# Title IX Final Rule Law and Policy, Academic Labor Union Duty to Bargain Rights and the Evidentiary Standard of Proof: A Critical Examination of the Emerging Intersection of Title IX and Labor Law Jurisprudence in Higher Education

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*Abstract*

This article critically examines the legislative and historical foundations of Title IX law and policy as it relates to academic labor union duty to bargain rights on America's college campuses. To be sure, this law review article argues that, in light of the May 2020 U.S. Department of Education Office of Civil Rights ("OCR") Final Rule Title IX amendments and

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established legal precedent, campus labor unions at both public and private educational institutions nationwide may, in fact, have both the statutory right under the NLRA (private colleges) and similar rights under the various public sector statutes (public colleges) to collectively bargain the evidentiary standard of proof in campus Title IX investigations as the evidentiary standard is, arguably, a "term and condition" of employment and therefore a mandatory subject of bargaining. The Trump administration's recently amended 2020 Title IX Final Rule, among the several legally significant proposed alterations to the Obama Administration's 2011 "Dear Colleague Letter," allow colleges and universities to independently choose between (1) the "preponderance of the evidence" standard or (2) the heightened "clear and convincing evidence" standard of proof to determine a finding in campus Title IX investigations and, perhaps more importantly, under the Title IX Final Rules, the standard of evidence must be a uniform across the campus, i.e., a uniformity rule requiring that the stated evidentiary standard of proof on each campus must be the same in cases against students-respondents as it is with cases against employees and faculty.

While it may appear that the Title IX Final Rule by its written language is a clear paradigm shift in independent university choice of standard by respective campus administrations which solely impacts campus Title IX sexual assault rights and responsibilities, upon review and comparison to the considerable settled principles of labor law jurisprudence in the United States, however, the Final Rule also has a direct and substantive legal impact on the workplace rights of thousands of campus labor union employees employed under collective bargaining agreements at hundreds of public and private institutions throughout the U.S. Ultimately, the U.S. Department of

Education's ideological shift towards individual colleges independently choosing the evidentiary standard of proof in Title IX investigations is a stark and profound policy change from the "mandated" preponderance of the evidence standard set forth by the Obama administration in its 2011 "Dear Colleague Letter" agency guidance.

In its totality, the Trump administration's 2020 Title IX Final Rule standard of proof amendments not only redefine and succinctly challenge past core practices in higher education policy, but, in fact, the Title IX changes plainly reveal a more important, if not existential legal question to the broader academic community: Does a public university under state statute/PERB or a private university under the NLRA have an affirmative legal duty to collectively bargain the 2020 Final Rule Title IX evidentiary standard of proof decision with an on-campus labor union or can the standard of proof decision be reached unilaterally? In other words, who chooses: campus administration, labor unions or both?

The answer to this question will have far-reaching legal, financial, academic, political and evidentiary ramifications. Accordingly, by examining this legally important question thru both an historical and modern-day lens, I define and articulate the origins of (1) academic labor union history in both public and private higher education institutions (2) the origins of Title IX law and policy from its initial legislative enactment in 1972, to the 2011 Dear Colleague Letter and (3) concluding with the recently revised 2020 Title IX Final Rule amendments under the Trump administration and the U.S. Department of Education Office of Civil Rights. To be sure, in examining this question in its full scope and context, I not only critically analyze the question

presented and the substantial law supporting the conclusions reached, but also recommend solutions and strategies that may provide helpful construct, context and exposition.

At the outset, I employ three major research strategies in this examination of Title IX and Labor Law: (1) a qualitative analysis and a nationwide data sample of numerous university position statements on intended choice of Title IX evidentiary standard, (2) select labor union statutory, common law and contractual "Duty to Bargain" rights under both the National Labor Relations Act applicable to academic labor employees employed at private institutions and the various state statutory frameworks and public employment board decisions applicable to academic labor employees employed at public institutions and (3) established legal precedent. Data has been collected from interviews, books, present-day labor contracts between academic labor unions and college administrations, surveys, legal precedent, news articles, case law and published reports.

Undoubtedly, what's at stake at the core of this research is of utmost legal importance to American higher education institutions, labor unions, Title IX practitioners, lawyers, the courts, the N.L.R.B., legislators, advocacy groups, students and the like. In light of the gravity of ubiquitous sexual assault and harassment on college campuses nationwide in addition to the inconsistencies in adjudication of these matters in the courts (and on campus), it makes sense to understand and address this critical issue for the betterment of society. That said, American colleges and universities, its respective faculty and students deserve the procedural predictability and legal reliability of a common, uniform and collectively bargained evidentiary standard in campus Title IX investigations. The issue remains, however, determining the methodology, legal

construct and progressive labor law statutory framework that best supports a fair, reasoned and evidence-centered Title IX standard of proof within a share-governance institutional model. This issue, in its proper legal and social context, may be one of the most important decisions a college makes and, more importantly, represents an unexpected collision of settled labor law principles and Title IX sexual assault law never before introduced on America's college campuses.

What is revealed with this research, however, is that the ultimate institutional resolution of the Title IX standard of proof decision on each campus between the preponderance of the evidence standard and the clear and convincing evidence standard, which will directly impact students, staff and unionized employees alike, ultimately may not be achieved by way of an expected campus leadership sense of altruism, fairness and shared governance, but rather (unwittingly) by a likely unknown and perhaps forgotten burden of proof provision often-times buried among the pages of an active and binding campus collective bargaining agreement. An examination of this distinct possibility is central to the core research question in this article. Accordingly, and after review of the substantial research evidence gathered, however, only one reasonable conclusion is possible: the considerable evidence revealed and analyzed in this critical research supports the well-founded conclusion that on-campus labor unions (including faculty, graduate, clerical, etc.) and America's respective public and private college administrations must, in fact, collectively bargain the Title IX Final Rule evidentiary standard of proof decision.

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# INTRODUCTION

## THE HISTORY OF ACADEMIC LABOR UNIONS

In the United States, academic labor unions, similar to the ubiquitous and burgeoning industrial revolution unionized labor organizations in the broader working-class sense, endured a difficult and tenuous start.[2] In 1915, for example, academic labor began in earnest in the United States when the American Association of University Professors ("AAUP") was established.[3] "The creation of the AAUP was preceded by an incident that had come to epitomize the perils of this state of affairs: the dismissal in 1900 of Stanford University economist Edward Ross at the behest of Jane Lathrop Stanford, the widow of the university's railroad-magnate founder, after Ross had criticized railroad monopolies and the use of immigrant labor. The Ross case reminded faculty members that their professional autonomy was dependent on the whims of those who ran the institutions that employed them."[4] "With the founding of the American Federation of

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[2] *See* The Rise and Fall of Labor Unions In The U.S., From the 1830s until 2012 (but mostly the 1930s-1980s) G. William Domhoff, https://whorulesamerica.ucsc.edu/power/history_of_labor_unions.html (last visited April 25, 2020), *see also* Wesley, Charles H., "Organised Labor and the Negro" (1939). Faculty Reprints. 213 https://dh.howard.edu/cgi/viewcontent.cgi?referer=https://www.google.com/&httpsredir=1&article=1212&context=reprints (last visited April 25, 2020).

[3] https://www.aaup.org/about/history-aaup (last visited April 17, 2020). "More proximate to the AAUP's founding was the work undertaken in 1914 by the Joint Committee on Academic Freedom and Tenure, also known as the "committee of nine." This committee, which included three representatives each from the American Economic Association, the American Sociological Society, and the American Political Science Association and was headed by Columbia University economics professor Edwin R. A. Seligman, was charged with examining academic freedom issues and investigating individual cases. The difficulties of undertaking this work through separate disciplinary societies made apparent the need for a more broadly conceived faculty association."

https://www.aaup.org/about/history/timeline-first-100-years (last visited April 16, 2020).

[4] https://www.aaup.org/about/history/timeline-first-100-years (last visited April 16, 2020). More specifically, the founding of the AAUP involved, in part, the collective desire for greater influence and authority in the academy. For example,

Teachers Local 33 at Howard University in November 1918, [becoming the first educational institution in the United States to recognize and bargain with a campus labor union] college and school faculty organized 20 separate union locals for a variety of social, economic, and institutional reasons before the end of 1920."[5] "The first AFT college local at Howard University was founded because of what one member called the 'degradation of faculty in university affairs' and also to try to encourage greater federal financial support for the institution. The second at the University of Illinois was formed both to increase faculty salaries and to bridge divides between what were termed by the local papers the 'brain workers' and 'hand workers.'"[6] Yet, prior to 1918, there was little in the way of legislation, academic collective bargaining or mutual protection for faculty, or the American laborer in the general sense. For example:

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> [i]n 1915, trustees and regents regularly exercised much more direct control over day-to-day operations of the university than they do now. They often viewed professors as their employees, or "hired men," to use a term of derision the founders of the AAUP employed, and treated them accordingly. The founders of the AAUP wanted to establish a role for the faculty in institutional governance that would make them the equals of the trustees rather than their subordinates. Academic freedom was an important part of changing the role of professors, since it directly related to their professional autonomy, but it was only one part in the overarching goal of the AAUP. A term that AAUP co-founder Arthur Lovejoy [a professor of philosophy at Johns Hopkins University] employed to describe his vision of the university was that of a "self-governing republic of scholars." While he saw a role for trustees in oversight, he did not believe that they should have final authority over academic matters.
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> Interview with Hans Joerg Tiede, Inside Higher ed. https://www.insidehighered.com/news/2015/10/22/new-book-details-founding-and-evolution-aaup (last visited April 22, 2020).

[5] https://news.illinois.edu/view/6367/205660, *College faculty unionization still contested territory, scholar say*s (last visited April 16, 2020).

[6] https://www.higheredjobs.com/HigherEdCareers/interviews.cfm?ID=315 (last visited April 22, 2020). Interview with Timothy Reese Cain, Ph.D, Assistant Professor, College of Education, University of Illinois at Urbana-Champaign. The societal divide proposing a discernible difference in "brain workers" and "hand workers" was more than just a social construct of the times, it also crossed racial lines. *See* Marie A. Failinger, Yick Wo at 125: Four Simple Lessons for the Contemporary Supreme Court, 17 Mich. J. Race & L. 217, 236 (2012).

> [i]n the early days of the labor movement in the United States there was no legislation to deal explicitly with the issue of workers' rights to form labor unions and to collectively bargain with their employer. In the absence of such legislation, the Courts generally ruled in favor of business when disputes between business and labor arose. For example, the Cordwainers Case[7] in 1806 and Commonwealth of *Massachusetts v Hunt*[8] in 1842 each applied the Conspiracy Doctrine to rule that workers joining together for their own benefit was harmful to society. As a result, union membership was about six percent of the labor force before 1930 (citation omitted). [Beginning with the founding of AFT Local 33 at Howard University in November 1918, college and normal school faculty organized 20 separate union locals for a variety of social, economic, and institutional reasons before the end of 1920.][9] In 1926, Congress passed the Railway Labor Act.[10] While the Railway Labor Act was the first federal law to cover the collective bargaining process, it was not until the Great Depression of the 1930s that labor unions gained political power across industries nationwide. This power resulted in legislation to cover all workers in the private sector. Notably, the Norris-LaGuardia Act was passed in 1932 and the Wagner Act (National Labor Relations Act) was passed in 1935.[11]

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[7] The course of these early labor cases began with the first recorded decision, the Philadelphia Cordwainers Case*,* *(*Commonwealth v. Pullis*)*, decided in 1806. The indictment was for a conspiracy to raise wages and charged the journeymen shoemakers with combining and agreeing not to work except at certain rates, and also to prevent others from working at lower ones. There was no statutory condemnation of a combination of workers for the purpose of raising wages, and so judicially-formulated common law principles were required if a criminal conspiracy was to be found. *** Although the indictment and the charge contained the requirement of a bad end, *i.e.*, the former charged that the combination was for the purpose of not working unless certain rates were given and also to prevent others from working, and the latter held bad a combination to raise wages, still, in the light of the previously quoted "transcendental wrong and outrage," the jury found no difficulty in holding the defendants guilty. Their verdict itself discloses how necessary they considered this bad end: "We find the defendants guilty of a combination to raise their wages." Morris D. Forkosch, *The Doctrine of Criminal Conspiracy and Its Modern Application to Labor*, 40 Tex. L. Rev. 303, 320–21 (1962).

[8] Com. v. Hunt*,* 45 Mass. 111, 123, 4 Met. 111, 1842 WL 4012 (1842), § 7:137. Conspiracy—Parties, 14A Mass. Prac., Summary Of Basic Law § 7:137 (5th ed.)

[9] Timothy Cain, The First Attempts to Unionize the Faculty, *Teachers College Record* Volume 112 Number 3, 2010, p. 876-913

[10] Railway Labor Act, Pub. L. No. 257, 69th Cong., 1st Sess., 44 Stat. 577 (1926).

[11] EXAMINING THE PARALLELS OF THE DECLINES IN THE BARGAINING POWER OF FACULTY LABOR UNIONS IN PUBLIC HIGHER EDUCATION AND INDUSTRIAL LABOR UNIONS IN THE UNITED STATES: A USE OF THE HISTORICAL PERSPECTIVE AND DESCRIPTIVE STATISTICS, Lynn A. Smith and Robert S. Balough, Proceedings of the Pennsylvania Economic Association 2010 Conference (2010). "[W]hen the Wagner and Taft-Hartley Acts were approved, it was [originally] thought that congressional power did not extend to university faculties because they were employed by nonprofit institutions which did not "affect commerce." N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 679, 100 S. Ct. 856, 861, 63 L. Ed. 2d 115 (1980).

