TITLE IX'S SEXUAL HARASSMENT OBLIGATIONS ON POSTSECONDARY INSTITUTIONS: USING CROSS-EXAMINATION AND THE POWER TO SUBPOENA AS TOOLS FOR ASCERTAINING THE TRUTH

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I. INTRODUCTION

According to research done by the American Association of University Women, "two-thirds of college students experience sexual harassment."[1] Although sexual harassment is, unfortunately, common on college campuses, as this article will show, colleges are often ill-equipped to handle such allegations. It is both important and necessary for Title IX to create consistent and fair obligations regarding how colleges must handle sexual harassment allegations.

This article begins by exploring the background of Title IX and the incorporation of sexual harassment into sexual discrimination. The article then focuses on postsecondary institutions' obligations under section 106.45(b)(6)(i) of Title IX, known as the cross-examination requirement. Next, the article provides an analysis of *Victim Rights Law Center v. Cardona*, in which an organization successfully challenged section 106.45(b)(6)(i).[2] Specifically, the court in *Victim Rights* found the provision limiting decision-makers' consideration to statements that were subjected to cross-examination during the Title IX hearing to be arbitrary and capricious.[3] The article then looks at the Department of Education's response to the court's holding in *Victim Rights*, which involved

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[1] *AAUW Advocates Equitable Access to Education and Climates Free of Harassment, Bullying, and Sexual Assault*, AAUW, https://www.aauw.org/resources/policy/position-school-harassment/ (last visited Jan. 4, 2023) (the research also shows that women are disproportionately victims of sexual assault on college campuses).

[2] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 138 (D. Mass. 2021).

[3] *Id.* at 134.

ceasing enforcement of the provision.[4] Next, the article suggests that the Department of Education's response will have a negative impact on Title IX's sexual harassment procedures. In making this argument, the article first recognizes the potential negatives of cross-examination and, further, continues to assess the importance of cross-examination. The article then proposes a solution that will protect all parties involved in Title IX proceedings, while also furthering the goal of ascertaining the truth. The proposed solution gives universities the power to subpoena and requires all non-party witnesses to be subjected to cross-examination. Finally, the article contends that the Department of Education's Title IX guidance needs to be clear to ensure that sexual harassment allegations are handled consistently across all college campuses.

II. BACKGROUND

Title IX was enacted in 1972 to prohibit discrimination on the basis of sex in elementary, secondary, and postsecondary schools that receive federal financial funding.[5] Title IX states that "[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance . . . ."[6] The U.S. Department of Education's predecessor, the Department of Health, Education, and Welfare, was given authority to create regulations to effectuate that goal.[7] In 1975, The Department of Health, Education, and Welfare enacted the first regulations under Title IX.[8] The regulations focused on sex discrimination in schools' hiring, admissions, and

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[4] Letter to Students, Educators, and other Stakeholders re Victim Rights Law Center v. Cardona, Suzanne B. Goldberg, Acting Assistant Sec'y for Off. of Civ. Rts., U.S. Dep't of Educ. (Aug. 24, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf [hereinafter Goldberg Letter].

[5] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30028 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

[6] 20 U.S.C.S. § 1681(a) (2021).

[7] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30028.

[8] *Id.*

athletic programs.[9] The regulations also required schools to designate an employee as the Title IX director and to develop a Title IX grievance procedure.[10] At that time, because "Federal courts had not yet addressed [whether] sexual harassment [was a type] of sex[ual] discrimination," the regulations did not mention sexual harassment.[11]

It was not until 1997 that the Department of Health, Education, and Welfare began to address sexual harassment.[12] Even then, the Department of Health, Education, and Welfare did not enact legal regulations addressing sexual harassment, rather, it published several guidance documents: "2001 Guidance," "2011 Dear Colleague Letter," "2014 Q&A," and "2017 Q&A."[13] In 2017, the Department of Education (formally the Department of Health, Education, and Welfare) began to look at how the guidance documents worked in practice.[14] The Department of Education recognized that despite the guidance documents, there still existed confusion among schools regarding how to address Title IX sexual harassment allegations.[15] Ultimately, schools interpreted the guidance documents differently amongst themselves and their interpretations did not always align with principles of fairness, due process, reliability, and impartiality.[16]

For example, in 2015, New York state adopted "Enough is Enough" in an attempt to create a "safe, healthy, and nurturing environment" at New York colleges.[17] Although, on its face, the law seemed like a step in the right direction, "the law fail[ed] to provide specific and uniform guidelines for [New York] colleges to

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[9] *Id.*

[10] *Id.*

[11] *Id.*

[12] *Id.* at 30028-29.

[13] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30028-29.

[14] *Id.* at 30048.

[15] *Id.* at 30048-49.

[16] *Id.* at 30048.

[17] *Enough is Enough,* OFF. FOR THE PREVENTION OF DOMESTIC VIOLENCE, https://opdv.ny.gov/enough-enough (last visited Jan. 30, 2022).

create and implement adjudication procedures."[18] Anna, a freshman at Hobart and William Smith College in New York, experienced firsthand how little guidance "Enough is Enough" actually provided.[19] Anna and her friend went to a fraternity party where they were separated.[20] Anna texted her friend "I'm scared" and "He won't leave me."[21] When the friend found Anna, Anna was " 'bent over a pool table as a football player appeared to be sexually assaulting her from behind . . . with six or seven people watching and laughing. Some had their cellphones out, apparently taking pictures.' "[22] When Anna filed her sexual assault complaint, it became clear that "Enough is Enough" did not provide her college sufficient guidance to navigate her complaint.[23] There was a three-person panel who asked questions and eventually found that the assault did not occur.[24] Anna "filed an appeal and the decision was [ultimately] upheld."[25]

Throughout the Title IX proceeding, the panel consistently cut Anna off as she was testifying and asked inappropriate questions.[26] For example, even after Anna's friend explained that when she found Anna, both Anna's pants and the football player's pants were down, the panel asked Anna if they were merely dancing together.[27] Further, only one of the members of the panel actually looked at the medical records, which showed "blunt force trauma," before making the decision that the assault did not occur.[28]

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[18] Nicolo Taormina, *Not Yet Enough: Why New York's Sexual Assault Law Does Not Provide Enough Protection to Complainants or Defendants*, 24 J.L. & POL'Y 595, 599 (2016).

[19] *Id.* at 595.

[20] *Id.* at 596.

[21] *Id.*

[22] *Id.* (citing Walt Bogdanich, *Reporting Rape, and Wishing She Hadn't: How One College Handled a Sexual Assault Complaint*, N.Y. TIMES (July 12, 2014), http://www.nytimes.com/2014/07/13/us/how-one-college-handled-a-sexualassault-complaint.html?_r=0).

[23] *Id.* at 599.

[24] Taormina, *supra* note 18, at 596-97.

