

NOTES

RESISTING RULEMAKING: CHALLENGING THE MONTANA SETTLEMENT'S TITLE IX SEXUAL HARASSMENT BLUEPRINT

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“Sexual assault and sexual harassment are intolerable; they undermine women’s basic rights and, when perpetrated against students, can negatively impact their ability to learn and continue their education. As we approach the 40th anniversary of Title IX this year (2012), incidents of sexual assault on our college campuses remind us of the continuing critical importance of the law to reduce barriers in education. Our goal is to determine whether there are violations of federal law and if we find a problem, work cooperatively with [universities] to ensure that all students . . . feel safe in their communities, regardless of sex.”¹

—Thomas E. Perez, Assistant Attorney General for the Civil Rights Division

“Let me say this respectfully and with as much clarity as I can: you do not know my work. You do not know what I face every day in responding to a student culture of alcohol-infused hook-ups, where regrettable sex is a daily occurrence. . . . [The administrator’s] voice has been missing from this debate . . . [No university wants the Office of Civil Rights] knocking on our doors, Title IX complaint in hand, ready to put [our university] under the microscope”²

—Anonymous Student Affairs Professional

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1 Press Release, Dep’t of Just., Justice Department Announces Investigations of the Handling of Sexual Assault Allegations by the University of Montana, the Missoula, Mont., Police Department and the Missoula County Attorney’s Office (May 1, 2012) [hereinafter Montana Press Release], <http://www.justice.gov/opa/pr/2012/May/12-crt-561.html>.

2 *An Open Letter to OCR*, INSIDE HIGHER ED (Oct. 28, 2011), <http://www.insidehighered.com/views/2011/10/28/essay-ocr-guidelines-sexual-assault-hurt-colleges-and-students>.

INTRODUCTION

Every university and college across the nation—with the exception of three³—accepts federal financial assistance. Consequently, in the world of higher education, the impact of administrative regulation and compliance that accompanies federal funding cannot be overstated. Title IX of the Education Amendments of 1972 prohibits discrimination on the basis of sex in education programs or activities operated by recipients of federal financial assistance.⁴ The text of Title IX states that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”⁵ Since its enactment in 1972, Title IX most often has been associated with bolstering the participation of female students in athletics.⁶ Title IX has generally been associated with the athletic arena, although the statute does not expressly address athletics.⁷

Until relatively recently, however, Title IX’s application to sexual harassment was less well known. A superficial reading of the text does not immediately evidence inclusion of claims of sexual violence on college campuses. In fact, nothing in Title IX’s legislative history indicates congressional intent to reach claims of sexual misconduct at all.⁸ The idea that Title IX covers sexual misconduct took root years after the passage of the statute. Nonetheless, the legal proposition that sexual harassment can constitute discrimination on the basis of sex under Title IX is now well settled, as the Supreme Court, in *Gebser v. Lago Vista Independent School District*, noted explicitly that “sexual har-

3 Hillsdale College in Michigan, Grove City College in Pennsylvania, and Patrick Henry College in Virginia remain independent of federal funding. See *History*, HILLSDALE COLL., <http://www.hillsdale.edu/about/history> (last visited Mar. 11, 2014) (“On the pretext that some of its students were receiving federal loans, the Department of Health, Education, and Welfare attempted to interfere with the College’s internal affairs [T]he College . . . announced that rather than complying with unconstitutional federal regulation, it would instruct its students that they could no longer bring federal taxpayer money to Hillsdale.”); *Supreme Court Case*, GROVE CITY COLL., <http://www.gcc.edu/about/howeare/Pages/Supreme-Court-Case.aspx> (last visited Mar. 11, 2014) (“In order to preserve and protect its independence, Grove City College refused federal student aid beginning in the mid-1980s.”); *Financial Aid*, PATRICK HENRY COLL., <http://www.phc.edu/financial.php> (last visited Mar. 11, 2014) (“In order to safeguard our distinctly Christian worldview, we do not accept or participate in government funding. We believe such financial independence to be a critical component of a Patrick Henry College education.”).

4 20 U.S.C. §§ 1681–1688 (2012).

5 *Id.* § 1681(a).

6 Christine I. Hepler, Symposium, *A Bibliography of Title IX of the Education Amendments of 1972*, 35 W. NEW ENG. L. REV. 441, 441 (2013).

7 *Id.* Requirements that schools offer male and female students equal opportunities to play sports, give male and female athletes their fair share of athletic scholarship money, and treat male and female athletes equally in all other respects are the most well-known aspects of Title IX. *Id.*

8 Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 51 (2013).

assessment can constitute discrimination on the basis of sex under Title IX.”⁹ Moreover, it is clear that Title IX also requires schools and colleges to protect students from sexual misconduct, sexual harassment, and sexual violence, and to take seriously all reports of sexual harassment.¹⁰

It is with this background that we arrive at the current Title IX landscape. The evolution of sexual harassment standards in the law and in Title IX compliance has had an immense impact on higher education. The Department of Education (DOE) is authorized and directed to carry into effect Title IX's nondiscrimination mandate by issuing rules and regulations consistent with achieving the statute's objectives.¹¹ The DOE delegates to the Office for Civil Rights (OCR) responsibility for enforcing Title IX and ensuring that institutions receiving federal funding comply with Title IX.¹² But the DOE and OCR have not published rules or regulations in the area of sexual harassment. Instead, OCR has issued guidance and “Dear Colleague” letters (DCLs). Under Title IX, OCR has jurisdiction to investigate complaints of noncompliance involving institutions receiving federal funds.¹³ Failure to voluntarily comply with DOE standards can result in proceedings to withdraw federal funding.¹⁴ OCR also has the power to refer a case to the U.S. Department of Justice (DOJ) for litigation.¹⁵ Since 2011, universities across the nation have been scrambling to enact policies and procedures that comply with DOE guidance.

Notably, OCR has the authority to initiate compliance reviews even if no complaint has been filed against the institution.¹⁶ By initiating reviews and investigations, OCR can target discrimination and highlight Title IX issues that the DOE thinks all higher education institutions should address. OCR's articulated rationale is simple: “By addressing new or emerging problems in this way, . . . OCR can set a tone for future compliance.”¹⁷

9 *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (citing *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998)); *see also id.* at 299–300 n.10.

10 *See, e.g.*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (Jan. 2001) [hereinafter 2001 GUIDANCE], *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

11 20 U.S.C. § 1682 (2012).

12 34 C.F.R. § 106.11 (2013) (“[Section] 106 applies to every recipient and to the education program or activity operated by such recipient which receives Federal financial assistance.”).

13 *Title IX and Sex Discrimination*, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. (Aug. 1998), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/tix_dis.html.

14 20 U.S.C. § 1682; *see also* “Dear Colleague” Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. DEP'T OF EDUC., OFF. FOR CIV. RTS. 16 (Apr. 4, 2011) [hereinafter 2011 DCL], *available at* <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

15 *See* 2011 DCL, *supra* note 14, at 16.

16 *Id.*; *see also* Kristin Galles, *Title IX and the Importance of a Reinvigorated OCR*, 37 HUM. RTS. 18, 20 (2010) (discussing OCR's scope of authority).

17 Galles, *supra* note 16, at 20.

This Note argues that OCR's compliance investigations do more than "set a tone": the DOE—through OCR—uses the resulting findings and settlement agreements to force compliance of the entire higher education community with standards announced in its guidance and "Dear Colleague" letters, but not promulgated in rules and regulations adopted pursuant to the Administrative Procedure Act (APA).

Ultimately, universities face difficult decisions as they implement compliance measures at the university administration level and deal with student issues on their individual campuses. Given the DOE's threat of pulling federal funding, universities are forced to choose between affording students meaningful due process protections and complying with the newest government guidance. As one higher education professional asks: "Do we really want to be tagging students with scarlet letters? . . . Or do we want to protect our educational mission?"¹⁸

When dealing with Title IX and sexual harassment standards, the struggle is particularly acute; universities strive to design grievance procedures that balance protecting victims with providing adequate due process for accused students. This burden is complicated by the fact that sexual harassment claims, by their very nature, involve at least one party who feels like he or she has been sexually harassed. For institutions of higher education, this delicate balancing act presents broader questions about how far colleges should go in assuming investigative responsibility for issues that continue to frustrate the American legal system.¹⁹

These issues are manifest in the new sexual harassment standard set forth in the DOE's Resolution Agreement and the accompanying Findings Letter regarding an investigation of the University of Montana. In May 2012, the DOJ Civil Rights Division announced that it would join the OCR to conduct a formal Title IX²⁰ compliance review and Title IV investigation regarding the University of Montana's response to sexual assaults and sexual harassment of students.²¹

Between September 2010 and December 2011, there had been allegations of student-on-student sexual assault at the University of Montana, as well as many alleged rapes in the surrounding town of Missoula in that three year period.²² In a town where there had been at least eighty alleged rapes in the past three years, and a university where there had been nine allega-

18 Libby Sander, *3 Accused of Sexual Misconduct Say Colleges Acted Hastily and Assumed Guilt*, CHRON. HIGHER EDUC. (Sept. 11, 2013), <http://chronicle.com/article/3-Accused-of-Sexual-Misconduct/141551/> (quoting Peter F. Lake, director of the Center for Excellence in Higher Education Law and Policy at Stetson University) (internal quotation marks omitted).

