

NOTES

[DE-]PRIORITIZING PREVENTION: A CASE AGAINST THE 2020 TITLE IX SEXUAL HARASSMENT RULE

YONAS ASFAW-COOPER*

In 2020, the Department of Education issued a final Rule pursuant to notice-and-comment rulemaking which created the most far-reaching regulation on sexual harassment in educational institutions under Title IX to date. This Rule significantly limited the availability of administrative remedies for those experiencing sexual harassment in their educational institutions. While much has been said regarding the propriety of the substantive policy decisions advanced by the Department's regulation, relatively little attention has been paid to the cost-benefit analysis (CBA) employed in the Rule. The Rule's CBA found that the regulations would result in a net cost of tens of millions of dollars. In justifying their commitment to these cost-unjustified regulations, the Department relied only on a few non-quantified benefits. To make matters worse, the Department also disclaimed any responsibility to consider whether the Rule's deregulatory policies would leave sexual harassment under-deterred. The 2020 Rule was arbitrary and capricious by reason of its faulty CBA. The Department's failure to consider the costs associated with the Rule's under-deterrent effects was an abrogation of their obligation to uphold Title IX's preventative purpose.

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* Copyright © 2022 by Yonas Asfaw-Cooper (né Takele), J.D., 2022, New York University School of Law; B.A., 2017, Yale University. I am deeply grateful to Professor Catherine Sharkey for her initial encouragement of my research and writing efforts. I also thank Dean Troy McKenzie and Professor Roderick M. Hills for their valuable edits and recommendations in the formulation of this Note. I would also like to thank Natan Sebhatleab, Benjamin Healy, Rupali Srivastava, Eliza Hopkins, David Blitzer, Luiza Leão, Thomas Hislop, Aaditya Tolappa, and the editors of the *New York University Law Review* for their invaluable feedback. I am deeply indebted to my wife, Jamie Asfaw-Cooper, family, and all of my friends for their support and willingness to listen. This Note is dedicated to Dr. Melanie Boyd. Any grammatical errors or omissions are the fault of the author.

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INTRODUCTION

During her confirmation hearing, Senator Patricia Murray asked former Department of Education Secretary Elisabeth “Betsy” DeVos whether the manner of nonconsensual kissing and touching discussed by President Trump in the infamous *Access Hollywood* tapes constituted sexual assault.¹ In a clipped, direct tone not often seen in confirmation hearings, DeVos stated that it did.² In response, Senator Murray asked DeVos about her alleged desire to “rein[] in the Office of Civil Rights and the department’s work to protect students from campus sexual assault.”³ Senator Murray’s question aimed to solicit DeVos’s views on the Department’s statutory duty to prevent and respond to gender discrimination in educational settings under Title IX of the Education Amendments (“Title IX”).⁴ That time, DeVos was not as quick to answer. She dodged the question, simply conveying her commitment to “looking very closely at how this has been regulated and handled.”⁵

Given that Donald Trump’s presidential campaign made many promises to roll back the administrative state,⁶ it was not surprising that DeVos wasted little time in directing her attention towards rolling back many of the Department’s previous regulations. Within just a

¹ *Nomination of Betsy DeVos to Serve as Secretary of Education: Hearing of the Comm. on Health, Educ., Lab., & Pensions*, 115th Cong. 61 (2017) [hereinafter *Hearing*] (statement of Sen. Patricia Murray).

² *Id.* (statement of Betsy DeVos, Nominee to Serve as Sec’y of Educ.).

³ *Id.* (statement of Sen. Patricia Murray) (quoting DeVos’s own statements to the press).

⁴ See generally 20 U.S.C. §§ 1681(a), 1682 (directing all departments that distribute federal educational funds to prevent gender discrimination in funded entities).

⁵ *Hearing*, *supra* note 1, at 61 (statement of Betsy DeVos, Nominee to Serve as Sec’y of Educ.).

⁶ See, e.g., J. Brian Charles, *Transcript of Donald Trump’s Economic Policy Speech to Detroit Economic Club*, THE HILL (Aug. 8, 2016), <https://thehill.com/blogs/pundits-blog/campaign/290777-transcript-of-donald-trumps-economic-policy-speech-to-detroit> [https://perma.cc/XQP2-MCES] (reporting that Candidate Trump disparaged Hillary Clinton’s alleged desire for “onerous regulations” and claimed that he would “cut regulations massively”); Justin Worland, *Donald Trump Promises to Cut Regulation on ‘Phony’ Environmental Issues*, TIME (May 26, 2016), <https://time.com/4349309/donald-trump-bismarck-energy-speech> [https://perma.cc/CD82-5URU] (reporting on Trump’s campaign promise to “scale back President Obama’s environmental regulations”).

few short months of her confirmation, Secretary DeVos rescinded or obstructed many of the Obama Administration's regulations in areas like student loan financing⁷ and for-profit educational institutions.⁸ It also quickly became apparent that DeVos's plan to curtail the Department's involvement in Title IX enforcement went beyond simply looking closely at the issue. The Department rescinded several far-reaching regulations⁹ and proposed a new binding rule on sexual harassment in higher education (the "Proposed Rule").¹⁰ The Proposed Rule would shrink the categories of actionable sexual

⁷ See *Bauer v. DeVos*, 325 F. Supp. 3d 74 (D.D.C. 2018) (finding the Department unduly obstructed Obama-era regulations that forgave the loans of defrauded borrowers); Student Assistance General Provisions, Federal Family Education Loan Programs, and William D. Ford Federal Direct Loan Program, 84 Fed. Reg. 49788, 49790, 49840 (Sep. 23, 2019) (to be codified at 34 C.F.R. pts. 668, 682, 685) (imposing new evidentiary requirements for defrauded student borrowers seeking to discharge their federal loans and rolling back limitations on pre-dispute arbitration agreements between schools and students). For more information on the Obama Administration's regulations on student loan financing, see generally Student Assistance General Provisions, Federal Perkins Loan Program, Federal Family Education Loan Program, William D. Ford Federal Direct Loan Program, and Teacher Education Assistance for College and Higher Education Grant Program, 81 Fed. Reg. 75926 (Nov. 1, 2016) (to be codified at 34 C.F.R. pts. 30, 668, 674, 682, 685, 686).

⁸ See Program Integrity: Gainful Employment, 84 Fed. Reg. 31392, 31392 (July 1, 2019) (to be codified at 34 C.F.R. pts. 600, 668) (rescinding the gainful employment rule which withheld federal financial aid from for-profit educational institutions that could not prove that their graduates would find gainful employment).

⁹ See Letter from Candice Jackson, Acting Assistant Sec'y for C.R., U.S. Dep't of Educ. (Sep. 22, 2017), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [<https://perma.cc/PG4T-WU8X>] (announcing the rescission of Obama era guidance on sexual misconduct investigations and adjudications). The Obama guidance set heightened requirements for investigations and speedy formal complaint resolution for educational institutions that receive notice of sexual harassment or assault in their community. *Id.* However, many still criticized the previous guidance, including regulated entities, who lambasted the Administration for the letter's ambiguity. See, e.g., Jake New, *Must vs. Should: Colleges Say the Department of Education's Guidance on Campus Sexual Assault Is Vague and Inconsistent*, INSIDE HIGHER ED (Feb. 25, 2016), <https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance> [<https://perma.cc/Y2KM-5E4X>] (relaying concerns that the guidance did not clearly differentiate between required and suggested protocols); Alison Somin, *Colleges and Students Are Better Off Now that Obama Era "Dear Colleague" Letter Is Rescinded*, PAC. LEGAL FOUND. (Sept. 9, 2020), <https://pacificlegal.org/colleges-students-better-off-now-that-obamas-dear-colleague-letter-rescinded> [<https://perma.cc/Z3KS-L3NE>] (suggesting that the Obama Administration's use of guidance documents was dubiously lawful). Others criticized the Obama Administration's failure to provide binding regulations, resulting in a piecemeal, circuit-by-circuit review of school policies under Title IX. See Greta Anderson, *Supreme Court Asked to Review Title IX 'Circuit Split'*, INSIDE HIGHER ED (July 24, 2020), <https://www.insidehighered.com/quicktakes/2020/07/24/supreme-court-asked-review-title-ix-%E2%80%98circuit-split%E2%80%99> [<https://perma.cc/HM8H-F6P9>] (discussing differences in the 6th and 8th Circuit's Title IX jurisprudence).

¹⁰ See E-mail from U.S. Dep't of Educ. Press Off., press@ed.gov, to Bull. Subscribers (Nov. 22, 2017, 10:31 AM EDT) (on file with author) (announcing that the Department of

harassment that institutions would be required to respond to and prevent, making Title IX applicable in fewer campus settings. It also instituted more rigid procedural frameworks into formal campus harassment adjudication mechanisms.¹¹

The Department's approach to sexual harassment swiftly provoked widespread backlash and criticism. Commentators and interest groups called out the Department for many of its substantive policy choices.¹² The press also lambasted the Department for conspicuously seeking out the views of so-called "men's rights" and "campus free speech" activist groups.¹³ This critique and backlash also littered the comments to the Proposed Rule.¹⁴

Education intends to undergo rulemaking on institutions' Title IX responsibilities regarding sexual misconduct complaints).

¹¹ See discussion *infra* Part II.

¹² See, e.g., Victoria Yuen & Osub Ahmed, *4 Ways Secretary DeVos' Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault*, CTR. FOR AM. PROGRESS (Nov. 16, 2018), <https://www.americanprogress.org/article/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault> [<https://perma.cc/DPV5-XEMJ>] (stating that the DeVos Department is taking "major steps backward" for Title IX protections); Andrew Kreighbaum, *College Groups Blast DeVos Title IX Proposal*, INSIDE HIGHER ED (Jan. 31, 2019), <https://www.insidehighered.com/news/2019/01/31/higher-ed-groups-call-major-changes-devos-title-ix-rule> [<https://perma.cc/U9MH-L85E>] (reporting that college groups and lobbies have voiced opposition to the Proposed Rule).

¹³ See, e.g., Jeannie Suk Gersen, *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, NEW YORKER (Sept. 8, 2017), <https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault> [<https://perma.cc/8E6N-L3Z5>] (discussing DeVos's "high-profile" meetings with the aforementioned groups); Christina Cauterucci, *Betsy DeVos Plans to Consult Men's Rights Trolls About Campus Sexual Assault*, SLATE (July 11, 2017, 5:56 PM), <https://slate.com/human-interest/2017/07/betsy-devos-is-asking-mens-rights-trolls-to-advise-her-on-campus-sexual-assault.html> [<https://perma.cc/TT9P-TYEG>] (discussing DeVos's efforts to arrange meetings with men's rights groups); Erika L. Greene & Sheryl Gay Stolberg, *Campus Rape Policies Get a New Look as the Accused Get DeVos's Ear*, N.Y. TIMES (July 12, 2017), <https://www.nytimes.com/2017/07/12/us/politics/campus-rape-betsy-devos-title-iv-education-trump-candice-jackson.html> [<https://perma.cc/YZP5-WSDN>] (noting DeVos's planned private meetings with accused students and advocates for those accused of sexual assault, as well as assault survivors).

¹⁴ See, e.g., Feminist Campus, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs (Jan. 30, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-32291> [<https://perma.cc/T35M-QKTM>] ("The proposed rules reflect the reality of [the Department's] clear refusal to listen to the experiences of feminists, student survivors, and women, and the prioritization of men's rights groups and the 'falsely accused.'"); Theodora Springer, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs, <https://www.regulations.gov/comment/ED-2018-OCR-0064-31639> [<https://perma.cc/H6Y4-5U7U>] ("At every turn, the DeVos Education Department has been consistently hostile to survivors and instead has embraced so-called men's rights activists and the university administrators, fraternities and athletic clubs that have promoted misogyny, gender stereotypes, and rape myths.").