[25] *Id.* at 597.

[26] *Id.*

[27] *Id.*

[28] *Id.* (internal quotations omitted).

Anna's case is an example of a sexual harassment complainant who did not receive fair Title IX proceedings. There are also cases where respondents to sexual harassment allegations are not given due process under Title IX. For example, Auburn University found Joshua Strange " 'responsible' for 'sexual assault and/or sexual harassment.' " [29] Joshua's punishment was expulsion from Auburn University, with the warning that if he ever returned to campus he would be arrested for trespassing.[30] The following day, Alabama's grand jury returned a " 'no bill' on criminal charges for the [sexual assault]."[31] The grand jury "found insufficient evidence to support a finding of probable cause that the alleged misconduct ever occurred."[32] The university's panel, however, found Joshua guilty by a preponderance of the evidence, which is a much higher standard than that of probable cause.[33]

During Joshua's sexual assault hearing at Auburn, the panel consisted of a judge who was the school's librarian, "a staff member from the College of Liberal Arts, two students, and a professor from the Agriculture College—none of whom had any legal training."[34] Both Joshua and his accuser had lawyers, but the lawyers were not permitted to speak.[35] Instead, there were two witnesses who spoke for the complainant.[36] Neither witness knew the details of the alleged sexual assault but, nevertheless, said they thought Joshua was responsible for the alleged misconduct.[37] It was under those procedures that Joshua was expelled from Auburn University.[38] Those are only two examples of numerous times when universities

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[29] Cory J. Schoonmaker, Note, *An "F" in Due Process: How Colleges Fail When Handling Sexual Assault*, 66 SYRACUSE L. REV. 213, 213 (2016) (quoting James Taranto, *An Education in College Justice*, WALL ST. J. (Dec. 6, 2003), http://www.wsj.com/articles/SB10001424052702303615304579157900127017) .

[30] *Id.*

[31] *Id.*

[32] *Id.*

[33] *Id.* at 214.

[34] *Id.*

[35] Schoonmaker, *supra* note 29, at 214.

[36] *Id.*

[37] *Id.*

[38] *Id.*

attempted to give their students fair, reliable, and impartial Title IX proceedings, but fell short.

The often unsatisfactory disposition of sexual harassment cases was not surprising to the Department of Education because, at that point, Title IX had not created legally binding rules regarding schools' sexual harassment obligations and did not even mention sexual harassment.[39] To address these shortcomings, in 2018, the Department of Education decided to amend its regulations.[40] The Supreme Court, at the time, had already determined in *Franklin v. Gwinnett County Public School*[41] that sexual harassment was a form of sex discrimination that was protected under Title IX.[42] The Department of Education released new regulations on May 19, 2020.[43] The new regulations became effective on August 14, 2020.[44]

For the first time, the 2020 regulations created legally binding rules on how schools should respond to sexual harassment.[45] Although the Department of Education's 2020 regulations shared some similarities to the guidance documents, there were also marked differences.[46] The 2020 regulations specifically built on the "2001 Guidance" and the "2011 Dear Colleague Letter," requiring Title IX to be interpreted consistent with the constitutional requirement of due process.[47] The 2020 regulations also continued to broaden the

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[39] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30029 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

[40] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 114-15 (D. Mass. 2021).

[41] Yolanda Wu, *Trends in Sexual Harassment Litigation Under Title IX*, WEEA DIG. (October 1998), http://www2.edc.org/womensequity/pubs/digests/digest-title9-harass.html (holding "that private individuals bringing Title IX suits could sue schools for monetary damages"); *accord* Franklin v. Gwinnett Cnty. Pub. Schs., 503 U.S. 60 (1991).

[42] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30046.

[43] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 115.

[44] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30046, 30028.

[45] *Id.* at 30029.

[46] *Id.*

[47] *Id.* at 30047.

definition of sexual harassment.[48] Accordingly, sexual harassment was defined in the 2020 regulations as "unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party."[49] Under the regulations, sexual harassment also included sexual assault.[50] The goal of the 2020 regulations was to finally create legal obligations on schools for sexual harassment allegations under Title IX.[51] The Department of Education believed that legally binding rules were necessary because sexual harassment could have serious consequences on both the complainant's and the respondent's access to equal education.[52]

Under the 2020 regulations, schools have three general requirements: (1) the school must "[p]romptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures;" (2) the school must "follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the [school's] behalf that an investigation is necessary;" and (3) the school must "provide remedies to victims of sexual harassment."[53] The 2020 regulations focus on the school's legal obligations while leaving the school with some "flexibility to choose to follow best practices . . . ."[54]

The Department of Education believes the 2020 regulations align with the purpose of Title IX, the Constitution of the United States, and today's times.[55] As a federal agency, the Department of Education is bound by the Constitution.[56] As a result, the Department of Education is precluded from interpreting Title IX in

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[48] *Id.* at 30036.

[49] *Id.*

[50] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30036.

[51] *Id.* at 30029.

[52] *Id.* at 30030-31.

[53] *Id.* at 30030.

[54] *Id.*

[55] *Id.*

[56] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30051.

a way that deprives an individual of his or her due process rights.[57] The sexual harassment grievance process, under the 2020 regulations, "provides a fair process rooted in due process protections that improves the accuracy and legitimacy of the outcome for the benefit of both parties."[58]

III. DUE PROCESS AND SECTION 106.45

The Title IX grievance process is not intended to "replace civil or criminal justice systems."[59] To that extent, parties in Title IX sexual harassment proceedings are not entitled to all of the constitutional protections that criminal defendants enjoy.[60] At the same time, the Department of Education is aware that sexual harassment has an impact on equal educational access.[61] In an effort to balance these considerations, the Department of Education created procedural requirements, consistent with the Due Process Clause, that are appropriate for a school setting.[62]

To accomplish that goal, the Department of Education added section 106.45 ("Grievance Process for Formal Complaints of Sexual Harassment") to the 2020 regulations.[63] Section 106.45 is consistent with the Due Process Clause because it protects the complainant and the respondent by requiring notice and a meaningful opportunity to be heard.[64] The Department of Education's goal for section 106.45 was to provide "specific procedures to be consistently applied by [schools]."[65]

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[57] *Id.* at 30051.

[58] *Id.* at 30050.

[59] *Id.* at 30030.

[60] *Id.* at 30050.

[61] *Id.* at 30030.

[62] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30026, 30051.

[63] *Id.* at 30051.

[64] *Id.* at 30053.

