

## *Student Note*

### **Surviving Recission: Refining the 2020 Final Title IX Regulations’ Cross-Examination Requirement to Balance the Interests of Complainants and Respondents**

Samantha J. Dorward\*

#### **INTRODUCTION**

The mother of a college student found responsible for sexual misconduct, and who was subsequently expelled, after a Title IX proceeding on his college campus said,

In one fell swoop, his school crippled him for life. He will never be able to apply for the jobs he had hoped for without a college degree. I can’t begin to tell you the emotional toll it has taken on him. He has been in therapy and is trying to move on, but the damage has been enormous.<sup>1</sup>

The proceeding lacked the ability to cross-examine the accuser.<sup>2</sup> This is just one of many stories from students accused of sexual misconduct at higher education institutions (HEI) across the United States.<sup>3</sup> After a Title IX proceeding that did allow for live, direct cross-examination, a student shared, “[I] would not have reported my assault if I had to do it all over again . . . The hearing and cross-examination was the most traumatic experience I have ever had, worse than being sexually assaulted by someone I thought was my friend.”<sup>4</sup> She further explained, “After I gave my statement, I was cross-examined. It was even worse. I was asked victim-blaming questions—why I didn’t call for help, why I didn’t fight him off . . . I

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\* Samantha Dorward is a second-year law student at the University of South Carolina School of Law. Thank you to Lisa Martin, Associate Professor at the University of South Carolina School of Law, for her guidance, support, encouragement in crafting this Note.

1. *Parent of a Falsely Accused Student*, FAMS. ADVOCATING FOR CAMPUS EQUAL., <https://www.facecampusequality.org/stories-8> (last visited Oct. 20, 2021).

2. *Id.*

3. *Id.*

4. Brief for the California Women’s Law Center, Equal Rights Advocates, as Amicus Curiae at 26, *Boermeester v. Carry*, 472 P.3d 1062 (2020).

was also asked about things that had nothing to do with his assault . . . .”<sup>5</sup>

These two stories exhibit the competing interests and valid concerns between complainants and respondents in regard to cross-examination, or lack thereof, in Title IX proceedings. These competing interests complicate the Department of Education’s (the Department) task of crafting Title IX procedures that balance those interests.<sup>6</sup> Most recently, the Department attempted to balance these interests in its 2020 Final Title IX Regulations (the Final Rule).<sup>7</sup>

Sexual misconduct on HEI campuses falls within the purview of Title IX of the Education Amendments of 1972, which states, “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>8</sup> Specifically, Title IX seeks to “avoid the use of federal money to support sex discrimination in educational programs and to provide individual citizens effective protection against those practices.”<sup>9</sup> Thus, Title IX applies to HEIs that receive federal funding.<sup>10</sup>

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5. *Id.* at 27.

6. “Complainant” refers to students who have filed a complaint under Title IX. “Respondent” refers to students who have had complaints of sexual assault filed against them.

7. 34 C.F.R. § 106.45 (2020).

8. 20 U.S.C. §§ 1681–1688 (1972). “Higher education institution” refers to any post-secondary institution, such as universities, colleges, etc., both public and private, that receive federal funding. *Sex-Based Harassment*, U.S. DEPT. OF HEALTH & HUM. SERVS., <https://www.hhs.gov/civil-rights/for-individuals/special-topics/harassment/index.html>. Title IX refers to any school, post-secondary and K-12, that receive federal funding, but this Note will focus on higher education institutions. *Id.* Further, “sexual misconduct” encompasses sexual violence and sexual harassment. *Id.* Sexual harassment is unwelcome conduct of a sexual nature, such as “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” *Id.* “Sexual violence is a form sexual harassment” and “refers to physical sexual acts perpetrated against a person’s will or where a person is incapable of giving consent.” *Id.* “A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, sexual abuse, and sexual coercion.” *Id.*

9. Amina Zarrugh et al., *What Is Title IX? Toward a Campus-Based Pedagogy to Study Inequality*, 48 AM. SOCIO. ASS’N 196, 198 (2020).

10. Seth Wiseman, *Re-Tooling Title IX: How Adopting Intermediary Cross-Examination in Title IX Sexual Misconduct Adjudication Can Provide Fairness and Due Process for All*, 59 U. LOUISVILLE L. REV. 125, 132 (2020) [hereinafter *Re-Tooling Title IX*].

Title IX's enforcement is largely handled by administrative guidance from the Department.<sup>11</sup> And prior to 2011, the Department's Title IX guidance primarily focused on addressing sexual harassment at HEIs.<sup>12</sup> However, the epidemic of sexual misconduct on HEI campuses shifted the focus of that guidance in 2011.<sup>13</sup> A 2009 Campus Sexual Assault Study, "sponsored by the National Institute of Justice and based on a sample of 5,446 undergraduate females, concluded that 19% of undergraduate women have experienced attempted or completed sexual assault since entering college."<sup>14</sup> Exacerbating the issue of sexual misconduct on HEI campuses is the issue of underreporting. For example, a National Crime Victimization Survey compiled 2005–2013 data and concluded that 20% of sexual misconduct survivors on HEI campuses reported to authorities, "compared to 32% reported among nonstudent survivors between the ages of 18 and 24."<sup>15</sup> Given the rates of underreporting, the 2009 Campus Sexual Assault Study statistics underestimate the actual prevalence of sexual misconduct on HEI campuses.<sup>16</sup> It is within this context that the focus of Title IX on HEI campuses shifted toward addressing sexual misconduct.

The shift began with the Department's 2011 Dear Colleague Letter (DCL), under the Obama administration, in which the Department explicitly identified HEIs as responsible for addressing and adjudicating complaints of sexual misconduct on campuses.<sup>17</sup> Notably, the 2011 DCL discouraged cross-examination in Title IX proceedings.<sup>18</sup> While the 2011 DCL provided a much needed response to the issue of sexual misconduct at HEIs, its response created a new problem—providing justice for complainants while trampling respondents' procedural due process rights afforded by the United States Constitution.<sup>19</sup> Procedural

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11. *Id.* at 133.

