

COMMENTS

BITING THE HAND THAT FEEDS?: THE NEED FOR INDEPENDENCE AND IMPARTIALITY IN THE TITLE IX SEXUAL MISCONDUCT INVESTIGATION PROCESS AT COLLEGES AND UNIVERSITIES

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Trigger Warning: sexual assault adjudication procedures are discussed in this Comment.

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INTRODUCTION

The pervasive nature of sexual assault on college campuses requires federal safeguards to ensure fair proceedings for both victims and perpetrators.¹ The Association of American Universities (AAU) gathered information from thirty-three universities and over 180,000 students and compiled a report on the AAU Climate Survey on Sexual Assault and Sexual Misconduct (AAU Report).² The AAU Report concluded that thirteen percent of respondents experienced nonconsensual sexual contact by physical force or inability to consent.³ Further, the rates of such nonconsensual sexual contact for women and undergraduate students was significantly higher than comparable contact for men and graduate students, with up to thirty-two percent of undergraduate women experiencing nonconsensual sexual contact by physical force or inability to consent.⁴ The AAU Report found that almost one in four undergraduate women experienced sexual assault or misconduct.⁵ According to the National Sexual Violence Resource Center, in the United States, around

1. See DAVID CANTOR, BONNIE FISHER, SUSAN CHIBNALL, SHAUNA HARPS, REANNE TOWNSEND, GAIL THOMAS, ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT xi, xiii, 78 (2020) [hereinafter AAU REPORT].

2. *Id.* at vii, 5–6.

3. *Id.* at vii, ix.

4. *Id.* at vii–ix, 14, 17. While the statistics cited by this Comment discuss sexual violence against men and women, it is important to note that sexual violence on college campuses impacts people of all genders. See *Sexual Violence & Transgender/Non-Binary Communities*, NAT'L SEXUAL VIOLENCE RES. CTR. (Feb. 2019), https://www.nsvrc.org/sites/default/files/publications/2019-02/Transgender_infographic_508_0.pdf (last visited Aug. 13, 2023).

5. See AAU REPORT, *supra* note 1, at vii–ix, 14, 17; *Statistics*, NAT'L SEXUAL VIOLENCE RES. CTR. [hereinafter *Sexual Assault Statistics*], <https://www.nsvrc.org/statistics> (last visited Aug. 13, 2023).

twenty percent of women and two-point-six percent of men will experience attempted or completed rape⁶ at some point in their lives.⁷

Title IX of the Education Amendments of 1972 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.”⁸ In 1972, Congress passed Title IX to remedy the educational disparities and lack of access that women experienced before its enactment.⁹ Fortunately, the Supreme Court has interpreted Title IX to address employee-on-student sexual misconduct and student-on-student sexual misconduct in colleges and universities.¹⁰ In *Franklin v. Gwinnett County Public Schools*,¹¹ the Court unanimously held that Title IX allows students who experience sexual harassment in public schools to sue for monetary damages.¹² The Supreme Court expanded its holding in *Franklin* in *Davis v. Monroe County Board of Education*¹³ by ruling that Title IX holds school boards liable for failing to

6. According to the Rape, Abuse & Incest National Network (RAINN), sexual assault is nonconsensual sexual contact or behavior. See *Sexual Assault, RAPE, ABUSE & INCEST NAT'L NETWORK*, <https://www.rainn.org/articles/sexual-assault> (last visited Aug. 13, 2023). Further, RAINN clarifies that “[r]ape is a form of sexual assault, but not all sexual assault is rape.” *Id.* For accuracy, and because of the seriousness and prevalence of rape culture in United States colleges, this Comment intentionally uses the term “rape” instead of “sexual assault.” See AAU REPORT, *supra* note 1, at xii, 78.

7. *Statistics About Sexual Violence*, NAT'L SEXUAL VIOLENCE RES. CTR., https://www.nsvrc.org/sites/default/files/publications_nsvrc_factsheet_media-packet_statistics-about-sexual-violence_0.pdf (last visited Aug. 13, 2023); *Sexual Assault Statistics*, *supra* note 5 (citing SHARON G. SMITH, XINJIAN ZHANG, KATHLEEN C. BASILE, MELISSA T. MERRICK, JING WANG, MARCIE-JO KRESNOW, ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2015 DATA BRIEF – UPDATED RELEASE 1, 3 (2018), <https://www.nsvrc.org/sites/default/files/2021-04/2015data-brief508.pdf>); see CHRISTOPHER P. KREBS, CHRISTINE H. LINDQUIST, TARA D. WARNER, BONNIE S. FISHER & SANDRA L. MARTIN, THE CAMPUS SEXUAL ASSAULT (CSA) STUDY (Dec. 2007), <https://www.ojp.gov/pdffiles1/nij/grants/221153.pdf>.

8. Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a) (2012).

9. *Id.*; see also U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1 (2012) (reporting the impact of Title IX in the four decades after its enactment).

10. See, e.g., *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 630 (1999) (noting that a school district may be liable for damages under Title IX in employee-on-student and student-on-student cases); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (holding that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment).

11. 503 U.S. 60 (1992).

12. See *id.* at 75.

13. 526 U.S. 629.

prevent student-on-student sexual harassment.¹⁴

Today, Title IX is widely understood as a law that addresses all kinds of sexual misconduct adjudications in colleges and universities.¹⁵ As of 2011, the Office for Civil Rights (OCR) at the Department of Education (Ed or the Department) has intensified its enforcement of Title IX on school campuses by establishing specific procedural requirements that schools receiving federal funding must use to remedy sexual misconduct.¹⁶ However, the investigative bodies responsible for adjudicating claims of Title IX grievances and violations are usually housed within the schools themselves.¹⁷ Thus, the people who are charged with investigating Title IX claims are employed by the universities they investigate, creating a question of objectivity and impartiality in the Title IX grievance process.¹⁸

The Ed OCR should issue a rule that requires universities to employ a hybrid model of the single-investigator and disciplinary-hearing models of Title IX adjudication in which the investigators and decisionmakers are independent and adequately separated from the university's own bureaucratic, political, and financial structure.¹⁹ Alternatively, Congress should enact a law that creates an independent agency with a neutral investigative body and impartial tribunal to conduct the evidence-collection, fact-finding, and decisionmaking processes.²⁰

In Part I, this Comment will explain the historical and current Title IX sexual misconduct decisionmaking processes in higher education institutions, the evolution of Title IX regulations over the past several years, and the different models that schools have used over the years to adjudicate Title IX complaints. In Part II, this Comment will analyze the current Title IX landscape, the effects of the Title IX 2022 Proposed Changes (Biden Rule), and the reasons for the lack of impartiality in Title IX sexual misconduct

14. *See id.* at 651–53.

15. *See id.* at 652; *Gebser*, 524 U.S. at 292–93; NAT'L WOMEN'S L. CTR., DEVOS'S NEW TITLE IX HARASSMENT RULE, EXPLAINED FACT SHEET (2020).

16. Russlynn Ali, U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE, 6-14 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; *An Overview of the U.S. Department of Education*, U.S. DEP'T OF EDUC., 2 (Sept. 2010) [hereinafter *Overview of the Department*], <https://www2.ed.gov/print/about/overview/focus/what.html>.

17. *See Questions & Answers on the Title IX Regulations on Sexual Harassment*, U.S. DEP'T OF EDUC., 2–3 (June 28, 2022), <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf> (explaining that schools enumerate processes “for addressing formal complaints of sexual harassment under Title IX.”).

18. *See id.* at 3.

19. *Infra* Part III.A.

20. *Infra* Part III.B.

adjudications. Lastly, in Part III, this Comment will evaluate the strengths and weaknesses of the hybrid model and recommend an added layer of independence that would improve impartiality in Title IX proceedings. Alternatively, Part III of this Comment will recommend the creation of an independent agency within the Department of Education, like the Employment Opportunity Commission (EEOC) in the Department of Labor, to conduct impartial investigations and adjudications of Title IX claims.²¹

I. BACKGROUND

A. *The Department of Education and Title IX*

The Department of Education is charged with establishing policies and rules regarding federal financial educational aid, administering educational funding distribution, and monitoring the use of such funding under Title IX.²² The Department derives its authority to implement programs from Congress's authorization through legislation.²³ The Department then has the authority to develop regulations and rules through informal notice-and-comment rulemaking or interpretive rulemaking to determine how such federal programs will be implemented.²⁴ The Supreme Court helped to clarify the Department's administrative function under Title IX, stating that "[t]he express statutory means of enforcement is administrative: The statute directs federal agencies that distribute education funding to establish requirements to effectuate the nondiscrimination mandate, and permits the agencies to enforce those requirements through 'any . . . means authorized by law,' including ultimately the termination of federal funding."²⁵

However, to view the whole picture of the Department's regulatory landscape for Title IX, one must understand how education law functions.

21. *Equal Employment Opportunity*, U.S. DEP'T OF LAB., <https://www.dol.gov/general/topic/discrimination#:~:text=The%20Equal%20Employment%20Opportunity%20Commission,through%20education%20and%20technical%20assistance> (last visited Aug. 13, 2023).

22. *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC. (Aug. 20, 2021) [hereinafter *Title IX and Sex Discrimination*], https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

23. *Overview of the Department*, *supra* note 16, at 1–2.

24. *Sex Discrimination: Overview of the Law*, U.S. DEP'T OF EDUC. (Apr. 13, 2023) <https://www2.ed.gov/policy/rights/guid/ocr/sexoverview.html>. See generally *Questions & Answers on the Title IX Regulations on Sexual Harassment*, *supra* note 17; TODD GARVEY, CONG. RSCH. SERV., R41546, A BRIEF OVERVIEW OF RULEMAKING AND JUDICIAL REVIEW 7 (2017) (explaining that federal agencies may engage in rulemaking through informal means).

25. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280–81 (1998) (quoting 20 U.S.C. § 1681).

