Admission of Evidence in Title IX Sexual Misconduct Hearings

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New Title IX regulations mandate an adversarial school hearing to resolve formal Title IX complaints of sexual misconduct involving college students. The new regulations adopt an unprecedented approach to the admission of evidence in these hearings. In particular, schools can admit only statements, including medical reports and other documents, by parties and witnesses who have submitted to full and live cross-examination. This approach departs sharply from both the due process requirements and practices for public school student discipline and administrative hearings, and the rules for admissibility of evidence in civil and even criminal trials. An analysis of the evidentiary standards under the new regulations identifies a myriad of issues that are not clearly resolved. Some issues are addressed but not authoritatively resolved by non-binding agency guidance; many other issues remain unsettled or unaddressed. The analysis suggests practices for schools to adopt and places the new Title IX evidentiary approach in context by comparing it with evidence standards in other legal contexts.

President Biden criticized the new regulations and promised "a quick end" to them, but the same years-long notice and comment process used to enact regulations is required for repeal or revision. In the context of future modification, which apparently will begin with proposed new regulations in May 2022, the new regulations' approach to the admission of evidence is evaluated using the lens of the agency's stated goals: due process and fairness for respondents, equal treatment of complainants and respondents, the centrality of credibility assessment, and the reality that schools are not courtrooms and decision-makers in hearings are

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neither trained judges nor attorneys. The new regulations fail to achieve these goals. Due process does not require the ban on uncross-examined statements. The ban fetishizes cross-examination to assess credibility while ignoring other common and important impeachment techniques. Its adoption is part of a conspicuous pattern: the new regulations borrow general evidentiary approaches from the rules for trial, and then modifies them in ways that disfavor complainants and provide protection for respondents that equal or exceed trial protections for criminal defendants. The new regulations adopt the general ban on hearsay for trials but do not adopt any of the trial rules' many exceptions—even those that would admit hearsay against criminal defendants. The new regulations also create a rape shield barring evidence of complainant sexual history and character, modeled on the approach for criminal trials. Unlike the criminal rape shield, the Title IX rape shield eliminates protection for the sexual history of other victims of sexual misconduct by the respondent and even requires the school to disclose the complainant's protected sexual history information to the respondent prior to the hearing. There are fairer and better alternatives that are appropriate to the nature of school hearings with non-attorney decision-makers. For example, the normal approach in school hearings and administrative hearings is to focus on weight rather than admissibility; admitting almost all evidence, while allowing the parties to argue that a piece of evidence's hearsay status means that the decision-maker should give it little or no weight. The new regulations' evidentiary approach for resolving formal Title IX complaints does not offer fairness to the parties, and complainants should not assume that filing formal Title IX complaints serves their interests.

I. INTRODUCTION

Title IX[1] prohibits gender discrimination by schools that receive federal education funds. Sexual harassment, including but not limited to sexual assault (hereinafter collectively referred to as "sexual misconduct"), is a form of gender discrimination and has been the subject of much litigation and guidance from the U.S. Department of Education ("DOE").[2] However, neither Title IX's statutory text nor its regulations specifically addressed sexual misconduct until new regulations became effective in August 2020.[3]

[1] 20 U.S.C. §§ 1681–1688.

[2] *See, e.g.*, Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998); Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60 (1992); Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,034–38 (May 19, 2020) [hereinafter Preamble] (reviewing 1997–2017 DOE guidance, DCLs, and Q&As on sexual harassment).

[3] *See* Preamble, *supra* note 2, at 30,028–29.

Longstanding Title IX regulations require schools to offer an internal grievance process for Title IX complaints generally that provides "prompt and equitable" resolution.[4] Similarly, longstanding regulations under the Clery Act,[5] which applies to certain offenses covered by the new Title IX regulations,[6] require "prompt, fair, and impartial" hearings.[7] The new Title IX regulations establish a novel and specific process for schools to follow when responding to formal complaints of sexual misconduct.[8] Schools must investigate formal complaints and share the evidence gathered in the investigation with the parties.[9] At the college level, the complaint is resolved in a formal adversarial hearing conducted in accordance with specific rules of evidence.[10] The agency explains that its new process and the rules of evidence focus on providing due process[11] and fundamental fairness for accused students (termed "respondents" in the new regulations) and "equal" treatment of respondents and victims (termed "complainants" in the new regulations).[12] Critics argue the new process is based on the

[4] *Compare* former 34 C.F.R. § 106.8(b) (1980) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part.") *with* 34 C.F.R. § 106.8(c) (2020) ("*Adoption of grievance procedures.* A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with §106.45 for formal complaints as defined in §106.30.").

[5] 20 U.S.C. § 1092(f).

[6] *Id.* (listing covered offenses—domestic violence, dating violence, sexual assault, and stalking).

[7] 34 C.F.R. § 668.46(k)(2)(i).

[8] *See generally* 34 C.F.R. § 106.45.

[9] *See infra* Section II.A.

[10] *See infra* Sections II.B, II.C.

[11] *See infra* Section III.B. Notably, the procedural requirements apply equally to private schools, against whom students do not have constitutional due process rights.

[12] Along these lines, treatment of a complainant or respondent may be actionable. 34 C.F.R. § 106.45(a) ("[R]ecipient's treatment of a complainant or a respondent in response to a formal complaint of sexual harassment may constitute discrimination on the basis of sex under title IX."). Staff involved in investigations, hearings, and other meetings and proceedings must not exhibit bias toward complainants or respondents. 34 C.F.R. § 106.45(b)(1)(iii) ("[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate 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."). Training materials "used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment . . . ." *Id.*

rape myth of false accusations[13] and does not provide equal treatment to victims. The new regulations are currently under challenge on a myriad of grounds in lawsuits brought by the ACLU, the State of New York, a coalition of state attorneys general, and the Victim Rights Law Center.[14]

The new Title IX regulations adopt an unprecedented approach to evidence in college hearings. In particular, schools must exclude all statements made by parties and witnesses who do not submit to full cross-examination at the hearing as to evidence used to determine responsibility.[15] The new approach departs significantly from other proceedings, including: school hearings for public school student discipline and for other Title IX and Clery Act matters, administrative hearings, and civil and criminal trials.[16]

Part II offers an analysis of the new evidentiary standards. The new regulations do not resolve many issues; some are addressed but not authoritatively resolved[17] by a non-binding Preamble of more than 500

[13] *See, e.g.*, Suzannah C. Dowling, *(Un)Due Process: Adversarial Cross-Examination in Title IX Adjudications*, 73 ME. L. REV. 123, 139 (2021) (citing comments by a senior agency employee repeating rape myths about frequent false allegations of rape); *id*. at 144–148 (arguing that cross-examination in rape hearings and trials weaponize rape myths and led to enactment of rape shields).

[14] *See, e.g.*, New York v. Dep't of Educ., 477 F. Supp. 3d 279 (S.D.N.Y. 2020); Pennsylvania v. DeVos, 480 F. Supp. 3d 47 (D.D.C. 2020); Know Your IX v. DeVos, No. 20-cv-01224, 2020 U.S. Dist. LEXIS 194288 (D. Md. Oct. 20, 2020); Complaint, Victim Rts. L. Ctr. v. DeVos, No. 20-cv-11104, 2020 WL 5700819 (D. Mass. June 10, 2020). In the Victim Rights Law Center case, a federal trial court found the new regulations' ban on uncross-examined statements arbitrary and capricious in violation of the Administrative Procedure Act (APA), Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104, 2021 WL 3185743, at *16 (D. Mass. July 28, 2021). The court later clarified that it was vacating the ban generally, and not only with regard to the parties. Order, Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104 (D. Mass. Aug. 10, 2021), https://cases.justia.com/federal/district-courts/massachusetts/madce/1:2020cv11104/222276/186/0.pdf. Most recently, the DOE issued a guidance letter indicating it would not administratively enforce the ban. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Dear Students, Educators, and Other Stakeholders Letter re Victim Rights Law Center et al. v. Cardona (Aug. 24, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf (indicating that colleges are free to admit and consider statements by persons who have not submitted to cross-examination). The agency's response suggests that it will propose new regulations that do not include this ban, but it is not clear what approach the proposed new regulations may take regarding hearsay. It also remains to be seen whether courts outside of Massachusetts hearing Title IX litigation will uphold the ban.

[15] *See infra* Section II.C.3.

[16] *See infra* Section III.B.

[17] Preambles to regulations are not binding law. However, the agency writes them pursuant to APA requirements that the regulatory process include a concise general statement of regulations' basis and purpose, 5 U.S.C. § 553(c), and they are published in the Federal Register. Hence, some commentators suggest they may be the most

pages,[18] and subsequent non-binding guidance documents from the enforcing agency.[19] This analysis identifies relevant guidance from the agency, explores unsettled issues, makes suggestions for school practices, and compares the new Title IX approach with the approach in these legal contexts.[20]

As a candidate, President Biden criticized the new regulations as an attempt to "shame and silence survivors" and promised "a quick end" to them.[21] President Biden issued an Executive Order directing their review,[22] and the agency announced its intent to publish proposed revised regulations in May 2022.[23] Any end will almost certainly not be quick. The same years-long notice-and-comment process used to enact regulations is required to repeal or revise them.[24] And one cannot predict or know whether the new regulations will be wholly reworked or amended in more modest ways. In the context of the announced intent to amend, Part III of this Article evaluates the evidentiary approach under the current regulations using the lens of the agency's goals for its new process: due process and fairness for respondents, equal treatment of complainants and respondents, the importance of

authoritative source of agency intent, analogous to legislative history for a statute. *See, e.g.*, Kevin Stack, *Preambles as Guidance*, 84 GEO. WASH. L. REV. 1252, 1272–77 (2016).

18 Preamble, *supra* note 2, at 30,026–572.

19 *See* OFFICE FOR CIVIL RIGHTS, *Questions and Answers Regarding the Department's Final Title IX Rule*, U.S. Dep't of Educ. (Sept. 4, 2020) [hereinafter *2020 Q & A*], https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-20200904.pdf; OFFICE FOR CIVIL RIGHTS, *Part I: Questions and Answers Regarding the Department's Title IX Regulations*, U.S. Dep't of Educ. (Jan. 15, 2021) [hereinafter *2021 Q & A Part I*], https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part1-20210115.pdf; OFFICE FOR CIVIL RIGHTS, *Part II: Questions and Answers Regarding the Department's Title IX Regulations*, U.S. Dep't of Educ. (Jan. 15, 2021) [hereinafter *2021 Q & A Part II*], https://www2.ed.gov/about/offices/list/ocr/docs/qa-titleix-part2-20210115.pdf; OFFICE FOR CIVIL RIGHTS, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 21, 2021) [hereinafter *2021 Q & A Part III*], https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf. There are also OCR blogs on some other general issues. *See* OFFICE FOR CIVIL RIGHTS BLOG, https://www2.ed.gov/about/offices/list/ocr/blog/index.html (last visited Oct. 2, 2021).

20 This overview and analysis may serve as a resource for persons who become involved in the new Title IX formal complaint process as Title IX Coordinators and investigators, hearing decision-makers, parties, and party advisors.

21 Bianca Quilantan, *Biden Vows 'Quick End' to DeVos' Sexual Misconduct Rule*, POLITICO (May 6, 2020, 9:33 PM), https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715.

22 Exec. Order No. 14,021, 86 Fed. Reg. 13,803, 13,803 (Mar. 11, 2021).

23 OFF. OF INFO. & REGUL. AFFS., OFF. OF MGMT. & BUDGET, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (2021), https://www.reginfo.gov/public/do/eAgendaViewRule?pubId=202104&RIN=1870-AA16 (stating intent to propose amended regulations implementing Title IX in May 2022).

24 *See* 5 U.S.C. §§ 551(5), 553.

credibility assessment, and the reality that schools are not courtrooms, and decision-makers in hearings are neither trained judges nor attorneys.

Part III explains that the new regulations fail to fulfill the agency's own goals for them. The complete ban on uncross-examined statements is not a due process requirement. It fetishizes cross-examination to assess credibility, ignoring other common and important impeachment techniques, and fails to address the admissibility of uncross-examined statements to impeach. Its adoption is one of a series of choices by the agency to borrow general evidentiary approaches from the rules for trial and modify them in ways that disfavor complainants and provide protection for respondents that equal or exceed the trial protections for criminal defendants. As another example, the new regulations create a rape shield to protect complainant sexual history and character modeled on the approach for criminal trials. The new Title IX rape shield narrows the protections of the trial approach by eliminating protection for the sexual history of pattern witnesses (other victims of sexual misconduct by the respondent) and even requires the school to disclose the complainant's protected sexual history information to the respondent prior to the hearing.[25] The new system is purportedly justified by the nature of school hearings and the limited expertise of non-attorney decision-makers. The reality is that: (1) the new system actually assumes Title IX hearing decision-makers will have great expertise, even to the point of providing live reasoning for any rulings to exclude evidence, which is not required of trial judges; and (2) there exist appropriate and fairer alternatives to the ban on uncross-examined statements and the specifics of the rape shield. For example, school and administrative hearings normally focus on weight rather than admissibility, admitting almost all evidence, while allowing the parties to argue that the hearsay status or similar issues about a specific piece of evidence demands that the decision-maker give it little or no weight.[26] The new regulations' evidentiary approach must be wholly reconsidered. It does not offer fairness to the parties and complainants should consider whether filing formal complaints or otherwise participating really serves their interests.[27]

[25] *See infra* Section II.C.2.iii.

[26] *See infra* Sections III.B, III.D.

[27] *See infra* Section III.F.

II. ANALYSIS OF THE EVIDENTIARY STANDARDS FOR TITLE IX FORMAL COMPLAINTS OF SEXUAL MISCONDUCT

A. *Pre-Hearing: Gathering and Sharing Evidence*

1. Gathering Evidence

Schools must investigate formal Title IX complaints of sexual misconduct and are responsible for gathering evidence.[28] The Preamble recognizes that schools do not have subpoena powers to obtain evidence.[29] Moreover, the new regulations create a right to abstain from participation in investigations and hearings,[30] so schools apparently cannot enforce personnel or student rules that require participation by their employees or students. At the beginning of an investigation, schools must give the parties notice of the allegations with sufficient detail and advance notice to prepare for a voluntary initial interview.[31] The parties are also free to seek and offer their own evidence, and schools cannot limit them in doing so.[32]

The parties can agree to an informal resolution at any point.[33] Otherwise, colleges can either dismiss formal complaints for a variety of reasons[34] or conduct a private live evidentiary hearing with a different decision-maker than the investigator.[35] K-12 schools may either provide hearings or less formal meetings.[36]

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[28] 34 C.F.R. §§ 106.44(b), 106.45(b)(3).

[29] *See, e.g.*, Preamble, *supra* note 2, at 30,051, 30,292, 30,306.

[30] 34 C.F.R. § 106.71.

[31] 34 C.F.R. § 106.45(b)(2)(i)(B).

[32] 34 C.F.R. §§ 106.45(b)(5)(ii)–(iii).