Some of the earliest contracts on campuses date back to the 1940s.[12] ["In Ohio, the University of Akron in 1942 voluntarily recognized and started negotiating contracts with State County Municipal Workers of America (SCMWA) Local 38, a public sector affiliate of the Congress of Industrial Organizations (CIO), for a unit of maintenance and custodial workers.[13] … An important early example of voluntary institutional embrace of workplace democracy on campus was the creation of a collective bargaining program by the University of Illinois in 1945 for over 2000 non-academic employees.]"[14] Howard University entered into an agreement with United Federal Workers of America, Congress of Industrial Organizations (CIO), in April 1946 for a bargaining unit of non-faculty staff, and United Public Workers of America, Local 555, CIO, negotiated agreements for teachers at vocational schools. CIO unions negotiated faculty contracts at Howard University and Fisk University during the same period (citation omitted). Higher education collective bargaining in that era was the result of voluntary recognition by institutions, rather than by legal mandate.

The National Labor Relations Board (NLRB) declined jurisdiction over private nonprofit educational institutions for many years. In the public sector, a long and largely unstudied history of union organizing led to informal agreements and some written contracts without the existence of enabling legislation, primarily with local governments. … A procedural framework for unionization and collective bargaining on public college campuses was not established until passage of state public sector collective bargaining laws in the 1960s and 1970s.[15] The enactment of *de jure* mechanisms led to unionization and collective bargaining agreements on public sector campuses involving the trades and buildings and grounds workers, as well as clerical, food service, public safety, and academic labor.[16]

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[12] "At the end of World War II, when organized labor in the United States was at the peak of its political power and influence, industrial relations units were established at many universities around the nation. In 1945, Governor Earl Warren established two such units at the University of California: one at UCLA, the other at Berkeley." https://irle.ucla.edu/about/history (last visited April 22, 2020).

[13] Herbert, William A. (2017) "The History Books Tell It? Collective Bargaining in Higher Education in the 1940s," *Journal of Collective Bargaining in the Academy*: Vol. 9 , Article 3. https://thekeep.eiu.edu/cgi/viewcontent.cgi?article=1734&context=jcba (last visited May 4, 2020)., p. 3

[14] *Id*. at p. 10

[15] "Beginning with Wisconsin in 1959, state legislatures began to enact legislation authorizing collective bargaining in the public sector. Joan Weitzman, The Scope of Bargaining in Public Employment 40-41 (1975). By 1974, forty states had adopted some kind of collective bargaining for public employees, while twenty-eight states enacted comprehensive statutes of general applicability." Waterloo Education v. Public Employ, 740 N.W.2d 418, 420 (Iowa 2007).

[16] Herbert, W. A. and Apkarian, J., Everything passes, everything changes: Unionization and collective bargaining in higher education. Perspectives on Work, 21(1): 30-35. (2017)

THE NLRA and The Duty to Bargain

> The National Labor Relations Act of 1935 (also known as the Wagner Act)[17] is a foundational statute of United States labor law which guarantees the right of private sector employees to organize into trade unions, engage in collective bargaining, and take collective action such as strikes. The act was written by Senator Robert F. Wagner, passed by the 74th United States Congress, and signed into law by President Franklin D. Roosevelt. The National Labor Relations Act seeks to correct the 'inequality of bargaining power' between employers and employees by promoting collective bargaining between trade unions and employers. The law established the National Labor Relations Board to prosecute violations of labor law and to oversee the process by which employees decide whether to be represented by a labor organization. It also established various rules concerning collective bargaining and defined a series of banned unfair labor practices, including interference with the formation or organization of labor unions by employers.[18]

Accordingly, the NLRA firmly establishes a private employer's (including private colleges and universities) affirmative duty to collectively bargain with labor unions "terms and conditions of

[17] "The Wagner Act is arguably the most important piece of legislation to date protecting workers' and unions' rights. It involved the federal government in this protection and in arbitrating employer-employee disputes, a key step in preventing unjust treatment of workers. Its key principles include encouraging collective bargaining and protecting the exercise of freedom of association. It also defined and prohibited five unfair labor practices by employers, including interfering with, restraining, or coercing employees against their rights; interfering with the formation of a labor organization; discriminating against employees to encourage or discourage forming a union; discriminating against employees who file charges or testify; and refusing to bargain collectively with the employees' representative." https://rooseveltinstitute.org/wagner-act/ (last visited April 22, 2020).

[18] https://en.wikipedia.org/wiki/National_Labor_Relations_Act_of_1935, (last visited April 16, 2020). "The denial by some employers of the right of employees to organize and the refusal by some employers to accept the procedure of collective bargaining lead to strikes and other forms of industrial strife or unrest, which have the intent or the necessary effect of burdening or obstructing commerce by (a) impairing the efficiency, safety, or operation of the instrumentalities of commerce; (b) occurring in the current of commerce; (c) materially affecting, restraining, or controlling the flow of raw materials or manufactured or processed goods from or into the channels of commerce, or the prices of such materials or goods in commerce; or (d) causing diminution of employment and wages in such volume as substantially to impair or disrupt the market for goods flowing from or into the channels of commerce. The inequality of bargaining power between employees who do not possess full freedom of association or actual liberty of contract, and employers who are organized in the corporate or other forms of ownership association substantially burdens and affects the flow of commerce, and tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners in industry and by preventing the stabilization of competitive wage rates and working conditions within and between industries." 29 U.S.C.A. § 151

employment."[19] "The NLRA applies to most private sector employers, including manufacturers, retailers, *private universities*, and health care facilities. The NLRA does *not* apply to federal, state, or local governments, [however, nor does it apply to] employers who employ only agricultural workers; and employers subject to the Railway Labor Act (interstate railroads and airlines)."[20] Conversely, public employers and, specifically, "public universities are covered by state law. In spelling out the subjects of collective bargaining in the public sector, many state statutes draw heavily upon § 8(d) of the National Labor Relations Act (NLRA) which calls upon employers to bargain over 'wages, hours, and other terms and conditions of employment.'"[21] Ultimately, "it has been left to case law to sort out the line between [private sector] bargainable issues [mandatory subjects of bargaining] and non-bargainable management prerogatives."[22]

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[19] 29 U.S.C.A. § 158(d). "Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in § 158(a)(3) of this title." 29 U.S.C.A. § 157.

[20] https://www.nlrb.gov/resources/faq/nlrb (last visited April 16, 2020). Under the NLRA, the term "employer" includes any person acting as an agent of an employer, directly or indirectly, but shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof, or any person subject to the Railway Labor Act, as amended from time to time, or any labor organization (other than when acting as an employer), or anyone acting in the capacity of officer or agent of such labor organization. 29 U.S.C.A. § 152 [Similarly], the term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, but shall not include any individual employed as an agricultural laborer, or in the domestic service of any family or person at his home, or any individual employed by his parent or spouse, or any individual having the status of an independent contractor, or any individual employed as a supervisor, or any individual employed by an employer subject to the Railway Labor Act, as amended from time to time, or by any other person who is not an employer as herein defined. 29 U.S.C.A. § 152

[21] Scope of collective bargaining, St. Loc. Emp. Liab § 16:9

[22] *Id.*, *See also* City of Lynn v. Labor Relations Com'n, 43 Mass. App. Ct. 172, 681 N.E.2d 1234, 158 L.R.R.M. (BNA) 2822 (1997) (fire chief's decision to seek involuntary retirement of firefighter deemed matter of exclusive managerial prerogatives). Washington Metropolitan Area Transit Authority v. Local 2, Office Professional Employees Intern. Union, 465 F.3d 151, 180 L.R.R.M. (BNA) 2785, 153 Lab. Cas. (CCH) P 10737 (4th Cir. 2006)

A critical component of the history of academic labor includes not only the history of labor organizations such as the AAUP and the AFT seeking to organize on-campus chapters, but also the issue of misclassification, i.e. determining the line between NLRA protected unionized faculty members and NLRA exempt managers. For example, Gregory Saltzman aptly notes in his 2001 publication, *Higher Education Collective Bargaining And the Law,* in discussing the fits and starts of academic labor that:

> [c]lassifying faculty at private institutions as managers not protected by the NLRA began with the U.S. Supreme Court's 1980 Yeshiva ruling.[23] Yeshiva did not prohibit faculty unionization, but most faculty lacked the militancy and power to win union recognition without legal protection. Yeshiva, noted a journalist, "crippled" union organizers at private colleges for 20 years. (citation omitted). But two rulings of the Clinton-era National Labor Relations Board (NLRB) eroded the Yeshiva doctrine—a 1997 University of Great Falls (UGF) decision[24] and a June 2000 decision not to hear an appeal of the NLRB regional director's Manhattan College decision. Faculty at both institutions sought representation by the American Federation of Teachers (AFT). The NLRB ruled that they had a protected right to organize and bargain since they had insufficient authority to be considered managers under Yeshiva.[25]

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(closing cafeteria run by a public transit authority for its employees was an employment benefit, thus the issue was a core managerial decision subject to arbitration). § 16:9. Scope of collective bargaining, St. Loc. Emp. Liab § 16:9

[23] NLRB v. Yeshiva University, 444 U.S. 672 (1980) Here, the Supreme Court, Mr. Justice Powell, held that private university's full-time faculty members whose authority in academic matters was absolute, who decided what courses would be offered, when they would be scheduled, and to whom they would be taught, who determined teaching methods, grading policies, and matriculation standards, and who effectively decided which students would be admitted, retained and graduated, exercised supervisory and managerial functions and were therefore excluded from the category of employees entitled to benefits of collective bargaining under the National Labor Relations Act. N.L.R.B. v. Yeshiva Univ., 444 U.S. 672, 100 S. Ct. 856, 63 L. Ed. 2d 115 (1980). As such, faculty defined as managers [at that time] under the NLRA [had] no statutory rights to unionize and collectively bargain with their university employer. Risa L. Lieberwitz, Faculty in the Corporate University: Professional Identity, Law and Collective Action, 16 Cornell J.L. & Pub. Pol'y 263, 264–65 (2007). "The requisite responsibility to confer managerial status will be found where an employee has (1) the independent authority to establish and effectuate policy, or (2) the ability to make recommendations that are almost always implemented." Bd. of Trustees of Univ. of Illinois v. Illinois Educ. Labor Relations Bd., 2018 IL App (4th) 170059, ¶ 93, 101 N.E.3d 209, 222, appeal denied, 108 N.E.3d 812 (Ill. 2018).

[24] 325 NLRB No. 3 (N.L.R.B.), 325 NLRB 83, 157 L.R.R.M. (BNA) 1196

[25] Gregory M. Saltzman, Higher Education Collective Bargaining And the Law, THE NEA 2001 ALMANAC OF HIGHER EDUCATION, http://www.nea.org/assets/img/PubAlmanac/ALM_01_05.pdf (last visited April 30, 2020).

Defining the Duty to Bargain Under the NLRA: When Does the Duty Arise?

Under the NLRA, "[o]nce a union has been certified by the NLRB or voluntarily recognized by an employer as the representative of the employees in a bargaining unit, it is an unfair labor practice ("ULP") for an employer to refuse to bargain collectively with the union.[26] In *N.L.R.B. v. Katz*, for example, the U.S. Supreme Court, held in a landmark decision that:

> [t]he duty 'to bargain collectively' enjoined by § 8(a)(5) [of the NLRA] is defined by § 8(d) as the duty to 'meet * * * and confer in good faith with respect to wages, hours, and other terms and conditions of employment.' [Under § 8(a)(5) of the NLRA "it shall be an unfair labor practice for an employer … to refuse to bargain collectively with the representatives of his employees."][27] Clearly, the duty thus defined may be violated without a general failure of subjective good faith; for there is no occasion to consider the issue of good faith if a party has refused even to negotiate in fact— 'to meet * * * and confer'—about any of the mandatory subjects. A refusal to negotiate in fact as to any subject which is within § 8(d) [mandatory subject of bargaining], and about which the union seeks to negotiate, violates § 8(a)(5) though the employer has every desire to reach agreement with the union upon an over-all collective agreement and earnestly and in all good faith bargains to that end. We hold that an employer's unilateral change in conditions of employment under negotiation is similarly a violation of § 8(a)(5), for it is a circumvention of the duty to negotiate which frustrates the objectives of § 8(a)(5) much as does a flat refusal.[28]

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[26] Collective Bargaining Under the National Labor Relations Act, Practical Law Practice Note 5-518-7132

[27] 29 U.S.C.A. § 158(a)(5).

[28] N. L. R. B. v. Katz, 369 U.S. 736, 742–43, 82 S. Ct. 1107, 1111, 8 L. Ed. 2d 230 (1962) "In *NLRB v. Katz*, the Supreme Court held that an employer's unilateral change in a mandatory bargaining subject, i.e., wages, hours, and other terms and conditions of employment is a violation of § 8(a)(5). The theory is that such a unilateral change circumvents the duty to negotiate in good faith in much the same way as a flat refusal to bargain. As a general rule, therefore, an employer may not unilaterally impose material changes in terms or conditions of employment that are mandatory subjects of bargaining without first negotiating to impasse. To establish a prima facie case of failure to bargain in good faith in connection with an alleged unilateral change in working conditions, it must be shown that the change: (1) was material, substantial or significant;4 (2) altered an existing practice; (3) affected a mandatory subject of bargaining; and (4) was implemented without prior notice and an opportunity to bargain." § 13:74.Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74

This decision established the unilateral change doctrine, i.e., notice and an opportunity to bargain. In *Katz*, the question presented to the Supreme Court (considering varying sick leave and merit increase policy changes) was whether it is a "violation of the duty 'to bargain collectively' imposed by § 8(a)(5) of the National Labor Relations Act for an employer, without first consulting a union with which it is carrying on bona fide contract negotiations, to institute changes regarding matters which are subjects of mandatory bargaining under § 8(d) and which are in fact under discussion."[29] The Court noted that "[u]nilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance."[30] "The Supreme Court has held that a unilateral change to a permissive or non-mandatory subject of bargaining does not constitute an unfair labor practice."[31]

Further Supreme Court ruling has held that "[t]he unilateral change doctrine of *NLRB v. Katz,* whereby an employer violates the NLRA if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment—extends to cases in which an existing

[29] *Id.* at 737.

