

# Title IX Updates and Future Outlook

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# TITLE IX UPDATES

# Title IX Updates

## Biden Administration

- New Education Secretary Miguel Cardona
- Deputy Assistant Secretary Suzanne Goldberg (Columbia) will oversee Title IX policy
- Catherine Lhamon has been nominated for Assistant Secretary for Civil Rights
- Biden executive order created a White House Gender Policy Council
- LSU under Title IX-related DOE investigation (also under investigation for Clery Act)/LSU Law Firm Report/NASA Voluntary Resolution Agreement (March 22, 2021)
- *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
  - 100-day review at Department of Education
  - Biden gave all clear to issue new guidance and revise, rescind or suspend the Title IX regulations.
  - Rep. Foxx and Sen. Burr wrote letters to Secretary Cardona urging him not to change 2020 Title IX regulations



# Dept. of Education, *Letter to Students, Educators, and other Stakeholders re Executive Order 14021* (April 6, 2021)

- A comprehensive review of Title IX regulations.
- Public Hearings [OCCURRED IN JUNE 2021. TRANSCRIPT RELEASED JULY 20, 2021.]
  - *OCR seeks to hear from as many interested parties as possible. We recognize that many students, parents, teachers, faculty members, school staff, administrators, and other members of the public have important insights to share on the issue of sexual harassment in school environments, including sexual violence, and discrimination based on sexual orientation and gender identity. To facilitate this sharing of views, the Department plans to hold a public hearing in which students, educators, and others with interest and expertise in Title IX will be able to participate by offering oral comments and written submissions. OCR expects to announce the dates and times for this hearing in the coming weeks. More information regarding this public hearing, including dates, times, and how to register to participate and speak, will be published on the News Room section of OCR's website (<https://www.ed.gov/ocr/newsroom.html>) and in a forthcoming Federal Register notice.*



# Letter to Students, Educators, and other Stakeholders re Executive Order 14021 Cont'd

- Forthcoming Q&A [**Released on July 20, 2021**]
  - *At this time, the Department's Title IX regulations, as amended in 2020, remain in effect. To assist schools, students, and others, OCR plans to issue a question-and-answer document in the coming months. The purpose of this Q&A document will be to provide additional clarity about how OCR interprets schools' existing obligations under the 2020 amendments, including the areas in which schools have discretion in their procedures for responding to reports of sexual harassment.*
- Notice of Proposed Rulemaking [**Anticipated/Possibly May 2022**]
  - *After hearing from the public and completing its review of the Department's current Title IX regulations and other agency actions, OCR anticipates publishing in the Federal Register a notice of proposed rulemaking to amend the Department's Title IX regulations. This notice will provide individuals, organizations, schools, and other members of the public with an additional opportunity to share insights and views through a formal notice-and-comment period.*



# Title IX Updates

## VAWA Reauthorization

- Especially important since there is information that domestic violence has increased during the pandemic *CCJ, Impact Report: COVID-19 and Domestic Violence Trends (Feb. 2021).*
- Cleared the House, faces obstacles in the senate
- *Strengthen[s] enforcement of court orders that require convicted abusers to relinquish their firearms,*
- *Extend[s] protections to immigrant women and transgender women,*
- *Ensur[es] Indigenous tribes' jurisdiction over non-Native perpetrators of sexual assault and domestic violence on tribal lands,*
- *Clos[es] the "boyfriend loophole" by prohibiting anyone convicted of dating violence from purchasing a firearm. Smeal and Spillar, Feminists' Goals of Ratifying ERA and Ending Violence Against Women Are Inextricably Linked, Ms. Magazine (April 6, 2021).*



# Title IX Updates

- Recission of Clery Handbook in October 2020
  - Trump administration viewed some parts as overreach
  - Look to the actual regulations for guidance/indications that some form of handbook will return
  - Recission impact on campus Title IX obligations
- Equal Rights Amendment
  - Efforts to pass have been renewed in the House
- SCOTUS
  - Justice Comey Barrett now sits on the High Court
  - Her opinion in *Purdue* in a *7<sup>th</sup> Circuit case* in 2019—focus on due process and a relaxed standard to plead sex discrimination.



