IN THE UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

VICTIM RIGHTS LAW CENTER, *et al.*, Plaintiffs. v. ELISABETH DEVOS, *et al.,* Defendants.	Case No. 1:20-cv-11104 The Honorable William G. Young

AMICUS BRIEF OF STOP ABUSIVE AND VIOLENT ENVIRONMENTS IN OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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Table of Contents

Table of Authorities

CASES

OTHER AUTHORITIES

REGULATIONS

STATEMENT OF INTEREST OF AMICUS CURIAE

Established in 2008, *amicus curiae* Stop Abusive and Violent Environments ("SAVE") is a 501(c)(3) non-profit, DBA entity of the Center for Prosecutor Integrity, and leader in the national movement to assure fairness and due process on college campuses. In recent years, SAVE has identified numerous cases in which complainants were mistreated by campus Title IX procedures,[1] published five relevant Special Reports,[2] commented on the proposed Title IX regulations,[3] coordinated a Due Process Statement signed by nearly 300 leading law professors and others,[4] sponsored an interactive spreadsheet of lawsuits against universities,[5] compiled information on the due process violations of faculty members,[6] and more.[7]

Through its research and experiences, SAVE has recognized the rampant disparate treatment discrimination, particularly against male students, that has been occurring on college campuses since at least 2011. This discrimination occurs within the disciplinary process itself, where students are dragged through inquisitorial systems designed to churn out guilty findings with no regard for basic due process rights that have existed in English common law since before the Republic.[8] These rights include such foundational concepts such as: the right of the accused to know what one is accused of,

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[1] *Victims Deserve Better than a Kangaroo Court*, SAVE blog, http://www.saveservices.org/sexual-assault/victims-deserve-better/.
[2] *Special Reports*, SAVE blog, http://www.saveservices.org/reports/.
[3] *Proposed Title IX Regulations Target Sex Bias on College Campuses*, SAVE blog, (Jan. 24, 2019) http://www.saveservices.org/2019/01/proposed-title-ix-regulations-target-sex-bias-on-college-campuses/.
[4] *Statement in Support of Due Process in Campus Disciplinary Proceedings*, SAVE, http://www.saveservices.org/wp-content/uploads/Due-Process-Statement-11.29.2018.pdf.
[5] Benjamin North, *Interactive Spreadsheet of Lawsuits Against Universities*, SAVE blog, http://www.saveservices.org/sexual-assault/complaints-and-lawsuits/lawsuit-analysis/
[6] *Faculty Members Targeted by Title IX*, SAVE blog, http://www.saveservices.org/sexual-assault/faculty-members/.
[7] *Key Information about Title IX Regulation*, SAVE blog, http://www.saveservices.org/title-ix-regulation/.
[8] John Adams' Argument for the Defense, December 3-4, 1770, https://founders.archives.gov/documents/Adams/05-03-02-0001-0004-0016.

the right to present evidence in one's defense, the right to call and examine witnesses, and above all, the right to the presumption of innocence until proven guilty. These most basic rights are repeatedly denied to accused students, who are overwhelmingly male, across the country. Like a criminal guilty verdict, a finding of "responsible" for a Title IX offense on college campuses is life-altering and can result in the absolute inability for the wrongfully accused student to continue in his career or education. These findings are overwhelmingly the result of adjudications that are biased on the basis of sex in violation of Title IX itself. Action by the Department of Education is desperately needed. The Regulations,[9] issued by the U.S. Department of Education, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, remedy this problem.

SUMMARY OF ARGUMENT

Plaintiffs moved for a preliminary injunction to prevent the Regulations from going into effect on August 14, 2020. A preliminary injunction is an extraordinary remedy that should only be issued upon a clear showing that the plaintiff is entitled to such relief. *Winter v. Natural Resources Defense Council, Inc.*, 555 U.S. 7, 20-23 (2008). To make this showing, plaintiffs must demonstrate (1) they are likely to succeed on the merits, (2) they will experience irreparable harm in the absence of injunctive relief, (3) the balance of equities tip in their favor, and (4) the preliminary injunction is in the public interest. *Id.* In the First Circuit, a plaintiff must show that each of these elements are satisfied. *Arborjet, Inc. v. Rainbow Treecare Sci. Advancements, Inc.*, 794 F.3d 168, 171 (1st Cir. 2015). Plaintiffs do not meet this standard.

This brief will first show that the Regulations are within the Department of Education's jurisdiction under Title IX as they require a fair grievance process in order to eliminate sex

[9] 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. Part 106) (available at: https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf) ("Regulations").

discrimination. Next, SAVE will bring serious policy considerations to the Court's attention that are ignored by plaintiffs and their proposed *amici*. These considerations tip the balance of equities in favor of the Regulations and show the Regulations are in the public interest.

