New Title IX Regs Radically Revamp Campus Disciplinary Proceedings – But Is Due Process the First Casualty?

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The long-awaited Title IX regulations governing campus disciplinary proceedings have finally been issued. They are designed to encourage victims of sexual discrimination to come forward, promote access and efficiency, help schools maintain a safe environment for learning, and foster institutional and civic values. That, at least, is how the Department of Education has advertised them—and how the media has, in the main, reported on them.

This article agrees that protecting survivors by preventing revictimization is a critically important objective. It also takes the Department of Education's carefully articulated justifications for its wholesale changes at face value.

That said, what has been largely overlooked is that in certain central respects, the finalized regulations seek to achieve these laudable objectives by making it significantly easier for university and college administrators to remove or otherwise discipline allegedly problematic students and staff. Unfortunately missing, however, are sound policy justifications striking the appropriately careful balance between the protection of the accused and the protection of the allegedly abused.

Of particular concern are: The adoption of the "single-investigator" model option under which those investigating the allegations and initiating charges can also determine the accused's ultimate factual guilt; the move to a lower default standard of proof for establishing violations; the removal of the accused's right to a live hearing; and the elimination of the right to present expert witness testimony.

These components of the final regulations risk trading crucial due process protections and truth-seeking mechanisms for administrative efficiency. They also undermine the fundamental principle of justice that everyone, regardless of the accusation, deserves a fair and impartial hearing when the stakes are high.

This article underscores the importance of continuing the discussion about the revised regulations. It explains why the efforts to maximize institutional ease raise serious questions about procedural fairness and the factual accuracy of campus "guilt" determinations.

The article concludes that these concerns, along with the potential to exacerbate discrimination against historically marginalized populations, should be at the forefront of the debate. The legitimacy of Title IX enforcement is at stake. This is bad news for the accused, their accusers, and the system as a whole.

After repeatedly missing its self-imposed deadlines for changes initially proposed back in 2022, the U.S. Department of Education (DOE) on February 2, 2024, finally sent[1] its proposed sweeping changes[2] to Title IX's implementing regulations to the White House for formal review and approval. On April 19, 2024, the White House released the final regulations, part of the 1,561-page notice of final rulemaking designed to explain and defend the DOE's revisions.[3] Schools have until August 1, 2024, to set up compliant policies and procedures.

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[1] *Executive Order Submissions Under Review*, OFF. OF INFO. AND REGUL. AFFS. (Feb. 27, 2024), https://perma.cc/9H8M-GZ78.

[2] *See The U.S. Department of Education Releases Proposed Changes to Title IX Regulations, Invites Public Comment*, U.S. DEP'T OF EDUC. (June 23, 2022), https://perma.cc/5R6T-VZQK.

[3] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal
Financial Assistance, 34 C.F.R. pt. 106 (2024) [hereinafter DOE Revised Regulations]; *see also Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking*, U.S. DEP'T OF EDUC., https://perma.cc/5TDS-XQ3V.

Although the final regulations touch on a host of contentious issues, this article focuses on how certain revisions fundamentally impact college and university grievance procedures.[4] More specifically, some of the new regulations' key revisions are buoyed by claims that they will encourage victims to come forward and avoid retraumatization. In truth, however, they are purpose-built to make it much easier for university and college administrators to remove or otherwise discipline allegedly problematic students and staff.

The regulations directionally return to the Obama-era approach and reverse broad swaths of the Secretary of Education Betsy DeVos-era amendments. These changes will affect roughly 20 million current students and 3 million faculty and staff in higher education alone.

One constant as the regulations see-saw from administration to administration is that their bi-partisan core purpose is to help resolve complaints alleging discrimination based on sex both promptly *and* equitably. Yet, important sections in the new regulations raise genuine questions over procedural fairness and the factual accuracy of campus "guilt" determinations. These concerns about due process and accuracy in fact-finding, in turn, must be viewed against the backdrop of the charges' lifelong potential negative impacts that frequently accompany the accused and accusers alike.

As is often true of reforms driven by a mix of ideology and politics, the truth (or, as more relevant here, the most defensible outcome) lies somewhere in the middle. There is an appropriate balance to be found between those who wish to enforce maximalist protections for the accused, on the one hand, and those who are committed to significantly curtailing the accuseds' procedural rights and defenses in service of protecting abuse survivors and punishing abusers, on the other.

The perspective we advance here is that most of the DOE's revisions are legally, morally, practically understandable, and justifiable. However, in a few discrete areas they threaten to tip the balance too far in favor of

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[4] *See Title IX Legal Manual* ch. V(E), U.S. Dep't of Just. (Sept. 14, 2023), https://perma.cc/VQ3L-YTH9.

administrators and against the presumed-innocent accused (or, in the Title IX vernacular, the "respondent").

Our concerns, in short, lie not as much with *when* institutions impose discipline but rather with *how* they impose it. Specifically, this article takes aim at the new regulation's adoption of the single-investigator model under which the Title IX administrator investigating allegations of misconduct and deciding to charge disciplinary violations can now also concurrently serve as the ultimate decision-maker (that is, the de facto prosecutor is now permitted to also serve as the judge grading his or her own work). Relatedly, we have reservations over the wholesale abandonment of live hearing and cross-examination requirements. Finally, we question the decisions to abandon the right to present expert witness testimony and to impose the default "50% plus a feather" preponderance of the evidence standard.

