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Symbolism Over Substance: The Role of Adversarial Cross-Examination in Campus Sexual Assault Adjudications and the Legality of the Proposed Rulemaking on Title IX

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SYMBOLISM OVER SUBSTANCE: THE ROLE OF
ADVERSARIAL CROSS-EXAMINATION IN
CAMPUS SEXUAL ASSAULT ADJUDICATIONS
AND THE LEGALITY OF THE PROPOSED
RULEMAKING ON TITLE IX

*Hunter Davis**

ABSTRACT

Traditionally, it has been understood that campus sexual assault adjudications need not take on the formalities of the justice system. Since the consequences faced in campus adjudications are considerably less than punishments faced in the justice system, less process is owed under the Due Process Clause. However, in September 2018, the Sixth Circuit reconceived what constitutes due process in campus sexual assault adjudications in the case of Doe v. Baum. The court found that in cases involving conflicting narratives at public universities, the accused or his agent must have the ability to cross-examine his accuser in the presence of a neutral factfinder. On November 29, 2018, the Department of Education took Baum several steps further in a proposed rulemaking on Title IX, mandating cross-examination in all campus sexual assault cases at both public and private universities.

In this Comment, I argue that the proposed rulemaking on Title IX goes too far, misinterpreting the case law and the dictates of due process, while neglecting empirical evidence and foreseen adverse consequences. I argue that the proposed rulemaking misinterprets case law—most notably the recent Baum decision—by failing to appreciate important limits to the scope of compulsory cross-examination. I also unpack the vast negative

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implications of the proposed rulemaking, including drops in reporting rates and considerable institutional costs. As a result of these legal shortcomings and practical implications, I argue that the proposed rulemaking fails to pass the Mathews balancing test. As universities, the federal government, and courts determine how best to adjudicate campus sexual assault allegations, all efforts must be taken to minimize trauma to the victim, safeguard the rights of the accused, and protect the financial viability of educational institutions.

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INTRODUCTION

On April 4, 2011, the Department of Education's Office of Civil Rights (OCR) issued a Dear Colleague Letter (DCL) with sweeping implications for the scope of Title IX and the power of the federal government to shape sexual assault adjudications on college campuses.¹ The DCL encouraged colleges and universities to better investigate and resolve instances of campus sexual assault.² Notably, it required schools to use a preponderance of evidence standard³ in adjudicating campus sexual assault cases.⁴ The impact of the DCL and its accompanying 2014 Questions and Answers (Q&A) was clear and substantial. Colleges and universities adhered to a preponderance of evidence standard, hastened adjudications, and—perhaps most controversially—curtailed the accused's confrontation rights by barring direct cross-examination.⁵

Under pressure from OCR and mounting public scrutiny, some schools ramped up their efforts to implement the DCL.⁶ Some university adjudication procedures gained the reputation of “kangaroo courts”⁷ due to procedures that could interfere with the rights of the accused; this shifted sympathies and attention away from the accuser to

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1. See, e.g., KC Johnson & Stuart Taylor, *The Path to Obama's 'Dear Colleague' Letter*, WASH. POST (Jan. 31, 2017), https://www.washingtonpost.com/news/volokh-conspiracy/wp/2017/01/31/the-path-to-obamas-dear-colleague-letter/?utm_term=.4d4c7af22313.
 2. Jake New, *Must v. Should*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance>.
 3. The preponderance of evidence standard is typically used in civil trials; it is met “when the party with the burden convinces the fact finder that there is a greater than 50% chance that the claim is true.” *Preponderance of the Evidence*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/preponderance_of_the_evidence. Before the 2011 Dear Colleague Letter, some schools used the “clear and convincing” standard (“i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred”). Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter on Sexual Violence 10–11 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter DCL]. As the DCL aptly noted, “[g]rievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.” *Id.*
 4. DCL, *supra* note 3, at 12.
 5. See Nancy Gertner, *Sex, Lies, and Justice*, AM. PROSPECT (Jan. 12, 2015), <https://prospect.org/article/sex-lies-and-justice>.
 6. *Id.*
 7. For example, a court ignoring recognized standards of justice.

the accused.⁸ Advocates of the accused insisted that universities rushed to judgments with inadequate processes to compensate for past procedural failures.⁹ Clamor for safeguarding the due process rights of the accused mounted.

In the wake of this progression, there have been two substantial developments reshaping the definition of due process in campus sexual assault adjudications. *First*, the Sixth Circuit redefined due process rights for the accused in *Doe v. University of Cincinnati*¹⁰ and *Doe v. Baum*.¹¹ These decisions established that in cases involving credibility disputes, the accused or their agent must have the ability to cross-examine their accuser in the presence of a neutral factfinder.¹² *Second*, the Department of Education sought to codify and expand cross-examination of the victim in its notice of a proposed rulemaking on Title IX (“proposed rulemaking”).¹³ As part of this proposed rulemaking, the Department of Education recommended a live hearing and cross-examination by party advisors in all campus sexual assault adjudications.¹⁴ Despite Sixth Circuit precedent that seems to support the proposed rulemaking,¹⁵ the legal and practical foundations on which these sweeping changes rest are murky.

In this Comment, I argue that the proposed rulemaking on Title IX goes too far: It misinterprets case law and the dictates of due process while neglecting empirical evidence and adverse consequences. I begin by providing a brief background of Title IX and the Due Process Clause as it pertains to higher education. Then, in Section I, I argue that the proposed rulemaking mischaracterizes *Baum* and improperly extends its reach. I point out that the court in *Baum* overstepped and that *Baum* does not reflect national consensus on cross-examination in campus sexual assault adjudications. I also emphasize that determining the dictates of due process is a job best left for the courts, not the Department of Education. In Section II, I discuss the lack of empirical support for the value of these expansions.

8. See Kathryn Joyce, *The Takedown of Title IX*, N.Y. TIMES (Dec. 5, 2017), <https://www.nytimes.com/2017/12/05/magazine/the-takedown-of-title-ix.html>.

9. See, e.g., *id.*

10. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 402–404 (6th Cir. 2017).

11. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

12. See generally *Univ. of Cincinnati*, 872 F.3d at 393; *Baum*, 903 F.3d at 575.

13. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter referred to as Proposed Rulemaking].

14. See *id.* at 61,476.

15. See generally *Univ. of Cincinnati*, 872 F.3d at 393; *Baum*, 903 F.3d at 575.

Section III argues that the proposed rulemaking fails to appreciate and counteract the vast repercussions of compulsory, live cross-examination, which include adverse implications for reporting rates and victim trauma, as well as substantial institutional costs.¹⁶ Due to the considerable consequences of this proposed rulemaking and its spurious empirical or legal support, I argue that this proposal fails the *Mathews* balancing test by overextending the due process rights afforded to the accused while minimizing those of the victim.¹⁷ In sum, I argue that the Department of Education should refrain from mandating adversarial cross-examination in campus sexual assault adjudications.

BACKGROUND ON TITLE IX

Title IX was passed in 1972 as part of the Education Amendments to the Civil Rights Act.¹⁸ It bars sex discrimination in any educational program or activity that accepts federal funding.¹⁹ This captures the majority of colleges and universities since virtually all schools receive some form of federal funding.²⁰ Although Title IX does not explicitly bar sexual assault or harassment, the Supreme Court acknowledged that these abuses are a prohibited form of sex discrimination under Title IX in 1990.²¹ Over the subsequent two decades, the definition of what behaviors constitute sexual assault or harassment broadened, while

16. None of the arguments presented in this Comment should be construed to undermine the importance of cross-examination in criminal adjudications. The balance of equities is significantly distinguishable for many reasons, notably the potential penalties for criminal conviction, which include prison and sexual offender registration. Moreover, safeguards in the criminal context are lacking in campus adjudications, such as adherence to the rules of evidence, as well as legal representation and a trained adjudicator. In addition, the balance of power is distributed differently when the State pursues charges against a suspect compared with when a survivor of sexual assault brings a complaint against their assailant.

17. Discussion of the accusers' due process rights is beyond the scope of this Comment.

18. 20 U.S.C. §1681 (Westlaw through Pub. L. No. 116-91).

19. *See id.*

20. Federal funding is defined broadly to encompass such activities as students receiving Pell Grants. *See, e.g.,* Ibbey Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), <https://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> (noting that a small number of religious institutions, such as Hillsdale College, refuse to accept federal funding and forbid students to accept Pell Grants as a means of evading government regulations).

21. *Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 75 (1992).

expectations for schools to promptly and fairly resolve complaints grew.²²

In 2011, OCR issued a DCL,²³ which was later clarified by a 2014 Q&A.²⁴ The DCL was notable for many changes, such as hastening sexual assault adjudications and mandating that schools adhere to the preponderance standard.²⁵ Notably, the DCL strongly discouraged “allowing the parties personally to question or cross-examine each other during the hearing,” indicating that direct questioning could be “traumatic or intimidating.”²⁶ Some schools interpreted this as a pseudo-requirement to bar cross-examination, as demonstrated by policy changes at various schools.²⁷ In 2014, the Q&A clarified that schools can “allow parties to submit questions to a trained third party to ask the questions on their behalf.”²⁸ They recommended that the trained third party screen the questions and exclude inappropriate or irrelevant questions.²⁹ A circumscribed form of cross-examination was thus permissible under the 2011 DCL.

On September 22, 2017, the Department of Education issued a new DCL rescinding the 2011 DCL and 2014 Q&A.³⁰ Three days later, the Sixth Circuit held in *Doe v. University of Cincinnati* that when public universities are tasked with resolving conflicting narratives, they must provide the accused with some form of cross-examination, though it

22. In 1999, the Department of Education formally advised schools to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee [Title IX] complaints.” This put schools on notice of their obligation to rapidly and fairly resolve complaints including sexual assault and harassment. In 1997 and again in 2001, OCR issued guidance for sexual assault adjudications on college campuses. These documents formally defined harassment and emphasized the importance of “well-publicized and effective grievance procedures.” Sara O’Toole, *Campus Sexual Assault Adjudication, Student Due Process, and a Bar on Direct Cross-Examination*, 79 U. PITT. L. REV. 511, 516 (2018).