# Title IX Updates

- In June 2021, DOJ issued a statement of interest regarding the University of Nebraska stating the university adopted inappropriate definitions of discrimination and harassment in alleged sexual misconduct against male athletes
- House passed the Equality Act
  - Sweeping protections for LGBTQ individuals in many areas, such as education, employment, housing, etc.
  - Currently in Senate committee
- Gender Pay Equity
  - Megan Rapinoe, U.S. Women's Soccer star, appeared before a congressional committee to testify





# Title IX Updates

- Diversity Training
  - Trump restricted diversity training for federal agencies in 2020
  - Biden reversed this in his first days in office in 2021
  - Chris Quintana, *Trump's controversial diversity training order is dead – or is it? Colleges are still feeling its effects*, USA Today (Feb. 6, 2021).
- Post-Covid
  - “Roaring 20s” phenomenon on the horizon? Delta/ Mu pause---pandemic or endemic
- Activism on All Sides
  - New report from Know Your IX, *The Cost of Reporting: Perpetrator Retaliation, Institutional Betrayal, and Student Survivor Pushout* (March 2021).
  - Alexis Gravely, *Nominee Faces Criticism at Confirmation Hearing*, Inside Higher Ed (July 14, 2021).



# June 10, 2021 Letter to Dept. of Education, Spearheaded by the American Council on Education (ACE)

## Signed by:

- American Association of Collegiate Registrars and Admissions Officers
- American Association of Colleges for Teacher Education
- American Association of Community Colleges
- American Association of State Colleges and Universities
- American College Personnel Association
- American Council on Education
- American Dental Education Association
- American Indian Higher Education Consortium
- APPA, “Leadership in Educational Facilities”
- Association of American Colleges and Universities



# June 10, 2021 Letter to Dept. of Education Quotes

- *...the Regulations are antithetical to the fundamental educational nature and objectives of campus student disciplinary processes.*
- *...colleges and universities are not courts, nor should they be. They do not convict people of crimes, impose criminal sanctions, or award damages.*
- *... the Regulations force campuses to turn their disciplinary proceedings into legal tribunals with highly prescriptive, court-like processes.*
- *The Regulations mandate that every campus must provide a “live hearing” with direct cross-examination by the party’s advisor of choice or an advisor supplied by the institution. A “live hearing” with direct cross-examination is not necessary in order to provide a thorough and fair process for determining the facts of a matter and a means for the parties to test the credibility of the other party and other witnesses.*
- *The Regulations inappropriately extend these court-like and prescriptive processes to sexual harassment allegations involving employees.*



## June 10, 2021 Letter to Dept. of Education Quotes Cont'd

- *The Regulations fail to recognize the myriad other federal, state and local laws, judicial precedent, institutional commitments and values regarding the handling of sexual harassment with which campuses must also comply.*
- *The Regulations also provide insufficient flexibility to allow campuses to choose between using a “preponderance of evidence” or “clear and convincing” evidentiary standard.*
- *We appreciate that the Regulations allow campuses to use informal resolution processes when both parties are fully informed of this option and voluntarily consent.*
- *. . . the Regulations require colleges and universities to adopt a new Title IX-specific definition of “sexual harassment” that is inconsistent with Title VII’s definition, and also with definitions contained in campus sexual misconduct policies. The Regulations also raise questions about precisely what conduct will be considered to have occurred within a “program or activity.”*
- *The Regulations have driven up the costs and burden of compliance . . .*
- *When considering revising the Regulations, we urge OCR to keep the “long game” in mind, and look for solutions that are broadly supported by stakeholders.*



# BRIEF OVERVIEW OF TITLE IX-RELATED LITIGATION



# SOME LITIGATION HIGHLIGHTS

## Judicial activism and inactivism

- Lower courts and SCOTUS
- 6<sup>th</sup> Circuit in *Baum*
- 7<sup>th</sup> Circuit in *Purdue*
- 3<sup>rd</sup> Circuit in *University of Sciences*
- Univ. of Southern California --\$852 million settlement in case regarding abuse by campus gynecologist
- *Bostock*
- *Lady of Guadalupe*
- *NCAA v. Alston et al* (See Jeremy Bauer-Wolf, *Constitutional Due Process at Private Institutions?* Inside Higher Ed (June 25, 2019).