While the political backdrop of the Rule's issuance and its deregulatory policy has generated significant normative debate among gender rights scholars, antidiscrimination scholars, and theorists of varying political persuasions,¹⁵ this Note critiques an overlooked procedural aspect of this rulemaking—its cost-benefit analysis (CBA). Prior to public notice-and-comment, the Department projected a net savings of between \$286.4 and \$367.7 million over ten years.¹⁶ After the Department incorporated several commenters' critiques of its methodology, the Enacted Rule's CBA stated that the regulation would create a net monetary cost of between \$48.6 and \$62.2 million for regulated entities.¹⁷ Despite this significant, unjustified cost to regulated institutions, the Department proceeded with the regulation. If this implementation of cost-unjustified regulations wasn't aberrant or striking enough, the Department also pointed to no quantified benefits at all, instead justifying its regulation using the non-quantified benefits of due process, free speech, and religious liberty.¹⁸

Of course, cost-unjustified regulations can be properly implemented in some circumstances,¹⁹ and non-quantified benefits do have

¹⁵ Compare Nancy Chi Cantalupo, *Title IX & the Civil Rights Approach to Sexual Harassment in Education*, 25 ROGER WILLIAMS U. L. REV. 225 *passim* (2020) (arguing that Title IX should be approached using a civil rights framework, rather than a criminal law framework), and Haley C. Carter, *Under the Guise of "Due Process": Sexual Harassment and the Impact of Trump's Title IX Regulations on Women Students of Color*, 36 BERKELEY J. GENDER L. & JUST., 180, 184 (2021) (applying an intersectional framework to the Obama and Trump Administrations' Title IX policies), with Jeannie Suk Gersen, *How Concerning Are the Trump Administration's New Title IX Regulations?*, NEW YORKER (May 16, 2020), <https://www.newyorker.com/news/our-columnists/how-concerning-are-the-trump-administrations-new-title-ix-regulations> [<https://perma.cc/R55T-PTLC>] (arguing that, from the perspective of fair process, the Trump Administration's Title IX regulations improve upon previous regulations).

¹⁶ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61462, 61463 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) [hereinafter Proposed Rule].

¹⁷ Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30565 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) [hereinafter Enacted Rule].

¹⁸ See *id.* at 30035, 30037, 30050–51, 30475–76 (justifying the Enacted Rule by reference to constitutional and statutory conceptions of due process, free speech, and religious liberty).

¹⁹ CBAs are mostly a creature of the Executive Branch. See Exec. Order No. 13,563, 76 Fed. Reg. 3821, 3821 (Jan. 18, 2011) [hereinafter EO 13,563] (stating that agencies can consider values that are difficult to quantify in their CBAs). Additionally, Congress may require agencies to conduct CBAs within statutory language. See, e.g., *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201, 1219, 1222 (5th Cir. 1991) (interpreting legislative language that requires an agency to adopt the "least burdensome" regulation as requiring the agency to conduct a CBA). Where Congress has not mandated one, it is up to the Executive Branch to decide whether and to what extent to rely upon a CBA when introducing regulation. See generally EO 13,563, *supra*.

a place in agency decisionmaking.²⁰ While often debated, these are not entirely novel concepts.²¹ However, the Department's CBA had another significant issue. One might expect that a regulatory regime with fewer cognizable and redressable injuries would leave institutions with fewer avenues for deterring harassing behavior. The agency that creates and enforces such an under-inclusive regulation should perhaps consider the costs of such under-deterrence. The Department refused to include any such costs—quantified or not—even when instructed to do so by several commenters.²² To make matters worse, the Department used a single, flawed statistical analysis to conclude that its regulation would not cause under-deterrence, as neither its new policy nor any previous anti-harassment regulation could be expected to have any appreciable effect on harassment rates at all.²³ Such a conclusion flies in the face of the psychological and criminological research that commenters cite to extensively throughout the administrative record.²⁴ It is entirely out of step with the structure and function of Title IX²⁵ and completely abrogates the Department's statutory obligation to consider preventing underlying gender discrimination.²⁶

This Note argues that the Department's decisionmaking was arbitrary and capricious, and it outlines a path for the present administration to right these wrongs. Regardless of the propriety of the Enacted Rule's substantive policy positions, the Department abdicated its clearly delineated statutory duty to consider the *prevention* of harms, namely harassment.²⁷ Any subsequent regulation of dignitary harms under Title IX should uphold the Department's basic statutory obliga-

²⁰ See Cass R. Sunstein, *The Limits of Quantification*, 102 CALIF. L. REV. 1369, 1387–90 (2014) (discussing mixed models of quantified and non-quantifiable decisionmaking in government practice).

²¹ See *id.* at 1372–73 (advocating that agencies use certain analytical techniques when “quantification is impossible”); Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1426 (2014) (noting some benefits of devising ways to analyze nonquantifiable benefits for agency regulations).

²² Enacted Rule, *supra* note 17, at 30539; see also discussion *infra* Part IV (arguing that this refusal to address costs made the Enacted Rule arbitrary and capricious).

²³ Enacted Rule, *supra* note 17, at 30539–44 (using statistical analysis to conclude “we have no evidence to support the claim that the final regulations would have an effect on the underlying number of incidents of sexual harassment and assault”).

²⁴ See *infra* Section IV.B.

²⁵ See *infra* Part I.

²⁶ See *infra* Section I.C.

²⁷ See *infra* Part IV.

tions by considering the impact on the underlying rates of sexual harassment.²⁸

Part I of this Note overviews Title IX's preventative purpose and enforcement mechanisms, as well as the Department's previous interpretation of the Statute. Understanding the Department's previous stances on Title IX clarifies the Statute's fundamental purpose of prevention and deterrence and also establishes the Enacted Rule as a significant policy reversal. Part II describes at length the Enacted Rule's new effects, with a particular focus on educational institutions' responsibilities in responding to sexual harassment. Part III then describes in more detail the worrisome cost-benefit analysis used to justify the Enacted Rule. Finally, Part IV will argue that the faulty CBA made the Enacted Rule arbitrary and capricious and concludes by charting a path forward for Title IX regulation.

I

ENFORCEMENT OF TITLE IX

Title IX, at its core, withholds federal funds from educational institutions that discriminate on the basis of sex.²⁹ The Statute states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”³⁰ The application of this statute, modeled after Title VI of the Civil Rights Act, would quickly expand after its passage to cover not only sex-based quotas in admissions and hiring but also inequitable sports funding and, most relevant here, sexual harassment.³¹ Alongside this expansive applicability, Title IX also provides expansive enforcement procedures. Many civil rights statutes, including Title IX, use a dual-enforcement mechanism that provides both administrative and private pathways for redressing injury. On the administrative end, the Department of Education enforces the Statute and has the authority to interpret the Statute through regulations.³² Harmed individuals also have standing to sue

²⁸ See *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins.*, 463 U.S. 29, 43 (1983) (holding that an agency rule that entirely fails to consider an important aspect of the problem is usually arbitrary and capricious); see also *infra* Section IV.B.

²⁹ 20 U.S.C. § 1681(a).

³⁰ *Id.*

³¹ See *History of Title IX*, WOMEN'S SPORTS FOUND. (Aug. 13, 2019), <https://www.womenssportsfoundation.org/advocacy/history-of-title-ix> [<https://perma.cc/C9LC-ZM3U>] (providing a brief historical overview of the main political players in the passage and expansion of Title IX).

³² 20 U.S.C. § 1682.

institutions that fail to uphold their statutory obligations for money damages.³³

This Part begins by analyzing both the historical progression of Title IX interpretation as well as the current landscape of Title IX enforcement. Analyzing the past and present of Title IX is necessary to understand its function and preventative purpose. Section I.A describes several ways in which both the Department and private attorneys general enforce their statutory rights. Because the Supreme Court read the private remedy into the Statute, Section I.A also briefly presents the landmark Title IX cases that fashioned the private remedy. Section I.B discusses the trajectory of the Department's statutory interpretation in the decades before the Trump Administration's passage of the Enacted Rule. This Section argues that the Department consistently advocated for an expansive interpretation of Title IX's bar on sexual harassment, taking to heart its mandate to prevent harassment. Section I.C concludes this Part by characterizing the core statutory purpose of Title IX as the prevention of all manner of recognized harassment injury.

A. Enforcement of Title IX

Title IX's private enforcement mechanism is rather straightforward. A victim of discrimination can sue their educational institution in tort for money damages where (1) the harassing conduct at issue was "so severe, pervasive, and objectively offensive that it [deprived] the victims of access to . . . educational opportunities" and (2) where the institution had "actual knowledge" of the harassment and did not sufficiently respond.³⁴ While simple at first glance, this legal standard was crafted over several decades as Title IX's applicability steadily expanded. In its early days, the Statute addressed only explicit sex discrimination in admissions and employment.³⁵ Over time, the Statute's ambit expanded to include more insidious forms of sex discrimination, such as inequitable funding for men's and women's sports³⁶ and sexual harassment.³⁷ These expansions came about partly

³³ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 688–89, 709, 717 (1979).

³⁴ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999).

³⁵ See *Alexander v. Yale Univ.*, 459 F. Supp. 1, 2–3 (D. Conn. 1977) (acting as the first test case to expand the applicability of Title IX to sexual harassment after the statute's passage).

³⁶ In truth, the story of Title IX's application to sports funding is one of both expansion and contraction. Despite administrative and private enforcement of Title IX in the realm of sports soon after the statute's passage, the Supreme Court decided in *Grove City College v. Bell* that the statute only applied to educational programs and not coeducational sports programs. 465 U.S. 555 (1984). Nevertheless, Congress undid the Court's decision by amending Title IX to apply to all such sports programs. See Civil Rights Restoration Act of

through a line of landmark Supreme Court cases. Because the Supreme Court had established that Title IX had an implied private right of action in *Cannon v. University of Chicago*,³⁸ victims of discriminatory conduct began to act as private attorneys general, suing institutions that failed to heed their statutory duty. In *Franklin v. Gwinnett County Public Schools*, the Court held that Title IX allowed students who were sexually harassed and abused by teachers to bring claims in court against their educational institutions for monetary damages.³⁹ The Court's decision in *Franklin* hinged on a finding that the school's failure to take any remedial steps in response to the plaintiff's report of being sexually assaulted by her teacher qualified as an act of intentional gender discrimination actionable under Title IX.⁴⁰ The Court concluded this by analogizing to its decision in the Title VII case *Meritor Savings Bank, FSB v. Vinson*, in which the Court found that an employer incurred monetary liability by failing to address a supervisor's routine sexual harassment of the subordinate-plaintiff.⁴¹

While the *Franklin* Court held the educational institution liable for its inaction, it did not provide a clear liability standard for future cases. The Court would do so in the *Gebser* and *Davis* cases.⁴² In *Gebser v. Lago Vista Independent School District*, the Court held that a school or district would be liable for teacher-on-student harassment where "an official of the school district . . . ha[d] actual notice of, and [was] deliberately indifferent to, the . . . misconduct."⁴³ In *Davis v. Monroe County Board of Education*, the Court applied this same deliberate indifference liability standard to instances of student-on-student harassment⁴⁴ that are "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school."⁴⁵

To sum up, educational institutions will be statutorily liable where they are deliberately indifferent to the harassing behavior of their

1987, Pub. L. No. 100-259, sec. 3, § 908, 102 Stat. 28, 28–29 (codified as amended at 20 U.S.C. § 1687) (amending Title IX to characterize all the operations of postsecondary institutions as programs for the purposes of the statute).

³⁷ See *Franklin v. Gwinnett Cnty. Pub. Schs.*, 503 U.S. 60, 64–65 (1992) (holding that Title IX authorized an award of damages for a plaintiff that experienced sexual harassment from a teacher).

³⁸ 441 U.S. 677, 689 (1979).

³⁹ 503 U.S. at 76.

⁴⁰ *Id.* at 74–75.

⁴¹ *Id.* (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986)).

⁴² See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998); *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999).

⁴³ 524 U.S. at 277.

⁴⁴ 526 U.S. at 633.

⁴⁵ *Id.* at 650.

employees and/or students and the harassing conduct was sufficiently serious. This monetary remedy therefore incentivizes regulated institutions to prevent serious harassment and to respond to it effectively when it occurs.

As the administrative enforcer, the Department currently has several ways to respond to an institution that is not complying with Title IX. Per the language of Title IX, the Department has the statutory authority to revoke the entirety of an offending institution's federal funding.⁴⁶ However, it rarely opts for such a "nuclear option."⁴⁷ The Department's Office of Civil Rights (OCR), which spearheads much of their regulatory enforcement, has a number of other tools to ensure that institutions comply with Title IX's mandates. These tools include conducting compliance reviews of institutional policies and procedures, providing technical assistance to institutions with new prevention and response protocols, performing on-site compliance investigations, and more.⁴⁸ OCR's investigative powers are often triggered once they are informed of an institution's alleged infraction of Title IX.⁴⁹ The Department has investigated many different kinds of alleged Title IX infractions, including inequitable athletics funding, discriminatory grading, sexual harassment, and more.⁵⁰ Once an

⁴⁶ 20 U.S.C. § 1682.

