Resubmitted: January 5, 2024
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In the Matter of

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

and

AFSCME LOCAL 888, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000277-23 T1

CIVIL ACTION

On Appeal from a
Final Order of the:

New Jersey Public Employment Relations Commission

Docket No. SN-2023-028
Docket No. SN-2023-029

PETITIONER-APPELLANT'S OPENING BRIEF

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PRELIMINARY STATEMENT

This appeal is from an Order by the Public Employment Relations Commission ("PERC") denying Petitions by Rutgers, The State University of New Jersey ("Rutgers" or "University"), to restrain two disciplinary grievance arbitrations under a collective negotiations agreement. Subsequently, one of the grievances was withdrawn. The Order denying the Petitions must be reversed and the remaining grievance arbitration restrained because it is preempted by the 2020 implementing regulations of Title IX of the Education Amendment Acts of 1972, 20 U.S.C. §1681 *et seq*. ("Title IX"), codified at 34 C.F.R. Part 106 ("Title IX Regulations" or "Regulations").

Appellant Rutgers is a public university subject to Title IX. On May 19, 2020, the U.S. Department of Education ("US DOE") adopted Title IX Regulations mandating a comprehensive grievance process (the "Title IX Grievance Process"). The Regulations require covered schools to adopt the mandated grievance process and to follow that process in response to covered complaints of sexual harassment. 34 C.F.R. §106.45. The mandated Title IX grievance process explicitly protects and provides due process to both the complainant and the accused. Notably, the Title IX Regulations expressly require that any supplemental "provisions, rules, or practices" for investigating or adjudicating covered complaints of sexual harassment must be set forth in the

adopted Title IX grievance process itself, "must apply equally to both parties," and must comport with other requirements. 34 C.F.R. §106.45(b).

Here, Rutgers followed the process dictated by the Title IX Regulations. The Title IX process concluded with a final determination – final by policy and by law – that an employee had sexually harassed and assaulted a female co-worker and there was "just cause" to discharge him from employment. Based on the Title IX determination, Rutgers discharged the employee.

Respondent (the discharged employee's collective negotiations representative) now seeks to collaterally challenge that final determination under a separate process – an arbitration under the grievance process in a collective negotiations agreement. Specifically, Respondent seeks to arbitrate whether there was "just cause" for discharge. That would be a collateral proceeding seeking to usurp the Title IX process and potentially nullify the Title IX determination.

The mandatory, comprehensive, and final process set forth in the Title IX Regulations preempts the entirety of the grievance process under the collective negotiations agreement as applied to this matter, including arbitration. The Title IX Regulations compel this conclusion. Leaving no doubt, the US DOE explicitly has stated that the Regulations preempt state laws and, specifically,

that they preempt any contrary provision or practice under a collective negotiations agreement:

> in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30298, 30371 (May 19, 2020) ("*US DOE Preamble*").

The Order denying the Petition to restrain arbitration, therefore, should be reversed.

PROCEDURAL HISTORY

Rutgers appeals from a final Order of PERC. The matter below commenced with Rutgers' Petitions to PERC.

Specifically, on February 2, 2023, Rutgers filed two Petitions with PERC, each for a scope of negotiations determination with a restraint of arbitration. (Pa9, 39).[1] The Petitions sought to restrain two grievance arbitrations under the collective negotiations agreement (the "CNA") between Rutgers and Respondent, AFSCME Local 888, American Federation of State, County and Municipal Employees, AFL-CIO ("Local 888"). (*Id.*) Each Petition was separately docketed. Petition number SN-2023-028 addressed the grievance

[1] Record citations to Petitioner Rutger's appendix are in the form "Pa[page]."

brought by Local 888 on behalf of I.R.M., and Petition number SN-2023-029 addressed the grievance brought by Local 888 on behalf of J.M. (*Id.*)[2]

On August 24, 2023, after consolidating the two Petitions, PERC issued its Decision and Order ("Order"). (Pa8). PERC concluded that the Title IX Regulations did not preempt the subject matter of the grievance arbitrations. (Pa25-31). The Order, therefore, denied the Petitions for restraint of arbitration. (Pa31).

On September 28, 2023, Rutgers timely filed its Notice of Appeal from the Order, and on October 5, 2023 filed an Amended Notice of Appeal correcting the caption. (Pa1, 4). The Notice of Appeal identifies both Petitions addressed by the Order. (*Id.*) However, after PERC issued the Order, Local 888 withdrew the grievance that had been addressed by Petition number SN-2023-028. This brief, therefore, addresses only Petition number SN-2023-029 and the requested restraint of the grievance arbitration brought by Local 888 on behalf of J.M.

On October 6, 2023, the Clerk of the Appellate Division requested that the parties submit statements addressing whether PERC's Order was appealable under Rule 2:2-3(a)(3). (eCourts Docket, No. A-000277-23 T1). Rutgers, Local 888, and PERC each filed statements explaining that PERC's Order was a final

[2] Consistent with PERC's Decision and Order, and to respect individual privacy, this Brief refers to the individuals by initials.

and, therefore, appealable Order. On October 18, 2023, the Clerk confirmed that the Order was final and appealable. (*Id.*)

STATEMENT OF FACTS

A. The Parties

Rutgers is a public research university in New Jersey. N.J.S.A. 18A:65-1 *et seq*.; N.J.S.A. C.18A:64M-2(c). As a recipient of federal education funds, it is subject to Title IX. (*See* Pa45 ¶3). Local 888 is the exclusive collective negotiations representative for certain Rutgers' employees, including J.M. (Pa178-179). Rutgers and Local 888 are parties to the CNA, which was in effect at all relevant times. (Pa154).

B. The Title IX Policy

On May 19, 2020, the US DOE issued amended regulations under Title IX. *US DOE Preamble*, 85 Fed. Reg. 30026. These amended Title IX Regulations require educational institutions that receive federal aid ("recipients"), such as Rutgers, to adopt and follow a specific grievance process to resolve formal complaints of sexual harassment by staff or students. 34 C.F.R. §106.44(b) and §106.45. The Title IX Regulations comprehensively define the required process – the Title IX Grievance Process – setting forth mandatory elements of that process through the initial intake, investigation, hearing, final determination, and appeal. 34 C.F.R. §106.45(1)-(8).

As defined by the Title IX Regulations, the mandated Title IX Grievance Process promotes the statute's anti-discrimination objective while protecting the due process rights of both the complainant and the respondent. The Regulations, therefore, define a comprehensive process for resolving formal complaints that must be set forth in the school's implementing policy and that must include, for example, the following:

- issuing a written notice of allegations to the parties after receipt of a formal complaint, 34 C.F.R. §106.45(b)(2);
- the right of each party to an attorney or non-attorney advisor of their own choosing for all grievance proceedings, or, if the party does not choose one, an advisor provided by the school for the purpose of conducting cross-examination at the live hearing, 34 C.F.R. §106.45(b)(2)(i)(B), 34 C.F.R. §106.45(b)(5)(iv), and 34 C.F.R. §106.45(b)(6)(i);
- "a presumption that the respondent is not responsible for the alleged conduct" and "an objective evaluation of all relevant evidence," 34 C.F.R. §106.45(b)(1)(ii) and (iv);
- a defined standard of evidence, 34 C.F.R. §106.45(b)(1)(ii);
- "investigating a formal complaint" by an unbiased investigator, with the right of each party to respond to the evidence prior to the conclusion of the investigation, 34 C.F.R. §106.45(b)(5);
- an investigation report "that fairly summarizes relevant evidence" and is provided to the parties, 34 C.F.R. §106.45(b)(5)(vii);
- "a live hearing" before a "decision-maker(s)," with the presentation of evidence including the examination and cross-examination of witnesses by each party's advisor, 34 C.F.R. §106.45(b)(6);

- "a written determination regarding responsibility," "disciplinary sanctions," and "remedies," 34 C.F.R. §106.45(b)(7);
- a right to appeal on certain enumerated grounds and procedures, and a written determination of the appeal 34 C.F.R. §106.45(b)(8); and
- having decision-makers – both at the initial live hearing stage and on appeal – who are unbiased and who comply with Title IX standards, including training. 34 C.F.R. §106.45(b)(1)(iii).

Any "provisions, rules, or practices" adopted beyond the specific mandated grievance procedures must be set forth in the implementing policy and "must apply equally to both parties." 34 C.F.R. §106.45(b). The Title IX Regulations also require that, under a Title IX Grievance Process, "[t]he determination regarding responsibility becomes final" upon the expiration of the time to appeal or, if there is an appeal, upon "the written determination of the result of the appeal." 34 C.F.R. §106.45(b)(7)(iii).

As required by the Title IX Regulations, Rutgers adopted a Title IX Policy and Grievance Procedures (the "Title IX Policy"). (Pa53 *ff.*) Rutgers' Title IX Policy includes a grievance process complying with the mandatory terms and elements under the Regulations. (Pa66 *ff.*, Title IX Policy §VIII). As required by the Regulations, the Title IX Policy explicitly protects rights and provides due process for both the complainant and the respondent, including terms for a fair hearing, the right of both parties to present witnesses and other evidence, and the impartiality of any investigator, decision-maker, or appeal officer.

(Pa66-67 and 77, Title IX Policy §VIII.A, B, and J.4). It sets forth and defines each of the mandated process steps (*see* pp. 6-7, *supra*) from the filing a formal complaint through an investigation, live hearing, written determination, appeal, and appeal determination. (Pa67-86, Title IX Policy §VIII.C - M). The Title IX Policy, therefore, comprehensively implements the Title IX Regulations.

As mandated by the Title IX Regulations, the grievance process implemented in the Title IX Policy is conclusive. Mirroring the Title IX Regulations (34 C.F.R. §106.45(b)(7)(iii)), therefore, Rutgers' Title IX Policy provides that at the end of the process, the written Determination Regarding Responsibility is final:

> **5. Finality of the Determination Regarding Responsibility**
>
> The determination regarding responsibility ***becomes final*** either on the date that the University provides the Parties with the written determination of the result of the appeal, if an appeal is filed consistent with the procedures and timeline outlined in "Appeals" below, or if an appeal is not filed, the date on which the opportunity to appeal expires.

(Pa81-82, Title IX Policy §VIII.K.5; italics emphasis added).

C. The Sexual Harassment Complaint against J.M.

On February 2, 2022, a female Rutgers employee submitted a Formal Complaint alleging that she had been sexually harassed by a male co-worker, J.M. (Pa130). Both Complainant and J.M. were custodial staff employees. (*Id.*)

Both also were members of the negotiations unit represented by Local 888. (Pa179, ¶4). Based on the Formal Complaint, J.M. was charged with violating Title IX, as well as the University Policy Prohibiting Discrimination & Harassment (which covers discrimination and harassment more broadly than Title IX). (Pa119).

Complainant alleged a pattern of sexual harassment. (Pa132-134, 140-142). The alleged harassment included persistent verbal conduct by J.M. during a three-month period despite Complainant's repeated objections to that conduct. (*Id*.) The Complaint also described a physical assault:

> When I began to clean a small one stall bathroom, my co-worker came in the bathroom about a minute or two behind me while I was cleaning the toilet. He was asking me to be his girlfriend. I told him no! after I said no! He began to nervously tremble and said to me, "I'm so nervous, feel my chest" and again I said no I don't want to feel your chest!
>
> All the while he's pressing his body against me in the little stall and now beginning to push me in the corner to the wall. I was afraid and didn't know what he was going to do next. Then he grabbed my left hand by my wrist and tried to force me to feel his chest but I resisted and tried to pull my hand away, at the same time trying to keep the weight of him off me. I felt weaker than him so I began to push hard against him with both arms and maneuver my way through a small gap pass [*sic*] him and finally out of the bathroom.

(Pa132-134, 140-141). The Complaint also alleged that, in the weeks after the assault, J.M. retaliated by refusing to do his share of the work and, thereby, significantly increasing Complainant's workload. (Pa134, 141)

D. The Title IX Grievance Process and Hearing

Following receipt of Complainant's Formal Complaint, the matter proceeded under the mandated Title IX Grievance Process steps. (Pa46). The University's Title IX Coordinator determined that the Complaint alleged harassment covered by Title IX. (Pa137). The Associate Director, Office of Employment Equity ("OEE"), Melissa Ercolano, investigated the Complaint. (Pa136). The investigator interviewed J.M. (with a Local 888 representative in attendance) and others. (Pa139). The investigator explained both the allegations and the Title IX Grievance Process to J.M. and the Local 888 representative. (*Id*.) On May 20, 2022, the investigator issued a detailed investigation report, which included the statements provided by J.M., Complainant, and witnesses. (Pa136, 140-145).

On July 21, 2022, a live evidentiary hearing was held before two impartial decision-makers. (Pa122). The Hearing Officer and Decision-Maker regarding responsibility, Ralph J. Marra, Jr., was a private attorney and former Acting U.S. Attorney retained as a neutral third-party. (Pa122). The Senior Director of Environmental Services, Institutional Planning and Operations, John Malley,

served as the second Decision-Maker, whose role was to determine appropriate sanctions if J.M. were found responsible for violating the Title IX Policy. (*Id.*) J.M. himself was represented by a private outside attorney who served as his Advisor, and who was provided by Rutgers because J.M. had not selected his own Advisor for the hearing. (Pa122). The hearing included the examination and cross-examination of the Complainant, J.M., and another witness. (*Id.*) In all respects, the hearing was conducted in accordance with the mandated Title IX Grievance Process.

E. The Written Determination and Appeal

On July 28, 2022, the Decision-Makers issued a ten-page Written Determination.[3] (Pa119). The Written Determination reviewed the allegations and the evidence presented. (Pa119, 123-126). On responsibility, the Written Determination found that Complainant was "highly credible" and that J.M. was "not credible on the significant issues in dispute." (Pa124). As reflected in the Written Determination, J.M. had regularly asked Complainant to be his girlfriend, cook for him, and have him come to her house despite Complainant "fend[ing] off these advances." (Pa124-125). J.M. also had subjected Complainant to the "harrowing bathroom incident," which "traumatized"

[3] Mr. Marra wrote the part of the Written Determination addressing responsibility, and Mr. Malley authored the part addressing disciplinary sanction.

Complainant and subjected her to an "emotional toll." (Pa125; *see* description of incident at p. 9, *supra*).

The Written Determination, therefore, found J.M. responsible for sexual harassment and sexual assault. (Pa125-126). J.M.'s pattern of "unwelcome sexual advances and unwelcome verbal and physical conduct of a sexual nature" was "severe and pervasive" and "constituted sexual harassment." (*Id.*) His conduct during the bathroom incident also "constitute[d] sexual assault." (*Id.*) In both respects, J.M. was found to have violated the Title IX Policy (as well as the University Policy Prohibiting Discrimination & Harassment). (*Id.*)

On disciplinary sanctions, the Written Determination found that J.M.'s conduct and policy violations warranted discharge. (Pa126). The Written Determination specifically found that there was "just cause" for dismissal based on the finding of sexual harassment and assault:

> In light of the finding by a preponderance of evidence following the hearing in this matter (as part of which Respondent received notice of the allegations and had an opportunity to be heard) that Respondent violated Policy 60.1.33, and having considered all data available to me, ***I find that there is just cause to terminate the Respondent's employment with Rutgers University effective immediately***, consistent with the terms of University Policies and the collective negotiations agreement between the University and the AFSMSC Local 888.

(*Id.*; emphasis in original). After enumerating factors supporting this finding, the Written Determination concluded:

> Accordingly, I am recommending dismissal pursuant to University Policy 60.1.33 and University Policy 60.1.12, because the Respondent's behavior was clearly in violation of the Title IX Policy and Grievance Procedures and the University Policy Prohibiting Discrimination & Harassment.

(*Id.*)

On August 2, 2022, through his attorney Advisor, J.M. submitted an appeal under the mandated grievance process implemented under the Title IX Policy. (Pa46, Pa147-148). Subsequently, OEE invited J.M. to submit any additional information supporting his appeal, and his attorney Advisor confirmed in response that he had submitted everything. (Pa148). On August 30, 2022, a Written Appeal Determination issued. (*Id.*). The Written Appeal Determination denied the appeal and upheld the prior Written Determination because the grounds stated for the appeal were not supported. (*Id.*)

F. Termination of Employment

By letter dated September 26, 2022, Rutgers formally terminated J.M. from his employment. (Pa152). Rutgers based the termination on the Written Determination issued under the Title IX Grievance Process. (*Id.*)

G. Local 888 Request for CNA Grievance Arbitration

On September 14, 2022 (before the formal termination letter), Local 888 submitted a grievance on behalf of J.M. under the CNA between Local 888 and Rutgers. (Pa173). Article 4 of the CNA sets forth a grievance procedure as "the sole and exclusive remedy for any and all claims pertaining to the provisions of this Agreement." (Pa162, Art. 4.1). The CNA grievance procedure, where applicable, potentially ends with binding arbitration. (Pa164, Art. 4.3). On October 3, 2022, after Rutgers had declined to process the grievance on the grounds that it was preempted by the Title IX Regulations (Pa50 ¶¶8-9), Local 888 submitted to PERC a request to submit the grievance to arbitration under the CNA. (Pa177).

As stated by Local 888 in its grievance form and request for arbitration, it seeks to re-adjudicate through the CNA grievance arbitration what already had been determined under the Title IX Grievance Process: namely, whether there was just cause to terminate J.M.'s employment. Specifically, Local 888's CNA grievance form (Pa173) asserted a violation of CNA Article 4, which provides, as part of the CNA grievance process, that "No employee shall be discharged, suspended, or disciplined in any way except for just cause." (Pa165, CNA Art. 4.8). In its request for arbitration, Local 888 was even more direct:

> STATEMENT IDENTIFYING GRIEVANCES TO BE ARBITRATED:
>
> Whether the grievant, [J.M.], was terminated for just cause.

(Pa177).

In response to Local 888's request, PERC has appointed an arbitrator. On February 2, 2023, Rutgers filed with PERC its Petitions for a scope of negotiations determination and restraint of arbitration. (Pa39).

ARGUMENT

THE COURT SHOULD REVERSE THE ORDER AND RESTRAIN ARBITRATION BECAUSE IT IS PREEMPTED (Ruled on at Pa21-31)

A. The Order Is Subject to *De Novo* Review

The question presented on this appeal is whether the Title IX Regulations preempt a separate CNA grievance process and arbitration on the same subject matter. Because the question is one of law, this Court's review is *de novo*. *In re Ridgefield Park Bd. of Education*, 244 N.J. 1 (2020).

As the Supreme Court explained, "PERC has primary jurisdiction to determine in the first instance whether a matter in dispute is within the scope of collective negotiations." *Ridgefield Park Bd. of Education*, 244 N.J. at 16, *quoting In re New Brunswick Mun. Emps. Ass'n*, 453 N.J. Super. 408, 413 (App. Div. 2018). Deferential review, however, applies only "[i]n the absence of

constitutional concerns or countervailing expressions of legislative intent." *Ridgefield Park Bd. of Education*, 244 N.J. at 17, *quoting City of Jersey City v. Jersey City Police Officers Benevolent Ass'n*, 154 N.J. 555, 567 (1998). For questions of law, review is *de novo*:

> "when an agency's decision is based on the 'agency's interpretation of a statute or its determination of a strictly legal issue,' we are not bound by the agency's interpretation." Instead, we review that determination *de novo*.

Ridgefield Park Bd. of Education, 244 N.J. at 17 (internal citations omitted).

Here, the preemption issue depends on an interpretation of the Title IX Regulations. Therefore, PERC's scope of negotiations determination in this case addresses a federal law outside its area of expertise. As a result, PERC's decision is not entitled to any special deference, and the Court's review is *de novo*. *See Communications Workers, Local 1034 v. N.J. State Policemen's Benevolent Ass'n*, *Local 203*, 412 N.J. Super. 286, 291 (App. Div. 2010) ("PERC's interpretation of the law outside of its charge is entitled to 'no special deference'").