[30] *Id*. at 747

[31] See Allied Chemical and Alkali Workers of America, Local Union No. 1 v. Pittsburgh Plate Glass Co., Chemical Division, 404 U.S. 157, 185, 92 S. Ct. 383, 400, 30 L. Ed. 2d 341, 1 Employee Benefits Cas. (BNA) 1019, 78 L.R.R.M. (BNA) 2974, 66 Lab. Cas. (CCH) P 12254 (1971) ("a 'modification' is a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining."). § 13:74. Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74

agreement has expired and negotiations on a new one have yet to be completed."[32] "There are two exceptions to the rule that an employer may not unilaterally impose material changes in terms or conditions of employment that are mandatory subjects of bargaining without first negotiating to impasse. First, an employer may impose unilateral terms if the union engages in dilatory tactics to delay bargaining.[33] Second, an employer may act unilaterally if faced with an economic exigency justifying the change."[34]

In *El Paso Elec. Co. v. N.L.R.B.*, for example, the employer unilaterally changed its policy (among many other substantive policy changes) regarding the use of performance improvement plans and employee discipline. The United States Court of Appeals for the 5th Circuit, in finding the employer in direct violation of §8 of the NLRA held "[t]he employer *** violates [the NLRA] by unilaterally implementing new *work rules* and subjecting employees to discipline for violating those rules."[35] The 5th Circuit continued in its exposition of unilateral employer action involving mandatory subjects of bargaining when it held "[f]or a unilateral change to require the

[32] Litton Fin. Printing Div., a Div. of Litton Bus. Sys., Inc. v. N.L.R.B., 501 U.S. 190, 191, 111 S. Ct. 2215, 2217, 115 L. Ed. 2d 177 (1991).

[33] See Serramonte Oldsmobile, Inc. v. N.L.R.B., 86 F.3d 227, 152 L.R.R.M. (BNA) 2558 (D.C. Cir. 1996). § 13:74.Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74

[34] Visiting Nurse Services of Western Massachusetts, Inc. v. N.L.R.B., 177 F.3d 52, 161 L.R.R.M. (BNA) 2326 (1st Cir. 1999); RBE Electronics of S.D., Inc., 320 N.L.R.B. 80, 151 L.R.R.M. (BNA) 1329, 1995-96 NLRB Dec. (CCH) ¶ 15924, 1995 WL 788575 (1995). § 13:74.Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74

[35] El Paso Elec. Co. v. N.L.R.B., 681 F.3d 651, 657 (5th Cir. 2012) *citing* Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198, 111 S.Ct. 2215, 115 L.Ed.2d 177 (1991).

employer to bargain with the union, the change must represent a '*material, substantial, and a significant change*' in the terms and conditions of employment."[36]

"Material changes" in policy as explained in *El Paso Elec. Co. v. N.L.R.B*. implicate both new policy implementation, but also *clarification* of previous policy that impacts the terms and conditions of employment. For example, in *N.L.R.B. v. Roll & Hold Warehouse & Distribution Corp.*, the U.S. Court of Appeals (7th Cir. 1998) considered the merits of an employer's action in unilaterally amending or clarifying its established attendance policy without bargaining with the local union. In response, the court held that "[w]hile some management decisions may have such slight impact on the 'terms and conditions' of employment that they are not reasonably encompassed by § 8, [the employer's] decision [here] to adopt the new attendance policy is not one of them."[37] The court concluded "so long as the new policy represents a *material and significant change* in working conditions, the union has a right to bargain over it on behalf of its members."[38] Thus, "[a] unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change."[39]

Thus, to establish a prima facie case of failure to bargain in good faith in connection with an alleged unilateral change in working conditions, it must be shown that the change:

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[36] *Id*.

[37] N.L.R.B. v. Roll & Hold Warehouse & Distribution Corp., 162 F.3d 513, 517 (7th Cir. 1998)

[38] *Id*. at 518.

[39] The Toledo Blade Co., Inc. & Toledo Newspaper & Printing Graphics Union No. 27n, a/w Graphic Commc'ns Int'l Union, Afl-Cio, 343 NLRB 385, 387 (2004).

(1) was material, substantial or significant (*El Paso Elec. Co.* and *Roll & Hold*)[40]

(2) altered an existing practice;

(3) affected a mandatory subject of bargaining; and

(4) was implemented without prior notice and an opportunity to bargain. (*Katz*)[41]

Similar to the Supreme Court line of reasoning in *Katz*, "[u]nder § 8(a)(5) of the NLRA, an employer is required to notify and bargain with a union before changing its disciplinary system, including when beginning to use a more formalized system of discipline."[42] Accordingly,

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[40] *see also* Mississippi Power Co. v. N.L.R.B., 284 F.3d 605, 615, 28 Employee Benefits Cas. (BNA) 1498, 169 L.R.R.M. (BNA) 2840, 145 Lab. Cas. (CCH) P 11251 (5th Cir. 2002); Peerless Food Prods., 236 NLRB at 161 (citing Rust Craft Broadcasting of New York, Inc., 225 N.L.R.B. 327, 327, 92 L.R.R.M. (BNA) 1576, 1975-76 NLRB Dec. (CCH) P 16974, 1976 WL 7242 (1976)); Bureau of National Affairs, Inc., 235 N.L.R.B. 8, 9, 97 L.R.R.M. (BNA) 1447, 1978 NLRB Dec. (CCH) P 19114, 1978 WL 7352 (1978) (dismissal of duty to bargain in good faith charge based on failure to establish "significant or substantial" change); Murphy Diesel Co., 184 N.L.R.B. 757, 76 L.R.R.M. (BNA) 1469, 1970 NLRB Dec. (CCH) P 22192, 1970 WL 25816 (1970) (duty to bargain is triggered by a "material, substantial, and a significant change"). § 13:74. Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74. "The Board has long held that an employer is not obligated to bargain over changes so minimal that they lack such an impact." W-I Forest Products Co., 304 NLRB 957 (1991) (citing Rust Craft Broadcasting, 225 NLRB 327 (1976). "[A] unilateral change in a mandatory subject of bargaining is unlawful only if it is a "material, substantial, and significant change." Flambeau Airmold Corp., 334 NLRB 165 (2001), quoting Alamo Cement Co., 281 NLRB 737, 738 (1986), modified on other grounds 337 NLRB 1025 (2002). The Toledo Blade Co., Inc. & Toledo Newspaper & Printing Graphics Union No. 27n, a/w Graphic Commc'ns Int'l Union, Afl-Cio, 343 NLRB 385, 387 (2004).

[41] *See also* Ampersand Publishing, LLC, 358 N.L.R.B. 1539, 194 L.R.R.M. (BNA) 1401, 2012 WL 4471120 (2012), decision set aside, 200 L.R.R.M. (BNA) 1080, 2014 WL 2929811 (N.L.R.B. 2014) and aff'd, 361 N.L.R.B. 903, 201 L.R.R.M. (BNA) 1558, 2014 WL 5590005 (2014), review denied, enforcement granted, 208 L.R.R.M. (BNA) 3385, 2017 WL 1314946 (D.C. Cir. 2017) (due to lack of quorum as found in N.L.R.B. v. Noel Canning, 573 U.S. 513, 134 S. Ct. 2550, 189 L. Ed. 2d 538, 199 L.R.R.M. (BNA) 3685, 164 Lab. Cas. (CCH) P 10699 (2014)); Santa Clara County Correctional Peace Officers' Assn., Inc. v. County of Santa Clara, 224 Cal. App. 4th 1016, 169 Cal. Rptr. 3d 228 (6th Dist. 2014); EL Paso Electric Co., 355 N.L.R.B. 428, 189 L.R.R.M. (BNA) 1260, 2010 WL 3177587 (2010), aff'd, 681 F.3d 651, 193 L.R.R.M. (BNA) 2280, 162 Lab. Cas. (CCH) P 10487, 94 A.L.R. Fed. 2d 707 (5th Cir. 2012); Teamsters, Local 726 and Forest Preserve District of Cook County, 21 PERI ¶ 43, 21 Pub. Employee Rep. for Illinois ¶ 43, 2005 WL 6710632 (2005). § 13:74. Unilateral changes in terms of conditions of employment—Mandatory subjects of bargaining, Legal Guide to Human Resources § 13:74

[42] El Paso Elec. Co. v. N.L.R.B., 681 F.3d 651, 662 (5th Cir. 2012)

however, without providing notice to the employer about the desire to collectively bargain a mandatory subject, a labor union may potentially waive its right to challenge unilateral policy change. More clearly stated:

> "[t]he NLRA provides that a union can waive its right to bargain by failing to request bargaining or otherwise inform the employer that the union wishes to bargain. Shortly after the NLRA was enacted, the U.S. Supreme Court explained [in *Labor Board v. Columbian Co*.] that an employer cannot be held liable when the employees have failed to act:
>
> > Since there must be at least two parties to a bargain and to any negotiations for a bargain, it follows that there can be no breach of the statutory duty by the employer—when he has not refused to receive communications from his employees—without some indication given to him by them or their representatives of their desire or willingness to bargain. In the normal course of transactions between them, willingness of the employees is evidenced by their request, invitation, or expressed desire to bargain, communicated to their employer.[43]

In *Labor Board v. Columbian Co.,*[44] after failed contract negotiations and labor union strike, the union asserted an unfair labor charge against the employer after employees returned to work but during the time in question, the union failed to express to the employer an indication to enter into negotiations. The Supreme Court correctly held that "there is no evidence that the [u]nion gave

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[43] Serv. Employees Int'l Union (AFL-CIO) Local 226 v. Douglas Cty. Sch. Dist. 001, 286 Neb. 755, 766, 839 N.W.2d 290, 299–300 (2013) *citing* Labor Board v. Columbian Co., 306 U.S. 292, 297–98, 59 S.Ct. 501, 83 L.Ed. 660 (1939). Regarding waiver:

> [s]ince the NLRA's enactment, many of the federal circuit courts have similarly recognized the possibility of a waiver by employees or their representatives of the right to bargain on mandatory subjects of bargaining. See, e.g., Intern. Broth. of Elec. Workers v. N.L.R.B., supra; N.L.R.B. v. Solutia, Inc., 699 F.3d 50 (1st Cir.2012); N.L.R.B. v. Seaport Printing & Ad Specialties, 589 F.3d 812 (5th Cir.2009); Regal Cinemas, Inc. v. N.L.R.B., 317 F.3d 300 (D.C.Cir.2003); N.L.R.B. v. Oklahoma Fixture Co., 79 F.3d 1030 (10th Cir.1996); N.L.R.B. v. Unbelievable, Inc., 71 F.3d 1434 (9th Cir.1995); Intermountain Rural Elec. Ass'n v. N.L.R.B., 984 F.2d 1562 (10th Cir.1993).

[44] Labor Board v. Columbian Co., 306 U.S. 292, 297–98, 59 S.Ct. 501, 83 L.Ed. 660 (1939).

to the employer *** any indication of its willingness to bargain or that [the] respondent knew that they represented the [u]nion. The employer cannot, under the statute, be charged with refusal [to bargain] of that which is not proffered."[45] Thus, in light of the binding Supreme Court decisions in *Labor Board v. Columbian Co*. and *Katz*, in order to protect against unilateral policy change, private college and university employee labor unions must affirmatively assert with respective colleges an express desire to collectively bargain policy changes that directly impact the "terms and conditions of employment," i.e. mandatory subjects of bargaining, in order to trigger statutory duty to bargain rights under the NLRA.[46]

Defining "Terms and Conditions of Employment" & Mandatory Subjects of Bargaining

The NLRA and a Private Employer's Duty to Bargain

> From the beginning of collective bargaining, the question of what subject matters are mandatory subjects of collective bargaining sparked considerable litigation as employers and employee organizations jockeyed for position. In general, the United States Supreme Court has construed the NLRA to provide a relatively broad scope of mandatory bargaining under the phrase "wages, hours, and other terms and conditions of employment." The United States Supreme Court has, however, held that even the expansive NLRA scope-of-bargaining provision has limits. For example, in *Fibreboard Paper Products Corporation v. National Labor Relations Board,* (citation omitted), the high court observed that the phrase "other terms and conditions of employment" was a flexible term which would expand to conform with prevailing industry practices.[47]

[45] N.L.R.B. v. Columbian Enameling & Stamping Co., 306 U.S. 292, 298, 59 S. Ct. 501, 504, 83 L. Ed. 660 (1939).

[46] *See* 34 N.L.R.B. 1123 (1997).