Education law is implemented and enacted at the state and local level.²⁶ At the state level, state constitutions and statutes outline the public school system; at the local level, school boards create policies to fill gaps left open by state laws.²⁷ At the federal level, the Constitution does not directly address education, implying that most authority regarding the day-to-day operations of the American education system lies with the states.²⁸ While Congress has a hand in these educational operations, its role is limited to using its spending power to encourage states to implement federal education programs, as it does with federal educational funding under Title IX.²⁹ As a result, the Department of Education's most effective avenues for influencing educational institutions and creating regulations to enforce Title IX are mostly through interpretive rulemaking, guidance documents, and sometimes notice-and-comment rulemaking; the Department's OCR is then charged with enforcing these rules and, upon finding a violation, has the authority to initiate proceedings to terminate federal funding to offending educators.³⁰

B. 2011 Dear Colleague Letter, 2014 Questions and Answers, and Pre-Trump Title IX Adjudication

In 2011, the Department stepped in to clarify Title IX practices for colleges and universities.³¹ The Department's OCR released a Dear Colleague Letter (2011 Letter) establishing specific procedural requirements that recipient schools of federal funding must use to remedy student-on-student sexual harassment.³² The 2011 Letter was intended to compile previous guidance into a document that would clarify and guide the Department's expectations for universities' adjudication of sexual misconduct under Title IX.³³ In doing so, though the Department did not engage in informal notice-and-comment rulemaking, it expanded its authority to enforce Title IX by providing guidelines for schools.³⁴ As a result, the guidance provided by the Letter was

26. DEREK W. BLACK, *EDUCATION LAW: EQUALITY, FAIRNESS, AND REFORM* 1–5 (Robert A. Garda, et al. eds., 3d ed. 2021).

27. *Id.*

28. *Id.* at 7.

29. *Id.* at 7–8.

30. *Id.* at 8–9 (explaining how the Office for Civil Rights's (OCR's) enforcement role and power to initiate proceedings to terminate federal funding typically results in most offending districts agreeing to take corrective action).

31. *See generally* Ali, *supra* note 16.

32. *Id.* at 3–14.

33. *Id.* at 1–2.

34. *Id.* *See generally* GARVEY, *supra* note 24 (explaining that agencies can create rules through informal interpretive rules or guidance documents).

not legally binding; the Department could only enforce the guidance through incentivizing schools not to lose federal funding by violating the guidelines.³⁵

In 2014, the OCR issued the 2014 Questions and Answers (2014 Q&A) to provide additional specific guidance and instructions to universities and colleges clarifying their duties under Title IX and the 2011 Letter.³⁶ The 2014 Q&A provided three procedural requirements institutions bound by Title IX must take.³⁷ First, the OCR required every school to “disseminate a notice of nondiscrimination[.]” which states that under Title IX, the institution is not allowed to discriminate on the basis of sex in its educational programs and activities.³⁸ Second, the 2014 Q&A established and reinforced that schools must have a Title IX coordinator and clarified the coordinator’s duties.³⁹ Lastly, the 2014 Q&A required every university to “adopt and publish grievance procedures providing for the prompt and equitable resolution of student and employee sex discrimination complaints.”⁴⁰

C. Title IX Adjudication Models

As long as schools abided by the guidelines, they were free to implement Title IX sexual misconduct policies that fit their needs.⁴¹ Generally, before the Trump Administration’s final rule (Trump Rule), schools’ Title IX procedures varied significantly.⁴² The universities’ Title IX adjudication procedures fit approximately within three models: the investigative model, the disciplinary-hearing model, and a hybrid model.⁴³ Though the Trump

35. Ali, *supra* note 16, at 16. See generally GARVEY, *supra* note 24 (summarizing administrative rulemaking generally); ANDREW F. POPPER, GWENDOLYN M. MCKEE SAVITZ, ANTHONY E. VARONA & MARK C. NILES, ADMINISTRATIVE LAW: A CONTEMPORARY APPROACH 258, 273, 703 (4th ed. 2021) (explaining different types of rulemaking: formal rulemaking, informal notice-and-comment rulemaking, and interpretive rulemaking exempt from process).

36. Catherine E. Lhamon, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. i–ii (Apr. 29, 2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (“formally rescinded”).

37. *Id.* at 9.

38. *Id.* at 9–10; 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, 131, 135–36 (2020).

39. Lhamon, *supra* note 36, at i–ii, 9–11.

40. *Id.* at 10.

41. See *id.* at 4–5 (demonstrating the leeway schools had in implementing Title IX policies by providing examples of policies schools could consider).

42. See *infra* Part II.B; Wiseman, *supra* note 38, at 130–31.

43. Nicole E. Smith, *The Old College Trial: Evaluating the Investigative Model for Adjudicating Claims of Sexual Misconduct*, 117 COLUM. L. REV. 953, 954 (2017); see also Wiseman, *supra* note

Rule effectively disposed of the investigative model and moved toward a model that requires, by law, a live hearing component, it is still useful to examine each of these models that universities once had the freedom to choose between for two reasons: first, to determine how to improve the impartiality of the Title IX sexual misconduct adjudication process; second, because the Biden Administration's 2022 *Proposed Changes* (Biden Rule) promise a rollback of Trump-era regulations and a return to regulations that more closely resemble the Obama-era regulations.⁴⁴

For the most part, the beginning of a Title IX sexual misconduct adjudication is similar across higher education institutions.⁴⁵ First, a complainant files a Title IX complaint with the school, triggering legal responsibilities for the university.⁴⁶ The university's Title IX investigator interviews the complainant and respondent as well as witnesses if the parties provide.⁴⁷ During this process, the investigator gathers and reviews relevant evidence and then prepares a written investigation report, which details the allegations, summarizes and assesses the evidence found, and sometimes includes a disciplinary recommendation.⁴⁸

The three different models for adjudication arise in the next step. In the disciplinary-hearing model, a panel tries and hears a student's case.⁴⁹ In the investigative model, a "trained investigator or investigators interview the complainant and alleged perpetrator, gather physical evidence, interview available witnesses—and then either render a finding, present a recommendation, or even work out an acceptance-of-responsibility agreement with the offender."⁵⁰ The hybrid model is a combination of both

38, at 130–31 (describing the disciplinary-hearing model and the investigative model).

44. See *Fact Sheet: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations*, U.S. DEPT OF EDUC. (June 23, 2022), [hereinafter *2022 Proposed Rule Fact Sheet*], <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-factsheet.pdf> (last visited July 13, 2023). See generally *Summary of Major Provisions of the Department of Education's Title IX Notice of Proposed Rulemaking*, U.S. DEPT OF EDUC. [hereinafter *2022 Proposed Rule Summary*], <https://www2.ed.gov/about/offices/list/ocr/docs/t9nprm-chart.pdf> (last visited Aug. 13, 2023); *infra* Part II.B.

45. See Wiseman, *supra* note 38, at 130.

46. See *id.* at 129–30.

47. See *id.* at 130.

48. See *id.*; Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 645–46 (2018).

49. See Wiseman, *supra* note 38, at 130; Smith, *supra* note 43, at 954.

50. Smith, *supra* note 43, at 956 (quoting WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, NOT ALONE: THE FIRST REPORT OF THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT 14 (Apr. 2014), <http://www.justice.gov/ovw/page/file/905942/download>); see also, e.g., *University Implements*

the investigative model and the disciplinary-hearing model.⁵¹

D. The Trump Rule in Contrast with Obama-Era Title IX Regulations

Under President Donald Trump, the Department withdrew the 2011 Dear Colleague Letter issued under President Barack Obama and issued the Trump Rule, which is still in effect today.⁵² The Trump Rule purported to address concerns related to due process and false accusations against alleged perpetrators, in effect skewing the Title IX process to favor defendants and alleged sexual misconduct perpetrators.⁵³ The Trump Rule emphasized a live hearing with a cross-examination function—one of the most controversial aspects of the Rule.⁵⁴ In this kind of hearing, all parties must be present, either physically or virtually, and a cross-examination must be conducted.⁵⁵ After the hearing, the decisionmaker determines whether the accused is responsible.⁵⁶ Until higher education institutions formally adopt the Biden Rule, higher education institutions still have the Trump Rule in effect by law; however, it is also still the subject of much controversy and President Biden's Education Secretary, Miguel Cardona, has proposed new rules to replace it.⁵⁷

New Model for Investigating Sexual Assault Cases, PA. STATE UNIV. NEWS (Apr. 29, 2015), <https://www.psu.edu/news/administration/story/university-implements-new-model-investigating-sexual-assault-cases/> (providing an example of a university that utilized an investigative model for Title IX adjudications).

51. Smith, *supra* note 43, at 956.

52. Nick Anderson, *Trump Administration Rescinds Obama-Era Guidance on Campus Sexual Assault*, WASH. POST (Sept. 22, 2017, 5:10 PM), https://www.washingtonpost.com/local/education/trump-administration-rescinds-obama-era-guidance-on-campus-sexual-assault/2017/09/22/43c5c8fa-9faa-11e7-8ea1-ed975285475e_story.html; see *President Donald J. Trump Is Working to Protect Students from Sexual Misconduct and Restore Fairness and Due Process to Our Campuses*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/titleix-fact-sheet.pdf> (last visited Aug. 13, 2023).

53. 34 C.F.R. § 106; see also Nicole Bedera, *Trump's New Rule Governing College Sex Assault Is Nearly Impossible for Survivors to Use. That's the Point*, TIME (May 14, 2020, 1:32 PM), <https://time.com/5836774/trump-new-title-ix-rules/>; Anna North, *Betsy DeVos's Sexual Assault Rules Have Already Hurt Survivors*, VOX (Mar. 9, 2021, 11:00 AM), <https://www.vox.com/2021/3/9/22319574/biden-executive-order-devos-sexual-assault-ix>.

54. 34 C.F.R. § 106.45(b)(6)(i); Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations>.

55. 34 C.F.R. § 106.45(b)(6)(1).

56. § 106.45(b)(7)(i).