The Title IX disciplinary procedures set out the *minimum* steps covered institutions must take to ensure compliance. By giving colleges and universities the option to trade due process protections for administrative and procedural efficiency and convenience, the revised regulations threaten to introduce a concerning laxness into the vital fact-finding mission. This unnecessarily undermines the interests of the accused, their accusers, and the system as a whole.

A Short Title IX Primer

Title IX of the Education Amendments of 1972[5] is a civil rights law prohibiting discrimination based on sex in all education programs and activities receiving any form of federal dollars (including through student loans). Covered institutions include public and private elementary and secondary schools, school districts, colleges, and universities, commonly collectively called "recipients" because they receive federal funds.

The implementing regulations, codified in 34 C.F.R. Part 106,[6] require qualifying colleges and universities to respond promptly and equitably to

[5] *See* 20 U.S.C. § 1653.
[6] 34 C.F.R. § 106 (2024).

claims of discrimination based on sex.[7] Such claims include, but are not limited to, sexual assault, sexual coercion, and harassment.

Turning from goals to expectations, the extent a school knows—or reasonably should know—about such discrimination, it is required to take immediate action to eliminate it, prevent its recurrence, and address its effects. Failure to abide by the requirements outlined in the implementing regulations can result in severe consequences, including complete loss of federal funding, which can be institution-shuttering.[8]

The Fundamental Revamping of Campus Disciplinary Proceedings

In a world where federal departments and agencies tend to make modest[9] changes to the Code of Federal Regulations, the DOE's Title IX rulemaking[10] stands out because of its breadth (the notice of proposed rulemaking is roughly 1,560 pages)[11] and ambition.[12] The almost 240,000 comments sent to the DOE, forcing it to delay issuing the finalized regulations by nearly two years, serve as a statistical telltale of the proposed regulations' contentiousness.[13]

Title IX disciplinary regulations have been abruptly changed throughout recent presidential administrations. From the perspective of a campus administrator and advocacy groups, among others, the ping-pong pattern of

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[7] *See generally Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to Its Title IX*
Regulations, U.S. DEP'T OF EDUC., https://perma.cc/4CYC-S76M.
[8] *See* U.S. DEP'T OF JUST., *supra* note 4, ch. III(A).
[9] *See generally List of CRS Sections Affected*, U.S. GOV'T PUBL'G OFF. (Mar. 2024), https://perma.cc/VN3K-YFU3 (providing a summary of all changes to the 50 subject matter titles).
[10] *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 87 Fed. Reg. 41390 (Jul. 12, 2022) (to be codified at 34 C.F.R. pt. 106).
[11] *See* U.S. DEP'T OF EDUC., *supra* note 3; *see also* DOE Revised Regulations, *supra* note 3.
[12] *See* U.S. DEP'T OF EDUC., *supra* note 2.
[13] *See generally* Libby Stanford, *Proposed Federal Rules on Title IX Draw Flood of Public Comments*, EDUC. WEEK (Sept. 13, 2022), https://perma.cc/EN6U-C82X; T. Markus Funk & Ella Uhde, *DOE Title IX Revamp of Campus Disciplinary Process Casts Wide Net*, BLOOMBERG L. (July 1, 2023), https://perma.cc/E4NT-MQA4.

wholesale adjustments, no matter how expected or reasonable, has been jarring.

Consider, for example, the Obama-era guidelines. They represented the first full revamp of Title IX since 1975.[14] The revised rules back then permitted live hearings and cross-examination, but (understandably) discouraged the accused from personally cross-examining their accuser. Upon assuming power, the Trump Administration reversed course. It focused on ensuring a trial-like process where accused students and staff were entitled to live hearings, could cross-examine witnesses, and were guaranteed neutral decision-makers operating free from potential institutional conflicts of interest or biases.

Far from universally endorsed, many survivor-focused advocacy groups, college administrators, and observers viewed these Trump-era regulations with substantial suspicion and concern. They argued that the new regime created "university kangaroo courts" unduly protective of the accused. Further, they worried that these more restrictive regulations created unjustified administrative burdens, encouraged harassment of victims and witnesses, and relatedly, discouraged victims from reporting their abuse.[15]

Fast forward to 2024, and the Biden-era DOE's changes revert the emphasis back to administrative convenience, stressing quick and relatively inexpensive adjudications. What should not be discounted, however, is the worthy objective of reducing the negative impacts on survivors subjected to the challenging experience of adversarial live hearings and cross-examination by lawyers.[16]

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[14] *See generally* R. Shep Melnick, *Analyzing the Department of Education's Final Title IX Rules on Sexual Misconduct*, BROOKINGS (June 11, 2020), https://perma.cc/M59V-C2S6.
[15] *See generally* Tyler Kingkade, *Why Schools Say Betsy DeVos' Title IX Overhaul Would be a Total Nightmare*, BUSTLE (Mar. 14, 2019), https://perma.cc/JGW5-5SK5 (arguing that the Trump-era rules "were largely seen as favoring schools and students accused of sexual assault over survivors" and contending that they " restrict the ways in which schools can investigate allegations, require schools to release more information to students involved in the cases, and would subject students to in-person questioning by lawyers").
[16] *See id*.