Title IX is for all students, both males and females, both accuser and accused. Plaintiffs obscure this legal truism in their complaint by suggesting that Title IX's protections are limited to alleged victims of sexual harassment and not those accused of it. Am. Compl., ECF No. 9, ¶ 286. Title IX has no such limitation; its purpose is to eliminate *all* discrimination on the basis of sex, not just the forms plaintiffs and supporting *amicus* prefer to discuss. The discrimination at issue here is the disparate treatment discrimination on the basis of sex that occurs when a university erroneously finds a student responsible for sexual harassment, at least in part on the basis of sex. The Regulations seek to eliminate this discrimination, thus fulfilling the purpose of Title IX.

The Court should deny plaintiffs' motion because the balance of equities weighs in favor of the Regulations. The Regulations are in the public interest because they protect *all* students. The Regulations are desperately needed to effectuate the purpose of Title IX: to eliminate discrimination on the basis of sex in education. *See Bostock v. Clayton Cty., Ga.,* 140 S. Ct. 1731, 1739 (2020) (holding that at least in Title VII cases, "basis of sex" means that "so long as the plaintiff 's sex was one but-for cause of [an adverse employment] decision, that is enough to trigger the law").

ARGUMENT

I. Plaintiffs are Unlikely to Succeed on the Merits at least insofar as Department of Education has Jurisdiction to Eliminate Discrimination in the Disciplinary Process.

a. It is settled law that respondents are not excluded from Title IX's protections. Plaintiffs' suggestions to the contrary demonstrate their ignorance of the law or an effort to deceive the Court, or both.

Plaintiffs argue that in issuing the Regulations, the Department of Education exceeded its jurisdiction by, *inter alia*, mandating grievance procedures for Title IX violations (sexual harassment and assault claims) on campus. In doing so, plaintiffs put forward a view of Title IX jurisprudence that is either wholly uninformed of the explosion of accused-student Title IX litigation over the past decade[10], or is actively deceitful. Plaintiffs state in conclusory fashion several times in their pleadings that respondents are categorically excluded from Title IX's anti-discrimination protections. *See, e.g.,* Am. Compl., ECF No. 9 at ¶ 286 ("It further exceeds Title IX's nondiscrimination mandate to include respondents in the prohibition of sex discrimination in a statute designed to protect the civil rights of complainants"). Plaintiffs never acknowledge that courts have found that a school can violate a respondent's Title IX rights which demonstrates that respondents do possess Title IX rights. *See Doe v. Columbia Univ.*, 831 F.3d 46, 53 (2d Cir. 2016). It is in fact settled law nationwide that Title IX guarantees students the right to be free from discrimination on the basis of sex in education, including when it takes the form of "a university's decision to discipline a student…on the basis of sex." *Doe v. Purdue Univ.*, 928 F.3d 652, 667-8 (7th Cir. 2019); *see, e.g. Doe v. Oberlin College,* 2020 WL 3495298 No. 19-3342, (6th Cir. June 29, 2020), *Doe v. Miami Univ.*, 882 F.3d 579 (6th Cir. 2018), *Doe v. Univ. of the Sciences*, 961 F.3d 203 (3rd Cir. 2020). The suggestion that Title IX

[10] *See, e.g., infra* Harris & Johnson, note 48.

protections are limited to complainants is therefore bewildering, and this Court should look upon one who makes such a claim with extreme skepticism for all other and future assertions.

b. The Department of Education has jurisdiction to eliminate sex discrimination within the disciplinary process at educational institutions.

As a preliminary matter, courts must give the Department of Education's regulations interpreting Title IX "controlling weight unless they are arbitrary, capricious, or manifestly contrary to the statute." *Cohen v. Brown Univ.*, 101 F.3d 155, 173 (1st Cir. 1996) (quoting *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984)). In an attempt to avoid *Chevron* deference, Plaintiffs state in conclusory fashion that the Department of Education "issue[d] regulations that require schools not to protect students from discrimination." Pls. Mot., ECF No. 32 at 21. But the Department of Education has shown extensively in the Regulation's Preamble, *see* 85 Fed. Reg. 30238-407 that schools are failing to protect respondents' Title IX rights, necessitating action. Furthermore, this problem has been explained in extraordinary detail in the administrative record by "Coalition for Title IX" in its comment on the proposed rule, attached hereto as **Exhibit 1**. SAVE directs the Court's attention to pages 4-13 of Exhibit 1 in particular, but the entirety of the comment is attached for transparency. In addition to what has extensively been covered, SAVE provides additional factual and analytical support below to defeat plaintiffs' naked assertion.

