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6 **IN THE UNITED STATES DISTRICT COURT**
7 **FOR THE DISTRICT OF ARIZONA**
8

9 Unknown Party,

10 Plaintiff,

11 v.

12 Arizona Board of Regents, et al.,

13 Defendants.
14

No. CV-18-01623-PHX-DWL

ORDER

15 **INTRODUCTION**

16 In February 2021, Plaintiff John Doe (“Doe”) served a Rule 30(b)(6) deposition
17 notice on Defendant Arizona Board of Regents (“ABOR”). (Doc. 141-2 at 65-69.) The
18 notice lists 19 examination topics. (*Id.*) Since then, the parties have engaged in extensive
19 meet-and-confer efforts concerning ABOR’s objections to some of the noticed topics.
20 After those meet-and-confer efforts proved unsuccessful, the parties sought judicial
21 intervention by filing a joint notice of discovery dispute (Doc. 133), which resulted in a
22 telephonic hearing on May 6, 2021. (Doc. 137.) At the conclusion of that hearing, the
23 Court ordered the parties to continue meeting and conferring and authorized the submission
24 of additional briefing if the parties remained at an impasse. (*Id.*) Unfortunately, the parties
25 were unable to resolve their differences during the post-hearing conferral process. ABOR
26 has now formalized its objections in a motion for protective order (Doc. 141) and Doe has
27 filed a response (Doc. 142).

28 For the following reasons, ABOR’s motion is granted in part and denied in part.

1 **LEGAL STANDARD**

2 Rule 26(c)(1) of the Federal Rules of Civil Procedure provides that “[a] party or any
3 person from whom discovery is sought may move for a protective order in the court where
4 the action is pending.” *Id.* Such protective orders may be sought for a host of different
5 reasons, including “protect[ing] a party or person from annoyance, embarrassment,
6 oppression, or undue burden or expense.” *Id.* “With respect to undue burden and expense,
7 Rule 26(c) operates parallel to, and in tandem with, the proportionality limits now set forth
8 in Rule 26(b)(1).” *See* 1 Gensler, *Federal Rules of Civil Procedure, Rules and*
9 *Commentary, Rule 26, at 865 (2021).*

10 Rule 26(c)(1) specifies that a protective order may be issued only “for good cause.”
11 The burden of establishing “good cause” falls onto the party seeking the protective order.
12 *In re Roman Cath. Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011)
13 (“Under Rule 26, . . . [t]he party opposing disclosure has the burden of proving ‘good
14 cause,’ which requires a showing ‘that specific prejudice or harm will result’ if the
15 protective order is not granted.”) (citation omitted).

16 If the requisite showing is made, the court “has broad power” and “can choose from
17 a wide range of protective measures.” *See* 1 Gensler, *supra*, Rule 26, at 866. Those
18 protective measures include, but are not limited to, “forbidding the discovery,” “specifying
19 terms . . . for the disclosure or discovery,” “prescribing a discovery method other than the
20 one selected by the party seeking discovery,” and “forbidding inquiry into certain matters,
21 or limiting the scope of disclosure or discovery to certain matters.” *See* Fed. R. Civ. P.
22 26(c)(1)(A)-(H).

23 **DISCUSSION**

24 ABOR’s motion explains that “the parties are at an impasse with respect to Topics
25 5, 8, 10, 11, 12, 13, and 14” and also disagree as to the time limit for the Rule 30(b)(6)
26 deposition. (Doc. 141 at 1.) The disputed issues are addressed below.

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1 I. Topic 5

2 Topic 5 of the deposition notice seeks to require ABOR's Rule 30(b)(6) designee to
3 testify about the following topic: "ASU's response to the Department of Education's 2014
4 investigation into possible Title IX violations at ASU." (Doc. 141-2 at 67.)