Though the revisions are considerable, it is also true that many aspects of the Trump-era Title IX regulations continue largely unchanged. The accused are still presumed innocent ("not responsible for the alleged sex discrimination," per § 106.45(b)(3)) until the conclusion of the grievance procedures. Also, under § 106.44(k), informal resolution of complaints continues to be an option if the accused and respondent agree to pursue this route. Yet, changes to previous procedural guarantees, such as live hearings with the opportunity to cross-examine witnesses and decision-makers insulated from conflicts of interest and bias, have significantly shifted how administrators will be able to mete out discipline on campus.

To be clear, we believe that many—perhaps even most—of the changes to Title IX reflect a defensible policy decision to widen the jurisdictional net and capture additional types of serious misconduct. However, the disciplinary-hearing-focused revisions highlighted here push the limits by significantly narrowing the accused's procedural and due process rights without persuasive justifications.[17]

Summary of the Most Concerning Changes

The DOE and its Office for Civil Rights staunchly reject claims that the new regulations threaten to violate the due process rights of the accused,[18] undermine the truth-finding function, lower the credibility of outcomes, or put the legitimacy of Title IX enforcement at risk. Instead, they contend that the changes promote access and efficiency, help schools maintain a safe

[17] *See generally* Press Release, ACLU, ACLU Comment on U.S. Department of Education's Final Title IX Rule (Apr. 19, 2024), https://perma.cc/M32E-RDQ3 (endorsing most of the changes, but opposing the elimination of the right to a live hearing and opportunity for cross-examination when serious sanctions may apply, permitting the use of the single-investigator model, and not requiring institutions to delay Title IX proceedings when a respondent facing imminent or ongoing criminal investigation or prosecution requests it).

[18] We understand that the formal due process argument applies to public universities, which are required to provide students with constitutional due process. In contrast, private universities create due process interests by promising certain disciplinary processes (so with private universities the safeguards are more contractual and constitutional). That said, and for ease of reference, we will use the term "due process" as a shorthand for procedural fairness and apply it without differentiation in both the public and private college and university contexts.

environment for learning, encourage reporting of misconduct, and foster institutional and civic values.[19] They also point to one undeniable truth, namely, that these changes simply give each institution additional flexibility to accept lower burdens and easier adjudications. Put another way, the revised rules give schools the *option* to take the easier way out; they do not *force* schools to adopt them.

The DOE and Office for Civil Rights' approaches are generally understandable and in the main simply reflect legitimate public policy judgment calls. When it comes to the discrete areas highlighted below, however, we urge colleges and universities to exercise caution and consider the longer-term downsides before they succumb to the regulations' tempting invitation to "ease administrative burdens."[20]

The Person Investigating Allegations and Initiating Charges May Now Also Determine Ultimate Factual Guilt.

The new § 106.45(b)(2) permits schools to adopt the "single investigator model" approach (somewhat of a misnomer—the "investigator-as-ultimate-decider" or "investigator-prosecutor-judge-jury-and-executioner" model would be more on point). This model permits a school's Title IX coordinator or investigator in a case to *also* serve as the sole decision-maker in that same matter. The change stands out because it cannot plausibly be defended based on the worthy goals of encouraging self-reporting or protecting survivors.

Allowing the administrators to, in effect, grade their own investigative work and determine the credibility of witnesses after they have already done so as part of the underlying investigation is designed almost exclusively for administrative ease. Considering how important the final decision-maker is

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[19] *See generally* U.S. DEP'T OF EDUC, *supra* note 7.

[20] We note that disagreement with the DOE's final rules does not provide solid grounds for legal action. Those challenging the new regulations will face a steep uphill battle. Under the Administrative Procedure Act, reviewing courts generally may only strike down agency regulations if they are "arbitrary and capricious," were drafted "in excess of statutory authority," or were promulgated in a procedurally deficient manner. 5 U.S.C. § 706. The DOE, seeking to cut these challenges off at the pass, has sought to buttress its reasoning with hundreds of pages of careful analysis and argumentation.

to the fairness of the process, the accuracy of the factfinding, and the integrity and robustness of the final decision, this modification is the most difficult to defend.

For its part, the DOE has consistently rejected concerns over conflicts of interest, politicization, and accuracy in factfinding when a Title IX coordinator serves as both the de facto prosecutor (finding facts, evaluating witness' credibility, and initiating charges) and the judge (finding facts, evaluating credibility, and adjudicating ultimate factual guilt).[21] In the discussion accompanying the final regulations, the DOE contends that "requiring separate staff members to handle investigation and adjudication is burdensome for some recipients."[22] It adds that schools can, of course, voluntarily elect to use independent factfinders.[23] Finally, the DOE repeatedly points to the requirement and expectation that decision-makers will control their own biases and objectively evaluate the evidence (which, of course, is true of adjudicators in all civil, criminal, and regulatory contexts, where reliance on such self-policing would be a complete non-starter).[24]

These changes have, for good reason, generated significant concerns. It is simply impossible to argue that permitting the Title IX coordinator to grade their own work is compatible with an unbiased process. Would any rational criminal defendant elect to have their prosecutor also serve as their judge, jury, and sentencer (whether in the court context, in Title IX grievance hearings, or otherwise)? The common-sense answer is of course no. What is more, no U.S. court, whether federal, state, or local, would ever tolerate such a system in the criminal justice or civil realm, even in cases where the stakes are much lower.

