

SUPREME COURT OF NEW JERSEY
Docket No. 090230

IN THE MATTER OF
RUTGERS, THE STATE
UNIVERSITY
OF NEW JERSEY,
Petitioner-Petitioner,

and

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

Petition for Certification from the
Final Judgment of the Superior Court
of New Jersey, Appellate Division,
Docket No. A-0277-23

Sat Below:

Hon. Lisa Perez Friscia, J.A.D.

Hon. Stanley L. Bergman, Jr. J.A.D.

Civil Action

**BRIEF OF AMICUS CURIAE MATTHEW J. PLATKIN,
ATTORNEY GENERAL OF THE STATE OF NEW JERSEY**

Date Submitted: July 16, 2025

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY
124 Halsey Street, P.O. Box 45029
Newark, New Jersey 07101
(609) 696-5362
Eve.Weissman@law.njoag.gov

Jeremy M. Feigenbaum, Solicitor General
Stephen Ehrlich, Deputy Solicitor General
Of Counsel

Liza B. Fleming (441912023)
Eve E. Weissman (093902013)
Olivia C. Mendes (410672022)
Deputy Attorneys General
On the Brief

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INTEREST OF AMICUS CURIAE

The Attorney General has substantial interests in safeguarding New Jersey public employees' collective bargaining rights under the Employer-Employee Relations Act (EERA), N.J.S.A. 34:13A-1 to -64, and in protecting all New Jerseyans from unlawful discrimination in the workplace. As the State's legal advisor, the Attorney General also has a substantial interest in ensuring that the proper preemption analysis is correctly applied in matters concerning Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681–1689.

This case is a matter of first impression involving the proper preemption framework that applies to Title IX regulations adopted in 2020 by the U.S. Department of Education. Those federal regulations mandate that a school that receives federal financial assistance adopt a grievance process to address Title IX complaints. See 34 C.F.R. § 106.45 (2020). The issue here is whether those regulations preempt a request for arbitration, made under a collective negotiations agreement that is generally enforceable under the EERA, concerning a disciplinary sanction imposed as a result of that Title IX process. The Attorney General has a substantial interest in ensuring that the proper framework is correctly applied to preemption questions given their implications for state laws more broadly, and especially those implicating Title IX regulations

and rights under the EERA. The Attorney General therefore submits this amicus brief on that issue.

PRELIMINARY STATEMENT

The EERA, N.J.S.A. 34:13A-1 to -64, has long required public employers and collective bargaining organizations to use the “grievance and disciplinary review procedures” agreed to in the parties’ collective negotiations agreement (“CNA”) to appeal disciplinary determinations affecting employees. See N.J.S.A. 34:13A-5.3. In 2020, the U.S. Department of Education (“USDOE”) adopted regulations implementing Title IX, which require that a recipient of federal financial assistance (which includes Rutgers) adopt a grievance process to address complaints concerning sex discrimination and sexual harassment that complies with the Title IX regulations “before the imposition of any disciplinary sanctions.” 34 C.F.R. § 106.45(b)(1)(i) (2020).

Rutgers and Local 888 were parties to a CNA, which set forth a grievance procedure for disciplinary actions that ended in binding arbitration and which provided that no employee could be discharged except for just cause. In 2022, a Rutgers employee (a Local 888 member) accused another employee J.M. (also a Local 888 member) of sexual harassment. Following the grievance process set forth in 34 C.F.R. § 106.45(b) (herein, “the Title IX Regulation”), the Rutgers adjudicators deemed J.M. responsible and found just cause to terminate. Local 888 then filed a grievance under the CNA on behalf of J.M. alleging that he had been terminated without just cause. After Rutgers denied the grievance, Local

888 requested that the grievance be submitted to binding arbitration with PERC. Rutgers responded with a petition for a scope-of-negotiations determination from PERC to restrain arbitration because, Rutgers argued, Local 888's arbitration request was preempted by the Title IX Regulation. PERC denied Rutgers's petition and found that the Title IX Regulation did not preempt the request. The Appellate Division affirmed, agreeing the Title IX Regulation did not preempt Local 888's arbitration request under a state law preemption test. See Bethlehem Twp. Bd. of Educ. v. Bethlehem Twp. Educ. Ass'n, 91 N.J. 38, 44 (1982).

Although the Appellate Division came to the correct conclusion, it applied the wrong test. Specifically, the Appellate Division should have applied federal preemption analysis under the U.S. Supremacy Clause—rather than the state law preemption test for scope-of-negotiations cases—to this regulation. Under the Supremacy Clause, “if there is any conflict between federal and state law, federal law shall prevail.” Hager v. M&K Constr., 246 N.J. 1, 28 (2021) (citation omitted). Because the question here is whether binding arbitration under the CNA is preempted by the Title IX Regulation, federal preemption supplies the proper legal framework.

Applying federal conflict preemption analysis, the binding arbitration request challenging the “just cause” determination here—as agreed to by the

parties in the CNA—is not preempted by the Title IX Regulation. Because the Title IX Regulation governs the pre-discipline grievance process, while the CNA arbitration request concerns post-disciplinary review, each process addresses a distinct issue, and it was therefore not “a physical impossibility” for Rutgers to comply with both. See In re Altice USA, Inc., 253 N.J. 406, 417 (2023) (citation omitted). That is, Rutgers was required to (and did) administer the regulation’s pre-disciplinary grievance process and Rutgers was likewise able to subsequently comply with the CNA’s post-disciplinary arbitration process.

Nor does Local 888’s request for binding arbitration present an obstacle to the Title IX Regulation. As this Court has explained, binding arbitration of disciplinary actions does not interfere with an employer’s duty to prevent sexual harassment because the “employer’s obligation to adopt and implement policies against sexual harassment ‘is distinct from the employees’ ability to seek review of disciplinary actions based on allegations of sexual harassment.’” N.J. Tpk. Auth. v. N.J. Tpk. Supervisors Ass’n, 143 N.J. 185, 197 (1996) (citations omitted). Accordingly, since the Title IX Regulation’s grievance process and the CNA arbitration process address “different subjects altogether,” ibid., the CNA arbitration process does not undermine Rutgers’s duty to adhere to the Title IX Regulation and so does not frustrate the Title IX Regulation. This Court should therefore affirm under the federal preemption framework.

