


Title IX Update: Spring 2024


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This Module is Designed for:



- TRACK 1 – Title IX Coordinators
- TRACK 2 – Title IX Decision-Makers and Student Conduct Administrators
- TRACK 3 – Title IX Investigators


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Nothing in these training materials
should be considered legal advice.

Know when to consult legal counsel.

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The 3-Track NASPA Title IX Training Certificate focuses on the 2020 Title IX regulations, which are currently in effect.

Proposed new Title IX regulations were released in June 2022 and are currently in the final stages of promulgation. After significant delays, there is indication that the final regulations may be published in March 2024, although that may change. The date of implementation for campuses is not yet known.

We will examine some of the language in the proposed new regulations at the end of this module. Remember that the proposed language will change, (potentially in major or minor ways), in the final version.


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The Title IX Landscape

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Before We Dig in Let's Consider the "Landscape"



- Enforcement context
- Cultural issues
- Legal context
 - American Law Institute project—*congruence*

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Examples of Title IX Regulatory Enforcement Under Biden

LSU

- Dept. of Ed began two investigations (for alleged Title IX and Clery Act non-compliance)
- 2021 LSU Law Firm Report (Husch Blackwell) and subsequent audit (Baker Tilly)
- NASA Review found LSU to be out of compliance with Title IX obligations (the agency funds the LSU Dept. of Physics and Astronomy through grants)
- Voluntary Resolution Agreement with NASA (March 22, 2021)
- Find more here: [Title IX Review \(lsu.edu\)](#)

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Examples of Title IX Regulatory Enforcement Under Biden

San Jose State

- Resolution agreement with U.S. Dept of Justice and U.S. Attorney's Office for the Northern District of California
- Female student-athletes were abused by an athletic trainer and SJSU failed to appropriately respond to reports of the abuse
- SJSU will pay \$1.6 million to victims and will reform Title IX system
- SJSU's President stepped down
- More info here: [External Reviews | Title IX and Gender Equity Office \(sjsu.edu\)](#)

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Examples of Title IX Regulatory Enforcement Under Biden

Montgomery College

- OCR investigation
- Professor required female students to wear only sports bras in class
- OCR found the college complied with investigation requirements under Title IX, "However, OCR is concerned that the College did not provide the Student, Student A, or any of the other students in the class with notification that the College had completed the investigation, confirmed the existence of a hostile environment, and taken steps designed to end that hostile environment for affected students." [Montgomery College \(PDF\) \(ed.gov\)](#)

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Examples of Title IX Regulatory Enforcement Under Biden

Arcadia University

- School was investigated by OCR for an alleged failure to properly address harassment complaints against a Professor
- Resolution agreement in Oct. 2023
- Arcadia violated Title IX because it "failed to complete its investigation and make a determination regarding the allegations because the Professor tendered his resignation. OCR also finds that the University violated Title IX when it failed to investigate possible sexual harassment by the Professor about which the University had knowledge prior to April 2021."
- [Arcadia University \(PDF\) \(ed.gov\)](#)
- A good read: [A College Stopped Investigating a Professor's Alleged Misconduct When He Quit. That's illegal, U.S. Says. \(chronicle.com\)](#)

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Examples of Title IX Regulatory Enforcement Under Biden

Taft College

- Transgender female student complainant alleged that several professors subjected her to repeated harassment when they repeatedly misgendered her (using her previous male name and male pronouns) subjecting her to near daily harassment.
- One professor stated he was "too old" to deal with the complainant's requests to use the proper pronouns.
- One faculty refused to refer to the complainant with female pronouns because the complainant "did not look feminine enough."
- OCR found the college did not take appropriate steps despite receiving reports from the complainant.
- OCR found the college violated Title IX because the school did nothing to remedy the situation, thus subjecting the student to a hostile environment.
- OCR also found that the Taft College community was not appropriately informed of how to make a Title IX report or the Title IX coordinator contact information.

[Taft College \(PDF\) \(ed.gov\)](#)

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Examples of Title IX Regulatory Enforcement Under Biden

Troy University

- Complaint filed by a pregnant student, alleging the school did not make consistent and appropriate accommodations.
- The complainant asked for a table to be installed in a classroom to accommodate her; she alleges the table was never provided. The university stated it was indeed provided.
- A professor would not allow the student to make up some class work due to missed classes because of the pregnancy; the professor stated they were never trained on pregnant students' Title IX rights to accommodations.
- The University did not appear include pregnancy-related information on its Title IX webpage or in the Student Handbook.
- OCR found instances of lack of communication between parties pertinent to the situation, in addition to slow and inconsistent responses from the Title IX coordinator.
- OCR believed the accommodations the complainant did receive from professors were "ad hoc" and "uncoordinated."