57. Suzanne Eckes, R. Shep Melnick & Kimberly J. Robinson, *Reactions to the Biden*

There are major differences between the Trump Rule and the Obama Administration's Dear Colleague Letter.⁵⁸ The Trump Rule requires universities to impose a presumption of non-responsibility onto the accused.⁵⁹ While the presumption of non-responsibility for the accused in a Title IX proceeding sounds sufficiently similar to the presumption of innocence standard for the accused, it is distinct in that it effectively tilts the scale for a decision in favor of the accused.⁶⁰ This is in part due to the stigma that exists around sexual assault despite the statistic that only a very small percentage of accusations are false.⁶¹ The Trump Rule, unlike the 2011 Dear Colleague Letter, explicitly requires providing the accused student with notice of either the violations or any details in the claim.⁶² Additionally, the Trump Rule requires that the notice requirement should apply to both victims and the accused, increasing the threshold for any Title IX complaints filed.⁶³

The 2011 Dear Colleague Letter provided a preponderance-of-the-evidence standard of proof.⁶⁴ On the other hand, the Trump Rule allows entities to choose between preponderance-of-the-evidence and the much higher clear-and-convincing standard.⁶⁵ In practice, this leads to disparate results among various institutions, and a much lower chance for victims to receive any remedy from the school.⁶⁶ While the majority of the Trump Rule's changes reduce objectivity and impartiality, a few of the requirements put forth are helpful to facilitate a fair and just proceeding.⁶⁷ Specifically, the Trump Rule requires an impartial decisionmaker who is free from biases

Administration's Proposed Title IX Changes from Education Law Scholars, BROOKINGS INST. (June 30, 2022), <https://www.brookings.edu/blog/brown-center-chalkboard/2022/06/30/reactions-to-the-biden-administrations-proposed-title-ix-changes-from-education-law-scholars/>; Kayla Jimenez, *How Schools Will Treat Sexual Misconduct Is Changing. Who's Saying What About Title IX?*, USA TODAY (Sept. 13, 2022, 12:57 PM), <https://www.usatoday.com/story/news/2022/09/13/title-ix-changes-2022-biden-rule-public-comments-devos/10362763002/?gnt-cfr=1>.

58. See 34 C.F.R. § 106 (2021); Ali, *supra* note 16.

59. See § 106.45(b)(1)(iv).

60. See *id.*

61. See *id.*; Bedera, *supra* note 53; *Sexual Assault Statistics*, *supra* note 5 (citing David Lisak, Lori Gardinier, Sarah C. Nicksa & Ashley M. Cote, *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 SAGE J.S., 1318–34 (2010)) (indicating that the prevalence of false sexual assault allegations may be as low as two percent).

62. See § 106.

63. See *id.*

64. See Ali, *supra* note 16, at 11.

65. See 34 C.F.R. § 106.45(b)(1)(vi); Gersen, *supra* note 54.

66. See North, *supra* note 53; Eckes, Melnick & Robinson, *supra* note 57.

67. See Eckes, Melnick & Robinson, *supra* note 57.

toward either party.⁶⁸ While this type of decisionmaker is critical, it is unlikely that any decisionmaker employed by the institution can be an unbiased and impartial decisionmaker.⁶⁹

The Trump Rule also disposed of the single-investigator model.⁷⁰ Now, the same individual who gathers evidence and investigates claims also makes determinations of the validity of such evidence.⁷¹ For the most part, the Trump Rule's evidentiary requirements are logical and fair. For example, "the decisionmaker must consider relevant evidence and must not consider irrelevant evidence."⁷² Further, the final regulations of the Trump Rule do not allow universities "to impose rules of evidence that result in exclusion of relevant evidence."⁷³ In practice, this could be harmful to both a victim and an accused person as it increases costs, time of the adjudication process, and the exposure of private information to more individuals.⁷⁴

The most controversial aspect of the Trump Rule is the live hearing

68. See § 106.45(b)(1)(iii).

69. See Sheldon Krinsky, *Do Financial Conflicts of Interest Bias Research? An Inquiry Into the "Funding Effect" Hypothesis*, 38 SCI., TECH., & HUM. VALUES 566, 570 (2012), <https://web.archive.org/web/20121017165144/http://www.tufts.edu/~skrimsky/PDF/Funding%20Effect%20and%20Bias.PDF> (explaining that in the mid-1980s, scientists began testing 'the funding effect' which is the hypothesis that study outcomes are statistically correlated with funding sources, therefore, "where there is a 'funding effect' there must be bias."); *Reciprocity Bias*, ASS'N FOR QUALITATIVE RSCH., <https://www.aqr.org.uk/glossary/reciprocity-bias> (last visited Aug. 13, 2023) ("Reciprocity bias describes the impulse to reciprocate actions others have done towards us . . . Robert Cialdini . . . researched reciprocity bias and considers it powerful" because it allows one person to decide the indebtedting first favor while also allowing them to steer the nature of the debt-cancelling return favor); see also Lori Nishiura Mackenzie, JoAnne Wehner & Shelley J. Correll, *Why Most Performance Evaluations Are Biased, and How to Fix Them*, HARV. BUS. REV. (Jan. 11, 2019), <https://hbr.org/2019/01/why-most-performance-evaluations-are-biased-and-how-to-fix-them> (explaining that people's assessments of people they work with are imperfect and allow for "implicit biases to creep in").

70. § 106.45(b)(7); Brett Sokolow, *Death to the Single Investigator Model . . . Long Live the Single Investigator Model*, J.D. SUPRA (Oct. 18, 2022), <https://www.jdsupra.com/legalnews/death-to-the-single-investigator-model-9605126/> (last visited Aug. 13, 2023) (explaining that the requirement of a live hearing before an unbiased decisionmaker, who is not the investigator, eliminated the single investigator approach for sexual harassment complaints).

71. § 106.45(b)(7).

72. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,337 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

73. *Id.* at 30,336–37.

74. Gersen, *supra* note 54.

requirement, which mimics a courtroom setting.⁷⁵ This live hearing requirement directly contradicts the 2011 Letter, which did not prohibit but strongly discouraged schools from using cross-examination in sexual misconduct proceedings and hearings (which must be live) to avoid re-traumatizing the complainant.⁷⁶ At the conclusion of the hearing, the decisionmaker determines whether the accused is responsible.⁷⁷ Overall, the implementation of the Trump Rule has enabled male students found guilty at their institutions to pursue successful litigation against their schools based on their proceedings.⁷⁸ After universities adopted the Trump Rule, accused students who were found guilty in university Title IX adjudications had stronger legal grounds to successfully sue their universities for alleged due process violations in violation of the new Title IX regulations.⁷⁹ This perpetuation of extra adjudication and litigation is time-consuming, costly to litigants, and a waste of judicial resources.⁸⁰

75. 34 C.F.R. § 106.45(b)(6)(i); Gersen, *supra* note 54 (noting the Obama-era guidance’s concern that “allowing an alleged perpetrator to question an alleged victim may be traumatic or intimidating.”).

76. § 106.45(b)(6)(i); *see* Ali, *supra* note 16, at 12 (detailing how cross-examination could escalate or perpetuate a hostile environment).

77. § 106.45(b)(7)(i). Under the Trump Rule, parties in a Title IX proceeding must have an advisor during the live hearing. § 106.45(b)(6)(i). The details of this requirement are discussed later in the Comment. *Infra* Part II.A.

78. *See* Joe Dryden, David Stader & Jeanne L. Surface, *Title IX Violations Arising from Title IX Investigations: The Snake Is Eating Its Own Tail*, 53 IDAHO L. REV. 639, 642 (2017) (noting cases in five different states decided between 2014–2016); *see, e.g., Doe v. Brown Univ.*, 166 F. Supp. 3d 177 (D.R.I. 2016) (holding that the student plaintiff stated a plausible erroneous outcome claim against the university); *Wells v. Xavier Univ.*, 7 F. Supp. 3d 746 (S.D. Ohio 2014) (finding that student plaintiff’s allegations were sufficient to state erroneous outcome and deliberate indifference claims). Since the issuance of the 2011 Dear Colleague Letter, hundreds of lawsuits have been filed against universities for alleged due process violations in Title IX investigations; a database called Title IX for All keeps track of them. *See Welcome to the Title IX Lawsuits Database*, TITLE IX FOR ALL, <https://titleixforall.com/title-ix-legal-database/> (last visited Aug. 13, 2023).

79. *See* Dryden, Stader & Surface, *supra* note 78, at 642 (observing that many of the cases alleged that pressure from the OCR caused a backlash male students accused of sexual assault); *see, e.g., Brown Univ.*, 166 F. Supp. 3d at 185, 197 (denying the University’s Motion to Dismiss the “Erroneous Outcome” claim on the basis that “Doe [] pled ‘facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding’” (citing *Yusuf v. Vassar Coll.*, 35 F.3d 709, 715 (2d Cir. 1994))); *Wells*, 7 F. Supp. 3d at 751 (finding that plaintiff student’s “erroneous outcome theory survives Defendants’ [Motion to Dismiss] challenge.”).

80. Gersen, *supra* note 54.

E. The Biden Rule: A Rollback to Pre-Trump Title IX Policies

Under the Biden Administration, Secretary Cardona and the Department proposed a new set of changes to the Title IX sexual misconduct adjudication process (Biden Rule), this time engaging in a more formal rulemaking process than the guidance documents issued by the Obama Administration.⁸¹ After publishing the Biden Rule to the Federal Register, the Department opened a sixty-day notice-and-comment period which closed on September 12, 2022.⁸² The Department received more than 235,000 public comments regarding the changes, almost double the 124,000 the Trump Administration received on its proposed changes which went into effect August of 2020, after almost a year-and-a-half of review and implementation.⁸³ The comments, which address various issues ranging from wanting clarification to expressing disapproval, show a deep divide in the Title IX landscape.⁸⁴

The Department's proposed regulations would effectively roll back the Trump Administration's changes and emphasize providing equitable representation and treatment to both the victim and the accused student.⁸⁵ Importantly, the Biden Rule would eliminate the live hearing requirement in the current Trump Rule and return to the preponderance-of-the-evidence standard for proving responsibility, unless the school uses the clear-and-convincing standard in similar proceedings.⁸⁶ In addition, the Biden Rule is required to give both parties "an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties."⁸⁷ This procedure appears to attempt to ease the process for victims to report sexual misconduct and rebuke the Trump Administration's attempt to improve the advantage of the accused and the impact of the Trump Rule's increased legal representation for the accused.⁸⁸

Under President Biden, the Department's proposed regulations also

81. Katherine Knott, INSIDE HIGHER ED (Sept. 14, 2022), <https://www.insidehighered.com/news/2022/09/14/thousands-weigh-new-title-ix-rules>.