# Dimensions of Title IX-Related Litigation

- Athletic Equity
- Deliberate Indifference
- Due Process
- Retaliation
- Erroneous Outcome
- Selective Enforcement
- Plausible Inference
- “Preventable” Sexual Assault Claims – State Negligence Claims
- Hazing/Student Suicide
- Breach of Contract
- Negligent Investigation?



# Plausible Inference

*Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

*“[T]o state a claim under Title IX, the alleged facts, if true, must support a plausible inference that a federally-funded college or university discriminated against a person on the basis of sex.”*

*\*Amy Comey Barrett*





# Breach of Contract

*Doe v. University of the Sciences*, No. 19-2966 (3d Cir. May 31, 2020).

*Here, the fairness promised by the Student Handbook and the Policy relates to procedural protections for students accused of sexual misconduct, and Doe alleges that he did not receive a “fair and impartial hearing.” In this context, a “fair hearing” or “fair process” “is a term of art used to describe a ‘judicial or administrative hearing conducted in accordance with due process.’” [Internal citations omitted.]*

*We hold that UScience’s contractual promises of “fair” and “equitable” treatment to those accused of sexual misconduct require at least a real, live, and adversarial hearing and the opportunity for the accused student or his or her representative to cross-examine witnesses—including his or her accusers.*



# SCOTUS/*Bostock* and Implications for Title IX

## *Bostock v. Clayton County* (June 15, 2020)

A consolidation of three cases of employment discrimination under **Title VII**.

Holding: An employer who fires an individual merely for being homosexual or transgender violates Title VII of the Civil Rights Act of 1964.

*Caveat: The employers worry that our decision will sweep beyond Title VII to other federal or state laws that prohibit sex discrimination. And, under Title VII itself, they say sex-segregated bathrooms, locker rooms, and dress codes will prove unsustainable after our decision today. But none of these other laws are before us; we have not had the benefit of adversarial testing about the meaning of their terms, and we do not prejudge any such question today.*



# *Bostock* and the New Dept. of Education Position on LGBTQ Protections

"The Supreme Court has upheld the right for LGBTQ+ people to live and work without fear of harassment, exclusion, and discrimination – and our LGBTQ+ students have the same rights and deserve the same protections. I'm proud to have directed the Office for Civil Rights to enforce Title IX to protect all students from all forms of sex discrimination. Today, the Department makes clear that all students—including LGBTQ+ students—deserve the opportunity to learn and thrive in schools that are free from discrimination."

U.S. Secretary of Education Miguel Cardona  
*U.S. Department of Education Confirms  
Title IX Protects Students from Discrimination  
Based on Sexual Orientation and Gender Identity*  
[Press release]

JUNE 16, 2021



## *Bostock* and the New Dept. of Education Position on LGBTQ Protections Cont'd

“OCR has long recognized that Title IX protects all students, including students who are lesbian, gay, bisexual, and transgender, from harassment and other forms of sex discrimination. OCR also has long recognized that Title IX prohibits harassment and other forms of discrimination against all students for not conforming to stereotypical notions of masculinity and femininity. But OCR at times has stated that Title IX’s prohibition on sex discrimination does not encompass discrimination based on sexual orientation and gender identity. To ensure clarity, the Department issues this Notice of Interpretation addressing Title IX’s coverage of discrimination based on sexual orientation and gender identity in light of the Supreme Court decision discussed below.

In 2020, the Supreme Court in *Bostock v. Clayton County*, 140 S. Ct. 1731, 590 U.S. \_\_\_\_ (2020), concluded that discrimination based on sexual orientation and discrimination based on gender identity inherently involve treating individuals differently because of their sex. It reached this conclusion in the context of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., which prohibits sex discrimination in employment. As noted below, courts rely on interpretations of Title VII to inform interpretations of Title IX.

The Department issues this Notice of Interpretation to make clear that the Department interprets Title IX’s prohibition on sex discrimination to encompass discrimination based on sexual orientation and gender identity . . .”