[Troy University \(PDF\) \(ed.gov\)](#)

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American Law Institute (ALI) Document (2022)



Principles of the Law, Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities

- This document is extraordinary and forward thinking.
- First effort by ALI to articulate principles of due process for student conduct administration in its history.
- Crafted by members of ALI, in consultation with others, the principles are likely to be influential to both jurists and educators—and indeed have been, as evidenced by newly proposed Title IX regulations that are noticeably consistent.
- All schools should review Title IX policies in consultation with this document.
- [student-misconduct-td1-black-letter.pdf \(ali.org\)](https://www.ali.org/publications/student-misconduct-td1-black-letter-pdf)

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Title IX Updates—Court Watch



SCOTUS—Winds of change

- Faith protection—*Guadalupe*, etc.
- “Sex”—*Bostock*, etc.
- Damages Limits—*Cummings v. Premier Rehab Keller*
- Privacy/ Substantive Due Process—*Dobbs v. Jackson Women’s Health Organization* (overturning *Roe*)
- Limits of Regulatory Authority/End of Chevron?—*State Farm, West Virginia v. Environmental Protection Agency, Loper Bright Enterprises v. Raimondo* (fishermen, Chevron)
- True Threats/Online Harassment—*Counterman v. Colorado*

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A Closer Look



• *Counterman v. Colorado*, 599 U.S. 66 (2023).

- Billy Counterman was convicted of stalking under Colorado law in 2016 after he sent hundreds of messages via Facebook to a female singer/songwriter named Coles Whalen. Several of these messages foretold of her impending death and indicated he was following her movements.
- The Colorado law made it unlawful to “[r]epeatedly . . . make[] any form of communication with another person” in “a manner that would cause a reasonable person to suffer serious emotional distress and does cause that person . . . to suffer serious emotional distress.” Colo. Rev. Stat. §18–3–602(1)(c).
- The Colorado Court of Appeals upheld his conviction and the Colorado Supreme Court denied review.
- Colorado courts applied an objective “reasonable person standard” to determine what could be constituted as a “true threat.”

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A Closer Look Cont’d



• *Counterman v. Colorado*, 599 U.S. 66 (2023).

- In a 7-2 decision, the U.S. Supreme Court vacated Counterman’s conviction holding that “the State must prove in true-threats cases that the defendant had some subjective understanding of his statements’ threatening nature, but the First Amendment requires no more demanding a showing than recklessness.”
- “A recklessness standard—i.e., a showing that a person ‘consciously disregard[ed] a substantial [and unjustifiable] risk that [his] conduct will cause harm to another,’ . . . —is the appropriate *mens rea*. Requiring purpose or knowledge would make it harder for States to counter true threats—with diminished returns for protected expression.”
- “Counterman . . . was prosecuted in accordance with an objective standard. . . . The State had to show only that a reasonable person would understand his statements as threats. It did not have to show any awareness on his part that the statements could be understood that way. . . . [T]hat is a violation of the First Amendment.”

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Title IX Updates—Court Watch



SCOTUS Cont’d

- Athletes—*NCAA v. Alston*
- First Amendment and “harassment”—Clues from *Mahoney (Fennes)/Counterman/ Elston*
- No major Title IX focus as such on the docket but...
 - Justice Comey Barrett now sits on the high court, author of *Purdue* in a 7th Circuit case in 2019—focus on due process and a relaxed standard to plead sex discrimination—a prognosticator?
 - NOTE: Intersection of proposed Title IX regulations and *Dobbs* documents ask for extra guidance on pregnant students and Title IX
 - “. . . Title IX covers discrimination based on medical conditions related to or caused by pregnancy, childbirth, **termination of pregnancy**, or lactation . . .” (NPRM at 461).
 - A group of 60 Congressional Democrats has asked for clarification on Title IX protections for students who are pregnant, parenting, or seeking an abortion.
 - 2022- allowed cases to proceed such as *Fairfax County*; “The U.S. Supreme Court . . . turned away bids by a public school district in Virginia and the University of Toledo in Ohio to avoid sexual harassment lawsuits brought by female students under a law that prohibits sex discrimination at schools that receive federal funds.” U.S. Supreme Court

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Title IX Updates—Court Watch



Judicial activism in lower federal courts and state courts on due process and compliance error// inactivism of SCOTUS

Examples

- 6th Circuit in *Baum*
 - 7th Circuit in *Purdue*
 - Colorado Court of Appeals in *Doe v. University of Denver*
 - 3rd Circuit in *University of Sciences*
 - “Plausible allegations supporting the reasonable inference that USciences discriminated against him [plaintiff] on account of his sex.” (Male plaintiff drank alcohol at levels similar to female complainants but only male plaintiff’s actions were investigated.)
 - “USciences’ 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.”
- Billion Dollar Exposure; e.g., Univ. of Southern California—\$852 million settlement in case regarding abuse by campus gynecologist

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Dimensions of Title IX-Related Litigation

- Florida "Stop WOKE" act (banning certain aspects of DEI training) declared unconstitutional
 - In *Honeyfund.com, Inc. v. DeSantis*, Judge Walker writes:

"In the popular television series Stranger Things, the 'upside down' describes a parallel dimension containing a distorted version of our world. . . . Recently, Florida has seemed like a First Amendment upside down. Normally, the First Amendment bars the state from burdening speech, while private actors may burden speech freely. But in Florida, the First Amendment apparently bars private actors from burdening speech, while the state may burden speech freely."
- "Gender dysphoria" now considered a disability under the ADA in Fourth Circuit in *Williams v. Kincaid* [Fourth Circuit Holds Gender Dysphoria as an ADA disability \(natlawreview.com\)](https://natlawreview.com/fourth-circuit-holds-gender-dysphoria-as-an-ada-disability/)
- Adams v. School Board of St. Johns County, Florida* – Eleventh Circuit of Appeals (7-4 en banc) ruled that public schools have the right to segregate locker rooms and bathrooms by biological sex.

