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TITLE IX SEXUAL ASSAULT INVESTIGATIONS IN PUBLIC INSTITUTIONS OF HIGHER EDUCATION: CONSTITUTIONAL DUE PROCESS IMPLICATIONS OF THE EVIDENTIARY STANDARD SET FORTH IN THE DEPARTMENT OF EDUCATION'S 2011 DEAR COLLEAGUE LETTER

ABSTRACT

This Article examines the constitutional due process impact of the vastly opposite and conflicting standards of review in Title IX sexual assault investigations. Thousands of unionized public employees are subject to the terms and conditions of a public university collective bargaining agreement, which requires a heightened standard of "clear and convincing evidence" to discipline employees. At the same time-perhaps unknowingly-the employee is also held to the strict federally mandated standard of a "preponderance of the evidence," which has a lower standard of review. In short, under the same facts and within the same Title IX investigation, the employee is subject to two conflicting legal standards. The circumstances and facts revealed that many Title IX sexual assault investigations can lead to: employee discipline, suspension, termination or even a private right of action. With this ***322** valuable right at stake for unionized public university employees, the legal conflict surrounding standards of review has manifested as one of the nation's most pressing social, political, and legal matters of this decade.

By examining this constitutionally important case, I define and articulate the historical and legal origins of (1) collective bargaining rights in the public sector; (2) the origins of Title IX from its initial legislative embodiment to its present day form; and (3) the intersection of unionization and due process rights in Title IX sexual assault investigations which result in an unintended constitutional conflict that may challenge at the core the legal permissibility of the manner in which sexual assault investigations are conducted nationwide. At the outset, I use two major research strategies: (1) a qualitative analysis and nationwide data sample of numerous public sector university collective bargaining agreements; and (2) established legal precedent. Data has been collected from interviews, newspapers, legal precedent, case law and published reports.

Undoubtedly, this Article challenges the constitutionality of the "preponderance of the evidence" standard. While public institutions and public employee unions grapple with this important issue at the grassroots level, the facts uncovered in this critical research reveals that, upon legal challenge to the U.S. Supreme Court, the now ubiquitous "preponderance of the standard," ostensibly mandated by the U.S. Department of Education's 2011 Dear Colleague Letter is, in fact, contrary to federal law and violates the Due Process Clause of the U.S. Constitution.

This contention is not made lightly however. For what is at stake for public education institutions, Congress, the courts, labor unions and the like is of utmost legal importance. Yet, in view of the legal precedent revealed in this research, there can be only one reasonable conclusion when the evidence is considered in its totality; the April 2011 Dear Colleague Letter is not binding law. Rather, it is merely suggestive agency guidance cleverly held out to the public as binding law but, in actuality, lacks the necessary constitutional authority sufficient to withstand legal challenge.

I. INTRODUCTION

There is a looming and unprecedented constitutional law issue on the horizon for thousands of public colleges and universities nationwide. This issue represents the evolution and eventual collision of years of ***323** legal jurisprudence involving collective bargaining rights from the origin of public employee law and the administratively relaxed evidentiary standards at play in Title IX sexual assault investigations in public higher education. In a nutshell, when collectively bargained labor agreements on American public college campuses calls for the heightened "clear and convincing" evidentiary standard in a sexual assault investigation of a unionized employee, but federally mandated Title IX investigations as required by the 2011 Dear Colleague Letter [1] only require the much lower threshold "preponderance of the evidence" standard to discipline the accused public employee, which prevails?

This question is paramount to the understanding of this issue and to the analysis of the multitude of laws at play in this matter. The law of collective bargaining, property rights, due process, and labor law which applies the "clear and convincing evidence" standard, for example, is plentiful. [2] Equally so, the law relating to the "preponderance of the evidence" standard is equally plentiful as its use is ubiquitous and commonplace in American civil jurisprudence. [3] However, in juxtaposition to one another, the law is almost silent in all jurisdictions on which of the two prevails in the context of a federally mandated Title IX investigation (the preponderance of the evidence standard) of a unionized public employee (clear and convincing standard). Ultimately, the overarching and final constitutional question remains: Does the Title IX "preponderance of the evidence" standard *mandated* by the U.S. Department of Education violate the constitutional due process rights of the accused public college employee? Is the "preponderance of the evidence" standard constitutionally permissible?

These are the core legal questions at the forefront of this research. The answer to these important questions has yet to be determined by the courts, but the issues are of grave legal and constitutional importance nationwide to thousands of unionized public college employees, the victims of sexual assault and, ultimately, to those investigating the alleged sexual assault for the public higher education institution under ***324** the strict and multifaceted guidelines of the Title IX mandate.

A. Background

The problem of sexual violence, which includes rape and varying forms of sexual assault, is a widespread problem incurred by college and university campuses across the U.S. [4] It has been reported that "[a]s many as one in every five women is likely to be raped or sexually assaulted during her college years, most often by someone she knows." [5] And women attending college are more likely to be sexually assaulted than those in the same age group that do not attend college. [6]

While the topic is one that is now very prevalent in the public discourse, one of the earliest studies published which addressed the issue was titled "Male Sex Aggression on a University Campus." [7] In 1957, for example, "sociologist

Eugene Kanin posited a model where men used secrecy and stigma to pressure and exploit women." [8] In the 1980s, Mary Koss coined the term "date rape," a term that illustrates the secrecy described by Eugene Kanin. [9] As a professor of psychology at the University of Arizona, over the course of her career, Mary Koss has collected the stories of thousands from campuses and around the world. [10] A national study published in 1987, for example, revealed that "7.7 percent of male students volunteered anonymously that they had engaged in or attempted forced sex." [11] Among those in that 7.7 percent, almost none considered forced sex to be a crime. [12]

***325** Simultaneously, "[a]s the women's civil rights movement gained momentum in the late 1960's and early 1970's, sex bias and discrimination in schools emerged as a major public policy concern." [13] Women, who were entering the workforce in record numbers, faced a persistent earnings gap compared to their male counterparts. [14] As a result of the workforce inequality debate, "Americans also began to focus attention generally on inequities that inhibited the progress of women and girls in education." [15] In turn, "[s]everal advocacy groups filed class action lawsuits against colleges, universities and the federal government." [16] In response to the inequities in education due to gender, Congress took action to address this vital public policy concern with the beginnings of legislation that eventually would become what is now known today as Title IX. [17]

B. Origins of Title IX

In 1972, Indiana Senator Birch Bayh introduced an amendment on the Senate floor that would later become Title IX. [18] The amendment, as he put it, had the purpose of combatting "the continuation of corrosive and unjustified discrimination against women in the American educational system." [19] Officially, the sponsors of Title IX were Senator Birch Bayh and Representative Edith Green. [20] Title IX, in its infancy, was modeled after Title VI [21] of the Civil Rights Act of 1964 and they both share a common purpose: to ensure that public funds derived from all the people are not utilized in ways that encourage, subsidize, permit, or result in prohibited discrimination against some of the people. [22] ***326** Towards that end, both Title VI and Title IX broadly prohibit conduct by a recipient of federal financial assistance that results in a person being "excluded from participation in, ... denied the benefits of, or ... subjected to discrimination under" a federally-assisted program or activity. [23] Title VI was enacted pursuant to Congress' dual constitutional authority under the spending clause [24] and § 5 of the Fourteenth Amendment. [25]

Thus, both Title VI and Title IX trace their roots to common constitutional sources: [26]

> Congress and the U.S. Department of Education have sought to address the problem of sexual assault in the nation's schools through legislation such as Title IX of the Education Amendments of 1972. Most commonly known for promoting equality in sports participation, Title IX prohibits discrimination based on sex in any educational program or activity that receives federal funds. Under Title IX, discrimination includes conduct which denies or limits a student's ability to benefit from a school's programs or activities on the basis of that student's sex. Courts and the Department of Education recognize sexual harassment as conduct that is so severe or pervasive that it creates a hostile learning environment, thereby limiting a student's ability to access the full benefits of a school's program. Even a single incident of sexual assault can create a hostile environment and constitute sexual harassment. Consequently, Title IX requires schools to respond "prompt[ly] and effective [ly]" to student-on-student sexual harassment and assault to mitigate the

effects of the hostile learning environment and to safeguard all ***327** students' right to an education free from sex-based discrimination and violence. [27]

On June 23, 1972, Title IX of the Education Amendments was enacted by Congress and was signed into law by President Richard Nixon. [28] Title IX prohibits sex discrimination in any educational program or activity receiving any type of federal financial aid. [29] Members of Congress, in both the House and the Senate, continued to introduce legislation addressing the problem of sex discrimination in education. [30] While it became commonly accepted that sex discrimination in education was a problem that should be addressed, varying opinions still existed as to the best means to bring it to an end. [31]

The purpose of this legislation was subsequently claimed by some critics to be aimed at filling a quota or ratio of male to female students. [32] Contrary to this, Senator Birch Bayh of Indiana stated many times, however, that "the amendment is not designed to require specific quotas. The thrust of the amendment is to do away with every quota." [33] With the introduction of Title IX in 1972 came enforcement of the law and the establishment of specific institutional requirements to be met in order to remain in compliance. [34]

***328** *C. Title IX Enforcement and Institutional Compliance*

The Title IX regulation is enforced by the U.S. Department of Education's Office of Civil Rights ("OCR") and is codified in the Code of Federal Regulations. [35] Educational institutions that receive federal financial assistance are covered by Title IX. [36] "If only one of the institution's programs or activities receives federal funding, all of the programs within the institution must comply with Title IX regulations." [37] Failure to remain in compliance with Title IX may subject an institution to a loss in federal funding. [38] Failure to remain in compliance with Title IX may also subject the institution to civil actions by victims of sexual assault. [39] There is an implied private right of action to file suit against an institution for non-compliance with Title IX. [40]

The Administrative Procedure Act ("APA") governs formal rulemaking by federal agencies like the Department of Education's OCR. [41] In its enforcement of Title IX, under the APA, the U.S. Department of Education ("DOE") as a federal agency has the authority to issue guidance documents and conduct formal rulemaking in order to assist the public in understanding the myriad of federal regulations that the DOE is mandated to enforce. [42] Under the APA, "each [a]gency shall separately state and currently publish in the Federal Register for the ***329** guidance of the public ... substantive rules of general applicability adopted as authorized by law, and statements of general policy or interpretations of general applicability formulated and adopted by the agency." [43]

The APA states that a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." [44] The APA "was adopted to provide, *inter alia*, that administrative policies affecting individual rights and obligations be promulgated pursuant to certain stated procedures so as to avoid the inherently arbitrary nature of unpublished ad hoc determinations." [45]

In light of the DOE's status as a federal agency and its enumerated obligations and rights to promulgate rules and changes to rules under the APA,

> [i]n April 2011, Vice President Joseph Biden and U.S. Secretary of Education Arne Duncan announced that the [OCR], the agency charged with enforcing Title IX, was issuing a "Dear Colleague Letter" focusing on sexual assault on college campuses and schools' Title IX obligations to respond. The Department of Education designated the Dear Colleague Letter [as] a "significant guidance document," meaning that it sets forth statements of general policy and interpretive rules of broad, prospective applicability on regulatory and statutory issues. ... One significant component of the Dear Colleague Letter is its specification of the standard of proof schools must use in campus disciplinary proceedings for sexual assault complaints. Prior to the Dear Colleague Letter, OCR had not specified that Title IX requires schools to use a particular standard of proof in disciplinary proceedings addressing student-on-student sexual assault. According to the Letter, however, for a school's disciplinary procedures to comply with Title IX, *the school must utilize the "preponderance of the evidence" standard in* ***330** *adjudications for sexual harassment and assault. Thus, a school's use of a higher standard, such as "clear and convincing evidence," would constitute a violation of Title IX*. According to OCR, the preponderance of the evidence standard is necessary to ensure an equitable disciplinary proceeding because it is consistent with other civil rights laws and is the evidentiary standard used by OCR itself when investigating a school's alleged failure to comply with Title IX. [46]

The Obama Administration's new interpretation of Title IX, utilizing the now articulated "preponderance of evidence" standard within the April 4, 2011 Dear Colleague Letter was a major policy shift for the DOE. [47] As stated, this new interpretation of Title IX by the DOE sets forth requirements that all colleges and universities must meet in order to remain in compliance, and created new standards and substantive rules that bind all colleges and universities governed by Title IX substantive rules "establish[es] a standard of conduct which has the force of law." [48]

In other words, in adjudications involving substantive rules, the facts will be analyzed as to whether they conform to the substantive ***331** rules. For example, the Dear Colleague Letter uses phraseology such as "must," which is the kind of "mandatory, definitive language [that] is a powerful, even potentially dispositive, factor suggesting ... substantive rules." [49]