[33] 34 C.F.R. § 106.45(b)(9). Details of the optional informal resolution process are beyond the scope of this Article.

[34] Complaints that assert sexual misconduct not covered by the new Title IX regulations, such as misconduct occurring outside of the U.S., or much sexual misconduct that occurred off-campus, must be dismissed but can be processed under school conduct codes. 34 C.F.R. § 106.45(b)(3)(i). Schools may dismiss complaints against students or employees who are no longer enrolled or employed, respectively. 34 C.F.R. § 106.45(b)(3)(ii). Formal complaints may not be made after the student is no longer enrolled at the school. 34 C.F.R. § 106.30 (definition of formal complaint). The parties must get written notice of any dismissal, 34 C.F.R. § 106.45(b)(3)(iii), and may appeal it. 34 C.F.R. § 106.45(b)(8).

[35] 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement); 34 C.F.R. § 106.45(b)(7) (decision-maker cannot be investigator).

[36] 34 C.F.R. § 106.45(b)(6)(ii). This Article examines evidence in college hearings.

2. Scope of Evidence Gathered in the School Investigation

As evidence for the hearing or other resolution process, school investigators likely would attempt to interview the complainant, respondent, and any witnesses—including any pattern witnesses who experienced sexual misconduct by the respondent. Investigators likely would also attempt to obtain campus security and school records, police reports, the parties' social media, relevant video or other recordings, and other evidence.[37] Schools may want to put a sort of litigation hold on the parties' school records, both to preserve evidence for the investigation and hearing, and to avoid spoliation claims in the event of later litigation. At the hearing, the parties, through their advisors, have a right to cross-examine witnesses, including impeachment of credibility,[38] which is performed by the advisors to the parties,[39] so presumably the school will gather credibility evidence. But certain evidence is barred from the investigation and/or the hearing:

- Party treatment records are excluded from both the school investigation and the hearing.[40]
- Privileged information is also excluded from both the school investigation and the hearing.[41]
- A new rape shield excludes some evidence from the hearing but not the school investigation.[42] As discussed below, to the extent the school gathers such information in its investigation it must be shared with the parties and their advisors.
- Statements made by persons (both parties and witnesses) who do not submit to full cross- examination are excluded from the hearing.[43] In most circumstances, this bar would not seem to affect the evidence gathered and shared with parties and advisors. In fact, it may not be clear until mid-hearing whether a witness will appear and submit to full cross-examination.

[37] A companion article provides more detail about the extensive and intimate information schools may seek in Title IX investigations. Lynn M. Daggett, *Student Privacy in the New Title IX Sexual Misconduct Formal Complaint Process*, 50 J. L. & EDUC. 64, 74–77 (2021).

[38] 34 C.F.R. § 106.45(b)(6)(i).

[39] *Id.*

[40] *See infra* Section II.C.2.i.

[41] *See infra* Section II.C.2.ii.

[42] *See infra* Section II.C.2.iii.

[43] *See infra* Section II.C.3.

3. Sharing Evidence with Parties and Advisors

Parties and their advisors must receive all the evidence the school gathers in its investigation that is "directly related to the allegations" in the complaint, whether or not the investigator thinks that a party will rely on it in the hearing, and not limited to evidence the investigator thinks is relevant.[44] The parties must have at least ten days to respond to this evidence.[45] Comments on the new regulations during their proposed stage note this provides the parties with an opportunity to strategically add prejudicial information.[46]

While the new regulations themselves do not address this, the Preamble indicates that schools may require parties and advisors to sign non-disclosure agreements about the evidence.[47] The Preamble also indicates the investigator may redact information, including FERPA-protected personally identifiable information,[48] that is not "directly related to the allegations," and barred information, such as privileged information.[49] At this stage, the investigator cannot redact evidence seemingly made irrelevant and inadmissible in the hearing by the new regulations' rape shield.[50] The Preamble indicates that unlawfully

[44] 34 C.F.R. § 106.45(b)(5)(vi). In contrast, the Clery Act requires access to the information that will actually be used in the hearing. 34 C.F.R. § 668.46(k)(3)(i)(B)(3).

[45] 34 C.F.R. § 106.45(b)(5)(vii).

[46] Preamble, *supra* note 2, at 30,302 ("Commenters stated that the final regulations would allow the improper, and potentially widespread, sharing of confidential information and incentivize respondents to 'slip in' prejudicial information to undermine the process.").

[47] *Id.* at 30,304 ("Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing recipients with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint.").

[48] *Id.* at 30,429 ("Consistent with FERPA, these final regulations do not prohibit a recipient from redacting personally identifiable information from education records, if the information is not directly related to the allegations raised in a formal complaint. . . . A recipient, however, should be judicious in redacting information and should not redact more information than is necessary under the circumstances so as to fully comply with obligations under § 106.45.").

[49] *Id.* at 30,304 ("With regard to the sharing of confidential information, a recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review.").

[50] 34 C.F.R. § 106.45(b)(5)(vi) (noting parties' right to review "any evidence" gathered in investigations); Preamble, *supra* note 2, at 30,352 ("disagreeing" that party

obtained or unlawfully created information also need not be shared.[51] As noted earlier, the parties may gather their own evidence without limitation,[52] and may ask the school to gather specific additional evidence. Parties and advisors also have a right to access the school's investigation report the school then prepares, which is limited to relevant information[53] and thus excludes evidence protected by the rape shield. They have at least another ten days to respond to this report,[54] which may include recommendations, even recommended findings and conclusions.[55]

Parents have the right to file formal complaints or otherwise exercise legal rights on behalf of (minor) children.[56] A new general Title IX regulation notes that Title IX will not be construed in derogation of parent rights,[57] and recent non-binding guidance indicates that schools may need to inform parents of possible sexual misconduct involving their child so that they can exercise their rights.[58] The agency contemplates that if FERPA does not provide access rights to the parent (for example, a minor college student who has thereby become the holder of FERPA rights but is not yet a legal adult), the parent who filed the formal complaint has the right to access the evidence and investigative report.[59] In other cases the Title IX Coordinator signs the

access to sexual history information gathered in the investigation effectively negates the rape shield).

51 Preamble, *supra* note 2, at 30,427 ("The Department is not persuaded that these final regulations require a recipient to violate State law. If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.").

52 34 C.F.R. § 106.45(b)(5)(iii) (explaining that recipients must not restrict parties' ability "to gather and present relevant evidence"); Preamble, *supra* note 2, at 30,432 ("These final regulations do not allow a Title IX Coordinator to restrict a party's ability to provide evidence. If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii).").

53 Hence, schools may redact non-relevant information. Preamble, *supra* note 2, at 30,304 ("Similarly, a recipient may permit or require the investigator to redact from the investigative report information that is not relevant, which is contained in documents or evidence that is relevant, because § 106.45(b)(5)(vii) requires the investigative report to summarize only "relevant evidence."). However, parties may assert at the hearing that redacted or other evidence is in fact relevant and admissible.

54 34 C.F.R. § 106.45(b)(5)(vii).

55 Preamble, *supra* note 2, at 30,308; *2021 Q & A Part II*, *supra* note 19, at 4–5 (noting that decision-maker cannot defer to any recommendations in the investigation report).

56 34 C.F.R. § 106.6(g).

57 *Id.*

58 *2021 Q & A Part I*, *supra* note 19, at 4–5.

59 Preamble, *supra* note 2, at 30,453 ("However, in circumstances in which FERPA would not accord a party the opportunity to inspect and review such evidence, these

formal complaint.[60] If a parent or the Title IX Coordinator files the formal complaint, the Preamble suggests the student remains the complainant and has access to the evidence and investigative report.[61] Schools can consolidate formal complaints arising out of a common incident with multiple complainants and/or respondents.[62] While the new regulations and Preamble are silent on this point, in this event it appears that all of the parties and their advisors would have access to evidence and investigative reports.

A companion article explores privacy issues in the Title IX formal complaint context.[63] Briefly, the Preamble asserts that to the extent the school gathers evidence "directly related to the allegations" and therefore must be shared with the parties,[64] it is "directly related" to the complainant and respondent.[65] The agency reasons it is thus the FERPA record of each of them, and each has a right of access.[66] In fact, the Preamble asserts the parties would have a FERPA right of access even without the new regulations.[67] Notably, under this theory FERPA's limits on re-disclosure of records[68] shared with third parties do not apply and the parties are free to share the evidence with others. The new regulations explicitly prohibit gag orders on the "allegations under investigation."[69] The Preamble suggests that the ban on gag orders does not extend to discussions of evidence or the investigative report,[70] and, as discussed above, indicates schools may, but need not, require non-

final regulations do so and provide a parent or guardian who has a legal right to act on behalf of a party with the same opportunity.").

60 34 C.F.R. § 106.30(a).

61 Preamble, *supra* note 2, at 30,453.

62 34 C.F.R. § 106.45(b)(4).

63 *See generally* Daggett, *supra* note 37, at 64–112.

64 34 C.F.R. § 106.45(b)(5)(vi).

65 Preamble, *supra* note 2, at 30,423–26.

66 *Id.*

67 *Id.* at 30,432 ("Even if these final regulations did not exist, parties who are students would have a right to inspect and review records directly related to the allegations in a formal complaint under FERPA, 20 U.S.C. 1232g(a)(1)(A)–(B), and its implementing regulations, 34 CFR 99.10 through 99.12, because these records would directly relate to the parties in the complaint.").

68 20 U.S.C. § 1232g(b)(4)(B).

69 34 C.F.R. § 106.45(b)(5)(iii).

70 Preamble, *supra* note 2, at 30,295–96 ("§ 106.45(b)(5)(iii) is not unlimited in scope; by its terms, this provision stops a recipient from restricting parties' ability to discuss 'the allegations under investigation.' This provision does not, therefore, apply to discussion of information that does not consist of 'the allegations under investigation' (for example, evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation under § 106.45(b)(5)(vi), or the investigative report summarizing relevant evidence sent to the parties and their advisors under § 106.45(b)(5)(vii)).").

disclosure agreements.[71] The Preamble also suggests disclosures or statements that are defamatory, invasive to privacy, or retaliatory (such as witness tampering) are not permitted.[72] Moreover, a new regulation confoundingly asserts that Title IX regulations override FERPA statutory requirements.[73]

B. *The Hearing*

According to recent non-binding guidance from the agency, schools can establish rules for hearings, such as rules that limit evidence to what was gathered and shared prior to the hearing, provide opportunities for opening or closing statements, and set reasonable time limits for hearings.[74]

1. The Decision-Maker

The decision-maker cannot be the investigator, nor the school's Title IX Coordinator.[75] The decision-maker need not be an attorney, and often will be an employee of the school. Decision-makers must be trained on relevance and other evidentiary matters,[76] and rule on admissibility of evidence.[77] Recent non-binding guidance from the agency suggests that the Title IX Coordinator can play a limited role in

[71] *See id.* at 30,304 ("Recipients may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process . . . .")). Any requirement of non-disclosure agreements would need to apply to both parties. 34 C.F.R. § 106.45(b) ("Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in § 106.30, must apply equally to both parties."). Where advisors or parties are school employees, FERPA bars re-disclosure. *See also* Preamble, *supra* note 2, at 30,422–23 ("The Department does not interpret Title IX as either requiring recipients to, or prohibiting recipients from, using a non-disclosure agreement, as long as such non-disclosure agreement does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence under § 106.45(b)(5)(iii). Any non-disclosure agreement, however, must comply with all applicable laws.").

[72] *Id.* at 30,296 (clarifying that there is no right to discuss "allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation"); *id.* at 30,281 (witness tampering); *id.* at 30,438.

[73] 34 C.F.R. § 106.6(e) ("The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.").

[74] *2021 Q & A Part III*, *supra* note 19, at 17.

[75] 34 C.F.R. § 106.45(b)(7).

[76] 34 C.F.R. § 106.45(b)(1)(iii).

[77] 34 C.F.R. § 106.45(b)(6).

the hearing to maintain order and facilitate procedurally, but evidentiary issues must be reserved to the decision-maker.[78]

2. The Parties

Unlike some agencies that investigate administrative complaints and then prosecute cases for complainants,[79] or schools that present disciplinary cases against students,[80] the school does not advocate for the complainant in a Title IX hearing. As discussed above, the parties are normally the complainant and respondent, even if the Title IX Coordinator signed the formal complaint. Whether or not a complainant filed a formal complaint, however, they (and respondents) are not required to participate in the hearing and cannot suffer retaliation for this decision.[81] Where the parent filed or responded to a complaint on behalf of a minor, it appears the parent is the party.

3. Party Advisors

The parties have the right to use an attorney or lay advisor of their choosing,[82] and the school must provide a free advisor to parties who have not chosen a private advisor.[83] The Preamble suggests that advisors need not be impartial, and schools are not required to train advisors.[84] The Preamble also indicates that schools must appoint advisors for absent parties.[85]

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[78] *2021 Q & A Part II*, *supra* note 19, at 2 ("The Title IX regulations do not preclude a Title IX Coordinator from serving as a hearing officer whose function is to control the order and decorum of the hearing, so long as that role as a hearing officer is distinct from the 'decision-maker' whose role is to, among other obligations, objectively evaluate all relevant evidence, apply the standard of evidence to reach a determination regarding responsibility, issue the written determination, and (during any live hearing with cross-examination) determine whether a question is relevant (and explain any decision to exclude a question as not relevant) before a party or witness answers a question.").

[79] *See, e.g.*, NAT'L LAB. RELS. BD., *The NLRB Process*, https://web.archive.org/web/20210426045926/https://www.nlrb.gov/resources/nlrb-process (investigating prior to prosecuting unfair labor practice complaints).

[80] *See generally* JAMES RAPP, 3 EDUCATION LAW § 9.09 (Matthew Bender & Co. ed. 2020).

[81] 34 C.F.R. § 106.71(a) (Retaliation prohibited against a person who "refused to participate in any manner in an investigation, proceeding, or hearing under this part.").

[82] Schools may require a new advisor if an advisor does not comply with rules of decorum in a hearing. *2021 Q & A Part III*, *supra* note 19, at 17.

[83] 34 C.F.R. § 106.45(b)(5)(iv) (party's right to retain advisor of party's choosing); 34 C.F.R. § 106.45(b)(6)(i) (school appointment of advisor when party has not retained an advisor).

[84] Preamble, *supra* note 2, at 30,342.

[85] *See* Preamble, *supra* note 2, at 30,346.

4. Presumption of Innocence and Burden of Proof

Respondents must be presumed innocent.[86] Schools cannot impose sanctions on respondents who have not yet been found responsible; recent non-binding guidance from the agency suggests that even a temporary hold on graduation or a transcript will generally not be permitted.[87] Schools choose whether to use the preponderance of evidence standard that normally governs administrative hearings and civil litigation, or a higher "clear and convincing evidence" standard.[88] But the burden of proof for student respondents cannot be lower than that for faculty respondents.[89] For example, if a school's faculty handbook, staff collective bargaining agreement, or tenure contract requires clear and convincing evidence for employee discipline, that must be the burden of proof for the school's Title IX student hearings.

