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03B

Introduction to Sexual Misconduct Issues: Title IX, Title VII, and the Courts

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TITLE IX AND SEXUAL MISCONDUCT: FROM THEN TO NOW

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INTRODUCTION:

Title IX of the Education Amendments of 1972 prohibits sex discrimination in federally funded education programs or activities. Over the years, it has been the bedrock of gender equity in athletics, and more recently, has served as the statutory underpinning for federal guidance and regulations involving sexual misconduct on campus. This manuscript, which focuses exclusively on sexual misconduct, lays out the statutory, regulatory, and sub-regulatory history of Title IX from 1972 to the present, and highlights some of the pivotal court cases that have shaped Title IX litigation. The manuscript is intended as a resource for attorneys who are new to the practice of higher education law.

DISCUSSION:

I. Title IX's History

On June 8, 1972, Congress enacted Title IX, which amended the Civil Rights Act of 1964 to prohibit sex discrimination in education programs and activities. But for certain exceptions, it generally provides:

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.¹

Until Title IX became law, there existed no federal law prohibiting sex discrimination in education programs and activities, except those tied to federal contracts.² Title IX passed both chambers of Congress, with votes of 275-125 (House) and 86-6 (Senate), and by the signature of President Nixon, took effect on June 23, 1972.

A. Regulations and Administrative Enforcement

1. 1975 Regulations Promulgated (Nixon Administration)

On July 21, 1975, pursuant to the delegated authority in 20 U.S.C. §1682, the Department of Health, Education, and Welfare (HEW) promulgated regulations to implement Title IX. Generally, the regulations prohibited differential treatment based on sex in education programs or activities including admissions, financial aid, athletics, course offerings, housing, employment opportunities, and other aspects of college and university operations.³ While the 1975 regulations did not directly address sexual harassment, they required that each recipient institution “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities [to address and remedy sex discrimination], including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by [Title IX and its implementing regulations].”⁴ It also required recipients to “adopt and publish prompt and equitable resolution of

¹ 20 U.S.C. §1681 *et seq.*

² Eight years earlier, Congress had enacted Title VI, which prohibited discrimination in educational programs based on race, color, and national origin, but the statute was silent on sex discrimination.

³ Federal Register, Vol. 40, No. 108, 24128-24144 (June 4, 1975).

⁴ §86.8 (a).

student and employee complaints alleging any action that would be prohibited [by Title IX and its implementing regulations].”⁵

2. 1997 Guidance (Clinton Administration)

On March 13, 1997, the U.S. Department of Education Office for Civil Rights published a guidance document titled, “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.”⁶ Though not part of the formal rulemaking process, the Assistant Secretary for Civil Rights published a notice in the Federal Register inviting the public to comment on what, at the time, were two separate guidance documents, one related to peer sexual harassment and the other related to employee sexual harassment.⁷ The Department received 70 comments as a result of that invitation, all of which were addressed in a preamble to the guidance. As part of this process, the Department also consolidated the two guidance documents into a single guidance document.

The guidance began by stating that the Department had “long recognized that sexual harassment of students engaged in by school employees, other students, or third parties is covered by Title IX.”⁸ The guidance endeavored to “enable school employees and officials to identify sexual harassment and to take steps to prevent its occurrence.”⁹ The Department continued, “In addition, the Guidance is intended to inform educational institutions about the standards that should be followed when investigating and resolving claims of sexual harassment of students.”¹⁰

To that end, the guidance defined sexual harassment as “verbal, nonverbal, or physical conduct of a sexual nature by an employee, by another student, or by a third party that is sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment.”¹¹ It required recipients to adopt grievance procedures for sex discrimination, including sexual harassment,¹² when the alleged harassment occurred within an institution’s education program or activity. OCR defined an “education program or activity” as “all of the school’s operations,” which included “all of the academic, educational, extracurricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere.”¹³ An institution’s obligation triggered when it knew or should have known of harassment, and liability attached if the school “fail[ed] to take immediate and appropriate corrective action.”¹⁴

The guidance permitted informal resolution and other than requiring “prompt, thorough, and impartial” action that effectively remedied known harassment¹⁵, did not specify exact requirements for institutional disciplinary proceedings. The Department did, however, specify markers of a prompt and equitable process which included:

⁵ *Id.* §86.8(b).

⁶ Federal Register / Vol. 62, No. 49 / Thursday, March 13, 1997 / Notices.

⁷ *Id.* at 12305.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 12038. Pages 12041-42 elaborated on how to go about evaluating the “severe, persistent, or pervasive” standard.

¹² *Id.* at 12038.

¹³ *Id.* at 12038.

¹⁴ *Id.* at 12039.

¹⁵ *Id.* at 12042.

- Sufficient notice;
- a procedure duly followed by institutional officials;
- an adequate, reliable, and impartial investigation, including the opportunity to present witnesses and evidence;
- designated timeframes for major stages in the process;
- notice to the parties of the outcome of the complaint; and
- an appropriate remedy.¹⁶

The guidance also discussed topics such as requests for confidentiality, interim measures, appeals, and the intersection of harassment and protected speech under the First Amendment.

Looking back, perhaps the biggest hallmark of the 1997 guidance was its acknowledgment that educational institutions are different from courtrooms, and different from one another. For example, the guidance acknowledged, “Even if a school determines that a student’s conduct is sexual harassment, the Guidance explicitly states that Title IX permits the use of a general student disciplinary procedure.”¹⁷ Similarly, the Department acknowledged that “[grievance procedures] adopted by schools [would] vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience.”¹⁸ Over time, though the Department continued to offer cursory nods to this deferential notion of flexibility, regulatory and sub-regulatory guidance would become increasingly prescriptive, in some instances mirroring criminal court proceedings.

3. 2001 Guidance (Clinton Administration)

On January 19, 2001, the last day of the Clinton Administration, the U.S. Department of Education issued “significant” subregulatory guidance titled, “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties.” This 39-page guidance document, which adopted much of the 1997 guidance, included revisions to distinguish the Department’s administrative standard from the more stringent standard articulated in recent U.S. Supreme Court decisions regarding private rights of action for money damages under Title IX.¹⁹ In so doing, the guidance set forth principles that a school should use to recognize and effectively respond to sexual harassment of students in its education programs or activities as a condition of receiving federal financial assistance.”²⁰ Though subregulatory and not part of the formal rulemaking process, the Department published a notice requesting comments on the revised guidance²¹ and received 11 public comments,²² which is striking when juxtaposed against the hundreds of thousands of public comments that the Department would receive two decades later in response to its 2018 and 2022 proposed rulemakings, as the issue became more divisive and the electorate became more polarized.

The 2001 guidance defined sexual harassment as “unwelcome conduct of a sexual nature.”²³ Like the 1997 guidance, the jurisdictional scope was broad, prohibiting sexual harassment in “all of the

¹⁶ *Id.* at 12044.

¹⁷ *Id.* at 12305.

¹⁸ *Id.* at 12405

¹⁹ *Davis v. Montgomery County School District*, 526 U.S. 629 (1999); *Gebser v. Lago Vista Independent School District*, 524 U.S. 274 (1998).