82. *Id.*

83. *Id.*

84. *See id.* ("A coalition of 17 Republic state attorneys general . . . argued in a letter that the new definition for sex discrimination exceeds the department's statutory authority").

85. *See 2022 Proposed Rule Fact Sheet*, *supra* note 44 (noting the restoration of protections for students against all forms of sex-based harassment); *2022 Proposed Rule Summary*, *supra* note 44 (adapting current regulations to apply to all complaints of sex discrimination).

86. *See 2022 Proposed Rule Fact Sheet*, *supra* note 44 (listing the requirements of the proposed regulations); Knott, *supra* note 81 (detailing the comments received over the elimination of the live hearing requirement).

87. *2022 Proposed Rule Fact Sheet*, *supra* note 44; *2022 Proposed Rule Summary*, *supra* note 44.

88. *See* Knott, *supra* note 81 (noting the expansion of protections for LGBTQ+ students).

require that “Title IX coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”⁸⁹ They also require the school’s decisionmakers to be objective throughout the evaluation process of claims and evidence.⁹⁰ In practice, these requirements are too vague to impose a legitimate objectivity standard on decisionmakers employed by the university and serve to provide the university cover.⁹¹

As explained above, in the past three presidencies, the Title IX enforcement landscape has changed in rapid succession with each administration.⁹² The Supreme Court’s interpretations of Title IX and the implementing regulations from the Department squarely put the responsibility to adjudicate university students’ claims of sexual misconduct on colleges and universities.⁹³ Considering both the unfortunate reality of campus sexual assault, illustrated through empirical data, and the fact that students’ legal rights may be in jeopardy, it is imperative that a just and fair system for adjudicating such claims exists.

89. See *2022 Proposed Rule Fact Sheet*, *supra* note 44; *2022 Proposed Rule Summary*, *supra* note 44, at 5.

90. See *2022 Proposed Rule Fact Sheet*, *supra* note 44 (championing the restoration of “vital protections” which the previous Administration’s regulations “eroded”). It is necessary to roll back the effects and impacts of the Trump Rule. See *Victim Rts. L. Ctr. v. Cardona*, 522 F. Supp. 104, 118 (D. Mass. 2021), *appeals pending* (1st Cir.) (explaining that plaintiff Mary Doe “has considered withdrawing her Title IX complaint” due to concerns that the “school is not permitted to provide [her] with any supportive measures that could be considered punitive to [the Classmate] until the investigation is resolved,” and that “she may be cross-examined at the hearing,” among other impediments).

91. See Eckes, Melnick & Robinson, *supra* note 57.

92. *Id.*

93. 20 U.S.C. § 1681(a) (2012); 34 C.F.R. § 106.8(a)–(b) (2016); see Ali, *supra* note 16, at 3–4; Smith, *supra* note 43, at 954; *Title IX and Sex Discrimination*, *supra* note 22; *Sex Discrimination Frequently Asked Questions*, U.S. DEP’T OF EDUC. (Aug. 19, 2021), <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/sex.html>; see, e.g., *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 629–30 (1999) (noting that a school district may be liable for damages under Title IX in both employee-on-student and student-on-student cases); *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 277 (1998) (setting forth a standard that a school district may be liable for damages under Title IX where it is deliberately indifferent to known acts of teacher-student sexual harassment); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 75 (1992) (“Unquestionably, Title IX placed on the Gwinnett County Public Schools the duty not to discriminate on the basis of sex, and ‘when a supervisor sexually harasses a subordinate because of the subordinate’s sex, that supervisor ‘discriminate[s]’ on the basis of sex.” (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986))).

II. ANALYZING PAST, PRESENT, AND FUTURE TITLE IX ADJUDICATION PROCESSES

The Title IX adjudication process for sexual misconduct in higher education is different than both civil and criminal adjudication processes.⁹⁴ However, as state actors, public universities must still comport with due process requirements in Title IX proceedings, further supporting the goal of impartiality in the Title IX sexual misconduct grievance process.⁹⁵ The schools adjudicating these claims, the complainant students, and the students accused of sexual misconduct all have compelling interests in protecting due process rights.⁹⁶ Schools have an interest in maintaining fairness for the victim and accused student and promoting a successful educational environment.⁹⁷ Students who initiate complaints have an interest in justice, safety, and the potential for the educational institution to impose a punishment on the individual the student has accused.⁹⁸ Students accused of sexual misconduct, on the other hand, have a compelling interest in protecting their status as a student, their reputation, and the potential of the evidence and outcome from the Title IX proceeding being used in a later criminal proceeding.⁹⁹ Even in the university setting where a Title IX

94. See Nancy Chi Cantalupo, *For the Title IX Civil Rights Movement: Congratulations and Cautions*, 125 YALE L.J.F. 281, 281–82 (2016), http://www.yalelawjournal.org/pdf/Cantalupo_PDF_7ee3t5ic.pdf (explaining the difference between criminal rape and campus sexual misconduct proceedings); Wiseman, *supra* note 38, at 129; Sokolow, *supra* note 70.

95. See *Doe v. Washington Univ.*, 434 F. Supp. 3d 735, 746–47 (E.D. Mo. 2020) (holding that public universities are state actors and private universities are not); see also *Scott v. Northwestern Univ. Sch. of L.*, 1999 WL 134059, at *1, *5–*6 (N.D. Ill. Mar. 8, 1999) (concluding that, though Northwestern University is a private university, Northwestern University’s police force is a state actor).

96. See Wiseman, *supra* note 38, at 143–44; Shannon Harper, Jon Maskaly, Anne Kirkner, & Katherine Lorenz, *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); Jesse Singal, *A Bizarre Case at USC Shows How Broken Title IX Enforcement Is Right Now*, N.Y. MAG. (Aug. 4, 2017), <http://nymag.com/intelligencer/2017/08/a-bizarre-usc-case-shows-how-broken-title-ix-enforcement-is.html>.

97. See Wiseman, *supra* note 38, at 144; Alexandra Yetter, *Title IX Policies Have ‘Anti-Male Bias’ and Treat Students Accused of Sexual Assault Unfairly, Lawsuit Alleges*, COLUM. CHRON. (July 23, 2019), <https://columbiachronicle.com/title-ix-policies-have-anti-male-bias-and-treat-students-accused-of-sexual-assault-unfairly-lawsuit-alleges>.

98. See Harper, Maskaly, Kirkner & Lorenz, *supra* note 96, at 306; Wiseman, *supra* note 38, at 149.

99. See Wiseman, *supra* note 38, at 144–46; Harper, Maskaly, Kirkner & Lorenz, *supra* note 96, at 307; Ilana Frier, *Campus Sexual Assault and Due Process*, 15 DUKE J. CONST. L. & PUB. POL’Y SIDEBAR 117, 120–21 (2020); see, e.g., *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561 (D.

violation may lead only to educational consequences, there is a long-standing stigma that may be associated with a guilty finding.¹⁰⁰

A. *The Title IX Sexual Misconduct Adjudication Process Today*

While the Title IX regulations require some safeguards in the different roles played by Title IX officers at schools which have received federal grants, the Department gives schools a significant amount of discretion.¹⁰¹ Importantly, schools can decide who can be the decisionmaker, as long as the decisionmaker is not the Title IX coordinator and, on appeal, not the same decisionmaker who served in the lower stage.¹⁰² The coordinator, however, can also serve as the Title IX investigator.¹⁰³ Additionally, the regulations do not require recipient schools to use outside unaffiliated Title IX personnel, and most schools choose to comply with Title IX regulations by using their own employees.¹⁰⁴

Under the Trump Rule, parties in a Title IX proceeding may have an advisor throughout the entire process, but they must have an advisor during the live hearing.¹⁰⁵ Each party may choose an advisor, such as a parent, professor, or lawyer, but if a party does not have an advisor of choice for the hearing, the institution is required to assign an advisor to the lacking party.¹⁰⁶ The regulations state that the advisor does not have to meet any qualification, skill, or competence bar.¹⁰⁷ Additionally, advisors are not subject to impartiality, conflict of interest, or bias requirements, like other Title IX personnel.¹⁰⁸ Moreover, though institutions may provide training or competency requirements on assigned advisors, institutions are not allowed

Mass. 2016) (providing an example of unfair treatment, due process concerns, and collateral consequences faced by an accused student in a Title IX adjudication).

100. See 177 F. Supp. 3d at 571–72; Frier, *supra* note 99, at 124.

101. See Smith, *supra* note 43, at 962; Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 492 (2012).

102. 34 C.F.R. § 106.45(b)(7)(i) (2021); see *Who Can Be the Decision-Maker*, ASS'N OF TITLE IX ADM'RS (2023), <https://www.atixa.org/open-center/who-can-be-the-decision-maker/> (last visited Aug. 13, 2023).

103. See § 106.45(b)(7)(i); *Who Can Be the Decision-Maker*, *supra* note 102.

104. See *Who Can Be the Decision-Maker*, *supra* note 102.

105. See § 106.45(b)(2)(i)(B).

106. See § 106.45(b)(6)(i).

107. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,340 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

108. See *id.*

to place any competency requirements on chosen advisors.¹⁰⁹ There is no remedy for parties who feel their advisor was insufficient in representing them because the Department does not entertain any claims of ineffective assistance of counsel.¹¹⁰

The regulations also restrict what institutions may do to regulate the equity between the parties' chosen or assigned advisors.¹¹¹ While some of these requirements serve to protect students and ensure each student has an advisor, others promote considerable inequities between parties and may give one party an unfair advantage in a Title IX proceeding. Specifically, while universities may not charge a party money for an assigned advisor and must stop a hearing if a party does not have an advisor, universities also may not limit who a party selects as an advisor (for example, by requiring a lawyer as opposed to an individual without legal training).¹¹² They are also prohibited from setting an upper-cost ceiling for advisors, which gives those with more financial resources the ability to hire skilled legal professionals to represent them, while others may not have this same opportunity.¹¹³ During cross-examination, a hearing officer must have the opportunity to ask questions of parties or witnesses and observe cross-examination of the other party.¹¹⁴ The advisor, regardless of their legal training or Title IX understanding, is charged with performing cross-examination on the opposing party, which may serve to prolong the process and engagement with parties without yielding helpful testimony.¹¹⁵

Problems with the cross-examination requirement at a live hearing include a high chance for re-traumatization of a victim, inequities between the representation the parties can afford, and a general lack of impartiality of the different Title IX personnel who adjudicate the claim.¹¹⁶ Courts have found that school proceedings do not require a live hearing with cross-examination in accordance with the Due Process Clause.¹¹⁷ Further, courts

109. *See id.* at 30,342.

