SUNY The State University of New York

Office of the Chancellor

State University Plaza
Albany, NY 12246

www.suny.edu

January 29, 2019

The Honorable Betsy DeVos
Secretary of Education
Care/Of Brittany Bull
United States Department of Education
400 Maryland Avenue, SW
Room 6E310
Washington, District of Columbia 20202

Re: Docket ID ED-2018-OCR-0064

Dear Secretary DeVos:

On behalf of the State University of New York, I write to offer comments in opposition to the above-referenced Proposed Regulations under Title IX of the Education Amendments of 1972. Pursuant to the Administrative Procedure Act,[1] I ask that each comment herein be carefully considered and responded to before Final Regulations are issued.

As a general matter, the State University of New York believes that the vast majority of the Proposed Regulations exceed the Department's authority and include requirements that are contrary to the evidence, are inconsistent with other federal and New York State law, and represent a marked change in approach from the position of the Department during prior Democratic and Republican administrations. The State University of New York therefore is strongly opposed to these Proposed Regulations and asks the Department to withdraw them from consideration.

The State University of New York (SUNY) is the largest comprehensive system of higher education in the United States, with 64 college and university campuses located within 30 miles of every home, school, and business in the state. As of Fall 2018, nearly 425,000 students were enrolled in a degree program at a SUNY campus. In total, SUNY served 1.4 million students in credit-bearing courses and programs, continuing education, and community outreach programs in the 2017-18 academic year. SUNY oversees nearly a quarter of academic research in New York. Its students and faculty make significant contributions to research and discovery, contributing to a $1.6 billion research portfolio. There are 3 million SUNY alumni worldwide, and one in three New Yorkers with a college degree is a SUNY alum.

SUNY has invested significantly in the prevention of, and response to, sexual and interpersonal violence on campus and in the community. University leadership and staff have

[1] 5 U.S.C.A. § 706.

traveled to the White House, testified before the United States Senate, and advised executive and legislative leadership and staff at both the federal and state levels, as they consider legislation governing institutional response to harassment and violence both domestically and while on study abroad. In 2014, New York Governor Andrew M. Cuomo met with the SUNY Board of Trustees to discuss the issue of sexual assault on campus. The resulting Working Group[2] and uniform policies[3] were widely lauded as the most comprehensive, forward-thinking, and balanced in the nation, and formed the basis for legislation introduced by the Governor. That legislation, Education Law Article 129-B (referred to as "Enough is Enough"), was passed by wide bipartisan majorities. It passed unanimously in the State Senate, with a Republican majority, and with all but four votes in favor in the State Assembly. SUNY proudly worked with New York State's Education Department and other stakeholders to develop regulations implementing pieces of the legislation,[4] as well as a guidance document to assist campuses in implementing the law,[5] and partnered with the New York State Department of Health and State Coalitions to develop a model Memorandum of Understanding for campuses and external programs.[6] SUNY obtained a federal grant to translate important policies under the law into 120 written languages and American Sign Language, and made those translations freely available for download.[7]

On the national level, we regularly work with Senator Kirsten E. Gillibrand and New York delegation Members of the House of Representatives from both parties to assist them in considering and drafting legislation in this area. SUNY was the first University to endorse the Campus Accountability and Safety Act, bi-partisan legislation introduced in each House of Congress.

After passage of the Violence Against Women Act amendments to the Clery Act, SUNY developed a free 93-page resource[8] to assist colleges and universities in compliance. Issued within weeks of the Regulations, it was downloaded tens of thousands of times before the Department issued an updated Clery Act Handbook. The new law called for, among other things, access to existing "visa and immigration resources." In response, SUNY brought in partners and developed a Visa and Immigration Resource to assist campuses in providing plain-language information. That resource has likewise been translated into 120 written languages and made

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[2] https://system.suny.edu/sexual-violence-prevention-workgroup/.
[3] https://system.suny.edu/media/suny/content-assets/documents/sexualviolenceprevention/SUNY-Policies-Sexual-Violence-Prevention-Response-Updated-Jun2015.pdf.
[4] *Part 48 Annual Aggregate Data Reporting by New York State Institutions of Higher Education Related to Reports of Domestic Violence, Dating Violence, Stalking and Sexual Assault*, NEW YORK STATE EDUCATION DEPARTMENT (Aug. 31, 2017), *available at* https://www.regents.nysed.gov/common/regents/files/917brca4.pdf.
[5] *Complying with Education Law Article 129-B*, NEW YORK STATE EDUCATION DEPARTMENT (June 2, 2016), *available at* http://www.nysed.gov/common/nysed/files/article-129-b-guidance.pdf.
[6] https://system.suny.edu/sexual-violence-prevention-workgroup/mou-model/.
[7] *SUNY SAVR 129-B Translations*, STATE UNIVERSITY OF NEW YORK, Funded in part with a grant through the New York State Department of Health. https://docs.google.com/forms/d/e/1FAIpQLSc-Ere2v0QmQxEy_GFhvSIcdqBQwbdme_xvKUIptvkTtF8Y0g/viewform?c=0&w=1.
[8] *Policy and Programming Changes Pursuant to the Campus SaVE Provisions of the Violence Against Women Act*, STATE UNIVERSITY OF NEW YORK (JULY 2014 AND JAN. 2015), HTTPS://SYSTEM.SUNY.EDU/MEDIA/SUNY/CONTENT-ASSETS/DOCUMENTS/GENERALCOUNSEL/SUNY-VAWA-GUIDANCE-2014.PDF.

available for download and customization at no cost.[9] SUNY partnered with the City University of New York (CUNY) to develop SPARC,[10] an online introduction to prevention training that is likewise made available for download and customization by colleges and universities at no cost.[11] SUNY partnered with the One Love Foundation[12] to develop the largest installation of a dating violence prevention program in the nation, directly reaching over 20,000 students in a one month awareness program and reaching thousands more via social media.[13] SUNY collaborates with the New York State Office of Victim Services and many partners on *SUNY's Got Your Back*, a program to educate college students in violence reduction while assembling comfort bags for those who present to hospitals, rape crisis programs, domestic violence shelters, and law enforcement. To date, tens of thousands of bags have been assembled while educating thousands of students and community members.[14]

While we appreciate the time and effort the Department has expended in researching and proposing a series of regulations on this critically important issue, aside from certain minor technical areas, the State University of New York must respectfully oppose the implementation of these Proposed Regulations in their current form.

In Part I of SUNY's comments, we address the Secretary's authority to regulate Title IX, which falls under 20 U.S.C. 1681, et seq., in the introductory regulatory language of proposed 34 CFR Part 106 et seq. In offering comments regarding this authority under 20 U.S.C. 1681, et seq., we highlight areas of alignment, while raising major concerns about the significant economic, legal and regulatory problems evinced within the Proposed Regulations, to provide the Department with sound guidance about the appropriate path forward. Then, in Part II, we proceed to comment on each section of the Proposed Regulations in the order they are proposed. We identify specific areas within the Proposed Regulations that must be reconsidered or removed to comply with the text and purpose of Title IX. Preceding our formal comments, we begin with an Executive Summary.

[9] *Immigration and Visa Information In Response To Sexual & Interpersonal Violence*, STATE UNIVERSITY OF NEW YORK, Funded in part with a grant through the New York State Department of Health. https://www.suny.edu/violence-response/Visa-and-Immigration-Resource/.
[10] Sexual and interpersonal violence Prevention And Response Course.
[11] SPARC: Sexual and Interpersonal Violence Prevention & Response Course Online Training, STATE UNIVERSITY OF NEW YORK AND CITY UNIVERSITY OF NEW YORK, Funded in part with a grant through the New York State Department of Health. https://system.suny.edu/sexual-violence-prevention-workgroup/online-training/.
[12] https://www.joinonelove.org/.
[13] https://www.suny.edu/y4y/.
[14] https://www.suny.edu/gotyourback/.

Executive Summary

The Department of Education's (the Department) Proposed Regulations pursuant to Title IX of the Education Amendments of 1972 include minor technical areas with which the University agrees. However, the vast majority of the Proposed Regulations exceed the Department's authority and include requirements that are contrary to the evidence, inconsistent with other federal and New York State law, and represent a marked change in approach from the position of the Department during prior administrations (both Democratic and Republican). The State University of New York (SUNY), therefore, after much consideration, must oppose these Proposed Regulations and ask the Department to withdraw them from consideration.

SUNY does not believe the Department has made a sufficient showing that it has the authority to propose important aspects of these regulations under Title IX itself. The Department has not offered *any* evidence that there has been any disparate impact on Respondents in the conduct process, the party of interest for the Department in proposing these new rules, and has not shown that there is discrimination to be redressed *on the basis of sex*. The Department clearly has the right to regulate under Title IX of the Education Amendments of 1972 in a way that addresses unequal treatment *on the basis of sex*. But there must be *some* evidence that the regulation is promulgated to address inequality or discrimination on the basis of sex. Undoubtedly, through its request for comments, the Department has received references to dozens of studies of populations in college, secondary education, and society-wide showing a clear and statistically significant difference in the percentage of males versus females who are subject to sexual harassment, sexual violence and unequal treatment on the basis of sex.

Approximately 1 in 5 females report in climate surveys that they have experienced non-consensual sex in their college years, while 1 in 13 males report the same, with transgender students generally reporting even higher rates. Simply analyzing identified male and female experiences with harassment shows that it has a differential impact on the basis of gender. Therefore, the Department would be on fairly solid ground requiring educational institutions to offer resources aimed at ameliorating the impact of such discrimination for which prevalence differs so much by gender, and requiring institutions to take it seriously and pursue investigations and adjudications to sanction those who violate the law and policy. That would be tied to serious, published and peer-reviewed studies that consistently show a differential impact in victimization and impact between genders.

Conversely, the Department presents no such published study showing that a complete lack of due process, traditional due process owed under case law, or the new maximized due process envisioned in these Proposed Regulations differently impacts people *on the basis of sex.* After careful research, we can find no such study. The Department has not shown or referenced *any* evidence that due process differences affect people differently *on the basis of sex.* Plainly, the Department now offers a mistaken understanding of its own regulatory system surrounding Title IX. Its Proposed Regulations distort the beneficial impact that Title IX has had on protecting Reporting Individuals and ensuring a fair process for all parties in campus disciplinary proceedings. The detailed due process provisions of the Proposed Regulations may or may not be a good idea. But the Department does not have jurisdiction to mandate "good ideas" or "best

practices." It is not a consulting firm. The Department only maintains jurisdiction under this Civil Rights law to regulate in a way that reduces discrimination on the basis of sex.

Even conceding for the sake of argument that a Respondent, if treated differently than similarly situated individuals of another sex, *could* be a victim of *discrimination* on the basis of sex, the Department still must show that the current system is actually allowing *discrimination on the basis of sex.* The Department has not shown that Respondents are predominantly male. It may assume so based on the few conversations it held with activists in preparation for drafting these Proposed Regulations, but there is no actual evidence this is so. Further, even if most Respondents were male, there is no evidence that they are held responsible more or less often than females, that their sanctions are greater or lesser than females, or that these additional due process requirements would change that. The Department must regulate within its jurisdiction. There is no evidence here that the current system of investigating and adjudicating sexual harassment and violence leads to disparate treatment *on the basis of sex*. There is no evidence that these Proposed Regulations would lessen such disparate impact. The Department simply does not have jurisdiction to regulate in this way and cannot do so without some evidence that this is not a solution in search of a problem but an evidence-based method of addressing a problem of unequal treatment on the basis of sex.

SUNY also must oppose these Proposed Regulations because they fail the standards of the President's Executive Order 13771. The cost savings the Department proposes are inaccurate and exaggerated, and the Department should have to identify two deregulatory actions for every new regulation in this Notice of Proposed Rulemaking. There is no actual cost savings here; instead, it is a cost shift that is a result of fewer cases being investigated under Title IX but still being investigated and adjudicated under the Clery Act and state law. The due process obligations will increase actual costs within Title IX investigations and will lead to significant additional litigation. Further, the proposals will drive up costs for both the institutions and their students.

SUNY also does not believe the Department has followed the Administrative Procedure Act, and thus its actions will not withstand judicial scrutiny. Only a few days ago, a lawsuit against the Secretary of Commerce overruled his bid for a 2020 census question because the courts ruled that the Secretary had clear pretexts for his actions and ignored public opinion, facts and evidence. As the January 2019 decision in *State of New York v. Department of Commerce* shows, courts will look beyond the "presumption of regularity" afforded Executive Branch officials where they cannot escape the conclusion that the agency's stated rationale was not the true reason for its actions, and may look both within the administrative record and outside of it to identify if the stated reason for acting was just a pretext masking an unstated goal. Over 50,000 comments have been submitted so far to the Department, and the overwhelming majority are in opposition to this regulatory action the Department seeks to take. From its own statements since coming into office, Department leadership decided what they wanted the regulations to cover, and then built a document to suit.

In addition, while the regulations state that the Department considered First Amendment Constitutional freedoms, the Department impinges on an institution's academic freedom, which is protected under the First Amendment. SUNY is unable to find any case that says the First

Amendment or other Constitutional rights automatically give way just because the action by the federal government is declared to be under the Spending Clause. The due process elements of the Proposed Regulations abrogate the rights of colleges to determine their process at a local level, in a shared governance approach with the communities they serve, by setting detailed and comprehensive processes before the institution can determine whether someone credibly accused of harassing or assaulting another member of the institution's community can be sanctioned or limited in their ability to continue harassing or assaulting the Reporting Individual or other community members. It is clear that these Proposed Regulations rescind the common principles of local control, and micro-regulate a process that many institutions have put significant research and resources into creating.

SUNY also believes that the Department's Proposed Regulations significantly abridge Federalism principles enshrined within the Tenth Amendment to the Constitution. New York will acutely feel this impact as it has the nation's most comprehensive state law to combat sexual assault, dating violence, domestic violence and stalking within college communities. New York also has detailed laws to combat sexual harassment in the workplace, and the Department's Proposed Regulations interfere with many laws a state is charged with implementing under the State's police powers. As the Department alluded to in its Directed Questions, there is a significant impact on New York's labor sector regarding these requirements in the Proposed Regulations. The Proposed Regulations themselves conflict with New York City labor laws, New York State labor laws, and cause significant issues with collective bargaining agreements.

SUNY also has specific issues with multiple sections of the Proposed Regulations. By pulling in the Clery Act definition of "sexual assault," the Regulations would create process conflicts depending on the type of report. Essentially, the Department is creating a different process for sexual harassment including sexual assault that is not consistent with existing statute and regulations covering that same assault. Institutions will have to choose between violating the Clery Act, and risking fines and funding, or violating the new Title IX regulations and risking funding and having their determinations overturned (but only in favor of Respondents). It is also clear that the notice provisions are far more onerous than what is provided to someone under the Clery Act or even someone questioned by police. Campus conduct processes have never been treated as a stand in for criminal adjudications, and that has not changed.

SUNY also has specific issues with the way the Department structured proposed section 106.44, regarding an institution's response to sexual harassment under Title IX. Previously, the geography to which campus conduct processes applied did not just include incidents within the United States. By narrowing the geography of where institutions' codes of conduct apply, it essentially excludes recourse for students on study abroad programs sanctioned by institutions and creates significant issues with campus management and supervision of Greek letter organizations. The Department's treatment of geography within these Proposed Regulations is also in direct conflict with the Congressional intent of the 2013 Violence Against Women Act amendments to the Clery Act.

SUNY also takes issue with the Department's partial "safe harbor" because it is written in such a way that would significantly elevate the Respondent's rights over the Reporting Individual when due process balancing dictates that each are to be treated equally in a conduct

process. SUNY also raises concerns with the unintended consequences of the mandated investigation of an Accused when there are two or more complainants due to the damage it will do to the rights of Reporting Individuals and Respondents. The Department includes higher disclosure requirements that would force an institution to reveal the names of all those who had made a complaint to date even if those who disclosed the incidents do not wish to participate in the process. SUNY also objects to the "emergency removal" provision the Department has provided for in these proposed regulations. Again, there is a lack of clarity on procedure that can be interpreted to modify current college and university procedure.

SUNY also finds that many areas in proposed section 106.45, which addresses the process for formal grievance procedures for sexual harassment, lack clarity and engage in cost shifting on institutions and students. The Department did not define "bias" in one area, which could lead to significant legal challenges on frivolous bases and extend the time before formal hearings are completed. SUNY also found that there is no definition of "delay solely caused by administrative needs," which could lead to needless challenges. SUNY can think of multiple situations in which something may have to be postponed for minimal time, and if these Proposed Regulations go into effect, this could cause confusion and challenges. The Department also puts bounds around which standard of evidence may be used (preponderance of the evidence versus clear and convincing evidence), where other authority, such as the Clery Act, are neutral on such choice. The Department also regulates K-12 institutions and institutions of higher education differently to a point that ignores the balance of due process required for each type of institution and ignores the level of quasi-property rights afforded to each student at each different level.

SUNY has found that the way the Proposed Regulations treat cross-examination and "advisor of choice" are structurally defective and completely obliterate any cost savings the Department believes it will find by implementing these provisions. Contrary to what the Department stated only a few years ago, it now seeks to add significantly to the Clery Act "advisor of choice" language by essentially requiring equal representation in all forms in all campus conduct proceedings, which would include attorneys, and mandate cross-examination. The cross-examination mandate would harm both Reporting Individuals and Respondents because if they do not participate, all their previous testimony and submissions will be excluded. While the impact on Reporting Individuals is obvious, the Department likely did not realize the harm to Respondents who may face analogous criminal charges and are advised not to participate in cross-examination.

SUNY also finds that allowing access to evidence on which the institution does not intend to rely will cause significant privacy and confidentiality issues if not defined further. The Department's timeline for an official investigative report is also practically unworkable because institutions and students expect that the conduct process will be resolved in a timely and expedient manner. This requirement would cause an onerous burden on institutions, Reporting Individuals and Respondents alike, and would cause undue delay in resolving conduct issues while adding little to Title IX's core legislative mission of reducing sex-based barriers to educational access. SUNY also urges the Department to revisit its language regarding appeals, as it causes undue confusion and changes the nature of what may be appealed for against common practice across the country.

SUNY and its campuses care deeply about preventing and responding to harassment and assault in a way that makes education as accessible as possible, treats crimes and violations seriously, and offers all due process required under the Constitution, statute, and case law prior to assigning a sanction to a person found responsible for a violation. In New York, *nearly half* of Article 129-B, the longest and most comprehensive state law on point to date, is devoted to due process and fair process. That is a critical part of the approach. Institutions must always try to "get it right" when it comes to sanctioning a student. But the law was balanced. It also includes provisions on consent, amnesty for Reporting Individuals and Bystanders disclosing violence at a time they were using drugs or alcohol, clear language around confidentiality, mandatory biennial climate surveys to understand the state of the issue, and clear language about available resources for all parties. Such a balanced approach has been lauded in New York and looked to elsewhere.

A balanced approach helps a policy change stand the test of time. No one is calling for drastic changes to the Higher Education Opportunity Act (HEOA), to the VAWA Amendments to the Clery Act, or to the Negotiated Regulations issued by the Department under that law. Here in New York, no one is calling for repeal of Education Law Article 129-B. These laws were drafted with significant input from stakeholders, and with careful consideration to balance and protect the rights of all interested parties while still addressing important governmental interests.

We urge the Department to re-open consideration of these rules and issue new Proposed Regulations that balance the rights of the accused with the rights of students to access K-12 and higher education when faced with harassment and violence. This is a moment where the entire country is considering issues of harassment in employment and education, athletics, the private sector, and government. The Department has an opportunity to lead a national conversation about a balanced approach to harassment and violence in education, to align with laws on the books, both federally and in laboratory states, and to establish an approach that future administrations leave undisturbed because, even if not perfect, it is fair, balanced, and flexible to all different institutions to respond in appropriate ways.

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I. 20 U.S.C. 1681, et seq.: The Proposed Regulations Raise the Cost of Title IX Compliance for Reasons Unrelated to Redressing Discrimination "On the Basis of Sex" and In Violation of the U.S. Constitution and the Administrative Procedure Act

For the reasons detailed below, we do not find in current law the Department's jurisdiction to regulate in this precise way. The Department's proposed due process procedures violate longstanding precedent requiring balance in due process, and will have unintended consequences to the detriment of both students who report harassment and those who are accused. The specific provisions will make the investigation and adjudication of harassment and violence on our campuses more complex, more difficult, more expensive and far less effective.

A. SUNY Supports Proposals to Align Title IX Procedures with Existing Federal and State Law and Judicial Authority

Before addressing the myriad reasons we believe parts of these regulations exceed the Department's authority, are out of concert with other statutory and regulatory authority as well as case law, and will make the investigation and adjudication of sexual harassment and sexual violence less efficient, more error-prone, and less equitable for our students, we wish to point out a few areas where we strongly agree with the Department.

We applaud the Department's requirement that cases be investigated and adjudicated by those sufficiently trained in important concepts central to these investigations, including an emphasis on the neutral role of institutions, and who are not taught with materials that use sex stereotypes.[15] The 2013 Violence Against Women Act (VAWA) Amendments to the Clery Act and New York State Education Law Article 129-B similarly require comprehensive training, and SUNY has committed itself to developing and promulgating training materials to help its campuses, and fellow educational institutions, continuously improve their response to, and prevention of, sexual harassment and sexual assault. SUNY System Administration and Student Conduct Institute[16] leadership and staff have hosted hundreds of live and digital trainings over the last decade. Our campuses have hosted thousands of such trainings as well. We recognize that, as with any offering of due process and fair process before a government action, the level of training and preparation is not uniform at all institutions across the country. We hear and support the continued call of the Department to raise the capacity of professionals at the higher education and K-12 levels, and SUNY will continue to develop training materials and resources that can be accessed at no cost or very low cost to help fellow institutions meet this need.

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[15] U.S. Department of Education, Title IX Proposed Regulations, Vol. 83, Fed. Reg., pp. 61473, 61479, 61483, 61497 (Nov. 29, 2018) (hereinafter referred to as "Title IX Proposed Regulations").

[16] The SUNY Student Conduct Institute (SUNYSCI) is a joint Project of the SUNY Student Conduct Association (SUNYSCA), SUNY Title IX Coordinators Association (STIXCA), and Office of General Counsel. It provides in-depth live and digital training to student conduct officials, hearing officers, Title IX officials and other college personnel in due process, trauma-informed investigations and adjudications, questioning and weighing of evidence, and other crucial best practices in the investigation and conduct process that comply with relevant case law, Title IX guidance, the Clery Act, and New York State Education Law 129-B. Material for training is created with a careful emphasis on case law, statutory requirements, best practices, and eschewing sex stereotypes. As of the date of this letter, the Institute had trained well over 600 people in its first half-year of operation. https://system.suny.edu/sci/.

In considering training, while we applaud the Department's requirements for training those that work on the formal grievance process, we would note that the Proposed Regulations are devoid of *any* training requirements or professional expectations for staff that work on the newly elevated informal process. While SUNY does not use an informal process to address cases of sexual assault (we may use informal processes in certain harassment cases, depending upon the nature of the conduct and other factors), we acknowledge that some institutions may choose to do so based upon the imprimatur of the Department. Thus, we urge the Department to set minimum standards for training in that area as well, so that students are served by individuals with the highest level of training, regardless of whether they go through a formal or informal process.

We support the Department's efforts to standardize the importance of the role of the Title IX Coordinator at a high level and to require institutions to provide all students and community members with relevant contact information for the Coordinator. SUNY, through its SAVR (Sexual Assault and Violence Response) Resource, available at http://response.suny.edu, provides community members with 24/7, anonymous access to relevant on and off campus resources including counseling, health, and wellness; Title IX; University Police/Public Safety; anonymous reporting mechanisms; and disability services on campus. We also provide access to all known law enforcement, medical, rape crisis, legal resources, and resources specific to immigrant Reporting Individuals[17] through that same resource. We would happily share this resource with the Department and other institutions of education to assist them in providing similar information to their students and community members.

We also thank the Department for acknowledging that its regulations may not violate rights protected by the Constitution.[18] As the Department noted in its Preamble, the previous Title IX guidance was criticized because it "removed reasonable options for how schools should structure their grievance processes to accommodate each school's unique pedagogical mission, resources, and educational community."[19] We appreciate the Department's acknowledgment of the knowledge and experience of educational institutions and agree that institutions are more often in a better place to directly speak with students and community members about how best to meet the challenge of preventing and responding to harassment and violence on campus and in the community.

While we do not necessarily agree with this determination on policy grounds and believe it will cause significant confusion with Title VII, state laws on employee harassment, and case law traditionally interpreting Title IX, we acknowledge that the Department likely has "prosecutorial discretion" to limit the occasions upon which it will investigate and find an institution to have violated Title IX. In these Proposed Regulations, the Department has significantly limited what disclosures are covered under Title IX and, while we again do not agree on policy grounds, we acknowledge that the Department may expend limited resources in a

[17] While the Department uses multiple terms to refer to the person impacted by harassment or violence, we are using the neutral term Reporting Individual that is outlined and defined in New York State Education Law Article 129-B. N.Y. EDUC. L. 6439(9).
[18] Title IX Proposed Regulations, at 61495.
[19] Title IX Proposed Regulations, at 61464.

broad or narrow manner. We appreciate the Department's acknowledgment that a 60-day timeline (even if not enforced strictly) poses significant challenges for campuses, especially in complex cases, and all parties are better served by a flexible standard that requires institutions to take these cases seriously and address them in a reasonably prompt manner that may be extended for good cause (which we note should include administrative need),[20] but that does not shortchange the parties and the need to gather facts and apply law and policy.

B. This Regulation Fails the Standards of Executive Order 13771

The Proposed Regulations should not be exempt from Executive Order 13771,[21] as the cost savings are inaccurate and exaggerated. Therefore, the Department should identify two deregulatory actions for each additional regulation added herein.[22] While SUNY supports the proposals outlined above to the extent they align with existing state and federal law and constitutional norms of due process, we have significant legal and policy concerns with the remainder of the Proposed Regulations. First, we disagree that the proposals will lower the administrative costs of investigating and adjudicating claims of sexual harassment and sexual violence. Closer examination of the cost-shifting that will occur under the Proposed Regulations reveals that the Department's cost estimates are fanciful, and not based on the actual administrative costs to recipients and the social costs to Reporting Individuals.