²⁰ 2001 Guidance at i (citations omitted).

²¹ 62 Fed. Reg. 66092 (Nov. 2, 2000).

²² 2001 Guidance at iii.

²³ 2001 Guidance at 2.

school's operations," meaning that it protected students "in connection with all of the academic, educational, extra-curricular, athletic, and other programs of the school, whether they take place in the facilities of the school, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."²⁴ Also like the 1997 guidance (and the 1975 regulations that preceded it), it required institutions to adopt and publish grievance procedures and identify a Title IX coordinator.²⁵

The guidance explicitly set forth criteria for determining an institution's responsibilities under Title IX. It defined hostile environment harassment as "sexually harassing conduct by an employee, another student, or a third party [that] is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex."²⁶ Under the 2001 guidance, hostile environment harassment needed both to be subjectively and objectively unwelcome,²⁷ and OCR laid out factors to evaluate the "severity and pervasiveness" of hostile environment harassment.²⁸

The guidance also discussed in detail the nature of the institution's responsibility to respond to sexual harassment, which again, similar to the 1997 guidance, obligated institutions to respond "promptly and effectively."²⁹ Outside of *quid pro quo* harassment or other employee harassment that occurred in connection with "the provision of aid, benefits and services to students", an institution only was obligated to respond when it had "notice" of sexual harassment. The Department deemed an institution to be on notice when a "responsible employee"—defined as "any employee who has the authority to take action to redress the harassment, who has the duty to report to appropriate school officials sexual harassment or any other misconduct by students or employees, or an individual who a student could reasonably believe has the authority or responsibility"—"knew or in the exercise of reasonable care should have known [about the harassment]."³⁰ Once on notice, an institution was obligated to invoke its grievance procedures,³¹ which must include a mechanism that procedurally vests the university with the authority to "take immediate and appropriate steps to investigate or otherwise determine what occurred and take prompt and effective steps reasonably calculated to end any harassment, eliminate a hostile environment if one has been created, and prevent harassment from occurring again."³² Like the 1997 guidance, it contained explicit instruction on requests for confidentiality, recognizing that guarantees of confidentiality may limit an institution's ability to respond³³ and acknowledging how confidentiality may impede federally protected due process rights.³⁴ The guidance also discussed interim measures and informal resolution.³⁵ Specifically with respect to informal resolution, the guidance specified, "Grievance procedures may include informal mechanisms for resolving sexual harassment complaints to be used if the parties agree to do so," but in some cases, "such as alleged sexual assaults, mediation will not be appropriate even on a voluntary basis."³⁶

²⁴ *Id.* at 2-3.

²⁵ *Id.* at 4.

²⁶ *Id.* at 5.

²⁷ *Id.* at 5. *See also id.* at 7-9 (discussing "welcomeness" in greater detail).

²⁸ *Id.* at 5-7.

²⁹ *Id.* at 9.

³⁰ *Id.* at 13.

³¹ *Id.* at 14.

³² *Id.*

³³ *Id.*

³⁴ *Id.* at 17. *See also id.* at 22.

³⁵ *Id.* at 17.

³⁶ *Id.* at 21.

Finally, the guidance set forth factors for evaluating whether an institution's process was "prompt and equitable," which included consideration such as notice, impartiality, timelines, and remedies, among other things.³⁷ Like the 1997 Guidance, OCR explicitly acknowledged that "[p]rocedures adopted by schools would vary considerably in detail, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience."³⁸

The 1997 and 2001 guidance received very little attention, including from the regulatory body that issued the guidance. For the next decade, the Department of Education did little either to enforce or explain the guidance.

4. 2011 "Dear Colleague" Letter (Obama Administration)

On April 4, 2011, the U.S. Department of Education under the Obama Administration, issued a "Dear Colleague" letter on Title IX and sexual violence (hereinafter "2011 DCL"). This 19-page Dear Colleague letter was said to "supplement" the 2001 Guidance, by offering additional instruction and examples.³⁹ Still referenced today, the 2011 DCL was a game-changer in the higher education world. Despite the guidance that came before it, the 2011 DCL signaled *the moment* in time when campus sexual assault garnered national attention, mobilized advocacy groups, energized regulators, and fundamentally changed the way colleges and universities addressed the pervasive problem of campus sexual assault.

The 2011 DCL adopted the 2001 definition of sexual harassment as conduct that is "sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program."⁴⁰ Also like the 2001 Guidance, it prohibited harassment in a school's education programs or activities, which the Department defined as any harassment "in connection with all the academic, educational, extracurricular, athletic, and other programs of the school, whether those programs take place in a school's facilities, on a school bus, at a class or training program sponsored by the school at another location, or elsewhere."⁴¹ It clarified that "[s]chools may have an obligation to respond to student-on-student sexual harassment that initially occurred off school grounds, outside a school's education program or activity" when a student experiences continuing effects of that harassment on campus.⁴² Also like the 2001 and 1997 guidance, and the 1975 regulations, it required institutions to identify a Title IX coordinator, though the 2011 DCL added required training for that individual.⁴³

It required a school to take action if it "kn[ew] or reasonably should know[n]" about student-on-student harassment⁴⁴ by initiating a "prompt, thorough, and fair" investigation.⁴⁵ With respect to unwilling complainants, it advised that although institutions "should take all reasonable steps to investigate and respond to the complaint consistent with the request for confidentiality or the request not to pursue an investigation," that institutions still had independent obligations, including constitutional obligations that could constrain the range of options available to institutions as they respond to

³⁷ *Id.* at 20.

³⁸ *Id.*

³⁹ 2011 DCL at 2.

⁴⁰ *Id.* at 3.

⁴¹ *Id.* at 3-4.

⁴² *Id.*

⁴³ *Id.* at 7.

⁴⁴ *Id.* at 4.

⁴⁵ *Id.* at 5.

incidents.⁴⁶ While the 2011 DCL allowed informal resolution in some circumstances, it prohibited mediating sexual assault allegations, even on a voluntary basis.⁴⁷

For a formal process, the 2011 DCL generally adopted the broad-stroke factors from the 1997 and 2001 guidance to assist institutions in evaluating whether a process was prompt and equitable (e.g., notice, impartiality, timelines, and remedies, among other things),⁴⁸ but it seemingly added additional, more prescriptive requirements.⁴⁹ In particular, it discussed parallel criminal proceedings, warning institutions that they should not wait for criminal investigations to conclude before taking action and instead imposing a 60-calendar-day requirement for prompt resolution of allegations.⁵⁰ It explained that the complainant and alleged respondent should have “similar and timely access to information” and equal opportunity to participate in the proceedings.⁵¹ It “discourage[d] schools from allowing the parties personally to question or cross examine each other.”⁵² Finally, prompting a good bit of debate, it stated that institutions should adopt a “preponderance of the evidence” standard for reviewing allegations of misconduct.⁵³