COMBINED PROCEDURAL HISTORY AND STATEMENT OF FACTS¹

The Attorney General adopts the statement of facts and procedural history set forth in Petitioner’s and Respondent’s briefs supplemented as follows.

A. The New Jersey Employer-Employee Relations Act.

The EERA governs collective negotiations between public employers, like Rutgers, and their employees. The Act requires public employers and employee majority representatives to “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. And “[w]hen an agreement is reached on the terms and conditions of employment,” the EERA requires that “it shall be embodied in writing and signed by the authorized representatives of the public employer and the majority representative.” *Ibid.* The Act further instructs that “[p]ublic employers shall negotiate written policies setting forth grievance and disciplinary review procedures by means of which their employees or representatives of employees may appeal” actions “including disciplinary determinations, affecting them, provided that such grievance and disciplinary review procedures shall be included in any [CNA].” *Ibid.* “Such grievance and disciplinary review procedures may provide for binding arbitration as a means for resolving

¹ The statement of facts and procedural history are combined to avoid repetition and limited to the information pertinent to the interests of amicus.

disputes.” Ibid. Procedures established in a CNA “between the public employer and the representative organization shall be utilized for any dispute covered by the terms of such agreement.” Ibid. (emphasis added). Thus, under the EERA, if a public employer and an employee representative agree in the CNA to binding arbitration as the final step in the grievance procedure for disciplinary actions, that arbitration is mandatory.

The EERA also established the New Jersey Public Employment Relations Commission (“PERC”) to “make policy and establish rules and regulations concerning employer-employee relations.” N.J.S.A. 34:13A-5.2. Under the EERA, PERC is charged with authority to determine “whether a matter in dispute is within the scope of collective negotiations,” which determination “may be appealed to the Appellate Division.” N.J.S.A. 34:13A-5.4(d).

B. The 2020 Title IX Regulation.

Title IX prohibits discrimination based on sex in any educational program or activity that receives federal financial assistance. 20 U.S.C. § 1681. In May 2020, the USDOE adopted a Title IX regulation, which mandates that a school that receives such financial assistance adopt a grievance process to address

formal Title IX complaints that complies with the requirements of the Title IX Regulation. See 34 C.F.R. § 106.45 (2020).²

Under the Title IX Regulation, a recipient must ensure equitable treatment of complainants and respondents “by following a grievance process that complies with [the Title IX Regulation] before the imposition of any disciplinary sanctions.” Id. § 106.45(b)(1)(i) (emphasis added). As part of that grievance process, the Title IX Regulation outlines steps that a recipient school must take upon its receipt of a complaint, including providing written notice of the allegations; conducting an impartial investigation of the complaint; conducting “a live hearing” before unbiased decisionmakers; and providing a written determination regarding responsibility. See id. § 106.45(b)(2)–(7).

During the investigation of a formal complaint, the Title IX Regulation requires that “a recipient must,” among other things, “[p]rovide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence,” id. § 106.45(b)(5)(ii); “[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their

² Although the Title IX Regulation was amended on August 31, 2024, the 2020 version of the Title IX Regulation was in effect at all relevant times.

choice,” who may be an attorney, id. § 106.45(b)(5)(iv); and “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation,” id. § 106.45(b)(5)(vi).

During “the live hearing, the decision-maker(s) must permit each party’s advisor to” cross-examine “the other party and any witnesses.” Id. § 106.45(b)(6)(i). Following the hearing, “[t]he decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility.” Id. § 106.45(b)(7)(i). “The written determination must include,” among other things, “[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.” Id. § 106.45(b)(7)(ii)(E).

The 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 three enumerated bases and “may offer an appeal equally to both parties on additional bases.” Id. § 106.45(b)(8). A “determination regarding responsibility becomes final” upon a written disposition resulting from an appeal or, if no appeal is filed, upon expiration of

the time to appeal. Id. § 106.45(b)(7)(iii). The Title IX Regulation also specifies that “[a]ny provisions, rules, or practices” that a recipient adopts “other than those required by” the Regulation “must apply equally to both parties.” Id. § 106.45(b). Finally, the Title IX Regulation makes clear that “[t]o the extent of a conflict between State or local law and [the] [T]itle IX regulations,” entities must still comply with the Title IX Regulation. Id. § 106.6(h).

C. This Case.

Under the EERA, Rutgers and Local 888 (the exclusive collective negotiations representative of maintenance and services employees employed by Rutgers) were parties to a CNA, which set forth a grievance procedure for disciplinary actions that culminated in binding arbitration before an arbitrator appointed by PERC. (Pa162-66, Pa178-79).³ The CNA defines “grievance” broadly to include “any difference or dispute concerning the interpretation, application, or claimed violation of any provision of this [CNA] 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 added).

³ “Pb” refers to Petitioner’s Petition for Certification. “Pa” refers to Petitioner’s Appendix submitted to the Appellate Division. “Aa” refers to Petitioner’s Appendix to the Petition for Certification submitted to this Court.

The grievance procedure, set forth in Article 4 of the CNA, directs the steps for handling an employee grievance and gives Local 888 the exclusive right to submit a grievance to binding arbitration on behalf of an employee after a final disciplinary action. (Pa163-64). The CNA also makes clear that “[n]o employee shall be discharged, suspended, or disciplined in any way except for just cause,” and that “[t]he 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).

As a recipient of federal education funds, Rutgers also is subject to Title IX and its implementing regulations and thus must adhere to the grievance-process requirements of the Title IX Regulation. 34 C.F.R. § 100.2. To comply with the Title IX Regulation, Rutgers implemented Policy 60.1.33 (“Title IX Policy”), (Pa53-112), which incorporates the grievance procedures required by the Title IX Regulation, including providing a live hearing and an equal right for both the respondent and complainant to appeal a determination of responsibility on limited grounds, (Pa66-85).