[86] 34 C.F.R. § 106.45(b)(1)(iv) (Grievance process must "[i]nclude a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process."). No disciplinary or punitive consequences may be imposed on respondents prior to a determination of responsibility. 34 C.F.R. § 106.45(b)(1)(vi). Schools can do interim emergency removal of respondents, but only when there is an "immediate threat to the physical health or safety of any student or other individual." 34 C.F.R. § 106.44(c).

[87] *2021 Q & A Part II*, *supra* note 19, at 9–10 ("The Title IX regulations prohibit a recipient from imposing 'any disciplinary sanctions or other actions that are not supportive measures as defined in 34 C.F.R. § 106.30, against a respondent' without following the 34 C.F.R. § 106.45 grievance process. 34 C.F.R. §§ 106.44(a), 106.45(b)(1)(i). Even a temporary 'hold' on a transcript, registration, or graduation will generally be considered to be disciplinary, punitive, and/or unreasonably burdensome, and appropriate supportive measures cannot be disciplinary, punitive, or unreasonably burdensome. In the Preamble to the regulations at, e.g., 30,182, the Department stated: '[r]emoval from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30(a) definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.'").

[88] 34 C.F.R. § 106.45(b)(1)(vii).

[89] *Id.*

5. Witnesses and Cross-Examination

The investigator may be a witness.[90] The decision-maker will have the investigation report and any party responses,[91] but the report is not evidence.[92]

There is a right to full and live cross-examination of anyone who makes a statement, including persons who made statements outside of the hearing.[93] Witnesses may appear remotely for cross-examination,[94] which advisors perform and not the parties.[95] However, the Preamble indicates that direct examination is not limited to advisors.[96] The Preamble indicates that schools have discretion as to who conducts direct examination.[97] Schools may want to enact rules providing that only advisors may conduct direct examination, to prevent parties from calling hostile witnesses in order to conduct direct examination themselves.

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[90] Preamble, *supra* note 2, at 30,314; *2021 Q & A Part II*, *supra* note 19, at 4 (noting, however, that the investigator cannot testify to statements by persons who do not submit to cross-examination).

[91] Preamble, *supra* note 2, at 30,309; *2021 Q & A Part II*, *supra* note 19, at 6–7 ("The Title IX regulations . . . do not prescribe how or when the investigative report should be given to the decision-maker. Because the purpose of this requirement, found at 34 C.F.R. § 106.45(b)(5)(vii), is to ensure that the parties are prepared for a hearing or, if no hearing is required or otherwise provided, that the parties have the opportunity to have their views of the evidence considered by the decision-maker, the decision-maker will need to have the investigative report and the parties' responses to same, prior to reaching a determination regarding responsibility, but the timing and manner of transmitting the investigative report to the decision-maker is within the recipient's discretion.").

[92] *2021 Q & A Part II*, *supra* note 19, at 8 ("The Title IX regulations do not deem the investigative report itself, or a party's written response to it, as relevant evidence that a decision-maker must consider, and the decision-maker has an independent obligation to evaluate the relevance of available evidence, including evidence summarized in the investigative report, and to consider all other relevant evidence. The decision-maker may not, however, consider evidence that the regulations preclude the decision-maker from considering. (For instance, the regulations preclude a recipient from using in a Title IX grievance process information protected by a legally recognized privilege, a party's treatment records, or (as to postsecondary institutions) a party or witness's statements, unless the party or witness has submitted to cross-examination. 34 C.F.R. §§ 106.45(b)(1)(x), 106.45(b)(5), 106.45(b)(6)(i).)").

[93] 34 C.F.R. § 106.45(b)(6)(i). The agency suggests that school policy could limit the role of advisors and thereby enhance party participation and autonomy in a variety of ways: providing that advisors do not represent parties, providing that parties may prevent advisors from asking their own questions and limit advisors to asking questions provided by the party, or providing that advisors may not make objections or arguments, leaving those matters for the parties. *2021 Q & A Part III*, *supra* note 19, at 34.

[94] *Id.* (providing for the possibility of remote testimony and cross-examination).

[95] *Id.*

[96] Preamble, *supra* note 2, at 30,342.

[97] *Id.*

6. Decision

The decision-maker must issue a detailed written decision that the school must share with the parties.[98] FERPA permits colleges to publicly disclose the names of students found to commit certain violent or sex offenses.[99] The new Title IX regulations generally forbid disclosure of respondents' names but allow release when permitted by FERPA.[100] Recent nonbinding guidance from the agency indicates that names of respondents found responsible cannot be publicly disclosed for retaliatory reasons.[101]

C. *Admissibility of Evidence at the Hearing*

The parties may not be limited in presenting evidence, including expert witnesses.[102] The Preamble indicates that schools may enact rules of decorum to "forbid badgering a witness" or to "prohibit any party advisor or decision-maker from questioning witnesses in an abusive, intimidating, or disrespectful manner."[103] Schools should consider adopting rules of this type. The Preamble, however, forbids

[98] 34 C.F.R. § 106.45(b)(7).

[99] 20 U.S.C. § 1232g(b)(6)(B), (C) ("(B) Nothing in this section shall be construed to prohibit an institution of postsecondary education from disclosing the final results of any disciplinary proceeding conducted by such institution against a student who is an alleged perpetrator of any crime of violence (as that term is defined in section 16 of title 18), or a nonforcible sex offense, if the institution determines as a result of that disciplinary proceeding that the student committed a violation of the institution's rules or policies with respect to such crime or offense.

(C) For the purpose of this paragraph, the final results of any disciplinary proceeding:
(i) shall include only the name of the student, the violation committed, and any sanction imposed by the institution on that student; and

(ii) may include the name of any other student, such as a victim or witness, only with the written consent of that other student.").

[100] 34 C.F.R. § 106.71(a).

[101] *2021 Q & A Part I*, *supra* note 19, at 7.

[102] 34 C.F.R. § 106.45(b)(5)(iii) (Recipients must not restrict parties' ability "to gather and present evidence."); Preamble, *supra* note 2, at 30,432 ("These final regulations do not allow a Title IX Coordinator to restrict a party's ability to provide evidence. If a Title IX Coordinator restricts a party from providing evidence, then the Title IX Coordinator would be violating these final regulations and may even have a conflict of interest or bias, as described in § 106.45(b)(1)(iii)."); 34 C.F.R. § 106.45(b)(5)(ii) (Schools must "[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.").

[103] Preamble, *supra* note 2, at 30,248, 30,319.

schools from adopting rules of evidence.[104] Admitted evidence must be objectively evaluated.[105]

The new regulations leave many gaps and open issues concerning admissible evidence in Title IX hearings. As noted above, the non-binding Preamble purports to resolve some issues at least partially. Further complicating matters, schools are forbidden from adopting their own rules for admission of evidence in Title IX hearings,[106] whether to address these gaps and omissions or for other reasons. But the Preamble indicates that schools may adopt rules about the weight given to certain categories of evidence.[107]

The parties may raise alleged evidence errors in internal school appeals, external Title IX complaints, and Title IX and other litigation.[108]

1. Relevance

i. Live Rulings and On-the-Record Reasoning

Whether or not a dispute or objection exists, the decision-maker must determine the relevance of each question before it is answered and offer reasoning for any determination that a question lacks relevance.[109] This contrasts with the approach for trials where judges need not offer live or post hoc reasoning for their evidentiary rulings.[110] Schools must provide training to decision-makers on relevance.[111] It is unclear what the appeal standard will be for on-the-record decision-maker reasoning in Title IX hearings. Courts find no error if the trial judge comes to the right result, even if they used faulty extant supporting reasoning.[112] The same approach seems appropriate here, with the caveat that some decision-maker reasoning may constitute actionable evidence of bias. The requirement for contemporaneous reasoning when a question is

104 Preamble, *supra* note 2, at 30,336–37.

105 34 C.F.R. § 106.45(b)(1)(ii) (requiring "an objective evaluation of all relevant evidence—including both inculpatory and exculpatory evidence" not related to complainant or other status).

106 Preamble, *supra* note 2, at 30,294.

107 Preamble, *supra* note 2, at 30,248, 30,294.

108 *See infra* Section II.D.

109 34 C.F.R. § 106.45(b)(6)(i) ("Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant."). The agency suggests this will slow down the pace of cross-examination and thereby lessen pressure on the witness. *2021 Q & A Part III*, *supra* note 19, at 19.

110 *Cf.* FED. R. EVID. 103(c) ("The court *may* make any statement" about rulings) (emphasis added).

111 34 C.F.R. § 106.45(b)(1)(iii).

112 *Cf.* FED. R. EVID. 103(a) (error must affect a substantial right of the parties).

excluded as irrelevant would seem to incentivize decision-makers to find questions relevant. A finding of relevance avoids the requirement of putting reasoning on the record and may also avoid claims of bias against the decision-maker.

ii. Relevance Generally

The new regulations exclude certain evidence as irrelevant,[113] but do not define relevance generally. Presumably, since the decision-maker will often be a school official who is not an attorney, the term is not used in a hyper-technical sense. On its face, Title IX relevance might reasonably be interpreted to refer to "logical" relevance[114] as in Federal Rules of Evidence Rule 401 (the evidence adds something to a fact at issue in the hearing, such as: whether and what sexual misconduct happened; witness credibility; the impact of any misconduct on the complainant, such as mental trauma, physical injury, or academic difficulty; and what sanctions or remedies might be appropriate). Alternatively, Title IX relevance might reasonably be interpreted as "practical" relevance[115] as in Federal Rules of Evidence Rule 403 (what the evidence adds to the case is not greatly outweighed by unfair prejudice, unnecessary delay, or confusing or misleading the factfinder).

As noted above, however, the Preamble indicates schools may not adopt their own rules of evidence and specifically forbids adoption of a Federal Rules of Evidence Rule 403-type practical relevance standard: "a recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence."[116] The Preamble does indicate that decision-makers "may fairly deem repetition of the same question to be irrelevant,"[117] suggesting some support for the concept of marginal relevance (i.e., looking at what a piece of evidence adds over and above the other admitted evidence), but does not endorse a marginal relevance approach more generally. The Preamble reasons that decision-makers in Title IX hearings are generally not attorneys and thus are unfamiliar with evidence rules for trials.[118] The agency's guidance is consistent with understanding the decision-maker to be a trained person more akin to a judge in a bench trial—who can appropriately weight evidence with low-level practical relevance—than

113 *See infra* Section II.C.1.

114 FED. R. EVID. 401.

115 FED. R. EVID. 403.

116 Preamble, *supra* note 2, at 30,248; s*ee also id.* at 30,294.

117 *Id.* at 30,248.

118 *See id.* at 30,347.

to a lay juror. Hence, perhaps practical relevance concerns need not weigh heavily at the admissibility level in Title IX hearings. As discussed above, however, the combination of requiring on-the-record reasoning when a question is excluded and rejecting a practical relevance standard for admissibility likely means that decision-makers cannot and do not often find evidence irrelevant. This reluctance may result in lengthy and inefficient hearings.

The Preamble also indicates that schools cannot enact rules that make categories of evidence inadmissible, offering examples of lie detector test results and rape kits.[119] The Preamble suggests, however, that the

> grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker, and recipients thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with [the regulation] and apply equally to both parties.[120]

Perhaps, for example, a school could adopt a rule that notes the unreliability of lie detector test results and their subsequent inadmissibility in trials,[121] and provides that such results should therefore be given little weight in Title IX hearings.

2. Barred Evidence—Party Treatment Records, Privileged Information, Rape Shield

i. Party Treatment Records

Schools may not access or use a party's medical or psychological treatment records without voluntary written consent.[122] The Preamble

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119 *Id.* at 30,294.

120 *Id.*

121 *See generally* CHRISTOPHER B. MUELLER & LAIRD C. KIRKPATRICK, FEDERAL EVIDENCE § 7:21 (4th ed. 2009 & May 2020 update) (noting unreliability of lie detector tests, resulting in the inadmissibility of their results).

122 34 C.F.R. § 106.45(b)(5) ("When investigating a formal complaint and throughout the grievance process, a recipient must[:] (i) Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties provided that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process under this section (if a party is not an 'eligible student,' . . . then the recipient must obtain the voluntary, written consent of a

suggests this provision covers records of all treatment—by private off-campus providers, by on-campus providers in school health clinics, and by on-campus providers outside of a school health clinic, such as a nurse or counselor employed by a K-12 school.[123] The provision, however, is explicitly limited to the treatment records of parties. Schools are not banned from non-consensual access to treatment records of non-parties—such as treatment records of pattern witnesses, other witnesses such as friends of the parties—as perhaps bearing on the credibility of the parties,[124] or to establish a pattern of sexual misconduct by the respondent. As discussed above, the school shares the evidence gathered with the parties and advisors. Thus, when a party consents to release of treatment records, normally both parties and their advisors will have full access to those records.[125]

Since schools are forbidden from non-consensually accessing party treatment records, it seems that such records will not commonly be offered in the hearing. But it is possible treatment records will be available because the opposing party independently accessed them, or a party consented to disclosure, or a school investigation erroneously included them. Portions of available party treatment records may nonetheless be irrelevant because the party did not provide consent, because they are protected by a privilege,[126] such as those for therapists and physicians (or in the case of pastoral counseling, for clergy) that has not been waived, or because they are protected by the rape shield.[127] In the case of privilege, whether a privilege exists and whether it was waived may need to be decided.

Moreover, to the extent a party treatment record contains statements of another person, those statements must be excluded

'parent' . . .)"). Thus for minor students not yet in college, the parent consents rather than the student.

123 The Preamble suggests schools must comply with state and federal laws concerning treatment records. Preamble, *supra* note 2, at 30,434 ("Medical records may be subject to other Federal and State laws that govern recipients, and recipients should comply with those laws."). However, the regulations themselves state that "[t]o the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law." 34 C.F.R. § 106.6(h).

124 The new regulations require an opportunity to cross-examine witnesses, including attacking credibility. 34 C.F.R. § 106.45(b)(6)(i) ("At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.").

125 Preamble, *supra* note 2, at 30,434.

126 *See infra* Section II.C.2.ii.

127 *See infra* Section II.C.2.iii.

unless that other person submits to live cross-examination.[128] For example, if a complainant went to therapy and the therapist diagnosed PTSD, or a complainant went for a physical exam and the doctor noted bruising and other injuries, those statements need to be redacted from medical records unless the therapist or doctor, respectively, submitted to full cross-examination at the hearing.

ii. Privileged Information

Use of privileged information is also forbidden unless waived.[129] The regulation does not set out a list of applicable privileges or address whether state or federal privilege rules apply. The Preamble mentions attorney-client, spousal, and doctor-patient privileges.[130] Notably, there is a federal therapist privilege but not a federal doctor-patient privilege.[131] The Preamble also notes that respondents may assert their Fifth Amendment privilege against self-incrimination, in which case the Preamble indicates the respondent's statements would be inadmissible and no inference from failure to testify could be drawn.[132] The new regulations include this bar on inferences from failure to testify,[133] which is the approach in criminal but not civil trials.[134] Where the contours of the relevant federal and state privilege differ (perhaps, for example, about which "therapist" credentials qualify for the privilege),[135] the regulations provide no guidance on which privilege

128 *See infra* Section II.C.3.