Preliminarily, we note that by aligning the standards of actionable harassment for agency action with the standards used by courts for money judgments, there is no longer any advantage for Reporting Individuals to seek agency-level redress from the Office for Civil Rights (OCR) over the court system, especially since they will not (as has traditionally been the case) be able to obtain money damages beyond actual expenses through OCR.[23] The burden of showing a Title IX violation in their specific case through the administrative or judicial process will align. While this will potentially save resources for OCR with fewer Reporting Individuals able to successfully seek an investigation of Title IX violation claims, and perhaps in a small way save resources that institutions would spend going through an OCR program review, this savings will be eclipsed by the funds institutions will expend to defend the same accusations of Title IX violations in Article III or state courts.

Additionally, while OCR's jurisdiction to find an institution in violation of Title IX for failing a Reporting Individual would all but disappear for most college campuses, Respondents would maintain robust rights for administrative review, and even the right to have their determination overturned, through the OCR administrative process with the new rights the Proposed Regulations award only to Respondents. We believe nearly all Respondents found in violation will automatically appeal to OCR to have their findings overturned since such an appeal is free and can only help their position. This will significantly increase the effort and expenditures of recipients when compared with the far less expensive task of responding to an

[20] Title IX Proposed Regulations, at 61497.
[21] Exec. Order No. 13771, 82 FR 9339 (Jan. 30, 2017), *available at* https://www.federalregister.gov/documents/2017/02/03/2017-02451/reducing-regulation-and-controlling-regulatory-costs.
[22] A review of the plain language of the requirements reveals nearly 50 new regulatory obligations.
[23] Title IX Proposed Regulations, at 61495.

OCR data request and addressing any issues through the administrative process. It will likewise clog court dockets with litigation filed by both Reporting Individuals and Respondents and will not advance the obligations of institutions to decrease the impact of harassment and violence on access to education.

The Proposed Regulations reshape the Title IX landscape without any true estimate of the cost. The Department admits that it cannot make such a determination with "absolute precision," but estimates that the changes in the Proposed Regulations "would result in a net cost savings of between $286.4 million to $367.7 million over ten years."[24] Yet this cost estimate does not consider in any way the impact of continued exposure to sexual harassment and sexual violence which would not be investigable and actionable under this regime.

Incredibly, despite the thousands of words devoted to regulating and enforcing brand new, invasive, and incredibly detailed standards under Title IX of the Education Amendments of 1972, "[t]he Department *does not believe* it is reasonable to assume that these Proposed Regulations *will have a quantifiable effect* on the underlying rate of sexual harassment occurring in the education programs or activities of recipients."[25] In other words, these rules will not effectuate Title IX's main mission of eliminating the barriers to education that are erected on the basis of sex. The Department does not even account for the continued impact of harassment and assault on the basis of sex, or the likelihood that, with fewer allegations investigated, those who commit harassment and assault will be free to continue to do so towards this specific Reporting Individual and others. The Department writes that "we do not attempt to capture costs that arise out of the underlying incidents themselves, but rather those associated with the actions prescribed by the Proposed Regulations and the likely response of regulated entities to those proposed requirements."[26]

Yet even ignoring the impact on Reporting Individuals across the country who will not have their complaints heard and the financial impact on institutions if those exposed to harassment and assault drop out of college (and if other students are exposed to harassment and assault by someone who may have been removed from the campus under another process), the Department ignores or minimizes the steep costs for public and private colleges to maintain an expanded system of due process as mandated by the Department, and the near certainty that such elevated requirements—beyond the requirements of any court or statute in the country—will lead to significant amounts of litigation for institutions.

Such litigation will have direct costs to institutions that will likely have to be passed on to the end users, students. The insurance company United Educators analyzed 1,000 claims in cases of Title IX litigation and found the cost of litigation to be high. In just 100 of those cases, judgments and attorney's fees cost $21.8 million. United Educators reported that the cost *on average* is $350,000 per case.[27] Using those numbers, a mere 1,050 additional cases would completely wipe out any savings from even the highest savings number estimated by the

[24] Title IX Proposed Regulations, at 61484.
[25] Title IX Proposed Regulations, at 61485 (emphasis added).
[26] Title IX Proposed Regulations, at 61485.
[27] Emily Tate, *The High (Dollar) Cost of Sexual Assault*, INSIDE HIGHER ED (Apr. 6, 2017), *available at* https://www.insidehighered.com/news/2017/04/06/sexual-assault-claims-can-be-costly.

Department. Considering the detailed requirements and the gray areas they are certain to create, 1,050 additional cases filed over the course of the same 10-year period should be considered a low estimate.

Further, the savings for institutions are not real because, at least in higher education institutions, the approach to sexual harassment and assault is likely to remain fairly static, even for cases that do not meet the narrower definitions of a Title IX violation under these rules. The VAWA amendments to the Clery Act remain in place, and the same sexual assault report that may be a form of harassment under these Proposed Regulations would engage those VAWA requirements. Institutions may have state laws, as here in New York, that maintain obligations. The Department admits that many institutions are unlikely to change their approach to reports of sexual harassment and assault, even if they are outside of the narrow scope of the definitions here.[28] For those institutions (and there are many of them), the costs of investigations and adjudications **will not be reduced; the costs will merely be shifted**. Whether the institution now investigates and adjudicates under the Clery Act requirements, state law, or its own student conduct code,[29] those same costs will remain. Simply passing them from a Title IX accounting ledger to a conduct code accounting ledger does not make those expenses disappear.

The Department's estimates are not accurate because, while for most institutions, the cost of investigating and adjudicating will not disappear but only shift to other obligations, the costs of the due process requirements, and their subsequent litigation, will ultimately raise the cost of compliance for institutions of higher education. We have identified more than four dozen new regulatory obligations in these Proposed Regulations. To that end, to comply with Executive Order 13771,[30] this rule should not be allowed to proceed without the Department identifying at least two deregulatory actions for each of the myriad regulatory additions imposed upon institutions.[31]

We note that these costs will fall hardest on less-resourced institutions, including community colleges. At many community colleges, there is insufficient staff to fill the myriad separate positions required by the plain language of these Proposed Regulations and the process requirements and administrative and judicial litigation costs will cripple many institutions. We acknowledge that many of our private college counterparts, especially small institutions, specialized institutions, technical institutions, and religious institutions, are likewise thinly

[28] Title IX Proposed Regulations, at 61485-61486 ("We believe it is highly likely that a subset of recipients have continued Title IX enforcement in accordance with the prior, now rescinded guidance, due to the uncertainty of the regulatory Environment...In general, the Department assumes that recipients fall into one of three groups: (1) Recipients who have complied with the statutory and regulatory requirements and either did not comply with the 2011 DCL or the 2014 Q&A or who reduced Title IX activities to the level required by statute and regulation after the rescission of the 2011 DCL or the 2014 Q&A and will continue to do so; (2) recipients who continued Title IX activities at the level required by the 2011 DCL or the 2014 Q&A but will amend their Title IX activities to the level required under current statute and the proposed regulations issued in this proceeding; and (3) recipients who continued Title IX activities at the level required under the 2011 DCL or the 2014 Q&A and will continue to do so after final regulations are issued.").
[29] Title IX Proposed Regulations, at 61486.
[30] Exec. Order No. 13771, Reducing Regulation and Controlling Regulatory Costs, 82 FR 22 (Jan. 30, 2017), https://www.govinfo.gov/content/pkg/FR-2017-02-03/pdf/2017-02451.pdf.
[31] Title IX Proposed Regulations, at 61484.

staffed, which will make compliance especially difficult and the administrative and judicial litigation costs may be ruinous for institutions that already operate on a tight budget.

C. Due Process in Campus Conduct Proceedings

Indeed, the full impact of the Proposed Regulations cannot be understood without addressing its impact on the cost of adjudicating campus conduct proceedings. Certainly, outside of the Student Handbook or Code of Conduct's promises,[32] due process is required at public institutions whenever a decision excludes the student from the education process for more than a trivial period or threatens a person's reputation.[33] Almost all suspensions beyond 10 days or so are likely to be non-trivial to require some basic due process procedures.[34] As the length of the suspension increases, those procedures and safeguards may take on an increasingly formal nature. Under current case law and practice, the due process requirements relax when discipline is limited to required counseling or classroom reprimand, unless, in some cases, those sanctions include a potential transcript notation or other designation that may impact a student's future.[35] Yet the Department now proscribes a one-size-fits-all system that is beyond its authority and outside the requirements of binding authority.

How is Due Process applied in different contexts?

Procedural due process is intentionally broad and flexible. As explained in more detail below, in purely academic cases, there are few *procedural* requirements imposed on the college, whereas, in student conduct cases at public institutions, notice, hearing, and written decision are generally required. *Substantive* due process, on the other hand, always applies. Any decision subject to due process analysis can be overturned by a court on the grounds of arbitrary decision-making. Finally, in the case of sexual assault, domestic or dating violence, or stalking, the form and standards of the proceedings change to account for the sensitive nature of issues.

Notice

A student must be given notice of the specific charges, the grounds for those charges, and the names of witnesses against them.[36] The college must generally adhere to the notice deadlines

[32] Most or nearly all institutions offer far more process in their code or policies than is legally required and institutions are generally held to the process they offer under contract law or a related theory.
[33] *Goss v. Lopez*, 419 U.S. 565, 574 (1975).
[34] *Id.*
[35] *Winnick v. Manning*, 460 F.2d 545, 548 n.3 (2d Cir. 1972); *Esteban v. Cent. Mo. State Coll.*, 415 F.2d 1077, 1079 n. 1 (8th Cir. 1969).
[36] *E.g. Dixon v. Alabama State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961); *Goss*, 419 U.S. at 582; *Gruen v. Chase*, 215 A.D.2d 481 (2d Dep't 1995); *Nawaz v. Univ. at Buffalo Sch. Of Dental Med.*, 295 A.D.2d 944 (4th Dep't 2002). Note that while the identity of student witnesses would generally be covered by FERPA within any documents the witnesses provide in which they are identified, SUNY's long-standing analysis has been that due process, which is Constitutional, trumps FERPA, which is statutory/regulatory. Due process requires providing the names of witnesses, with the exception of extreme cases where providing such identification would endanger the witnesses. We note that the Proposed Regulations are consistent with this analysis.

in general outlined in applicable policy.[37] Many colleges also provide notice of the disciplinary process and the student's right to a hearing. The notice is intended to provide the student with the information necessary to prepare a defense, including a description of the basic facts and evidence.[38] In emergency or exigent circumstances where a student poses a specific health or safety danger to others or property, a student may be suspended without notice of the charges.[39] However, the student must be given proper notice promptly after the suspension, preferably within 24 hours.[40]

Hearing

Both in cases of academic dishonesty and other discipline, public colleges generally must provide students with some form of hearing before being suspended or expelled.[41] The hearing must be scheduled promptly after the process is initiated but also provide the student with enough time to prepare,[42] and must be before an impartial decision maker.[43] Yet, courts have never required the hearing to mimic judicial customs and rules.[44] For example, the disciplinary officer or panel does not need to follow the rules of evidence[45] and can consider any evidence

[37] *Weidemann v. State Univ. of N.Y. Coll. at Cortland*, 188 A.D.2d 974, 975 (3d Dep't 1992) (Holding a failure to adhere to the 5-day notice requirement deprived the student of any opportunity to rebut or explain the evidence against him and violated his rights).

[38] *See Goss*, 419 U.S. at 580 ("No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."); *Blanton v. State Univ. of N.Y.*, 489 F.2d 377, 386 (2d Cir. 1973) ("notice need not be drawn with the precision of a criminal indictment") (internal quotations omitted).

[39] *Schwarzmueller v. State Univ. of N.Y. at Potsdam*, 105 A.D.3d 1117, 1118-19 (3d Dep't 2013) (holding that suspending the student immediately after he was released by police at 1 a.m. did not violate due process in light of the circumstances and the fact he was given notice later that morning); *cf. Held v. State Univ. of N.Y. Coll. at Fredonia*, 165 Misc. 2d 577, 579 (Sup. Ct., Chautauqua Cty. 1995) ("The [disciplinary code] provision clearly recognizes that suspension without hearing (and presumably proper notice) may not be invoked except in limited cases that come within a finding of the college's legitimate interest in protecting property and the safety and welfare of specific individuals or the general public").

[40] *See Schwarzmueller*, 105 A.D.3d at 1119.

[41] *Goss*, 419 U.S. at 579 ("The fundamental requisite of due process of law is the opportunity to be heard"); *see also Mary M. v. Clark*, 100 A.D.2d 41 (3d Dep't 1984); *Budd v. State Univ. of N.Y. at Geneseo*, 133 A.D.3d 1341, 1342 (4th Dep't 2015).

[42] *Compare Held*, 165 Misc.2d at 582 (expressing the need to provide a student sufficient time to prepare for a hearing) *with Machosky v. State Univ. of N.Y. at Oswego*, 145 Misc.2d 210 (Oswego Cty. 1989) (holding unnecessary delays in scheduling the hearing deprived the student of significant rights).

[43] *See Marshall v. Maguire*, 102 Misc.2d 697, 699 (Nassau Cty. 1980) (overturning college board decision where the Associate Dean served on both the initial decision-making committee and the review board); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (indicating that prior involvement in an investigation renders impartiality difficult to maintain and holding the student was entitled to show that members of the panel with prior contact with the case could be presumed to have been biased).

[44] *See Dixon, v. Alabama State Bd. of Educ.*, 294 F.2d at 159; *Fain v. Brooklyn Coll. of the City of N.Y.*, 112 A.D.2d 992 (2d Dep't 1985) ("Despite the informality of the hearing and the committee's failure to adhere to the question and answer format, petitioners were afforded a full opportunity to explain their actions and confront their accusers.").

[45] *Monnat v. State Univ. of N.Y. at Canton*, 125 A.D.3d 1176, 1177 (3d Dep't 2015) (holding where the code indicated the Hearing Board was not bound by rules of evidence and free to consider any information "relevant to the charges that would contribute to the rendering of an impartial and fair judgment," it was not improper to

"relevant to the charges that would contribute to the rendering of an impartial and fair judgment."[46] At the hearing, students are entitled to present their side of the story, including evidence and witnesses to support their claims.[47] However, absent campus rules (which are common) or specific legal requirements to the contrary, a student generally does not have the right to cross-examine witnesses directly or through a panel.[48] Finally, many schools offer students the ability to choose an advisor to help them in the disciplinary process. Colleges may limit the role the advisor plays and, except in cases of sexual and interpersonal violence, colleges may place limits on who may serve as an advisor.[49] When a student is given a choice of advisor, the college may need to make reasonable but not unlimited accommodations to ensure that advisor is available for the student to ensure the student's right is effectuated.[50]

Decision

After the hearing, the student is entitled to a written decision.[51] That decision should describe the factual findings and the evidence relied upon in reaching the determination of responsibility. It must be specific enough to permit the student to effectively challenge the determination in administrative appeals or the courts and to demonstrate that the decision was based on the evidence in the record.[52] Therefore, conclusory references to source documents or testimony are insufficient to satisfy due process. For example, it is insufficient to simply state that one student harassed another based on the testimony of a police officer. Instead, the determination should describe the facts about which the witness testified, such as the violations with which the student was charged, and why that witness was credible.[53]

Substantial Evidence

Substantive due process requires that all disciplinary decisions are based on the evidence and the rules.[54] The required evidentiary standards, such as the "preponderance of the evidence"

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consider prior disciplinary history or other uncharged conduct); *Budd*, 133 A.D.3d at 1344 (upholding a disciplinary decision based on hearsay evidence).

[46] *Monnat*, 125 A.D.3d at 1177.

[47] However, such right is not unlimited; for example, a student may be restricted from calling character witnesses. *See Schwarzmueller*, 105 A.D.3d at 1119.

[48] *See*, e.g., *Dixon*, 294 F.2d at 159; *Goss*, 419 U.S. at 583; *Gruen*, 215 A.D.2d at 482; *but see Donohue v. Baker*, 976 F. Supp. 136, 146-47 (N.D.N.Y. 1997).

[49] *Gruen*, 215 A.D.2d at 482.

[50] *Machosky*, 145 Misc.2d at 214 ("Given the extreme prejudice,…and given that there were no prior requests by petitioner for any adjournment or other abuse of the disciplinary process by the petitioner, the failure to afford the petitioner an opportunity to have an advisor present at the hearing was violative of his legal rights."). However, these accommodations must be reasonable. A student may not use the choice of an advisor to delay or stall the conduct process.

[51] *Kalinsky v. State Univ. of N.Y. at Binghamton*, 161 A.D.2d 1006, 1007 (3d Dep't 1990); *Boyd v. State Univ. of N.Y. at Cortland*, 110 A.D.3d 1174, 1175-76 (3d Dep't 2013).

[52] *Id.*

[53] These were the facts of *Boyd v. State Univ. of N.Y. at Cortland*, 110 A.D.3d 1174 (3d Dep't 2013).

[54] N.Y. C.P.L.R. § 7803.

standard, are determined in the Code of Conduct. Generally, the judicial officer will be given deference in credibility determinations.[55]

The preponderance of the evidence standard is applied in most administrative settings, including all federal civil rights cases.[56] By allowing recipients to choose a higher standard of proof, the Department treats those who disclose sexual harassment and sexual violence differently than others who disclose discrimination, without any reasoned explanation.

In drawing the ultimate legal conclusions, courts review decisions to ensure a sufficient factual basis exists to support those findings. Speculation, conjecture, and suspicion are insufficient to reach the necessary threshold.[57] The court will review the record and will generally defer to the college's decision if it finds sufficient facts to allow a reasonable person to reach the same decision.[58] This standard applies even if the reviewing federal or state judge would have decided the case differently.

In sum, procedural due process is not a one-size-fits-all standard in the student conduct forum. As will be discussed in greater detail, below, the Department's Proposed Regulations seek to remove the flexibility afforded to recipients in investigating and adjudicating sexual misconduct in a manner outside its authority and well beyond the requirements of statute and binding legal precedent.

D. The Department's Regulations, as Proposed, Violate the Administrative Procedure Act, are Arbitrary and Capricious and Cannot Withstand Judicial Scrutiny

Not only do the Proposed Regulations promise to raise administrative costs for recipients and OCR and social costs to Reporting Individuals and Respondents without a basis in well-established judicial precedent, they likely cannot withstand judicial scrutiny if enacted in their current form. C*hevron* deference is not absolute. Courts will overturn agency interpretations of statutes that are arbitrary and capricious, or otherwise violate the Administrative Procedure Act,[59] and will not countenance agency rulemaking that is pretextual or breaks with settled policy without a good reason. Here, the proposals cannot hold the force of law because they manifestly contradict the text and purpose of Title IX, reverse the Department's long-standing interpretations of the statute, and may be dressed in a pretextual rationale. Simply put, the

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[55] *Lambraia v. State Univ. of N.Y. at Binghamton*, 135 A.D.3d 1144, 1146 (3d Dep't 2015); *In re Lampert v. State Univ. of N.Y. at Albany*, 116 A.D.3d 1292, 1294 (3d Dep't 2014).

[56] *See*, K.K. Baker, D.L. Brake and N.C. Cantalupo, *Title IX & The Preponderance of the Evidence: A White Paper* (Aug. 7, 2016), retrieved from https://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf; Amy Chmielewski, Comment, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 B.Y.U. EDUC. & L.J. 143.

[57] *Fain*, 112 A.D.2d at 994 (holding that "a mere scintilla of evidence sufficient to justify a suspicion is not sufficient" and the record lacked proof of sufficient quality and quantity to persuade a fair and detached fact-finder "reasonably, probatively, and logically").

[58] *Esmail v. S.U.N.Y. Health Sci. Ctr. at Brooklyn*, 220 A.D.2d 328 (1st Dep't 1995) provides an example of the analysis for academic dismissal. *Katz v. Bd. Of Regents of the Univ. of N.Y.*, 85 A.D.3d 1277, 1280 (3d Dep't 2011), provides an example for academic dishonesty cases. Finally, *Lambraia*, 135 A.D.3d 1144 (3d Dep't 2015), provides an example in the realm of behavioral conduct cases.

[59] 5 U.S.C.A. § 706.

Department has not offered a scintilla of evidence to show that its proposals are necessary to remedy discrimination on the basis of sex. Without such evidence of discrimination on the basis of sex, or an explanation for why its Proposed Regulations ameliorate this putative sex discrimination, the rulemaking is without legal substance, and the Proposed Regulations cannot have the force of law.

i. There Is No Evidence That These Regulations Are Aimed at Reducing Discrimination or Unequal Treatment On The Basis of Sex

The Department clearly has the right to regulate under Title IX of the Education Amendments of 1972 in a way that addresses unequal treatment on the basis of sex. But there must be *some* evidence that the regulation is promulgated to address inequality or discrimination on the basis of sex. Undoubtedly, through its request for comments, the Department has received references to dozens of studies of populations in college, secondary education, and society-wide showing a clear and statistically significant difference in the percentage of males versus females who are subject to sexual harassment, sexual violence and unequal treatment on the basis of sex. Approximately 1 in 5 females report in climate surveys that they have experienced non-consensual sex in their college years, while 1 in 13 males report the same, with transgender students generally reporting even higher rates.[60] Simply analyzing identified male and female experiences with harassment shows that it has a differential impact on the basis of gender. Therefore, the Department would be on fairly solid ground requiring educational institutions to offer resources aimed at ameliorating the impact of such discrimination for which the impact differs so much by gender, and requiring institutions to take it seriously and pursue investigations and adjudications to sanction those who violate the law and policy. That requirement would be tied to serious, published and peer-reviewed studies that consistently show a differential impact in victimization and educational and employment impact between genders.

Conversely, the Department presents no such published study showing that a complete lack of due process, traditional due process owed under case law, or the new maximized due process envisioned in these Proposed Regulations differently impacts people *on the basis of sex.* The Department has not shown or referenced *any* evidence that due process differences affect people differently *on the basis of sex.*

The Preamble—which provides the Secretary's reasons for issuing these Proposed Regulations— lacks an evidentiary showing sufficient to establish the facts by which the agency makes such a critical determination—one that promises to fundamentally shift the effectiveness of Title IX as a tool for preventing and adjudicating harassment and violence and certainly shifts the population of interest to be protected under this Civil Rights law from those limited in educational access when subject to sex-based harassment or assault to those accused of harassment or assault under Title IX. It does not identify what data within its cited literature informs its decision and why that data dictates the present changes. Without more specific

[60] *See e.g.* David Cantor, Bonnie Fisher, Susan Chibnall, Reanne Townsend, *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct,* Association of American Universities (Oct. 20, 2017), *available at* https://www.aau.edu/sites/default/files/AAU-Files/Key-Issues/Campus-Safety/AAU-Campus-Climate-Survey-FINAL-10-20-17.pdf.

information, the public has no basis for understanding how that literature led the agency to reverse its long-standing interpretation of Title IX.

The Secretary's opinion on the matter, moreover, is not the kind of evidence-based decision-making that our courts expect of agencies. It may be that the Secretary disfavors the Department's current guidance, but she does not have the unilateral authority to cancel it without following the APA. The agency must proceed along the legal channels, including setting forth a particularized rationale for the reversal.

The closest item in the Preamble approximating evidence are references to statistics, drawn from a website maintained by a historian, K.C. Johnson, that over two hundred "students" have sued their institutions for due process violations since the 2011 Dear Colleague Letter (2011 DCL), and that ninety institutions have "lost" due process challenges brought by Respondents since 2011 DCL. Most experts would not give such credit to non-peer reviewed research, housed on a web link by an activist with a clear agenda (and an interest in selling books). A cursory review shows that the list is far from comprehensive and is shaded towards cases that will support the professor's viewpoint, while leaving out or minimizing cases that may not. Certainly, even if taken as true, two hundred cases amidst the tens of millions of students who have attended college over the past decade should not be the factual basis for a landmark reversal of federal policy. What is clear on its face is that these statistics, standing alone, do not demonstrate that the Proposed Regulations specific to due process are needed to prevent discrimination on the basis of sex.

For one thing, many of the two hundred "students" who have sued their institutions pursuant to the private right of action recognized under Title IX are actually Reporting Individuals alleging that the institution acted in "deliberate indifference" to their Title IX rights. Elevating the due process protections afforded to accused students will do nothing to ameliorate harms to the Title IX rights of such Reporting Individuals. For another, the assertion that institutions "lost" ninety legal challenges by Respondents is highly misleading. Professor Johnson trumpeted that SUNY "lost" a student conduct case in a mid-level appeals court, but did not make such a fuss when that same case was reversed by a nearly unanimous Court of Appeals (New York's highest court) in SUNY's favor.[61] In the bulk of the cases cited in Professor Johnson's spreadsheet, the Respondent "won" by overcoming an institution's motion to dismiss the complaint or deny an application for temporary or permanent injunction. The most likely inference we can draw from this limited outcome data is that the courts determined that the Respondent alleged facts which, if proven true, *could* support a claim of discrimination by the institution on the basis of sex in violation of Title IX.

Clearing a procedural hurdle is not the same as proving a case of discrimination. The spreadsheet does not support a conclusion that these violations occurred as a matter of fact, only that some courts hold that the complaints, as pleaded, *could* support a claim of Title IX

[61] *Haug v. State Univ. of New York at Potsdam*, 149 A.D.3d 1200 (N.Y. App. Div. 2017), *rev'd*, 32 N.Y.3d 1044 (2018).

discrimination as a matter of law.[62] Simply asserting that the case was withdrawn and settled, moreover, is not evidence that the institution admitted fault.

The spreadsheet is not comprehensive of the state of Title IX case law. The spreadsheet is not designed to track how many institutions have "won" due process challenges and, of course, the spreadsheet cannot report on how many lawsuits are never brought in the first place because the Respondent or Reporting Individual found the process generally fair (even if they do not agree with the outcome) or could not identify a challengeable error. The spreadsheet also, in an effort to include state-level counterparts to Title IX, it cites state case law arising from violations of state law, rather than Title IX.[63] These cases may be dispositive of general principles of due process, but are not relevant to the rights guaranteed under Title IX. By mixing these types of cases, it creates a database that is far from a neutral, scholarly, thorough, complete, and accurate collection upon which to base a fundamental reversal of decades of agency policy and practice.[64]

At best, this list of cases could offer a legal syllabus of how selected courts interpret the contours of due process in the student conduct forum. But, without exploring the merits of each case, the list offers no information about how any institution has actually violated Title IX and whether such violations have a disparate impact by gender, nor does it explain why the Department must abruptly change decades of consistent interpretations of the statute to address such alleged violations. Without such evidence, the Department does not have jurisdiction under Title IX to force nearly every school district, college, and university in the United States to require these procedural due process protections for Respondents and, even if it did, the proposals could effectively force these recipients to violate the statute by treating those who disclose sexual harassment and sexual assault unequally.