II. FORMAL RULEMAKING

Congress grants the authority and power to federal agencies to conduct rulemaking. [50] The Court determined, "absent constitutional constraints or extremely compelling circumstances the 'administrative agencies "should be free to fashion their own rules of procedure and to pursue methods of inquiry capable of permitting them to discharge their multitudinous duties."'" [51] However, to preserve legislative prerogatives and to allow participation from affected parties the APA requires agencies to provide the public with notice and the opportunity to comment before promulgating final rules. [52]

After considering all relevant matter, "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." [53] The requirement for notice and comment is "designed to assure fairness and mature consideration of rules of general application." [54] Solicitation of public input for new regulations is more than a bureaucratic courtesy; it ensures that the rulemaking process remains in harmony with the basic tenets of representative

government. [55] The APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from its notice and comment requirement. [56] This exemption recognizes that, in theory, such rules do not impose new obligations but affect only the agency itself or serve simply to clarify existing agency interpretations. [57] Similarly, the U.S. Court of Appeals for the D.C. Circuit has stated that "if a statement has a present-day binding effect," it is a substantive rule ***332** and thus must be subject to APA notice and comment. [58]

In determining whether a rule has binding effect and imposes new legal obligations, courts review the language of the agency statement for imperative language such as must and "will." [59] Courts also assess an agency's intention to bind its own decision-making moving forward as evidence of a substantive rule. [60] "[A] critical test of whether a rule is a general statement of policy is its practical effect in a subsequent administrative proceeding"; if an agency statement establishes a "binding norm," it has engaged in substantive rulemaking. [61] In stark contrast, interpretative rules "merely clarify or explain existing law or regulations." [62] To determine whether an agency action is a substantive rule, requiring notice and comment, or simply an interpretative rule, the Supreme Court has looked to the impact of the rule on "individual rights and obligations." [63]

Similarly, the lower federal courts are in accord with the reasoning of the Supreme Court insofar as individual rights and obligations are implicated. [64] These courts have held that, with regard to substantive versus interpretative rules, there are two means of determining whether "an agency has issued a binding norm or merely a statement of policy." [65] One requires the court to ask whether the agency has "(1) 'impose[d] any rights and obligations,' or (2) 'genuinely [left] the agency and its decision makers free to exercise discretion.'" [66] The other is to look to the agency's intent, considering three factors: "(1) the agency's own characterization of the action; (2) whether the action was published in the Federal Register or the Code of Federal Regulations; and (3) whether the action has binding effects on private parties or on the agency." [67]

Notwithstanding, in light of the APA's authorization of guidance documents by federal agencies, the observation of the APA's notice-and-comment requirements by those agencies remains a great concern. [68] ***333** When an agency adopts a binding policy position rather than creating a rule that interprets an existing law, "regardless of how they initially are labeled," those changes are seen by both Congress and the courts as requiring notice-and-comment. [69] The APA's notice-and-comment requirement is considered a safeguard against poor and arbitrary governance in order to promote transparency and accountability. [70]

Similarly, legal scholars and commentators have pointed to the APA's broad definition of the term "rule." [71] In reality, when an agency makes a statement for the purpose of interpreting or prescribing a law or announcing a policy, that statement is a "rule" under the APA. [72] In short, when an agency adopts a substantive rule without following the APA's notice and comment requirement, absent a good cause for not doing so, it is a non-legislative rule. [73] The rule itself is not invalid procedurally. [74] Rather, it is when an agency gives that rule binding legal effect that the action of the agency is unlawful. [75] However, the non-legislative rule still may be invalid if the rule interprets the law improperly. [76]

With regard to the "Dear Colleague Letter" and its "rule" mandating a preponderance of the evidence standard, there was no notice and comment phase established before the document was issued by the DOE and announced by Vice President Biden as a "significant guidance document." [77] Interestingly, and opposite to the statutory requirements of the ADA,

the DOE, in a nondescript footnote to the Dear Colleague Letter announcement on its website, invited public comments to the rule only *after* the mandate requiring a preponderance ***334** of the evidence standard was made public. [78] The post-announcement invitation for public comment states:

> OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce. OCR's legal authority is based on those laws and regulations. This letter does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates whether covered entities are complying with their legal obligations. If you are interested in commenting on this guidance, please send an e-mail with your comments to OCR@ed.gov, or write to us at the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, SW, Washington, DC 20202. [79]

In apparent recognition of its well-established notice and comment obligations, in 2014 the DOE followed the APA in order to implement its changes to the Clery Act by the Violence Against Women Reauthorization Act of 2013 (VAWA). [80] Under the Clery Act, all institutions of higher learning that receive federal funding are required to notify members of the campus community upon the occurrence of certain crimes. [81] When campus law enforcement or security learns of a crime that poses a threat to students and employees, the college or university must alert the campus community in a timely fashion. [82]

Clearly, the U.S. DOE, a federal agency, failed to follow the APA. [83] The DOE instead invited public comment to its newly announced agency interpretation after its April 4, 2011 Dear Colleague publication. [84] This action, in direct opposition to the APA, relegates the preponderance of the evidence standard *mandated* in the April 4, 2011 ***335** Dear Colleague Letter and the procedure with which it was promulgated as a non-legislative, non-notice and comment (interpretive) rule, meaning without binding legal effect. [85] This type of agency action in violation of the APA's notice and comment requirements has been recognized by the courts in all its various iterations and has been consistently reversed. [86]

III. JUDICIAL ENFORCEMENT OF THE ADMINISTRATIVE PROCEDURE ACT

In recent years, the federal courts have consistently found that federal agencies who re-interpret pre-existing regulations remain under a strict duty to comply with the APA. [87] The D.C. Circuit Court of Appeals in 1992, for example, in regards to an announcement by the U.S. Department of Health and Human Services, held "that a 1988 regulation which had theretofore been construed to strictly prohibit abortion counseling or referral ... in Title X programs, would thereafter be interpreted to permit doctors to counsel on abortion ... effectively amend[ing] the 1988 regulation to significantly alter its meaning, as previously interpreted," and therefore required notice and comment procedure. [88] In 2008, the U.S. District Court for the District of Columbia held that a Medicare Provider Reimbursement Manual section 2534.5, concerning calculation of amount of atypical services exception, significantly altered Department of Health and Human Services' established interpretation of 42 U.S.C. section 1395d(a)(2) and § 1395x(v)(1)(A), the Department violated the APA by not following notice and comment procedures of 5 U.S.C. section 553(b)(1)-(3) before enacting section 2534.5. [89]

***336** Central to the APA compliance argument, on January 25, 2007, the Office of Management and Budget ("OMB"), Executive Office of the President (one year before the Obama Administration took office and four years before the April 2011 Dear Colleague Letter), issued a Final Bulletin in the Federal Register entitled "'Agency Good Guidance Practices' which establishes policies and procedures for the development, issuance, and use of significant guidance documents by Executive Branch departments and agencies." [90] The intent of the bulletin was "to increase the quality and transparency of agency guidance practices and the significant guidance documents produced through them." [91] The authority of the Bulletin "is issued under statutory authority, Executive Order, and OMB's general authorities to oversee and coordinate the rulemaking process." [92] Within this final bulletin issued by OMB lies the constitutional blueprint and legislative forewarning against unlawful and unfounded agency rulemaking action under the guise and concealment of "guidance documents." [93]

The OMB Final Bulletin makes clear, in no uncertain terms that ***337** given their legally nonbinding nature, significant guidance documents should not include mandatory language such as "shall," "must," "required" or "requirement," unless the agency is using these words to describe a statutory or regulatory requirement, or the language is addressed to agency staff and will not foreclose consideration by the agency of positions advanced by affected private parties. [94]

It has been held that "agencies need to follow statutory rulemaking requirements, such as those of the APA, to issue documents with legally binding effect, i.e., legislative rules." [95] In closing, the Final Bulletin states that, with regard to an agency's duty to comply with APA requirements:

> The agency then should publish a notice in the Federal Register announcing that the significant guidance document is available. The agency must post the significant guidance document on the Internet and make it available in hard copy. The agency also must prepare a robust response-to-comments document and make it publicly available. [96]

More persuasively, the Supreme Court on March 9, 2015, articulated a more strict and exacting judicial interpretation of the APA's notice and comment requirements on executive agencies and the distinction between legislative rules and non-legislative rules. [97] In *Perez v. Mortgage Bankers Association*, the Supreme Court stated that

> The [APA] establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." ... The APA distinguishes between two types of rules: So-called "legislative rules" are issued through notice-and-comment rulemaking, and have the "force and effect of law." "Interpretive rules," by contrast, are ***338** "issued ... to advise the public of the agency's construction of the statutes and rules which it administers," ... do not require notice-and-comment rulemaking, and "do not have the force and effect of law." [98]

Arguably, however, the distinction between legislative rules and interpretative rules or policy statements has been described at various times as "tenuous." [99] Notwithstanding, the Supreme Court held, opposite to the widely held judicial approach, that "[b]ecause an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule." [100]

In this case, the Mortgage Bankers Association ("MBA") "filed suit contending, as relevant here, that the [DOL] Administrator's interpretation was procedurally invalid under the D.C. Circuit's decision in *Paralyzed Veterans of America v. D.C. Arena L.P.*" [101] Under what has come to be known as the *Paralyzed Veterans* doctrine, courts "hold[] that an agency must use the APA's notice-and-comment procedures ***339** when it wishes to issue a new interpretation of a regulation that deviates significantly from a previously adopted interpretation." [102] At the district court level, the Department was granted summary judgment, "but the D.C. Circuit applied Paralyzed Veterans and reversed." [103] The Supreme Court, however, reversed upon certiorari and held in sum that "[t]he *Paralyzed Veterans* doctrine is contrary to the clear text of the APA's rulemaking provisions and improperly imposes on agencies an obligation beyond the APA's maximum procedural requirements." [104]

In unusual and specific detail of the APA, the Supreme Court stated the foundation and purpose of the APA and how its legal requirements must be met when it articulated that:

> The APA establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." "Rule," in turn, is defined broadly to include "statement[s] of general or particular applicability and future effect" that are designed to "implement, interpret, or prescribe law or policy." Section 4 of the APA, 5 U.S.C. section 553, prescribes a three-step procedure for so-called "notice-and-comment rulemaking." First, the agency must issue a "[g]eneral notice of proposed rulemaking," ordinarily by publication in the Federal Register. Second, if "notice [is] required," the agency must "give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments." An agency must consider and respond to significant comments received during the period for public comment. ... Not all "rules" must be issued through the notice-and-comment process. Section 4(b)(A) of the APA provides that, unless another statute states otherwise, the notice-and-comment requirement "does not apply" to "interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice. The term "interpretative rule," or "interpretive rule," is not further defined by the APA, and its precise meaning ***340** is the source of much scholarly and judicial debate. [105]

The Supreme Court concluded its detailed explanation of the APA, interpretive rules and its non-binding nature by stating explicitly that interpretive rules "do not have the force and effect of law and are not accorded that weight in the adjudicatory process." [106]

Based upon the Supreme Court's holding in this matter, these facts demonstrate that a federal agency that issues re-interpretative guidelines must meet APA requirements, or the law is non-binding as an interpretive rule. [107] This Supreme Court ruling provides the legal context for the DOE's failure to meet the APA guidelines. [108] Yet, even ***341** without the Supreme Court's authoritative ruling in this matter, the DOE's April 2011 Dear Colleague Letter evidentiary rule also fails as authoritative agency guidance because of binding judicial precedent under the *Chevron* deference. [109]

IV. THE CHEVRON DEFERENCE

Assuming *arguendo*, that the Supreme Court does not reverse the DOE's apparent rule mandating the preponderance of the evidence standard on APA violation grounds, the rule also stands in jeopardy of reversal on grounds of the violation

of the *Chevron* deference. [110] In 1984, the U.S. Supreme Court addressed how much weight should be given to federal agencies' interpretation of federal law and whether the agency's interpretation of statutes was a permissible construction of a statutory scheme. [111] In *Chevron v. NRDC*, the Supreme Court held that EPA's interpretation of the statute was a permissible construction and entitled to deference, where the legislative history of the statute was silent as to the instant issue. [112] In other words, the Supreme Court held that a court must give effect to an agency's regulation containing a reasonable interpretation of an ambiguous statute. [113]