23. DCL, *supra* note 3.

24. Catherine E. Lhamon, Assistant Sec’y for Civil Rights, U.S. Dept. of Educ. Office for Civil Rights, Questions and Answers on Title IX and Sexual Violence (Apr. 24, 2014), <https://perma.cc/A7W8-J8PR> [hereinafter Q&A].

25. DCL, *supra* note 3, at 13.

26. *Id.* at 12.

27. The University of Virginia, Yale University, and the University of Texas all changed their policies in light of the OCR letter. See O’Toole, *supra* note 22, at 518.

28. Q&A, *supra* note 24, at 31.

29. *Id.*

30. Letter from Candice Jackson, Acting Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ. Office for Civil Rights, Dear Colleague Letter (Sept. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf>.

need not take the form of direct confrontation at a live hearing.³¹ The court found it acceptable for both parties to submit questions to the trier of fact, who would then pose questions to the witnesses directly.³² Less than a year after *University of Cincinnati*, the Sixth Circuit expanded the definition of what type of confrontation the accused is owed in *Doe v. Baum*. In a split circuit decision, the court held that when credibility disputes exist, the accused or his agent must have the ability to cross-examine the victim in the presence of a neutral factfinder.³³ Like in *University of Cincinnati*, the scope of the decision in *Baum* was expressly limited to public universities.³⁴

Taking note of the decision in *Baum*, the Department of Education took up the issue of cross-examination in the proposed rulemaking released on November 29, 2018.³⁵ The proposed rulemaking mandates a live hearing as well as cross-examination by a party advisor in campus sexual assault adjudications.³⁶ Notably, it extends beyond *Baum* in scope, applying to both public and private institutions and expanding its reach beyond cases where credibility is in dispute.³⁷

BACKGROUND ON DUE PROCESS RIGHTS IN HIGHER EDUCATION

In order to assess whether cross-examination is required under the Due Process Clause in campus sexual assault adjudications, the dictates of due process must be examined. The Fifth Amendment asserts that “no one shall be deprived of life, liberty or property without due process

31. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 401 (6th Cir. 2017). *See also* *Doe v. Univ. of S. Cal.*, 241 Cal. Rptr. 3d 146, 361 (Cal. Ct. App. 2018) (noting that credibility disputes are the norm in campus sexual assault adjudications).

32. *Univ. of Cincinnati*, 872 F.3d at 396–97 (citing *Doe v. Cummins*, 662 F. App’x 437, 439, 448 (6th Cir. 2016) (holding that this requirement was met even where the trier of fact did not ask all the questions submitted or allow an opportunity to submit follow-up questions)).

33. *Doe v. Baum*, 903 F.3d 575, 581 (6th Cir. 2018).

34. *Baum*, 903 F.3d at 578.

35. A leaked earlier draft shows that the rule on cross-examination was added in the wake of *Baum*. U.S. Dep’t of Educ., Office of Civil Rights, Proposed Regulation Concerning Title IX (unpublished draft) (Aug. 25, 2018) (on file with ATIXA), https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2019/02/18120534/Draft-OCR-regulations-September-2018.pdf. *See also* Erica L. Green, *New U.S. Sexual Misconduct Rules Bolster Rights of Accused and Protect Colleges*, N.Y. TIMES (Aug. 29, 2018), <https://www.nytimes.com/2018/08/29/us/politics/devos-campus-sexual-assault.html> (noting the main components of the leaked draft).

36. Proposed Rulemaking, *supra* note 13, at 61,474–75.

37. *See id.*

of law.”³⁸ This applies to the federal government and was extended to the states through the Fourteenth Amendment.³⁹ Due process is implicated when a state actor violates a protected interest, and it is necessary to discern what process is owed. Notice and an opportunity to be heard have been held as fundamental requirements of due process.⁴⁰ Beyond these basic tenets, the requisite type of notice and opportunity to be heard is context specific and depends on a number of factors. The Supreme Court precedent of *Mathews v. Eldridge* offers a balancing test to determine the requirements of due process in a discrete context. *Mathews* implores adjudicators to consider three key factors:

First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government’s interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.⁴¹

The *Mathews* test provides a clear framework to ascertain whether direct, adversarial cross-examination is required in campus sexual assault adjudications at public institutions.

Public schools are considered state actors and must comply with the Due Process Clause, while private schools are exempt from this mandate.⁴² The scope of institutions that must comply with the Due Process Clause is therefore narrower than the range of schools that must abide by Title IX.⁴³

38. U.S. CONST. amend. V.

39. U.S. CONST. amend. XIV, § 1.

40. Lavinia M. Weizel, *The Process That Is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudication of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1624 (2012) (citing *Mathews v. Eldridge*, 424 U.S. 319 (1976)).

41. *Mathews*, 424 U.S. at 320.

42. See THE AM. LAW INST., PRINCIPLES OF THE LAW, STUDENT SEXUAL MISCONDUCT: PROCEDURAL FRAMEWORKS FOR COLLEGES AND UNIVERSITIES (DISCUSSION DRAFT) 22 (2018) (noting “federal constitutional requirements apply only to public institutions (and to those private institutions sufficiently entwined with public institutions to be treated as ‘state actors’)”). Most private institutions do not meet this exception.

43. As previously mentioned, Title IX prohibits sex discrimination in any educational program or activity that accepts federal funding. 20 U.S.C. §1681 (Westlaw through Pub. L. No. 116-91).

In the educational context, due process protections for the accused emanate from threats to protected liberty or property interests.⁴⁴ In *Goss v. Lopez*, the Court found that protected liberty and property interests are implicated when a *primary school student* faces expulsion.⁴⁵ The property interest is tied to a state statute providing for compulsory K-12 public education,⁴⁶ while the liberty interest stems from the reputational damage of a misconduct charge.⁴⁷ Accordingly, notice and a hearing are required when a primary school student faces a potential expulsion.⁴⁸

The protected interests implicated in the higher education setting are not as strong. In particular, the property interest in higher education is weaker, given that unlike K-12 education, the right to higher education is not guaranteed by law.⁴⁹ Furthermore, courts have been reluctant to recognize a protected liberty interest in the higher education setting.⁵⁰ The Supreme Court has yet to recognize a protected liberty or property interest in higher education.⁵¹ It is thus unsurprising that the Court in *Missouri v. Horowitz* found that the absence of a live hearing prior to the expulsion of a medical student did not violate the student's due process

44. See, e.g., *Goss v. Lopez*, 419 U.S. 565 (1975).

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

46. *Goss*, 419 U.S. at 573.

47. *Goss*, 419 U.S. at 575.

48. *Goss*, 419 U.S. at 579.

49. Kristina Johnson, State Univ. of N.Y., Comment Letter on ED Title IX Proposed Regulations (Jan. 29, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-11388> [hereinafter SUNY Comment] (noting elementary and secondary education is "a right guaranteed by federal law and state law in every jurisdiction in the United States," while higher education is not a legal right). See also *Goss*, 419 U.S. at 574 (noting that students have a "legitimate entitlement to a public education as a property interest"). The Court has not found that this right extends to higher education. SUNY Comment at 58–59.

50. See, e.g., *Bd. of Curators of Univ. of Mo. v. Horowitz*, 435 U.S. 78, 84 (1978) ("We need not decide, however, whether respondent's dismissal deprived her of a liberty interest in pursuing a medical career. Nor need we decide whether respondent's dismissal infringed any other interest constitutionally protected against deprivation without procedural due process.").

51. See O'Toole, *supra* note 22, at 524.

rights.⁵² It is clear that under the Constitution less process is owed in the higher education context.⁵³

I. THE PROPOSED RULEMAKING LACKS A STRONG LEGAL FOUNDATION

The merits of the proposed rulemaking and its capacity to prevail under the *Mathews* framework depend in large part on its legal foundation. This section will assess the myriad of flaws in the substantive legal underpinnings of the proposed rulemaking.

First, the proposed rulemaking mischaracterizes *Baum* and overextends that case's reach by asserting that it controls not just when credibility is at issue but rather in all sexual assault adjudications. The proposed rulemaking misconstrues *Baum* in the context of campus sexual assault. Second, *Baum* was an unwarranted decision where the majority overreached in its responsibility; and therefore, the proposed rulemaking relies on mere dicta. Third, *Baum* does not represent the consensus approach to sexual assault adjudications—it is an outlier within the current circuit split.

A. *The Proposed Rulemaking Misconstrues Baum and Overextends Its Reach*

Doe v. Baum involved a case of alleged sexual assault at the University of Michigan.⁵⁴ Complainant “Roe” and respondent “Doe” had sex after a fraternity party, and Roe alleged that she had been too drunk to consent.⁵⁵ A three-month investigation ensued.⁵⁶ Ultimately, the investigator reported that there was insufficient evidence to find that it was more probable than not that sexual misconduct occurred.⁵⁷ Roe ap-

52. See *Horowitz*, 435 U.S. at 84. In recent Sixth Circuit cases, judges have assumed the existence of protected interests in higher education adjudications without substantive grounding. For example, in *Baum*, the court does not discuss liberty or property interests in dispute. *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018). In *University of Cincinnati*, the court makes a conclusory assertion that liberty and property interests are implicated. See *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017).

53. However, this does not mean that no process is owed. Protected interests, regardless of their strength, can likely be assumed based on circuit and district court precedent. See Weizel, *supra* note 40, at 1621–22.

54. *Baum*, 903 F.3d at 579.

55. *Baum*, 903 F.3d at 578.

56. *Baum*, 903 F.3d at 579.