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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
- Abuse of Process (see *Debra McCarthy et al v. Raul Jauregui et al*: "Pennsylvania magistrate judge held that Title IX disciplinary proceedings are 'quasi-judicial' and 'if abused, gives rise to an abuse of process claim'—and may result in an uptick in litigation brought against either party to a Title IX dispute." [Is Abuse of Title IX a New Legal Strategy for Sexual Assault Victims? | The Legal Intelligencer \(law.com\)](https://www.thelawintelligencer.com/news/is-abuse-of-title-ix-a-new-legal-strategy-for-sexual-assault-victims/))
- Negligent Investigation?
- Tortious failure to provide fair process?

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Civil Action Under Title IX

- The US Supreme Court allows actions in court to pursue damages for Title IX (but with many limitations)
 - Gebser v. Lago Vista Independent School District*, 118 S. Ct. 1989, 141 L. Ed. 2d 277 (1998).
 - Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999).
 - "[S]chool administrators will continue to enjoy the flexibility they require in making disciplinary decisions so long as funding recipients are deemed 'deliberately indifferent' to acts of student-on-student harassment only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances."
 - See *Fairfax County, supra*.
 - Cummings v. Premier Rehab Keller*
- Victims as "plaintiffs" face tough standards
 - Knowledge (Reporting)
 - Pattern
 - Objective
 - Deliberate indifference
 - Emotional distress damages
- The Supreme Court has hesitated to:
 - Apply Title IX to a "single act"
 - Broadly protect LGBTQ rights, but see the recent *Bostock* Title VII decision (more to come on this...)

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From the 2020 Regulations:

The Department believes that the Davis definition in § 106.30 provides a definition for non-quid pro quo, non-Clery Act/VAWA offense sexual harassment better aligned with the purpose of Title IX than the definition of hostile environment harassment in the 2001 Guidance or the withdrawn 2011 Dear Colleague Letter.

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Litigation Pointers

- Litigation potential always exists
- Follow your own policy
 - Do what you say and say what you do.
- Do not be afraid to consult with your attorney
- Equity, bias, impartiality
- Think "contractual fairness"
 - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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Athletic Equity

Balow et al v. Michigan State et al, No. 1:21-cv-44 (6th Cir. 2022).

- MSU discontinued its men's and women's diving programs in 2020
- Members of the women's team sued, claiming the move violated Title IX by providing less opportunities for female athletes
- A U.S. district court judge ruled in August 2022 that MSU was not in compliance with Title IX
- The school must complete a Title IX compliance plan.

[Federal Judge Rules Michigan State in Violation of Title IX \(roadshighered.com\)](https://www.federaljudge.com/news/federal-judge-rules-michigan-state-in-violation-of-title-ix/)

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Deliberate Indifference/Actual Notice



Doe v. Fairfax Cnty. Sch. Bd., 1 F.4th 257 (4th Cir. 2021).

Doe was assaulted by another student on a bus ride at the start of a 5-day band trip. Doe told two friends what had happened and they informed school staff during the trip. Staff did not intervene on the trip but waited several days until the trip was over before interviewing Doe and taking action.

Actual knowledge (as used in *Gebser*) means actual knowledge or actual notice; **“a school has actual notice or knowledge when it is informed or notified of the alleged harassment—most likely via a report.”**

“As the Court [in *Gebser*] stated, the school must have ‘actual knowledge of the [sexual] conduct’ and also ‘have an opportunity to take action to end the harassment or to limit further harassment.’. . . In short, its deliberate indifference must be ‘the cause of the violation.’

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Deliberate Indifference



Doe v. Board of Trustees of the Nebraska State Colleges, 78 F.4th 419 (8th Cir. Aug. 15, 2023).

- Doe alleged she was assaulted twice by another student during her time as a student at Chadron State.
- After the first incident, she asked college personnel not to share the information. After the second incident, she filed a formal Title IX complaint.
- The college found the respondent responsible but did not remove him from campus.
- Doe sued but the court found for the university, citing the multiple steps the college took to keep Doe safe from the respondent, including instituting a no-contact order, making academic and work accommodations for Doe, promptly investigating Doe's complaint, and instituting sanctions against the respondent.
- Tracks 6th circuit “deliberate indifference” standard (under *Davis*) in *Kollaritsch v. Michigan State Univ.*

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Due Process



- “Due Process” – a complex and multidimensional concept
 - More than dialectic between “complainants” and “respondents”
 - The college as bystander or neutral: *Citizens United?*
 - Peter Lake, *Colleges Are Legally Pummeled From All Sides. It's Time They Fought Back*. In *Chron. of Higher Educ.*, *The New Risk Management: A Multilayered Strategy for Today's Legal Threats* (Jan. 2021). [This special report is available in the Chronicle store.]
 - Is this the way to create college court?
- What about resource imbalances between institutions or complainants/respondents?
- *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).
- *Haidak v. Univ. of Mass.-Amherst*, 933 F.3d 56 (1st Cir. 2019).
- *John Doe v. Purdue University*, Case No. 17-3565 (7th Cir. June 28, 2019).

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Erroneous Outcome



Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994).

A plaintiff must show facts both casting doubt on the outcome of the disciplinary proceeding and connecting that outcome to gender bias.