5 ABOR raises several objections to this topic. (Doc. 141 at 6-9.) First, ABOR
6 contends the topic is vague because ASU has, in fact, been the subject of six different
7 investigations in the last 10 years. (*Id.* at 6.) Second, ABOR contends the topic is
8 overbroad and disproportionate because, even assuming the subject matter is limited to
9 "two investigations that OCR [Office of Civil Rights] consolidated into a systematic review
10 of ASU's Title IX processes," that review spanned six years, involved a large number of
11 communications and document exchanges, and thus "it is not reasonable or proportionate
12 to require ASU to prepare a witness with respect to the 'specifics' of any OCR
13 investigation, which would require numerous interviews and the review of hundreds of
14 documents." (*Id.* at 6-7.) Third, ABOR contends that, because the OCR investigations
15 were managed by ASU's Office of General Counsel ("OGC"), the process of preparing a
16 Rule 30(b)(6) witness would require either a review of OGC-prepared summaries of
17 interviews and phone calls (which could waive the attorney-client privilege or work-
18 product protection as to those documents) or "the arduous task of re-interviewing each
19 person OCR interviewed to gain what would certainly be less accurate information about
20 those discussions given the passage of time." (*Id.* at 7-8.) Fourth, ABOR argues that the
21 requested information is irrelevant because Doe can't prevail on his Title IX claim based
22 solely on evidence of outside pressure and none of the individual decisionmakers in this
23 case indicated, during their respective depositions, any awareness of (let alone influence
24 by) the OCR investigations. (*Id.* at 8-9.)

25 Doe disagrees. (Doc. 142 at 4-8.) As for relevance, Doe contends that the pressure
26 exerted by the OCR investigations forms "the crux of the case," acknowledges that outside
27 pressure alone can't support his Title IX claim but argues it can form part of his claim, and
28 asserts that at least one individual decisionmaker, Dr. Rund, conceded he "knew there were

1 ongoing investigations regarding ASU’s Title IX policies.” (*Id.* at 4, 7-8.) Doe also
2 disputes ABOR’s claim that it would be overly burdensome to prepare a witness to testify
3 on this topic, arguing that the deponent “need only conduct a reasonable investigation into
4 the topic” and need not be prepared “to talk about all communications” or “interview
5 everyone who ever touched the investigation.” (*Id.* at 5-6.) As for ABOR’s claims of
6 privilege, Doe argues there is no automatic waiver when a Rule 30(b)(6) designee uses
7 privileged documents to prepare and raises various other reasons why such testimony
8 should be required. (*Id.* at 6-7.) Finally, Doe notes that, during the meet-and-confer
9 process, ABOR agreed to prepare a witness to address a modified version of Topic 5. (*Id.*
10 at 4-5 & 5 n.2; Doc. 141-3 at 33-34.)

11 ABOR’s motion for a protective order as to Topic 5 is granted in part and denied in
12 part. On the one hand, the Court disagrees with ABOR’s contention that the subject matter
13 implicated by Topic 5 is irrelevant. One reason why the Court denied ABOR’s motion to
14 dismiss Doe’s Title IX claim was the presence of allegations that “ASU [w]as one of the
15 universities whose Title IX processes were under investigation” by OCR. (Doc. 66 at 21.)
16 Such “school-specific allegations,” the Court concluded, “may render a Title IX claim
17 more plausible than a claim premised solely on the ‘Dear Colleague’ letter.” (*Id.* at 21-
18 22.) Given this backdrop, and in light of the fact that “[r]elevancy in civil litigation is a
19 relatively low bar,” *Continental Circuits LLC v. Intel Corp.*, 435 F. Supp. 3d 1014, 1018
20 (D. Ariz. 2020),¹ the Court has no trouble concluding that the information sought by Topic
21 5 is relevant.

22 On the other hand, the Court is sympathetic to ABOR’s concerns over the vagueness
23 and overbreadth of Topic 5. Rule 30(b)(6) requires the deposing party to “describe with
24 reasonable particularity the matters for examination.” This means that “the requesting
25 party must take care to designate, with painstaking specificity, the particular subject areas

26 ¹ See also 1 Gensler, *supra*, Rule 26, at 801-02 (“For discovery purposes, courts
27 define relevance broadly, stating that information is relevant if it bears on or might
28 reasonably lead to information that bears on any material fact or issue in the action. . . .
[C]ourts are quick to point out that discovery is concerned with relevant information—not
irrelevant evidence—and that as a result the scope of relevance for discovery purposes is
necessarily broader than trial relevance.”) (internal quotation marks omitted).

