa/.

164. *Id.*

165. Exec. Order No. 14,021, 85 Fed. Reg. 13,803 (Mar. 11, 2021).

166. *Id.*

167. U.S. Dep't of Educ., Letter to Students, Educators, and other Stakeholders re Executive Order 14021 (Apr. 6, 2021), at 2, https://www2.ed.gov/about/offices/list/ocr/correspondence/stakeholders/20210406-titleix-eo-14021.pdf.

168. *Id.* at 3.

169. Sarah Brown, *6 Things to Know About the New Title IX Guidance*, CHRON. OF HIGHER EDUC. (July 20, 2021), https://www.chronicle.com/blogs/higher-ed-under-biden-harris/six-things-to-know-about-the-new-title-ix-guidance?utm_source=Iterable&utm_medium=email&utm_campaign=campaign_2616359_nl_Academe-Today_date_20210721&cid=at&source=&sourceId=&cid2=gen_login_refresh.

any question.[170] By placing an emphasis on the authority of the decisionmaker to screen certain questions, the document may signal a shift away from the adversarial process.

Although the executive order and policy guidance documents suggest forthcoming amendments to Title IX regulations, it remains uncertain which parts of the regulations the administration might seek to amend. Given that some federal appeals court decisions have endorsed enhanced due process protections for students accused of misconduct, the Biden administration will likely not be able to rescind all parts of the revised regulations.[171] If the Biden administration rescinds the regulations, appeals court decisions requiring cross-examination and live hearings will continue to be applicable to colleges and universities in those judicial circuits.

The challenge will be to craft a regulatory scheme that acknowledges and incorporates these judicially sanctioned due process requirements while also reducing reporting barriers, such as fear of re-traumatization through the adjudication process. The administration should establish a flexible regulatory framework that allows colleges and universities to develop disciplinary procedures that facilitate credibility assessment while also ensuring adequate protections for victims of sexual harassment. The direct cross-examination mandate contained in the current Title IX rule constrains schools' ability to effectively balance the parties' competing interests and fails to adequately appreciate its negative consequences.

A. The Final Rule Mischaracterizes the Baum Decision

The final rule mischaracterizes *Baum*, which held that cross-examination is required as part of campus sexual assault adjudications when credibility is material to the resolution of the hearing.[172] The final rule extends this narrow holding to require cross-examination in all such adjudications.[173]

In *Baum*, the investigator reported that there was insufficient evidence to meet the preponderance of the evidence standard.[174] The appeals board reversed, as it found the complainant to be more credible than the respondent.[175] Following the appeals board decision, the respondent filed a lawsuit in federal

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170. OFF. FOR C.R., U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX REGULATIONS ON SEXUAL HARASSMENT 47 (July 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf.

171. *See e.g.*, Doe v. Univ. of the Scis., 961 F.3d 203, 214 (3d Cir. 2020) (holding that "fairness" in the context of student misconduct proceedings means that accused students have an opportunity to "test witness credibility through some form of cross-examination and a live, adversarial hearing").

172. *See* Davis, *supra* note 24, at 228.

173. *See* 34 C.F.R. § 106.45(b)(6)(i) (2020).

174. Doe v. Baum, 903 F.3d 575, 580 (6th Cir. 2018).

175. *Id.*

court, arguing that because the decision rested on a credibility determination, he was entitled to cross-examine the complainant and adverse witnesses.[176] The court held that due process requires some form of cross-examination in campus sexual assault adjudications but limited this holding to situations when "credibility is in dispute and material to the outcome."[177]

Although credibility disputes are common in sexual misconduct hearings, there are situations in which *Baum* would not require cross-examination, such as where the alleged misconduct is depicted in a photo or video, thereby negating the need to rely on testimonial evidence.[178] In relying on the decision, the final regulation obscures this distinction and extends this requirement beyond the narrow scope of the *Baum* precedent, recharacterizing compulsory, live cross-examination as an affirmative right in all cases and contexts.[179]

The final rule also does not fully acknowledge that the Sixth Circuit decision in *Baum* conflicts with other circuit court decisions,[180] namely the *Haidak* decision. In *Haidak*, the First Circuit expressly rejected the reasoning in *Baum*, stating that by announcing a categorical rule that cross-examination is required in all cases turning on a credibility determination, the Sixth Circuit "took the conclusion one step further than we care to go."[181] While the final Title IX regulation characterizes *Baum* and similar decisions as evidence of a "growing judicial consensus,"[182] a majority of federal courts have declined to hold that the Due Process Clause requires direct, adversarial cross-examination as part of campus sexual misconduct hearings.[183]

Furthermore, the *Baum* decision relies in part on criminal cases which support cross-examination as a fundamental element of constitutional due process. However, the campus disciplinary process is separate from the criminal justice system, with each serving distinct purposes.[184] Whereas a criminal proceeding may result in incarceration, a criminal record, or registration as a sexual offender, the most severe sanction that a university may

176. Doe v. Baum, 903 F.3d 575, 580 (6th Cir. 2018).

177. *Id.* at 584.