B. Arbitration Is Not Appropriate Where Submission of the Matter Is Preempted or Would Impair the Determination of Government Policy

The Employer-Employee Relations Act ("EERA") requires public employers to negotiate with employee majority representatives "with respect to grievances, disciplinary disputes, and other terms and conditions of

employment." N.J.S.A. 34:13A-5.3. *See generally Rozinblit v. Lyles*, 245 N.J. 105, 125-26 (2021). The obligation to negotiate includes having a grievance process ending, where applicable, with arbitration:

> The grievance procedures that employers covered by this act are required to negotiate pursuant to section 7 of [N.J.S.A. 34:13A-5.3] shall be deemed to require binding arbitration as the terminal step with respect to disputes concerning imposition of reprimands and discipline as that term is defined in this act.

N.J.S.A. 34:13A-29(a). The CNA between Local 888 and Rutgers includes such a grievance process. (Pa164, Art. 4).

Because the duty to arbitrate under a collective negotiations agreement arises from the duty to negotiate, "[t]he scope of arbitrability is generally coextensive with the scope of negotiability." *Teaneck Bd. of Educ. v. Teaneck Teacher's Ass'n*, 94 N.J. 9, 14 (1983). As the Supreme Court explained:

> In contrast to mandatorily negotiable terms and conditions of employment, "[m]atters of public policy are properly decided, not by negotiation and arbitration, but by the political process."

Barila v. Board of Education of Cliffside Park, 241 N.J. 595, 613 (2020), *quoting In re Local 195, IFPTE AFL-CIO v. State*, 88 N.J. 393, 402 (1982). *See also Robbinsville Twp. Bd. of Education v. Washington Twp. Education Association*, 227 N.J. 192, 199-200 (2016) (distinguishing between

"mandatorily negotiable subjects and nonnegotiable matters of governmental policy").

Where a subject matter has been preempted by law or would conflict with a public policy determination, it is not negotiable under a collective negotiations agreement and "it [is] also, by definition, non-arbitrable." *City of Newark v. Newark Council 21, Newark Chapter, New Jersey Civil Service Ass'n*, 320 N.J. Super. 8, 16-17 (App. Div. 1999). This follows from the "time-honored" standard for determining negotiability. *Robbinsville Twp. Bd. of Education v. Washington Twp. Education. Ass'n*, 227 N.J. at 199. Under this standard:

> A subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) ***the subject has not been fully or partially preempted by statute or regulation****;* and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy.

In re Local 195, IFPTE AFL-CIO v. State, 88 N.J. at 404-05 (emphasis added).

Arbitration, therefore, cannot be required when the subject matter is preempted by law or conflicts with the determination of public policy.

C. The Title IX Regulations Have Preemptive Effect

1. The Preemption Standard

Preemption may arise from Federal and State administrative regulations, no less than statutory laws. For purposes of preemption, "legislation …

encompasses agency regulations." *Bethlehem Twp. Bd. of Education v. Bethlehem Twp. Education Association*, 91 N.J. 38, 44 (1982). *See also New Jersey Guild of Hearing Aid Dispensers v. Long*, 75 N.J. 544, 576 (1978) ("There is no question that Congress may authorize federal administrative agencies to preempt state laws by the promulgation of administrative regulations").

Legislation preempts negotiability and arbitrability "if the regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" *Bethlehem Twp. Bd. of Education*, 91 N.J. at 44 (1982) ("legislation which expressly set[s] terms and conditions of employment . . . for public employees may not be contravened by negotiated agreement"). The regulation must "speak in the imperative and leave nothing to the discretion of the public employer." *State v. State Supervisory Employees Association*, 78 N.J. 54, 80-82 (1978). Permitting some discretion, however, does not preclude preemption: if the legislation "contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiation will be confined within these limits" – that is, the legislation precludes negotiation outside the discretionary limits. *Bethlehem*, 91 N.J. at 44.

Where, as here, there are relevant Federal regulations, preemption also can be "rooted in the Supremacy Clause." *Hager v. M&K Construction*, 246

N.J. 1, 27 (2021) (citations omitted). Federal preemption can be express or implied. *Id*. Implied "conflict preemption" occurs either where compliance with both federal and state requirements is impossible or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.'" *Id*. at 28-29 (citations omitted). To the extent there is a conflict, therefore, the mandated Title IX Grievance Process preempts a grievance process under a collective negotiations agreement pursuant to the EERA. *US DOE Preamble*, 85 Fed. Reg. at 30298, 30371.

2. The Title IX Grievance Process Is Mandatory, Comprehensive, and Preemptive

Preemption depends on legislative intent. *In re Ridgefield Park Bd. of Education*, 244 N.J. at 18. The preemption analysis, therefore, begins with the plain language of the potentially preemptive law:

> We look first to the statute's actual language and ascribe to its words their ordinary meaning. [T]he best indicator of [the Legislature's] intent is the statutory language, thus it is the first place we look. If the plain language leads to a clear and unambiguous result, then our interpretive process is over.

Id. (citations and internal quotation marks omitted; alterations in original). If the law's language is ambiguous, the Court then "may consider extrinsic materials such as legislative history, committee reports, and other relevant

sources … as valuable interpretive aid[s] in determining the Legislature's intent." *Id*. at 19.

As explained in more detail below, both the plain language and the legislative history of the 2020 Title IX Regulations establish preemptive intent. The Regulations' plain language mandates an express, specific, and comprehensive process for determining responsibility and, where applicable, disciplinary sanctions for alleged Title IX violations. The US DOE's preamble to its Regulations explicitly confirms its preemptive intent, both as to state laws and labor agreements. *US DOE Preamble*, *supra*. Leaving no doubt, the purpose of the Regulations also confirms their preemptive scope.

a. The Plain Text Sets Forth a Mandatory and Comprehensive Process

The Title IX Regulations plainly mandate the process for recipient schools to investigate and adjudicate alleged Title IX violations, including the determination of responsibility, remedies, and disciplinary sanctions. 34 C.F.R. §§106.45(b) and 106.45(b)(1) – (8); *see* pages 5-7, *supra*. The mandated process is comprehensive and conclusive. The plain text of the Regulations, therefore, establishes their preemptive effect. *In re Ridgefield Park Bd. of Education*, *supra*.

i. The Process Is Mandatory

The Title IX Regulations are explicitly imperative. They expressly require each educational institution receiving federal funds ("recipient") to adopt and follow a Title IX-compliant grievance process:

> A recipient ***must*** adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with §106.45 for formal complaints as defined in § 106.30.
>
> . . .
>
> For the purpose of addressing formal complaints of sexual harassment, a recipient's grievance process ***must*** comply with the requirements of this section [§106.45].

34 C.F.R. §106.8(c) and §106.45(b) (emphasis added). The Regulations unequivocally direct that the recipient school "must" follow this specific process in response to complaints of covered sexual harassment:

> A recipient's response [to sexual harassment] ***must*** treat complainants and respondents equitably … by following a grievance process that complies with §106.45 before the imposition of any disciplinary sanctions….
>
> . . .
>
> In response to a formal complaint, a recipient ***must*** follow a grievance process that complies with §106.45.

34 C.F.R. §106.44(a) and (b) (emphasis added).

By repeatedly using the word "must" with respect to the Title IX process, the Regulations leave no doubt as to their imperative effect. *See*, *e.g.*, *Harvey v. Essex County Board of Freeholders*, 30 N.J. 381, 391-92 (1959) ("the words 'must' and 'shall' are generally mandatory"); *accord State v. A.M.*, 472 N.J. Super. 51, 71-72 (App. Div. 2022). The Regulations, therefore, explicitly have the mandatory effect necessary for preemption.

ii. The Process Is Comprehensive

The Title IX Regulations also are comprehensive. They do not merely mandate that schools adopt and follow a grievance process. As addressed at pages 5-7, *supra*, the Regulations specifically define the elements of the mandated Title IX Grievance Process. 34 C.F.R. §106.45(b). They define underlying principles for the process, such as presumptions, standards of evidence, notice, representation, and unbiased investigators and decision-makers. *Id*.; *see* pp. 6-7, *supra*. They also define a complete set of procedural steps to address and resolve a Title IX complaint: from the intake of a formal complaint and initial handling, through investigation, a live hearing, written determination, appeal, and determination of the appeal. 34 C.F.R. §§106.45(b)(1) – (8); see pp. 6-7*, supra*.

The comprehensiveness of the Title IX Grievance Process is underscored by its terminal steps. The mandated Written Determination that concludes the

live evidential hearing itself has a comprehensive scope. 34 C.F.R. §106.45(b)(7)(ii). It is required to determine responsibility, and, where applicable, disciplinary sanctions and remedies:

> A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any ***disciplinary sanctions the recipient imposes on the respondent***, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant.

34 C.F.R. §106.45(b)(7)(ii)(E) (emphasis added). Further, each aspect of the Written Determination must be supported by "findings of fact supporting the determination." 34 C.F.R. §106.45(b)(7)(ii)(C).

The mandated appeal process also is comprehensive. 34 C.F.R. §106.45(b)(8). The Title IX Regulations address "the procedures and permissible bases for the complainant and respondent to appeal." 34 C.F.R. §106.45(b)(8)(viii). The Regulations enumerate grounds for appeal. 34 C.F.R. §106.45(b)(8)(i)(A)-(C). The Regulations mandate "a written decision describing the result of the appeal and the rationale for the result." 34 C.F.R. §106.45(b)(8)(iii)(E). The Regulations also mandate the conclusion of the process:

> The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not

> filed, the date on which an appeal would no longer be considered timely.

34 C.F.R. §106.45(b)(7)(ii)(E).

While the Regulations permit a recipient school to include additional grounds for appeal in its adopted process (beyond those enumerated in the Regulations), 34 C.F.R. §106.45(b)(8)(i)(A)-(C), the Regulations also explicitly limit that discretion. First, any additional grounds for appeal must be set forth ***within*** the recipient's Title IX Grievance Process:

> A recipient's grievance process must … Include the procedures and permissible bases for the complainant and respondent to appeal.

34 C.F.R. §106.45(b)(1)(viii). Second, any such grounds must be available to both parties:

> Any provisions, rules, or practices other than those required by this section that a recipient adopts as part of its grievance process for handling formal complaints of sexual harassment as defined in §106.30, ***must apply equally to both parties***.
>
> . . .
>
> A recipient may offer an appeal ***equally to both parties*** on additional bases.

34 C.F.R. 34 C.F.R. §106.45(b) and (b)(8)(ii) (emphasis added). Third, any such additional appeal provisions must comport with other Title IX Regulation mandates applicable to the appeal process – including decision-maker Title IX

training, application of a previously defined standard of evidence, and consideration of the Title IX purposes and goals. 34 C.F.R. §106.45(b)(1)(iii), (b)(7)(i), and (b)(7)(ii)(E).

In all respects, therefore, the Title IX Regulations set forth an express, specific, and comprehensive process that recipients must follow to respond to complaints of covered sexual harassment.

b. <u>The US DOE Confirmed Its Preemptive Intent</u>

Because the regulatory language plainly demonstrates preemptive effect, there is no need to go beyond that text. *See In re Ridgefield Park Bd. of Education*, *supra*. Doing so, however, confirms the preemptive scope and effect of the Regulations.

In the preamble to its Regulations, the US DOE expressly stated its preemptive intent:

> 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.

US DOE Preamble, 85 Fed. Reg. at 30454-30455. This preemptive effect is integral to the governmental policy determination regarding the prohibition of sexual harassment within educational institutions:

> where Title IX is implicated the Department [US DOE] has determined that the protections and rights set forth in these final regulations represent the most effective

> ways to promote Title IX's non-discrimination mandate, and recipients of Federal financial assistance agree to comply with Title IX obligations as a condition of receiving Federal funds.

Id. at 30371. Leaving no doubt, the US DOE specifically addressed the preemptive effect as to collective negotiation agreements:

> [W]e wish to clarify that in the event of an actual conflict between a union contract or practice and the final regulations, then ***the final regulations would have preemptive effect***.

Id. at 30298 (emphasis added).

The US DOE, therefore, has clearly stated its intent that the Regulations have preemptive effect, and that they do not permit a conflicting process under a collective negotiations agreement or otherwise.

c. The Entire Title IX Process Has Preemptive Effect, Including the Written Determination and Disciplinary Sanctions

In addition to the Regulations' text and the US DOE's clear statements of general preemptive intent, the Regulations' expressed purpose also defines the scope of preemption. *See In re Ridgefield Park Bd. of Education*, 244 N.J. at 10 (considering statutory language "in conjunction with [the statute's] purpose and legislative history" to find "plain" preemptive intent); *Hager v. M&K Construction*, 246 N.J. at 29 ("The purpose of Congress is the ultimate touchstone"). This purpose confirms that the ***outcome*** of the Title IX Grievance

Process – the Written Determination of responsibility and disciplinary sanction, as upheld or modified in an appeal determination under that process – is an integral part of the mandated process and its preemptive scope.

The Title IX Regulations implement the Title IX prohibition of sex discrimination in schools receiving Federal funds. *US DOE Preamble*, 85 Fed. Reg. at 30026. The explicit purpose of the mandated Title IX Grievance Process – including the Written Determination of responsibility and disciplinary sanctions – is to fulfill the recipient school's legal obligation to address ***and remedy*** sexual harassment. As the US DOE explained:

> These regulations are intended to effectuate Title IX's prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in education programs or activities. The final regulations obligate recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, ***resolve*** allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and ***effectively implement*** remedies for victims.

US DOE Preamble, 85 Fed. Reg. at 30026 (emphasis added). The Title IX Grievance Process, therefore, addresses the recipient school's legal obligations:

> These final regulations are premised on setting forth clear legal obligations that require recipients to: Promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process ***to resolve***

> sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the recipient's behalf that an investigation is necessary; and ***provide remedies*** to victims of sexual harassment.

Id. at 30030 (emphasis added).

As clearly stated by the US DOE, therefore, the Written Determination of responsibility and disciplinary sanction is not a mere suggestive outcome. It is an integral part of the mandated Title IX Grievance Process: the recipient school must "effectively implement remedies" and "provide remedies." *US DOE Preamble*, 85 Fed. Reg. at 30026 and 30030. Were it otherwise, the whole Title IX Grievance Process would be relegated to mere exercise and its outcome something that could be ignored, re-adjudicated, and negated in a separate process. The Regulations' purpose as reflected in their text and the US DOE's statements is plainly to the contrary.

D. The Grievance Arbitration Sought by Local 888 Collaterally Attacks, Conflicts with, and Is Preempted by the Title IX Regulations

In this case, Rutgers followed the Title IX Grievance Process mandated by the Title IX Regulations. (Pa46, 136-37). The process concluded with the required Written Determination and a written appeal decision upholding it. (Pa119, 148). The Written Determination found that J.M. sexually harassed and assaulted the complainant. (Pa125-26). As required by the mandated process,

the Written Determination also addressed the disciplinary sanction warranted by the finding of responsibility:

> there is just cause to terminate the Respondent's employment with Rutgers University effective immediately, consistent with the terms of University Policies and the collective negotiations agreement between the University and the AFSMSC Local 888.

(Pa126). Under the Title IX Grievance Process, and as required by the Title IX Regulations, the Written Determination as upheld on appeal is final. (*See* p. 8, *supra*, addressing 34 C.F.R. §106.45(b)(7)(iii) and Exh. 3 §VIII.K.5). It is not and should not be subject to collateral attack outside of the now completed Title IX Grievance Process.

Local 888 now seeks to re-adjudicate the same issue in a grievance arbitration pursuant to the CNA grievance process. The CNA grievance process would conflict with the mandated Title IX Regulations both procedurally and substantively.

1. Local 888's Grievance Arbitration Procedurally Conflicts with the Title IX-Mandated Process

The CNA grievance arbitration sought by Local 888 would revisit the Written Determination made under the Title IX Grievance Process: whether J.M. sexually harassed and assaulted a co-worker and whether his conduct constitutes just cause for discharge. In doing so, the CNA arbitration would displace the

mandated Title IX Grievance Process with a different resolution process that lacks the procedural protections required by the Regulations.

The core purpose of the Title IX Regulations is to establish a process that protects the due process rights of both the complainant and the accused while enabling the school to conclude the matter with a resolution that, if sexual harassment is found, includes disciplinary sanctions and remedial actions. With respect to due process, the US DOE explained the Regulations' animating principle: to mandate "a predicable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment" and to balance policy considerations unique to sexual harassment in the educational environment through a "prescribed grievance process giv[ing] strong due process protections to both parties." *US DOE Preamble*, 85 Fed. Reg. at 30026, 30050, and 30127. Under the Title IX Regulations, the right of both the alleged victim and perpetrator to "meaningfully participate" in any proceeding is "an essential requirement for due process." *Id*. at 30265.

To the extent that the Regulations permit any "provisions, rules, or practices other than those required by this section [34 C.F.R. §106.45]," therefore, they must comport with the due process protections required by the Regulations. They must explicitly be included in – "adopt[ed] as part of" – the school's Title IX Grievance Process. 34 C.F.R. 106.45(b). They "must apply

equally to both parties." *Id*. And they must comport with other procedural protections mandated by the Regulations. *Id*.

The CNA arbitration process violates these basic procedural precepts. The Title IX Regulations, therefore, do not permit the CNA arbitration process as a provision, rule, or practice supplementing the comprehensive steps enumerated in the Regulations.

Specifically, the CNA arbitration process is not included or "adopted" as part of the Title IX Policy, as a supplemental appeal, review, or otherwise. Moreover, and critically, the CNA arbitration process does not "apply equally" to both the sexual harassment victim and the accused. To the contrary, in an arbitration under the CNA, the sexual harassment victim would be shorn of the procedural rights that are central to the framework and purpose of the Title IX Regulations. The sexual harassment victim is not even a party to a CNA arbitration brought on behalf of the accused harasser to contest the just cause of his discipline and, therefore, has no rights under that process whatsoever. For example, unlike the grievant (the accused harasser) in a CNA arbitration brought by the union on his behalf, the sexual harassment victim would not have the rights to:

- Notice of the proceedings;
- Participate in the selection of the arbitrator (as provided to the grievant in the CNA arbitration process);

- Gather, provide, and respond to evidence prior to or during the arbitration; or
- Participate in the arbitration, including presenting evidence and examining and cross-examining witnesses.

In each of these respects, the CNA arbitration process fails to "apply equally" to both the sexual harassment victim and the accused.

The CNA arbitration process also would deprive the sexual harassment victim of other rights that the Title IX Regulations require for the adjudication and resolution of sexual harassment issues. In addition to the absence of required procedural steps, *see* pp. 6-7, *supra*, the CNA arbitration process does not require that a decision-maker have Title IX training. 34 C.F.R. §106.45(b)(1)(iii). It does not require application of the previously defined standard of evidence. 34 C.F.R. §106.45(b)(7)(i). And it does not require considering the purposes and goals of Title IX, including "whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant." 34 C.F.R. §106.45(b)(7)(ii)(E). All of these procedural points are integral to the purpose and intent of the Title IX Regulations.

In the proceedings below, PERC and Local 888 sought to circumvent these clear procedural conflicts in two ways. Neither has merit.

First, PERC and Local 888 sought to reconcile a CNA arbitration with the Title IX Regulations by viewing it as an additional appeal permitted under 34 C.F.R. §106.45(b)(8)(ii). The same conflicts, however, remain: The CNA arbitration is not included in the Title IX Policy and does not apply equally to both parties. With respect to these requirements and others, ***the Regulations are as clear and comprehensive for appeals as they are for other parts of the Title IX Grievance Process.*** The Regulations require that any appeal process, including any supplemental procedures or grounds for appeal, must be set forth explicitly in the Title IX Grievance Process:

> A recipient's grievance process must … Include the procedures and permissible bases for the complainant and respondent to appeal….