A handful of other notable “requirements”⁵⁴ marked the 2011 DCL. Like other guidance, it discussed interim measures, but at least with respect to no-contact orders, it instructed that such interim measures should “minimize the burden on the complainant.”⁵⁵ It discussed education and prevention in much more detail than prior guidance.⁵⁶ Finally, it listed several proposed remedies, both for the survivor and the broader community.⁵⁷

Unlike in 1997 and 2001, OCR did not invite the public to comment on the 2011 DCL, so on paper, the 2011 DCL was nothing more than unenforceable subregulatory guidance. But in practice, it was much more. Starting around 2013 when Assistant Secretary Catherine Lhamon was confirmed to head OCR, she would address the public on many occasions, threatening to pull federal funding from any institution that deviated from the guidance.⁵⁸

The 2011 DCL signaled the moment in time when campus sexual misconduct would become as prominent as it was divisive in higher education. While some advocacy groups praised the 2011 DCL and were emboldened to seek ever greater protections from institutions, respondents’ groups emerged and mobilized⁵⁹, calling for stronger due process protections for those accused of misconduct. As institutions formal adjudications of complaints increased in response to Undersecretary Lhamon’s enforcement objectives, Title IX lawsuits against institutions by both unsatisfied complainants and disciplined students proliferated. The initial wave of lawsuits against institutions was a series of complainant-initiated

⁴⁶ *Id.* at 5.

⁴⁷ *Id.* at 8.

⁴⁸ *Id.* at 9.

⁴⁹ The 2011 DCL caused confusion by routinely using the word “should” as opposed to “may” or “must.”

⁵⁰ *Id.* at 10-12.

⁵¹ *Id.* at 11.

⁵² *Id.*

⁵³ *Id.* (“[I]n order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred.”))

⁵⁴ The 2011 DCL was subregulatory guidance, not regulation.

⁵⁵ *Id.* at 15.

⁵⁶ *Id.* at 14-15.

⁵⁷ *Id.* at 16-17.

⁵⁸ *See*, e.g., Meredith Clark, [“Officials to Colleges: Fix Sexual Assault or Lose Funding.”](#) MSNBC (July 14, 2014).

⁵⁹ E.g., [Families Advocating for Campus Equality \(FACE\)](#) (last visited Aug. 19, 2022).

deliberate indifference lawsuits. Plaintiff-complainants often referenced the 2011 DCL in these lawsuits as the gold standard of what institutions should be doing to avoid a finding of “deliberate indifference.” Not long after that, the newly formed respondent advocacy groups would mobilize to file massive amounts of litigation against colleges and universities, both under the *Yusuf*⁶⁰ theories of erroneous outcome and selective enforcement (discussed *infra* in Part B), and due process or contract actions, alleging that respondents were deprived of constitutional due process (publics) or a fair process (privates) as institutions carried out their obligations under the 2011 DCL.

In all of this, the higher education community was caught in the crossfire. Campus leaders shared the desire to operate campuses free of sexual misconduct, while at the same time offering a fair process that was legally and operationally sound and consistent with the institution’s primary educational mission. Yet, it was becoming more and more impossible to satisfy all stakeholders, and on top of that, Title IX compliance and litigation costs were quickly becoming an unmanageable line item in institutional budgets, at the expense of other mission driven priorities.

5. 2014 Q&A (Obama Administration)

On August 29, 2014, the Office for Civil Rights issued its “Questions and Answers on Sexual Violence” to supplement the 2011 DCL and “further clarify the legal requirements.”⁶¹ The 2014 Q&A expanded upon, rather than changed, the guidance from the 2011 DCL in the following material ways:

- **Expansion of Definition of Sex Discrimination:** It expanded Title IX’s protections to prohibit more clearly discrimination based on sexual orientation and gender identity. Specifically, it states that Title IX protects “male and female students [and] straight, gay, lesbian, bisexual, transgender students.”⁶²
- **Knew or Should Have Known:** The 2014 Q&A reiterated that an institution has an obligation to act when it “kn[ew] or reasonably should know” about student-on-student harassment.”⁶³ The Q&A clarified that the school may also receive notice about sexual violence in an indirect manner, from sources such as a member of the local community, social networking sites, or the media.”⁶⁴ Further, “[i]n some situations, if the school knows of incidents of sexual violence, the exercise of reasonable care should trigger an investigation that would lead to the discovery of additional incidents.”⁶⁵ It included exceptions for public awareness events, such as “Take Back the Night.”⁶⁶
- **Responsible Employees:** The 2014 Q&A obliged “responsible employees” to take action when they know or should know of harassment, and defines responsible employee as an employee “who has the authority to take action to redress sexual violence, who has been given the duty of reporting incidents of sexual violence or any other misconduct by

⁶⁰ For a full discussion of private rights of action to recover money damages under Title IX theories of erroneous outcome and selective enforcement, see discussion of *Yusuf v. Vassar College* at Part II.B.1 *infra*.

⁶¹ 2014 Q&A at ii.

⁶² *Id.* at 4. *Compare* 1997 Guidance (Although Title IX does not prohibit discrimination on the basis of sexual orientation, sexual harassment directed at gay or lesbian students may constitute sexual harassment prohibited by Title IX.”)

⁶³ *Id.* at 2.

⁶⁴ *Id.*

⁶⁵ *Id.*

⁶⁶ *Id.* at 24.

students to the Title IX coordinator or other appropriate school designee; or whom a student could reasonably believe has this authority or duty.”⁶⁷

- **Obligation to Address and Remedy Off Campus Conduct:** The 2014 Q&A expanded an institution’s obligation to address off campus conduct and make determinations about whether off campus conduct occurred in the context of an institution program or activity.⁶⁸ The Department emphasized, “[o]ff-campus education programs and activities are clearly covered and include, but are not limited to: activities that take place at houses of fraternities or sororities recognized by the school; school-sponsored field trips, including athletic team travel; and events for school clubs that occur off campus (e.g., a debate team trip to another school or to a weekend competition).”⁶⁹ In any case, an institution “must assess whether there are any continuing effects on campus or in an off-campus education program or activity that are creating or contributing to a hostile environment and, if so, address that hostile environment in the same manner in which it would address a hostile environment created by on-campus misconduct.”⁷⁰
- **Obligation to Address Harassment When Alleged Perpetrator is Not Affiliated with the School:** The 2014 Q&A required institutions to address harassment, even when the alleged perpetrator was not affiliated with the institution.⁷¹ The Department was mindful that the institution’s response will differ depending on how much control the institution exerts over the alleged harasser.⁷²
- **Hearings Not Required:** Live hearings were discretionary under the 2014 Q&A.⁷³
- **Cross Examination:** OCR did not require cross examination of witnesses and “strongly discourage[d] a school from allowing the parties to personally question or cross-examine each other during a hearing on alleged sexual violence.”⁷⁴ Instead, OCR suggested that the parties be “allowed to submit questions to a trained third party (e.g., the hearing panel) to ask the questions on their behalf.”⁷⁵
- **Appeals Discretionary:** Appeals were discretionary under the 2014 Q&A and only recommended “where procedural error or previously unavailable relevant evidence could significantly impact the outcome of a case or where a sanction is substantially

⁶⁷ *Id.* at 15.