⁴⁷ Meghan Racklin, *Title IX and Criminal Law on Campus: Against Mandatory Police Involvement in Campus Sexual Assault Cases*, 94 N.Y.U. L. REV. 982, 1017 (2019). In truth, the Department rarely needs to resort to such an option, as the mere threat of funding suspension deters most educational institutions from engaging in potentially discriminatory behavior. For post-secondary institutions, the stigma and negative press associated with the opening of an investigation or some especially problematic on-campus sexual harassment scandal can often be more than sufficient to bring them to an informal resolution with the Department. See Sara Lipka, *How 46 Title IX Cases Were Resolved*, CHRON. OF HIGHER EDUC. (Jan. 15, 2016), <https://www.chronicle.com/article/how-46-title-ix-cases-were-resolved> [<https://perma.cc/HXH8-UHAW>] (noting that the vast majority of Department investigations ended in informal resolutions); cf. Nick Anderson, *U-Va. Waged Intense Fight to Influence Federal Sexual Assault Investigation*, WASH. POST (Nov. 3, 2015), https://www.washingtonpost.com/local/education/u-va-waged-intense-fight-to-influence-federal-sexual-assault-investigation/2015/11/03/1fd69812-79b3-11e5-bc80-9091021aeb69_story.html [<https://perma.cc/5W2F-4PUT>] (discussing the University of Virginia's protracted battle with Department officials for a more favorable negotiation outcome).

⁴⁸ See Valerie McMurtrie Bonnette, *How Title IX Is Enforced*, GOOD SPORTS, INC., <https://titleixspecialists.com/wp-content/uploads/2013/09/How-Title-IX-is-Enforced.pdf> [<https://perma.cc/QD6T-FPX8>] (overviewing the Department's options for ensuring Title IX compliance).

⁴⁹ *Id.*

⁵⁰ See U.S. DEP'T OF EDUC., OFFICE FOR C.R., TITLE IX ENFORCEMENT HIGHLIGHTS 3 (June 2012), <https://www2.ed.gov/documents/press-releases/title-ix-enforcement.pdf> [<https://perma.cc/X33P-F79E>] (overviewing the different types of gender discrimination raised by Title IX allegations in 2009–2010 and 2010–2011). Specific infractions related solely to sexual harassment often include an institution's alleged failure to publish annual self-evaluation studies regarding their Title IX policies and treatment of students,

injured party has filed a complaint with OCR, or once an institution's allegedly discriminatory behavior is publicly reported, OCR can investigate, issue letters of findings, and come to a voluntary resolution with the rule-breaking institution.⁵¹

These voluntary resolution agreements usually focus on streamlining institutional responses to harassment and on prospectively preventing harassment from occurring. Institutions have agreed to implement new grievance procedures, coordinate institutional responses through a centralized Title IX officer, develop educational tools for all sectors of the institution, publicize institutional resources, and conduct self-assessments of rates of harassment—just to name a few options.⁵²

Turning away from this brief primer, the next Section considers the historical trajectory of changing administrative enforcement prior to the 2020 Enacted Rule.

B. Agency Interpretation of Title IX Before 2020

Although the judiciary and the administrative state interpreted Title IX in different contexts, each party was often influenced by the other's decisions. The Department often joined suits as amicus, providing its recommendations for judicial consideration. For example, the Department argued in court that an implied private right of action would be instrumental in aiding the general enforcement of Title IX before the Court's decision in *Cannon*⁵³ and also made sure to inform the Court that it considered peer harassment actionable for administrative remedy prior to the Court's decision in *Davis*.⁵⁴

designate a responsible Title IX administrator, and write and disseminate a nondiscrimination policy. *Id.* at 3, 10.

⁵¹ U.S. DEP'T OF EDUC., OFFICE FOR C.R., COMPLAINT PROCESSING PROCEDURES 2–3 (July 2022), <https://www2.ed.gov/about/offices/list/ocr/complaints-how.html> [<https://perma.cc/BL2A-6HMF>].

⁵² For an example of an institution's informal resolution with OCR, see Letter from Thomas J. Hibino, Reg'l Dir., U.S. Dep't. of Educ., Office for C.R., Region 1, to Dorothy K. Robinson, Vice President & Gen. Couns., Yale Univ. (June 15, 2012), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/01112027-a.pdf> [<https://perma.cc/47AE-QYM5>] (recommending clarification of grievance procedures, changes to appointment of University Title IX Coordinator, and the creation of a formal complaint adjudicatory body, among other things).

⁵³ See *Alexander v. Yale Univ.*, 459 F. Supp. 1, 2 (D. Conn. 1977) (noting that the agency advocated for a finding that Title IX had an implied private right of action prior to the *Cannon* decision).

⁵⁴ See U.S. DEP'T OF EDUC., OFFICE FOR C.R., SEXUAL HARASSMENT GUIDANCE n.2 (1997), <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html> [<https://perma.cc/VFH8-B7CU>] (stating that “it has been OCR's longstanding practice to apply Title IX to peer harassment” prior to the *Davis* decision).

This interplay also worked in the opposite direction as the Department often also borrowed from judicial opinions in constructing its regulatory enforcement regime. The Department in 1997 penned its first guidance document on sexual harassment under Title IX as the *Davis* case was making its way through the appeals process. In the 1997 guidance, the Department used the *Davis* sexual harassment definition as a scaffold for its own regulatory regime. The Department established that it would take administrative enforcement action against conduct that was “sufficiently severe, persistent, or pervasive”⁵⁵ as opposed to that which was “sufficiently severe, pervasive, and objectively offensive.”⁵⁶

The Department embraced the Court’s willingness in *Franklin* to import standards from Title VII jurisprudence into Title IX.⁵⁷ The issue of what notice was required to trigger an educational institution’s responsibility to respond to harassment was left open until the *Davis* decision. The Department, for its part prior to the *Davis* decision, adopted the notice regime applied in Title VII cases at the time which would attach liability wherever an institution “knew, or in the exercise of reasonable care, should have known about the harassment” but did not act.⁵⁸ Following the *Davis* decision, which applied a narrower actual notice and deliberate indifference regime, the Department in its 2001 Guidance elected to maintain its more permissive standard borrowed from Title VII jurisprudence.⁵⁹ In making this decision, the Department relied upon the Court’s acknowledgement in *Gebser* that “[f]ederal agencies . . . [could] ‘promulgate and enforce requirements that effectuate [Title IX’s] nondiscrimination mandate.’”⁶⁰ The Department therefore lowered the evidentiary burden of administrative enforcement relative to the *Franklin/Gebser/Davis* monetary liability framework.⁶¹

⁵⁵ *Id.* at n.7 (emphasis added) (citing the Eleventh Circuit’s liability standard from *Davis v. Monroe Cnty. Bd. of Educ.*, 74 F.3d 1186, 1194 (11th Cir. 1996) that would subsequently be refined by the Supreme Court).

⁵⁶ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 633 (1999) (emphasis added).

⁵⁷ See U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 n.6 (2001) [hereinafter 2001 GUIDANCE], <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [<https://perma.cc/YAY7-JH23>] (referring to leading Title VII cases in the agency’s formulation of a working definition of sexual harassment).

⁵⁸ See *id.* at 24 (2001) (citing *Ellison v. Brady*, 924 F.2d 872, 881 (9th Cir. 1991) and other Title VII cases).

⁵⁹ *Id.* at 13. The 2001 Guidance also provided several illustrations and greater detail on what exactly could count as “sufficiently severe, persistent, or pervasive” harassment. *Id.* at 5–14.

⁶⁰ *Id.* at ii (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998)).

⁶¹ *Id.* (referencing the Court’s own willingness to permit the Department to enjoin conduct that may not be cognizable under the money damages standard).

The Department did not stop there. Relying on the *Gebser* decision's "specific affirm[ance] [of] the Department's authority to enforce"⁶² Title IX, the Department also impressed upon institutions the importance of "issu[ing] . . . a policy against sex discrimination and adopt[ing] and publi[shing] . . . grievance procedures providing for prompt and equitable resolution of complaints of sex discrimination" as a means of effectively preventing and responding to harassment.⁶³ These grievance procedures were "essential to let students and employees know that sexual harassment will not be tolerated and to ensure that they know how to report it."⁶⁴

Later guidance documents also maintained the 2001 Guidance's pro-regulatory emphasis. In 2011, the Department of Education under President Obama issued a Dear Colleague Letter (DCL) regarding Title IX.⁶⁵ DCLs are a form of non-binding guidance document by which an administrative agency can make statements of policy.⁶⁶ The Obama Administration issued the 2011 DCL in the midst of a period of enhanced regulatory enforcement of Title IX.⁶⁷ The letter reaffirmed the principles laid out by the earlier regulation and also pointedly reminded institutions of their obligations.⁶⁸ The DCL did also expand the scope of actionable sexual harassment under Title IX, stating that it included "unwelcome conduct of a sexual nature . . . includ[ing] unwelcome sexual advances, requests for sexual favors,

⁶² *Id.* at iii.

⁶³ *Id.* at 4.

⁶⁴ *Id.* at iii. The 2001 Guidance also encouraged schools to provide notice to those involved with the grievance or disciplinary proceedings, conduct impartial investigations of complaints, designate prompt timeframes for resolution of the complaint, institute a non-retaliation policy, and designate at least one employee to act as a Title IX coordinator for the school. *Id.* at 20–21.

⁶⁵ RUSSLYNN ALI, ASSISTANT SEC'Y FOR C.R., U.S. DEP'T OF EDUC., DEAR COLLEAGUE LETTER (Apr. 4, 2011) [hereinafter 2011 DCL], <https://www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html> [<https://perma.cc/QM2R-TXMG>].

⁶⁶ Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 399–400 (2007) ("An agency may use such [non-binding guidance] documents to indicate how it will implement a particular statutory or regulatory regime.").

⁶⁷ The increase in enforcement has been attributed to reports of high rates of harassment on campuses as well as the Obama Administration's belief that many schools were not effectively implementing the recommendations of the 2001 Guidance. See Robin Wilson, *How a 20-Page Letter Changed the Way Higher Education Handles Sexual Assault*, CHRON. OF HIGHER EDUC. (Feb. 8, 2017), <https://www.chronicle.com/article/how-a-20-page-letter-changed-the-way-higher-education-handles-sexual-assault> [<https://perma.cc/8YJZ-JFVR>] (noting how prior to this letter colleges were handling sexual assault inconsistently and many failed to use the preponderance standard of evidence).

⁶⁸ 2011 DCL, *supra* note 65, at 2 ("The statistics on sexual violence are both deeply troubling and a call to action for the nation.").

and other verbal, nonverbal, or physical conduct of a sexual nature.”⁶⁹ It also emphasized the need for “prompt and equitable resolution of . . . sex discrimination complaints,” while requiring formal complaints to be adjudged using a preponderance standard.⁷⁰

There are two main lessons that we can glean from the flow of the Department’s interpretation of Title IX. First, that there was such a robust exchange of differing opinions makes clear the fact that the Department was not bound to the interpretations of the judiciary as to what constituted impermissible sexual harassment. Prior to the 2020 Enacted Rule, the Department instituted a regulatory enforcement policy which allowed it to intervene in instances of sexual harassment and abuse that did not meet the monetary damages standard announced by the Supreme Court.⁷¹ Put another way, the Department summarily divorced its regulatory enforcement powers from those of the private attorneys general who had standing to sue in tort.⁷² Second, the Department required more effective response to and prevention of underlying harassment from institutions with each one of its subsequent interpretive documents. All of the major changes put into place—increased enforcement, the construction of more expansive definitions of actionable harassment, incorporation of less stringent legal standards from Title VII jurisprudence, lowering of the evidentiary burden in formal complaint adjudication—required schools to direct more attention and resources to addressing the problem of sexual harassment.

C. Title IX’s Preventative Purpose

Title IX imports a duty on the Department to consider whether proposed regulations will foster or impede an institution’s deterrence of harassment. The deterrence of harassment refers to the prevention of any statutorily impermissible harassment that might occur in the educational context. This Note has discussed a variety of injuries that fall under statutorily impermissible harassment. Such injuries have

⁶⁹ *Id.* at 3; see also Wilson, *supra* note 67 (explaining how many higher education institutions overhauled their policies after the issuing of this letter, and there has been a spike in the number of universities under investigation for mishandling reports of assault).

⁷⁰ 2011 DCL, *supra* note 65, at 8; see also Wilson, *supra* note 67 (discussing the ineffectiveness of some campus adjudication processes).

⁷¹ See 2001 GUIDANCE, *supra* note 57, at 13.