After all, in its thirty-seven words, Title IX of the Education Amendments of 1972 specifically prohibits any person, "on the basis of sex," from being "excluded from participation in, be[ing] denied the benefits of, or be[ing] subjected to discrimination under any education program or activity receiving Federal financial assistance."[65] Nothing in the statute or its history remotely suggests a Congressional intent to elevate the due process rights of those accused of harassment or assault over the minimums established by the U.S. Supreme Court, at great cost to those whose educational access was limited by harassment or assault.

To the contrary, both the Department and the judiciary have consistently interpreted Title IX to prohibit sexual harassment and sexual violence of all forms at schools receiving federal assistance. Sexual harassment and sexual violence can create hostile environments that interfere with the ability of students to receive equitable access to education free from discrimination on the basis of sex. In turn, to assist school districts, colleges, and universities in meeting their obligations to fairly and promptly investigate and adjudicate incidents of sexual harassment and

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[62] Remember that in consideration of a motion to dismiss or a motion for summary judgment, courts are obligated to reasonably construe all facts in favor of the non-moving party. This does not mean those "facts" are "true" or that they would be proven at trial.
[63] *See, e.g.*, *Jacobson v. Blaise*, 157 A.D.3d 1072 (3d Dep't 2018) (violation of New York Education Law 129-B).
[64] *See generally* FED. R. EVID. 702; *Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 584-587 (1993); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999).
[65] 20 U.S.C.A. § 1681.

violence, the Department and its Office for Civil Rights (OCR) issued a Dear Colleague letter on April 4, 2011 (2011 DCL).[66] The 2011 DCL supplemented the "Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties," issued January 19, 2001 (2001 Guidance),[67] by the OCR under the Clinton Administration (which was very similar to guidance issued on March 13, 1997),[68] and then reissued January 25, 2006, by the OCR under the Bush Administration.[69] OCR then issued its "Questions and Answers on Title IX and Sexual Violence" on April 29, 2014 (2014 Q&A), which provided additional assistance in implementing the 2011 DCL and the 2001 Guidance.[70]

These documents, along with Resolution Agreements that school districts, colleges, and universities have entered into with OCR to settle alleged Title IX violations or compliance reviews, demonstrate a consistent, bipartisan understanding that Title IX prohibits these institutions from discriminating against those who disclose sexual harassment and violence. The Department recognized this consistent tradition in the Preamble, detailing the history of sub-regulatory guidance issued in this area.[71] It did not mention, however, that for the most part this sub-regulatory guidance was consistent over the course of more than twenty years, with comparatively minor deviations. Indeed the Department's consistent interpretation, across administrations from different political parties, has been in place for so long that it is older than nearly all current K-12 students and more than half of all college students.

This consistency lasted until the Department announced a marked shift in interpretation of the role of Title IX in September 2017. The Secretary announced that OCR would commence a formal notice and comment period to replace the 2011 DCL, and then issued a Dear Colleague Letter (the 2017 DCL) rescinding the 2011 DCL and 2014 Q&A and advising recipients to follow the 2001 Guidance.[72]

Plainly, the Department now offers a mistaken understanding of its own regulatory system surrounding Title IX. Its Proposed Regulations distort the beneficial impact that Title IX has had on protecting Reporting Individuals and ensuring a fair process for all parties in campus disciplinary proceedings. The detailed due process provisions of the Proposed Regulations may or may not be a good idea. But the Department does not have jurisdiction to mandate "good ideas" or "best practices." It is not a consulting firm. The Department only maintains jurisdiction

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[66] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, DEAR COLLEAGUE LETTER (Apr. 4, 2011), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf (*hereinafter* referred to as "2011 DCL").
[67] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 19, 2001), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf (*hereinafter* referred to as "2001 guidance").
[68] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 FR 12034 (March 13, 1997).
[69] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, DEAR COLLEAGUE LETTER (Jan. 25, 2006), *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
[70] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (Apr. 29, 2014), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf (hereinafter referred to as "2014 Q&A").
[71] Title IX Proposed Regulations, at 61463.
[72] OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUCATION, Q&A ON CAMPUS SEXUAL MISCONDUCT (Sept. 1, 2017), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (hereinafter referred to as "2017 DCL").

under this Civil Rights law to regulate in a way that reduces discrimination on the basis of sex. Even conceding for the sake of argument that a Respondent, if treated improperly, *could* be a victim of discrimination on the basis of sex, the Department still must show that the current system is actually allowing *discrimination on the basis of sex.* The Department has not shown that Respondents are predominantly male. It may assume so based on the few conversations it held with activists in preparation for drafting these Proposed Regulations, but there is no actual evidence this is so.

Further, even if most Respondents were male, there is no evidence that they are held responsible more or less often than females, that their sanctions are greater or lesser than females, or that these additional due process requirements would change that. The Department must regulate within its jurisdiction. There is no evidence here that the current system of investigating and adjudicating sexual harassment and violence leads to disparate treatment on the basis of sex. There is no evidence that these Proposed Regulations would lessen such disparate impact. The Department simply does not have jurisdiction to regulate in this way, and cannot do so without some evidence that this is not a solution in search of a problem but an evidence-based method of addressing a problem of unequal treatment on the basis of sex.

ii. Chevron Deference is Not Absolute, and Agency Rulemaking Cannot Be Arbitrary and Capricious

We point the Department to this evidentiary gap because it reveals the fundamental legal issues with the instant rulemaking. As the Department is aware, the U.S. Supreme Court holds that when Congress authorizes an agency to issue regulations, and that agency creates a regulation interpreting a statute it enforces, those regulations will only be given controlling weight if they obey the two-part test described in *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*[73] The judiciary need only defer to the agency's interpretation, first, if the statute is ambiguous as to the precise question at issue, and, second, if the interpretation reasonably resolves those ambiguities.[74]

The *Chevron* court understood that agencies balance competing interests in formulating policy. It recognized that an agency's interpretation may reflect a "reasonable accommodation of conflicting policies that were committed to the agency's care by the statute," yet still may not warrant deference if "it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned."[75] As such, the interpretation cannot manifestly offend the text and purpose of the statute.[76]

Chevron built on well-established standards of review of agency action derived from the Administrative Procedure Act (APA).[77] The U.S. Supreme Court has long held agency regulations to the "arbitrary and capricious" standard of review, invalidating regulations where

[73] *Chevron*, 467 U.S. 837, 842-44 (1984).
[74] *Chevron*, 467 U.S. at 842-44.
[75] *Id.* at 845 (internal quotation marks omitted).
[76] *Id.* at 844.
[77] 5 U.S.C.A. § 706.

the agency "relied on factors which Congress has not intended it to consider, entirely failed to consider an important aspect of the problem, offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise."[78] Regulations may also be set aside where they are contrary to a Constitutional right, made in excess of jurisdiction or in violation of procedure, and not supported by substantial evidence.[79]

Fundamentally, an agency's regulatory action will be arbitrary and capricious—and therefore cannot carry the force of law—when the agency does not "examine the relevant data and articulate a satisfactory explanation for its action including a rational connection between the facts found and the choice made."[80] Courts require agencies to detail the "essential facts upon which the administrative decision was based" and "may not supply a reasoned basis for the agency's action that the agency itself has not given."[81] Courts also demand that agencies explain their decision-making rationale in response to significant comments made during the rule-making procedure.[82] Courts also will invalidate regulations that are facially illogical, such as policies that conflict with other agency regulations and create a "back door" allowing the agency to circumvent its own rules.[83] And they will deem a regulation arbitrary and capricious where the agency adopts a more restrictive means of achieving a policy goal without explaining why less restrictive means were inadequate.[84]

In January, the United States District Court for the Southern District of New York found a textbook example of illegal rulemaking in its Findings of Fact and Conclusions of Law in *State of New York v. Department of Commerce*.[85] There, the Department of Commerce inserted a question in the 2020 Census that would ask respondents their citizenship, even as this question contradicted longstanding practice and the agency's own experts objected to it. The Court stated that the Commerce Secretary "failed to consider several important aspects of the problem; alternately ignored, cherry-picked, or badly misconstrued the evidence in the record before him; acted irrationally both in light of that evidence and his own stated decisional criteria; and failed to justify significant departures from past policies and practices — a veritable smorgasbord of classic, clear-cut APA violations."[86] The court declared this process a sham, wherein the agency

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[78] *Motor Vehicle Mfrs. Assn. of United States, Inc. v. State Farm Mut. Automobile Ins. Co.*, 463 U.S. 29, 43 (1983); 5 U.S.C.A. § 706 (2)(A). *See, also, Ctr. for Biological Diversity v. U.S. Bureau of Land Mgmt.*, 698 F.3d 1101, 1124 (9th Cir. 2012) (agency's failure to consider policy impacts of decision); *Advocates for Highway & Auto Safety v. Fed. Motor Carrier Safety Admin.*, 429 F.3d 1136, 1147 (D.C. Cir. 2005) (agency's failure to consider vital aspects of the problem before it).

[79] 5 U.S.C.A. § 706 (2)(B) - (E).

[80] *Motor Vehicle Mfrs. Assn. of United States, Inc.*, 463 U.S. at 43 (internal quotation marks omitted); *Williams Gas Processing-Gulf Coast Co., L.P. v. FERC*, 475 F.3d 319, 321 (D.C. Cir. 2006) (agency determination devoid of reasoned decision-making must be set aside).

[81] *United States v. Dierckman*, 201 F.3d 915, 926 (7th Cir. 2000) (internal quotation marks omitted).

[82] *Ass'n of Private Sector Colls. & Univs. v. Duncan*, 681 F.3d 427, 449 (D.C. Cir. 2012); *Int'l Union, United Mine Workers of Am. v. Mine Safety & Health Admin.*, 626 F.3d 84, 94 (D.C. Cir. 2010).

[83] *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 934 (D.C. Cir. 2008).

[84] *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

[85] *New York v. United States Dep't of Commerce*, No. 18-CV-2921 (JMF), 2019 WL 190285 (S.D.N.Y. Jan. 15, 2019), *available at* https://www.courtlistener.com/recap/gov.uscourts.nysd.491254/gov.uscourts.nysd.491254.166.0.pdf.

[86] *Id.* at 225-245.

pursued a single-minded goal of adding the citizenship question even as the "real" reason for the decision was outside the pretext of enhancing enforcement of the Voting Rights Act.[87]

Thus, precedent is clear that administrative agencies are not above the law, and courts take seriously their obligations to evaluate whether the agency's stated rationale for rulemaking is supported by the evidence. The judiciary is the final authority on issues of statutory construction, and it will reject administrative constructions that conflict with clear congressional intent.[88]

iii. Agencies Cannot Revoke Long-Standing Guidance Without Good Reasons

The Department need also be aware that sudden reversals in policy may be unlawful, even where the revoked policy was not a regulation. The U.S. Supreme Court recognizes that "regulatory agencies do not establish rules of conduct to last forever," but cautions that "the forces of change do not always or necessarily point in the direction of deregulation."[89] When an agency upends its own interpretation of a statute, courts require a showing of "good reasons for the new policy," including "a reasoned explanation" for disregarding facts and circumstances underlying the former policy.[90] Particularly where the change in policy "could necessitate systemic, significant changes" to stakeholders' practices, the agency owes more than "conclusory statements" to justify the interpretation.[91]

The U.S. Supreme Court's recent decision in *Encino Motorcars* has affirmed Justice Scalia's majority opinion in *FCC v. Fox Television Stations* that an agency's decision to change course may be arbitrary and capricious where it ignores or contradicts its earlier factual findings without a good reason.[92] *Encino Motorcars* arose from an agency rulemaking with parallel flaws to this current process. In that case, the Department of Labor, which is charged with interpreting and enforcing the Fair Labor Standards Act (FLSA), issued an "interpretive regulation" in 1970 that a service advisor who sold maintenance and repair services at an automobile dealership was not a "salesman" exempt from receiving overtime compensation.[93] Following several court cases that rejected this interpretation, the Department of Labor issued an opinion letter in 1978 that changed its position and aligned with those court decisions.[94] This guidance made clear that service advisors were exempt employees who were not required to receive overtime compensation under the FLSA.[95] Twenty-one years later, in 2008, the Department of Labor issued a notice of proposed rulemaking that would hold service advisors to be exempt.[96] Then, in 2011, the Department of Labor reversed course, and completed its 2008 notice-and-comment

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[87] *Id.* at 245-253.
[88] *Chevron*, 467 U.S. at 845.
[89] *Motor Vehicle Mfrs. Assn. of United States*, 463 U.S. at 42 (internal quotation marks omitted).
[90] *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 515 (2009).
[91] *Encino Motorcars, LLC v. Navarro*, 136 S.Ct. 2117, 2126-27 (2016).
[92] *Encino Motorcars*, 136 S.Ct. at 2127.
[93] *Id.* at 2122.
[94] *Id.* at 2123.
[95] *Id.*
[96] *Id.*

rulemaking by issuing a final rule that went back to the 1970 guidance.[97] Service advisors were again entitled to overtime compensation.[98]

Based on that sudden reversal in policy, a group of service advisors sued their employer, claiming violations of the FLSA.[99] Ultimately, the U.S. Supreme Court threw out the final rule, holding that the regulation "was issued without the reasoned explanation that was required in light of the Department of Labor's change in position and the significant reliance interests involved."[100] The Department of Labor referenced comments made for and against the proposal, but then gave no actual reason why it believed one approach was more reasonable than the other.[101] It also made no effort to sort out inconsistencies in its regulation, which would exempt dealership employees who sold vehicles but not exempt dealership employees who sold services.[102] Conclusory statements were not enough to satisfy this burden.[103]

Clearly, under the U.S. Supreme Court's 7-2 decision in *Encino Motorcars*, an agency exceeds its jurisdiction when it revokes a longstanding policy without providing a good reason, even if that policy constituted sub-regulatory guidance. Yet the Department of Education has offered nothing but conclusory statements to justify this change. Here, the Proposed Regulations acknowledge that the Department has been issuing guidance on the proper interpretation and enforcement of Title IX in the campus disciplinary process for decades. It also acknowledges the force of this guidance, as it putatively has "created" a process followed by recipients of federal funds.[104] Yet it has suddenly reversed course, with no reasoned explanation for why it has upset decades of settled practice.

To be sure, the Department never "created" the disciplinary process, nor does the Department have jurisdiction to mandate such a top-down system under Title IX. It is more accurate to say that the Department's Office for Civil Rights enforces Title IX through campus investigations, and its approach has encouraged recipients to reform their practices to conform with investigatory standards and outcomes. Moreover, individuals have spurred reform by filing complaints with OCR claiming that campuses are failing to live up to their Title IX obligations. OCR follows a Case Processing Manual to determine if the institution is in violation. Institutions such as SUNY have relied for decades on this guidance material in shaping their campus responses to sexual harassment and sexual violence.

Additionally, students, faculty, staff, and third-parties have long relied on this guidance in understanding their Title IX rights. Those individuals can bring private lawsuits against universities for not following Title IX. This private right of action has led universities to reform their practices to avoid liability. Nearly forty years ago, the Second Circuit Court of Appeals

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[97] *Encino Motorcars*, 136 S.Ct. at 2123.
[98] *Id.*
[99] *Id.* at 2124.
[100] *Id.* at 2126.
[101] *Id.* at 2126-27.
[102] *Id.* at 2127.
[103] *Id. See, also, Allied-Signal, Inc. v. Nuclear Reg. Comm'n*, 988 F.2d 146, 152 (D.C. Cir. 1993) (agency rationale must be based on actual evidence beyond conclusory statements).
[104] Title IX Proposed Regulations, at 61465.

held in *Alexander v. Yale University* that a university could be held liable under Title IX for failing to take seriously allegations of "quid pro quo" sexual harassment between a female student and a male faculty member or administrator. [105] The students in *Alexander* alleged that the university was obliged under Title IX to address sexual harassment, because this misconduct compromised their ability to access the educational benefits provided by the university. [106] Although the plaintiffs in *Alexander* did not prevail in their claims, the case led universities to implement grievance procedures for preventing, investigating, and adjudicating sexual harassment.

The U.S. Supreme Court then expanded the scope of institutional liability in two cases during the late 1990s. In *Gebser v. Lago Vista Independent School District*, the Court identified a private right of action under Title IX against recipients for teacher-on-student sexual harassment. [107] One year later, the Court held in *Davis v. Monroe County Board of Education* that a school could be liable for monetary damages under Title IX if it was "deliberately indifferent" to student-on-student harassment about which it had "actual" knowledge. [108] The harassment had to be so severe, pervasive, and objectively offensive that it deprived the impacted students of access to the benefits of education.

In light of *Gebser* and *Davis*, the Department sought public comments regarding a school's obligation to take affirmative steps to prevent, investigate, and adjudicate sexual harassment. In 2001, it published its Revised Sexual Harassment Guidance, which updated nearly identical guidance published in 1997. This Guidance affirmed that institutions were responsible for incidents of student-on-student sexual harassment.

The 2001 Guidance meshed the definition of sexual harassment in *Davis* applicable to private causes of action for money damages with the "core factors" previously offered by the Department of Education in a 1997 guidance letter for determining the appropriate institutional response. [109] Specifically, institutions must examine the "constellation of surrounding circumstances, expectations, and relationships" to determine whether the conduct is "sufficiently serious that it adversely affects a student's ability to participate in or benefit from the school's program." [110] The 2001 Guidance also created a wide scope of responsibility for preventing sexual harassment and violence. The institution has a duty to prevent and address discrimination throughout its operations, "whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere." [111] Because Title IX protects any "person" from sex discrimination, students of all genders may

[105] 631 F.2d 178 (2d Cir. 1980).
[106] *Alexander*, 631 F.2d at 181.
[107] 524 U.S. 274 (1998).
[108] 526 U.S. 629 (1999).
[109] OFFICE FOR CIVIL RIGHTS, DEPT. OF EDUCATION, SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997), *available at* https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.
[110] 2001 Guidance, at p. vi.
[111] 2001 Guidance, at p. 3.

bring complaints of harassment. Students are protected from harassment by a school employee, another student, or a non-employee third party, like a visiting speaker or visiting athlete.[112]

Contrary to the Department's revisionist history, the Department has followed a consistent policy regarding the application of Title IX as an anti-violence and anti-harassment tool for decades. The 2011 Dear Colleague letter, in turn, reinforced these policies and clarified certain ambiguities in the 2001 notice-and-comment guidance, such as holding that Title IX applies "in connection with all the academic, educational, extracurricular, athletic, and other programs of the school . . ." including those activities occurring off-campus or on a study abroad program.[113] The 2011 Dear Colleague Letter also included third-parties under the umbrella of the school's protection. "For example, Title IX protects a high school student participating in a college's recruitment program, a visiting student athlete, and a visitor in a school's on-campus residence hall."[114] It also set forth preponderance of the evidence as the standard of proof in cases of sexual misconduct.

The Department's apparent legal position is that it can abandon its longstanding interpretation of Title IX, without any explanation grounded in evidence, simply because its former interpretation was not a regulation. Yet under *Skidmore v. Swift & Co.*,[115] courts give significant deference to agency interpretations that speak from the agency's expertise, are thoroughly considered, and are consistent with prior interpretations.[116] As such, the Department's more than twenty years of guidance on this issue—including policies put into place following notice-and-comment—have heavy legal weight that cannot be abandoned without a good reason. Yet the dearth of evidence offered in the Proposed Regulations makes it difficult to argue that these proposals were the product of agency expertise. The Preamble offers nothing but conclusory statements to justify the Department's abrupt reversal.

iv. The Proposed Rules Are Inconsistent with the 2013 VAWA Reauthorization (Campus SaVE Act) and Enacting Regulations

The Department must also account for why it acts in derogation of congressional intent and its own interpretation of that intent.[117] Less than six years ago, Congress passed legislation that specifically defines what due process rights it demands for campus adjudications of sexual misconduct, and the Department promulgated regulations to enforce that law. Nowhere did Congress manifest an intent that the Department should consider the elevated due process protections accumulated in the instant Proposed Regulations. To the contrary, the Proposed Regulations' elevated emphasis on the rights of the accused undermine Congress' wishes by relying on factors that Congress never intended to be considered and departs from the due process balance struck by Congress.

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[112] *Id.*
[113] *See generally* 2011 DCL.
[114] 2011 DCL, at p. 4 n.11.
[115] 323 U.S. 134 (1944).
[116] *See*, *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) and *U.S. v. Mead Corp.*, 533 U.S. 218, 235 (2001).
[117] Agency decision-making that allows the agency to circumvent its own regulations is arbitrary and capricious. *Venetian Casino Resort, L.L.C. v. EEOC*, 530 F.3d 925, 934 (D.C. Cir. 2008).

In 2013, Congress reauthorized the 1994 Violence Against Women Act (VAWA), which was signed into law on March 7, 2013. The relevant provisions of this law are also known as the Campus SaVE Act. Among other things, this law amended Section 485(f) of the Higher Education Act of 1965 (HEA), better known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act). VAWA amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking, and to include policies, procedures, and programs regarding these incidents in their annual security reports.

In amending the Clery Act, VAWA set forth specific standards of due process that colleges and universities had to apply in proceedings arising from incidents of sexual assault and related crimes and violations. Those proceedings had to "provide a prompt, fair, and impartial investigation and resolution" by officials with "annual training on the issues related to domestic violence, dating violence, sexual assault, and stalking and how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability." The Reporting Individual and the Respondent were "entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice" and shared the right to simultaneous written notification of the outcome of the proceeding, any appeal procedures, and when the results became final.[118]

The Department enacted regulations after a Negotiated Rulemaking process in a manner designed to implement Congress' intent of preventing sexual violence and promoting the fair adjudication of campus sexual misconduct. In doing so, the Department did not interpret the phrase "prompt, fair, and impartial investigation and resolution" in Section 485(f)(8)(B)(iv)(I)(aa) to require any of the elevated due process protections for the accused now under consideration.

As to the role of the advisor, the Department considered comments asking it to specifically define the role of the advisor in campus proceedings, to which it demurred; the Department found that "regulating an institution's actions in these areas would restrict their flexibility to protect the interests of all parties."[119] Blanket rules about the role of the advisor would "unnecessarily limit an institution's flexibility to provide an equitable and appropriate disciplinary proceeding."[120]

Contrary to its present position, the Department did not interpret the Clery Act amendments to require the presence of an advisor at all. This function was at the parties' option, but not mandatory, and institutions would not run afoul of the law if a properly notified advisor did not attend the proceeding.[121] Indeed, the Department specifically rejected a proposal that would require institutions to provide legal representation in a meeting or hearing in which the accused or accuser has legal representation but the other party does not. "Absent clear and

[118] *See*, Clery Act, § 485 (f)(8)(B)(iv)(I).
[119] VAWA Final Rule, at 62773.
[120] VAWA Final Rule, at 62774.
[121] VAWA Final Rule, at 62773.

unambiguous statutory authority," the Department wrote at the time, "we would not impose such a burden on institutions."[122]

The Department's current proposals elevate the due process rights of the accused in ways never anticipated by the drafters of the VAWA amendments to the Clery Act. Its present interpretation of Title IX is incompatible with its regulations implementing the Clery Act amendments, demonstrating another ground by which its present rulemaking is arbitrary and capricious as allowing the agency to circumvent its own regulations and offending the clear intent of Congress on the issue of procedural due process in campus sexual assault proceedings.[123]

v. The Proposed Rules May Prove to Be a Pretext for Otherwise Unlawful Agency Action

The sum total of this analysis is that a court may find that the Department has acted in a manner designed to hide its true purpose in pursuing these Proposed Regulations. As the January 2019 decision in *State of New York v. Department of Commerce* shows, courts will look beyond the "presumption of regularity" afforded Executive Branch officials where they cannot escape the conclusion that the agency's stated rationale was not the true reason for its actions, and may look both within the administrative record and outside of it to identify if the stated reason for acting was just a pretext masking an unstated goal.[124] There, the Secretary of Commerce decided to add the citizenship question to the census for reasons unrelated to Voting Rights Act enforcement before he involved the Department of Justice. The evidence showed that his aides sought to conceal aspects of the process and set aside "near uniform opposition" from experts about the citizenship question.[125] The agency's obfuscation and demonstrated unwillingness to consider alternative arguments showed that the Secretary of Commerce had prejudged the outcome regardless of the evidence.[126]

Respectfully, the Department is proceeding along a similar path. The Department has entered the rulemaking process having decided that the due process afforded to Respondents in disciplinary proceedings violates Title IX's prohibition on discrimination on the basis of sex. It has offered a series of proposals that it believes will correct this putative imbalance. Yet it has not produced any evidence to support its belief that these measures are needed to address *sex-based discrimination*, or even any evidence that sex-based discrimination exists against Respondents. Making such a critical change without any explanation may be found to be an arbitrary and capricious act.[127]

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[122] VAWA Final Rule, at 62774.
[123] *Compare, Midwater Trawlers Coop. v. Dep't of Commerce*, 282 F.3d 710, 720 (9th Cir. 2002) (where Congress requires agency regulations to be based on scientific evidence, a regulation is arbitrary and capricious where it is grounded in political choices rather than scientific evidence).
[124] *Dept. of Commerce*, Case 1:18-cv-05025-JMF (S.D.N.Y. Jan. 15, 2019), at p. 248, *available at* https://www.courtlistener.com/recap/gov.uscourts.nysd.491254/gov.uscourts.nysd.491254.166.0.pdf.
[125] *Id.* at 246-48.
[126] *Id.* at 251.
[127] *Fox v. Clinton*, 684 F.3d 67, 80 (D.C. Cir. 2012).