19 *Id.*

20 This Note will only address the issues raised by the Title IX compliance review. The Title IV investigation (although related and intertwined in the Findings Letter) is not the primary focus of this Note.

21 See Montana Press Release, *supra* note 1.

22 Letter from U.S. Dep't of Justice & Dep't of Educ. to President Royce Engstrom and Lucy France, Esq., The University of Montana, DOJ Case No. DJ 169-44-9, OCR Case No.

tions of student-on-student sexual assault, the Title IX compliance review was particularly important.²³ In response, the university took steps—termed “initial reforms”²⁴—to prevent future harassment even before the formal investigation began. The government investigation included a review of these new efforts.²⁵

For over a year, the DOE and the DOJ investigated the university’s policies and procedures.²⁶ They assessed the university’s policies, its implementation of policies, its adherence to proper procedures, and its responses to sexual harassment and sexual violence.²⁷ Ultimately, the investigation and review included a comprehensive examination of the university’s policies, grievance procedures, and Title IX enforcement.²⁸ The DOE and DOJ reviewed thousands of documents, including all student complaints filed over three academic years. The investigation included multiple site visits and over forty interviews.²⁹

The conclusion of the DOE and DOJ investigation on May 9, 2013 resulted in two documents: a Resolution Agreement³⁰ outlining the compliance agreement between the University of Montana and the DOE and DOJ, and a Findings Letter³¹ documenting the investigation’s findings. The investigative approach, standards applied by the government, findings, and remedies were explained in the Findings Letter.³² In the Findings Letter, DOE stated: “The Agreement will serve as a blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.”³³

The sixteen-page Resolution Agreement and thirty-one-page Findings Letter significantly redefined sexual harassment.³⁴ Prior to the government investigation, section 406.5.1 of the University of Montana’s Sexual Harass-

10126001, at 2 (May 9, 2013) [hereinafter Findings Letter], *available at* <http://www2.ed.gov/documents/press-releases/montana-missoula-letter.pdf>.

23 *See* Montana Press Release, *supra* note 1.

24 *See* Findings Letter, *supra* note 22, at 3.

25 *Id.*

26 *Id.* at 2.

27 *Id.* at 3.

28 *Id.*

29 *Id.* at 3–4.

30 U.S. DEP’T OF JUSTICE & DEP’T OF EDUC., DOJ CASE NO. DJ 169-44-9, OCR CASE NO. 10126001, RESOLUTION AGREEMENT AMONG THE UNIVERSITY OF MONTANA – MISSOULA, THE U.S. DEPARTMENT OF JUSTICE, CIVIL RIGHTS DIVISION, EDUCATIONAL OPPORTUNITIES SECTION AND THE U.S. DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS 2 (May 9, 2013) [hereinafter RESOLUTION AGREEMENT], *available at* <http://www.justice.gov/crt/about/edu/documents/montanaagree.pdf>.

31 *See* Findings Letter, *supra* note 22, at 2.

32 *Id.*

33 *Id.* at 1.

34 *See, e.g.,* Sara Lipka, *Colleges Consider a New ‘Blueprint’ for Responding to Sexual Assault*, CHRON. HIGHER EDUC. (July 24, 2013), <http://chronicle.com/article/Colleges-Consider-a-New/140503/> (explaining the impact of the Montana Resolution on higher education institutions).

ment Policy defined sexual harassment as “conduct that ‘is sufficiently severe or pervasive as to disrupt or undermine a person’s ability to participate in or receive the benefits, services, or opportunities of the University, including unreasonably interfering with a person’s work or educational performance.’”³⁵ In determining whether conduct constituted sexual harassment under this definition, the university used the following standard: “[w]hether conduct is sufficiently offensive to constitute sexual harassment is determined from the perspective of an objectively reasonable person of the same gender in the same situation.”³⁶

In this regard, Montana’s Sexual Harassment Policy tracked the DOE’s sexual harassment standard in the 2003 DCL—which was itself based on the DOE’s 2001 sexual harassment guidance and, more importantly, on the Supreme Court’s holding in *Davis v. Monroe County Board of Education*—stating that alleged sexual harassment claims “be evaluated *from the perspective of a reasonable person in the alleged victim’s position*.”³⁷

In contrast, the Findings Letter stated that “[s]exual harassment is unwelcome conduct of a sexual nature”³⁸ and noted:

[The University of Montana’s Sexual Harassment Policy] improperly suggests that the conduct does not constitute sexual harassment unless it is objectively offensive. . . . Whether conduct is objectively offensive . . . is not the standard to determine whether conduct was “unwelcome conduct of a sexual nature” and therefore constitutes “sexual harassment.” As explained in the Legal Standards³⁹ section above, the United States considers a variety of factors, from *both a subjective and objective perspective*⁴⁰

The Findings Letter stated that “unwelcome conduct of a sexual nature” includes “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature, such as sexual assault or acts of sexual violence.”⁴¹ The Montana Resolution invites students to come forward with claims when they have been subjected to *any* unwelcome sexual conduct, and requires the university to evaluate *all* alleged conduct to determine if it created “a hostile environment.”⁴²

35 See Findings Letter, *supra* note 22, at 8 (quoting the University of Montana’s Sexual Harassment Policy 406.5.1).

36 *Id.* at 9 (alteration in original) (quoting the University of Montana’s Sexual Harassment Policy 406.5.1) (internal quotation marks omitted).

37 First Amendment: “Dear Colleague” Letter from the Assistant Sec. for Civil Rights, U.S. DEP’T OF EDUC., OFF. FOR CIV. RTS. (July 28, 2003) [hereinafter 2003 DCL] (emphasis added), available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html>. See generally *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629 (1999) (holding that harassment claims are to be judged based whether they are objectively offensive); 2001 GUIDANCE, *supra* note 10, at 30 n.39.

38 See Findings Letter, *supra* note 22, at 8.

39 See *id.* at 4 (“Sexual harassment is *unwelcome conduct of a sexual nature*”) (emphasis added).

40 *Id.* at 8–9 (emphasis added).

41 *Id.* at 4.

42 *Id.*

The Findings Letter also required the university to take immediate steps to protect a complainant from further harassment and minimize the burden on the complainant “prior to the completion of the Title IX . . . investigation.”⁴³ The letter offered examples of “appropriate steps,” including taking steps to separate the accused and the complainant or providing counseling for one or both parties.⁴⁴ One of the proposed actions, however, is “taking disciplinary action against the harasser.”⁴⁵ Simply put, accused students can be punished before they are found guilty of harassment.

This Note will argue that when the DOE labeled the Montana Resolution Agreement as a document to be used as a “blueprint for colleges and universities throughout the country,” the agency promulgated a legislative rule that should be subject to judicial review under the APA. Part I of this Note introduces the landscape of sexual harassment claims before the Montana Resolution Agreement and examines the standard for sexual harassment set forth in case law; traces the DOE’s articulated standards from the DOE sexual harassment guidance issued in 2001 (2001 Guidance) to the “Dear Colleague” letter of April 4, 2011⁴⁶ (April 2011 DCL) and the Montana Resolution; and discusses the negative effects of the more expansive standard for measuring sexual harassment in the Montana Resolution on institutions of higher education. Part II then examines relevant administrative law principles and the application of these principles to this particular problem, including a discussion of how best to challenge agency rulemaking under the APA. Part III focuses specifically on challenging the Montana “blueprint” under the framework of the APA, using *Association of Irrigated Residents v. EPA* as an illustrative example of how a court should analyze the use of the Montana Resolution Agreement. Part III concludes that, functionally, the Montana Resolution imposes a subjective sexual harassment standard on the entire higher education community and should be deemed improper legislative rulemaking. Finally, Part IV recommends litigation to challenge the standard for sexual harassment set forth by the DOE in the Montana Resolution. Part IV argues that successful litigation would compel the DOE to amend its sexual harassment standard to conform with existing case law and, ultimately, conduct future rulemaking in a manner that complies with the notice and comment requirements of the APA.

I. RELEVANT LEGAL DEVELOPMENTS

A. *Title IX Case Law*

Three Supreme Court cases provide the legal framework for evaluating sexual harassment claims. *Harris v. Forklift Systems, Inc.*⁴⁷ is the foundational Supreme Court decision setting forth the standard for evaluating sexual har-

43 *Id.* at 6.

44 *Id.*

45 *Id.*

46 2011 DCL, *supra* note 14.