57. *Baum*, 903 F.3d at 580.

pealed.⁵⁸ The appeals board reversed based on the investigator's report alone, finding Roe's recollection of events to be "more credible" than Doe's.⁵⁹ This forced Doe to withdraw from the University of Michigan.⁶⁰ He then filed a lawsuit arguing that when investigations are tasked with resolving conflicting narratives, the school must provide a hearing with an opportunity to cross-examine the accuser and adverse witnesses.⁶¹ The University of Michigan filed and was granted a motion to dismiss at the district level.⁶² Doe appealed.⁶³ The Sixth Circuit reversed, holding that the University of Michigan's failure to provide Doe an opportunity for cross examination violated his due process rights.⁶⁴ The court found that in cases where credibility is in dispute, the accused must be afforded at least a circumscribed form of cross-examination.⁶⁵

The proposed rulemaking mischaracterizes *Baum*,⁶⁶ obviating its limitation to cases where credibility is in dispute and improperly extending its reach to private institutions. The proposed rulemaking asserts that *Baum* held that "in the Title IX context cross-examination is not just a wise policy, but is a *constitutional requirement* of Due Process."⁶⁷ However, the opinion in *Baum* was more limited and nuanced. *Baum* held that cross-examination is only required in those cases where the "university has to choose between competing narratives to resolve a case."⁶⁸ Credibility disputes may be "more common" in sexual assault adjudications than in other contexts.⁶⁹ However, there are at least two examples where cross-examination is not necessary: (1) when conduct depicted in videos and photos can sustain a finding of misconduct with-

58. *Baum*, 903 F.3d at 580.

59. *Doe v. Baum*, 903 F.3d 575, 580 (6th Cir. 2018).

60. *Baum*, 903 F.3d at 580.

61. Doe also argued that the Board violated Title IX by discriminating against him on account of his gender. *Baum*, 903 F.3d at 580.

62. *Baum*, 903 F.3d at 580.

63. *Baum*, 903 F.3d at 580.

64. *Baum*, 903 F.3d at 578.

65. *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018).

66. It should be noted that *Baum* is arguably the principal source of legal support for the proposed rulemaking, as it is one of two cited cases for this rule. It is also the most topical and current of the cited cases. See generally Proposed Rulemaking, *supra* note 13, at 61,476.

67. Proposed Rulemaking, *supra* note 13, at 61,476 (emphasis added).

68. *Baum*, 903 F.3d at 578.

69. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 406 (6th Cir. 2017). See also *Doe v. Univ. of S. Cal.*, 241 Cal. Rptr. 3d 146, 361 (Cal. Ct. App. 2018) (noting that credibility disputes are typical "in disciplinary proceedings involving sexual misconduct where there is no corroborating physical evidence to assist the adjudicator in resolving conflicting accounts").

out resorting to testimonial evidence,⁷⁰ and (2) where a student admits to engaging in misconduct.⁷¹ *Baum* leaves space for cases where credibility is not in dispute.

The proposed rulemaking also obscures the scope of the *Baum* precedent and the reach of the Due Process Clause. After noting that *Baum* established cross-examination as a “constitutional requirement of Due Process” the proposed rulemaking asserts that live cross-examination is a requirement in *all* campus sexual assault adjudications.⁷² However, *Baum* limited the scope of mandatory cross-examination to contexts where “a *public university* has to choose between competing narratives.”⁷³ This fits squarely with the Due Process Clause’s limited application to public institutions.⁷⁴ Private institutions are not constrained by the Constitution and are free to formulate their own disciplinary procedures.⁷⁵ *Baum* did not establish “an affirmative right to adversarial cross-examination” in all cases and contexts, nor could it.⁷⁶

B. Doe v. Baum was an Unwarranted Decision

Not only does the proposed rulemaking misconstrue *Baum*, but *Baum* itself was wrongly decided. As Judge Keith Starrett pointed out in a case distinguishing *Baum*, “the majority in *Baum* went too far,” because the court was called upon merely to review a motion to dismiss, not to make a ruling on the merits.⁷⁷ According to Judge Starrett, the court should have found, based on case precedent, that a circumscribed form of cross-examination was warranted in the case, and therefore held that “such an allegation does state a claim and reverse” the court below.⁷⁸ The court was not compelled to ascertain precisely what form of

70. *Baum*, 903 F.3d at 584 (citing *Plummer v. Univ. of Hous.*, 860 F.3d 767, 775–76 (5th Cir. 2017)).

71. *Doe v. Baum*, 903 F.3d 575, 584 (6th Cir. 2018) (citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 641 (6th Cir. 2005)).

72. Proposed Rulemaking, *supra* note 13, at 61,476.

73. *Baum*, 903 F.3d at 578.

74. See THE AM. LAW INST., *supra* note 42, at 22.

75. See HARVEY A. SILVERGATE ET AL., FIRE’S GUIDE TO FREE SPEECH ON CAMPUS 60 (Greg Lukianoff & William Creeley, eds., 2d ed. 2012).

76. Naomi M. Mann, *Taming Title IX Tensions*, 20 U. PA. J. CONST. L. 631, 658–59 (2018).

77. *Doe v. Univ. of S. Miss.*, No. 2:18-cv-00153, slip op. at 7 (S.D. Miss. Nov. 27, 2018).

78. *Univ. of S. Miss.*, slip op. at 7.

cross-examination was required.⁷⁹ Its discussion of the matter is a judicial overreach and serves as “mere dicta.”⁸⁰

The holding in *Baum* also improperly relies on criminal cases to buttress its argument for cross-examination’s supposed constitutional mandate in the educational context.⁸¹ Title IX is a civil rights law, not a criminal law.⁸² The school disciplinary process is therefore distinct from the criminal justice system.⁸³ The process owed to accused students in campus sexual assault adjudications is far less than what is owed to defendants in the criminal justice system; this is based primarily on the severity of the punishment in question.⁸⁴ Students in sexual assault adjudications may receive punishments of temporary dismissal or, in rare cases, expulsion or transcript notations.⁸⁵ They do not face prison, fines, sex offender registration, or other forms of criminal sanction or deprivation of liberty.⁸⁶ Courts have asserted time and again that campus sexual assault adjudications “need not take on the formalities of a criminal trial,” and that procedural protections afforded to students need not match those of a criminal prosecution.⁸⁷ In fact, the Supreme Court has emphasized that “school disciplinary proceedings should not

79. *Univ. of S. Miss.*, slip op. at 7.

80. *Univ. of S. Miss.*, slip op. at 8.

81. Defendant’s Supplement in Support of Motion to Dismiss, *Doe v. Univ. of S. Miss.*, No. 3:18-cv-00138 (S.D. Miss. Dec. 11, 2018).

82. *See, e.g.*, U.S. DEP’T OF EDUC., OFFICE OF CIVIL RIGHTS, KNOW YOUR RIGHTS: TITLE IX PROHIBITS SEXUAL HARASSMENT AND SEXUAL VIOLENCE WHERE YOU GO TO SCHOOL 1 (2020), <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-rights-201104.pdf> (noting that Title IX “is a Federal civil rights law”).

83. SUNY Comment, *supra* note 49, at 54; *see also Why Schools Handle Sexual Violence Reports*, KNOW YOUR IX, <https://www.knowyourix.org/issues/schools-handle-sexual-violence-reports/> (last visited Mar. 28, 2020) (noting how colleges and universities respond to campus sexual assault outside of the criminal justice system).

84. *See* SUNY Comment, *supra* note 49, at 55.

85. Students are rarely expelled for campus sexual assault. Although temporary dismissal is more common, both sanctions are rarer than less serious sanctions. *See, e.g.*, Tyler Kingkade, *Fewer Than One-Third of Campus Sexual Assault Cases Result in Expulsion*, HUFFPOST (Dec. 6, 2017, 8:59 AM), https://www.huffpost.com/entry/campus-sexual-assault_n_5888742. Transcript notations are even rarer and are only required in New York and Virginia. *See* N.Y. Educ. Law § 6444(6) (McKinney 2019); VA. CODE ANN. § 23.1-900 (2019); Jake New, *Requiring a Red Flag*, INSIDE HIGHER ED. (July 10, 2015), <https://www.insidehighered.com/news/2015/07/10/states-requiring-colleges-note-sexual-assault-responsibility-student-transcripts>.

86. SUNY Comment, *supra* note 49, at 60.

87. *See, e.g.*, *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017) (citing *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005)).

track the judicial system.”⁸⁸ Accordingly, it is improper for the Sixth Circuit to “graft[] the Sixth Amendment onto student disciplinary proceedings.”⁸⁹

C. *Baum is Not the Consensus Approach*

The proposed rulemaking is improperly grounded in the Department of Education’s flawed reading of a single, split circuit decision: *Baum*.⁹⁰ The Sixth Circuit approach is “inconsistent with myriad decisions of other circuits and state law.”⁹¹ For example, the First Circuit recently refused to apply the *Baum* precedent, noting that the decision went too far in mandating that state schools facilitate cross-examination by the accused or their representative in all cases where credibility is in dispute.⁹² The First Circuit pointed out that while it could “easily join” the *Baum* precedent, it “[took] seriously the admonition that student disciplinary proceedings need not mirror common law trials.”⁹³ Additionally, the Second Circuit has held that cross-examination is not an “essential requirement of due process” in campus disciplinary adjudications.⁹⁴ The Eleventh Circuit has also found that “cross-examination of witnesses and a full adversary proceeding” need not be provided so long as “basic fairness” is preserved.⁹⁵ Other circuits have emphasized that campus adjudications should not mirror the judicial system.⁹⁶ Precedent mirroring *Baum* at the circuit level is lacking.⁹⁷

88. See, e.g., *Univ. of Cincinnati*, 872 F.3d at 400 (citing *Plummer v. Univ. of Houston*, 860 F.3d 767, 774 (5th Cir. 2017)).

89. Defendant’s Supplement in Support of Motion to Dismiss, *supra* note 81, at 5.

90. It should be noted that the Sixth Circuit to date has not overturned this precedent.

91. SUNY Comment, *supra* note 49, at 60.

92. *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69 (1st Cir. 2019). The First Circuit has traditionally held that “the right to unlimited cross-examination has not been deemed an essential requirement of due process in school disciplinary cases.” *Gorman v. Univ. of R.I.*, 837 F.2d 7, 16 (1st Cir. 1988).