[65] *Id.* at 30049. It is important to recognize that not every part of section 106.45 applies to every school level. *Id.* at 30052. The Department of Education recognized that there is a significant age difference in the students at elementary and secondary schools, and postsecondary schools. *Id.* Because of the age difference in the students, some procedures that are appropriate at postsecondary

The remainder of this article focuses on section 106.45(b)(6)(i). Section 106.45(b)(6)(i) applies only to postsecondary schools.[66] Section 106.45(b)(6)(i) is known as the cross-examination requirement and provides, in pertinent part, that:

> For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally . . . . Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. . . . *If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's*

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schools may not be effective with elementary and secondary students. *Id.* Although, section 106.45's procedures apply consistently regardless of whether the school which receives Federal assistance is public or private. *Id.*

[66] 34 C.F.R. § 106.45 (2020); *Postsecondary Education*, TOP HAT, https://tophat.com/glossary/p/postsecondary-education/ (last visited Jan. 4, 2023) (noting postsecondary schools include universities, colleges, trade schools, and vocational schools).

> *absence from the live hearing or refusal to answer cross-examination or other questions . . . .*[67]

The cross-examination requirement received both positive and negative feedback from commenters.[68] Some commenters believed that the cross-examination requirement was the most important addition to the 2020 regulations.[69] Other commenters believed that the cross-examination requirement was unnecessary, potentially traumatizing, and was likely to have a chilling effect.[70] The Department of Education considered the comments and ultimately agreed that cross-examination was necessary to satisfy both the fairness and the meaningful right to be heard requirements.[71] The cross-examination requirement is an important tool for the decision-makers in the truth-seeking process that benefits the complainant, respondent, and school.[72]

The negative comments surrounding section 106.45 persisted, however, and less than a year after the 2020 regulations were enacted, *Victim Rights Law Center v. Cardona* challenged several provisions in the United States District Court for the District of Massachusetts.[73] The July 2021 case was successful in challenging the provision requiring the decision-makers to only consider statements that had been subjected to cross-examination at the live hearing.[74]

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[67] 34 C.F.R. § 106.45 (2020) (emphasis added) (emphasizing the most relevant portion for the subject of this article).

[68] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30311, 30314 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). The negatives and positives of cross-examination are explained further in Sections VII and VIII of this article, respectively.

[69] *Id.* at 30311.

[70] *Id.* at 30314-15.

[71] *Id.* at 30313.

[72] *Id.*

[73] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 115 (D. Mass. 2021).

[74] *Id.* at 138.

IV. VICTIM RIGHTS LAW CENTER V. CARDONA SUCCESSFULLY CHALLENGED SECTION 106.45(B)(6)(I)

In *Victim Rights Law Center v. Cardona*, four victim rights organizations (the Organizations) challenged the Title IX procedures set forth in the 2020 regulations on behalf of sexual harassment victims.[75] In count one, the Organizations argued that thirteen provisions of the 2020 regulations undermined the purpose of Title IX.[76] In count two, the Organizations argued that the thirteen provisions were arbitrary or capricious.[77] In count three, the Organizations argued that six provisions violated the Department of Education's statutory authority.[78] In count four, the Organizations argued that five provisions " 'invite retaliation against complainants, and purport to preempt state and local laws . . . .' "[79] In count five, the Organizations argued that thirteen provisions violated the Equal Protection Clause of the Fifth Amendment.[80] The Organizations sought a preliminary injunction to stop the implementation of the 2020 Title IX regulations.[81] The defendants (collectively known as the Government), Cardona (Acting Secretary of Education), the Department of Education, and the Assistant Secretary for Civil Rights, maintained that the 2020 regulations were constitutional.[82]

The Organizations advocated on behalf of the three sexual harassment victims, Mary Doe, Nancy Doe, and Jane Doe.[83] One

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[75] *Id.* at 115.
[76] *Id.* at 126.
[77] *Id.*
[78] *Id.*
[79] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 134.
[80] *Id.* at 115.
[81] *Id.*
[82] *Id.*
[83] *Id.* Because this article focuses only on postsecondary schools, Jane Doe's claim is not further discussed. Jane Doe was in fourth grade when she was sexually harassed and assaulted by one of her classmates on several occasions from January to February 2020. *Id.* at 118. The school did little to address the sexual harassment and assault. *Id.* at 118-19. Jane Doe's guardians did not initiate a formal Title IX complaint. *Id.* at 119. Jane Doe's guardians were concerned that if they initiated the Title IX grievance process under the 2020 regulations, their concerns would not be adequately addressed. *Id.*

of the Organizations, Victim Rights, asserted that since the 2020 regulations became effective, it has "actively experienced unwillingness and hesitancy from student victims to continue their Title IX complaints."[84] Victim Rights provided evidence of students who were hesitant to report their sexual harassment because they did not want to be subjected to cross-examination at the Title IX live hearing.[85]

Mary Doe was sexually assaulted by a male classmate in her dormitory in the fall of 2020.[86] Mary Doe reported the sexual assault to her school's Title IX director, but was told that if she initiated a Title IX investigation she would be required to attend a live hearing in which she would have to sit in the same room as her assailant.[87] Mary Doe instead decided to get a restraining order against her assaulter but she, nevertheless, continued to see him on campus.[88] Accordingly, she decided to pursue a Title IX investigation.[89] Mary Doe and her attorney met with the Title IX director and received information regarding the Title IX sexual harassment grievance process.[90] After talking with the Title IX director, Mary Doe took issue with several effects of the 2020 regulations.[91] Mary Doe's relevant concerns were: (1) she was "required to participate in a live hearing," (2) the school did not "rely on the statements of any witness who does not appear and submit to cross-examination at the live hearing," and (3) she "may [have] be[en] cross-examined at the hearing[.]"[92] Mary Doe considered stopping her Title IX investigation.[93]

Nancy Doe was sexually assaulted and sexually harassed at her university.[94] Nancy Doe sought relief from her university's Title IX director, but was not sure whether she wanted to pursue a Title IX

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[84] *Id.* at 119.
[85] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 119.
[86] *Id.* at 117.
[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *Id.* at 118.
[91] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 118.
[92] *Id.*
[93] *Id.*
[94] *Id.*

investigation.[95] The university's Title IX director eventually suspended the claim.[96] After graduating, Nancy Doe reopened her Title IX investigation against the male who was still enrolled at the university.[97] However, Nancy Doe provided that she will again stop the Title IX investigation if the cross-examination requirement is applied to her case.[98]

The Department of Education addressed each of the 2020 regulations that the Organizations attacked.[99] The Department explained its reasoning for requiring a live hearing and cross-examination at the hearing.[100] The Department stated that cross-examination is a "necessary part of a fair, truth-seeking grievance process."[101] The Department next emphasized that there are safeguards in place in section 106.45 "to minimize the potential for 'traumatic effects on the complainants[.]' "[102] Specifically, the Department of Education explained that schools have discretion to hold the live hearing virtually and, moreover, the cross-examination questions have to be relevant.[103] The Department maintained that, in "the interest of a 'fair grievance process leading to reliable outcomes, which is necessary in order to ensure that [schools] appropriately remedy sexual harassment occurring in education programs or activities,' " cross-examination is important.[104]