⁶⁸ *Id.* at 29.

⁶⁹ *Id.*

⁷⁰ *Id.* Though the 2020 regulation would narrow the circumstances triggering institutional obligations to those articulated in *Davis* and *Gebser*—namely, those instances where the institution exercised control over the harasser and the context in which the harassment occurred—the Preamble would still acknowledge limited circumstances in which off-campus conduct might trigger an institution’s obligations where the extraterritorial conduct had lingering effects on campus. *See* 2020 Preamble at 636 (“[A] recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient’s control where the complainant has to interact with the respondent in the recipient’s education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant’s workplace or educational environment.”) The July 2022 NPRM signaled an intention to embed broader obligations into the regulations by stating, “A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.” 2022 NPRM §106.11.

⁷¹ *Id.* at 9.

⁷² *Id.*

⁷³ *Cf. id.* at 30 (“If a school uses a hearing process . . .”).

⁷⁴ *Id.* at 31.

⁷⁵ *Id.*

disproportionate to the findings.”⁷⁶ If an institution allowed appeals, it was required to allow them equally for both parties.⁷⁷

- **60-Day Requirement:** The 2014 Q&A reiterated the 60-calendar-day requirement and clarified that this time period was intended to cover everything from the allegation through the final resolution, excluding any appeal.⁷⁸ OCR explained that the 60-day-period was based on its understanding of a typical case, that some investigations may take longer, and that it would evaluate extensions based on the unique circumstances of the case.⁷⁹
- **Employee Harassment:** The 2014 Q&A clarified that in addition to prohibiting peer harassment, Title IX also covered employee-on-student harassment.⁸⁰
- **Title IX Coordinator Responsibilities:** The 2014 Q&A detailed a prescriptive list of Title IX Coordinator responsibilities, in many instances conflating requirements and emerging practices, such that the Department’s expectations were unclear.⁸¹

6. Sept. 22, 2017—OCR Rescinds 2011 DCL and 2014 Q&A and Issues New Sub Regulatory Guidance (Trump Administration)

On September 22, 2017, Betsy DeVos, Secretary of Education during the Trump Administration, formally rescinded the 2011 DCL and the 2014 Q&A.⁸² That same day, under the leadership of Assistant Secretary Candace Jackson, OCR issued new subregulatory guidance in the form of a Q&A.⁸³ At the outset, it instructed that the 2017 Guidance, read in concert with the 2001 Guidance, should guide institutions while the Department undertook a formal rulemaking process.⁸⁴

The Q&A explained that institutions have an obligation to “understand what occurred and to respond appropriately” when it “knows or reasonably should know of an incident of sexual misconduct.”⁸⁵ It defined hostile environment harassment as “severe, persistent, or pervasive” misconduct that “den[ies] or limit[s] a student’s ability to participate in or benefit from the school’s program or activities,”⁸⁶ though this definition would materially change in the final regulation.

Like before, the guidance required institutions to offer interim measures but cautioned that “a school may not rely on fixed rules or operating assumptions that favor one party over another,”⁸⁷ a course correction from the earlier guidance that instructed that institutions must endeavor not to burden the complainant. Also departing from the 2011 DCL and 2014 Q&A, the 2017 Guidance once again allowed

⁷⁶ *Id.* at 37.

⁷⁷ *Id.*

⁷⁸ *Id.* at 31-32.

⁷⁹ *Id.*

⁸⁰ *Id.* at 3.

⁸¹ *See id.* at 11 (“In addition to these core responsibilities, a school may decide to give its Title IX coordinator additional responsibilities. . . . A school must ensure that its Title IX coordinator is appropriately trained in all areas over which he or she has responsibility. The Title IX coordinator or designee should also be available to meet with students as needed.”)(emphasis added).

⁸² [Dear Colleague Letter](#) from Candice Jackson at 1 (Sept. 22, 2017)(hereinafter 2017 Guidance).

⁸³ 2017 Guidance.

⁸⁴ *Id.* at 1.

⁸⁵ *Id.* at 1.

⁸⁶ *Id.*

⁸⁷ *Id.* at 3.

informal resolution, including mediation, for all forms of sexual misconduct, provided that the parties voluntarily agreed and that the institution deemed the matter appropriate for information resolution.⁸⁸

For allegations that proceed to formal resolution, the guidance detailed content that must be included in the notice and the final report. Same as the 2001 Guidance and even the 1975 regulations, the process must be “prompt and equitable,”⁸⁹ but it no longer needed to be concluded in 60 calendar-days, a requirement that institutions struggled with, especially when faced with complicated fact patterns or holiday breaks, when parties or witnesses were not available and common delays resulting from the increasing involvement of attorney-advisors for many parties. Rather, OCR indicated that it would “evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.”⁹⁰

Finally, and of great relief to some institutions and great consternation to others, OCR permitted institutions to choose between a preponderance of the evidence or clear and convincing evidence standard, with one important caveat buried in Footnote 19:

The standard of evidence for evaluating a claim of sexual misconduct should be consistent with the standard the school applies in other student misconduct cases. In a recent decision, a court concluded that a school denied ‘basic fairness’ to a responding party by, among other things, applying a lower standard of evidence only in cases of alleged sexual misconduct.⁹¹

The *Brandeis* case referenced in Footnote 19 concerned a contract action filed against a private university and contained no Title IX allegations. Yet, OCR looked to this district court case as authority for its position that if institutions apply a “clear and convincing” standard of evidence to most student disciplinary matters, then they must use that same standard in sex discrimination procedures to avoid a finding that they harbored a discriminatory purpose in lowering the standard of review. Not surprisingly, this interpretation raised a number of concerns among NACUA members, including questions about how one can draw a lawful inference of sex bias based on differential treatment of complainants and respondents, when anyone regardless of sex may experience or perpetrate sex discrimination; whether OCR would infer discriminatory intent from the very act of having separate policies with different standards of proof for different policy infractions; and whether OCR intended to extend its jurisdiction over all student conduct matters, and not just Title IX matters; among other things.

7. November 29, 2018—NPRM on Title IX (Trump Administration)

On November 29, 2018, the U.S. Department of Education under the Trump Administration issued a Notice of Proposed Rulemaking on Title IX and Student Sexual Harassment. The NPRM came on the heels of several public pronouncements by Secretary DeVos, in which she expressed concern that campus sexual misconduct proceedings neglected to embed needed protections for accused students.⁹² To that end, the NPRM proposed a highly prescriptive set of regulations, with particular emphasis on “due process” and the rights of the accused. For the first time, the proposed regulations called for live hearings, the right to directly cross examine accusers and witnesses, and advisors provided at the university’s

⁸⁸ *Id.* at 4.

⁸⁹ *Id.* at 3.

⁹⁰ *Id.*

⁹¹ *Id.* at 5 (citing *Doe v. Brandeis Univ.*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016)).

⁹² See, e.g., Susan Svrluga, [“Complete Transcript: Betsy DeVos’s Remarks on Sexual Assault.”](#) *The Washington Post* (Sept. 7, 2017).

expense, among other things. Pursuant to the Administrative Procedure Act, the Department published the NPRM in the Federal Register and invited the public to comment.