This theory has come to be known as the "*Chevron* Deference." [114] Here, petitioner sought review of a judgment from the U.S. Court of Appeals for the District of Columbia Circuit, which set aside a regulation. [115] Petitioner contended that the Environmental Protection Agency (EPA) regulation, implementing permit requirements for nonattainment states pursuant to the Clean Air Act Amendments of 1977, [116] was a reasonable interpretation of the term "stationary source." [117] Petitioner argued that the EPA regulation, implementing permit requirements for nonattainment states pursuant to the Clean Air Act Amendments of 1977, 42 U.S.C. section 7502(c)(6), permitting states to treat all of the pollution-emitting devices within the same industrial grouping as though they were encased within a single 'bubble' [was] based on a reasonable construction of the statutory term ***342** 'stationary source.'" [118]

On appeal, the judgment below was reversed. [119] In support of its ruling, the Supreme Court held that "if the statute was silent or ambiguous with respect to the specific issue, the question for the court [was] whether the agency's action [was] based on a permissible construction of the statute." [120] Further, the Court "ha[s] long recognized that considerable weight [was to] be accorded to an agency's construction of a statutory scheme. ..." [121] The Court noted that while the legislative history of the statute was silent on the instant issue, it did reveal that the EPA's interpretation was fully consistent with one of the two principal goals of the statute, namely allowance of reasonable economic growth. [122] Accordingly, the EPA's interpretation was entitled to deference. [123]

Similar to the thrust of this dissertation, the Supreme Court reversed the judgment because the EPA's interpretation of the statute was a permissible construction and entitled to deference, where the legislative history of the statute was silent as to the instant issue. [124] Here, regarding the DOE's 2011 Dear Colleague Letter which mandates the preponderance of the evidence standard in Title IX sexual assault investigations, there is no legislative history because the proposed rule was not submitted for notice and comment in violation of the APA. [125] Similarly, it has been argued that:

> A "Dear Colleague" letter, by its very nature, is not entitled to binding force--that is, *Chevron* deference. Depending on its contents and reasoning, such a letter might be entitled to so-called *Skidmore* deference--a lesser form of deference which means an agency's decision is not binding, but merely worthy of consideration, and thus to be followed only if it is "persuasive." [126]

Prior to its March 2015 decision in *Perez*, the Supreme Court made ***343** clear its view of federal agencies and the controlling weight of guidance documents that do not meet APA notice and comment requirements. [127] In *Christensen v. Harris County*, the Court held that, with respect to a Department of Labor Opinion Letter:

> [W]e confront an interpretation contained in an opinion letter, not one arrived at after, for example, a formal adjudication or notice-and-comment rulemaking. Interpretations such as those in opinion letters--

like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law--do not warrant *Chevron*-style deference. [128]

In applying the Supreme Court's holding on interpretative rules in *Perez*, [129] in light of the strict tenets of the *Chevron* deference, [130] the January 2007 OMB Final Bulletin in the Federal Register, [131] and the enumerated procedural requirements of the APA, [132] the DOE issued the 2011 Dear Colleague Letter in its newly articulated interpretation of Title IX, which is a non-binding, non-legislative agency rule which has no legal binding effect. [133] The Dear Colleague Letter falsely directs colleges to employ a lowered evidentiary standard ("preponderance of the evidence") which violates the APA and, upon discipline or termination of a unionized public employee, arguably violates the Due Process Clause of the U.S. Constitution. [134]

V. THE TITLE IX AND UNIVERSITY COLLECTIVE BARGAINING CROSSROADS

Ostensibly, there might not appear to be a close or apparent relationship between Title IX and public institution collective bargaining agreements. [135] To be sure, Title IX involves in large part students' ***344** gender equity and their safety from sexual harassment on a college campus. [136] Unionized public employees, on the other hand, employed on a college campus who may become victims of sexual harassment by a fellow employee or university student enjoys the expansive protections of Title VII, [137] state laws, [138] college policy [139] and the provisions of their respective collective bargaining agreements. [140]

However, what is revealed between these two seemingly unrelated members of a campus community is that unionized public employees who may be accused by a student of sexual harassment, and are held to the standard of "preponderance of evidence" under Title IX and the 2011 Dear Colleague Letter, despite the fact that the employee's collective bargaining agreement may require the heightened "clear and convincing evidence" standard in order to discipline or terminate the employee for the alleged harassing conduct. [141] The juxtaposition of the preponderance of the evidence standard under the 2011 Dear Colleague Letter and the more rigorous clear and convincing evidence standard found in many, if not most public institution collective bargaining agreements demonstrate that this undiscovered legal tension between these two conflicting evidentiary standards are on a constitutional due process collision course possibly before the U.S. Supreme Court. [142]

*345 VI. THE ORIGINS OF PUBLIC LABOR UNIONS IN THE UNITED STATES

Until the 1960s, there was no federal legislation allowing public employees "the right to organize and bargain collectively." [143] However, President John F. Kennedy signed Executive Order 10988 [144] in 1962, granting federal employees the right to "greater participation in the formulation and implementation of policies and procedures" of their employment and to form or join any employee organization. [145] Executive Order 10988 came to be known "as the Magna Carta for federal-employee unionism," because of the rights it granted to public employees. [146] States adopted similar legislation to the Executive Order in granting public employers "the authority to bargain with associations of public employees." [147] "By 1980, forty-two states had authorized collective bargaining for at least some categories of public employees." [148]

Just cause protection [149] is standard in labor agreements. [150] While ***346** many if not most public labor agreements contain "just cause" protections for its member-employees, more frequently, labor unions have argued and negotiated greater protection for its employees in the form of a heightened standard of review to meet in order to justify discipline. [151] The heightened standard is the "clear and convincing" evidentiary standard. [152]

VII. THE CLEAR AND CONVINCING STANDARD

"'Clear and convincing evidence' means evidence greater than a preponderance of the evidence but not quite as high as the evidence necessary for a criminal conviction." [153] To show clear and convincing evidence, "a party's evidence should be unequivocal and uncontradicted, and intrinsically probable and credible." [154] Whether in a Title IX sexual assault investigation there can ever be credible evidence that is truly "unequivocal and uncontradicted" in order to satisfy the clear and convincing standard is a compelling subject for further research. [155] Here, however, the thrust of the research focuses not on whether the evidence gathered in a Title IX investigation satisfies the clear and convincing standard, but whether which of the two standards at issue (preponderance vs. clear and convincing) is constitutionally permissible. [156]

At the heart of this question is fairness, reasonableness and the ultimate wisdom of allowing a public labor agreement to heighten the standard of review in a sexual assault investigation versus one of its members. In doing so, the public employee would unfairly enjoy the protection of a raised evidentiary standard which, for all intents and ***347** purposes, is almost impossible to meet. For if all sexual assault investigations must meet the test of gathering evidence that is "unequivocal and uncontradicted," then does the victim of sexual assault suffer actual insult to injury? Arguably, utilizing the clear and convincing standard would render a Title IX investigation as holding an even higher evidentiary standard than there would be for the accused public employee to be arrested for the same sexual assault criminally, which requires only a probable cause determination. [157] This legal and ethical conundrum has not seemed to alter the conscience or endowments of some of the most prominent, influential and well-known public universities in the U.S. [158]

VIII. INSTITUTIONAL RESISTANCE

The University of California System, for example, a public higher education system with over 238,000 students and 190,000 faculty and staff members, [159] boasts the most staunch institutional resistance to the preponderance of the evidence standard. [160] Under the UC System, there includes UC Berkeley, UCLA, UC Davis, and many other campuses with thousands of students and employees. [161] Within this massive educational system, whereupon a faculty member is accused of misconduct of any nature, "[t]he hearing panel can only consider ***348** evidence presented at the hearing and facts that are commonly known. The administration has the burden of proving the allegations by *clear and convincing* evidence." [162]

Within the University of North Carolina System, a public education institution with over 220,000 students and sixteen university campuses, [163] upon a university faculty member being accused of misconduct, the standard for discipline set forth dictates that:

> In reaching decisions on which its written recommendations to the chancellor shall be based, the committee shall consider only the evidence presented at the hearing and such written or oral arguments as the committee, in its discretion, may allow. The university has the burden of proof. In evaluating the evidence,

> the committee shall use the standard of "*clear and convincing*" evidence in determining whether the institution has met its burden of showing that permissible grounds for serious sanction exist and are the basis for the recommended action. [164]

The University of North Carolina System defines misconduct as "violations of professional ethics, mistreatment of students or other employees, research misconduct, financial fraud, criminal, or other illegal, inappropriate or unethical conduct." [165] There are two ways in which such conduct would warrant serious disciplinary action. [166] First, the misconduct is "sufficiently related to a faculty member's academic responsibilities as to disqualify the individual from effective performance of university duties." [167] Alternatively, misconduct that is "sufficiently serious as to adversely reflect on the individual's honesty, trustworthiness or fitness to be a faculty member" would also warrant ***349** serious disciplinary action. [168]

At The Ohio State University, a public education institution with over 55,000 students, [169] when a faculty member is accused of misconduct:

> Upon receipt of a referral of a complaint from the dean, the college investigation committee shall meet with the complainant and the respondent and shall review any documentary evidence provided by these parties. The respondent shall be given copies of any documentary evidence provided to the committee by the complainant. The committee may also obtain relevant information from other persons, but shall protect the confidentiality of the proceedings. At the conclusion of its investigation, the committee shall deliver to the dean its findings, a recommendation concerning the merits of the complaint and, if the complaint is judged to have merit, a proposed sanction. Findings of the committee shall be based on *clear and convincing evidence*. [170]

At Louisiana State University (LSU), the termination of a tenured appointment, or the dismissal of a faculty member previous to the expiration of a term appointment for cause, each must "be restricted to (a) demonstrated incompetence or dishonesty in teaching or research, (b) substantial and manifest neglect of duty, and (c) personal conduct which substantially impairs the individual's fulfillment of his institutional responsibilities." [171] At LSU, both the faculty committee and the governing board are required to consider any decision to terminate. [172] Indeed, the school states that "[a]n important principle is that the burden of proving the charges rests on the administration, based on *clear and convincing evidence* of the faculty member's record as a whole." [173] ***350** Similarly, at the University of Louisville and the Kentucky State System, "[t]he burden of proof that there is adequate cause for dismissal rests with the University and shall be satisfied only by *clear and convincing* evidence in the record considered as a whole." [174]

Interestingly, several well-known private universities, while not subject to the strict due process constitutional requirements that public institutions are subject to, have also resisted the "Dear Colleague" preponderance of the evidence mandate. [175] Those same elite institutions, however, are slowly capitulating to the will of the DOE. [176] For example, in November 2014, the DOE and Princeton University agreed to terminate a civil rights investigation related to Princeton's management of cases involving sexual assault on campus. [177] It was determined that Princeton violated Title IX of the Education Amendment of 1972 for "failing to promptly and equitably" answer complaints of sexual

violence. [178] Further, Princeton was using a higher standard of proof than what was allowed by the DOE. [179] Notably, Princeton, a rare and prominent institution, was the final Ivy League school to be using the "clear and convincing" standard rather than the "preponderance of evidence" standard when deciding assault cases. [180] And so, Princeton lowered its standard to "preponderance of evidence" in compliance with Title IX to satisfy the Department's OCR. [181] Doing so brought an end to ***351** the investigation. [182]

By the time the Department issued its Dear Colleague letter in 2011, roughly seventy percent of colleges were using the preponderance of evidence standard. [183] The Dear Colleague letter did not merely "recommend" that schools use this standard but instead, required it. [184] However, the clear and convincing standard was still used at Ivy League schools including, Yale University, Harvard, and Princeton. [185] Although Yale altered its policies almost immediately following the release of the Dear Colleague letter in 2011, Princeton and Yale did. [186] In fact, both schools changed their respective policies only following an investigation by the Department. [187]

The DOE can determine whether certain actions violate Title IX and even pull federal funding from a college found in violation therewith. [188] However, the preponderance of evidence standard has not been codified by Congress. [189] Indeed, the Campus SaVE Act is silent as to what particular standard colleges must employ. [190] It merely requires that institutions *disclose* which standard they use. [191]

While many colleges and universities are unfairly caught in the middle between the publicly apparent but legally meritless DOE *mandate* requiring the preponderance of the evidence standard, some schools have taken the bold initiative to preemptively lower the standard of proof in cooperation with university labor unions in order to avoid litigation and potential DOE Title IX investigations. [192] For example, at the University of Delaware, a public university, a change in the evidentiary standard of proof took place recently in January 2015. [193] At a special meeting of the University of Delaware Faculty Senate members approved a resolution revising the Faculty Welfare and Privileges Committee's Termination and Complaint Procedures to conform to new ***352** requirements under the DOE's OCR interpretation of Title IX. [194] Interestingly, the California State University System ("CSU") (as directly opposed to the University of California System) in its present labor agreement with the California Faculty Association holds that CSU has the burden of proving alleged faculty misconduct by the preponderance of the evidence in all discipline cases. [195]

Notwithstanding the staunch public university resistance to the Dear Colleague mandate, the crux of the reluctance to adopt such an unfounded and constitutionally impaired legal policy rests primarily in the critical due process considerations at play for the accused public employee, the public labor union, the educational institution and, most importantly, the alleged student-victim.