The Department of Education further explained in an effort to avoid creating "complex" rules, it decided the decision-makers could only consider statements if those statements were subjected to cross-examination.[105] The Department also maintained that "[p]robing the credibility and reliability of statements asserted by witnesses contained in such evidence . . . requires the parties to have

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[95] *Id.*
[96] *Id.*
[97] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 118.
[98] *Id.*
[99] *Id.* at 119.
[100] *Id.* at 120.
[101] *Id.*
[102] *Id.*
[103] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 120.
[104] *Id.* at 121.
[105] *Id.*

the opportunity to cross-examine the witnesses making the statements."[106]

The court first found that, out of the students, only Mary Doe had standing to pursue her claim.[107] To have standing, an individual must have a "personal stake" in the litigation.[108] "[T]o establish standing, a plaintiff must show (i) that [s]he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief."[109] Mary Doe was the only student whose Title IX investigation occurred after August 14, 2020 (the 2020 regulations' effective date).[110] For an organization to have standing, its mission had to have been " 'frustrated' by the challenged conduct," and the organization had to have "expended resources to combat it."[111] The court found Victim Rights was the only organization that satisfied the standing requirements.[112] Victim Rights encountered students who were unwilling and hesitant to pursue the Title IX grievance process because of the 2020 regulations and Victim Rights also demonstrated that it had expended resources on the 2020 regulations.[113] Next, the court analyzed the five counts under section 706(2)(a) of the Administrative Procedures Act.[114]

The Administrative Procedures Act (APA) "sets forth standards governing judicial review of findings of fact made by federal administrative agencies."[115] Pursuant to section 706(2)(a):

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[106] *Id.*

[107] *Id.* at 122.

[108] *Id.* (citing TransUnion LLC v. Ramirez, 141 S. Ct. 2190, 2203 (2021)).

[109] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 122 (quoting *TransUnion*, 141 S. Ct. at 2203).

[110] *Id.* at 123.

[111] *Id.* at 125. (citing Equal Means Equal v. Dep't of Educ., 450 F. Supp. 3d 1, 7 (D. Mass. 2020)).

[112] *Id.* at 126.

[113] *Id.*

[114] *Id.* at 127.

[115] Dickinson v. Zurko, 527 U.S. 150, 152 (1999) (deciding that APA § 706, which governs the scope of judicial review of agency factfinding, applies to the Patent and Trademark Office).

> The reviewing court shall –
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> (2) hold unlawful and set aside agency action, findings, and conclusions found to be –
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> (A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;
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> (B) contrary to constitutional right, power, privilege, or immunity;
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> (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;
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> (D) without observance of procedure required by law;
>
> (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or
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> (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.
>
> In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.[116]

The court began by addressing count one, which alleged that thirteen provisions of the 2020 regulations undermined the purpose of Title IX, and count three, which alleged that six provisions were outside of the scope of the Department's authority.[117] To analyze counts one and three, the court had to determine whether "six provisions of the Final Rule exceed[ed] the Department's statutory

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[116] 5 U.S.C.S. § 706 (LexisNexis 1996).
[117] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 127.

authority."[118] The court found that the Department of Education has authority "to enforce Title IX, so long as the regulations are 'consistent with achievement of the objectives of' Title IX."[119] The court deferred to the Department of Education and, therefore, found that the Department's actions did not undermine the purpose of Title IX.[120]

Then the court addressed count two, which alleged that thirteen provisions were arbitrary and capricious.[121] The court recognized that a review for arbitrary and capricious is "narrow" and "highly deferential."[122] A decision is arbitrary and capricious:

> if the agency has 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.[123]

The court found section 106.45(b)(6)(i)'s prohibition on statements that were not subjected to cross-examination to be arbitrary and capricious.[124]

The pertinent part of section 106.45(b)(6)(i) states, "[i]f a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility[.]"[125] The Department of Education has defined "statement" in the context of section 106.45(b)(6)(i):[126]

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[118] *Id.*
[119] *Id.* at 128.
[120] *Id.* at 130.
[121] *Id.*
[122] *Id.*
[123] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 130.
[124] *Id.* at 134.
[125] 34 C.F.R. § 106.45 (2021).
[126] *Victim Rts. L. Ctr.*, 552 F. Supp. 3d at 121.

> The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.[127]

Essentially, under the 2020 regulations, if an individual had information regarding the alleged sexual harassment and that individual was not subjected to cross-examination at the live hearing, the decision-makers could not consider the information, regardless of how relevant, impartial, or supported it was.[128]

The court reasoned that section 106.45(b)(6)(i) was arbitrary and capricious because, under the 2020 regulations, the respondent could schedule the live hearing but then choose not attend to avoid self-incrimination and could also persuade other witnesses not to attend.[129] Because Title IX live hearings at universities are not court proceedings, the university lacks subpoena power to compel the respondent and witnesses to appear.[130] If the respondent and possibly witnesses do not attend the live hearing, then the decision-makers may be left with only the testimony of the complainant. Moreover, the decision-makers are not permitted to draw any inferences from the fact that the respondent and witnesses were not in attendance.[131] Further, the complainant would still be subjected to cross-examination and, because the respondent did not attend, the complainant would be left "with little to no hope of evidentiary

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[127] *Id.*

[128] *Id.*

[129] *Id.* at 132-33.

[130] *Id.* at 133.

[131] *Id.*; *See also* 34 C.F.R. § 106.45(b)(6)(i) (2021) ("the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing . . . ").

rehabilitation."[132] The court emphasized that "[t]his is not some extreme outlier or fanciful scenario," because "[n]o attorney worth her salt, recognizing that—were her client simply not to show up for the hearing—an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise."[133]

It was the court's responsibility, in determining whether the provision was arbitrary and capricious, to ensure the Department of Education considered the necessary and likely consequence of the cross-examination requirement by requiring the Department to explain why it intended those results.[134] The record did not show that the Department of Education knew of, or considered, the potential results of the section 106.45(b)(6)(i)'s cross-examination requirement, which requires the decision-makers to only consider statements that are subjected to cross-examination at the live hearing; therefore, the court found section 106.45(b)(6)(i) to be arbitrary and capricious.[135]

During the arbitrary and capricious argument, Victim Rights also argued that the court should find section 106.45(b)(6)(i) to be unenforceable because the Department of Education ignored the fact that the cross-examination requirement will " 're-traumatize victims, chill reporting, and undermine Title IX's antidiscrimination mandate.' "[136] The court was not persuaded that the Department failed to consider those consequences, and concluded that other portions of section 106.45(b)(6)(i) provided safeguards to minimize the potential of chilling reports and re-traumatization.[137]

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[132] *Victim Rts. Law Ctr.*, 552 F. Supp. 3d at 133.

[133] *Id.*

[134] *Id.*

[135] *Id.* at 133-34.