12. Emily Nichols, *The Lasting Impact of the 2011 Dear Colleague Letter on Sexual Violence: A Qualitative Study on College Campus Policies and Procedures* (2020) (Ph.D. dissertation, Michigan State University) (ProQuest).

13. David DeMatteo et. al., *Sexual Assault on College Campuses: A 50-State Survey of Criminal Sexual Assault Statutes and Their Relevance to Campus Sexual Assault*, 21 *PSYCH., PUB. POL'Y, & L.*, 227, 228 (2015).

14. *Id.*

15. *Id.*

16. *Id.*

17. Dear Colleague Letter from Russlynn Ali, Assistant Sec'y for Civ. Rts., U.S. Dep't of Educ. 2 (Apr. 4, 2011) [hereinafter 2011 Dear Colleague Letter].

18. *Id.* at 12.

19. U.S. CONST. amend. XIV, § 1.

due process “[d]escribes a procedure that justifies outcome; it provides reasons for asserting that the [consequences] a person receives is the [consequences] he [or she] deserves.”<sup>20</sup>

While Title IX proceedings are not criminal trials with criminal sanctions immediately at stake, the other severe consequences that respondents face warrant procedural due process protection.<sup>21</sup> For example, HEIs may disclose, without the student’s consent, the fact that the HEI found the student responsible for sexual misconduct to future employers or post-graduate institutions—affecting the student’s acceptance into post-graduate programs and employment.<sup>22</sup> Moreover, such a finding impacts the student’s reputation and relationships with his professors and classmates; the education of the student, particularly in the event of suspension or expulsion; and the long-term mental health of the student due to the distress caused by the proceeding.<sup>23</sup> Further, the record of these proceedings, including statements made by respondents, can be later used in a criminal trial to prosecute the respondent.<sup>24</sup> This is not to say that the lack of cross-examination conclusively increases the likelihood that a respondent will be found responsible. Rather, the risk of a finding of responsibility, and the potential consequences that attach to such a finding, compels protection that HEIs can only afford through procedural due process—namely, cross-examination.<sup>25</sup>

In response to concerns about the deprivation of procedural due process for respondents, the Department, under the Trump administration, withdrew the 2011 DCL and rejected its language that discouraged cross-examination in Title IX proceedings.<sup>26</sup> To strike the correct balance of interests, the Department published its Final Rule in

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20. David Resnick, *Due Process and Procedural Justice*, 18 DUE PROCESS 206, 214 (1977).

21. Shannon Harper et al., *Enhancing Title IX Due Process Standards in Campus Sexual Assault Adjudication: Considering the Roles of Distributive, Procedural, and Restorative Justice*, 16 J. SCH. VIOLENCE 302, 305 (2017) [hereinafter *Title IX Due Process Standards*].

22. See e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 592 (D. Mass. 2016).

23. Harper et al., *Title IX Due Process Standards*, *supra* note 21.

24. Casey McGowan, *The Threat of Expulsion as Unacceptable Coercion: Title IX, Due Process, and Coerced Confessions*, 66 EMORY L. J. 1175, 1204 (2017).

25. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 151.

26. *Id.* at 137.

2020.<sup>27</sup> Importantly, the Department required live, direct cross-examination in Title IX proceedings on HEI campuses.<sup>28</sup>

The Department received immediate condemnation of the Final Rule's requirement of cross-examination as it has the potential to retraumatize complainants.<sup>29</sup> Given the concerns of complainants and the Biden administration's disapproval of the cross-examination requirement, the Final Rule's future is uncertain.<sup>30</sup> Under the new administration, the Department could write its own regulations, effectively rescinding the Final Rule.<sup>31</sup> However, to uncover the truth of the allegations, to assess witnesses' and parties' credibility, and to ultimately ensure respondents are not falsely held responsible, the new administration should maintain cross-examination in Title IX proceedings. Additionally, to address and protect the interests of complainants, the Department should refine the way in which cross-examination occurs through requiring a neutral intermediary to effectively regulate cross-examination.<sup>32</sup>

This Note will first discuss the comments to the Final Rule illustrating the remaining competing interests of the parties involved in Title IX proceedings. Then, this Note will explain the common procedures for the adjudication of Title IX complaints.<sup>33</sup> Subsequently, this Note will discuss the evolution of Title IX on HEI campuses and the uncertain future of the Final Rule. Finally, this Note will walk through the framework used to analyze whether the Constitution compels cross-examination in Title IX proceedings—by discussing whether procedural due process is required in a disciplinary proceeding

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27. Kathryn J. Holland et. al., *The Selective Shield of Due Process: Analysis of the U.S. Department of Education's 2020 Title IX Regulations on Live Cross-Examination*, 20 ANALYSES OF SOC. ISSUES & PUB. POL'Y 584, 586 (2020) [hereinafter *The Selective Shield of Due Process*].

28. "Cross-examination" as referred to through this Note means live, direct cross-examination. Further, the Department's Final Rule covered a wide range of new requirements for Title IX proceedings, but this Note will solely address the cross-examination requirement.

29. Holland et. al., *The Selective Shield of Due Process*, *supra* note 27, at 592.

30. Franczek P.C., *What Comes next? Title IX under a Biden Presidency*, JD SUPRA, (Nov. 9, 2020) <https://www.jdsupra.com/legalnews/what-comes-next-title-ix-under-a-biden-95583/>.

31. *Id.*

32. This proposal stems from the proposed intermediary discussed in *Re-Tooling Title IX*, but the proposal in this Note is not identical. In *Re-Tooling Title IX*, the proposal was for an intermediary cross-examination hearing in which the parties would be in separate rooms. Their questions would be directed at each other through the intermediary, and the intermediary would use its discretion to ask or deny to ask submitted questions; *See* discussion *infra* Section III.