47 510 U.S. 17 (1993).

assment. Decided in 1993, *Harris* involved a sexual harassment claim under Title VII. The Court found that “[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment—an environment that a *reasonable person* would find hostile or abusive—is beyond Title VII’s purview.”⁴⁸ The Court consequently characterized the objective standard in *Harris* as setting a “high bar”⁴⁹ intended to prevent Title VII from becoming a “general civility code.”⁵⁰ The objective standard of *Harris*—and its accompanying reasoning—has been consistently applied to Title IX sexual harassment claims.⁵¹

In 1998, the Supreme Court decided *Gebser v. Lago Vista Independent School District*,⁵² a case involving a Title IX claim of teacher-on-student sexual harassment.⁵³ The Court held that a school district could not be held liable for damages under Title IX unless a school official had actual notice of, and was deliberately indifferent to, the teacher’s sexual misconduct.⁵⁴ The *Gebser* opinion also noted that the DOE has the “authority to promulgate and enforce requirements that effectuate the [Title IX] nondiscrimination mandate.”⁵⁵ Although this Note does not focus on school liability, *Gebser* is important because it is cited by the DOE’s Title IX significant guidance documents as one of the cases setting forth the standard for Title IX compliance.⁵⁶

In 1999, the Supreme Court decided *Davis v. Monroe County Board of Education*,⁵⁷ concluding that student-on-student, peer harassment provides a private cause of action for money damages under Title IX when a school “acts with deliberate indifference to known acts of harassment in its programs or activities.”⁵⁸ The Court applied a standard similar to the standard in *Harris*. To prove a claim under Title IX, a plaintiff must show “harassment that is so severe, pervasive, and *objectively offensive* that it effectively bars the victim’s access to an educational opportunity or benefit.”⁵⁹ The *Davis* case dealt with elementary school students, but Justice Kennedy in his dissent noted that “the majority’s holding would appear to apply with equal force to universities.”⁶⁰

48 *Id.* at 21 (emphasis added).

49 *EEOC v. Sunbelt Rentals, Inc.*, 521 F.3d 306, 315 (4th Cir. 2008).

50 *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

51 *See, e.g.*, *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.”).

52 524 U.S. 274 (1998).

53 *Id.* at 277.

54 *Id.*

55 *Id.* at 292.

56 *See, e.g.*, 2001 GUIDANCE, *supra* note 10, at iv–vi, 30 n.39 (affirming that OCR would determine Title IX compliance by using the standard in *Gebser* and *Davis*).

57 526 U.S. 629 (1999).

58 *Id.* at 633.

59 *Id.* (emphasis added).

60 *Id.* at 667 (Kennedy, J., dissenting).

Justice Kennedy's prediction proved correct; lower federal courts have applied the objective standard to sexual harassment claims in higher education, as well as K-12 education and employment.⁶¹ Although the "reasonable woman" standard may be controversial,⁶² the Supreme Court has not backed away from using it to evaluate cases involving sexual harassment claims in education and employment.

B. Department of Education: Higher Education Title IX Guidance

In 2001, the DOE released a guidance document titled Revised Sexual Harassment Guidance.⁶³ This document looked to case law interpreting

61 In December 2013, a California district court cited *Davis* in *Lopez v. Regents of the University of California*, noting that "to state a prima facie case under Title IX based on student-to-student sexual harassment, Plaintiffs must show: (1) The sexual harassment was so severe, pervasive, and *objectively offensive* that it could be said to deprive the plaintiff of access to the educational opportunities or benefits." *Lopez v. Regents of the Univ. of Cal.*, No. C-13-2811 EMC, 2013 WL 6492395, at *9 (N.D. Cal. Dec. 10, 2013) (emphasis added). In March 2013, a Kentucky district court also applied *Davis*, noting that the Sixth Circuit had summarized *Davis* when it

held that in order to establish a prima facie case of student-on-student sexual harassment for the purposes of Title IX, the plaintiff must show . . . that the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits provided by the school

Moore v. Murray State Univ., No. 5:12-CV-00178, 2013 WL 960320, at *4 (W.D. Ky. Mar. 12, 2013) (emphasis added). In cases involving primary and secondary education, federal courts have also continued to apply *Davis*. On March 27, 2013, a district court applied the *Davis* standard to a case involving peer harassment of a high school student who committed suicide. *Moore v. Chilton Cnty. Bd. of Educ.*, 936 F. Supp. 2d 1300, 1314 (M.D. Ala. 2013) (noting that sexual harassment must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school" (quoting *S.S. v. E. Ky. Univ.*, 532 F.3d 445, 454 (6th Cir. 2008))). In Title VII cases, courts have continued to apply the *Davis* standard. On September 27, 2013, the Fifth Circuit applied the "objective 'reasonable person' standard to evaluate severity and pervasiveness" to a Title VII action. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 453 (5th Cir. 2013). On January 28, 2013, the First Circuit applied the objective standard, asking whether "a reasonable person [would] find the conduct" severe and pervasive. *Gerald v. Univ. of P.R.*, 707 F.3d 7, 19 (1st Cir. 2013). At the district court level, on July 9, 2013, a district court in Pennsylvania applied the objective standard when it decided *Young v. Pleasant Valley School District*. No. 3:07-cv-00854, 2013 WL 3456946, at *3 (M.D. Pa. July 9, 2013) (noting that, in order to avoid turning "Title VII into a 'general civility code,' . . . the Supreme Court has reminded lower courts of the limitations that govern such claims"). On March 14, 2013, a district court in North Carolina applied the same standard in *Freeman v. Dal-Tile Corp.* 930 F. Supp. 2d 611, 633-34 (E.D.N.C. 2013) (finding that the plaintiff did not provide evidence that "[t]he conduct in the present case [was] severe enough to clear the 'high bar' which is intended to prevent Title VII from becoming a general civility code").

62 See, e.g., Robert S. Adler & Ellen R. Peirce, *The Legal, Ethical, and Social Implications of the "Reasonable Woman" Standard in Sexual Harassment Cases*, 61 *FORDHAM L. REV.* 773, 773 (1993).

63 2001 GUIDANCE, *supra* note 10.

Title VII and Title IX harassment standards to guide its own evaluation of Title IX claims.⁶⁴ Like Title IX, Title VII prohibits discrimination on the basis of sex.⁶⁵ The 2001 Guidance stated that OCR, in investigating compliance, would use the standard outlined by the Supreme Court in *Gebser* and *Davis*.⁶⁶

Two years later, in 2003, the Assistant Secretary for Civil Rights issued a “Dear Colleague” letter addressing sexual harassment standards and the First Amendment. This 2003 DCL explicitly stated that harassment “must include something beyond the mere expression of views, words, symbols or thoughts that some person finds offensive.”⁶⁷ The letter further outlined the OCR’s standard for evaluating conduct:

Under OCR’s standard, the conduct must also be considered sufficiently serious to deny or limit a student’s ability to participate in or benefit from the educational program. Thus, *OCR’s standards require that the conduct be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances . . .*⁶⁸

This 2003 letter was the DOE’s most recent guidance about sexual harassment standards until the Montana Resolution Agreement in 2013.

In April 2011, another DCL outlined the evidentiary burden that institutions should use in grievance procedures investigating sexual harassment claims.⁶⁹ OCR requires schools to provide equitable grievance procedures. The April 2011 DCL did not modify the 2001 definition of sexual harassment, but it did change the evidentiary standard to be used in sexual harassment claims to a “preponderance of the evidence.”⁷⁰ The April 2011 DCL

64 *Id.* at ii, vi; *see also id.* at vi (noting that the Supreme Court in *Davis v. Monroe County Board of Education* indicated, “through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX”). *See generally* *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75 (1998) (a sexual harassment case decided under Title VII).

65 *Jennings v. Univ. of N.C.*, 482 F.3d 686, 695 (4th Cir. 2007) (“We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX.” (citing *Davis*, 526 U.S. at 651)).

66 *See* 2001 GUIDANCE, *supra* note 10, at iv–vi, 30 n.39 (affirming that OCR would determine Title IX compliance by using the standard in *Gebser* and *Davis*).

67 *See* 2003 DCL, *supra* note 37.

68 *Id.* (emphasis added). It should be noted that the consideration of “all the circumstances” is not meant to include the subjective interpretation of the victim. Rather, it is meant to encompass all the circumstances regarding the alleged harassment. Thus, if conduct is more serious (e.g., sexual assault), one single instance could certainly constitute harassment from a reasonable person’s perspective. However, a single occasion of less serious conduct (e.g., catcalling) might be perceived as very offensive by the victim, but would not constitute harassment from the reasonable person’s perspective, considering all the circumstances (namely, the number of occasions on which this occurred and the seriousness of the alleged action). This 2003 DCL does not give weight to the victim’s subjective view of the conduct, but instead emphasizes the reasonable person standard.

69 *See* 2011 DCL, *supra* note 14, at 10–11.

70 Preponderance of the evidence is best understood as a “more likely than not” standard of proof. *Id.* at 11.

stated that the use of a “clear and convincing”⁷¹ standard was inconsistent with the standard of proof established for violations of the civil rights laws, thus making them not equitable under Title IX.⁷² In adopting the “preponderance of the evidence” standard, DOE and OCR chose the same standard that the Supreme Court has applied in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964.⁷³ OCR cited the Supreme Court’s use of the “preponderance of the evidence” as the primary reason for applying that evidentiary standard.⁷⁴

This decision was met with frustration from schools across the nation, many of which utilized the “clear and convincing” or “beyond a reasonable doubt” standard in their own disciplinary hearings.⁷⁵ A survey conducted of the top 100 universities concluded that, in general, the higher a school’s ranking, the more likely it was to use an evidentiary standard above the “50.01% standard” mandated in the DCL.⁷⁶ Moreover, several schools had discussed and rejected the “preponderance of the evidence” standard in the past.⁷⁷ The April 2011 DCL meant that colleges were no longer permitted to determine for themselves the appropriate level of due process protections to grant their accused students.⁷⁸ University officials expressed concern that a “preponderance of evidence” standard would mean “more convictions—of both guilty and innocent individuals.”⁷⁹

A case at Stanford University brought these concerns into sharp relief.⁸⁰ In February 2011, a student at Stanford was accused of sexual assault. At the time Stanford initiated disciplinary proceedings, its standard of responsibility was “beyond a reasonable doubt.”⁸¹ This standard, paralleling that used in

71 Clear and convincing requires that it “is highly probable or reasonably certain that the sexual harassment or violence occurred.” *Id.*

72 *Id.*

73 *Id.* (citing *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989) (plurality opinion) (approving the preponderance standard in a Title VII sex discrimination case)).

