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.	A Petition for Certification from the December 13, 2024, 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 IN REPLY TO AMICUS CURIAE THE NEW JERSEY EDUCATION ASSOCIATION

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

STATE CASES

REGULATIONS AND REGISTER

PRELIMINARY STATEMENT

At the outset, Rutgers notes points of agreement. Rutgers agrees with amicus curiae the New Jersey Education Association (the NJEA or Amicus) that "Title IX and its grievance procedures serve the vital goal of ensuring that the plague of sexual harassment and discrimination in our nation's universities and schools does not go unaddressed by [] institutions." NJEA brief at 1. Rutgers also agrees that the Title IX complaint procedures are "more receptive to the grievances of victims." NJEA brief at 1. And Rutgers agrees that "ensur[ing] that [victims'] complaints are investigated and appropriately addressed is a necessary and salutary step." NJEA brief at 1.

Amicus also is correct that this matter involves a "question of federal preemption" (NJEA brief at 7)—an observation the court below failed to follow. In that regard, Amicus seemingly concurs with Rutgers (or does not disagree) that federal preemption law supplies the proper analytical framework. Rutgers, however, strongly disagrees with Amicus's assertion that "there is simply no evidence of any conflict" between federal law and the relevant arbitration provision. NJEA brief at 1. As explained in Rutgers' other briefs and herein, the requested arbitration would conflict with several mandatory components of the Title IX regulations.

Rutgers also parts company with Amicus's mistaken impression that

compliance with federal procedures would be done "at the expense" of the arbitration of labor disputes. NJEA brief at 1. To be clear, arbitration still will be available to resolve labor disputes, just not when it conflicts with the one instance in which federal Title IX procedures are triggered because an employee accused of sexual misconduct is subject to those procedures. For the sake of the victim in this case—and future victims—whom Title IX is designed to protect, the procedures and outcome resulting from this critical federal law should be preserved.

ARGUMENT

Amicus opens its argument by stressing the salience of the right to arbitrate employment disputes. To do so, Amicus cites several cases that have upheld the right to collectively negotiate arbitration rights. See NJEA brief at 7-8 (citing cases). That opening misses the point. This case is not about whether a right exists to collectively negotiate a grievance and arbitration process; that right has been settled for some time. Likewise, Rutgers assumes all participants in this appeal hold Title IX and its objective to combat sexual misconduct in high regard. The legal issue that matters most in this case is whether the requested CNA arbitration is preempted by federal law. On that question, for the reasons that follow, Amicus's submission is unpersuasive.

I. AMICUS MISREADS THE REGULATORY HISTORY OF THE TITLE IX REQUIREMENTS AT ISSUE IN THIS CASE.

Amicus argues the notice and comments to the then-proposed Title IX rules demonstrate that such requirements "would coexist with labor arbitration." NJEA brief at 8. Amicus relies on such "coexistence" to incorrectly reduce the enacted rules to their narrowest form in which they essentially serve as a forum for grievance that is devoid of any binding remedy. Surely, the drafters of these critically important federal rules had more in mind than simply a process that could be completely undone by a conflicting state labor agreement.

As an initial matter, the possibility of coexistence between a state requirement and federal law does not necessarily save the state requirement from preemption. See Crosby v. Nat'l Foreign Trade Council, 530 U.S. 363, 379-80 (2000) ("[T]he fact that some companies ***may be able to comply*** with both sets of sanctions does not mean that the state Act is not at odds with achievement of the federal decision about the right degree of pressure to employ.") (emphasis added). Rather, the applicable standard is whether compliance with both a state requirement and federal law either is "impossible" or the state requirement "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of" the agency. Brown v. Hotel & Rest. Emps. & Bartenders Int'l Union Local 54, 468 U.S. 491, 501 (1984).

As an example of "coexistence," Amicus refers to the U.S. Department of Education's (the Department) discussion in the regulatory history about the ability of covered employers to, in Amicus's words, "choose the standard of proof in Title IX proceedings to harmonize that standard with those called for by a CBA grievance procedures." NJEA brief at 8-9. Although an employer's selected evidentiary standard for Title IX proceedings could or might align with the standard to be used by an arbitrator in a labor arbitration, that point assumes too much. For example, it assumes that a counterparty (such as a union) is willing to agree to an evidentiary standard that comports with the covered employer's Title IX process. And in any event, in this case, the CNA does not even identify the standard of proof to be used by an arbitrator. (See Pa162-166).