Surely, the Department is aware that the public's response to its "opening bid" in this process, the 2017 DCL, was nearly universally negative. According to a survey of 12,035 comments received by the Department in the wake of the 2017 DCL, ninety-nine percent of the commenters filed a comment in support of Title IX, with ninety-seven percent of the Title IX supporters specifically asking the Department to maintain the 2011 DCL.[128] Only one percent of the writers offered comments opposing Title IX, of which just 123 letters supported rescinding the 2011 DCL.[129] This interpretation elevates the needle over the entire haystack, and is not the basis for an evidence-based determination.[130]

Prior to even engaging in this process, the then-Assistant Secretary showed that the determinations of how to regulate had already been made, telling the New York Times that "[i]nvestigative processes have not been 'fairly balanced between the accusing victim and the accused student,'…and students have been branded rapists 'when the facts just don't back that up.' In most investigations, she said, there's 'not even an accusation that these accused students overrode the will of a young woman…Rather, the accusations — 90 percent of them — fall into the category of 'we were both drunk,' 'we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.'"[131] The Assistant Secretary later apologized for her statement.[132]

Having released its Proposed Regulations without considering the overwhelming support of these commenters to the pre-2017 DCL, the Proposed Regulations weaken the core goal of Title IX as a means of preventing and redressing campus sexual harassment and assault, even if their stated goal is otherwise. Line-by-line, the Proposed Regulations discourage reporting and raise the cost of handling complaints, raising the due process floor in ways sometimes not even required in the criminal justice system. Yet the department has offered no evidence that requiring such protections is necessary to stop discrimination *on the basis of sex* against people accused of sexual violence and harassment, nor a reasoned explanation for why such extreme measures are needed, when less restrictive means could prove adequate.[133]

At the same time, the Department has not considered the impact these elevated protections will have on individuals who have relied on Title IX for decades to prevent and address campus sexual assault. The Department writes that it "does not believe it is reasonable to

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[128] Tiffany Bufkin, et al., *Widely Welcomed and Supported by the Public: A Report on the Title IX-Related Comments in the U.S. Department of Education's Executive Order 13777 Comment Call*, California Law Review Online (forthcoming), *available at* https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3255205.
[129] *Id*.
[130] As the Ninth Circuit Court of Appeals has explained, an agency decision will be arbitrary and capricious where it reaches a conclusion that contradicts the underlying record. *Tucson Herpetological Soc. v. Salazar*, 566 F.3d 870, 879 (9th Cir. 2009).
[131] Erica L. Green and Sheryl Gay Stollberg, *Campus Rape Policies Get A New Look As The Accused Get DeVos' Ear*, N.Y. TIMES (July 12, 2017), *available at* https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html.
[132] Fernanda Zamudio-Suaréz, *Civil Rights Official Apologizes For Saying 90% Of Campus Rape Cases Stem From Regret*, CHRONICLE OF HIGHER EDUCATION (July 12, 2017), *available at* https://www.chronicle.com/blogs/ticker/civil-rights-official-says-sexual-assault-policies-ignore-rights-of-the-accused/119310.
[133] *Cin. Bell Tel. Co. v. FCC*, 69 F.3d 752, 761 (6th Cir. 1995).

assume that these Proposed Regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of recipients."[134] This statement is surprising. If implemented as proposed, these regulations would offend Title IX by allowing institutions to treat those who disclose sexual harassment, assault, and violence unequally. The chilling effect on Reporting Individuals would be immediate, and, without a robust and credible infrastructure for addressing these claims, rates of sexual harassment would remain the same or even increase, all for a new regime that the Department does not even believe will reduce discrimination.

Ultimately, the Proposed Regulations present a solution in search of a problem. Its authors insist that a lack of "clear regulatory standards" have "contributed to processes that have not been fair to all parties involved, that have lacked appropriate procedural protections, and that have undermined confidence in the reliability of the outcomes of investigations of sexual harassment allegations."[135] Yet the Department's guidance has been in place for at least twenty years. Any lack of clarity has been the Department's own creation, produced by its revocation of long-standing guidance without a good reason, and a pretextual reason is not a legally sufficient reason.

Respectfully, upending twenty years of guidance in the manner proposed will not provide more clarity; rather, it will dilute Title IX's effectiveness in addressing the perniciousness of sexual violence on campuses. We believe that New York State's Education Law Art. 129-B's statutory framework does provide clear guidance, all while protecting the rights of the parties involved and without sacrificing Title IX's purpose of remedying and preventing sexual violence on campuses.

E. The Proposed Regulations Implicate Significant First Amendment Academic Freedom Issues

Even as the Proposed Regulations direct that "[n]othing in this part requires a recipient to: (1) Restrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution,"[136] the Proposed Regulations violate the First Amendment rights of academic institutions. Traditionally, it is the provenance of educational institutions, and especially public institutions which enjoy the sovereignty of their state, to determine for themselves "on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[137] Elemental to the right of deciding who may be admitted to study is determining who, and under what conditions, someone can continue to study.

Colleges and universities, and especially state colleges and universities, thus have a duty to investigate violations of their policies (both academic and non-academic), conduct a fair process to determine responsibility, and sanction, where warranted, in a way that both educates the student as to the consequences of their actions and deters further similar deleterious activity. We can find no case that says the First Amendment or other Constitutional rights automatically

[134] Title IX Proposed Regulations, at 61484.
[135] Title IX Proposed Regulations, at 61465.
[136] Title IX Proposed Regulations, at 61495.
[137] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J, concurring).

give way just because the action by the federal government is declared to be under the Spending Clause. The due process elements of the Proposed Regulations abrogate the rights of colleges and universities to determine their process at a local level, in a shared governance approach with the communities they serve, by setting detailed, costly processes, beyond those required by courts or statute, before the institution can determine whether someone credibly accused of harassing or assaulting another member of the institution's community can be sanctioned or limited in their ability to continue harassing or assaulting the Reporting Individual or other community members. This infringes upon the institution's academic freedom rights under the First Amendment to the Constitution.

Institutions have an interest, protected by the First Amendment, in determining that process and developing that policy. These Proposed Regulations would diminish that interest. It is hard to determine if, in consideration of all the other issues raised in this letter, the Department would be able to survive a strict scrutiny analysis and show that, in depriving public and private institutions of what would otherwise be their First Amendment right, to determine a process that serves their interests and needs at the local level, the Department's regulations were addressing a compelling governmental interest and were narrowly tailored to achieve that interest. It is especially difficult to make this showing inasmuch as the prior system has existed for more than four-and-a-half decades without infringing on academic freedom.

Further, since the Department has stated that it "does not believe it is reasonable to assume that these Proposed Regulations will have a quantifiable effect on the underlying rate of sexual harassment occurring in the education programs or activities of" educational institutions,[138] it is not even clear what the compelling governmental interest is that the Department would be addressing in the first place. Again, due process rights for Respondents, without some showing of unequal treatment or disparate impact *on the basis of sex*, is not even within the jurisdiction of the Department under this specific civil rights law, and so could hardly be called a compelling governmental interest. If it is, the Department could ask Congress to change the law or enact a new law, amend the Constitution, or otherwise take action in a manner that does not infringe on the First Amendment rights of institutions. But the Department may not use the regulatory process to infringe upon the First Amendment rights of institutions recognized under Supreme Court precedent.

F. The Proposed Regulations Violate Basic Principles of Federalism

One of the largest oversights of these Proposed Regulations is the Department's lack of recognition that many states have considered legislation related to sexual assault since 2014.[139] In 2015, nearly a quarter of U.S. states passed legislation on this topic, and legislators in other states created committees to examine this issue and make policy recommendations.[140] The lack of consideration of state laws regarding campus sexual assault will create problems not only for New York, but for a host of other states that have been active in legislating in this area. Many of

[138] Title IX Proposed Regulations, at 61485.
[139] Kati Lebioda, *State Policy Proposals to Combat Campus Sexual Assault*, American Association of State Colleges and Universities (Dec. 2015), *available at* https://www.aascu.org/policy/publications/policy-matters/campussexualassault.pdf (In 2014, only six states considered legislation related to sexual assault).
[140] *Id.*

these state laws incorporate federal statute, regulations and previous guidance as the "floor" and then regulate beyond what is required on the federal level to ensure increased due process protection for both Reporting Individuals and Respondents.

i. Federalism and State Impacts on New York's Administrative Law

SUNY opposes the Proposed Regulations because they interfere with New York State's obligation under New York Education Law Article 129-B to provide for a safe campus environment for New York's students and fairly adjudicate violations of conduct on college campuses. Although the Department states, without evidence, that "[w]e also have determined that this regulatory action does not unduly interfere with State, local, or tribal governments in the exercise of their governmental functions,"[141] for the reasons outlined in this letter, these Proposed Regulations violate the principle of federalism, the sovereignty of the State of New York, and are inconsistent with existing New York State law.

The Tenth Amendment states that powers not expressly granted to the federal government must remain with the sovereign state. Issues of state law preemption and preemption of the rulings of a state's highest court must be considered when a Notice of Proposed Rulemaking is issued.

Even though multiple states in the country have laws addressing this overall issue, nothing in the Proposed Regulations has acknowledged that fact. It is one of grave importance when the Department's Proposed Regulations make wholesale changes to the nature of campus conduct hearings. While the proposed definition of "sexual harassment" is broader than what is defined in New York State's Education Law, it encompasses specific conduct addressed in New York State law.

The Proposed Regulations define "sexual harassment" as:

> (i) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
> (ii) Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
> (iii) Sexual assault, as defined in 34 CFR 668.46(a).[142]

Sexual harassment as defined in the Proposed Regulations squarely captures certain areas now regulated by New York State law, including sexual assault, and significantly changes the nature of campus hearings in regard to due process in a way that runs counter to New York State's public policy and could cause significant conflicts with New York's own law.

[141] Title IX Proposed Regulations, at 61484.
[142] Title IX Proposed Regulations, at 61,496.

Specifically, the Proposed Regulations will cause issues in regard to hearsay statements as used in administrative proceedings in New York. The final ruling of *Matter of Haug v. State Univ. Of N.Y. at Potsdam*,[143] which was taken up by the New York Court of Appeals in late 2018, held that hearsay evidence and Haug's own testimony constituted substantial evidence to support the University's determination.[144] Similarly, the Second Circuit recently affirmed in *Doe v. Colgate University* (2019), a private college case, that a university's sexual misconduct hearing did not violate Title IX when it considered hearsay evidence and did not permit the Respondent to directly cross-examine the Reporting Individuals.[145]

Hearsay statements are commonly used in administrative proceedings in New York.[146] New York's highest court, the New York State Court of Appeals, has stated in numerous cases, including *Haug*: "[h]earsay evidence is admissible as competent evidence in an administrative proceeding, and if sufficiently relevant and probative may constitute substantial evidence even if contradicted by live testimony on credibility grounds."[147] This is not the first time the Court of Appeals has ruled on this issue in general, but it was the first time the high court has taken up this issue regarding CPLR Article 78[148] proceedings challenging a formal hearing on a college campus in New York for sexual misconduct. The facts here demonstrate exactly why hearsay was an important, probative component of this specific type of hearing. The Reporting Individual did not testify, but the police officer who took the Reporting Individual's statement did, and written notes prepared by the Director of Student Conduct and Community Standards were also considered.[149] In *Haug*, the Petitioner (Respondent below) testified at the hearing, and the Court stated: "[t]he hearing board also could have reasonably interpreted some of petitioner's behavior as consciousness of guilt and concluded that his version of the events was not credible."[150] The Court further stated that, "[u]ltimately, it was the province of the hearing board to resolve any conflicts in the evidence and make credibility determinations."[151] As a matter of process, New York has an entire structure for any administrative proceedings to ensure that due process rights are not violated. Considering the myriad of agencies and different types of administrative hearings that exist, it is no surprise that New York's courts have ruled on some of the issues that go to the heart of the Proposed Regulations.

The lack of a requirement for cross-examination during administrative proceedings goes directly to the heart of New York Education Law Article 129-B (Article 129-B) as well.[152] Article 129-B affords this discretion and is integral to the law because it allows the Reporting Individual to decide not to participate in the disciplinary process, but still allows an institution to go forward in the event they want to pursue these allegations. New York's law is structured in

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[143] *Matter of Haug v. State Univ. of N.Y. at Potsdam*, 32 N.Y.3d 1044, 1046 (2018).
[144] 32 N.Y.3d at 1046-47.
[145] *Doe v. Colgate Univ.*, 2019 WL 190515, at *8 (N.D.N.Y., Jan. 15, 2019) (Summary Order).
[146] *See Matter of Gray v. Adduci*, 73 N.Y.2d 741, 742 (1988); *see also Matter of National Basketball Assn. v. New York State Div. Of Human Rights*, 68 N.Y.2d 644, 646 (1986); *see also People ex rel. Vega v. Smith*, 66 N.Y.2d 130, 139 (1985); and *Matter of Malacarne v. City of Yonkers Parking Auth.*, 41 N.Y.2d 198, 193 (1976).
[147] *Haug*, 32 N.Y.3d at 1046.
[148] N.Y. C.P.L.R. 7801 et seq.
[149] *Matter of Haug v. State Univ. Of New York at Potsdam*, 149 A.D.3d 1200, 1201-1202 (3d Dep't 2017).
[150] *Haug*, 32 N.Y.3d at 1046.
[151] *Id.* at 1046-47.
[152] N.Y. EDUC. L. § 6439 et seq.

such a way that the institution is responsible for investigating and adjudicating any claims of misconduct.[153] This was true even before the enactment of Article 129-B and is now an essential part of the Students' Bill of Rights provisions.[154] To ignore what is current principle and process on cross-examination in administrative proceedings in not just New York, but also the Second Circuit, would then create significant issues going forward for college campuses in New York.

Specifically, *Jacobson v. Blaise*, an Appellate Division case, directly addressed the issue of cross examination in live hearings relating to sexual misconduct.[155] The court "reject[ed the] petitioner's claim that he was denied due process because he was not permitted to cross-examine an adverse witness in an administrative proceeding."[156] Further, the Second Circuit has stated, "[t]he right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings."[157] The Department's Proposed Regulations will cause undue disruption of settled case law and statute in New York, and goes against well-settled administrative law principles that govern administrative proceedings.

New York's laws and the rulings by New York's highest court are embedded with New York's fundamental policies and beliefs as a state, and preempt the Proposed Regulations by the Department. The Proposed Regulations violate the principles of federalism.

ii. How *Sebelius* Informs the Nature of Federalism

The Tenth Amendment to the U.S. Constitution states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to the states respectively, or to the people."[158] As recently as 2012, the United States Supreme Court has ruled on the limited powers of the federal government and the importance of state police powers.[159] While *Nat'l Fed'n of Indep. Bus. v. Sebelius* deals with the Patient Protection and Affordable Care Act (PPACA), it is instructive on how the U.S. Supreme Court has now treated federal laws and regulations and how they abridge the states' police powers going forward.

The majority opinion in *Sebelius* clarifies that Congress' power under the Spending Clause has great latitude, including allowing grants to be conditioned upon "taking certain actions Congress could not require [states] to take."[160] However, the Court made it clear there are "recognized limits [ ] to secure state compliance with federal objectives."[161] The Court has "repeatedly characterized" legislation and regulation reliant on the Spending Clause as contractual in nature between the states and the federal government.[162] When the federal

[153] *Matter of Boyd v. State Univ. Of N.Y. at Cortland*, 110 A.D.3d 1174, 1175 (3d Dep't 2013).
[154] N.Y. EDUC. L § 6443(3) ("Make a decision about whether or not to disclose a crime or violation and participate in the judicial or conduct process and/or criminal justice process free from pressure by the institution").
[155] *Jacobson*, 157 A.D.3d at 1076-78.
[156] *Jacobson*, 157 A.D.3d at 1076.
[157] *Winnick*, 460 F.2d at 549.
[158] U.S. CONST. art. X.
[159] *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 536 (2012).
[160] *College Savings Bank v. Florida Prepaid Postsecondary Ed. Expense Bd.*, 527 U.S. 666, 686 (1999); *Sebelius*, 567 U.S. at 576.
[161] *Sebelius*, 567 U.S. at 577.
[162] *Id.* at 577.

government exercises spending power, it hinges upon "the State voluntarily and knowingly accept[ing] the terms of the 'contract.'"[163] Essentially, when the federal government uses "financial inducements to exert a 'power akin to undue influence,'" it is a violation of the principles set forth in the Tenth Amendment.[164] This concept has been supported in past decisions by the Supreme Court in *New York v. U.S.* and *Printz v. U.S.*[165] The Court has long stated that federal programs do not hold the same type of danger when the state has a "legitimate choice whether to accept the federal conditions in exchange for the federal funds."[166]

In *Sebelius*, the PPACA was written so that if a state did not implement the new substantial expansion of Medicaid, the state would lose all Medicaid funding going forward. That would include both federal dollars for the existing Medicaid program, and any funding for the Medicaid expansion.[167] Essentially, the Court stated that federal funding for Medicaid made up such substantial portions of current state budgets that changing the program in this fashion through this legislation constituted a new program, and as such, revoking all funds from the existing program on top of any new funds constituted an essential overreach in Spending Clause powers.[168] The Court was very clear by stating: "[w]hen… such conditions take the form of threats to terminate other significant independent grants, the conditions are properly viewed as a means of pressuring the States to accept policy changes."[169]

Here, the Department has substantially altered the nature of Title IX through these Proposed Regulations so that it would create an entirely new process for campus hearings in relation to sexual harassment and sexual assault. A parallel argument can be made to *Sebelius* that if these Proposed Regulations were implemented and a state did not come into compliance, it would lose a significant portion of its state budget provided through federal education funding. Many of the funds a state would stand to lose are independent grants, including a loss of all federal financial aid funds. *Sebelius* does also address blanket warnings about future loss of federal funding for noncompliance in statute.[170] Essentially, the Court has stated that there can be a blanket warning, however, a state cannot anticipate alterations that "transform [something] so dramatically."[171] For many reasons stated above, the Proposed Regulations are a significant departure from all guidance, statutes and regulation that have come before it, and, as such, no state would have any advance warning or knowledge from the past 45 years of accepting federal funds for education. This would constitute a significant overreach with no clear precedent in the actual text of Title IX itself and would allow the Department to withhold federal funding from states that do not comply if these regulations are implemented. For these foregoing reasons, SUNY requests that the Proposed Regulations be withdrawn.

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[163] *Id.*
[164] *Id.*
[165] *New York v. U.S.*, 505 U.S. 144 (1992); *Printz v. U.S.*, 521 U.S. 898 (1997).
[166] *Sebelius*, 567 U.S. at 578.
[167] *Id.* at 579-80.
[168] *Id.*
[169] *Sebelius*, 567 U.S. at 580.
[170] *Id.* at 584-85.
[171] *Id.* at 584.

iii. The Conduct Regulated by the Department Falls Directly Within New York State's Police Powers

A recognized principle of state sovereignty is the acknowledgement of what qualifies as a state police power. State police powers have historically been broad. Case law refers to this as a "general power of governing, possessed by the States but not by the Federal Government."[172] State police power does not need constitutional authorization, as it occupies the space where the federal government has no authority to govern, and ensures that issues "touch[ing] on citizens' daily lives" are addressed "by smaller governments closer to the governed."[173] This includes issues such as "punishing street crime, running public schools, and zoning property for development," however, that list is not exhaustive.[174] Even if the federal government does not have express authorization through the Constitution to govern certain issues, any state government action is still subject to constitutional principles, including due process and equal protection.[175]

SUNY is a public state entity providing education, thus, it falls squarely within New York's police powers to regulate it. Further, in 2015, New York passed the most comprehensive law in the country governing campus conduct processes in relation to sexual assault, dating violence, domestic violence, and stalking.[176] Article 129-B of the New York State Education Law put into place a balanced procedure for receiving, investigating and adjudicating disclosures by Reporting Individuals in relation to that specific conduct. Article 129-B creates uniform procedures for handling these types of reports on college and university campuses in New York.[177] As early as 2014, New York's upper chamber held a roundtable discussion about best practices for any hearings conducted by campuses in relation to sexual assault and released a report on this issue in relation to how it affected New York students.[178] New York's Governor and both houses of New York's Legislature engaged in extensive negotiations before the final passage of the legislation and its signature into law.[179]

New York's laws in this specific area are well within its state police powers. The federal government has set the floor on this issue in the past with the passage of the VAWA

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[172] *Sebelius*, 567 U.S. at 536; *see also e.g. U.S. v. Morrison*, 529 U.S. 598, 617-19 (2000).
[173] *Sebelius*, 567 U.S. at 536.
[174] *Id.* at 535.
[175] *Id.*
[176] N.Y. EDUC. L. Art. 129-B; Press Release, Governor Andrew M. Cuomo, Governor Cuomo Signs "Enough is Enough" Legislation to Combat Sexual Assault on College and University Campuses (July 7, 2015), https://www.governor.ny.gov/news/governor-cuomo-signs-enough-enough-legislation-combat-sexual-assault-college-and-university.
[177] Assemblymember Glick Letter in Support, Bill Jacket, L. 2015, ch.76 at 06 (N.Y.); New York Civil Liberties Union Mem. Of Support, Bill Jacket, L. 2015, ch. 76 at 21 (N.Y.).
[178] Press Release, Senator Kenneth P. LaValle, Senator Ken LaValle Holds Roundtable Concerning College Rape and Sexual Assault (May 20, 2014), https://www.nysenate.gov/newsroom/video/kenneth-p-lavalle/senator-ken-lavalle-holds-roundtable-concerning-college-rape-and; Sen. Kenneth P. LaValle, Chairman, New York State Senate Standing Committee on Higher Education, *Sexual Violence on College Campuses: A New York State Perspective* (Oct. 2014).
[179] Matthew Hamilton, *Cuomo, legislative leaders reach agreement on 'Enough is Enough' (update)*, Times Union, Jun. 16, 2015, https://blog.timesunion.com/capitol/archives/237093/cuomo-legislative-leaders-reach-agreement-on-enough-is-enough/.

Amendments to the Clery Act, and New York's law incorporates the due process strictures required in the Final Rule promulgated pursuant to the 2013 VAWA amendments to the Clery Act.[180] New York's law has features that are not discussed in either guidance or federal law, such as transcript notations.[181] The Proposed Regulations, if enacted, threaten to disturb not just New York's laws, but also that of many other states. Further, it significantly disrupts settled law in New York and at least one provision runs in direct contravention to case law settled in the New York State Court of Appeals, New York's highest court.[182]

In *Matter of Haug v. State Univ. of N.Y. at Potsdam*, a student commenced a CPLR Article 78 proceeding against SUNY Potsdam, challenging his expulsion after a finding of responsibility.[183] The original decision saw Haug suspended, and when Haug challenged the decision with an appeal, the school revised its decision and expelled Haug.[184] The Court of Appeals took up the case specifically on the issue regarding whether hearsay evidence, along with the petitioner's own testimony at the administrative hearing, was enough to provide substantial evidence to support SUNY Potsdam's determination.[185] The Proposed Regulations as a whole are troubling because specific sections of it directly contradict New York State's administrative procedures. This again goes back to how important it is for the federal government to recognize that state sovereignty must be respected, especially in relation to these specific processes. The Federal government's goal in regulating this area has never gone so far as to invalidate such procedures in this arena, and if these Proposed Regulations go into effect, it will render part of New York's considered approach to these issues less effective. For these reasons, the Proposed Regulations should be withdrawn.

iv. Inconsistency with New York State Law

SUNY further opposes the Proposed Regulations because of the inconsistencies it creates with New York State law. One distinction between New York Education Law Article 129-B and the Proposed Regulations is that the Department would only allow parties to exclude past sexual history while Article 129-B allows parties to exclude both past sexual history and past mental health history to protect Reporting Individuals and Respondents alike in the conduct process.[186]

SUNY also has concerns with how protective and supportive measures are described by the Department in the Proposed Regulations. Previously, in the 2016 Clery Act Handbook, Department guidance stated:

> [p]rotective measures should minimize the burden on the victim. For example, if the complainant and alleged perpetrator share the same class or residence hall, the school should not, as a matter of course, remove the victim from the class or

[180] *See* N.Y. EDUC. L. ART. 129-B, § 6440 et seq.; *see also* 34 C.F.R. Part 668 (2014).
[181] N.Y. EDUC. L. §6444(6).
[182] *See Haug*, 32 N.Y.3d at 1045.
[183] 149 A.3d 1200, 1200-1201 (3d Dep't 2018).
[184] *Id.*
[185] *Haug*, 32 N.Y.3d at 1045.
[186] *See* N.Y. EDUC. L § 6444(5)(b)(vi) in contrast with Title IX Proposed Regulations, at 61474.

> housing while allowing the alleged perpetrator to remain without carefully considering the facts of the case.[187]

Supportive measures are considered non-disciplinary and non-punitive. Once a complaint is lodged against a student, if one student's housing or academic schedule must change to maintain a status quo, colleges generally move the accused student. Education Law Article 129-B requires that if there is a no contact order in place, if both parties arrive simultaneously to a location, the Respondent must leave.[188] This now raises a series of questions that may cause New York colleges to have compliance challenges. The Department is unclear on whether these supportive measures are now considered disciplinary in nature, and whether this would constitute an "unreasonable burden."[189] At this point, the Proposed Regulations do not lend any clarity to what this means and do not define this in plain terms for recipients to follow. This could cause confusion for states, and lead to onerous and expensive litigation.

In sum, the Department has offered no rationale for why it upends its own long-standing guidance, including policies and sub-regulatory guidance enacted following a notice-and-comment period, severely impacting the reliance interests of millions of students, faculty, and staff at the nation's school districts, colleges, and universities. Moreover, these proposals are inconsistent with the procedural due process minimums and balances already established by superior authorities—Congress, through the 2013 reauthorization of the Violence Against Women Act (VAWA) and the United States Supreme Court—for recipient institutions handling cases of sexual harassment and sexual violence. They offend the Tenth Amendment right of States, including New York, to set forth standards of due process applicable to administrative proceedings, and they erode the First Amendment rights of colleges and universities without serving a compelling government interest. Our hope is that the Department is not so single-minded in its pursuit of the Proposed Regulations that it cannot accommodate SUNY's concerns, and the concerns of thousands of other writers submitting comments. The Department must fully consider all of these comments and address the undeniable imbalance promised by the Proposed Regulations.

II. Issues With Specific Sections of the Proposed Regulations

In this part of its comments, SUNY discusses its issues with specific sections of the Department's Proposed Regulations. Section A describes issues with the § 106.30 definitions. Section B describes issues with § 106.44, which describes how recipients should respond to sexual harassment allegations. Section C describes issues with § 106.45, which relates to grievance procedures for formal complaints of sexual harassment. Section D contains answers to the Department's directed questions.

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[187] U.S. DEPARTMENT OF EDUCATION, THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING 2016 EDITION, pp. 8-15, *available at* https://ifap.ed.gov/eannouncements/attachments/HandbookforCampusSafetyandSecurityReporting.pdf (*hereinafter* referred to as "2016 Handbook").

[188] N.Y. EDUC. L. § 6444(5)(b)(vi).

[189] Title IX Proposed Regulations, at 61469.