34 C.F.R. §106.45(b)(1)(viii). Further, any such additional procedures or grounds for appeal must be equally available to the complainant and respondent:

> A recipient may offer an appeal equally to both parties on additional bases … [and] implement appeal procedures equally for both parties.

34 C.F.R. §106.45(b)(8)(ii) and §106.45(b)(8)(iii)(A). Leaving no doubt, the Regulations reiterate both points together:

> Any provisions, rules, or practices other than those required by this section that a recipient ***adopts as part of its grievance process*** for handling formal complaints of sexual harassment as defined in §106.30, ***must apply equally to both parties***.

34 C.F.R. §106.45(b) (emphasis added). The CNA arbitration also conflicts with other procedural requirements for an appeal from a Title IX Grievance Process determination. These include:

- Having appeal decision-makers who comply with Title IX standards, including training. 34 C.F.R. §106.45(b)(1)(iii).
- Giving the victim the right to have an advisor of their own choosing advocating on their behalf. 34 C.F.R. §106.45(b)(5)(iv).
- "Giv[ing] both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome." 34 C.F.R. §106.45(b)(8)(iii)(D).
- "Provid[ing] the written decision simultaneously to both parties." 34 C.F.R. §106.45(b)(8)(iii)(E) and (F).

Second, PERC and Local 888 relied on the happenstance that J.M.'s victim is a Local 888 unit member to view CNA arbitration as an appeal procedure applying "equally for both parties." 34 C.F.R. §106.45(b)(8)(iii)(A). For an appeal regarding disciplinary sanctions to apply "equally for both parties," the procedure must not only permit the accused sexual harasser to challenge the disciplinary sanction; it also must permit the sexual harassment victim to do so – that is, to seek in the appeal the imposition of greater disciplinary sanctions (*i.e.*, where the discipline imposed following the hearing was less than discharge). The US DOE explicitly made this point:

> We have also removed the limitation that precluded a complainant from appealing the severity of sanctions; the final regulations leave to a recipient's discretion whether severity or proportionality of sanctions is an

> appropriate basis for appeal, but any such appeal offered by a recipient must be offered equally to both parties.

US DOE Preamble, 85 Fed. Reg. at 30396; *see also id*. at 30397 ("whether the parties can appeal based solely on the severity of the sanctions is left to the recipient's discretion, though if the recipient allows appeals based on that basis, both parties must have equal opportunity to appeal on that basis").

Regardless of the happenstance of whether J.M.'s victim was a member of the same union as J.M., the CNA grievance process and arbitration do not apply equally to J.M. and his victim regarding disciplinary sanctions. J.M.'s victim could not grieve the discipline imposed on J.M. *See Twp. of Neptune and AFSCME Council 63, Local 2792*, 48 NJPER 97, slip op. at 11-12 (PERC April 28, 2022) (Pa181).[4] But even if such a grievance could be filed, it still would lack the procedural elements mandated by the Title IX Regulations – whether framed as an appeal or otherwise. (*See* pp. 30-35, *supra*). Just as importantly, it would not be part of the proceeding that is the subject matter of this appeal: Local 888's requested grievance arbitration on behalf of J.M. There is no

[4] Permitting arbitration claiming discrimination by supervisors only to the extent that it did not implicate a managerial prerogative: "Accordingly, to the extent that Local 2792's grievances seek an arbitral remedy that would order the Township to impose discipline on certain employees, arbitration must be restrained." *Id*.

dispute that J.M.'s victim is not a party to Local 888's grievance on behalf of J.M. (indeed, for the same reason, she is not a party to this appeal). Any hypothetical ability of J.M.'s victim to submit her own grievance under the CNA does nothing to bring Local 888's grievance arbitration on behalf of J.M. into the scope of and compliance with the Title IX Requirements and the mandated Title IX Grievance Process.[5]

In sum, the CNA arbitration sought by Local 888 undermines the most basic principle of the Title IX Regulations regarding due process and the careful balancing of the rights of the sexual harassment victim and the accused. The CNA arbitration does not include due process protections for J.M.'s victim, who would not even be included as a party and, therefore, would have no *right* to participate in the arbitration, to present evidence, or to examine and cross-examine witnesses. Instead, the CNA arbitration would subject J.M.'s victim to a procedure designed only to address J.M.'s rights, rather than the one designed and mandated by the US DOE to have a careful balancing of and procedural protections for both the harassment victim's and accused's rights.

---

[5] Nor would such a hypothetical CNA grievance on behalf of J.M.'s victim comport with the Title IX Regulations. It would not include the procedural elements and protections mandated by the Regulations to protect both the victim and the accused. *See* pp. 30-35, *supra*. Further, just as J.M.'s CNA grievance does not include his victim as a party, a hypothetical grievance by J.M.'s victim would not include J.M. as a party – in each case, violating a basic right mandated by the Regulations.

Whether as an appeal or otherwise, therefore, permitting the CNA Grievance Process to proceed would alter and conflict with the procedural framework and balancing of rights established by the Title IX Regulations. That is precisely what preemption prevents. *See*, *e.g.*, *USA Chamber of Commerce v. State*, 89 N.J. 131 (1982) (holding that Strikebreakers Act was preempted as to NLRA-covered employees because it would interfere with the "the federal framework structuring the economic balance between employer and union").

2. Local 888's Grievance Arbitration Substantively Conflicts with the Title IX-Mandated Process

The proposed CNA arbitration is specifically intended to collaterally attack and negate the final determination that resulted from the mandated Title IX Grievance Process. Specifically, the Title IX Grievance Process resulted in a determination that J.M. engaged in conduct that (i) violated the Title IX Policy and (ii) constituted just cause to terminate his employment. (Pa125-26, Written Determination, and Pa147, Appeal Determination). Local 888 seeks through its grievance and related CNA arbitration to reverse those conclusions. This creates a direct conflict between the two processes requiring preemption.

In the Order below, PERC permits Local 888 to arbitrate under the CNA the ***same*** issue that already was determined in the Title IX Grievance Process. In PERC's words:

> We find that 34 C.F.R. § 106.45 does not preempt negotiation over the subject of the grievances at issue, that is, ***whether there was just cause to terminate the grievants' employment***.

(Pa25). Local 888's arbitration request itself states this intended subject matter of the arbitration:

> Whether the grievant, [J.M.], was terminated for just cause.

(Pa177).

The requested CNA grievance arbitration, therefore, explicitly seeks to change the outcome of the mandated Title IX Grievance Process. If Local 888 and J.M. were to prevail in the requested arbitration and obtain an award of reinstatement, J.M.'s victim would lose the rights and remedy obtained through the Title IX Grievance Process – including the removal of her sexual harasser from the workplace. Rutgers itself would be subject to potentially conflicting determinations: under the Title IX Grievance Process, Rutgers must respond to the determination that J.M. sexually harassed a co-worker and that there is just cause for termination, while in a CNA arbitration Rutgers could be faced with a contrary arbitration award.

In each of these respects, there is a direct conflict requiring preemption. As the New Jersey Supreme Court has instructed, Federal conflict preemption arises when "state law 'stands as an obstacle to the accomplishment and

execution of the full purposes and objectives of Congress'" or compliance with both laws would be impossible. *Hager v. M&K Construction*, 246 N.J. at 28-29. Here, Local 888 and J.M. seek to use the requested CNA arbitration to negate the determinations reached under the Title IX Grievance Process. As expressed by the US DOE, however, the mandated Title IX process is integral to the objectives of Title IX:

> to effectuate Title IX's prohibition against sex discrimination [by] obligat[ing] recipients to respond promptly and supportively to persons alleged to be victimized by sexual harassment, resolve allegations of sexual harassment promptly and accurately under a predictable, fair grievance process that provides due process protections to alleged victims and alleged perpetrators of sexual harassment, and effectively implement remedies for victims.

US DOE Preamble, 85 Fed. Reg. at 30026.

PERC appears to have recognized the conflict it was creating. It sought to avoid the conflict, therefore, by minimizing the Title IX Grievance Process determination of "just cause" as being merely a "recommendation." (Pa18).

PERC's characterization of the Title IX determination is incorrect. While framing the disciplinary sanction as "recommending dismissal," the Written Determination made a specific "find[ing]" of "just cause" for termination, not merely a recommendation:

> ***I find that there is just cause to terminate the Respondent's employment with Rutgers University***

> ***effective immediately***, consistent with the terms of University Policies and the collective negotiations agreement between the University and the AFSMSC Local 888.

(Pa126; emphasis in original). Leaving no doubt, the Written Determination stated that this determination was based on the applicable preponderance of the evidence standard and finding of sexual harassment and assault. (*Id*.) There is nothing equivocal about this determination.

The finding of "just cause" is part of the mandated determination. The Title IX Regulations require "***a determination*** regarding … any disciplinary sanctions the recipient imposes on the respondent," not merely a recommendation. 34 C.F.R. §106.45(b)(7)(ii)(E) (emphasis added). PERC itself acknowledged this point in its Order. (Pa13-14). Consistent with the Regulations, the Title IX Policy also clearly states that its grievance process includes the determination and imposition of disciplinary sanctions, not merely a recommendation:

> The Decision-maker(s) ***will impose sanctions***…. The Decision-maker(s) will consider recommended sanctions and may consult the appropriate Title IX Coordinator to obtain information about sanctions imposed in similar cases. However, the Decision-maker(s) ***will determine the appropriate sanctions to impose***.

(Pa82, Title IX Policy §VIII.L.1).

Further, the Written Determination's finding of "just cause" is inextricably linked with the mandated determination of responsibility. The "just cause" determination cannot be challenged without implicating the Written Determination that J.M. had engaged, as PERC acknowledged, in a "course of conduct" constituting "sexual harassment" and "non-consensual sexual assault." (Pa125-26). To the contrary, the Written Determination explicitly based the "just cause" determination on these findings. (Pa126).

Local 888's requested arbitration specifically seeks to overturn the outcome of the Title IX Grievance Procedure. The requested arbitration, therefore, would be a collateral attack against the Title IX-mandated Written Determination. It thereby conflicts with and is preempted by the Title IX Regulations.

3. The Title IX Policy Does Not Incorporate CNA Arbitration as a Supplemental Appeal Process or Otherwise

In its Order, PERC appears to have adopted Local 888's argument that the Title IX Regulations somehow permit arbitration under the CNA. As addressed in Point D.1, *supra*, the Title IX Regulations do not permit an extraneous appeal process. Any additional procedure or grounds for appeal from the Written Determination ***must*** be set forth in the Title IX Grievance Process. 34 C.F.R. §106.45(b) and §106.45(b)(1)(viii).

The question, therefore, is whether Rutgers' Title IX Policy incorporates the CNA grievance process. It does not. The appeal section of the Title IX Policy makes no reference to the CNA grievance process or arbitration. (Pa84-85, Title IX Policy §VIII.M). That is undisputed. To the contrary, the Title IX Policy specifically forecloses challenges based on "[d]isagreement with … sanctions." (*Id.*) There is no basis to add by implication what the Policy explicitly does not permit. *See GE Solid State v. Director, Div. of Taxation*, 132 N.J. 298, 308 (1993) (a term "should not be implied where excluded").

Instead, PERC and Local 888 incorrectly rely on the Title IX Policy provision addressing available disciplinary sanctions. (Pa14, 29). As required by Title IX, 34 C.F.R. §106.45(b)(1)(vi), the Policy includes a "Sanctions and Other Remedial Measures" section. It provides:

> For employees, sanctions may include discipline up to and including termination of employment, consistent with the terms of all University Policies concerning personnel actions and the terms of any applicable collective negotiations agreements.

(Pa83, Title IX Policy §VIII.L.3).

This Policy language neither refers to nor incorporates extraneous grievance or dispute resolution processes. Instead, the provision complies with the Title IX Regulation requirement that the Title IX Grievance Process define the range of potential disciplinary sanctions. 34 C.F.R. §106.45(b)(1)(vi).

Rather than incorporate extraneous processes, therefore, it merely defines the range of possible disciplinary actions as required by the Regulation. Related language in the Policy confirms that the Policy addresses consistency with the substance, not process, of possible disciplinary actions under other policies or agreements:

> The Decision-maker(s) will impose sanctions…. The Decision-maker(s) will consider recommended sanctions and may consult the appropriate Title IX Coordinator to obtain ***information about sanctions imposed in similar cases***. However, the Decision-maker(s) will determine the appropriate sanctions to impose. In all cases involving employee Respondents, ***the decision concerning discipline shall be consistent with*** the terms of all University Policies and the terms of any collective negotiations agreements that may be applicable.

(Pa82, Title IX Policy §VIII.L.1). Similarly, by explicitly foreclosing any challenge based on "[d]isagreement with … sanctions," the Title IX Policy confirms that disciplinary sanctions are not subject to further review. (Pa84, Title IX Policy §VIII.M).

Thus, the Decision-Maker is to determine disciplinary sanctions consistent with sanctions imposed in similar cases, under other policies, and under any collective negotiations agreements – for example, termination for "just cause." Following the Policy, therefore, the Written Determination in this case described its "just cause to terminate" conclusion as being "consistent with"

the discipline available under Rutgers' policies and the CNA. (Pa126). Nothing in the Title IX Policy nor the Written Determination incorporates grievance procedures in any other policies or agreements. Nor could it do so. *See* Points D.2 and D.3, *supra*.

4. The *New Jersey Turnpike Authority* Decision Contradicts PERC's Conclusion

PERC cites *New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Association*, 143 N.J. 185 (1996), for the "general holding … that contractual disciplinary procedures, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment." (Pa31). PERC, however, ignores the key distinction between *New Jersey Turnpike Authority* and this case and, thereby, ignores the key limitation to the cited "general holding." Contrary to PERC's conclusion, *New Jersey Turnpike Authority* supports finding preemption where, as here, there is a legally-mandated grievance process.

The issue in *New Jersey Turnpike Authority* was whether the New Jersey Law Against Discrimination (NJLAD) preempted collectively negotiated disciplinary procedures. 143 N.J. at 188, 201, 203. The Court addressed only the NJLAD; it did not address Title IX or the current Title IX Regulations (which were not issued until 2020 and, therefore, did not exist in 1996). Unlike the current Title IX Regulations, the NJLAD does not mandate that employers adopt

and follow specific grievance or dispute resolution procedures. As the Court noted, "[n]othing in the LAD speaks in such an imperative." 143 N.J. at 203. The Court also explained that the NJLAD is designed to "protect ***victims*** of sexual harassment" and, unlike a contractual grievance process, does not address "procedures by which ***the person charged with harassment*** may challenge his or her disciplinary penalty." 143 N.J. at 197 (emphasis in original). The Court, therefore, distinguished the N.J.S.A. 34:13A-5.3 directive that collectively negotiated grievance procedures "may not replace or be inconsistent with any alternate statutory appeal procedure." *Id*. at 195, 197. On that basis, the Court held that the NJLAD did not preempt such grievance procedures. *Id.* at 203.

At the same time, however, the Court recognized that a process mandated by law could preempt a collectively negotiated grievance procedure. As the Court explained, preemption would occur if the alleged wrongdoer had a statutory avenue to dispute discipline:

> Thus, under the [EERA] an employer may agree to submit a disciplinary dispute to binding arbitration pursuant to the negotiated disciplinary procedures, provided those procedures neither replace nor are inconsistent with any other statutory remedy. ***If an aggrieved employee has an alternative statutory remedy against alleged unjust discipline, then binding arbitration of that grievance, otherwise authorized as part of negotiated disciplinary procedures, may not be invoked***.

143 N.J. at 196 (emphasis added). The Court held that the NJLAD did not preempt the employee's grievance only because the statute did not provide a procedure for him to dispute the imposition of discipline. *Id*. at 203.

Here, the Title IX Regulations provide what the NJLAD did not: an "alternative statutory remedy against alleged unjust discipline." 143 N.J. at 196. As required by the Regulations, the Title IX Grievance Process gives an individual such as J.M. multiple opportunities to dispute whether there should be any disciplinary sanction. For example, even before the hearing, J.M. and his attorney Advisor had the right to participate in the investigation and, then, the right to respond to the investigation report. 34 C.F.R. §106.45(b)(5)(ii) and (vi). At the hearing, J.M. and his attorney Advisor again had the right to address not only whether he had engaged in sexual harassment and assault but also what level of disciplinary sanction was appropriate, including whether there was just cause for dismissal. 34 C.F.R. §106.45(b)(6). The Title IX Regulations specifically condition any disciplinary sanctions on the completion of these procedures:

> A recipient's grievance process must—
>
> (i) Treat complainants and respondents equitably … by following a grievance process that complies with this section before the imposition of any disciplinary sanctions … against a respondent.

34 C.F.R. §106.45(b)(1)(i). The Written Determination is the culmination, therefore, of the very type of "alternative statutory remedy" to which the Court referred in *New Jersey Turnpike Authority*, *supra*. 143 N.J. at 196.

This case involves what was absent in *New Jersey Turnpike Authority*, *supra*. The Title IX Regulations mandate a specific grievance procedure for the accused employee as well as the alleged victim. The comprehensive Title IX Grievance Procedure, therefore, preempts an inconsistent grievance process under the CNA. *E.g.*, *Bethlehem Twp. Bd. of Education*, *supra*; *In re Ridgefield Park Bd. of Education*, *supra*.

CONCLUSION

For the foregoing reasons, Rutgers respectfully submits that the Court must reverse PERC's August 24, 2023 Order and direct the entry of an Order restraining the arbitration of the subject grievance submitted by Local 888 on behalf of J.M.

Respectfully submitted,

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RE: **In the Matter of Rutgers, the State University of New Jersey, Appellant -and- AFSCME Local 888, Respondent; App. Div. Dkt. No. A-000277-23 Agcy Dkt. Nos. - SN-2023-028 and SN-2023-029**

Dear Mr. Orlando:

The New Jersey Public Employment Relations Commission (Commission or PERC) files this letter brief in opposition to the appeal of Rutgers University (University or Rutgers) from PERC's final agency decision issued on August 24, 2023, P.E.R.C. No. 2024-2, 50 NJPER 127 (¶31 2023) (Pa8-32[1/]).

1/ All citations to the record herein with the designation "Pa__" refer to the Appendix filed by the University on January 5, 2024. See, R. 2:6-8.

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PRELIMINARY STATEMENT

PERC submits this letter brief in support of its well-reasoned decision finding that the federal Title IX regulations do not preempt the disciplinary review procedures in the parties' CNA. The record establishes that the University complied with its Title IX investigation procedures while it examined the allegations against the grievants. This pre-disciplinary Title IX investigation and adjudication, and subsequent post-disciplinary grievance challenging disciplinary action are two separate procedures. These separate processes coordinate to protect the rights of the University, the University community, and majority representatives, including Local 888. The findings ascertained by the University's investigation may be presented to the neutral and independent labor arbitrator to establish just cause for the imposed discipline.

PROCEDURAL HISTORY AND COUNTERSTATEMENT OF MATERIAL FACTS[2/]

In February 2022, the University received complaints from three employees (the complainants) alleging that they were sexually harassed by two[3/] of their coworkers. (Pa15). At all relevant times, both the complaints and the accused employees (the respondents) were members of American Federation of State, County and Municipal Employees, Local 888, AFL-CIO (AFSCME Local 888 or "the Local"). (PA15-16). The Local represents certain employees of the University with which it has negotiated a collective negotiations agreement (CNA). (Pa154-69). In response to these complaints, the University initiated an investigation pursuant to the Title IX regulations and its policy governing these disputes. (Pa16). After the completion of the investigation, the University conducted a hearing, also in accordance with Title IX regulations, to determine whether the respondents violated the University sexual harassment policy and if so, what punishment those employees should receive. (Pa16-17). Both the complainants and respondents, and, by implication, the University, but not the

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2/ The procedural history and statement of facts are combined because the facts material to the issues on appeal are largely procedural in nature.