⁷² 2011 DCL, *supra* note 65; see, e.g., *supra* notes 57–61 and accompanying text; see also STEPHANIE MONROE, ASSISTANT SEC’Y FOR C.R., U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER (Jan. 25, 2006), <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> [<https://perma.cc/2P8S-4C58>] (reiterating the agency’s commitment to enforcing Title IX and the regulatory enforcement machinery’s uncoupling from private tort liability standards).

included institutions' actual commission of gender discrimination,⁷³ indifference (deliberate or otherwise) to sexual harassment that occurred on their watch,⁷⁴ and insufficient prevention of sexual harassment.⁷⁵ This emphasis on institutional injury is proper because Title IX conditions institutional funding on the institution's ability to refrain from committing sex discrimination.⁷⁶

Therefore, where the Department, as here, is issuing an interpretive rule that defines the metes and bounds of institutional responsibility for addressing sexual harassment, there must be some consideration of whether those regulations might prevent institutions from sufficiently recognizing or responding to bona fide instances of harassment. If a regulation is under-inclusive, then institutions will necessarily insufficiently respond.⁷⁷ This insufficient response can itself be understood as a type of injury, a form of mandated institutional indifference, if you will, akin to the kinds of otherwise recognized institutional indifference injuries. Such under-inclusive regulations may result in insufficient prevention of harassment because these policies might signal to the educational community that harassing conduct will not be sufficiently recognized, investigated, or apprehended.⁷⁸ Therefore, consideration of a regulation's impacts on underlying harassment becomes necessary as it illuminates whether such mandated indifference or institutional under-deterrence may

⁷³ Examples of such injuries include, but are not limited to, instances of out-and-out gender discrimination in admissions, hiring, and promotion. *See generally* Cannon v. Univ. of Chi., 441 U.S. 677 (1979) (permitting private suits against educational institutions which commit sex discrimination in admissions).

⁷⁴ These institutional injuries were recognized as extending monetary liability in the *Franklin/Gebser/Davis* line of cases. *See supra* Section I.A.

⁷⁵ As stated earlier, monetary and administrative liability can extend to institutions that do not enact policies and procedures that sufficiently prevent the commission of harassment. The liability extended to the institution in *Gebser* was in part predicated upon the school failing to adopt an anti-harassment policy and failing to enact official procedure for reporting harassment. *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 278 (1998); *see also supra* Section I.A (discussing the place of preventative mandates in the administrative enforcement of Title IX).

⁷⁶ 20 U.S.C. § 1681(a).

⁷⁷ It is a general axiomatic principle of law that under-inclusive codifications of liability will leave malefeasance under-deterred. *See generally* Gerald Leonard, *Towards a Legal History of American Criminal Theory: Culture and Doctrine from Blackstone to the Model Penal Code*, 6 BUFF. CRIM. L. REV. 691, 712 (2003) (attributing to William Blackstone the assertion that "the sole purpose of punishment was the public purpose of prevention" and tracing the importance of general deterrence to the modern era).

⁷⁸ For a discussion of the research supporting the assertion that under-inclusive institutional recognition of harassment can lead to its under-deterrence, *see infra* Section IV.B. Criminological research supports the assertion that increased apprehension deters crime. *See generally* Aaron Chalfin & Justin McCrary, *Criminal Deterrence: A Review of the Literature*, 55 J. ECON. LITERATURE 5, 10 (2017) (explaining that crime is sensitive to apprehension).

occur. If there is a risk that a regulation may be under-inclusive, such injuries may result and ought to be captured in a CBA.

Title IX's core preventative purpose requires the Department to consider the risk of potential under-deterrence whenever it contemplates implementing under-inclusive regulations. The statute commands regulated institutions not only to refrain from discriminating themselves (whether by active discriminatory conduct or indifference) but also to strive towards constructing educational environments where discrimination is less likely to occur.

In substantiating Title IX's preventative purpose, we begin with statutory text and legislative history. Title VI of the Civil Rights Act served as a scaffold for Title IX. Tying Title IX's text to Title VI provided an expedient and reliable path to passing and shoring up Title IX.⁷⁹ It made pragmatic sense for a legislature setting its sights on gender discrimination in education eight years after the tumultuous passage of the Civil Rights Act to employ the same successful statutory language. That the shadow of Title VI extends over Title IX is instructive for our purposes because it demonstrates that the two statutes "sought to accomplish two related . . . objectives," namely to "avoid the use of federal resources to support discriminatory practices" and "to provide individual citizens effective protection against those practices."⁸⁰ *Gebser* also stated these two statutes therefore operate "in the same manner, conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a *contract between the Government and the recipient of funds*."⁸¹ This comparison of Title IX to a contract is rather illustrative for our purposes—just as a contract stipulates a set of conditions for future conduct, Title IX must therefore stipulate the provision of federal funding not only upon responses to already committed discrimination but also upon the prevention of its further commission.

The Supreme Court was also unequivocal in many of its decisions that Title IX was passed "with two principal objectives in mind: '[T]o avoid the use of federal resources to support discriminatory practices' and 'to provide individual citizens effective *protection* against those practices.'"⁸² Though the dissent in *Davis* took issue with the expansion of monetary liability to student-on-student harassment, they reiterated strongly "that Title IX *prevents* discrimination by the grant recipient."⁸³

⁷⁹ See *infra* notes 80–86.

⁸⁰ *Cannon v. Univ. of Chi.*, 441 U.S. 667, 704 (1979).

⁸¹ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 286 (1998) (emphasis added).

⁸² *Id.* (emphasis added) (citing 441 U.S. at 704).

⁸³ *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 658 (1999) (emphasis added).

That prevention and deterrence were core to Title IX is also apparent from the statute's textual amendment process. As debate over the statute developed in both chambers of Congress, numerous legislators attempted to replace the language ultimately passed with weaker language and to limit its zone of applicability.⁸⁴ One proposed alternative read in relevant part, "[t]he Secretary shall not make any grant . . . unless the . . . financial assistance contains assurances satisfactory to the Secretary that any such institution, center, or agency will not discriminate on the basis of sex in the admission of Individuals to any program to which the application, contract, or other arrangement is applicable."⁸⁵ This proposal was objected to and ultimately voted down on the grounds that it targeted only discrimination in admissions and did not "expressly authorize a private remedy."⁸⁶ The private remedy in Title IX ultimately authorized by the Court in *Cannon* has been and continues to be an extremely important element of the deterrent aim of Title IX. Suits for monetary damages alongside the threat of the revocation of federal funds remain the great deterrent "sticks" that have given Title IX its strong staying power. In recognition of this potential monetary liability, institutions are therefore propelled to take greater care in preventing interpersonal harassment that may occur within their communities. That Congress contemplated a weaker statutory text, and ultimately decided against it, provides support for the assertion that Title IX has a preventative purpose.

We now move along to the Department's statutory enforcement. A number of the Department's own statutory enforcement mechanisms are predicated upon a prevention and deterrence theory of Title IX and would otherwise be unjustifiable if the statute did not have a preventative purpose. For example, many informal resolutions negotiated with educational institutions following investigations have commanded the institution to take up some manner of expanded preventative measures.⁸⁷ These measures might include, for example, mandating annual sexual violence prevention training regimes, conducting regular campus sexual climate surveys, or ordering audits of

⁸⁴ *Cannon*, 441 U.S. at 702–03 (noting the legislative debate over whether Title IX created a private remedy).

⁸⁵ *Id.* at 693 n.14 (citing 117 CONG. REC. 30411 (1971)).

⁸⁶ *Id.* at 694 n.14.

⁸⁷ *See, e.g.*, Letter from Thomas J. Hibino, *supra* note 52 (putting in place several significant changes to campus Title IX policies including the responsibilities of campus Title IX coordinators, formal grievance procedures, and more); Letter from Joel J. Berner, Reg'l Dir., U.S. Dep't. of Educ. Off. for C.R., to Martha C. Minow, Dean, Harv. L. Sch. (Dec. 30, 2014), <https://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf> [<https://perma.cc/EC4B-SCFX>] (requiring the investigated institution to, amongst other things, "prevent recurrence from harassment" and clarify language on Title IX policies).

institutional harassment reporting mechanisms.⁸⁸ The imposition of each of these informal resolutions prioritizes preventing future harassing conduct. Mandatory education programs often focus on building skills helpful to prevent harassment and assault.⁸⁹ Campus climate surveys help institutions direct resources and attention to specific institutional arms where harassing behavior may be occurring and intervene to prevent its recurrence.⁹⁰ The Department even adopted a requirement that institutions create and provide students with grievance procedures and zero-tolerance policies to sexual discrimination in hopes that it would prevent harassment.⁹¹

Additionally, the Department itself states in the Enacted Rule that it believes its regulations are capable of deterring and preventing sexual harassment. This admission arises out of a provision of the Rule which requires educational institutions to provide “supportive measures” to a complainant.⁹² In supporting this policy, the Department stated that such a requirement was justified in part based on a need “to protect safety of all parties or *deter sexual harassment*.”⁹³

Despite this admission and the other overwhelming evidence to the contrary, the Department decided against including costs—quantified or not—related to the de-prioritization of prevention that this Rule would employ. To make matters worse, the Department made this decision even though the administrative record is littered with instances of commenters bringing the issue of under-deterrence to its attention. Yet, before tackling these issues in Part IV, the next Part discusses the actual substantive policies of the Enacted Rule.

⁸⁸ See Letter from Joel J. Berner, *supra* note 87, at 18.

⁸⁹ See 2001 GUIDANCE, *supra* note 57, at 13 (“Training for employees should include practical information about how to identify harassment and, as applicable, the person to whom it should be reported.”).

⁹⁰ *Id.* at 18 (noting that measures that do not reveal the complainant or require formal action can still be effective in notifying the institution of harassment so that they can take preventative steps).

⁹¹ *Id.* at 19 (calling for specific policies and grievance procedures for sexual harassment to encourage prevention).

⁹² 34 C.F.R. § 106.44(a) (2020). The regulations define these supportive measures as including “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, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.” 34 C.F.R. § 106.30(a)(3) (2020).

⁹³ Enacted Rule, *supra* note 17, at 30486 (emphasis added).

II

CHANGES BROUGHT ON BY THE 2020 ENACTED RULE

Armed with this understanding of the development of Title IX in the administrative and judicial spheres, we can now analyze the changes brought on by the Enacted Rule.

A. Scope of Responsibility

First, the Rule narrowed the number of settings where recipients would have duties under Title IX to prevent and respond to sexual harassment. Although Title IX defines “program or activity” as “all the operations of . . . a college, university, or other postsecondary institution,” the Department defined “education program or activity” as “includ[ing] locations, events or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”⁹⁴ This alteration potentially permits educational institutions to disclaim their liability for otherwise actionable sexual harassment simply because the harassment occurred in a separate geographic area such as an off-campus residence or a study abroad program.⁹⁵

Additionally, institutions previously had a duty to respond to harassment if they had constructive notice that it had occurred.⁹⁶ This Rule shrinks the requirement to actual notice of the harassment.⁹⁷ A recipient is said to have received actual notice when a “Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient” is made aware of an occurrence that meets the Department’s definition of harassment.⁹⁸ The Department’s previous constructive notice regime required recipients to address instances of sexual harassment where a “responsible

⁹⁴ 34 C.F.R. 106.44(a) (2020).

⁹⁵ See 20 U.S.C. § 1687(2)(A) (noting that “program or activity” includes the operations of a college, university, or post-secondary institution); see also Greta Anderson, *Location-Based Protection*, INSIDE HIGHER ED (May 12, 2020), <https://www.insidehighered.com/news/2020/05/12/new-title-ix-regulation-sets-location-based-boundaries-sexual-harassment-enforcement> [<https://perma.cc/HR36-G6AW>] (“The legal responsibility for colleges and universities to protect students from such sexual assaults while studying abroad may now be diminished under new regulations . . .”).

⁹⁶ Cf. 2001 GUIDANCE, *supra* note 57, at 13 (“A school has notice if a responsible employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment.”).

⁹⁷ 34 C.F.R. § 106.30(a) (2020) (requiring more than constructive notice to constitute actual knowledge).

⁹⁸ *Id.*

employee ‘knew, or in the exercise of reasonable care should have known,’ about the harassment,” with a “responsible employee” defined as any employee who had “the authority to take action to redress the harassment,” had a duty to report any instance of harassment to appropriate school officials, or whomever “a student could reasonably believe has this authority or responsibility.”⁹⁹ This policy change therefore lessens educational institutions’ duty to monitor their educational environments and decreases the likelihood that bona fide instances of harassment will be properly addressed.

B. Definition of Sexual Harassment

Next, the Rule limits the definition of “sexual harassment” actionable under Title IX. Prior to this Rule, the 2011 Dear Colleague Letter defined sexual harassment as “unwelcome conduct of a sexual nature.”¹⁰⁰ “[A] single or isolated incident of sexual harassment” could also impose a duty on the recipient under Title IX as long as the “incident [was] sufficiently severe.”¹⁰¹ The new rule tightened the standard to include only quid pro quo harassment,¹⁰² certain offenses under the Clery Act and VAWA,¹⁰³ and “unwelcome conduct determined by a reasonable person to be so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”¹⁰⁴

This new definition, while providing greater clarity for regulated institutions, significantly narrows the scope of actionable sexual harassment.¹⁰⁵ It is worth taking a moment to focus on this more closely.