129 34 C.F.R. § 106.45(b)(1)(x) (Schools may "[n]ot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.").

130 Preamble, *supra* note 2, at 30,277.

131 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, §§ 5:42, 5:43.

132 Preamble, *supra* note 2, at 30,352 ("As discussed above, we have revised § 106.45(b)(6)(i) to direct a decision-maker who must not rely on the statement of a party who has not appeared or submitted to cross-examination not to draw any inference about the determination regarding responsibility based on the party's absence or refusal to be cross-examined (or refusal to answer other questions, such as those posed by the decision-maker). This modification provides protection to respondents exercising Fifth Amendment rights against self-incrimination (though it applies equally to protect complainants who choose not to appear or testify).").

133 34 C.F.R. § 106.45(b)(6)(i) ("[T]he decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.").

134 Baxter v. Palmigiano, 425 U.S. 308, 318 (1976) (holding that invocation of Fifth Amendment privilege is subject to comment, and an adverse inference may be drawn in civil lawsuits); Griffin v. California, 380 U.S. 609, 615 (1965) (determining no comment permitted about criminal defendant's decision not to testify).

135 *See* Jaffee v. Redmond, 518 U.S. 1, 15 (1996) (exploring this issue, and finding federal therapist privilege includes licensed social workers).

applies. Since the regulation refers to "a legally recognized privilege,"[136] the best approach seems to be to protect information covered by either a federal privilege (since these hearings are conducted pursuant to federal statute) or a privilege of the applicable state (which may include additional privileges, such as physicians-patients and journalists-confidential sources). Moreover, and as with the approach for relevance, since the decision-maker is often not an attorney, a hyper-technical approach does not seem realistic or appropriate. The privileges most likely at issue regarding evidence at these hearings seem to be attorney-client and related work product privileges, therapist[137] and physician[138] privileges, and the constitutional Fifth Amendment privilege against self-incrimination. Occasionally, a party may claim the clergy privilege, the journalist privilege, or one of the two spousal privileges (spousal testimonial privilege and marital communications privilege). State law may include other privileges, such as a privilege for communications with sexual assault support staff or lay advocates.[139]

Some privileges listed above apply to "confidential" "communications."[140] As to confidentiality, conversations in public or under other circumstances where it is reasonably foreseeable that third persons may hear information likely are not privileged. In a recent Title IX case, a federal court found that attorney-client privilege had been waived for several student plaintiffs' emails to their attorney.[141] Analogizing from case law concerning employee emails, the court held that using the school email system, which had "terms and conditions" available to (although perhaps not read by) students stating that there was no privacy in school emails, amounted to a waiver of any privilege.[142]

External law also limits reasonable expectations of privacy and "confidentiality." Courts have held that the parameters of "confidential" medical information in disclosure claims are determined by looking to

136 34 C.F.R. § 106.45(b)(1)(x).

137 *Jaffee,* 518 U.S. at 10 (recognizing a federal therapist-patient privilege, in part because "[e]ffective psychotherapy . . . depends upon an atmosphere of confidence and trust in which the patient is willing to make a frank and complete disclosure of facts, emotions, memories, and fears.").

138 In federal court there is no doctor-patient privilege to protect communications for physical health treatment, but many states recognize such a privilege for trials in their courts. *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 5:42.

139 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 5:43.

140 *See, e.g.*, MUELLER & KIRKPATRICK, *supra* note 121, §§ 5:17, 5:18 (examining confidentiality and communications elements for attorney-client privilege).

141 Doe 1 v. Geo. Wash. Univ., 480 F. Supp. 3d 224, 229–30 (D.D.C. 2020).

142 *Id.* at 227–28.

an external legal source.[143] For example, school health clinic records are subject to FERPA and not the HIPAA Privacy Rule. FERPA does not itself create a privilege, so disclosure of school health clinic records within the school to the extent permitted by FERPA may be outside of therapist and physician privileges.[144] State law, however, may add further confidentiality requirements to these records.[145] Also, "communications" do not include observations. For example, a witness's testimony that a party had (or did not have) defensive wounds or other injuries to their person is an observation, not a communication, and hence may be outside an otherwise applicable privilege.

As the provision states, privileges may be waived.[146] Waiver can occur through: (1) intentional sharing of information (even if it is not understood that the sharing waives the privilege), such as deliberate sharing of otherwise privileged treatment records; (2) inadvertent disclosure (for example, during formal discovery prior to litigation, accidentally sharing privileged information with the other party); and (3) implied waiver (for example, suing for medical and mental harm damages sustained in a car accident likely waives privilege as to relevant medical and therapy records, respectively). Generally, the scope of the waiver is not a blanket one, but instead is limited either to only what was actually disclosed, or in the case of implied waiver, to information relevant to the matter at hand.[147] In Title IX hearings, the complainant does not seek damages from the respondent, so filing the complaint likely does not amount to an implied waiver. But an implied waiver may occur when a witness uses privileged notes to refresh memory or otherwise assist with hearing testimony.[148] In the event of waiver, the decision-maker will also need to determine its scope.

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143 Humphers v. First Interstate Bank, 696 P.2d 527, 534 (Or. 1985).

144 *See* Doe v. N. Ky. Univ., No. 16-CV-28, 2016 WL 6237510, at *1–2 (E.D. Ky. Oct. 24, 2016) (imposing sanctions for refusing to answer deposition questions on grounds of FERPA protection because FERPA does not create a privilege). *See generally* Lynn M. Daggett, *Female Student Patient "Privacy" at Campus Health Clinics: Realities and Consequences*, 50 U. BALT. L. REV. 79 (2020) (exploring privacy in school health clinic records).

145 *See*, *e.g.*, WASH. REV. CODE §§ 70.02.005–905 (2020) (adopting Uniform Health Care Information Act, which creates confidentiality with no exclusion of student records).

146 *See, e.g.*, FED. R. EVID. 502 (setting out types of waivers and their respective scope for attorney-client and work product privileges).

147 *See, e.g.*, State *ex rel.* Dean v. Cunningham, 182 S.W.3d 561, 567 (Mo. 2006).

148 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 6:97.

iii. Rape Shield

The new Title IX regulations create a rape shield[149] for complainants modeled on the approach to criminal trials under the federal evidence rule.[150] This provision renders most evidence of the complainant's sexual history and sexual character/disposition irrelevant and thus inadmissible in the hearing. The rape shield does not apply to the voluntary informal resolution process, although presumably the parties could agree that it applies.[151] According to the Preamble, the Title IX rape shield does not bar schools from gathering protected information in the school's investigation, which is shared with the parties and their advisors.[152] Thus, a respondent may know about and try to admit such evidence in the hearing.

Title IX's rape shield[153] includes two exceptions, both modeled on the federal evidentiary rape shield for criminal[154] trials: (1) evidence "offered to prove that someone other than the respondent committed the conduct alleged by the complainant"[155] (for example, sexual activity

149 34 C.F.R. § 106.45(b)(6)(i) (Regarding grievance hearings in higher education: "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if 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."); *id*. § 106.45(b)(6)(ii) (grievance adjudication procedures in K-12 schools).

150 *See* FED. R. EVID. 412 (creating an exception for constitutionally required evidence, such as prior false allegations of sexual assault by the victim, or a motive to label consensual sexual contact with the defendant as rape (for example, to preserve the victim's marriage or other relationship)).

151 34 C.F.R. § 106.45(b)(9).

152 Preamble, *supra* note 2, at 30,352 ("The Department disagrees that the evidence exchange provision in § 106.45(b)(5)(vi) negates the rape shield protections in §106.45(b)(6)(i)–(ii). As noted by the Supreme Court, rape shield protections generally are designed to protect complainants from harassing, irrelevant inquiries into sexual behavior *at trial*.").

153 34 C.F.R. § 106.45(b)(6)(i) (Regarding grievance hearings in higher education: "Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if 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."); *id*. § 106.45(b)(6)(ii) (grievance adjudication procedures in K-12 schools).

154 The rape shield approach in civil trials was not adopted. *See* FED. R. EVID. 412(b)(2) ("In a civil case, the court may admit evidence offered to prove a victim's sexual behavior or sexual predisposition if its probative value substantially outweighs the danger of harm to any victim and of unfair prejudice to any party. The court may admit evidence of a victim's reputation only if the victim has placed it in controversy.").

155 34 C.F.R. § 106.45(b)(6)(i), (ii).

with someone other than the respondent close to the time of the alleged sexual assault by the respondent to explain the complainant's injuries or physical evidence), and (2) "evidence concern[ing] specific incidents of the complainant's prior sexual behavior with respect to the respondent . . . to prove consent"[156] (prior consensual activity between the parties as evidence that the complained of conduct was consensual). The federal rape shield evidence rule for criminal trials also contains an exception for evidence that is constitutionally required,[157] for example, prior false allegations of sexual assault by the victim, or a motive to label consensual sexual contact with the defendant as rape (perhaps to preserve the victim's marriage or other relationship). The Preamble indicates this evidence is not truly sexual history or sexual predisposition evidence, implying it is outside the rape shield and would thus not be barred by it.[158]

There is no indication in the new regulations or Preamble that the rape shield can be waived. Thus, the rape shield arguably bars admission of parts of some treatment records. For example, even if a student complainant shared details of sexual history in counseling and consented to school access of those records, which were then shared with the respondent, the records may not be relevant and admissible in the hearing.

The Title IX rape shield is explicitly limited to complainants. It thus does not bar evidence of the respondent's sexual history and character, including the respondent's sexual assault or harassment of other persons, who may testify as pattern witnesses. This approach also mirrors federal rules of evidence for trials, which expressly make some prior sexual misconduct of defendants admissible in some civil and criminal sexual misconduct trials.[159] But the Title IX rape shield appears not to apply to pattern witnesses who are not parties in the hearing; in contrast to the federal evidence rule for trials which repeatedly refers to evidence concerning "a victim,"[160] the new Title IX regulations reference "the complainant."[161]

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156 *Id.* The parameters of the consent exception may depend on the school's definition of consent. *2021 Q & A Part III*, *supra* note 19, at 24–25.

157 FED. R. EVID. 412(b)(1)(c).

158 Preamble, *supra* note 2, at 30,351.

159 FED. R. EVID. 413–415.

160 FED. R. EVID. 412 advisory committee's note to 1994 amendment (stating that this rule "extends to 'pattern' witnesses in both criminal and civil cases whose testimony about other instances of sexual misconduct by the person accused is otherwise admissible").

161 *See* 34 C.F.R. § 106.45(b)(6)(i).

3. Banned Evidence in Higher Education Hearings
Statements by Persons Who Do Not Submit to Cross-Examination

While the Clery Act allows statements in hearings that are not cross-examined,[162] the new Title IX regulations provide that, at the college level, statements of persons who do not submit to live cross-examination at the hearing *must* be excluded: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility."[163]

One federal trial court found this complete "ban" on uncross-examined statements to be arbitrary and capricious in violation of the Administrative Procedure Act (APA).[164] Subsequently, the DOE issued a non-binding guidance letter indicating it will not administratively enforce the ban,[165] and so it seems that DOE will not include the ban in its present form in the proposed revised regulations it plans to issue. Schools may choose to revise their Title IX policies to allow some or all cross-examined statements. Schools can do so without worry that DOE will find this change violates Title IX in the context of Title IX OCR complaints and compliance audits. In the context of Title IX litigation, however, other courts may view the ban as not arbitrary and capricious and determine that schools must continue to follow it.

This ban explicitly applies to both parties and nonparty witnesses.[166] As a result, either party can prevent their interview or other statements from being admitted at the hearing by refusing to submit to cross-examination. Witnesses also have this option. Neither schools nor parties have obligations to attempt to secure attendance by

162 *See* 34 C.F.R. § 668.46(k).

163 34 C.F.R. § 106.45(b)(6)(i) (providing also that "the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions").

164 Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104, 2021 WL 3185743, *16 (D. Mass. July 28, 2021). The court later clarified that it was vacating the ban generally, and not only with regard to the parties. Order, Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104 (D. Mass. Aug. 10, 2021), https://cases.justia.com/federal/district-courts/massachusetts/madce/1:2020cv11104/222276/186/0.pdf.

165 U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Dear Students, Educators, and Other Stakeholders Letter re Victim Rights Law Center et al. v. Cardona (Aug. 24, 2021), https://www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf (indicating that colleges are free to admit and consider statements by persons who have not submitted to cross-examination).

166 *Id.*

witnesses.[167] Some witnesses may be unavailable to testify at the hearing; their statements would also be excluded. As discussed above, the new regulations provide that inferences may not be drawn from a failure or refusal to submit to cross-examination.[168] According to the Preamble, this ban cannot be waived by agreement of the parties.[169] The Preamble suggests that witnesses are not required to answer questions posed by the decision-maker, and a witness's failure to answer a question from the decision-maker would not render their statements inadmissible.[170]

i. Ban Limited to Determination of Responsibility

The ban is limited to the determination of responsibility. Thus, it does not appear to bar evidence offered regarding sanctions against respondents found responsible,[171] nor to the impact of misconduct on the victim as relevant to determine appropriate remedies for the complainant. Less clear is whether it applies to the impact of misconduct on the victim to determine whether the misconduct caused denial of equal access to the educational program.[172] For example, a complainant's academic transcript showing a decline in grades coinciding with misconduct seems relevant to both academic remedies and whether misconduct caused denial of equal access to the educational program, and as to the latter, is likely subject to the ban.

ii. "Submitting" to Cross-Examination

The Preamble indicates that a party advisor might decide not to cross-examine a witness; only an opportunity to do so is required.[173]

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167 *Cf.* 34 C.F.R. § 106.71 (defining prohibited retaliation to include school "coerc[ion]" involving Title IX rights, including refusing to participate in a Title IX investigation or hearing).

168 34 C.F.R. § 106.45(b)(6)(1).

169 Preamble, *supra* note 2, at 30,349.

170 *Id.*

171 Recent agency guidance indicates hearings may be bifurcated for responsibility and sanctions, perhaps with different decision-makers. *2020 Q & A*, *supra* note 19, at 10–11.

172 *See* 34 C.F.R. § 106.30(a)(1)–(3) (defining sexual harassment to require effective denial of access to the educational program).