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct*, FIRE Newdesk (June 1, 2020).

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Selective Enforcement



Yusuf v. Vassar College, 35 F.3d 709 (2d Cir. 1994).

A plaintiff must plead facts showing that the institution treated a similarly situated individual differently on the basis of sex (e.g., that in a case where both parties were alleged to have had sex while heavily intoxicated and unable to consent, the university took action against one student but not the other).

Samantha Harris, *Third Circuit: Private Universities that Promise Basic Fairness Must Provide Hearing, Cross-Examination to Students Accused of Sexual Misconduct*, FIRE Newdesk (June 1, 2020).

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Selective Enforcement



Radwan v. Manuel, No. 20-2194 (2d Cir. Nov. 30, 2022).

“Radwan presented multiple forms of evidence related to discriminatory intent, including: evidence of similarly situated male athletes in multiple misconduct incidents who were not disciplined as harshly, inconsistent reasoning for the level of punishment by different administrators at the University, varying assessments over time regarding the consequences of her misconduct, the failure of the University to properly apply its own student conduct policy, and giving conflicting dates to Radwan for her to appeal the termination of her athletic scholarship.”

“Same decision-maker” rationale rejected for Title IX.

“Second Circuit reversed the District Court's grant of summary judgment for the University and the case will be remanded back to the District Court for further proceedings.” <https://www.courts.gov/record-keeping/record-keeping-3> (bricker.com)

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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*

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"Preventable" Sexual Assault Claims – State Negligence Claims



Karasek v. Regents of Univ. of California, 956 F.3d 1093 (9th Cir. 2020).

1. a school maintained a policy of deliberate indifference to reports of sexual misconduct,
2. which created a heightened risk of sexual harassment,
3. in a context subject to the school's control, and
4. the plaintiff was harassed as a result.

[Karasek v. Regents of the University of California, No. 18-15841, 9th Cir. 2020 – Jura](#)

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Hazing/Student Safety



Gruver v. LSU

- Max Gruver died in a fraternity hazing incident.
- His parents allege a novel Title IX complaint: "that LSU discriminated against male students by policing hazing in fraternities more leniently than hazing in sororities."
- Trial date has yet to be set...

McCluskey v. Univ. of Utah

- Lauren McCluskey was shot and killed by a man she had dated (she broke off the relationship after finding out he was a convicted sex offender).
- Her family had repeatedly asked the University to intervene after he stalked and extorted her.
- The University admitted they could have done more to intervene and did not handle the situation properly. The University settled for \$13.5 million.
- Family has created a foundation and aspires to rate colleges.

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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 USciences'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.

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Breach of Contract



Stiles v. Brown University and *Smith v. Brown University*

- Plaintiffs in both cases allege breach of contract.
- Both cases involved male athletes suspended after sexual misconduct allegations. Both were suspended days after allegations were made against them and before the conclusion of a full Title IX investigation.
- *In Stiles* the judge ruled the University must reinstate Stiles "until the investigation concludes or a more thorough threat assessment warrants removal."
- *In Smith*, both parties agreed to dismiss the lawsuit.

Suspended athletes facing sexual assault allegations sue University - The Brown Daily Herald

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Program/Activity—A Case to Watch



Fields v. Morehouse College

- Lawsuit filed recently by a Spelman College student, Fields, alleging she was raped by a Morehouse College student.
- Fields reported first to the Morehouse campus police department, whom she claims did not investigate. She then filed a Title IX complaint at Morehouse College, but the college dismissed the complaint, stating that Fields was not "participating in or attempting to participate in an education program or activity of the College."
- The colleges have joint programs/cross registration.
- There have been prior accusations of sexual misconduct by Morehouse College men directed against Spelman college women.

[Spelman student sues Morehouse over Title IX complaint \(insidehighered.com\)](#)

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Sexual Orientation Discrimination/ Retaliation/ Causation



Grabowski v Arizona Bd of Regents 69 F. 4th 1110 (9th Cir. June 2023)

- Grabowski was a student athlete and he alleged he was subjected to bullying and homophobic slurs by his teammates. He informed his coaches, but was eventually kicked him off the team.
- Grabowski sued alleging Title IX violations (discrimination and retaliation).
- Sexual orientation discrimination is sex discrimination. However, plaintiff must demonstrate a causal connection between discrimination and program or benefit denial.
- Retaliation complaint survives:: allegations by Grabowski directed at “top athletes”

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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.

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Bostock: Critical Language



“These terms generate the following rule: An employer violates Title VII when it intentionally fires an individual employee based in part on sex. It makes no difference if other factors besides the plaintiff’s sex contributed to the decision or that the employer treated women as a group the same when compared to men as a group.”

“Few facts are needed to appreciate the legal question we face. Each of the three cases before us started the same way: An employer fired a long-time employee shortly after the employee revealed that he or she is homosexual or transgender—and allegedly for no reason other than the employee’s homosexuality or transgender status.”

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The *Bostock* Caveats



“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.”

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



“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.”

U.S. Dept. of Education, Office for Civil Rights, The Department’s Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, June 2021

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Bostock and the Biden Dept. of Education Position on LGBTQ Protections Cont’d



“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 . . .”