110. *See id.* at 30,340.

111. *See id.* at 30,341.

112. *See id.* at 30,341–42.

113. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,332, 30,341 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

114. *See generally* 34 C.F.R. § 106.45(b)(6)(i) (2021) (describing the requirements of hearing officers during cross-examination in Title IX hearings).

115. *See id.*

116. The regulations governing cross-examination during Title IX hearings provide that the complainant may be asked about their sexual history in specific circumstances and that all parties must be present at live hearings, whether in-person or virtually. *See id.*

117. *See* Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 640–41 (6th Cir. 2005) (“Full-scale

have determined that the “Constitution does not confer on [an accused student] the right to cross-examine his accuser in a school disciplinary proceeding[]”¹¹⁸ and “[t]he right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.”¹¹⁹

Under the Trump Rule, the Title IX coordinator and investigator may be the same individual.¹²⁰ The Title IX coordinator must act once the institution has actual notice of a Title IX claim.¹²¹ This individual is required to contact the complainant and discuss the available supportive measures, consider the complainant’s wishes with respect to these measures, explain the process for filing an official complaint to the complainant, and notify the complainant of available supportive measures regardless of whether an official complaint was filed.¹²² The Title IX decisionmaker is tasked with deciding whether the accused individual is responsible of the accused sexual misconduct after a live hearing is conducted.¹²³ The decisionmaker who makes fact determinations can be a layperson who impartially uses logic and common sense to come to a conclusion but has to explain their rationale.¹²⁴

The Title IX grievance processes at higher education institutions lack the

adversarial hearings in school disciplinary proceedings have never been required by the Due Process Clause and conducting these types of hearings with professional counsel would entail significant expense and additional procedural complexity.”); *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (“The right to cross-examine witnesses generally has not been considered an essential requirement of due process in school disciplinary proceedings.” (citing *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (1961))). Although the *Flaim* Court commented that in cases involving “believing an accuser and an accused, cross-examination is not only beneficial, but essential to due process,” the Court also noted that while the plaintiff was unable to cross-examine his arresting officer, “[he] then had the opportunity to present his version of events, during which he had the opportunity to point out inconsistencies or contradictions in the officer’s testimony.” See 418 F.3d at 640–41.

118. See *Flaim*, 418 F.3d at 641 (quoting *Jaksa v. Regents of Univ. of Mich.*, 597 F. Supp. 1245, 1252 (E.D. Mich. 1984)).

119. See *Winnick*, 460 F.2d at 549 (citing *Dixon*, 294 F.2d at 159). The Supreme Court has determined, for certain disciplinary hearings, it “stop[s] short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to . . . confront and cross-examine witnesses supporting the charge” *Goss v. Lopez*, 419 U.S. 565, 583 (1975).

120. See 34 C.F.R. § 106.45(b)(7) (2021).

121. § 106.44(a).

122. *Id.*

123. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,389 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

124. *Id.* at 30,320.

proper impartiality required to provide fair and just treatment to both the victims and the students accused of sexual misconduct. Unfair treatment arises from due process concerns due to the criminal implications of such proceedings and the new trend towards favoring accused students in Title IX proceedings under the Trump Rule.¹²⁵ Unfortunately, even under the pre-Trump Rule, Title IX sexual misconduct adjudication structures employed by various schools—the investigative, the disciplinary-hearing, and the hybrid models¹²⁶— did not provide an adequate method for improving the impartiality which would provide a greater level of fairness.¹²⁷

B. Title IX Sexual Misconduct Adjudication Models and Decisionmaking Structure in Higher Education

Before the Trump Rule, schools' chosen Title IX procedures fit approximately within three models: the investigative model, the disciplinary-hearing model, and a hybrid model.¹²⁸ The Trump Rule disposed of the investigative model and moved towards a model that requires, by law, a live hearing component.¹²⁹ However, it is useful to examine each of these models that universities once had the freedom to choose between to (1) determine how to improve the impartiality of the Title IX sexual misconduct adjudication process and (2) understand what Title IX regulations may look like once the Biden Rule is in effect.

Some universities employed a two-part disciplinary-hearing model that functions like a trial in a courtroom.¹³⁰ In this model, universities employ an investigator or investigative team to conduct an initial screening to determine whether a complaint should be further adjudicated.¹³¹ The respondent party may choose to have the complaint heard in a hearing.¹³² Then, the primary fact-finding is done by the parties when they present their cases to a board of university officials, who make a final determination

125. See Frier, *supra* note 99, at 120–21; Smith, *supra* note 43, at 972–73; Wiseman, *supra* note 38, at 144–49; Triplett, *supra* note 101, at 492.

126. Smith, *supra* note 43, at 963.

127. *Id.*

128. *Id.* at 960.

129. 34 C.F.R. § 106.45(b)(6) (2021).

130. See Smith, *supra* note 43, at 964; Cantalupo, *supra* note 94, at 283–84 (stating how conflation of Title IX with criminal laws against rape and sexual assault undermines Title IX's central purpose).

131. See Smith, *supra* note 43, at 964; Cantalupo, *supra* note 94, at 283–84; Wiseman, *supra* note 38, at 131.

132. See Smith, *supra* note 43, at 964.

of responsibility in the case.¹³³

Some universities used the investigative or single-investigator model to adjudicate Title IX sexual misconduct claims.¹³⁴ This investigative model combined the investigation part of the process with the adjudication, effectively making the investigator(s) the fact-finder and initial decisionmaker.¹³⁵ In this model, universities appoint an investigator or investigative team to first meet with the complainant and decide whether the complaint merits more fact-finding.¹³⁶ The same investigative team, if it determines the claim is viable, proceeds to interview both parties separately and, upon further fact-finding and a written form of cross-examination, determines whether the accused party is responsible.¹³⁷ This model attempted to reduce contact between both the parties and the courtroom-like atmosphere, since the courtroom-like atmosphere can lead to conflict and re-traumatization of the victim.¹³⁸ However, this model is more likely than the disciplinary-hearing model to raise questions about whether such a model can meet due process standards.¹³⁹

Like the other two models, the disciplinary-hearing model charges an investigative team with conducting initial fact-finding to determine whether the case should proceed on its merits.¹⁴⁰ If a disciplinary hearing is then deemed necessary, the investigator conducts further fact-finding.¹⁴¹ Once both parties have an opportunity to review the others' reports, a hearing takes place where the parties present their case to a board or panel of university officials.¹⁴² The board then serves as the decisionmaker and

133. *Id.*

134. *See* Smith, *supra* note 43, at 956, 962; Wiseman, *supra* note 38, at 131.

135. PRINCIPLES OF THE L., STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLS. & UNIVS. § 6.3A (AM. L. INST., Tentative Draft No. 1, 2022).

136. *See* Smith, *supra* note 43, at 956, 962–64.

137. *Id.* at 962–64; *see* SARAH NESBITT & SAGE CARSON, THE COST OF REPORTING: PERPETRATOR RETALIATION, INSTITUTIONAL BETRAYAL, AND STUDENT SURVIVOR PUSHOUT 31–32 (2021), <https://www.knowyourix.org/wp-content/uploads/2021/03/Know-Your-IX-2021-Report-Final-Copy.pdf> (detailing how institutional neglect, lack of administrative enforcement, and perpetrator backlash have significant costs for survivors during Title IX investigations).

138. *See* Smith, *supra* note 43, at 964; NESBITT & CARSON, *supra* note 137, at 35.

139. *See* Smith, *supra* note 43, at 974; NESBITT & CARSON, *supra* note 137, at 31–32; Triplett, *supra* note 101, at 497–98.

140. Smith, *supra* note 43, at 963.

141. *Id.* at 963–64.

142. *See* Smith, *supra* note 43, at 964. Typically, both parties do not appear before the board at the same time. *Id.* at 965. However, under President Donald Trump Administration's Final Rule, a live hearing with both parties present is required. 34 C.F.R.

determines whether the accused party is responsible.¹⁴³

Different universities have taken different approaches to the hybrid model.¹⁴⁴ For example, the University of Minnesota hired lawyers to act as investigators and as employees of the University's Title IX Office, which is housed within the Office for Equity and Diversity.¹⁴⁵ On the other hand, Yale University hired outside investigators to conduct the fact-finding and generate a report of both parties' claims.¹⁴⁶

The Trump Rule places a heavy emphasis on a live hearing with a cross-examination function.¹⁴⁷ Before its adoption, universities were once more free to choose between the models to implement one they deemed fit their needs best; however, the Rule effectively pushes universities towards using the disciplinary-hearing model of adjudicating Title IX claims and dispenses with the single-investigator model.¹⁴⁸ In all three models, in practice, almost all of the people charged with investigating and issuing disciplinary decisions are employed by the school at which the proceeding is taking place, and they most likely report to the university's administrators, which poses a major conflict of interest.¹⁴⁹

C. *Expected Effects of the Proposed Biden Rule*

The Biden Rule under Education Secretary Miguel Cardona indicates a near-total reversal of most of President Trump's changes under Secretary Betsy DeVos.¹⁵⁰ Overall, the Biden Rule makes four big changes that indicate

§ 106.45(b)(6) (2021).

143. See Smith, *supra* note 43, at 964.

144. See *id.* at 962; Triplett, *supra* note 101.

145. *Equal Opportunity Associate, University of Minnesota*, DIVERSITY JOBS (Jan. 31, 2023), <https://diversityjobs.com/career/4080631/Equal-Opportunity-Associate-Minnesota-Saint-Paul>.

146. See Smith, *supra* note 43, at 964–65; Jeffrey J. Nolan, *Title IX: Legal Framework and Practical Considerations*, HOLLAND & KNIGHT 11, 21 (Oct. 28, 2022), https://smr.yale.edu/sites/default/files/files/Yale%20Title%20IX%20Legal%20Framework%20and%20Practical%20Considerations%2010_28_22.pdf; Aley Menon & Anita Sharif-Hyder, *Title IX Professional Development University-Wide Committee on Sexual Misconduct (UWC)*, YALE UNIV. (Oct. 28, 2022), [https://smr.yale.edu/sites/default/files/files/UWC%20PPT%20slides%20-%20TIX%20training%2010_28_22%20\(2\).pdf](https://smr.yale.edu/sites/default/files/files/UWC%20PPT%20slides%20-%20TIX%20training%2010_28_22%20(2).pdf).