A. § 106.30 – Definitions - Sexual Harassment

Section A describes SUNY's specific issues with the Department's definition of "sexual harassment" as it narrows the Department's administrative enforcement of Title IX with its definition in the Proposed Regulations, and also contains inconsistencies with the 2013 VAWA amendments to the Clery Act.

Department Narrows Administrative Enforcement of Title IX through Its New Definition of "Sexual Harassment"

The Department's Proposed Regulations would change its approach to administrative enforcement of Title IX in a way that is far narrower than the plain language of the statute. The Proposed Regulations define "sexual harassment" as, among other things, "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it **effectively denies** a person equal access to the recipient's education program or activity."[190] While this provision mirrors the statutory language of "excluded from participation," it forgets the other two provisions, which state that no person should be "denied the benefits of, or be subjected to discrimination" in educational programs or activities.[191] While SUNY understands and agrees with the Supreme Court's higher standards for receipt of money judgments, we find it very surprising that the Department would reduce its administrative authority in this area in this way.

Across the country, sexual harassment and assault can deny people the *benefits* of education, even if it does not *exclude* them from education. If Congress meant "deny benefits" to be as narrow as "exclude," it would not have bothered repeating the phrase. A plain interpretation, consistent with statutory interpretation standards, states that a legislative body does not use words accidentally or without meaning. Therefore, a plain interpretation is that a lower level of denial of benefits *could* violate Title IX. This likely does not mean that a very minor limitation *would* meet the standard. But by affirmatively declining *any* authority to even investigate whether the actions of an employee or other student in a K-12 or higher education institution denies a person or persons "the benefits of" education on the basis of sex, the Department firmly closes the door on investigating a prong that Congress included in the statute. Further, it is possible to be the victim of discrimination without being fully denied access. Again, by regulating away any authority to even investigate such cases, the Department denies itself the ability to effectuate the will of Congress or to even attempt to effectuate that will. We believe this is an error of interpretation and urge the Department to return to its long-held approach to investigating Title IX.

The 2013 VAWA Amendments to the Clery Act Show Congressional Intent and the Department's Definition Contradicts Congress' Statements on this Issue

In defining sexual harassment to specifically include "sexual assault" as defined in the 2013 Violence Against Women Act amendments to the Clery Act,[192] the Proposed Regulations create significant inconsistencies that could require colleges to make the Hobson's choice of

[190] Title IX Proposed Regulations, at 61496 (emphasis added).
[191] 20 U.S.C. §1681.
[192] 34 CFR 668.46(a).

risking funds and fines by acting in a way that is inconsistent with the Higher Education Act or risking funds (and having determinations of responsibility for violations—but not determinations of non-responsibility—overturned by OCR staff) by acting in a way that is inconsistent with Title IX regulations. While the greatest impact will be in higher education, we will note that some traditional K-12 institutions accept Title IV funds for certain post-baccalaureate career and technical education and will likewise face this difficult and confusing choice.

These distinctions and inconsistencies are troubling since the Proposed Regulations conflict with a statute passed by bipartisan majorities in both Houses of Congress, signed by the President, and implemented after a successful Negotiated Rulemaking and opportunity for public comment.

In the Final Rule implementing the Violence Against Women Act amendments to the Clery Act, the Department heard from commenters who worried that the "Proposed Regulations eliminate essential due process protections, and entrust unqualified campus employees and students to safeguard the interests of the parties involved in adjudicating allegations."[193] The Department firmly disagreed, pointing out that the statute and the regulations developed pursuant to the statute "require that: an institution's disciplinary proceedings be fair, prompt, and impartial to both the accused and the accuser; the proceedings provide the same opportunities to both parties to have an advisor of their choice present; and the proceedings be conducted by officials who receive training on sexual assault issues and on how to conduct a proceeding that protects the safety of victims and promotes accountability. Thus, these procedures do provide significant protections for all parties."[194] The Department also made clear that the levels of due process should be appropriate for these types of cases, writing that "[w]e also note that institutions are not making determinations of criminal responsibility but are determining whether the institution's own rules have been violated."[195] In the current Proposed Regulations, the Department ignores this history to make changes that are inconsistent with, and may be seen as an attempt to supersede, the VAWA Amendments to the Clery Act, inasmuch as both sets of regulations would include actions defined in the VAWA Amendments as sexual assault.

B. § 106.44 – Recipient's response to sexual harassment

Section B of this Part outlines SUNY's specific concerns with parts of the Department's Proposed Regulations. Subsection (i) discusses SUNY's concerns with the contradictions to Clery Act geography, and the inconsistencies in relation to off campus programs. Subsection (ii) discusses SUNY's concerns with the Department's new "safe harbor" provisions. Subsection (iii) discusses SUNY's concerns with mandated investigations in the instance of two or more complainants and highlights the confidentiality issues associated with that provision. Subsection (iv) discusses SUNY's specific concerns with the Department's proposed "emergency removal" provision.

[193] VAWA Final Rule, at 62771.
[194] *Id.* at 62772.
[195] *Id.*

i. §106.44(a) Generally – Geography

SUNY takes specific issue with how the Department has treated geography in its Proposed Regulations. It is in contradiction with the Congressional intent of the 2013 VAWA amendments to the Clery Act in relation to geography, and also causes significant problems going forward in relation to Greek letter organizations.

The Department's Proposed Regulations Ignore Congressional Intent of the 2013 VAWA Amendments to the Clery Act Regarding Geography

The response requirements of the VAWA amendments to the Clery Act are not limited to Clery Act geography. From the face of the Final Rule, they apply to the institution regardless of whether the incident disclosed occurred on campus or off campus. The Final Rule requires that higher education institutions have a policy statement explaining the process and procedure for disclosures of sexual assault (and three other crimes) and the policy statement would apply "whether the offense occurred on or off campus."[196] In its 2016 Clery Handbook, the Department clearly states and emphasizes that "[y]ou must follow the procedures described in your statement (of response, investigation and adjudication policy) **regardless of where the alleged case of dating violence, domestic violence, sexual assault or stalking occurred** (i.e., on or off your institution's Clery Act geography)."[197]

The Department, even while defining sexual harassment to include, in part, sexual assault as defined in the Clery Act, uses a very different standard of geographic jurisdiction. The Department had traditionally required institutions to respond to harassment or violence that could limit participation in educational programs or activities, wherever they occurred in the world, if the covered institution was in the United States. Case law is split in determining whether the provisions of Title IX would apply to activity that occurred outside of the United States.[198] In its Proposed Regulations, the Department now states that "[t]he requirements that a recipient adopt a policy and grievance procedures as described in this section apply only to exclusion from participation, denial of benefits, or discrimination on the basis of sex occurring against a person in the United States."[199] In addition to being inconsistent with the Department's own interpretation of the VAWA Amendments to the Clery Act, another education law that is a mere half-decade old, and being inconsistent with longstanding Department interpretation and practice, this limitation will have real and significant impact on the access of some students to their education.

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[196] VAWA Final Rule, at 62786.
[197] 2016 Handbook, at pp. 8-16 (emphasis in original).
[198] *Compare King v. Board of Control of Eastern Michigan University*, 221 F.Supp. 2d 783 (E.D. Mich. 2002) with *Mattingly v. Univ. of Louisville*, 2006 WL 2178032 (W.D. Ky. July 28, 2006) and *Phillips v. St. George's University*, 2007 WL 3407728 (E.D.N.Y. Nov. 15, 2007). For more detail, s*ee* Robert J. Aalberts, Chad Marzen, and Darren Prum, *Studying is Dangerous? Possible Federal Remedies for Study Abroad Liability*, 41 J. OF COLLEGE AND UNIV. L. 189 (2015); Joseph Storch and Natalie Mello, Reporting on Student Safety and Security Abroad: Legal Requirements and Best Practices, Conference Paper, National Association of College and University Attorneys Annual Conference (2015), *available at* https://system.suny.edu/media/suny/content-assets/documents/compliance/NACUA-Mello-and-Storch.pdf.
[199] Title IX Proposed Regulations, at 61496.

Based on the plain language of the Department's Proposed Regulations, if 10 students of an educational institution go on an institution-sponsored and run study abroad trip to fulfill a requirement of their major at the institution, and the three female participants disclose that they have been repeatedly raped, harassed and sexually assaulted by an institution-employed chaperone (no male students report this experience), hired to attend this program and supervise students, and due to the repeated harassment by an institution employee, those three students leave the international program, thus derailing their ability to complete their major at their home institution in the United States, and causing all three to drop out of their institution and incur significant debt, **if the institution takes no action, those students—whose access to education at home and abroad was barred by the action aimed solely at females—would have absolutely no recourse to OCR under Title IX, the law charged with prohibiting restrictions of access to education on the basis of sex.** We can see no policy reason to support this change and believe that such a scenario is not impossible to imagine (indeed similar scenarios have been reported on distance education trips). At best, we will see confusion in Reporting Individuals between the requirements of Title IX, the Clery Act, and state laws such as Education Law Article 129-B.

The Department's Intent on Off Campus Programs Is Confusing and Inconsistent with the Clery Act

The Department, in significantly limiting Title IX requirements to disclosures of incidents that occur on campus or off campus on institution programs or activities includes some language around Greek letter organization housing and other off campus activities.[200] In addition to being inconsistent with the Clery Act response requirements as added by the 2013 VAWA amendments, the standards are inconsistent with the Clery Act crime reporting definitions of On Campus, Non-Campus and Public Property,[201] and will likely cause additional confusion as the Department adds yet one more set of geographic demarcating rules.

Further, the Department's discussion of Greek letter association housing will likely have an impact on the relationship of some institutions to those organizations. Institutions that are incentivized to reduce their obligations under Title IX (and we do not count the State University of New York among this group), may be incentivized to reduce their oversight of such housing so violations occurring there are not covered under these Proposed Regulations.

Under the prior OCR interpretations, institutions would be required to take action if incidents disclosed there could limit access to education, regardless of the level of oversight of the group. Further, under the Clery Act, analogous sexual assault crimes *might* be reported if they occurred at Greek letter housing, but only, per the Department's definition, if the house was "owned or controlled by a student organization that is officially recognized."[202] The limiting factor here is that the deed or lease would have to be held *by the organization*, since the Department also declares that "[p]rivate homes and businesses are not included."[203] Therefore if individual members of a recognized organization (Greek letter or otherwise) live in a house and

[200] Title IX Proposed Regulations, at 61468.
[201] VAWA Final Rule, at 62783-62784.
[202] 2016 Handbook, at 2-18.
[203] 2016 Handbook, at 2-13.

they (or their parents) are on the deed or lease, it would not be considered non-campus property. This definition is inconsistent with the Department's new regime based on a reading of selected case law that could indicate whether a recognized student organization's house would or would not be considered to be a program or activity under these new Title IX standards. At best, this is confusing and inconsistent with longstanding Clery Act geographic definitions. At worst, it would incentivize some institutions to either no longer recognize Greek letter associations, or reduce their recognition so that it would not meet the tests drawn from the selected cases in the Proposed Regulations.[204] But there are very good reasons for the Department to *incentivize* such relationships. Recognition can come with requirements such as mandatory insurance, risk management standards and, most importantly, training requirements. Not only could such training requirements reduce the incidents of sexual harassment and sexual assault,[205] but it could also reduce the incidents of hazing, educate about the safe use of alcohol, assist in suicide reduction, and other important topics. Disincentivizing engagement with these student populations, even slightly, may lead some institutions to forego these beneficial educational programs, increasing risks for certain students.

ii. §106.44 (a) and (b) – "Safe Harbor"

SUNY has significant concerns with the "safe harbor" provision the Department has included in its Proposed Regulations. The Proposed Regulations create a significant imbalance in rights for Reporting Individuals and Respondents, and do not follow the spirit of Title IX. In truth, the Proposed Regulations provide a "partial" safe harbor—safe harbor from accusations of Title IX violations made by Reporting Individuals but elevated exposure to Title IX violation accusations made by Respondents.

The Safe Harbor Provisions Provide Only Partial Safe Harbor, Elevating Rights of Respondents over Those Traditionally Protected By Title IX

In its Proposed Regulations, the Department writes that institutions will not be found to be deliberately indifferent and, thus, out of compliance with Title IX in responding to complaints unless their actions are "clearly unreasonable in light of the known circumstances"[206] and the "Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient merely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence."[207] The Department separately refers to this as a "safe harbor."[208] But the Department only seeks to shield institutions from liability from failing those who directly experience sexual harassment or sexual violence. These are, to be clear, the people that Title IX was written to protect.

[204] Title IX Proposed Regulations, at 61468.
[205] For a particularly useful example, *see* Binghamton University: State University of New York, 20:1 Sexual Assault Prevention; 20:1 Bystander Intervention, *available at* https://www.binghamton.edu/hpps/students/peer-education/index.html.
[206] Title IX Proposed Regulations, at 61497.
[207] Title IX Proposed Regulations, at 61497.
[208] Title IX Proposed Regulations, at 61469.

In considering the incredibly detailed due process requirements imposed by the Department on public and private institutions of education, requirements that are, in total, far beyond what any statute or court case in any jurisdiction have ever required of a disciplinary process, the Department invades upon the measured and considered due process and policy balance that public and private institutions carefully apply to their policies and practices, and wholesale replaces local control with a top down one-size-fits-all set of standards issued from what the Secretary of Education called "the heavy hand of Washington."[209] The Department admits in the preamble that these due process requirements go beyond what case law would require of institutions.[210] As the Secretary of Education once criticized, this is an example of "the Department insist[ing] it knew better than those who walk side-by-side with students every day."[211] The Department in its Preamble, at least in terms of reducing liability for failing to serve a Reporting Individual, writes that it believes the narrowed standard of obligation

> …holds recipients accountable without depriving them of legitimate and necessary flexibility to make disciplinary decisions and to provide supportive measures that might be necessary in response to sexual harassment. Moreover, the Department believes that teachers and local school leaders with unique knowledge of the school culture and student body are best positioned to make disciplinary decisions; thus, unless the recipient's response to sexual harassment is clearly unreasonable in light of known circumstances, the Department will not second guess such decisions. In fact, the Court observed in *Davis* that courts must not second guess recipients' disciplinary decisions. As a matter of policy, the Department believes that it would be equally wrong for it to second guess recipients' disciplinary decisions through the administrative enforcement process.[212]

Later, the Department insists that its "intent is to balance the need to establish procedural safeguards providing a fair process for all parties with recognition that a recipient needs flexibility to employ grievance procedures that work best for the recipient's educational environment."[213] SUNY again appreciates the Department's acknowledgement of the expertise that exists on our campuses and in our states for how to address harassment and violence in a balanced, thoughtful manner.

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[209] Remarks of Secretary of Education Betsy DeVos, George Mason University (Sep. 7, 2017), *available at* https://www.washingtonpost.com/news/grade-point/wp/2017/09/07/transcript-betsy-devoss-remarks-on-campus-sexual-assault/?noredirect=on&utm_term=.037d88f26620.

[210] Title IX Proposed Regulations, at 61469. "Recognizing that the Department has broad authority under the Title IX statute to issue regulations that effectuate the provisions of Title IX, the Department is retaining and proposes to add in the proposed regulation provisions that would clarify that, in addition to a general deliberate indifference standard, schools must take other actions that courts do not require in private litigation under Title IX (e.g., requiring a designated Title IX Coordinator, requiring written grievance procedures, describing the supportive measures that a non-deliberatively indifferent response may require, requiring a school to investigate and adjudicate formal complaints, and other requirements found in proposed §§ 106.8, **106.44, and 106.45"**). 106.44 is the safe harbor section. 106.45 list due process obligations.

[211] Title IX Proposed Regulations, at 61469.

[212] Title IX Proposed Regulations, at 61468.

[213] Title IX Proposed Regulations, at 61472.

So it is curious that, while the Department offers safe harbor from a Title IX violation finding for failing to serve a Reporting Individual, it specifically *disclaims* any safe harbor for failing to follow the detailed due process obligations the Department would impose upon institutions. The Department calls for institutional policies to have the "basic requirement" to "treat complainants and Respondents equitably."[214] The Department admits that "OCR's role is not to conduct a de novo review of the recipient's investigation and determination of responsibility for a particular Respondent. Rather, OCR's role is to determine whether a recipient has complied with Title IX and its implementing regulations."[215] To that end, with local control and minimal impact as its goal, the Department states that "OCR will not find a recipient to have violated Title IX or this part solely because OCR may have weighed the evidence differently in a given case. The Department believes it is important to include this provision in the regulations to provide notice and transparency to recipients about OCR's role and standard of review in enforcing Title IX."[216]

But even as it calls for institutions to treat Reporting Individuals and Respondents equitably as a basic part of their own procedures, OCR will only provide such local control and a light bureaucratic touch in cases where a Respondent has been found *not responsible*. Incredibly, on the same page as these adulatory statements of flexibility and local control of the process by institutions that are closest to the students, the Department firmly states that "[t[his provision does not, however, preclude OCR from requiring a recipient's determination of responsibility to be set aside if the recipient did not comply with proposed § 106.45."[217] No standards are set for such an invasive overturning of a determination made by an institution after going through its process. Ostensibly, OCR could find a minor violation of the detailed due process requirements of the regulations and reverse a finding of responsibility. Yet even with a finding of gross or even malicious violations that lead to a *non-responsibility finding*, an OCR investigator would be powerless to do anything aside from closing the file and moving on.

This inequitable and unbalanced process will certainly lead to more administrative litigation filed by Respondents. What attorney for a Respondent found responsible after a hearing *would not* file with OCR on the off chance that they can point out a major or minor process violation and have an OCR attorney in Washington or their region completely reverse the finding against their client? In filing, the only possibilities are that nothing will happen or their case will be overturned on this new OCR appeal, meaning their client will be considered not responsible, regardless of institutional policy, practices, and the weight of the evidence at the institution level. Frankly, it might be ineffective assistance of counsel *not* to make such a filing inasmuch as it is free, does not meet the current vexatious standards of the Case Processing Manual and could only have positive results for their Respondent client. OCR could become, in effect, one more level of appeal for Respondents (and only Respondents) hoping to have a determination of responsibility overturned.

Like many aspects of these Proposed Regulations, such a one-sided application has no support in statute. But more so, it is hard to imagine the framers of Title IX hoping that OCR's

[214] Title IX Proposed Regulations, at 61497.
[215] Title IX Proposed Regulations, at 61471.
[216] Title IX Proposed Regulations, at 61471.
[217] Title IX Proposed Regulations, at 61471.

role would be reduced to closing cases of harassment and assault filed by Reporting Individuals who directly experienced that harm and believed their access to education was limited or denied, while serving as a free appeals board for Respondents so credibly accused that they were found responsible by neutral hearing officers after an institutional process.

iii. §106.44(b)(2) – Multiple Complainants/Confidentiality

SUNY is concerned about the Proposed Regulations' mandate to always investigate multiple complainants against the same individual—not because of the requirement to investigate, but because of the impact of other provisions on such a requirement—and wishes to raise some of the issues this new requirement will cause with confidentiality to Reporting Individuals (we later detail harm these provisions will cause to Respondents).

Harm to Reporting Individuals in the Department's Proposed Regulations Regarding Confidentiality and Reversal of Course on Previous Guidance

SUNY opposes the Proposed Regulations on the basis that they harm Reporting Individuals by not following previous precedent in regard to confidentiality. In 2014, the Department called on institutions to protect the confidentiality of Reporting Individuals, "even if the victim does not specifically request confidentiality."[218] The Department adopted the 2013 VAWA amendment to the Clery Act confidentiality provisions, which also govern cases of sexual assault, and which include name and contact information.[219] The issue here is that the Department has changed course in these Proposed Regulations, and now expects recipients to release the names of Reporting Individuals to a Respondent in the notice process if the Reporting Individual participates or if there are two or more disclosures and the Title IX Coordinator is obligated to commence the process, even if both individuals decline to be involved in an investigation.[220] This could cause significant issues in the case where one individual is the subject of multiple complaints and a Title IX coordinator does not have enough information to open an investigation. It would mean that individuals who do not want to be involved would then have their names revealed in the notice, but if they still do not participate, will likely see a finding of non-responsibility against the Respondent which could then nullify any future involvement by the individuals if more reporters come forward later. This would certainly chill reporting and cause significant problems for investigations at recipient schools going forward.

Unfortunately, higher education and K-12 have seen their share of serial violators, both among students and employees. If two Reporting Individuals disclose assault or harassment by the same person but decline to participate in any way, the Title IX Coordinator would be obligated to start an investigation, reveal the identities of the two Reporting Individuals to the Accused (now a Respondent) in the notice, and then, if they still refuse to participate, ultimately find the Accused/Respondent not responsible. Under public college due process obligations, it would be very hard if not impossible to then use these first two disclosures in the investigation and adjudication of reports three and four. If those Reporting Individuals in turn do not participate, the Respondent will have another "get out of jail free" card and be free to offend

[218] 2016 Handbook at p. 8-12; VAWA Final Rule, at 62785.
[219] 2016 Handbook at pp. 8-12–8-13.
[220] Title IX Proposed Regulations, at 61474.

again and again until someone is willing to testify and be subject to cross-examination. For offenders who target vulnerable populations—children; immigrants; those dependents upon the harasser for employment, scholarship funds or work study or a letter of recommendation in their chosen field; individuals with disabilities; transgender and gender non-binary—the likelihood of willingness to stand for cross-examination is reduced significantly. The offender will be free to continue and the institution would be powerless under processes subject to these Proposed Regulations, even as, in cases of sexual assault, the Proposed Regulations would require institutions to ignore the confidentiality provisions of VAWA and New York State law.

For the foregoing reason, SUNY requests the Proposed Regulations be withdrawn due to the harm it will cause students and institutions attempting to investigate multiple complaints against one individual.

iv. §106.44(c) - Emergency Removal

SUNY opposes the Department's Proposed Regulations that dictate a new process for emergency removal on the basis that it does not actually track the Clery Act language as the Department claims, would inadvertently cause due process violations with the way the provisions are currently written, and would cause SUNY to potentially violate New York State law.

The Department's Emergency Removal Provision Lacks Crucial Context

Under proposed section 106.44(c), recipients would have the authority to conduct an "emergency removal" of Respondents based on an individualized threat assessment, provided that the Respondent had the opportunity to challenge the decision "immediately following the removal." While the Department writes that this language tracks the Clery Act regulations at 34 CFR 668.46(g), the corresponding Clery Act provision says nothing about the process owed to Respondents subject to an interim suspension. Courts hold that the due process required under an interim suspension is less elaborate than necessary during a full hearing.[221] In turn, New York Education Law Article 129-B provides a detailed framework by which campus officials may conduct an individualized threat assessment, order an interim suspension, and provide due process to the Respondent.

The Proposed Regulations, however, harbor a clear ambiguity in requiring an opportunity to challenge the suspension "immediately" following the removal. It is unclear if the "immediate" challenge must occur minutes, hours, one day, or several days after the suspension. A requirement that the challenge occur minutes after the suspension (a plain language interpretation of "immediately") could jeopardize the safety of the Reporting Individual and the community, since the very point of an interim suspension is to remove a known risk from campus. Conversely, requiring an immediate hearing could undermine the Respondent's due process rights, because the Respondent might not be physically present on campus when the interim suspension is issued. This ambiguity will subject recipients to potential litigation by both Reporting Individuals and Respondents, seeking to parse the definition of "immediate," with no corresponding benefit.

[221] *Haidak v. Univ. of Mass. at Amherst*, 299 F.Supp.3d 242, 265-66 (D. Mass 2018).

C. § 106.45 – Grievance procedures for formal complaints of sexual harassment

Section C of this part of the comment letter outlines SUNY's specific concerns with § 106.45 of the Department's Proposed Regulations. Subsection (i) outlines issues with the lack of definition of "bias." Subsection (ii) outlines issues with lack of clarity on the phrase "delay caused solely by administrative needs." Subsection (iii) outlines issues with the Department's changes in what standard of evidence may be used to determine responsibility and specifically raises that the Department's current Proposed Regulations are in direct contravention to Congressional intent of the 2013 VAWA Amendments to the Clery Act. Subsection (iv) outlines specific issues with the notice of allegations, including the ambiguities created with no definition of "sufficient time," and the issue that the notice the Department is requiring through the Proposed Regulations is more detailed than notice given in criminal adjudications. Subsection (v) discusses the confusion caused by the differences in approach between K-12 and higher education. Subsection (vi) outlines SUNY's issues regarding cross-examination and advisor of choice, including that this will completely eliminate any cost-savings the Department claims. Subsection (vii) outlines issues related to allowing access to evidence that is not relevant. Subsection (viii) outlines issues related to the investigative report requirements that the Department has mandated. Subsection (ix) discusses SUNY's concerns with the Department's appeals provision in the Proposed Regulations.

i. §106.45(b)(1)(iii) – No conflicts of interest or bias of coordinators, investigators and decision makers

Lack of Definition of "Bias" by the Department Will Cause Confusion

Proposed section 106.45(b)(1)(iii) would prohibit "any individual designated by a recipient as a coordinator, investigator, or decision-maker" from having a bias or conflict of interest for or against Reporting Individuals or Respondents. This proposal is similar, albeit broader in scope, to the Department's regulations enacting the 2013 VAWA Amendments to the Clery Act mandating that "proceedings" be "[c]onducted by officials who do not have a conflict of interest or bias for or against the accuser or the accused."[222]

Without a clearer definition of "conflict of interest" or "bias," and in light of the other confusing and conflicting aspects of these Proposed Regulations, institutions will have difficulty implementing this mandate. After all, the Proposed Regulations suggest a reversal of the judicial presumption that campus decision-makers are free of bias. To overcome this presumption in Title IX litigation, courts require proof that a conduct official had an "actual" bias against the party because of the party's sex, and that the discriminatory actions flowed from that actual sex-based bias. As the Seventh Circuit Court of Appeals held, "[t]he presumption is a rebuttable one, but the burden of rebuttal is heavy indeed: To carry that burden, the party claiming bias must lay a specific foundation of prejudice or prejudgment, such that the probability of actual bias is too high to be constitutionally tolerable."[223]

[222] 34 C.F.R. 668.46(k)(3)(i)(C).
[223] *Hess v. Bd. of Trustees of S. Illinois Univ.*, 839 F.3d 668, 675 (7th Cir. 2016).