1 that are intended to be questioned.” *Vantage Mobility Int’l, LLC v. Kersey Mobility, LLC*,
2 2021 WL 148651, *2 (D. Ariz. 2021) (internal quotation marks omitted). As written, it is
3 difficult to see how Topic 5 could satisfy these standards—it calls for an ABOR designee
4 to testify about “ASU’s response” to an investigation (which, accepting ABOR’s account,
5 could pertain to several different investigations), without clarifying which aspects of that
6 “response” are at issue.

7 Fortunately, during the meet-and-confer process, the parties were able to identify
8 ways to narrow Topic 5 and sharpen its focus. In an email written on May 10, 2021—less
9 than two weeks before ABOR filed its motion for protective order—ABOR’s counsel
10 agreed that “ABOR is willing . . . to prepare a witness to respond to questions about the
11 OCR investigations generally, including whether the OCR ever found that ASU had
12 violated Title IX, whether ASU made any procedure or policy changes in response to either
13 the investigations or any determination by the OCR, and any discussions or
14 communications ASU had with the OCR as to those procedure or policy changes.” (Doc.
15 141-3 at 12.) In the Court’s view, this seems like a reasonable narrowing formulation that
16 supplies the necessary particularity required by Rule 30(b)(6) (and thus addresses ABOR’s
17 concerns about vagueness and overbreadth) while still providing Doe with the core
18 information he needs to pursue his Title IX claim (albeit while not supplying quite as much
19 information as he originally hoped to obtain on this topic through his deposition notice).

20 As for ABOR’s concerns about burdensomeness and proportionality, the Court
21 appreciates that it may be fairly burdensome for an ABOR designee to become
22 knowledgeable about this topic, even in its narrowed form, due to the volume of underlying
23 information at issue. Nevertheless, this is not a disproportionate burden “considering the
24 importance of the issues at stake in the action, the amount in controversy, the parties’
25 relative access to relevant information, the parties’ resources, the importance of the
26 discovery in resolving the issues, and whether the burden or expense of the proposed
27 discovery outweighs its likely benefit.” *See* Fed. R. Civ. P. 26(b)(1).

28 Finally, as for ABOR’s concerns regarding the attorney-client privilege, the Court

1 is unwilling to prevent Doe from inquiring into a relevant, unprivileged subject area—
2 conversations between representatives of ASU and OCR—simply because ASU may have
3 chosen to memorialize those conversations in attorney-drafted memoranda. *Upjohn Co. v.*
4 *United States*, 449 U.S. 383, 395 (1981) (“The [attorney-client privilege] only protects
5 disclosure of communications; it does not protect disclosure of the underlying facts by
6 those who communicated with the attorney.”). *Cf. Matter of Fischel*, 557 F.2d 209, 212
7 (9th Cir. 1977) (“[F]acts which an attorney receives from a third party about a client are
8 not privileged. . . . A client has no expectation of confidentiality with respect to these facts.
9 An attorney’s subsequent use of this information in advising his client does not
10 automatically make the information privileged.”); *Dolby Labs. Licensing Corp. v. Adobe*
11 *Inc.*, 402 F. Supp. 3d 855, 870 (N.D. Cal. 2019) (email chain was not privileged where
12 email did “not convey any analysis or opinion and relate[d] purely to underlying facts,
13 which are not protected by attorney-client privilege”). At any rate, ABOR acknowledges
14 there are other ways, apart from reviewing such memoranda, for a witness to become
15 reasonably knowledgeable on this topic. Additionally, the designee will not be expected
16 to have a verbatim recollection of every underlying conversation. *See, e.g., QBE Ins. Corp.*
17 *v. Jorda Enters., Inc.*, 277 F.R.D. 676, 691 (S.D. Fla. 2012) (“Absolute perfection is not
18 required of a 30(b)(6) witness.”); *Wilson v. Lakner*, 228 F.R.D. 524, 529 n.7 (D. Md. 2005)
19 (“Obviously a rule of reason applies. There is no obligation to produce [Rule 30(b)(6)]
20 witnesses who know every single fact, only those that are relevant and material to the
21 incident or incidents that underlie the suit.”).