In 2022, a Rutgers employee and Local 888 member accused another Rutgers employee and Local 888 member, J.M., of sexual harassment and sexual assault. (Pa120). Rutgers investigated the allegations and J.M. was charged

with violating both the Title IX Policy and Rutgers's Policy Prohibiting Discrimination & Harassment. (Pa119; Pa122-26; Pa136; Pa139; Pa140-45). Under the grievance process in its Title IX Policy, see (Pa53-112), Rutgers conducted a live hearing where both parties presented witnesses and evidence. (Pa122-26). Two Rutgers-appointed decisionmakers attended the hearing—one decisionmaker was assigned to decide liability and the other decisionmaker was assigned to decide sanctions. (Pa122). Following the hearing, the first decisionmaker determined that J.M. was responsible for the alleged misconduct and the second decisionmaker found just cause to terminate J.M.'s employment with Rutgers. (Pa123-28).

Under Rutgers' Title IX Policy, the right to appeal a sanction was only available to students and did not extend to employees, such as J.M. (Pa84). The Title IX Policy did, however, grant J.M. the right to appeal the finding of responsibility, to be heard by a different decisionmaker assigned by Rutgers, other than the individual who made the responsibility determination, on three limited bases: (1) procedural irregularity, (2) new information not reasonably available at the time of the hearing, and (3) conflict of interest or bias. (Pa84, 127). J.M. appealed the finding of responsibility, which Rutgers denied and confirmed that no additional appeals were available under Rutgers' Title IX Policy. (Pa147-49); see also (Pa81-82) (providing that a "determination

regarding responsibility becomes final either on the date that the University provides the Parties with the written determination of” the appeal or “the date on which the opportunity to appeal expires”).

Thereafter, Local 888 filed a grievance under the CNA on behalf of J.M., alleging that J.M. had been terminated without just cause in violation of Article 4 of the CNA. (Pa173). Rutgers denied the grievance on the basis that “Title IX and its implementing regulations preempt any further review under the [CNA].” (Pa50). Local 888 then filed a request that the grievance be submitted to binding arbitration with PERC also under the CNA. (Pa177). In response, Rutgers filed a petition for a scope-of-negotiations determination, requesting that PERC restrain arbitration and arguing that Local 888’s grievance and related request for arbitration were not within the scope of negotiations because the CNA grievance process was preempted by the Title IX Regulation. (Pa39-43). In August 2023, PERC issued a final order denying Rutgers’s petition and directing that Local 888’s grievance proceed to binding arbitration, reasoning that the Title IX Regulation did not preempt the grievance process in the CNA because nothing in the Title IX Regulation “pertains to, or preempts, collectively negotiated grievance procedures that may be available to represented employees after discipline has been imposed.” (Pa8-32).

The Appellate Division affirmed. (Aa2-22). The panel held that the Title IX Regulation did not preempt Local 888's request for arbitration, filed after Rutgers's decision to terminate J.M. for committing sexual harassment. (Aa15). The panel applied the three-part scope-of-negotiations test under which a "[n]egotiation is preempted only if the regulation fixes a term and condition of employment 'expressly, specifically and comprehensively.'" (Aa14) (quoting Bethlehem Twp. Bd. of Educ., 91 N.J. at 44). Applying that inquiry, the panel determined that "the Title IX Regulations did not specifically address appeals from a Title IX Coordinator's implementation of a recommended sanction," and instead "permitted Rutgers to 'offer an appeal equally to both parties on additional bases.'" (Aa17-18) (quoting 34 C.F.R. § 106.45(b)(8)). Accordingly, the panel held that the Title IX Regulation did not preempt Local 888's request for arbitration to determine whether Rutgers discharged J.M. "for just cause," because the Title IX Regulation did not dictate any post-disciplinary process. (Aa18).

This Court granted Rutgers's petition for certification.

ARGUMENT

A. POINT I

FEDERAL PREEMPTION ANALYSIS APPLIES TO THE TITLE IX REGULATION.

The New Jersey Legislature has long recognized that public employees have a “legitimate interest in engaging in collective negotiations about issues that affect ‘terms and conditions of employment.’” In re Local 195 IFPTE, 88 N.J. 393, 401 (1982) (quoting N.J.S.A. 34:13A-5.3). To determine whether a term or condition of public employment falls within the scope of collective negotiations, our courts apply a three-part test, under which

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.

[Id. at 404–05.]

Because the duty to arbitrate under a CNA arises from the duty to negotiate, “[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). PERC has primary jurisdiction to determine whether a particular subject matter “is within the scope of collective negotiations.” Ridgefield Park Educ.

Ass’n v. Ridgefield Park Bd. of Educ., 78 N.J. 144, 154 (1978) (citing N.J.S.A. 34:13A-5.4(d)). Accordingly, if PERC finds that a particular dispute is negotiable under a CNA, “the matter may proceed to arbitration,” whereas, if PERC finds that such “dispute is not within the scope of collective negotiations,” PERC will restrain arbitration. Ibid.

In its petition to PERC and before this Court, Rutgers disputes only the second prong, arguing that the Title IX Regulation preempts the grievance arbitration request here as forth in the CNA. (Pb9; Pa41). Because preemption is a purely legal question, PERC’s decision is subject to de novo review. See In re Ridgefield Park Bd. of Educ., 244 N.J. 1, 17 (2020) (“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” (citation omitted)); In re Reglan Litig., 226 N.J. 315, 327–28 (2016) (applying de novo review to federal preemption question).

As a threshold matter, while the Appellate Division correctly held that the Title IX Regulation is not preemptive in this case, it should have applied federal preemption analysis—rather than the analysis under state law to scope-of-negotiations cases—because Title IX and its regulations are governed by the Supremacy Clause of the U.S. Constitution. As this Court has long recognized, “[a] bedrock principle of the United States Constitution is that Congress is

empowered to preempt state law.” In re Altice, 253 N.J. at 416. The Supremacy Clause provides that federal law “shall be the supreme Law of the Land,” notwithstanding any state law to the contrary. U.S. Const. art. VI, cl. 2. Under the Supremacy Clause, “State laws that conflict or interfere with federal legislation must give way,” including in the field of labor relations. Chamber of Com. v. State, 89 N.J. 131, 141 (1982). So “if there is any conflict between federal and state law, federal law shall prevail.” Hager, 246 N.J. at 28 (citation omitted). Under current law, valid “regulations of a federal agency are given the same weight and afforded the same presumptions regarding preemption as federal statutes.” Glukowsky v. Equity One, Inc., 180 N.J. 49, 65 (2004).