74 *Id.*

75 See *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, FOUND. FOR INDIVIDUAL RTS. EDUCATION (Oct. 28, 2011) [hereinafter *Standard of Evidence Survey*], <http://www.thefire.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/>.

76 *Id.* (“FIRE surveyed the top 100 colleges and universities in the country, as defined by the 2011 *U.S. News & World Report* rankings. Nine of the colleges ranked in the top 10 used a standard other than preponderance of the evidence. . . . In general, the higher a school’s *U.S. News* ranking, the more likely that school would protect accused students with a higher standard than the OCR-mandated 50.01% standard.”).

77 *Id.*

78 *Id.*

79 Greg Lukianoff, *Feds to Students: You Can’t Say That*, WALL ST. J. (May 16, 2013, 7:15 PM), <http://online.wsj.com/news/articles/SB10001424127887323582904578485041304763554> (quoting former Dean of Harvard College Harry Lewis).

80 Andrew R. Kloster, *Student and Professorial Causes of Action Against Non-University Actors*, 23 GEO. MASON U. C.R. L.J. 143, 143 (2013) (summarizing the Stanford case); see also *Standard of Evidence Survey*, *supra* note 75.

81 Kloster, *supra* note 80, at 143.

the criminal justice system, had been in place at Stanford since 1968.⁸² Midway through the case, the DOE issued its April 2011 DCL. Stanford promptly changed its burden of proof to “preponderance of the evidence.”⁸³ Under the new standard, the student was found guilty and suspended. Although it is possible that the student would have been expelled under the old standard, “at least one juror would have exonerated the student under the ‘beyond a reasonable doubt’ standard.”⁸⁴

There was no real resistance to the DOE’s April 2011 DCL from Stanford or any other university. Some college administrators complained—one in an anonymous letter, describing his anonymity as a byproduct of worrying about attracting OCR attention⁸⁵—but most officials meekly accepted the DOE’s informal (and coercive) guidance. Like Stanford, universities changed their burden of proof standard and moved on.⁸⁶

It was not until the Montana Resolution Agreement, announced in 2013, that the DOE gave any indication that the standard for evaluating sexual harassment claims should be anything other than the historical “objective” standard. With the Findings Letter, the DOE set forth a new standard defining sexual harassment. The Montana Resolution Agreement and Findings Letter represent the DOE’s latest interpretation of Title IX standards. These documents redefined the sexual harassment standard that had been in place since the Supreme Court’s rulings in *Gebser* and *Davis*. As recently as 2003, OCR guidance interpreted sexual harassment using the objective standard set forth in Supreme Court case law. The 2003 DCL affirmed the standard that *conduct be evaluated from the perspective of a reasonable person*.⁸⁷ Now, the Montana Resolution imposes a standard that flouts the Supreme Court’s ruling in *Davis*. Instead, institutions of higher education must use the standard found in the Findings Letter: sexual harassment is any unwelcome conduct of a sexual nature.⁸⁸

C. *Widening the Lens: The Effect of the Montana Agreement on Higher Education*

The importance of the DOE guidance and DCLs lies in their effect on institutions of higher education across the nation. In the April 2011 DCL, the DOE calls the letter a “significant guidance document,” and notes that it

82 *Id.* at 143–44.

83 Elizabeth Titus, *Stanford Lowers Standard of Proof for Sexual Assault*, STANFORD DAILY (Apr. 12, 2011), <http://www.stanforddaily.com/2011/04/12/stanford-lowers-standard-of-proof-for-sexual-assault/>.

84 Kloster, *supra* note 80, at 144, 146.

85 See *An Open Letter to OCR*, *supra* note 2.

86 See *Standard of Evidence Survey*, *supra* note 75 (“Confronted by the threat of losing federal funding for failure to comply with OCR’s new directive, colleges and universities nationwide have scrambled to revise their policies to comport with OCR’s April 4, 2011, ‘Dear Colleague’ letter . . . 39 colleges ranked in the top 100 have already changed or will be required to change their standard of evidence to comply with the OCR mandate.”).

87 2003 DCL, *supra* note 37.

88 Findings Letter, *supra* note 22, at 5.

“does not add requirements to applicable law, but provides information and examples to inform recipients about how OCR evaluates [compliance].”⁸⁹ Yet, the letter also states that the DOE, in seeking “to obtain voluntary compliance,” reserves the right to have OCR initiate proceedings to withdraw Federal Title IX funding if an institution does not come into compliance voluntarily.⁹⁰ The DOE’s request that schools “proactively consider”⁹¹ implementing these guidelines is little more than a thinly veiled threat. Given the thoroughness of OCR investigations, the potential for litigation, and the threat of losing federal funding, virtually no university is willing to risk non-compliance with DOE’s guidelines. In an anonymous letter written to the OCR by a student affairs professional at an accredited university, the writer expressed his view that the April 2011 DCL’s guidance “at best complicates [administrators’] work, at worst undermines [their] judgment and [their] ability to make good decisions for [their] institution and [their] students.”⁹²

Although the Montana Resolution was only released in May, by now, many universities across the nation have implemented the guidance set forth in those documents.⁹³ The debate rages on.⁹⁴ Special interest groups like the Foundation for Individual Rights in Education (FIRE) are outraged by the impact that this standard could have on free speech, allowing individuals who are offended by speech to claim sexual harassment.⁹⁵ Senator John McCain published an open letter to United States Attorney General Eric Holder, expressing his concerns about the Montana Resolution, saying it “cir-

89 See 2011 DCL, *supra* note 14, at 1 n.1.

90 *Id.*

91 *Id.* at 16.

92 *An Open Letter to OCR, supra* note 2.

93 The same “threat of losing federal funding for failure to comply with OCR’s new directive” that colleges and universities felt in response to the 2011 DCL certainly applies here, too. See *Standard of Evidence Survey, supra* note 75. Although a survey has not yet been conducted to determine how many schools have changed their definition of sexual harassment, it is reasonable—given the propensity of schools to “scramble[] to revise their policies to comport with OCR”—to assume that many have already made the change outlined in the Montana Resolution’s blueprint. *Id.*

94 See, e.g., Allie Grasgreen, *Classrooms, Courts, or Neither?*, INSIDE HIGHER ED (Feb. 12, 2014), <http://www.insidehighered.com/news/2014/02/12/disagreement-campus-judicial-systems> (“Since the U.S. Education Department’s Office for Civil Rights affirmed in its 2011 [DCL] that colleges should use a lower standard of evidence than criminal courts when adjudicating sexual assault complaints, many civil liberties advocates, lawyers and even politicians have accused the federal government of trampling students’ right to due process. Campus officials, for the most part, have stressed that adjudication is an educational experience, where students are found ‘responsible’ rather than ‘guilty,’ so their processes should be different from the criminal justice system’s. But during a two-day ‘dialogue’ about sexual misconduct and college students here at the University of Virginia, it was clear that discontent over OCR’s decree—not to mention the question of whether colleges should even be adjudicating these cases in the first place—is alive and well within academe.”).

95 Russell Westerholm, *Free Speech Coalition Files Open Letter to U.S. Department of Justice and Education to Retract Sexual Harassment Settlement*, FOUND. FOR INDIVIDUAL RTS. EDUCATION (July 17, 2001), <http://thefire.org/article/16062.html>.

cumvented the regular rulemaking process and congressional authority by redefining long-standing legal precedent through a settlement agreement with a single university.”⁹⁶

By opening up sexual harassment to mean any unwelcome conduct of a sexual nature, the DOE moves from applying an objective standard to applying a subjective standard. The use of this subjective standard means that *all* claims of sexual harassment that a student brings forth—*any* conduct that is unwelcome conduct of a sexual nature, including claims a reasonable person would not find to be objectively offensive—must be investigated. In plain English, “any unwelcome speech or conduct of a sexual nature is harassment, even if it would not offend a reasonable person.”⁹⁷ It does not take much imagination to think of everyday actions the subjective standard would now deem inappropriate.⁹⁸ Under this standard, “an unwelcome request for a date” could constitute harassment,⁹⁹ as could any expression related to sexual topics that offends any person, including “a campus performance of ‘The Vagina Monologues,’ a presentation on safe sex practices, a debate about sexual morality . . . any sexually-themed joke.”¹⁰⁰ Although claims of sexual assault (meaning, specifically, “intercourse without consent”)¹⁰¹ would certainly rise to the level of sexual harassment under both the subjective standard and the objective standard, a single instance of unwelcome conduct of a sexual nature (e.g., an unsuccessful request for a date),¹⁰² could now be construed as sexual harassment under the subjective standard. It could be enough to land a student in the midst of a sexual harassment investigation.