173 Preamble, *supra* note 2, at 30,349 ("Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have *the opportunity* to cross-examine the witnesses making the statements. The Department appreciates the opportunity to clarify here that to 'submit to cross-examination' means answering those cross-examination questions that are relevant; the decision-maker is required to make relevance determinations regarding cross-examination in real time during the hearing in part to ensure that parties and witnesses do not feel compelled to answer irrelevant questions for fear of their statements being

This suggests a possible workaround in some cases: making a record at the hearing that a declarant is available for cross-examination, but the opposing party indicates that they do not wish to cross-examine. Otherwise, "submitting" is undefined. Two primary issues here include: (1) witnesses who willingly answer questions but assert a (real or feigned) lack of memory, and (2) witnesses who answer most questions on cross-examination but refuse to answer one or more specific questions. As to the latter issue, on its face, it seems appropriate for the decision-maker to reflect on whether a witness offers an adequate basis to evaluate demeanor and credibility and whether the opposing party had a fair opportunity to cross-examine. However, non-binding agency guidance suggests the witness must answer all relevant questions.[174] As to lack of memory, guidance from case law involving these issues in trials may be helpful. For example, under federal evidence rules governing hearsay in trials, a witness is not "unavailable" when they are willing to answer questions, even if most of the witness's answers report a lack of memory, and whether or not the lack of memory appears real.[175]

iii. The Approach to Hearsay of the Rules of Evidence for Trials

The Federal Rules of Evidence generally ban hearsay,[176] but also create limits on what is actually hearsay, as well as several dozen

excluded.") (emphasis added and omitted from original); *2020 Q & A*, *supra* note 19, at 9 ("Thus, the decision-maker is obligated to 'permit' each party's advisor to ask all relevant questions. However, this provision provides only an 'opportunity' for each party (through an advisor) to conduct cross-examination; this provision does not purport to require that each party conduct cross-examination or will conduct cross-examination to the fullest extent possible. If a party chooses not to conduct cross-examination of another party or witness, that other party or witness cannot 'submit' or 'not submit' to cross-examination. Accordingly, the decision-maker is not precluded from relying on any statement of the party or witness who was not given the opportunity to submit to cross-examination. The same is true if a party's advisor asks some cross-examination questions but not every possible cross-examination question; as to cross-examination questions *not asked* of a party or witness, that party or witness cannot be said to have submitted or not submitted to cross-examination, so the decision-maker is not precluded from relying on that party's or witness's statements.").

174 *2020 Q & A*, *supra* note 19, at 9 ("Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party's advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party's or witness's statements cannot be relied on by the decision-maker."). *See* Preamble, *supra* note 2, at 30,349 ("[T]he Department declines to allow a party or witness to 'waive' a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications.").

175 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:112.

176 FED. R. EVID. 802.

exceptions to the ban. The Federal Rules of Evidence limit hearsay to "statements,"[177] an approach that appears to have been adopted by the new Title IX regulations, as discussed below.[178] Under the Federal Rules of Evidence, evidence offered for a nontruth purpose is not hearsay,[179] an issue that is unclear under the new regulations. The Federal Rules of Evidence for trials also make the statements of opposing parties and their agents and co-conspirators admissible nonhearsay[180] on the theory that they are important evidence, and the parties have a fair opportunity to testify, present other evidence to put their statement in context, explain, or deny it.[181] The new Title IX regulations do not adopt this approach. The Federal Rules of Evidence for trials create a long list of admissible categories of hearsay, such as business records and other generally reliable categories of statements,[182] and other exceptions when the declarant is unavailable for testimony and cross-examination, including statements against interest.[183] The new Title IX regulations adopt no hearsay exceptions. When prosecutors offer evidence against criminal defendants, the Constitution's Confrontation Clause limits admission of certain hearsay.[184] The new Title IX regulations reject this approach. Title IX's unprecedented and complete ban on uncross-examined statements in hearings exists despite the lack of power of schools, parties, and advisors to subpoena witnesses for cross-examination. Moreover, even if school conduct codes or workplace rules require cooperation by student or employee witnesses, in Title IX formal complaint proceedings there is a right not to participate.[185] In many cases, the ban on uncross-examined statements will make it very difficult to admit sufficient evidence for the decision-maker to find the respondent responsible.

177 FED. R. EVID. 801(a).

178 34 C.F.R. § 106.45(b)(6)(i) (ban on uncross-examined evidence limited to "statements").

179 FED. R. EVID. 801(c)(2).

180 FED. R. EVID. 801(d)(2).

181 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:44.

182 *See generally* FED. R. EVID. 803.

183 *See generally* FED. R. EVID. 804.

184 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, §§ 8:26–8:34 (surveying the Court's past and current approach to the Confrontation Clause); Crawford v. Washington, 541 U.S. 36, 68 (2004) (setting forth the Court's current Confrontation Clause analysis).

185 34 C.F.R. § 106.45(b)(6)(1).

a. Statements

The scope of the Title IX hearing ban on uncross-examined "statements" is not certain. "Statements" under the Federal Rules of Evidence for trials are limited to verbal or nonverbal assertions.[186] Under those rules, a true question is not a statement, nor is conduct a statement, unless the actor intends the conduct to express a message. For example, a classmate asking a complainant "Why are you shaking and crying?" would not be a statement by the classmate, nor would the shaking and crying behavior be a statement by the complainant, unless they made themself shake and cry for the purpose of expressing a message. The Preamble suggests that "statement" should be used in its ordinary sense and would not include behavior not intended to express a message.[187] For example, the Preamble indicates that a video recording of actions (perhaps even of the alleged sexual misconduct) would not normally be a statement.[188] In a non-binding blog, the agency also indicates that statements of verbal sexual harassment such as, "If you go on a date with me, I'll give you a higher grade in my class," is also not an excluded "statement" because it does not make a factual assertion.[189] The Federal Rules of Evidence for trials also limit hearsay to assertions by human declarants. Presumably, a machine or animal does not make a statement, and so a dog barking, or a time display on a clock, or an automated store receipt dated at the time of the alleged misconduct would not be barred. The new Title IX regulations and Preamble do not explicitly address this issue, but it seems reasonable to interpret the Preamble's limitation of statements to assertions made by human declarants.

The Federal Rules of Evidence for trials also exclude statements that are offered for purposes other than truth from hearsay.[190] For example, if a witness testifies they saw the respondent harass the complainant at a basketball game, repetition at trial of a statement by someone who was present at the game that they saw no harassment would be admissible in court for the nontruth purpose of impeaching

186 FED. R. EVID. 801(a).

187 Preamble, *supra* note 2, at 30,349 ("'Statements' has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements.").

188 *Id.*

189 Dep't of Educ., *The New Title IX Rule: Excluding Reliance on a Party's "Statements" When the Sexual Harassment at Issue Consists of Verbal Conduct*, OFFICE FOR CIVIL RIGHTS BLOG (May 22, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200522.html.

190 FED. R. EVID. 801(c)(2).

the first witness with evidence that contradicts their testimony. The new Title IX regulations do not address this issue. On the one hand, the ban on uncross-examined statements is phrased absolutely. On the other hand, the new Title IX regulations require opportunities to impeach and emphasize the importance of assessing credibility, and the agency might characterize such statements as not factual assertions and thus outside of the ban.[191] The emphasis on credibility evidence arguably supports admission of uncross-examined statements for impeachment purposes. It is difficult, however, to keep the purposes of evidence separate. In the example above, it is difficult not to consider the statement of the second witness as evidence of its truth (no harassment occurred at the basketball game), for which purpose it is completely barred unless the second witness submits to cross-examination.

b. Hearsay Exceptions

The Federal Rules of Evidence for trials also include dozens of categories of hearsay evidence that may be admitted because they are generally reliable.[192] These rules of evidence allow for testing a hearsay declarant's credibility by permitting impeachment of their credibility to the same extent as testifying witnesses.[193] For example, the "business records" exception[194] permits admission of evidence such as transcripts (which might show academic impact of misconduct on the complainant and therefore whether the respondent's behavior is prohibited sexual misconduct because it deprived the complainant of equal access to the educational program), and other routine school records. The new Title IX regulations reject this approach. The Preamble specifically mentions police records and medical records, indicating that statements in such records are admissible only if the maker(s) submit(s) to live cross-examination at the hearing.[195] Technically, an academic transcript

191 *See* 34 C.F.R. § 106.45(b)(6)(i). A more accurate characterization might be that these words are not offered as an assertion, but as words with special legal significance (they are the alleged harassment) offered for a nonhearsay purpose.

192 *See, e.g.*, FED. R. EVID. 803, 804, 807.

193 FED. R. EVID. 806.

194 *See* FED. R. EVID. 803(6).

195 Preamble, *supra* note 2, at 30,349 ("Thus, *police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination*. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of *statements* asserted by witnesses contained in such evidence requires

includes "statements" of many persons, such as the faculty who submitted the individual grades recorded on the transcript. It may be that each faculty member must be willing to submit to cross-examination to admit the transcript. Yet, as it is only the *opportunity* to cross that is required, a workaround might be to make a record at the hearing that the faculty are available for cross-examination, and the opposing party indicates that they do not wish to cross-examine these faculty.

c. Party Wrongdoing Causing Unavailability for Cross-Examination

The Federal Rules of Evidence for trials also deal with situations where a party's wrongdoing causes unavailability of testimony, such as threatening or even harming a prospective witness. In such a case, the trial rules provide that the prospective witness's out of court statements may be admitted,[196] reasoning that otherwise the wrongdoer benefits from the misconduct. This approach also complies with Confrontation Clause requirements when hearsay is admitted against criminal defendants.[197]

The Preamble mentions wrongful procurement of absence, indicating that schools "must remedy" this retaliation, and suggesting schools could do so by rescheduling the hearing after taking safety precautions.[198] The Preamble does not address admissibility of evidence in this situation. Again, there are arguments both for and against admission. The ban on statements without opportunity for cross-examination is phrased absolutely. On the other hand, the regulation on retaliation[199] clearly bans interference with witness availability and testimony, and it seems inappropriate to reward retaliatory conduct by banning out of court statements by prospective witnesses who are not available due to party wrongdoing.

iv. Constitutional Requirements in Criminal Trials

In criminal trials, the Confrontation Clause operates as a constitutional bar on prosecutor admission of "testimonial" hearsay against criminal defendants unless there is an opportunity for cross-examination.[200] Testimonial hearsay is a statement made for the

the parties to have the opportunity to cross-examine the witnesses making the statements.") (emphasis added).

196 FED. R. EVID. 804(b)(6).

197 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:31.

198 Preamble, *supra* note 2, at 30,346–47.

199 *See* 34 C.F.R. § 106.71.

200 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:27.

primary purpose of establishing facts for use in later proceedings.[201] While Title IX hearings are not criminal proceedings, statements made to the investigator during a Title IX investigation arguably are "testimonial." On the other hand, a party or witness statement to a friend or parent about what happened is not testimonial and is not constitutionally barred in a criminal prosecution, even if there was no opportunity to cross-examine.[202] Moreover, the Confrontation Clause has exceptions, notably including the statements of defendant parties and their agents and co-conspirators, and situations where the defendant's misconduct caused the witness's unavailability for testimony and cross-examination.[203] The new Title IX regulations do not adopt this approach. As comments on the proposed regulations noted, much evidence that would be admissible in a criminal prosecution of a respondent is not admissible in the school Title IX hearing.[204] The Preamble recognizes this reality as well.[205]

v. Impact of the Ban

Inadmissibility of uncross-examined evidence likely makes proving or defending responsibility quite difficult for the parties and, given the presumption of innocence and burden of proof, especially challenging for complainants.[206] If a respondent confessed outside of the hearing and then refused to submit to live cross-examination at the hearing, their confession must be excluded.[207] This creates many strategic options for respondents, for example to: "further a disruptive agenda—e.g., at an inopportune time for third-party witnesses[,]. . . . [and to] speak freely to his or her peers about the investigation to collect

201 *Id.*

202 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:30.

203 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 8:31.

204 *See, e.g.*, Preamble, *supra* note 2, at 30,344.

205 Preamble, *supra* note 2, at 30,313.

206 A federal district court has noted the near-impossibility to prove responsibility with the ban. Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104, 2021 WL 3185743, at*47–48 (D. Mass. July 28, 2021) ("When . . . the school has elected to apply the clear and convincing evidence standard given the 'high stakes and potentially life-altering consequences for both parties,' . . . this Court is hard pressed to imagine how a complainant reasonably could overcome the presumption of non-responsibility to attain anything beyond the supportive measures that he or she is offered when they first file the formal complaint.").

207 *See* Aaron Bayer et al., *Conducting a Live Hearing with Cross-Examination Under the New Title IX Rules*, NAT'L L. REV. (May 26, 2020), https://www.natlawreview.com/article/conducting-live-hearing-cross-examination-under-new-title-ix-rules; Nicole Bedera et al., *A New Title IX Rule Essentially Allows Accused Sexual Assailants to Hide Evidence Against Them*, TIME (Aug. 14, 2020), https://time.com/5879262/devos-title-ix-rule/.

evidence or even to persuade other witnesses not to attend the hearing."[208] It also suggests an approach for respondents' attorneys: "No attorney worth her salt, recognizing that—were her client simply not to show up for the hearing—an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise."[209] Similarly, a complainant who confided outside of the hearing that they were not sure what happened, or not sure who did it, can also keep that statement from admission at the hearing by not submitting to cross-examination. In both instances, one party may not know whether the other will testify prior to the hearing, which makes it difficult to prepare. Moreover, statements by eyewitnesses who will not or cannot testify, even perhaps because of death, are excluded. And as discussed earlier, the school and decision-maker cannot compel testimony.[210]

4. Impeachment Evidence

Cross-examination questions to impeach witnesses are clearly relevant.[211] The Preamble notes that impeachment of witnesses must be permitted: "the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility."[212] The new regulations ban one method of credibility assessment by decision-makers; they may not evaluate credibility due to a witness's status, such as complainant or respondent, and associated general beliefs about credibility.[213]

i. Impeachment Techniques

In litigation, the main impeachment approaches include: (1) bias[214] (a witness may have reason not to offer impartial testimony; for example, an eyewitness for the complainant or an alibi witness for the respondent may be a friend, or an expert witness may have ideological bias or a party has paid them for their testimony); (2) capacity[215] (a witness's ability to perceive or remember is limited; for example, an eyewitness was standing far away in poor lighting, was not wearing

208 *Victim Rts. L. Ctr.*, 2021 WL 3185743, at *15.

209 *Id.* at *16.

210 *Cf.* 34 C.F.R. § 106.45(b)(6)(1).

211 *See* 34 C.F.R. § 106.45(b)(6)(i).

212 *Id.*

213 34 C.F.R. § 106.45(b)(1)(ii) ("[C]redibility determinations may not be based on a person's status as a complainant, respondent, or witness.").

214 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, §§ 6:26, 6:75–79.