This case presents the question of whether the federal Title IX Regulation conflicts with the binding grievance arbitration process provided for in the CNA between Rutgers and Local 888 such that the latter is unenforceable. The EERA requires that where a public employer, like Rutgers, and an exclusive employee representative, like Local 888, have a CNA that sets forth a grievance process for disciplinary actions that includes binding arbitration, the employer must provide the employee with that arbitration process. See supra at 6–7; N.J.S.A. 34:13A-5.3 (providing that while such grievance procedures “may provide for binding arbitration as a means for resolving disputes,” procedures that have been agreed to in a CNA “shall be utilized for any dispute covered by the terms of

such agreement” (emphases added)). Thus, because Rutgers and Local 888 agreed in the CNA to a grievance process providing for binding arbitration of final disciplinary actions, see (Pa163-64), the parties were required under the EERA to use that binding arbitration process, see N.J.S.A. 34:13A-5.3, unless it was preempted by another statute or regulation. See N.J. Tpk. Auth., 143 N.J. at 195 (noting “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,” in which case they “may not be invoked”).

And because the question here is whether the binding arbitration agreed to in the CNA (and required by the EERA) is preempted by the federal Title IX Regulation, federal preemption under the Supremacy Clause supplies the proper framework. See, e.g., In re Altice, 253 N.J. at 416 (applying federal conflict preemption analysis to question of whether federal Cable Communications Policy Act of 1984 preempted state regulation); Hager, 246 N.J. at 28 (applying federal preemption analysis to interplay between the federal Controlled Substances Act and New Jersey’s Compassionate Use Medical Cannabis Act); In re Reglan Litig., 226 N.J. at 328 (applying federal preemption analysis to question of whether federal Food, Drug, and Cosmetic Act preempted failure-to-warn product-liability claim under New Jersey Product Liability Act). This

rule makes sense. After all, if state-law preemption supplied the framework whenever federal Title IX regulations allegedly conflicted with a state law, then each state could determine based on its own state-common-law standards whether its state sovereignty should yield to a federal law pursuant to the Supremacy Clause. That conception of the Supremacy Clause is wrong as a matter of constitutional doctrine and first principles.

The Appellate Division did not apply a federal preemption test, instead assessing the preemption question under this Court’s preemption test applied in scope-of-negotiations disputes, where “[n]egotiation is preempted only if the regulation fixes a term and condition of employment ‘expressly, specifically and comprehensively.’” (Aa14) (quoting In re Ridgefield Park Bd. of Educ., 244 N.J. at 17–18). While this Court has consistently applied that preemption test as part of any scope-of-negotiations analysis under the EERA, prior cases invoking that test have asked whether another state law or regulation—rather than a federal law or regulation—preempted a particular subject of collective negotiation. See, e.g., In re Ridgefield Park Bd. of Educ., 244 N.J. at 17–21 (State law prescribing annual increases in health care contributions for those employed by a local board of education); Borough of Keyport v. Int’l Union of Operating Eng’rs, 222 N.J. 314, 336–41 (2015) (Civil Service Commission regulation); N.J. Tpk. Auth., 143 N.J. at 202–04 (New Jersey Law Against

Discrimination); Wright v. Bd. of Educ., 99 N.J. 112, 118–20 (1985) (State law concerning tenure of janitors); Bethlehem Twp. Bd. of Educ., 91 N.J. at 44 (State Board of Education regulations); In re Local 195, IFPTE, 88 N.J. at 405–06 (Civil Service Act and regulations); State v. State Supervisory Emp. Ass’n, 78 N.J. 54, 81 (1978) (Civil Service Commission regulations). But those cases all were tasked with resolving conflicts between two co-equal state laws—none of them addressed the question of whether a federal law or regulation conflicts with, and therefore preempts, a subject that is otherwise mandatory under the CNA. Instead, the preemptive effect of a federal law or regulation under the Supremacy Clause requires application of the federal preemption framework.

Accordingly, in this case, the Court should apply federal preemption analysis—rather than the state law analysis typically applied to scope-of-negotiations cases—because Title IX and its regulations are federal laws governed by the Supremacy Clause of the U.S. Constitution.

B. POINT II

THE TITLE IX REGULATION DOES NOT PREEMPT THIS ARBITRATION REQUEST.

The binding-arbitration request invoked by Local 888 to challenge the “just cause” determination in this particular disciplinary dispute—as agreed to by Rutgers and Local 888 in the CNA and therefore required by the EERA—is not preempted by the Title IX Regulation. See In re Local 195 IFPTE, 88 N.J. at 403 (holding a subject “is not negotiable if it has been preempted by statute or regulation”). Federal law can preempt state law in three ways: (1) “when Congress explicitly preempts state law”; (2) “where the scheme of federal regulation is so pervasive as to make reasonable the inference that Congress left no room for the States to supplement it”; and (3) “when state law actually conflicts with federal law.” In re Altice, 253 N.J. at 417 (citations omitted). Rutgers presses only the first and third theories: that the Title IX Regulation expressly and impliedly preempts the grievance arbitration request because the grievance-arbitration request conflicts with the Title IX Regulation. (Pb12-16). Because the grievance-arbitration request in this case does not conflict with the Title IX Regulation, it is not preempted.

A. The Presumption Against Preemption Applies Here.

As this Court has explained, “the preemption analysis begins with the ‘assumption that the historic police powers of the State are not to be superseded

by a federal act unless that was the clear and manifest purpose of Congress.”