IX. DUE PROCESS

Ultimately, the question remains: does the Title IX "preponderance of the evidence" standard ostensibly *mandated* by the U.S. DOE violate the constitutional due process rights of the accused public employee? The answer to this ominous question is made clear in the original text of the U.S. Constitution and relevant legal precedent. The Due Process Clause of the Fourteenth Amendment provides: "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; Nor shall any State deprive any person of life, liberty, or property, without due process of law." [196] In the past, "this guarantee of due process has been applied to *deliberate* decisions of

government officials to deprive a person of life, liberty, or property." [197] The protection of individual liberty against arbitrary government action is the touchstone of due process protection. [198] The Due Process Clause has both procedural and substantive components. [199]

In its procedural aspect, due process ensures that government, when dealing with private persons, will use fair procedures. [200] In its substantive aspect, due process safeguards individuals against certain offensive government actions, notwithstanding that facially fair ***353** procedures are used to implement them. [201] There are two distinctive safeguards offered under the doctrine of substantive due process. [202] First, the doctrine is said to be the source of protection for rights that are not specifically enumerated in the Constitution, but have been found to be "central to the liberty protected by the Fourteenth Amendment." [203] For example, the right to bodily integrity, marriage, and procreation are interpreted as having their source in the doctrine of substantive due process. [204] Second, substantive due process is used to defend against state action that is so unconstitutionally "arbitrary" or "conscious-shocking," irrespective of the fairness of the procedures used to implement those state actions. [205]

To sustain a substantive due process claim, a plaintiff "must show *both* that the [challenged] acts were so egregious as to shock the conscience *and* that they deprived [her] of a protected interest in life, liberty or property." [206] There is firm legal foundation, however, in support of the novel contention that, in regards to "academic decision" making, the arbitrary and capricious standard is most appropriate when a liberty or property interest is impinged, [207] not the "shock the conscience standard." [208]

More specifically, at least one circuit court has held that "whether a person has a substantive due process right to his public employment is an unsettled question of law. ..." [209] Undoubtedly, most other circuits "have rejected the claim that substantive due process protects the right to a particular public employment position." [210] One circuit court, however, ***354** has found such a right when "school authorities ... make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status." [211] In *Newman v. Massachusetts*, a tenured professor brought claims against university employees, alleging that they violated her right to procedural due process in handling the plagiarism charge, and her right to substantive due process by resolving the charge against her on the merits. [212] The court held, in finding for the fired tenured faculty member that:

> We are persuaded that at the time defendants acted it was clearly established in our circuit that school authorities who make an arbitrary and capricious decision significantly affecting a tenured teacher's employment status are liable for a substantive due process violation. In reaching this conclusion, we recognize that the courts are not yet unanimous on whether this substantive right exists and that the Supreme Court several times in the last decade has sidestepped the question of whether the Fourteenth Amendment provides substantive protection against arbitrary and capricious academic decision-making. ... In addition, we note that at the time of plaintiff's censure, most circuits that had considered the issue either had held explicitly or had suggested that the Fourteenth Amendment protects public employees from arbitrary and capricious government action affecting their employment. Thus, even if in the future this circuit or the Supreme Court rejects the view that a public employee has a substantive due process right in these circumstances, our recognition of that right was clear at the time defendants acted and it is still viable law today. [213]

The expansive and forward-looking decision in *Newman* (*Newman* Standard), almost in anticipation of the Supreme Court establishing an eventual harmonious standard, firmly establishes and plainly reveals an uncharted Constitutional path to soundly support the argument that the ***355** state-created right to tenured public employment is entitled to substantive due process protection.[214] In asserting this progressive and somewhat novel constitutional concept, the court additionally held that "plaintiff's substantive due process right was clearly established means that ... defendants should have known that they were violating the law if their decision to censure plaintiff was unrelated to educational concerns, taken for trivial reasons, or wholly unsupported by any basis in fact."[215]

The U.S. Supreme Court has considered, but did not decide, this same question of substantive due process in academic decision making in *Regents of University of Michigan v. Ewing*.[216] In this case, respondent student filed an action against petitioner university.[217] The Sixth Circuit directed the university to allow the student to retake an exam, and, if he passed, to reinstate him in the program.[218] The court held that its review was very narrow, and under this narrow review, the university did not act arbitrarily in dropping the student from the particular academic program because its decision was not such a substantial departure from accepted academic norms as to demonstrate that the university's faculty did not exercise professional judgment.[219] In its reversal, the Supreme Court held that:

> In *Board of Curators, Univ. of Mo. V. Horowitz*, ... we assumed, without deciding, that federal courts can review an academic decision of a public educational institution under a substantive due process standard. In this case Ewing contends that such review is appropriate because he had a constitutionally protected property interest in his continued enrollment in the Inteflex program. But remembering Justice Brandeis' admonition not to "'formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied,"' we again conclude, as we did in *Horowitz*, that the precise facts disclosed by the record afford the most appropriate basis for decision. We therefore accept the University's invitation to ***356** "assume the existence of a constitutionally protectible property right in [Ewing's] continued enrollment," and hold that even if Ewing's assumed property interest gave rise to a substantive right under the Due Process Clause to continued enrollment free from arbitrary state action, the facts of record disclose no such action.[220]

The *Newman* Standard, in context of the Supreme Court's *Ewing* decision and the DOE's mandate in 2011, despite its being held out to the general public as binding law, makes clear that the action of unilaterally lowering an evidentiary standard, is "arbitrary and capricious."[221] The arbitrary executive action (i.e., academic decision making) is not only in the Dear Colleague Letter's mandate to lower the evidentiary standard of proof without review or comment in violation of the APA,[222] but also the DOE mandate violates the APA in a manner that simultaneously violates state created collective bargaining rights, a public university's duty to bargain with labor unions and, as a result, ***357** directly impinges the terms and conditions of employment of unionized public employees in violation of multiple public employment statutes.[223]

In California for example, under Cal. Gov. Code section 3500 ("MMBA"), the public employment statute articulates that "[i]t is the purpose of this chapter to promote full communication between public employers and their employees by providing a reasonable method of resolving disputes regarding wages, hours, and other *terms and conditions of employment* between public employers and public employee organizations."[224] When an employee or employee

representative complains that a local government employer has refused to meet and confer over a mandatory subject of bargaining, the state authorized Public Employment Relations Board processes the complaint as an unfair labor practice charge. [225]

The MMBA's scope of representation covers any and all issues regarding "employment conditions and employer-employee relations, including, but not limited to, wages, hours, and other *terms and conditions of employment*, except, however, that the scope of representation shall not include consideration of the merits, necessity, or organization of any service or activity provided by law or executive order." [226]

To resolve ambiguities and uncertainties inherent in the MMBA's definition of the scope of representation, like most other jurisdictions, courts look to federal precedents. [227] To that end, with regard to mandatory subjects of bargaining:

> In relation to mandatory subjects of bargaining under the federal NLRA, the United States Supreme Court has identified three categories of management decisions. In the first category are decisions that "have only an indirect and attenuated impact on the employment relationship" and thus are not mandatory subjects of bargaining. Examples of decisions in this category are "choice of advertising and promotion, product type and design, and financing arrangements." In the second category are decisions directly defining the employment ***358** relationship, such as wages, workplace rules, and the order of succession of layoffs and recalls. Decisions in this second category are always mandatory subjects of bargaining. In the third category are management decisions that directly affect employment, such as eliminating jobs, but nonetheless may not be mandatory subjects of bargaining because they involve "a change in the scope and direction of the enterprise" or, in other words, the employer's "retained freedom to manage its affairs unrelated to employment." Bargaining is not required for decisions in this category if they do not raise an issue that is "amenable to resolution through the bargaining process" although the employer is normally required to bargain about the results or effects of such decisions. To determine whether a particular decision in this third category is within the scope of representation, the high court prescribed a balancing test, under which "in view of an employer's need for unencumbered decisionmaking, bargaining over management decisions that have a substantial impact on the continued availability of employment should be required only if the benefit, for labor-management relations and the collective-bargaining process, outweighs the burden placed on the conduct of the business." [228]

The California example is illustrative and also applicable nationwide. [229] Many public employment statutes mirror each other in respect to management rights, discipline, rights of representation, etc. [230] In the context of the Dear Colleague Letter, as the letter impinges upon the terms and conditions of employment, public employers have a duty to bargain with public labor unions over the evidentiary standard of review in Title IX sexual assault investigations, as a term and condition ***359** of employment, as legal precedent demonstrates, is a mandatory subject of bargaining. [231] In this light, it becomes plainly clear that public education institutions who unilaterally adopt and publish employment policies involving Title IX investigations evidentiary standards that directly affect the terms and conditions of employment of unionized public employees without bargaining those changes violates the affirmative duty to bargain. [232]

Stated in more direct terms, coupled with the above APA contention, this note demonstrates that the strongest argument to directly challenge the constitutionality of the 2011 Dear Colleague Letter's evidentiary mandate rests in the substantive due process rights of unionized public employees whose property interest in employment has been impinged by the act

of an executive administration unilaterally lowering the evidentiary standard of proof (*academic decision making*) from "clear and convincing" to the lower "preponderance of the evidence" standard. This lowered standard of proof directly impinges the terms and conditions of employment when the educational institution fails to negotiate this mandatory subject of bargaining. Unilaterally lowering the evidentiary standard in a Title IX investigation of a unionized public employee to "preponderance of the evidence" when the stated terms of a collective bargaining agreement dictates a "clear and convincing" evidentiary standard plainly violates a collective bargaining agreement, violates state public employment statutes, contravenes the strict obligations of the APA, and ultimately, the Due Process Clause of the U.S. Constitution.

X. RECOMMENDATIONS

In light of the evidence presented above, there remains specific steps that may be adopted by public universities and/or public labor unions in order to mitigate the risk of litigation and resolve this looming constitutional conflict while at the same time ensuring that victims of sexual assault on campus receive the utmost in protection from harassment. To be sure, without addressing this concern, the risk of litigation is significant on both sides of the equation. For public labor unions, the duty of fair representation presents the greatest risk of litigation in this regard. Failing to legally challenge the unilateral action of a public employer when that action (lowering the evidentiary standard ***360** of proof) directly impinges on the terms and conditions of employment of union members presents a daunting legal and ethical conflict for labor unions and its respective members. Labor organizations that act as the sole representative for members of a bargaining unit have the duty of fair representation imposed upon them. [233] The obligation to fairly represent employees is considered to be of a doctrine of judicial origin that arose out of the exclusive representation provisions of the National Labor Relations Act ("NLRA"). [234] Simply, unions are required to fairly represent the interests of all bargaining unit employees, both collectively and individually. [235] A union breached the duty of fair representation, "only when the union's conduct is 'arbitrary, discriminatory, or in bad faith.'" [236] As one court stated, "[a] union's conduct is arbitrary if, considering all the circumstances at the time of the union's action or inaction, 'the union's behavior is so far outside a wide range of reasonableness as to be irrational.'" [237] The Supreme Court has found that one example of a breach of the duty of fair representation is when a union "arbitrarily ignore[s] a meritorious grievance or process[es] it in [a] perfunctory fashion." [238] The Eighth Circuit has defined "perfunctory" to mean that the union "acted without concern or solicitude, or gave plaintiff's grievance only cursory attention." [239]

Equally so, for public colleges and universities (and potentially individual members of the university administration under 42 U.S.C. section 1983), [240] the risk of litigation also remains high. Plaintiffs will ***361** likely enjoy legal claims, inter alia, against a public university based on breach of contract, potential Public Employment Relations Board ("PERB") violations, unfair labor practice charges (failure of the duty to bargain), breach of the covenant of good faith and fair dealing, and violations of various state statutory and constitutional protections in addition to the above noted substantive due process argument. The substantive due process claim is likely only applicable to the public university, as the deprivation of the property interest required to sustain the substantive due process claim by a state actor would be based upon any adverse employment action taken by the university against the accused public employee as a result of the Title IX investigation. The DOE may also find itself in litigation, as the strongest claim that it may face is the violation of the APA. Notwithstanding the above claims, recommendations to resolve this constitutional conflict reflect the complexity of this matter. There is no clear legal or political resolution to this matter without some concession from all sides. Nonetheless, the most reasonable, precedent-based and practical resolutions are articulated below:

The DOE should amend its 2011 Dear Colleague letter to state that the "preponderance of the evidence standard" is *highly recommended* or *strongly recommended* in order to remain in compliance with Title IX. The current language stating that colleges "must" decide sexual assault investigations with the preponderance of the evidence standard is in violation of the APA and unfairly subjects public universities to substantive due process litigation, breach of contract and claims of failure of the duty to bargain a mandatory subject of bargaining (the standard of proof in Title IX sexual assault investigation are terms and conditions of employment).