178. *See e.g.*, Plummer v. Univ. of Houston, 860 F.3d 767, 775–76 (5th Cir. 2017) (holding that cross-examination is not required where the plaintiffs distributed videos and a photograph of the sexual assault).

179. *See* Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 658–59 (2018).

180. For a comprehensive discussion of conflicting federal district and circuit court decisions, see Davis, *supra* note 24, at 226–28.

181. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 69–71 (1st Cir 2019).

182. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,311 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

183. Davis, *supra* note 24, at 228.

184. *Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/.

impose is expulsion.[185] Yet data points to the fact that less than one third of students found guilty of sexual misconduct receive this punishment.[186] Although a student dismissed from school may suffer collateral consequences, his interests are not the same as those of a criminal defendant. The procedural process owed to a respondent in a campus disciplinary hearing is therefore not the same as that owed a defendant in a criminal proceeding.

B. The Cross-Examination Mandate Lacks Empirical Evidence

Cross-examination has been viewed as a valuable tool for assessing witness credibility and eliciting advantageous information. However, it also has the potential to distort the truth. The risk for abuse is particularly acute in campus sexual misconduct hearings.

Under the new regulations, the complainant and respondent are each entitled to select an advisor, who may be an attorney, to help guide them through the grievance process.[187] The final regulation requires that colleges and universities allow advisors to directly cross-examine the opposing party and any witnesses.[188] This raises equity concerns, particularly as students with greater financial resources are more likely to hire highly skilled attorneys.[189] Although postsecondary institutions must provide an unrepresented party with an advisor, the advisor need not have any legal expertise.[190] This may increase the risk of obscuring the truth where one party is questioned by an attorney well-versed in strategies to attack witness credibility, and the other is questioned by an inexperienced lay advisor.[191]

Furthermore, evidence suggests that cross-examination "lacks . . . empirical support for its value as a truth-finding device."[192] In *Baum*, the

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185. Sara O'Toole, Note, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 530–31 (2018).

186. Tyler Kingkade, *Fewer than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFPOST (Dec. 06, 2017), https://www.huffpost.com/entry/campus-sexual-assault_n_5888742.

187. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,332 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) ("The final regulations clarify that a party's advisor may be, but is not required to be, an attorney . . . .").

188. 34 C.F.R. § 106.45(b)(6)(i) (2020).

189. Levitsky et al., *supra* note 68.

190. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,066 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

191. Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual Assault Cases*, CHRON. OF HIGHER EDUC. (Jan. 10, 2019), https://www.chronicle.com/article/keep-cross-examination-out-of-college-sexual-assault-cases/?cid=gen_sign_in.

192. Davis, *supra* note 24, at 234.

university argued that even if the respondent did not have a formal opportunity to question the complainant, he was permitted to review her statement and submit a response drawing attention to any alleged inconsistencies in her account.[193] The court rejected this argument, reasoning that "[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness's story to test her memory, intelligence, or potential ulterior motives."[194] The court further emphasized the value to the factfinder of observing the witness's demeanor during questioning.[195]

Given that trauma has physiological effects that impact memory, inconsistencies in the testimony of a complainant may lead the factfinder to incorrectly infer dishonesty. The value of cross-examination as a tool for assessing credibility is significantly undermined where a victim's stress-induced response to a traumatic event impairs memory formation.[196] In addition, studies suggest that the stress of cross-examination itself affects memory and may reduce the accuracy of witness testimony.[197] With respect to demeanor evidence, a recent survey of scientific evidence suggests that behavioral responses to adversarial questioning are poor indicators of witness deception.[198] Thus, despite its reputation as a reliable truth-seeking device, cross-examination has substantial limitations which weaken its usefulness in the context of campus sexual assault adjudications.