93. *Haidak*, 933 F.3d at 69–70. The First Circuit also noted that it had “no reason to believe that questioning of a complaining witness by a neutral party is so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation” and that “[if] we were to insist on a right to party-conducted cross-examination, it would be a short slide to insist on the participation of counsel able to conduct such examination, and at that point the mandated mimicry of a jury-waived trial would be near complete.” *Id.*

94. *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972).

95. *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987).

96. See, e.g., *Plummer v. Univ. of Houston*, 860 F.3d 767, 775–76 (5th Cir. 2017) (“[A] school is an academic institution, not a courtroom or administrative courtroom.”) The court in *Plummer* refused to determine “whether confrontation and cross-

Recent district court decisions outside the Sixth Circuit have not followed *Baum*. For example, a court in the Second Circuit recently held that “while the *Baum* court did hold that a university must allow cross examination by a representative, that holding is not binding on this Court.”⁹⁸ Additionally, a court in the Third Circuit repudiated *Baum* in *Doe v. Princeton University*, noting that there is “no authority showing that the Third Circuit or this Court has adopted the same reasoning.”⁹⁹ In early 2019, courts in the Second Circuit¹⁰⁰ and Eighth Circuit¹⁰¹ held that a circumscribed form of cross-examination is acceptable. Additionally, courts in the Fourth Circuit recently found that “the accused” is not entitled to “trial-like” rights of confrontation or cross-examination at disciplinary proceedings.¹⁰² District courts in the Fifth Circuit,¹⁰³ Seventh Circuit,¹⁰⁴ Tenth Circuit,¹⁰⁵ Eleventh Circuit,¹⁰⁶ and D.C. Circuit¹⁰⁷ also have yet to adopt *Baum*.

examination would ever be constitutionally required in student disciplinary proceedings.” *Id.* at 775.

97. See Mann, *supra* note 76, at 658 (noting “no federal appellate court has held that there is an affirmative right to adversarial cross-examination in the educational context”).
98. Doe v. Haas, No. 19-CV-0014 (DRH) (AKT), 2019 U.S. Dist. LEXIS 211575, at *26 (E.D.N.Y. Dec. 9, 2019).
99. Doe v. Princeton Univ., No. 18-16539 (MAS) (LHG), 2019 U.S. Dist. LEXIS 4449, at *20 (D.N.J. Jan. 9, 2019). A recent Third Circuit decision “decline[d] to address” *Baum* with regard to the issue of cross-examination in campus sexual assault adjudications. See Doe v. Univ. of the Scis., No. 19-358, 2019 U.S. Dist. LEXIS 125592, at *9 (E.D. Pa. July 29, 2019).
100. Doe v. Rensselaer Polytechnic Inst., No. 1:18-CV-1374 (FJS/CFH), 2019 U.S. Dist. LEXIS 5396, at *21 (N.D.N.Y. Jan. 11, 2019).
101. “Doe was afforded an opportunity to submit questions to the hearing panel for cross-examination of Roe and other witnesses.” Doe v. Univ. of Ark-Fayetteville, No. 5:18-CV-05182, 2019 U.S. Dist. LEXIS 57889, at *27 (W.D. Ark. Apr. 3, 2019).
102. Byerly v. Va. Polytechnic Inst. & State Univ., No. 7:18-cv-16, 2019 U.S. Dist. LEXIS 49952, at *20–21 (W.D. Va. Mar. 25, 2019). See also Doe v. Fairfax Cty. Sch. Bd., No. 1:19-cv-65 (AJT/MSN), 2019 U.S. Dist. LEXIS 170577, at *21 (E.D. Va. Sept. 11, 2019) (noting that “[d]ue process does not require the opportunity to cross-examine the accuser or witnesses, as the Fourth Circuit ‘has not found a basis in the law’ for ‘importing’ the right to cross-examination ‘into the academic context’”).
103. Although this may change in the case of *Doe v. University of Mississippi*, No. 3:18-CV-138-DPJ-FKB, 2019 U.S. Dist. LEXIS 7490, at *25 (S.D. Miss. Jan. 16, 2019).
104. The Seventh Circuit recently declined to examine whether adversarial cross-examination is required in campus sexual assault adjudications. Doe v. Purdue Univ., 928 F.3d 652, 664 n.4 (7th Cir. 2019) (noting that “[b]ecause John has otherwise alleged procedural deficiencies sufficient to survive a motion to dismiss, we need not address” whether John was entitled to cross-examine Jane in light of the *Baum* precedent).
105. Although this may change in the case of *Norris v. University of Colorado-Boulder*, 362 F. Supp. 3d 1001, 1020 (D. Colo. 2019), which noted that the Tenth Circuit has

Courts in the Ninth Circuit have perhaps been the most favorable to *Baum*.¹⁰⁸ In *Powell v. Montana State University*, the court noted that “[a]lthough the Ninth Circuit has not yet adopted the [*Baum* precedent], it has expressed its view that a charge resulting in a disciplinary suspension of a student ‘may require more formal procedures’ to satisfy components of our system of constitutional due process.”¹⁰⁹ A California state appeals court also recently embraced the *Baum* precedent, finding that “[w]here credibility is central to a university’s determination, a student accused of sexual misconduct has a right to cross-examine the accuser . . . if the university does not want the accused to cross-examine the accuser under any scenario, then it must allow a representative to do so.”¹¹⁰ Proponents of *Baum* may suggest that these decisions are indicative of changing tides in the Ninth Circuit and even nationally. However, at this juncture, the majority of circuit courts and lower district courts have yet to find that direct, adversarial cross-examination is required by the Due Process Clause in all cases at public institutions where credibility is in dispute.¹¹¹

not yet adopted *Baum*, but that “several district courts have found that a lack of meaningful cross-examination may contribute to a violation of due process rights of an accused student in a disciplinary hearing regarding sexual assault.”

106. Shepard’s search of *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) in the 11th Circuit, LEXIS ADVANCE, <https://advance.lexis.com/> (search 903 F.3d 575; then click “Shepardize this document”).
107. Shepard’s search of *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018) in the D.C. Circuit, LEXIS ADVANCE, <https://advance.lexis.com/> (search 903 F.3d 575; then click “Shepardize this document”).
108. See *Powell v. Mont. State Univ.*, No. CV 17-15-BU-SEH, 2018 WL 6728061, at *7 (D. Mont. Dec. 21, 2018).
109. *Powell*, No. CV 17-15-BU-SEH, 2018 WL 6728061, at *7 (D. Mont. Dec. 21, 2018). It should be noted that the assertions by the Montana District Court ruling on a motion for summary judgment in *Powell* may not be indicative of the Ninth Circuit as a whole.
110. *Doe v. Allee*, 242 Cal. Rptr. 3d 109, 134 (Cal. Ct. App. 2019).
111. See *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56, 69–70 (1st Cir. 2019); *Plummer v. Univ. of Houston*, 860 F.3d 767, 774 (5th Cir. 2017); *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987); *Winnick v. Manning*, 460 F.2d 545, 549–50 (2d Cir. 1972); *Doe v. Haas*, No. 19-CV-0014 (DRH)(AKT), 2019 WL 6699910, at *9–10 (E.D.N.Y. Dec. 9, 2019); *Doe v. Fairfax Cty. Sch. Bd.*, 403 F. Supp. 3d 508, 520 (E.D. Va. 2019); *Doe v. Univ. of the Scis.*, No. 19-358, 2019 WL 3413821, at *5 (E.D. Pa. July 29, 2019); *Byerly v. Va. Polytechnic Inst. & State Univ.*, No. 7:18-cv-162019, 2019 WL 1370873, at *8 (W.D. Va. Mar. 25, 2019); *Doe v. Univ. of Miss.*, 361 F. Supp. 3d 597, 613 (S.D. Miss. 2019); *Doe v. Rensselaer Polytechnic Inst.*, No. 1:18-CV-1374 (FJS/CFH), 2019 WL 181280, at *7 (N.D.N.Y. Jan. 11, 2019); *Doe v. Princeton Univ.*, No. 18-16539 (MAS) (LHG), 2019 WL 161513, at *7 (D.N.J. Jan. 9, 2019).

Although adjudications in various circuits are ongoing and there is potential for the *Baum* precedent to expand, the Department of Education should step aside and leave these decisions to the courts. Discerning the dictates of due process is a job vested in the courts, not the Department of Education.¹¹² Indeed, “[c]ourts have superior competence in interpreting—and constitutionally vested authority and responsibility to interpret—the content of the Constitution.”¹¹³ Although judges are implored to afford considerable deference to agency interpretations of their own organic statutes, they need not defer to agency interpretations of the Constitution.¹¹⁴

II. THE PROPOSED RULEMAKING LACKS A STRONG EMPIRICAL FOUNDATION

This section explores the value of cross-examination in campus sexual assault adjudications. None of the arguments presented here should be construed to advocate for eliminating cross-examination in criminal settings. The next section further explores key differences between those contexts.

In campus sexual assault adjudications, there is an absence of empirical evidence for the unique importance of direct, adversarial cross-examination as a truth-finding device. In improperly overextending the scope of the *Baum* precedent, the proposed rulemaking fails to detail compelling justifications for mandating direct, adversarial cross-examination. The only support¹¹⁵ the Department of Education provides for this extension is a citation to the conclusory John Henry Wigmore quote, asserting that cross-examination is the “greatest legal engine

112. See *Doe v. Univ. of S. Miss.*, No. 2:18-cv-00153, slip op. at 7 (S.D. Miss. Nov. 27, 2018) (citing *Jarita Mesa Livestock Grazing Ass’n v. U.S. Forest Serv.*, 58 F. Supp. 3d 1191, 1232 (D.N.M. 2014)).

113. *Jarita Mesa*, 58 F. Supp. 3d at 1232.