In a footnote, Amicus faults Rutgers for not addressing whether any incongruent evidentiary standards result from "its own failure or refusal to bargain for the desired standard of proof, or its failure to harmonize its own Title IX grievance process." NJEA brief at 9 n.2. Amicus's attempt to cast blame on Rutgers falls short. The relevant CNA was entered on March 29, 2019 (Pa156), more than one year ***before*** the final Title IX Rules were adopted on May 19, 2020. Final 2020 Title IX Rules, 85 Fed. Reg. 30026 (May 19, 2020). Rutgers cannot be responsible for failing to negotiate about then-non-existent issues. More fundamentally, preemption does not turn on whether two parties agree on

certain contractual terms, or one party succeeded in convincing the other to accept such terms. Amicus cites no law to the contrary.

Next, Amicus misconstrues other parts of the regulatory history in which the Department recognizes a covered employer's ability "to provide parties with additional rights as long as the recipient [of federal funds like Rutgers] fulfills its obligations under Title IX." NJEA brief at 9 (quoting 85 Fed. Reg. at 30442). Amicus apparently believes that such "additional rights" include labor arbitration even if it conflicts with federal grievance procedures. To be sure, covered employers may provide "additional rights," but such rights may not detract from Title IX obligations. This is why the Department cautioned as it did that additional rights are permitted "as long as the recipient fulfills its obligations under Title IX." 85 Fed. Reg. at 30442.

The alternative view endorsed by Amicus, however, would allow the protections afforded by the mandatory federal process to be negated later by a materially different process (labor arbitration) that could yield different, conflicting results. In that scenario, Title IX obligations cannot be said to be "fulfill[ed]." Amicus's argument is inconsistent with federal preemption jurisprudence. See Garner v. Teamsters, 346 U.S. 485, 498-99 (1953) (observing, in a federal preemption case, that "conflict is imminent" when "two separate remedies are brought to bear on the same activity").

In another footnote, Amicus criticizes Rutgers for pointing out that the requested arbitration would serve as a "collateral attack" on the Title IX determination even though Rutgers "does not argue that collateral estoppel should apply." NJEA brief at 10 n.3. Again, Amicus misses the point. Rutgers need not formally invoke the doctrine of collateral estoppel to make the point that the requested arbitration would serve as an attack on the Title IX process. Whether that attack is termed "collateral," "indirect" or something else is merely a matter of nomenclature. Irrespective of the words used, the broader point remains—the requested arbitration would function as an after-the-fact attack on the Title IX determination, i.e., a vehicle to unravel or supersede the Title IX outcome.

Rather than support Amicus's view, the notice and comment to the Title IX requirements support the soundness of Rutgers' position. The forewarning expressed by the Department, as reflected in its discussion of the comments to the proposed rule (see supra at 5 and 85 Fed. Reg. at 30442) and embodied in the rule's explicit text, has come to pass. It has done so in the form of a collateral attack on the very process and outcome that federal preemption law is designed to preserve. This Court should set aside such attack and restore the outcome of the Title IX process that yielded a just result in this case.

II. AMICUS'S ANALYSIS CONFLICTS WITH FEDERAL LAW AND THE RIGHTS OF THE VICTIM IN THIS CASE.

As for the specific ways in which the requested arbitration would conflict with Title IX rules, Amicus asserts that Rutgers has not articulated why Title IX would be violated if the victim is excluded as a party to the arbitration. NJEA brief at 10. Rutgers did, in fact, articulate such reasons. See Petition at 14-16, 18; Rutgers' reply brief at 6. We will not repeat them here except to say briefly that the victim's exclusion as a party to the arbitration would deprive her of rights that "must apply equally" to her, the same as they would to the accused. 34 C.F.R. § 106.6(h). And it is no consolation that Amicus believes, as the court below similarly did (see Aa21), that "the victim's voice is sure to feature prominently in any arbitration." NJEA brief at 10 n.4. As the Petition explains, Title IX rules demand much more: Victims must be provided full participatory due process rights, with the right of cross examination and the assistance of an advisor; half-measures are inadequate. See Petition at 18.

Yet, as Amicus would have it, the victim would have no "right to be involved" in the disciplinary or remedial "final stages" of the process. NJEA brief at 12. As Amicus sees it, the regulations should be construed to shut out victims because twenty-six years ago the United States Supreme Court rejected a claim that a victim had the right to make "particular remedial demands." NJEA brief at 12. But no one is suggesting that victims are entitled to make such

demands; only that victims retain the full participatory rights afforded them by federal law.

Amicus seems to share Respondent Local 888's narrow view of the Title IX procedures, contending that they terminate once a victim has been "provided a supportive environment" and "a complaint proceeding that guarantees due process rights." NJEA brief at 11. Amicus's argument is hard to pin down. It is unclear at which point a "supportive environment" would be satisfied or even what Amicus means by the phrase "a complaint proceeding."