In re Altice, 253 N.J. at 416 (cleaned up) (quoting Altria Grp., Inc. v. Good, 555 U.S. 70, 77 (2008)). A preemption claim must overcome “a strong presumption against preemption in areas of the law that States have traditionally occupied.” Klotz v. Celentano Stadtmauer & Walentowicz LLP, 991 F.3d 458, 463 (3d Cir. 2021) (quoting Kansas v. Garcia, 140 S. Ct. 791, 804 (2020)); see also Bruesewitz v. Wyeth, 561 F.3d 233, 240 (3d Cir. 2009) (noting courts “have a duty to accept the reading [of federal law] that disfavors preemption”). “Consistent with the nature of federalism, . . . ‘pre-emption is not to be lightly presumed’” and “the historic police powers of the State [are] not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.” Ridgefield Park v. N.Y. Susquehanna & W. Ry. Corp., 163 N.J. 446, 453 (2000) (citation omitted).

The presumption against preemption applies here because the EERA, the statutory source of the grievance-arbitration process set forth in the CNA, “protect[s]” public employees in their right to “be represented in collective negotiations by an employee organization,” N.J.S.A. 34:13A-5.3, and thus falls “within New Jersey’s police power.” See Bedoya v. Am. Eagle Express, Inc., 914 F.3d 812 (3d Cir. 2019) (noting that because employment regulations “protect workers, they are within New Jersey’s police power, and the

presumption against preemption by federal law applies”); see also Lupian v. Joseph Cory Holdings LLC, 905 F.3d 127, 131 (3d Cir. 2018) (similar).

Rutgers must show “clear and manifest evidence” to overcome this presumption. See Summit Plaza Assocs. v. Kolta, 462 N.J. Super. 401, 410 (App. Div. 2020) (citation omitted). To determine whether there is a “clear and manifest purpose” to preempt the grievance-arbitration process here, the Court must “look to the plain language of the [Title IX Regulation] and, if necessary, to the statutory framework as a whole.” See Bedoya, 914 F.3d at 818. Here, because the USDOE did not clearly intend for the Title IX Regulation to preempt the CNA provision requiring binding arbitration as the final step in a grievance of disciplinary sanctions (enforceable under the EERA), Rutgers cannot overcome the presumption against preemption.⁴

⁴ Although this Court has acknowledged some uncertainty over whether the presumption against preemption applies in express preemption cases, see In re Altice, 253 N.J. at 416 n.1, courts like the Third Circuit continue to apply it in such cases, see Lupian, 905 F.3d at 131 & n.5. And in any event, it is well settled that the presumption applies in conflict preemption cases. Klotz, 991 F.3d at 463. Regardless, as explained infra Section II.B, there is no preemption here even absent the presumption.

B. The Title IX Regulation Does Not Preempt The Grievance Arbitration Requested Here.

The Title IX Regulation does not preempt the grievance-arbitration request in this case. Rutgers contends otherwise, arguing that the Title IX Regulation preempts the grievance-arbitration request here both expressly and impliedly through conflict preemption. (Pb12-16). For its express preemption theory, Rutgers relies on language in the 2020 regulations providing that the Title IX Regulation preempts “[t]o the extent of a conflict between State or local law and [the] [T]itle IX [Regulation].” 34 C.F.R. § 106.6(h) (2020). (Pb12-13). As Rutgers acknowledges, since this express preemption provision only applies in the event of a conflict between the Title IX Regulation and state law, “the analyses for express and implied conflict preemption largely overlap because they both turn on whether arbitration would conflict with the Title IX process.” (Pb15). Accordingly, the question is whether a conflict exists between the Title IX Regulation and the grievance-arbitration request such that the Title IX Regulation preempts the binding arbitration process. It does not.

1. The CNA Grievance Arbitration Request Here Is Not An Obstacle To The Title IX Regulation, And It Is Not Impossible For Rutgers To Comply With Both.

Conflict preemption only applies when “compliance with both federal and state regulations is a physical impossibility” or when “state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives

of Congress.” In re Altice, 253 N.J. at 417 (cleaned up and citations omitted). It thus “requires an actual—rather than hypothetical or speculative—conflict between federal and state law.” Hager, 246 N.J. at 29. Whether conflict preemption applies “is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects.” Crosby v. Nat’l Foreign Trade Council, 530 U.S. 363, 373 (2000). “The primary source of Congress’s intent is the language of the preemptive statute and the statutory framework surrounding it.” Ridgefield Park, 163 N.J. at 453–54 (citing Medtronic, Inc. v. Lohr, 518 U.S. 470, 484–85 (1996)). In the case of federal regulations, “the question is whether the [federal agency] meant to preempt [the state law], and, if so, whether that action is within the scope of the [agency’s] delegated authority.” Fid. Fed. Sav. & Loan Ass’n v. de la Cuesta, 458 U.S. 141, 154 (1982).

Here, Rutgers argues that the Title IX Regulation setting forth the grievance process for formal complaints of sexual harassment, established at 34 C.F.R. § 106.45, conflicts with the binding arbitration process provided for in Article 4 of the CNA because it was impossible for Rutgers to comply with both and because the binding arbitration process stands as an obstacle to the accomplishment of the purposes and objectives of the Title IX Regulation. (Pb15-16 & n.3). But no conflict exists under either theory.

Because the Title IX Regulation governs the pre-discipline grievance process, while the CNA arbitration request made in this case concerns post-disciplinary review, it was not “a physical impossibility” for Rutgers to comply with both. See In re Altice, 253 N.J. at 417. For the same reason, Local 888’s request for binding arbitration under the CNA poses no obstacle to the purposes and objectives of the Title IX Regulation. See Crosby, 530 U.S. at 372–73 (instructing that obstacle preemption can be shown where, “under the circumstances of [a] particular case, the [challenged law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress” (quoting Hines v. Davidowitz, 312 U.S. 52, 67 (1941))).