The Department of Education also hosted a number of listening sessions during this time period. NACUA attorneys attended several of these listening sessions to serve as a resource to the federal government in understanding how proposed regulations would impact college and university operations, including in states that had conflicting laws, unionized employees, binding court decisions, or other implementation challenges.⁹³ The American Council on Education also convened college and university presidents and other leaders in the higher education community to weigh in on the proposed regulations. Of course, in addition to reaching out to the higher education community, the Department also hosted listening sessions with victims' advocacy groups and respondent advocacy groups alike, as well as other interested stakeholders.

On January 30, 2019, the public comment period closed. All in all, the Department received over 124,000 comments from institutions, advocacy groups, and interested parties, including comments from the American Council on Education, on behalf of the higher education community, who urged the Department to embed additional flexibility into the Proposed Rule and honor higher education's primary mission as educational institutions, a mission compromised and eroded as adversarial courtroom proceedings were grafted onto student conduct proceedings. In addition, the Office of Management and Budget hosted over one hundred 12866 meetings.⁹⁴ In both instances, the volume of public participation reflected an unusual amount of interest, relative to a standard regulatory action, and it would take the Trump Administration nearly two years to review and address the comments, an undertaking that they took quite seriously due to recent legal setbacks.⁹⁵

Also during this time, OCR committed to resolving Obama-Era compliance reviews that had been languishing in regional offices for several years. As part of this effort, OCR revised the Case Processing Manual, most notably by deemphasizing reviews and promising to furnish copies of complaints to colleges and universities against which complaints had been filed.⁹⁶

8. May 19, 2020—Final Rule published in Federal Register (Trump Administration)

On May 19, 2020, for the first time in 25 years since the initial Title IX regulations issued, the Trump Administration promulgated amended regulations on Title IX. With the preamble, the 2033 pages of regulatory text laid out a highly prescriptive, highly legalistic set of requirements. Most notably, the regulations made the following changes:⁹⁷

⁹³ NACUA does not take policy positions but periodically serves as a resource to government agencies.

⁹⁴ These 12866 meetings are hosted by the Office of Information and Regulatory Affairs, upon the request of a member of the general public, to carry out the requirements set forth in the 1993 [Executive Order 12866 on Regulatory Planning and Review](#).

⁹⁵ In particular, the NPRM issued shortly after a couple of federal court decisions enjoined the Trump Administration from enacting policies related to Deferred Action for Childhood Arrivals and the Borrower Defense to Repayment Act. Generally, the decisions hinged on procedural missteps under the Administrative Procedure Act. These court losses provided a particularly compelling motivation for the Administration to follow the APA to a tee in order to withstand the inevitable court actions that would follow.

⁹⁶ This would change again on July 18, 2022, when the Office for Civil Rights again updated the Case Processing Manual, removing the requirement that OCR furnish recipient institutions copies of complaints.

⁹⁷ For a more comprehensive overview of the regulatory content, see Holly Peterson, [Title IX Grid \(Regulations and Preamble\)](#) (NACUA May 2020).

- **Definition of Hostile Environment Sexual Harassment:** The Department defined hostile environment sexual harassment “[u]nwelcome 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.”⁹⁸ This definition departed from previous administrative guidance, including the 2017 guidance issued by the same administration, instead adopting the higher standard articulated for private rights of action in court proceedings.
- **Definition of Education Program or Activity:** “[E]ducation program or activity” includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.⁹⁹ The preamble spoke extensively about off-campus conduct, for example, by noting that “whether sexual harassment occurs in a recipient’s education program or activity is a fact specific inquiry” that includes questions such as “whether the recipient exercised substantial control over the respondent and the context in which the incident occurred”¹⁰⁰ and whether “the effects of the underlying sexual assault create a hostile environment in the complainant’s workplace or educational environment.”¹⁰¹ Even with the preamble, recipients were confused about the extent to which the regulations obligated or permitted them to address off campus conduct.
- **No Extraterritorial Application:** Strictly interpreting the statutory text, the regulations clarified that Title IX does not have extraterritorial application.¹⁰²
- **Narrowed General Obligation:** In contrast to the responsible employee framework from the 2011 DCL and 2014 Q&A, a recipient was required to take action under the 2020 regulations only when it had “actual knowledge” of sexual harassment. “Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient....”¹⁰³
- **Narrowed Scope of When Institution Must Initiate Formal Grievance Procedures:** An institution needed only initiate a formal grievance process that included the many procedural protections embedded in the regulations (e.g., live hearing, cross examination, etc.) when a complainant submitted a formal complaint, that is “a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.”¹⁰⁴
- **Mandatory Dismissals:** If the conduct alleged in the formal complaint would not constitute sexual harassment even if proved, did not occur in the recipient’s education program or activity, or did not occur against a person in the United States, then the recipient must dismiss the formal complaint with regard to that conduct for purposes of

⁹⁸ §106.30 (emphasis added).

⁹⁹ §106.44(a).

¹⁰⁰ Preamble (Unofficial Version) at 654.

¹⁰¹ Preamble (Unofficial Version) at 636.

¹⁰² Preamble (Unofficial Version) at 658.

¹⁰³ §106.30.

¹⁰⁴ §106.30.

sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.¹⁰⁵

- **Prescriptive Requirements:** The regulations included several prescriptive elements related to pre-hearing obligations, contents of notice, contents of reports, training requirements, evidentiary rulings, rules of decorum, conflicts of interest, and more.
- **Informal Resolution Permitted:** The regulations once again permitted informal resolution in all cases, provided that the institution deem the matter appropriate for informal resolution and “[o]btain[] the parties’ voluntary, written consent to the informal resolution process.”¹⁰⁶
- **Live Hearing Required:** For postsecondary institutions only, the recipient’s grievance process must provide for a live hearing.¹⁰⁷ The regulations explicitly foreclosed use of a single investigator model.¹⁰⁸
- **Direct Cross Examination Required:** The 2020 regulations required institutions to permit parties to cross examine each other and witnesses. “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. . . .”¹⁰⁹
- **Advisors:** The regulations required that recipients “[p]rovide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney.”¹¹⁰ The regulations also required advisors to conduct cross examination, and in so doing, the regulations clarified, “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.”¹¹¹
- **Immediate Evidentiary Rulings:** “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.”¹¹²
- **Untested Statements:** “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.”¹¹³ A now-removed blog post would later clarify that this regulation prohibited even consideration of admissions in text

¹⁰⁵ §106.45(b)(3)(i).

¹⁰⁶ §106.45(b)(9).

¹⁰⁷ §106.45(b)(6)(i).

¹⁰⁸ Preamble (Unofficial Version) at 1247.

¹⁰⁹ §106.45(b)(6)(i).

¹¹⁰ §106.45 (b)(3)(iv).

¹¹¹ §106.45(b)(6)(i).