The Proposed Regulations open the door to numerous claims that undermine the presumption of honesty in campus proceedings. For example, litigants in Title IX cases commonly argue that campus disciplinary officials were biased or conflicted because of their research agenda or record of pro-victim advocacy. Yet the Department has previously indicated that a party could not support a claim of "bias" under Section 668.46(k)(3)(i) of VAWA based on the bare allegation that "ideologically inspired people dominate the pool of available participants" in a proceeding arising from sexual misconduct.[224] Federal courts of appeal, including the Sixth Circuit, likewise agree that "being a feminist, being affiliated with a gender-studies program, or researching sexual assault does not support a reasonable inference than an individual is biased against men."[225] The present proposal offers no clarity on whether the Department would brook such frivolous claims.

The plain text of the Proposed Regulations also does not illuminate whether the Department will consider an official's holding of two or more roles in the conduct process to be *per se* proof of bias or conflict of interest. Small community colleges, in particular, have limited staff resources to investigate and adjudicate incidents of campus sexual harassment and violence. If the Department intends to prohibit any overlap in responsibilities among the "coordinator, investigator, or decision-maker," it must make that intention clear. Such a rule would provide due process protections exceeding those required by federal and state courts, including the Sixth Circuit.[226] Courts have held that a decision-maker's being part of the initial investigation of the incident and the initiation of the conduct proceeding is not, in and of itself, proof of bias.[227] Declaring the holding of dual roles as a *per se* due process violation will strain already limited resources, even as courts have condoned the practice absent clear evidence of "actual" bias.

Finally, these Proposed Regulations cloud efforts to bring trauma-informed practice to campus disciplinary proceedings. To address the neurobiological impact of trauma on Reporting Individuals' memories, many colleges and universities now require conduct officials to obtain training in trauma-informed practice. The VAWA amendments to the Clery Act require officials to be trained annually and several states, including New York, California, and Illinois, mandate trauma-informed training for campus officials who respond to sexual assault.[228] Title IX litigants have claimed that trauma-informed practice constitutes a form of sex discrimination in favor of Reporting Individuals.[229] Courts generally reject this argument, but the Department's lack of clarity promises further litigation in the future.[230]

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[224] *See*, VAWA Final Rule, at 62775.
[225] *Doe v. Miami University*, 882 F.3d 579, 593 n. 6 (6th Cir. 2018).
[226] *See*, *Doe v. Miami University*, 882 F.3d at 601 ("an individual's dual roles do not per se disqualify him or her from being an impartial arbiter").
[227] *Doe v. University of South Alabama*, 2017 WL 3974997 at * 4 (S.D. Alabama, 2017), citing *Nash v. Auburn Univ.*, 812 F.2d 655, 666 (11th Cir. 1987); *Hess v. Bd. of Trs. of S. Ill. Univ.*, 839 F.3d 668, 675 (7th Cir. 2016).
[228] Jeffrey J. Nolan, "Promoting Fairness in Trauma-Informed Investigation Training," NACUA Notes, vol. 16, no. 5, p. 3 (Feb. 8, 2018).
[229] *E.g.*, *Doe v. University of Oregon*, 2018 WL 1474531 (D. Oregon, March 26, 2018).
[230] *Rossley v. Drake Univ.*, 2018 WL 5307625 at *17 (S.D. Iowa, 2018), citing *Doe v. Univ. of Colo., Boulder ex rel. Bd. of Regents of Univ. of Colo.*, 255 F.Supp.3d 1064, 1075, 1076 (D. Colo. 2017).

ii. §106.45(b)(1)(v) – Reasonably prompt timeframes for conclusion of process

SUNY opposes the Department's Proposed Regulations specifically because of the language around delays caused solely by administrative needs. SUNY can demonstrate multiple situations in which this would be unworkable and untenable.

The Department's Lack of Clarity on "Delay Caused Solely by Administrative Needs" Causes Significant Issues in Interpretation for Recipients

According to proposed section 106.45(b)(1)(v), the Department recognizes that grievance procedures need only provide "reasonably prompt timeframes" and may allow for temporary delays and delays based on "good cause." While we agree that some flexibility is necessary, we are confused by the Department's contradictory interpretation of the Proposed Regulations as meaning that "delays caused solely by administrative needs are insufficient to satisfy this standard."[231] The Department must further clarify what "administrative needs" would not constitute good cause for delay.

For example, it is not uncommon for a SUNY campus in New York's "Snow Belt" to delay or cancel classes because of dangerous winter weather. Under that circumstance, parties, witnesses, and disciplinary officials could not be expected to attend a scheduled meeting or hearing in the proceeding. Yet the Proposed Regulations would offer grounds for a party to claim a due process violation based on a recipient's "administrative needs" decision to delay a hearing to protect the safety of its students and staff.

iii. §106.45(b)(1)(vii) – Standard of evidence described to determine responsibility

SUNY takes issue with the constraints the Department has put around the use of preponderance of the evidence because it reverses course from the Congressional intent of the 2013 VAWA amendments to the Clery Act.

The 2013 VAWA Amendments to the Clery Act Are Inconsistent With The Proposed Regulations on What Standard of Evidence Should be used in Campus Conduct Processes

In its Final Rule implementing the Violence Against Women Act amendments to the Clery Act, the Department allowed institutions to select between the preponderance of the evidence standard and the clear and convincing evidence standard. The Department allowed institutions to select in their discretion, without emphasis on one standard over the other or challenges to implementing the chosen standard. The Department received comments asking that it require the "'clear and convincing' standard of evidence...because this standard better safeguards due process."[232] But the Department demurred writing that an institution "can comply

[231] Title IX Proposed Regulations, at 61473.
[232] *Id.*

with both Title IX and the Clery Act by using a preponderance of the evidence standard in disciplinary proceedings."[233]

However, the Department's instant Proposed Regulations instead set a standard that is incongruent with what was previously stated in the VAWA Final Rule. Now, the Department is putting significant bounds on when preponderance of the evidence can be used versus clear and convincing evidence, with a clear intent to push recipients to use the higher standard. The Department states:

> ...in reaching a determination regarding responsibility, the recipient must apply either the preponderance of the evidence standard or the clear and convincing evidence standard. The recipient may, however, employ the preponderance of the evidence standard only if the recipient uses that standard for conduct code violations that do not involve sexual harassment but carry the same maximum disciplinary sanction. The recipient must also apply the same standard of evidence for complaints against students as it does for complaints against employees, including faculty.[234]

This is a reversal of previous policy without any explanation from the Department other than the fact that campus conduct processes are not the same as civil litigation.[235] This, frankly is not enough of a showing to warrant such a drastic reversal in course. The Department has never contended before now that campus conduct processes must hold the same level of "process" as a lawsuit in federal court, and it is clear that was never Congress' intent based on much of the commentary in the 2013 VAWA Final Rule. The tying of this standard to those in place for employees and faculty is also arbitrary and capricious; such standards are often collectively bargained and tailored specifically to the circumstances of particular employees. There was no sufficient basis given for tying a standard for student discipline to that of employee or faculty discipline. Again, the Department is imposing a one-size fits all approach on colleges without concern for the nuances and considerations that may be at play. For the foregoing reasons, SUNY requests that the Proposed Regulations be withdrawn.

iv. §106.45(b)(2)(i)(B) - Notice of allegations upon receipt of formal complaint

SUNY takes issue with this specific section of the Department's Proposed Regulations because there is now a major ambiguity regarding what constitutes "sufficient time," and because the notice the Department now requires is far more detailed than what is required in criminal investigations.

[233] *Id.*
[234] Title IX Proposed Regulations, at 61477.
[235] Title IX Proposed Regulations, at 61477.

"Sufficient Time" Creates a Major Ambiguity in Interpretation

The Proposed Regulations require written notice to the parties of all hearings, investigative interviews, or other meetings with a party, "with sufficient time for the party to prepare to participate."[236] We are concerned that requiring "sufficient time" for preparation creates a major ambiguity in Title IX proceedings. It will inevitably be exploited during the proceeding to create undue delays, and be deployed in post-hearing litigation and OCR investigations as a due process wedge. Campus codes of conduct generally limit a party's right to request adjournments to several days, absent good cause, because of the risk that a party will delay the proceeding. Such delays prejudice the rights of the parties to obtain a fair hearing. The "sufficient time" clause leaves the door open for unwarranted legal maneuvers that will compromise the due process rights of the parties. Therefore, SUNY requests that the Proposed Regulations be withdrawn due to the ambiguities created by this provision.

Notice is More Detailed than what is Required in Criminal Investigations

Not only does dictating the terms of the required notice infringe on SUNY's academic freedom under the First Amendment, but its structure undermines the ability of campuses to effectively adjudicate cases of sexual harassment and sexual violence.

As indicated in Part I of this letter, the Department has not offered a specific showing for why it must upset its longstanding interpretation of Title IX in favor of prescriptive, top-down policies that conflict with the text and purpose of the statute. Nor has the Department justified why the level of due process provided to Respondents, who face expulsion or suspension from voluntary higher education, is higher than the notice provided to criminal defendants, who face the loss of their liberty (or in some states for some crimes, life).

As the Secretary is aware, campus investigations of sexual violence often run concurrently with the criminal justice process. Campuses coordinate how they will question the Respondent, Reporting Individual, and witnesses with police to ensure a fair and effective process. Here, the Proposed Regulations would require, "upon receipt of a formal complaint," that the Respondent be issued a detailed notice of the charges, and "sufficient time to prepare before any initial interview."[237] A campus investigator could not even begin to question the Respondent until the Respondent knew of the charges and had "sufficient time to prepare," which presumably would involve consultation with an advisor or attorney.

This procedure elevates the notice rights of the Respondent well beyond any notice rights afforded to an individual suspected of committing a crime. We are not aware of any jurisdiction that prohibits a police officer from questioning an individual without first obtaining an indictment (the closest analog to a "formal complaint"), providing that individual with the indictment, and then giving the individual "sufficient time to prepare" before questioning. Nor can we imagine that U.S. Supreme Court jurisprudence would support such fetters on policing. Police may approach a suspect and start questioning right away. They can even lie to the suspect

[236] Title IX Proposed Regulations, at 61498.
[237] Title IX Proposed Regulations, at 61498.

or hide their identity as a police officer. With certain exceptions, evidence obtained in this manner may be used in the investigation and prosecution. The Department must make a strong case under *Mathews v. Eldridge*[238] to support such a drastic imbalance in the due process rights of criminal defendants and administrative Respondents, and has not done so anywhere in the body of these proposals. Further, the Department would need to show that this additional notice is required to ameliorate discrimination on the basis of sex.

Not only is this proposal Constitutionally-unsound, but it will have several pernicious impacts on campus investigations of sexual violence. First, it will interfere with the ability of campus officials to conduct concurrent investigations with police. Take a case where the Reporting Individual goes to the Title IX office, rather than the police, to report a sexual assault. A formal complaint is drafted. Then, the Reporting Individual decides to file a report with the local police. Immediately upon receiving the report, a police officer goes to the Respondent's residence hall and questions the Respondent. Then, the Title IX coordinator sends the required notice to the Respondent. The Respondent has now been questioned about the charges without receiving the necessary notice and time to prepare. Has the process now been tainted by a due process violation, such that the campus cannot move forward on its internal, federally-required investigation? This amounts to a fundamental violation of the Reporting Individual's Title IX rights, particularly since the Reporting Individual has no way of anticipating how these overlapping enforcement entities will pursue the complaint.

Second, by including a statement prohibiting "knowingly making false statements or knowingly submitting false information during the grievance process,"[239] the required notice may discourage Reporting Individuals and Respondents from participating in the process, out of fear that their statements may be used against them. While most colleges already have such policies detailing consequences for false statements, by requiring specific language in the notice, the Proposed Regulations will send a specific but unnecessary message to students that may deter participation. Respondents could use this language to demand charges be brought against Reporting Individuals for submitting false statements and vice versa. By discouraging reporting, the required notice promises to make the grievance process less effective, less fair, and not impartial, in contradiction of the Proposed Regulations and the Department's longstanding guidance regarding Title IX. As with other aspects of these Proposed Regulations, there is no showing that false statements impact individuals differently on the basis of gender, occur differently from different genders, or that this specific statement will ameliorate inequality on the basis of gender.

v. §106.45(b)(3)(vi) - Elementary and secondary schools – may require a live hearing

SUNY opposes the Department's Proposed Regulations on the basis that they create extreme confusion for recipients, Reporting Individuals and Respondents, and give lower due process rights to individuals who deserve a higher amount of due process for a mandatory property right.

[238] 424 U.S. 319 (1976).
[239] Title IX Proposed Regulations, at 61474, 61498.

Differences in Approach Between K-12 and Higher Education Will Lead to Needless Confusion

These Proposed Regulations draw bright line distinctions between K-12 and college and university education in a manner that does not necessary reflect the realities of enrollment and education within the State University of New York and other higher education institutions and systems. Proposed Regulations §106.45(b)(3)(vi) and (vii) establish significantly different systems for adjudicating allegations of harassment and assault. At the elementary and secondary level, institutions may or may not require a live hearing. Questions must be asked of both parties, including follow-up questions, but they need not be conducted live and there is no role for advisors (including attorneys) of the parties to cross-examine the other party.[240] For institutions of higher education, the Proposed Regulations mandate a live hearing that must allow for cross-examination of parties by the advisor of choice of the other party. Further, if a party does not have an advisor, the institution must provide an advisor "aligned with that party to conduct cross-examination." If the party or witness chooses not to submit to cross-examination, the "decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility."[241] In other words, the expectations and experiences of student participants in a K-12 and higher education adjudication process will be markedly different.

Modern education does not necessarily match the neat lines and standardized approaches of yesteryear. Colleges and high schools have developed myriad programs that include dual enrollment, summer and intersession college learning, high school laboratory schools on college campuses, colleges operating K-12 charter schools, and situations as simple as high school students who enroll in college classes. Further, colleges regularly return their students to elementary and secondary schools as student teachers and related experience based learning assignments.

By maintaining strict differences in the process between K-12 and higher education, the Department will necessarily create confusing situations where students will not know precisely which system—and accompanying rights—apply in their case. Do the rights run with the Reporting Individual or the Respondent? What if one Reporting Individual in a multi-report case is a high school student and the other a college student? What if a college student discloses harassment by a high school student? What of a high school student disclosing harassment or an assault in a college class or a dual-enrollment program? Is it different if the Respondent is a fellow high school student dual-enrolled in the college class? What if the Respondent is an employee of the high school? Or an employee of the College? What of a college investigating whether one of its students committed harassment against a high school student or students in a student teaching assignment? What if multiple elementary school students report assault by a college-level student teacher? Must the Title IX Coordinator at the college move forward with a report, identify the elementary school students to the Respondent student teacher, but then find the Respondent not in violation if the children refuse to be subjected to cross-examination by the Respondent's advisor of choice (after all, none of their prior statements would be admissible in the college process if they refuse to be cross-examined)? Must the college then return that

[240] Title IX Proposed Regulations, at 61498 (§106.45(b)(3)(vi)).
[241] Title IX Proposed Regulations, at 61498 (§106.45(b)(3)(vii)).

student teacher to a different elementary school, exposing additional children to harassment or violence, since they have been found not responsible in the prescribed Title IX process?

In any of these cases, one is hard pressed to determine from the plain language of the Proposed Regulations which set of rules and responsibilities apply, or whether they only partly apply. While this will cause confusion among education professionals and lead to significant litigation costs defending various permutations in lawsuits filed by Reporting Individuals and Respondents at different education levels, it will be even more confusing for students, who will not know whether and to whom to report, and what rights and challenges they will face in reporting. In a society in which reporting harassment and assault at all levels—from elementary school through professional employees—is depressed by the challenges that face those who disclose, this confusing labyrinth of rules will further depress reporting and disclosure among students in dual enrollment and other programs where the lines between high school and college are simply not as clear cut as these Proposed Regulations would imagine. We urge the Department to follow longstanding practice (including the 2001 Notice and Comment Dear Colleague Letter, and 2011, 2014, 2015, and 2017 Dear Colleague Letters) and set uniform, high-level, standards equally applicable to elementary, secondary, and post-secondary education systems.

We can find no evidence offered in the Preamble for drawing such a bright line between K-12 and higher education. Nor do we see any evidence that the bright line is drawn to address and redress sex discrimination in education. This appears to be an arbitrary line drawn between high school seniors and college freshmen, based on an outdated and inaccurate assumption of the age and competency of *all* K-12 and *all* college students, without any evidence offered. But there is no such clear line of the maturity level of students that would support a clear line of different processes. The Department devotes a mere 59 words—four of which are "may" or "most" indicating likelihood, but not certainty—to support a distinction that will have significant impact on millions of K-12, college, and mixed jurisdiction Reporting Individuals and Respondents. "Because **most** parties and **many** witnesses are minors in the elementary and secondary school context, sensitivities associated with age and developmental ability **may** outweigh the benefits of cross-examination at a live hearing...In contrast, the Department has determined that at institutions of higher education, where **most** parties and witnesses are adults, grievance procedures must include live cross-examination at a hearing."[242]

Respectfully, *Mathews v. Eldridge*[243] and its progeny would require far more analysis before drawing hard line conclusions of the appropriate balance of due process during various processes. And even that would assume that the plain language of Title IX even provided jurisdiction to enact such narrow and detailed distinctions between important proceedings at various educational institutions (language we cannot find in the statute).

Further, we would note the interesting reversal of expectations for due process within K-12 and higher education. Elementary and secondary education is compulsory. It is a right guaranteed by federal law and state law in every jurisdiction in the United States. A young person of eligible age may seek public education *as a right*. Higher education is not a right under

[242] Title IX Proposed Regulations, at 61476 (emphasis added).
[243] 424 U.S. 319 (1976).

federal or state law. While some colleges are "open admission" offering admission to all qualified students, that still is not a legal requirement and those institutions may place academic and behavioral limitations on whom they admit. Colleges have First Amendment rights to determine, among other things, "who may be admitted to study."[244] It is clear that the property rights that accumulate in K-12 are greater than the property rights that accumulate in higher education as the K-12 rights are guaranteed by law. Concomitantly, any due process obligations imposed (if there was authority in the law to impose them) should be equal or greater in the compulsory K-12 sphere than in higher education since the deprivation would be of a right guaranteed in state law. Yet these Proposed Regulations invert the levels of due process requiring significantly more process in the lower property rights that apply in higher education than in the compulsory K-12.

vi. §106.45(b)(3)(vii) – Cross-Examination and Advisor of Choice

SUNY opposes the Department's Proposed Regulations regarding cross-examination and advisor of choice for numerous reasons. The Department's changes are an overreach that do not follow binding authority and will cause recipients skyrocketing costs. The Proposed Regulations will cause needless confusion in relation to cross-examination, and result in significant due process violations. The provisions relating to exclusion of all evidence relating to a party or witness if they refuse to subject themselves to cross-examination will create significant issues for recipients, Reporting Individuals and Respondents. Further, the Proposed Regulations are in direct conflict with the Congressional intent of the 2013 VAWA amendments to the Clery Act. Lastly, requiring on the spot detailed explanations for each such determination as to why evidence is excluded in a hearing is a higher standard than judges adhere to in civil and criminal adjudications in courts and will lengthen hearings while inevitably raising litigation costs.

Proposed Regulations on Cross-Examination are an Overreach by the Department, do not Follow Binding Authority and Will Skyrocket Costs for Recipients

Perhaps the Department's most overreaching proposal is its requirement that colleges and universities (but, puzzlingly, not K-12 institutions where attendance is a right under the law of every state) provide a live hearing and cross-examination by the advisor of choice for each party and provide advisors to students without one to conduct cross-examination on their behalf.[245] No court has ever required this level of due process for an accused party in a campus disciplinary proceeding. Neither the U.S. Supreme Court nor Congress have ever anticipated this mandate as a due process requirement. And such a policy is manifestly in error, as it will unduly complicate campus affairs, dramatically raise costs, and inflict trauma on Reporting Individuals and Respondents alike, without any corresponding benefit to seeking the truth.

Ostensibly, the Department acts according to its reading of case law emanating from one split Circuit Court decision. While we appreciate the Department's statement that "[t]he Proposed Regulations would help ensure that the obligations imposed on recipients fall within the scope of the civil rights law that Congress created," we object to its reservation that these

[244] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J, concurring).
[245] Title IX Proposed Regulations, at 61498 (section 106.45 (b)(3)(vii)).

regulations will, "*where persuasive*, align with relevant case law."[246] Case law must be followed in the jurisdictions covered by its courts, whether "persuasive" to Department staff or otherwise. While the Department enthusiastically cites a 2-1 decision of a Sixth Circuit panel, *Doe v. Baum*, on the issue of cross-examination, that decision only binds four states, is inconsistent with myriad decisions of other Circuits and state law (and even other Sixth Circuit decisions), and the decision itself does not demand the criminal justice-level procedures of the Proposed Regulations.[247]

To that point, federal courts of appeals have roundly rejected the Department's strained analogy between the student conduct and the criminal justice process. Justice Harry Blackmun, writing for the Eighth Circuit Court of Appeals, emphasized that "school regulations are not to be measured by the standards which prevail for the criminal law and for criminal procedure."[248] Courts understand that student discipline is part of the education process. When a student is removed from the academic community, the purpose is not punitive in the criminal law sense, but a determination that the student is not qualified to remain part of the community. Expelled students may suffer damaging effects, but they do not face imprisonment, fines, disenfranchisement, or probation.[249]

Frankly, there are Supreme Court decisions that require far different balances of due process in education discipline cases. Colleges and universities should not be required to ignore binding judicial precedent and separately enacted state law and federal law simply because current representatives of the Department find a recent 2-1 decision of one Circuit court more "persuasive." That is inconsistent with interpretations of federalism, administrative law, and the general rule of law.

Here, precedent is clear that cross-examination is not a constitutional requirement in campus conduct proceedings. The U.S. Supreme Court has never required it in such administrative settings; indeed, it held in *Goss v. Lopez* that "[n]o better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it."[250] The Court has never held that cross-examination is necessary under these circumstances to satisfy procedural due process.

In turn, the Second Circuit Court of Appeals, which governs SUNY institutions, holds that "the right to cross examine witnesses has not been considered an essential requirement of due process in school disciplinary proceedings."[251] Most recently, in *Doe v. Colgate University* (2019), the Second Circuit affirmed that a university's sexual misconduct hearing did not violate Title IX when it considered hearsay evidence and did not permit the Respondent to directly cross-examine the Reporting Individuals.[252] The court noted that the university permitted both

[246] Title IX Proposed Regulations, at 61465 (emphasis added).
[247] 903 F.3d 575, 581 (6th Cir. 2018).
[248] *Esteban v. Cent. Missouri State Coll.*, 415 F.2d 1077, 1090 (8th Cir. 1969).
[249] *See*, General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education (U.S. Dist. Ct., D. Missouri, 1968), p. 6.
[250] *Goss v. Lopez*, 419 U.S. 565, 580 (1975).
[251] *Winnick*, 460 F.2d at 549.
[252] *Doe v. Colgate Univ.*, 2019 WL 190515, at *8 (N.D.N.Y., Jan. 15, 2019) (Summary Order).

parties to submit questions to one another through the nonvoting chair of the hearing, as well as to submit questions to the Title IX investigator, and that neither party was allowed to directly cross-examine the other.[253] The court identified nothing in this procedure that violated the rights of the parties or demonstrated gender bias against men.[254]

The Department's proposal, moreover, exceeds anything required in the line of Sixth Circuit decisions referenced in *Doe v. Baum*. The Sixth Circuit does not require that campuses falling within its jurisdiction hold adversarial proceedings with cross-examination by the advisor of choice for each party in every case. Rather, it has identified that the "Supreme Court has declined to set out a universal rule and instead instructs lower courts to consider the parties' competing interests."[255] Applying *Goss v. Lopez* and the balancing test set forth in *Mathews v. Eldridge*, the Sixth Circuit holds that "when the university's determination turns on the credibility of the accuser, the accused, or witnesses, that hearing must include an opportunity for cross-examination."[256] The Sixth Circuit cautions, however, that the university need only provide "some form of cross-examination"[257] when credibility is at issue. There are many college disciplinary cases which are fact-specific but do not necessarily rely on credibility. Often the weight of the evidence is clear, or it is backstopped by video or other electronic evidence. Or a party has already admitted conduct and the only question is what sanction is appropriate. Going even beyond this Sixth Circuit case, the Proposed Regulations would seem to require that parties subject themselves to cross-examination when credibility is not at issue. Here there is much harm and no gain to the process.

We likewise note that the same Sixth Circuit just one year earlier declined to strike down a "circumscribed form of cross-examination" that "involves submitting written questions to the [ ] panelists."[258] Such trauma-informed questioning—directed through a panel, rather than against the other party—has become the norm among institutions of higher education, and was approved, without comment, by the Second Circuit in *Doe v. Colgate University*.[259] The Department acknowledges this state of practice and specifically allows this system elsewhere in the Proposed Regulations for investigations and adjudications in K-12.[260] Such a bright line comes without evidence and, indeed, is contrary to the evidence.

The Sixth Circuit also has never announced a *per se* rule akin to proposed section 106.45 (3)(vii) that a hearing board cannot consider an out-of-court statement by a witness who declines

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[253] *Id*.
[254] *Id*.
[255] *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).
[256] *Baum*, 903 F.3d, at 581.
[257] *Id*.
[258] *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 396-97 (6th Cir. 2017).
[259] Tamara Rice Lave, *A Critical Look at How Top Colleges and Universities are Adjudicating Sexual Assault*, 71 U. MIAMI L. REV. 377, 396 (2017) (survey of thirty-five highly-ranked colleges and universities determined that only six percent of surveyed institutions permitted traditional cross-examination, while fifty percent permitted questioning through the hearing panel); *Doe v. Colgate Univ.*, 2019 WL 190515, at *8 (N.D.N.Y., Jan. 15, 2019); *Yu v. Vassar Coll.*, 97 F. Supp. 3d 448, 465 (S.D.N.Y. 2015) (requirement that questions be asked through a hearing chair is procedurally adequate); *Doe v. Rensselaer Polytechnic Inst.*, No. 118CV1374FJSCFH, 2019 WL 181280, at *7 (N.D.N.Y. 2019) (same).
[260] Title IX Proposed Regulations, at 61498.

to be cross-examined. In fact, the Sixth Circuit held in *Doe v. University of Cincinnati* "that admission of hearsay evidence [at a school disciplinary proceeding] is not a denial of procedural due process."[261] Federal and state rules of evidence appropriate to courtrooms do not apply in campus disciplinary proceedings, and hearsay evidence may be admitted and considered to the extent it is relevant to the ultimate question of responsibility. The Department has not, and cannot, provide any statutory or judicial authority allowing it to mandate such rules of evidence for campus disciplinary proceedings.