More to the point, the federal Title IX rules contemplate a comprehensive process, one that encompasses disciplinary and post-disciplinary matters. These include appeals (34 C.F.R. § 106.45(b)(8)) as well as the provision of remedies (id. § 106.45(b)(1)(i)) and their "effective implementation." Id. § 106.45(b)(7)(iv). Indeed, the regulatory history explicitly confirms that not only are the Title IX rules "premised" on ensuring "a fair grievance procedure" but also on "provid[ing] remedies to victims of sexual harassment." 85 Fed. Reg. at 30030. Contrary to Amicus's constrained view, the Court should interpret the rules broadly so they can achieve their remedial purposes. See Siemens Power Transmission & Distrib. v. Norfolk & S. Ry., 420 F.3d 1243, 1245 (11th Cir. 2005) (interpreting federal regulation liberally in light of its purpose); Haffer v. Temple Univ. of Commonwealth Sys. of Higher Educ., 524 F. Supp. 531, 537

(E.D. Pa. 1981) ("Civil rights statutes such as Title IX generally are entitled to broad interpretation to facilitate their remedial purposes."). In short, the federal process is much more expansive than Amicus's description of it.

Another critical flaw in Amicus's argument is the belief that arbitrations will not produce inconsistent outcomes because arbitrations "must follow public policy." NJEA brief at 12. Public policy does provide that an arbitrator must "follow the law and consider the public's interest and welfare." Jersey City Educ. Ass'n v. Bd. of Educ., 218 N.J. Super. 177, 188 (App. Div. 1987) (citations omitted). But following public policy does not mean that an arbitrator will uphold the decision rendered through the Title IX process. Indeed, the very purpose of arbitrating a disciplinary decision is to scrutinize whether just cause exists for the discipline imposed or any discipline at all.

In other words, even giving all due consideration to the public interest, an arbitrator could conclude there is no just cause for the accused's discipline, contrary to the determination under the Title IX process. The specter of such inconsistent outcomes as it concerns the accused individual is an unavoidable conflict in every case under the NJEA's framework. Title IX rules should not be construed in a way that second guesses a school's disciplinary decisions. See 85 Fed. Reg. at 30044. And arbitration should not be permitted to undo or undermine all the rights and protections afforded to victims by the Title IX rules.

Nor is it of any help that the arbitrator could "implement public policy such as is embodied under Title IX." NJEA brief at 10-11. Even if the arbitrator ***could*** do so, the federal requirements at issue are not designed to survive on a state arbitrator's discretion. They are mandatory. And they do not allow for a type of proceeding, as the one urged by Amicus, under which the victim would have no assured rights while the person found to have sexually harassed and assaulted her would enjoy all the rights afforded to him by the CNA and state law in a post-termination arbitration.

III. AMICUS'S REMAINING POINTS ARE EQUALLY WITHOUT MERIT.

Finally, we address some of Amicus's remaining commentary. Amicus suggests that the Title IX rules should be seen in some sort of negative light because the "regulations have changed in recent years." NJEA brief at 14. That is a disconcerting suggestion that should be rejected out of hand. Federal law has no less force or effect because it has changed or may change in the future. And far from being in a state of "constant revision" (NJEA brief at 14), as Amicus would have the Court believe, the pertinent Title IX regulations have been promulgated only twice, namely, in 2020 (the operative rules) and 2024 (which rules were vacated in their entirety in Tennessee v. Cardona, No. 24-0072-DCR, 2025 WL 63795, at *6 (E.D. Ky. Jan. 9, 2025)). As Amicus itself notes, the 2020 Title IX rules remain fully effective.

Then there are Amicus's closing predictions. According to Amicus, "The frank truth is that the vast majority of discipline in this context will be upheld in arbitration, and in the unlikely event an arbitrator fails to uphold public policy, New Jersey Courts will be required to overturn errant decisions—and they will do so." NJEA brief at 16. Lacking any basis or support—the "empirical studies" cited on page 13 of Amicus's brief did not compare decisions rendered by the Title IX process against those made by arbitration—this remark is nothing more than conjecture.

It is not, however, conjecture to say that, if Amicus's view prevails, an arbitrator can reinstate an accused perpetrator after a fully compliant Title IX process already has found just cause for his termination. That type of inconsistent result would further injure the victim and would be unacceptable under Title IX. Judicial review of arbitration, with its "extremely limited" scope, Scotch Plains-Fanwood Bd. of Educ. v. Scotch Plains-Fanwood Educ. Ass'n, 139 N.J. 141, 149 (1995), offers no effective safeguard or cure. The only true safeguard is for this Court to reject Amicus's view for the reasons already stated.

CONCLUSION

The Court should not be persuaded by the arguments of Amicus and instead should reverse the Appellate Division's judgment.

Respectfully submitted,

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Dated: July 17, 2025

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