33. HEIs have an interest in the proceedings, but this Note will focus on the interests of complainants and respondents.

and if so, whether due process is sufficiently satisfied by cross-examination as the Final Rule describes. After highlighting the shortcomings of the Department's Final Rule to provide adequate protection to complainants, this Note proposes incorporating a neutral intermediary to mitigate the risks of re-traumatization to complainants that cross-examination has the potential to cause. Ultimately, this Note argues the Department, under the Biden administration, should uphold the cross-examination requirement but refine it with the neutral intermediary so as to strike a balance between the competing interests of the parties in Title IX proceedings.

## I. BACKGROUND

Before reaching whether due process requires cross-examination in Title IX proceedings, it is essential to understand the evolution of Title IX guidance from the Department of Education as it illustrates the Department's efforts and struggle to create a system that provides adequate rights and protection to both parties involved.<sup>34</sup> Further, it is important to understand the two general models for conducting Title IX proceedings to understand how the neutral intermediary would fit within those procedures. Prior to analyzing the sufficiency of cross-examination as the Final Rule requires, it is necessary to discuss the competing interests the Department considered in publishing the Final Rule and the specific cross-examination requirements it outlines. Lastly, this section will discuss the prospect of the Final Rule's recission.

### A. The Evolution of Title IX on Higher Education Institution Campuses: The Department's Persistent Attempts to Strike the Proper Balance

In response to the prevalence of sexual misconduct on HEIs, the Department swung the pendulum in favor of complainants in 2011 with

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34. The debate and evolution of Title IX began with its enactment in 1972 and is still ongoing today. While reforms to Title IX predate 2011, that is where this Note will begin and focus its discussion on the evolution of the proceedings and guidance to HEIs because the Title IX reforms 2011 were directly aimed at sexual misconduct on HEI campuses. Nichols, *supra* note 12. Further, the regulations issued by the Department contain a litany of reforms, but this Note will focus on the guidance regarding cross-examination.

its DCL in which it “strongly discourage[d] schools from allowing the parties personally to question or cross-examine each other during the hearing.”<sup>35</sup> The Department’s view on cross-examination grew out of concerns that such a practice would traumatize complainants, discourage reporting sexual misconduct, and therefore leave the issue of sexual misconduct prevalence untouched.<sup>36</sup> To include some semblance of cross-examination, the Department recommended indirect questioning through which parties could cross-examine through written questions submitted to the Title IX decisionmaker.<sup>37</sup>

In 2017, the Department under the Trump administration, swung the pendulum in favor of respondents out of the growing concern that the Department’s 2011 guidance lacked “the most basic elements of fairness and due process, [were] overwhelmingly stacked against the accused, and [were] in no way required by Title IX law or regulation.”<sup>38</sup> Therefore, the administration rescinded the 2011 DCL and supplanted it with its own DCL in 2017.<sup>39</sup> Importantly, the 2017 DCL withdrew the language that discouraged cross-examination and that suggested “to recognize a right to cross-examination might itself violate Title IX.”<sup>40</sup> Importantly, under the 2017 DCL, HEIs did not require cross-examination, but HEIs were no longer threatened with losing federal funding if they permitted cross-examination.<sup>41</sup>

## B. Title IX Procedures Without Cross-Examination

Title IX proceedings vary between HEIs; however, there are two general models.<sup>42</sup> First, some HEIs follow a more formal process that involves a formal presentation of evidence, and taking of testimony before a decisionmaking panel, sometimes with the parties represented

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35. 2011 Dear Colleague Letter, *supra* note 17, at 12.

36. *See* Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 135.

37. Catherine E. Lhamon, Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ., Questions and Answers on Title IX and Sexual Violence 31 (Apr. 29, 2014).

38. Dear Colleague Letter from Candice Jackson, Acting Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ. 1 (Sept. 22, 2017).

39. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 137.

40. Patrick Saccocio, *The Impact of the September 22, 2017 “Dear Colleague Letter,”* PARISI, COAN & SACCOCIO, PLLC, 1 (Jan. 15, 2018), <https://www.pandslawtitleix.com/blog/2018/january/the-impact-of-the-september-22-2017-dear-colleag/>.

41. *Id.*

42. Naomi Mann, *Taming Title IX Tensions*, 20 UNIV. OF PA. J. CONST. L. 631, 644 (2018).

by a representative.<sup>43</sup> In this process, some HEIs incorporate indirect cross-examination by which the parties can submit written questions to the Title IX decisionmaker, and whether the decisionmaker asked a party or witness those questions solely rested on its discretion.<sup>44</sup>

Other HEIs have shifted away from this process towards a non-adversarial model in which a trained Title IX investigator examines the allegations made in a filed complaint.<sup>45</sup> This process often includes interviewing the parties and potential witnesses, reviewing any evidence, and preparing a written report.<sup>46</sup> Under this model, the investigator would effectively cross-examine and assess credibility.<sup>47</sup>

### **C. The Competing Interests Considered by the Department of Education**

After the Department shared its proposed regulations in 2018, the Department solicited comments from the public regarding cross-examination in Title IX proceedings.<sup>48</sup> Therefrom, the Department shared,

Some individuals told us they never would have reported under the proposed rules because of the cross-examination requirement. Individuals who went through cross-examination in the criminal context told us how they suffered to get justice and that it is a traumatic experience that led to post-traumatic stress disorder and more therapy. Several of these individuals told us defense attorneys badgered or humiliated them.<sup>49</sup>

On the other hand, “A number of commenters discussed the lack of due process protections in their experience with Title IX proceedings.

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43. *Id.* at 644–45.

44. *Id.* at 673.

45. *Id.* at 645.

46. *Id.*

47. *Id.* at 645–46.

48. Title IX Regulations Addressing Sexual Harassment, Office for Civ. Rts., U.S. Dep’t of Educ., 115 (2020) <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf> (last visited Oct. 20, 2021) [hereinafter 2020 Title IX Regulations].

49. *Id.* at 111.