# Bostock and Title IX

- How will campuses define “sex” going forward?
- Title VII = Title IX
- 21 State Attorneys General pushed back in a letter to Pres. Biden
- 20 States Sue Biden Administration
  - *Tennessee et al v. United States Department of Education et al*, Tennessee Eastern District Court, Case No. 3:21-cv-00308



# SCOTUS decision in *Our Lady of Guadalupe School v. Morrissey-Berru* (July 8, 2020)

- “Ministerial exception”: application to Title VII and Title IX.
- Employees vs. Students
- “When a school with a religious mission entrusts a teacher with the responsibility of educating and forming students in the faith, judicial intervention into disputes between the school and the teacher threatens the school’s independence in a way that the First Amendment does not allow.”
- Nonsectarian “tenets” or “teachers”? Viewpoint discrimination?
- What may be next for students



# Litigation

- Follow policies--Do what you say and say what you do.
- Equity, bias, impartiality, promptness
- Think “contractual fairness”
  - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).
  - Rethink “Rudy” instincts





# JULY 2021 Q&A DOCUMENT



# July 2021 Q&A

- 2020 regulations remain in force and are enforceable.
  - Refers frequently to the “preamble” to the 2020 regulations
- Some interesting interpretations
- OCR clearly waiting to make major changes in notice and comment process in 2022
- Gave examples of policy language at the end of the document in an appendix/not model policies
- Document clearly states the Q&A and Preamble to regulations do not have the force of law

Dept. of Education, Office for Civil Rights, *Questions and Answers on the Title IX Regulations on Sexual Harassment* (July 2021), at 1.



# July 2021 Q&A Cont'd

- Mini Glossary of Terms
  - Define “allegation” and subtly redefine “complainant” and “respondent”
  - Allegation: *“An assertion that someone has engaged in sexual harassment.”* *id.* at 2.

## 2021 Q&A “Complainant”

*The person who has experienced the alleged sexual harassment. This person is considered a complainant regardless of whether they choose to file a formal complaint of sexual harassment under Title IX.* *id.* at 2.

## 2020 Regs

### “Complainant”

*Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.* 34 CFR § 106.30(a)

## 2021 Q&A

### “Respondent”

*The person accused of the alleged sexual harassment.* 2021 Q&A at 3.

## 2020 Regs

### “Respondent”

*Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.* 34 CFR § 106.30(a)



# July 2021 Q&A Cont'd

- No return to use of term “hostile environment” or use of a “balancing test”, or separation of sexual harassment from hostile environment.
- No prohibition on single decision-maker
- Question #3—Emphasizes prevention
  - *The 2020 amendments focus on “setting forth requirements for [schools’] responses to sexual harassment.” However, the preamble also says that “the Department agrees with commenters that educators, experts, students, and employees should also endeavor to prevent sexual harassment from occurring in the first place.” OCR encourages schools to undertake prevention efforts that best serve the needs, values, and environment of their own educational communities.* *Id.* at 4 (internal citations omitted).
- Question #7—Addressing Conduct that Does Not Meet Definition of Sexual Harassment
  - *Yes. . . . A school has discretion to respond appropriately to reports of sexual misconduct that do not fit within the scope of conduct covered by the Title IX grievance process.* *Id.* at 6 (internal citation omitted).



# July 2021 Q&A Cont'd

- Question #13—Clarifies that the new regulations do not apply to “straddle cases” where an event occurred before August 14, 2020, even if the school’s response occurred after that date.
- Question #19—OCR encourages postsecondary institutions to publish a list of mandatory reporters.
- Question #22—You can receive a formal complaint by email if there is an electronic signature
- Question #28—A school may deploy responses that are trauma-informed.



# July 2021 Q&A Cont'd

- Question #35—Emergency removal may require some form of direct threat analysis.
- Question #36—Respondent should be presumed not responsible but that doesn't mean a complainant should be presumed to be lying.
  - *Schools that have relied on this presumption to decline services to a complainant or to make assumptions about a complainant's credibility have done so in error.* *Id.* at 20.