¹¹² §106.45(b)(6)(i). This includes rulings on the rape shield laws, which were incorporated into the regulations. *Id.*

¹¹³ §106.45(b)(6)(i).

messages. This provision would eventually be the sole provision to fall in forthcoming litigation.¹¹⁴

- **Standard of Evidence:** Recipients may use either the preponderance of the evidence standard or the clear and convincing evidence standard but, the recipient must “apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.”¹¹⁵
- **Mandatory Appeals:** Departing from the 2011 DCL and 2014 Q&A, appeals became mandatory. As stated in the regulations, “[a] recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient’s dismissal of a formal complaint or any allegations therein.”¹¹⁶

Some stakeholders championed the regulations as embedding needed procedural protections for the accused. Other stakeholders viewed the regulations both as *ultra vires* and as hostile to survivors of sexual assault. Either way, the regulations would impose sizeable costs on colleges and universities as they implemented the new regulations. The regulations took effect on August 14, 2020, just under three months after they were published.

9. July 20, 2021—OCR Issues Interpretive Guidance (Biden Administration)

On July 20, 2021, the U.S. Department of Education Office for Civil Rights under the Biden Administration issued new subregulatory guidance in the form of a Q&A.¹¹⁷ By-and-large, the Department left the existing regulations undisturbed, as was required to avoid legal action. In one notable instance, the Biden Administration took modest liberties to interpret the regulatory requirements: In Question 13, the Department instructed that the Rule did not apply retroactively to any conduct that predated the August 14, 2020, effective date. The regulations themselves had afforded institutions discretion on whether to apply the final rule retroactively, but through Question 13, the Department was clear that “[a] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.”¹¹⁸

10. July 28, 2021: Untested Statement Rule Enjoined in *Victim’s Rights Center v. Cardona*

In *Victim’s Rights Center v. Cardona*¹¹⁹, plaintiffs, four organizations that advocate for victim’s rights and three individual plaintiffs, brought a legal action to challenge the Department of Education’s May 19, 2020, Final Rule on Title IX and Sexual Harassment. With one notable exception, the court held that the 2020 regulations were lawfully promulgated consistent with the Administrative Procedure Act. However, the court deemed Section 106.45(b)(6)(i) to be arbitrary and capricious, insofar as it prohibited hearing officers from considering untested statements, including admissions, that had not been subjected

¹¹⁴ See *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).

¹¹⁵ §106.45(b)(i)(vii).

¹¹⁶ §106.45(b)(8).

¹¹⁷ 2021 Guidance.

¹¹⁸ *Id.* Q13

¹¹⁹ No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021).

to cross-examination.¹²⁰ In other words, imagine that the evidence contained a text message from the respondent to the complainant that said, “I’m sorry about last night.” Until *Victim’s Rights Center v. Cardona*, an institution could not consider that admission unless the respondent agreed to subject himself to live cross examination. Describing this particular regulatory provision as “render[ing] the most vital and ultimate hallmark of the investigation—the hearing—a remarkably hollow gesture,” the court vacated that section of the regulations. Shortly thereafter, on August 24, 2021, the U.S. Department of Education issued a memo saying that it would no longer enforce the now vacated provision.¹²¹

11. July 12, 2022: NPRM published in the Federal Register (Biden Administration)

On July 12, 2022, with Catherine Lhamon at the helm of the U.S. Department of Education’s Office for Civil Rights, the Department again published a Notice of Proposed Rulemaking on Title IX. While the NPRM did not propose to reinstate all elements of the 2011 DCL and 2014 Q&A, it did endeavor to restore additional protections for survivors of sexual assault, while maintaining variations of the respondent procedural protections that were debuted in the 2020 regulations:

- **Broadened Scope of Obligations to Address and Remedy Sex Discrimination:** The proposed regulations distinguish sex discrimination and sex-based harassment involving student complainants.¹²² Institutions have an obligation to address and remedy all sex discrimination consistent with the extensive procedures outlines in section 106.45 of the proposed regulations.¹²³ For allegations that involve sex-based harassment as defined in section 106.2, where the allegations involve a student, institutions must initiate a process consistent with the proposed regulatory requirements outlined in §§ 106.45 and 106.46.¹²⁴
- **Broadened Definition of Sex:** The NPRM prohibits discrimination on the basis of sex, which includes discrimination based on “sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”¹²⁵
- **Broadened Definition of Hostile Environment Harassment:** It proposed to again change the definition of hostile environment sexual harassment from “severe, pervasive, and objectively offensive”¹²⁶ conduct to “unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, it denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity.”¹²⁷
- **Off-Campus Conduct:** The NPRM more acutely clarifies that certain off-campus conduct triggers an institution’s Title IX obligations.¹²⁸ Specifically, it states that “a recipient’s education program or activity includes but is not limited to conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary

¹²⁰ *Id.*

¹²¹ [Letter](#) from Suzanne B. Goldberg, Acting Assistant Secretary for Civil Rights to Students, Educators, and Stakeholders re: *Victims Rights Center v. Cardona* (Aug. 24, 2021).

¹²² Compare Proposed Regulations §§ 106.45-106.46.

¹²³ Proposed Regulations § 106.45.

¹²⁴ See Proposed Regulations §106.46 (noting in part (a) that the additional requirements set forth in §106.46 are intended to supplement the requirements outlined in §106.45).

¹²⁵ Proposed Regulations §106.10.

¹²⁶ Proposed Regulations §106.30.

¹²⁷ Proposed Regulations §106.2 (emphasis added).

¹²⁸ See Proposed Regulations §106.11.

institution, and conduct that is subject to the recipient's disciplinary authority."¹²⁹ It clarifies ambiguity from the 2020 regulations by specifying, "A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the United States."¹³⁰

- **Reporting Obligations:** The NPRM greatly expands reporting obligations for employees who acquire information about conduct that might amount to prohibited sex discrimination under Title IX.¹³¹ Broadly speaking, all employees who are not confidential employees as defined in §106.2, and who either have the authority to implement corrective measures or serve in an administrative leadership, teaching, or advising capacity, must notify the Title IX coordinator when the employee knows of conduct that might amount to prohibited sex discrimination.¹³² All other employees who are not confidential employees must either notify the Title IX coordinator of known sex discrimination or furnish the contact information of the Title IX coordinator.¹³³
- **Supportive Measures *can* Burden Respondent:** Though it is expected that supportive measures will not unreasonably burden any party, the proposed regulations permit temporary measures that burden the respondent for non-punitive, non-disciplinary reasons.¹³⁴ Supportive measures that burden the respondent must terminate at the conclusion of the grievance procedures.¹³⁵ This proposed regulation departs from the 2020 regulations, which instructed that supportive measures cannot "unreasonably burdening the other party."¹³⁶
- **Single Investigator Model Permitted:** For either sex-based discrimination (§106.45) or sexual harassment involving a student (§106.46), the proposed regulations would restore as an option what was previously coined the "single investigator model," provided that appropriate guardrails for ascertaining witness credibility are built into the process.¹³⁷ Specifically, the proposed regulations specify, "The decisionmaker may be the same person as the Title IX Coordinator or investigator."
- **No Live Hearing Required:** The proposed regulations no longer require a live hearing and embed discretion where an institution chooses to resolve matters using a single investigator model, provided that there is a suitable way to test witness credibility, as state above.¹³⁸
- **No Direct Cross Examination Required:** The proposed regulations no longer require direct cross examination, though with respect to allegations of sexual harassment involving a student (§106.46), the proposed regulations do require "a process that enables the decision maker to assess the credibility of the parties and witnesses when credibility is in dispute and relevant."¹³⁹ This process, set forth in §106.46 (f), differs depending on whether an institution proceeds with a live hearing or through some other procedural mechanism. For example, under a single investigator model, a decisionmaker may ask the parties and witnesses relevant

¹²⁹ Proposed Regulations § 106.11.