The DOE, alternatively, should affirm the substance of the 2011 Dear Colleague Letter but simply submit the already published interpretive rule in its totality for review and comment in accordance with the APA. By submitting the Dear Colleague Letter to the Federal Register, the DOE would enjoy the benefits of the letter's mandate while at the same time codifying its requirements as binding agency policy. This approach, if adopted and post review and comment, would provide the necessary legal foundation for public universities to unilaterally and ***362** universally adopt the preponderance of the evidence standard *without* having to collectively bargain the rule, and thus, evading the ever-present substantive due process, unfair labor practice, and failure to bargain a mandatory subject claims.

Public universities and labor unions should jointly bargain and adopt an agreed upon standard of proof in a Title IX sexual assault investigation. In doing so, (along with the suggestive remaining procedural guidelines from the DOE's Dear Colleague Letter, the Clery Act [241] and the Campus SaVE Act [242]), the risk of litigation is greatly reduced as both parties would create the opportunity to shape fairly the disciplinary landscape of its labor workforce without the need for unilateral action by the college administration or claims by the union of ***363** the failure to bargain a mandatory subject.

State legislatures should codify by statute the standard of proof in on-campus sexual assault investigations so that the standard (1) mirrors the substance of the Dear Colleague Letter (preponderance), and (2) mirrors the standard of proof of the criminal equivalent to a sexual assault charge (probable cause) in order to make more consistent the definition of rape, sexual assault, etc. In doing so, state public institutions and labor unions would be compelled to adopt the standard and would thwart any potential litigation arguing the validity of the preponderance of the evidence standard. There are no Supremacy Clause issues at play to invalidate the proposed state legislation on the standard of proof since the Dear Colleague Letter is not binding agency policy. [243] Several states have made considerable progress in addressing this concern in light of the Dear Colleague Letter's questionable legal footing. The State of California, for example, has taken the bold step to codify by statute another contested area of concern in the Title IX Dear Colleague Letter debate. [244] On September 28, 2014, California became the first state in the nation to establish a statutory definition of "consent" in on-campus sexual assault investigations. [245] The State of Arizona has proposed similar legislation. [246] Not surprisingly, California's "Yes Means Yes" law (affirmative consent), similar to the 2011 Dear Colleague Letter, fails to take into account that the accused party in a Title IX sex assault investigation may in fact be a unionized public ***364** employee with a collective bargaining agreement that requires a collectively bargained evidentiary standard.

Alternatively, public education labor unions that have endured unilateral university action regarding the standard of proof in Title IX sexual assault investigations should seek declaratory relief as to whether the 2011 Dear Colleague Letter's evidentiary mandate is in fact binding law pursuant to 28 U.S.C. section 2201, The Declaratory Judgment Act. [247] In 2005, the Supreme Court, in defining and explaining the contours of this law indicated that:

> The Declaratory Judgment Act has been understood to confer on federal courts unique and substantial discretion in deciding whether to declare the rights of litigants. On its face, the statute provides that a court "*may* declare the rights and other legal relations of any interested party seeking such declaration." The statute's textual commitment to discretion, and the breadth of leeway we have always understood it to suggest, distinguish the declaratory judgment context from other areas of the law in which concepts of

discretion surface. We have repeatedly characterized the Declaratory Judgment Act as "an enabling Act, which confers a discretion on the courts rather than an absolute right upon the litigant." [248]

XI. CONCLUSION

Title IX is valuable public policy for which its purpose and intent is laudable and necessary to protect against sexual harassment on campus. Notwithstanding this Article's legal contentions, the protection of victims of sexual assault must remain the paramount concern in this conversation. While these laws should be advanced and reauthorized, it is also important to remain vigilant as to the procedures with which we ***365** implement amendments, guidance documents and agency rules based upon those laws. Accordingly, the DOE's 2011 Dear Colleague Letter implements mandatory policy that fails to adhere to established requirements under the APA as set forth by Congress. As such, this conflict must be remedied with all due expediency for the sake of clarity, prudence and fairness.

Footnotes

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1 Russlynn Ali, Dear Colleague Letter, U.S. DEP'T OF EDUC., OFF. FOR C.R. (Apr. 4, 2011), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf [hereinafter *Dear Colleague Letter*].

2 *See Evidentiary Standards and Burdens of Proof*, JUSTIA, https://www.justia.com/trials-litigation/evidentiary-standards-burdens-proof/ (last visited Apr. 8, 2017) (stating that clear and convincing evidence is a higher standard than a preponderance of the evidence and requires the plaintiff to prove that a fact is substantially more likely than not to be true).

3 *See id.* (stating that a preponderance of the evidence requires the jury to be able to find that a fact or event is more likely than not to have occurred; meaning that the evidence favors the plaintiff's outcome by at least 5fifty-one percent).

4 Lavinia M. Weizel, *The Process That is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints*, 53 B.C. L. REV. 1613, 1613-14 (2012).

5 *Id.*

6 *Id.*

7 Anya Kamenetz, *The History of Campus Sexual Assault*, NPR (Nov. 30, 2014, 8:03AM), http://www.npr.org/blogs/ed/2014/11/30/366348383/the-history-of-campus-sexual-assault.

8 *Id.*

9 *Id.*

10 *Id.*

11 *Id.*

12 *Id.*; *see also* Ellen Sweet, *Date Rape Revisited*, WOMEN'S MEDIA CTR. (Feb. 23, 2012), http://www.womensmediacenter.com/feature/entry/date-rape-revisited. ("In 1982, *Ms.* Magazine and an academic researcher embarked on a groundbreaking study of a little-known subject: date rape on college campuses. At that time, most people still thought of rape, on campus or off, as committed by someone who was a stranger to the victim. The three-year study, funded by the federal government, surveyed more than 7,000 students at 35 schools and blew the top off accepted wisdom. I [Ellen Sweet] was the coordinator of the *Ms.* Magazine Campus Project on Sexual Assault, and Mary P. Koss, ... a nationally known research psychologist, directed the field study and analysis of data. The early findings first appeared in my article in the October 1985 issue of *Ms.* entitled 'Date Rape: The Story of an Epidemic and Those Who Deny It.' Among them, 1 in 4 college women were victims of rape or attempted rape, and only 1 in 4 women whose sexual assault met the legal definition identified their experience as rape.").

13 *Title IX Legal Manual: Synopsis of Purpose of Title IX, Legislative History, and Regulations*, JUSTIA, https://www.justia.com/education/docs/title-ix-legal-manual/synopsis-of-purpose-of-title-ix.html (last visited Apr. 8, 2017) [hereinafter JUSTIA].

14 *See* Anthony P. Carnevale and Nicole Smith, *Gender Discrimination Is at the Heart of the Wage Gap*, TIME (May 19, 2014), http://time.com/105292/gender-wage-gap.

15 JUSTIA, *supra* note 13.

16 *Id.*

17 *See id.*

18 *Id.*

19 *Id.*

20 *See Title IX - The Nine*, ACLU, https://www.aclu.org/print/node/26393 (last visited Apr. 8, 2017).

21 David S. Cohen, *Title IX: Beyond Equal Protection*, 28 HARV. J.L. & GENDER 217, 223-24 (2005).

22 *See Overview of Title VI of the Civil Rights Act of 1964*, U.S. DEP'T OF JUST., http://www.justice.gov/crt/about/cor/coord/titlevi.php (last visited Apr. 8, 2017) ("Title VI, 42 U.S.C. § 2000d et seq., was enacted as part of the landmark Civil Rights Act of 1964. It prohibits discrimination on the basis of race, color, and national origin in programs and activities receiving federal financial assistance. As President John F. Kennedy said in 1963: Simple justice requires that public funds, to which all taxpayers of all races [colors, and national origins] contribute, not be spent in any fashion which encourages, entrenches, subsidizes or results in racial [color or national origin] discrimination.").

23 Title VI of the Civil Rights Act, 42 U.S.C § 200d (1964).

24 *See*U.S. CONST. art. I, § 8, cl. 1.

25 *See*U.S. CONST. amend. XIV, § 1.

26 *See id.*

27 Weizel, *supra* note 4, at 1615-16. Senator Birch Bayh of Indiana, co-sponsor of the Title IX bill explained that its purpose was to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system." 118 Cong. Rec. 5803 (1972). During debate, Senator Bayh stressed the fact that economic inequities suffered by women can often be traced to educational inequities. In support of the amendment, Senator Bayh pointed to the link between discrimination in education and subsequent employment opportunities. *See id.* at 5804.

28 *See* Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000); *see also*34 C.F.R. § 106.1 (2017). Title IX provides that no person 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 operated by a recipient. 34 C.F.R. § 106.31(a) (2017).

29 Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688 (2000); *see also* Dana Bolger, *9 Things To Know About Title IX*, KNOW YOUR IX, https://www.knowyourix.org/college-resources/title-ix/ (last visited Apr. 8, 2017).

30 *Synopsis of Legislative History and Purpose of Title IX*, U.S. DEP'T OF JUST., https://www.justice.gov/crt/titleix#II.%C2%CA0%CC2%CA0%C20Synopsis%C20*o*f%C20Purpose%C20of%C20Title%C20IX,%C20Legislative%C20History,%C20and%20Regulations (last updated Aug. 6, 2015).

31 *Id.*

32 *Id.*

33 *Id.*

34 *See The Living Law*, TITLE IX, http://www.titleix.info/history/the-living-law.aspx (last visited Apr. 8, 2017).

35 34 C.F.R. § 106.1 (2016); *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., https://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html (last modified Apr. 29, 2015).

36 34 C.F.R. § 106.11.

37 *Title IX Fact Sheet*, WAYNE CTY. CMTY. C. DIST., http://www.wcccd.edu/dept/pdf/HR/00082907.pdf (last visited Apr. 8, 2017).

38 *See*Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 255 (2009) ("The statute's only express enforcement mechanism, §1682, is an administrative procedure resulting in the withdrawal of federal funding from institutions that are not in compliance."); *see also* Tyler Kingkade, *Colleges Warned They Will Lose Federal Funding For Botching Campus Rape Cases*, HUFFINGTON POST, http://www.huffingtonpost.com/2014/07/14/funding-campus-rape-dartmouth-summit_n_5585654.html (last updated July 14, 2014) (articulating the point that to date, no institution has lost federal funding as a result of a Department of Education finding of a Title IX violation).

39 *See Know Your Rights: Title IX and Sexual Assault*, ACLU, https://www.aclu.org/know-your-rights/title-ix-and-sexual-assault (last visited Apr. 8, 2017).

40 *Title IX Legal Manual: Private Right of Action and Individual Relief through Agency Action*, JUSTIA, https://www.justia.com/education/docs/title-ix-legal-manual/private-right-of-action.html (last visited Apr. 8, 2017) (internal citations omitted).

41 5 U.S.C. § 553 (2012).

42 *Id.* § 552(a)(1); B&B Hardware, Inc. v. Hargis Indus., Inc., 575 U.S. ___, 135 S. Ct. 1293, 1316 (2015) (internal citations omitted) ("Executive agencies derive their authority from Article II of the Constitution, which vests '[t]he executive power' in 'a President of the United States.' Executive agencies are thus part of the political branches of Government and make decisions 'not by fixed rules of law, but by the application of governmental discretion or policy.").

43 5 U.S.C. § 552 (a)(1).

44 *Id.* § 551(4).

45 Morton v. Ruiz, 415 U.S. 199, 232 (1974).

46 Weizel, *supra* note 4, at 1616-17 (emphasis added); *see*Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3433 (Jan. 25, 2007), https://www.gpo.gov/fdsys/pkg/FR=2007-01-25/pdf/FR-2007-01-25.pdf ("Section I(4) defines the term 'significant guidance document' as a guidance document disseminated to regulated entities or the general public that may reasonably be anticipated to: (i) Lead to an annual effect on the economy of $100 million or more or 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; or (ii) Create a serious inconsistency or otherwise interfere with an action taken or planned by another agency; or (iii) Materially alter the budgetary impact of entitlements, grants, user fees, or loan programs or the rights and obligations of recipients thereof; or (iv) Raise novel legal or policy issues arising out of legal mandates, the President's priorities, or the principles set forth in Executive Order 12866, as further amended. Under the Bulletin, significant guidance documents include interpretive rules of general applicability and statements of general policy that have the effects described in Section I(4)(i)-(iv).").