114. See, e.g., *Jarita Mesa*, 58 F. Supp. 3d at 1232 (citing *U.S. West, Inc. v. F.C.C.*, 182 F.3d 1224, 1231 (10th Cir. 1999)) (“Courts afford agencies no deference in interpreting the Constitution.”); *Univ. of S. Miss.*, slip op. at 9.

115. The proposed rulemaking does cite to *Doe v. Baum*, which goes slightly further in its explanation of the value of cross-examination and emphasizes that “[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test her memory, intelligence, or potential ulterior motives. Nor can the factfinder observe the witness’s demeanor under that questioning.” 903 F.3d 575, 582 (6th Cir. 2018). Still, this explanation fails to offer support for how adversarial methods are more effective in probing memory, intelligence, and ulterior motives.

ever invented for the discovery of truth.”¹¹⁶ However, even this conclusory quotation is taken out of context, as Wigmore went on to offer a caveat that “[a] lawyer can do anything with cross-examination . . . He may, it is true, do more than he ought to do; he . . . may make the truth appear like falsehood.”¹¹⁷ As Wigmore himself recognized, cross-examination can distort the truth and hinder just outcomes.¹¹⁸

In fact, there is a lack of empirical evidence for the importance of cross-examination as a truth-finding device. *Baum* claims that cross-examination is uniquely valuable in highlighting confusion and gaps in memory, uncovering potential ulterior motives, and providing valuable demeanor evidence.¹¹⁹ However, experimental support indicates the opposite. Below, I deal with each of these proposed benefits of cross-examination in turn.

First, some scholars suggest cross-examination is most useful in revealing gaps in memory and problems in perception.¹²⁰ However, cross-examination is not uniquely valuable for this purpose. Forgetfulness or confusion can just as easily be highlighted by presenting conflicting testimony in the absence of cross-examination.¹²¹ Additionally, errors in recollection may be more indicative of witness truthfulness than decep-

116. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61476 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106); Education Law Center, Comment Letter on Proposed Rule Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-17740> [hereinafter Education Law Center Comment] (noting that “[t]he Department fails to explain, beyond a single quote from John Henry Wigmore, why cross-examination is more likely to find the truth than less confrontational methods of probing and investigating, such as utilizing written questions”).

117. Education Law Center Comment, *supra* note 116, at 17.

118. Frank E. Vandervort, *A Search for the Truth or Trial by Ordeal: When Prosecutors Cross Examine Adolescents How Should Courts Respond?*, 16 WIDENER L. REV. 335, 335 (2010) (citing 5 JOHN HENRY WIGMORE, EVIDENCE IN TRIALS AT COMMON LAW, § 1367, at 32 (James H. Chabourn ed., 1974)). This is particularly concerning in the campus sexual assault context, which can lack trained adjudicators and representatives, as well as the rules of evidence.

119. See *Baum*, 903 F.3d at 582 (noting that “[w]ithout the back-and-forth of adversarial questioning, the accused cannot probe the witness’s story to test her memory, intelligence, or potential ulterior motives”).

120. These include law professors Edmund M. Morgan and Charles T. McCormick. See ROGER PARK & TOM LININGER, THE NEW WIGMORE: A TREATISE ON EVIDENCE, IMPEACHMENT AND REHABILITATION, § 1.6 (2019).

121. *Id.* (“[F]or example, by presenting testimony that a witness was not wearing glasses and testimony that the witness needed them.”).

tion.¹²² Witnesses who lie are often able to tell the same story time and again without gaps or mistakes.¹²³ Usually, deceptive witnesses cannot be broken by either oath or counsel unless “either witness or counsel is unusually stupid.”¹²⁴ Meanwhile, studies have shown that the stress of cross-examination “impairs memory and reduces the accuracy of testimony.”¹²⁵ Cross-examination’s value in uncovering gaps in memory or perception is duplicative at best and misleading at worst.

Second, proponents of cross-examination suggest that its principal value lies in its capacity to reveal and inhibit deception.¹²⁶ However, it should be noted that social psychologists have yet to study the role of cross-examination in uncovering evasion or ulterior motives.¹²⁷ It is unclear whether cross-examination offers any unique benefits in this role. What is clear is that there are other ways of revealing biases or ulterior motives that are less harmful to the accuser.¹²⁸ For example, the observations of an eyewitness can highlight “bias, insanity, or inconsistencies.”¹²⁹ Relying on hearsay is acceptable here as in many similar civil contexts. Adjudicators are able to rely upon hearsay evidence instead of cross-examination in findings of responsibility in prisons that may add years to a prisoner’s sentence, child custody determinations, adjudications on Social Security Disability benefits, as well as decisions to revoke a police officer’s duty disability payments or a store’s cigarette and lottery license.¹³⁰ Beyond hearsay, there are other tools to uncover a majority of the information solicited on cross-examination including “calling other witnesses or by describing inferences in final argument.”¹³¹

Anecdotal evidence suggests that efforts to elicit inconsistent statements on cross-examination typically fail.¹³² For example, Judge John Kane noted that most evocations of prior inconsistent statements are

122. Cf. Edmund M. Morgan, *Hearsay Dangers and the Application of the Hearsay Concept*, 62 HARV. L. REV. 177, 186–88 (1948) (noting that a witness willing to commit perjury on cross-examination will “tell a simple story, free of all complications [and] try to explain suggested inconsistencies; he will purport to remember only the rather obvious and give no reason for failure to remember anything else”).

123. *Id.* at 186.

124. *Id.*

125. STEPHEN J. ADLER, *THE JURY: TRIAL AND ERROR IN THE AMERICAN COURTROOM* 210 (1994).

126. PARK & LININGER, *supra* note 120, at § 1.8.

127. *Id.* at § 1.7.

128. *See id.* at § 1.1.

129. *Id.*

130. *See* SUNY Comment, *supra* note 49, at 62.

131. PARK & LININGER, *supra* note 120, at § 1.8.

132. *See, e.g.*, John L. Kane, *Judging Credibility*, 33 LITIGATION 31, 32 (2007); Morgan, *supra* note 122, at 188; PARK & LININGER, *supra* note 120, at § 1.11.

“trivial and seldom lead to an admission that the present testimony is false.”¹³³ The revelation of “willful falsehood” on cross-examination is rare.¹³⁴ It should also be noted that the value in demonstrating deception varies based on the context of a case. Lies in response to humiliating or degrading questions about topics such as sex acts are not necessarily indicative of a willingness to lie about other matters.¹³⁵ Not only are efforts to uncover inconsistent statements likely to fail in campus sexual assault adjudications, but any “lies” uncovered may stem from shame rather than deception or false accusation.¹³⁶

Third, case law connects the importance of cross-examination to the ability to assess a witness’s demeanor and thus probe his or her credibility. The court in *Baum* noted that “the value of cross-examination is tied to the fact-finder’s ability to assess the witness’s demeanor.”¹³⁷ There is a belief that the way a person testifies is uniquely informative of whether a person is worthy of belief.¹³⁸ However, it should be noted that there is no support for demeanor evidence being more valuable in probing credibility than any number of the credibility assessment tools offered in typical jury instructions.¹³⁹ Jury instructions do not privilege any particular method of credibility assessment, instead offering jurors various ways to probe credibility, including (1) the impact of a witness’s “background, training, education, or experience” on their credibility; (2) an assessment of a witness’s biases, motivations, and interests in the outcome of the case, and potential motives to lie; (3) a witness’s criminal background; and (4) the relative consistency between the statements of a witness and the statements of others.¹⁴⁰ Beyond conclusory allegations for the unique value of demeanor evidence, there seems to be no reason for valuing demeanor evidence and live testimony over other forms of circumscribed cross-examination in campus sexual assault adjudications permissible under the *University of Cincinnati* precedent.

Additionally, empirical evidence indicates that demeanor evidence is actually more harmful than helpful in campus sexual assault adjudica-

133. See Kane, *supra* note 132, at 32.

134. Morgan, *supra* note 122, at 186.

135. PARK & LININGER, *supra* note 120, at § 1.11.

136. See *id.*

137. Doe v. Baum, 903 F.3d 575, 585 (6th Cir. 2018) (citing Doe v. Univ. of Cincinnati, 872 F.3d 393, 402 (6th Cir. 2017)).

138. Baum, 903 F.3d at 581; *Univ. of Cincinnati*, 872 F.3d at 402.

139. N.Y. STATE UNIFIED COURT SYSTEM, *Credibility of Witnesses*, in 2 CRIMINAL JURY INSTRUCTIONS: INSTRUCTIONS OF GENERAL APPLICABILITY (2018), <https://www.nycourts.gov/judges/cji/1-General/CJI2d.Credibility.pdf>.

140. *Id.* at 2–3.

tions.¹⁴¹ In 2017, the *Cornell Journal of Law and Public Policy* published a survey of available scientific evidence, which indicated that behavioral cues discerned from cross-examination are of little benefit to both laypeople and experts in detecting deception.¹⁴² There are three preeminent explanations for the limited value of demeanor evidence.

First, the stress of the courtroom minimizes the value of demeanor evidence.¹⁴³ Testifying is a strange and terrifying experience for most people, which can affect mannerisms or speech patterns.¹⁴⁴ Research indicates that “a witness’s nervous or stumbling response to adversarial questioning is more likely an ordinary human reaction to stress than an indicator of false testimony.”¹⁴⁵ Second, adjudicators are unfamiliar with the personal proclivities or mannerisms of a witness.¹⁴⁶ For example, they do not know “what makes one person stammer or hesitate.”¹⁴⁷ In the absence of baseline knowledge of a person’s behaviors, demeanor evidence is even less valuable.¹⁴⁸ Furthermore, there is not enough time to understand how each witness operates; adjudicators are only able to observe witnesses for an extremely short period of time.¹⁴⁹ Third, signs of nervousness or fear may be more strongly correlated with innocence than deception.¹⁵⁰ For those that are guilty, rehearsing arguments can bolster confidence and minimize fear of detection; meanwhile, those that are in fact innocent often fear being disbelieved, showing visible signs of fear.¹⁵¹ In light of limitations with demeanor evidence, the value of such cues may not always exceed that of chance.¹⁵² It matters not whether an adjudicator relies on facial expressions,¹⁵³ patterns of

141. H. Hunter Bruton, *Cross-Examination, College Sexual-Assault Adjudications, and the Opportunity for Tuning up the “Greatest Legal Engine Ever Invented,”* 27 CORNELL J. L. & PUB. POL’Y 145, 155–56 (2017).