C. The Final Rule Fails to Take into Account the Adverse Consequences of Compulsory, Live Cross-Examination

1. Reporting

The blanket cross-examination requirement would likely have a chilling effect on reporting, even in cases where the evidence overwhelmingly supports a finding that sexual misconduct more probably than not occurred. Following *Baum*, colleges and universities in the Sixth Circuit sought to develop and adopt policies implementing its holding.[199] These policies varied widely in their interpretation of the live hearing and cross-examination mandates and provide a clear illustration of the potential effect of such policies on the willingness of victims to pursue formal disciplinary processes.

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193. Doe v. Baum, 903 F.3d 575, 582 (6th Cir. 2018).

194. *Id.*

195. *Id.*

196. *See* Hopper, *supra* note 71.

197. STEPHEN J. ADLER, THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM 210 (1994).

198. H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the "Greatest Legal Engine Ever Invented*," 27 CORNELL J. L. & PUB. POL'Y 145, 155–56 (2017).

199. Leckrone, *supra* note 147.

The University of Michigan, for example, adopted a strict interpretation of *Baum* and revised its sexual misconduct policy to allow the accused to directly cross-examine the accuser.[200] The revised policy led to a significant increase in the number of complainants who opted to pursue an adaptable resolution process, in which the university takes no formal disciplinary action against the respondent.[201] A university report noted the timing of the *Baum* decision, suggesting that some complainants may have been hesitant to pursue the formal disciplinary process as a result of the direct cross-examination requirement.[202]

The University of Kentucky, by contrast, amended its policy to allow a hearing officer to conduct cross-examination using questions submitted by the parties.[203] Although the policy permitted the respondent and university counsel to directly cross-examine any witnesses, the respondent could not cross-examine the complainant and vice versa.[204] Such practices are not as likely to result in significant reporting declines.

2. Victim Re-Traumatization

The requirement that complainants submit to cross-examination as part of a live hearing would also subject vulnerable victims to adversarial, and potentially hostile, questioning that may cause further psychological harm. The complainant will be forced to relive a traumatic experience while having their credibility called into question. This perpetuates the very environment which Title IX is meant to confront and reinforces the silencing of victims which has long prevailed on college campuses.

This is not to say, however, that colleges and universities should conduct disciplinary adjudications without meaningful mechanisms for probing the complainant's account.

Rather than imposing strict due process requirements, the Title IX regulations should provide a flexible framework that allows schools to develop procedures that respond to applicable judicial precedent while protecting the victim from unnecessary psychological harm. For example, eyewitness testimony can highlight bias and narrative inconsistencies.[205] Although this

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200. *Id.*

201. *Id. See also* Dana Elger, *OIE Releases Annual Report on Prohibited Student Conduct*, UNIV. REC., UNIV. OF MICH. (Nov. 11, 2019), https://record.umich.edu/articles/oie-releases-annual-report-on-prohibited-student-conduct/.

202. *Id.*

203. *Policy and Procedures for Addressing and Resolving Allegations of Sexual Assault, Stalking, Dating Violence, Domestic Violence, and Sexual Exploitation*, UNIV. OF KY. (2018), at 17, https://www.uky.edu/regs/sites/www.uky.edu.regs/files/files/ar/ar6-2_final_0682018_08-01-18_corrections.pdf.

204. *Id.*

205. Davis, *supra* note 24, at 231.

constitutes hearsay, relying on hearsay evidence is acceptable in similar civil contexts.[206]

Due process may also be satisfied through certain circumscribed forms of cross-examination. In *Haidak*, the court found that a system in which the hearing panel examined the witnesses and conducted "reasonably adequate questioning" met due process standards.[207] The hearing panel examined each student several times and alternated between questioning the complainant and respondent. As a result of this process, the questioning of each party was informed by the testimony of the other. Although the "reasonably adequate" standard could bear further elaboration, it provides a workable model that would allow the complainant to avoid adversarial questioning, thereby reducing the risk of re-traumatization, and would provide the respondent with an opportunity to draw attention to inconsistencies in witness testimony through questions submitted to an impartial decisionmaker.

CONCLUSION

As the Biden administration reviews the current Title IX regulations and considers potential amendments, it faces significant challenges. It must balance due process concerns against protections for victims of sexual harassment. In the absence of a Supreme Court ruling on the dictates of constitutional due process in the educational context, any policy or regulatory changes must take into account diverging federal court decisions and weigh the practical implications of procedural requirements. With respect to cross-examination, the Biden administration should adopt a flexible regulatory framework that allows schools to develop procedures that respond to applicable judicial precedent while protecting victims of sexual assault from unnecessary psychological harm and reducing reporting barriers.

206. *Id.*

207. Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 70 (1st Cir. 2019).