47 Josh Gerstein, *Title IX: The New Transparency Fight*, POLITICO (May 25, 2014, 6:59 AM), http://www.politico.com/story/2014/05/barack-obama-joe-biden-title-ix-transparency-fight-107065; Allie Grasgreen, *Tide Shifts on Title IX,*INSIDE HIGHER ED (Apr. 24, 2012), https://www.insidehighered.com/news/2012/04/24/ocr-dear-colleague-letter-prompts-big-change-sexual-assault-hearings-unc; *On Campus, Debate Over Civil Rights and Rape*, USA TODAY, http://usatoday30.usatoday.com/news/nation/story/2012-04-21/title-ix-campus-sexual-violence/54456812/1 (last updated Apr. 21, 2012, 3:00 PM). It remains unclear whether or not the "preponderance of evidence" standard articulated under the Obama Administration will remain intact under the Trump Administration.

48 Pac. Gas & Elec. Co. v. FPC, 506 F.2d 33, 38 (D.C. Cir. 1974).

49 Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 n.4 (D.C. Cir. 1987) ("In the modern administrative state, many 'laws' emanate not from Congress but from administrative agencies, inasmuch as Congress has seen fit to vest broad rulemaking power in the executive branch, including independent agencies.").

50 5 U.S.C. § 553 (2012); Morton v. Ruiz, 415 U.S. 199, 231 (1974).

51 Vermont Yankee Nuclear Power Corp. v. Nat. Resources Def. Council, Inc., 435 U.S. 519, 543 (1978).

52 5 U.S.C. § 553.

53 *Id.* § 553(c).

54 NLRB v. Wyman-Gordon Co., 394 U.S. 759, 764 (1969).

55 Chamber of Commerce v. OSHA, 636 F.2d 464, 470-71 (D.C. Cir. 1980).

56 5 U.S.C. § 553(b)(A).

57 *Id.*

58 Cmty. Nutrition Inst. v. Young, 818 F.2d 943, 946 n.4 (D.C. Cir. 1987).

59 Am. Bus Ass'n v. United States, 627 F.2d 525, 532 (D.C. Cir. 1980).

60 *Id.*

61 Guardian Fed. Sav. & Loan Ass'n v. Fed. Sav. & Loan Insurance Corp., 589 F.2d 658, 666 (D.C. Cir. 1978).

62 Powderly v. Schweiker, 704 F.2d 1092, 1098 (9th Cir. 1983).

63 Chrysler Corp. v. Brown, 441 U.S. 281, 301-02 (1979).

64 *See infra* notes 65-67 and accompanying text.

65 Wilderness Soc'y v. Norton, 434 F.3d 584, 595 (D.C. Cir. 2006).

66 CropLife Am. v. EPA, 329 F.3d 876, 883 (D.C. Cir. 2003).

67 *Wilderness Soc'y*, 434 F.3d at 595; Northwest Bypass Group v. U.S. Army Corps of Eng'rs, 552 F. Supp. 2d 97, 120-21 (D.N.H. 2008).

68 Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3433 (Jan. 25, 2007), https://www.gpo.gov/fdsys/pkg/FR=2007-01-25/pdf/FR-2007-01-25.pdf.

69 *Id.*

70 *Id.*

71 *See, e.g.*, William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322 (2001) ("Accordingly, a 'rule' under the APA includes both 'interpretative rules' and 'general statements of policy;' terms which are themselves undefined, but which are used in section 553 of the APA to describe certain rules that are exempt from the requirements of notice-and-comment rulemaking.").

72 *Id.* ("These rules are often called nonlegislative rules, because they are not 'law' in the way that statutes and substantive rules that have gone through notice and comment are law, in the sense of creating legal obligations on private parties. These rules can be contrasted with legislative rules, which are 'law,' because legislative rules have binding legal effect. That is, just like statutes passed by Congress, these rules adopted by an agency are legally binding on persons, and in many cases violations of these rules can subject a person to civil or criminal penalties.").

73 *Id.* at 1325.

74 *Id.*

75 *Id.*

76 *Id.*

77 *Dear Colleague Letter*, *supra* note 1, at 1, 10.

78 *Id.* at 1-2.

79 *Id.*

80 Violence Against Women Act, 79 Fed. Reg. 202 (Oct. 20, 2014) (to be codified at 34 C.F.R. pt. 668), http://www.gpo.gov/fdsys/pkg/FR-2014-10-20/pdf/2014-24284.pdf.

81 Havlik v. Johnson & Wales Univ., 509 F.3d 25, 30 (1st Cir. 2007).

82 *Id.*

83 *See* Funk, *supra* note 71, at 1322.

84 *See Dear Colleague Letter*, *supra* note 1, at 1-2.

85 *See id.*; *see also* Funk, *supra* note 71, at 1322-23; Final Bulletin for Agency Good Guidance Practice, 72 Fed. Reg. 3432, 3432-33 (Jan. 25, 2007).

86 *See*Final Bulletin for Agency Good Guidance Practice, 72 Fed. Reg. at 3436 n. 23; Gen. Elec. Co. v. EPA, 290 F.3d 377, 378-79 (D.C. Cir. 2002) (striking down PCB risk assessment guidance as a legislative rule which required notice and comment); Appalachian Power Co. v. EPA, 208 F.3d 1015, 1020-21 (D.C. Cir. 2000) (striking down emissions monitoring guidance as a legislative rule which required notice and comment); Chamber of Commerce v. Dep't of Labor, 174 F.3d 206, 208, 213 (D.C. Cir. 1999) (striking down an OSHA Directive as a legislative rule which required notice and comment); *see also e.g.*, Nat'l Family Planning & Reprod. Health Ass'n v. Sullivan, 979 F.2d 227, 229 (D.C. Cir. 1992).

87 Final Bulletin for Agency Good Guidance Practice, 72 Fed. Reg. at 3433.

88 *Sullivan*, 979 F.2d at 228-29, 242.

89 Montefiore Med. Ctr. v. Leavitt, 578 F. Supp. 2d 129, 134 (D.D.C. 2008) (citing Mercy Med. Skilled Nursing Facility v. Thompson, No. C.A.99-2765TPJ, 2004 WL 3541332, at *3 (D.D.C. May 14, 2004) ("Any significant alternation of [an] established practice requires notice and an opportunity for those affected to comment")).

90 Final Bulletin for Agency Good Guidance Practice, 72 Fed. Reg. at 3432.

91 *Id.* at 3432.

92 *Id.* at 3433.
In what is commonly known as the Information Quality Act, Congress directed OMB to issue guidelines to "provide policy and procedural guidance to Federal agencies for ensuring and maximizing the quality, utility, objectivity and integrity of information disseminated by Federal agencies. Moreover, Executive Order 13422, "Further Amendment to Executive Order 12866 on Regulatory Planning and Review," recently clarified OMB's authority to oversee agency guidance documents. As further amended, Executive Order 12866 affirms that "[c]oordinated review of agency rulemaking is necessary to ensure that regulations and guidance documents are consistent with applicable law, the President's priorities, and the principles set forth in this Executive order," and the Order assigns that responsibility to OMB.
Id.

93 *See id.* at 3436.
Section II(2) establishes basic requirements for significant guidance documents. They must: (i) Include the term "guidance" or its functional equivalent; (ii) Identify the agenc(ies) or office(s) issuing the document; (iii) Identify the activity to which and the persons to whom the document applies; (iv) Include the date of issuance; (v) Note if it is a revision to a previously issued guidance document and, if so, identify the guidance that it replaces; (vi) Provide the title of the guidance and any document identification number, if one exists; and (vii) include the citation to the statutory provision or regulation (in Code of Federal Regulations format) which it applies to or interprets.
Id.

94 *Id.*

95 *Id.* at 3436 n.23.

96 *Id.* at 3438.

97 *See*Perez v. Mortgage Bankers Ass'n, 575 U.S._, 135 S. Ct. 1199 (2015).

98 *Perez*, 135 S. Ct. at 1200-01 (citations omitted). In cases similar to *Perez*, the federal courts have made it clear that the APA must be followed when a Federal agency wishes to amend its regulations.
When Congress authorizes an agency to create standards, it is delegating legislative authority, rather than itself setting forth a standard which the agency might then particularize through interpretation. Put differently, when a statute does not impose a duty on the persons subject to it but instead authorizes (or requires--it makes no difference) an agency to impose a duty,

the formulation of that duty becomes a legislative task entrusted to the agency. Provided that a rule promulgated pursuant to such a delegation is intended to bind, and not merely to be a tentative statement of the agency's view, which would make it just a policy statement, and not a rule at all, the rule would be the clearest possible example of a legislative rule, as to which the notice and comment procedure not followed here is mandatory, as distinct from an interpretive rule; for there would be nothing to interpret.
Mission Grp. Kan. v. Riley, 146 F.3d 775, 784 (10th Cir. 1998).

99 Chisholm v. FCC, 538 F.2d 349, 393 (D.C. Cir. 1976).
No talismanic factor has emerged from the cases or the commentary as a guide for puzzled courts, and the last section of a lengthy dissent is no place to assay a definitive resolution of the riddle. Therefore, without attempting to establish a general formula for detecting legislative rules although they are labeled interpretative, I will simply identify three aspects of this proceeding which support the conclusion that the Commission's new approach to [s]ection 315(a)(4) is not merely an interpretation.
Id.; *see also* Kevin W. Saunders, *Interpretative Rules with Legislative Effect: An Analysis and a Proposal for Public Participation*, 1986 DUKE L.J. 346, 348 (1986).

100 *Perez*, 135 S. Ct. at 1201.

101 *Id.* at 1201 (citations omitted).

102 *Id.*

103 *Id.*

104 *Id.*

105 *Id.* at 1203-04 (citations omitted).

106 *Id.* at 1204.
[T]he Supreme Court released another decision for the government in [*Perez*], which concerned how to tell the difference between an administrative interpretive rule and a substantive rule under the [APA]. Under the APA, an interpretive rule need not be subjected to notice-and-comment, but a substantive rule must. Agencies have several ways to use interpretive rules as a substitute for substantive rules, so naturally, the question becomes: how do we tell the difference? In 1997, D.C. Circuit judge Laurence Silberman (who also taught Administrative Law at Georgetown) wrote an important decision in a case called [*Paralyzed Veterans*]. In it, Judge Silberman explained that "[t]o allow an agency to make a fundamental change in its interpretation of a substantive regulation without notice and comment obviously would undermine" the APA's requirements of notice and comment for all repeals or amendments of substantive rules. To tell when an interpretive rule is actually substantive, then, it depends on whether the interpretation "really provides all the guidance," filling in the content of a "very general" rule. If so, then changing such an "interpretive" rule without notice and comment would violate the APA. Although the Court's judgment was 9-0 for the government, the opinions split four ways. The majority opinion stuck to the narrow statutory ruling described below. Justice Alito concurred with most of the Court's opinion, but wrote separately to endorse Justices Scalia and Thomas's critiques of deference to agencies. Justice Scalia agreed only with the majority's reasoning that that the D.C. Circuit's approach was inconsistent with the APA and wrote separately to criticize deference as a more general matter. Justice Thomas, too, agreed with the Court's holding under the APA, but wrote separately to outline a broader set of separation-of-powers questions raised by agency deference.
Jonathan Keim, Perez v. Mortgage Bankers Association: *Formalism Trumps Originalism*, NAT'L REV. (Mar. 12, 2015, 12:57 PM), http://www.nationalreview.com/bench-memos/415306/perez-v-mortgage-bankers-association-formalism-trumps-originalism-jonathan-keim.

107 *Perez*, 135 S. Ct. at 1204; Keim, *supra* note 106.

108 *See* Keim, *supra* note 106; *see also* Hans Bader, *No, OCR's April 4, 2011 Dear Colleague Letter is not Entitled to Deference*, LIBERTY UNYIELDING 2 (Sept. 30, 2015), http://libertyunyielding.com/2015/09/30/no-ocrs-april-4-2011-dear-colleague-letter-not-entitled-deference/.

109 *See* Bader, *supra* note 108, at 3.