U.S. Dept. of Education, Office for Civil Rights, The Department’s Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, June 2021

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The Biden Dept. of Education Position on LGBTQ Protections visible before June 23, 2022



"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

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Bostock Pushback



- 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
 - On July 15, 2022, plaintiff's motion for injunction was granted and defendants motion to dismiss was denied.
 - [Federal Judge blocks Ed. Dept Title IX guidance for trans students \(insidehighered.com\)](#)
 - [Court temporarily halts Ed Dept from enforcing LGBTQ protections under Title IX | Higher Ed Dive](#)
- FL House Bill 7 "Stop WOKE" sought to ban certain aspects of DEI training; was declared unconstitutional by a Florida judge
 - [Florida Passes Stop WOKE Bill Prohibiting Diversity Training \(natlawreview.com\)](#)

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Faith, Title IX, Bostock and Trifurcation?



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?

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Some Reflections on Bostock and Title IX?



"Title IX's broad prohibition on discrimination "on the basis of sex" under a recipient's education program or activity encompasses, at a minimum, discrimination against an individual because, for example, they are or are perceived to be male, female, or nonbinary; transgender or cisgender; intersex; currently or previously pregnant; lesbian, gay, bisexual, queer, heterosexual, or asexual; or gender-conforming or gender-nonconforming. All such classifications depend, at least in part, on consideration of a person's sex. The Department therefore proposes to clarify in this section [§ 106.10] that, consistent with *Bostock* and other Supreme Court precedent, Title IX bars all forms of sex discrimination, including discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity." (NPRM at 522.)

- How will campuses define "sex" going forward right now?
- Title VII = Title IX? Proposed rules aim to facilitate both processes.
- LGBTQ+ rights and *Bostock*...note the Court's emphasis on the specific issues raised. "On the basis of sex" // "Because of... sex"
- Spending v. Commerce clause...the "notice issue" ...addressed at some length in NPRM
- How are religious institutions impacted? Title IX's "religious tenets" exception and its date of origin.
 - [Yeshiva University recent emergency request to SCOTUS to block a LGBTQ student club. - CNNPolitics](#)

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AREAS TO WATCH: ATHLETICS AND MEDICAL



Snyder-Hill et al. v. The Ohio State University, Ohio Southern District Court, Case No. 2:18-cv-00736-MHW-EPD

- 93 plaintiffs sued The Ohio State University as a result of alleged sexual abuse they suffered as students at the hands of Dr. Strauss
- Title IX claims include:
 - Hostile environment/heighted risk
 - Deliberate indifference to both prior sexual harassment and reports of sexual harassment
- Judge granted Ohio State's motion to dismiss on the grounds of the statute of limitations (Sept. 22, 2021)
- Open cases against Ohio State are still pending
- Ohio State has previously settled with over 200 men

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Concluding Thoughts: Litigation



- Follow your own policy
 - Do what you say and say what you do.
- Equity, bias, impartiality
- Think "contractual fairness"
 - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

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Aspect of 2020 Regulations Struck Down

34 CFR § 106.45(b)(6)(i) Vacated in
Victim Rights Law Center et al. v. Cardona



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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.

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§ 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.

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§ 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.

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§ 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.

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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.

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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.

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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 3-2.

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The 2022 Proposed Title IX Regulations: Highlights from DOE in Their Own Words

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Some Key Features of Proposed Title IX Regulations:

Sex stereotypes, Pregnancy, Sexual orientation, Gender identity are covered under Title IX

The Department's proposed regulations clarify that Title IX's prohibition of discrimination based on sex includes protections against discrimination based on sex stereotypes and pregnancy. The Department is also clarifying that Title IX's protections against discrimination based on sex apply to sexual orientation and gender identity. This clarification is necessary to fulfill Title IX's nondiscrimination mandate.

[FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations](#)

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Proposed Title IX Regulations:

Hostile Environment Sexual Harassment

The proposed regulations will restore vital protections for students against all forms of sex-based harassment. Under the previous Administration's regulations, some forms of sex-based harassment were not considered to be a violation of Title IX, denying equal educational opportunity. The proposed regulations would cover all forms of sex-based harassment, including unwelcome sex-based conduct that creates a hostile environment by denying or limiting a person's ability to participate in or benefit from a school's education program or activity.

[FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations](#)

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Obama-Era Definition of Hostile Environment

In determining whether this denial or limitation [to access to educational benefits] has occurred, the United States examines all the relevant circumstances from an objective and subjective perspective, including:

1. the type of harassment (e.g., whether it was verbal or physical);
2. the frequency and severity of the conduct;
3. the age, sex, and relationship of the individuals involved (e.g., teacher-student or student-student);
4. the setting and context in which the harassment occurred;
5. whether other incidents have occurred at the college or university;
6. and other relevant factors

U.S. Dept. of Educ., Office for Civil Rights and U.S. Dept. of Justice Civil Rights Division, University of Minnesota letter of findings, at 10 (May 6, 2013), <https://www.civilrightsdivision.ed.gov/documents/universityofminnesotaletteroffindings.pdf>

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Trump-Era Definition "Sexual Harassment" [Three-Prong Test]



Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
- (2) Unwelcome conduct determined by a **reasonable person** to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
- (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).