We start with the agency’s invocation of the Clery Act and VAWA’s definitions of sexual assault and domestic violence.¹⁰⁶ These

⁹⁹ 2001 GUIDANCE, *supra* note 57, at 13.

¹⁰⁰ 2011 DCL, *supra* note 65, at 3.

¹⁰¹ *Id.*

¹⁰² 34 C.F.R. § 106.30(a) (2020) (defining quid pro quo harassment as when “[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct”).

¹⁰³ *Id.* (“‘Sexual assault’ as defined in [the Clery Act,] 20 U.S.C. § 1092(f)(6)(A)(v), ‘dating violence’ as defined in [the Violence Against Women Act (VAWA),] 34 U.S.C. § 12291(a)(10), ‘domestic violence’ as defined in 34 U.S.C. § 12291(a)(8), or ‘stalking’ as defined in 34 U.S.C. § 12291(a)(30).”).

¹⁰⁴ *Id.* (emphasis added); *see also* New York v. U.S. Dep’t of Educ., 477 F. Supp. 3d 279, 290–91 (S.D.N.Y. 2020) (describing the new rule’s standards for sexual harassment).

¹⁰⁵ *See infra* notes 106–10.

¹⁰⁶ The first section on quid pro quo harassment did not depart greatly from the Department’s previous regulation. Quid pro quo harassment was defined in the Rule as “[a]n employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwanted sexual conduct” and is in line with previous Departmental regulations and enforcement procedures. 34 C.F.R.

federal statutes impose requirements on recipients to disclose rates of criminal activity on their campuses, including instances and rates of sexual assault, domestic violence, dating violence, and stalking.¹⁰⁷ These statutes define these impermissible actions through the lens of the criminal law. Therefore, the Department's invocation of these statutes effectively holds sexual harassment actionable under administrative regulation to a criminal standard.¹⁰⁸ This is significant as the Department had previously stated several times that administrative enforcement of sexual harassment claims was wholly separate from criminal enforcement.¹⁰⁹ While some national advocacy organizations have advanced the position that campus sexual harassment and assault ought to be read through the lens of the criminal law, this view held little sway with the Department prior to 2016.¹¹⁰

Continuing on, we turn next to the final "unwelcome conduct" sweeping catchall. This language is a direct recitation of the monetary

§ 106.30(a) (2020). Compare *id.*, with 2001 GUIDANCE, *supra* note 57, at 5 ("The type of harassment traditionally referred to as *quid pro quo* harassment occurs if a teacher or other employee conditions an educational decision or benefit on the student's submission to unwelcome sexual conduct.").

¹⁰⁷ See 20 U.S.C. § 1092 (stating educational institutions' obligations under the Clery Act to report relevant information, including crime statistics, for prospective and enrolled students in order to qualify for federal financial assistance); 34 U.S.C. § 12291 (doing the same under VAWA).

¹⁰⁸ The Clery Act defines sexual assault as "an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation." 20 U.S.C. § 1092(f)(6)(A)(v). VAWA defines domestic violence as any "felony or misdemeanor crime[] of violence" committed by a partner. 34 U.S.C. § 12291(a)(8).

¹⁰⁹ See, e.g., SEXUAL HARASSMENT GUIDANCE, *supra* note 54, at 15 ("[B]ecause legal standards for criminal investigations are different, police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly."); see 2011 DCL, *supra* note 65, at 10 ("Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX.").

¹¹⁰ See SEXUAL HARASSMENT GUIDANCE, *supra* note 54, at 15; see also 2011 DCL, *supra* note 65, at 10. While the criminal law's definitions of sexual harassment have definitely improved over the past several decades, they continue to miss the mark. See generally Erin Collins, *The Criminalization of Title IX*, 13 OHIO ST. J. CRIM. L. 365 (2016) (discussing the shortcomings of a punitive interpretation of Title IX); Bennett Capers, *Real Rape Too*, 99 CALIF. L. REV. 1259 (2011) (critiquing the criminal law's neglect of male sexual violence victims); Allegra M. McLeod, *Regulating Sexual Harms: Strangers, Intimates, and Social Institutional Reform*, 102 CALIF. L. REV. 1553 (2014) (noting at length the criminal law's utter failure to deter future sexual violence). It is also notable that educational institutions often fall short of the Clery Act's mandate to report instances of sexual violence which occur on their campuses. See, e.g., Corey Rayburn Yung, *Concealing Campus Sexual Assault: An Empirical Examination*, 21 PSYCH., PUB. POL'Y & L. 1, 5 (finding through empirical analysis that Clery reports of sexual assault increased by forty-four percent in response to an audit).

liability standard articulated in the *Davis* decision.¹¹¹ The standard requires the plaintiff to meet a high evidentiary threshold for non-physical sexual harassment claims.¹¹² Because the first two segments of the definition encompass the most egregious physical forms of sexual harassment, this standard likely would apply where a student claims that they have suffered from a hostile educational environment. Such claims may encompass issues like “gender-based and sexualized commentary targeting and diminishing certain persons, stereotyping based on gendered traits (which may disproportionately impact persons who identify as LGBTQ), and dissemination of sexually inappropriate photographs and videos.”¹¹³ The Rule’s language calls into question the extent to which such conduct can be regulated by the Department because it increases the threshold of concern for such hostile environment claims.¹¹⁴

C. *Formal Complaint Procedures*

The next and perhaps most significant set of changes this Rule brings about are its procedural prescriptions for formal university adjudications. The first issue to consider is the evidentiary standard employed. The 2011 DCL did not provide a rigid procedural framework for formal adjudications of sexual harassment and assault. However, it did mandate that all institutions employ a preponderance of the evidence standard in instances where previous agency guidance had given recipients the option to choose which evidentiary standard they thought was proper.¹¹⁵ The Enacted Rule altered the evidentiary standard to allow institutions to choose between clear-and-convincing and preponderance of the evidence.¹¹⁶ Many survivors’ and women’s rights organizations disparaged this change, as it would result in an

¹¹¹ See *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643, 648 (1999) (holding that schools may be liable for school officials’ deliberate indifference to acts of peer sexual harassment).

¹¹² See *id.* at 643 (remarking that the bar for an educational institution’s monetary liability imposed by *Gesber* was a “high standard”).

¹¹³ Monica Shah, *What is the Impact of the Narrowed Definition of “Sexual Harassment” Under the New Title IX Regulations?*, ZALKIND DUNCAN & BERNSTEIN: BOS. LAW. BLOG (May 12, 2020), <https://www.bostonlawyerblog.com/what-is-the-impact-of-the-narrowed-definition-of-sexual-harassment-under-the-new-title-ix-regulations> [<https://perma.cc/D3R6-Z6CN>].

¹¹⁴ See *id.* (stating that the regulations “significantly narrow the scope of Title IX’s definition of sexual harassment”).

¹¹⁵ See 2011 DCL, *supra* note 65, at 11 (“Therefore, preponderance of the evidence is the appropriate standard for investigation allegations of sexual harassment or violence.”).

¹¹⁶ See 34 C.F.R. § 106.45(b)(1)(vii) (2020) (requiring educational institutions to state whether the standard of evidence used is “preponderance of the evidence” or “clear and convincing”).

inequitable administration of sexual harassment claims because some educational institutions used the higher clear-and-convincing standard for sexual harassment claims and lower preponderance standard for academic infractions.¹¹⁷

Secondly, the Rule puts into place a live cross-examination requirement for all formal hearings held in post-secondary institutions.¹¹⁸ While parties themselves are not allowed to conduct the cross-examination, their advisors, who may be attorneys, must conduct these cross-examinations “directly, orally, and in real time.”¹¹⁹ This cross-examination requirement has no corollary in the agency’s previous regulations. The 2011 DCL directly opposed such a requirement, stating that direct questioning “may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”¹²⁰

The Rule establishes a number of other changes intended to bolster the “due process rights” of the accused.¹²¹ These changes include a presumption of innocence for the respondent, timely notice requirements that all parties be informed of the allegations presented in detail, the timely presentation of all evidence to both parties, and a requirement that the investigator of the claim and the adjudicating officer be different people.¹²²

Equipped with this understanding of the Department’s Rule and its myriad of narrowing functions, we can turn next to the CBA and its implementation.

III

THE DEPARTMENT’S COST-BENEFIT ANALYSIS

Cost-benefit analysis has long been the subject of debate among academics, some of whom deeply support and others who vehemently oppose its application in certain arenas.¹²³ Despite its opponents, the

¹¹⁷ See Yuen & Ahmed, *supra* note 12 (discussing the negative impacts of the heightened evidentiary standard).

¹¹⁸ 34 C.F.R. § 106.45(b)(6) (2020).

¹¹⁹ *Id.*

¹²⁰ See 2011 DCL, *supra* note 65, at 12.

¹²¹ The Rule pontificates on the requirements of due process throughout and uses the phrase over one hundred times. See Enacted Rule, *supra* note 17, at 30035.

¹²² 34 C.F.R. § 106.45(b)(2)(iii)–(v) (2020).

¹²³ See generally Cass R. Sunstein, *THE COST-BENEFIT STATE: THE FUTURE OF REGULATORY PROTECTION* xi (2003) (noting that while government agencies generally see CBAs as desirable, there is disagreement about how to value complex costs and benefits such as life, health, and the interests of future generations); Ted Gayer & W. Kip Viscusi, *Resisting Abuses of Benefit-Cost Analysis*, 27 NAT’L AFFS. 59–62 (2016) (arguing that regulatory agencies struggle to incorporate irrational decisionmaking into their CBAs, and as a result may produce suboptimal policies).

CBA has played a prominent role in executive oversight of agency regulation for many years.¹²⁴ Since the 1980s, the Office of Information and Regulatory Affairs (OIRA) has been able to call upon agencies to produce CBAs for their regulatory actions wherever they see fit.¹²⁵ By requiring a CBA, OIRA orders the agency to “conduct an information-intensive examination of the costs and benefits” while also deeply considering “viable alternatives rejected by the agency.”¹²⁶ Conducting a CBA is no small task and agencies can encounter many significant econometric and epistemological problems. The chains of causation between the proposed regulation and the desired effect could be impossible to trace, meaning that the tangible economic benefits are extremely difficult to quantify.¹²⁷ Additionally, an agency may be unsure whether its regulation would actually incentivize regulated entities to change their conduct.¹²⁸ The list of problems goes on.¹²⁹ Because of the heavy lift they can pose to agencies, CBAs are therefore required by OIRA only in the instances

¹²⁴ CBAs have been implemented by regulatory agencies since the Reagan Administration. See Exec. Order No. 12,291, 3 C.F.R. 127, 127 (1982) (requiring that federal agencies prepare a Regulatory Impact Analysis—meant to ensure that agency actions maximized the “aggregate net benefits to society”—for all “major” rules).

¹²⁵ Catherine M. Sharkey, State Farm “*With Teeth*”: *Heightened Judicial Review in the Absence of Executive Oversight*, 89 N.Y.U. L. REV. 1589, 1617 (2014).

¹²⁶ *Id.* at 1621.

¹²⁷ The SEC faced this exact issue when attempting to regulate the use of conflict diamonds and other materials. See Eric A. Posner & Cass R. Sunstein, *Moral Commitments in Cost-Benefit Analysis*, 103 VA. L. REV. 1809, 1841–44 (2017).

¹²⁸ The Department of Agriculture faced this problem when deciding whether to regulate the labeling of genetically modified organisms. It was unclear whether this labeling would exacerbate widespread misinformation about the dangerousness of these foods or if it would properly support those morally opposed to GMOs to avoid consuming them accidentally. See *id.* at 1844–46.

¹²⁹ For an in-depth analysis of the limits of quantification and the heavy lift agencies must often undertake, see generally *id.*; John C. Coates IV, *Cost-Benefit Analysis of Financial Regulation: Case Studies and Implications*, 124 YALE L.J. 882 (2015) (providing case studies on the construction and implementation of several financial regulation CBAs); Sunstein, *supra* note 20 (exploring the problem of non-quantifiability and potential solutions); Richard L. Revesz, *Quantifying Regulatory Benefits*, 102 CALIF. L. REV. 1423, 1436–54 (2014) (discussing methods of quantification in regulatory CBAs). For a wholesale discussion of the practicality and morality of employing economic valuation in contemplated agency action, see generally W. KIP VISCUSI, *FATAL TRADEOFFS: PUBLIC AND PRIVATE RESPONSIBILITIES FOR RISK* (1992); Lisa Heinzerling, *Cost-Nothing Analysis: Environmental Economics in the Age of Trump*, 30 COLO. NAT. RES. ENERGY & ENV'T L. REV. 287 (2019) (disparaging the use of CBA decisionmaking in environmental regulation); Lisa Heinzerling, *Quality Control: A Reply to Professor Sunstein*, 102 CALIF. L. REV. 1457, 1457 (2014) (positing that the use of CBA in regulatory decisionmaking will “skew systematically against government action to address social problems”).

where the proposed policy is “economically significant,” as was the case with the Department’s Rule.¹³⁰

We first look to the contents of the 2020 Enacted Rule’s CBA before a deeper analysis of its shortcomings in Part IV.