Finally, as a matter of law, judicial precedent holds that cross-examination is not required in myriad civil court and administrative proceedings that can result in significant property and liberty deprivations. The U.S. Supreme Court has not announced a "blanket rejection by the Court of administrative reliance on hearsay irrespective of reliability and probative value," and holds that hearsay evidence may constitute substantial evidence supporting an administrative finding.[262] As the United States Court of Appeals for the District of Columbia Circuit holds, "[w]e have rejected a per se approach that brands evidence as insubstantial solely because it bears the hearsay label. . . . Instead, we evaluate the weight each item of hearsay should receive according to the item's truthfulness, reasonableness, and credibility."[263]

Administrators base fundamental *liberty* interests on hearsay evidence. Liberty interests are traditionally valued higher than property interests. Prison administrators, for example, may rely on hearsay evidence of a prisoner's alleged criminal activity within the prison to make a finding of responsibility that adds years to the prisoner's sentence.[264] Child welfare officials may also depend on hearsay to determine child custody if it is relevant and probative, particularly where the parent waives the right to cross-examine the child.[265] Thus, a video-recorded interview may be offered to establish proof of child sexual abuse, sufficient to remove a parent's visitation rights, where the parent raises no specific objection to the reliability of the evidence.[266]

Agencies may also rely on hearsay to decide other liberty and property interests. Cross-examination is not an absolute requirement in a Social Security Disability benefits case,[267] a hearing to revoke a police officer's duty disability payments,[268] an action to revoke a store's cigarette and lottery license,[269] a Coast Guard finding that a pilot negligently operated a boat,[270] a Department of Agriculture finding of animal abuse based on a four-year-old veterinary

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[261] *Univ. of Cincinnati*, 872 F.3d at 405 (internal quotation marks omitted.)
[262] *Richardson v. Perales*, 402 U.S. 389, 407 (1971).
[263] *Johnson v United States*, 628 F.2d 187, 190-91 (D.C. Cir. 1980) (internal citation omitted).
[264] *Wolff v. McDonnell*, 418 U.S. 539, 567–68 (1974); *Matter of Jehan Abdur-Raheem v. Mann*, 85 N.Y.2d 113 (N.Y. Ct. App. 1995).
[265] *In re J.D.C.*, 284 Kan. 155, 170 (Kan. 2007).
[266] *In re D.B.*, 947 A.2d 443, 450-51 (D.C. Cir. 2008).
[267] *Richardson v. Perales*, 402 U.S. 389, 402 (1971).
[268] *Delgado v. City of Milwaukee Employees' Retirement System/Annuity and Pension Bd.*, 268 Wis.2d 845 (Wisc. Ct. App. 2003).
[269] *Putnam Companies v. Shah*, 93 A.D.3d 1315, 941 N.Y.S.2d 432 (4th Dep't 2012), leave to appeal denied, 96 A.D.3d 1514, 945 N.Y.S.2d 587 (4th Dep't 2012) and leave to appeal denied, 19 N.Y.3d 811, 951 N.Y.S.2d 721, 976 N.E.2d 250 (N.Y. Ct. App. 2012).
[270] *Williams v United States Dept. of Transp.*, 781 F2d 1573 (11th Cir. 1986), Reh. Den., en banc, 794 F2d 687 (1986).

record,[271] or a Department of Environmental Protection decision to designate a waterway as a fishery.[272]

Limitations on cross-examination also apply in cases where individuals face the suspension or loss of employment or their professional licenses.[273] An administrative agency may support its termination decision on hearsay statements drafted by the terminated employee's superiors, as long as those statements bear the indicia of reliability.[274] A police officer contesting his termination does not necessarily have the right to cross-examine laboratory technicians who administered a positive drug test,[275] nor do physicians have the right to cross-examine adverse witnesses in license suspension hearings in a manner comparable to the criminal justice system.[276] This despite the fact that any of these processes affect significant property interests, if not liberty interests.

This discretion is derived from basic principles of administrative law and a concern for the separation of powers. Courts will not impose cross-examination as a due process requirement where the legislature has not authorized the administrative body with subpoena power, as this allows the agency to act in a manner contrary to its enabling statute.[277] If the body cannot force a witness to appear (as in most college proceedings where the institution and parties generally do not have subpoena powers), then it cannot be foreclosed from relying on hearsay testimony of absent witnesses. Thus, where lawmakers require cross-examination and the right to an attorney in civil and administrative proceedings, they will clearly and unambiguously set forth this elevated procedure in law.[278]

Along with these legal considerations, as neutral bodies, whose obligations extend equally to Reporting Individual and Respondent, SUNY holds numerous practical concerns about the ability to maintain fair and impartial proceedings under proposed section 106.45(3)(vii).

Cross-examination threatens to weaponize the hearing process against the Reporting Individual, and risks intimidation and victim-blaming. Contrary to the Proposed Regulations' ban on the use of sex stereotypes, cross-examination of rape complaints often utilizes rape myths

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[271] *Crawford v United States Dep't of Agric.*, 50 F3d 46 (D.C. Cir. 1995).
[272] *Honeywell International, Inc. v. EPA*, 372 F.3d 441, 447 (D.C. Cir. 2004).
[273] *Johnson v United States*, 628 F.2d 187 (D.C. Cir. 1980).
[274] *Lacson v. U.S. Dept. of Homeland Sec.*, 726 F.3d 170, 178 (D.C. Cir. 2013).
[275] *Matter of Gordon v. Brown*, 84 N.Y.2d 574, 578 (NY Ct App 1994)
[276] *Matter of Friedel v. Board of Regents*, 296 N.Y. 347, 352–353, (NY Ct App 1947) (limitation on right to confront investigators in suspension hearing for performing illegal procedures); *See also Matter of Yoonessi v. State Bd. for Professional Med. Conduct*, 2 A.D.3d 1070, 1072, 769 N.Y.S.2d 326 (NY 3d Dep't 2003), lv. denied 3 N.Y.3d 607, 785 N.Y.S.2d 24, 818 N.E.2d 666 (2004) (limitation on cross-examination of board's expert witness not an abuse of discretion); *Sookhu v. Commissioner of Health of State of New York*, 31 A.D.3d 1012 (3d Dep't NY 2006) (cross-examination of patient not required in license suspension hearing).
[277] *Public Employees' Retirement System v. Stamps*, 898 So.2d 664, 676 (Sup. Ct., Miss. 2005).
[278] *E.g.*, North Carolina Gen. Stat. § 116-40.11 (student right to be represented by counsel, at student's own expense, in campus disciplinary hearings, except in cases of academic dishonesty or where institution maintains a "Student Honor Court"); Mass. Gen. L. 71 § 37H 3/4 (student facing expulsion or suspension for more than ten days for bullying has the right to cross-examination and the right to counsel).

and victim-blaming language to discredit witnesses, causing a phenomenon known as "secondary victimization."[279] Regardless, the Department does not actually offer an evidence-based study supporting its unique effectiveness as a means of detecting lies.

Yet this untested assumption bears further scrutiny should it be mandated at every college and university covered by Title IX. Empirical studies of cross-examination suggest that its storied reputation as a truth-seeking device may be more mythic than real. In particular, a 2017 survey of available scientific evidence published in the *Cornell Journal of Law and Public Policy* contends that the "observable behavioral cues" derived from cross-examination do little to aid laypeople and experts in detecting lies.[280] "From evasive eyes to twitching toes, behavioral responses to questioning seem to be more idiosyncrasies than deception giveaways."[281] Notably, many of the cues that observers associate with deception may simply be reactions to the stress of an adjudicatory hearing, and the lawyer's demeanor in questioning the witness may also prejudicially impact how the observer judges the testimony.[282] While cross-examination can have the salutary effect of disrupting efforts to maintain a lie, research demonstrates that witnesses can be enticed by questioners to distort the truth, even among adult victims.[283] This result is by design: lawyers avoid asking a question they do not already know the answer to, making cross-examination an exercise in creating "a carefully crafted narrative at the expense of broader context and accuracy."[284]

The Proposed Regulations are also certain to tilt disciplinary proceedings in favor of parties who have the means to afford attorneys who are skilled at cross-examination. The Department may imagine that this will only limit the testimony of Reporting Individuals but not Respondents, the protected party of interest. But some Reporting Individuals may be represented by highly-skilled attorneys, sometimes pro bono, while some Respondents may bring a friend or family member.

Yet because colleges and universities have affirmative duties in the Proposed Regulations to ensure a fair and impartial proceeding, they may have to cover the costs of expert litigators on behalf of Reporting Individuals or Respondents to ensure equal representation between the parties. The Department has previously acknowledged that it lacks statutory authority to mandate legal representation in these proceedings.[285] Requiring cross-examination by an "advisor" rather than an "attorney" is a thinly-veiled means of circumventing the Department's own five-year-old regulations and interpretations of the Clery Act. And it masks the true costs of supplying attorney-advisors in campus disciplinary proceedings.

After all, having offered no research to support its unprecedented advisor requirement, the Department cannot begin to estimate how high these costs will be. Because both the Reporting Individual and the Respondent have the right to an impartial proceeding under Title

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[279] Sarah Zedervelt, et al., *"Lawyers' Strategies for Cross-Examining Rape Complainants: Have we Moved Beyond the 1950s?,"* 57 BRIT. J. CRIMINOLOGY 1, 3 (2016).
[280] *Bruton*, at 155-56.
[281] *Id.* at 156.
[282] *Id.* at 157.
[283] *Id.* at 164.
[284] *Id.* at 166.
[285] VAWA Final Rule, at 62774.

IX, in theory, both should have access to equal representation. Allowing one party to hire litigators from a prestigious trial law firm, while allowing the other to be represented by a well-meaning professor, coach, friend or parent without training in cross-examination, could be a facial inequality that opens recipients to a Title IX challenge which, under the Proposed Regulations could result in OCR overturning a finding of responsibility on an appeal from a Respondent (while a similar complaint filed by a Reporting Individual would result in no action by OCR under the partial safe harbor). If a recipient responds by hiring an attorney for the unrepresented party, and pays the costs of that attorney, then the other side can plausibly argue a Title IX violation in having to personally bear the costs of legal representation. The result is that the recipient may receive challenges seeking that it indemnify both parties for their legal representatives.

Institution costs will skyrocket, as the incentive to hire an attorney in campus proceedings will be very high. If the campus pays the cost of representation, then both parties will rely on lawyers, rather than any other type of "advisor," to represent them in these proceedings. These attorneys must be allowed to participate in all aspects of the proceeding, including pre-hearing conferences, pre-hearing examination of the investigatory report, the hearing, the sanctions hearing, and the appeal. The attorneys will write pre-hearing and post-hearing briefs, responses to the investigatory reports, appeal briefs, and various other correspondence. The attorneys will also be involved in gathering and submitting evidence to the fact-finder. At the rate of $250 per hour (a conservative rate in New York State), the likely costs of a single proceeding will easily run into the tens of thousands of dollars and, unfortunately, since federal funding to absorb these new costs demanded by the Proposed Regulations is unlikely, costs will likely have to be passed on to students or institutions will have to cut academic programs or student services to make up for the new expense.

We also note that the requirement that the advisor of choice be allowed to conduct the cross-examination is actually *not* limited to attorneys trained in litigation (not even all attorneys are actually trained in direct and cross-examination). The Department's Proposed Regulations would allow the fraternity brother or sorority sister, parent, roommate, or anyone else to conduct cross-examination, so long as the party said they were the chosen advisor. Cross-examination may or may not be the "greatest legal engine," but it is doubtful that Dean Wigmore was imagining that such cross-examination would be conducted by an untrained 19-year-old friend of the party. Whatever gain to truth-seeking the Department imagines would occur with genteel attorneys ethically asking probing questions is sure to be outweighed by the grave trauma and harm caused by unskilled advisors "playing attorney" while likely elucidating few, if any, facts that could not have been learned in a less adversarial, more educational manner.

Significant Harm to Both Reporting Individuals and Respondents if all Evidence is Excluded When Anyone Will Not Submit to Cross Examination

The Proposed Regulations bar the institutional decision maker from considering the testimony or account of any participant who does not subject themselves to cross-examination by the advisor of the other party. The Department states: "[i]f a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party

or witness in reaching a determination regarding responsibility[.]"[286] While this clearly impacts Reporting Individuals as noted elsewhere herein, it likewise can have significant and severe consequences for Respondents. Inasmuch as the Proposed Regulations define harassment to include sexual assault as defined by the Clery Act, and the Clery Act itself takes its definitions from the Uniform Crime Reporting and National Incident Based Reporting System,[287] the same facts that may undergird a Title IX disciplinary charge may also be a crime, and disclosures of such facts may lead to criminal charges (and in some cases, a civil suit).

For that reason, attorneys for Respondents may advise their clients not to testify in a formal hearing or subject themselves to cross examination where they could make statements against penal interest, generally admissible as an exception to the hearsay prohibition in criminal and civil courts.[288] Instead, many institutions have traditionally accepted written statements or other methods of providing information, with decision makers according different weight to an uncrossed statement than would be given to crossed testimony.

With these limiting rules, however, the Proposed Regulations would prohibit the decision maker from considering *any* statements by Respondent. To the extent that a Reporting Individual testifies, is willing to subject themselves to cross examination by the advisor of the Respondent, and is generally credible, these rules would nearly certainly *require* the institution to find the Respondent responsible under either a preponderance or clear and convincing standard without considering any denials or different account the Respondent might have provided. But such a silencing by regulation nearly certainly offends the due process rights of such a Respondent, since they would not be able to defend themselves *in any way* (including having prior statements to law enforcement or college officials considered on their behalf) unless they were willing to risk inculpating themselves in a criminal or civil proceeding. In such cases, an alternative model that does not include the formal cross examination requirement or allows for uncrossed evidence to be taken into account "for what it's worth" by the decision maker provides significantly more due process and fundamental fairness to such a Respondent.

Based on the narrative in the Proposed Regulations, it is clear that such harm to Respondents in Title IX cases was not its intention. The Department stated in its background:

> The Proposed Regulations require schools to investigate and adjudicate formal complaints of sexual harassment, and to **treat complainants and Respondents equally**, giving each a meaningful opportunity to participate in the investigation and requiring the recipient to apply substantive and procedural safeguards that **provide a predictable, consistent, impartial process for both parties and increase the likelihood that the recipient will reach a determination regarding the Respondent's responsibility based on objective standards and relevant facts and evidence.**[289]

[286] Title IX Proposed Regulation, at 61475 (section 106.45(b)(3)(vii)).
[287] VAWA Final Rule, at 62784, 62790.
[288] *See e.g.* FED. R. EVID. 804(b)(3)(a).
[289] Title IX Proposed Regulations, at 61465 (emphasis added).

Therefore, the proposed rule should be withdrawn because of the harm it will cause Respondents who might be advised not to appear in the hearing process or subject themselves to cross-examination.

The 2013 VAWA Amendments to the Clery Act State Reflect Congressional Intent in Regard to Providing Advisors and Cross-Examination in Campus Conduct Processes

In the Final Rules implementing the 2013 VAWA amendments to the Clery Act, the Department was interpreting a statute that required, in black letter, that "the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice."[290] This is far more detailed and specific to details of access to an advisor of choice than the 37 words of the Title IX statute. Since Congressional intent was fairly plain from the language of the statute, the Department reasonably interpreted "of their choice" to mean that the identity and professional qualifications of the advisor belonged to the Reporting Individual and Respondent, not to the institution. That is to say, an institution could not ban a participating student from choosing an attorney. While the negotiated rulemaking process included a spirited discussion of the policy wisdom of this minor extension, there was general assent to the Department's interpretation of the plain language of the supporting statute.

During the commenting process, "[o]ne commenter asked that the final regulations require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not."[291]

The Department responded to this comment by following time-tested administrative law principles. "We do not believe that the statute permits us to require institutions to provide legal representation in any meeting or disciplinary proceeding in which the accused or the accuser has legal representation but the other party does not. Absent clear and unambiguous statutory authority, we would not impose such a burden on institutions."[292] Again, and to emphasize, when faced with a statute that made specific reference to the presence of an advisor for the Reporting Individual and Respondent in a case of sexual assault, and a request that the Department extend that statutory provision by requiring that institutions provide an advisor to students who did not have an advisor, the Department declined because "**[a]bsent clear and unambiguous statutory authority, we would not impose such a burden on institutions.**"[293]

Unlike when interpreting the 2013 VAWA amendments to the Clery Act, there is not a single reference to an advisor of choice anywhere in the Title IX statute. While SUNY does not contest the wisdom of allowing students to have advisors of choice, and our campuses have since time immemorial chosen on their own accord and in concert with due process to allow advisors to be present in proceedings, at the students' cost, we can find no statutory authority in Title IX for the Department to require them to be provided to students at no cost in regulations pursuant to Title IX. If a simple extension of a right guaranteed by the enacting federal law was, a mere 5

[290] 20 U.S.C. §1092(f)(8)(B)(iv)(II).
[291] VAWA Final Rule, at 62774.
[292] *Id.*
[293] *Id.* (Emphasis added).

years ago and immediately following passage of the enabling statute, considered to be outside of the Department's "clear and unambiguous statutory authority," then certainly a statute that completely lacks reference to advisors, attorneys or otherwise, participating or silent, and is being interpreted by the Department this way for the first time more than 45 years after enactment must even more clearly lack such authority. To put it plainly, the Department has already acknowledged it lacks clear and unambiguous authority when it arguably might have had such authority. Here, there is absolutely no authority, no evidence that providing or not providing advisors has a disparate impact based on gender, and such a requirement is therefore arbitrary and capricious under the law.

The requirement that colleges and universities allow for cross-examination by an advisor of choice in sexual harassment cases under Title IX that are also within the definition of sexual assault as defined by the VAWA amendments to the Clery Act runs in contrast to the plain language of the rules and preamble promulgated pursuant to that law, just a few years ago. The Department responded to concerns that advisors of choice, interpreted by the Department to include attorneys, may interfere with the process and make the efficient investigation and adjudication of sexual assault (and related) cases more legalistic and take it further away from the educational model. The Department made several clear statements that institutions did not have to allow advisors—including attorney advisors—to participate in any way, shape, or form. "Institutions may restrict an advisor's role, such as prohibiting the advisor from speaking during the proceeding, addressing the disciplinary tribunal, or questioning witnesses. An institution may remove or dismiss advisors who become disruptive or who do not abide by the restrictions on their participation."[294] Further, "Section 668.46(k)(2)(iv) allows an institution to establish restrictions on an advisor's participation in a disciplinary proceeding. As stated earlier in the preamble, we believe that specifying what restrictions are appropriate or removing the ability of an institution to restrict an advisor's participation would unnecessarily limit an institution's flexibility to provide an equitable and appropriate disciplinary proceeding."[295]

The language of the VAWA regulations clearly allows colleges and universities to prohibit advisors, including attorneys, from participating in any way, including prohibiting them from conducting or participating in direct or cross examination. This language in the Final VAWA Rules would cover those sexual harassment cases that are also sexual assault. While this inconsistency does not impact most of K-12 or cases adjudicating verbal sexual harassment, it is certainly noteworthy for those cases of sexual assault disclosed, investigated and adjudicated in higher education under the Clery Act and Title IX.

Further, as discussed already, there is no statutory authority under Title IX to support a requirement that institutions allow advisors, including attorneys, to participate in investigations and adjudications under Title IX. The Department could have—and did not—at least made an argument that the VAWA amendments to the Clery Act that required that parties be allowed to bring an advisor of choice with them to required or optional hearings and related meetings would likewise be effectuated if those advisors could participate. At least the Department in 2014 would have been simply stretching clear statutory language, not creating regulatory requirements with no underlying statutory authority. We urge the Department to return to the conservative

[294] VAWA Final Rule, at 62773.
[295] *Id.* at 62774.

principles of administrative law that limits regulations to the clear statutory authority under which they regulate.

In the Proposed Regulations, the Department would also require that institutions provide advisors "aligned" with a student who does not have an advisor. The document does not define "aligned," and we fear that this will lead to litigation to determine what is required to properly align. Further, it may be argued that the only way to truly "align" with a party is to develop a formal "alignment." In litigation and administrative complaints to OCR, parties may argue that the only way to achieve this new regulatory requirement is through an attorney-client relationship with the student party, one that requires the advisor to zealously advocate[296] for the client and allows the client to provide information to the advisor in a way that is privileged. At best, courts are likely to split on this question and various OCR Field Offices are likely to interpret it differently, with some overturning determinations of a college if an advisor was not considered aligned enough (due to the partial safe harbor in the Proposed Regulations, only determinations that OCR views as harming the Respondent in the due process section could lead to the determination being overturned; Determinations that are seen as harmful to the Reporting Individual alone would likely be subject to the partial safe harbor). While the harms of further legalizing the system are clear, this will also likely create inequity. Frankly, a creative student can find the other party accompanied by a parent or sibling, demand an advisor paid for by the college, receive an attorney, and have an advantage in cross-examination over the other party. This will create a second-mover advantage, and such gamesmanship should have no place in the Title IX and student conduct processes. If an advisor need not be an attorney, it will likewise potentially lead to inequity as parties would have advisors with different skills and competencies conducting cross-examination on their behalf.

If the institution is forced to hire and compensate the student party, the advisor will have an incentive to create additional work for themselves, the institution and the other party, since that will be tied to their compensation. This will further delay and bog down formal proceedings, raising costs for institutions and students and delaying final determinations for both Reporting Individuals and Respondents. Finally, the cost of providing such advisors may be astronomical for institutions.

Explaining Decisions to Exclude Evidence during the Hearing

The Proposed Regulations impose an unusual burden on the fact-finder to "explain to the party's advisor asking cross-examination questions *any* decision to exclude questions as not relevant."[297] The Department offers no jurisdictional basis for imposing this micro-level mandate on the hearing board, nor any statutory or judicial authority requiring administrative officials to put on the record, during a live hearing, why they have permitted or excluded a question as irrelevant. Presumably, a fact-finder excludes a question as being "not relevant" because it does not tend to prove the matter at issue.[298] In other words, if it is not relevant, it is not relevant. The

[296] *See* e.g. American Bar Association, Model Rules of Professional Conduct (2018), *available at* https://www.americanbar.org/groups/professional_responsibility/publications/model_rules_of_professional_conduct/model_rules_of_professional_conduct_preamble_scope/.
[297] Title IX Proposed Regulations, at 61474.
[298] See, FRE Rule 401.

parties face no prejudice, much less prejudice of Constitutional proportions, where a fact-finder does not explain why a question is not relevant, because the answer is self-evident: the fact-finder does not believe it has a tendency to answer the ultimate question at issue. Therefore, this provision promises much mischief, with no gain to truth-seeking.

vii. §106.45(b)(3)(viii) - Inspect and review evidence upon which recipient does not intend to rely

SUNY opposes the Department's Proposed Regulations because this provision relies on technology that does not exist and forces institutions to share irrelevant information with Respondents that is both deeply private and irrelevant to the investigation being conducted by the institution.

Access to Evidence that is Not Relevant

Proposed section 106.45(b)(3)(viii) requires that the recipient must "[p]rovide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation."[299]

In addition to requiring recipients to provide this information electronically, through an undisclosed and likely technologically unfeasible "file sharing platform" that prevents a party from copying, downloading, or ostensibly using their smartphone to photograph the screen, the Proposed Regulations require that this evidence be again provided "at any hearing" and for purposes of cross-examination.

In explaining this section of the Proposed Regulations, the Department has used justifications that include, "these requirements will facilitate each party's ability to identify evidence that supports their position and emphasize such evidence in their arguments to the decision-maker."[300] However, this statement is conclusory, unworkable, and conflicts with New York State law.

Section 6444 of New York Education Law states that "[t]hroughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, [every student has] the right":***"[t]o review and present available evidence in the case file, or otherwise in the possession or control of the institution, and relevant to the conduct case, consistent with institution policies and procedures."[301] There could be a situation where there are points that are conceded factually, such as that both parties agreed that there was sexual intercourse, and the question hinges upon affirmative consent. The Reporting Individual could have had a forensic examination conducted. The forensic exam includes copious amounts of confidential information

[299] Title IX Proposed Regulations, at 61498.
[300] Title IX Proposed Regulations, at 61476.
[301] N.Y. EDUC. L. § 6444(5)(c)(v).

that is not relevant to the underlying question of whether there was affirmative consent, such as whether the Reporting Individual has another medical condition or other trauma that would not be relevant to the current question.

Likewise, it is possible that information about a Reporting Individual's mental health history could be disclosed to the Respondent, in direct violation of New York State law.[302] There would be no gain in providing the Respondent access to this information that is not considered "relevant" since the occurrence of sexual intercourse is conceded by both parties and would cause significant harm to the Reporting Individual. With the way the regulation is drafted, it would mandate sharing this information, and would cause significant harm potentially to both Respondent and Reporting Individual, depending upon the type of information that is collected during the course of the investigation.

But remember that it is not just Reporting Individuals who should fear overexposure of deeply private information that is irrelevant to the determination. Respondents should be concerned as well. The nature of such investigations is that some witnesses will provide extraordinary amounts of information about Respondents, some of which is positive and some of which is negative. Past bad acts, not relevant to the question of violation here, are often discussed. The Respondent may seek to prove some positive point academically and in doing so, turn over their transcript. Relevant to the question of affirmative consent? Clearly not. Covered under this requirement that *all* evidence is provided? Likely so. Evidence might include the Respondent's other disciplinary records, their own medical records, mental health history, or past sexual history, and other information that may be in the file, but is not relevant to the underlying question of responsibility (and indeed may be protected from disclosure by New York State law). In its effort to protect Respondents by creating a regime where a Reporting Individual's life is laid bare before the Respondent and their advisor or attorney, regardless of relevance to the underlying matter, the Department is likewise creating a regime that may dissuade Respondents from participating or being forthcoming, knowing that *any* information they provide, even if irrelevant, even if more prejudicial than probative, even if completely detached from any matter being considered in the conduct process, will be provided to the Reporting Individual and their advisor or attorney.

Due to both the potential legal conflict with New York State Education Law Article 129-B, the unworkable aspects the Department requires, and the ramifications it would have on individuals involved in campus conduct processes, SUNY requests the Proposed Regulations be withdrawn.

viii. §106.45(b)(3)(ix) - Investigative report must be created

SUNY opposes this section of the Department's Proposed Regulations because of the onerous and burdensome requirements the investigative report as outlined would put on recipients and the ambiguity some of the language in this section creates.

[302] N.Y. EDUC. L. § 6444(5)(c)(vi).