Several students and professors detailed how they were expelled or fired without being permitted to give their side of the story.”<sup>50</sup> These comments reflect the conflicting concerns the Department considered to formulate the Final Rule.<sup>51</sup>

### D. One More Attempt: The Department’s Final Rule

In 2020, the Department published its Final Rule in a comprehensive document in which it explained and justified its new regulations.<sup>52</sup> The Final Rule requires HEIs to include cross-examination in Title IX proceedings.<sup>53</sup> In particular, advisors, not the parties themselves, must conduct the questioning at a live hearing, and “each party’s advisor [must be permitted] to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.”<sup>54</sup> The Final Rule also requires HEIs to provide an advisor to conduct cross-examination for any party who does not have one of his or her own.<sup>55</sup> The Department explained in an extensive questions and answers document that if a party or witness does not submit to cross-examination, the decisionmaker cannot rely on that party or witness’s statements in making the decision as to responsibility.<sup>56</sup>

Cross-examination as required by the Final Rule is nevertheless subject to some limitations—limitations likely set to control cross-examination so that it is less likely to cause re-traumatization of complainants.<sup>57</sup> After an advisor asks a question, but before a witness answers, the decisionmaker may exclude questions it deems are irrelevant.<sup>58</sup> Particularly, irrelevant questions include those that are

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50. *Id.* at 115; procedural due process “refers to the constitutional requirement that when the federal government acts in such a way that denies a citizen of a life, liberty, or property interest, the person must be given notice, the opportunity to be heard, and a decision by a neutral decisionmaker.” *Procedural Due Process*, LEGAL INFO. INST. [https://www.law.cornell.edu/wex/procedural\\_due\\_process](https://www.law.cornell.edu/wex/procedural_due_process) (last visited Oct. 2, 202).

51. 2020 Title IX Regulations, *supra* note 48.

52. *Id.*

53. *Id.* at 98–99.

54. *Id.* at 2024.

55. *Id.* at 2025.

56. *Questions and Answers on the Title IX Regulations*, ED.GOV, 26 (2021), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> (last visited Oct. 15, 2021).

57. *See* 2020 Title IX Regulations, *supra* note 48, at 1060.

58. *Id.* at 1100.

redundant and those that are about any party's medical, psychological, or similar privileged records, without consent.<sup>59</sup> Further, questions about the complainant's sexual history are presumptively irrelevant.<sup>60</sup> Though, this presumption may be overcome if the complainant's sexual history is "offered to prove that someone other than the respondent committed the conduct alleged" or the "questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent,"<sup>61</sup> which hinges on each respective higher education institution's definition of consent.<sup>62</sup> The term "prior sexual behavior" refers to sexual behavior that is unrelated to the alleged incident.<sup>63</sup> In regard to subsequent sexual conduct, the questions and answers document explains that the Final Rule implies that those questions are also irrelevant.<sup>64</sup>

In addition to those substantive safeguards, the Final Rule requires HEIs to pause cross-examination each time before a party or witness answers a question to ensure that "the pace of the cross-examination does not place undue pressure on a party or a witness to answer immediately."<sup>65</sup> Moreover, the Final Rule does not require specificity in answers to "protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence."<sup>66</sup>

### E. The Uncertain Endurance of the Department's Final Rule

With the Biden administration taking office in 2021, the Final Rule's continuity is in jeopardy.<sup>67</sup> In March of 2021, President Biden declared an executive order "'direct[ing] the Department [] to review all of its existing regulations, orders, guidance, and policies' for the ostensible purpose of 'guarantee[ing] an educational environment free

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59. *Id.* at 1009.

60. *Id.* at 366.

61. *Id.* at 2025.

62. *Id.* at 1195–97.

63. *Id.* at 1192.

64. *Questions and Answers on the Title IX Regulations*, *supra* note 56, at 24.

65. 2020 Title IX Regulations, *supra* note 48, at 1089.

66. *Id.*

67. See Press Release, Dep't of Educ., (April 6, 2021) (on file with the Department of Education).

from discrimination on the basis of sex . . . .”<sup>68</sup> In April of 2021, the Department explained in a press release that it “[p]lans to solicit the public’s input on the regulations, ultimately leading to possible revisions through a notice of proposed rulemaking.”<sup>69</sup>

Portions of the Final Rule have already been successfully challenged in federal court.<sup>70</sup> A federal district court in Massachusetts issued a decision in which it vacated the part of the Final Rule that prohibits a decisionmaker from relying on statements that are not subject to cross-examination during the hearing.<sup>71</sup> Subsequently, on August 24, 2021, the Department issued a letter in which it explained that “the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.”<sup>72</sup> And of particular concern, the Department explained that the process of reviewing the Final Rule is ongoing and that it “[a]nticipates publishing a notice of proposed rulemaking to amend the Department’s Title IX regulations.”<sup>73</sup> Therefore, it seems unlikely whether the Final Rule, as is, will survive the new administration.

## II. THE FOURTEENTH AMENDMENT’S RIGHT TO PROCEDURAL DUE PROCESS REQUIRES CROSS-EXAMINATION IN TITLE IX PROCEEDINGS

While courts have repeatedly held that disciplinary proceedings on HEIs are not meant to mirror criminal proceedings, courts require procedural due process when a decision of the State implicates an interest within the protection of the Fourteenth Amendment.<sup>74</sup> If a

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68. Harriet Hageman, *Biden Title IX Order*, NEW CIV. LIBERTIES ALL., (Mar. 26, 2021, 8:00 AM), <https://nclalegal.org/2021/03/biden-title-ix-order/>.

69. Press Release, Dep’t of Educ., *supra* note 67.

70. *See* Victim Rights Law Center et al. v. Cardona, No. 20-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).

71. *Id.*

72. Letter from Suzanne B. Goldberg, Acting Assistant Sec’y for Civ. Rts., U.S. Dep’t of Educ., to Students, Educators, and other Stakeholders re Victim Rights Law Center et al. v. Cardona 2 (Aug. 24, 2021).