147. 34 C.F.R. § 106.45(b)(6); see also Gersen, *supra* note 54 (“Many schools have not used a live hearing in front of the decision-maker as part of their disciplinary process, possibly because of its costliness and a desire to avoid stressful confrontation, but the new rules require colleges and universities to provide a live hearing . . .”).

148. § 106.45(b)(1)(i)–(iii), (b)(7)(i)–(iv); see Smith, *supra* note 43, at 962.

149. See Smith, *supra* note 43, at 962–65.

150. See 34 C.F.R. § 106 (2021); 2022 *Proposed Rule Fact Sheet*, *supra* note 44. Education

a reversion to Obama-era regulations: (1) the preponderance-of-the-evidence standard of proof, (2) the removal of the cross-examination requirement, (3) the broadening of the definition of sexual harassment, and (4) a return of the option for a school to implement the single-investigator model.¹⁵¹

The Biden Rule generally requires schools to return to the Obama-era guidance for the standard of proof in Title IX sexual misconduct proceedings: the preponderance-of-the-evidence standard, where a complainant must prove that more likely than not, discrimination occurred.¹⁵² The Biden Rule also permits a school to require a clear and convincing evidence standard—a much higher standard—if other similar proceedings at that school require that standard; in contrast, the Trump Rule broadly promoted a clear and convincing standard, which was “the same standard of proof as it adopts for complaints against employees, including faculty.”¹⁵³ Kimberly J. Robinson, a professor of law at the University of Virginia and education law expert, explained that “[t]he latter standard is so difficult to meet that it can deter those who have experienced sexual harassment and assault from coming forward.”¹⁵⁴ Professor Robinson added that the “preponderance of the evidence standard appropriately enables the decisionmaker to weigh all evidence, including the credibility of witnesses, and determine what is likely to have happened without extrinsic corroborating evidence that is oftentimes lacking”¹⁵⁵

Another major difference between the Trump Rule and the Biden Rule that education law scholars are paying close attention to is the live hearing and cross-examination requirement.¹⁵⁶ The Biden Rule does not require a live hearing and cross-examination, which opponents of the live cross-examination requirement like Professor Robinson say “give educational institutions flexibility to assess credibility through questioning at individual meetings with the parties or a live hearing.”¹⁵⁷ As a result, universities have the ability to decide on a strategy to assess the credibility of witnesses and the validity of evidence while mitigating the negative impacts that a live hearing

law scholars have weighed in on the expected effects of the current proposed Biden Rule. *See* Eckes, Melnick & Robinson, *supra* note 57, at 2–7 (commenting that some scholars welcome the rollback to the Biden Rule and others lament a reduction in due process rights for accused students).

151. *See* 34 C.F.R. §§ 106.30(a)(1)–(3), 106.45(b)(1)(vii), (b)(6)(i), (b)(7)(i); *2022 Proposed Rule Fact Sheet*, *supra* note 44.

152. *See* *2022 Proposed Rule Fact Sheet*, *supra* note 44, at 3.

153. *Id.*; Eckes, Melnick & Robinson, *supra* note 57, at 2; *see* 34 C.F.R. § 106.45(a)(1)(vii).

154. Eckes, Melnick & Robinson, *supra* note 57, at 2.

155. *Id.*

156. *See id.* at 3.

157. *Id.* at 2; *see* *2022 Proposed Rule Fact Sheet*, *supra* note 44, at 3.

might have on both the victim and the accused.¹⁵⁸ Further, universities can simultaneously provide flexibility in tailoring the procedure to the specific parties and allegations.¹⁵⁹ The requirement of a live hearing with a cross-examination is highly resource intensive, less cost effective, and as a result, difficult for universities to comply with while also ensuring that Title IX cases do not become backlogged.¹⁶⁰

Further, the Trump Rule disposed of the single-investigator model; the Biden Rule brings it back.¹⁶¹ The single-investigator model “allows the same person who investigates sexual misconduct complaints to determine guilt and innocence.”¹⁶² Proponents say that this is fairer to the complainant and is more resource-friendly way to adjudicate Title IX claims.¹⁶³ Critics argue that this marks a return to Title IX adjudications that prevent accused students from access to adequate due process.¹⁶⁴ Further, it shortens the need to prolong investigations and Title IX proceedings longer than necessary and reduces the exposure of the details of the claims to a smaller group of people, which is beneficial to both the complainant and the respondent.¹⁶⁵

Lastly, while the Trump Rule narrowed the definition of sexual harassment, the Biden Rule broadens it.¹⁶⁶ Under the former, students were required to show that the behavior they were enduring was “so severe, pervasive, and objectively offensive” that it denied access to educational benefits on the basis of sex.¹⁶⁷ The Biden Rule defines an unlawful hostile sexual harassment environment as “unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”¹⁶⁸ Under the latter definition, students are more protected from sexual misconduct and may feel more comfortable reporting claims and initiating Title IX proceedings.¹⁶⁹ Professor Robinson stated, “All

158. See Eckes, Melnick & Robinson, *supra* note 57, at 2, 9.

159. *See id.*

160. *See id.* at 2–3, 5.

161. See 34 C.F.R. § 106.45(a)(1)(iii) (2021); 2022 Proposed Rule Fact Sheet, *supra* note 44; Sokolow, *supra* note 70.

162. Eckes, Melnick & Robinson, *supra* note 57.

163. *See id.*

164. *See id.*

165. *See id.*

166. See 34 C.F.R. § 106.30(a)(1)–(3); Title IX Notice of Proposed Rulemaking, 87 Fed. Reg. 41,390, 41,410 (July 12, 2022) (to be codified at 34 C.F.R. pt. 106).

167. § 106.30(a)(2).

168. Title IX Notice of Proposed Rulemaking, 87 Fed. Reg. at 41410.

169. See Eckes, Melnick & Robinson, *supra* note 57.

students will benefit from a stronger institutional commitment to preventing, ending, and remedying a broader range of sexual harassment so that students can focus on learning in a safer and more welcoming environment.”¹⁷⁰

The differences between the Trump-Era regulations and the Biden Rule represent a sharp contrast in the cultural attitudes of the two administrations.¹⁷¹ Professor R. Shep Melnick observed that the Trump Administration followed a narrow understanding articulated by the Supreme Court in the late 1990s that only required schools to “take action against individual students or employees who engage in sexual misconduct so serious that it deprives students of the opportunity to receive an education.”¹⁷² Professor Melnick suggests that the Trump Administration intended to spot and punish the few “bad apples.”¹⁷³ On the other hand, the Biden Rule illustrates a return to “what the Obama administration called a ‘new paradigm’ on sexual harassment”¹⁷⁴ The Biden Rule does not seek to punish a few “bad apples”; it seeks to change the “rape culture” pervasive on college campuses.¹⁷⁵

While the Biden Rule offers a more balanced approach and more reasonable avenues for implementation, it still does not provide enough impartiality in Title IX sexual misconduct proceedings. First, the Title IX adjudication process must be free from conflicts of interest.¹⁷⁶ Second, the Title IX adjudication process must adequately balance respondents’ and complainants’ interests.¹⁷⁷

D. Balancing Respondents’ and Complainants’ Interests: Due Process for the Accused and Regulating Inequities Between Parties

Critics are justifiably concerned that a return to a single-investigator model may provide for a lack of constitutional due process rights for students accused of sexual misconduct.¹⁷⁸ When the same person who investigates

170. *Id.*

171. *See id.*

172. *Id.*

173. *Id.*

174. *Id.*

175. Eckes, Melnick & Robinson, *supra* note 57.

176. *See infra* Part II.D (discussing critics’ concerns over the conflicts of interest in a single-investigator model).

177. *See infra* Part II.D (exploring the competing need for universities to balance each party’s interests).

178. *See, e.g.,* Ingrid Jacques, *In New Title IX Rules, Biden Must Not Kick Due Process and Free Speech to the Curb*, USA TODAY (Dec. 12, 2022, 4:00 AM), <https://www.usatoday.com/>

also makes the finding of innocence or guilt, that person is acting as though they are both the lawyer and the jury in a trial court.¹⁷⁹ At the same time, there must exist a path for universities to regulate the inequities that may exist between parties when it comes to resources.¹⁸⁰ For example, some students may be able to hire a lawyer to defend them in a Title IX proceeding, while other students may be represented by professors or parents who lack legal training or experience.¹⁸¹

The Trump Rule also restricts what institutions may do to regulate the equity between the parties' chosen or assigned advisors, some of which enable considerable inequities between parties and may, in practice, give one party an unfair advantage in a Title IX proceeding.¹⁸² Specifically, while universities are not allowed to charge for an assigned advisor and must stop a hearing if a party does not have an advisor, the universities are also not permitted to place a limit on who a party selects as an advisor (a lawyer as opposed to a parent or professor not trained in the law).¹⁸³ They also may not set a cost ceiling for advisors, giving those with more financial resources the ability to hire skilled legal professionals to represent them, while others may not be able to.¹⁸⁴ The advisor, regardless of the amount of legal training or understanding of Title IX they have, must perform a live cross-examination on the opposing party.¹⁸⁵ Together, these restrictions on advisors detract from the university's ability to balance competing interests and are likely to increase inequities between parties.

story/opinion/columnist/2022/12/12/biden-title-ix-rule-erase-constitutional-protections-sexual-assault-allegations/10861438002/?gnt-cfr=1 (stating that the Trump administration called for the ban of using single investigators); Josh Moody, *What Biden's Title IX Rules Mean for Due Process*, INSIDE HIGHER ED (June 29, 2022), <https://www.insidehighered.com/news/2022/06/30/new-title-ix-rules-raise-concerns-accused> (explaining some critics worry that changing the process for sexual assault investigations may compromise due process rights for the accused).