[47] Waterloo Educ. Ass'n v. Iowa Pub. Employment Relations Bd., 740 N.W.2d 418, 422 (Iowa 2007)

"Mandatory subjects of bargaining are subjects that 'vitally affect' the union-represented employees' wages, hours and working conditions."[48] Similarly, in 1981, and central to the thrust of this research, the U.S. Supreme Court identified three categories of management decisions that largely shape how the employer-unionized employee relationship is presently defined. In *First National Corp. v. N.L.R.B*., the court held that in the private sector, "[a]lthough parties are free to bargain about any legal subject, Congress has limited the mandate or duty to bargain to matters of 'wages, hours, and other terms and conditions of employment.'"[49] The Supreme Court took into account the varying scope of the degree of management decisions that may impact a union when it asserted that "[s]ome management decisions, such as [1] choice of advertising and promotion, product type and design, and financing arrangements, have only an indirect and attenuated impact on the employment relationship. Other management decisions, [however] such as [2] the order of succession of layoffs and recalls, production quotas, and *work rules*, are almost exclusively "an aspect of the relationship" between employer and employee."[50]

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[48] Collective Bargaining Under the National Labor Relations Act, Practical Law Practice Note 5-518-7132 *citing* Allied Chem. & Alkali Workers, Local Union No. 1 v. Pittsburgh Plate Glass Co., 404 U.S. 157 (1971)

[49] First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, 674 (1981)

[50] *Id*. at 676. "§ 8(d) of the Act, of course, does not immutably fix a list of subjects for mandatory bargaining. See, e.g., Fibreboard Paper Products Corp. v. National Labor Relations Board, supra, 379 U.S., at 220—221, 85 S.Ct., at 407—408; But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that settle an aspect of the relationship between the employer and employees." Allied Chem. & Alkali Workers of Am., Local Union No. 1 v. Pittsburgh Plate Glass Co., Chem. Div., 404 U.S. 157, 178, 92 S. Ct. 383, 397, 30 L. Ed. 2d 341 (1971). A third type of management decision [3] (purely financial in nature, although but not applicable to this research), may be a mandatory subject of bargaining under certain circumstances impacting the "scope and direction of the enterprise, is akin to the decision whether to be in business at all, 'not in [itself] primarily about conditions of employment, though the effect of the decision may be necessarily to terminate employment.'" Id. at 676.

To be sure, this article concerns the Supreme Court's 2nd category "work rules" as defined in *First National.* The Supreme Court rationale in *First National* is necessary to contextualize an employer's failure to bargain a mandatory subject as under the NLRA and legal precedent, courts have consistently found that "work rules" such as employee discipline,[51] anti-discrimination policies[52] and grievance procedures[53] are, in fact mandatory subjects of bargaining. "Mandatory subjects are subjects that directly impact the union-represented employees' wages, hours, and working conditions. An employer: (1) must bargain about these subjects if the union requests to do so; (2) can insist that the union bargain about these subjects until there is a bargaining impasse; and (3) can unilaterally impose its final offer about these subjects in collective bargaining only after an impasse has been reached."[54]

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[51] Toledo Blade Co., Inc., 343 N.L.R.B. 385 (2004). It is equally well settled that "work rules, especially those involving the imposition of discipline, constitute a mandatory subject of bargaining." Cotter & Co., 331 NLRB 787, 796 (2000) The Toledo Blade Co., Inc. & Toledo Newspaper & Printing Graphics Union No. 27n, a/w Graphic Commc'ns Int'l Union, Afl-Cio, 343 NLRB 385, 387 (2004). Greater Bridgeport Transit Dist. v. State Bd. of Labor Relations, 232 Conn. 57, 653 A.2d 151, 155 (1995) (similar); City of Miami v. F.O.P., Miami Lodge 20, 571 So.2d 1309, 1322 (Fla.Dist.Ct.App.1989) (similar), approved, 609 So.2d 31 (Fla.1992); Univ. of Haw. Prof'l Assembly v. Tomasu, 79 Hawai'i 154, 900 P.2d 161, 170 (1995) (similar); Omaha Police Union Local 101, 736 N.W.2d at 382 (similar); Union Twp. Bd. of Trustees v. Fraternal Order of Police, Ohio Valley Lodge No. 112, 146 Ohio App.3d 456, 766 N.E.2d 1027, 1031 (2001) (similar); Blackhawk Teachers' Fed'n Local 2308 v. State Emp't Relations Comm'n, 109 Wis.2d 415, 326 N.W.2d 247, 260–61 (App.1982) (policy provision that referred to sanctions that could be imposed on an employee only because of the employment relationship was held to relate to employment conditions). Denver Firefighters Local No. 858, IAFF, AFL-CIO v. City & Cty. of Denver, 2012 COA 138, ¶ 24, 292 P.3d 1101, 1106, rev'd, 2014 CO 15, ¶ 24, 320 P.3d 354. Migali Industries, 285 NLRB 820, 821 (1987) (progressive discipline system held to be mandatory subject of bargaining); Electri-Flex Co., 228 NLRB 847 (1977) (written warning system of discipline held to be mandatory subject of bargaining), enfd. as modified 570 F.2d 1327 (7th Cir. 1978), cert. denied 439 U.S. 911 (1978).

[52] United Packinghouse, Food and Allied Workers Intern. Union, AFL-CIO v. N. L. R. B., 416 F.2d 1126, 9 Fair Empl. Prac. Cas. (BNA) 317, 70 L.R.R.M. (BNA) 2489, 1 Empl. Prac. Dec. (CCH) ¶ 9921, 59 Lab. Cas. (CCH) ¶ 13254 (D.C. Cir. 1969), Jubilee Mfg. Co., 202 N.L.R.B. 272 (1973).

[53] Georgia Power Co. v. N.L.R.B., 427 F.3d 1354, 178 L.R.R.M. (BNA) 2257, 151 Lab. Cas. (CCH) ¶ 10553 (11th Cir. 2005)., Wire Prods. Mfg. Corp., 329 N.L.R.B. 155 (1999).

[54] Subjects of Collective Bargaining Chart, Practical Law Checklist 0-507-0182

Colleges and Universities, The Duty to Bargain and Unilateral Policy Change

In light of the several Supreme Court (*Katz* and *First National)* and binding NLRB decisions on mandatory subjects of bargaining, in addition to the "material and significant change in working conditions" requirement under *El Paso Elec. Co.* and *Roll & Hold*, there exists presently numerous leading private colleges and universities nationwide under NLRA jurisdiction, and a substantially greater number of public colleges under state law/binding PERB decisions[55] where the evidentiary standard of proof (either clear and convincing or preponderance of the evidence) is collectively bargained with on-campus labor unions in either disciplinary/termination, anti-discrimination, and grievance procedures.[56] For example, at Yale University, a private

[55] For a succinct definition of state PERB (public employment relations board) authorities and its functions, see the State of California definition, it's broad enough to be applied nationally: "[t]he Public Employment Relations Board is a quasi-judicial administrative agency charged with administering the eight collective bargaining statutes covering employees of California's public schools, colleges, and universities, employees of the State of California, employees of California local public agencies (cities, counties and special districts)..." https://perb.ca.gov (last visited May 28, 2020). In New York state, "[t]he Public Employment Relations Board (PERB) was created by the Public Employees' Fair Employment Act of 1967, commonly referred to as the Taylor Law. PERB's mission includes: the impartial application and enforcement of the Act; the prevention of strikes, protecting the delivery of services to constituents; the protection of the rights of public employees to organize without interference or detriment; the determination of appropriate bargaining units and the direction of the process of representative selection; and issuance of determinations on charges of improper employment practices." https://perb.ny.gov/ (last visited May 28, 2020). In the State of Delaware, "[t]he mission of the Public Employment Relations Board is to promote harmonious and cooperative relationships between public employers and their represented employees through the collective bargaining process. The Public Employment Relations Board (PERB) administers the Public School Employment Relations Act (14 Del.C. Chapter 40), the Police Officers and Firefighters Employment Relations Act (19 Del.C. Chapter 16), and the Public Employment Relations Act (19 Del.C. Chapter 13). PERB is responsible for administering the impasse resolution, representation, unfair labor practice and declaratory statement procedures for essentially all Delaware public sector employers and employees." https://perb.delaware.gov/about-agency (last visited May 28, 2020).

[56] While not contained within a current collective bargaining agreement, similar policy language at present use at leading private colleges and universities speaks to the ever present issue (and potential implied-in-fact contract debate) of campus Title IX policies and the evidentiary standard of proof. For example, at Vassar College, a private college located in New York, with respect to faculty/student consensual relationships (which are prohibited under Vassar College policy and punishable by campus discipline up to including termination) the standard of proof is "clear and convincing evidence." https://eoaa.vassar.edu/title-ix/policy/faculty-student-relationships.html. (last visited May 17, 2020). The Vassar College consenual relationship policy is found under the college's Title IX Gender/Sex Discrimation policy. https://eoaa.vassar.edu/title-ix/policy/ (last visited May 17, 2020). Similarly, at Williams College, a private 4-year college located in Massachusetts, "termination of an appointment with

4-year university and a member of the Ivy League, with respect to the evidentiary standard of proof in unionized employee leave of absence requests (and disputes), the collective bargaining agreement between Yale and Local 35, Federation of University Employees, AFL-CIO states the "[final] decision shall be based upon the *preponderance of evidence* … ."[57] In another example, at Hofstra University, a private 4-year college located in Long Island, New York with over 1,000 faculty members,[58] the evidentiary standard of proof in faculty discipline is collectively bargained with an on-campus labor union. The 2016-2021 collective bargained labor agreement between Hofstra University and the AAUP requires "*clear and convincing evidence*" should the university seek to terminate a faculty member.[59] In pertinent part, the Hofstra-AAUP collective bargaining agreement states:

> [i]n the event that the Administration is seeking a penalty of termination or suspension and/or the Grievance Committee is authorized to recommend such penalties, the burden of proof will be satisfied only by *clear and convincing evidence* in the record considered as a whole. In those cases in which the Administration is seeking a lesser penalty and/or the Grievance Committee is advised that it may not recommend termination or suspension, the burden of proof will be satisfied by the *preponderance of the evidence*… .[60]

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continuous tenure, or of a non-tenured appointment before the end of the specified term, may be effected by the College upon due notice but only for adequate cause. The burden of proof that adequate cause exists rests with the College and shall be satisfied only by *clear and convincing evidence* in the record considered as a whole." Williams College Faculty Handbook, § II-V: Termination of Faculty Appointment for Cause, p. 67.

[57]Agreement Between Yale University & Local 35, FUE, Unite Here, p. 29 https://your.yale.edu/sites/default/files/yale_local35_agreement_0.pdf (last visited May 4, 2020).

[58] https://www.hofstra.edu/about/about_glance.html (last visited June 12, 2020).

[59] 2016-2021 Collective Bargaining Agreement By and Between HOFSTRA UNIVERSITY and THE HOFSTRA CHAPTER OF THE AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS, § 12.10, p. 120 http://aaup-hofstra.org/wp-content/uploads/2016/11/Final-2016-2021-AAUP-Collective-Bargaining-Agreement.pdf (last visited April 28, 2020).

[60] *Id*.

With respect to public colleges and universities, "[t]he scope of bargaining in the public sector has traditionally been narrower than in the private sector for fear of institutionalizing the 'power of public employee unions in a way that would leave competing groups in the political process at a permanent and substantial disadvantage.'"[61] Accordingly, in the public sector, keeping in mind the considerable *Loudermill*[62] procedural due process protections required in public employee discipline, the various state statutes, common law and binding PERB decisions reflect a similar legislative construct and intent that affirmatively sets forth mandatory subjects of bargaining largely similar to that of the NLRA. For example, in the Commonwealth of Massachusetts, under Mass. Gen. Laws Ann. ch. 150E, §2, public employees (including all eligible state workers employed within the University of Massachusetts system):

> shall have the right of self-organization and the right to form, join, or assist any employee organization for the purpose of bargaining collectively through representatives of their own choosing on questions of wages, hours, and other terms and conditions of employment, and to engage in lawful, concerted activities for the purpose of collective bargaining or other mutual aid or protection, free from interference, restraint, or coercion.[63]

The Massachusetts Supreme Judicial Court has similarly held that "[n]otwithstanding a public employer's prerogative to make certain types of core managerial decisions without prior bargaining, we have recognized that such decisions may also have impacts or effects that would themselves be the subject of mandatory bargaining. '[I]f a managerial decision has impact upon

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[61] Appeal of City of Concord, 139 N.H. 277, 279, 651 A.2d 944, 946 (1994).

[62] Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 542, 105 S. Ct. 1487, 1493, 84 L. Ed. 2d 494 (1985) An essential principle of due process is that a deprivation of life, liberty, or property "be preceded by notice and opportunity for hearing appropriate to the nature of the case." Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306, 313, 70 S.Ct. 652, 656, 94 L.Ed. 865 (1950).

[63] Mass. Gen. Laws Ann. ch. 150E, § 2.

or affects a mandatory topic of bargaining, negotiation over the impact is required.'"[64] Further, *work rules* in Massachusetts related to anti-discrimination and grievance procedures are routinely collectively bargained as these rules directly impact the thousands of public employees and, more specifically, public university employee's workplace rights, as these rules are, in effect, a "term and condition of employment."[65] At the University of Massachusetts ("UMass"), for example, the commonwealth of Massachusetts' flagship public research university located in Amherst, Massachusetts with an enrollment of 30,000[66] students and over 1,400 faculty members,[67] the UMass campus anti-discrimination and sexual harassment policy is collectively bargained with on-campus labor unions. More specifically, the agreement states:

> [t]he Union and the Employer/University Administration agree that when the effects of employment practices, regardless of their intent, discriminate against any group of people on the basis of race, religion, creed, color, national origin, *sex*, age, veteran status, sexual orientation, or mental or physical handicap, specific positive and aggressive measures must be taken to redress the effects of past discrimination, to eliminate present and future discrimination, and to ensure equal opportunity in the areas of hiring, upgrading, demotion or transfer, recruitment, layoff or termination, and rate of compensation. Therefore the parties acknowledge the need for positive and aggressive affirmative action and are committed to a diverse workforce.[68]

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[64] City of Worcester v. Labor Relations Comm'n, 438 Mass. 177, 185, 779 N.E.2d 630, 637 (2002) *citing* Boston v. Boston Police Patrolmen's Ass'n, 403 Mass. 680, 685, 532 N.E.2d 640 (1989).

[65] Art. 6, AFSCME/SEIU and Commonwealth of Massachusetts contract. https://www.mass.gov/doc/unit-2-collective-bargaining-agreement/download (last visited March 21, 2020).

[66] https://www.umass.edu/oir/sites/default/files/publications/factsheets/enrollment/fall/FS_enr_01_f.pdf (last visited June 12, 2020).

[67] https://www.umass.edu/oir/sites/default/files/publications/factsheets/employees/FS_emp_02.pdf (last visited June 12, 2020).