142. *Id.*

143. See Kane, *supra* note 132, at 31.

144. Suzanne B. Goldberg, *Keep Cross-Examination Out of College Sexual-Assault Cases*, CHRON. HIGHER EDUC. (Jan. 10, 2019), https://www.chronicle.com/article/Keep-Cross-Examination-Out-of/245448?cid=wcontentlist_hp_5.

145. *Id.*

146. See Kane, *supra* note 132, at 31.

147. *Id.*

148. PARK & LININGER, *supra* note 120, at § 1.5.

149. See Kane, *supra* note 132, at 31.

150. PARK & LININGER, *supra* note 120, at § 1.5.

151. *Id.*

152. See ALDERT VRIJ, *DETECTING LIES AND DECEIT: PITFALLS AND OPPORTUNITIES* 234–35 (2d ed. 2008) (discussing a study finding that demeanor lie detectors had an accuracy rate of fifty-four percent).

153. See Goldberg, *supra* note 144.

speech,¹⁵⁴ or body language.¹⁵⁵ All are of little value in uncovering the truth.

On the whole, direct, adversarial cross-examination appears to be more harmful than helpful in the task of uncovering the truth in campus sexual assault adjudications. Experts contend that in this context, “aggressive, adversarial questioning is more likely to distort reality than enable truth-telling.”¹⁵⁶ Furthermore, cross-examination tends to present conflicting testimony in a dramatic fashion that can distract from the truth.¹⁵⁷ The value of cross-examination should hinge on its capacity to ensure just verdicts. Evidence suggests that cross-examination often inhibits principled outcomes; its value appears more theatrical than practical. In sum, cross-examination in campus sexual assault adjudications lacks both a substantive legal grounding and empirical support for its value as a truth-finding device.

III. THE PROPOSED RULEMAKING FAILS TO FULLY APPRECIATE AND COUNTERACT THE VAST NEGATIVE CONSEQUENCES OF COMPULSORY, LIVE CROSS-EXAMINATION

The merits of the proposed rulemaking are weakened by its neglect of significant, adverse consequences, such as negative implications for reporting rates and increased institutional costs.¹⁵⁸

154. See Kane, *supra* note 132, at 31.

155. Studies have indicated that there is a lack of evidence “to support the hypothesis that lying is accompanied by distinctive body behavior that others can discern.” PARK & LININGER, *supra* note 120, at § 1.5 (citing Olin Guy Wellborn III, *Demeanor*, 76 CORNELL L. REV. 1075, 1088 (1991)).

156. See Goldberg, *supra* note 144. Cross-examination is especially dangerous for impressionable or young witnesses, where the pressure of the adversarial questioning may steer them toward appeasing the questioner over telling the truth. See Education Law Center Comment, *supra* note 116, at 17.

157. PARK & LININGER, *supra* note 120, at § 1.8.

158. For brevity, I will neglect additional repercussions, such as lingering vulnerabilities for students under the age of 18 at colleges and universities. The proposed rule points out that cross-examination is not compulsory in adjudications at K-12 schools “[b]ecause most parties and many witnesses are minors in the [K-12] context, sensitivities associated with age and developmental ability may outweigh the benefits of cross-examination at a live hearing.” Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61476 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106). However, this dichotomy between K-12 schools and institutions of higher education ignores the fact that hundreds of thousands of college students are under the age of 18. It also fails to appreciate the fluidity of the American educational system. Intersections between institutions of higher education and K-12 schools are significant due to dual

First, mandatory cross-examination is likely to lead to a decrease in the already low reporting rates for campus sexual assault. Aggressive and dramatic questioning that focuses on detailed and humiliating aspects of the assault without protections will only exacerbate the power dynamics between the victim and the accused. Second, the proposed rulemaking drastically increases the costs to colleges and universities of adjudicating sexual assault allegations. Costs include hiring adjudicators as well as training advisors for students unable to obtain independent counsel. Lastly, the proposed rulemaking neglects the *Mathews* balancing test to determine the dictates of due process in the context of campus sexual assault. It overextends due process for the accused and eliminates important due process protections for the victim.¹⁵⁹ The proposed rulemaking therefore contradicts established due process jurisprudence.

A. Adverse Implications for Reporting Rates

The proposed rulemaking disregards the impact compulsory cross-examination will have on victims and their ability to come forward. Direct cross-examination will foster a “hostile and confrontational hearing process”¹⁶⁰ with immense potential to re-traumatize survivors.¹⁶¹ Concerns for trauma are so acute in the proposed rulemaking that experts expect that students will be deterred from filing complaints.¹⁶²

A decrease in reporting is likely due to four main factors. First, popular perceptions of the general tone of cross-examination serve as strong deterrents. Cross-examination is portrayed in the media as an aggressive and dramatic device.¹⁶³ Jeffrey J. Nolan, a lawyer who advises colleges on Title IX issues, predicted that victims are likely to be

enrollment programs, summer programs, student teaching programs, and colleges operating K-12 charter schools. It is unclear which system and accompanying rights apply in cases where one party is a K-12 student and another party is a college student.

159. Analysis of the accusers’ due process rights is beyond the scope of this Comment.

160. Deborah J. Vagins, Senior Vice President, Pub. Policy & Research, Am. Ass’n of Univ. Women, Comment Re: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 15 (Jan. 30, 2019), <https://www.regulations.gov/docket?D=ED-2018-OCR-0064-31034>.

161. See Am. Psychological Ass’n, Comment on FR Doc # 2018-25314 2 (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-30626>.

162. See Goldberg, *supra* note 144.

163. See, e.g., Sarah Brown & Katherine Mangan, *What You Need to Know About the Proposed Title IX Regulations*, CHRON. HIGHER EDUC. (Nov. 16, 2018), <https://www.chronicle.com/article/What-You-Need-to-Know-About/245118>.

deterred from reporting if they “picture themselves in a courtroom being yelled at about their sexual history the way you see on TV shows.”¹⁶⁴

Second, the types of questions asked on cross-examination further dissuade survivors from coming forward.¹⁶⁵ Cross-examination will open the door to “detailed, personal, and humiliating questions often rooted in gender stereotypes and rape myths that tend to blame victims for the assault they experienced.”¹⁶⁶ Questions may be structured with the intent to embarrass or traumatize the complainant and may tactlessly delve into irrelevant or sensitive topics, such as mental health, substance abuse, or immaterial details of the alleged incident.¹⁶⁷ This risk is especially acute given the absence of the rules of evidence in campus sexual assault adjudications.¹⁶⁸

Third, the suggested limits on cross-examination fail to neutralize these risks. The proposed rulemaking places sparse limits on the types of questions that may be asked.¹⁶⁹ The proposed rulemaking proclaims that it “incorporate[s] language from (and . . . in the spirit of) the rape shield protections found in Federal Rule of Evidence (FRE) 412.”¹⁷⁰ However, the scope of the exceptions under FRE 412 (or a rule mirroring it) is vast. For example, the exception for admitting “evidence when its exclusion would violate the defendant’s constitutional rights” has traditionally been especially dangerous in exposing a victim to harmful questioning.¹⁷¹ In the legal system, courts frequently “misinterpret and

164. *Id.*

165. *See, e.g.*, Nat’l Coal. for Women and Girls in Educ., Comment RE: ED Docket No. ED-2018-OCR-0064, RIN 1870-AA14, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance 5 (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-18420> [hereinafter NCWGE Comment].

166. *Id.*

167. Andrew Kreighbaum, *New Uncertainty on Title IX*, INSIDE HIGHER ED. (Nov. 20, 2018) <https://www.insidehighered.com/news/2018/11/20/title-ix-rules-cross-examination-would-make-colleges-act-courts-lawyers-say>.

168. Questions may contain assertions that “hurt the witness without much advancing the cause of truth-finding.” PARK & LININGER, *supra* note 120, at § 1.10.

169. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,476 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (laying out the limits on cross-examination).

170. *Id.* Notably, the exceptions to FED. R. EVID. 412 are also incorporated into the proposed rule.

171. Michelle J. Anderson, *From Chastity Requirement to Sexuality License: Sexual Consent and a New Rape Shield Law*, 70 GEO. WASH. L. REV. 51, 56 (2002) (noting that this exception “often crumbles what is left of the [rape] shield because courts routinely

exaggerate” this exception.¹⁷² A similar result would likely take place in campus sexual assault adjudications.¹⁷³

The proposed rulemaking also boldly asserts that it will “avoid[] any unnecessary trauma that could arise from personal confrontation” by ensuring that an advisor (rather than the accused) questions the victim and allowing either side to ask for the parties to be located in different rooms for cross-examination.¹⁷⁴ However, these protections do not go far enough. The proposed rulemaking does not mandate sophisticated representatives and adjudicators.¹⁷⁵ It fails to dictate who may conduct cross-examination (apart from the exclusion of the parties), as well as what qualifications or training are necessary.¹⁷⁶ This means that “individuals wholly untrained in cross-examination, such as fraternity brothers, parents, peers, or even faculty members” will be tasked with carrying out cross-examination.¹⁷⁷ Mistakes in properly discerning and respecting the bounds of exceptions to FRE 412 are expected to be exacerbated by untrained representatives and adjudicators.¹⁷⁸ As a result, proceedings are expected to be “chaotic [and] uncontrolled.”¹⁷⁹

Fourth, contrasts in resources and institutional power between the victim and the accused could discourage victims from seeking justice. Assailants appear to target vulnerable parties.¹⁸⁰ In Title IX cases, there have long been concerns about the stark contrasts between male respondents who can afford counsel and female reporting parties who cannot.¹⁸¹ Demographics such as “children; immigrants; those

misinterpret and exaggerate the scope of the defendant’s constitutional right to inquire into the complainant’s sexual history . . .”).