As shown at length in Section II of this brief, males comprise the overwhelming majority of accused students (respondents). One might be tempted to think this is because males commit the majority of sexual harassment and assault, but that assumption is inaccurate. Government data through the CDC's National Intimate Partner and Sexual Violence Survey ("NISVS")[11] includes "made to penetrate" offenses (where a victim is forced to penetrate the perpetrator) and reports the

[11] Centers for Disease Control, *National Intimate Partner and Sexual Violence Survey* https://www.cdc.gov/violenceprevention/datasources/nisvs/index.html.

following numbers of persons who were sexually victimized in the general population between 2010 and 2012: 1.7 million males were made to penetrate[12] and 1.5 million women were victims of rape.[13] UCLA researchers Lara Stemple and Ilan Meyer explain that "by introducing the term, 'made to penetrate,' the CDC has added new detail to help understand what happens when men are sexually victimized…therefore, to the extent that males experience nonconsensual sex differently (i.e., being made to penetrate), male victimization will remain vastly undercounted in federal data collection on violent crime."[14] While the NISVS does not provide separate results for college students, two other methodologically rigorous studies focused on this population: (1) a survey of 302 male college students found that 51.2% reported experiencing at least one sexual victimization since age 16[15]; and (2) a study of 284 college and high school males found that 43% reported being sexually coerced, with the majority of such incidents resulting in unwanted sexual intercourse. Of these, 95% of men reported female perpetrators.[16] Therefore, females also commit a significant portion of sexual assaults.

In light of this scientific data, the near-total male composition of student respondents appears suspect. Indeed, under the current data, there should be a near-equal number of female and male respondents on campus. The list of wrongfully disciplined respondents is, however, "overwhelmingly male."[17] As shown through case studies in Section II, this is due to discriminatory disparate treatment of males in the disciplinary process, in violation of Title IX. Indeed, it is a sexual

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[12] NISVS, Table 3.5.
[13] NISVS, Table 3.1.
[14] Lara Stemple and Ilan Meyer, *The Sexual Victimization of Men in America: New Data Challenge Old Assumptions.* American Journal of Public Health (2014). https://www.ncbi.nlm.nih.gov/pmc/articles/PMC4062022/
[15] Turchik, *Sexual victimization among male college students: Assault severity, sexual functioning, and health risk behaviors.* Psychology of Men and Masculinity (2012).
[16] French, Tilghman, and Malebranche, *Sexual coercion context and psychological correlates among diverse males.* Psychology of Men and Masculinity (2014).
[17] *See, e.g., infra* Harris & Johnson, note 48; Taylor, note 50; North, note 52.

stereotype at odds with the civil-rights laws to assume that men are guilty. *See, e.g., Sassaman v. Gamache*, 566 F.3d 307 (2d Cir. 2009) (Title VII was violated by employer presuming accused was guilty because he was male); *Menaker v. Hofstra Univ.*, 935 F.3d 20 (2d Cir. 2019) (erroneous finding of guilt, coupled with sexual nature of allegation and other evidence, supported inference of Title IX discrimination); *see also Doe v. Oberlin College,* 2020 WL 3495298 No. 19-3342, at *6 (6th Cir. June 29, 2020) (holding that the erroneous disciplinary finding itself can be strong evidence of Title IX discrimination). In light of these facts, cases, and the factual allegations of the cases set forth below in Section II, it is clear that respondents are mistreated on the basis of sex under current standards. Therefore, the Regulations, at least as they regulate the discriminatory disciplinary processes on campus, are within the Department of Education's jurisdiction.

II. Contrary to Proposed *Amicus Curiae* American Council on Education's ("ACE") assertion, universities will not suffer irreparable harm by meeting an "impossible" deadline, because many universities already have come into compliance.

ACE alleges in its proposed brief as *amicus curiae* that the effective date of the Regulations will "prove to be impossible to meet." Proposed Brief of ACE as *Amicus Curiae*, ECF No. 68-1, at 16. This argument is fatally undermined by the fact that many universities have already come into compliance with the supposed "impossible" deadlines. Therefore, the Regulations do not cause irreparable harm to universities. *See COMMONWEALTH OF PENNSYLVANIA v. ELISABETH DEVOS,* No. 1:20-CV-01468 (CJN), 2020 WL 4673413, at *13 (D.D.C. Aug. 12, 2020), *citing New York v. United States Dep't of Educ.*, No. 20-CV-4260 (JGK), 2020 WL 4581595. at *13 (S.D.N.Y. Aug. 9, 2020). A non-exhaustive list of the universities that have so far come into compliance is attached as **Exhibit 3**.

III. The Balance of Equities and Public Interest Require that the Court Deny Plaintiff's Motion Because *All* Students Benefit from the Regulations.

a. Title IX Protects the Rights of All Accused Students—Male and Female.

Equal protection under the law is a bedrock principle of American jurisprudence. The Equal Protection Clauses of the Fifth and Fourteenth Amendments likewise ensure "the equal protection of the laws." U.S. Const. Amend. V, XIV. Title IX of the Education Amendments of 1972 similarly prohibits discrimination on the basis of sex under any federally funded educational program or activity. 20 USC 1681 *et seq*. The law proclaims a broad prohibition on discrimination on the basis of sex:

> No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.

Id.