73. *Id.*

74. Harper et al., *Title IX Due Process Standards*, *supra* note 21, at 305.

decision of the State requires procedural due process, courts must then determine what procedures sufficiently constitute due process.<sup>75</sup>

### A. Is Due Process Due in Title IX Proceedings?

The Due Process Clause of the Fourteenth Amendment states that the State cannot deprive any person of “life, liberty, or property, without due process of law.”<sup>76</sup> Specifically, the Fourteenth Amendment affords a procedural due process right—that is, procedures that the government must implement and abide by before it deprives a person of life, liberty, or property interest.<sup>77</sup>

Although the federal Constitution does not enumerate a right to education, education nevertheless falls within the purview of the Fourteenth Amendment.<sup>78</sup> The Court has consistently stated, “Where a person’s good name, reputation, honor, or integrity is at stake because of what the government is doing to him,” the State implicates a liberty interest for which the Constitution grants procedural due process protection.<sup>79</sup> Respondents’ liberty interests are implicated in Title IX proceedings as charges of sexual misconduct undoubtedly affect his or her “good name, reputation, honor, and integrity.”<sup>80</sup> Particularly, such charges “could seriously damage the students’ standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment.”<sup>81</sup> As the State implicates this constitutionally protected interest in Title IX proceedings, the Constitution requires procedural due process.

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75. *Ingraham v. Wright*, 430 U.S. 651, 672 (1977).

76. U.S. CONST. amend. XIV, § 1.

77. *Wiseman, Re-Tooling Title IX*, *supra* note 10, at 141.

78. *Goss v. Lopez*, 419 U.S. 565, 572 (1975). The Court in *Goss* held that K-12 students have a legitimate entitlement to a public education as a property interest protected by the Due Process Clause, but the Court has not yet extended property interest protection to higher education. However, the Sixth Circuit held in *Doe v. Cummins* that the appellant’s suspension “[c]learly implicate[d] a property interest,” which suggests that higher education is also protected by the Fourteenth Amendment as a property interest. *Doe v. Cummins*, 662 F. App’x 437, 445 (6th Cir. 2016).

79. *Bd. of Regents v. Roth*, 408 U.S. 564, 573 (1972); *Doe*, 662 F. App’x at 445 (applying this holding in the context of a Title IX proceeding).

80. *Goss*, 419 U.S. at 574.

81. *Id.* at 575.

## B. What Process is Due?

“[D]ue process is flexible and calls for such procedural protections as the particular situation demands.”<sup>82</sup> Determining whether cross-examination is constitutionally sufficient requires an analysis of the affected governmental and private interests of the parties.<sup>83</sup> Specifically, to determine whether a given procedure, cross-examination, is due in disciplinary proceedings to sufficiently satisfy the requirements of due process, courts weigh three factors enumerated in *Mathews v. Eldridge*.<sup>84</sup> Specifically, courts consider (1) the private interest that will be affected by the action; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional procedural safeguards; and (3) the government’s interest in imposing the additional safeguards weighed against the burdens of imposing those safeguards.<sup>85</sup>

### *i. Private Interests that Will be Affected by Maintaining Cross-Examination*

Both respondents and complainants have an interest in their education and equal access to their education, which Title IX proceedings on HEI campuses seeks to protect and certainly affects.<sup>86</sup> And, both parties have “paramount” interests in completing their education as well as in the accuracy in the adjudication of Title IX claims.<sup>87</sup>

#### 1. For Complainants

Title IX protects those interests by providing an avenue for which complainants may seek justice after experiencing sexual misconduct, so that they may move on from that experience without it further affecting

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82. *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

83. *Arnett v. Kennedy*, 416 U.S. 134, 167–68 (1974).

84. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976).

85. *Id.*

86. See Michad Heavilon, Note, *Peer Review: Top of Form Expanding Procedural Due Process to Require Students as Members of University Sexual Misconduct Hearing Boards*, 51 *IND. L. REV.* 773, 790 (2018).

87. *Id.*

their education.<sup>88</sup> This private interest is affected by cross-examination as there is the risk that it will re-traumatize complainants.<sup>89</sup> The re-traumatization, and the fear thereof, may ultimately discourage reports of sexual misconduct and leave the experience unaddressed, which would likely affect their education.<sup>90</sup>

## 2. For Respondents

Respondents have an interest in “[a]voiding unfair or mistaken exclusion from the educational environment, and the accompanying stigma.”<sup>91</sup> A lack of meaningful cross-examination may affect whether a respondent is found responsible for sexual misconduct and the consequences thereof may significantly affect respondents’ interest in education.<sup>92</sup> For example, findings of responsibility can lead to ineligibility for campus housing, loss of the opportunity to participate in campus activities or employment, suspension, and expulsion from many HEIs.<sup>93</sup> Moreover, “post-graduate educational and employment opportunities may require disclosure of disciplinary actions taken by a student’s former educational institution.”<sup>94</sup> In some cases, HEIs can disclose records of disciplinary actions without the consent of the student.<sup>95</sup>

### *ii. The Risk of Erroneous Deprivation of Such Interests by Maintaining Cross-Examination Weighed Against Its Probative Value*

While cross-examination is of probative value to both respondents and complainants,<sup>96</sup> cross-examination only creates a risk of erroneous deprivation of complainants’ private interest in education.<sup>97</sup>

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88. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 145.

89. *Id.*

90. *Id.* at 147.

91. *Gorman v. Univ. of Rhode Island*, 837 F.2d 7, 14 (1st Cir. 1988).

92. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 145–46.

93. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601 (D. Mass. 2016).

94. *Id.*

95. *Id.*

96. Harper et al., *Title IX Due Process Standards*, *supra* note 21, at 310–11.

97. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 168.