Investigative Report Requirement is Onerous and Burdensome on Recipients

Section 106.45(b)(3)(ix) of the Proposed Regulations requires recipients to generate an "investigative report that fairly summarizes relevant evidence" and provide that report to the parties for their "review and response" at least ten days before the hearing.[303] Even as the Proposed Regulations effectively eliminate the "single investigator" model, it now imposes an investigative report requirement that is administratively burdensome, impractical, and has limited benefit as a truth-seeking technology.

To our knowledge, many college campuses generally do not create a single report prior to the evidentiary hearing. Drafting such a report is time-consuming and requires the singular attention of investigative staff, which is an unreasonable expense at many of our smaller campuses. There is little corresponding benefit in truth-seeking to creating a comprehensive report so far in advance of the hearing, moreover, because the very purpose of the hearing is to try the evidence. The parties already are guaranteed the right to examine the evidentiary file prior to the hearing under New York State Education Law Article 129-B; it goes beyond any due process requirement we are aware of to have this information synthesized into a summary report ten days before the hearing.

We also note that this requirement imposes a shadow cost in terms of the need for a responsive report to the parties' "review and response." Presumably, the Proposed Regulations cannot be satisfied unless the recipient amends its "investigative report" in light of the "response" to "fairly summarize[ ] relevant evidence." How these revisions must occur, and according to what standard, are undefined, as are the practical and legal consequences of a failure to respond, or failure to "fairly" respond, to the parties' objections. Errors in such a revision, we assume, could be appealed by Respondents to OCR seeking to have a responsibility determination overturned. Errors that inappropriately led to a finding of responsibility, if appealed by the Reporting Individual, would likely not be reviewed by OCR under the partial safe harbor provision of these Proposed Regulations.

ix. §106.45(b)(5) - Appeals

SUNY opposes this section of the Department's Proposed Regulations because of the inequity it would create in appeals of findings, and the confusion this section causes due to the Department including some measures that would not historically be included in an appeal.

The Proposed Regulations Create Inequity in Appeals of Findings

In terms of its requirements for appeal, even as the Department calls for campuses to "[t]reat complainants and Respondents equitably" as a "basic requirement,"[304] the Proposed Regulations are not equitable between a Reporting Individual and Respondent. While a Respondent may appeal and seek to overturn both the underlying finding and the sanction, the Department limits the appeal rights of the Reporting Individual. An earlier leaked version of the Proposed Regulations would have allowed institutions to offer appeals either to Respondent only

[303] Title IX Proposed Regulations, at 61498.
[304] Title IX Proposed Regulations, at 61497.

or to Respondent and Reporting Individual. The Violence Against Women Act amendments to the Clery Act[305] and New York State Education Law 129-B[306] both require that appeals be offered to both parties.

In the time prior to finalizing the Proposed Regulations, the Department changed the language to require that appeals be offered to both parties,[307] but then undercut the value of the Reporting Individual's appeal, writing that in "cases where there has been a finding of responsibility, although a complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the recipient's education program or activity, a complainant is not entitled to a particular sanction against the Respondent."[308] But the appeal of a student conduct finding is simply not the place to even ask for changes to remedies other than the sanction levied against a person found responsible. It is not the place to appeal and ask for academic accommodations, mental health counseling, or medical assistance. That is through a separate process that, frankly, need not even involve the other party to a conduct proceeding. By placing this limitation, not only does it invasively govern the processes of institutions, but it makes such a "right" of appeal a right in name only as the one thing a Reporting Individual would seek in a student conduct appeal would be barred by federal regulation. This is an overstep and creates inconsistency and inequity in the process.

D. Directed Questions

Section D provides SUNY's responses to certain directed questions as put forth by the Department in the Preamble. Subsection (i) relates to question 1 (applicability to elementary and secondary schools), subsection (ii) relates to question 2 (applicability of provisions based on type of recipient or age of parties), subsection (iii) relates to question 3 (applicability of the rule to employees), subsection (iv) relates to question 4 (training), subsection (v) relates to question 6 (standard of evidence), subsection (vi) relates to question 7 (potential clarification regarding "directly related to the allegations" language), and subsection (vii) relates to question 8 (appropriate time period for record retention).

i. (Question 1) Applicability to elementary and secondary schools

As we indicated in our response to Proposed Regulations §106.45(b)(3)(vi) and (vii), SUNY does not believe that a bright-line division between institutions of higher education and primary and secondary schools is workable or appropriate, as modern education does not necessarily match the neat lines and standardized approaches of yesteryear. These educational environments overlap, with programs that include dual enrollment, summer and intersession college learning, high school laboratory schools on college campuses, colleges operating K-12 charter schools, and situations as simple as high school students who enroll in college classes.

Further, colleges regularly return their students to elementary and secondary schools as student teachers and related experience based learning assignments. Attempting to create two

[305] *See generally,* VAWA Final Rule, at 62752.
[306] N.Y. EDUC. L. Art. 129-B.
[307] Title IX Proposed Regulations, at 61478.
[308] Title IX Proposed Regulations, at 61478.

sets of processes along this line will create enormous confusion where students cannot identify which system and surrounding rights apply to their case. Such confusion, as we indicate in our response, above, will further depress reporting and disclosure among students in dual enrollment and other programs where the lines between high school and college are simply not as clear cut as these Proposed Regulations would imagine. We urge the Department to follow longstanding practice (including the 2001 Notice and Comment Dear Colleague Letter, and the 2011, 2014, 2015, and 2017 Dear Colleague Letters) and set uniform, high-level, standards equally applicable to elementary, secondary, and post-secondary education institutions and systems.

While we appreciate the Secretary's effort to gather information on this topic, we note that the Department has offered no evidence in the Preamble that the developmental level of the parties or systematic differences between the K-12 and higher education settings merit different standards of procedure when addressing sexual harassment. As we indicate in our response to the second Direct Question, absent such a showing, there is no legal basis for the Department to add more due process protections in the higher education setting, which is voluntary, than in the K-12 setting, which is compulsory and a recognized property right.

Elementary and secondary education is compulsory. It is a right guaranteed by federal law and state law in every jurisdiction in the United States. A young person of eligible age may seek public education in their jurisdiction *as a right*. Higher education is not a right under federal or state law. While some colleges are "open admission" offering admission to all qualified students, that still is not a legal requirement and those institutions may place academic and behavioral limitations on whom they admit. Colleges have First Amendment rights to determine, among other things, "who may be admitted to study."[309]

It is clear that the property rights that accumulate in K-12 are greater than the property rights that accumulate in higher education as the K-12 rights are guaranteed by law. Concomitantly, any due process obligations imposed (if there were authority in the law to impose them) should be equal or greater in the compulsory K-12 sphere than in higher education since the deprivation would be of a right guaranteed in law. Yet these Proposed Regulations invert the levels of due process requiring significantly more process before a deprivation of the lower property rights (or quasi-property rights) that arguably apply in higher education than the property rights that clearly apply in the compulsory K-12.

ii. (Question 2) Applicability of provisions based on type of recipient or age of parties

The Secretary further requests comment on whether its Proposed Regulations, including the "safe harbor" of §106.44(b) and the provision regarding written questions and cross-examination of §106.45(b)(3)(vi) and (vii), should differentiate on the basis of whether the parties are age 18 or over, "in recognition of the fact that 18-year-olds are generally considered to be adults for many legal purposes."[310]

[309] *Sweezy v. New Hampshire*, 354 U.S. 234 (1957) (Frankfurter, J, concurring).
[310] Title IX Proposed Regulations, at 61483.

Just as we can find no evidence offered in the Preamble for drawing a bright line between K-12 and higher education, we do not see a showing that the due process rights afforded to a 17-year-old first-year college student should be different than those provided to an 18-year-old first year college student or an 18-year-old high school student. Nor do we see any evidence that the bright line is drawn to address and redress sex discrimination in education. The Department offers no evidence that an 18-year-old first-year college student will absorb less trauma from cross-examination than a 17-year-old peer or that these differences are exacerbated based on sex.

This appears to be an arbitrary line drawn between high school seniors and college freshmen, based on an outdated and inaccurate assumption of the age and competency of all K-12 and college students, without any evidence offered. The Department devotes a mere 59 words—four of which are "may" or "most" indicating likelihood, but not certainty—to support a distinction that will have significant impact on millions of K-12, college, and mixed jurisdiction Reporting Individuals and Respondents.[311]

Respectfully, even if the Department has the authority under the plain language of Title IX to draw such narrow and detailed distinctions, *Mathews v. Eldridge*[312] and its progeny would require far more analysis before drawing hard line conclusions of the appropriate balance of due process during various processes.

iii. (Question 3) Applicability of the rule to employees

The Department's Proposed Regulations Significantly Interfere with New York State Law, New York City Law, and the State Collective Bargaining Agreements

The Secretary further requests comment on whether its Proposed Regulations would prove unworkable in relation to employees. With this SUNY responds as follows:

a. The Proposed Regulations Interaction with Due Process Required by New York Civil Service Law and/or Collective Bargaining Agreements

Taken together, SUNY employees constitute the largest segment of New York State government employees. As a public employer, SUNY is required to comply with the State's Civil Service Laws and/or collective bargaining agreements (CBA) with various divisions of its predominantly unionized employees. The Civil Service Law and applicable CBAs cover various subjects such as employee pay, working conditions, and disciplinary measures for misconduct. Such disciplinary measures include specific due process rights afforded to the represented employees including, without limitation, the ability to file grievances and the right to seek binding arbitration for all disciplinary-related reasons with an independent arbitrator. The due process requirements imposed by law and/or by CBA are largely inconsistent with the Department's Proposed Regulations.

As a practical matter, collective bargaining negotiations in New York take place on a statewide level at approximate six-year intervals. Put simply, SUNY's compliance with the

[311] Title IX Proposed Regulations, at 61476.
[312] 424 U.S. 319 (1976).

Proposed Regulations as written would require significant and substantial changes to most, if not all, of its CBAs. While SUNY takes its compliance requirements seriously, the unions may not want to open up their current agreements, would have no incentive to do so, and certainly would be required to change policies and procedures that are already handled in their CBAs. Further, some unions bargain statewide, not with SUNY, and would have even less incentive to make changes to help one employer, especially if they may not be positive for some or all of their members. Therefore, SUNY requests that the Department withdraw the Proposed Regulations or, in the alternative, make clear the Proposed Regulations do not abrogate the rights and procedures afforded to employees by law or by applicable CBAs.

b. Inconsistencies with Applicable State and Municipal Employment Discrimination Laws

SUNY respectfully notes that the proposed Regulations are inconsistent with New York State's related employment laws. For example, New York adopted a law that became effective on October 9, 2018 requiring that all New York employers—including colleges and universities—adopt a sexual harassment policy that, *inter alia*: prohibits sexual harassment; provides a complaint process that allows for due process by all parties; makes clear any such harassment is employee misconduct; informs employees of their rights; provides training to all employees on an annual basis; and, prohibits retaliation against any individual that participates in the reporting and/or investigation process.[313]

On August 23, 2018, Governor Andrew Cuomo issued an executive order to ensure diversity and inclusion and to combat harassment and discrimination, including sex-based discrimination at all levels of state government.[314]

Similarly, in May 2018, New York City enacted a package of legislation to combat workplace sexual harassment. The package consisted of 11 bills that will mandate anti-sexual harassment training in the public and private sectors; make information about sexual harassment available so more New Yorkers know their rights; require sexual harassment data reporting from city agencies; and expand sexual harassment protections under the New York City Human Rights Law (NYCHRL).[315] Under the NYCHRL, sexual harassment is a form of gender-based discrimination that is defined as "unwelcome verbal or physical behavior based upon a person's gender." This definition differs significantly from the definition of sexual harassment in the Proposed Regulations.[316]

Thus, the Proposed Regulations not only conflict with state and local government laws generally but also infringe on said bodies police powers to manage its own affairs with regard to employee conduct and investigating discrimination.

[313] N.Y. LAB. L. § 201-g (2018).
[314] N.Y. EXEC. ORDER NO. 187 (Aug. 23, 2018), https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO187.pdf.
[315] N.Y.C. ADMIN. CODE § 8-101 to 8-703.
[316] Title IX Proposed Regulations, at 61496.

c. The Proposed Regulations Interplay with Title VII of the Civil Rights Act of 1964

As noted by the Department, a college or university employee may have rights against its higher education employee under Title IX and also Title VII for sex-based discrimination. Section 106.6(f) of the Proposed Regulations attempts to address this possible conflict by noting that nothing in the Proposed Regulations shall be read as derogation of an employee's rights under Title VII or any regulations promulgated thereunder. However, it fails to address how an employer should proceed when such a conflict arises between the two laws as interpreted. For example, as with any civil case, Title VII discrimination claims generally utilize a preponderance of the evidence standard. However, the Proposed Regulations indicate that an institution may choose between the preponderance of the evidence standard and the clear and convincing standard. This conflict creates an undue burden on institutions to manage standards of evidence both in its own internal proceedings but also if the employee seeks external review by OCR or the Equal Employment Opportunity Commission (EEOC). As such, SUNY respectfully objects to the ambiguity caused by the overly prescriptive nature of the Proposed Regulations.

In sum, due to the impact the Proposed Regulations will have on New York State collective bargaining agreements, multiple areas of New York State and New York City law, and the ambiguity caused by its inherent overlap with Title VII, SUNY believes the Proposed Regulations should be withdrawn.

iv. (Question 4) Training

As we indicated in the introduction, we strongly support the Department's requirement that cases be investigated and adjudicated by those sufficiently trained in important concepts central to these investigations, including an emphasis on the neutral role of institutions, and using educational materials that are not based on sex stereotypes. The 2013 VAWA Amendments to the Clery Act and New York State Education Law Article 129-B similarly require comprehensive training and the State University of New York has committed itself to developing and promulgating training materials to help its campuses, and fellow educational institutions, continuously improve their response to, and prevention of, sexual harassment and sexual assault. SUNY System Administration and the SUNY Student Conduct Institute[317] leadership and staff have hosted hundreds of live and digital trainings over the last decade. Our campuses have hosted thousands. We recognize that, as with any offering of due process and fair process before a government action, the level of training and preparation is not uniform at all institutions across the country. We hear and support the continued call of the Department to raise the capacity of professionals at the higher education and K-12 levels, and SUNY will continue to develop training materials and resources that can be accessed at no cost or very low cost to help fellow institutions meet this need. We urge the Department to conform the training requirements to

[317] The SUNY Student Conduct Institute (SUNYSCI) is a joint Project of the SUNY Student Conduct Association (SUNYSCA), SUNY Title IX Coordinators Association (STIXCA), and Office of General Counsel. It provides in-depth live and digital training to student conduct officials, hearing officers, Title IX officials and other college personnel in due process, trauma-informed investigations and adjudications, questioning and weighing of evidence, and other crucial best practices in the investigation and conduct process that comply with relevant case law, Title IX guidance, the Clery Act, and New York State Education Law 129-B. Material for training is created with a careful emphasis on case law, statutory requirements, best practices, and eschewing sex stereotypes. As of the date of this letter, the Institute had trained well over 600 people in its first half-year of operation. https://system.suny.edu/sci/.

those published in the Final Rules implementing the VAWA amendments to the Clery Act to avoid confusion and differing requirements.

The mandated training required of Title IX coordinators, investigators, and decision-makers is not comprehensive of the categories mandated under VAWA, and therefore presents a conflict of federal law. In particular, the training mandates under the Proposed Regulations would not require these officials to receive training that "protects the safety of victims and promotes accountability," a phrase that is victim-centered and designed to ensure that institutions are accountable to those harmed by sexual violence. Further, VAWA does not reference sex stereotypes, which the University tries not to use in trainings, but which the Second Circuit recently opined do not reflect gender bias.318 In practice, these officials will likely receive training in VAWA and Title IX requirements, as well as Education Law Article 129-B if they serve New York institutions, but any differences may cause needless confusion and disserve the interests of all stakeholders to a fair process.

In considering training, while we applaud the Department's requirements for training those that work on the formal grievance process and urge the Final Regulations to conform with current analogous requirements, we would note that the Proposed Regulations are devoid of *any* training requirements or professional expectations for staff that work on an informal process. While SUNY does not use an informal process to address cases of sexual assault (we may use informal processes in certain harassment cases, depending upon the nature of the conduct and other factors) we acknowledge that some institutions may choose to do so based upon the imprimatur of the Department, and we urge the Department to set minimum standards for training in that area as well, so that students are served by individuals with the highest level of training, regardless of whether they go through a formal or informal process.

v. (Question 6) Standard of evidence

SUNY respectfully requests that the Department consider reversing course on the standard of evidence. Currently, there are no bounds on using preponderance of the evidence rather than clear and convincing evidence.[319] Congressional intent of the 2013 VAWA

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[318] *Doe v. Colgate Univ.*, 2019 WL 190515, at *9 (N.D.N.Y., Jan. 15, 2019) (Summary Order) ("John Doe contends that Rugg, the Title IX Coordinator, introduced gender bias into the EGP process. Rugg trained EGP staff, and in 2014, she attended a training session for investigating campus sexual misconduct. Rugg's notes from the session indicate that investigators should refer to the complainant as a 'complainant' when talking to a respondent, but as the 'victim' or 'survivor' when talking to a complainant. Moreover, in her own training presentations, Rugg would sometimes refer to complainants using female pronouns and respondents with male pronouns because in her experience, most complainants were female and most respondents were male. This is insufficient evidence to demonstrate that John Doe was expelled based on gender bias. There is no indication that Rugg's use of such pronouns reflects anything more than the statistical reality that most respondents are men and most complainants are women, nor that calling complainants of any gender 'victims' or 'survivors' when speaking to them reflects gender bias, rather than a desire to be sensitive.").

[319] A single District Court Judge in New Mexico ruled, without any explanation or citations at all, that "preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences" of a transcript notation. *Lee v. The University of New Mexico*, 1:17-cv-01230-JB-LF, *3 (D. N.M. Sep. 20, 2018). No other court that we can find has similarly ruled and there is no explanation for this ruling in the opinion.

amendments to the Clery Act and implementation of the Final Rule through a Negotiated Rulemaking process demonstrates that this issue was well thought out in 2014 and, as such, the Department should not reverse course due to the harm it would cause Reporting Individuals, Respondents and institutions in attempting to implement something counter to what has already been implemented and in place for years.

In its Final Rules implementing the Violence Against Women Act amendments to the Clery Act, the Department allowed institutions to select equally, without emphasis on one standard over the other or challenges to implementing the institution's chosen standard. The Department received comments asking that it require the "'clear and convincing' standard of evidence...because this standard better safeguards due process."[320] But the Department demurred, writing that an institution "can comply with both Title IX and the Clery Act by using a preponderance of the evidence standard in disciplinary proceedings."[321]

These instant Proposed Regulations contain a clear reversal of previous policy without any explanation from the Department other than the fact that campus conduct processes are not the same as civil litigation.[322] The Department has never contended before now that campus conduct processes must hold the same level of "process" as a lawsuit in federal court, and it is clear that was never Congress' intent based on much of the commentary in the 2013 VAWA Final Rules. For the foregoing reasons, SUNY respectfully requests that the Department does not reverse course on this standard.

vi. (Question 7) Potential clarification regarding "directly related to the allegations" language

Proposed section 106.45(b)(3)(viii) requires that the recipient "[p]rovide both parties an equal opportunity to inspect and review evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility, so that each party can meaningfully respond to the evidence prior to the conclusion of the investigation."

In addition to requiring recipients to provide this information electronically, through an undisclosed and likely technologically unfeasible "file sharing platform" that somehow completely prevents a party from downloading the documents apparently including using their smartphone to photographing the screen, the Proposed Regulations require that this evidence be again provided "at any hearing" and for purposes of cross-examination.

In explaining this section of the Proposed Regulations, the Department has used justifications that include, "these requirements will facilitate each party's ability to identify evidence that supports their position and emphasize such evidence in their arguments to the

[320] VAWA Final Rule, at 62772.
[321] *Id.*
[322] Title IX Proposed Regulations, at 61477.

decision-maker."[323] However, this statement is conclusory, unworkable, conflicts with New York State law, and makes no assertion that it is intended to address gender-based inequality.

Section 6444 of New York Education Law states that "[t]hroughout proceedings involving such an accusation of sexual assault, domestic violence, dating violence, stalking, or sexual activity that may otherwise violate the institution's code of conduct, [every student has] the right":***"[t]o review and present available evidence in the case file, or otherwise in the possession or control of the institution, and relevant to the conduct case, consistent with institution policies and procedures."[324] There could be a situation where there are points that are conceded factually, such as that both parties agreed that there was sexual intercourse, and the question hinges upon affirmative consent. The Reporting Individual could have had a forensic examination conducted. The forensic exam includes copious amounts of confidential information that is not relevant to the underlying question of whether there was affirmative consent, such as whether the Reporting Individual has another medical condition or other trauma that would not be relevant to the current question.

Likewise, it is possible that information about a Reporting Individual's mental health history could be disclosed to the Respondent, in direct violation of New York State law.[325] There would be no gain in providing the Respondent access to this information that is not considered "relevant" since the occurrence of sexual intercourse is conceded by both parties and would cause significant harm to the Reporting Individual. With the way the regulation is drafted, it would mandate sharing this information, and would cause significant harm potentially to both Respondent and Reporting Individual, depending upon the type of information that is collected during the course of the investigation.

But remember that it isn't just Reporting Individuals who should fear overexposure of deeply private information that is irrelevant to the determination. Respondents should be concerned as well. The nature of such investigations is that some witnesses will provide extraordinary amounts of positive and negative information about Respondents. Past bad acts, not relevant to the question of violation here, are often discussed. The Respondent may seek to prove some positive point academically and in doing so, turn over their transcript. Relevant to the question of affirmative consent? Clearly not. Covered under this requirement that *all* evidence is provided? Likely so. Evidence might include the Respondent's other disciplinary record, their own mental health history or past sexual history, and other information that may be in the record, but is not relevant to the underlying question of responsibility (and indeed may be protected from disclosure by New York State law). In its effort to protect Respondents by creating a regime where a Reporting Individual's life is laid bare before the Respondent and their advisor or attorney, regardless of relevance to the underlying matter, the Department is likewise creating a regime that may dissuade Respondents from participating or being forthcoming, knowing that *any* information they provide, even if irrelevant, even if more prejudicial than probative, even if completely detached from any matter being considered in the conduct process, will be provided to the Reporting Individual and their advisor or attorney.

[323] Title IX Proposed Regulations, at 61476.
[324] N.Y. EDUC. L. § 6444(5)(c)(v).
[325] N.Y. EDUC. L. § 6444(5)(c)(vi).

Section 106.45(b)(3)(viii) of the Proposed Regulations is not clear enough, and there are too many situations in which it could compromise privacy for both Reporting Individuals and Respondents alike. SUNY respectfully disagrees that this section, as written, complies with the intentions in FERPA that the Department has pointed to as justification for this language,[326] and requests the Department does not include this language.

vii. (Question 8) Appropriate time period for record retention

The Department proposes in section 106.45(b)(7) of the Proposed Regulations "that a recipient must create, make available to the complainant and Respondent, and maintain records for a period of three years."[327] This time period is shorter than what is currently required by New York State law, where section 6444(5)(b)(2) of the Education Law states that every student at an institution shall have the right to have their records preserved for no less than five years.[328] New York's law goes beyond the record retention period that the Department has proposed, and as such, SUNY would have to comply with New York State's five year record retention period.

III. Conclusion

SUNY and its campuses care deeply about preventing and responding to harassment and assault in a way that makes education as accessible as possible, treats crimes and violations seriously, and offers all due process required under the Constitution, statute, and case law prior to assigning a sanction to a person found responsible for a violation. The University has had the honor of supporting balanced approaches to violence reduction in the past. We sent a Negotiator to the 2008 Negotiated Rulemaking to implement President Bush's Higher Education Opportunity Act (HEOA). We worked with our bi-partisan delegation and advised Negotiators when the Department implemented President Obama's Violence Against Women Act amendments to the Clery Act. We have advised House and Senate members and staff of both parties, inside and outside New York, on changes to the Higher Education Act, and other pieces of legislation. In New York State, we proudly worked with Governor Cuomo and a bi-partisan legislature that passed Education Law Article 129-B all but unanimously.

These laws were balanced. Balance gives legislation staying power. In New York, *nearly half* of Education Law Article 129-B, the longest and most comprehensive state law on point to date, is devoted to due process and fair process. That is a critical part of the approach. Institutions must always try to "get it right" when it comes to sanctioning a student. But the law is balanced. It also includes provisions on consent, amnesty for Reporting Individuals and Bystanders disclosing violence at a time they were using drugs or alcohol, clear language around confidentiality, mandatory biennial climate surveys to understand the state of the issue, and clear language around available resources for all parties. Such a balanced approach has been lauded in New York and looked to elsewhere.

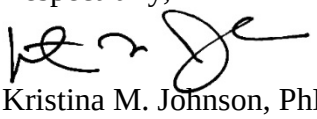
A balanced approach helps a policy change stand the test of time. No one is calling for drastic changes to the HEOA, to the VAWA Amendments to the Clery Act, or to the Negotiated

[326] 20 U.S.C. 1232g(a)(4)(A)(1).
[327] Title IX Proposed Regulations, at 61843.
[328] N.Y. EDUC. L. § 6444(5)(b)(2).

Regulations issued by the Department under that law. Here in New York, no one is calling for repeal of Education Law Article 129-B. These laws balance very important interests, and were passed as a result of significant input from multiple parties, beyond just those who speak loudest. It is likely that they will be on the books well beyond the retirement date of everyone who worked on this letter.

The approach taken by the Department in these Proposed Regulations is not balanced. A future administration of another party would quickly look to change the provisions, and uncertainty about rights and responsibilities would continue. But that is not the only path forward. We urge the Department to re-open consideration of these rules and issue new Proposed Regulations that balance the rights of the accused with the rights of students exposed to harassment and violence to access K-12 and higher education. This is a moment where the entire country is considering issues of harassment in employment and education, athletics, the private sector, and government. The Department has an opportunity to lead a national conversation about a balanced approach to harassment and violence in education; to align with laws, both federally and in states; and to establish an approach that future administrations leave undisturbed because, even if not perfect, it is fair, balanced, and flexible to all different institutions to respond in appropriate ways. We hope the Department takes advantage of this opportunity, and if the leaders, faculty, staff, and students of the State University of New York can help the Department achieve this lasting balance, please do not hesitate to call upon us.

Respectfully,



Kristina M. Johnson, PhD
Chancellor
The State University of New York