The Department of Education Office for Civil Rights (OCR) is responsible for the enforcement of Title IX.[18] In 1975, OCR published 34 CFR 106, the implementing regulation of Title IX. Nothing in the text of this lengthy regulation states or implies the rule was designed to preferentially benefit the members of only one sex. Indeed, by its very terms ("no person") it is gender neutral.

OCR has also issued numerous guidance on sexual harassment and sexual violence including (1) Sexual Harassment Guidance, 1997[19]; (2) Revised Sexual Harassment Guidance, 2001[20]; (3) Dear

[18] U.S. Dep't of Educ. Office of Civil Rights, *Title IX and Sex Discrimination* (Apr. 2015), https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.
[19] 62 Fed. Reg. 12,034 (Mar. 13, 1997) https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.
[20] U.S. Dep't of Educ., Office for Civil Rights, *Revised Sexual Harassment Guidance; Harassment of Students by School Employees, Other Students, or Third Parties* (2001).

Colleague Letter on Sexual Violence, 2011[21] (subsequently withdrawn in 2017)[22]; and (4); Questions and Answers on Title IX and Sexual Violence, 2014[23] (subsequently withdrawn in 2017).[24]

Neither the Title IX statute itself nor any of the guidance indicate that Title IX was intended to benefit the members of a single sex or only victims of sexual harassment, as plaintiffs and supporting *amici* seemingly suggest. Indeed, OCR has investigated and resolved numerous complaints on behalf of male students, both at secondary and post-secondary institutions:

Secondary Education

- Dayton Regional STEM School, Dayton, OH (2016)[25] (sexual harassment)
- Jonesboro Community Consolidated School District 43, Jonesboro, IL[26] (2015) (sexual harassment)
- Kern High School District, Bakersfield, CA[27] (2016) (sexual harassment and disparate treatment)
- Muscogee County School District, Columbus, GA[28] (2013) (sexual and disability-based harassment)
- Pasco County District School Board, Land O'Lakes, FL[29] (2017) (disparate treatment)
- Sandwich Community Unit School District #430[30] (2015) (sexual and disability-based harassment)

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[21] U.S. Dep't of Educ., *Dear Colleague Letter*, (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.
[22] U.S. Dep't of Educ., *Dear Colleague Letter*, (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.
[23] U.S. Dep't of Educ. Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[24] U.S. Dep't of Educ. Office of Civil Rights, *Dear Colleague Letter*, (Sept. 22, 2017), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf.
[25] Resolution Agreement, Dayton Regional STEM School, OCR No. 15-14-1205, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/15141205-b.pdf.
[26] Resolution Agreement, Jonesboro Cmty. Consolidated School District 43, No. 05-15-1033, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151033-b.pdf.
[27] Resolution Agreement, Kern High School District, OCR No. 09-14-1339, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/09141338-b.pdf.
[28] Resolution Agreement, Muscogee Cnty School District, OCR No. 04-13-1162, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04131162-b.pdf.
[29] Resolution Agreement, Pasco Cnty School District, FL, OCR No. 04-12-1251, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/04121251-b.pdf.
[30] Resolution Agreement, Sandwich Cmty. Unit School District 430, OCR No. 05-15-1051, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05151051-b.pdf.

- Yonkers Public Schools, Yonkers, NY[31] (2016) (harassment)

Colleges and Universities

- Carthage College, Kenosha, WI[32] (2015) (failure to respond to complaints of sexual harassment against two male students)
- Clemson University, Clemson, SC[33] (2019) (sex-specific programs)
- Grand Valley State University, Grand Rapids, MI[34] (2020) (sex-specific programs)
- Jefferson Community and Technical College, Louisville, KY[35] (2015) (disparate treatment)
- Lyon College, Batesville, AR[36] (2012) (sexual harassment)
- Seattle University, Seattle, WA[37] (2015) (sex-specific programs)
- Shepherd University, Shepherdstown, WV[38] (2014) (sex discrimination)
- Southern Methodist University[39] (2014) (sexual harassment and hostile environment against three male students)
- Temple University, PA[40] (2014) (athletics)
- Tulane University, New Orleans, LA[41] (2018) (sex-specific programs)