Far from a matter of recent creation, in 1780 Founding Father John Adams in the Massachusetts Constitution's Declaration of Rights focused on the functional, not to mention systemic, importance of the factfinder's

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[21] *See DOE Revised Regulations*, *supra* note 3, at 586-602, 822-31, 945-1017.
[22] *Id*. at 688.
[23] *Id*. at 688-89.
[24] *See id.*

independence: "It is the right of every citizen to be tried by judges as free, impartial, and independent as the lot of humanity will admit."[25]

Of course, being dismissed from a school and being prosecuted for a crime are very different (and, as noted in note 18, above, private and public institutions differ in terms of what process is due). Nevertheless, the same conduct can initiate both, and the collateral consequences can be very similar. School discipline certainly is not an ordinary or private matter. Its lasting impacts can follow a student or staff member throughout the life course.

Colleges and universities will be tempted to take advantage of the DOE's superficially attractive offer to forego independent decision-makers and put in place the single-investigator model.[26] This route will undoubtedly be simpler, cheaper, and grant institutions more control over the ultimate decisions. After all, is it reasonable to expect the very same investigator who brought the charges in the first place to later conclude that the evidence they brought forward was insufficient?

Adopting this procedurally flimsy approach will no doubt be difficult to decline. However, institutions seeking an unbiased process producing credible fact-finding and integrity-filled decisions should reject the single-investigator model and its perceived short-term benefits. A Title IX coordinator who investigates a case, asserts violations of the campus code of conduct, and then presides over a proceeding yielding a finding of responsibility will not, and should not, be viewed as impartial. The ultimate decision, accordingly, will not, and should not, be considered robust and reliable.

Institutions concerned with offering their students and faculty a fair and unbiased process, and with producing credible, defensible findings, will

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[25] Mass. Const. of 1780, art. XXIX. *See also* The Report of a Constitution or Form of Government for the Commonwealth of Massachusetts, 28 – 31 October 1779 ch. I, art. 30, https://perma.cc/2TYJ-37UD.

[26] Although it is unclear what percentage of schools will take up the DOE's invitation, in the past, approximately a third of colleges and universities, when given the chance under the Obama-era changes, switched to the single-investigator model. *See generally* Melnick, *supra* note 14.

reject the single-investigator model. Though it may be more cumbersome, they will endorse a process that can stand up to scrutiny and ensures that instances of victimization will be taken seriously. Fairness to the accused and accusers alike demands no less.

Rebuttable Presumption That a Lower Standard of Proof Will Be Used to Determine Student Violations (Whereas Employees Receive Greater Protections).

Previously, § 106.45(b)(1)(vi) allowed colleges to choose a standard of proof and required institutions to apply the *same* standard of proof to all formal complaints (whether against students or faculty).[27] So, if the factfinding was based on a "clear and convincing" standard of proof (requiring a "high probability" of guilt) in one context, the institution, for fairness reasons, could not opt to use the lower preponderance of the evidence standard in another.

Under the new § 106.45(h)(1), institutions are, by default, expected to determine whether sex discrimination occurred using the lower preponderance of the evidence ("50% and a feather") standard of proof.[28] Only if the institution opts for the more demanding clear and convincing evidence standard in other comparable proceedings, including other discrimination complaints, may the higher standard be used to adjudicate whether sex discrimination occurred. In other words, the new regulation creates a rebuttable presumption that adjudications of responsibility will be based on the lower standard of proof.

The revised regulations also permit institutions to apply lower standards of proof to students accused of misconduct than to faculty and staff. This will strike some readers as counterintuitive since institutions should be particularly focused on removing problematic faculty and staff who by dint of their positions have greater control, are in positions of trust, and should be held to higher standards. Nevertheless, per the DOE, employees' distinguishable obligations, work functions, and union membership justify an institution's decision to carve out allegations of employee misconduct from the new regulations that govern students so that the decision-makers

[27] *See DOE Revised Regulations*, *supra* note 3.
[28] *See generally* U.S. DEP'T OF EDUC., *supra* note 3, at 7..

evaluate allegations raised against employees based on the higher clear and convincing standard of proof.

Most colleges and universities will be hard-pressed to turn down the DOE's offer to deploy a lower standard of proof. It will make things easier for them and, particularly in tandem with the single investigator model, help ensure more predictable results. That said, these institutions should also remain mindful that using a higher standard of proof will yield more reliable final decisions less susceptible to being second-guessed later on.

Right to a Live Hearing Removed.

In a significant further departure from a trial-like setting, the new § 106.46(g) removes the accused's right to a live hearing and the related opportunity to cross-examine witnesses. The arguments supporting this change are that permitting cross-examination may re-traumatize complainants, inject unnecessary adversariality into the system, discourage reporting of misconduct, and provide an unfair advantage to those with the means to hire attorneys.[29]

Removing the right to a live hearing will undoubtedly advance many of these worthwhile objectives. It must also be conceded that cross-examination in most cases is inherently traumatic and adversarial. However, as federal and state courts have concluded in the higher education context, the system requires a careful weighing of pros and cons when it comes to this kind of fundamental change.