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Biden-Era Definition of Sex-Based Harassment



Sex-based harassment prohibited by this part means sexual harassment, harassment on the bases described in § 106.10, and other conduct on the basis of sex that is:

- (1) **Quid pro quo harassment.** An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- (2) **Hostile environment harassment.** Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity (i.e., creates a hostile environment). Whether a hostile environment has been created is a fact-specific inquiry that includes consideration of the following:
 - (i) The degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
 - (ii) The type, frequency, and duration of the conduct;
 - (iii) The parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the alleged unwelcome conduct;
 - (iv) The location of the conduct, the context in which the conduct occurred, and the control the recipient has over the respondent; and
 - (v) Other sex-based harassment in the recipient's education program or activity.

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A Note on "Unwelcome Conduct"



The Department proposes retaining the requirement that the conduct in categories one and two of the definition of "sex-based harassment" must be unwelcome. Although the Department does not propose revising this requirement, the Department understands it is important to provide recipients with additional clarity on how to analyze whether conduct is unwelcome under the proposed regulations. *Conduct would be unwelcome if a person did not request or invite it and regarded the conduct as undesirable or offensive. Acquiescence to the conduct or the failure to complain, resist, or object when the conduct was taking place would not mean that the conduct was welcome, and the fact that a person may have accepted the conduct does not mean that they welcomed it. For example, a student may decide not to resist the sexual advances of another student out of fear, or a student may not object to a pattern of sexually harassing comments directed at the student by a group of fellow students out of concern that objections might cause the harassers to make more comments. On the other hand, if a student actively participates in sexual banter and discussions and gives no indication that they object, then that would generally support a conclusion that the conduct was not unwelcome, depending on the facts and circumstances. In addition, simply because a person willingly participated in the conduct on one occasion does not prevent that same conduct from being unwelcome on a subsequent occasion. Specific issues related to welcome may also arise if the person who engages in harassment is in a position of authority. For example, because a teacher has authority over the operation of their classroom, a student may decide not to object to a teacher's sexually harassing comments during class; however, this does not mean that the conduct was welcome because, for example, the student may believe that any objections would be ineffective in stopping the harassment or may fear that by making objections they will be singled out for harassing comments or retaliation. (NPRM at 82-83.)*

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Proposed Title IX Regulations:



Emphasis on Pregnancy and Parenting Students

The proposed regulations would update existing protections for students, applicants, and employees against discrimination because of pregnancy or related conditions. The proposed regulations would strengthen requirements that schools provide reasonable modifications for pregnant students, reasonable break time for pregnant employees, and lactation space.

[FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations](#)

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NOTABLE



U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College

OCR determined that the college violated both Title IX of the Education Amendments of 1972 (Title IX) and Section 504 of the Rehabilitation Act of 1973 (Section 504) after investigating allegations that Salt Lake Community College encouraged a pregnant student to drop a course because she was pregnant, did not engage in an interactive process to provide her with academic adjustments or necessary services during her pregnancy, and did not excuse her pregnancy-related absences or allow her later to submit work following those absences.

OCR found that the college violated Title IX and its implementing regulations by failing: (1) to respond promptly and equitably to the student's complaint of pregnancy discrimination, (2) to engage in an interactive process with the student to determine the appropriate special services and/or academic adjustments to provide in light of her pregnancy, and (3) to excuse her absences related to pregnancy, provide her the opportunity to make up work missed due to these pregnancy-related absences, or provide her with alternatives to making up missed work at a later date.

[U.S. Department of Education's Office for Civil Rights Announces Resolution of Pregnancy Discrimination Investigation of Salt Lake Community College \(identifying.com\)](#)

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Proposed Title IX Regulations:



Broadens Mandated Reporters on Campus

The proposed regulations would promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information and complaints about sex discrimination in their education programs or activities. And they would require that schools train employees to notify the Title IX coordinator and respond to allegations of sex-based harassment in their education programs or activities.

[FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations](#)

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Note:**"Employee with responsibility for administrative leadership, teaching, or advising"**

It is the Department's current understanding that employees with responsibility for administrative leadership would include deans, coaches, public safety supervisors, and other employees with a similar level of responsibility, such as those who hold positions as assistant or associate deans and directors of programs or activities. The Department anticipates that employees with teaching responsibilities would include any employee with ultimate responsibility for a course, which could include full-time, part-time, and adjunct faculty members as well as graduate students who have full responsibility for teaching and grading students in a course. It is the Department's current understanding that employees with responsibility for advising would include academic advisors, as well as employees who serve as advisors for clubs, fraternities and sororities, and other programs or activities offered or supported for students by the recipient. When a person is both a student and an employee, the Department expects that the person would be required to notify the Title IX Coordinator only of information that may constitute sex discrimination under Title IX that was shared with the person while they were fulfilling their employment responsibilities (e.g., receiving information about sex discrimination from a student during class or office hours). Similar to employees who have the authority to institute corrective measures on behalf of the recipient, the Department now believes that whether an employee has responsibility for administrative leadership, teaching, or advising is a fact-specific determination to be made by the recipient taking into account the types of factors just discussed and any others that may be relevant in the recipient's educational environment.

NPRM at 184-181.

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A Note on Barriers to Reporting and Prevention

"It is the Department's current view that a recipient must identify and address barriers to reporting information that may constitute sex discrimination under Title IX in order to fulfill this obligation." NPRM at 180.

