



**NASPA**<sup>®</sup>

Student Affairs Administrators  
in Higher Education

# Title IX Update: Fall 2022

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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**



**Nothing in these training materials should be considered legal advice.**



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 will go through a notice and comment period before becoming final, likely in 2023 or later.

We will examine some of the language in the proposed new regulations at the end of this module.

# The Title IX Landscape



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



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



## LSU

- Title IX-related DOE investigation (also under investigation for Clery Act)
- LSU Law Firm Report
- NASA
- Voluntary Resolution Agreement (March 22, 2021)



## 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



# Examples of Title IX Regulatory Enforcement Under Biden



## Univ. of Maryland Baltimore County

- The U.S. Department of Justice is investigating the potential mishandling of sexual harassment cases
- The civil rights investigation, which is ongoing, was opened in 2020
- The school was previously investigated by the U.S. Dept. of Education in 2016.

[U.S. Justice Department is investigating UMBC's Title IX compliance and response to sexual misconduct – Baltimore Sun - Ocean City Weather](#)

# Title IX— Cultural and Legal Issues



## Tinder Points

- LGBTQI+ [NPRM at 23 n. 4] →
- Transgender Athletes/ Bathrooms
- Pronouns
- Expressive Freedoms—Note focus on “conduct”
- Due Process—single investigator, cross-examination—  
'college court'?
- ***Reproductive rights***
- Men's rights
- Training/costs of compliance/ “reliance interest”
- Sexual violence prevention/intervention
- Transparency/FERPA
- Efficacy—Note DOE comments on supportive services

*The Department generally uses the term “LGBTQI+” to refer to students who are lesbian, gay, bisexual, transgender, queer, questioning, asexual, intersex, nonbinary, or describe their sex characteristics, sexual orientation, or gender identity in another similar way.*

# Title IX— Cultural and Legal Crossfire



- Efficiency
- Authenticity and mission
- Mental health
- Red blue purple affinity...and travel/enrollment management
- Prevention/ prevention
- Role of alcohol and other drugs...only mentioned with amnesty. SDFSCA guidance?
- Reporting structures// criminal justice interface
- Consumer focus: No contact and supportive measures
- Field position football fatigue
- DOE's role in education—DeVos comments in Florida



## ***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 \(ali.org\)](#)

# Title IX- Some Observations on Related Litigation and Legal Issues





## 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—*State Farm, West Virginia v. Environmental Protection Agency*



## SCOTUS Cont'd

- Athletes—*NCAA v. Alston*
- First Amendment and “harassment” —Clues from *Mahoney (Fenves)*//*Elonis*
- 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 7<sup>th</sup> 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*

“ . . . 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.

[Democrats ask for extra guidance on pregnant students and Title IX \(insidehighered.com\)](https://www.insidehighered.com/news/2022/07/20/democrats-ask-for-extra-guidance-on-pregnant-students-and-title-ix)

# Title IX Updates—Court Watch



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

### Examples

- 6<sup>th</sup> Circuit in *Baum*
- 7<sup>th</sup> Circuit in *Purdue*
- Colorado Court of Appeals in *Doe v. University of Denver*
- 3<sup>rd</sup> 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’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.”

Billion Dollar Exposure; e.g., Univ. of Southern California—\$852 million settlement in case regarding abuse by campus gynecologist



# 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)

# 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?
- Tortious failure to provide fair process?

# 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.”
  - *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...)

# "Gebser/Davis Framework" for Evaluating Institutional Compliance (with Some Twists)



## 3-Part Framework

1. *A definition of actionable sexual harassment*

2. *The school's actual knowledge*

Department of Education, *Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance*, 85 Fed. Reg. 30026 (May 19, 2020) (final rule) (online at [www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf](http://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf)) at 30032 (numeration and emphasis added).

3. *The school's deliberate indifference*

4. **Promptness**

5. **Equitableness**

6. **Reasonableness**

- 2020 regs re: grievance procedures well beyond *Gebser*
- Roadmap for litigation?
- Risk of DOE enforcement?
- Doug Lederman, *A New Day at OCR Inside Higher Ed* (June 28, 2017).