On the con side, cross-examination is *the* central feature of our justice system. It is an important means of determining the credibility of witnesses, particularly when other forms of evidence are unavailable. As eminent legal scholar John H. Wigmore, quoted in *Lilly v. Virginia*,[30] put it,

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[29] *See generally* Amelia Roskin-Frazee, *"Terrifying and Exhausting": Secondary Victimization in Title IX Proceedings at U.S. Higher Education Institutions*, 18 FEMINIST CRIMINOLOGY (2023); Ann J. Cahill, *Still Harming: Why the Trump-Era Title IX Regulations Need to Go*, BLOG OF THE APA (Oct. 6, 2021), https://perma.cc/MSR8-H8X4.
[30] 527 U.S. 116 (1999)

"cross-examination [is] the greatest legal engine ever invented for the discovery of truth."[31]

On the pro side, as any experienced practitioner can attest, the adversarial nature of contested proceedings and the undeniably unpleasant pressures they create can be traumatizing. Yet, these pressures also lie at the heart of the search for the truth, particularly when witnesses offer diametrically opposite accounts.

The analysis is naturally different when minor children are involved. But here we are largely dealing with factfinders grappling with high-stakes conflicting claims made by adult witnesses, accusers, and accused. The decision to dispense with hearings and adversarial examinations, though it in many cases will further praiseworthy goals, is not as self-evidently prudent and cost-free as the DOE would have it. Institutions should once again carefully consider whether the negatives of permitting live hearings, in fact, substantially outweigh the significant benefits.

Right to Present Expert Witnesses Removed. The new § 106.46(e)(4) accords schools the discretion to allow the parties to present expert witnesses; it no longer requires them to do so. According to the DOE, "the use of expert witnesses may introduce delays without adding a meaningful benefit to the recipient's investigation and resolution of the case."[32]

This objection can, of course, be lodged against almost all evidence either side wishes to introduce. Courtrooms around the country daily echo with full-throated, relevance-based objections that judges swiftly rule on. Why, then, do we believe campus decision-makers cannot evaluate and, when appropriate, reject evidence on the grounds of irrelevance (a term that, it must be noted, Section 106.2 explicitly defines)? Institutions should think twice before they accept the DOE's offer to adopt procedures that, at the outset, cut off all parties', including the alleged victim's, ability to present potentially relevant evidence.

Legal Challenges on the Horizon

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[31] *Id.* at 124.
[32] *See DOE Revised Regulations*, *supra* note 3, at 807.

On April 29, 2024, some ten days after the revised regulations were released, Alabama, Florida, Georgia, and South Carolina joined a group of plaintiffs in *State of Alabama v. Cardona.*[33] In their lawsuit they seek to block the revised regulations from taking effect on August 1, 2024.

Unlike other recent federal lawsuits challenging the inclusion of gender identity in the definition of discrimination based on sex, *Cardona* directs its fire at the revised regulations' approach to campus disciplinary proceedings. The plaintiffs argue that the revised regulations violate the Administrative Procedure Act[34] (APA):

> The elimination of a parties' right to a live hearing with cross-examination, even when credibility is a key issue, is arbitrary and capricious. The challenged rule states that college students accused of misconduct—charges that could ruin their academic and professional careers if they are found guilty—no longer have a right to be accompanied by counsel at all proceedings. . . . The Department has not reasonably considered these concerns. . . .[35]

Further, plaintiffs contend that the revised regulations fail to "adequately consider the significant due-process concerns of a single-investigator model, let alone how its interests militate the grave dangers of allowing a single person investigate, prosecute, and convict."[36] They conclude that the revised rules "separately and collectively raise grave concerns, opening recipients up to lawsuits raising due-process claims."[37]

Under the APA, courts must "hold unlawful and set aside agency action" that is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law"; "contrary to constitutional right, power, privilege, or immunity"; or "in excess of statutory jurisdiction, authority, or limitations,

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[33] Complaint, Alabama v. Cardona, No. 7:24-cv-00533-GMB (N.D. Ala. Apr. 29, 2024).
[34] 5 U.S.C. §§ 551-59.
[35] Complaint at 78, Alabama v. Cardona, No. 7:24-cv-00533-GMB (N.D. Ala. Apr. 29, 2024).
[36] *Id.* at 81.
[37] *Id*. at 82.

or short of statutory right." 5 U.S.C. §706(2). However, reviewing courts are not permitted to substitute their judgment for that of the agency.

The policy concerns raised here overlap with many of those plaintiffs highlighted in *Cardona*. Yet, the DOE, with its intentionally detailed 1,500+ page notice of final rulemaking, has conspicuously tried to inoculate its decision-making against arbitrary and capricious challenges. As a matter of public policy, there are many serious issues with the revised rules. However, the APA's intentionally high bar will not be easy to overcome.

Other Notable Changes

Recognizing Additional Forms of Discrimination

Quid pro quo, hostile environment harassment, and incidents of sexual assault, dating violence, domestic violence, and stalking have been—and will continue to be—covered. But the final regulations now also cover additional forms of sex discrimination, including discrimination based on sex stereotypes, gender identity, sex characteristics, pregnancy or related conditions, and sexual orientation.

This expansion has generated its share of controversy on policy grounds.[38] The DOE, nevertheless, was likely within its rights to add protections focused on safeguarding additional vulnerable groups from maltreatment based on sex and sex stereotypes and ensuring their full and equal access to educational opportunities.