22 Accordingly, ABOR’s Rule 30(b)(6) designee must be prepared to address the
23 following topic, in lieu of the version of Topic 5 that appeared in the original deposition
24 notice: “Whether the OCR ever found that ASU had violated Title IX, whether ASU made
25 any procedure or policy changes in response to either the investigations or any
26 determination by the OCR, and any discussions or communications ASU had with the OCR
27 as to those procedure or policy changes.”

28 ...

1 II. Topics 8, 12, 13, and 14

2 Both sides agree that Topics 8, 12, 13 and 14 should be addressed together because
3 they implicate the same issues. (Doc. 141 at 9; Doc. 142 at 8.) As background, the disputed
4 topics provide as follows:

- 5 ▪ Topic 8: “For each case listed in Exhibits 1 and 2 to ABOR’s Responses to
6 Doe’s Non-Uniform Interrogatories, the details of the charges, the
7 facts supporting those charges, the UHB findings and
8 recommendations, and the Senior VP’s decision.”
- 9 ▪ Topic 12: “Disciplinary actions where there was a finding of responsibility
10 based on a violation of F-23 of the Student Code of Conduct that was
11 not articulated in the factual basis for the F-23 charge contained in the
12 initial notice of charges (or thereafter in any subsequent notice
13 preceding the UHB hearing).”
- 14 ▪ Topic 13: “Disciplinary actions where the student was accused of violating F-23
15 of the Student Code of Conduct because he or she engaged in sex with
16 someone who was incapacitated and therefore could not consent, but
17 was later found to have engaged in sex by force.”
- 18 ▪ Topic 14: “Disciplinary action where a female was accused of sexual
19 misconduct under the Student Code of Conduct, to include details of
20 the charges levied, the facts supporting the charges, the finding and
21 recommendations by the UHB, and the final decision by the
22 University.”

23 (Doc. 141-2 at 67-68.)

24 ABOR argues these topics are overbroad and unduly burdensome because they
25 would require its designee to become knowledgeable about the details of hundreds, if not
26 thousands, of individual discipline proceedings involving ASU students over a period of
27 many years. (Doc. 141 at 9-13.) For example, with respect to Topic 8 (which calls for the
28 designee to become familiar with “each case” listed in two different exhibits), ABOR notes

1 that the first exhibit lists 543 different cases in which an ASU student was charged with
2 sexual misconduct and the second exhibit lists 8,337 different cases in which an ASU
3 student was charged with an alcohol violation, all over a five-year period. (*Id.* at 9-10.) In
4 ABOR’s view, it would “be difficult, if not impossible, for a witness to prepare to
5 competently or accurately discuss the details of even five student disciplinary cases,” let
6 alone hundreds or thousands of such cases. (*Id.* at 11.) In a similar vein, ABOR contends
7 that Topic 14 is objectionable because it encompasses 20 different cases over a five-year
8 period. (*Id.* at 10.) And as for Topics 12 and 13 (which call for information about cases
9 in which the original charge deviated from ultimate charge), ABOR contends they are
10 unduly burdensome because “ASU does not track the requested information” so a designee
11 could only become knowledgeable by “reviewing the individual case files of every
12 disciplinary matter in which a student was found responsible for sexual misconduct, and
13 comparing the original complaint or notice of charges to the final decision.” (*Id.*) Finally,
14 ABOR notes that, during the meet-and-confer process, Doe offered a compromise approach
15 under which ABOR would produce the complete files for 81 discipline cases, Doe would
16 select up to five of those cases, and the designee’s testimony would be limited to the five
17 selected cases, but ABOR argues this approach would be problematic for a host of
18 reasons—it would result in the production of documents that Doe previously attempted
19 (without success) to obtain through normal discovery channels, would still require the
20 review (and redaction) of huge volumes of material, would inevitably require an extension
21 of the discovery deadline, and would not necessarily limit the questioning as to Topics 12,
22 13, and 14. (*Id.* at 10-13.)