# July 2021 Q&A Cont'd

- Cross-examination
  - Question #43—*The preamble says that an advisor’s cross-examination role “is satisfied where the advisor poses questions on a party’s behalf, which means that an assigned advisor could relay a party’s own questions to the other party or witness.” Thus, for example, a postsecondary school could limit the role of advisors to relaying questions drafted by their party.* *Id.* at 23 (emphasis added).
  - Question #53— a complex answer, *inter alia*, on “Hearsay”
    - ***See infra***



# ASPECT OF 34 CFR § 106.45(B)(6)(I) VACATED



# 34 CFR § 106.45(b)(6)(i)

## *(6) Hearings.*

*(i) For postsecondary institutions, the recipient's grievance process must provide for a live hearing. At the live hearing, the decisionmaker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility. Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.*





# § 106.45(b)(6)(i) Cont'd

*At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Only relevant cross-examination and other questions may be asked of a party or witness. Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant. If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.*



# § 106.45(b)(6)(i) Cont'd

*Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent. If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.*



# § 106.45(b)(6)(i) Cont'd

*Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other. Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.*



*Victim Rights Law Center, et al. v. Cardona*, 20-11104-WGY,  
2021 WL 3185743 (D. Mass. July 28, 2021).

- Three individuals and four organizations challenged the 2020 Title IX regulations.
- Plaintiffs alleged several of the provisions in the regulations violate the Administrative Procedure Act and/or the Equal Protection Clause of the Fifth Amendment.
- The court found a provision (prohibition on statements not subject to cross-examination) in § 106.45(b)(6)(i) “arbitrary and capricious.”



# *Victim Rights Law Center, et al. v. Cardona, 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).*

*Under a plain reading of the Final Rule’s hearing provisions, a respondent may work with the school to schedule the live hearing, and nothing in the Final Rule or administrative record prevents him or her from doing so to further a disruptive agenda -- e.g., at an inopportune time for third-party witnesses. The respondent may elect not to attend the hearing to avoid the possibility of self-incrimination, and, so long as he or she does not do so in a tortious or retaliatory manner, the respondent may speak freely to his or her peers about the investigation to collect evidence or even to persuade other witnesses not to attend the hearing.* Victim Rights Law Center, et al. v. Cardona at 46.



*Victim Rights Law Center, et al. v. Cardona, 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).*

*When section 106.45(b)(6)(i)'s statement prohibition is applied (as it must be, pursuant to the Final Rule) alongside these exercised rights, the hearing officer is prohibited from hearing any evidence other than the testimony of the complainant, and the hearing officer cannot draw a negative inference from the absence of the respondent . . . -- no police reports, no medical history, no admissions by the respondent, no statements by anyone who witnessed the incident and either could not attend or was dissuaded from attending by the respondent. Id. at 47.*



*Victim Rights Law Center, et al. v. Cardona, 20-11104-WGY, 2021 WL 3185743 (D. Mass. July 28, 2021).*

*This is not some extreme outlier or fanciful scenario. No attorney worth her salt, recognizing that -- were her client simply not to show up for the hearing -- an ironclad bar would descend, suppressing any inculpatory statements her client might have made to the police or third parties, would hesitate so to advise.* Id. at 48.



# DOE Letter RE: *Victim Rights Law Center et al. v. Cardona*

**The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility...”** Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

U.S. Dept. of Education, Office for Civil Rights, *Letter re Victim Rights Law Center et al. v. Cardona* (Aug. 24, 2021) at 1.





# DOE Letter RE: *Victim Rights Law Center et al. v. Cardona*

*In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.*

*In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.*

*Id.*



# DOE Letter RE: *Victim Rights Law Center et al. v. Cardona*

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

*Id.* at 1-2.





# THE FUTURE OF TITLE IX

# What does the future hold for Title IX?

Changes to the regulations through a Notice and Comment Process in 2022?

What could change?

- Definition of sexual harassment
- Informal process
- Cross-examination
- Role of advisors
- Jurisdiction
- “Mandatory” reporters/”responsible employees”
- Single investigator model?

Role of prevention (Dept. of Education Six Priorities - 34 CFR Part 75)



# What does the future hold for Title IX?

- Broader LGBTQ protections: transgender athletes' rights issues
  - Several states have laws that prevent transgender females from playing on female sports teams
- Social justice issues and Title IX intersections
- March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQ plaintiffs from 30 institutions.
  - Is the religious exemption in Title IX unconstitutional?
- *Speech First, Inc. vs. Fenves*
- State law pushbacks
- Rewrite Codes....again? And when?
- Time for preventative audits: lessons from LSU, USC.





# THANK YOU!