[136] *Id.* at 131.

[137] *Id.* The court analyzed counts four and five and found for the Government. *Id.* at 134-138. Count four challenged five provisions of the Final Rule alleging they " 'were not identified, described, or otherwise included in the Proposed Rule[.]' " *Id.* at 134. The court explained, however, that § 706(2)(D) does not require the Proposed Rule to be the same as the Final Rule. *Id.* The court held the five provisions were "logical outgrowth[s] of the notice and comment process" and therefore held for the Department of Education. *Id.* at 135. Count five challenged thirteen provisions of the Final Rule as violating the Equal

The court remanded section 106.45(b)(6)(i) to the Department of Education for further consideration and explanation regarding why the decision-makers could only consider statements that were subjected to cross-examination at the live hearing.[138]

On August 10, 2021, the court entered another order clarifying its initial July 28, 2021 judgment from *Victim Rights Law Center v. Cardona*.[139] The court restated that section 106.45(b)(6)(i)'s requirement—that the decision-maker consider statements only if they were subjected to cross-examination—was arbitrary and capricious.[140] The court clarified that the specific provision at issue was vacated and remanded.[141]

V. THE DEPARTMENT OF EDUCATION'S RESPONSE TO VICTIM RIGHTS LAW CENTER. V. CARDONA

On August 24, 2021, Suzanne B. Goldberg, Assistant Secretary for Civil Rights, issued the Department of Education's response to *Victim Rights Law Center v. Cardona*.[142] The Department of Education immediately "cease[d] enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination."[143] The Department of Education explained that:

> In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in

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Protection Clause. *Id.* at 137. The court found that Victim Rights failed to identify a discriminatory purpose and failed to demonstrate how women and men were treated differently under the Final Rule; thus, it found the provisions did not violate the Equal Protection Clause. *Id.* at 138.

[138] *Victim Rts. Law Ctr.*, 552 F. Supp. 3d at 138.

[139] Victim Rts Law Ctr. v. Cardona, No. 20-11104-WGY, 2021 U.S. Dist. LEXIS 150076, at *6 (D. Mass. Aug. 10, 2021).

[140] *Id.* at *7.

[141] *Id.*

[142] Goldberg Letter, *supra* note 4.

[143] *Id.*

> reaching a determination regarding responsibility in a Title IX grievance process.[144]

The letter from the Department of Education then explained how the new rule will operate during the Title IX process:

> For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the living hearing.[145]

The letter also stated that all resources from the Department of Education would be updated to reflect the change and, moving forward, if any Department of Education resource still contains that vacated regulation, that portion should be disregarded.[146]

VI. THE DEPARTMENT OF EDUCATION'S DECISION TO IMMEDIATELY CEASE ENFORCEMENT OF THE PROVISION REQUIRING THE DECISION-MAKER TO ONLY CONSIDER STATEMENTS SUBJECTED TO CROSS-EXAMINATION MAY HAVE DETRIMENTAL EFFECTS

It is clear why the court in *Victim Rights Law Center v. Cardona* found section 106.45(b)(6)(i)'s requirement that the decision-maker could only consider statements subjected to cross-examination to be arbitrary and capricious. A rule that effectively encourages the respondent not to attend the live hearing to avoid the risk of self-

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[144] *Id.*
[145] *Id.*
[146] *Id.*

incrimination, while also encouraging the respondent to convince other witnesses not to attend the live hearing, hinders the Department of Education's goal to provide the parties with a fair, just process. Although the previous rule was flawed, the new rule is also flawed and will likewise hinder the truth-seeking process. The Department of Education is now allowing the decision-makers to consider statements that are not subjected to cross-examination.[147] As a result, it is likely that witnesses will be even less inclined to attend the live hearing. If witnesses know they do not have to attend the live hearing for their statements to be considered, it is unlikely they would be incentivized to attend the live hearing.

It is my submission that if the Department of Education permanently ceases enforcement of requiring witness statements to be subjected to cross-examination before their statements are considered by the decision-makers, fewer witnesses will attend the live hearings. If fewer witnesses attend the live hearing, fewer statements during the Title IX hearing will be subjected to cross-examination which would inhibit the truth-seeking process. The purpose and benefits of the cross-examination requirement are significant, so it is important for the Department of Education to enact regulations that ensure witness statements are subjected to cross-examination.

VII. NEGATIVES OF CROSS-EXAMINATION

Although it is my submission that cross-examination is a crucial component in the truth-seeking process of Title IX sexual harassment proceedings, the article would be incomplete if it did not recognize some of the negatives asserted by commentators.

In the case of postsecondary institutions' Title IX grievance proceedings, the complainant and respondent often live, study, and work on the same campus, so some find that " 'cross-examination is

[147] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 130-32 (D. Mass 2021).

especially fraught with potential drawbacks.' "[148] Some commentators believe that requiring the complainant and respondent to be subjected to cross-examination while explaining terrible events is wholly unnecessary, particularly where both parties are likely to have future contact with each other on campus.[149] Some commentators also argue that it is difficult enough for victims of sexual harassment to report the incident, and when victims find out that cross-examination is part of the Title IX grievance process they often do not want to pursue a formal Title IX investigation.[150] Accordingly, the commentators believe that the thought of having to relive the experience while being questioned in front of others may be discouraging to victims who just want to forget about a harrowing and traumatic event that changed the course of their life.[151] There is also significant concern that the cross-examination requirement will "revictimize, retraumatize, and scar survivors of sexual harassment[.]"[152] It follows that being subjected to cross-examination could cause the complainant to suffer from post-traumatic stress disorder, anxiety, or depression.[153]

Further, commentators argue that the Title IX grievance process is not a proceeding in a court of law and that cross-examination is part of an adversarial proceeding.[154] Consequently, they argue, there is no reason to "interrogate victims like they are the criminals . . . and essentially place the victim on trial when victims

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[148] Doe v. Regents of Univ. of Cal., 210 Cal. Rptr. 3d 479, 505 (Cal. Ct. App. 2016). The court agreed with the university that John Doe's sexual misconduct violated its student conduct code. *Id.* at 484. Prior to the hearing, John Doe was allowed to submit written questions to the Panel. *Id.* at 504. The Panel screened the questions and only asked Jane Doe those which were relevant. *Id.* at 505. The court recognized that, because the students lived on the same campus, the indirect use of cross-examination was an appropriate way to conduct the hearing. *Id.*

[149] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30314-15 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

[150] *Id.* at 30315.

[151] *Id.* at 30314.