23 Doe frames the issues much differently. (Doc. 142 at 8-13.) As for Topic 8, Doe
24 argues that, although there are 8,800 relevant investigations involving other students, he
25 has agreed to limit his inquiry to five other cases and has agreed to, among other things,
26 “eliminate from the discussion of 8,337 cases where the student was charged with an
27 alcohol violation.” (*Id.* at 8-9.) Doe further argues that ABOR has already agreed to allow
28 its designee to testify about the five selected cases. (*Id.* at 9.) Thus, Doe contends the only

1 disputed issue is whether ABOR should produce the files pertaining to the five selected
2 cases. (*Id.* at 9-10.) In Doe’s view, the files are properly subject to discovery because
3 redaction would not be particularly burdensome (*id.* at 9 n.5) and because, as a matter of
4 fairness, “[i]f ASU’s designees must use documents to inform [their] testimony, those
5 documents should be produced especially when the documents arise from a small subset
6 agreed-on by the parties to avoid a much more expansive investigation by the designee”
7 (*id.* at 10). Finally, as for Topics 12, 13, and 14, Doe argues he is not attempting to obtain
8 specific information about past cases and simply wants to obtain information regarding the
9 three following topics: “(1) Are you aware of any case where a female student was
10 suspended after being charged with sexual misconduct? (2) Are you aware of any case
11 where a female student was expelled after being charged with sexual misconduct? (3) Are
12 you aware of any case where a female student was charged with violating the student [code
13 of] conduct and attended a hearing on that charge but was later found guilty of violating
14 another section of the student code of conduct following the hearing?” (*Id.* at 11.) Doe
15 contends that “[i]f ASU is unaware of such cases, it should so answer. If it knows such
16 information, it should so answer. If ASU wants to defend on the basis that it is impossible
17 to review each case, it may do so. But the topics were properly noticed, and ASU has
18 provided no basis to prevent Doe from asking about past cases.” (*Id.*)

19 ABOR’s motion for a protective order as to Topics 8, 12, 13, and 14 is granted. The
20 overarching problem is that, although the general subject area Doe wishes to explore via
21 Topics 8, 12, 13, and 14—which Doe describes in his response as “how ASU has treated
22 others in the student disciplinary system, specifically those involving claims of sexual
23 assault” (Doc. 142 at 8, emphasis omitted)—is relevant and ought to be fair game for
24 examination, the verbiage he chose to use when formulating the deposition topics is vague,
25 overbroad, and would place overly burdensome and disproportionate preparation demands
26 on ABOR. For example, Doe clarifies in his response that one issue he wishes to explore
27 during the Rule 30(b)(6) process is whether ASU is “aware of any case where a female
28 student was suspended [or expelled] after being charged with sexual misconduct.” (*Id.* at

1 11.) It is easy to understand why this issue would be useful to explore in this case, as Doe’s
2 claim is that his flawed investigative and disciplinary processes were the product of anti-
3 male bias. Nevertheless, Doe isn’t asking for permission to propound an interrogatory to
4 ABOR asking for a yes/no answer to this question. Instead, he is seeking to explore this
5 subject through the Rule 30(b)(6) deposition process² and his designated topics, as written,
6 would literally require ABOR’s designee to review thousands and thousands of pages of
7 investigative files, master the details of hundreds of individual cases that occurred over a
8 span of many years, and synthesize those details in a manner that ABOR doesn’t usually
9 track. The Court agrees with ABOR that it would be unduly burdensome to require a
10 designee to engage in such preparation efforts.

11 To his credit, Doe appears to acknowledge that the noticed topics, as written, are
12 overbroad and impermissible. During the meet-and-confer process, the parties expended
13 substantial resources in an attempt to narrow their scope. Even now, months after the
14 deposition notice was originally issued, Doe is still proposing new changes and new
15 narrowing constructions. Although the Court appreciates these efforts, this is not the way
16 the Rule 30(b)(6) process is supposed to work.