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[31] Resolution Agreement, Yonkers Public Schools, OCR No. 02-16-1243, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/02161243-b.pdf.
[32] Resolution Agreement, Carthage College, Nos. 05-15-2053 & 0515-2086, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/05152053-b.pdf
[33] U.S. Dep't of Educ., Office of Civil Rights, Dismissal Letter, OCR No. 11-19-2081 (Aug. 14, 2019), http://www.saveservices.org/wp-content/uploads/OCR-LETTER-CLEMSON-U-8.14.2019.pdf.
[34] Resolution Agreement, Grand Valley State University, OCR No. 15-19-2052 (Feb. 2, 2020), http://www.saveservices.org/wp-content/uploads/Grand-Valley-State-University-15-19-2052-Resolution-Agreement-SIGNED.pdf.
[35] Resolution Agreement, Jefferson Cmty. & Technical College, OCR No. 03142384 (Feb. 20, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03142384-b.pdf
[36] Resolution Agreement, Lyon College, OCR No. 06-12-2184, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06122184-b.pdf.
[37] Resolution Agreement, Seattle University, OCR Nos. 10152145, 10152146, 10152147, 10152148, (Nov. 19, 2015), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/10152145-b.pdf.
[38] U.S. Dep't of Educ., Office of Civil Rights, No. 03-14-2241, (Sept. 29, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03142241-a.pdf.
[39] Resolution Agreement, Southern Methodist University, OCR No. 06112126, 06132081, 06132088, (Nov. 16, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06112126-b.pdf.
[40] U.S. Dep't of Educ., Office for Civil Rights, No. 03142257, (Nov. 4, 2014), https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03142257-a.pdf.
[41] Resolution Agreement, Tulane University, OCR No. 06-18-2230, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/06182230-b.pdf

- University of Central Arkansas[42] (2020) (sex-specific programs)
- Wesley College, Dover, DE[43] (2016) (due process)

OCR has also long been concerned with due process for the accused and has viewed adjudications of sexual harassment complaints as within their jurisdiction:

2001 Guidance[44]

- In a section called "Due Process Rights for the Accused," OCR stated that the procedures for adjudicating campus complaints must ensure not only the Title IX rights of the complainant, but also "accord due process to all parties involved." *Id.* at 20.
- OCR stated that schools must provide notice to the accused student and allow both parties to present witnesses and evidence. *Id.*
- OCR stated that schools must undertake an impartial and prompt investigation and adjudication of each claim. *Id.*

2011 Dear Colleague Letter[45]

- Even in the notorious "Dear Colleague Letter" (now withdrawn),[46] OCR interpreted Title IX as requiring schools to provide both accusers and accused "the equal opportunity to present relevant witnesses and other evidence." *Id.* at 11.
- OCR interpreted Title IX as requiring "prompt and equitable" adjudications of complaints on campus. *Id.* at 8.
- OCR stated that that schools should "provide an appeals process" and allow the accused to present his side of the story. *Id.* at 11-12.

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[42] Resolution Agreement, University of Central Arkansas, OCR No. 07-19-2134, (Mar. 4, 2020), http://www.saveservices.org/wp-content/uploads/07192134-UCA-Agreement-1.pdf.
[43] Resolution Agreement, Wesley College, No. 03-15-2329, https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf
[44] U.S. Dep't of Educ. Office of Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties*, (Jan. 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.
[45] U.S. Dep't of Educ., *Dear Colleague Letter*, (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.
[46] This Guidance document has been heavily criticized as curtailing due process on campus by several groups including a group of Harvard Law professors. *See* Elizabeth Bartholet, Nancy Gertner, Janet Halley, and Jeannie Suk Gersen, Harvard Library Office for Scholarly Communication, *Fairness For All Students Under Title IX*, https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1. Even this document recognized that the regulation of the disciplinary process was within its jurisdiction.

2014 Question and Answer Guidance[47]

- OCR required that a school's Title IX adjudication process be "adequate, reliable, impartial, and prompt and include the opportunity for both parties to present witnesses and other evidence. *Id.* at 25.

Despite the above, plaintiffs and their *amicus* seek to cast the Regulations as an unprecedented regulation of school adjudications. In order to support this argument, they focus almost entirely on the perspective of female victims of sexual harassment. *See* Am. Compl., ECF No. 9, Brief as *amicus curiae* of Lawyers' Committee for Civil Rights Under Law, ECF No. 39-1. This focus misunderstands the very purpose of Title IX. OCR has long believed the regulation of disciplinary processes was within its jurisdiction because discrimination can (and does) occur within the disciplinary process. The statute is not limited to the protection of one sex or gender; it protects all.

b. Recent Litigation Reflects Existing Discrimination in Campus Disciplinary Systems.

On April 4, 2011, the Obama Administration's Department of Education issued the now-infamous "Dear Colleague Letter" which "pressured universities to adopt procedures that all but ensured schools would find more accused students responsible in campus sexual misconduct cases."[48] Since then, over 500 lawsuits have been filed by accused students against their universities, usually alleging breach of contract, due process deprivations, or sex discrimination in violation of Title IX. *Id.* at 64-9. Over 340 of the lawsuits were filed in federal courts.[49] *Id.* Accused students in

[47] U.S. Dep't of Educ. Office of Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[48] 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 (2019) (Harris & Johnson).
[49] A complete list of all federal and state campus due process cases compiled by Harris & Johnson can be found at Samantha Harris and KC Johnson, *Lawsuits Filed by Students Accused of Sexual Misconduct, 4/4/2011 through 5/1/2020,* https://docs.google.com/spreadsheets/d/e/2PACX-

these cases are "overwhelmingly male." *Id.* at 92.[50] Of the more than 298 substantive decisions by state and federal judges, universities have been on the losing side a majority of the time. *Id.* at 65-6.