[152] *Id.*

[153] *Id.*

[154] *Id.*

are already trying to heal from a horrific experience."[155] Finally, commentators point out that no other school disciplinary process "gives respondents the right to 'put on trial' the person accusing the respondent of wrongdoing[.]"[156] For example, "professors accusing a student of cheating are not 'put on trial,' " and, similarly, "a student accusing another student of vandalism is not 'put on trial[.]' "[157] Therefore, to some commentators, it follows that respondents in sexual harassment proceedings should not be permitted to put the complainant "on trial."[158]

VIII. BENEFITS OF CROSS-EXAMINATION

The Department of Education considered the potential negative impacts of the cross-examination requirement at the time it enacted the 2020 Title IX regulations and, as a result, it created safeguards in section 106.45(b)(6) to minimize those concerns.[159]

> Cross-examination is only conducted by party advisors and not directly or personally by the parties themselves; upon any party's request the entire live hearing, including cross-examination, must occur with the parties in separate rooms; questions about a complainant's prior sexual behavior are barred subject to two limited exceptions; a party's medical or psychological records can only be used with the party's voluntary consent; recipients are instructed that only relevant questions must be answered and the decision-maker must determine relevance prior to a party or witness answering a cross-examination question; and recipients can oversee cross-examination in a manner that avoids aggressive, abusive questioning of any party or witness.[160]

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[155] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30314.

[156] *Id.*

[157] *Id.*

[158] *Id.*

[159] *Id.* at 30315.

[160] *Id.* at 30313-14.

The Department of Education believes with those safeguards in place, there is a legitimate purpose for including the cross-examination requirement in the Title IX grievance process.[161]

The Department of Education has continually emphasized that the cross-examination requirement benefits the respondent, the complainant, and the university.[162] Further, the cross-examination of witnesses is an especially important part of the Title IX grievance process because the outcome of the live hearing largely rests on witness testimony.[163] Statements from witnesses allow the decision-makers to decide factual disputes between the complainant and the respondent.[164] If witness statements are not subjected to cross-examination, then the decision-makers do not have the opportunity to determine the credibility of the witness' statement.[165] Cross-examination is necessary to "bring out contradictions and improbabilities in the witness' [statements]."[166]

"Few procedures safeguard accuracy better than adversarial questioning. In the case of competing narratives, 'cross-examination has always been considered a most effective way to ascertain truth.' "[167] It is essential for the decision-makers to have the opportunity to make credibility determinations because both the complainant and respondent have high stakes in the outcome of the proceeding.

If the decision-makers erroneously find that the sexual harassment did not occur, both the complainant and the respondent

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[161] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30314.

[162] *Id.* at 30313.

[163] *Id.* at 30311.

[164] *Id.*

[165] *Id.* at 30313.

[166] *Id.* at 30311-12.

[167] Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017). John Doe was suspended from the University of Cincinnati after he was found responsible for sexually assaulting Jane Roe. *Id.* at 396. Because Jane Roe did not attend the university's hearing, John Doe appealed his suspension arguing that his inability to confront his accuser violated his due process rights. *Id.* The district court granted a preliminary injunction against John Doe's suspension because it believed he would prevail on his constitutional claim. *Id.* The court of appeals affirmed, reasoning that cross-examination is an important part of the truth-seeking process. *Id.* at 404.

will likely be permitted to remain at the university. Moreover, if one of the individuals decides to leave the university, it is likely to be the complainant because he or she was the individual that was particularly traumatized by the incident.

The complainant will likely decide to withdraw from the university because when a complainant and respondent share the same campus, it is often difficult for them to avoid each other. There are several factors that might increase the likelihood of the complainant encountering the respondent on campus: the size of the university; whether the students are in the same classes or major; whether the students are in the same organizations; whether the students have a similar friend group; and whether the students live in the same building.[168] This issue was demonstrated by Mary Doe in *Victim Rights Law Center v. Cardona*.[169] Mary Doe saw the respondent several times on campus, at the cafeteria, and in a common courtyard.[170]

Unfortunately, the opportunities for the complainant and respondent to encounter each other are endless and the likelihood that the complainant will feel uncomfortable or retraumatized is high. Therefore, it is necessary for the decision-makers to have all the tools necessary to avoid erroneously deciding that the sexual harassment did not occur. One of the best ways for a decision-makers to feel confident in their determination is the ability to test the credibility of witness statements. Cross-examination allows for such credibility determinations to be made.

The cross-examination requirement also benefits the respondent.[171] If cross-examination is utilized and the decision-makers find that the respondent was not responsible for sexual harassment, it is less likely that the university and the public will "doubt the legitimacy of that determination."[172] After the decision-makers find for the respondent, the respondent should be able to

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[168] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 117 (D. Mass. 2021).

[169] *Id.*

[170] *Id.*

[171] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30051 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

[172] *Id.* at 30314.

move forward with his or her education without others questioning the accuracy of the outcome.

If the decision-makers find that the respondent did commit the sexual harassment, then the decision will have a tremendous impact on the respondent; thus, it is important the decision-makers have the ability to make credibility determinations during the live hearing. As the Sixth Circuit Court of Appeals found in *Doe v. University of Cincinnati*, "[a] finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to [their] 'educational and employment opportunities,' especially when the disciplinary action involves a long-term suspension."[173]

If the decision-makers find that the respondent did commit the sexual harassment, the respondent will likely be suspended or expelled from the school and forced to move off of campus.[174] Some states even have legislation which requires the university to put a note on the respondent's academic transcript.[175] The note on the academic transcript is "similar to being put on a sex offender list[.]"[176] The note may prevent the respondent from receiving a higher education or jobs in the future.[177] "Thus, the effect of a finding of responsibility for sexual misconduct on 'a person's good name, reputation, honor, or integrity' is profound."[178] Courts have held, "[t]he Due Process Clause guarantees fundamental fairness to state university students facing long-term exclusion from the educational process."[179] The cross-examination requirement is necessary in situations, like a Title IX sexual harassment proceeding, where the outcome will have a lasting impact on both parties.

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[173] Doe v. Univ. of Cincinnati, 872 F.3d 393, 400 (6th Cir. 2017).

[174] Doe v. Miami Univ., 882 F.3d 579, 600 (6th Cir. 2018) (recognizing that a respondent to a university sexual assault claim has a "substantial" interest at stake).

[175] *Id.*

[176] *Id.*

[177] *Id.*

[178] *Id.*

[179] *Id.* at 396.

IX. THE DEPARTMENT OF EDUCATION SHOULD CREATE NEW REGULATIONS TO FURTHER ITS GOAL OF ASCERTAINING THE TRUTH

Although it has been long recognized that, generally, there is no right to cross-examine witnesses in a school proceeding, it has also long been recognized that "[t]he more serious the deprivation, the more demanding the process."[180] There is no question the outcome of a Title IX sexual harassment proceeding has a serious impact on the complainant, the respondent, and the university; therefore, it requires a demanding process. The Department of Education has recognized how critical it is for the complainant, the respondent, and the university that the Title IX process be demanding in order to ascertain the truth.[181] Although, since the Department of Education's response to *Victim Rights Law Center v. Cardona*, the Title IX grievance process has effectively gotten less demanding.