96 Press Release, Senator John McCain Sends Letters to DOJ and EPA on Obama Administration Settlement Abuse, (June 26, 2013) [hereinafter Press Release, Senator John McCain Sends Letters], <http://www.mccain.senate.gov/public/index.cfm/2013/6/post-818fd6f0-b009-240c-b963-7b7bb47f03fb>.

97 Hans Bader, *How the Education Department Would Limit Dating*, CHRON. HIGHER EDUC. (May 23, 2013), <http://chronicle.com/article/Dark-Cloud-Over-Academic/139463/>.

98 Lipka, *supra* note 34 (explaining the impact of the Montana Resolution on higher education institutions).

99 This example has been commonly used to demonstrate the type of subjectively offensive verbal conduct of a sexual nature that would have been excluded under the reasonable person standard, but falls within the standard set forth in the Montana Resolution. See, e.g., Wendy Kaminer, *No Sex Talk Allowed*, ATLANTIC (May 15, 2013, 4:21 PM), <http://www.theatlantic.com/sexes/archive/2013/05/no-sex-talk-allowed/275782/>.

100 *Federal Government Mandates Unconstitutional Speech Codes at Colleges and Universities Nationwide*, FOUND. FOR INDIVIDUAL RTS. EDUCATION (May 17, 2013), <http://thefire.org/article/15767.html>.

101 See Findings Letter, *supra* note 22, at 1 n.1 (“Although “sexual assault” is a form of “sexual harassment,” where this letter refers to “sexual assault” and “sexual harassment” separately, it is differentiating sexual contact, including intercourse without consent (“sexual assault”), from unwanted conduct of a sexual nature that does not rise to the level of sexual assault.”).

102 Lukianoff, *supra* note 79 (listing examples of instances where conduct could subjectively constitute sexual harassment).

In the past, the “reasonable person” standard protected the accused against unreasonable or insincere allegations.¹⁰³

Concluding that the new definition includes asking someone out on a date, telling jokes, and discussing politics or morality is not a baseless exaggeration. In the past, sexual harassment claims have been made against university professors for giving controversial (and potentially subjectively offensive) lectures or expressing unpopular opinions.¹⁰⁴ Given the increased number of potential claims, the number of claims that will require investigation may increase. Furthermore, while this Note does not elaborate on the additional requirements set forth in the Montana Resolution—numbering more than forty¹⁰⁵—the administrative burden of complying with the entire Montana Resolution’s blueprint is staggering.

Moreover, the DOE has been explicit that “[c]onduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”¹⁰⁶ Because the standards for criminal investigations are different, the DOE does not regard criminal standards as determinative of whether sexual harassment or violence violates Title IX.¹⁰⁷ The university grievance system, however, has power to impose serious disciplinary sanctions. Violations of university conduct carry serious consequences. Expulsion, suspension, or other serious actions can alter a student’s entire life and future.¹⁰⁸

Certainly, these consequences are deserved if the accused individual is sexually harassing a peer within the meaning of *Davis*. The idea that a student could be accused of sexual harassment for an offense that does not

103 *Id.*

104 See, e.g., *Frequently Asked Questions Regarding the Federal “Blueprint” for Sexual Harassment Policies on Campus*, FOUND. FOR INDIVIDUAL RTS. EDUCATION (May 28, 2013), <http://thefire.org/article/15849.html>. The website gives examples of subjectively offensive claims that were made in universities:

- A devout Muslim student at William Paterson University was found guilty of sexual harassment for expressing his religious objection to homosexuality in a private email to a professor.
- A University of Denver professor was charged with sexual harassment because of anonymous complaints over his teaching of a course segment entitled “Drugs and Sin in American Life: From Masturbation and Prostitution to Alcohol and Drugs,” which focuses in part on the negative effects of “purity crusades.”
- At Appalachian State University, tenured professor Jammie Price was placed on administrative leave after students alleged that she had created a “hostile environment.” The allegations included making negative comments about the university and its student athletes and showing a documentary on pornography.

Id.

105 Additional requirements include developing and carrying out a system for tracking and reviewing claims, conducting annual surveys about the campus climate, etc.

106 See 2011 DCL, *supra* note 14, at 10.

107 *Id.*

108 See, e.g., Sander, *supra* note 18 (reporting on three suits—against Vassar College, St. Joseph’s University, and Xavier University—brought by students challenging disciplinary hearing procedures that are heavily weighted against the accused).

meet the objective standard of *Davis*, and then found guilty of a university violation under a preponderance of the evidence, however, is a troubling result in a society that values due process, fairness, and individual rights.

Recently, a number of students have filed suits against universities, alleging that the grievance procedures were so victim-focused that due process was lacking and administrators facilitated an environment in which a presumption of guilt prevailed.¹⁰⁹ As universities investigate claims under the broader standard of sexual harassment and apply the preponderance of the evidence burden of proof, lawyers and advocates for accused students predict an increase in these kinds of suits in years to come.¹¹⁰

It is vitally important that students are not discouraged from reporting harassment.¹¹¹ OCR's goal is admirable: to provide an environment in which victims feel comfortable reporting. But, in *Davis v. Monroe County Board of Education*, the Supreme Court offered a clear definition of sexual harassment as a pattern of serious, persistent discriminatory behavior. The objective standard allowed harassers to be punished while also avoiding threats to due process or freedom of speech. The DOE 2003 DCL correctly utilized this standard. In the Montana Resolution, however, the DOE changed this standard for higher education Title IX compliance—without going through the proper channels. The standard set forth by the DOE has prompted a laundry list of concerns, as both university administrators and independent groups outside of higher education express dissatisfaction with the administrative burdens the Montana blueprint raises and its potential chilling effect on free speech and due process rights for the accused.

II. AN ADMINISTRATIVE LAW REMEDY

The April 2011 DCL and the Montana Resolution essentially forced institutions to change their policies, without any warning and without gathering any input from the higher education community. The bulk of the DOE's regulatory actions come from "Dear Colleague" letters, "significant guidance" documents, and settlement agreements that result from OCR investigations.¹¹² Using informal guidance to change the definition of sexual harassment without any prior notice is disruptive for higher education institutions, and the DOE's use of informal guidance to establish a preponderance of the evidence standard for Title IX compliance was inappropriate.¹¹³ The Mon-

109 *Id.*

110 *Id.*

111 Department of Education's Office for Civil Rights Response to Letters of Concern Regarding "Blueprint," FOUND. FOR INDIVIDUAL RTS. EDUCATION (May 29, 2013), <http://thefire.org/article/15854.html> (explaining OCR's goals in the Montana Resolution).

112 See *Reading Room*, U.S. DEP'T OF EDUC., OFF. FOR CIVIL RTS., <http://www2.ed.gov/about/offices/list/ocr/publications.html#General-Pubs> (last visited Mar. 12, 2014); see also Kloster, *supra* note 80, at 168.

113 *An Open Letter to OCR*, *supra* note 2 (letter of a student affairs professional, writing anonymously to OCR: "[The administrator's] voice has been missing from this debate, just as it seems our input was missing from your letter. None of us want [the OCR] knocking

tana Resolution's blueprint defines sexual harassment so broadly that even good faith efforts to comply could leave universities at high risk for OCR investigation.¹¹⁴

When the DOE seeks to enact a change that (1) differs from the standard set forth in case law, (2) differs from previous DOE guidance, and (3) affects every university receiving federal funding, it should enact that change using the procedures set forth in the Administrative Procedure Act. Simply put, when the DOE fails to follow the procedures set forth in the APA, its actions should be subject to judicial review. This includes guidance that is set forth in DCLs and Resolution Agreements. Parts II and III of this Note attempt to provide a brief overview of administrative law and the avenues for challenging the change in the sexual harassment standard set forth in the Montana Resolution's "blueprint."

Particularly, the APA's notice and comment procedures would have provided university administrators with notice of a potential change and allowed them an opportunity to voice their concerns about—or their support for—the proposed changes.¹¹⁵ If this had occurred, the heated debate about freedom of speech would have been proactive and productive, instead of reactive and divisive.¹¹⁶ Institutional concerns about due process could have been addressed.¹¹⁷ University administration concerns about investigating an increased volume of sexual harassment claims and the resulting strain on administrative resources would have been considered before guidelines were issued.¹¹⁸

The APA defines the legal authority of federal agencies, and provides a remedy for parties adversely affected by agency action.¹¹⁹ Under the APA, federal courts are authorized to "hold unlawful and set aside agency action, findings, and conclusions" that violate rules codified in the APA.¹²⁰ In *Allentown Mack Sales & Service, Inc. v. NLRB*, the Court affirmed its view that the APA "establishes a scheme of 'reasoned decisionmaking.'"¹²¹ When evaluating an agency's decisionmaking, 5 U.S.C. § 706(2)(A) provides something of

on our doors, Title IX complaint in hand, ready to put [our university] under the microscope and force us to explain to you, a group of skilled attorneys, why we did what we did.").

114 Samantha Harris, *A Massive Burden*, INSIDE HIGHER ED (June 13, 2013), <http://www.insidehighered.com/views/2013/06/13/essay-criticizes-education-dept-approach-sexual-harassment>.

115 5 U.S.C. § 553 (2012).

116 See, e.g., Press Release, Senator John McCain Sends Letters, *supra* note 96; Lukianoff, *supra* note 79; Westerholm, *supra* note 95.