[68] Agreement between the Board of Trustees of the University of Massachusetts and the Professional Staff Union/MTA/NEA, § 6.1. https://www.umass.edu/humres/sites/default/files/PSU%202017-2020%20CONTRACT.pdf (last visited May 4, 2020).

In the State of California, under Cal. Gov't Code § 3543.2, regarding the representation rights of thousands of public employees "[t]he scope of representation shall be limited to matters relating to wages, hours of employment, and other terms and conditions of employment."[69] Consistent with this statute, in *California State Employees' Assn. v. Pub. Employment Relations Bd.*, for example, the California Court of Appeals held that:

> PERB decisions have adopted both the holding and rationale of the *Katz* [NLRB] decision. Thus, under standards established by PERB, to prevail on a complaint of illegal unilateral change, the union must establish: (1) the employer breached or altered the parties' written agreement, or own established past practice; (2) such action was taken without giving the exclusive representative notice or an opportunity to bargain over the change; (3) the change is not merely an isolated breach of the contract, but amounts to a change of policy, i.e., the change has a generalized effect or continuing impact on bargaining unit members' terms and conditions of employment; and (4) the change in policy concerns a matter within the scope of representation.[70]

Similarly, the 2014-2017 labor contract between the California State University System with over 27,000 faculty members[71] and the California Faculty Association collectively bargains the

[69] Cal. Gov't Code § 3543.2 (a)(1). Under this statute, "[t]he scope of representation shall be limited to matters relating to wages, hours of employment, and other *terms and conditions of employment*. "Terms and conditions of employment" mean health and welfare benefits as defined by § 53200, leave, transfer and reassignment policies, safety conditions of employment, class size, procedures to be used for the evaluation of employees, organizational security pursuant to § 3546, procedures for processing grievances pursuant to §§ 3548.5, 3548.6, 3548.7, and 3548.8, the layoff of probationary certificated school district employees, pursuant to § 44959.5 of the Education Code, and alternative compensation or benefits for employees adversely affected by pension limitations pursuant to former § 22316 of the Education Code, as that § read on December 31, 1999, to the extent deemed reasonable and without violating the intent and purposes of § 415 of the Internal Revenue Code." Cal. Gov't Code § 3543.2

[70] California State Employees' Assn. v. Pub. Employment Relations Bd., 51 Cal. App. 4th 923, 935, 59 Cal. Rptr. 2d 488, 496 (1996).

[71] https://www2.calstate.edu/csu-system/about-the-csu/facts-about-the-csu/Pages/employees.aspx (last visited June 12, 2020).

evidentiary standard of proof.[72] In pertinent part, the CSA/CFA contract states, upon proposed termination of a faculty member that "[t]he CSU has the burden of proving the conduct by the *preponderance of the evidence* in all discipline cases.."[73] At the University of California, the system-wide labor agreement with the American Federation of Teachers collectively bargains the terms of the non-discrimination, sexual harassment, appeals and resolution procedures.[74] Interestingly, with respect to sexual harassment, this agreement also collectively bargains the appealability and arbitrability of disputes under this section. The agreement states in pertinent part:

> If the UC-AFT appeals a grievance to arbitration which contains allegations of a violation of this article which are not made in conjunction with the provision of another article that is arbitrable, the UC-AFT's notice must include an Acknowledgement and Waiver Form signed by the affected Librarian. The Acknowledgement and Waiver Form will reflect that the Librarian has elected to pursue arbitration as the exclusive dispute resolution mechanism for such claim and that the Librarian understands the procedural and substantive differences between arbitration and other remedial forums in which the dispute might have been resolved, including the differences in the scope of remedies available in arbitration as compared to other forums.[75]

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[72] Extended to June 2020. https://www2.calstate.edu/csu-system/faculty-staff/labor-and-employee-relations/Pages/unit3-cfa.aspx (last visited April 29, 2020).

[73] https://www2.calstate.edu/csu-system/faculty-staff/labor-and-employee-relations/Documents/unit3-cfa/article19.pdf § 19.29 (last visited April 29, 2020).

[74] Professional Librarians labor agreement with the University of California, https://ucnet.universityofcalifornia.edu/labor/bargaining-units/lx/docs/lx_2019-2024_00_complete-contract.pdf , Article 2, p. 4-6 (last visited May 23, 2020).

[75] Id.

In Illinois, under 5 Ill. Comp. Stat. Ann. 315/7 "[t]he duty 'to bargain collectively' shall also include an obligation to negotiate over any matter with respect to wages, hours and other *conditions of employment*."[76] In determining this issue under the Illinois statute, the Supreme Court of Illinois succinctly explained:

> [i]n *Central City Education Ass'n v. Illinois Educational Labor Relations Board*,[77] the Supreme Court of Illinois prescribed a three-part test for determining whether a matter is a mandatory subject of bargaining. The first issue is whether the matter is one of wages, hours, or other terms and conditions of employment.[78] If not, the employer has no duty to bargain the issue.[79] If the answer is yes, then the second issue is whether the matter is one of inherent managerial authority.[80] If not, then no duty to bargain arises.[81] If the matter is within the inherent managerial authority of the employer, then the third step must be reached, which involves weighing the benefits of bargaining against the burdens that would be imposed on the employer's authority.[82] If the burdens outweigh the benefits, the issue is a non mandatory subject of bargaining.[83]

At Northern Illinois University, for example, the collective bargaining agreement with University Professionals of Illinois Local 4100, with respect to faculty termination "the burden

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[76] 5 Ill. Comp. Stat. Ann. 315/7. *See* Cty. of Cook v. Illinois Labor Relations Bd., 2017 IL App (1st) 153015, ¶ 43, 70 N.E.3d 795, 810–11

[77] 149 Ill.2d 496, 174 Ill.Dec. 808, 599 N.E.2d 892 (1992).

[78] Central City, 149 Ill.2d at 523, 174 Ill.Dec. 808, 599 N.E.2d at 905.

[79] Id.

[80] Id.

[81] Id.

[82] Id.

[83] Bd. of Trustees of Univ. of Illinois v. Illinois Labor Relations Bd., State Panel, 361 Ill. App. 3d 256, 265, 836 N.E.2d 187, 194 (2005), rev'd sub nom. Bd. of Trustees of Univ. of Illinois v. Illinois Educ. Labor Relations Bd., 224 Ill. 2d 88, 862 N.E.2d 944 (2007). ("When an employer has a duty to bargain about an issue which is a mandatory subject of collective bargaining and refuses to negotiate, it commits a *per se* unfair labor practice."). Cty. of Cook v. Illinois Labor Relations Bd., 2017 IL App (1st) 153015, ¶ 66, 70 N.E.3d 795, 817

of proof that adequate cause exists rests with the University and shall be satisfied only by *clear and convincing evidence* in the record considered as a whole."[84] Similar clear and convincing language is employed within the Western Illinois University collective bargaining agreement with, as with Northern Illinois University, the University Professionals of Illinois Local 4100. Here, the agreement connotes that "[t]he burden of proof that there is adequate cause for termination rests with the University and shall be satisfied only by *clear and convincing evidence* in the record considered as a whole.[85]

In Connecticut, "statutes dealing with labor relations have been closely patterned after the National Labor Relations Act. This is particularly evidenced by the phraseology [the] legislature has adopted to define the scope of negotiations in the various Connecticut acts."[86] Under Conn. Gen. Stat. Ann. § 31-105, for example, "[i]t shall be an unfair labor practice for an employer: to dominate or actually interfere with the formation, existence or administration of any employee organization or association, agency or plan which exists in whole or in part for the purpose of dealing with employers concerning terms or conditions of employment…"[87] To establish a unilateral change of a condition of employment, the union must establish that the employment

[84] Collective Bargaining Agreement Between the UNIVERSITY PROFESSIONALS OF ILLINOIS LOCAL 4100 and the NORTHEASTERN ILLINOIS UNIVERSITY BOARD OF TRUSTEES, p. 136, § E(4)

[85] 2017-2021 Western Illinois University Collective Bargaining Agreement with the University Professionals of Illinois Local 4100, § 22.6, p. 67

[86] W. Hartford Ed. Ass'n v. Dayson DeCourcy, 162 Conn. 566, 578, 295 A.2d 526, 533 (1972).

[87] Conn. Gen. Stat. Ann. § 31-105(3).

practice was [1] “clearly enunciated and consistent, [2] [that it] endure[d ] over a reasonable length of time, and [3] [that it was] an accepted practice by both parties.”[88]

Accordingly, within the established labor agreement between the Connecticut State University System and the AAUP with respect to termination of faculty, "[t]he burden of proof to sustain an action rests with the university and shall be satisfied only by *clear and convincing evidence* in the record as a whole."[89] This agreement collectively bargains and provides rationale supporting the final determination standard of evidentiary proof for termination in stating that "[i]n weighing the case for dismissal for adequate cause other than falsification of credentials, the Termination Hearing Committee must consider whether there is *clear and convincing evidence* of unfitness of the affected member to discharge professional responsibilities."[90] Interestingly, within the Connecticut State University System, specifically at the University of Connecticut ("UConn"), the flagship public university of the State of Connecticut, with over 30,000 students[91] and over 2,600 faculty members,[92] UConn collectively bargains the evidentiary standard of proof under the preponderance standard. The 2017-2021 University of Connecticut/AAUP contract states:

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[88] Bd. of Educ. of Region 16 v. State Bd. of Labor Relations, 299 Conn. 63, 73, 7 A.3d 371, 378 (2010).

[89] 2016-2021 Collective Bargaining Agreement between the Connecticut State University System and the AAUP, § 16.3, p. 92 https://csuaaup.org/wp-content/uploads/2018/09/CSU-AAUP-BOR-Contract_Indexed-and-TOC-1.pdf (last visited May 18, 2020).

[90] *Id.* at 16.6.11.2

[91] https://oire.uconn.edu/wp-content/uploads/sites/35/2019/11/TotalEnroll_With_MD_DMD-2019-AD.pdf (last visited June 12, 2020).

[92] https://oire.uconn.edu/wp-content/uploads/sites/35/2017/09/Faculty16.pdf (last visited June 12, 2020).

> [t]he parties agree that, except for serious misconduct, dismissal of a non-probationary employee or non-renewal of an employee following a multi-year appointment should occur only as the final step in a progressive disciplinary system and each instance of misconduct shall be judged solely on its own factual merits. The level of proof shall be a *preponderance of the evidence*.[93]

Under Ohio law, "[a]ll matters pertaining to wages, hours, or terms and *other conditions of employment* and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement are subject to collective bargaining between the public employer and the exclusive representative."[94] For example, at the University of Cincinnati ("UC"), a 4-year public research university located Cincinnati, Ohio, with over 15,000 public employees,[95] the 2019-2022 collective bargaining agreement between the AAUP and the university affirmatively states "[f]or discipline involving dismissal, this burden will be satisfied only by *clear and convincing evidence* in the record considered as a whole. For lesser proposed discipline, the standard shall be *preponderance of the evidence*."[96]

The University of New Hampshire ("UNH"), a public research university with its main campus in Durham, New Hampshire, is another example of a public university labor contract with the

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[93] 2017-2021 COLLECTIVE BARGAINING AGREEMENT Between The University of Connecticut Board of Trustees And The University of Connecticut Chapter of the American Association of University Professors § 37.12, https://hr.uconn.edu/wp-content/uploads/sites/1421/2020/01/AAUP.CBA_.07.01.17.pdf (last visited April 29, 2020).

[94] Ohio Rev. Code Ann. § 4117.08

[95] https://www.uc.edu/employees.html (last visited June 12, 2020).

[96] COLLECTIVE BARGAINING AGREEMENT between UNIVERSITY OF CINCINNATI And AMERICAN ASSOCIATION OF UNIVERSITY PROFESSORS [AAUP], § 8.5.3 (https://www.uc.edu/content/dam/refresh/provost-62/faculty/cba-documents/2019-2022%20COLLECTIVE%20BARGAINING%20AGREEMENT%20-%20WORKING%20COPY%20-%208-26-19.pdf (last visited April 29, 2020).

AAUP which collectively bargains the evidentiary standard of proof. Here, under the 2015-2020 Collective Bargaining Agreement with the AAUP, upon proposed termination of a faculty member, the agreement states:

> "[i]f the President of the University decides that dismissal or suspension without pay is warranted after either the above procedure has been followed, or the time limit specified in Article 14.2.4.2 has passed without a recommendation from the Professional Standards Committee, s/he shall notify the faculty member in question and the Association in writing of the intent to dismiss or suspend without pay. The faculty member shall have fourteen (14) calendar days to file a grievance under Article 9, Grievance Procedure, of this Agreement, once the President's notice of intent to dismiss or suspend without pay is received. ... The grievance shall utilize the expedited arbitration process in Article 9.5.6. The burden of proof in a grievance involving a dismissal or suspension without pay shall be on the University, which proof shall be by *clear and convincing evidence*.[97]

The above examples reflect the substantial number of leading public and private colleges nationwide that collectively bargain the evidentiary standard of proof. These examples illustrate existing campus labor agreements arising out of the present legal construct and binding decisions fundamental to the core research question presented in this article. The above campus labor agreement examples and attendant legal construct under both the NLRA and various state law and PERB decisions reflect a clear, defined and unmistakable public policy mandate: private colleges under *First National* (duty to bargain work rules), *Katz* (unilateral employer policy change) and *Roll and Hold* (duty to bargain policy clarifications) and public colleges under the various binding state supreme and appellate court decisions, statutes, and PERB decisions must, in fact, negotiate the mandatory subjects of bargaining with on-campus labor unions.