215 *See generally id.* §§ 6:26, 6:75, 6:80.

their eyeglasses, or was intoxicated); (3) contradiction of a witness's testimony by other evidence[216] (for example, after the complainant testifies they tore the respondent's shirt, the untorn shirt is offered as evidence, or after the complainant testifies the assault caused academic difficulty, a transcript is offered showing no decline in grades); (4) prior inconsistent statements by the witness[217] (the witness told a story shared outside of the hearing—perhaps in the school interview, in a police statement, or talking to a friend—that is different from their testimony in the hearing); and (5) a witness's poor character for truthfulness (for example, the witness has a perjury or fraud conviction, or is known to be dishonest, or has lied or otherwise been dishonest in the past).[218] Presumably, questions aimed to impeach in each of these ways would be admissible in Title IX hearings.

ii. Extrinsic Impeachment Evidence

Impeachment may involve not only cross-examination of a witness, but also other "extrinsic" or independent evidence—whether physical (such as the torn shirt), documentary (such as the transcript), or witnesses called to impeach (such as a friend to whom a witness told a story that differs from testimony or who can offer an opinion about the witness's character for truthfulness). The new regulations only mention questions to the witness about "credibility,"[219] and the Preamble does not address extrinsic impeachment evidence. Given the focus on the importance of challenging credibility, the low standard of relevance, and the mention in the Preamble of admission of character evidence in various forms, such as prior bad acts, it seems appropriate to admit extrinsic evidence to impeach in Title IX hearings. The Federal Rules of Evidence for trials establish limits for extrinsic evidence depending on the type of impeachment.[220] Given the normal approach of not limiting evidence in school hearings to admissible trial evidence, the reality that decision-makers will often not be attorneys, the importance of credibility, and the low standard for relevance, it would not seem appropriate to import these extrinsic evidence format limits into Title IX hearings.

Much less clear is whether extrinsic impeachment evidence is admissible in a Title IX hearing if its declarant does not submit to live

216 *See generally id.* §§ 6:26, 6:75, 6:85–6:90.

217 *See* FED. R. EVID. 613; *see generally* MUELLER & KIRKPATRICK, *supra* note 121, §§ 6:98–102.

218 *See* FED. R. EVID. 608, 609; *see generally* MUELLER & KIRKPATRICK, *supra* note 121, §§ 6:29–57.

219 34 C.F.R. § 106.45(b)(6)(i).

220 *See, e.g.*, FED. R. EVID. 608(b).

cross-examination. For example, it is unclear whether a witness's perjury conviction, or a document reporting a friend of a party was told a story by a party that differs from the party's testimony, would be barred if the declarant (the judge issuing the conviction or the friend, respectively) did not submit to live cross-examination. The competing arguments include the absolute ban on statements made by persons who do not submit to cross-examination, that evidence offered solely to impeach is not a statement offered for its truth and is thus arguably outside the ban as discussed above,[221] and the new regulations' emphasis on the need to assess credibility.

iii. Bolstering

The new regulations and Preamble also do not address whether questions designed to enhance a witness's credibility can be asked before that witness's credibility has been attacked. The rules of evidence for trials do not allow this "bolstering,"[222] but the lesser formality of Title IX hearings and the new regulations' underlying basis of the essentialness of evaluating witness credibility seem inconsistent with a ban on bolstering.

5. Expert Witnesses

The new regulations note the parties' right to present expert witnesses,[223] who in trials are allowed to offer opinions on a wide variety of subjects. The school might identify some experts, such as police officers, in its investigation; a party might independently identify others. In trials, experts are generally not allowed to offer opinions about whether a witness is testifying truthfully,[224] nor about the law,[225] because those matters are the province of the fact-finder and trial judge, respectively. As to witness truthfulness, courts sometimes allow expert opinions about general matters, such as reliability of eyewitness identification or perhaps markers of veracity or deception.[226] The new regulations and Preamble do not address these issues, nor other matters, such as sufficient qualifications to testify as an expert.

221 *See supra* Section II.C.3.iii.a.
222 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 6:91.
223 34 C.F.R. § 106.45(b)(5)(ii).
224 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 6:32.
225 *Id.* § 7:12.
226 *Id.* § 6:82.

6. Character Evidence

The rules of evidence for trials generally forbid character evidence in civil trials for propensity purposes.[227] For example, in a car accident negligence case, evidence that the defendant is a poor driver or had prior accidents is inadmissible to show the driver drove negligently at the time of the accident. Courts generally regard the logical relevance of such evidence as low and its potential for unfair prejudice as high. The new Title IX regulations address certain sexual history character evidence with the rape shield and the admissibility of prior sexual misconduct by the respondent.[228] The new regulations are silent about character evidence generally, but the Preamble suggests that schools may not make rules banning character evidence and also suggests that character evidence, including prior bad acts, is admissible.[229] Certainly the respondent's character is relevant to what sanctions may be appropriate if found responsible. The Preamble suggests the parties' character is admissible more generally as to both responsibility (whether the alleged sexual misconduct happened) and credibility (whether a party or key witness is believable).[230] The Federal Rules of Evidence do allow criminal defendants to introduce certain character evidence.[231] Schools may wish to create rules that nonsexual character evidence should be given little weight for propensity purposes to avoid propensity reasoning (such as a respondent is a good person and thus not likely responsible for sexual misconduct or is a bad person and thus likely responsible for sexual misconduct).

The rules of evidence for trials also greatly limit the format for character evidence.[232] Generally, the rules allow character witnesses and certain convictions, but ban evidence of prior bad acts.[233] The Preamble's approval of admission of prior bad acts suggests that these format limits do not apply in Title IX hearings.

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227 *See* FED. R. EVID. 404(a)(1).

228 34 C.F.R. § 106.45(b)(6)(i).

229 Preamble, *supra* note 2, at 30,248, 30,294.

230 *Id.* at 30,248 (stating that schools cannot have rules banning character evidence); *id.* at 30,337 (noting that character evidence may go to witness credibility); *cf. id.* at 30,352 (indicating that respondent's sexual history may be relevant for propensity purposes).

231 *See* FED. R. EVID. 404(a)(2).

232 *See* FED. R. EVID. 405.

233 FED. R. EVID. 608, 609, 405(b).

7. Stipulations

In school proceedings, agency hearings, and trials, parties may stipulate as to facts.[234] The new regulations and Preamble are silent about stipulation generally. As to uncross-examined statements specifically, the Preamble suggests that there can be no waiver of the requirement of submitting to cross-examination,[235] implying that the parties could not waive the opportunity for cross-examination of, for example, a therapist who prepared a report about a party. In some circumstances, however, a workaround might be to make a record at the hearing that the therapist is available for cross-examination, and the opposing party indicates that they do not wish to cross-examine.

8. Taking Notice

Courts and other decision makers, such as administrative hearing officers and arbitrators, may "notice" facts that are beyond reasonable dispute.[236] The new regulations and Preamble are silent on this issue. A Title IX decision-maker might decide to notice facts; for example, when an eyewitness testifies that they saw an assault in the middle of the campus quad from their dorm window, the decision-maker might take notice of the distance between the dorm window and the middle of the quad. Doing so on the record at the hearing would give the parties a chance to be heard as to any dispute about the noticed fact.

9. Other Constitutional Admissibility Issues

The new Title IX regulations explicitly provide that they do not require schools to deprive persons of their due process rights.[237] Of course, parties to Title IX hearings in public schools are due some process, which a court may determine to be more than the school provides; some courts have found that Title IX processes alleged at some public colleges would not provide due process to accused students.[238] In a Title IX hearing, a party might argue a due process right to present otherwise inadmissible evidence, such as an uncross-examined statement. In an older case, the U.S. Supreme Court held that a criminal defendant has a due process right to offer a third-party's reliable confession to committing the crime the defendant is being prosecuted

234 *See generally* MUELLER & KIRKPATRICK, *supra* note 121, § 4:67.

235 Preamble, *supra* note 2, at 30,349 ("[T]he Department declines to allow a party or witness to 'waive' a question because such a rule would circumvent the benefits and purposes of cross-examination as a truth-seeking tool for postsecondary institutions' Title IX adjudications.").

236 FED. R. EVID. 201.

237 34 C.F.R. § 106.6(d)(2).

238 *See infra* Section III.B.2.

for, even if the confession is not otherwise admissible under the evidence rules.[239] A respondent might argue a due process right to introduce a third party confession to the sexual misconduct at issue in the Title IX hearing, even if the third party will not submit to cross-examination.

On due process more generally, complainants might argue that the new regulations' complete ban on uncross-examined statements—coupled with the lack of subpoena power to compel witnesses to appear and submit to cross-examination and the high burden of proof—amounts to a violation of their due process rights. One of the lawsuits challenging the new regulations argues that this combination, in light of the reality that the females are the overwhelming majority of complainants, is unconstitutional gender discrimination in violation of the Equal Protection Clause.[240]

10. Argument About Weight to Be Assigned to the Evidence in a Hearing

The Preamble indicates that parties must be given an opportunity to argue the weight that a decision-maker should accord to admitted evidence.[241] The Preamble suggests that this could be accomplished with an opportunity for closing statements.[242]

D. *Challenges to Admissibility Determinations*

1. Satellite Title IX Claims

The new regulations assert that Title IX is violated if a school does not follow the required formal complaint procedures for a claimant or respondent.[243] Parties may argue admissibility rulings at hearings violate Title IX. Parties may file lawsuits, complaints with the enforcing Office of Civil Rights, or both.[244]

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239 Green v. Georgia, 442 U.S. 95, 97 (1979) (noting, however, the "unique circumstances" of a murder case and suggesting opinion was fact-specific).

240 *See generally* Victim Rts. L. Ctr. v. DeVos, No. 20-cv-11104, 2020 WL 5700819 (D. Mass. Aug. 5, 2020).

241 *2020 Q & A*, *supra* note 19, at 9–10 (Parties must have "the opportunity to provide input and make arguments about the relevance of evidence and how a decision-maker should weigh the evidence.").

242 Preamble, *supra* note 2, at 30,303 (Parties must be able to make "arguments to the decision-maker regarding the relevance of evidence and the weight or credibility of relevant evidence.").

243 34 C.F.R. § 106.45(a).

244 34 C.F.R. § 106.81; Franklin v. Gwinnett Cnty. Pub. Sch., 503 U.S. 60, 65 (1992).

2. Internal Appeals

Schools must offer internal hearing appeals on at least some grounds, including a "[p]rocedural irregularity that affected the outcome of the matter,"[245] new evidence not available at the hearing that "could affect the outcome of the matter,"[246] and bias, from a Title IX Coordinator, investigator, or decision-maker, toward a party or toward respondents or complainants generally "that affected the outcome of the matter."[247] Thus, a party might appeal admissibility rulings as procedural regularities or bias that affected the outcome. Recent non-binding guidance from the agency suggests that parties may pursue appeals even after their enrollment or employment ends.[248]

3. Non-Title IX Litigation

Parties in public college Title IX hearings might claim that admissibility rules or rulings in their hearings violated their due process, equal protection, or other constitutional rights.[249] Parties in private college Title IX hearings might make analogous breach of contract claims.[250]

III. ADMISSION OF EVIDENCE STANDARDS FOR TITLE IX HEARINGS ARE INSUFFICIENTLY CLEAR AND FAIL TO ACHIEVE THE AGENCY'S STATED GOALS

The rules of admission established by the new Title IX regulations are based on public policies identified by the agency: due process and fairness for respondents[251] given the serious consequences of being found responsible for sexual misconduct;[252] the need to treat complainants and respondents equally;[253] the importance of credibility assessment, specifically through the crucible of live cross-examination;[254] and the reality that schools are not courtrooms and decision-makers in hearings are neither trained judges nor attorneys.[255] Often these policies are in tension with one another, limiting their ability to resolve gaps and omissions in the new standards. Moreover, the

245 34 C.F.R. § 106.45(b)(8)(i)(A).
246 *Id.* § 106.45(b)(8)(i)(B).
247 *Id.* § 106.45(b)(8)(i)(C).
248 *2021 Q & A Part II*, *supra* note 19, at 10.
249 *See infra* Section III.B.2.
250 *See, e.g.*, Doe v. Univ. of Scis., 961 F.3d 203, 215 (3d Cir. 2020) (requiring some form of cross-examination under school policy but reserving details).
251 *See, e.g.*, Preamble, *supra* note 2, at 30,046–55.
252 *See, e.g.*, Preamble, *supra* note 2, at 30,329, 30,381.
253 *See, e.g.*, Preamble, *supra* note 2, at 30,242–46.
254 *See, e.g.*, Preamble, *supra* note 2, at 30,311–14.
255 *See, e.g.*, Preamble, *supra* note 2, at 30,336–38.

approach to evidence in the new regulations is not consistent with the agency's own public policy goals. One court found that the ban on uncross-examined statements, in combination with other protections for respondents, "render the most vital and ultimate hallmark of the investigation—the hearing—a remarkably hollow gesture,"[256] inconsistent with the agency's own goals.[257]

A. *Admission of Evidence Standards for Title IX Hearings Are Not Sufficiently Clear*

The approach to admissibility of evidence in Title IX hearings leaves many issues partially or fully unresolved. Schools, their Title IX Coordinators, investigators, and decision-makers, and the parties and their advisors have much to learn about and try to puzzle out, and much to argue about in Title IX hearings. Unresolved admissibility issues in Title IX hearings include fundamental ones, such as whether evidence offered for a nontruth purpose is subject to the ban on uncross-examined statements,[258] whether and under what circumstances extrinsic evidence to impeach is admissible,[259] and whether decision-makers may admit uncross-examined statements where unavailability for cross-examination resulted from party wrongdoing.[260] While a non-binding Preamble addresses some unresolved issues, these and others are not addressed. Reviewing the new regulations' varied policy underpinnings often counsels different and inconsistent admissibility standards.[261] Similarly, Title IX admissibility standards in some respects are modeled on the Federal Rules of Evidence for trials and in other respects are not. But the agency is clear that it does not think schools and Title IX hearing decision-makers have the expertise required to implement trial evidence rules. It is thus unclear whether and when the trial rules approach can offer helpful guidance on Title IX issues.

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256 Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104, 2021 WL 3185743, at *15 (D. Mass. July 28, 2021).

257 *Id.* at *16 ("The Department goes to great lengths to solidify the hearing as the hallmark of the Title IX process, essential to the goals of fact finding, weighing credibility, and a 'fair grievance process leading to reliable outcomes. . . .' To so carefully balance and craft the respondent's safeguards, the definitions, the burdens, and the policies in the run-up to the hearing, just to have the prohibition and definition of absentee statements render the hearing a hollow exercise . . . .").

258 *See supra* Section II.C.3.iii.a.

259 *See supra* Section II.C.4.ii.

260 *See supra* Section II.C.3.iii.c.

261 Other examples of this inconsistency include what are banned hearsay "statements," *see supra* Section II.C.3.iii.a, and admissibility of hearsay when witness unavailability is caused by party wrongdoing, *see supra* Section II.C.3.iii.c.