Begin with the Title IX Regulation, which describes the “[g]rievance process for formal complaints of sexual harassment” with which a recipient, like Rutgers, must comply. See 34 C.F.R. § 106.45(b); see also supra at 7–10. The Regulation makes clear that a recipient must “[t]reat complainants and respondents equitably” by administering “a grievance process that complies with” the Title IX Regulation “before the imposition of any disciplinary sanctions.” 34 C.F.R. § 106.45(b)(1)(i) (emphasis added). The Title IX Regulation also provides that “[w]hen investigating a formal complaint and throughout the grievance process, a recipient must,” among other things, “[p]rovide an equal opportunity for the parties to present witnesses, including

fact and expert witnesses, and other inculpatory and exculpatory evidence,” id. § 106.45(b)(5)(ii); “[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice,” who may be an attorney, id. § 106.45(b)(5)(iv); and “[p]rovide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation,” id. § 106.45(b)(5)(vi). Additionally, “[a]t the live hearing, the decision-maker(s) must permit each party’s advisor to” cross-examine “the other party and any witnesses.” Id. § 106.45(b)(6)(i).

The Title IX Regulation also requires that a recipient “offer both parties an appeal [1] from a determination regarding responsibility, and [2] from a recipient’s dismissal of a formal complaint or any allegations therein” on three specific enumerated bases,⁵ id. § 106.45(b)(8)(i); it further provides that a “recipient may offer an appeal equally to both parties on additional bases,” id. § 106.45(b)(8)(ii). Beyond that, the Regulation mandates that “[a]ny provisions, rules, or practices other than those required by [the Regulation] that a recipient

⁵ The three bases on which a recipient must offer such an appeal are: “(A) Procedural irregularity that affected the outcome of the matter; (B) New evidence that was not reasonably available . . . 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” regarding a complainant or respondent “that affected the outcome.” 34 C.F.R. § 106.45(b)(8)(i).

adopts as part of its grievance process for handling” complaints “must apply equally to both parties.” Id. § 106.45(b). Put simply, the Title IX Regulation addresses only the procedures for appealing a determination of responsibility or a dismissal—that is, whether the respondent committed the alleged sexual harassment or assault. But the Regulation is silent as to appeals concerning the imposition of discipline following a finding of responsibility.

By contrast, Local 888’s request here—that the grievance be submitted to binding arbitration—concerned the appropriateness of the sanction imposed (whether the employee “was terminated for just cause”) after the employee had been found to be responsible for the alleged sexual harassment. (Pa177). That arbitration request was made under Article 4 of the CNA, which makes clear that employees may only be discharged “for just cause,” and that “[t]he sole right and remedy of any employee who claims that he or she has been discharged,” from employment “without just cause shall be to file a grievance through and in accordance with the grievance procedure.” (Pa165). The arbitration request submitted by Local 888 in this case was thus concerned with whether the discipline imposed—discharge of the employee—was justified.

The grievance process mandated by the Title IX Regulation and the binding arbitration required under the CNA therefore address separate, albeit related, issues: the former is concerned with violations of Title IX and Rutgers’s

own policies concerning sexual harassment, while the latter is concerned with whether there was just cause for a termination. It was therefore not impossible for Rutgers to comply with both grievance processes: the Title IX Regulation and the arbitration request made by Local 888 under the CNA. That is, Rutgers was required to (and did) administer the pre-disciplinary grievance process required by the Title IX Regulation and could have then administered the grievance-arbitration process provided for in the CNA concerning the post-disciplinary sanction imposed. And because the Title IX grievance process and the CNA arbitration process address distinct subjects, the CNA arbitration process presents no obstacle to the purposes and objectives of Title IX.

Courts applying federal preemption analysis have declined to find a conflict between a federal and a state law when the two regulate different subjects. For instance, in Virginia Uranium, Inc. v. Warren, the U.S. Supreme Court considered the preemptive effect of the federal Atomic Energy Act, which regulated “nearly every aspect of the nuclear fuel life cycle except mining,” on a state law banning uranium mining itself. 587 U.S. 761, 768 (2019). The Court held that the Atomic Energy Act did not preempt the state law under a conflict preemption theory. Id. at 777. The Court reasoned that the state law did not frustrate the purposes and objectives of the federal law because the absence of mining as an area of regulation in the text of the Atomic Energy Act “suggests

that Congress elected to leave mining regulation on private land to the States and grant the [federal] regulatory authority only after uranium is removed from the earth.” Id. at 779. Nor was there any conflict under an impossibility preemption theory since it was not impossible for the state to comply with both laws. Id. at 780.

Similarly, in Pennsylvania v. Navient, the Third Circuit held that the Higher Education Act’s regulation of claims based on the failure of a student loan lender or servicer to disclose information did not preempt state law claims based on affirmative misrepresentations by a student loan servicer, either expressly or impliedly through conflict preemption. 967 F.3d 273, 277 (3d Cir. 2020). Highlighting the “stark contrast” between claims of failure to disclose and claims of affirmative misrepresentation, the court instructed that by mandating disclosure requirements, there was “no indication that Congress had the sweeping goal of regulating all misconduct that could possibly occur in student-loan financing and requiring uniformity of all claims tangentially related to the Education Act.” Id. at 293.

This notion that no conflict exists by sole virtue of two laws regulating related but separate subjects is reinforced by the Court’s analogous decision in N.J. Turnpike Authority, where it considered how to reconcile the New Jersey Law Against Discrimination (“LAD”) with an arbitration request concerning

employee discipline under a CNA. See 143 N.J. at 197. Although that case involved the preemptive effect of a state law and therefore applied state-law preemption analysis, the factual similarities illustrate why there is no conflict here either. There, a Turnpike Authority employee filed a sexual harassment complaint against her supervisor, a union member, under the Authority's sexual harassment policy. Id. at 189. After an investigation and hearing concerning the allegation, the Authority concluded that the supervisor was responsible and imposed a three-day suspension. Id. at 190. After the union filed a grievance under the CNA on behalf of the supervisor, the union then filed an arbitration request. Ibid. The Authority submitted a scope-of-negotiations request with PERC, claiming that the grievance was preempted by the LAD. Ibid. The Authority argued that the LAD prevented the grievance from going forward because using "negotiated disciplinary procedures for resolving disciplinary disputes based on sexual harassment is incompatible with the statutory protections against sexual harassment under the LAD." Id. at 196.