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[97] 2015-2020 COLLECTIVE BARGAINING AGREEMENT USNH Board of Trustees University of New Hampshire & University of New Hampshire Chapter of The American Association of University Professors (AAUP), https://cola.unh.edu/sites/default/files/media/2018/09/aauptt-full_executed_pdf_2016-2020.pdf (last visited April 29, 2020).

What's revealed in this research, however, is that while the above mandate establishes and articulates the particular areas of the employer-employee unionized relationship that must be negotiated under a collective bargaining agreement, none of the above decisions speak to the Title IX evidentiary standard of proof decision methodology, regulatory preemption, grievability, appealability and arbitrability or, ultimately whether the employer's duty to bargain obligations become unclear at the intersection of ostensibly settled labor law jurisprudence with emerging Title IX law and policy mandate under the U.S. Department of Education Office of Civil Rights.

TITLE IX - LEGISLATIVE HISTORY

"On October 15, 2019, Harvard University released the results of a survey intended to estimate the prevalence of sexual assault and other sexual misconduct among its undergraduate, graduate and professional-school students. The survey, conducted during the spring of 2019, reached about 23,000 students, of whom 36.1 percent (about 8,300) responded."[98] The survey revealed that among undergraduates, [similar to the 32 different public and private universities that participated in the study] that on-campus sexual assault is a "serious "problem."[99] The Harvard study revealed, in particular, that the vast majority of non-consensual sexual contact is student-to-student (82%) and that 79% of incidents involved physical force.[100] This campus sexual assault study is similar in subject matter, scope and result to the groundbreaking work

[98] https://harvardmagazine.com/2019/10/2019-sexual-assault-survey (last visited May 23, 2020).

[99] Id.

[100] Id.

conducted by sociologist Eugene Kanin[101] in 1957 which gave rise, in part, to the introduction of legislation that would eventually become Title IX.[102]

> In 1972, Indiana Senator Birch Bayh introduced an amendment on the Senate floor that would later become Title IX. 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." Officially, the sponsors of Title IX were Senator Birch Bayh and Representative Edith Green. Title IX, in its infancy, was modeled after Title VI 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. 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. Title VI was enacted pursuant to Congress' dual constitutional authority under the spending clause and § 5 of the Fourteenth Amendment. Thus, both Title VI and Title IX trace their roots to common constitutional sources.[103]

On June 23, 1972, Title IX of the Education Amendments was enacted by Congress and was signed into law by President Richard Nixon.[104] Title IX prohibits sex discrimination in

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[101] 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. (last visited May 23, 2020). "In 1957, for example, 'sociologist Eugene Kanin posited a model where men used secrecy and stigma to pressure and exploit women.' In the 1980s, Mary Koss coined the term 'date rape,' a term that illustrates the secrecy described by Eugene Kanin. 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. 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.' Among those in that 7.7 percent, almost none considered forced sex to be a crime." Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321, 324 (2017).

[102] 20 U.S.C. §§ 1681-1688

[103] Lance Toron Houston, Title IX Sexual Assault Investigations in Public Institutions of Higher Education at 325–26

[104] Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321, 327 (2017)

educational program or activity receiving *** federal financial aid.[105] 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.[106] Educational institutions that receive federal financial assistance are covered by Title IX.[107] "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." Failure to remain in compliance with Title IX may subject an institution to a loss in federal funding.[108] Failure to remain in compliance with Title IX may also subject the institution to civil actions by victims of sexual assault [or the accused].[109] "The U.S. Department of Education 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."[110]

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[105] Id. at 327 *citing* 20 U.S.C. §§ 1681-1688

[106] Id. at 328 *citing* 34 C.F.R. § 106.1

[107] Id. at 328 *citing* 34 C.F.R. § 106.11

[108] "Title IX's only express enforcement mechanism, 20 U.S.C. § 1682, is an administrative procedure resulting in the withdrawal of federal funding from noncompliant institutions. [There is] an implied private right of action, Cannon v. University of Chicago, 441 U.S. 677, 717, (1979) for which both injunctive relief and damages are available, Franklin v. Gwinnett County Public Schools, 503 U.S. 60, 76 (1992). *** Title IX has no administrative exhaustion requirement and no notice provisions. Plaintiffs can file directly in court under its implied private right of action and can obtain the full range of remedies." Fitzgerald v. Barnstable Sch. Comm., 555 U.S. 246, 247 (2009)

[109] Lance Toron Houston, Title IX Sexual Assault Investigations in Public Institutions of Higher Education at 328

[110] Id. at 328 *citing* 5 U.S.C. § 552 (a)(1) and § 553. For an examination of legislative versus interpretive agency rules, see Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321, 327 (2017). This article critically examines and contrasts, inter alia, agency rules versus interpretive rules. In particular:

> The APA [Administration Procedure Act, 5 U.S.C.A. § 553] requires agencies to provide the public with notice and the opportunity to comment before promulgating final rules. After considering all relevant matter, "the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose." The requirement for notice and comment is

> In April 2011, [however] Vice President Joseph Biden *** [under the Obama administration] announced that the [OCR], the agency charged with enforcing Title IX, was issuing a "Dear Colleague Letter" ("DCL") on sexual assault on college campuses and schools' Title IX obligations to respond. *** One significant component of the DCL [was] its specification of the standard of proof schools must use in campus disciplinary proceedings for sexual assault complaints. Prior to the DCL, 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 DCL, however, for a school's disciplinary procedures to comply with Title IX, the school [would need to] utilize the "preponderance of the evidence" standard in sexual assault adjudications. Thus, a school's use of a higher standard [at that time], such as "clear and convincing evidence," would constitute a violation of Title IX.[111]

The 2011 Dear Colleague Letter remained as OCR "mandated policy"[112] nationwide in campus sexual assault adjudications until September 2017 when (after the election of Donald Trump)[113] OCR withdrew the Dear Colleague Letter and issued interim guidance.[114]

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> "designed to assure fairness and mature consideration of rules of general application." 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. The APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from its notice and comment requirement. 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. *** 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." Courts also assess an agency's intention to bind its own decision-making moving forward as evidence of a substantive rule. Id.

[111] Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321, 329–30 (2017) *citing* 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) at 1616-17.

[112] The 2011 Dear Colleague Letter did not meet APA review and comment requirements however. *See* Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321 (2017).

[113] https://www.nytimes.com/2016/11/09/us/politics/hillary-clinton-donald-trump-president.html (last visited May 23, 2020).

[114] https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-miscon

PROPOSED TITLE IX RULES

On November 16, 2018, the U.S. Department of Education Office of Civil Rights, in compliance with the Administrative Procedure Act,[115] issued its Proposed Title IX rules ("NPRM").[116] The proposed Title IX rules, promulgated by Betsy DeVos, Secretary of the U.S. Department of Education, instituted wholesale Federal agency formal rule-making policy change that was, for all intents and purposes, an intended due process and evidence-centered policy shift away from the Obama administration's widely criticized 2011 Dear Colleague Letter.[117] The proposed changes set the stage for a fundamental paradigm shift in Title IX law and policy nationwide. One of the more controversial proposed changes from the 2011 Dear Colleague Letter "would require schools to apply basic due process protections for students, including a presumption of innocence throughout the grievance process; written notice of allegations and an equal opportunity to review all evidence collected; and the right to cross-examination, subject to "rape shield" protections."[118] More importantly, the 2018 proposed changes presented the first public legislative rule suggestion by OCR of a possible intended and recognized intersection of

duct (last visited May 23, 2020). *See also* https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf (last visited May 23, 2020)

[115] 5 U.S.C.A. § 553

[116] https://www.ed.gov/news/press-releases/secretary-devos-proposed-title-ix-rule-provides-clarity-schools-support-survivors-and-due-process-rights-all (last visited May 23, 2020).

[117] https://www.insidehighered.com/news/2016/02/25/colleges-frustrated-lack-clarification-title-ix-guidance (last visited May 25, 2020).

[118] Id.

emerging Title IX law and policy change with settled labor law jurisprudence in its proposed rule under 34 CFR § 106.45(b)(4):

> [a]fter investigation, a written determination must be sent to both parties explaining for each allegation whether the respondent is responsible or not responsible including the facts and evidence on which the conclusion is based. *** The [written] determination must be made by applying either the *preponderance of the evidence standard* or the *clear and convincing evidence standard*; *** Further, schools must use the same standard of evidence in cases against student respondents that it uses in cases against *employee* respondents, including *faculty*.[119]

This proposed Title IX rule signaled to the larger academic and labor law community that there was, in fact, an intended and recognized legislative intersection between emerging Title IX law and policy and settled labor law jurisprudence as, for the first time, Title IX proposed formal rule-making under the Administrative Procedure Act articulated clear language speaking to evidentiary standards of proof, campus Title IX adjudications and faculty. In summary, the proposed rules in their totality, were announced and made available for public review and comment as required under the Administrative Procedure Act,[120] and as such, after expiration of the review and comment period, the Title IX Final Rule has the full force and effect of law.[121]

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[119] https://www2.ed.gov/about/offices/list/ocr/docs/background-summary-proposed-ttle-ix-regulation.pdf (last visited May 24, 2020).

[120] 5 U.S.C.A. § 553; https://www.insidehighered.com/news/2020/05/07/education-department-releases-final-title-ix-regulations (last visited May 24, 2020).

[121] The Administrative Procedure Act ("APA") establishes the procedures federal administrative agencies use for "rule making," defined as the process of "formulating, amending, or repealing a rule." 5 U.S.C. § 551(5). The APA distinguishes between two types of rules: [s]o-called "legislative rules" are issued through notice-and-comment rulemaking, see 5 U.S.C.A §§ 553(b), (c), and have the "force and effect of law," Chrysler Corp. v. Brown, 441 U.S. 281, 302–303, 99 S.Ct. 1705, 60 L.Ed.2d 208. "Interpretive rules," by contrast, are "issued ... to advise the public of the agency's construction of the statutes and rules which it administers," Shalala v. Guernsey Memorial Hospital, 514 U.S. 87, 99, 115 S.Ct. 1232, 131 L.Ed.2d 106, do not require notice-and-comment rulemaking, and "do not have the force and effect of law," ibid.

TITLE IX FINAL RULE AND LABOR LAW IMPLICATIONS

On May 6, 2020 the U.S. Department of Education Office of Civil Rights announced its Title IX Final Rule.[122] The final version of the Title IX OCR rules, published in the Federal Register,[123] included distinct language implicating employee and labor law principles that, until this time, did not exist in letter or spirit in previous Title IX policy. For example, with respect to the standard of evidence to be used in Title IX adjudications, previous OCR policy mandated that only the preponderance of the evidence was available,[124] however under the revised Title IX Final Rule, 34 CFR § 106.45(b)(1)(vii) recipients have the *choice* of either applying the preponderance of the evidence standard or the clear and convincing evidence standard.[125]

Here, the Title IX Final Rule "choice" of evidentiary standard that must be made by respective college administrations pursuant to 34 CFR § 106.45(b)(1)(vii), however, is in fact a "work rule" as originally contemplated and examined by the U.S. Supreme Court in *First National*. The Supreme Court articulated in *First National* that "work rules" are "an aspect of the relationship

Perez v. Mortg. Bankers Ass'n, 575 U.S. 92, 92, 135 S. Ct. 1199, 1200–01, 191 L. Ed. 2d 186 (2015)

[122] https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students (last visited May 24, 2020).

[123] 85 FR 30026-01

[124] https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct (last visited June 14, 2020).

[125] 34 CFR § 106.45(b)(1)(vii). Under this rule, recipients must "state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard." Id.

between employer and employee"[126] and, as such, requires under § 158(d) of the NLRA,[127] that an employer collectively bargain "work rules" as a "term and condition of employment."[128] Stated more succinctly, "the NLRB has held that [work rules such as] employee discipline is unquestionably a mandatory subject of bargaining, and any alteration of a disciplinary system is also a mandatory subject of bargaining."[129]

The Title IX Final Rule choice of evidentiary standard is not only a clear Supreme Court *First National* "work rule" which directly implicates unionized employee measure and weight of the evidence to be considered by the university in campus Title IX live hearings mandated under 34 CFR § 106.45, it is also a term and condition of employment which, upon a determination of culpability, could lead to employee discipline, up to and including termination.[130] The employee discipline to be determined upon a finding of responsibility by the college or university, while discretionary,[131] will be shaped largely by the evidentiary standard of proof utilized. As such, the Supreme Court explained in *First National* that "despite the deliberate open-endedness of the

[126] First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, 677, 101 S. Ct. 2573, 2580, 69 L. Ed. 2d 318 (1981)

[127] *Id. See* 29 U.S.C. s 158(d)

[128] Id.

[129] In Re Mcclatchy Newspapers, Inc., 337 NLRB 1161, 1186 (2002)

[130] § 106.45(b)(1)(vi); List of Possible Sanctions and Remedies. Under the Title IX Final Rule, § 106.45(b)(1)(vi) "a recipient may describe the range of possible sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility." 85 FR 30273

[131] In Re Mcclatchy Newspapers, Inc., 337 NLRB 1161, 1186 (2002)

statutory language, there is an undeniable limit to the subjects about which bargaining must take place:

> § 8(a) of the [NLRA], of course, does not immutably fix a list of subjects for mandatory bargaining.... But it does establish a limitation against which proposed topics must be measured. In general terms, the limitation includes only issues that *settle an aspect of the relationship* between the employer and the employees."[132]

Undoubtedly, the evidentiary standard of proof choice upon which a university determines culpability in a Title IX investigation of a unionized employee (up to and including termination), under 34 CFR § 106.45(b)(1)(vii) "settles an aspect of the relationship" between the university and union member because the evidentiary standard applied objectively at the conclusion of a Title IX live hearing will determine whether the university will be justified (or not) imposing discipline, suspension, termination for the alleged employee conduct. Under a heightened clear and convincing standard, for example, the evidence derived during the Title IX investigation may not necessarily justify to an impartial Hearing Officer/Decision-Maker that the unionized employee is culpable. Under a lowered preponderance standard, however, and in consideration of the exact same evidence, the hearing officer may be persuaded that the conduct does, in fact, justify discipline. Thus, the evidentiary standard of proof is not just a mere work rule or "aspect of the relationship," with which employee discipline is measured and adjudicated during a Title IX live hearing, rather, the standard of proof lies at the core of the employee-employer relationship as an essential function to the objective measure of responsibility that, as a free society, is expected to reliably confirm whether there has been a violation of laws, policy or norms that reasonably warrant employee discipline.