117 See, e.g., Bob Unruh, *Illegal Flirting? Feds Revisit 'Sex Harassment,'* WORLDNETDAILY (June 1, 2013, 7:15 PM), <http://www.wnd.com/2013/06/illegal-flirting-feds-revisit-sex-harassment/>; Lukianoff, *supra* note 79.

118 Harris, *supra* note 114.

119 5 U.S.C. §§ 701–06.

120 *Id.* § 706(2).

121 522 U.S. 359, 374 (1998) (quoting *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 52 (1983)).

a catch-all provision: it prohibits agency action that is “arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹²² The court must conclude that the rule promulgated by an agency is “[n]ot only . . . within the scope of [the agency’s] lawful authority,” but also “*logical and rational*.”¹²³

The DOE has all the authority of a cabinet-level, executive branch agency,¹²⁴ which falls broadly into two categories: rulemaking¹²⁵ and adjudication.¹²⁶ When the OCR issues guidance documents in response to specific investigations, as it does with Findings Letters and Resolution Agreements, it can be difficult to determine whether it is engaging in rulemaking or adjudication. Based on the D.C. Circuit’s interpretation of similar settlement agreements between the Environmental Protection Agency (EPA) and private parties in *Association of Irrigated Residents v. EPA*,¹²⁷ this Note will consider the Montana Resolution as rulemaking.¹²⁸

In the rulemaking context, the DOE regulates primarily through informal guidance.¹²⁹ DOE compliance guidance comes from “significant guidance documents,”¹³⁰ “Dear Colleague” Letters, and Settlement Agreements. The DOE has issued over 175 “significant guidance documents” since 1970.¹³¹ Many guidance documents and DCLs have included follow-up or revisionary guidance documents that were released later.¹³² With respect to Title IX, DOE has promulgated only one notice-and-comment rule in response to a congressional directive since Congress enacted it in 1972.¹³³

Section 553 of the APA notes that, except where notice or hearing is required by statute, a notice and comment period is unnecessary when an agency is issuing “interpretative rules, general statements of policy, or rules of agency organization, procedure, or practice,”¹³⁴ or when a notice and comment period would be “impracticable, unnecessary, or contrary to the public interest.”¹³⁵

122 5 U.S.C. § 706(2) (A).

123 See *Allentown*, 522 U.S. at 374 (emphasis added).

124 See Kloster, *supra* note 80, at 167.

125 5 U.S.C. § 553.

126 *Id.* § 554.

127 494 F.3d 1027 (D.C. Cir. 2007).

128 See *infra* Part III.

129 See Nina A. Mendelson, *Regulatory Beneficiaries and Informal Agency Policymaking*, 92 CORNELL L. REV. 397, 404 (2007).

130 See generally 2001 GUIDANCE, *supra* note 10 (showing an example of a significant guidance document).

131 See *Significant Guidance Documents*, U.S. DEP’T OF EDUC. (Sept. 27, 2013), <http://www2.ed.gov/policy/gen/guid/significant-guidance.html> (listing 177 “Significant Guidance Documents” by category, including some that have been withdrawn).

132 *Id.*

133 *Id.* at 7 (listing only one instance where “notice” was given: 1994-01-31—Notice of Application of Supreme Court Decision in *United States v. Fordice*).

134 5 U.S.C. § 553(b)(3)(A) (2012).

135 *Id.* § 553(b)(3)(B).

Both informal and notice-and-comment rulemaking may be challenged under this catch-all provision.¹³⁶ Section 702 provides for judicial review of notice-and-comment rulemaking, stating that “[a] person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof.”¹³⁷

In the case of the Montana Resolution, the APA could be used to provide judicial review of the policy change regarding the sexual harassment standard. A university challenging the Montana Resolution could argue that the Montana Resolution itself was a rule change that was “arbitrary, capricious, an abuse of discretion, [and] . . . not in accordance with law.”¹³⁸ Given that the *DOE itself* acknowledged the document’s purpose as “a blueprint for colleges and universities throughout the country,”¹³⁹ a strong argument can be made that it was engaging in legislative rulemaking. Moreover, legal precedent gives some indication of how a court might evaluate a university’s suit challenging the DOE’s Montana Resolution.

III. CHALLENGING THE MONTANA RESOLUTION’S “BLUEPRINT” AS AGENCY RULEMAKING

A recent case in the United States Court of Appeals for the District of Columbia Circuit, *Association of Irrigated Residents v. EPA*,¹⁴⁰ provides some instruction. A comparison of the facts in *Irrigated Residents* to the DOE’s actions in the Montana Resolution reveals many similarities between the cases. Although the *Irrigated Residents* plaintiffs ultimately did not prevail, there is reason to think a university challenging the DOE’s Montana Settlement Agreement may be more successful. Judge Judith W. Rogers’s dissent in *Irrigated Residents* offers an analysis under which a court might conclude that the DOE’s Montana Resolution was legislative rulemaking subject to judicial review.

A. *The Majority Opinion*

In 2007, the D.C. Circuit, in a 2-1 decision in *Association of Irrigated Residents v. EPA*, considered whether consent agreements between the EPA and animal feeding operations (AFOs) constituted EPA rulemaking.¹⁴¹ Although the majority ruled that the consent agreements did not constitute rulemaking, enforcement actions within EPA’s statutory authority were, and Judge Rogers wrote a detailed dissent outlining the flaws in the majority’s analysis.¹⁴² Here, *Irrigated Residents* is particularly appropriate for the pur-

136 *Id.*

137 *Id.* § 702.

138 *Id.* § 706(2)(A).

139 See Findings Letter, *supra* note 22, at 1.

140 494 F.3d 1027 (D.C. Cir. 2007).

141 *Id.* at 1028.

142 *Id.* at 1037–46 (Rogers, J., dissenting).

poses of this Note because it is illustrative of a situation where petitioners challenged an agency's use of consent agreements that are analogous, in form, to settlement agreements.

AFOs are facilities where animals are raised for eggs, dairy, or slaughter.¹⁴³ These facilities emit pollutants and are regulated by the EPA under the Clean Air Act. There are currently no effective methods to precisely measure AFO emissions, which hampers the EPA's enforcement ability.¹⁴⁴ The EPA's solution to this problem was to have thousands of AFOs sign a consent agreement. Each consent agreement was identical.¹⁴⁵ The EPA drafted the consent agreement with input from state government representatives, environmental groups, local citizens' groups, and the AFO industry. Additionally, the EPA published a draft of the agreement and sought public comment before finalizing the draft.¹⁴⁶ Under the agreement, each AFO assisted in developing an emissions methodology in exchange for the EPA's agreement not to pursue administrative actions and lawsuits against the AFO for a defined period of time.¹⁴⁷ The EPA used the consent agreements as a mechanism to achieve compliance because it believed consent agreements were the "quickest and most effective way" to do so.¹⁴⁸ The EPA argued that the agreements were a valid exercise of the agency's enforcement discretion and, in the alternative, if they did constitute a "rule," that the agency complied with the APA's notice and comment requirements.¹⁴⁹

Petitioners were a number of community and environmental groups claiming that their members—who lived near AFOs—"suffer[ed] effects ranging from reduced enjoyment of the outdoor portion of their property to adverse health effects."¹⁵⁰ Petitioners brought the suit alleging that the agreements, which were intended to bring the AFOs into eventual compliance, met the definition of a "rule" under the APA.¹⁵¹ Petitioners argued that the agreements were actually rules disguised as enforcement actions. As such, the EPA did not follow proper procedures for rulemaking and exceeded its statutory authority by entering into the agreements.¹⁵²

The majority first addressed the issue of subject matter jurisdiction.¹⁵³ This issue turned on whether the consent agreements constituted rulemaking subject to APA review, or enforcement proceedings initiated at the agency's discretion. If the latter, then they were not reviewable by the

143 *Id.* at 1028 (majority opinion).

144 *Id.* at 1029.

145 *Id.*

146 *Id.*

147 *Id.*

148 *Id.* (quoting Animal Feeding Operations Consent Agreement and Final Order, 70 Fed. Reg. 4958, 4958 (Jan. 31, 2005)).

149 *Id.* at 1030.

150 *Id.* at 1028.

151 *Id.* at 1030.

152 *Id.* at 1028.

153 *Id.* at 1030 ("Our analysis of this case begins and ends with subject matter jurisdiction.").

court.¹⁵⁴ The court looked to *Heckler v. Chaney*,¹⁵⁵ a Supreme Court case ruling that “an agency’s decision not to prosecute or enforce . . . is a decision generally committed to an agency’s absolute discretion.”¹⁵⁶

As a result, such decisions are presumptively unreviewable.¹⁵⁷ The court noted that the D.C. Circuit had also applied *Chaney* in *Schering Corp. v. Heckler*,¹⁵⁸ a case involving an agency’s decision to settle an enforcement agreement.¹⁵⁹ The court ruled that the EPA’s consent agreements fell squarely within the *Chaney* and *Schering* precedents. As such, the consent agreements represented enforcement actions that were not subject to judicial review.¹⁶⁰ The majority viewed the consent agreements as a “broader strategy” designed by the EPA “to save the time and cost of litigation,” while leading “to quicker industry-wide compliance.”¹⁶¹

The majority opinion also rejected the notion that the consent agreements constituted a rule.¹⁶² Noting that the “APA defines a ‘rule’ as ‘an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy,’” the majority ruled that the agreements merely conditionally deferred enforcement of statutory requirements.¹⁶³ The majority also rejected petitioners’ argument that the agreements exceeded the EPA’s authority, ruling that the Acts authorizing the EPA to enforce the Clean Air Act permitted the use of consent agreements.¹⁶⁴ In short, the majority held that use of consent agreements as an enforcement protocol did not constitute legislative rulemaking subject to judicial review.