# 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.*

# “Deliberate Indifference”



*As the Supreme Court reasoned in Davis, a recipient acts with deliberate indifference only when it responds to sexual harassment in a manner that is “clearly unreasonable in light of the known circumstances.”* Id. at 30091 (internal citation omitted).

*[U]nless the recipient’s response to sexual harassment is clearly unreasonable in light of the known circumstances, the Department will not second guess such decisions.* Id. at 30092 (internal citation omitted)

# "Deliberate Indifference" Cont'd



*[T]he final regulations apply a deliberate indifference standard for evaluating a recipient's decisions with respect to selection of supportive measures and remedies, and these final regulations do not mandate or scrutinize a recipient's decisions with respect to disciplinary sanctions imposed on a respondent after a respondent has been found responsible for sexual harassment.*

*Id.* at 30034 n.60.

*[T]he Department will not deem a recipient not deliberately indifferent based on the recipient's restriction of rights protected under the U.S. Constitution, including the First Amendment, the Fifth Amendment, and the Fourteenth Amendment.*

*Id.* at 30091.

*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.



# Deliberate Indifference



## *Kollaritsch v. Michigan State Univ. Bd. of Trustees*, 944 F.3d 613 (6th Cir. 2019).

*In 2011, Michigan State University (MSU) student John Doe sexually assaulted fellow student Emily Kollaritsch. Kollaritsch reported the assault, and the university opened an investigation. The investigation lasted over six months. During that time, MSU placed no restrictions on Doe and made no accommodations for Kollaritsch, even though the two lived in the same dormitory. The school concluded that Doe had violated MSU's sexual harassment policy, placing him on probation and issuing an order that prohibited him from contacting Kollaritsch. Doe proceeded to violate the order on at least nine occasions by "stalking, harassing, and intimidating" Kollaritsch, who had a panic attack on each encounter. She reported the violations and then filed a complaint for retaliatory harassment with MSU. During its investigation, MSU provided no interim safety measures, and Kollaritsch obtained a protection order from a local court. MSU concluded that no retaliatory harassment had occurred.*

# Deliberate Indifference



## *Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613 (6th Cir. 2019).*

*For “causation,” Judge Batchelder pointed to language in Davis that a school may not be liable for damages unless its “deliberate indifference ‘subject[ed]’ its students to harassment.” She noted that Davis understood the verb “subject[s]” to mean that “deliberate indifference must, at a minimum, cause students to undergo harassment or make them liable or vulnerable to it.” In the Sixth Circuit’s view, the fact that Davis linked the verb “subject[s]” to harassment, not injury, was critical; it necessarily meant that a deliberate indifference claim requires further actionable harassment. Thus, “a plain and correct reading” of causation in Davis dictates two ways the school’s response can result in further harassment: (1) through action that instigates harassment, or (2) through inaction that renders the victim unprotected from harassment. Either way, Davis “presumes that post-notice harassment has taken place.” The court thus rejected the plaintiffs’ interpretation that the phrase “or . . . make [students] . . . vulnerable to [harassment]” established a separate basis for liability. On these facts, Judge Batchelder concluded that Kollaritsch failed to show that her subsequent encounters with John Doe were severe, pervasive, or objectively offensive. Similarly, the mere fact that MSU allegedly left the other plaintiffs vulnerable to encountering their assailants was insufficient to establish actionable further harassment. The students thus failed to satisfy the causation element under Davis; the school’s response had not caused them to suffer a second instance of actionable harassment.*



# 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).

# 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 Newsdesk (June 1, 2020).

# 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 Newsdesk (June 1, 2020).

# 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*

# “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 \(9th Cir. 2020\) :: Justia](#)

# 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.



# 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.*

# 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.



## *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.

# 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.”

# Bostock: Critical Language



“An individual’s homosexuality or transgender status is not relevant to employment decisions. That’s because it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex.”

“... homosexuality and transgender status are inextricably bound up with sex.”