B. *The Title IX Hearing Ban on Uncross-Examined Statements Is Not Required by Due Process*

The new regulations require a very formal adversarial hearing that excludes statements made by persons who do not submit to full cross-examination.[262] This broad ban on uncross-examined statements, which is tantamount to a hearsay ban unless the statement's maker (termed the "declarant" in the rules of evidence for trials) testifies as a witness, is an unprecedented deviation from: (1) normal practices and public school due process requirements for school discipline generally and Title IX specifically, (2) the new regulations' approach for K-12 school formal complaints, (3) the practice in administrative hearings, (4) the rules of evidence for trials, and (5) even the constitutional limits on admission of hearsay against criminal defendants. And the ban is not required to provide due process to respondents.[263]

Procedural due process and other constitutional rights are rights as to the government and so do not apply to private schools and colleges, but the new regulations apply equally to public and private schools.[264] In public schools and colleges, due process is triggered by a deprivation of life, liberty, or property.[265] In the world of K–12 education, state laws guarantee a right to attend school, and so student suspension or expulsion involves a deprivation of a property right.[266] In higher education, there is no abstract legal right to attend a public college, but admission and payment of tuition may create a property right. Injury to reputation is not facially a due process liberty deprivation.[267] When reputation is damaged, accompanied by concrete consequences such as loss of a job, however, a due process liberty deprivation may be involved.[268] If there is a deprivation, what process is due is sorted out

262 *See supra* Section II.C.3.

263 *See generally* Dowling, *supra* note 13.

264 The Preamble recognizes this limit. Preamble, *supra* note 2, at 30,052.

265 *See generally* ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES §§ 7.3.2–7.3.3 (6th ed. 2019) (discussing property and liberty deprivations respectively).

266 Goss v. Lopez, 419 U.S. 565, 574 (1975).

267 Paul v. Davis, 424 U.S. 693, 711–12 (1976).

268 *See generally* CHEMERINSKY, *supra* note 265, § 7.3.3 (discussing liberty deprivations involving reputation).

by a balancing test weighing the private interests at stake[269] against risk of error[270] and government burdens.[271]

1. Due Process in Public K–12 School Proceedings

The U.S. Supreme Court requires "rudimentary" due process for K-12 student suspensions of ten days or less (a property deprivation of the state law right to attend school).[272] Rudimentary due process requires a short informal meeting with notice of the charges, a general summary of the evidence if the charges are denied, and a chance for the student to tell their side.[273] The student has no right to hear, present, or cross-examine witnesses.[274] The Court found a liberty deprivation involved in student corporal punishment, but held that post-punishment tort claims offer sufficient due process, and hence pre-punishment rudimentary due process is not required.[275] The Court noted that "[h]earings—even informal hearings—require time, personnel, and a diversion of attention from normal school pursuits."[276]

The Court has not addressed due process requirements for K–12 student expulsions and lengthy suspensions (property deprivations of larger magnitude given the longer exclusion from school). The consensus of the lower courts is that an evidentiary hearing is required.[277] While some courts found that due process requires the accused student in certain school expulsion hearings to have an

269 Mathews v. Eldridge, 424 U.S. 319, 334–35 (1976). Several commentators suggest the interest of the victim and not only the interest of the respondent should be weighed here. *See, e.g.*, Sage Carson & Sarah Nesbitt, *Balancing the Scales: Student Survivors' Interests and the Mathews Analysis*, 43 HARV. J. L. & GENDER 319, 372–74 (2020); Hannah Walsh, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1803–05 (2020).

270 *Mathews*, 424 U.S. at 334–35. Some commentators suggest the risk of error without cross-examination is low, in light of statistical evidence that there is a low rate of false rape reporting. *See, e.g.*, Hunter Davis, *Symbolism over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX*, 27 MICH. J. GENDER & L. 213, 242–44 (2020).

271 *Mathews*, 424 U.S. at 334–35; *see generally* CHEMERINSKY, *supra* note 265, § 7.4 (discussing what process is due in education and other contexts).

272 Goss v. Lopez, 419 U.S. 565, 581 (1975).

273 *Id.* at 581–82 ("Students facing temporary suspension have interests qualifying for protection of the Due Process Clause, and due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, *if he denies them, an explanation of the evidence* the authorities have and an opportunity to present his side of the story.") (emphasis added).

274 *Id.*

275 *See* Ingraham v. Wright, 430 U.S. 651, 680 (1977).

276 *Id.* at 680.

277 *See generally* RAPP, *supra* note 80, at § 9.09.

opportunity to cross-examine victims,[278] generally courts have allowed hearsay statements of others and have not required an opportunity for cross-examination.[279] Notably, the new Title IX regulations do not ban uncross-examined statements from meetings to resolve formal Title IX complaints at K–12 schools, apparently recognizing that this ban is not a due process requirement.[280]

2. Due Process in Public College Discipline

At the college level, the U.S. Supreme Court found that cross-examination and an evidentiary hearing is not required for academic discipline[281] but has not addressed cross-examination or other due process requirements for misconduct discipline. In an academic discipline case, the Court noted that "[t]he educational process is not by nature adversar[ial]"[282] and declined to "formalize the academic dismissal process by requiring a hearing. . . . [and] further enlarge the judicial presence in the academic community and thereby risk deterioration of many beneficial aspects of the faculty-student relationship,"[283] suggesting some reluctance to require adversarial school hearings. Some courts have found that expulsion from a public college is a property deprivation.[284] One decision by now-Justice Amy Coney Barrett noted a circuit split on property deprivation in these circumstances.[285] That court found a liberty deprivation in a Title IX case where a student was suspended for a year for sexual misconduct and lost his Reserve Officer Training Corps ("ROTC") scholarship;[286] notably, the opinion does not assert that all Title IX public school formal hearings involve due process liberty or property deprivations.[287]

278 *See, e.g.*, Stone v. Prosser Consol. Sch. Dist., 971 P.2d 125, 127–28 (Wash. Ct. App. 1999) (finding that due process and state statute require a student facing expulsion to be able to question his alleged victims; school administrator's summary of their experiences is insufficient).

279 *See generally* RAPP, *supra* note 80, at § 9.09 (noting that "[a]bsent a statutory requirement that cross-examination be allowed, the decided trend of courts is now to allow the use of written witness reports and statements.").

280 *See* 34 C.F.R. § 106.45(b)(6)(ii).

281 Bd. of Curators of Univ. of Mo. v. Horowitz, 435 U.S. 78, 85–91 (1978); *cf.* Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 227 (1985) (finding no constitutional violation where medical student was academically dismissed without a hearing).

282 *Horowitz*, 435 U.S. at 90.

283 *Id.*

284 *See, e.g.*, Haidak v. Univ. of Mass.-Amherst, 933 F.3d 56, 65 (1st Cir. 2019).

285 Doe v. Purdue Univ., 928 F.3d 652, 659 n.2 (7th Cir. 2019).

286 *Id.* at 663.

287 *Id.* at 659.

A recent wave of cases brought by Title IX respondents examines Title IX due process requirements.[288] Some recent Sixth Circuit and other federal appellate Title IX and other misconduct discipline decisions find that the due process rights of accused students in public colleges require an opportunity for the respondent or their agent to cross-examine the victim and other witnesses under some circumstances.[289] Other decisions hold that questioning by the decision-maker, after a party has had an opportunity to submit written questions, is sufficient, similar to the approach of the new regulations for K–12 schools.[290] And in contrast to the agency's guidance requiring unlimited cross (all questions on cross must be answered or the witness's testimony is barred),[291] the Sixth Circuit most recently held that due process does not require a witness to answer every question on cross.[292] Instead, the court found that where credibility is in dispute, some form of cross that allowed the decision-maker to evaluate credibility and assess demeanor was sufficient for due process,[293] noting that unlimited cross could result in harassment of a witness.[294] One federal appeals court found that a private college's student handbook language providing in part for a "fair" and "equitable" disciplinary process

288 For a summary of these cases, see Samantha Harris & KC Johnson, *Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications*, 22 N.Y.U. J. LEGIS. & PUB. POL'Y 49, 49 (2019) (noting more than 500 lawsuits since 2011, more than 90 losses by defendant colleges, and more than 70 cases settled).

289 *See, e.g.*, Doe v. Baum, 903 F.3d 575, 581–85 (6th Cir. 2018) (holding that at public college that provides for cross-examination in student misconduct discipline cases generally, in sexual assault case which turns on credibility, cross-examination of victim by accused student or their agent is required); *Haidak*, 933 F.3d at 69 (finding that due process does not require cross of victim by accused student, but due process does require some opportunity to question the victim by the decision-maker; rejecting the *Baum* approach); Doe v. Univ. of Cincinnati, 872 F.3d 393, 401 (6th Cir. 2017). A recent decision by now-Justice Amy Coney Barrett reserves the issue of whether due process requires cross-examination. *Purdue Univ.*, 928 F.3d at 664 n.4. *See generally* Diane Heckman, *The Proliferation of Title IX Collegiate Mishandling Cases Involving Sexual Misconduct Between 2016–2018: The March to the Federal Circuit Courts*, 358 EDUC. L. REP. 697 (2018); Amy R. LaMendola, *School's or School Official's Liability for Unfair Disciplinary Action Against Student Accused of Sexual Harassment or Assault*, 34 A.L.R. 7th 1 (2017 & Supp.).

290 *See Haidak*, 933 F.3d at 69–70.

291 *2020 Q & A*, *supra* note 19, at 9 ("Conversely, if a party or witness answers one, or some, but not all, relevant cross-examination questions asked by a party's advisor at the live hearing, then that party or witness has not submitted to cross-examination and that party's or witness's statements cannot be relied on by the decision-maker.").

292 Doe v. Mich. State Univ., 989 F.3d 418, 427 (6th Cir. 2021).

293 *Id.* at 429–32 (determining that *Mathews v. Eldridge* balancing does not require unlimited cross-examination).

294 *Id.* at 431–32.

required an opportunity to cross-examine witnesses.[295] None of these decisions extended cross-examination requirements to the makers of documents, such as medical records and academic transcripts.

3. Administrative Agency Hearings

In an administrative hearing case, the U.S. Supreme Court determined that due process does not bar the introduction of reliable but uncross-examined hearsay, even approving reliable hearsay as the primary basis for an agency decision. Specifically, the Court upheld an agency determination regarding eligibility for social security disability that was based primarily on the written medical report of a physician who did not appear at the hearing and was not called by the claimant for cross-examination.[296] The Court reasoned, in part, that medical reports were generally reliable and admissible in court under the evidence rules as business records exempt from the general ban on hearsay.[297] The Title IX hearing rules reject this approach. The Court, however, has found a right to cross-examine adverse witnesses in a welfare benefits hearing, noting the essential nature of welfare benefits for eligible persons.[298]

C. *Admission of Evidence Standards for Title IX Hearings Do Not Treat Complainants and Respondents Equally*

Indisputably, equitable treatment is required of both complainants, who are mostly female, and respondents, who are mostly male. Title IX prohibits gender discrimination and applies to both males and females.[299] The college Title IX cases discussed above address only alleged defects in process; they do not reach the merits of finding the respondent responsible for sexual misconduct, nor make findings about what actual Title IX procedures the defendant-colleges used.[300] The practices alleged at some schools do appear unfair to respondents.[301]

295 Doe v. Univ. of Scis., 961 F.3d 203, 211–12, 215 (3d Cir. 2020) (concluding that some form of cross-examination is required but reserving details).

296 Richardson v. Perales, 402 U.S. 389, 402 (1971).

297 *Id.* at 403–04 (noting reliability of medical reports); *id*. at 405 (referring to admissibility of medical reports at trials although hearsay).

298 Goldberg v. Kelly, 397 U.S. 254, 268–70 (1970) (determining that in welfare benefits context, due process requires opportunity to cross-examine adverse witnesses).

299 20 U.S.C. § 1681; *see* RAPP, *supra* note 80, at § 10B.01[5][c].

300 *See supra* Section III.B.2.

301 *See, e.g.*, Doe v. Purdue Univ., 928 F.3d 652, 657–58 (7th Cir. 2019) (alleging college did not provide access to evidence, hearing panel determined complainant who did not appear at the hearing was nonetheless credible, and several hearing panel members did not read the investigation report).

This inequity may explain the new regulations as a reaction to alleged procedures at some schools that treated respondents unfairly. If so, the reaction overcompensates in a way substantially unfair to complainants.

On a facial level, the new approach treats complainants and respondents equally, with limited exceptions and accommodations, such as the presumption of innocence for respondents,[302] creation of a rape shield limited to complainants,[303] potential adoption of a burden of proof that favors respondents,[304] and having party advisors rather than parties themselves conduct cross-examination (perhaps remotely) to minimize trauma to complainants.[305] In practice and application, however, treatment is not equal, perhaps resulting in part from the agency's close work with men's rights groups in conceptualizing and drafting the new regulations.[306] A federal district court recognized the reality that complainants and respondents are not treated equally, noting that when a respondent chooses not to testify

> the hearing officer is prohibited from hearing any evidence other than the testimony of the complainant, and . . . cannot draw a negative inference from the absence of the respondent, ... While the complainant must attend the hearing for his or her evidence to be admitted, he or she can be cross-examined and discredited by the absent respondent's attorney, . . . with little to no hope of evidentiary rehabilitation. When the foregoing occurs and the school has elected to apply the clear and convincing evidence standard given the 'high stakes and potentially life-altering consequences for both parties,'. . . this Court is hard pressed to imagine how a complainant reasonably could overcome the presumption of non-responsibility to attain anything beyond the supportive measures that he or she is offered when they first file the formal complaint. . . . This is not some extreme outlier or fanciful scenario.[307]

Notably, the new regulations evince a conspicuous pattern of borrowing trial evidence approaches, then modifying them in ways that make the process difficult for complainants. First, although Title IX

302 *See supra* Section II.B.4.

303 *See supra* Section II.C.2.iii.

304 *See supra* Section II.B.4.

305 *See supra* Section II.B.5.

306 *See* Hélène Barthélemy, *How Men's Rights Groups Helped Rewrite Regulations on Campus Rape*, NATION (Aug. 14, 2020), https://thenation.com/article/politics/betsy-devos-title-ix-mens-rights/.

307 Victim Rts. L. Ctr. v. Cardona, No. 20-cv-11104, 2021 WL 3185743, at *15–16 (D. Mass. July 28, 2021).

hearings are civil, and are not trials, schools may be required to adopt a clear and convincing burden of proof rather than the normal civil standard of preponderance of evidence,[308] making it more difficult to prove a respondent is responsible. Second, the regulations model their newly created rape shield[309] on rules of evidence for criminal trials rather than the provisions for civil trials. But in contrast to the criminal trial provisions, it does not appear to extend to pattern witnesses, making their participation more difficult and perhaps less likely. Moreover, information protected by the rape shield must be disclosed to the respondent, which is also not required in a criminal trial, and invades the privacy of the complainant. Third, the requirement that advisors perform cross-examination rather than parties[310] seems helpful to protect complainants from retraumatization on cross-examination, but failure to bar direct examination by parties means that, for example, a respondent could call a complainant as a witness and themself conduct a potentially traumatizing direct examination. The Preamble suggests school policy could limit direct examination to advisors, but does not require it.[311] Fourth, the complete ban on uncross-examined statements[312] goes well beyond the hearsay exclusion in trials and even greatly exceeds the Confrontation Clause's ban on prosecutor introduction of hearsay against actual criminal defendants. The ban also ignores the reality that respondents are more likely to have made inculpatory statements outside of the hearing.[313] And of course, that ban on uncross-examined statements, in concert with the burden of proof, makes it difficult to prove responsibility for sexual misconduct. Fifth, the new regulations adopt some of the trial rules' definition of hearsay,[314] limiting it to assertive statements, but notably do not adopt the trial rules' admission of opposing party statements, allowing respondents full ability to exclude their inculpatory statements, even confessions to sexual misconduct. Sixth, the sensitive nature of the evidence and the privacy interests of both

308 *See supra* Section II.B.4.