¹³⁰ *Id.*

¹³¹ Proposed Regulations §106.44(c).

¹³² *Id.*

¹³³ *Id.*

¹³⁴ Proposed Regulations § 106.2.

¹³⁵ Proposed Regulations §106.44(g)(2).

¹³⁶ 2020 Regulations §106.30.

¹³⁷ *See* Proposed Regulations §106.45(b)(2).

¹³⁸ Proposed Regulations §106.46(g).

¹³⁹ Proposed Regulations §106.45(f).

and not otherwise impermissible questions.¹⁴⁰ But if, on the other hand, the institution chooses to conduct a live hearing, then, the institution must allow each party’s advisor to ask relevant, permitted questions.¹⁴¹

- **Advisors:** Consistent with the 2020 regulations, and with respect to allegations related to sexual harassment involving a student (§106.46), parties must have the opportunity to be accompanied to any meeting or proceeding by an advisor of their choice, which may include an attorney.¹⁴² If an institution chooses to offer a hearing, the advisor conducts cross examination, and an institution must provide an advisor free of charge to any party who does not have one.¹⁴³
- **Revised Untested Statements Provision:** “If a party does not respond to questions related to their credibility, then the decisionmaker must not rely on any statement of that party that supports that party’s position.”¹⁴⁴ Presumably, in light of *Victims Rights Center v. Cardona* discussed above, the Department is not interpreting this provision as broadly as the previous administration.
- **Standard of Review:** The proposed regulations require that institutions use a preponderance of the evidence standard “unless the recipient uses the clear and convincing standard of proof in all other comparable proceedings, including proceedings relating to other discrimination complaints.”¹⁴⁵
- **Informal Resolution Still Permitted:** Except in cases where a student accuses an employee of sex discrimination, the proposed regulations allow for voluntary informal resolution in appropriate circumstances.¹⁴⁶
- **Additional Responsibilities for Title IX Coordinators:** The proposed regulations impose a plethora of new responsibilities on Title IX coordinators, in some instances conflating what used to be institutional obligations with individual employee obligations.
- **Training:** The NPRM requires varied training for (1) all employees; (2) investigators, decisionmakers, and persons who are responsible for implementing the recipient’s grievance procedures or have the authority to modify or terminate supportive measures; (3) informal resolution facilitators, and (4) Title IX coordinators and designees.¹⁴⁷

As before, the American Council on Education weighed in on behalf of the higher education community by submitting a comment letter on behalf of itself and 50 other higher education associations that thanked the Department for increased flexibility while expressing concerns about implementation and other technical challenges.¹⁴⁸ By September 12, 2022, when public comments were due, the Department received 235,000 comments.

¹⁴⁰ *Id.* §106.45(1)(i).

¹⁴¹ *Id.* §106.45(f)(1)(ii).

¹⁴² Proposed Regulations §106.46(e)(2).

¹⁴³ Proposed Regulations §106.46(f)(1)(ii).

¹⁴⁴ Proposed Regulations §106.46(f)(4).

¹⁴⁵ Proposed Regulations § 106.45(h)(1).

¹⁴⁶ Proposed Regulations § 106.44(k).

¹⁴⁷ Proposed Regulations § 106.8(d).

¹⁴⁸ American Council on Education [Comment Letter](#) (September 12, 2022).

B. Case Law Developments

Amidst the regulatory pendulum swings, the courts have actively developed the contours of private rights of action for money damages under Title IX. Below are some of the most salient court decisions that have shaped Title IX litigation over the years.

1. Cannon v. Univ. of Chicago (U.S. 1979)

In 1979, the U.S. Supreme Court issued an opinion in *Cannon v. University of Chicago*¹⁴⁹, wherein it held that Title IX is enforceable through a judicially implied private right of action.

2. Yusef v. Vassar College (2nd Circuit 1994)

Yusef v. Vassar College is the seminal case recognizing respondent-initiated¹⁵⁰ erroneous outcome and selective enforcement claims, which were few and far between at the time that the case issued, but which would proliferate, beginning around 2012. Plaintiff, a student at Vassar College, alleged that the College unlawfully suspended him after a hearing board erroneously found him responsible for sexual harassment. He presented a novel theory to the court: that the College discriminated against him based on sex, in violation of Title IX, by “finding him guilty”¹⁵¹ in the sexual harassment proceeding. The Second Circuit looked to Title IX and analogous case law under the other Civil Rights statutes to conclude that “Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline.” In so holding, the court recognized two classes of actionable claims under this theory: (1) erroneous outcome claims, where an aggrieved party pleads facts that cast articulable doubt on the accuracy of a proceeding and (2) selective enforcement claims, where the severity of the penalty and/or the decision to initiate the proceeding was affected by the student’s gender. In both cases, an aggrieved plaintiff must show that gender bias infected the proceedings. Since 1994 when this decision issued, every other circuit in the nation has recognized Title IX causes of action based on erroneous outcome or selective enforcement theories.¹⁵² Among the circuits, the only semi-relevant distinction over time is a circuit split on the pleading standard, with circuits trending away from a formulaic recitation of the elements towards a simple requirement that a grievant plead facts that, if true, raise a plausible inference of sex discrimination.¹⁵³

¹⁴⁹ 441 U.S. 677 (1979).

¹⁵⁰ From time to time, a complainant endeavors to bring erroneous outcome or selective enforcement claims against a college or university. See, e.g., *Doe v. Columbia University, et al.* No. 21 Civ. 5839,*28-34 (S.D.N.Y. Aug. 25, 2022)(Plaintiff alleged that Columbia arrived at an erroneous outcome by finding her alleged assailant not responsible for sexual misconduct.). With the one exception of *Doe v. Curators of the Univ. of Missouri*, No. 19-cv-04229-NKL (W.D. Mo. Aug. 30, 2022) (holding that in the 8th Circuit, plaintiff complainants can proceed on erroneous outcome theories because Title IX cases do not depend upon doctrinal tests), the author is only aware of cases in which the court assumes *arguendo* that the plaintiff-complainant can proceed. See *id.*

¹⁵¹ In the higher education community, we tend to use the terminology “responsible” and “not responsible” to distinguish student conduct proceedings from criminal court proceedings.

¹⁵² For historical purposes only, litigants can also file “archaic assumptions” claims, wherein a plaintiff alleges that he or she was denied equal opportunity to participate in an education program or activity based on historical assumptions about boys’ or girls’ capabilities. See *Doe v. Baum*, 903 F.3d 575, 587-88 (6th Cir. 2018). This theory is rarely invoked any longer.