## 1. The Probative Value of Cross-Examination for Both Complainants and Respondents

Cross-examination has probative value to both parties as it allows each side to uncover the truth in Title IX proceedings.<sup>98</sup> Indeed, cross-examination is the “greatest legal engine ever invented for the discovery of truth.”<sup>99</sup> Not only does cross-examination allow each party to identify and highlight inconsistencies in the other party’s testimony, but it also provides the cross-examiner with an opportunity to refute false testimony and the Title IX decisionmaker with the occasion to assess a witness’ credibility.<sup>100</sup> As sexual misconduct cases often turn on disputes of fact with scarce evidence, the repercussions of disallowing either party to cross-examine the opposing party and its witnesses preclude the ability to “uncover biased, untruthful, incomplete, and inaccurate allegations.”<sup>101</sup>

Despite this probative value, the First Circuit Court of Appeals held in *Haidak v. University of Massachusetts-Amherst* that while procedural due process in disciplinary proceedings requires some opportunity for cross-examination, it does not require live, direct cross-examination.<sup>102</sup> The court clarified that its holding did not mean that HEIs could justly decide cases of sexual misconduct without any method of examining a witness’s statements.<sup>103</sup> The court was particularly concerned that a student or an advisor of the student examining a witness would cause trauma to the complainant or allow the conversation to “devolve into an uncontrolled debate.”<sup>104</sup> Thus, the court concluded that while some semblance of cross-examination had probative value, cross-examination, such as the live and direct cross-examination the Final Rule requires, does not have probative value that outweighs the risk of erroneous deprivation of complainants’ interests.<sup>105</sup> However, the Sixth Circuit Court of Appeals in *Doe v. Baum* explained the insufficiency of

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98. Harper et al., *Title IX Due Process Standards*, *supra* note 21, at 313.

99. *California v. Green*, 399 U.S. 149, 158 (1970) (quoting 5 J. WIGMORE, EVIDENCE § 1367 (3d ed. 1940)).

100. *Doe v. Baum*, 903 F.3d 575, 579 (6th Cir. 2018).

101. McGowan, *supra* note 24, at 1190.

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

103. *Id.*

104. *Id.*

105. *See id.*

cross-examination that is not live and direct.<sup>106</sup> For example, the court opined that written statements cannot supplant cross-examination because absent the adversarial, back-and-forth questioning, the accused cannot probe the complainant's memory, intelligence, potential ulterior motives, or observe the witness's demeanor.<sup>107</sup> Thus, the *Haidak* court's position that cross-examination need not be live and direct is flawed.

## 2. The Risk of an Erroneous Deprivation of Respondents' Interests by Maintaining Cross-Examination

The risk of erroneous deprivation of respondents' interests by maintaining cross-examination in Title IX proceedings is low; rather, the risk is high without cross-examination.<sup>108</sup> Without the opportunity to cross-examine the opposing party and witnesses, respondents are at a high risk of having their private interests erroneously deprived because sexual misconduct cases often turn on circumstantial evidence, no evidence at all, or competing narratives—or a combination of the three.<sup>109</sup> Because of this reality, in *Baum*, the court affirmed its holding in a prior decision that “if a university is faced with competing narratives about potential misconduct, the administration must facilitate some form of cross-examination in order to satisfy due process.”<sup>110</sup>

## 3. The Risk of an Erroneous Deprivation of Complainants' Interests by Maintaining Cross-Examination

Despite the safeguards in place by the Final Rule to limit cross-examination, complainants' interest in their education are at risk of being erroneously deprived by the maintenance of cross-examination as it could cause trauma to complainants and, therefore, increased rates of underreporting—which undoubtedly has the potential to deprive complainants' interest in education.<sup>111</sup> Specifically, cross-examination can subject complainants to questioning “via verbal attacks on the

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

107. *Id.* at 582.

108. *See Wiseman, Re-Tooling Title IX*, *supra* note 10, at 145–46.

109. Mann, *supra* note 42, at 659.

110. *Baum*, 903 F.3d at 581.

111. Holland et. al., *The Selective Shield of Due Process*, *supra* note 27, at 594–95.



complainant's character rather than sensitively in a respectful manner designed to aid the fact-finding process."<sup>112</sup> Further, because Title IX proceedings do not occur within the context of a court of law, those administering the proceeding do not have adequate power to constrain advisors' aggressive questioning.<sup>113</sup> Especially harmful is that not only can the advisor be an attorney, but it can also be "a respondent's angry parent, fraternity brother, roommate, or other person untrained in conducting cross-examination."<sup>114</sup>

While the Final Rule contemplates these risks and imposes safeguards, discussed above, to combat these risks, the risks that remain are significant. For example, while the Final Rule's requirement that the decisionmaker must determine relevance of a question prior to a witness or party answering is meant to ensure that parties are not asking improper questions, the damage is already done.<sup>115</sup> At this point in the process, a questioning party has already supplied the question.<sup>116</sup> Thus, concerns that the question itself may negatively impact a party, in particular the complainant, are not avoided. Moreover, questions can include facts or details that allude to a witness's or a party's answer, and the questions can contain prohibited content solely to present that information in front of the decisionmaker.<sup>117</sup> And therefore, the harmful information is already said in the presence of the decisionmaker—affecting their ability to make an unbiased decision based solely on relevant information.<sup>118</sup>

Thus, while the probative value of cross-examination outweighs any potential risk of erroneous deprivation of respondents' private interests, the risk of erroneous deprivation of complainants' private interests under the Final Rule's formulation of cross-examination outweighs the probative value of cross-examination.

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112. *Id.* at 592.

113. *Id.* at 594.

114. *Id.*

115. See Andrew J. Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1251–52 (2005).

116. 2020 Title IX Regulations, *supra* note 48, at 116.

117. Brian H. Bornstein & Krystia Reed, *Objection! Psychological Perspectives on Jurors' Perceptions of In-Court Attorney Objections*, 63 S. DAKOTA L. REV. 1, 9–12 (2018).