309 *See supra* Section II.C.2.iii.

310 *See supra* Section II.B.5.

311 *Id.*

312 *See supra* Section II.C.3.

313 This reality is discussed in Nicole Bedera et al., *A New Title IX Rule Essentially Allows Accused Sexual Assailants to Hide Evidence Against Them*, TIME (Aug. 14, 2020), https://time.com/5879262/devos-title-ix-rule/.

314 *See supra* Section II.C.3.iii.a.

parties and, in particular, complainants, also must be considered.[315] The investigation may gather sensitive information about both parties and pattern witnesses, such as their statements about what happened, their sexual history/character, and with consent, their treatment records.[316] Parties control school access to their own treatment records, but this does not extend to treatment records of pattern witnesses that might help prove the complainant's allegations.[317] All of this information is shared with both parties and their advisors, with no ban in the new regulations on re-disclosure of this information.[318] The Preamble suggests schools can require non-disclosure agreements, but does not require them.[319]

D. *The Admission of Evidence Standards Adopted for Title IX Hearings Are Neither Necessitated by nor Consistent with the Reality that Schools Are Not Courtrooms and Decision-Makers Are Often Not Attorneys*

The agency correctly notes that schools are not courtrooms, and decision-makers in Title IX hearings often will not be judges or attorneys.[320] The new regulations appropriately require training for decision-makers on relevance and some other evidentiary issues.[321] Recognizing this reality, the normal practice in school hearings, administrative hearings, and arbitration is to shift evidence arguments from admissibility to weight.[322] This means that evidence is normally admitted, but the parties may argue that because of hearsay status or similar issues, the decision-maker should accord specific pieces of evidence little or no weight. The new regulations inconsistently adopt and reject this default approach to broadly admit evidence in non-trial proceedings. In some respects, evidence is admitted in Title IX hearings

315 The privacy interests and protections in Title IX formal complaint matters are explored in Lynn M. Daggett, *Student Privacy in the New Title IX Sexual Misconduct Formal Complaint Process*, 50 J. L. & EDUC. 64 (2021).

316 *See supra* Section II.A.2.

317 *See supra* Section II.C.2.

318 *Id.*

319 *Id.*

320 *See, e.g.*, Preamble, *supra* note 2, at 30,336–38.

321 *See, e.g.*, 34 C.F.R. § 106.45(b)(1)(iii) ("[M]aterials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment."); § 106.45(b)(1)(iii) (requiring decision-maker training on relevance).

322 *See generally* Lynn M. Daggett, *Evidentiary Arguments in Proceedings that Are Not Governed by the Rules of Evidence*, LITIG. NEWS (Litig. Section of Wash. State Bar Ass'n), Spring 2010, at 6.

that would not be admitted in trial. The Title IX relevance standard is more akin to logical relevance under Federal Rule of Evidence Rule 401, and the Preamble rejects the practical relevance standard of Federal Rule of Evidence Rule 403.[323] Character evidence, apparently for both propensity and other purposes and without limitation as to format, is widely admissible in Title IX hearings, in contrast to the narrow avenues for its admission at trial.[324] Extrinsic impeachment evidence may be admissible, in contrast to the limits on extrinsic evidence at trial, but it is unclear whether the ban on uncross-examined statements applies.[325]

In other respects, the new regulations ban much evidence in Title IX hearings that would be admissible at trial, most notably the new regulations' ban on uncross-examined statements. The Preamble indicates that the parties cannot waive this requirement,[326] and it is also unclear whether parties can stipulate as to other matters.[327] These latter rules inappropriately limit party autonomy. Finally, the Title IX rape shield does not appear to protect pattern witnesses, unlike the rape shield for trials.[328]

The reasons for this inconsistent approach are unclear. As to the creation of the ban on uncross-examined statements, the Preamble asserts that cross-examination is essential to ascertainment of truth.[329] Cross-examination, as compared to other impeachment techniques, does provide an opportunity to assess the demeanor of a witness. Some commentators suggest that in rape cases, cross-examination is not significantly helpful in ascertaining truth.[330] The Preamble also suggests the agency had to choose between creating a comprehensive evidence code for Title IX hearings, such as the Federal Rules of Evidence for trials in federal court,[331] and the bright line approach of the ban on uncross-examined statements. The agency posits that it is unreasonable to expect Title IX decision-makers to implement a comprehensive evidence code, necessitating the agency's chosen bright line approach. This is a false dichotomy; in fact, there are many other alternatives. First and foremost, and as discussed above, the general approach for school and administrative hearings is to admit evidence including hearsay,

323 *See supra* Section II.C.1.ii.
324 *See supra* Section II.C.6.
325 *See supra* Section II.C.4.ii.
326 *See supra* Section II.C.3.
327 *See supra* Section II.C.7.
328 *See supra* Section II.C.2.iii.
329 *See, e.g.*, Preamble, *supra* note 2, at 30,311–14.
330 A recent summary of this commentary is provided by Dowling, *supra* note 13, at 151.
331 Preamble, *supra* note 2, at 30,347.

allowing the parties to argue what weight it should be accorded given its hearsay or other status.[332] Second, the requirement of cross-examination could be limited, perhaps to witnesses who testify at hearings. Third, and notwithstanding the right to participate or not in hearings, the new regulations could permit inferences to be drawn from failure to appear and undergo cross-examination, as is permitted in civil trials. Fourth, a very limited set of hearsay exceptions could be created, perhaps for example, an exception for business records and another for the statements of opposing parties. Finally, as some commentators suggest, the decision-maker could test credibility by inquisitorial questioning, with an opportunity for parties to submit questions, rather than adversarial cross-examination by parties or their agents.[333] This last approach is consistent with the new regulations' approach to resolution of formal complaints at K-12 schools.[334]

The agency's concern for limited evidentiary expertise of Title IX decision-makers is also undercut by the evidentiary issues the new regulations require decision-makers to resolve. Title IX decision-makers must resolve relevance issues.[335] Decision-makers must also resolve other evidence subtleties, such as whether evidence is truly a statement,[336] and thus inadmissible hearsay unless the declarant fully submits to cross-examination; whether evidence is protected by a privilege and if so whether privilege has been waived;[337] whether evidence falls within one of the two exceptions to the rape shield;[338] and whether an uncross-examined statement is relevant to issues beyond determination of responsibility[339] and thus not subject to the ban. And in these and other instances when the decision-maker determines evidence is irrelevant and thus inadmissible, the decision-maker must offer on-the-record and contemporaneous reasoning.[340] Even trial

[332] *See supra* Section III.B.

[333] Dowling, *supra* note 13, at 166; Ilana Frier, *Campus Sexual Assault and Due Process*, 15 DUKE J. CONST. L. & PUB. POL'Y SIDEBAR 117, 136-40 (2020); Hannah Walsh, *Further Harm and Harassment: The Cost of Excess Process to Victims of Sexual Violence on College Campuses*, 95 NOTRE DAME L. REV. 1785, 1807-08 (2020). This was the approach taken in earlier agency guidance, since rescinded. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, Questions and Answers on Title IX and Sexual Violence 31 (Apr. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

[334] 34 C.F.R. § 106.45(b)(6)(ii).

[335] *See supra* Section II.C.1.

[336] *See supra* Section II.C.3.iii.

[337] *See supra* Section II.C.2.ii.

[338] *See supra* Section II.C.2.iii.

[339] *See supra* Section II.C.3.i.

[340] *See supra* Section II.C.1.i.

judges are not required to offer on-the-record reasoning for their evidentiary rulings.[341]

E. *Admission of Evidence Standards for Title IX Hearings Do Not Fully Reflect the Centrality of Credibility in These Hearings*

The agency correctly notes that campus sexual misconduct cases often have no forensic evidence or eyewitnesses, and hence the credibility of the parties is uniquely central.[342] The new regulations appropriately make clear that questions to witnesses about credibility are relevant.[343] The agency also appropriately recognizes the importance of cross-examination to assess credibility. But it does not follow that cross-examination is required for all statements—not just the statements of parties but as the agency suggests, even the makers of medical records,[344] and perhaps even the faculty whose grades are recorded on a party's transcript. Some of the alternatives to a complete ban on uncross-examined statements are set forth above.[345]

Moreover, and as discussed above, other important and commonly used techniques test credibility in trials: bias, capacity, contradiction, prior inconsistent statements, and character for truthfulness.[346] The trial rules of evidence are premised on a belief that these impeachment techniques can provide a fair opportunity to assess credibility, even when live cross-examination is not available. Given the agency's recognition of the importance of credibility, the new regulations' complete failure to address these fundamental impeachment techniques, and to offer guidance on admissibility of extrinsic evidence to impeach and whether such evidence offered for impeachment purposes is subject to the ban on uncross-examined statements,[347] is quite surprising.

F. *Admission of Evidence Standards for Title IX Hearings Do Not Create a Hearing Process that Is Fair or Equitable*

The current approach to admissibility of evidence in Title IX hearings does not seem to offer the equitable resolution required by

341 *See supra* Section II.C.1.i.
342 *See, e.g.*, Preamble, *supra* note 2, at 30,311–14.
343 *See supra* Section II.C.4.
344 *See supra* Section II.C.4.
345 *See supra* Section III.0.
346 *See supra* Section II.C.4.i.
347 *See supra* Section II.C.4.

Title IX for its grievance processes generally,[348] nor the fair and impartial[349] resolution required by Clery Act regulations, which apply to some of the offenses covered by the new Title IX regulations.

Respondents do not have control over becoming parties to Title IX hearings. Respondents can choose not to participate, but the potential disciplinary consequences—up to and including expulsion—are powerful incentives to participate and advocate. Complainants decide whether to file formal complaints, but in some cases Title IX Coordinators or parents will file; even in this event, the complainant may choose not to participate.[350] Complainants who do not file formal complaints, or who do not participate, face different consequences than respondents. Complainants do not face discipline themselves, but instead risk a hearing outcome that finds the respondent not responsible, or finds the respondent responsible without granting appropriate sanctions, or does not afford the complainant appropriate remedies.

Looking at the Title IX hearing process,[351] and the admission of evidence specifically, the disappointing but unescapable reality is that it is not clear that filing a formal complaint is a good option for complainants. While the school does the work of gathering evidence, that evidence involves sensitive information shared with the respondent and party advisors without a regulatory ban on re-disclosure.[352] While a rape shield bars admission of complainant sexual history and reputation, rape shield-protected information must be shared with the opposing party and party advisors, and no regulatory

348 *See* former 34 C.F.R. § 106.8(b) ("A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part."); current 34 C.F.R. § 106.8(c) ("Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.").

349 34 C.F.R. § 668.46(k)(2)(i).

350 *See supra* Section II.B.2.

351 While beyond the scope of this Article, other seemingly unfair aspects of the new regulations include new limits on interim relief for complainants, 34 C.F.R. § 106.45(b)(1)(vi); a significantly narrowed definition of sexual harassment, § 106.30(a); a higher standard for school liability, §§ 106.30 and 106.44(a); dismissal of complaints for most off-campus harassment, § 106.44(a), or when the respondent is no longer enrolled or employed, § 106.45(b)(3)(ii), or the complainant is no longer enrolled or employed, § 106.30(a); and the ability to put the formal complaint process on hold while criminal investigation or proceedings are pending, § 106.45(b)(1)(v).

352 *See supra* Section II.A.3.

ban on re-disclosure exists.[353] Depending on school policy, the decision-maker will have to find the respondent responsible by either the normal civil preponderance of evidence standard, or by a higher standard of clear and convincing evidence.[354] The school lacks subpoena power to gather evidence to meet this standard, and the right not to participate in the hearing means the school cannot compel cooperation of students or employees through school policies.[355] A pattern witness in particular may be reluctant to participate if they are aware that their sexual history and character is not protected by the new regulations' rape shield.[356] Moreover, the requirement of consent for school access to treatment records is limited to parties and does not include pattern witnesses.[357]

At the hearing, the decision-maker cannot admit statements by persons who do not fully submit to cross-examination. This exclusion is a broad one, including the parties' own statements to the Title IX investigator or otherwise, witness statements, statements by health care providers in medical records, and perhaps even statements by faculty who submitted grades for a party.[358] As discussed above, this ban is not necessary for due process and also is not equitable for either complainants or respondents.[359] In some cases, it will not be possible to get the makers of statements to agree to submit to cross-examination, although remote participation is an option.[360] Even persons who appear at the hearing and answer questions on cross may refuse to answer one or more questions, be deemed not to have submitted fully, and have their statements excluded.[361] The parties can keep their own statements, even a confession to sexual misconduct or fabrication of allegations, from admission at the hearing by refusing to submit to cross-examination. Hence, it will often not be clear even at the outset of a hearing which statements offered by a party will be admitted and which will be excluded, and much evidence can be kept out of the hearing by a party's strategic choices.

353 *See supra* Sections II.C.2.iii, II.A.3.

354 *See supra* Section II.B.4.

355 *See supra* Section II.A.1.

356 *See supra* Section II.C.2.iii.

357 *See supra* Section II.C.2.i.

358 *See supra* Section II.C.3.

359 *See supra* Sections III.B., III.C.

360 34 C.F.R. § 106.45(b)(6)(i) (providing for possible remote testimony and cross-examination).

361 *See supra* Section II.C.3.ii.

IV. CONCLUSION

The new Title IX regulations adopt unprecedented standards for admission of evidence in college hearings, in particular limiting evidence to statements by parties and other persons who have fully submitted to live cross-examination. Attorneys with experience in school discipline, administrative hearings, or civil or criminal trials will find a very different approach to evidence in Title IX hearings. Complicating matters further, the new approach to admissibility of evidence in Title IX hearings leaves many issues partially or fully unresolved. Schools, their Title IX Coordinators, investigators, and decision-makers, and the parties and their advisors have much to learn about and try to puzzle out, and much to argue about in Title IX hearings.

Several pending lawsuits request invalidation of the new Title IX regulations; President Biden criticized them as unfair to complainants and proposed revised regulations are apparently forthcoming. At the least, a new approach to the standards for admission of evidence in school Title IX hearings is required. The current approach lacks basic clarity, is not required to provide due process, fails to treat respondents and complainants equally, and is not responsive to the realities of school hearings and decision-makers. Simply put, under the current evidentiary approach and its many deficiencies, it is not clear that filing a formal complaint is a good option for a college victim of sexual misconduct. Wholesale reconsideration of the evidentiary approach of the new regulations is appropriate.