179. Eckes, Melnick & Robinson, *supra* note 57.

180. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,260, 30,340 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

181. *See id.* Other inequities may arise from the issues described above. *See supra* Part I.D (discussing the Trump Rule's lack of qualification and impartiality requirements for advisors and the lack of remedy for a party who receives insufficient representation).

182. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,341 (describing the responsibilities of an advisor and lack of cost or fee limitation).

183. *Id.* at 30,341–42.

184. *Id.* at 30,332, 30,341.

185. 34 C.F.R. § 106.45(b)(6)(i) (2021).

E. Title IX Adjudication Free from Conflicts of Interest: An Analogue to Executive and Independent Agencies

There is a critical need to address the lack of impartiality in the Title IX sexual misconduct grievance process in higher education institutions. A model in which universities pay investigative teams and decisionmakers to adjudicate cases arising from those universities can lead to biases and undue political pressures to rule in the school's favor.¹⁸⁶ As such, safeguards must exist to ensure that the Title IX proceedings are as free from conflicts of interest as possible.

To illustrate why such a safeguard is needed, the federal agency structure is a helpful analogue. In the federal government, administrative agencies exist in two forms: executive agencies and independent agencies.¹⁸⁷ Executive agencies operate under the direct control of the President.¹⁸⁸ The leaders of executive agencies, mostly cabinet members, such as the Defense Secretary, serve at the pleasure of the President.¹⁸⁹ For the most part, these cabinet members and executive agencies exert efforts to implement the President's vision for governing.¹⁹⁰

On the other hand, independent agencies are structurally different from executive agencies in that they are "collegial" decisionmaking bodies, meaning they make decisions after deliberating and voting.¹⁹¹ In some independent agencies, decisionmakers are required to be politically diverse to prevent any one party from dominating, and to ensure decisions are free from partisan politics.¹⁹² Instead of serving at the pleasure of the President, as the cabinet members of executive agencies do, commissioners of independent agencies serve for a term of years.¹⁹³

One example of an independent agency that could serve as a model for an enforcement agency with adjudicatory responsibilities is the EEOC.¹⁹⁴ Title VII of the Civil Rights Act created the EEOC and gave it the authority to enforce Title VII.¹⁹⁵ Title VII forbids employment discrimination on the

186. See Krimsky, *supra* note 69, at 4 (discussing the concept of a "funding effect" and how when one exists, there often exists bias); *Reciprocity Bias*, *supra* note 69 (explaining how reciprocity bias can work in reverse, creating a negative effect).

187. POPPER, MCKEE SAVITZ, VARONA & NILES, *supra* note 35, at 55.

188. *Id.*

189. *Id.* at 55–56.

190. *See id.*

191. *Id.* at 56.

192. *Id.*

193. *See* POPPER, MCKEE SAVITZ, VARONA & NILES, *supra* note 35, at 56.

194. *See Equal Employment Opportunity*, *supra* note 21.

195. Title VII, 42 U.S.C. §§ 2000e-4, 2000e-5 (2018).

basis of an employee’s “race, color, religion, sex, or national origin”¹⁹⁶ The EEOC’s mission is to “[p]revent and remedy unlawful employment discrimination and advance equal opportunity for all in the workplace”¹⁹⁷ Title VII gives the EEOC the authority to investigate employees’ discrimination allegations against employers who are bound by Title VII.¹⁹⁸ Once the EEOC concludes its 180-day investigation, it gives the complainant two options.¹⁹⁹ First, the complainant may file a lawsuit against the employer; if the employee decides to take this route, the EEOC will close the complaint and cease action regarding the matter.²⁰⁰

Under the second option, the complainant may request a hearing pursuant to 29 C.F.R. § 1614.109, which is usually an informal proceeding, serving as the EEOC’s adjudicatory function.²⁰¹ In this hearing, an administrative judge (AJ) will be assigned to oversee the complainant’s case.²⁰² As an employee of the EEOC and an attorney familiar with relevant laws, the AJ presides over the hearing, acting as jury and judge.²⁰³ During the proceeding, “[p]arties generally are permitted to make opening and closing statements, offer into evidence witness testimony and documents, examine and cross-examine witnesses and raise objections and obtain rulings on objections from the AJ.”²⁰⁴

While parties may represent themselves pro se, they are expected to be familiar with the agency’s relevant regulations and laws.²⁰⁵ If the EEOC

196. § 2000e-2(a).

197. *U.S. Equal Employment Opportunity Commission (EEOC) Strategic Plan for Fiscal Years 2018–2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (Feb. 2018), <https://www.eeoc.gov/us-equal-employment-opportunity-commission-eeoc-strategic-plan-fiscal-years-2018-2022>; *Overview*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2023) [hereinafter *EEOC Overview*], <https://www.eeoc.gov/overview>.

198. 42 U.S.C. § 2000e-5.

199. *See id.* (outlining a complainant’s choices under the enforcement provisions); *Hearings*, U.S. EQUAL EMP. OPPORTUNITY COMM’N (2023), <https://www.eeoc.gov/federal-sector/hearings-0> (last visited Aug. 13, 2023).

200. *Hearings*, *supra* note 199.

201. 29 C.F.R. § 1614.109(a) (2004); *see Hearing Process*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/federal-sector/hearing-process> (last visited Aug. 13, 2023).

202. *Frequently Asked Questions About the Federal Sector Hearing Process*, U.S. EQUAL EMP. OPPORTUNITY COMM’N [hereinafter *EEOC FAQ*], <https://www.eeoc.gov/federal-sector/frequently-asked-questions-about-federal-sector-hearing-process> (last visited Aug. 13, 2023).

203. *See id.*

204. *Id.*

205. *Id.*; *see also Discrimination by Type*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/discrimination-type> (last visited Aug. 13, 2023) (providing information on the legal elements of various forms of discrimination).

concludes its investigation and finds that the employer unlawfully discriminated against the employee, the EEOC has the authority and may decide to file a lawsuit to “protect the rights of individuals and the interests of the public and litigate a small percentage of these cases.”²⁰⁶

The EEOC is a particularly relevant independent federal agency to analyze in this context because, although Title IX was modeled after Title VI,²⁰⁷ courts have interpreted Title IX in accordance with Title VII.²⁰⁸ The Supreme Court has asserted that the statutes are different and that Title VI’s standards are not to be blindly followed in Title IX cases.²⁰⁹ However, even the Supreme Court has invoked Title VII principles when interpreting Title IX.²¹⁰ Further, several federal courts have acknowledged that, because Title IX does not provide an analytical framework for evaluating claims of gender discrimination, Title VII provides “the most appropriate analogue when defining Title IX’s substantive standards”²¹¹ Just as independent agencies have a degree of removal from the President’s influence and, thus, electoral politics, Title IX officers (especially Title IX investigators and decisionmakers) must have an added degree of separation from the politics and financial pressures of the universities they serve.²¹²

206. *EEOC Overview*, *supra* note 197.

207. BLACK, *supra* note 26, at 338.

208. *See, e.g.*, *Murray v. N.Y. Univ. Coll. of Dentistry*, 57 F.3d 243, 248 (2d Cir. 1995) (“In reviewing claims of discrimination brought under Title IX by employees . . . courts have generally adopted the same legal standards that are applied to such claims under Title VII.” (citing *Lipsett v. Univ. of P.R.*, 864 F.2d 881, 896–98 (1st Cir. 1988))).

209. *See, e.g.*, *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 168, 175 (2005) (“The fact that Title VII of the Civil Rights Act of 1964 expressly prohibits retaliation is of limited use with respect to Title IX.”); *Davis ex rel. Lashonda D. v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (“[I]n *Gebser* we expressly . . . [noted] the textual differences between Title IX and Title VII.”); *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 65 n.4 (1992) (“The court also rejected an argument by Franklin that the terms of outright prohibition of Title VII . . . apply by analogy to Title IX’s antidiscrimination provision”).

210. *See Olmstead v. L.C. ex rel. Zimring*, 527 U.S. 581, 616–17 n.1 (1999) (Thomas, J., dissenting) (“This Court has also looked to its Title VII interpretations of discrimination in illuminating Title IX”); *Franklin*, 503 U.S. at 73.

211. *Roberts v. Colo. State Bd. of Agric.*, 998 F.2d 824, 832 (10th Cir. 1993) (quoting *Mabry v. State Bd. of Cmty. Colls. & Occupational Educ.*, 813 F.2d 311, 316 n.6 (10th Cir. 1987)); *see Murray*, 57 F.3d at 248; *Tingley-Kelley v. Trustees of Univ. of Penn.*, 677 F. Supp. 2d 764, 775 (E.D. Pa. 2010).

212. *See POPPER, MCKEE SAVITZ, VARONA & NILES*, *supra* note 35, at 55–56; Krimsky, *supra* note 69; *Reciprocity Bias*, *supra* note 69.

III. RECOMMENDATIONS

The Department should promulgate a rule requiring schools to add an extra degree of separation between those adjudicating Title IX claims and those involved in university spending and hiring.²¹³ Alternatively, Congress should enact legislation similar to Title VII to create an independent agency under the Department of Education, such as the EEOC under the Department of Labor, that may impartially adjudicate Title IX claims.²¹⁴

A. *The Hybrid Model Plus: Implementing the Hybrid Model with an Additional Layer of Independence*

As explained in the above sections, the investigative model and the disciplinary-hearing model have advantages and disadvantages.²¹⁵ The investigative model is inadequate because, although the intentional separation of the victim and perpetrator may increase comfort and fairness for a complainant, the combination of the investigative and decisionmaking processes may detract from the accused student's due process rights.²¹⁶ The Trump Rule is an iteration of the disciplinary-hearing model of adjudicating Title IX sexual misconduct claims.²¹⁷ While the general requirement that the investigative part of a Title IX proceeding and the decisionmaking part remain separate improves the impartiality over a single-investigator model, the Trump Rule exacerbated certain problems in the process.²¹⁸ The inclusion of a cross-examination requirement at a live hearing is likely to re-traumatize victims, the lack of a cost ceiling for advisors perpetuates inequities between the amount of representation the parties can afford, and the structure of Title IX personnel still generally lacks impartiality.²¹⁹

On the other hand, a hybrid model incorporates elements of both the

213. *Infra* Part III.A.