The agency ascribed numerous costs to the policy, all of which were related to the costs incurred by educational institutions that had to contend with implementing a new regulation. Some were procedural—such as the costs associated with recipients becoming familiar with the rule, revising their adjudication policies, training relevant employees, and creating novel documentation policies.¹³¹ The substantive costs included those associated with responding to reports of harassment, increased investigation and adjudication requirements, and the mandated appeals process for formal complaints.¹³² The only monetary benefit associated with the rule came from a reduction in the expected number of investigations a recipient would need to conduct under the new Rule.¹³³ All tallied, the agency initially estimated a net savings for educational institutions from their proposed rule between \$286.4 and \$367.7 million over ten years.¹³⁴

The Department also listed three non-quantified benefits in the CBA: due process in campus formal complaint adjudications, clarity for recipients on their legal obligations under Title IX, and preservation of constitutional rights like free speech and religious liberty.¹³⁵ Conspicuously missing from this list of non-quantified variables that the Department may have considered is, of course, the cost of potentially under-detering sexual harassment. Because the Rule shrinks cognizable harassment under Title IX and institutes greater procedural safeguards in formal adjudication,¹³⁶ one might expect this to decrease the general deterrent effect of the statutory scheme.¹³⁷

¹³⁰ A proposed agency action is “significant” where the rule will either have “an annual effect on the economy of \$100 million or more” or will “adversely affect in a material way the economy, a sector of the economy, productivity, competition, jobs, the environment, public health or safety, or State, local, or tribal governments or communities.” Exec. Order No. 12,866, 3 C.F.R. 638 (1994).

¹³¹ Proposed Rule, *supra* note 16, at 61490.

¹³² *Id.*

¹³³ *Id.* at 61489–90.

¹³⁴ *Id.* at 61463.

¹³⁵ *Id.* at 61490; *see also id.* at 61484 (claiming that the rule would: (1) “ensure[] all reports of sexual harassment are treated seriously and all persons accused are given due process protections,” (2) “correct . . . recipients not understanding their duties and responsibilities,” and (3) prevent the “capturing [of] too wide a range of misconduct resulting in infringement on academic freedom and free speech”).

¹³⁶ *See* discussion *supra* Section II.A.

¹³⁷ *See infra* note 204 and accompanying text. *See generally* Leonard, *supra* note 77, at 712 (providing a theoretical backdrop on the relationship between punishment and deterrence).

Many stakeholders were quick to point out striking gaps in the agency's calculation of costs throughout notice-and-comment. Some discussed the tortured logic underlying the agency's analysis as the only monetary benefit was conferred from a decrease in required formal investigations.¹³⁸ This decrease, commenters stated, was possible only because the changes to the campus formal adjudicatory processes, namely the compulsory cross-examination requirement and the restrictive definition of actionable sexual harassment, disincentivized affected persons from coming forward and making a report.¹³⁹

Following notice-and-comment, the Rule actually ended up with a net cost between \$48.6 and \$62.2 million again with no quantified benefits.¹⁴⁰ This drastic shift in the CBA of over \$400 million came not from the inclusion of new costs like under-deterrence, but rather from a recalculation of the procedural and substantive costs already identified.¹⁴¹ Commenters also stated that the revision of grievance procedures, the training of Title IX coordinators and investigators, response to informal reports, investigatory requirements, and appeals processes would cost significantly more than the Department initially anticipated.¹⁴²

While this recalculation did present a more finely tuned recognition of some costs, the risk of under-deterrence was again not recognized. This was not because commenters failed to raise the issue. In fact, many commenters directed the Department to consider the possibility that its regulation would under-deter harassment and that the

¹³⁸ See Ctr. for Am. Progress, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://downloads.regulations.gov/ED-2018-OCR-0064-31283/attachment_1.pdf [<https://perma.cc/S3YJ-8DEK>] (stating that the Department's reliance on a reduction in investigations to make the Rule cost-justified was "an implicit acknowledgement that the Proposed Rule's provisions will stifle the filing of complaints by survivors, in direct opposition to the requirements and spirit of the statute").

¹³⁹ See *id.*; see also Nat'l Ctr. for Youth L., Comment Letter on Proposed Rule Regarding Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance (Jan. 30, 2019), https://downloads.regulations.gov/ED-2018-OCR-0064-18375/attachment_1.pdf [<https://perma.cc/79TP-GKJH>] ("The great hesitancy of people taking any action when sexually harassed or assaulted is well documented. And [sic] the reduction in rates of already-low reporting of sexual misconduct will reduce the risk of such misconduct being detected and punished.").

¹⁴⁰ Enacted Rule, *supra* note 17, at 30565.

¹⁴¹ See *id.* at 30570.

¹⁴² See *id.* For example, the cost attributed to training Title IX Coordinators, investigators, and other stakeholders increased almost fifteen times following notice-and-comment. Compare Proposed Rule, *supra* note 16, at 41563 (estimating annual costs of training Title IX personnel to range between \$2.77 and \$2.82 million), with Enacted Rule, *supra* note 17, at 30570 (estimating annual costs of training Title IX personnel to range between \$29.03 and \$29.54 million).

Department ought to change course.¹⁴³ Nevertheless, the Department batted aside this criticism. It did so by stating that it “does not have evidence to support the claim that the final regulations will have an effect on the underlying number of incidents of sexual harassment.”¹⁴⁴ It supported this assertion by conducting a differential statistical analysis of rates of harassment both before and after the publishing of the 2011 DCL.¹⁴⁵ The Department’s logic was as follows: If regulation can cause harassment rates to change, then rates of harassment following the expansive pro-regulatory 2011 DCL should have decreased significantly.¹⁴⁶ The Department therefore took harassment rates reported in campus Clery Act disclosures and analyzed whether the changes brought on by the 2011 DCL caused harassment to decrease.¹⁴⁷ The Department’s analysis showed that the stricter rules and higher enforcement put into place by the prior regulations did generally correlate with a decrease in reports of sexual violence, but this correlation was not sufficient to demonstrate causation.¹⁴⁸ The Department relied on this lack of statistical significance to avoid considering the rule’s impact on sexual harassment.¹⁴⁹

There is also the odd inclusion of due process, free speech, and religious liberty as non-quantified benefits. While the Department, prior to the Trump Administration, had recognized that Title IX does not supersede any recognized due process rights, it did not go so far as to expound upon what due process might require in campus Title IX enforcement.¹⁵⁰ It chose instead to remind schools to keep abreast of the law and its application to their institutions.¹⁵¹ The Department has also previously recognized freedom of speech as an important issue to consider in Title IX enforcement, especially insofar as to prevent schools from “regulat[ing] the content of speech.”¹⁵² The Enacted Rule therefore is the Department’s most significant foray into the

¹⁴³ See *infra* Part IV.

¹⁴⁴ Enacted Rule, *supra* note 17, at 30539.

¹⁴⁵ *Id.* at 30538–44.

¹⁴⁶ *Id.* at 30539.

¹⁴⁷ *Id.*

¹⁴⁸ See *id.* at 30541.

¹⁴⁹ See *id.* at 30539. For a more in-depth discussion of the legal problems associated with the Department’s faulty statistical analysis, see *infra* notes 194–201 and accompanying text.

¹⁵⁰ See 2001 GUIDANCE, *supra* note 57, at 22 (“The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding.”).

¹⁵¹ See *id.* (“In both public and private schools . . . rights may be created for employees or students by State law, institutional regulations and policies, . . . and collective bargaining agreements. Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.”).

¹⁵² *Id.*

consideration of these constitutional principles as these considerations take center stage in the Department's CBA.

As a normative matter, non-quantified benefits are not without their place in executive review of proposed agency action. Professor Cass Sunstein lays out three main reasons agencies might have to refrain from quantifying regulatory benefits. The first is because quantification poses too many “*epistemic* problem[s].”¹⁵³ An agency may simply have insufficient knowledge and data to quantify or monetize costs and benefits. Separately, agencies may themselves also have a particular ideological stance against monetization in the context of their regulation.¹⁵⁴ Despite having all the tools at their disposal to conduct the analysis, an agency may “believe that standard economic tools do not give the right answer to the monetization question.”¹⁵⁵ This comes up particularly in the context of regulatory actions that involve assessing impacts on human dignity or victimization.¹⁵⁶ Finally, an agency may be gripped by “a problem of *incommensurability*” in which quantification and monetization obfuscate important qualitative differences between regulatory actions.¹⁵⁷

At best, the Department's inclusion of these non-quantified benefits fell into the second zone and resulted from a belief that due process and fundamental fairness were too important to leave to monetization.¹⁵⁸ At worst, it is the result of a political commitment to certain constituencies.¹⁵⁹ Regardless of the propriety of the inclusion

¹⁵³ Sunstein, *supra* note 20, at 1375.

¹⁵⁴ *See id.*

¹⁵⁵ *Id.* at 1376.

¹⁵⁶ *See generally* HDR HLB DECISION ECON. INC., DEPARTMENT OF JUSTICE: DISABILITY RIGHTS SECTION OF THE CIVIL RIGHTS DIVISION, FINAL REGULATORY IMPACT ANALYSIS OF THE FINAL REVISED REGULATIONS IMPLEMENTING TITLES II AND III OF THE ADA, INCLUDING REVISED ADA STANDARDS FOR ACCESSIBLE DESIGN 142–46 (2010), https://www.ada.gov/regs2010/RIA_2010regs/DOJ%20ADA%20Final%20RIA.pdf [<https://perma.cc/HW34-FHFk>].

¹⁵⁷ Sunstein, *supra* note 20, at 1376.

¹⁵⁸ *See* Enacted Rule, *supra* note 17, at 30047. To this end, the Department notes prominently throughout the Rule that they are hoping to privilege “consistency with constitutional due process and fundamental fairness” through their importation of the *Gebser/Davis* framework's definition of actionable sexual harassment. *See id.* at 30035. Nevertheless, this commitment to the monetary liability standard goes further than even the plain text of *Gebser*, which stated that the Department was able to promulgate and enforce requirements on institutions even where “those requirements do not purport to represent a definition of discrimination under the statute.” *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

¹⁵⁹ *See* Jeannie Suk Gersen, *The Trump Administration's Fraught Attempt to Address Campus Sexual Assault*, *NEW YORKER* (July 15, 2017), <https://www.newyorker.com/news/news-desk/the-trump-administrations-fraught-attempt-to-address-campus-sexual-assault> [<https://perma.cc/KP2Q-XVUN>] (discussing the potentially outsized role that so-called “men's rights group[s]” may have had on the formulation of the Rule).

of the listed non-quantified benefits, most striking is the absence of potential under-deterrence as even a non-quantified cost. In effect, the Department instead considered a plenary conceptualization of due process to be incommensurate with and standing above any demonstrated possibility of under-deterrence.

All tallied, the Department used those three amorphous non-quantified benefits (due process, religious liberty, and free speech) to justify an imposition of millions of dollars on regulated entities without any consideration of how its regulation would impact the intended beneficiaries of Title IX—victims of sexual harassment. The obfuscation of this cost from consideration violates the preventative purpose of Title IX as the Department had a statutory obligation to consider the likely under-deterrence which would result from its regulation. Part IV shows how the Department improperly formed its CBA to circumvent its duty to consider prevention of harassment and argues for the Rule’s vacatur as arbitrary and capricious as a result.

IV

THE CASE AGAINST THE RULE

The statutory text and legislative history of Title IX clearly spell out that deterrence of sex discrimination is a core purpose of the federal statute.¹⁶⁰ The Department was under an obligation to consider the Rule’s potential impacts on that underlying incidence and it failed to do so on the record. To make matters worse, numerous commenters called out the agency during notice-and-comment for using flawed reasoning in avoiding contending sufficiently with the risk of under-deterrence.¹⁶¹

Part IV of this Note provides the legal argument against the Rule and proceeds in two Sections. Section IV.A discusses the arbitrary and capricious legal standard as applied to agency cost-benefit analyses. Section IV.B discusses, in part through replete references to the administrative comment record, the Department’s absolute abrogation of its duty to consider prevention and argues that this ought to lead to the Rule’s vacatur.

A. Judicial Review of Agency Cost-Benefit Analyses

Arbitrary and capricious review of agency decisionmaking is intended to “ensure[] that the agency bases its decision on a reasoned analysis of relevant information.”¹⁶² Where the administrative record

¹⁶⁰ See *supra* Section I.C.