172. *Id.* (noting this is especially true when “complainant is deemed promiscuous with the defendant or others”).

173. The room for error in misinterpreting and exaggerating this exception is perhaps even greater in the campus sexual assault adjudication process, which tends to lack legal counsel and adjudicators with legal training.

174. Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61,476.

175. *See id.*

176. *See id.*

177. Victim Rights Law Ctr., Public Comment by the Victim Rights Law Ctr. on the Dep’t of Ed.’s Proposed Regulations Regarding Title IX of the Education Amendments of 1972, 29 (2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-6471> [hereinafter VRLC Comment].

178. *Id.*

179. *Id.*

180. See Kathryn Casteel et al., *What We Know About Victims of Sexual Assault in America*, FIVETHIRTYEIGHT (Jan. 2, 2018, 10:30 AM), <https://projects.fivethirtyeight.com/sexual-assault-victims/> (noting that “perpetrators are more likely to target victims who are less likely to report what happened,” notably poor women).

181. *Id.*

dependent upon the harasser for employment, scholarship funds or work study or a letter of recommendation in their chosen field; individuals with disabilities; transgender and gender non-binary [persons]” are also especially vulnerable in sexual assault adjudications.¹⁸² The more active and adversarial role of advisors under the proposed rulemaking compounds these concerns. If a victim knows that a perpetrator has institutional power, access to substantial resources, and sophisticated counsel, this will create a “powerful incentive to not persist.”¹⁸³

As a result of these factors, the proposed rulemaking is expected to cause as high as a fifty-percent drop in reporting.¹⁸⁴ This is especially alarming given that anecdotal evidence on college campuses indicates that students are already under-reporting due to the burdens of existing procedure.¹⁸⁵ Currently, roughly seventy-seven percent of rape and sexual assault cases *are not* reported.¹⁸⁶ As procedural requirements expand, reporting is anticipated to decline further.¹⁸⁷ The proposed rulemaking reflects a clear concern for preventing false accusations.¹⁸⁸ However, false accusations are estimated to be as low as two to eight percent.¹⁸⁹ In its efforts to combat false reporting, the proposed rulemaking heightens the risk of under-reporting—a far more pervasive problem in the campus sexual assault adjudication process.¹⁹⁰

182. SUNY Comment, *supra* note 49, at 50.

183. Kreighbaum, *supra* note 167.

184. *Id.*

185. See, e.g., Emily A. Springston, Univ. Dir. of Inst. Equity & Title IX, Ind. Univ., Comment Letter Re: ED-2018-OCR-0064 (Jan. 30, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-14825> [hereinafter IU Comment].

186. Ronda M. Baldwn, Title IX Adm’r, Ohio Christian Univ., Comment on Notice of Proposed Title IX Rulemaking, 2 n.6 (Jan. 28, 2019) <https://www.regulations.gov/document?D=ED-2018-OCR-0064-68557> [hereinafter OCU Comment] (citing Casteel et al., *supra* note 180).

187. See IU Comment, *supra* note 185.

188. See Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,474 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

189. See OCU Comment, *supra* note 186, at 2 n.6 (citing David Lisak et al., *False Allegations of Sexual Assault: An Analysis of Ten Years of Reported Cases*, 16 VIOLENCE AGAINST WOMEN 1318, 1322 (2010)).

190. E.g., Michael K. Le Roy, President, Calvin Coll., Comment on Notice of Proposed Title IX Rulemaking, 2 (Jan. 28, 2019), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-68547> [hereinafter Calvin College Comment].

B. Significant Costs Incurred by Colleges and Universities

The proposed rulemaking disregards the substantial costs colleges and universities will incur from implementing these procedures. The proposed rulemaking proclaims that compulsory, live cross-examination is not anticipated to result in any substantively increased costs for higher education institutions.¹⁹¹ However, the cost estimate “assume[s] all parties obtain counsel,”¹⁹² a proposition that is highly unlikely and unfounded. It also ignores substantial costs universities will incur from training advisors and defending lawsuits.¹⁹³

Under the proposed rulemaking, colleges and universities would be required to provide students with advisors when they are unable to obtain one on their own accord.¹⁹⁴ Colleges and universities are expected to be regularly tasked with fulfilling this obligation.¹⁹⁵ Some advocates have suggested that colleges and universities must provide students with access to legal counsel in light of these new changes.¹⁹⁶ Although the provision of counsel is not strictly required, many institutions will feel substantial pressure to hire lawyers to serve as advisors and retired judges to serve as adjudicators in these hearings, resulting in substantial increased compliance costs.¹⁹⁷ The State University of New York has estimated that “the likely costs of a single proceeding will easily run into the tens of thousands of dollars.”¹⁹⁸ The financial implications of university-provided counsel are impractical for the overwhelming majority of institutions across the country.¹⁹⁹

191. See generally Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61,476. The proposed rulemaking on Title IX in the aggregate predicts cost savings up to \$367.7 million over a ten year period. *Id.* at 61,484.

192. *Id.* at 61,488.

193. See SUNY Comment, *supra* note 49, at 5, 57.

194. Nondiscrimination on the Basis of Sex in Education, 83 Fed. Reg. at 61,488.

195. See e.g., Goldberg, *supra* note 144.

196. *Id.*

197. For example, Baylor has hired retired judges to conduct campus sexual assault adjudications on multiple occasions and at great expense. See Sarah Brown, *When Kenneth Starr Gives the Keynote at a Higher Ed Conference*, CHRON. HIGHER EDUC. (Feb. 3, 2019), <https://www.chronicle.com/article/When-Kenneth-Starr-Gives-the/245602>.

198. SUNY Comment, *supra* note 49, at 65. See also, OCU Comment, *supra* note 186, at 5 (noting the substantial costs of the proposed rulemaking).

199. Goldberg, *supra* note 144 (noting “[o]f more than 4,000 higher-education institutions in the United States, few have lawyers on staff to serve in that role, and even fewer (just over 200) have accredited law schools with faculty members or students who might pitch in”).

Even if institutions of higher education need not hire attorneys to serve as advisors and conduct cross-examinations, advisors and adjudicators presumably must be trained to conduct cross-examinations effectively and in accordance with the proposed rulemaking, while minimizing trauma to the victim.²⁰⁰ Designing and executing a training regime would undoubtedly result in a significant expenditure of money and resources.²⁰¹ An especially challenging detail will be managing advisors that lack an institutional affiliation.²⁰² Technically speaking, the proposed rulemaking lacks guidance on what sort of training is necessary.²⁰³ At this juncture, it seems that it is possible for institutions to provide no specialized training to advocates or adjudicators whatsoever.²⁰⁴ However, for those institutions that bypass specialized training, the likelihood of victim re-traumatization and adverse reporting implications will rise substantially.²⁰⁵ Such evasion of responsibility could also expose universities to greater liability.²⁰⁶

It is plausible that colleges and universities will be exposed to litigation challenging the execution of cross-examination in adjudications.²⁰⁷ For example, survivors may sue for improper adherence to rules mirroring FRE 412.²⁰⁸ Students provided advisors by their institution may raise claims analogous to ineffective assistance of counsel.²⁰⁹ The costs associated with such litigation could be substantial.²¹⁰

It is true that some universities are positioned to meet these substantial anticipated costs. Elite private colleges and well-resourced public universities may be equipped to meet this requirement.²¹¹ For example, the court in *Baum* pointed out that the financial impact at the Universi-

200. See IU Comment, *supra* note 185, at 3.

201. *Id.*

202. *Id.*

203. See, e.g., Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,476 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (explaining cross-examination requirement without providing for training requirements).

204. *Id.*

205. See IU Comment, *supra* note 185, at 10 (noting the importance of specialized training).

206. *Id.*

207. See, e.g., Kreighbaum, *supra* note 167.

208. *Id.* FED. R. EVID. 412 generally prohibits the use of (1) “evidence offered to prove that a victim engaged in other sexual behavior” or (2) “evidence offered to prove a victim’s sexual predisposition” in civil or criminal cases involving alleged sexual misconduct. Discrete exceptions to this rule are noted in FED. R. EVID. 412(b).

209. See, e.g., Kreighbaum, *supra* note 167. See also IU Comment, *supra* note 185, at 10.

210. See SUNY Comment, *supra* note 49, at 5, 14.

211. Kreighbaum, *supra* note 167.

ty of Michigan should be limited, given that the university provides for a hearing with cross-examination in all other disciplinary adjudications.²¹² However, there are still many universities that lack the financial resources and staff necessary to meet this requirement.²¹³ For those schools, the costs associated with the proposed rulemaking could result in tuition hikes and significant cuts in academic programming.²¹⁴ In sum, the proposed rulemaking's assertion that substantial increased costs should not be anticipated is unfounded. Considerations of the impacts on reporting and increased costs weigh heavily in the *Mathews* balancing described below.

C. Neglect of the Mathews Balancing Test

The proposed rulemaking improperly bypasses the *Mathews* balancing test.²¹⁵ The process owed is context specific; the dictates of due process are established via a case-by-case approach applying the *Mathews* test.²¹⁶ Under this test, the amount of process owed is based on: "(1) the nature of the private interest subject to official action; (2) the risk of erroneous deprivation under the current procedures used, and the value of any additional or substitute procedural safeguards; and (3) the governmental interest, including the burden any additional or substitute procedures might entail."²¹⁷ The blanket mandate in the proposed rulemaking obliterates individuated analysis under *Mathews* to discern whether cross-examination is warranted in a particular case.²¹⁸ Even assuming an individualized assessment was unnecessary, and all colleges and claims were substantially similar in positioning, the proposed rulemaking fails to pass muster under a holistic application of the *Mathews* balancing

212. *Doe v. Baum*, 903 F.3d 575, 582 (6th Cir. 2018). Although additional expenditures should still be expected, Michigan has a substantial endowment. Still, *Baum* neglects associated costs, such as specialized training necessary for campus sexual assault advisors and adjudicators, as well as increased exposure to liability.