B. Judge Rogers’s Dissent

Judge Rogers began her analysis by framing the question before the court as whether the scope of the EPA’s enforcement discretion is expansive enough to cover the AFOs consent agreements.¹⁶⁵ To Judge Rogers, it was clear that, through its use of the consent agreements, the EPA “attempted to secure the benefits of legislative rulemaking without the burdens of its statutory duties.”¹⁶⁶ She criticized the majority for its “boundless stretching of *Chaney* to undercut the purposes of notice-and-comment rulemaking,”

154 *Id.*

155 470 U.S. 821 (1985).

156 *See Irritated Residents*, 494 F.3d at 1031 (citing *Heckler*, 470 U.S. at 831 (alteration in original)).

157 *Id.*

158 779 F.2d 683 (D.C. Cir. 1985).

159 *See Irritated Residents*, 494 F.3d at 1031.

160 *Id.*

161 *Id.* at 1031–32.

162 *Id.* at 1033.

163 *Id.* (citing 5 U.S.C. § 551(4) (2006)).

164 *Id.* at 1036–37.

165 *Id.* at 1037 (Rogers, J., dissenting).

166 *Id.*

emphasizing that even if *Chaney* creates a presumption of non-reviewability, the presumption disappears when an agency “veers far afield of Congress’s enforcement regime.”¹⁶⁷

Judge Rogers relied on precedent that emphasized the importance of the APA and evaluated the consequences of the EPA protocol:

[I]n enacting the APA, Congress made a judgment that notions of fairness and informed administrative decisionmaking require that agency decisions be made only after affording interested persons notice and an opportunity to comment. . . . [P]ublic participation assures that the agency will have before it the facts and information relevant to a particular administrative problem . . . [and] increase[s] the likelihood of administrative responsiveness to the needs and concerns of those affected.

EPA’s new enforcement protocol will have significant and immediate negative consequences. As EPA acknowledges, it affects both members of the regulated industry and those whom Congress intended to protect under the statutes as well as the safety and health of the environment.¹⁶⁸

Judge Rogers reasoned that the accountability and informed decision-making that the notice and comment procedure provides was required before the EPA could adopt an enforcement policy through consent agreements that essentially eliminated enforcement for many AFOs.¹⁶⁹

Judge Rogers also noted the factors that a court should consider when determining if an agency promulgated a legislative rule subject to judicial review: “Because the proposed enforcement protocol is of ‘general . . . applicability,’ will have ‘future effect,’ and defines the rights and obligations of members of the regulated community . . . it is a rule.”¹⁷⁰ Relying on D.C. Circuit precedent in *CropLife America v. EPA*,¹⁷¹ Judge Rogers determined that the EPA’s consent agreements created a new general approach to carrying out its enforcement responsibilities.¹⁷² In doing so, the EPA promulgated a legislative rule subject to notice and comment requirements under the APA.

Judge Rogers’s dissent focused on what the EPA actually did when it used consent agreements as “the quickest and most effective way” to ensure industry compliance.¹⁷³ The dissent recognized that the EPA used its “coercive power” to require compliance, without going through the APA require-

167 *Id.*

168 *Id.* at 1043 (alteration in original) (quoting *Chrysler Corp. v. Brown*, 441 U.S. 281, 316 (1979); *Am. Hosp. Ass’n v. Bowen*, 834 F.2d 1037, 1061 (D.C. Cir. 1987)) (internal quotation marks omitted).

169 *Id.* at 1043–44.

170 *Id.* at 1039 (quoting 5 U.S.C. § 553(4)).

171 329 F.3d 876, 881 (D.C. Cir. 2003) (holding that an enforcement policy was a legislative rule because it “create[d] a ‘binding norm’” (quoting *Chamber of Commerce v. U.S. Dep’t of Labor*, 174 F.3d 206, 212 (D.C. Cir. 1999))).

172 *See Irritated Residents*, 494 F.3d at 1039.

173 *Id.* at 1045 (quoting *Animal Feeding Operations Consent Agreement and Final Order*, 70 Fed. Reg. 4958, 4958 (Jan. 31, 2005)).

ments of notice and comment.¹⁷⁴ In *Irritated Residents*, the consent decrees were “consent decree[s] only in the sense that any regulated party has a choice whether or not to proceed in accordance with an agency rule.”¹⁷⁵

C. Comparing Irritated Residents to the Montana Resolution

This Note offers a comparison of the facts in *Irritated Residents* to the DOE's actions in the Montana Resolution and explains why the DOE's actions fit more appropriately within the framework of Judge Rogers's dissent. If a university challenged the Montana Resolution, a court might well reach the conclusion that Judge Rogers reached in her dissent.

Presumably, the court in *Irritated Residents* did not have to engage in a full analysis of the issue of standing because it affirmed on other grounds.¹⁷⁶ Although the idea that a university could challenge a settlement agreement to which it was not a party raises standing issues, this Note argues that the Montana Resolution was not merely a settlement agreement. Rather, it was an instance of legislative rulemaking. When viewed in that light, any higher education institution that has been adversely affected should be able to bring suit, and the rule should be subject to judicial review under the APA. Additionally, the Fourth Circuit Court of Appeals, in *Equity in Athletics (EIA) v. Department of Education*, ruled that a non-profit organization representing adversely affected students had standing to challenge a new DOE Title IX rule.¹⁷⁷ The organization had standing in that case because James Madison University claimed that funding cuts to programs were a consequence of bringing the institution into compliance with the new DOE rules, and the interests EIA sought to protect were germane to its purpose. Moreover, the suit did “not require the participation of its individual members, as EIA [sought] declaratory and injunctive relief against DOE's interpretations.”¹⁷⁸ A similar standing analysis would apply in the case of a university challenging the Montana Resolution.

The Montana Resolution lacks even the basic notice and input that was present in the EPA's consent agreements in *Irritated Residents*.¹⁷⁹ When the EPA drafted the consent agreements, it consulted with government representatives, outside groups, and the AFO industry. The Montana Resolution

174 *Id.* at 1041.

175 *Id.*

176 *Id.* at 1030 n.1 (majority opinion) (“Although petitioners' standing was also challenged, this court is not bound to consider jurisdictional questions in any particular order.” (citing *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584–85 (1999))).

177 639 F.3d 91, 95, 99 (4th Cir. 2011).

178 *Id.* at 99.

179 Compare RESOLUTION AGREEMENT, *supra* note 30, at 1 (explaining that the agreement was the product of the DOJ/OCR investigation and the actions outlined within the agreement were a result of Montana's “willingness to further implement actions that remedy the United States' concerns identified in the attached Letter of Findings and to ensure the University's compliance with Title IX and Title IV”), with *Irritated Residents*, 494 F.3d at 1029 (“[The EPA] sought public comment.”).

was the result of an investigation conducted by OCR; only OCR and the University of Montana were parties to drafting the resolution. Even the University of Montana did not have much say in the drafting of the Settlement Agreement, given that its initial efforts failed to bring the university into compliance.

The “coercive power” that Justice Rogers accused the EPA of using is clearly present in the DOE’s guidance documents. From DCLs to the Montana Resolution, the DOE’s use of the “coercive power”—the power to initiate OCR investigations and proceedings to withdraw federal funding—demands compliance from universities across the nation. While the EPA in *Irritated Residents* used thousands of individual consent agreements to condition compliance, the DOE used a single agreement and labeled it a “blueprint” for other colleges and universities. These institutions did not even have the “choice” that was available to AFOs to sign or not sign onto the consent decrees. In theory, the higher education institutions could choose not to comply but, in reality, noncompliance means inviting an OCR investigation and facing a potential loss of federal funding.

Moreover, the mitigating circumstances in *Irritated Residents* that necessitated a deferral of enforcement in exchange for help developing a methodology are not present here. There was a sense in the majority opinion in *Irritated Residents* that the unique necessity of the AFO enforcement situation helped sway the court’s deference to the EPA’s actions. The consent agreements were born out of the EPA’s struggle to develop a methodology for measuring emissions, and the majority seemed sympathetic to the EPA’s plight. In the case of the Montana Resolution, rather, the DOE abruptly changed its standard for defining sexual harassment, departing from prior agency guidance and federal case law.

The EPA in *Irritated Residents* used the consent decrees as a mechanism to achieve compliance because it believed consent decrees were the “quickest and most effective way” to do so.¹⁸⁰ In this sense, the DOE used the Montana Resolution in the same way—as a quick and effective way to bring other universities into compliance with the desired agency standards. Under the factors Judge Rogers cited as relevant to a court’s determination regarding whether agency guidance constitutes a legislative rule, the Montana Resolution’s guidelines—like the EPA’s consent decrees—have “general applicability” and “future effect,” and they “define[] the rights and obligations of members of the regulated community.”¹⁸¹ The Montana Resolution should be considered a legislative rule.