There is no question that the court in *Victim Rights Law Center v. Cardona* was correct that the regulation, which allowed the decision-makers to consider only statements that were subjected to cross-examination, was arbitrary and capricious. The Department of Education appropriately ceased enforcement of the regulation; nevertheless, the new 2020 regulations are still lacking. The 2020 regulations now allow the decision-makers to consider statements made regardless of whether the individual attends the live hearing.[182] Under this rule, there is a significant risk that witnesses will not see a need to attend the live hearing; if their statements are going to be considered regardless of whether they appear, why would a witness spend his or her time at an emotional Title IX hearing? This new rule will likely decrease the number of witnesses who attend live hearings and, therefore, will decrease the number of statements that are subjected to cross-examination. If few or no witness statements are subjected to cross-examination, how will the decision-makers be able to make credibility determinations to reach the appropriate outcome?

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[180] Doe v. Univ. of Cincinnati, 872 F.3d 393, 400 (6th Cir. 2017).

[181] Goldberg Letter, *supra* note 4.

[182] Suzannah Dowling, Note, *(Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 Me. L. Rev. 123, 128 (2021).

To keep the Title IX sexual harassment grievance process a truth-seeking effort, the Department of Education needs to create new regulations. Three changes to the Title IX 2020 regulations will further that effort.

First, the August 24, 2021 letter from the Department of Education is unclear regarding whether postsecondary institutions can still require the cross-examination of statements before they can be considered by the decision-maker. The statement from the Department of Education is as follows:

> In practical terms, a decision-maker at a postsecondary institution *may* now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.[183]

Arguably, the Department of Education's use of the word "may" in the letter seemingly leaves consideration of the statements to the university's discretion.[184] If the Department of Education allows some universities to require its decision-makers to consider statements regardless of whether they are subjected to cross-examination, but at the same time allows other universities to require its decision-makers to only consider statements that are subjected to cross-examination, there will be significant differences regarding how universities handle their Title IX grievance process.

The effect of this unclear guidance will likely have the same results of the guidance documents that the Department of Education observed in 2017: universities will interpret the regulation differently, the interpretations will be inconsistent with the principles of fundamental fairness and due process, and the

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[183] Goldberg Letter, *supra* note 4 (emphasis added).

[184] *See* In re Argose, Inc., 372 B.R. 705, 708 (Bankr. Dist. of Del. 2007) ("There is a big difference between may and must."); RICHARD C. WYDICK, PLAIN ENGLISH FOR LAWYERS 64 (5th ed. 2005) (noting that "may" indicates it is at the court's discretion or is permissive, while "must" indicates the court is required to do something).

grievance process will lack impartiality and reliability.[185] The Department of Education created the 2020 regulations after realizing the inconsistent effects of the guidance documents on the Title IX sexual harassment process, so it is unlikely it wants to adopt a regulation that will essentially have the same result. The Department of Education needs to release Title IX regulations that result in clear and consistent guidance to universities.

Second, although the Title IX grievance process is not a proceeding before a court of law, the Department of Education should give universities the power to subpoena relevant witnesses. Under this regulation, the university would have the power to subpoena important witnesses to the live hearing but would not have the power to subpoena the complainant or respondent. The complainant and the respondent, therefore, still have the option not to attend the live hearing if they believe it is not in their best interest to attend or if they believe it will be too traumatizing. Under this regulation, the decision-makers would still not be allowed to infer anything from the fact that neither the complainant nor the respondent attended the live hearing.

Since the Title IX grievance process is not a proceeding before a court of law, the university's power to subpoena would not be to the same extent as in a criminal or civil proceeding. In a court proceeding, a subpoena is defined as follows:

> An order to appear before the court to provide evidence. A subpoena is a summons issued to a witness or other party who might give evidence or assist the court to appear in court. A subpoena is usually served on a witness as a means of notice of a procedure at which the witness is desired and assuring the witness will appear, at a trial, hearing, or discovery. Failure to appear makes the witness liable for contempt of court or whichever body issued the subpoena.[186]

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[185] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30048 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

[186] STEPHEN MICHAEL SHEPPARD, BOUVIER LAW DICTIONARY (2012).

In a Title IX proceeding, the subpoena would also be issued to a witness who might give evidence or assist during the live hearing. Further, the Title IX subpoena would be used to give notice to the witness that he or she is desired at the live hearing and to ensure that he or she appears. However, since a university is not a court of law, the university would not have the power to hold the witness in contempt.

The universities' lack of power to hold witnesses in contempt should not be overanalyzed. As long as the Department of Education requires the university to give witnesses sufficient notice of the date, time, and location of the Title IX live hearing, witnesses will be able to reserve their availability for the hearing. The Department of Education, therefore, should determine how far in advance universities must notify witnesses through the Title IX subpoena and should require all universities to follow the same procedure. Because witness statements hold significant weight in the outcome of Title IX sexual harassment proceedings, it is important that the Title IX subpoena is used consistently by all universities.

Further, in the technological era in which we live, there are several video conference options the court can use in the event that extraneous circumstances, such as sickness or an unreasonable commute, prevent the witness from physically being present at the live hearing. Cross-examination can still be effectively conducted over a video call and will give the decision-makers an adequate opportunity to assess the information.

The idea of allowing the cross-examination of witnesses to be done by a video conference does not significantly change the Department of Education's 2020 regulations. Section 106.45(b)(6)(i) already allows video technology.[187] Section 106.45(b)(6)(i) states, "[a]t the request of either party, the [university] must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions."[188] Since the Department of Education has already acknowledged the use of video technology,

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[187] 34 C.F.R. § 106.45 (2021).
[188] *Id.*

allowing witnesses to give statements through a video conference platform under extraneous circumstances is not unreasonable.

Further, when the Department of Education enacted the 2020 regulations, it created legally binding obligations on universities while purposely providing flexibility for universities to choose some procedures based on what works best for them.[189] There is no question that postsecondary institutions have the power and tools to ensure their subpoenas are adhered to, especially with faculty members and students. If a faculty member is subpoenaed, universities know when and where he or she is on campus, so they can easily ensure that the faculty member receives the subpoena. To ensure that the faculty member abides by the subpoena, the university, as the faculty member's employer, likely has several options. The options depend on the university, but, for example, it could suspend the faculty member without pay for failing to adhere to the subpoena. If another student is subpoenaed, universities have the ability, among other things, to put a hold on the student's account until he or she attends the live hearing, charge the student's account, require the student to take sexual harassment awareness courses, or suspend the student from on-campus organizations.

As mentioned previously, as long as the university gives non-student or non-faculty witnesses, such as nurses and police officers, sufficient notice to reserve the date and time, it is likely that they will attend the live hearing without a problem under a Title IX subpoena. The Department of Education does not need to dictate every aspect of the Title IX subpoena process and can leave any "punishment" to the discretion of the university, depending on the relevant circumstances.