213. See, e.g., OCU Comment, *supra* note 186, at 5.

214. SUNY Comment, *supra* note 49, at 65.

215. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,475-76 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

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

217. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) (citing *Mathews*, 424 U.S. at 334-35).

218. Note that *Baum* left room for cases where credibility was not an issue, at least allowing for some individual analysis. The proposed rulemaking obliterates any remaining capacity to determine what process is warranted in a discrete context.

test. Instead, the proposed rulemaking exaggerates the due process rights of the accused while minimizing those of the accuser.

First, it is necessary to assess the private interest at stake.²¹⁹ In campus sexual assault adjudications, there is a property interest²²⁰ in higher education as well as a liberty interest stemming from the adverse implications of a guilty finding on a student's reputation and integrity.²²¹ It should be noted that the property rights in dispute in campus sexual assault adjudications are weaker than the property rights at issue in the K-12 education setting, given that the right to a K-12 education is guaranteed by law.²²² Still, the interests in dispute are significant. The court in *University of Cincinnati* noted that "[a] finding of responsibility for a sexual offense can have a 'lasting impact' on a student's personal life, in addition to his 'educational and employment opportunities,' especially when the disciplinary action involves a long-term suspension."²²³ However, it is necessary to keep in mind the range of sanctions in university adjudications. Campus sexual assault adjudications rarely result in suspension, and even more rarely result in expulsion.²²⁴ More importantly, even the harshest penalty—expulsion with a transcript notation—pales in comparison to prison, sex offender registration, or other forms of criminal sanction.²²⁵ In sum, while there is a significant private interest at stake, severe consequences are rare and fall far short of criminal consequences.

Second, the risk of erroneous deprivation and the value of additional safeguards must be considered.²²⁶ Case law suggests a high risk of

219. *Univ. of Cincinnati*, 872 F.3d at 399 (citing *Mathews*, 424 U.S. at 334–35).

220. The property interest stems from the significant temporal and monetary investments in a college education. See O'Toole, *supra* note 22, at 530.

221. See *Univ. of Cincinnati*, 872 F.3d at 399.

222. SUNY Comment, *supra* note 49, at 59.

223. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 400 (6th Cir. 2017).

224. Suspensions are often brief in duration. It is estimated that only thirteen to thirty percent of students found responsible for sexual assault are suspended from institutions of higher education. Kingkade, *supra* note 85. Even for those students who receive a punishment like expulsion or suspension, only two states (New York and Virginia) require transcript notations explaining that the disciplinary action was connected to sexual assault. See New, *supra* note 85. This allows perpetrators found guilty of sexual assault to easily transfer to a new school and resume their education. *Id.*

225. The discrepancy in punishments doled out by colleges and universities and criminal sanctions has traditionally allowed for less process in campus sexual assault adjudications. See *Univ. of Cincinnati*, 872 F.3d at 400.

226. *Univ. of Cincinnati*, 872 F.3d at 399 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

erroneous deprivation in cases involving credibility disputes.²²⁷ Credibility disputes are often central to sexual assault adjudications.²²⁸ However, the scope of the risk seems limited, given that the rate of false accusations falls between two and eight percent.²²⁹ Even if there is a substantial risk of erroneous deprivation, as discussed in Section II, there is sparse evidence that direct, adversarial cross-examination in this context by untrained advisors actually results in accurate outcomes.²³⁰ Contrarily, evidence suggests cross-examination can inhibit efforts to uncover the truth.²³¹ There are also reasonable alternatives to direct, adversarial cross-examination for probing the truth.²³² In fact, the Department of Education freely admits that written questions submitted by students or oral questioning conducted by a neutral adjudicator are lawful and fair methods to discern the truth in K-12 adjudications.²³³ Several courts have echoed the merits of a circumscribed form of cross-examination, preferring the approach to direct, adversarial cross-examination.²³⁴ For these reasons, the likelihood of an erroneous deprivation of private interests appears limited, and the value of adversarial cross-examination as an additional safeguard is lacking.²³⁵

Third, the government interest (i.e. the college or university's interest) and the burden of additional or substitute procedures must be contemplated.²³⁶ Courts have consistently noted skepticism of formalizing campus adjudications²³⁷ due to the significant burden of incorporat-

227. See, e.g., *Univ. of Cincinnati*, 872 F.3d at 401–02.

228. See, e.g., *Univ. of Cincinnati*, 872 F.3d at 406.

229. Furthermore, as previously mentioned, of the two to ten percent falsely accused, the vast majority will receive consequences far less severe than suspension or expulsion. OCU Comment, *supra* note 186, at 2 n.6 (citing Lisak et al., *supra* note 189, at 1322); see *supra* note 224 and accompanying text.

230. See discussion *supra* Section II (concerning the value of cross-examination as a truth-finding device).

231. See, e.g., *supra* text accompanying 119–40.

232. See, e.g., NCWGE Comment, *supra* note 165, at 6.

233. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,476 (Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

234. See, e.g., *Doe v. Rensselaer Polytechnic Inst.*, No. 1:18-CV-1374 (FJS/CFH), 2019 U.S. Dist. LEXIS 5396, at *21 (N.D.N.Y. Jan. 11, 2019); *Doe v. Univ. of Ark.-Fayetteville*, No. 5:18-CV-05182, 2019 U.S. Dist. LEXIS 57889, at *27 (W.D. Ark. Apr. 3, 2019).

235. See *Rensselaer Polytechnic Inst.*, 2019 U.S. Dist. LEXIS 5396, at *21; *Univ. of Ark.-Fayetteville*, 2019 U.S. Dist. LEXIS 57889, at *27.

236. *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017) (citing *Mathews v. Eldridge*, 424 U.S. 319, 334–35 (1976)).

237. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 583 (1975) (noting “further formalizing the suspension process and escalating its formality and adversary nature may not only

ing trial-like components, such as cross-examination, into campus sexual assault adjudications.²³⁸ College administrators are “ill-equipped” to administer adjudications involving cross-examination since they lack the legal expertise required to follow procedures analogous to the rules of evidence.²³⁹ Adversarial cross-examination also interferes with the focus on community and the education process shared by many institutions of higher education.²⁴⁰ Additionally, as noted in Section III.B, the costs and procedural difficulties of incorporating cross-examination into campus sexual assault adjudications would be great. In light of adequate substitute procedures, the added expense of administering direct, adversarial cross-examination is not only unnecessary, but also is untenable for many institutions.²⁴¹

In sum, while there is a sizeable interest at stake, the risk of erroneous deprivation appears limited. Even if the risk of erroneous deprivation is acute, it does not appear that cross-examination is successful in mitigating this risk in campus sexual assault adjudications. Meanwhile, the burden of incorporating live, adversarial cross-examination into campus adjudications would be significant and viable alternatives can be implemented. Accordingly, the *Mathews* factors weigh against the codification of the proposed rulemaking on cross-examination. While it is possible that some cases on balance call for in-person, adversarial cross-examination, the Department of Education has marshalled insufficient evidence for the value of such procedures across all cases and contexts. The proposed rulemaking overextends due process for the accused. While private institutions are free to implement processes as they see fit, it is imprudent for the Department of Education to mandate such a framework for all institutions of higher education.

CONCLUSION

As it stands, the proposed rulemaking for compulsory cross-examination is ill-conceived, lacking substantive legal and empirical support. Department of Education administrators ignore the sweeping consequences of these requirements. It seems clear that the focus is on

make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process”).

238. See, e.g., *Univ. of Cincinnati*, 872 F.3d at 404.

239. See, e.g., *Univ. of Cincinnati*, 872 F.3d at 404.

240. See, e.g., Calvin College Comment, *supra* note 190, at 2–3.

241. See discussion *supra* Section III.B (concerning the significant costs that educational institutions will incur under the proposed rule).

symbolism over substance, with the goal of appeasing advocates of the accused. Nonetheless, compulsory cross-examination should stand or fall based on its value in uncovering the truth and protecting important rights. Indeed, that is what the *Mathews* balancing test implores.²⁴² In the educational context, on balance, adversarial cross-examination is more harmful than helpful.²⁴³ The Department of Education should heed the guidance of thousands of comments and refrain from mandating compulsory adversarial cross-examination.²⁴⁴

In spite of what is legal and prudent, implementation may be inevitable. What is perhaps more troubling is that the proposed rulemaking provides little guidance or analysis on the impact of this rule and how it will work in practice.²⁴⁵ Prior to implementation, a system of rules must be conceived to constrain questioning, which provides for pertinent objections and guides adjudicators on how to rule on objections. Assuming counsel is allowed to serve in an advisory capacity, equal access to counsel must be ensured. All efforts must be taken to minimize trauma to the victim, safeguard the rights of the accused, and protect the financial viability of educational institutions.

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

243. See, e.g., Education Law Center Comment, *supra* note 116, at 29–31 (noting that cross-examination, while helpful in some contexts, is on balance inappropriate in Title IX proceedings because it can traumatize victims, spur on appeasement of the aggressor rather than truth telling, and unnecessarily legalize the Title IX process).

244. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,476 (Nov. 29, 2018), <https://www.regulations.gov/document?D=ED-2018-OCR-0064-0001> (indicating that 124,196 comments have been received).

245. A leaked earlier copy of the proposed rulemaking suggests that the compulsory cross-examination requirement was opportunistically added in the wake of *Baum*. This perhaps explains the lack of detail on how this rule will be implemented. See Dep't of Educ., Office of Civil Rights, Proposed Regulation Concerning Title IX (unpublished draft) (Aug. 25, 2018) (on file with ATIXA), https://cdn.atixa.org/website-media/o_atixa/wp-content/uploads/2019/02/18120534/Draft-OCR-regulations-September-2018.pdf.