Plaintiffs totally ignore Title IX discrimination against males in their Complaint and subsequent Motion for Preliminary Injunction. This is especially astounding given that the deprivation of students' rights in the disciplinary process, evidenced in part by the explosion of Title IX lawsuits, was a substantial predicate for the issuance of the Regulations. *See, e.g.*, 85 Fed. Reg. 30048-50. The Regulations thus recognize the existing discrimination on campus and attempt to resolve such discrimination.

c. The Regulations Specifically Seek to Resolve this Issue by Treating Male and Female Students Equitably.

In light of these concerns, the Regulations specifically seek to treat students equitably. Specifically, the Regulations state:

> Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in 34 C.F.R. § 106.30, against a respondent.

34 C.F.R. §106.45(b)(1).

This clear and unambiguous language provides a foundation for due process and equal treatment among men and women alike in the Title IX Process. This cornerstone principle, in conjunction with specific regulations discussed later in this brief, assists in providing students unbiased treatment in Title IX proceedings.

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[50] *See also* Jonathan Taylor, *Plaintiff Demographics in Accused Student Lawsuits*, TITLE IX FOR ALL (July 7, 2020), available at https://www.titleixforall.com/wp-content/uploads/2020/07/Plaintiff-Demographics-by-Race-and-Sex-Title-IX-Lawsuits-2020-7-6.pdf (showing that 97.69% of these plaintiffs are male)

d. SAVE has Collected Research, Data, and Case Summaries to Demonstrate how Due Process is Compromised for Male Accused Students in Title IX Proceedings.

SAVE has collected a representative sample of the factual allegations typically present in Title IX accused student litigation, attached as **Exhibit 2**. Each of these issues stems from a university's near-total control over the disciplinary process and repeated decisions to arbitrarily ignore male complaints of sexual assault seemingly on the basis of unlawful sex bias. Under the new Regulations, both complaining and responding students have the right to a live hearing and to cross-examine their alleged perpetrator. 34 C.F.R. § 106.45(b)(6)(i). The plaintiffs are concerned this will chill reporting of sexual harassment. Pls. Mot., ECF No. 32 at 21. But the Regulations in-fact provide greater protections and autonomy to the complainant by giving them the right to prove their cases in a live hearing with cross-examination of the respondent, instead of allowing the university to exercise total control over the adjudication. Under these Regulations, victims, including male victims, are protected from universities sweeping complaints under the rug. Therefore, the balance of equities and the public interest weigh in favor of applying the Regulations.

e. Federal Circuit Courts Have Increasingly Recognized the Need for Greater Due Process Protections in the Campus Disciplinary Context. This Court and this Circuit have so recognized.

The First Circuit has ruled – along with a growing number of federal circuits – that a live hearing or cross-examination is required in the campus discipline context, thereby showing implicit support for those provisions of the Regulations. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019) ("due process in the university disciplinary setting requires some opportunity for real-time cross-examination, even if only through a hearing panel.")[51] (internal quotations omitted), *Doe v.*

[51] Plaintiffs cite this case – without using a direct quote – in footnote 67 of their Memorandum in Support of their Motion for the proposition that the First Circuit "reject[ed the] argument that constitutional due process required direct cross examination in Title IX proceedings." Pls. Mot. at 18. Plaintiff's use of the word "direct" here is conspicuous; to be clear, in *Haidak* the First Circuit held that some form of cross examination was required by due process, even if conducted by a

Baum, 903 F.3d 575, 581 (6th Cir. 2018); *see also*, e.g. *Doe v. Purdue Univ.*, 928 F.3d 652, 663-4 (holding that due process requires a meaningful hearing); *see also Doe v. Univ. of the Sciences*, 961 F.3d 203, 213 (3rd Cir. 2020) (holding that when a university promises its student a "fair process", that process must include cross examination and a live hearing); *but see Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961) (holding that while cross examination is not required, the university must afford the accused an opportunity to "produce either oral testimony or written affidavits of witnesses in his behalf").

Additionally, this Court has explicitly recognized that Title IX proceedings must comport with common law basic fairness. *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 601-5 (D.Mass. 2016). This Court held that with respect to the lack of cross examination, "the elimination of such a basic protection for the rights of the accused raises profound concerns." *Brandeis*, 177 F. Supp. 3d at 604-5. This Court went on to discuss over ten other reasons why the proceedings were procedurally unfair and open to infection by university administrators' biases. *Id.* at 603-11. In this case, and in all of the cited cases in this brief, all of the plaintiffs are male and all of these cases concerned a lack of cross-examination or a hearing.[52] The new Regulations assist in remedying critical elements of due process deficiencies in Title IX proceedings on college campuses, as courts around the country have recognized.