¹⁶¹ See *id.*

¹⁶² Sharkey, *supra* note 125, at 1605.

seems to contradict the agency's reasoning, where the agency has ignored reasonable policy alternatives brought to its attention, or where it has considered statutorily impermissible evidence, the judiciary will vacate and remand the regulation to the regulatory agency.¹⁶³

Federal courts in reviewing arbitrary and capricious claims under APA § 706(2)(A) will employ the analytical framework from *Motor Vehicle Manufacturers Association v. State Farm Mutual Automobile Insurance Company*.¹⁶⁴ The *State Farm* Court drew a line between "'relevant factors' that an agency must consider in the process of making a decision and impermissible 'factors which Congress has not intended it to consider,'" and stated that an agency's failure to make reasoned decisions could result in a regulation's vacatur.¹⁶⁵ All in all, this standard requires that agencies not

rel[y] on factors which Congress has not intended it to consider, entirely fail[] to consider an important aspect of the problem, offer[] an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise.¹⁶⁶

When conducting this analysis, judges are careful to accept the "agency's view of the facts"¹⁶⁷ and merely decide on the strength of the agency's inferences while not going so far as to "ignore the disconnect between the decision made and the explanation given."¹⁶⁸

Where, as here, Congress has not required the agency to adopt cost-justified regulations, courts must generally "review an agency's cost/benefit analysis deferentially."¹⁶⁹ Because neither the APA nor

¹⁶³ See JOHN F. MANNING & MATTHEW C. STEPHENSON, LEGISLATION AND REGULATION 914, 916, 918 (3d ed. 2017) (describing modern "hard look" *State Farm* review as requiring vacatur of regulation where an agency: (1) "has entirely failed to consider an important aspect of the problem," (2) "has relied on factors which Congress has not intended it to consider," and (3) "offered an explanation for its decision that runs counter to the evidence before the agency, or is so implausible that it could not be ascribed to a difference in view or the product of agency expertise"). See generally *Motor Vehicle Mfrs. Ass'n of U.S. v. State Farm Mut. Auto. Ins.*, 463 U.S. 29 (1983). Relatedly, where the agency is acting in an arena of little or conflicting scientific evidence, courts are often more deferential to the agency's expertise than they are when operating in an arena with multiple legitimate schools of thought. See Richard J. Pierce, Jr., *What Factors Can an Agency Consider in Making a Decision?*, 2009 MICH. ST. L. REV. 67, 68 (2009).

¹⁶⁴ 463 U.S. 29.

¹⁶⁵ Pierce, *supra* note 163, at 68 (quoting 463 U.S. at 43).

¹⁶⁶ 463 U.S. at 43; see also *FCC v. Fox Television Stations*, 556 U.S. 502, 515 (2009) (stating that contradictions within the administrative record can give rise to *State Farm* concerns).

¹⁶⁷ 463 U.S. at 52.

¹⁶⁸ *Dep't of Com. v. New York*, 139 S. Ct. 2551, 2575 (2019).

¹⁶⁹ *Am. Trucking Ass'ns v. Fed. Motor Carrier Safety Admin.*, 724 F.3d 243, 254 (D.C. Cir. 2013); see also *Am. Textile Mfrs. Inst. v. Donovan*, 452 U.S. 490 (1981) (determining

Title IX required the Department to conduct a CBA of its rule, the proper extent to which judicial review should be exercised is an open question.¹⁷⁰ There has been significant scholarly debate regarding the extent to which judges should pay attention to agency CBAs when reviewing arbitrary and capricious claims. Some, like Professor Adrian Vermeule, believe that blanket consideration of CBAs without a clear textual prompt from Congress to do so would be “inconsistent with congressional instructions” and “inconsistent with . . . the judicial role that the APA embodies.”¹⁷¹ Such an approach, it is said, is unworkable because generalist judges should not usurp the decision-making of more politically accountable expert agencies but should instead merely check for internal inconsistencies with deference.¹⁷² Others, such as Professor Cass Sunstein, have stated that vacatur of regulations with “net costs or no net benefits” is a common-sense practice as it is in line with judicial review which requires “a serious effort” on the part of judges to consider “what the evidence allows.”¹⁷³ For Sunstein, to ignore the wellspring of evidence that CBAs can provide to the public would require a significant amount of questionable judicial restraint.¹⁷⁴ This view of judicial review has had some cachet in the nation’s highest court.¹⁷⁵

What, therefore, ought to be the proper judicial role in assessing the Department’s Rule? One commentator, Professor Catherine Sharkey, asserts that courts can, have, and will exercise review over CBAs even in the face of questionable or non-existent statutory hooks.¹⁷⁶ The *Business Roundtable*¹⁷⁷ and *Corrosion Proof Fittings*¹⁷⁸ cases are among the most prominent examples of this phenomenon. In

that the Occupational Safety and Health Act did not require the Occupational Safety and Health Administration to only enact cost-justified regulations). *But see* Pub. Citizen v. Fed. Motor Carrier Safety Admin., 374 F.3d 1209, 1216 (D.C. Cir. 2004) (vacating an agency rule due to faulty cost-benefit analyses).

¹⁷⁰ See 5 U.S.C. § 706; 20 U.S.C. § 1682 (making no reference to CBAs).

¹⁷¹ Cass R. Sunstein & Adrian Vermeule, *Libertarian Administrative Law*, 82 U. CHI. L. REV. 393, 444–45 (2015).

¹⁷² See *id.* at 439; see also Sharkey, *supra* note 125, at 1617–18 (arguing that CBA is a “prime example[] of [a] fact-based decision[] resting on expertise that Congress has implicitly delegated to agencies”).

¹⁷³ Sunstein & Vermeule, *supra* note 171, at 441 (internal punctuation omitted).

¹⁷⁴ See *id.* (describing the importance of considering cost-benefit analysis as a part of judicial arbitrariness review).

¹⁷⁵ See *Michigan v. EPA*, 576 U.S. 743, 769 (2015) (Kagan, J., dissenting) (“Cost is almost always a relevant—and usually, a highly important—factor in regulation.”); *FCC v. Fox Television Stations, Inc.*, 556 U.S. 502, 548–49 (2009) (Breyer, J., dissenting) (adopting an expansive view of judicial review).

¹⁷⁶ See Sharkey, *supra* note 125, at 1618–19 (stating that “courts will review” CBAs).

¹⁷⁷ *Bus. Roundtable v. SEC*, 647 F.3d 1144 (D.C. Cir. 2011).

¹⁷⁸ *Corrosion Proof Fittings v. EPA*, 947 F.2d 1201 (5th Cir. 1991).

these cases, the D.C. and Fifth Circuits, respectively, struck down regulations because of defective CBAs despite no clear directive from Congress to the agencies to consider costs. While these cases have been derided by “[a]lmost all scholars,” some theorists do defend them as the judicial overturning of entirely illogical and incoherent agency action and extract powerful lessons about judicial review from the holdings.¹⁷⁹ In both cases, the hard-look review exercised by the judiciary came in response to seriously defective CBAs. The SEC, for its part, entirely failed to quantify or consider extensive costs, relied on insufficient data, and based extensive conclusions on improper assumptions.¹⁸⁰ The EPA decided to enact a regulation that was not cost-justified.¹⁸¹ That the CBA employed by the Department contains the same issues of ineffective analysis as well as cost-unjustified decisionmaking suggests the imposition of hard-look judicial review would be proper in this case.¹⁸² Another issue that calls for harder-look review and eventual vacatur is the Department’s utilization of non-quantified benefits to overcome the quantified net costs of its regulation. Professor Sunstein’s view that the “reasonableness . . . of agency decisions to depart from strict forms of cost-benefit analysis” ought to be considered is highly instructive.¹⁸³ Professor Sunstein goes on to describe an agency’s “ignoring and thus entirely failing to take account of important costs or benefits” as a signal that that agency is unreasonably departing from considering quantified costs.¹⁸⁴

The 2020 Enacted Rule sported each of these fundamental flaws—the Department did not make cost-justified regulations,¹⁸⁵ wholly disclaimed its congressional mandate to prioritize prevention of harm,¹⁸⁶ and unreasonably used non-quantified benefits to ignore taking account of the costs of under-deterrence.¹⁸⁷ Therefore, because the Department “decide[d] to rely on a cost-benefit analysis as part of its rulemaking [with] a serious flaw undermining that analysis,” the

¹⁷⁹ Jonathan S. Masur & Eric A. Posner, *Cost-Benefit Analysis and the Judicial Role*, 85 U. CHI. L. REV. 935, 938 (2018); *see id.* at nn.79–82, 123–24 (citing a wide array of scholars who have deeply criticized the two cases).

¹⁸⁰ *Bus. Roundtable*, 647 F.3d at 1150–51.

¹⁸¹ *Corrosion Proof Fittings*, 947 F.2d at 1220–22.

¹⁸² *See generally* Sharkey, *supra* note 125 (advocating for harder look review in specific instances of agency action).

¹⁸³ Cass R. Sunstein, *Cost-Benefit Analysis and Arbitrariness Review*, 41 HARV. ENV'T L. REV. 1, 4 (2017).

¹⁸⁴ *Id.* at 22.

¹⁸⁵ *See supra* Part III (discussing the ballooning of costs following notice-and-comment and the Department’s persistence in promulgating the final rule).

¹⁸⁶ *See infra* Section IV.B.

¹⁸⁷ *See infra* Section IV.A.

rule ought to be subject to more rigorous judicial review and subsequently vacated.¹⁸⁸

B. *Insufficient Consideration of Prevention*

Having established that heightened judicial scrutiny of the 2020 Enacted Rule's CBA would be proper under these circumstances, we turn finally to the legal argument for vacatur.

We begin with the Department's abrogation of its preventative mandate. As discussed earlier, Title IX places upon the Department an obligation to consider whether its statutory interpretation may lead institutions to insufficiently prevent discrimination. Here, the Department not only failed to consider its regulation's effects on underlying harassment but also went so far as to claim that the regulation could not have an effect on harassment at all.¹⁸⁹ In support of this assertion, it cited a single statistical analysis built upon faulty and under-inclusive data.¹⁹⁰ Setting aside the insufficiency of the statistical analysis for a moment, the core of the Department's claim is entirely nonsensical. As one commenter clearly stated, "[i]f the regulations are not meant to . . . reduce sex discrimination, including sexual harassment, why impose them at all?"¹⁹¹ Of course, a potential answer to this clearly hypothetical question is that the Department may have sought to simply uphold the constitutional protections of due process, free speech, and religious liberty. While a regulation discreetly concerned with upholding those specific qualities might be understand-

¹⁸⁸ Nat'l Ass'n of Home Builders v. EPA, 682 F.3d 1032, 1040 (D.C. Cir. 2012); *see also* City of Portland v. EPA, 507 F.3d 706, 713 (D.C. Cir. 2007) (noting that "we will [not] tolerate rules based on arbitrary and capricious cost-benefit analyses"); Owner-Operator Indep. Drivers Ass'n v. Fed. Motor Carrier Safety Admin., 494 F.3d 188, 206 (D.C. Cir. 2007) (vacating regulatory provisions because the CBA supporting them was based on an unexplained methodology). Despite the Department's in-court statements that it did not rely on this CBA, *see* New York v. U.S. Dep't of Educ., 477 F. Supp. 3d 279, 300 (S.D.N.Y. 2020), it stated in its rule that "in deciding among alternative approaches, the Department is bound to choose the option that maximizes benefits and minimizes costs." Enacted Rule, *supra* note 17, at 30550. It is also important to note that near-identical statements made in other CBAs by the Department have been interpreted to demonstrate reliance on the CBA. *See, e.g.*, Assistance to States for the Education of Children with Disabilities, 83 Fed. Reg. 31306, 31314 (July 3, 2018) (to be codified at 34 C.F.R. pt. 300) ("We are issuing these final regulations only upon a reasoned determination that their benefits justify their costs."), *reviewed by* Council of Parent Att'ys & Advocs., Inc. v. DeVos, 365 F. Supp. 3d 28, n.11 (D.D.C. 2019).

¹⁸⁹ Enacted Rule, *supra* note 17, at 30545 ("[T]he Department does not have evidence to assume these final regulations would have any effect on the underlying number of incidents of sexual harassment and assault.").

¹⁹⁰ *See infra* notes 191–97 and accompanying text.