3/ Following the notice of appeal, the grievance and demand for arbitration in SN-2023-028 (Grievant "I.R.M.") was withdrawn, leaving only the matter in SN-2023-029 justiciable (Grievant "J.M.").

Local, were parties to this process as defined in the Title IX policy. (Pa58).

After the conclusion of hearings conducted in July 2022, the University-appointed "decision-maker" concluded that both respondent employees had violated the Title IX and sexual harassment policies and determined there was "just cause" to terminate the employment of both employees. (Pa18). After exhausting the limited Title IX appeal process[4/], both employees were separated from employment in September 2022. (Pa19).

In response to the disciplinary actions, the Local filed grievances in September 2022 alleging that the University breached the CNA between the University and the Local because Rutgers did not have just cause to terminate the employment of the two grievants. (Pa19). The University, asserting that regulations to Title IX of the Education Amendment Acts of 1972, 20 U.S.C. §1681; 34 C.F.R. § 106, preempts any negotiated disciplinary review process, such as the grievance arbitration required by contract here, denied the grievances. (Pa19). On September 20 and October 3, 2022, the Local submitted both grievances to arbitration by filing a request for a panel of arbitrators with the Commission's Director of Conciliation and Arbitration. (Pa174-175). In

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4/ For employees of the University, the Rutgers Title IX allows appeals only for procedural irregularity, newly discovered evidence, or conflict of interest or bias (Pa84-85).

response, the University filed two scope of negotiations petitions with the Commission, seeking restraints of binding arbitration. The University asserted that Title IX preempts negotiations over the CNA's disciplinary procedure. (Pa39-44).

The scope petitions were consolidated by agreement of the parties. The parties thoroughly briefed the issues and the the Commission issued its final decision and order on August 24, 2023. (Pa31-32). The Commission unanimously determined that Title IX regulations do not preclude arbitration of disciplinary actions issued pursuant to that process. (Pa31-32). Specifically, the Commission held that a negotiated disciplinary process was not preempted because, in applying PERC and New Jersey precedent, "contractual disciplinary procedures, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment." (Pa31-32). This appeal ensued. (Pa4-7).

LEGAL ARGUMENT

THE STANDARD OF REVIEW

The tripartite Commission has "broad authority and wide discretion in a highly specialized area of public life" and is entrusted with deciding cases based upon its "expertise and knowledge of circumstances and dynamics that are typical

or unique to the realm of employer-employee relations in the public sector." *Hunderdon Cty. Freeholder Bd. and CWA*, 116 N.J. 322, 328 (1989). The Commission's application of its expertise to the issues and facts presented should receive deference unless arbitrary, including its negotiability determinations even where other statutes are applicable. This "delegated authority is broad enough to enable [PERC] to apply laws other than which it administers, and should be construed so as to permit the fullest accomplishment of the legislative intent." *Hunderdon Central H.S. Bd. of Ed. v. Hunderdon Central H.S. Teach. Ass'n*, 174 N.J. Super. 468 (App. Div. 1980), *aff'd*, o.b. 86 N.J. 43 (1981).

I: ARBITRATION OF EMPLOYEE DISCIPLINE IS WITHIN THE SCOPE OF NEGOTIATIONS UNLESS PREEMPTED BY STATUTE

The Employer-Employee Relations Act (EERA) governs collective negotiations between public employers, including Rutgers, and public employees. N.J.S.A. 34:13A-1 to -64. Pursuant to the EERA, once employees select an exclusive representative, both the union and the employer must "negotiate in good faith with respect to grievances, **disciplinary disputes**, and other terms and conditions of employment." N.J.S.A. 34:13A-5.3 (emphasis added). Where, as here, a party seeks from PERC "a determination as to whether a matter in dispute is within the scope of negotiations," N.J.S.A. 34:13A-5.4d, the Commission has a limited role:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.
>
> *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 78 N.J. 144, 154 (1978).

In determining whether a subject is mandatorily negotiable, the Commission utilizes the three-prong test articulated in *Local 195, IFPTE v. State*, 88 N.J. 393 (1982).

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.
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> *Id*. at 404-405.

Where all three prongs are met, the subject is deemed "mandatorily negotiable." *Id.* It is equally well-established that "[t]he scope of arbitrability is generally coextensive with the scope of negotiability." *Teaneck Bd. of Ed. v. Teaneck Teacher's Ass'n*, 94 N.J. 9, 14 (1983).

Fundamental to collective negotiations and a primary role of union representation is the ability for the labor organization to challenge disciplinary actions that it contends are without just or proper cause. In fact, a union's ability to negotiate disciplinary procedures and contest disciplinary actions, including through binding arbitration, is explicitly required by the EERA, which mandates that:

> Public employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal the interpretation, application or violation of policies, agreements, and administrative decisions, including disciplinary determinations, affecting them…Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving disputes.
>
> N.J.S.A. 34:13A-5.3.

PERC has consistently held that absent statutory or regulatory preemption, the ability for an employee organization to challenge discipline concerns a term and condition of employment and does not infringe on an inherent managerial

prerogative. *See*, *e.g.*, *N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass'n*, 143 N.J. 185, 205 (1996).

II: THE PRE-DISCIPLINARY TITLE IX INVESTIGATORY AND ADJUDICATIVE PROCESS DOES NOT PREEMPT OR CONFLICT WITH POST-DISCIPLINARY GRIEVANCE ARBITRATION

The University's preemption argument fundamentally misidentifies the nature of the Title IX process and avers without legal support or precedent that Local 888's right to challenge disciplinary actions imposed at the conclusion of the Title IX process conflicts with the Congressional mandate prohibiting and remediating sexual harassment on college campuses. In its decision denying the University's petition, PERC correctly framed the issue before it and found that Title IX Regulations did not govern grievance and arbitration of final discipline based on the plain language of the regulations especially when considering the temporal aspect of the Title IX process in comparison to the collectively negotiated grievance process. It is abundantly clear that the Title IX regulations govern the investigatory and adjudication process **before** an agent of the University may impose disciplinary sanctions and does not fix with any specificity a disciplinary review process that applies after the discipline is imposed. Therefore, the appeal should be dismissed.

A. The Preemption Standard

This Court should apply the familiar preemption standard detailed in the Commission's final decision:

> Where a statute or regulation addresses a term and condition of employment, negotiations are preempted only if it fixes a term and condition of employment expressly, specifically and comprehensively. *Bethlehem Tp. Ed. Ass'n. v. Bethlehem Tp. Bd. of Ed.*, 91 N.J. 38, 44 (1982). Statutory or regulatory provisions which speak in the imperative and leave nothing to the discretion of the public employer may not be contravened by negotiated agreement. *State v. State Supervisory Employees Ass'n*, 78 N.J. 54, 80-82 (1978).

(Pa21).

The University also asserts that the Title IX regulations have preemptive effect pursuant to a theory of implied conflict preemption. Our Supreme Court, in reciting the federal preemption doctrines, noted that "[c]onflict preemption applies where compliance with both federal and state regulations is a physical impossibility or where state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *In re Reglan Litigation*, 226 N.J. 315, 328-29 (2016) (internal quotations and citations omitted). This matter presents no such conflict.

B. The Title IX Regulations do not expressly, specifically or comprehensively address disciplinary disputes challenging the final imposition of employee discipline

The U.S. Department of Education adopted 34 C.F.R. § 106.45, which requires recipients of federal funds to implement "a grievance process that complies with the requirements of this section" for the purpose of addressing formal complaints of sexual harassment under Title IX. § 106.45(b). PERC succinctly summarized the Title IX requirements:

> Basic requirements of compliance with the regulation include, among other things, the equitable treatment of complainants and respondents "by following a grievance process that complies with this section before the imposition of any disciplinary sanctions." Id. at 106.45(b)(1)(i) (emphasis added). That is, the "grievance process" required by the regulation, in large part, covers the things that must occur (including notice, investigation, and hearing) between the filing of a formal Title IX complaint, the "determination of responsibility," and the determination of a disciplinary sanction, if any. 34 C.F.R. § 106.45(b)(1-7). Within this process, the regulation does not dictate what disciplinary sanctions may be imposed. It requires only that the Title IX grievance process include a description of "the range of possible disciplinary sanctions and remedies or [a] list [of] the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility." Id. at 106.45(b)(1)(iv) (emphasis added).
>
> (Pa25-26)

Once a determination of responsibility is rendered by a decision-maker, the option of a limited appeal to the University is required by 34 C.F.R. § 106.45(b)(8):

> (i) A recipient [of federal funds] must offer both parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
>
> (A) Procedural irregularity that affected the outcome of the matter;
>
> (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome
>
> of the matter.
>
> (ii) A recipient may offer an appeal equally to both parties on additional bases.
>
> (iii) As to all appeals, the recipient must:
>
> (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties;
>
> (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator;
>
> (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph

> (b)(1)(iii) of this section;
>
> (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
>
> (E) Issue a written decision describing the result of the appeal and the rationale for the result; and
>
> (F) Provide the written decision simultaneously to both parties.

This appeals process, adopted by the University, is quite limited in scope and does not expressly, specifically and comprehensively detail an appeal process for disciplinary sanctions. (Pa84-85). As the Commission noted in its decision, the regulations lack any provision or mechanism for appealing the sanction itself, contesting the findings of the decision-maker, or reviewing whether just cause existed for any discipline by an outside third-party such as a labor arbitrator. Further, an appeal pursuant to Title IX essentially asks the employer to reconsider its own decision before discipline becomes final and is effectuated. (Pa84-85). Only when the University implements the Title IX disciplinary recommendation—that is, finalizing the disciplinary action—does the University create a ripe issue that the Local can challenge pursuant to the CNA. (Pa162-66).

This process prior to the issuance of final discipline excludes Local 888 in that it does not even speak to procedural safeguards and the direct involvement of the Local that are features of a collectively negotiated disciplinary process. While

a Title IX decision-maker may be unbiased towards the complainant and respondent, he or she is still an agent of the University selected without input from the Local. Thus, the Title IX regulations do not preempt the separate post-discipline process and the appeal should be dismissed.

This Commission's finding on this point squares with past precedent holding that "statutes and regulations are effectively incorporated by reference as terms of any collective agreement covering employees to which they apply. As such, disputes concerning their interpretation, application or claimed violation would be cognizable as grievances subject to the negotiated grievance procedure contained in the agreement." *West Windsor Tp. v. PERC*, 78 N.J. 98, 116 (1987); *see also Old Bridge Bd. of Ed. V. Old Bridge Ed. Ass'n* 98 N.J.523, 527-28 (1985). The relevant aspects of Title IX are already incorporated into the CNA and its provisions would be binding on any arbitrator tasked with interpreting the statute, eliminating risk that an interpretation of the CNA would lead to results contrary to Title IX.[5/]

5/ "In the public sector, the public interest, welfare, and other pertinent statutory criteria are inherent in the standards that inform and govern public sector arbitration. In the public sector, unlike the private sector, public policy demands that the arbitrator follow the law and consider the public's interest and welfare." *N.J. Tpk. Auth.* 143 N.J. at 198 (internal citations omitted). An arbitration award is further subject to judicial review. *Id*.

The Commission's denial of the petition follows our Supreme Court's holding in *N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass'n*, 143 N.J. 185 (1996), a case analogous to the instant matter. In that case, the Turnpike Authority sought a restraint of binding arbitration of a grievance because it viewed the "resort to negotiated disciplinary procedures for resolving disciplinary disputes based on sexual harassment [as] incompatible with the statutory protection against sexual harassment under the LAD." *Id*. at 196. That Court disagreed, finding that the duty to comply with the LAD "is not undermined by a collectively negotiated agreement requiring fair disciplinary procedures and **permitting neutral review** when an employee is accused of sexual harassment." *Id*. at 197-98 (emphasis added).

This principle can be applied to the instant case as well. Title IX imposes duties on the University in order to effectuate the goal of a University community free from sexual harassment and gender discrimination and to remedy unlawful acts when they occur. 85 Fed. Reg. 30026 (May 19, 2020). Permitting public employees the ability to negotiate additional due process rights including neutral review of an employer's disciplinary action does not undermine compliance with a fair process set forth in the Title IX regulations to ensure that complaints of sexual harassment are investigated and addressed thoroughly by the University. The

University's contrary assertion that Title IX provides employees with its sole "alternative statutory remedy against unjust discipline" is without merit because legitimate statutory remedies, including EERA's statutory grant of a right to a negotiated grievance procedure, as well as appeals to the Civil Service Commission or the Tenure Board, contain robust due process protections after discipline is imposed. The adjudication of the disciplinary dispute is also before a wholly independent entity, unlike a Title IX decision-maker appointed by the employer itself. *See, e.g.*, N.J.S.A. 18A6-10, *et seq.*; N.J.A.C. 4A:2-2.2.

C. Title IX, the EERA, and CNA Provide Different Rights that Originate from Different Sources Without Overlap or Conflict.

The University's additional argument that the Title IX regulations implicitly conflict with the CNA is without merit because it ignores the separate procedural postures and statutory grants of rights provided to the University, Local, and employees. Because Title IX rights and obligations and collective negotiation rights have separate legal origins and do not even overlap, let alone conflict, the University's compliance with both Title IX and the CNA is possible and therefore no actual conflict exists. *See generally*, *In re Reglan Litigation*, 226 N.J. 315.

With respect to Title IX regulations governing the pre-disciplinary process and the Rutgers policy implementing those regulations, only two parties to the

proceeding are defined: the individual Complainant and the individual Respondent. (Pa58). The University, by regulation, has both the role of investigator and decision-maker in the sense that it designates the individuals responsible for performing those functions. 34 C.F.R. § 106.45(b)(1)(iii). The Local is not a party to a Title IX proceeding nor does it have a role in selecting the decision-maker.

The CNA, authorized by the EERA, is a collective agreement between the Local and the University. (Pa156). The grievance process contained in Article IV, allows the Local (and, for a portion of the process, the employee) the discretionary choice to file a grievance on behalf of the grievant, a third-party beneficiary to the agreement, after a final disciplinary action has taken place. (Pa163-164). *See Hynes v. Clarke*, 297 N.J. Super. 44, 51-52 (App. Div. 1997) (employees are third-party beneficiaries to collective agreement and right to enforce the agreement are generally held by the union as the signatory). The Union, not the grievant or affected employee, has the exclusive right to process a grievance to the point of demanding arbitration.[6/] (Pa164).

6/ The Legislature recognized the majority representative's exclusive right to arbitrate grievances in the "Responsible Collective Negotiations Act." P.L. 2021, c. 44 § 7. N.J.S.A. 34:13A-62 provides: "Only the parties to a collective negotiations agreement shall have the authority to invoke the arbitration procedures of the agreement and the public employer and the

While both the Title IX regulations and the CNA touch upon aspects of employee discipline, each process concerns different parties at different stages of the disciplinary process. The Department of Education has noted that "in the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect," 85 Fed. Reg. 30026, 30298, 30371. No such conflict exists here as compliance with the related, but distinct, processes is not only possible, but encouraged and required by both the regulations[7/] and the Rutgers Title IX policy.[8/]

The University incorrectly asserts that arbitration of the grievance in question amounts to a "collateral attack" on the Title IX process. The Title IX regulations concern a statutory process not involving the Local, and as discussed above, standardizing a pre-disciplinary procedure granting certain due process

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employee organization shall be the only parties to the arbitration proceeding invoked pursuant to the collective negotiations agreement."

7/ "These final regulations do not preclude a recipient's obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations...The Department has never impeded a recipient's ability to provide parties with additional rights as long as the recipient fulfills its obligations under Title IX." 85 Fed. Reg. 30298, 30442.

8/ The Title IX Policy mandates that "In all cases involving employee Respondents, the decision concerning discipline shall be consistent with the terms of all University Policies and the terms of any collective negotiations agreements that may be applicable. (Pa82).

rights to a complainant and respondent to charges of Title IX violations. In contrast, the CNA creates contractual rights for the Local to a neutral and independent review of discipline through binding arbitration, specifically authorized by the EERA.[9/]

Even if there was some overlap between these separate rights, Rutgers is unable to show how the right to arbitration is extinguished "simply because Congress also has provided a statutory right" and "[b]oth rights have legally independent origins and are equally available to the aggrieved employee." *Alexander v. Gardner-Denver Co.*, 415 U.S. 36, 94 (1974). These rights, side-by-side, do not stand in obstacle to each other and therefore there is no "actual conflict," as noted by the Department of Education, that prevents the University from complying with both its regulatory and contractual obligations.

9/ As the Commission decision further noted, even if there was a conflict, J.M. received discipline under both Title IX And the University's sexual harassment policies which "address allegations of sexual harassment under laws other than Title IX, including the NJLAD," meaning that arbitration would be permitted for that separate charge notwithstanding the Title IX adjudication. (Pa31).

CONCLUSION

The NJ Public Employment Relations Commission respectfully requests the Court affirm the August 24, 2023 Decision and Order, P.E.R.C. No. 2024-2, and dismiss the appeal.

Respectfully submitted,

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In the Matter of RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY, Petitioner, -and- AFSCME LOCAL 888,AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO. Respondent.	SUPERIOR COURT OF NEW JERSEY APPELLATE DIVISION Docket No.: A-000277-23 T1 Civil Action On Appeal from a Final Order of the: New Jersey Public Employment Relations Commission Docket No. SN-2023-028 Docket No. SN-2023-029

BRIEF AND APPENDIX ON BEHALF OF RESPONDENT,
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PRELIMINARY STATEMENT

Fifty years ago, the United States Supreme Court ruled that laws designed to eradicate discrimination and collective bargaining rights protecting employees against unjust discipline were distinct rights that could be exercised separately. Nearly thirty years ago, our State Supreme Court reached the same conclusion. Appellant now asks this court to reject those holdings based on the novel claim that the pre-termination process provided by Title IX's regulations preempt an employee's right to arbitrate discipline under a union contract. Nothing in the regulations supports this claim, and no court in any jurisdiction has ever made such a finding. Indeed, the federal Department of Education (DOE) has specifically rejected the notion that the regulations preempt arbitration of discipline.

The Public Employment Relations Commission (PERC) rejected Appellant's argument as well, finding that nothing in the Title IX regulations "pertains to, or preempts, collectively negotiated grievance procedures that may be available to represented employees after discipline has been imposed…" (Pa26-Pa27). PERC's decision is consistent with decades of Commission and judicial precedent, as well as Rutgers' own governing policy. Appellant's argument on appeal is based upon a flawed reading of the regulations which conflates the pre-termination hearing process (governed by Title IX) with the post termination appeal process (governed by the union contract). As such, the Commission's decision should be affirmed.

PROCEDURAL HISTORY

On October 3, 2022, Respondent, AFSCME Local 888, filed a Request for Submission of a Panel of Arbitrators with the Public Employment Relations Commission (PERC) on behalf of member J.M. (Pa177). The union sought the appointment of an arbitrator to determine whether J.M had been discharged for just cause under Article 4 of the union contract. (Pa177).

On February 2, 2023, Appellant filed a Scope of Negotiations Petition with PERC seeking to restrain arbitration of the union's grievance. (Pa9, Pa39). On February 9, 2023, the Petition was consolidated with another Petition filed by Rutgers seeking the same relief as to a similar grievance filed by Local 888 on behalf of a different union member.[1] (Pa9-Pa10).

On August 24, 2023, PERC denied Rutgers' Petitions and directed that the grievances filed by Local 888 proceed to binding arbitration. [2] (Pa8-Pa32).