The Department has long emphasized the importance of a recipient's efforts to prevent sex discrimination. For example, in the preamble to its 2020 amendments to the Title IX regulations, the Department repeatedly acknowledged the importance of efforts to prevent sex discrimination. . . . The Department also added requirements related to training for certain employees in the 2020 amendments to the Title IX regulations . . . that serve a prevention function and thus are crucial to the fulfillment of Title IX. "

NPRM at 180 (internal citations omitted).

"The Department notes that under this proposed requirement, a recipient may use various strategies to identify barriers, such as conducting regular campus climate surveys, seeking targeted feedback from students and employees who have reported or made complaints about sex discrimination, participating in public awareness events for purposes of receiving feedback from student and employee attendees, or regularly publicizing and monitoring an email address designated for receiving anonymous feedback about barriers to reporting sex discrimination." NPRM at 171.

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Proposed Title IX Regulations:**Outlines Key Grievance Procedure Requirements**

- All schools must treat complainants and respondents equitably.
- Schools have the option to offer informal resolution for resolving sex discrimination complaints.
- Title IX Coordinators, investigators, decisionmakers, and facilitators of an informal resolution process must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- A school's grievance procedures must give the parties an equal opportunity to present relevant evidence and respond to the relevant evidence of other parties.
- The school's decisionmakers must objectively evaluate each party's evidence.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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A Note on "Bias" and "Impartiality"...

ALI states:

§ 4.1. Inquiries to Be Impartial, Fair, and Context-Sensitive

Colleges and universities should strive in all inquiries and investigations to be impartial, fair, and sensitive to context.

§ 6.3. Impartiality

Colleges and universities should adopt procedures and criteria for selecting impartial decisionmakers.

§ 6.3c. Challenges for Bias

Colleges and universities should provide a simple procedure for complainants or respondents to challenge the participation of an investigator or adjudicator in their case.

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ALI on "Bias" and "Impartiality":

- "One sense of impartiality is structural, the idea that the judge of a case should not be chosen for the case because of his or her likely views on the outcome."
- "Another aspect of impartiality is the avoidance of financial or other forms of self-interest in the adjudication: an impartial adjudicator is one who does not have a financial interest in the outcome."
- "A third sense of impartiality means that the person has not prejudged the facts and is not likely to have difficulty maintaining an open mind and deciding based on the evidence presented."
- "Prior involvement in or knowledge of the facts at issue may create the appearance or reality of bias."
- "Still another sense of impartiality is decisionmakers' freedom to decide without fearing repercussions from the influence of 'mob' passions."
- "One source of potential bias may arise when a decisionmaker has a preexisting relationship with one or more parties."

See ALI, *Student Sexual Misconduct: Procedural Frameworks for Colleges and Universities* [American Law Institute (ali.org)], at 179-193.

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"Bias"

Ikpeazu v. University of Nebraska, 775 F.2d 250, 254 (8th Cir. 1985):

"With respect to the claim of **bias**, we observe that the committee members are entitled to a presumption of honesty and integrity unless actual bias, such as **personal animosity, illegal prejudice, or a personal or financial stake in the outcome** can be proven."

NPRM at 281:

"To ensure that the grievance procedures are equitable, a recipient must ensure that the procedures are administered impartially. The Department therefore proposes retaining—in proposed § 106.45(b)(2)—the requirement that any person designated as a Title IX Coordinator, investigator, or decisionmaker must not have a conflict of interest or bias regarding complainants or respondents generally or regarding a particular complainant or respondent."

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Proposed Title IX Regulations:



Outlines Key Grievance Procedure Requirements

- The proposed regulations would not require a live hearing for evaluating evidence, meaning that if a school determines that its fair and reliable process will be best accomplished with a single-investigator model, it can use that model.
- A school must have a process for a decisionmaker to assess the credibility of parties and witnesses through live questions by the decisionmaker. The proposed regulations would not require cross-examination by the parties for this purpose but would permit a postsecondary institution to use cross-examination if it so chooses or is required to by law.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations:



Outlines Key Grievance Procedure Requirements

- In evaluating the parties' evidence, a school must use the preponderance-of-the-evidence standard of proof unless the school uses the clear-and-convincing-evidence standard in all other comparable proceedings, including other discrimination complaints, in which case the school may use that standard in determining whether sex discrimination occurred.
- A school must not impose disciplinary sanctions under Title IX on any person unless it determines that sex discrimination has occurred.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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NOTE: Standard of Proof Alignment with ALI



"The Department notes that the American Law Institute (ALI) membership, at its May 2022 Annual Meeting, approved the following principle as part of its project on procedural frameworks for resolving campus sexual misconduct cases in postsecondary institutions:

§ 6.8. Standard of Proof

Colleges and universities should adopt the same standard of proof for resolving disciplinary claims of sexual misconduct by students as they use in resolving other comparably serious disciplinary complaints against students. Standards that require proof either by a "preponderance of the evidence" or by "clear and convincing evidence" can satisfy the requirements of procedural due process and fair treatment. Whatever standard of proof is adopted, decisions that the standard of proof is met should always rest on a sound evidentiary basis.

The Department's proposed regulations would align with the ALI position, providing that for sex discrimination complaints a recipient can use either the preponderance of evidence or the clear and convincing evidence standard of proof but must not use a higher standard of proof for evaluating evidence of sex discrimination than for other forms of discrimination or other comparable proceedings."