[132] First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, 676, 101 S. Ct. 2573, 2579, 69 L. Ed. 2d 318 (1981)

Similar in purpose and effect regarding the evidentiary standard of proof decision, the Title IX Final Rule articulates a further, more comprehensive and intended intersection between emerging Title IX and settled labor law principles under 34 CFR § 106.45(b)(1)(vii) requiring colleges and universities to make the evidentiary standard of proof applicable to all formal complaints of sexual harassment, including those against *employees* and *faculty*."[133] In other words, an evidentiary standard of proof uniformity rule. The Title IX Final Rule states in its rationale that:

> [p]ermitting recipients to select between the two standards of evidence allows recipients who face conflicting requirements imposed by contracts or laws outside these final regulations the ability to resolve such conflict in whichever way a recipient deems appropriate. Not all recipients are subject to CBAs that require a different standard of evidence for employee discipline than the recipient uses for student discipline, and not all recipients are subject to State laws that mandate the standard of evidence to be used in student disciplinary cases; such recipients may select a standard of evidence in compliance with these final regulations without the external factors of CBA or State law requirements. For recipients who have CBAs requiring a clear and convincing evidence standard in employee cases but no State law directive requiring a different standard of evidence in student cases, recipients may comply with these final regulations by using the clear and convincing evidence standard in student cases, or by *renegotiating* their CBAs to use the preponderance of the evidence standard for employee cases. For recipients who do have CBAs requiring a clear and convincing evidence standard (in employee cases) and State laws requiring a preponderance of the evidence standard (in student cases), such recipients may find it appropriate to comply with these final regulations by *renegotiating* their CBAs rather than violate State law.
>
> We acknowledge commenters' point that renegotiating a CBA is often a time-consuming process; however, a recipient's contractual and employment arrangements must comply with Federal laws, and recipients of Federal financial assistance understand that a condition placed upon receipt of Federal funds is operation of education programs or activities free from sex discrimination under Title IX, including compliance with regulations implementing Title IX.[134]

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[133] 34 CFR § 106.45(b)(1)(vii). Under this rule, recipients must "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty." Id. *See* 85 FR 30374, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

[134] 85 FR 30377 - 30378; *See* Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321 (2017).

Here, under this rule, the OCR mandate to either raise the evidentiary standard of proof or renegotiate the current CBA where there is a provision requiring a clear and convincing standard and there is no state law requiring a different evidentiary standard of proof in student cases is, in fact, a *First National* "work rule" that "settles an aspect of the relationship" between the campus labor union and the university because it definitively answers the question of which standard of proof is legally available and appropriate in unionized employee Title IX cases.

This matter has been largely unsettled for years on many college campuses across the country as, prior to the 2020 Title IX Final Rule, numerous colleges routinely allowed a conflicting evidentiary standard to exist in faculty Title IX cases. In other words, a faculty member could be investigated for an alleged Title IX violation pursuant to a university-wide preponderance of the evidence standard under the DCL 2011 but upon faculty review board or university president final decision enjoy the full benefits and protections of the heightened clear and convincing evidentiary standard.[135] A student being investigated by the same college, however, under the same set of facts could not enjoy the protections of a dual and conflicting evidentiary standard. This conflicting and oftentimes confusing occurrence would yield, logically, widely different culpability findings. This issue was highlighted and critically examined in the 2017 law review article *Title IX Sexual Assault Investigations in Public Institutions of Higher Education: Constitutional Due Process Implications of the Evidentiary Standard Set Forth in the*

[135] *See* Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321 (2017)

*Department of Education's 2011 Dear Colleague Letter,* where the article posed the central question:

> when collectively bargained labor agreements on American public college campuses call 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 [under] the 2011 Dear Colleague Letter requires only the much lower threshold "preponderance of the evidence" standard to discipline the [same] accused public employee, which prevails?[136]

The U.S. Department of Education Office of Civil Rights Title IX Final Rule cited this article in its rationale to create and require the evidentiary standard of proof uniformity rule under 34 CFR § 106.45(b)(1)(vii).[137] Additionally, within the body of the Title IX Final Rule, among the thousands of comments from the general public, numerous commenters noted this same concern as being a substantial source of conflict nationwide. For example:

> [o]ne commenter contended that it is unfair to hold students to the same standard of evidence as employees because students are not parties to the employee union's

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[136] Id. at 323. This article not only examines this issue but also presents a cross-section of leading colleges and universities where the evidentiary standard of proof faculty conflict issue was most prevalent. For example:

> [t]he University of California System, for example, a public higher education system with over 238,000 students and 190,000 faculty and staff members, boasts the most staunch institutional resistance to the preponderance of the evidence standard. Under the UC System, there includes UC Berkeley, UCLA, UC Davis, and many other campuses with thousands of students and employees. Within this massive educational system, whereupon a faculty member is accused of misconduct of any nature, "[t]he hearing panel can only consider 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."
>
> 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. Id. at 347–48.

[137] *See* 85 FR 30378 n. 1424 and n. 1426

> CBAs and argued that the Department should not bind students to outcomes of negotiations in which the students could not participate. One commenter stated that, unlike students, university employees can lose lifetime employment, a much more serious outcome than being forced to leave one particular university, and this difference justifies using a higher burden of proof in faculty cases. One commenter asserted that the proposed rules' requirement to use the same standard of evidence for cases with student-respondents as with employee-respondents stems from anti-union bias. One commenter argued that the proposed choice given to recipients in the NPRM could potentially expose recipients to liability for sex discrimination under 34 CFR 106.51 ("A recipient shall not enter into a contractual or other relationship which directly or indirectly has the effect of subjecting employees or students to discrimination . . .") (emphasis added). This commenter argued that recipients who currently use the preponderance of the evidence standard in sexual harassment cases involving student-respondents, may be forced by the NPRM to raise the standard of evidence to the clear and convincing evidence standard in order to comply with recipients' CBAs, yet that reason for raising the standard of evidence (and, in the commenter's view, disfavoring complainants by raising the standard of evidence) may constitute violation of 34 CFR 106.51 because raising the standard of evidence to match what the recipient uses in a CBA could be viewed as having entered into a CBA (i.e., a contractual or other relationship) that indirectly has the effect of subjecting students to discrimination (i.e., by "disfavoring" complainants alleging sexual harassment).[138]

Whether raised as a substantial labor relations issue nationally, in public comment under the strict requirements of the Administrative Procedure Act, or asserted as an issue locally on college and university campuses, the issue of the evidentiary standard of proof faculty conflict is addressed, examined and resolved by 34 CFR § 106.45(b)(1)(vii). To be sure, § 106.45(b)(1)(vii) requiring recipients to establish a campus-wide and uniform Title IX evidentiary standard of proof (either preponderance or clear and convincing evidence) is a *First National* "work rule" because it "settles an aspect of the [employer-employee] relationship," as evidenced by its "material, substantial or significant" impact on mandatory subjects of

[138] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 FR 30376

bargaining such as (1) employee discipline, (2) grievance procedures, (3) and workplace anti-discrimination policy in addition to (4) the volume and significance of the direct accounts of thousands of public commentary statements under the APA on present-day conflicting evidentiary standards in higher education collective bargaining agreements. Thus 34 CFR § 106.45(b)(1)(vii), as a *First National* "work rule" requires the evidentiary standard of proof decision on each unionized campus to be collectively bargained (whether a private college under the NLRA or public college under the various public sector statutes)[139] because the evidentiary standard of proof decision, as demonstrated, is a "term and condition of employment"[140] and thus, a mandatory subject of bargaining.

REGULATORY PREEMPTION

Perhaps one of the most complex issues that will likely arise between campus labor unions and university leadership is the practical application of labor agreement contract "renegotiations" on the issue of the evidentiary standard of proof as recommended in the Title IX Final Rule.[141]

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[139] Many state statutes draw heavily from 29 U.S.C.A. § 158(d). *See* Mass. Gen. Laws Ann. ch. 150E, §2 (Massachusetts), 5 Ill. Comp. Stat. Ann. 315/7. (Illinois), Cal. Gov't Code § 3543.2 (California), Conn. Gen. Stat. Ann. § 31-105 (Connecticut), Ohio Rev. Code Ann. § 4117.08 (Ohio), "Public employees shall have the right to be represented by employee organizations, to negotiate collectively with their public employers in the determination of their *terms and conditions of employment*, and the administration of grievances arising thereunder." N.Y. Civ. Serv. Law § 203 (New York). "After an employee organization has been certified pursuant to the provisions of this part, the bargaining agent for the organization and the chief executive officer of the appropriate public employer or employers, jointly, shall bargain collectively in the determination of the wages, hours, and *terms and conditions of employment* of the public employees within the bargaining unit." Fla. Stat. Ann. § 447.309 (Florida). "Collective bargaining is the performance of the mutual obligation of the public employer and the representative of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other *terms and conditions of employment* …" 43 Pa. Stat. Ann. § 1101.701 (Pennsylvania).

[140] First Nat. Maint. Corp. v. N.L.R.B., 452 U.S. 666, 674 (1981); 29 U.S.C.A. § 158(d).

[141] 85 FR 30377 - 30378, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Under the Title IX Final Rule, 34 CFR § 106.45(b)(1)(vii), the evidentiary standard of proof made available to both public and private colleges nationwide is (1) the preponderance of the evidence standard *and* (2) the heightened clear and convincing evidence standard. Many colleges and universities, however, are located in states where the evidentiary standard of proof in campus sexual assault cases is codified by state statute which mandates that the preponderance of the evidence is the *only* legally available evidentiary standard. In this circumstance, the two laws conflict. Which conflicting law must the college (and unions) follow in collective bargaining renegotiations in order to comply with the standard of proof uniformity rule under 34 CFR § 106.45(b)(1)(vii)? Must campus labor unions remain bound to the lowered preponderance standard in labor renegotiations with campus administration? In other words, does the Title IX Final Rule preempt state laws that codify the preponderance evidentiary standard in campus sex assault investigations?

The answer is complex, but the evidence gathered reveals a clear and definitive answer. In the state of California, for example, under CA EDUC § 67386(a)(3), with respect to campus sex assault investigations under Title IX "the [evidentiary] standard used in determining whether the elements of the complaint against the accused have been demonstrated is the *preponderance of the evidence*."[142] Yet, to reach determination as to whether this California statute (and similar evidentiary statutes in other states) is preempted by the Title IX Final Rule and no longer binding law on colleges and universities in California, the analysis required to answer this question is not simply a matter of Federal law being more persuasive than state law, rather the analysis must

[142] Cal. Educ. Code § 67386(a)(3)

include a nuanced, constitutional and evidence-based understanding of the law in place that compels a clear answer.

To start, in *Garrelts v. SmithKline Beecham Corp.*,[143] the U.S. District court for the northern district of Iowa supplied an exhaustive, in-depth and highly relevant analysis of the preemption doctrine that has direct relevance as to whether the Title IX Final Rule preempts the California statute. Here, the court articulated that:

> [t]he Supremacy Clause of the United States Constitution states that "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding."[144] This clause of the Constitution has given birth to the familiar, though not uncomplicated, doctrine of "statutory" preemption. *(citations omitted)* The court begins its analysis with the doctrine of "statutory" preemption, then turns to consideration of the doctrine of "agency" preemption.[145]

With respect to the variations of statutory preemption:

> the Eighth Circuit Court of Appeals has therefore observed that "[p]reemption traditionally comes in four 'flavors' ": (1) "express preemption," resulting from an express Congressional directive ousting state law (citations omitted) (2) "implied preemption," resulting from an inference that Congress intended to oust state law in order to achieve its objective (citations omitted) (3) "conflict preemption," resulting from the operation of the Supremacy Clause when federal and state law actually conflict, even when Congress says nothing about it (citations omitted)

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[143] Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1028 (N.D. Iowa 1996)

[144] U.S. CONST. art. VI, cl. 2.

[145] Id.; See New York State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins., 514 U.S. 645, ——, 115 S.Ct. 1671, 1676, 131 L.Ed.2d 695 (1995) (Supremacy Clause gives rise to doctrine of federal preemption); CSX Transp., Inc. v. Easterwood, 507 U.S. 658, 663, 113 S.Ct. 1732, 1737, 123 L.Ed.2d 387 (1993) (citing the Supremacy Clause as the basis for implied preemption of state law by a federal statute); Hillsborough County v. Automated Med. Labs., Inc., 471 U.S. 707, 712–13, 105 S.Ct. 2371, 2375, 85 L.Ed.2d 714 (1985) ("It is familiar and well-established principle the Supremacy Clause ... invalidates state laws that 'interfere with, or are contrary to,' federal law."); Kinley Corp. v. Iowa Utilities Bd., 999 F.2d 354, 357 (8th Cir.1993) (also finding authority for congressional acts to preempt state law in the Supremacy Clause, U.S. CONST., Art. VI, cl. 2).

> and (4) "field preemption," resulting from a determination that Congress intended to remove an entire area from state regulatory authority (citations omitted).[146]

Thus, federal law preempts state law not only where the two are plainly contradictory, but also where " 'the incompatibility between [them] is discernible only through inference.[147] "The legitimacy of agency preemption as a general principle has been conclusively determined. The phrase 'Laws of the United States' in the Supremacy Clause, the Supreme Court has held, encompasses both federal statutes and statutorily authorized *federal regulations*."[148] "Thus, in addition to the forms of 'statutory' preemption described in the preceding [section], the Supreme Court has repeatedly recognized 'agency' preemption as a form of federal preemption of state law in which a federal agency, acting within its congressionally delegated authority, may preempt state law through a regulation or regulations."[149] In further clarification:

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[146] Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1033 (N.D. Iowa 1996).