On September 28, 2023, Rutgers filed a Notice of Appeal of PERC's decision with the Appellate Division. (Pa1). An Amended Notice of Appeal was filed by Rutgers on October 5, 2023. (Pa4).

On October 18, 2023, after hearing from all parties, the Clerk confirmed that PERC's decision was a final Order for the purpose of this appeal. (Pb4-5).

[1] The grievance for that member, I.R.M., was withdrawn following PERC's ruling. (Pa175).
[2] Arbitration of J.M's grievance has been scheduled for April 4, 2024.

STATEMENT OF FACTS

Appellant, Rutgers University ("Rutgers") and Respondent, AFSCME Local 888 ("Local 888") are parties to a collective negotiations agreement covering the period between July 1, 2018 and June 30, 2024. (Pa154-Pa169). The agreement governs the negotiable terms and conditions of employment of "all regular maintenance and service employees, both full time and part time" employed at Rutgers. (Pa160). Article 4 of the contract sets forth a grievance procedure which culminates in binding arbitration before an arbitrator appointed by PERC. (Pa162-Pa164). Article 4, section 8, of the contract specifically provides that:

> No employee shall be discharged, suspended, or disciplined in any way except for just cause. The sole right and remedy of any employee who claims that he or she has been discharged, suspended, or disciplined in any way without just cause shall be to file a grievance through and in accordance with the grievance procedure.

(Pa165, emphasis supplied). Thus, if a member of the Local 888 bargaining unit is disciplined or discharged, their only recourse is to appeal through the contractual grievance procedure. (Pa165).

In February 2022, unit member J.M. was accused of sexual harassment by a female co-worker. (Pa120). Both J.M. and the female complainant were members of the Local 888 bargaining unit. (Pa178-Pa180). J.M. was charged with two violations of Rutgers' Title IX Policy and Grievance Procedure (University Policy 60.1.33) and one violation of the University Policy Prohibiting Discrimination and

Harassment (University Policy 60.1.12). (Pa119). The allegations were investigated, and a pre-termination hearing conducted, pursuant to the Title IX Policy and Grievance Procedure, University Policy 60.1.33.(Pa53-Pa112). The hearing was held before two "decision-makers", one (Ralph Mara) assigned to determine whether J.M. was responsible for the conduct alleged, and another (John Malley) to make a recommendation concerning sanctions. (Pa119-Pa128, Pa147). On July 28, 2022, the decision makers issued a determination that J.M. was responsible for the alleged violations and recommended that he be terminated from employment. (Pa119-Pa128). The sanctions decision maker, Mr. Mally, specifically referred to his determination as a "recommended sanction." (Pa126). Pursuant to Policy 60.1.33, Section VIII.M, J.M. was permitted to appeal only on the issue of responsibility. (Pa84). That appeal was limited to three bases; (a) procedural irregularity affecting the outcome, (b) new information that was not available at the time the determination was made, and (c) a conflict of interest or bias. (Pa84, Pa127). Notably, under Rutgers' Title IX Policy, the right to appeal a recommended sanction is reserved only for Rutgers' students and does not extend to its employees. (Pa84).

On August 2, 2022, J.M. submitted a Notice of Appeal of the decision-maker's determination of responsibility. (Pa147). On August 30, 2022, the appeal was denied by Assistant Vice President Carolyn Dellatore in her capacity as

Appellate Decision Maker. (Pa147-149). Ms. Dellatore noted that there were "no further levels of appeal" available under Rutgers' policy. (Pa149).

On September 26, 2022, nearly a month after the Title IX process had concluded, Rutgers adopted the recommended sanction and notified J.M. that he was being terminated from employment "effective immediately." (Pa152). The termination letter was copied to both the President and Vice President of Local 888. (Pa152). Local 888 filed a grievance on behalf of J.M. alleging a violation of Article 4 of the contract and seeking that J.M. "be made whole in every way including any and all losses to which the grievant is entitled." (Pa173). The University refused to process the grievance on the basis that "Title IX and its implementing regulations preempt any further review under the collective negotiation agreement." (Pa50). On October 3, 2022, consistent with Article 4, paragraph 3 (Step 4) of the contract, Local 888 filed a Request for Submission of a Panel of Arbitrators with PERC. (Pa163, Pa177). In response, on February 2, 2023, Rutgers filed a Scope of Negotiations Petition seeking to restrain arbitration on the grounds that further proceedings were preempted by Title IX's governing regulations. (Pa39). On August 24, 2023, PERC issued a decision denying Rutgers' Petition and directing that the grievance proceed to binding arbitration. (Pa8-Pa32). This appeal followed. (Pa1, Pa4). For the reasons set forth below, PERC's decision was correct as a matter of law, and should be affirmed.

LEGAL ARGUMENT

Point I

The Standard of Review (Pa21-Pa32)

Appellate review of an agency decision is deferential. County of Atlantic, 445 N.J. Super. 1, 11 (2016) *citing* In re Hunterdon County Bd. of Chosen Freeholders, 116 N.J. 322, 328 (1989). Judicial inquiry is limited to (a) whether the agency followed the law, (b) whether the agency's decision is supported by substantial evidence in the record and (c) whether in applying the law to the facts, the agency reached a supportable conclusion. Id., *citing* City of Jersey City v. Jersey City POBA, 154 N.J. 555 (1998). The court will defer to PERC's interpretation of the Public Employer-Employee Relations Act unless that interpretation is "plainly unreasonable…contrary to the language of the Act or subversive of the Legislature's intent." Matter of Ridgefield Park Board of Education -and- Ridgefield Park Education Ass'n., 459 N.J. Super. 57, 69 (2019) rev'd on other grounds Matter of Ridgefield Park, 244 N.J. 1 (2020) *quoting* New Jersey Turnpike Authority v. AFSCME Council 73, 150 N.J. 331, 352 (1997). When interpreting its own Act, PERC's decision will be affirmed unless it is "clearly demonstrated to be arbitrary or capricious." Id., *quoting* City of Jersey City, *supra.* PERC's decision is entitled such deference here.

The Petition filed by Rutgers in this case called upon the Commission to decide whether the subject matter of the union's grievance fell within the scope of negotiations under the Act. The Commission has sole and exclusive jurisdiction over such matters pursuant to N.J.S.A. 34:13A-5.4(d), which is part of the Public Employer-Employee Relations Act. See also Barila v. Board of Education of Cliffside Park, 241 N.J. 595, 614 (2020). PERC's decision to deny the Petition and direct that the grievance proceed to arbitration is well within its area of expertise and flows from the exclusive jurisdiction granted to PERC under its authorizing legislation. Therefore, PERC's decision in this matter is entitled to substantial deference from the court. See Matter of Hunterdon County Bd. of Chosen Freeholders, 116 N.J. at 328-329 [PERC decisions regarding the scope of negotiations will stand unless "arbitrary and capricious"].

However, the court is not bound by PERC's interpretation of the Title IX regulations, since PERC is not charged with administering that law. Ridgefield Park Board of Education, 459 N.J. at 69. On that issue only, the court's review is *de novo.* Id. Thus, PERC's scope of negotiations decision pursuant to N.J.S.A. 34:13A-5.4(d) is entitled to substantial deference, provided that the court's *de novo* review of the applicable Title IX regulations aligns with PERC's. As discussed below, PERC's decision is supported by decades of its own precedent and that of the courts and should therefore be affirmed.

Point II

PERC's decision is consistent with governing law and well-settled precedent and should therefore be affirmed. (Pa21-Pa32).

In the public sector "that which is negotiable becomes arbitrable." Matter of New Jersey Transit Bus Operations, Inc., 125 N.J. 41, 55 (1991). Thus, if the subject matter of a union grievance is within the lawful scope of negotiations, the union has a right to pursue that grievance to binding arbitration.

PERC applies a "time honored" standard to decide whether a subject is within the scope of negotiations. Matter of Ridgefield Park Board of Education, 244 N.J. at 17, *citing* Robbinsville Twp. Bd. of Ed. v. Washington Twp. Ed. Ass'n., 227 N.J. 192, 199 (2016). A subject is negotiable if it (1) intimately and directly affects the work and welfare of the public employee, (2) has not been fully or partially preempted by statute or regulation and (3) a negotiated agreement would not significantly interfere with the determination of public policy. In re Local 195, 88 N.J. 393, 403-404 (1982). Disciplinary review procedures, including binding arbitration, are mandatorily negotiable as a matter of law, meaning that grievances challenging unjust discipline are generally arbitrable. See N.J.S.A. 34:13A-5.3. However, in this case, Rutgers invokes the second prong of the Local 195 test, arguing that the union's just cause grievance is preempted by Title IX's regulations, specifically 34 C.F.R. §106.45. (Pb21). PERC properly rejected that argument based on its own well-settled precedent and that of our courts.

The mere existence of legislation relating to a given term or condition of employment does not automatically preclude negotiations. Matter of Ridgefield Park Board of Education, 244 N.J. at 17 *quoting* Bethlehem Twp. Bd. of Ed. v. Bethlehem Twp. Ed. Ass'n., 91 N.J. 38, 44 (1982). Instead, negotiations are only preempted if the regulation fixes a term and condition of employment "expressly, specifically and comprehensively." Id. *quoting* Council of New Jersey State College Locals, 91 N.J. 18, 30 (1982). The State Supreme Court has held that to find a law or regulation to be preemptive:

> the legislative provision must "speak in the imperative and leave nothing to the discretion of the public employer." If the legislation, which encompasses agency regulations, contemplates discretionary limits or sets a minimum or maximum term or condition, then negotiations will be confined within these limits. Thus, the rule established is that legislation "which expressly sets terms and conditions of employment…for public employees may not be contravened by negotiated agreement."

Id. at 18 [citations omitted]. In construing whether a statute or regulation is preemptive, the analysis must begin with the language of the law, ascribing to its words their ordinary meaning. Id. *citing* Kean Federation of Teachers v. Morell, 233 N.J. 566, 582 (App. Div. 2018). Thus, the question before PERC was whether 34 C.F.R. §106.45 "expressly, specifically and comprehensively" prohibits a union member from arbitrating discipline imposed upon him/her following a Title IX investigation. PERC correctly found that it does not.

Here, there is no language in the text of 34 C.F.R. §106.45 which speaks to the right of employees to appeal discipline. Not only does the regulation not speak "expressly, specifically and comprehensively" to disciplinary appeal rights, it is completely silent on the issue. After a thorough review, PERC found that "Nothing in 34 C.F.R. §106.45 suggests that the 'grievance process' required by Title IX pertains to, or preempts, collectively negotiated grievance procedures that may be available to represented employees after discipline has been imposed…" (Pa26-Pa27). In the absence of any language in 34 C.F.R. §106.45 pertaining to disciplinary appeal rights, the Commission properly denied the Petition. PERC's decision is consistent with both its own case law and the courts' and should be affirmed. See Bethlehem Twp. Bd of Ed., 91 N.J. 38, 48 (1982) [to be preemptive regulations must leave no room for discussion and say all there is to be said]; Matter of Hunterdon County Board of Chosen Freeholders, 116 N.J. 322, 330-331 (1989) [statute not preemptive unless it specifically fixes term of employment]; County of Atlantic, 445 N.J. Super. 1, 21-22 (App. Div. 2016) [statute not preemptive absent specific conflicting language]; New Jersey State Troopers, 7 NJPER ¶ 12026 (1981) [subject matter not preempted where regulation is silent]; City of Hackensack, 45 NJPER ¶ 5 (2018) [no preemption where statute did not specifically address subject matter of union grievance].

Rutgers argues that Title IX's regulations are preemptive because they are both mandatory and comprehensive. (Pb21-Pb26). This argument ignores the well settled legal standards governing preemption determinations. Nearly all laws can accurately be described as both "mandatory" and "comprehensive", but very few are found to preempt arbitration under a union contract. That's because what makes a law or regulation preemptive is language which "expressly" and "specifically" forecloses the possibility of arbitration. Bethlehem Twp. Bd. of Ed., 91 N.J. at 44. The Commission found that there was no language in 34 C.F.R. §106.45 which spoke to the right of an employee to arbitrate discipline under a union contract, and Rutgers has failed to point to any such language in its brief. Thus, the Commission's decision to deny Rutgers' Petition is correct as a matter of law.

Unable to point to any specific language in the regulation which deprives employees of the right to arbitrate discipline, Rutgers is left to argue that the regulation creates an "implied conflict" with the union contract and cites to comments by the federal Department of Education as evidence of its preemptive intent. (Pb20-Pb27). As discussed below, that argument fails because Rutgers is fully able to comply with both the regulation and the union contract. Furthermore, in comments curiously absent from Rutgers' brief, the Department of Education made it quite clear that the regulations are not intended to preempt arbitration of discipline under a union contract. Rutgers' novel theory must therefore be rejected.

Point III

There is no "implied conflict preemption" in this case because Rutgers can comply with both the contract and the regulation, and because the DOE has rejected the notion that Title IX was intended to preempt arbitration of discipline under a union contract. (Pa21-Pa32).

In the absence of any specific language in 34 C.F.R. §106.45 preempting arbitration of the union's grievance, Rutgers makes a claim of "implied conflict preemption", which occurs "where compliance with both federal and state requirements is impossible…" (Pb20). In essence, Rutgers argues that it cannot lawfully comply with both Title IX's regulations and the terms of the union contract. This argument is based on a deeply flawed reading of the regulation. A more careful analysis reveals that Rutgers is fully able to comply with both its obligations under 34 C.F.R. §106.45 and the collective negotiations agreement. That is because Title IX governs the investigation and pre-termination hearing process, and the union contract governs the post termination hearing process. Furthermore, the DOE's comments to the 2020 regulations specifically reject Rutgers' claim of preemption, and expressly recognize that rights under a union contract are "additional rights" which apply after the Title IX process is complete.

The grievance process set forth at 34 C.F.R. §106.45 exists "for the purpose of addressing formal complaints of sexual harassment…" 34 C.F.R. §106.45(b). Importantly, the grievance process established by the regulation applies "<u>before the imposition of any disciplinary sanctions</u>…" 34 C.F.R. §106.45(b)(1)(i) (emphasis

supplied). The Title IX grievance process must specify what discipline might be imposed but contains no language regarding whether or how that discipline might be appealed. 34 C.F.R. §106.45(b)(1)(vi). Reading these provisions together, the regulation establishes a process by which to address and determine complaints of sexual harassment prior to the imposition of discipline. It does not, however, speak to the right of employees to appeal discipline imposed upon them once that process is complete. In this case, that right is governed by the terms of the collective negotiations agreement between the parties.

Article 4 of the Local 888 contract specifically provides that "the sole right and remedy of any employee who claims that he or she has been discharged, suspended or disciplined in any way without just cause shall be to file a grievance through and in accordance with the grievance procedure." (Pa165). Whereas the regulation is silent concerning the employee's right to appeal discipline, Article 4 provides that the only way for a member of the Local 888 bargaining unit to appeal discipline is to file a grievance. The regulation and the contract therefore work in harmony, with the former governing the determination of responsibility up to the point that discipline is imposed, and the latter governing the process by which an employee may appeal that discipline. Since the regulation and the contract govern different aspects of the disciplinary process, Rutgers may comply with both.

Any doubt that Title IX's regulations are not intended to preempt arbitration under a union contract is resolved by the DOE's comments to the May 2020 revisions to the regulations. Our Supreme Court has recognized that in making decisions about preemption, it is entirely appropriate to look to extrinsic materials such as legislative history, committee reports and other relevant sources. Matter of Ridgefield Park Bd. of Ed., 244 N.J. 1, 18-19 (2020). The federal DOE's responses to public comments regarding the May 2020 regulatory revisions are such a source.

During the public comment phase of the 2020 revisions, one commentator "suggested that the final regulations clearly state they do not preclude recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement…" 85 Fed. Reg. 30298 *30441 (May 19, 2020). If the regulations were intended to preempt arbitration, this comment offered the DOE the chance to say so. Instead, this is how the DOE responded to that suggestion:

> **These final regulations do not preclude a recipients' obligations to honor additional rights negotiated by faculty in any collective bargaining agreement** or employment contract, and such contracts must comply with these final regulations. In the Department's 2001 Guidance, and specifically in the context of the due process rights of the accused, the Department recognized that "additional or separate rights may be created for employees…by…institutional regulations and policies, such as faculty or student handbooks, and collective bargaining agreements." **The Department has never impeded a recipients' ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX. The Department has never suggested otherwise, and we believe it is unnecessary to expressly address this concern in the regulatory text.** 85 Fed. Reg. 30298 *30442 (May 19, 2020).

Not only did the DOE reject the notion that the regulation preempted employee rights under a union contract, the agency thought this result was so obvious that there was no need to specifically address the issue in the text of the regulation. The DOE reaffirmed its 2001 Guidance that recipients of federal funds remained obligated to honor the "additional rights" of employees set forth in union contracts, as long as the pre-termination process envisioned by 34 C.F.R. §106.45 was followed. The author of these regulations – the federal Department of Education – has confirmed that Title IX and union contracts confer distinct rights and obligations and that compliance with both is not only possible but required. These comments are fatal to Rutgers' claim of preemption.

The DOE's comments also draw a clear distinction between the pre-termination process governed by 34 C.F.R. §106.45 and the post-termination process governed by the union contract. One commentator observed that "the live hearing requirement for postsecondary institutions creates an unnecessary and duplicative process for employees who are subject to a collective bargaining agreement." 85 Fed. Reg. 30298 *30443 (May 19, 2020). That comment presumed the existence of two hearings, a pre-termination hearing under Title IX and a post termination hearing under a union contract. In response to that comment, the DOE provided additional clarity as to which aspects of the process are governed by 34 C.F.R. §106.45, and which are not:

> …some [collective] agreements provide a pre-termination hearing, while other agreements provide a post termination hearing…If a recipient chooses to accept Federal financial assistance and thus becomes subject to these final regulations, then the **recipient may negotiate a collective bargaining agreement that requires a pre-termination hearing consistent with the requirements for a hearing under §106.45(b)(6).** Nothing precludes a recipient and a union from renegotiating agreements to preclude the possibility of having both a pre-termination live hearing that complies with §106.45(b)(6) and a post termination arbitration hearing that requires a hearing with cross examination. **These final regulations do not require both a pre-termination hearing and a post termination hearing, and recipients have discretion to negotiate and bargain with unions acting on behalf of employees for the most suitable process** that complies with these final regulations**.** 85 Fed. Reg. 30298 *30444 (May 19, 2020).

Here, the DOE affirms that §106.45 only governs the pre-termination process, and that if a union wishes to include such a process in its contract, it must comply with the regulation. However, the DOE also confirms that it is entirely permissible (though not required) to have two hearings - a pre-termination hearing and a post-termination hearing. If the recipient wants the pre-termination process to be the exclusive process it must "negotiate and bargain" with the union for that result - a direct rebuke of Rutgers' claim that its Title IX ecision is final. The language of §106.45 and the DOE commentary confirm that an employee may arbitrate discipline under a union contract once the pre-termination process governed by Title IX has concluded. The DOE's comments also make it clear that the regulations were never intended to preempt that right. Since that was precisely the conclusion reached by PERC, the agency's decision should be affirmed.

In its brief, Rutgers points to language in the DOE commentary providing that "in the event of an actual conflict between a union contract and the final regulations, then the final regulations would have preemptive effect." (Pb27). This comment does not have the sweeping effect Rutgers' claims and must be read in tandem with the language of the regulation and the commentary cited above. When read together, a clear picture emerges. Section §106.45 is intended to govern the investigation and pre-termination hearing process "before the imposition of disciplinary sanctions." 34 C.F.R. §106.45(b)(1)(i). If there is language in a union contract which provides for a pre-termination hearing process, that language must comply with the regulation, and in the event of a conflict, the regulation would govern. However, the regulation's reach does not extend to post-termination proceedings under a union contract. As the DOE has made clear, the right to arbitrate discipline under a union contract is an "additional right" conferred upon represented employees which must be honored by the employer once the Title IX process has ended. The parties may agree to make the pre-termination process the exclusive process for imposing discipline, but that would require the negotiated agreement of the union. There is no such agreement here. Since the regulation and the union contract govern different aspects of the disciplinary process and can be complied with independently of one another, there is no "implied conflict preemption" in this case. PERC's decision should therefore be affirmed.