¹⁹¹ Fam. Violence L. Ctr., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs 10 (Feb. 23, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-17737> [<https://perma.cc/8W8U-5ZVF>].

able, the 2020 Enacted Rule is not so limited. Rather, it is expansive. As the Department's first foray into formal rulemaking on sexual harassment, it sets sweeping regulations that are themselves under-inclusive. The definition of sexual harassment is stricter than previous regulations. It constricts the settings in which institutional responsibility for enforcing Title IX is necessary. It even sets heightened procedural requirements for formal adjudication of harassment complaints. Agencies must make policy decisions of this scale with attention to effectuating the statutory objectives. Here, one of those statutory objectives is "prevent[ing] discrimination by the grant recipient."¹⁹² Because an institution's indifference to and insufficient prevention of harassment is itself discrimination, that the Department contemplated under-inclusive policies with no attention to whether those policies would affect the rates of harassment is incredibly suspect. The Department's failure to "adequately . . . quantify the certain costs or to explain why those costs could not be quantified" ought to lead to its vacatur and remand as it did in the *Business Roundtable* case.¹⁹³

Moving on from the threshold absurdity of the Department's claims, we next consider the implications of the faults in the Department's statistical analysis. Many commenters took issue with the propriety of the statistical analysis the Department used to conclude that their Rule would have no cognizable effect on underlying harassment. Remember that the Department relied exclusively upon evidence from Clery Act disclosures and that these disclosures have long been derided as ineffective.¹⁹⁴ First, as stated earlier, the manner of harassing conduct recorded under these statutes is under-inclusive of actionable sexual harassment under Title IX.¹⁹⁵ Secondly, the data recorded in these disclosures are often wildly inaccurate.¹⁹⁶ Many commenters stated that the Department's reliance on these data was illogical and advocated for alternative data sets or courses of action. One stated that the Department's reliance on Clery data meant "that the projected costs are not being conducted in a rigorous or high-quality manner and are likely to be inaccurate and underestimated."¹⁹⁷ Another commenter—a national youth legal advocacy

¹⁹² *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 658 (1999) (Kennedy, J., dissenting).

¹⁹³ *Bus. Roundtable v. SEC*, 647 F.3d 1144, 1149 (D.C. Cir. 2011).

¹⁹⁴ See Yung, *supra* note 110, at 6.

¹⁹⁵ See *supra* Section II.B.

¹⁹⁶ See Yung, *supra* note 110, at 6 (concluding that the study result is "consistent with the contention that schools are undercounting incidents of sexual assault").

¹⁹⁷ Jamila Taylor, Ctr. for Am. Progress, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs 5 (Mar. 5, 2019), <https://>

organization—also made clear that while it was not suggesting these data “cannot be used,” it urged the Department to still “account for the high potential of inaccuracy of these data.”¹⁹⁸ Yet, the Department did no such thing. Instead, it chose to simply disclaim the data’s critical shortcomings and rely on it anyways.¹⁹⁹

Several commenters also raised issue with the Department’s contention that its regulations could not have an appreciable effect on underlying harassment. One commenter, a prominent think tank, summed up the main issue in this way: “In creating significant disincentives for people to file complaints and thus reducing already-low rates of reporting of sexual misconduct, the risk of such misconduct being detected and punished will be minimized, which in turn will reduce the system’s general deterrent effect.”²⁰⁰ Another commenter, a concerned first-year law student, similarly noted that “the Department fail[ed] to justify its belief that there will be no quantifiable effect on the rate of underlying harassment, indicating that its conclusion about the impact on the underlying rate of sexual harassment is arbitrary and capricious.”²⁰¹ Another still, a prominent women’s legal advocacy organization, stated that “the proposed rules would in fact allow bad actors to engage in repeated and persistent harassment with impunity, thereby increasing the underlying rate of harassment and its associated costs to those who experience it.”²⁰² Yet another, the Chancellor of a state university, stated that

these rules will not effectuate Title IX’s main mission of eliminating the barriers to education that are erected on the basis of sex. The Department does not even account for the continued impact of harassment and assault on the basis of sex, or the likelihood that,

www.regulations.gov/comment/ED-2018-OCR-0064-31283 [<https://perma.cc/MPQ3-CTTH>].

¹⁹⁸ Nat’l Ctr. for Youth L., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs 22 (Feb. 27, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-18375> [<https://perma.cc/U6V3-P8VV>]; *see also id.* at 20 (“For years, the American Association of University Women has analyzed the . . . sexual harassment data and determined that many school districts were simply reporting zeros, rather than collecting and reporting the actual numbers of cases of sexual harassment that were reported or resulted in discipline.”).

¹⁹⁹ *See* Enacted Rule, *supra* note 17, at 30541 (disclaiming potential quality issues in the cited Clery Act reporting data).

²⁰⁰ Taylor, *supra* note 197, at 5.

²⁰¹ Eliza Schultz, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs (Feb. 5, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-9375> [<https://perma.cc/D6SH-VQBE>].

²⁰² Emily J. Martin, Shiwali Patel, Elizabeth Tang & Margaret Hazuka, Nat’l Women’s L. Ctr., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs 54 (Feb. 28, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-30297> [<https://perma.cc/3TXU-6WRS>].

with fewer allegations investigated, those who commit harassment and assault will be free to continue to do so towards this specific Reporting Individual and others.²⁰³

Commenters also brought several sources of evidence, some quantified and others not, to the Department's attention that counseled against ignoring under-deterrence.²⁰⁴ Commenters even provided citations to studies which concluded that institutional mechanisms like the ones regulated by the Department's rule have a discernable effect on sexual harassment.²⁰⁵ Nevertheless, the Department ignored this evidence, stating instead that commenters

²⁰³ Kristina M. Johnson, State Univ. of N.Y., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs 14 (Feb. 15, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-11388> [<https://perma.cc/3LY3-X7NN>].

²⁰⁴ E.g., Am. Psych. Ass'n, Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs (Mar. 1, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-30626> [<https://perma.cc/5B38-TNZZ>] (citing extensive criminological and psychological studies that counsel against the Department's adoption of the policy changes discussed in this Note); Jennifer A. Reisch, Equal Rts. Advocs., Comment Letter on Proposed Rule on Nondiscrimination on the Basis of Sex in Education Programs (Mar. 30, 2019), <https://www.regulations.gov/comment/ED-2018-OCR-0064-104092> [<https://perma.cc/E9XX-GVFB>] (cataloging the extensive research on sexual harassment under-reporting and arguing that the rule would not sufficiently prevent sexual harassment); see also CATHERINE HILL & HOLLY KEARL, AM. ASS'N OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 10–15 (2011), <https://www.aauw.org/research/crossing-the-line> [<https://perma.cc/UGN8-KGLN>] (providing an alternative data source of harassment rates that some commenters implored the Department to use instead of Clery disclosures); KAYLA PATRICK & NEENA CHAUDHRY, NAT'L WOMEN'S L. CTR., LET HER LEARN: STOPPING SCHOOL PUSHOUT FOR GIRLS WHO HAVE SUFFERED HARASSMENT AND SEXUAL VIOLENCE 1–8 (2017), <https://nwlc.org/resources/stopping-school-pushout-for-girls-who-have-suffered-harassment-and-sexual-violence> [<https://perma.cc/P98T-E3PK>] (compiling national statistics on gender-based violence from multiple sources).

²⁰⁵ The following are all sources provided by commenters. Some studies showed that respondents are less likely to commit harassment where they know there is a greater chance of punishment. See, e.g., Ronet Bachman, Raymond Paternoster & Sally Ward, *The Rationality of Sexual Offending: Testing a Deterrence/Rational Choice Conception of Sexual Assault*, 26 L. & SOC'Y REV. 343, 357 (1992) (“The more certain respondents were that the scenario male would be dismissed from school or arrested, the less likely they were to report that they would commit sexual assault under the same set of hypothetical conditions.”); Camille Gullivan Nelson, Jane A. Halpert & Douglas F. Cellar, *Organizational Responses for Preventing and Stopping Sexual Harassment: Effective Deterrents of Continued Endurance?*, 56 SEX ROLES 811, 812 (2007) (“[T]he perception that remedial actions will be taken to punish perpetrators and enforce anti-harassment policies often results in significant decreases in sexual harassment frequency.”). Inversely, respondents are also more likely to commit harassment when they believe that their behavior will not be punished. See Inez Dekker & Julian Barling, *Personal and Organizational Predictors of Workplace Sexual Harassment of Women by Men*, 3 J. OCCUPATIONAL HEALTH PSYCH. 7, 14 (1998) (finding that sexual harassment is “more likely” in an employment setting “if male employees perceive their employer as unwilling to deal seriously with sexual harassment complaints and punish those found guilty of sexual harassment”).

“assume” a causal relationship between regulations and harassment “without providing rigorous evidence.”²⁰⁶ This issue is exacerbated when one considers the deference the Department gives to less rigorously supported evidence supporting their conceptualizations of due process, free speech, and religious liberty.²⁰⁷

CONCLUSION

We are left therefore with a startling picture: an agency hiding behind shaky non-quantified benefits and “[f]unny [n]umbers” in order to make cost-unjustified regulatory policy that ignores the intent of the legislature.²⁰⁸ Unfortunately, despite the fact that several states have challenged the Enacted Rule under the APA, none have been successful in their suits.²⁰⁹ It should also be noted that two state litigants did make reference in their pleadings to the Department’s refusal to quantify the costs of under-deterrence as a ground for vacatur. Between them, one did so rather cursorily.²¹⁰ The other did claim that the Department’s CBA was faulty but made no reference to the administrative record or core purposes of the statute when doing so.²¹¹

²⁰⁶ Enacted Rule, *supra* note 17, at 30539.

²⁰⁷ See *id.* at 30050–51 (citing David Resnick, *Due Process and Procedural Justice*, in *DUE PROCESS: NOMOS XVIII* 206, 214 (J. Roland Pennock & John W. Chapman eds., 1977); Rebecca Holland-Blumoff, *Fairness Beyond the Adversary System: Procedural Justice Norms for Legal Negotiation*, 85 *FORDHAM L. REV.* 2081, 2084 (2017); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for “Fundamental Fairness” in Disciplinary Proceedings*, 42 *B.C. L. REV.* 653, 663–64 (2001).

²⁰⁸ See Sunstein, *supra* note 183, at 21 (providing hypothetical examples of how even an agency considering costs and benefits might make arbitrary choices).

²⁰⁹ See *New York v. U.S. Dep’t of Educ.*, 477 F. Supp. 3d 279, 305 (S.D.N.Y. 2020); *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47, 52 (D.D.C. 2020); *Know Your IX v. DeVos*, No. RDB-20-01224, 2020 WL 6150935, at *8 (D. Md. Oct. 20, 2020). This failure can be attributed in part to the fact that all litigants sought a preliminary injunction which requires plaintiffs to meet a heightened evidentiary burden.

²¹⁰ Complaint at 76, *New York v. U.S. Dep’t of Educ.*, 477 F. Supp. 3d 279 (S.D.N.Y. 2020) (No. 1:20-cv-04260) (stating only that “[t]he Final Rule is arbitrary and capricious because Defendants conducted and relied on a flawed cost-benefit analysis, citing benefits the Final Rule would confer without any evidentiary basis, and failing adequately to account for the true costs the Final Rule will impose”).

²¹¹ Complaint at 48–50, *Pennsylvania v. DeVos*, 480 F. Supp. 3d 47 (D.D.C. 2020) (No. 1:20-cv-01468). What’s more, the District of Columbia District Court adopted the Southern District of New York’s reasoning rather closely in its decision despite the fact that the plaintiffs in the other case did not brief this issue in a robust manner. Compare *Pennsylvania*, 480 F. Supp. 3d at 69 (concluding that the Department adequately considered the risk of rising sexual harassment rates along with countervailing interests), with *New York*, 477 F. Supp. 3d at 300–01 (finding that the Department acted appropriately in dismissing concerns about the effect of the rule on sexual harassment rates).

Nevertheless, there is hope. The Biden Administration has set its sights on revising sexual harassment regulations under Title IX as the President has directed the Secretary of Education to “consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules” in this arena.²¹² Since this directive, the Department has been meeting with key stakeholders and the public to chart a course ahead.²¹³ While many commenters and advocates have properly focused their comments on the substantive elements of the 2020 Enacted Rule, this Note argues that the Department must take the issue of prevention seriously as it crafts its next slate of regulations—whatever they might be. Whether quantified or not, the prevention of harm and the appendant costs of under-deterrence are legally necessary considerations for the agency to take into account and for the public to provide feedback on.

²¹² Exec. Order. No. 14,021, § 2(iii), 86 Fed. Reg. 13803, 13803 (Mar. 8, 2021).

²¹³ See Press Release, U.S. Dep’t of Educ., Department of Education’s Office for Civil Rights Announces Virtual Public Hearing to Gather Information for the Purpose of Improving Enforcement of Title IX (May 17, 2021), <https://www.ed.gov/news/press-releases/department-educations-office-civil-rights-announces-virtual-public-hearing-gather-information-purpose-improving-enforcement-title-ix> [https://perma.cc/8ME2-ZLNR].