NWHA at 253-254 (internal citations omitted).

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NOTE: Discipline v. Punishment



While punishment focuses on making a child suffer for breaking the rules, discipline is about teaching him how to make a better choice next time.

The Difference Between Punishment and Discipline (verywellfamily.com).

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Proposed Title IX Regulations:



Supportive Measures for Any Sex Discrimination

Require schools to provide supportive measures to students and employees affected by conduct that may constitute sex discrimination, including students who have brought complaints or been accused of sex-based harassment.

Under the proposed regulations, schools would be required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity. The current regulations require this support only when sexual harassment, rather than any form of sex discrimination, might have occurred.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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Proposed Title IX Regulations:



Retaliation

The proposed regulations would make clear that schools must not intimidate, threaten, coerce, or discriminate against someone because they provided information about or made a complaint of sex discrimination or because they participated in the school's Title IX process – and that schools must protect students from retaliation by other students.

FACT SHEET: U.S. Department of Education's 2022 Proposed Amendments to its Title IX Regulations

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What's next for the proposed regulations?

- 60-day notice and comment period has long ended.
 - Last notice and comment period garnered nearly 125,000 comments.
 - This go around the proposed regs garnered over 235,000. [See report on the proposed Title IX rules](#)
- After two delays, it is possible the new regulations will be released in spring 2024 ("March 00, 2024") and will go into effect later in 2024, perhaps August?
- There will be a separate process for student athletes/transgender issues. (Proposed rule released in April 2023: [FACT SHEET: U.S. Department of Education's Proposed Change to its Title IX Regulations on Students' Eligibility for Athletic Teams](#) | U.S. Department of Education) Expect more on informal resolutions, Clery and FERPA interpretation to come?

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Where is Title IX headed?

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What does the future hold for Title IX? Take-aways....

- LGBTQ+ protections: transgender athletes' rights issues
 - Several states have laws that prevent transgender individuals from playing on female sports teams
- March 2021, class action lawsuit filed against the Dept. of Education in Oregon federal court by 33 LGBTQ+ plaintiffs from 30 institutions. In January, a judge dismissed the lawsuit. Plaintiffs considering an appeal. (*Hunter v. U.S. Department of Education*, U.S. District Court, District of Oregon, No. 21-cv-00474.)
 - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
 - *Speech First, Inc. v. Timothy Sands*, No. 21-2061 (4th Cir. 2023)
 - Bias Response Team Policy at Virginia Tech: Conflicts in Circuits, SCOTUS reviewing whether to take the case.
- State law pushbacks
- Apply Title IX practices to other conduct codes?
- Time for preventative audits: lessons from LSU, USC.
- Nuclear weapons??? and Reproductive Rights—Title IX makes significant pivot...
 - SCOTUS overturns *Roe v. Wade* in *Dobbs*

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What does the future hold for Title IX? Take-aways....

- Political landscape 2024 :: SCOTUS
- End game for Title IX and detailed grievance regulation...what is ultimately sustainable? Will what we know of Title IX today devolve to state variances, subject to federal court oversight?
- Reporting and reporters...do we want this much flexibility?
- Training means assessment, especially on reporting and definitions.
- Culture intervention—rise, or return, of "remedies"
- New Clery manual?—prevention and reporting on it.
- Let's get Constitutional...What about *Citizens United*? Even *Gebser/Davis*? *Mathews v. Eldridge*? *Textualism*, *Originalism*, and the *Title IV trojan horse*. ALI and "mission sensitivity."
- SCOTUS @ limits of federal regulatory power
- Lawyers and legalisms....Student conduct dominated by law, lawyers and legalisms? Law as competitor?

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What does the future hold for Title IX? Take-aways....

- Does education culture have better solutions? Can we be, must we be, impartial in relation to our own mission? What are the limits of rooting out bias? Are the legal rules themselves a Title IX problem? *Fenves* :: *NPRM on bias* /// "Defamation by Litigation" :: FERPA restrictions
- Budgets and industry challenges. DOE cost estimates are perhaps "aspirational."
- College court becomes more like family court—supportive services and review.
- Protections for Title IX operatives....2015 guidance.
- The Transparency Dilemma: a) revise FERPA or b) create more detailed hearing and notice procedures....(DOE goes with b.)
- "Edu-pocalypse" and business issues
- OCR case management?
 - OCR received the most complaints in history in FY22
 - [The Ed. Dept. Received the Most Civil Rights Complaints in History Last Year \(edweek.org\)](#)

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What does the future hold for Title IX? Take-aways....

- Title IX and the "new tenure"... mid-twentieth century deference over? ALL project signals a bleed over effect....? The pursuit of happiness as a protected interest?
- Trifurcation?
- Congressional action in light of SCOTUS rulings....Title IX implications
- Vectoring...where are we headed?
- Culture impact...how do we explain the proposed regulations to our stake holders and "shapeholders"? Active monitoring required...
- Courts are inventing many new ways to hold colleges accountable for decisions on sexual misconduct? Compliance in the process of attempting compliance—meta-compliance issues dominate.
- The single investigator model as lightning rod.
- Arbitration and no cause dismissal?
- Flexibility=Title IX looks different across the country
- Rewrite Codes....again? And when? Notice and comment likely to change proposed rules
- Updated training will be required after the final regulations are published.

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