Expanding the Definition of "Sexual Harassment"

Title IX historically defined sexual harassment as "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and

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[38] *See, e.g.,* Brendan Clarey, *Biden Admin Finalizes Changes to Title IX Rule, Redefining Sex Discrimination*, JUST THE NEWS (Apr. 21, 2024), https://perma.cc/Q7VR-LVA7 ("Critics of the federal rule finalized Friday say that it rewrites the scope of the statute intended to prohibit sex discrimination at federally funded schools and institutions of higher learning. Proponents say the changes are necessary to protect all students. . . While the department sifted through over 240,000 comments in response to the proposed rulemaking, the agency did not make changes to scrutinized sections surrounding gender identity, which were targeted by Republican attorneys general and conservative organizations.")

objectively offensive that it effectively *denies a person equal access* to the recipient's education program or activity."[39] Now, § 106.2 defines sexual harassment more broadly to encompass "conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it *denies or limits* a person's *ability to participate in or benefit from* the recipient's education program or activity." Understanding the impact of these changes requires a bit of language parsing.

Per the DOE, this definition is consistent with the Supreme Court's *Davis* decision. The revised definition continues to contextualize consideration of the totality of the circumstances as a means of determining whether specific harassment impacted a complainant's educational benefits. It also only prohibits conduct so serious that it implicates a person's access to the recipient's education program or activity.[40]

The DOE's argument implies that the new definition is coextensive with the old one (which, of course, begs the question of why the DOE changed the language). That said, the DOE also acknowledges that the final regulations require that harassing conduct be "subjectively *and* objectively offensive" and "severe *or* pervasive." This definition is more expansive than the *Davis* standard's "severe, pervasive, *and* objectively offensive."[41] Consistent with the new regulations, then, *one* "severe" instance of harassing conduct (that is, an act that is high in severity but lacks breadth) could give rise to disciplinary action for sexual harassment.[42]

A small but vocal minority has additionally called for adopting an "if-I-consider-it-harassment-then-by-definition-it-is-harassment" test that is purely subjective.[43] The DOE, however, for sound reasons rejected this

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[39] *See* 34 C.F.R. § 106.30(a)(2); *see also Davis v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629, 633 (creating what the DOE refers to as the "*Davis* standard").
[40] *DOE Revised Regulations, supra* note 3, at 83-84.
[41] *Id*. at 84.
[42] *See DOE Revised Regulations*, *supra* note 3, at 68-75, 84-96.
[43] *See generally* Eileen M. Blackwood, *The Reasonable Woman in Sexual Harassment Law and the Case for Subjectivity*, 16 VT. L. REV. 1005, 1005-06 (1992); Anita Bernstein, *Treating Sexual Harassment with Respect*, 111 HARV. L. REV. 445, 480 (1997).

suggestion. A test based purely on one person's subjective (that is, honestly-held) perception, no matter how irrational, would require institutions to police speech, have a chilling effect on free expression, and create a "heckler's veto" because a single statement on a sensitive topic could be "offensive" to one student and generate a sex-based harassment complaint.

Fundamentally, the purely subjective approach would lower the bar so that all conduct and speech must meet—or, rather, comply with—the most finely calibrated sensibilities of the most sensitive, even if objectively entirely unreasonable, individuals on campus. This would represent a jarring and ill-considered departure from the traditional role higher education has and should play. Students attending colleges and universities should, through a good-faith interchange of ideas, have their preconceptions and intellectual boundaries constructively pushed and have their thinking challenged in objectively non-discriminatory ways.

To summarize, the conduct in question must now be (1) unwelcome, (2) sex-based, (3) subjectively *and* objectively offensive, *as well as* (4) so severe or pervasive, (5) that it results in a limitation or denial of a person's ability to participate in or benefit from the recipient's education program or activity. The public policy grounds for this expanded civil enforcement definition, though not immune from criticism, are on the whole understandable and defensible. That said, by going beyond *Davis's* more restrictive private monetary liability standard, the DOE's expanded definition will no doubt—and perhaps unnecessarily—generate additional litigation.

Making Additional Off-Campus Conduct Actionable

Under the new § 106.11, institutions must respond to allegations of sex discrimination within the recipient's "off-campus" education programs. This includes conduct occurring in buildings owned or controlled by officially recognized student organizations, such as fraternities and sororities.[44] The new regulation broadens the term "program or activity" and mandates that

[44] Of course, and as noted, schools have always been authorized to prohibit misconduct in such places in their student codes of conduct.

these geographical descriptions also fall under Title XI. Off-campus conduct anywhere in the world involving two students is also actionable.

The new regulations, therefore, have an extra-territorial attribute attaching jurisdiction based on an individual's status as an enrolled student rather than because of the location of the alleged misconduct.