Point IV

The employee's right to pursue a post termination arbitration hearing is protected and preserved by Rutgers' Title IX Policy. (Pa21-Pa32).

The investigatory and pre-termination hearing process applicable to Title IX complaints is governed by Rutgers Policy 60.1.33, entitled "Title IX Policy and Grievance Process." (Pa53-Pa112). That Policy specifically provides that any discipline imposed upon a Rutgers' employee must be consistent with the terms of their union contract. In this way, Rutgers' own policy protects and preserves the right of its employees to appeal discipline through binding arbitration.

Section VIII.L of Policy 60.1.33 is entitled "Sanctions and Other Remedial Measures." (Pa82). Section L, subsection 1, entitled "How Sanctions are Determined", provides that "In all cases involving employee Respondents, the decision concerning discipline shall be consistent with the terms of all University policies and the terms of any collective negotiations agreements that are applicable." (Pa82). Similarly, Section L, subsection 3, entitled "Sanctions for Employee Respondents", provides that "For employees, sanctions may include discipline up to and including termination from employment, consistent with the terms of all University Policies concerning personnel actions and the terms of any applicable collective negotiations agreements." (Pa83). Section VIII.L, subsections (1) and (3) of Policy 60.1.33 make it abundantly clear that any discipline imposed by Rutgers upon a represented employee must be consistent with the terms of the

applicable union contract. The contract between Rutgers and Local 888 expressly provides that the only way to appeal discipline or discharge is through the union grievance procedure set forth at Article 4. (Pa165). Thus, for Rutgers to comply with its own policy, any discipline imposed upon a member of the Local 888 bargaining unit must be subject to appeal through the contractual grievance procedure. The imposition of discipline without a corresponding right to appeal under Article 4 would be inconsistent with the terms of the Local 888 agreement, and therefore at odds with Rutgers' own Title IX Policy. By seeking to restrain the union's request for arbitration in this matter, Rutgers has effectively violated Section VIII.L, subsections (1) and (3) of Policy 60.1.33.

Rutgers attempts to argue its way out of this conundrum in two ways. First, Rutgers claims that the policy's reference to the contract is simply Rutgers' way of identifying the range of disciplinary sanctions. (Pb43). This claim is wholly without merit. If Rutgers wanted to list the range of disciplinary sanctions, they would simply list them. See e.g. N.J.A.C. 4A:2-2.2 and 4A:2-3.1 (listing major and minor disciplinary sanctions). Instead, Rutgers specifically refers to the terms of the "applicable union contracts" and commits (not once, but twice) to imposing discipline only in a manner consistent with those contracts. For Rutgers to comply with that obligation, members of the Local 888 bargaining unit must be afforded the right to arbitration guaranteed to them by Article 4, which provides the sole

means of appealing discipline. Furthermore, Rutgers' Title IX Policy already contains language describing the range of sanctions that might be imposed on employees. Section VIII.L, subsection 3 of the Policy provides that "For employees, sanctions may include discipline up to and including termination from employment." (Pa83). But after describing the range of possible sanctions, the policy goes on to provide that those sanctions must be imposed consistent with the union contract. (Pa83). The claim that the policy's reference to the union contract is merely intended to define the range of possible sanctions is simply not credible.

Rutgers also tries to avoid the plain language of its own policy by claiming that the Title IX decision-maker applied the "just cause" standard used in the Local 888 contract and that his conclusion was therefore consistent with the agreement. (Pb44-45). That argument is at odds with both the union contract and the law. Under Article 4, final authority to interpret the terms of the Local 888 contract, including the contractual just cause provision, belongs to the arbitrator. (Pa164-Pa165). As a matter of law, Rutgers cannot unilaterally reassign that task to someone else, as it claims to have done here. Under N.J.S.A. 34:13A-5.3, disciplinary review procedures, including binding arbitration, are a mandatory subject of bargaining. See also State, Office of Employee Relations v. Communications Workers of America, 154 N.J. 98, 115 (1998). Therefore, Rutgers does not have the legal authority to unilaterally assign a "just cause" determination

under the Local 888 contract to one of its managerial employees. That decision is reserved for the exclusive jurisdiction of an arbitrator, who must be selected through the applicable PERC procedures. (Pa164). The fact that Rutgers would justify violating its own policy by relying on a separate violation of the law and the contract speaks to the profound weakness of its case.

There is something else notable about Rutgers' Policy 60.1.33 that should not escape the court's attention. Section VIII.M, entitled "Appeals", sets forth the limited basis upon which a party may appeal a determination of responsibility. (Pa84). Although §106.45 lists only three grounds for appeal, Section M lists four. (Pa84; compare 34 C.F.R. §106.45(b)(8)). The fourth basis, the one not found in Title IX's regulation, is entitled "Disproportionate Sanction." (Pa84). Section M, subsection 4 describes the basis of such an appeal as "In matters involving students, the sanction imposed against the Respondent was not appropriate for the offense committed. This ground for appeal is only available in cases involving student Respondents." (Pa84, emphasis supplied). In effect, Rutgers' policy permits students to appeal discipline, but does not extend that right to employees. The explanation for that disparity is simple – ***the drafters of Policy 60.1.33 knew that Rutgers' employees had a separate and distinct right to appeal discipline under their union contracts.*** That right is preserved and protected within Policy 60.1.33 itself, which requires that any discipline imposed upon a Rutgers employee

be consistent with the terms of the applicable collective negotiations agreement. Put another way, Section VIII.M subsection 4 extends to students a right which is already enjoyed by Rutgers employees under their union contracts – the right to appeal a disciplinary sanction. Were this not the case, Rutgers would be in violation of the Title IX regulations, according to its own legal argument.

Rutgers claims that under 34 C.F.R. §106.45(b)(8)(ii) it is prohibited from providing one party to the Title IX process with an appeal right that is not offered equally to the other party. (Pb34). But that would be the result if only some parties to the Title IX process (students) had the right to appeal sanctions, while other parties (employees) did not. Thankfully, Rutgers' policy avoids this result by preserving the right of its employees to arbitrate under their union contracts.

PERC noted that Policy 60.1.33 requires discipline to be imposed in a manner consistent with the terms of any applicable collective negotiations agreements. (Pa29, emphasis in original). The Commission read Policy 60.1.33 to mean what it plainly said – that when imposing discipline for violating the policy, Rutgers was bound to honor the terms of the applicable union contract. To do so, members of the Local 888 bargaining unit must be permitted to arbitrate discipline imposed upon them pursuant to that policy. Since Rutgers' own Title IX Policy preserves the right of union members to arbitrate discipline, PERC's decision denying Rutgers' Scope Petition was correct and should be affirmed.

Point V

Both the New Jersey and United States Supreme Courts have held that laws intended to eradicate unlawful discrimination and rights conferred under a union contract were separate and distinct rights which may be exercised independently. (Pa21-Pa32).

In coming to its decision, PERC relied upon the State Supreme Court's ruling in New Jersey Turnpike Authority v. New Jersey Turnpike Authority Supervisors Ass'n., 143 N.J. 185 (1996). There, the Court held that disciplinary appeal procedures contained in a union contract, including binding arbitration, are not preempted by laws and policies designed to eradicate sexual harassment. Id. at 203. PERC's decision in this matter was inescapable given the remarkable similarities between this case and that one.

There, as here, a union worker was accused of sexual harassment. Id. at 189. There, as here, the allegations were investigated pursuant to the employer's Sexual Harassment Policy. Id. There, as here, the employer's policy provided for a live pre-termination hearing, including the right to call fact witnesses and the right to representation. Id. at 189-190. There, as here, the employee had a right to appeal an initial determination of guilt. Id. Upon completion of that process, which included an appeal of the employer's initial decision, the employer imposed a three-day unpaid suspension. Id. at 190. The union filed a grievance challenging the discipline, and the employer sought to restrain arbitration.

The Turnpike Authority made the same argument offered here by Rutgers, namely that arbitration was preempted by law, in that case, the New Jersey Law Against Discrimination (NJLAD). Id. at 194. The Court began by recognizing that discipline was generally appealable to arbitration under N.J.S.A. 34:13A-5.3. Id. at 195. The Court observed that the NJLAD would preempt arbitration only if it spoke in the imperative and left nothing to the discretion of the employer. Id. at 203, *citing* In re Local 195, 88 N.J. at 403-404, 443. Upon review, the Court found that "Nothing in the LAD speaks in such an imperative…moreover, nothing in the LAD compels an accused employee to forego an arbitral forum contesting discipline that may be unfounded or unjust." Id. For that reason, the Court rejected the employer's claim that arbitration was preempted by the NJLAD. Id.

The factors which drove the Court's analysis and conclusion in Turnpike Authority are also present here. In deciding Rutgers' preemption argument, PERC concluded that nothing in Title IX's regulations deprived a union member of his/her right to arbitrate discipline. (Pa26-Pa27). To the contrary, PERC found that the "sole right and remedy" for a Local 888 member to appeal discipline was contained in the union contract. (Pa27). Like the NJLAD, there is no language in Title IX's regulations which speaks to an employee's right to appeal discipline. PERC therefore rejected Rutgers' claim of preemption for the same reasons relied upon by the Court in Turnpike Authority. That decision should be affirmed.

The Turnpike Authority also argued that arbitration of the union's grievance was incompatible with enforcement of its Sexual Harassment Policy. Id. at 195-196. Rutgers makes the same argument here, claiming that the union's grievance "creates a direct conflict between the two processes requiring preemption." (Pb38). The Court rejected that claim and cited the appellate court's finding that "disciplinary procedures, including binding arbitration, would not interfere with a public employer's affirmative obligations to prevent and counteract sexual harassment." Id. at 197. The Court agreed, noting that "an employer's obligation to adopt and implement policies against sexual harassment 'is distinct from the employee's ability to seek review of disciplinary actions based on allegations of sexual harassment.'" Id. at 197, *quoting* New Jersey Turnpike Authority, 267 N.J. Super. at 335. In reaching that conclusion, the Court relied on Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974), in which the United States Supreme Court held that arbitration rights under a union contract and rights afforded by anti-discrimination laws were separate and independently enforceable. Id. at 200-201. The Court concluded that laws and policies protecting against sexual harassment did not preempt or supersede the right of employees to arbitrate discipline imposed upon them pursuant to the terms of their union contract. Turnpike Authority, 143 N.J. at 201. That holding applies directly here, and supports PERC's decision.

Rutgers strains to distinguish Turnpike Authority, but that effort is in vain. First, Rutgers claims that unlike Title IX the NJLAD does not mandate a specific grievance procedure. (Pb46). That argument fails because the grievance process provided by Title IX only governs prior to the imposition of discipline. (See Point III above). Furthermore, in Turnpike Authority the employer argued that its sexual harassment policy was required by law – precisely the same argument made by Rutgers here. Id. at 196-197. The Court nevertheless rejected the claim that the employer's legally required policy preempted arbitration of discipline under a union contract. Id. at 200-201. The result should be no different here.

Rutgers also argues that unlike the LAD, Title IX provides an alternative remedy against unjust discipline. (Pb47). That claim is simply untrue. Nothing in the Title IX regulations or Rutgers' Policy permits an employee to appeal discipline. To the contrary, under Policy 60.1.33 the right to appeal discipline is limited to students and does not extend to employees. (Pa84). Title IX only allows a limited appeal from an initial finding of guilt. (Pa84). The employee in Turnpike Authority had that right as well, but the Court refused to equate that right with the right to appeal discipline. Id. at 195. On that basis, the Court found that the employee did not have an alternative statutory right to appeal discipline. Id. The same is true here. PERC's reliance on Turnpike Authority was entirely appropriate given its nearly identical facts, and the agency's decision should be affirmed.

Point VI

The right to appeal discipline does not negate Title IX's regulations; indeed, the process envisioned by Title IX is no different than the process governing thousands of Civil Service employees. (Pa21-Pa32).

To support its claim of "implied" preemption, Rutgers argues that it could be faced with "conflicting determinations" if the union is allowed to arbitrate discipline. (Pb39). The employer in the Turnpike Authority case made the same claim, but the Court was unpersuaded. Id. at 198. Quoting from the U.S. Supreme Court's decision in Alexander, the Court observed that "a contractual right to arbitration is not displaced simply because Congress also has provided a statutory right against discrimination." Turnpike Authority, 143 N.J. at 200, *quoting* Alexander, 415 U.S. at 52. Given these alternate and independent rights, the Court understood the Alexander court to have recognized and accepted the possibility of inconsistent results. Id. at 201. However, the Court also noted that since arbitrators are required to consider the law, employee welfare and public policy in favor of eradicating discrimination, "the possibility of inconsistent results in arbitration proceedings and separate administrative or judicial actions…is sharply reduced." Id. at 201. Simply put, a strong case for discipline at the pre-termination stage is still a strong case for discipline at arbitration. Rutgers' concern for inconsistent results is overblown and has been rejected by the courts as a viable basis to appeal.

The possibility that discipline imposed by a public employer might be reversed on appeal is nothing new; indeed, that possibility is embedded in the process applicable to thousands of employees covered by Civil Service. As discussed, 34 C.F.R. §106.45 provides for a pre-termination process which applies before the imposition of discipline and includes the right to a hearing before an employer-designated "decision maker." The same process is set forth at N.J.A.C. 4A:2-2.1 et. seq. which governs major discipline for Civil Service employees. Pursuant to N.J.A.C. 4A:2-2.5, before a Civil Service employer can impose major discipline, it is required to serve the employee with a Preliminary Notice of Disciplinary Action, and, if requested, grant the employee a hearing. The employee is entitled to representation at that hearing and is entitled to review the evidence against them and to call and examine witnesses. See N.J.A.C. 4A:2-2.6. The "decision-maker" is a hearing officer appointed or designated by the employer. See N.J.A.C. 4A:2-2.6(a). Once the Hearing Officer makes a ruling, a Final Notice of Disciplinary Action is issued. See N.J.A.C. 4A:2-2.6(d). With limited exceptions, discipline cannot be imposed until the process is complete. See N.J.A.C. 4A:2-2.5(a). Like Title IX, these regulations create a mandatory process, controlled entirely by the employer, which applies ***before discipline is imposed*** and accords certain due process rights to the employee, including the right to a hearing.

Importantly, civil service regulations provide that the "final" determination of the employer to impose discipline may be appealed to a neutral authority. Pursuant to N.J.A.C. 4A:2-2.8, an employee who receives a Final Notice of Disciplinary Action may file an appeal with the Civil Service Commission (CSC). Cases are then referred to the Office of Administrative Law for an initial hearing. See N.J.A.C. 4A:2-9(b). A final decision is made by the CSC, which may adopt, reject, or modify the ALJ's initial decision. See N.J.A.C. 4A:2-2.9(c).

Rutgers argues that the pre-termination process set forth in the Title IX regulations must be the sole and exclusive process to determine guilt because "otherwise, the whole Title IX Grievance Process would be relegated to mere exercise and its outcome something that could be ignored, re-adjudicated, and negated in a separate process." (Pb29). But this claim is born of a flawed understanding of the regulation's scope. As with Civil Service, Title IX provides a specific and comprehensive process by which the employer determines whether to impose discipline. But as with Civil Service, that process is only "final" as to the employer's decision; it is not "final" as to the employee's rights. Indeed, the DOE recognized that the right to arbitrate discipline is an "additional right" that must be honored by the employer. 85 Fed. Reg. 30298 *30442 (May 19, 2020). In the same way that Civil Service employees have the right to appeal major discipline to the OAL, represented employees in non-civil service jurisdictions have the right to

arbitrate discipline through their union contract. Title IX's regulations are not "negated" because the employee can arbitrate discipline any more than Title 4A of the Administrative Code is "negated" because an employee can appeal major discipline to Civil Service. The existence of any appeal right comes with the possibility of conflicting results; indeed, that is the point of having the right to appeal. What Rutgers seeks is the right to become judge, jury, and executioner with respect to allegations governed by its Title IX policy. No court has ever accorded an employer that authority under Title IX, and no court should.

Rutgers is unable to cite to a single case in support of its claim that the grievance process established by 34 C.F.R. §106.45 preempts arbitration of a union's just cause grievance. By contrast, numerous cases have recognized an employee's right to appeal discipline imposed under Title IX through a union contract. See e.g. Meriwether v. Hartop, 992 F.3d 492 (6th Cir. 2021) [discipline imposed by college following Title IX investigation appealed through union grievance procedure]; Walter v. Queens College, 390 F. Supp. 3d 382 (E.D.N.Y. 2019) [professor terminated following Title IX investigation permitted to arbitrate union grievance]; Drisin v. Florida Int'l University Board of Trustees, 2019 WL 289581 (S.D. Fla. 2019) [professor pursues just cause grievance under union contract challenging termination following Title IX investigation]. (Da1-Da12). Of note is Farzinpour v. Berklee College of Music, 516 F. Supp. 3d 33 (2021), in

which a college professor filed a lawsuit challenging his termination following a Title IX investigation. The court partially dismissed the complaint, finding that some of plaintiff's claims were preempted by the terms of his union contract, including its "just cause" provision. Id. at 42. Based on the case law, not only is a union member able to pursue a just cause grievance challenging discipline imposed following a Title IX hearing, he or she may be required to do so.[3]

Contrary to its claims, Title IX does not grant Rutgers some supreme authority or magic powers. Like any employer, Rutgers has the right to investigate allegations of wrongdoing and to impose discipline. Title IX provides a road map for doing so in certain cases, but the destination is not final. Like thousands of employees throughout New Jersey, members of the Local 888 bargaining unit have the right to appeal discipline to a neutral authority following a hearing before the employer. And if the discipline is overturned on appeal, it only means the case was never strong to begin with. More importantly, as both the U.S. and State Supreme Courts have found, laws and policies designed to eradicate sexual harassment do not preempt the right of employees to arbitrate discipline under a union contract. PERC's decision is in accord with the case law and is consistent with the process governing tens of thousands of public employees. The decision should be affirmed.

[3] Although these cases arose prior to May 2020, the DOE comments to the 2020 revisions reaffirmed their 2001 Guidance that the regulations were not intended to preempt arbitration under a union contract. 85 Fed. Reg. 30298 *30442 (May 19, 2020). These comments confirm that no change from the 2001 Guidance was intended as a result of the 2020 revisions. As such, these cases remain valid and compelling precedent.

Point VII

Rutgers' "equal application" argument is unsupported by the language of the regulation and would, if accepted, completely rewrite New Jersey labor and employment law. (Pa21-Pa32).

The central premise of Rutgers' argument is that the appeal rights afforded by §106.45(b)(8) preempt arbitration under a union contract because the regulation requires those appeal rights to apply equally to both parties. (Pb34). So, the argument goes, since the complainant does not have the right to file a grievance under the Local 888 contract, it must deny respondent that right.[4] This "equal application" argument fails for a variety of reasons.