110 *See id.*

111 *See*Chevron, U.S.A., Inc. v. NRDC, Inc., 467 U.S. 837, 842-43 (1984).

112 *Id.* at 866.

113 *Id.* at 843-44.

114 Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

115 *Chevron*, 467 U.S. at 840-41.

116 42 U.S.C. § 7502(c)(6) (2012).

117 *Chevron*, 467 U.S. at 840.

118 *Id.*

119 *Id.* at 866.

120 *Id.* at 843.

121 *Id.* at 844.

122 *Id.* at 851.

123 *See id.* at 866.

124 *Id.*

125 *See* Bader, *supra* note 108.

126 *Id.* (citations omitted).

127 *See*Perez v. Mortgage Bankers Ass'n, 575 U.S. ___, 135 S. Ct. 1199, 1209, 1221 (2015).

128 Christensen v. Harris Cty., 529 U.S. 576, 587 (2000).

129 *Perez*, 135 S. Ct. at 1209, 1221.

130 *See Chevron*, 467 U.S. at 837.

131 *See*OFFICE OF MGMT. & BUDGET, EXEC. OFFICE OF THE PRESIDENT, OMB BULL. NO. 07-02, FINAL BULLETIN FOR AGENCY GOOD GUIDANCE PRACTICES, (Jan. 18, 2007).

132 *See* Administrative Procedure Act, 5 U.S.C. § 553 (2012).

133 *See Dear Colleague Letter*, *supra* note 1, at 2-3.

134 *See id.* at 10.

135 U.S. DEP'T. OF EDU., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, TITLE IX, at 22 (Jan. 2001).

136 Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681(a)(1)-(7) (2012); *see*U.S. DEP'T. OF EDU., *supra* note 135, at 2-3.

137 42 U.S.C. § 2000e-2(a)(2012).

138 *See*CAL. GEN. CODE§ 3500 (West 2016) (promoting "full communication between public employers and their employees").

139 *Due Process Before Discharge or the Imposition of Serious Sanctions*, THE UNC POLICY MANUAL § 603-1, http://www.northcarolina.edu/apps/policy/index.php?pg=dl&type=section&id=4433 (last visited Apr. 8, 2017) [hereinafter *Due Process*] (affording faculty members protection and due process from "unjust and arbitrary application of disciplinary penalties.")

140 *See*CAL. GEN. CODE§ 3500 (West 2016) (promoting "full communication between public employers and their employees"); *see also Due Process*, *supra* note 139, § 603-1 (affording faculty members protection and due process from "unjust and arbitrary application of disciplinary penalties."); *see also* Aidan Quigley & Natalie Shanklin, *A Look at Unions on College Campuses: Locally and Nationwide*, THE ITHACAN (Mar. 5, 2015), https://theithacan.org/news/a-look-at-unions-on-college-campuses-locally-and-nationwide/ (claiming that unions increase the job security of faculty members by requiring employers to "show 'just cause' for firing employees in a union.").

141 Matt Butler, *Standard of Proof in Sexual Assault Cases Debated by Professors*, THE REVIEW (Nov. 10, 2014), http://udreview.com/standard-of-proof-in-sexual-assault-cases-debated-by-professors/.

142 *Id.*

143 Deborah Prokopf, *Public Employees at the School of Hard Knox: How the Supreme Court is Turning Public-Sector Unions into a History Lesson*, 39 WM. MITCHELL L. REV. 1363, 1365 (2013).

144 Exec. Order No. 10988, 27 Fed. Reg. 551 (Jan. 17, 1962).

145 *Id.*

146 Prokopf, *supra* note 143, at 1366.

147 Exec. Order No. 10988, 27 Fed. Reg. 551; Prokopf, *supra* note 143, at 1366.

148 Prokopf, *supra* note 143, at 1366.
Labor organizers, particularly with the Service Employees International Union's Adjunct Action initiative, have helped adjuncts and part-time professors at other colleges and universities to unionize, including Georgetown University, Tufts University and Northeastern University. The SEIU is currently helping the part-time faculty at Ithaca College move toward unionization. There are currently over 22,000 adjuncts and part-time faculty members in unions with the SEIU, according to the organization's website. According to the National Center for the Study of Collective Bargaining in Higher Education and the Professions at Hunter College in the City University of New York, most schools where adjuncts vote to unionize, the vote passes and the union is formed. Since January 2013, there have been 41 successful unionization votes for faculty and grad student unions while only two unsuccessful votes and five petitions were withdrawn prior to votes.
Quigley & Shanklin, *supra* note 140.

149 *See*Straw v. Visiting Nurse Ass'n & Hospice, 86 A.3d 1016, 1021-22 (Vt. 2013) ("[W]e first defined just cause as 'some substantial shortcoming detrimental to the employer's interests, which the law and a sound public opinion recognize as a good cause for his dismissal.' ... '[T]he ultimate criterion of just cause is whether the employer acted reasonably in discharging the employee because of misconduct.' ... [A] discharge under this standard could be upheld 'only if it meets two criteria of

reasonableness: one that it is reasonable to discharge employees because of certain conduct, and the other, that the employee had fair notice, express or fairly implied, that such conduct would be ground for discharge."').

150 *See Seven Tests for Just Cause*, AFSCME LOCAL 3336, https://www.afscme3336.org:8383/Docs/stewardsGuides/SevenTestsForJustCause.pdf (last visited Apr. 8, 2017) [hereinafter AFSCME LOCAL 3336].

151 *See Terminated or Laid Off the Job,* AFL-CIO, http://www.aflcio.org/Issues/Civil-and-Workplace-Rights/Your-Rights-at-Work/Terminated-or-Laid-Off-the-Job (last visited Apr. 8, 2017); *see also*AFSCME LOCAL 3336, *supra*, note 150.

152 Bd. of Trs. of the Univ. of Ill. v. Ill. Educ. Labor Rels. Bd., 27 N.E.3d 623, 630 (Ill. App. Ct. 2015); Bazydlo v. Volant, 647 N.E.2d 273, 276 (Ill. 1995).

153 *Bd. of Trs. of the Univ. of Ill.*, 27 N.E.3d at 630.

154 Deli v. Univ. of Minn., 511 N.W.2d 46, 52 (Minn. Ct. App. 1994) (citing Kavanagh v. The Golden Rule, 33 N.W.2d 697, 700 (Minn. 1948)).

155 Nancy Chi Cantalupo & John Villasenor, *Is a Higher Standard Needed for Campus Sexual Assault Cases?*, N.Y. TIMES (Jan. 4, 2017), http://www.nytimes.com/roomfordebate/2017/01/04/is-a-higher-standard-needed-for-campus-sexual-assault-cases.

156 *See supra* Part I.

157 Illinois v. Gates, 462 U.S. 213, 215 (1983).
Chief Justice Marshall observed, in a closely related context:
"[T]he term 'probable cause,' according to its usual acceptation, means less than evidence which would justify condemnation .... It imports a seizure made under circumstances which warrant suspicion." More recently, we said that "the *quanta* ... of proof" appropriate in ordinary judicial proceedings are inapplicable to the decision to issue a warrant. Finely tuned standards such as proof beyond a reasonable doubt or by a preponderance of the evidence, useful in formal trials, have no place in the magistrate's decision. While an effort to fix some general, numerically precise degree of certainty corresponding to "probable cause" may not be helpful, it is clear that "only the probability, and not a prima facie showing, of criminal activity is the standard of probable cause."
Id. at 235.

158 *See Bargaining Units & Contracts*, UNIV. OF CAL., http://ucnet.universityofcalifornia.edu/labor/bargaining-units (last visited Apr. 8, 2017).

159 *The UC System*, UNIV. OF CAL., http://www.universityofcalifornia.edu/uc-system (last visited Apr. 8, 2017).

160 *See Bylaws of the Academic Senate* tit. 3 (B)(7), UNIV. OF CAL., http://senate.universityofcalifornia.edu/bylaws-regulations/bylaws/blpart3.html#blpart3-III (last visited Apr. 8, 2017) [hereinafter *Bylaws*].

161 *The Parts of UC*, UNIV. OF CAL., http://www.universityofcalifornia.edu/uc-system/parts-of-uc (last visited Apr. 8, 2017).

162 *Privilege and Tenure*, U.C. DAVIS, http://academicsenate.ucdavis.edu/committees/committee-list/priv-and-tenure/pt-policies.html (last visited Apr. 8, 2017) ("Steps in a Disciplinary Case"); *see also*BYLAWS, supra note 160, for a complete and comprehensive document review of all collective bargaining contracts within the University of California system that these contracts, excluding faculty members, offer just cause protection for its employees.

163 *About Our System*, UNIV. OF N.C., https://www.northcarolina.edu/?q=content/about-our-system (last visited Apr. 8, 2017).

164 *Due Process*, supra note 139, § 603-8 (emphasis added).

165 *Id.* § 603-1(c).

166 *Id.*

167 *Id.* § 603-1(c)(i).

168 *Id.* § 603-1(c)(ii).

169 *Ohio State Life*, THE OHIO STATE UNIV. COLL. OF MED.: GENETIC COUNSELING, https://medicine.osu.edu/residents/masters_programs/genetic_counseling/columbus/ohio%20state%20life/pages/index.aspx (last visited Apr. 8, 2017).

170 BD. OF TR., THE OHIO STATE UNIV., RULES OF THE UNIV. FACULTY ch. 3335-5-04 (E)(2) (emphasis added), http://trustees.osu.edu/rules/university-rules/chapter-3335-5-faculty-governance-and-committees.html (last visited Apr. 8, 2017).

171 *Id.*

172 *Id.*

173 *Id.* (emphasis added). Similarly, as an added component to the Title IX discussion, many other public colleges and universities boast a clear and convincing policy for faculty misconduct. *See*UNIV. COUNCIL, N. ILL. UNIV., CONSTITUTION AND BYLAWS art. 7.3.1.2 (emphasis added), http://www.niu.edu/u_council/constitution/bylaws/article07.shtml (last visited Apr. 8, 2017) ("If it is recommended that a tenured member of the faculty be dismissed for cause, or that a non-tenured member of the faculty be dismissed before the expiration of the contract period, the burden of proof that such action is justified shall be satisfied only by *clear and convincing* evidence in the record considered as a whole."); *see also*N.D. UNIV. SYS., STATE BD. OF HIGHER EDUC. POLICIES § 605.4-8 (emphasis added), http://www.ndus.edu/makers/procedures/sbhe/default.asp?PID=56&SID=7 (last visited Mar. 20, 2017) ("The findings of fact, conclusions and the decision shall be based solely on the evidence received by the Committee. In cases brought under section 605.3(4), the faculty member has the burden of persuasion to prove, by a preponderance of the evidence, that the action violated the faculty member's rights; in cases pursuant to section 605.3(8) or (9), the burden of proof that grounds for the institution's action exist shall rest with the institution and be satisfied only by *clear and convincing evidence* in the record considered as a whole.").

174 UNIV. OF LOUISVILLE, THE REDBOOK § 4.5.3 app. Termination Procedures (4)(E) (emphasis added), http://louisville.edu/provost/redbook/chap4.html (last visited Apr. 8, 2017).

175 Jake New, *The Wrong Standard*, INSIDE HIGHER ED (Nov. 6, 2014), https://www.insidehighered.com/news/2014/11/06/princeton-title-ix-agreement-higher-standard-proof-sexual-assault-cases-last-legs.

176 *Id.*

177 *Id.*

178 *Id.*

179 *Id.*

180 *Id.*

181 *Id.*

182 *Id.*

183 *Id.*

184 *Id.*

185 *Id.*

186 *Id.*

187 *Id.*

188 *Id.*

189 *Id.*

190 *Id.*

191 *Id.*

192 *See* Jerry Rhodes, *Special Meeting*, UDAILY (Jan. 13, 2015, 4:20 PM), http://www.udel.edu/udaily/2015/jan/FacultySenate011315.html; LOUIS BOULGARIDES ET AL., CFA/CSU COLLECTIVE BARGAINING AGREEMENT (Nov. 12, 2014), http://www.calfac.org/sites/main/files/file-attachments/cfa_cba_2014-17_final_1.23.2015.pdf.

193 *See* Rhodes, *supra* note 192.

194 *See id.*

195 BOULGARIDES ET AL., *supra* note 192, art. 19.29, at 78.

196 U.S. CONST. amend. XIV, § 1.

197 Daniels v. Williams, 474 U.S. 327, 331 (1986).

198 Wolff v. McDonnell, 418 U.S. 539, 558 (1974).

199 DePoutot v. Raffaelly, 424 F.3d 112, 118 (1st Cir. 2005).

200 *Id.*; Fuentes v. Shevin, 407 U.S. 67, 80-82 (1972).