214. *Infra* Part III.B. Universities should also be able to regulate the inequities that may exist between parties, which may help to increase fairness in the Title IX adjudication process. *Id.*

215. *Supra* Part II.A.

216. *See* Wiseman, *supra* note 38, at 127, 135 (explaining how the current Title IX adjudicatory process can violate the due process rights of both complainants and respondents).

217. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,332, 30,341 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

218. 34 C.F.R. § 106.45(b)(1)(iii); *see* Bedera, *supra* note 53; NESBITT & CARSON, *supra* note 137, at 32.

219. 34 C.F.R. § 106.45(b)(1)(iii), (b)(5)(iv), (b)(6)(i); *see* Bedera, *supra* note 53; NESBITT & CARSON, *supra* note 137.

disciplinary-hearing and investigative models.²²⁰ This model implements the necessary two-part process that ensures that the investigative team is not also the decisionmaker and allows for there to be a hearing if necessary.²²¹ However, implementing a hybrid model alone cannot solve the problem of impartiality that plagues the Title IX sexual misconduct grievance process. Such a model must also include an additional layer of separation between Title IX officers from the employer university to reduce potential funding or reciprocity bias and ensure impartiality.²²²

In the interest of preserving university discretion and reducing the financial and bureaucratic burdens that may otherwise be put on the Department, universities should employ various mechanisms to comply. For example, housing the Title IX Office, investigators, and decisionmakers within an office that would not report directly to higher-level university administrators or be charged with holding the university officials accountable for abiding by the law; this could be a legal office separate from the university's general counsel.²²³ Further, universities may choose to hire investigators who are externally employed entirely.²²⁴ A university's Title IX Office may also consider hiring lawyers as investigators and decisionmakers bound by an external ethics code to ensure their commitment to the law and that they mitigate their biases in their determinations.²²⁵ The imposition of an ethics code alone that includes a provision regarding impartial fact-finding and making determinations on universities' Title IX officers, especially investigators and decisionmakers, could help increase impartiality.²²⁶

B. *The Ideal Solution: An Analogue to the EEOC*

The Department may decide that such a hybrid model with an added layer of independence enacted through notice-and-comment rulemaking would not be adequately impartial for adjudicating sexual misconduct claims or would be too difficult to implement.²²⁷ In the alternative, Congress should

220. See Smith, *supra* note 43, at 964–65 (explaining the elements of a hybrid model).

221. *Id.*

222. See Krinsky, *supra* note 69; *Reciprocity Bias*, *supra* note 69.

223. See Krinsky, *supra* note 69; *Reciprocity Bias*, *supra* note 69.

224. See Smith, *supra* note 43, at 964–65 (detailing how Yale's University-Wide Committee "appoints an outside investigator to undertake the primary investigation" of a sexual misconduct complaint); see, e.g., Menon & Sharif-Hyder, *supra* note 146.

225. See, e.g., Menon & Sharif-Hyder, *supra* note 146.

226. See Krinsky, *supra* note 69, at 570; *Reciprocity Bias*, *supra* note 69.

227. See GARVEY, *supra* note 24, at 4, 7 ("The APA created the exception for nonlegislative [interpretive] rules principally to allow agencies to efficiently perform routine day-to-day duties, while encouraging agencies to provide the public with timely policy

enact a statute that would create an independent agency (Title IX Agency) within the Department of Education.²²⁸ This new agency would include an impartial tribunal with a neutral investigative body that adjudicates Title IX sexual misconduct claims, modeled after the EEOC.²²⁹ The Title IX Agency, as the EEOC is housed in the Department of Labor, would be housed in the Department of Education.²³⁰ The new independent agency would be critically helpful to ensure due process concerns are addressed as well as the impartial treatment of both victims and accused students, justifying the considerable resources required to create such an agency.

The Department of Education would employ and train the investigators and decisionmakers within the Title IX Agency—not the university—to ensure impartiality by having a decisionmaker that is substantially separated from the individuals and institution involved in the Title IX proceeding.²³¹ The investigators in the Title IX Agency would be charged with efficiently, fairly, and accurately assessing the allegations in the complainant’s sexual misconduct claim, similar to the responsibilities of the EEOC investigators.²³² The responsibilities of these investigators would include interviewing the relevant entities, gathering evidence, and potentially making a determination of guilt.²³³

While investigators may make findings of whether Title IX has been violated and sexual misconduct has occurred, after the conclusion of the investigation, the complainant will have the opportunity to request a hearing with an AJ.²³⁴ The decision of this Title IX Agency would be binding and an adverse ruling for a party could include consequences such as expulsion for a student, a financial sanction on a university that is deemed to have not abided by Title IX requirements, or a lawsuit filed by the Department of Education.²³⁵ However, there would be an opportunity to appeal to an AJ of the Department’s Office of Hearings and Appeals, which “provides an

guidance without having to engage in what can be the lengthy and burdensome notice-and-comment process.”).

228. See *Independent Agencies Established by Law*, JUSTIA, <https://www.justia.com/administrative-law/independent-agencies/> (last visited Aug. 13, 2023).

229. See *Equal Employment Opportunity*, *supra* note 21; *Independent Agencies*, *supra* note 228. See generally Title VII, 42 U.S.C. §§ 2000e-4–2000e-5 (2018) (describing structure and powers of the EEOC).

230. 42 U.S.C. §§ 2000e-4–2000e-5; see *Equal Employment Opportunity*, *supra* note 21.

231. See Krimsky, *supra* note 69, at 570; *Reciprocity Bias*, *supra* note 69.

232. See *EEOC Overview*, *supra* note 197 (describing that the EEOC’s role “in an investigation is to fairly and accurately assess the allegations in the charge and then make a finding.”).

233. See *id.*

234. See *id.*

235. See *id.*

independent forum for the fair, impartial, equitable, and timely resolution of certain disputes involving the [Department].”²³⁶

While the EEOC model may be used as a blueprint for a Title IX Agency, this Section recommends some differences from the EEOC. Because Title IX proceedings are steeped in legal jargon and the stakes are high for both the complainant and the accused, though it may prove costly, both parties should be required to be represented by an attorney.²³⁷ The Title IX Agency’s impartial tribunal and AJs, as courts do for indigent defenders in criminal proceedings, would appoint a legally trained individual to be a party’s advisor if they cannot afford one.²³⁸ Whether the solution to the lack of impartiality in the Title IX adjudication process is statutorily creating an EEOC-type adjudication tribunal or implementing a hybrid adjudication model with an ethics code, Title IX adjudications in higher education will not be sufficiently fair until the process is free from biases and injustices.

CONCLUSION

In the face of pervasive sexual misconduct on college campuses, the Title IX sexual misconduct adjudication process is desperately needed in higher education.²³⁹ However, Title IX adjudications are extremely controversial.²⁴⁰ While some argue that the culture of sexual assault discourages reporting and fails to protect victims of sexual misconduct, others argue that Title IX

236. See, e.g., *Home*, OFF. OF HEARINGS & APPEALS, U.S. DEP’T OF EDUC., <https://oha.ed.gov/> (last visited Aug. 13, 2023) (explaining that the Office of Hearings and Appeals of the Department of Education hears higher education appeals).

237. See Erica Coray, *Victim Protection or Revictimization: Should College Disciplinary Boards Handle Sexual Assault Claims?*, 36 BOS. COLL. J.L. & SOC. JUST. 59, 80 (2016) (“Legal representation is beneficial to both [the complainant and the accused] by ensuring the process is fair and by assisting in the presentation of evidence and questioning of witnesses.”); cf. *EEOC FAQ*, *supra* note 202 (noting that complainants “are not required to retain an attorney” and “may represent [themselves] (pro se).”).

238. See *The Right to a Public Defender in a Criminal Law Case*, JUSTIA, <https://www.justia.com/criminal/procedure/miranda-rights/right-to-public-defender/> (last visited Aug. 13, 2023). Additionally, though it would be difficult to implement, the Title IX Agency should place a ceiling on the amount of money a party may spend on representation to reduce inequities. See *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30,026, 30,332, 30,341 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

239. See AAU REPORT, *supra* note 1, at 14–15; Smith, *supra* note 43, at 953–55.

240. See R. Shep Melnick, *Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct*, BROOKINGS INST. (June 11, 2020), <https://www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/>; North, *supra* note 53; Eckes, Melnick & Robinson, *supra* note 57.

proceedings neglect accused students' due process rights.²⁴¹ With so many conflicting interests, it is increasingly imperative to improve the impartiality of such proceedings to provide legitimacy and fairness to the Title IX grievance process.²⁴² The Department must issue a rule that requires universities to employ a hybrid-plus model in which the investigative body and decisionmakers are separate entities far removed from the university's own bureaucratic, political, and financial structure.²⁴³

In the alternative, Congress should enact legislation that will create an independent agency, analogous to the Department of Labor's EEOC, that includes neutral investigators and an impartial tribunal to conduct the evidence-collecting, fact-finding, and decisionmaking processes for Title IX sexual misconduct proceedings.²⁴⁴ Such an agency, though costly and resource-intensive, would remove the burden from schools to adjudicate these claims; moreover, this agency would reduce the lack of impartiality that results when schools investigate Title IX violations.²⁴⁵ Rampant sexual misconduct on college campuses calls for an effective and fair Title IX sexual misconduct adjudication process, which must be free from biases.

241. See Eckes, Melnick & Robinson, *supra* note 57; Brett A. Sokolow, *More Flexible Title IX Regs Pose New Dilemmas*, INSIDE HIGHER ED (July 12, 2022), <https://www.insidehighered.com/views/2022/07/12/flexibility-title-ix-regs-blessing-and-curse-opinion> (explaining how the 2011 Dear Colleague Letter released by the Obama Administration “emphasiz[ed] colleges’ obligations to respond to claims of sexual harassment and sexual violence under Title IX” resulted in “more than 700 state and federal lawsuits alleging various due process violations . . .”).

242. See Smith, *supra* note 43, at 954–56; Harper, Maskaly, Kirkner & Lorenz, *supra* note 96, at 306–07; Wiseman, *supra* note 38, at 144–48.

243. See Krinsky, *supra* note 69; *Reciprocity Bias*, *supra* note 69.

244. See *EEOC Overview*, *supra* note 197; *supra* Part II.B.

245. See *Reciprocity Bias*, *supra* note 69.