17 Moreover, although the parties were able to come up with their own narrowing
18 formulation with respect to Topic 5 during the meet-and-confer process—a formulation the
19 Court has now adopted—the proposals Doe is now urging with respect to Topics 8, 12, 13,
20 and 14 are unworkable given the posture of this case. For example, one such proposal
21 would involve the following steps: (1) ABOR discloses certain documents from a range of

22 ² To be clear, the problem with Doe’s approach isn’t his choice to explore this topic
23 via the Rule 30(b)(6) process. In general, it is his prerogative to choose which discovery
24 tools to use. *See generally Campbell v. Facebook Inc.*, 310 F.R.D. 439, 449 (N.D. Cal.
25 2015) (“While Facebook may have provided detailed responses to Plaintiffs’
26 interrogatories and submitted the declarations of Facebook employees describing how its
27 private message processing works, Plaintiffs have a right to verify and explore the
28 information Facebook provided through a 30(b)(6) deposition”); 1 Gensler, *supra*,
Rule 30, at 971 (“[P]arties generally are not limited to using a single discovery device to
obtain information. Accordingly, a party is not precluded from seeking deposition
testimony via Rule 30(b)(6) on topics about which he already has information or has
learned through other discovery devices. . . . [P]arties generally get to choose for
themselves which discovery tools to use at what times and for what purposes.”). The
problem lies in the particular wording of the deposition notice.

1 different cases involving allegations of sexual misconduct; (2) Doe’s counsel then reviews
2 those documents and, based on that review, selects five cases that Doe is most interested
3 in exploring further; (3) ABOR then arranges for its designee to become knowledgeable
4 about the details of those five cases; and (4) after that preparation process is complete, the
5 Rule 30(b)(6) deposition occurs. An obvious difficulty with this approach is that it would
6 result in substantial delay and place new document production demands on ABOR, in
7 contravention of the scheduling order (whose discovery deadlines, which were extended
8 on multiple occasions due to the COVID-19 pandemic, have largely expired). This would
9 be an unreasonable outcome in a case that is already more than three years old.
10 Additionally, Doe is effectively asking this Court to rewrite his noticed deposition topics
11 in an effort to salvage them from ABOR’s legitimate concerns about overbreadth and
12 burdensomeness. In general, the Court is not inclined to accept such redrafting invitations
13 when resolving discovery disputes. *See generally Excel Fortress Ltd. v. Wilhelm*, 2018
14 WL 6067255, *2 (D. Ariz. 2018) (citing various cases for the proposition that “it is not the
15 province of the Court to rewrite discovery requests that seek irrelevant information, are
16 overbroad, or are otherwise improper”).

17 III. Topic 10

18 Topic 10 of the deposition notice seeks to require ABOR’s Rule 30(b)(6) designee
19 to testify about the following topic: “The factual bases (and when those bases arose) and
20 legal support for the affirmative defenses.” (Doc. 141-2 at 67.)

21 ABOR contends this topic is objectionable because it has already provided detailed
22 information concerning its affirmative defenses to Doe, in the form of MIDP disclosures,
23 and Doe has never objected to the sufficiency of those disclosures. (Doc. 141 at 13-14.)
24 ABOR further contends that, because its affirmative defenses are based on legal research
25 and analysis, requiring a Rule 30(b)(6) designee to testify on this topic would run the risk
26 of “revealing both the legal advice given by ABOR’s counsel and information protected
27 by the work product doctrine.” (*Id.*) Finally, ABOR notes that many courts have
28 recognized that other discovery tools, such as contention interrogatories, are a more

1 efficient vehicle for obtaining information about affirmative defenses than Rule 30(b)(6)
2 depositions. (*Id.*)

3 In response, Doe argues that ABOR didn't update its MIDP disclosures to disclose
4 the bases for its affirmative defenses until March 2021, which was after the deadline for
5 written discovery, so it would have been impossible for him to use contention
6 interrogatories (or other discovery tools) to seek more information on this topic. (Doc. 142
7 at 13-14.) At a minimum, Doe argues that even "if the Court believes [a Rule 30(b)(6)
8 deposition] is too burdensome, [he] should be permitted to serve contention interrogatories
9 to obtain the same information, as permitted by ASU's own [cited] authorities." (*Id.*)