201 *DePoutot*, 424 F.3d at 115.

202 Yu Juan Sheng v. City of New York, No. CV-05-1118(RRM)(VVP), 2009 U.S. Dist. LEXIS 129813, at *36-37 (E.D.N.Y. June 26, 2009).

203 *Id.* at *37 (quoting Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833, 851 (1992)).

204 *Id.*

205 *Id.* (quoting Daniels v. Williams, 474 U.S. 327, 331 (1986)).

206 Kraft v. Mayer, No. 10-CV-164-PB, 2012 U.S. Dist. LEXIS 8427, at *13 (D.N.H. 2012) (alterations in original) (quoting Pagan v. Calderon, 488 F.3d 16, 32 (1st Cir. 2006)).

207 *See*Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 222-23 (1985).

208 *See id.*; *see also*Carone v. Mascolo, 573 F. Supp. 2d 575, 594 (D. Conn. 2008) ("The Supreme Court has enunciated two alternative tests by which substantive due process is examined. Under the first theory, it is not required that the plaintiffs prove a violation of a specific liberty or property interest; however, the state's conduct must be such that it 'shocks the conscience.' 'To succeed under the second theory, a plaintiff must demonstrate a violation of an identified liberty or property interest protected by the [D]ue [P]rocess [C]lause." (alterations in original) (citations omitted)).

209 Elliot v. Staton, No. 3:11-CV-1536-ST, 2012 U.S. Dist. LEXIS 87449, at *5 (D. Or. Apr. 20, 2012) (citing Engquist v. Or. Dep't of Agric., 478 F.3d 985, 996-97 (9th Cir. 2007)).

210 *Engquist*, 478 F.3d at 996-97.

211 Newman v. Massachusetts, 884 F.2d 19, 25 (1st Cir. 1989).

212 *Id.* at 21-22.

213 *Id.* at 25 (citations omitted).

214 *Id.*

215 *Id.* at 26.

216 Regents of Univ. of Mich. v. Ewing, 474 U.S. 214, 223 (1985).

217 *Id.* at 217.

218 *Id.* at 221.

219 *Id.* at 227.

220 *Id.* at 222-23 (alteration in original); *see*Newman v. Burgin, 930 F.2d 955, 962 (1st Cir. 1991) (citations omitted) ("The Supreme Court has twice said that it would assume that an individual, in respect to 'property,' has a Constitutional ('due process') right to be 'free from arbitrary state action.' But it has not explicitly held that such a right exists, nor has it described its contours. (Would it mean, for example, that federal courts should review a large class of state administrative actions as if they were federal actions being reviewed for compliance with the Administrative Procedure Act's requirement that administrative decisions not be arbitrary?").); Gutzwiller v. Fenik, 860 F.2d 1317, 1328 (6th Cir. 1988) ("Indeed, in the academic setting, as the Supreme Court made clear in *Ewing*, courts may override a decision under substantive due process only if that decision is 'such a substantial departure from accepted academic norms as to demonstrate that the person or committee responsible did not actually exercise professional judgment.'"); Oyama v. Univ. of Haw., No. 12-00137 HG-BMK, 2013 WL 1767710, at *11 (D.Haw. Aug. 23, 2013) ("To establish a violation of substantive due process, a plaintiff must prove that the government's action was clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals or general welfare."); Mucci v. Rutgers, No. 08-4806(RBK), 2011 WL 831967, at *18 (D.N.J. Mar. 3, 2011) (citations omitted) ("With the exception of certain fundamental rights, which are not implicated here, a state improperly deprives a person of a substantive due process right if it acts arbitrarily and capriciously. To establish that an action or policy is arbitrary and capricious, a plaintiff must prove that the state did not have a rational basis for its conduct or that it was motivated by bad faith or ill will unrelated to a legitimate government objective."); Mawle v. Texas A & M Univ. Kingsville, No. CC-08-64, 2010 WL 1782214, at *8 (S.D. Tex. Apr. 30, 2010) (citations omitted) ("To state a substantive due process claim, a plaintiff must show that the government's deprivation of a property interest was arbitrary or not reasonably related to a legitimate governmental interest. In *Regents of University of Michigan v. Ewing* ... the Supreme Court recognized that decisions in the academic setting are subject to 'a narrow avenue for judicial review' under a substantive due process standard.").

221 Newman v. Mass., 884 F.2d 19, 25 (1st Cir. 1989). The "*Newman* Standard," in establishing a state-created right to tenured employment which enjoys substantive due process protection, arguably gives rise to claims actionable under section 1983. *See id.*

222 *See supra* notes 77-79 and accompanying text.

223 *See infra* notes 224-32 and accompanying text.

224 CAL. GOV'T CODE § 3500 (West 2017) (emphasis added).

225 *Id.* § 3509.

226 Int'l Ass'n of Fire Fighters, Local 188 v. Pub. Emp't Relations Bd., 245 P.3d 845, 852 (Cal. 2011) (emphasis added).

227 *See id.*

228 *Id.* at 852-53.

229 *See*CAL. GOV. CODE § 3504 (1968).

230 *See* Michael D. Sutton, *Forging a New Breed: The Emergence of Veterans' Preference Statutes within the Private Sector*, 67 ARK. L. REV. 1081, 1093-94 (2014) (explaining that private-sector statutes mirror public employment statutes within various aspects of employment relationships); *see also* Reuel E. Schiller, *Regulating the Workplace: Three Models of Labor and Employment Law in the United States*, U.C. HASTINGS SCHOLARSHIP REPOSITORY, at 1, 5, 8 (2012), http://repository.uchastings.edu/cgi/viewcontent.cgi?article=2254&context=faculty_scholarship (explaining that federal regulations cause states to have similar statutes and citing various similar state statutes).

231 *See Dear Colleague Letter*, *supra* note 1.

232 *See id.*

233 Brown v. Int'l Union, United Auto. Aerospace & Agric. Implement Workers, 512 F. Supp. 1337, 1354 (W.D. Mich. 1981).

234 *Id.*

235 *Id.*

236 Smith v. United Parcel Serv., 96 F.3d 1066, 1068 (8th Cir. 1996) (quoting Vaca v. Sipes, 386 U.S. 171, 190 (1967)).

237 Natoli v. Dist. Lodge No. 837, Int'l Ass'n of Machinists Aero. Workers, AFL-CIO, No. 4:14CV2017JCH, 2015 U.S. Dist. LEXIS 28086, at *5-6 (E.D. Mo. Mar. 9, 2015).

238 Int'l Bd. of Elec. Workers v. Foust, 442 U.S. 42, 47 (1979) (alterations in original) (quoting *Vaca*, 386 U.S. at 190, 191).

239 Brown v. Trans World Airlines, Inc., 746 F.2d 1354, 1357 (8th Cir. 1984).

240 42 U.S.C. § 1983 (1996); *see also*Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 256 (2009) ("A comparison of the substantive rights and protections guaranteed under Title IX and under the Equal Protection Clause lends further support to the conclusion that Congress did not intend Title IX to preclude [section] 1983 constitutional suits. Title IX's protections are narrower in some respects and broader in others. Because the protections guaranteed by the two sources of law diverge in this way, we cannot agree with the Court of Appeals that 'Congress saw Title IX as the sole means of vindicating the constitutional right to be free from gender discrimination perpetrated by educational institutions.'"); Jones v. Lowndes County, 678 F.3d 344, 349 (5th Cir. 2012) (Holding that to make out a section 1983 claim against a public official in their individual capacity, a plaintiff must show "that the defendant was either personally involved in the deprivation or that his wrongful actions were causally connected to the deprivation."); Wernecke v. Garcia, 591 F.3d 386, 401 (5th Cir. 2009) ("[A] supervisory official may be held liable [under section 1983] ... only if (1) [they] affirmatively participate[] in the acts that cause the constitutional deprivation, or (2) [they] implement[] unconstitutional policies that causally result in the constitutional injury."); Cozzo v. Tangipahoa Parish Council, 279 F.3d 273, 286 (5th Cir. 2002) ("[L]iability under the doctrine of respondeat superior is not cognizable in [section] 1983 actions.").

241 *See*20 U.S.C. § 1092(f)(18); *The Clery Act in Detail*, KNOW YOUR IX, http://knowyourix.org/the-clery-act-in-detail (last visited Apr. 8, 2017).

242 Campus Sexual Violence Elimination Act, H.R. 2016, 112th Cong. (2011-2012), https://www.congress.gov/bill/112th-congress/house-bill/2016.
Campus Sexual Violence Elimination Act or Campus SaVE Act - Amends title IV (Student Assistance) of the Higher Education Act of 1965 to require each institution of higher education (IHE) participating in a title IV program to include in its annual security report on campus security policy and crime statistics a statement of current policies for reporting crimes or other emergencies in or on noncampus buildings or property (currently, only reporting of crimes on campus is required). Requires such report to include statistics concerning the occurrence of domestic violence, dating violence, and stalking

incidents reported to campus security authorities or local police. Requires schools to protect victim confidentiality when reporting criminal threats to the campus community. Directs IHEs to include in their annual security report a statement of policy regarding their programs to prevent domestic violence, dating violence, sexual assault, and stalking and the procedures they follow when such an offense is reported. Requires such procedures to include: (1) the provision, in writing, to students or employees that report that they have been the victim of such an offense certain information regarding their rights, disciplinary processes, victim services, and safety planning; (2) a description of how the IHE will help enforce any protective order; and (3) information about how the IHE will protect victim confidentiality. Requires an IHE's policy regarding such offenses to include: (1) education that promotes awareness of the offenses; (2) possible sanctions or protective measures imposed following disciplinary action; (3) procedures victims should follow after such an offense occurs; (4) information about to whom the alleged offense should be reported; (5) institutional disciplinary procedures; and (6) the notification of victims regarding their options for, and assistance in, changing academic, living, transportation, and working situations. Directs the Secretary of Education to seek the counsel of the Attorney General and Secretary of Health and Human Services (HHS) regarding the development, and dissemination to IHEs, of best practices for preventing and responding to incidents of domestic violence, dating violence, sexual assault, and stalking.
Id.

243 *See* Administrative Procedure Act, ch. 324, Pub. L. No. 404 (1946) (codified as amended at 5 U.S.C. §§ 551-559 (2012)).

244 *See* S.B. 967, 2014 Leg., Reg. Sess. (Cal. 2014).

245 *See id.* ("An affirmative consent standard in the determination of whether consent was given by both parties to sexual activity. 'Affirmative consent' means affirmative, conscious, and voluntary agreement to engage in sexual activity. It is the responsibility of each person involved in the sexual activity to ensure that he or she has the affirmative consent of the other or others to engage in the sexual activity. Lack of protest or resistance does not mean consent, nor does silence mean consent. Affirmative consent must be ongoing throughout a sexual activity and can be revoked at any time. The existence of a dating relationship between the persons involved, or the fact of past sexual relations between them, should never by itself be assumed to be an indicator of consent."); *see also* Bill Chappell, *California Enacts 'Yes Means Yes' Law, Defining Sexual Consent*, NPR (Sept. 29, 2014, 12:27 PM), http://www.npr.org/blogs/thetwo-way/2014/09/29/352482932/california-enacts-yes-means-yes-law-defining-sexual-consent; Richard Perez-Pena & Ian Lovett, *California Law on Sexual Consent Pleases Many but Leaves Some Doubters*, N.Y. TIMES (Sept. 29, 2014), http://www.nytimes.com/2014/09/30/us/california-law-on-sex-consent-pleases-many-but-leaves-some-doubters.html?_r=0.

246 Matthew Hendley, *"Yes Means Yes" Law Proposed By Some Arizona Lawmakers*, PHOENIX NEW TIMES (Jan. 21, 2015), http://blogs.phoenixnewtimes.com/valleyfever/2015/01/yes_means_yes_law_proposed_by_some_arizona_lawmakers.php.

247 28 U.S.C. § 2201 (2010); *see*Verizon New Eng., Inc. v. Int'l Bd. of Elec. Workers, 651 F.3d 176, 188 (1st Cir. 2011) ("Requests for a declaratory judgment may not be granted unless they arise in a context of a controversy 'ripe' for judicial resolution. Ripeness is an Article III jurisdictional requirement. The need for ripeness is emphasized in the Declaratory Judgment Act (DJA), which refers to an 'actual' controversy. This is a sine qua non of any assumption of federal jurisdiction.").

248 Wilton v. Seven Falls Co., 515 U.S. 277, 286-87 (1995) (emphasis added) (citations omitted).

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