This Court determined that there was no conflict between the LAD and the arbitration request, explaining that binding arbitration of disciplinary actions "would not interfere with a public employer's affirmative obligations to prevent and counteract sexual harassment" because "an employer's obligation to adopt and implement policies against sexual harassment 'is distinct from the

employees’ ability to seek review of disciplinary actions based on allegations of sexual harassment.” Id. at 197. As this Court held, “[t]hat duty is not undermined by a [CNA] requiring fair disciplinary procedures and permitting neutral review when an employee is accused of sexual harassment.” Id. at 198.

So too here. The Title IX Regulation’s grievance process and the CNA arbitration process address “different subjects altogether.” Id. at 197. The former addresses pre-disciplinary procedures, while the latter addresses post-disciplinary procedures as to the sanction. And the absence of post-disciplinary procedures in the Title IX Regulation indicates that the USDOE intended to leave any such process to the states. The CNA arbitration process thus does not undermine an employer’s duty to adhere to the Title IX Regulation.

2. Rutgers’s Counterarguments Fall Short.

Rutgers’s contrary arguments fail to show that it cannot comply with its obligation to arbitrate under the CNA and with the Title IX Regulation or that its arbitration obligation presents an obstacle to the Title IX Regulation.

First, while Rutgers argues that it cannot comply with the Title IX Regulation and the CNA arbitration request because the CNA arbitration process does not give the complainant the rights required by the Title IX Regulation, (Pb14), this misconstrues the Title IX Regulation. The rights that Rutgers identifies—presenting witnesses, inspecting and reviewing evidence, and cross-

examining witnesses—are required as part of the grievance process that occurs before any disciplinary sanction is imposed. See 34 C.F.R. §§ 106.45(b)(5) (addressing investigation of a formal complaint); 106.45(b)(6)(i) (addressing requirements for live hearings). Nothing in the Regulation requires that these specific rights be afforded to the parties during a post-disciplinary proceeding.

Rutgers’s claims that binding arbitration under the CNA would conflict with the Title IX Regulation’s requirements that the arbitrator have completed Title IX training, id. § 106.45(b)(1)(iii), that the arbitration be bound by the standard of proof applied by the Title IX decision-maker, id. § 106.45(b)(7)(i), and that the arbitration consider the purposes and goals of Title IX, id. § 106.45(b)(7)(ii)(E), (Pb15), are likewise misplaced. The Regulation provides that these apply “before the imposition of any disciplinary sanctions,” id. § 106.45(b)(1)(i), and are specific to the “[d]etermination regarding responsibility,” id. § 106.45(b)(7), which occurs before a disciplinary sanction is imposed. Accordingly, these requirements do not conflict with the request for binding arbitration at issue here.

Although Rutgers notes that the Title IX Regulation requires any other “provisions, rules, or practices” adopted by a recipient to “apply equally to both parties,” (Pb14) (quoting 34 C.F.R. § 106.45(b)), that clause applies to “provisions, rules, or practices” that a recipient adopts “as part of its grievance

process for handling formal complaints of sexual harassment,” 34 C.F.R. § 106.45(b) (emphasis added). The “grievance process” for handling Title IX complaints occurs before a disciplinary sanction is imposed. Thus, the Title IX Regulation does not require any additional “provisions, rules, or practices” adopted by a recipient outside the pre-disciplinary grievance process—such as arbitration of for just cause termination—to “apply equally to both parties.”

In any event, the procedures under the Title IX Regulation and set forth in the CNA did apply equally to the complainant and respondent here. Both were treated equally throughout its Title IX grievance process, including by having the opportunity for an advisor throughout the process (Pa70), the opportunity to present and cross-examine fact and expert witnesses (Pa79), and the opportunity to inspect and review evidence (Pa75-76). See 34 C.F.R. § 106.45(b)(5). Moreover, both complainant and respondent were members of Local 888, so both parties had an equal right for Local 888 to submit an arbitration request on their behalf regardless of the outcome of the Title IX process. For example, had respondent not been terminated as a result of the allegations, complainant could have asked Local 888 to grieve a hostile work environment on her behalf and submit a request for binding arbitration about that grievance if necessary. The CNA broadly defines “grievance” as “any difference or dispute concerning the interpretation, application, or claimed violation of any provision of [the CNA]

or of any Rutgers policy or an administrative decision relating to wages, hours, or other terms or conditions of employment.” (Pa162) (emphasis added). The CNA’s arbitration process was available therefore “equally to both parties.”⁶ See 34 C.F.R. § 106.45(b).

Nothing in the Title IX Regulation bars additional processes beyond those in Title IX. The binding arbitration sought by Local 888 arises under the EERA and the CNA, and in comments to the final 2020 Title IX regulations, the USDOE explicitly interpreted the Title IX Regulation to allow collective bargaining representatives and recipients to negotiate supplementary processes beyond those in Title IX. Indeed, the USDOE clarified that the Title IX Regulation does not “inherently prevent[] recipients from complying with State and local laws or policies” and added that “some State laws may require recipients to provide additional protections for both complainants and respondents that exceed these final regulations.” 85 Fed. Reg. 30298, 30454–

⁶ Rutgers posits that a conflict exists because “a victim who is either a non-union-member employee or a student would have no such right under the CNA.” (Pb20). But the question here is whether the Title IX Regulation preempts the grievance arbitration as applied to the specific facts of this case; a hypothetical scenario involving a non-union-member complainant has no bearing on the preemption analysis as applied here. See Rice v. Norman Williams Co., 458 U.S. 654, 659 (1982) (holding that “[t]he existence of a hypothetical or potential conflict is insufficient to warrant the pre-emption of [a] state statute” and “state [law] is not pre-empted by federal [law] simply because in a hypothetical situation a . . . party’s compliance with the [state law] might cause him to violate the [federal law]”).