10 ABOR's motion for a protective order as to Topic 10 is granted in part and denied
11 in part. Although the Court agrees with ABOR that it would unnecessarily open a can of
12 worms to allow Doe to explore this topic via a Rule 30(b)(6) deposition, the Court also
13 concludes that, in light of the timing of ABOR's MIDP disclosures, Doe should be afforded
14 some mechanism for obtaining more information about ABOR's affirmative defenses.
15 Accordingly, in lieu of allowing this topic to be explored during ABOR's Rule 30(b)(6)
16 deposition, the Court will authorize Doe to propound one additional interrogatory to ABOR
17 seeking more information about ABOR's affirmative defenses. *United States v. HVI Cat*
18 *Canyon, Inc.*, 2016 WL 11683593, *10-11 (C.D. Cal. 2016) (granting defendant's motion
19 for protective order as to Rule 30(b)(6) deposition notice that sought information about
20 affirmative defenses, due to the fact that "many courts discourage the use of 30(b)(6)
21 depositions to obtain testimony concerning a party's affirmative defenses," but authorizing
22 plaintiff to issue "additional interrogatories" on the same topic). *See generally Clauss*
23 *Constr. v. UChicago Argonne LLC*, 2015 WL 191138, *4 (N.D. Ill. 2015) ("There is a
24 difference of opinion among courts as to whether a Rule 30(b)(6) topic that asks an entity
25 to designate a witness to testify about facts underlying legal claims or defenses is
26 appropriate. The issue usually comes down to whether contention interrogatories are a
27 better discovery vehicle for that kind of information than a Rule 30(b)(6) deposition.").

28 ...

1 IV. Topic 11

2 Topic 11 of the deposition notice seeks to require ABOR’s Rule 30(b)(6) designee
3 to testify about the following topic: “The use of the barrier between claimants and
4 respondents at a UHB hearing on a violation of F23 under the Student Code of Conduct,
5 including the first time a barrier was used.” (Doc. 141-2 at 67.)

6 In its motion, ABOR states that it is willing “to designate a witness to testify
7 regarding the purpose for using a barrier at a disciplinary hearing, and the circumstances
8 under which a barrier will be used.” (Doc. 141 at 14-15.) However, ABOR argues that its
9 designee shouldn’t be required to answer additional questions concerning barrier usage,
10 such as “the first time a barrier was used, whether a requested barrier has ever been denied,
11 and whether a barrier has ever been used with a male complainant or a female respondent,”
12 because it does not track those issues as a matter of course and thus “accurately answering
13 the questions [Doe] seeks to pose would require, at a minimum, a review of all UHB
14 hearing records.” (*Id.*) ABOR further contends that, even if it conducted such a review,
15 “the witness might still not have accurate or complete information” because a verbal
16 request for a barrier may not have been memorialized in writing. (*Id.*) Finally, ABOR
17 contends that the issue of barrier usage is irrelevant because it is not mentioned in the
18 complaint or in Doe’s MIDP disclosures. (*Id.* at 15-16.)

19 Doe argues that the issue of barrier usage is relevant because a barrier was used in
20 his case to separate him from the female complainant, and if ASU doesn’t use barriers in
21 cases involving male complainants, this may support his theory that “ASU considers males
22 paradigmatic predators and females as victims deserving protection.” (Doc. 142 at 15-16.)
23 As for ABOR’s arguments about the burden of conducting a factual investigation, Doe
24 contends those arguments are exaggerated because “there are only 11 cases where the male
25 is the accuser” and ABOR’s designee need not review every scrap of paper from those 11
26 cases to become reasonably knowledgeable—the universe of participants in those cases is
27 relatively small and the designee can simply conduct interviews, send email inquiries, and
28 conduct other limited inquiries. (*Id.*)

1 ABOR's motion for a protective order as to Topic 11 is granted in part and denied
2 in part. Once again, the overarching problem is that the subject matter Doe appears to
3 actually care about, as clarified in his motion papers (*i.e.*, the use of barriers during sexual
4 misconduct-related disciplinary proceedings involving male complainants), is much
5 narrower than the subject matter sought by Topic 11 in its as-written form (*i.e.*, all
6 information about the use of barriers during sexual misconduct-related disciplinary
7 proceedings, without regard to the gender of the participants). The Court agrees with Doe
8 that both of these subject areas are relevant, given the expansive definition of relevance
9 under Rule 26 and the nature of Doe's claims in this case. The issue is burdensomeness.
10 If the topic were limited to the use of barriers in the 11 cases involving male complainants,
11 it would be reasonable to expect an ABOR designee to become knowledgeable. But if the
12 topic were not so limited, it would be unreasonable to expect an ABOR designee to become
13 knowledgeable (due to the sheer number of underlying cases).