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hearing panel. Furthermore, this Court should note that Plaintiffs have cited case in which this Circuit acknowledged that respondents enjoy Title IX protections, **after suggesting in their Amended Complaint that respondents do not enjoy those protections.**

[52] In the Interactive Spreadsheet published by SAVE, compiling 137 judicial opinions favorable to accused students, at least 29 of those are cases in which the university did not allow cross examination, at least 36 were cases in which the university used the "single investigator model" which means no hearing or cross examination; at least 34 were cases in which the university impaired the ability of the accused student to present witnesses; at least 30 were cases in which the university impaired the ability of the accused student to present evidence; and at least 23 were cases in which the university impaired the ability of the accused student to review investigative report, comprising the evidence against him. *See* North, *supra* note 5. At least 133 of the 137 of the cases in the entire spreadsheet have male plaintiffs.

IV. Robust Due Process Protections are in the Public Interest and Weigh in Favor of Denying the Plaintiffs' Motion.

a. The Regulations Assist in Restoring Due Process for Accused Students.

The Regulations provide robust due process protections for complainants and respondents and require that both parties be treated equitably. To prevent discrimination on the basis of sex, the Regulations provide protections including, *inter alia*: (1) requiring universities to provide written notice to the parties regarding the grievance process and notice of the allegations "including sufficient details known at the time and with sufficient time to prepare a response before any initial interview" in the case of a formal complaint; "sufficient details include the identities of the parties involved in the incident, if known, the conduct allegedly constituting sexual harassment . . . and the date and location of the alleged incident, if known" and must supplement notice if additional allegations come to light[53]; (2) the right to cross-examine one's accuser through an advisor[54]; (3) the right to a presumption of "non-responsibility" for the accused [55]; (4) the right to present evidence/witnesses, including experts[56]; and (5) the right to a trained unbiased investigator, decision-maker, or any other person effecting an informal resolution that is free from conflict of interest or bias.[57] These basic protections will ensure students can more adequately defend themselves when accused of heinous offenses.

b. The Regulations Require that all Title IX Investigators are Unbiased and Undergo Training, Benefitting Both Accusers and Accused.

The Regulations require that any coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process be free from conflict of interest or bias and

[53] 34 C.F.R. § 106.45(b)(1)(i)-(ii).
[54] 34 C.F.R. § 106.45(b)(6)(i).
[55] 34 C.F.R. § 106.45(b)(1)(iv).
[56] 34 C.F.R. §106.45 (b)(5)(ii).
[57] 34 C.F.R. §106.45(b)(iii).

mandates training for those involved. 34 C.F.R. §106.45(b)(iii). According to an OCR publication, this mandate ensures that these employees are trained (1) on Title IX's definition of "sexual harassment"; (2) on the scope of the school's education program or activity; (3) on how to conduct an investigation and grievance process; (4) on how to serve impartially, including by avoiding prejudgment of the facts at issue; and (5) on how to avoid conflicts of interest and bias; (6) on any technology to be used at a live hearing; (7) on issues of relevance of questions and evidence, including when questions and evidence about a complainant's sexual predisposition or prior sexual behavior are not relevant; and (8) on issues of relevance to create an investigative report that fairly summarizes relevant evidence.[58] Further, universities must publish the materials used to train these employees, thereby ensuring transparency that will benefit accused and accuser alike. *Id.*; 34 C.F.R. §106.45(b)(10)(i)(D).

c. The Regulations Ensure Equality in the Gathering and Presenting of Evidence.

Under the new Regulations, the university retains the burden of proof and the burden of making the record. 34 C.F.R. §106.45(b)(5)(i). The Regulations also benefit all students by ensuring that both parties to a campus controversy have equal opportunity to present evidence and witnesses, including experts. 34 C.F.R. §106.45 (b)(5)(ii). Further, the Regulations prohibit the university from preventing the complainant or respondent from discussing the issue with other people. 34 C.F.R. §106.45 (b)(5)(iii). The Regulations ensure students that they will have the right to accompaniment by an advisor of their choice. 34 C.F.R. §106.45 (b)(5)(iv). Finally, the Regulations assure students that they will receive equal access to any evidence gathered as part of investigation "that is directly

[58] *See* U.S. Dep't of Educ., *Schools Must Post Important Information Regarding Title IX on School Websites Under the New Title IX Rule*, Office of Civil Rights Blog – 20200518 (May 18, 2020), https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html.

related to the allegations...including the evidence upon which the recipient does not intend to rely." 34 C.F.R. §106.45 (b)(5)(vi).

d. The Regulations Permit Live Hearings, Allowing Accused and Accusing Students to Take Control of Their Stories and to Advocate for Themselves.