First, as a matter of law, the appeal rights afforded by §106.45(b)(8) can only preempt arbitration of discipline under a union contract if those rights constitute an "alternate statutory appeal procedure." See N.J.S.A. 34:13A-5.3; Turnpike Authority, *supra* at 195-196. The Title IX regulation falls far short of the mark. As PERC found, there is nothing in §106.45(b)(8) which "expressly, specifically and comprehensively" speaks to the right of employees to arbitrate discipline under a union contract. To the contrary, the appeal rights provided by §106.45(b)(8) are limited to an initial determination of responsibility, and even those rights are confined to certain narrow grounds. Our Supreme Court has refused to find that the right to appeal an initial determination of guilt by the employer equates to having

[4] As discussed in Point VIII below, that claim is based on a false premise.

an alternate statutory right to appeal discipline. Turnpike Authority, *supra* at 195. Rutgers' Title IX Policy underscores this point by giving students, ***but not employees,*** the right to appeal discipline. That's because the drafters of the policy knew that employees had a separate right to appeal discipline under their respective union contracts pursuant to Section VIII.L. (See Point IV, above). Since §106.45(b)(8) does not speak to the employee's right to appeal discipline, it does not constitute an alternate statutory basis to do so, and therefore cannot preempt arbitration of discipline under a union contract. Turnpike Authority, *supra.*

In essence, Rutgers is asking the court to ***infer*** that §106.45(b)(8) was intended to preempt arbitration. That argument runs headlong into a wall of precedent which requires that to be preemptive, a law or regulation must speak "expressly" and "specifically" to the issue. See e.g. Council of New Jersey State College Locals, 91 N.J. 18, 30 (1982). In the absence of any specific language in the regulation which speaks "in the imperative" to the right of employees to appeal discipline through binding arbitration, or otherwise deprives employees of that right, PERC was compelled by its own precedent and the courts' to deny Rutgers' Petition. That decision was correct as a matter of law and should be affirmed.

Second, the limited appeal rights of §106.45(b)(8) only apply prior to the imposition of discipline and need only be offered equally to that extent. By contrast, employee rights under Article 4 of the collective bargaining agreement

only apply after discipline is imposed. The DOE left little doubt that collective bargaining rights are "additional rights" which recipients are required to honor, provided that the pre-termination process established by 34 C.F.R. §106.45 is complied with. See 85 Fed. Reg. 30298 *30442 (May 19, 2020). Since J.M and his accuser both had equal access to the appeal rights available prior to the imposition of discipline, the union has a right to pursue binding arbitration under Article 4.

This conclusion is borne out by the specific language of the regulation. 34 C.F.R. §106.45(b)(8)(i) provides that "A recipient must offer both parties ***an appeal from a determination regarding responsibility and from a recipient's dismissal of a formal complaint*** or any allegations therein, on the following bases." The regulation then lists three grounds for appeal – procedural irregularities, new evidence not previously available, and conflict of interest/bias. See 34 C.F.R. §106.45(b)(8)(i)(A)(B) and (C). The appeal rights conferred by §106.45(b)(8)(i) only apply to an initial determination of responsibility, or an initial decision to dismiss the complaint. Since §106.45(b)(8) does not apply (or even refer) to the employee's right to appeal discipline, it cannot preempt the union's right to arbitrate discipline on behalf of its member.

Rutgers hangs its hat on the next section, 34 C.F.R. §106.45(b)(8)(ii), which provides that "A recipient may offer an appeal equally to both parties on additional bases." (Pb25). From this, Rutgers claims that if any other appeal rights are

provided, they must be provided to both sides. (Pb31-32).[5] But the language of §106.45(b)(8)(ii) must be read in context with the entire section. The "additional bases" referred to in the regulation are those in addition to the ones set forth in §106.45(b)(8)(i). The specific grounds for appeal listed under §106.45(b)(8)(i), and the "additional bases" for appeal contemplated by §106.45(b)(b)(ii), only apply to appeals of an initial determination of responsibility, or an initial decision to dismiss the complaint. So, if Rutgers wishes to offer additional grounds to appeal an initial determination of responsibility, it must make those grounds available to both sides. Likewise, if Rutgers wants to offer additional grounds to appeal the dismissal of a complaint, it must offer those grounds to both sides equally. But arbitration is not an "additional basis" to appeal as that term is used in 34 C.F.R. §106.45(b)(8)(ii) because post-disciplinary appeals are beyond the limited scope of §106.45(b)(8)(i). Simply put, the complainant in this case was provided with all the rights due to her during Title IX's pre-termination process. The right to arbitration under a union contract is an "additional right" outside the ambit of 34 C.F.R. §106.45.

Finally, accepting Rutgers' "equal application" argument would lead to absurd results, and would effectively rewrite labor and employment law in New Jersey. Rutgers is asking this court to find that its decisions under the Title IX

[5] As discussed above, this argument is curious, insofar as Rutgers Policy 60.1.33, Section M, gives students the right to appeal disciplinary sanctions, but withholds that right from employees. By providing an appeal right to some parties (students) but not others (employees) Rutgers' legal argument is at odds with its own policy.

grievance process are final and cannot be challenged in any forum unless set forth explicitly in the process and made "equally available" to both sides. (Pb34). Consider for a moment what accepting that argument would mean with respect to other types of appeal rights currently provided by law. A tenured professor discharged after a Title IX hearing would lose the right to file an appeal pursuant to N.J.S.A. 18A:60-2 and N.J.S.A. 18A:6-18, which grant tenured faculty the right to appeal discipline to the Office of Administrative Law. The same would be true of thousands of Civil Service employees, who would lose their appeal rights under Title 4A because the employer's Title IX determination would not be subject to review. (See Point VI above). The consequences are just as concerning in the other direction. If Rutgers were to find an employee not responsible for sexual harassment at the conclusion of the Title IX process, and that decision was final and not subject to review or reversal in any forum, that would mean that the complainant would be unable to sue under Title IX or any other anti-discrimination law. That result was specifically rejected by the United States Supreme Court. Alexander, 415 U.S. at 52. Ironically, Rutgers' claim that the results of the Title IX process are final and not subject to review would make it harder to enforce laws prohibiting sexual harassment. To preserve the rights of both public employees and sexual harassment complainants, and to ensure the preservation of New Jersey labor and employment law as we know it, PERC's decision must be affirmed.

Point VIII

Rutgers "equal application" argument fails in this case because both the complainants and the respondents had equal access to the Local 888 grievance-arbitration process. (Pa21-Pa32).

Even if Rutgers were properly interpreting the scope and operation of the Title IX grievance process (which it is not) and even if the federal Department of Education intended the Title IX grievance process to supplant the rights of union members to arbitrate discipline under a collective bargaining agreement (which it has expressly stated is not the case), Rutgers' appeal should still be denied because, in this particular case, the Local 888 grievance process was equally available to both the complainants and the respondents. Therefore, assuming *arguendo* that the court agrees with every aspect of Rutgers' legal argument, arbitration of the union's just cause grievance would still be permitted by 34 C.F.R. §106.45.

Rutgers' primary argument on appeal is that it is prohibited by Title's IX's regulations from providing any additional appeal rights unless that right is offered "equally to both parties." 34 C.F.R. §106.45(b)(8)(ii). (Pb34). Even if the post-termination right to arbitration under the Local 888 contract is somehow deemed to be an "additional bases" to appeal a pre-termination Title IX decision, that process was equally available to both J.M and his accuser because both were members of the Local 888 bargaining unit. (Pa179). Therefore, further appeal by either party under the union contract does not offend 34 C.F.R. §106.45(b)(8)(ii).

There is no dispute that all the employees involved in this matter, including J.M. and his accuser, were covered by the Local 888 contract. (Pa179). As such, both J.M. and his accuser had a right to appeal the outcome of the Title IX hearing through the union contract. In J.M.'s case, he filed a grievance pursuant to Article 4, paragraph 8 challenging the discipline imposed upon him at the conclusion of the Title IX process. (Pa165). The union grievance procedure is the "sole right and remedy" for Local 888 members who wish to appeal discipline. Had she been unhappy with the outcome of the Title IX process, J.M.'s accuser would have a similar right. Under Article 4 of the union contract, a grievance is defined as "any difference or dispute concerning the interpretation, application, or claimed violation of any provision of this Agreement or of any Rutgers policy or an administrative decision relating to wages, hours or other terms or conditions of employment of the employees…" (Pa162, emphasis supplied). Under Article 4, an administrative decision by Rutgers, such as the one issued here pursuant to Rutgers' Title IX Policy, is subject to appeal through the contractual grievance-arbitration procedure. The complainants also had an independent right to file a grievance under Article 6, which prohibits discrimination of the basis of gender. (Pa167). Since all parties to this matter had equal access to the union grievance procedure, Rutgers' "equal application" argument fails.

Rutgers argues that the union grievance procedure does not apply equally because the accuser does not have the ability to seek a more serious sanction. (Pb35-Pb36). That argument is defeated by the DOE commentary cited in Rutgers' own brief. Those comments provide that the regulations "leave it to a recipient's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal…" (Pb35, *citing* US DOE *Preamble*, 85 Fed. Reg. at 30396, emphasis supplied). Under Title IX's regulations, the ability to appeal sanctions is clearly discretionary, not mandatory. In the exercise of that discretion, Rutgers has limited the right to appeal sanctions only to cases involving students. (Pa84). That's because employees already have the right to appeal sanctions through their union contracts under Section VIII.L of Policy 60.1.33. (Pb82-Pb83). Even if Rutgers' policy gave its employees the right to appeal sanctions, that would not preempt arbitration, since that basis for appeal is discretionary. See Local 195 IFPTE, 88 N.J. 393, 411-412 (1992), *citing* State v. State Supervisory Employees Ass'n., 78 N.J. 54, 80 (1978) [to be preemptive, a law or regulation must speak in the imperative, leaving nothing to the employer's discretion]. Since Rutgers admits that an employee's right to appeal discipline is discretionary under Title IX, the regulation cannot preempt arbitration. PERC's decision was therefore correct as a matter of law. Furthermore, since all parties had equal access to the union grievance procedure, arbitration is not prohibited by 34 C.F.R. §106.45.

CONCLUSION

Title IX's regulations do not preempt arbitration of discipline. Nothing contained in 34 C.F.R. §106.45 deprives union members of the right to arbitrate discipline, or even speaks to that right. To the contrary, the DOE has stated that the right to arbitrate discipline is an "additional right" which must be honored by the recipient of federal funds. Rutgers' governing policy recognizes that right. The U.S. and New Jersey Supreme Courts have both held that laws seeking to eradicate discrimination and collective bargaining rights contained in a union contract confer separate rights which may be exercised independently. Such is the case here. Rutgers complied with its obligations under Title IX in deciding whether to impose discipline. It must now comply with the terms of the union contract which provides the "sole right and remedy" for appealing that discipline. Given the regulatory silence and the applicable case law, PERC properly denied Rutgers' Petition to restrain arbitration. For the reasons stated herein, that decision should be affirmed.

Respectfully submitted,

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In the Matter of

RUTGERS, THE STATE UNIVERSITY OF NEW JERSEY,

and

AFSCME LOCAL 888, AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, AFL-CIO.

SUPERIOR COURT OF NEW JERSEY
APPELLATE DIVISION

DOCKET NO. A-000277-23 T1

CIVIL ACTION

On Appeal from a
Final Order of the:

New Jersey Public Employment Relations Commission

Docket No. SN-2023-028
Docket No. SN-2023-029

PETITIONER-APPELLANT'S REPLY BRIEF AND APPENDIX

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PRELIMINARY STATEMENT

Local 888's and PERC's briefs are most remarkable for what they do not do. They do not dispute that Local 888 seeks to use the CNA arbitration to re-litigate and overturn the outcome of the Federally-mandated Title IX Grievance Procedure. Specifically, Local 888 seeks to re-adjudicate and reverse the Title IX determination (which followed a live evidentiary hearing and by Federal law is final) that J.M. engaged in a pattern of sexual harassment and assault constituting "just cause" for discharge. PERC and Local 888, therefore, confirm the clear substantive conflict that requires preempting the CNA arbitration.

Local 888 and PERC also cannot dispute that the Title IX Regulations explicitly impose procedural requirements for any supplemental process with which the CNA arbitration does not comply. These requirements include the Regulations' mandate that any supplemental process or appeal grounds "apply equally" to both parties, be set forth explicitly in the Title IX Grievance Procedure, and comply with minimum requirements regarding the decision-maker and the process. Local 888 and PERC ignore those regulatory mandates because they know that the CNA arbitration procedures do not comport with them. Again, there is a plain conflict requiring preemption.

The arguments that Local 888 and PERC do make fail to avoid preemption. Local 888 and PERC cannot overcome the fundamental conflicts

between the Title IX Regulations and the CNA arbitration, which have been addressed at length in Rutgers' Opening Brief. While they argue that the Regulations do not comprehensively cover "appeals," they do so only by ignoring the Regulations' specific requirements applicable to appeals. Further, Local 888 has demanded the CNA arbitration to do much more than "appeal" the final determination reached through the mandated Title IX Grievance Procedure; it seeks to re-litigate the entire subject matter, with the goal of having an arbitrator reach a different conclusion about J.M.'s conduct. That inherently conflicts with the Regulations' mandate that covered sexual harassment complaints and any discipline be adjudicated under the Title IX Grievance Procedure.

These fundamental conflicts also undermine Local 888's attempted reliance on the US DOE comments to the Regulations. The comments merely recognized that parties could negotiate and include in a Title IX Grievance Process a supplemental labor agreement procedure that "complies with" the Regulations. In so doing, the US DOE did not contemplate or endorse the use of a *noncompliant* labor agreement arbitration to collaterally challenge a final determination reached through the Title IX Grievance Procedure.

Nor do the cases cited by Local 888 and PERC support their position. The Title IX preemption issue is one of first impression. The relevant Title IX

Regulations were not issued until May 2020. Despite claiming "decades of authority," neither Local 888 nor PERC cite any case involving the Title IX Regulations at issue nor any analogous statutory or regulatory construct.

This appeal inescapably returns to the fundamental conflicts between the Regulations and the proposed CNA arbitration. Therefore, under both Federal Supremacy Clause preemption and New Jersey's own preemption standards, the Title IX Regulations preempt the proposed CNA arbitration.

POINT I

THE ORDER IS SUBJECT TO *DE NOVO* REVIEW

Neither Local 888 nor PERC cite any authority to avoid the applicable *de novo* standard of review. Local 888 itself concedes that "the court is not bound by PERC's interpretation of the Title IX regulations, since PERC is not charged with administering that law." (Local 888 Brief at p. 7).

PERC incorrectly argues that deference applies under *Hunterdon Central H.S. Bd. of Ed. v. Hunterdon Central H.S. Teach. Ass'n,* 174 N.J. Super. 468 (App. Div. 1980), *aff'd o.b.*, 86 N.J. 43 (1981). (PERC Brief at p. 5). *Hunterdon* contradicts PERC's position. The *Hunterdon* Court upheld only PERC's *jurisdiction* to address other laws when determining a labor issue. The Court did not suggest that jurisdiction was coextensive with deference. To the contrary, the Court emphasized the absence of deference: "we should emphasize that

where the issue is one of law the agency's decision does not carry a presumption of validity, and it is for the court to decide if the decision is in accordance with the law." 174 N.J. Super. at 475. This Court's review, therefore, is *de novo*.

POINT II

THE TITLE IX REGULATIONS PREEMPT THE CNA ARBITRATION

A. Local 888 and PERC Cite No Case Contrary to the Regulations' Preemption of the CNA Arbitration.

Neither Local 888 nor PERC cite any case contradicting the Title IX Regulations' preemptive effect. As addressed in Rutgers' Opening Brief, the holding of *New Jersey Turnpike Authority v. New Jersey Turnpike Supervisors' Association*, 143 N.J. 185 (1986), is inapposite to this case, and its *dicta* supports preemption. (Opening Br. at pp. 45-48).

Nor can Local 888 and PERC rely on *Alexander v. Gardner-Denver Co.*, 415 U.S. 36 (1974). *Alexander* did not address Title IX or even preemption. Instead, the Court addressed an issue inapposite to this appeal: whether the elective use of a labor agreement grievance process foreclosed a judicial remedy under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*. 415 U.S. at 38, 43. The Court did not in any way address whether a labor agreement process might itself be legislatively preempted.

Despite the different situation addressed in *Alexander*, PERC relies on it to argue that preemption does not apply because Title IX rights and collectively

negotiated rights have "different sources" and "legally independent origins," "[e]ven if there was some overlap between these separate rights." (PERC Br. 15, 18). *Alexander* addressed an election-of-remedies argument. PERC's out-of-context quotes do not apply to preemption. By definition, preemption applies precisely when rights or obligations arising from different sources conflict.

Lastly, Local 888 cites several Title IX cases without disclosing the essential point: each of the cited cases addressed disputes pre-dating the non-retroactive 2020 Title IX Regulations. (Local 888 Br. at 30-31). Those cases, therefore, are inapposite. Apparently for that reason, even PERC declined to rely on the Title IX cases cited by Local 888. (PERC Dec. 16-17, 23).

B. Local 888 and PERC Confirm the Conflicts Between the Title IX Grievance Procedure and the CNA Arbitration.

1. The CNA Arbitration Conflicts with the Title IX Regulations' Equal Application and Other Procedural Requirements.

Neither Local 888 nor PERC can explain how the CNA arbitration would comport with the Title IX Regulations procedural safeguards and requirements – including those applicable to appeals – as set forth in 34 C.F.R. §106.45. (*See*, as to requirements applicable to appeals, Opening Br. 24-26, 31-37).[1] The only

[1] For example, the CNA arbitration is not explicitly set forth in the adopted Title IX Grievance Procedure, 34 C.F.R. §§106.45(b) and (b)(1)(viii); it does not "apply equally to both parties," *id*. at §§106.45(b), (b)(8)(ii), and (b)(8)(iii)(A); it does not require the decision-maker to meet Title IX requirements, *id*. at

requirement they even attempt to address is the mandate that a supplemental process or appeal basis must "apply equally" to both parties.

Local 888 incorrectly argues that the CNA grievance procedure "applies equally" to both parties because J.M.'s victim (the Title IX complainant) could bring her own CNA grievance under CNA Article 6. (Local 888 Br. 37). But that is not the equal application required by the Regulations. Article 6 addresses only non-discrimination; it does not enable J.M.'s victim to grieve the level of discipline imposed on J.M., which Local 888 seeks to arbitrate for J.M. under the CNA Article 4(8) discipline provision. (Pa173, 165, 168). Neither Local 888 nor PERC dispute that, under the CNA, J.M.'s victim could not grieve J.M.'s disciplinary sanction, would not be a party to J.M.'s CNA grievance arbitration, and would not have the rights provided to J.M. as a party in that arbitration. (*See* Opening Br. at pp. 36-37). That is the equal application required by the Regulations, and it does not exist here.[2]

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§106.45(b)(1)(iii); and it does not ensure the Title IX complainant's rights to meaningful participation and procedural due process.

[2] The happenstance that J.M. and his victim are both covered by the same CNA should not control the preemptive effect of the Title IX Regulations. A sexual harassment victim under Title IX just as likely could be a non-represented employee, an employee represented by a different union, or a student.

Ignoring the Regulations, Local 888 then seeks to subordinate the "apply equally" mandate to the recipient school's limited discretion regarding the grounds for appeal included within its Title IX Grievance Procedure. (Local 888 Br. 39). Specifically, Local 888 argues that "a recipient's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal" somehow permits the recipient to also decide whether to make such grounds for appeal equally applicable to the parties. (*Id*.) But the Regulations explicitly provide otherwise. The Regulations mandate that any supplemental basis for appeal – such as a challenge to disciplinary sanctions – "must apply equally to both parties" and must be offered "equally to both parties." 34 C.F.R. §106.45(b) and (b)(8)(ii). Nothing in the Regulations permits one party to have a one-sided right – such as what Local 888 seeks for J.M. under the CNA – to re-adjudicate the Title IX determination of responsibility and discipline. Because the Article 4(8) CNA arbitration challenging the Title IX discipline determination is not equally available to J.M.'s victim, it conflicts with Title IX's requirements.

2. The CNA Arbitration Conflicts with the Title IX Regulations Because It Would Re-Adjudicate the Title IX Grievance Procedure Determination.