[147] Id. *quoting* Hayfield Northern R.R. Co. v. Chicago & N.W. Transp. Co., 467 U.S. 622, 627, 104 S.Ct. 2610, 2614, 81 L.Ed. 527 (1984). To put it another way, "[p]reemption ... will arise when 'state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " Id. (*quoting* Schneidewind v. ANR Pipeline Co., 485 U.S. 293, 300, 108 S.Ct. 1145, 1150–51, 99 L.Ed.2d 316 (1988). Id.

[148] Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1036 (N.D. Iowa 1996) *citing* City of New York v. FCC, 486 U.S. 57, 63, 108 S.Ct. 1637, 1642, 100 L.Ed.2d 48 (1988).

[149] Id. at 1036; City of New York v. FCC, 486 U.S. at 63, 108 S.Ct. at 1642 (" 'a federal agency acting within the scope of its congressionally delegated authority may pre-empt state regulation,' " quoting Louisiana Pub. Serv. Comm'n, infra ); Louisiana Pub. Serv. Comm'n v. FCC, 476 U.S. 355, 369, 106 S.Ct. 1890, 1898–99, 90 L.Ed.2d 369 (1986); Hillsborough County, 471 U.S. at 713, 105 S.Ct. at 2375 ("We have repeatedly held that state laws can be pre-empted by federal regulations as well as by federal statutes."); Capital Cities Cable, Inc. v. Crisp, 467 U.S. 691, 699, 104 S.Ct. 2694, 2700, 81 L.Ed.2d 580 (1984) (" 'Federal regulations have no less pre-emptive effect than federal statutes,' " quoting de la Cuesta, infra ); Fidelity Fed. Sav. and Loan Ass'n v. de la Cuesta, 458 U.S. 141, 152–54, 102 S.Ct. 3014, 3022–23, 73 L.Ed.2d 664 (1982) (the Court observed that "Federal regulations have no less pre-emptive effect than federal statutes," and the question is whether the regulation is within the agency's statutory authority); Lynnbrook Farms, 79 F.3d at 624; Kansas ex rel. Todd v. United States, 995 F.2d 1505, 1509 (10th Cir.1993) ("An agency's preemption regulations have no less preemptive effect than statutes," citing de la Cuesta ). Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1036 (N.D. Iowa 1996).

> [t]he Supreme Court has explained [in *City of New York v. F.C.C.*,][150] that the nature of the inquiry the court must pursue when "agency" preemption is at issue differs [however] from that described above as applicable to the question of statutory preemption: [H]ere the inquiry becomes whether the federal agency has properly exercised its own delegated authority rather than simply whether Congress has properly exercised the legislative power. Thus we have emphasized that in a situation where state law is claimed to be pre-empted by federal regulation, a "narrow focus on Congress' intent to supersede state law [is] misdirected," for "[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law." (citations omitted) Instead, the correct focus is on the federal agency that seeks to displace state law and on the proper bounds of its lawful authority to undertake such action. The statutorily authorized regulations of an agency will pre-empt any state or local law that conflicts with such regulations or frustrates the purposes thereof. Beyond that, however, in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area. (citations omitted)
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> It has long been recognized that many of the responsibilities conferred on federal agencies involve a broad grant of authority to reconcile conflicting policies. Where this is true, the Court has cautioned that even in the area of pre-emption, if the agency's choice to pre-empt "represents a reasonable accommodation of conflicting policies that were committed to the agency's care by the statute, we should not disturb it unless it appears from the statute or its legislative history that the accommodation is not one that Congress would have sanctioned." (citations omitted).[151]

In *City of New York v. F.C.C.,*[152] for example, the U.S. Supreme Court held that a federal agency did not exceed its statutory authority by preempting state and local standards. In its decision "[t]he Supreme Court *** employed a two-prong analysis of agency preemption, looking first to see if the agency [1] intended to pre-empt state law, then examining [2] "whether the [agency] is

[150] City of New York v. F.C.C., 486 U.S. 57, 63, 108 S. Ct. 1637, 1642, 100 L. Ed. 2d 48 (1988)

[151] Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1036–37 (N.D. Iowa 1996) *citing* City of New York v. F.C.C., 486 U.S. 57, 63, 108 S. Ct. 1637, 1642, 100 L. Ed. 2d 48 (1988) in turn *citing* United States v. Shimer, 367 U.S. 374, 383 [81 S.Ct. 1554, 1560, 6 L.Ed.2d 908] (1961).

[152] City of New York v. F.C.C., 486 U.S. 57, 63, 108 S. Ct. 1637, 1642, 100 L. Ed. 2d 48 (1988)

legally authorized to pre-empt state and local" law or regulation."[153] With respect to the first prong of this analysis (intent to pre-empt) the Supreme Court articulated that there are varying theories of agency preemption. The first theory of agency preemption is:

> [1] implied preemption, in which the Supreme Court has held that "[t]he statutorily authorized regulations of an agency will pre-empt any state or local law *that conflicts with such regulations or frustrates the purposes thereof*." *(citations omitted)* "Beyond that," the Supreme Court wrote, there is also [2] express agency preemption, because "in proper circumstances the agency may determine that its authority is exclusive and pre-empts any state efforts to regulate in the forbidden area." *(citations omitted)* Where an agency has explicitly stated its intent to exercise exclusive authority in an area and to preempt state and local regulation, the case "does not turn on whether there is an actual conflict between federal and state law ... or whether compliance with both federal and state standards would be physically impossible." *(citations omitted)* Where an agency has expressly stated an intent to preempt state law, preemption may be authorized even "where it is clearly possible for [a person] to comply with [state] standards in addition to the federal standards." *(citations omitted)* However, where agency preemption is only implied, rather than express, the Court had previously observed that it was "even more reluctant to infer pre-emption from the comprehensiveness of regulations than from the comprehensiveness of statutes," because [a]s a result of their specialized functions, agencies normally deal with problems in far more detail than does Congress. To infer pre-emption whenever an agency deals with a problem comprehensively is virtually tantamount to saying that whenever a federal agency decides to step into a field, its regulations will be exclusive. Such a rule, of course, would be inconsistent with the federal-state balance embodied in our Supremacy Clause jurisprudence. *(citations omitted)* Thus, "if an agency does not speak to the question of pre-emption, [the Court] will pause before saying that the mere volume and complexity of its regulations indicate that the agency did in fact intend to pre-empt." *(citations omitted).*[154]
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> As to the second prong of the analysis, whether the agency acted within its delegated authority, " '[a] pre-emptive regulation's force does not depend on express congressional authorization to displace state law.'" *(citations omitted)*. Although no *express* congressional authorization is required, in *City of New York,* the Supreme Court reaffirmed its prior statement that there are at least two reasons why it is important to the determination of the agency preemption issue to discover whether the agency is acting within its congressionally delegated authority: "First, an agency literally has no power to act, let alone pre-empt the

[153] Garrelts v. SmithKline Beecham Corp., 943 F. Supp. 1023, 1037 (N.D. Iowa 1996).

[154] Garrelts, 943 F. Supp. 1038

> validly enacted legislation of a sovereign State, unless and until Congress confers power upon it. Second, the best way of determining whether Congress intended the regulations of an administrative agency to displace state law is to examine the nature and scope of the authority granted by Congress to the agency." *(citations omitted)* Thus, congressional intent remains critical to the propriety of agency preemption in this second prong of the inquiry.[155]

Here, under a theory of express agency preemption, the U.S. Department of Education Office of Civil Rights Title IX Final Rule appears to have met the first prong in the analysis in order to achieve regulatory preemption under the U.S. Supreme Court's binding decision in *City of New York v. F.C.C.* First, the Title IX Final Rule expressly states in intent to preempt state law overtly throughout the body of the Final Rule published in the Federal Register.[156] The most striking example of the Department of Education's intent to preempt within the Title IX Final Rule states "in the event of an actual conflict between State or local law and the provisions in §§ 106.30, 106.44, and 106.45, which address sexual harassment, the latter would have preemptive effect."[157] Stated in more direct terms, "by adding § 106.6(h), the Department clearly and unequivocally states its intention that these final regulations concerning sexual harassment preempt State and local law to the extent of a conflict."[158] Also within the Title IX Final Rule is 34 CFR § 106.6(h) which "provides that to the extent of a conflict between State or local law and Title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law."[159]

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[155] Id.

[156] 85 FR 30026-01

[157] 85 FR 3054

[158] 85 FR 3055

[159] Id.

With respect to the 2nd prong of the Supreme Court's substantive analysis in *City of New York v. F.C.C.* (delegated authority), "Congress grants the authority and power to federal agencies (in this case, the U.S. Department of Education) to conduct rulemaking."[160] The Supreme Court, in clear terms, stated "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.'"[161] More specifically;

> [t]he Administrative Procedure Act ("APA") governs formal rulemaking by federal agencies like the Department of Education's OCR. 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. Under the APA, "each [a]gency shall separately state and currently publish in the Federal Register for the 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."[162]

Here, as Congress has conferred upon the various federal agencies the authority to conduct formal rulemaking under 5 U.S.C. § 553, and the obligation to make public those rules under the Administrative Procedure Act, the U.S. Department of Education, as a federal agency, meets both prongs of the Supreme Court's analysis in *City of New York v. F.C.C.* As such, the Title IX Final Rule does, infact, preempt CA EDUC § 67386(a)(3), and in doing so, makes available to

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[160] Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321 (2017) *citing* 5 U.S.C. § 553 (2012); Morton v. Ruiz, 415 U.S. 199, 231 (1974).

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

[162] Lance Toron Houston, 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, 34 Hofstra Lab. & Emp. L.J. 321, 328–29 (2017) *citing* 5 U.S.C. § 553.

campus labor unions and universities in California both evidentiary standards set forth in 34 CFR § 106.45(b)(1)(vii). This fact will be determinative in how California colleges and universities comply with the Title IX evidentiary standard of proof uniformity rule.

Undoubtedly, there will be challenges to the Title IX Final Rule, but the evidence reveals that the Title IX OCR Final Rule meets Supreme Court muster as agency formal rulemaking within its congressional authority, overtly expresses an intent to preempt and, meets the requirements of legislative rulemaking under the Administrative Procedure Act to have the force and effect of law under 5 U.S.C.A §§ 553(b), (c), as such, requires private colleges and universities under the NLRA and public colleges under the various public sector statutes to collectively bargain (1) the evidentiary standard of proof decision and (2) comply with the standard of proof uniformity rule under 34 CFR § 106.45(b)(1)(vii).

RECOMMENDATIONS

Respective College Administrations both public and private, campus labor unions, legislators, advocacy groups, counselors, lawyers, consultants and members of the Title IX bar should work jointly to develop policies, agreements and compliant training strategies that support harmonious relationships on campus in order to further comply with the Title IX Final Rule. While other serious and equally important legal issues have yet to be examined (or discovered) in the Title IX and Labor Law context, the following recommendations will serve as a first step to a greater understanding of this emerging intersection in higher education. Specifically:

College Administrators should:

- Seek input from the campus community on choice of evidentiary standard.
- Set university policy to ensure that the evidentiary standard of proof in campus CBA's (under the uniformity rule) matches the standard of proof for students, faculty and staff as well as non-unionized members of the community. (colleges without a unionized faculty).
- Incorporate the evidentiary standard of proof issue into all current labor negotiations and also with emerging or graduate union group's attempting to unionize.
- Make publicly available (both college website and public inspection) all labor contracts that collectively bargain the evidentiary standard of proof.
- Consider language in collective bargaining agreements that speaks to the grievability of Title IX live hearings involving campus labor unions.

Campus Labor Unions should:

- Raise as an issue with campus administration the evidentiary standard of proof decision in order to trigger NLRA and public sector duty to bargain rights.
- Consider pursuing a declaratory judgment as to whether the Title IX Final Rule preempts state laws that codify either the preponderance or clear and convincing standard.
- Collectively bargain with campus leadership language that directly addresses another emerging Title IX/Labor Law issue: Title IX live hearing grievability, appellate rights

and arbitrability in campus labor union members cases, i.e., live hearing finality. This issue will be key and will be an important subject for future Title IX/Labor Law research.

State Legislators should:

- Codify by statute the evidentiary standard of proof in Title IX investigations. This act will further harmonious relationships between campus leadership and labor unions and promote further compliance with the Title IX Final Rule standard of proof uniformity requirement.
- Codify the appealability, grievability and arbitrability of Title IX live hearings in campus labor union member cases.
- Consider lawmaking that requires colleges and universities to make publicly available all CBA's between labor unions and recipients that collectively bargain the evidentiary standard of proof for campus labor union members. This will further transparency and public accountability.

The U.S. Department of Education Office of Civil Rights should:

- Consider lawmaking/guidance that requires colleges and universities to make publicly available all CBA's between labor unions and recipients that collectively bargain the evidentiary standard of proof for campus labor union members. This will further transparency and public accountability.

- Consider guidance which speaks to Title IX live hearing grievability, appellate rights and arbitrability in campus labor union member cases. In other words, the finality of the Title IX live hearing.

## CONCLUSION

The Title IX Final Rule is a valuable and needed public policy for which its purpose and intent is necessary to protect against sexual harassment on campus. Notwithstanding this Article's legal contentions, the protection of victims of sexual assault and due process for the accused must remain the paramount concern in this conversation. As such, the evidentiary standard of proof issue between campus labor unions and campus administrations must be remedied on college campuses nationwide with all due expediency for the sake of clarity, prudence and fairness.