Judge Rogers’s reference to *CropLife America v. EPA* in her dissent is also on point.¹⁸² The analysis in *CropLife* frames the relevant judicial inquiry in a Montana Resolution suit. Although *CropLife* did not involve the use of consent agreements, it outlined the factors that a court considers when determining if agency guidance is binding.

180 See *Irritated Residents*, 494 F.3d at 1029.

181 *Id.* at 1039 (Rogers, J., dissenting).

182 *Id.*

In *CropLife*, the EPA issued a directive in a press release,¹⁸³ announcing that it would no longer consider certain studies in its regulatory decision making.¹⁸⁴ Petitioners were pesticide manufacturers and a trade association claiming that their members would be adversely affected by the moratorium; they sought review of the directive announced in the press release.¹⁸⁵ The court evaluated the agency's action to determine "whether the agency action binds private parties or the agency itself with the 'force of law.'"¹⁸⁶ In *CropLife*, there was "little doubt" that the directive bound the private parties (and the agency itself) with the "force of law."¹⁸⁷ The court held that the EPA was required to follow notice and comment procedures because the rule "effect[ed] a dramatic change in the agency's established regulatory regime."¹⁸⁸ Similarly, the DOE's Montana Resolution made a dramatic change to the standard for determining sexual harassment for Title IX compliance and, like the EPA in *CropLife*, the DOE should be required to follow notice and comment procedures.

Furthermore, the court in *CropLife* emphasized that an agency's "characterization of its own action is not controlling if it self-servingly disclaims any intention to create a rule with the 'force of law,' but the record indicates otherwise."¹⁸⁹ This is particularly important for Montana Resolution litigation because the DOE has already begun to back away from the subjective standard. In a November 2013 letter to the Foundation for Individual Rights in Education, OCR's Assistant Secretary for Civil Rights Catherine Lhamon responded to FIRE's letters of concern regarding the Montana Resolution, stating that "the Agreement in the Montana case represents the resolution of that particular case and not OCR or DOJ policy."¹⁹⁰ Yet, this letter to FIRE does not constitute new Title IX guidance, nor does it undo the Montana Resolution's "blueprint" statement. Although the DOE may use it as evidence that the Montana Resolution is not binding on other universities, it is simply another factor for the court to consider in evaluating whether or not the DOE engaged in legislative rulemaking.¹⁹¹ The court will not find the letter controlling if the court determines that the letter is merely a "self-serv-

183 It is worth noting that the press release in *CropLife* is certainly similar to the DOE's Dear Colleague Letters.

184 *CropLife Am. v. EPA*, 329 F.3d 876, 881 (D.C. Cir. 2003).

185 *Id.* at 878.

186 *Id.* at 883 (citing *Gen. Elec. Co. v. EPA*, 290 F.3d 377, 382 (D.C. Cir. 2002)).

187 *Id.*

188 *Id.* at 884 (emphasis added).

189 *Id.* at 883; *see also Gen. Elec. Co.*, 290 F.3d at 382 (showing the EPA urged the court to consider the agency's own characterization of its actions); *Sugar Cane Growers Coop. of Fla. v. Veneman*, 289 F.3d 89, 95 (D.C. Cir. 2002) (explaining the steps an agency must take up when engaging in rulemaking).

190 Letter from Catherine E. Lhamon, Dep't of Educ., Off. for Civ. Rts. Ass't Sec'y, to FIRE, FOUND. FOR INDIVIDUAL RTS. EDUCATION 2 (Nov. 14, 2013), *available at* <http://thefire.org/article/16506.html>.

191 Indeed, it would be foolish for the DOE to say anything other than what it says in the letter because admitting that the Montana Resolution is binding on all universities

ing” disclaimer. The true inquiry is whether the DOE, through the Montana Resolution “blueprint,” intended to create a rule that operates with the force of law.

IV. RECOMMENDATIONS

Although the traditional wisdom dictates that universities defer to the DOE, successful legal pushback by colleges against excessive informal regulation could force the DOE to comply with the APA when it promulgates rules for higher education. The difficult part of bringing suit against the DOE for the Montana Resolution is getting past the hurdle of *Chaney*. Once a court accepts that the Montana Resolution was rulemaking, then the rules promulgated in the Montana Resolution are subject to judicial review. The DOE’s actions can be challenged on two grounds: (1) a procedural challenge, arguing that it violated the notice and comment procedures required for informal rulemaking, and (2) a substantive challenge on the merit of the rule, arguing that the use of the subjective standard is “arbitrary and capricious” because it deviates from the Supreme Court’s test in *Davis*.

A successful procedural challenge would lead to a court’s ruling to vacate the DOE’s rule, forcing the DOE to go through notice and comment in order to promulgate a rule if OCR still wanted to change the sexual harassment standard. If a case against the DOE is successful, it would serve to reinforce the notion that “agency should not be able to impede judicial review,”¹⁹² and future rules would be promulgated *with institutional input*. Concerns about due process, fairness in the grievance process, administrative burdens, and freedom of speech can be addressed prior to instituting a legislative rule.

Additionally, shifting litigation risk to the DOE is advantageous to universities.¹⁹³ The DOE should recognize that although it has been given power to enforce Title IX, the rights of university students, faculty, and administrators must be respected.¹⁹⁴ The procedural argument is not that the DOE cannot promulgate a rule requiring the use of the subjective sexual harassment standard in Title IX compliance, but rather that it must go through the requisite APA notice and comment procedures *before* promulgating this legislative rule.

Once an agency’s action is deemed to be rulemaking and is subject to judicial review, the court evaluates an agency’s decisionmaking under the APA. Substantive review of an agency’s interpretation of its regulations is governed by section 706(2)(A), which prohibits agency action that is “arbi-

would be an admission that the DOE engaged in legislative rulemaking with the force of law to bind all higher education institutions.

192 *Allentown Mack Sales & Servs., Inc. v. NLRB*, 522 U.S. 359, 376 (1998).

193 *See Kloster, supra* note 80, at 175.

194 *See id.*

trary, capricious, an abuse of discretion, or otherwise not in accordance with law.”¹⁹⁵

In *Allentown Mack Sales & Services, Inc. v. NLRB*, the Court analyzed agency action under this “catch-all” provision, noting: “It is hard to imagine a more violent breach of [the arbitrary and capricious] requirement than applying a rule of primary conduct or a standard of proof which is in fact different from the rule or standard formally announced.”¹⁹⁶ Given the fact that the change in sexual harassment standards deviates from prior agency guidance and, more importantly, from relevant Supreme Court case law, a university could argue that the DOE’s shift in definitions was arbitrary and capricious. Unlike the April 2011 DCL, which stated that the “preponderance of the evidence standard” is derived from the burden of proof used in civil litigation, the DOE gives no reasoned or logical explanation for changing the sexual harassment standard in the Montana Resolution. Under *Allentown*, an attack on the Montana Resolution under the APA’s “arbitrary and capricious” requirements might well be successful, and the court would be required to set aside the agency’s action.¹⁹⁷

This is not to diminish the risks involved with bringing suit: fighting back could risk an OCR investigation or proceedings to withdraw federal funding, not to mention the bad press that could surround litigation regarding sexual harassment standards. These concerns may be overstated, however, especially if a large university—one that receives millions of dollars of federal funding—leads the challenge. As Part III has argued, there are strong arguments in favor of viewing the Montana Resolution as agency rulemaking. This argument is bolstered by the DOE’s blunt declarations that the Montana Agreement is meant to be a compliance standard for the rest of the higher education institutions. Under the APA, a document that the DOE *itself* labels as a “blueprint for colleges and universities throughout the country”¹⁹⁸ should certainly be subject to judicial review.

The DOE has never pulled federal funding from a university.¹⁹⁹ In the event that DOE did initiate an OCR investigation to determine the eligibility of a university to receive federal funding, the university would have ample opportunity to change its mind, come into compliance, and enter into a settlement agreement with the DOE to avoid losing funding.

It is highly unlikely that the DOE would ever pull federal funding from major research universities that receive hundreds of millions of dollars in federal funding each year. Moreover, a university challenging DOE rulemak-

195 5 U.S.C. § 706(2)(A) (2012).

196 522 U.S. at 374.

197 *Id.* at 377 (“Substantive review of an agency’s interpretation of its regulations is governed only by that general provision of the Administrative Procedure Act which requires courts to set aside agency action that is ‘arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.’” (quoting 5 U.S.C. § 706(2)(A))).

198 See Findings Letter, *supra* note 22, at 1.

199 The DOE has always utilized settlement agreements when dealing with Title IX investigations.

ing might well receive the support of outside groups (e.g., Foundation for Individual Rights in Education, American Association of University Professors, Senator McCain) that have already expressed their displeasure at the DOE's regulatory actions.

CONCLUSION

Sexual harassment remains an issue on college campuses across the nation. As the chief enforcer of Title IX in higher education, the Department of Education aims to work cooperatively with universities to ensure that all students feel safe in their communities. Unfortunately, the Department of Education has used its immense power to coerce universities into complying with its rules. These rules have been implemented without following the requirements set forth in the Administrative Procedure Act. Given the issues raised by the Montana Resolution, a legal challenge to the Department of Education's standards could succeed. Simply put, when the Department of Education needlessly—and without going through the proper channels—changes its standards for universities, those rules should be subject to judicial review.