Both Local 888 and PERC avoid any plain discussion of what the CNA arbitration would decide. PERC acknowledges that the Title IX-mandated

Written Determination regarding J.M. found, "in accordance with Title IX regulations," that J.M. engaged in sexual harassment constituting "just cause" for discharge. (PERC Br. at 2-3). Neither Local 888 nor PERC dispute that this Written Determination, by law, became final after the Title IX appeal. *See* 34 C.F.R. §106.45(b)(7)(iii).

Both PERC and Local 888, however, concede that the intended purpose of the CNA arbitration is to re-adjudicate the Title IX determination. PERC offers only its hope that the arbitrator's adherence to the CNA non-discrimination terms might "eliminat[e] the risk that an interpretation of the CNA would lead to results contrary to Title IX." (PERC Br. at 13). But PERC's optimism does not align the CNA arbitration with the Title IX Regulations or resolve the conflict created by re-adjudicating a Title IX-mandated Written Determination that, by law, is final. *See* 34 C.F.R. §106.45(b)(7)(iii).

Local 888 contradicts PERC's optimism, since it seeks exactly what PERC speculates might not occur: a CNA arbitration result contrary to the Title IX determination. Local 888 explicitly states that the purpose of the arbitration is to adjudicate "just cause" under the CNA. (*E.g.*, Local 888 Br. at 2; Pa177). Even if only addressing whether J.M.'s sexual harassment and assault of a co-worker constitutes just cause for discharge, the arbitration would re-adjudicate part of the Title IX determination. However, since Local 888 presumably does

not dispute that such conduct can be just cause for discharge, its clear intent includes re-adjudicating the underlying facts – whether J.M. sexually harassed and assaulted the Title IX complainant. That question lies at the core of the Title IX Grievance Procedure and the scope of the Written Determination of responsibility that was specifically mandated by the Regulations and that, under those Regulations, became final after the Title IX appeal. *See* 34 C.F.R. §§106.45(b)(7), including (b)(7)(ii)(E) and (b)(7)(iii)(C).

The conclusion is inescapable: the intended purpose of the CNA arbitration is to re-adjudicate the Title IX Written Determination that, by law, is final, and replace it with the arbitrator's decision as to whether the underlying conduct occurred and whether there was "just cause" for discharge. Further, it would do so without the safeguards carefully provided by the Regulations to ensure due process and balance the rights of both the Title IX complainant and respondent. In both respects, there is a clear conflict requiring preemption.

C. The Asserted Pre- and Post-Discipline Distinction Presents a False Dichotomy that Does Not Avoid the Conflicts Between the Title IX and CNA Processes.

Both Local 888 and PERC seek to distinguish the Title IX and CNA arbitration processes because one occurs before and the other after discipline is implemented. (*E.g.*, PERC Br. 1, 8, 17; Local 888 Br. 12-13). Neither Local 888 nor PERC, however, provide any support for their implied position that the

Title IX Regulations permit a non-compliant process as long as that process occurs after discipline. Simply put, no such support exists because the Regulations do not permit such a process.

This proposed temporal distinction presents a false and meaningless dichotomy. J.M. either sexually harassed and assaulted the Title IX complainant or he did not. His conduct either constituted just cause for discharge or it did not. Those determinations are the same whether made before or after the imposed discipline is implemented. The critical point remains that Local 888 seeks to use the CNA arbitration to re-adjudicate and overturn the Title IX Written Determination ***and*** to do so through a process that does not comply with the Regulations' procedural safeguards and other requirements. Whether occurring before or after the Title IX Written Determination is implemented, a non-compliant CNA process seeking to re-adjudicate that determination conflicts with the Title IX Regulations.

D. Local 888 and PERC Ignore the Regulations' Comprehensive Scope and Requirements regarding Appeals.

Local 888 and PERC incorrectly argue that the Title IX Regulations somehow permit the CNA arbitration because the Regulations do not address an appeals process for disciplinary sanctions. (PERC Br. 12-13; Local 888 Br. 13). That argument fails for two reasons.

First, Local 888's and PERC's arguments about appeal processes are immaterial because the CNA arbitration is not an appeal from the Title IX determination. Indeed, both Local 888 and PERC deny that it is an appeal. Instead, they appear to view the CNA arbitration as a *de novo* re-litigation of the issues that already were decided.

Second, even if the CNA arbitration could be characterized appropriately as an "appeal," the Title IX Regulations do comprehensively address appeals. The Regulations do not merely require certain grounds for appeal and permit discretion as to other grounds. The Regulations mandate that any and all grounds for appeal be set forth explicitly in the Title IX Grievance Procedure. 34 C.F.R. §§106.45(b) and (b)(1)(viii). The Regulations similarly require that any and all supplemental processes be set forth explicitly as part of the Title IX Grievance Procedure. (*Id*.) The Regulations also mandate that any such appeal basis or supplemental process meet the "apply equally" requirement and otherwise comply with the full set of requirements imposed by the Regulations. 34 C.F.R. §§106.45(b) and (b)(8)(ii). (*See* Opening Br. at 24-25, 34-35).

These mandates are comprehensive and make the Title IX Grievance Procedure comprehensive. Because all appeal grounds and supplemental processes must be set forth in the Title IX Grievance Procedure, 34 C.F.R. §§106.45(b) and (b)(1)(viii), whatever is not included is, by definition, excluded

and not permitted. *See*, *e.g.*, *Krupski v. Costa Crociere S.p.A.*, 560 U.S. 538, 552-54 (2010) (an exclusive list of factors operates to preclude use of other factors); *Bethlehem Twp. Bd. of Education v. Bethlehem Twp. Education Association*, 91 N.J. 38, 44 (1982) (legislation that sets "discretionary limits" preempts matters outside of those limits).

The US DOE comments confirm the exclusivity of the grounds for appeal set forth in the recipient school's Title IX Grievance Procedure. The US DOE specifically considered whether to categorically preclude the severity of discipline as a basis for appeal or permit a recipient's Title IX Grievance Procedure to include it. *US DOE Preamble,* 85 Fed. Reg. at 30396. (*See* Opening Br. at 35-36). By choosing the latter, the US DOE established a framework under which a Title IX Grievance Procedure that does not include severity of discipline as a basis for appeal thereby precludes an appeal on that basis. 34 C.F.R. §§106.45(b) and (b)(1)(viii).

The Title IX Regulations, therefore, preclude – and therefore preempt – any appeal ground or process that is not explicitly included in the Title IX Grievance Procedure and that does not comply with the Regulations' requirements.

E. The US DOE Comments Do Not Permit the CNA Arbitration.

Even the US DOE comments cited by Local 888 contradict its argument. In the cited comments, the US DOE recognized that "recipients have discretion to negotiate and bargain with unions on behalf of employees for the most suitable process ***that complies with these final regulations***." 85 Fed. Reg. at 30444 (emphasis added). Local 888 ignores the last clause of that statement.

The cited US DOE comments, therefore, directly contradict Local 888's argument. They do not contemplate the use of a conflicting process. Instead, they make clear that a supplemental process, whether negotiated or otherwise, must comply with the Regulations. Here, the CNA arbitration does not comply with the Regulations. (*See*, *e.g.*, n. 1, *supra*, and Opening Br. 24-26, 34-35). Against this background, the cited comments confirm that the Regulations pre-empt the CNA arbitration.

F. Rutgers' Title IX Policy Does Not Incorporate CNA Arbitration.

Contrary to Local 888's argument, nothing in Rutgers' Title IX Policy preserves the right of a Title IX respondent to pursue post-discipline arbitration under the CNA. (*See* Opening Br. at pp. 42-45).

Local 888 now argues further that, if the Title IX Policy does not include CNA arbitration to adjudicate "just cause," Rutgers "unilaterally reassign[ed] that task" from the arbitrator in violation of the CNA and the EERA. (Local 888

Br. at 20). There has been no unilateral reassignment. The Regulations mandated Rutgers' adoption of the Title IX Policy. To the extent that conflicts with an alleged CNA right, the Regulations preempt the CNA. Even apart from Federal preemption, the EERA itself specifically recognizes that a labor agreement right to arbitration does not apply when the matter has been preempted by law. N.J.S.A. 34:13A-5.3.

G. <u>The Civil Service Regulations Do Not Support Local 888's Position</u>.

The New Jersey Civil Service regulations cited by Local 888 also contradict its position. Although the Civil Service regulations do not even apply to Rutgers (and would be subordinate to Federal law if applicable), Local 888 argues that J.M. should be able to use a CNA arbitration to challenge a Title IX disciplinary determination because a Civil Service employee can appeal a disciplinary determination made under the Civil Service process. (Local 888 Br. 27-30).

Local 888's argument overlooks the point that the Civil Service regulations explicitly permit an appeal. N.J.A.C. §§4A:2-2.8 and 4A:2-9. They do not support implying a right to pursue a collateral challenge. To the contrary, by setting forth a comprehensive procedure, the Civil Service regulations preempt other avenues to challenge the imposition of discipline within the scope of those regulations – including a CNA arbitration. *In re City*

of Passaic v. Int'l Brotherhood of Electrical Workers, Local 1158, P.E.R.C. No. 2011-58, 37 NJPER P5 (Feb. 3, 2011).

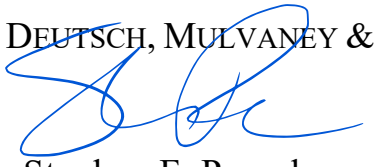
While the Civil Service regulations do not apply to Rutgers, the Title IX Regulations do. But Local 888's comparison of the two is apt in one respect: just as under the Civil Service regulations, the Title IX Regulations comprehensive procedural framework preempts review or re-adjudication through a non-compliant CNA process.

CONCLUSION

For the foregoing reasons and those set forth in its opening brief, Rutgers respectfully submits that the Court must reverse PERC's August 24, 2023 Order and direct the entry of an Order restraining the arbitration of the subject grievance submitted by Local 888 on behalf of J.M.

Respectfully submitted,

McElroy, Deutsch, Mulvaney & Carpenter, LLP



Stephen F. Payerle

Dated: February 27, 2024

P.E.R.C. NO. 2011-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and- Docket No. SN-2010-107

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1158,

Respondent.

SYNOPSIS

The Public Employment Relations Commission grants the request of the City of Passaic for restraints of binding arbitration of grievances filed by the International Brotherhood of Electrical Workers, Local 1158. The grievances allege that the City violated the parties' collective negotiations agreement when it terminated an employee based on the City's assertion that he was not fit for duty following a leave of absence resulting from a workplace accident. The Commission holds that removals or terminations of Civil Service employees in local jurisdictions may not be reviewed through binding arbitration and must be appealed to the Civil Service Commission.

This synopsis is not part of the Commission decision. It has been prepared for the convenience of the reader. It has been neither reviewed nor approved by the Commission.

P.E.R.C. NO. 2011-58

STATE OF NEW JERSEY
BEFORE THE PUBLIC EMPLOYMENT RELATIONS COMMISSION

In the Matter of

CITY OF PASSAIC,

Petitioner,

-and- Docket No. SN-2010-107

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, LOCAL 1158,

Respondent.

Appearances:

For the Petitioner, Scarinci Hollenbeck, attorneys (Christina M. Michelson, on the brief) and Florio Perrucci Steinhardt & Fader, LLC, attorneys (Steven R. Srenaski, on the reply brief)

For the Respondent, Kroll Heineman, attorneys (Curtiss T. Jameson, on the brief)

DECISION

On June 18, 2010, the City of Passaic petitioned for a scope of negotiations determination. The City seeks a restraint of binding arbitration of grievances filed by the International Brotherhood of Electrical Workers, Local 1158. The grievances allege that the City violated the parties' collective negotiations agreement when it terminated an employee based on the City's assertion that he was not fit for duty following a leave of absence resulting from a workplace accident. Because removals or terminations of Civil Service employees in local

jurisdictions may not be reviewed through binding arbitration, we restrain arbitration.

The parties have filed briefs and exhibits. Neither party has filed a certification of facts. See N.J.A.C. 19:13-3.5(f)(1). These facts appear.

The City is a Civil Service jurisdiction. Local 1158 is the majority representative of the City's full-time, non-supervisory, blue collar employees. The parties' collective negotiations agreement is effective from July 1, 2006 to June 30, 2011. The grievance procedure ends in binding arbitration. Article V.E allows an aggrieved employee to use Department of Personnel (now the Civil Service Commission) procedures to review adverse personnel actions. Where such an election is made the grievance proceedings will terminate.

Article VII.A provides:

> Matters involving promotions, seniority, layoffs, demotions, suspensions, termination and other disciplinary actions shall be handled in accordance with New Jersey Department of Personnel regulations (N.J.A.C.) where applicable.

Articles XVI and XXIX, respectively, address sick leave and line-of-duty injury.

In 2006, a laborer represented by Local 1158 suffered a workplace injury and was out for a substantial period of time. Local 1158 asserts that in 2008, the injured employee was examined by a physician and was pronounced able to work subject

to restrictions. The City declined to put the employee back to work. Local 1158 asserts that the Business Administrator told the laborer that he could "resign, retire or be terminated."

On August 13 and September 15, 2008, Local 1158 filed grievances claiming that the laborer could return to work. The grievances were denied and Local 1158 demanded arbitration stating that it was "challenging termination for fitness for duty." This petition ensued.

Our jurisdiction is narrow. Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed., 78 N.J. 144, 154 (1978), states:

> The Commission is addressing the abstract issue: is the subject matter in dispute within the scope of collective negotiations. Whether that subject is within the arbitration clause of the agreement, whether the facts are as alleged by the grievant, whether the contract provides a defense for the employer's alleged action, or even whether there is a valid arbitration clause in the agreement or any other question which might be raised is not to be determined by the Commission in a scope proceeding. Those are questions appropriate for determination by an arbitrator and/or the courts.

Thus, we do not consider the merits of these grievances or any contractual defenses the City may have.

Local 195, IFPTE v. State, 88 N.J. 393, 404-405 (1982), sets the standards for determining whether a subject is mandatorily negotiable:

> [A] subject is negotiable between public employers and employees when (1) the item intimately and directly affects the work and

> welfare of public employees; (2) the subject has not been fully or partially preempted by statute or regulation; and (3) a negotiated agreement would not significantly interfere with the determination of governmental policy. To decide whether a negotiated agreement would significantly interfere with the determination of governmental policy, it is necessary to balance the interests of the public employees and the public employer. When the dominant concern is the government's managerial prerogative to determine policy, a subject may not be included in collective negotiations even though it may intimately affect employees' working conditions.

A subject is preempted from arbitration where a statue or regulation "expressly, specifically and comprehensively" sets the term and condition of employment or provides another procedure for resolving disputes that must be used. See Bethlehem Tp. Bd. of Ed. and Bethlehem Tp. Ed. Ass'n, 91 N.J. 38, 45-46 (1982).

The City argues that the grievances challenge a disciplinary termination of a Civil Service employee that can only be reviewed by the Civil Service Commission (CSC).

Local 1158 responds that the termination of the grievant was not disciplinary as demonstrated by the City's failure to follow mandatory disciplinary procedures including service of a preliminary notice of disciplinary action, a departmental hearing and the service of a final notice of disciplinary action that triggers the time for an appeal. It maintains that the dispute involves the grievant's fitness for duty and arises under the provisions of the contract relating to sick leave and employees

who are injured on duty. Local 1158 asserts these issues can be resolved through binding arbitration.

The City, citing N.J.A.C. 4A:2-2.8, replies that a disciplined employee who does not receive a "Final Notice of Disciplinary Action" may nonetheless appeal to the CSC within a reasonable time. It points to Article VII.A as a reflection of the law governing personnel actions that affect Civil Service employees, implying that, whatever label is used, the termination of the grievant is within CSC jurisdiction. The City notes that this Commission has held that the creation of a light duty position is not mandatorily negotiable.

It is undisputed that the basis for the grievant's separation was the City's determination that his physical condition left him unfit to perform the duties of a laborer. Its administrator told the grievant that he could resign, retire or be terminated. The laborer's termination was not based on any act of misconduct and the City does not dispute Local 1158's assertion that Civil Service procedures for imposing discipline were not used.[1/]

1/ The City filed a copy of the laborer's claim under the Law Against Discrimination. It argues that as the Division of Civil Rights did not pursue the claim, arbitration is foreclosed. Individual claims asserting violations of personal rights do not bar a union from seeking arbitration to remedy alleged contractual violations stemming from the same events. See Fair Lawn Bd. of Ed. v. Fair Lawn Ed. Ass'n, 174 N.J. Super. 554, 558-560 (App. Div. 1980).

However, any termination or removal from employment in local service, even where no acts of misconduct are alleged, is viewed by the CSC as major discipline that is within its jurisdiction to review. Accordingly, and based on the following analysis, because the grievances assert that the City had no basis to terminate the laborer, arbitration is preempted by Civil Service laws and regulations.

N.J.S.A. 11A:2-6 provides in pertinent part:

> In addition to other powers and duties vested in it by this title or by any other law, the commission shall:
>
> a. After a hearing, render the final administrative decision on appeals concerning permanent career service employees or those in their working test period in the following categories:
>
> (1) Removal,
>
> (2) Suspension or fine as prescribed in N.J.S. 11A:2-14,
>
> (3) Disciplinary demotion, and
>
> (4) Termination at the end of the working test period for unsatisfactory performance;

N.J.A.C. 4A:2-2.2 lists "removal" as major discipline. N.J.A.C. 4A:2-2.3 specifies causes for major discipline. It provides in pertinent part:

> (a) An employee may be subject to discipline for:
>
> 1. Incompetency, inefficiency or failure to perform duties;
>
> 2. Insubordination;
>
> 3. Inability to perform duties;

4. Chronic or excessive absenteeism or lateness;

5. Conviction of a crime;

6. Conduct unbecoming a public employee;

7. Neglect of duty;

* * *

11. Other sufficient cause.

The circumstances surrounding the dismissal of the laborer would be regarded as an "inability to perform duties" under N.J.A.C. 4A:2-2.3(a)3. See In the Matter of Patricia Clarke, 2008 N.J. AGEN LEXIS 551; In the Matter of Yvette Gore-Bell, 2007 N.J. AGEN LEXIS 1024. In both of these cases, employees in local service had been terminated by their employers for inability to perform their jobs. Neither employee had engaged in misconduct and medical conditions prevented them from doing their jobs. In both cases, the Merit System Board (now the CSC) set aside the terminations and converted them to resignations in good standing given that neither employee had engaged in misconduct and medical conditions were the only reason they could not remain employed.

These cases show that the CSC has jurisdiction to determine if the laborer's removal was improper.[2/] As Local 1158's arbitration demand expressly challenges "termination for fitness

2/ We make no judgment as to whether the grievant can still file a timely appeal to the CSC.

for duty,"[3/] CSC jurisdiction preempts arbitration,[4/] and we restrain arbitration.

ORDER

The request of the City of Passaic for restraints of binding arbitration are granted.

BY ORDER OF THE COMMISSION

Chair Hatfield, Commissioners Bonanni, Colligan, Eaton, Eskilson and Voos voted in favor of this decision. None opposed. Commissioner Krengel was not present.

ISSUED: February 3, 2011

Trenton, New Jersey

3/ The grievance does not appear to challenge the City's assertion that it does not have a light duty position for a laborer. That issue has been considered in CSC appeals involving "inability to perform duties." See Clarke.

4/ In cases arising in non-Civil Service jurisdictions we have held that disputes over whether an employee, seeking to return to work after an injury, was fit to perform the job's duties are mandatorily negotiable and legally arbitrable, even where the employee was terminated. See Evesham Tp., P.E.R.C. No. 2011-14, 36 NJPER 318 (¶123 2010). Our ruling in this case is based on preemption and does not affect Evesham Tp. or other similar cases.