“We agree that homosexuality and transgender status are distinct concepts from sex. But, as we’ve seen, discrimination based on homosexuality or transgender status necessarily entails discrimination based on sex; the first cannot happen without the second.”

# 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.”

# The Bostock Caveats



“As a result of its deliberations in adopting the law, Congress included an express statutory exception for religious organizations... this Court has also recognized that the First Amendment can bar the application of employment discrimination laws “to claims concerning the employment relationship between a religious institution and its ministers.”

“Because the Religious Freedom Restoration Act (RFRA) operates as a kind of super statute, displacing the normal operation of other federal laws, it might supersede Title VII’s commands in appropriate cases.” “But how these doctrines protecting religious liberty interact with Title VII are questions for future cases too.”

“So while other employers in other cases may raise free exercise arguments that merit careful consideration, none of the employers before us today represent in this Court that compliance with Title VII will infringe their own religious liberties in any way.”

•

# 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.”



# Bostock and the New 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 . . .”

# The New 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

# 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 recently declared unconstitutional by a Florida judge
  - Florida Passes Stop WOKE Bill Prohibiting Diversity Training (natlawreview.com)

# Faith 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?

# 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.**
- **LGBTQI+ 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. [Yeshiva University asks](#)

# 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/heightened 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

*Kantele Franco, Ohio State sex abuse survivors plan appeals, defend motives, Associated Press, Sept. 28, 2021.*

# Concluding Thoughts: Litigation



- 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
- Documentation/Privacy
  - Recently a court in Pennsylvania ruled Title IX investigative files be protected against publication in a lawsuit involving Penn State  
[Federal Court Grants Penn State's Motion to Protect Title IX Documents, Sacks Student Athlete's Call for Unfettered Disclosure - Lexology](#)
- Equity, bias, impartiality
- Think “contractual fairness”
  - Peter Lake, *From Discipline Codes to Contractual Respect*, Chron. of Higher Educ. (Nov. 26, 2017).

# **Aspect of 2020 Regulations Struck Down**

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







## *(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



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.

# 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.*

# 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 2022 Proposed Title IX Regulations:

## Highlights from DOE in Their Own Words





# 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](#)

# 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](#)

# 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*

# 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).*

# 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.

# 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 welcomeness 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.)*

# 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](#)



## **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.*



# 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](#)

# 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.

# 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 168.

**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 168 (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.

# 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.*

# 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.

# 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.

# “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.”

# 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](#)



# 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](#)

# 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.” NPRM at 353-354 (internal citations omitted).

# 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 \(verywellfamily.com\).](https://www.verywellfamily.com/difference-between-punishment-and-discipline/)

# 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](#)

# 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.*

# What's next for the proposed regulations?



- **60 day notice and comment period.**
  - Last notice and comment period garnered more than 100,000 comments.
  - Some advocacy groups are pooling comments so as to make process go smoother and quicker.
  - Process under the Trump administration took 2 years from proposed rule to final rule.
- **It's likely that the new regulations will not go into effect until 2023 or later.**
- **There will be a separate process for student athletes/transgender issues. Expect more on informal resolutions, Clery manual, possible FERPA guidance.**
- **Congressional Review Act?**
  - Depends on timeline.

Where is Title IX headed?



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



- LGBTQI+ 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 LGBTQI+ plaintiffs from 30 institutions.
  - Is the religious exemption in Title IX constitutional?
- *Speech First, Inc. vs. Fenves; Speech First, Inc. vs. Cartwright*
- State law pushbacks
- Rewrite Codes....again? And when? Notice and comment likely to change proposed rules
- 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*



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



- Political landscape 2022/2024 :::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”
- Here comes new Clery manual, but when?—prevention and reporting on it.
  - OCT 1st is just weeks away (gulp!).
- 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

# 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.
- Lawyers and legalisms....Student conduct dominated by law, lawyers and legalisms? Law as competitor?
- The Transparency Dilemma:: a)revise FERPA or b)create more detailed hearing and notice procedures....(DOE goes with b.)

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



- Title IX and the “new tenure”... mid-twentieth century deference over? ALI 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
- Comment please!

# Thank You...

Assessment to follow...