According to the Supreme Court in *Davis*, jurisdiction extends because the misconduct occurred in a setting where the recipient institution "retain[ed] substantial control over the context in which the harassment occur[ed]."[45] Recognizing this limitation, the DOE concedes, though somewhat tautologically, that the recipient "should not focus its analysis on whether alleged conduct happened 'on' or 'off' campus but rather on whether the recipient has *disciplinary authority* over the respondent's conduct *in the context* in which it occurred."[46]

To help illustrate such "substantial control" scenarios, the DOE provides examples of school-sponsored field trips, athletic programs, online classes, conduct that takes place via school-sponsored electronic devices, and conduct occurring during training programs sponsored by a recipient away from campus.[47] To avoid doubt, the DOE adds that online and in-person harassment are equally covered.[48]

To the extent that off-campus incidents have a continuing impact on students' participation in educational programs and activities, which continues to be the central element investigators must establish, this expansion seems justifiable. The Supreme Court has created a default presumption against extraterritorial application of federal law.[49] With this in mind, the DOE's at times strained effort to argue for a broad reading of "substantial control" will no doubt generate significant litigation.[50] Yet, it is

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[45] 526 U.S. 630 (1999).
[46] *DOE Revised Regulations, supra* note 3, at 198 (emphasis added).
[47] *Id*. at 199.
[48] *Id*.
[49] *See, e.g., Kiobel v. Royal Dutch Petroleum Co*., 133 S. Ct. 1659, 1663-69 (2013), discussed in Zachary D. Clopton, *Replacing the Presumption against Extraterritoriality*, 94 B.U. L. REV. 1, 5 (2014).
[50] *See DOE Revised Regulations*, *supra* note 3, at 142-43.

not unreasonable for the DOE to conclude that, in today's world, institutions should discipline proven sex-based harassment occurring under an institution's education program however and wherever it happens.

Allowing Access to Evidence Only Upon Request

The new § 106.46(e)(6) lets schools first issue the investigative report and only after that grant the accused access to underlying evidence (and, even this late in the proceedings, only after one or more parties explicitly request such access). Although experienced counsel will surely make such requests as a matter of routine, the request-first requirement seems to be another administrative hurdle, albeit a low one, introduced for no good or compelling reason. It is unclear, then, why schools, akin to most of today's prosecutors focused on fairness, would not automatically provide the accused access to evidence following the issuance of an adverse report rather than conditioning the access on a formal request.

Refusing to Mandate Delay Because of Concurrent Criminal Investigations or Prosecutions

One reasonable question is whether a Title IX Coordinator may delay the grievance proceeding when there is an ongoing and concurrent law enforcement proceeding. After all, courts routinely delay civil proceedings when overlapping issues are being addressed in criminal proceedings. The most persuasive argument against delay is that criminal proceedings are more serious, operate on a higher standard of proof, and should not slow down Title IX grievance procedures requiring quicker resolution.[51]

It is, therefore, not unreasonable for the DOE to reject an automatic *blanket* right of respondents to demand that grievance proceedings be held in abeyance pending the outcome of any criminal matters. True, the DOE's push that recipients should "whenever possible . . . apply their grievance procedures in a manner that avoids the need for an extension"[52] might be going too far. The DOE, however, should not be faulted for seeking to keep

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[51] *See generally* Michael D. McKay, *et al., Staying Out Of Trouble: The Basics Every Civil Litigator Should Know About Staying Civil Proceedings When One of the Parties Faces Criminal Exposure*, THE NAT'L L. REV. (Aug. 23, 2021), https://perma.cc/B8ED-6LYZ.
[52] *Id*. at 715.

grievance procedures on track unless and until a party can establish that a criminal investigation or proceedings will substantively impact the grievance procedure (or vice versa).

Restricting False Statements Findings. The new § 106.45(h)(5) prohibits an institution from initiating disciplinary actions against a party for making false statements based *solely* on the grievance procedure's finding that no sex discrimination occurred. According to the DOE, however, recipients can still discipline parties, witnesses, or others participating in the Title IX grievance procedure for making false statements.[53] Such discipline must, consequently, be based on evidence *other* than a grievance procedure outcome. This furthers the Department's reasonable goal of "ensuring that a recipient's efforts to address sex discrimination are equitable by allowing parties, witnesses, and others to participate in grievance procedures without fear that the outcome alone could lead to a determination that false statements were made."[54]

The Unintended (and Intended) Consequences of Diminishing Due Process

As we have seen by this short and necessarily truncated excursion into the changes introduced by the final regulations, many of the new regulations reflect understandable, well-grounded policy choices. Yet, some of the changes highlighted above—most notably the decision to permit administrators to both investigate cases and serve as the final decision-makers—unmistakably signal the DOE's core view that it is more tolerable for potentially "innocent" students to be held responsible for school violations than it is for culpable students to evade punishment.

This policy judgment is one regulators are certainly free to make and codify. But it also clashes with the American tradition best captured by Benjamin Franklin, who, adopting William Blackstone's formulation ("Blackstone's Ratio"), famously said, "It is better 100 guilty Persons should escape than

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[53] *See DOE Revised Regulations*, *supra* note 3, at 74.
[54] *Id*. at 869.

that one innocent Person should suffer."[55] The centrality of due process is enshrined in the Fifth and Fourteenth Amendments, which guarantee equal protection and due process of law to every person in the jurisdiction of the United States. Though these constitutional protections, as discussed above, do not impact public and private institutions equally, any governmental efforts to undercut the fairness of high-stakes proceedings (whether in court, on campus, or elsewhere) or undermine the integrity and robustness of the factual findings should be viewed with great suspicion.

The longer-term effects of these regulations and their shift towards safeguarding accusers at the expense of the accused are far from clear. For example, will the changes disproportionately and disparately impact Black and other historically underrepresented and marginalized students and faculty who have faced systemic discrimination in the criminal justice system?