118. See Wistrich et al., *supra* note 115.

*iii. Government's Interest in Upholding Cross-Examination Weighed Against Its Burdens*

The government's interest in imposing cross-examination outweighs any burden of maintaining cross-examination in Title IX proceedings.<sup>119</sup> The lengthy history of administrative guidance and regulations of Title IX issued by the Department "illustrates the federal government has an interest in adopting the best possible procedures to effectuate the reporting of—and the adjudication of—sexual misconduct on college campuses."<sup>120</sup> Further, the government seeks to deliver higher education, through funding such education with federal resources, within a non-discriminatory environment for both parties.<sup>121</sup>

HEIs funded by the government also have an interest in creating the most fair and effective adjudicative procedures as possible because they face a great financial risk when respondents are denied procedural due process—as evidenced by the number of lawsuits respondents file against HEIs each year.<sup>122</sup> As "lawsuits by accused students also represent a growing proportion of all sexual assault lawsuits," and as those students cite the lack of procedural due process, permitting cross-examination would interest HEIs because it could potentially decrease lawsuits they face.<sup>123</sup> For lawsuits brought by respondents, the United Educators reported that such lawsuits settled with an average cost between \$20,000 and \$30,000.<sup>124</sup> United Educators also reported that some settlements for lawsuits brought by complainants reach \$1 million.<sup>125</sup> And, even if HEIs win a lawsuit, the costs of litigation nevertheless impose a heavy burden.<sup>126</sup>

On the other hand, critics argue that to require cross-examination would be financially burdensome at HEIs as the decisionmakers are inadequately equipped to determine evidentiary rulings, such as

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119. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 167.

120. *Id.*

121. Zarrugh et al., *supra* note 9, at 198.

122. SAVE, LAWSUITS AGAINST UNIVERSITIES FOR ALLEGED MISHANDLING OF SEXUAL MISCONDUCT CASES 2 (2016), <https://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf> (last visited Oct. 20, 2021).

123. *Id.*

124. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 144.

125. *Id.* at 144–45.

126. *Id.* at 145.

relevance, and therefore, the HEI will be forced to supply comparable training.<sup>127</sup> However, “Financial cost alone is not a controlling weight in determining whether due process requires a particular procedural safeguard prior to some [] decision.”<sup>128</sup> Additionally, as the Sixth Circuit emphasized in *Doe v. Baum*, many HEIs already maintain cross-examination in other disciplinary proceedings, and thus already had all the resources needed to facilitate the process and knew how to oversee the process.<sup>129</sup> The court then highlighted “the minimal burden that the university would bear by allowing cross-examination in Doe’s case.”<sup>130</sup> Among other topics, Title IX personnel are already trained on Title IX’s definition of “sexual harassment;” how to conduct an investigation and grievance process; and on issues of relevance of questions and evidence, including when questions and evidence about a complainant’s sexual predisposition or prior sexual behavior are not relevant.<sup>131</sup> And importantly, investigators are trained on “issues of relevance to create an investigative report that fairly summarizes relevant evidence.”<sup>132</sup> So, many HEIs likely already have the resources needed to facilitate cross-examination and are likely equipped to oversee the process.<sup>133</sup>

In sum, maintaining cross-examination in Title IX proceedings has probative value for both parties, with little risk of erroneous deprivation to respondents’ interests, but high risk of erroneous deprivation for complainants’ interests. And the government’s interest in upholding cross-examination outweighs any burdens of doing so. Thus, for cross-examination, as formulated by the Department, to sufficiently constitute due process, it must be refined to reduce the risk of erroneously depriving complainants of their interests.

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127. See Harper et al., *Title IX Due Process Standards*, *supra* note 21, at 308–09.

128. Mathews v. Eldridge, 424 U.S. 319, 348 (1976).

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

130. *Id.*

131. Off. for Civ. Rts., U.S. Dep’t of Educ., *Schools Must Post Important Information Regarding Title IX on School Websites Under the New Title IX Rule*, OFFICE FOR CIV. RTS. BLOG (May 18, 2020), <https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html> (last visited Oct. 18, 2021) [hereinafter *Title IX on School Websites*].

132. *Id.*

133. *Baum*, 903 F.3d at 582; see also *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406 (6th Cir. 2017) (noting that a university does not bear a significant administrative burden when it already has procedures in place to accommodate cross-examination).

### III. A PROPOSED SOLUTION: BALANCING THE SCALES WITH A NEUTRAL GATEKEEPER

As it presently stands, the decisionmaker in Title IX proceedings would serve as the gatekeepers who determine which proposed cross-examination questions are relevant.<sup>134</sup> As discussed above, this is ineffective as it allows the decisionmaker to potentially be influenced by the questions it screens.<sup>135</sup> For example, if an advisor proposes a question containing information about a complainant's sexual history, while the decisionmaker would exclude it as irrelevant, the decisionmaker cannot simply unhear the question—leaving open the possibility that the information will play a role in the decision, either consciously or subconsciously.<sup>136</sup> Moreover, while excluding irrelevant questions is in part to ensure that complainants are not re-traumatized,<sup>137</sup> the Final Rule would not achieve this goal either. The party being examined would also hear the question, and any potentially traumatizing phrasing or include information, so the fact that it will be excluded will not effectively achieve the goal of avoiding traumatization to complainants. Therefore, appointing a neutral intermediary to field proposed questions, outside of the presence of the decisionmaker and the party being examined, would prevent such bias and greatly diminish the possibility of traumatizing complainants.<sup>138</sup> After the intermediary approves proposed questions, based upon the phrasing and relevance, the party's advisor will be permitted to ask the question to the witness in front of the decisionmaker.<sup>139</sup>

Importantly, the proposed intermediary would receive any investigative reports and be present during the proceeding to ensure that he or she obtained all the necessary information to make determinations of relevance. Also, the intermediary would ensure that the question is phrased in a way that is not aggressive, does not induce trauma, and

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134. 2020 Title IX Regulations, *supra* note 48, at 1198.