14 Even though, as stated in Part II above, the Court is generally disinclined to re-write
15 discovery requests in an effort to salvage them, it appears that Doe had already proposed a
16 limitation to cases involving male complainants during the meet-and-confer process and
17 that ABOR had already agreed during the meet-and-confer process that Topic 11 could be
18 narrowed in an acceptable manner (albeit without agreeing to Doe's proposed narrowing
19 construction). Accordingly, ABOR's Rule 30(b)(6) designee must be prepared to address
20 the following topic, in lieu of the version of Topic 11 that appeared in the original
21 deposition notice: "The purpose for using a barrier at a disciplinary hearing, the
22 circumstances under which a barrier will be used, and whether a barrier was used during
23 the 11 sexual misconduct-related disciplinary proceedings involving a male complainant."

24 V. Length of Deposition

25 The parties' final dispute concerns the length of the Rule 30(b)(6) deposition.
26 ABOR argues the deposition may not exceed seven hours in the aggregate, irrespective of
27 how many designees it chooses to utilize (Doc. 141 at 16-17), whereas Doe argues he
28 should be allowed to depose each designee for up to seven hours (Doc. 142 at 16-17).

1 This dispute raises an interesting question of law that appears to be unsettled in the
2 Ninth Circuit. Rule 30(d)(1) provides that, “[u]nless otherwise stipulated or ordered by the
3 court, a deposition is limited to 1 day of 7 hours.” Additionally, the Ninth Circuit has
4 held—albeit in a case not specifically addressing the issue of durational limits—that “[a]
5 Rule 30(b)(6) deposition is ‘treated as a single deposition even though more than one
6 person may be designated to testify.’” *Stevens v. Corelogic, Inc.*, 899 F.3d 666, 679 n.13
7 (9th Cir. 2018) (quoting Fed. R. Civ. P. 30, advisory committee’s note to 1993
8 amendment). Taken together, these authorities tend to support ABOR’s position—after
9 all, Rule 30(d)(1) states that “a deposition” may not, as a presumptive matter, exceed seven
10 hours and the Ninth Circuit has held that a Rule 30(b)(6) deposition counts as “a single
11 deposition” regardless of the number of designees.

12 On the other hand, the advisory committee’s note to the 2000 amendment to Rule
13 30 specifically states that “[f]or purposes of this durational limit, the deposition of each
14 person designated under Rule 30(b)(6) should be considered a separate deposition.” This
15 language supports Doe’s position, albeit not conclusively. *United States v. Bainbridge*,
16 746 F.3d 943, 947 (9th Cir. 2014) (“[W]hile an advisory committee’s note is given ‘weight’
17 . . . [it] is not part of the Rule itself. As a result, an advisory committee’s note does not
18 have the force of law.”) (citation and emphasis omitted).

19 No consensus has emerged as to whether the approach set forth in the advisory
20 committee’s note should be followed. *Compare Buie v. District of Columbia*, 327 F.R.D.
21 1, 15 (D.D.C. 2018) (following the note), *with In re Rembrandt Techs.*, 2009 WL 1258761,
22 *14 (D. Colo. 2009) (not following the note). Here, the Court finds it unnecessary to wade
23 into the debate. Whatever the presumptive durational limit may be, the Court has discretion
24 under Rule 30(d)(1) to adjust it. Given the number of topics to be covered in this case, the
25 Court concludes that it would be reasonable to allocate a total of 14 hours to complete
26 ABOR’s Rule 30(b)(6) deposition, regardless of how many designees are utilized. Each
27 deposition day may not exceed seven hours.

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Accordingly,

IT IS ORDERED that ABOR's motion for protective order (Doc. 141) is **granted in part and denied in part**, as discussed above.

Dated this 4th day of June, 2021.



Dominic W. Lanza
United States District Judge