For those who believe such comparisons between campus discipline and the discriminatory dynamics traceable in the broader justice system miss the mark, consider studies showing that today's campus administrators are far more likely to pursue and punish historically marginalized students, as well as international students.[56] As groups such as the Foundation for Individual Rights and Expression found in their report, many colleges and universities have already exhibited an unwillingness to provide the due process protections mandated for Title IX proceedings.[57] According them even more discretion, therefore, may be a move in the wrong direction.

To the extent disparate treatment is an ongoing concern in the criminal justice arena (which it should be), it is unclear why removing due process protections should be viewed with any less skepticism when it occurs in the far less transparent arena of campus disciplinary proceedings run by comparatively inexperienced investigators and factfinders. Although the

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[55] *See* Letter from Benjamin Franklin to Benjamin Vaughan (Mar. 14, 1785), ALBERT H. SMYTH, THE WRITINGS OF BENJAMIN FRANKLIN 293 (vol. 9 1907), https://perma.cc/2KCG-86UQ.

[56] *See generally* Ben Trachtenberg, *How University Title IX Enforcement and Other Discipline Processes (Probably) Discriminate Against Minority Students*, 18 NEV. L.J. 107 (2017), https://perma.cc/9AAT-WW43.

[57] *See generally Spotlight on Campus Due Process 2022* (2022), FOUND. FOR INDIVIDUAL RIGHTS AND EXPRESSION, https://perma.cc/TV8D-A54V.

DOE has not addressed this important question, it is one that institutions should bear in mind when they decide whether and to what extent to take advantage of some of the due process-limiting options now on offer.

Irreconcilable Differences? Advocacy Groups Calling for Less Due Process for Alleged Campus Code Violators Demand More for Those Accused of Crimes

There are also some obvious ironies at play here. Some of the prominent groups most loudly championing the new regulations' shifting of power away from the accused and toward the campus prosecutors[58] ironically are also among the most outspoken proponents of limiting the ability of prosecutors and law enforcement to pursue actual criminal violations.[59] (To their credit, however, at least the American Civil Liberties Union, which in editorial and elsewhere has advocated in favor of defunding the police,[60] has also called out the new regulations' threats to important due process guarantees.[61]) If the advocates' concern truly is to ensure that due process rights do not discourage on-campus victims from coming forward, why do those concerns not equally apply to victims of crime outside of the insulated academic environment? Advocates have not addressed this question, let alone answered it.

Key Takeaways

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[58] *See generally* Alexis Gravely, '*Survivors Can't Wait'*, Inside Higher Ed (Aug.18, 2021), https://perma.cc/RU7M-JCNG.

[59] *See generally* Letter from the Leadership Conf. on Civ. And Hum. Rts. Et al. to Chairwoman Carolyn B. Maloney, U.S. House Comm. On Oversight and Reform, et al. (July 14, 2020), https://perma.cc/RU4V-87BZ.

[60] *See generally* Paige Fernandez, *Defunding the Police Will Actually Make Us Safer*, ACLU (June 11, 2020), https://perma.cc/H3UE-P7AQ ; Paige Fernandez and Taylor Pendergrass, *Transformational Public Safety: Reducing the Roles, Resources, and Power of Police*, ACLU (June 8, 2021) , https://perma.cc/2F5M-FWCP; Monica Melton, *Why The ACLU, Black Lives Matter And Others Want To 'Defund The Police' While This Weapons Supplier Disagrees*, Forbes (June 8, 2020), https://perma.cc/56W2-HNUH**.**

[61] *See ACLU Statement on Proposed New Title IX Rules*, ACLU (June 23, 2022), https://perma.cc/8KXW-VVAW.

Few will dispute that identifying and promptly disciplining students or employees on campus who have engaged in sexual discrimination, including sexual assault and harassment, is of critical institutional and societal importance. In its final regulation and the hundreds of pages of supporting supplementary information, the DOE has taken great pains to respond to criticisms and buttress its decisions. Nevertheless, a handful of the DOE's key changes threaten to undermine these core objectives by offering institutions integrity-sapping options.

Allegations of disciplinary code violations, particularly ones that are sex-related, are exceptionally serious business. Findings of guilt can, among other things, result in expulsion, suspension, or diploma revocation. These sanctions potentially have lifelong professional, academic, and reputational consequences. Assuming fair and impartial hearings, these penalties, even when severe, appropriately punish conduct that should be deemed unacceptable by all.

The proceedings resulting in such sanctions should never be or be perceived as a less-than-reliable rubber stamp. The stakes are far too high for both the accused (who deserve reliable factfinding) and the victims (who deserve robust, defensible, and integrity-based determinations of the factual guilt of their victimizers that will stand the test of time). Due process minimalism on campus should, therefore, not be a partisan political issue. It should be a concern to all.

Time will tell, but if the study of our justice system has taught us anything, it is that swapping due process and impartiality in decision-making for administrative efficiency typically turns out to be a bad tradeoff for all parties involved. Regardless of the accusation, everyone should be entitled to a fair and impartial hearing when the stakes are high.

The revised regulations give schools many new choices to shift the balance in favor of administrative efficiency. However, schools are not required to adopt most or any of them. If an institution elects not only to adopt the single investigator model, but also decides to remove the right to a live hearing and put in place the lower standard of proof, it should be prepared for deserved stakeholder criticism.

Even today's enthusiastic proponents of the new regulations should resist the siren song of administrative efficiency. They should keep an open mind and be willing to forego some of the "outs" the revised regulations offer because the long-term results are not likely to match their ambition.

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