135. *Cf.* Madelyn Chortek, *The Psychology of Unknowing: Inadmissible Evidence in Jury and Bench Trials*, 32 REV. OF LITIG. 117, 133 (2013).

136. *Cf. id.*

137. *See* 2020 Title IX Regulations, *supra* note 48 at 1065.

138. *See* Wistrich et al., *supra* note 115.

139. Developing a penalty or repercussion to a party who asks an unapproved question, through his or her advisor, would be helpful to enforce this proposal.

complies with any relevant rape shield laws.<sup>140</sup> Under such a model, respondents would not be afforded the ability, as they would have in a criminal trial, to robustly cross-examine witnesses, but it would afford them the opportunity to point out inconsistencies and allow the decisionmaker to access the witness's credibility.<sup>141</sup> Thus, incorporating a proposed intermediary, in addition to the substantive and procedural safeguards the Final Rule mandates, would provide an avenue by which both parties may take advantage of the benefits of cross-examination while decreasing the likelihood that it would re-traumatize complainants.<sup>142</sup>

This proposed intermediary could either be a trained employee of an HEI, or it could be a law student or an attorney. First, Title IX already requires HEIs to provide training to the decisionmaker and the investigators in the case.<sup>143</sup> Therefore, HEIs could subject the intermediary to that training as well.<sup>144</sup> Further, law students could be incentivized to serve as the intermediary, after requisite training, by allowing law students to receive school credit for their preparation and role in the proceeding—potentially an experiential credit.<sup>145</sup> Attorneys could also be incentivized to serve in such a position by allowing their time as the intermediary to satisfy its state bar's Continuing Legal Education requirements or potentially their firm's pro bono requirements, if applicable.<sup>146</sup>

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140. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 159. Many jurisdictions have adopted rape shield laws in an effort to protect sexual assault victims from defendants exposing their past sexual history. J. Alexander Tanford & Anthony J. Bocchino, *Rape Victim Shield Laws and the Sixth Amendment*, 128 U. PA. L. REV. 544, 544 (1980).

141. *See* Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 159.

142. *See* discussion *supra* Section I.D; Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 159.

143. *Title IX on School Websites*, *supra* note 131.

144. *See* Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 160.

145. *See e.g.*, *Pro Bono Experiential Learning Requirement*, ROGER WILLIAMS UNIV. SCH. OF L., <https://law.rwu.edu/academics/feinstein-center-pro-bono-experiential-education/pro-bono-experiential-learning-requirement> (last visited Oct. 20, 2021).

146. Each state bar requires its attorneys to complete a certain number of hours of CLEs. *See CLE Requirements by State*, AM. L. INST. CONTINUING LEGAL EDUC., <https://www.a-lie.org/mcle/sc> (last visited Oct. 22, 2021).

#### IV. POLICY ARGUMENTS IN FAVOR OF CROSS-EXAMINATION

Lastly, the policy benefits to HEIs of cross-examination further support maintaining it in Title IX proceedings.<sup>147</sup> Cross-examination is beneficial for HEIs to uphold as “procedurally fair treatment is directly related to perceptions of legitimacy, which is directly related to behavioral self-regulation and rule adherence.”<sup>148</sup> In other words, individuals, including those on HEI campuses, feel a sense of moral obligation to follow the rules and comply with the decisions of legitimate authorities, which procedural due process invokes. Therefore, bolstering Title IX’s procedural due process with cross-examination has the potential to deter sexual misconduct, or at very least repeat offenses, on HEI campuses.<sup>149</sup> Further, legitimacy in the process and the institutions itself allows both complainants and respondents students to have confidence that the decisionmakers in the proceeding take their concerns seriously, give credence to their side of the story, and respect their broadly defined rights.<sup>150</sup> This is especially noteworthy considering that in drafting its Final Rule, the Department received stories from people with concerns that the process inadequately protects complainants and insufficiently delivers justice—these sources of distrust for each party leads to underreporting and increased lawsuits for dissatisfied parties.<sup>151</sup>

Further, incorporating procedural due process, through cross-examination, in Title IX proceedings ensures that both parties know that the decisionmaker is neutral and trustworthy—which is difficult to ensure if it seems the scales are tilted in the opposing party’s favor.<sup>152</sup> Cross-examination also provides both parties with a voice as it allows for the parties to raise specific concerns and key points in their argument.<sup>153</sup> Both parties can then know that they are heard, which is

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147. See Harper et al., *Title IX Due Process Standards*, *supra* note 21.

148. *Id.* at 311.

149. *Id.* at 303; see also Tom Tyler, *Does the American Public Accept the Rule of Law? The Findings of Psychological Research on Deterrence to Authority*, 56 DE PAUL L. REV. 661 (2007).

150. Harper et al., *Title IX Due Process Standards*, *supra* note 21.

151. *Id.*; 2020 Title IX Regulations, *supra* note 48, at 105–12; Harper et al., *Title IX Due Process Standards*, *supra* note 21.

152. Harper et al., *Title IX Due Process Standards*, *supra* note 21.

153. *Id.* at 310–12.

especially important as “[t]he fundamental requisite of due process of law is the opportunity to be heard.”<sup>154</sup>

### CONCLUSION

A fair adjudication system that upholds procedural due process while simultaneously protecting complainants and punishing sexual misconduct appears impossible without a proper, nuanced framework; however, they are not mutually exclusive ideas.<sup>155</sup> The complex history of Title IX reflects how the competing interests and rights of both complainants and respondents in the proceedings make it difficult to achieve the right balance. The Department’s 2020 Final Rule’s cross-examination requirement falls short of striking the correct balance of the parties’ respective rights and therefore faces rescission under the Biden administration. However, the Department, under the new administration, should maintain the cross-examination requirement but refine the framework by incorporating a neutral intermediary to protect the interests of complainants—providing the much-needed balance between the interests of both parties.

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154. *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

155. Wiseman, *Re-Tooling Title IX*, *supra* note 10, at 150.