The Regulations ensure that advisors for both the accused and accuser will have the right to cross-examine the other party, while also providing extra protections for the complainant. 34 C.F.R. §106.45(b)(6)(i) ("questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant" except for two specific circumstances). Further, if a party does not submit to cross-examination, the university cannot rely on that party's testimony and is prohibited from "draw[ing] an inference about the determination regarding responsibility." *Id.* Therefore, the Regulations provide the ability for both parties to advocate for themselves while prohibiting them from directly questioning each other. This protects the complainant from direct cross-examination by the respondent. *Id.* The Regulations further require a decisionmaker to evaluate questions for relevancy and allow the university to retain control of the hearing by establishing restrictions on an advisors participation. 34 C.F.R. §106.45 (b)(5)(iv).

In these ways the Regulations allow the university to ensure questions are not meant to demean or harass. Additionally, the Regulations require universities to provide "supportive measures to either party," including but not limited to "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, or leaves of absence," all free of charge to students. 34 C.F.R. § 106.30(a). The Regulations also provide Rape Shield Protections for complainant and the availability of adverse inferences. 34 C.F.R. §106.45 (b)(6)(i). In other words, the Regulations strike a difficult balance that gives students autonomy through the process while also protecting them. This is in the best interest of all students.

e. The Regulations Provide for a More Concrete Determination of Responsibility.

The Regulations also ensure that final outcomes are reliable. First, the Regulations require that any determinations regarding responsibility be in writing and contain: standard of proof used; identification of allegations; procedural history (including methods used to gather evidence); findings of fact; application of student code to facts; and the statement of, and rationale for, the result as to each allegation. 34 C.F.R. §106.45(7)(i)-(iv). The finding is final only after written determination on appeal, or if no appeal filed, on the date on which appeal would no longer be considered timely. *Id.*

Second, the Regulations provide for a thorough appeals process. The Regulations ensure that the right of appeal is given to both parties on at least the bases of "(A) procedural irregularity that affected the outcome of the matter; (B) new evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) the Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter." 34 C.F.R. §106.45(b)(8)(i)(A)-(C). Further, a university may provide additional bases for appeal for both accuser and accused. 34 C.F.R. §106.45(b)(8)(ii). The Regulations ensure that the appeal is not managed by any of the same individuals that managed the original determination, give parties equal opportunity to provide written statements to the appeals officer, and require a written decision, issued simultaneously to both parties, explaining the bases for granting or denying the appeal. 34 C.F.R. §106.45(b)(8)(iii)(A)-(F). These appellate procedures provide considerable autonomy to students that appeal or are on the receiving end of an appeal. Taken together, the Regulations ensure a concrete determination of responsibility or non-responsibility informed by effective participation of both parties, while eliminating conflict of interest or bias on the part of the university or its employees.

f. The Balance of Equities and Public Interest Favors the Regulations.

Plaintiffs argue that the public interest is served by "having governmental agencies abide by the federal laws that govern their existence." (citing *League of Women Voters of the United States v. Newby*, 838 F.3d 1, 12 (D.C. Cir. 2016)), Pl.'s Mot., ECF No. 32 at 29-30. Plaintiffs fail to demonstrate, however, how the Department of Education is operating in violation of federal law. Indeed, they spend only one page discussing how these interests favor a stay or injunction and completely fail to consider the policy considerations argued above. "In deciding whether to grant an injunction, the district court must balance the strengths of the requesting party's arguments in each of the four required areas." *CityFed Fin. Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995).

Courts have acknowledged that "there is an overriding public interest . . . in the general importance of an agency's faithful adherence to its statutory mandate." *Jacksonville Port Auth. v. Adams*, 556 F.2d 52, 59 (D.C. Cir. 1977). Here, the Department of Education weighed the above information, followed the requirements of the Administrative Procedure Act, and adopted the Regulations. It has faithfully adhered to its statutory mandate, particularly in working to eliminate discrimination in the disciplinary process. Further, it has adhered to the statutory mandate of Title IX in adopting these Regulations to ensure equal protection for both male and female accused students while also protecting complainants' rights. It is in the public interest to deny plaintiffs' preliminary injunction.

Similarly, balancing the equities weighs in favor of denying plaintiffs' preliminary injunction. Although courts typically consider balancing the equities of the parties involved in the litigation ("[i]n each case, a court must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief," *Amoco Prod. Co. v. Vill. of Gambell*, 480 U.S. 531 (1987)), here , the Court should consider the equities of students across the country

attending colleges and universities. As shown above, the Regulations provide equitable considerations for both complainants and respondents. Moreover, the Regulations provide thorough due process protections for *all* students. These protections for students tip the balancing scale in favor of denying the preliminary injunction.

CONCLUSION

The Regulations are an attempt at ensuring a fair process for both complainants and accused students and have struck a balance along those lines. Because the new regulations assist in providing more robust due process protections to the accused while also protecting the accuser, they should be upheld. These matters are undoubtedly in the public interest, and balance the equities of the accused and accuser. The Court should deny the motion for preliminary injunction.

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CERTIFICATE OF SERVICE

I hereby certify that on August 17, 2020, I electronically filed the foregoing brief with the Clerk of Court by using the CM/ECF system. I further certify that the participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

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