55 (May 19, 2020). The USDOE explained that the Title IX Regulation “do[es] not preclude a recipients’ [sic] obligations to honor additional rights negotiated by faculty in any collective bargaining agreement,” and has “never impeded a recipient’s ability to provide parties with additional rights as long as the recipient fulfils its obligations under Title IX.” Id. at 30442. The USDOE also made clear that the Title IX “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.” Id. at 30443–44. The USDOE thus clearly anticipated that recipients could implement additional processes. In the end, nothing in the Title IX Regulation or the USDOE comments supports an intent to prohibit challenging a disciplinary sanction through binding arbitration.

Second, arbitration over the disciplinary sanction would not “obstruct” the USDOE’s “goal of ‘refraining from second guessing a [school’s] disciplinary decisions.’” (Pb16) (quoting 85 Fed. Reg. at 30104). This Court already rejected a similar argument in N.J. Turnpike Authority, explaining that “[i]n the public sector, the public interest, welfare, and other pertinent statutory criteria are inherent in the standards that inform and govern public sector arbitration.” 143 N.J. at 198. The “public policy relating to workplace sexual harassment”

therefore “infuses the standards governing public sector arbitration of disputes arising from accusations of discrimination in the form of sexual harassment.” Id. at 199. As this Court explained, the Authority had “adopted a strict Sexual Harassment Policy,” and imposed discipline under that Policy; “as long as those substantive standards defining sexual harassment are applied” in the arbitration, there would be “no fundamental inconsistency between the employer’s Sexual Harassment Policy and the negotiated disciplinary procedures invoked to determine whether sexual misconduct occurred and the appropriate discipline.” Id. at 199–200.

The same requirements apply to the arbitration at issue here, which also concerns a disciplinary sanction in public employment based on a finding of sexual harassment. Here, as in N.J. Tpk. Auth., the “public policy relating to workplace sexual harassment” would “infuse[] the standards governing” this arbitration. See Id. at 199. Indeed, the CNA here requires the arbitrator to find “just cause” (Pa165), which would encompass a violation of Rutgers’s Title IX Policy, in order to discharge an employee. So “as long as those substantive standards defining sexual harassment” in Rutgers’s Title IX Policy are applied, there is “no fundamental inconsistency between” the Title IX Policy and the CNA arbitration procedure utilized to determine whether “the appropriate discipline” was imposed for the sexual harassment. See N.J. Tpk. Auth., 143

N.J. at 199–200. Because “an arbitral award may not disregard or question the employer’s rules and regulations,” the arbitrator in any CNA arbitration here would need to apply “the substantive standard that defines sexual harassment” in Rutgers’s Title IX Policy. Id. at 200; see also Commc’ns Workers, Local 1087 v. Monmouth Cnty. Bd. of Soc. Servs., 96 N.J. 442, 448 (1984) (instructing that an arbitrator cannot second-guess an employer’s policy since “jurisdiction and authority of the arbitrator are circumscribed by and limited to the powers delegated to him”); Division 540, Amalgamated Transit Union, AFL-CIO v. Mercer Cnty. Improvement Auth., 76 N.J. 245, 252 (1978) (providing “the arbitrator must act within the scope of the authority delegated to him [and he] must consider the public interest and the impact of his decision on the public welfare”). In other words, it is highly unlikely that the CNA arbitration over the disciplinary sanction in this case would undermine or “second guess” the determination concerning sexual harassment in the Title IX grievance process.

Third, applying the CNA arbitration process to the disciplinary sanction here would not frustrate the Title IX Regulation’s aim “to timely ‘resolve’ and ‘remedy’ sexual harassment.” (Pb17-18) (quoting 85 Fed. Reg. at 30030). The portion of the USDOE comments on which Rutgers relies merely makes clear that recipients have an obligation to “[p]romptly respond to” alleged “victims of sexual harassment by offering supportive measures; follow a fair grievance

process to resolve sexual harassment allegations” when “an investigation is necessary; and provide remedies to victims of sexual harassment.” 85 Fed. Reg. at 30030. And, as discussed above, the investigation and grievance process required by the Title IX Regulation applies “before the imposition of disciplinary sanctions.” 34 C.F.R. § 106.45(b)(1)(i) (emphasis added).

Rutgers’s Title IX policy specifically provides that the parties have the right “[t]o a reasonably prompt and thorough investigation of the allegations” (Pa66) and that “[t]he Grievance Process will be concluded within a reasonably prompt manner, generally no longer than ninety (90) days after the filing of the Formal Complaint.” (Pa72). Thus, Rutgers recognizes that the Title IX Regulation requires it to promptly initiate and resolve complaints. And as described herein, see supra at 34, Rutgers’s Title IX policy does follow a fair and equal grievance process. Finally, Rutgers’s policy explicitly provides remedies to victims of sexual harassment, which may involve imposing discipline on the respondent or non-disciplinary supportive measures, such as providing increased security near where the misconduct occurred or requiring the respondent to complete training. (Pa83-84). The fact that the Title IX Regulation and Rutgers’s Title IX policy require Rutgers to provide remedies for victims of sexual harassment does not preclude an employee from pursuing post-disciplinary arbitration to determine whether their discipline was justified,

nor prevent Rutgers from imposing additional remedial measures to respond to the misconduct. And again, because an arbitrator here “may not disregard or question the employer’s rules and regulations” and because in “interpreting the CNA” any arbitrator would be required to “consider [Title IX], employee welfare, and the strong public policy in favor of eradicating discrimination” any “possibility of inconsistent results” between any remedy imposed by Rutgers and the arbitration award is “sharply reduced.” N.J. Tpk. Auth., 143 N.J. at 200–01.

The CNA arbitration process therefore presents no obstacle to the Title IX Regulation on this basis. Accordingly, Local 888’s request for post-disciplinary review of sanctions through the CNA’s arbitration process, enforceable under the EERA, does not frustrate the purposes and objectives of the Title IX Regulation.

CONCLUSION

This Court should affirm the judgment of the Appellate Division.

Respectfully submitted,

MATTHEW J. PLATKIN
ATTORNEY GENERAL OF NEW JERSEY

By: /s/ Eve E. Weissman
Eve E. Weissman
Deputy Attorney General
NJ Attorney ID # 093902013
Eve.Weissman@law.njoag.gov

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