This regulation would eliminate the court's concerns in *Victim Rights Law Center v. Cardona*. There, the court was concerned that, under the 2020 regulations, the respondent was encouraged not to attend the live hearing and, further, was encouraged to convince other witnesses not to attend, leaving only the complainant's statement to be considered by the decision-makers.[190] By giving the

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[189] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30030.

[190] Victim Rts. L. Ctr. v. Cardona, 552 F. Supp. 3d 104, 132-33 (D. Mass. 2021).

university the power to subpoena witnesses, the court no longer has to be concerned the respondent will influence a witness's decision of whether to attend the live hearing. Further, because witnesses will be required to attend the live hearing under the Title IX subpoena, either in-person or by video conference, the court does not have to worry about the complainant's statement being the only information the decision-makers have to consider.

Third, since universities will have the power to subpoena important witnesses, the Department of Education should still require witnesses to be subjected to cross-examination. Under this regulation, the complainant's statements and the respondent's statements will be considered, regardless of whether they are subjected to cross-examination. If the respondent or the complainant believes it is in his or her best interest, they can elect to be subjected to cross-examination. If either the respondent or the complainant believes cross-examination would be traumatizing, would create a hostile environment, or would be self-incriminating, they can elect to avoid cross-examination without worrying that their statements would not be adequately considered by the decision-makers.

Under the new regulation, the decision-makers would not be allowed to make inferences about the complainant's or the respondent's decision to avoid cross-examination. The most beneficial aspect of this regulation is that if either the complainant or the respondent declines to be subjected to cross-examination, the decision-makers will still be able to make credibility and factual determinations because they will have the ability to weigh the statements of the complainant and respondent against those statements of witnesses who are thoroughly cross-examined. Although there are not always other student witnesses, the Title IX employee who has been working on the case will have the details from the involved parties and will be subjected to cross-examination. There are also often nurses, police officers, or both, involved in helping the decision-makers make credibility determinations.[191]

It is important to recognize that, if the complainant or respondent decides it is in their best interest to move forward with

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[191] *Id.* at 121.

cross-examination, the other safeguards of section 106.45(b)(6) will still be in place. Moreover, those safeguards not only protect the complainant and respondent if they choose to be subjected to cross-examination, but also protect the other witnesses.

Further, the majority of those who have had negative comments surrounding the cross-examination requirement should be satisfied with the balance that the new regulations create. Most, if not all, of the negative comments are related to the complainant/victim.[192] The negative comments are essentially worried that the cross-examination requirement would retraumatize the victim and result in him or her choosing not to report the alleged sexual harassment.[193] Those commentators no longer have to worry about those effects since, under the new regulations, the decision-makers can still consider the complainant's statements, regardless of whether he or she chooses to submit to cross-examination. Under the new regulations, the complainant is not even required to attend the live hearing if he or she believes it will be too traumatizing. Similarly, neither is the respondent required to attend or be subjected to cross-examination, which eliminates any argument that the regulations are unfair.

The most valuable outcome of the new regulations is that the decision-makers will now always have the cross-examination of a witness—whether it is a police officer, Title IX director, nurse, student, or other individual—to help determine the credibility of the factual scenario before making a determination that has a lasting impact on the parties.

X. CONCLUSION

The trend in the United States in recent years has been for universities to adopt pro-victim policies regarding sexual harassment.[194] Universities have accomplished this goal by adopting policies that make it easier for victims to assert and prove

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[192] *Id.* at 132 n.12.

[193] *Id.*

[194] Doe v. Brandeis Univ., 177 F. Supp. 3d 561, 572 (D. Mass. 2016) (recognizing that, pursuant to the "Dear Colleague" letter the Department of Education issued in 2011, universities have adopted procedures that make it easier for victims of sexual assault to pursue their claims).

their claims.[195] "The goal of reducing sexual assault, and providing appropriate discipline for offenders, is certainly laudable."[196] Unfortunately, the push in that direction has, arguably, eliminated some basic procedural protections.[197]

In the context of a Title IX grievance process, both the complainant and the respondent have significant interests at stake; therefore, the grievance process needs to be grounded in principles of fundamental fairness and due process. Currently, the Department of Education allows the decision-makers to consider statements, regardless of whether they are subjected to cross-examination, which goes against the principles of fairness and due process. One of the best ways to ensure fairness and due process to the complainant, the respondent, and the university is to ensure that all relevant statements are considered by the decision-makers. Beyond the opportunity to consider all relevant statements, the decision-makers also require the ability to determine the credibility of those statements. Cross-examination is one of the most effective tools to make credibility determinations.

The Department of Education can achieve fundamental fairness and due process by implementing three changes. First, the Department of Education needs to give universities the power to subpoena relevant witnesses. Under the Title IX subpoena, universities will be required to subpoena relevant witnesses. This will ensure important witnesses attend the Title IX hearing and their statements are available for the decision-makers to consider. Under the Title IX subpoena, however, universities will not have the capability to subpoena the complainant or respondent. Moreover, if the complainant or the respondent does not attend the live hearing, the decision-makers cannot make any inferences regarding that decision. Under the regulation, the Department of Education should require all universities to give the witnesses the same amount of notice before the Title IX hearing. However, the Department of Education will still give the universities the flexibility to come up with their own penalties to ensure that witnesses adhere to the Title IX subpoena. This accommodates the Department of Education's

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[195] *Id.*
[196] *Id.*
[197] *Id.*

desire to apply the sexual harassment regulations consistently across universities while still allowing universities the flexibility to do what is best for them.

Second, the Department of Education needs to create a regulation that requires witness statements to be subjected to cross-examination. The regulations, however, would not require the complainant's statements or the respondent's statements to be subjected to cross-examination to be considered by the decision-makers. Further, the decision-makers cannot infer anything from the fact that neither the complainant's nor the respondent's statement was subjected to cross-examination. The Department of Education does not need to worry about requiring the witnesses to be subjected to cross-examination because, unlike the complainant and the respondent, the witnesses are unlikely to be potentially traumatized.

Finally, it is important that when the Department of Education releases Title IX sexual harassment regulations, the Department is clear regarding whether the university must follow the procedures or, alternatively, whether the university has discretion to choose whether follow the procedures. It is my suggestion that all universities have the power to subpoena and require witness statements to be cross-examined to aid in the truth-seeking process. Those regulations will further the Department of Education's goal of ensuring that fundamentals of fairness and due process are included in Title IX sexual harassment proceedings.

The proposed regulations balance the importance of allowing complainants and respondents to make their own decisions about whether to attend the live hearing or be subjected to cross-examination, while also recognizing that the grievance process is a truth-seeking process in which ascertaining credible information through cross-examination of witnesses is essential.