¹⁵³ Compare *Doe v. Miami University*, 882 f.3d. 579, 589 (6th Cir. 2018) (formulaic recitation of different theories) with *Doe v. Univ. of the Sciences*, No. 19-2966 (3rd Cir. May 29, 2020) (facts that raise a plausible inference of sex discrimination); *Doe v. Purdue University*, 928 F.3d 652 (7th Cir. 2019) (same).

3. *Davis and Gebser* (U.S. 1998, 1999)

In 1998 and 1999, the U.S. Supreme Court issued companion opinions in *Gebser v. Lago Vista Independent School District*¹⁵⁴ and *Davis v. Montgomery County School District*.¹⁵⁵ These cases are the seminal cases regarding private rights of action for money damages under Title IX, and to this day, they are not only the underpinning of every deliberate indifference claim brought against colleges and universities, but they are still referenced in nearly *every* brief and court opinion.

Both cases involved students who had been subjected to sexual harassment at school. In *Gebser*, plaintiff, a high school student who engaged in a secretive sexual relationship with one of her teachers that, once discovered, resulted in the teacher's immediate termination, alleged that the District subjected her to sex discrimination by failing to maintain a sexual harassment grievance policy.¹⁵⁶ *Davis* concerned a 5th grade student who was subjected to persistent harassment by one of her peers that remained unremedied for a sustained period of time despite multiple reports to school officials.¹⁵⁷ Expanding on the Court's 1979 opinion in *Cannon*, these companion cases established the standard of liability for "deliberate indifference" claims in complainant-initiated litigation. To be found liable for money damages in a Title IX deliberate indifference claim, a private litigant must prove that an institution:

- (1) had actual knowledge
- (2) of sexual harassment (defined as severe *and* pervasive conduct),
- (3) in an education program or activity,
- (4) that the institution had control over the harasser,
- (5) that the institution had control over the context in which the harassment occurred,
- (6) that the institution exhibited deliberate indifference, that is, it acted in a "clearly unreasonable [manner] in light of the known circumstances", *and*
- (7) that the grievant was deprived access to an education program or activity.

Later courts would go on to refine each of these elements.¹⁵⁸ For example, in 2018, the First Circuit in *Doe v. Brown University*¹⁵⁹ affirmed dismissal of a Title IX matter where Plaintiff Roe, as student at Providence College, never alleged that she participated in or planned to participate in any of Brown's education programs or activities (prong 3). In 2022, the Third and Ninth Circuits in *Hall v. Millersville University*¹⁶⁰ and *Brown v. State of Arizona*¹⁶¹ expanded on the nuances of evaluating when an institution had sufficient control over the harasser and the context in which the harassment occurred (prongs 4 and 5). With these refinements and others, *Davis* and *Gebser* remain the law of the land today.

¹⁵⁴ 524 U.S. 274 (1998).

¹⁵⁵ 526 U.S. 629 (1999).

¹⁵⁶ *Gebser*, 524 U.S. at 278.

¹⁵⁷ *Davis*, 526 U.S. at 633-34.

¹⁵⁸ See, e.g., *Doe v. Brown University*, No. 17-1941 (1st Cir. July 18, 2018) (affirming dismissal because Plaintiff Roe, as student at Providence College, never alleged that she participated in or planned to participate in any of Brown's education programs or activities); *Hall v. Millersville University* (3rd Cir. Jan. 11, 2022) (University exercises sufficient control over stranger who enters residence hall as guest); *Brown v. State of Arizona* (9th Cir. Jan. 25, 2022) (University did not exercise significant control over an off-campus residence).

¹⁵⁹ No. 17-1941 (1st Cir. July 18, 2018).

¹⁶⁰ 3rd Cir. Jan. 11, 2022.

¹⁶¹ 9th Cir. Jan. 25, 2022.

4. Doe v. Columbia University (2nd Circuit 2016)

*Doe v. Columbia University*¹⁶² addresses the pleading standard for demonstrating sex bias in respondent-initiated Title IX claims. Plaintiff Doe brought a Title IX action against Columbia University after he was suspended from the University for an alleged sexual assault. The issue before the court was whether Doe sufficiently pled the “minimal inference of sex bias” necessary to state a Title IX claim. Doe argued that the pleadings supported an inference of sex bias insofar as he alleged that (1) The student body and the press had recently criticized Columbia for its handling of sexual assaults, (2) the University administration was aware of this criticism, and (3) the investigator who handled Doe’s case had suffered personal criticism from the student body.¹⁶³ The court concluded that these allegations were enough to support an inference of sex bias.¹⁶⁴ These types of allegations often serve as a blueprint for plaintiffs as they craft complaints designed to survive dismissal.

5. Doe v. Baum (6th Cir. 2018)

*Doe v. Baum*¹⁶⁵ addressed the contours of constitutional due process in campus sexual misconduct proceedings at public universities. Plaintiff Doe, a student at the University of Michigan, brought due process and Title IX claims against the University after an appeals board reversed investigative findings to conclude that Doe violated the University’s sexual misconduct policy by engaging in sexual activity with an incapacitated student.¹⁶⁶ The appeals board’s decision hinged on a finding that “Roe and her witnesses were ‘more credible’ than Doe and his.”¹⁶⁷ The Sixth Circuit concluded that Doe sufficiently pled that he had been deprived of a constitutionally protected interest in due process.¹⁶⁸ The court held, “[I]f a public university has to choose between competing narratives to resolve a case, the university must give the accused student or his agent an opportunity to cross-examine the accuser and adverse witnesses in the presence of a neutral fact-finder.”¹⁶⁹ In *dicta*, the court further explained that the “back-and-forth of adversarial questioning” was necessary to probe “memory, intelligence, or potential ulterior motives,” that anything short of live questioning in front of a fact finder was insufficient, and that an agent’s representative could conduct cross to guard against emotional trauma.¹⁷⁰

6. Haidak v. University of Massachusetts-Amherst (1st Cir. 2019)

*Haidak v. University of Massachusetts-Amherst*¹⁷¹ also addressed the contours of constitutional due process in campus sexual misconduct proceedings at public universities, but the *Haidak* court stopped short of adopting *Baum*’s requirement of live, direct cross examination, instead requiring only that student disciplinary proceedings afford some meaningful opportunity to test the credibility of the parties and

¹⁶² 831 F.3d 46 (2d Cir. 2016).

¹⁶³ *Id.* at 57058

¹⁶⁴ *Id.* at 59.

¹⁶⁵ 903 F. 3d 575 (6th Cir. 2018).

¹⁶⁶ *Id.* at 580.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 582

¹⁶⁹ *Id.* at 578. Doe also sufficiently pled a Title IX erroneous outcome claim by pleading that the constitutional deprivation cast articulable doubt on the accuracy of the proceedings and that the University acted with bias based on sex. *Id.* at 585-86.

¹⁷⁰ *Id.* at 582-83. Judge Gilman dissented in an opinion that criticized the court’s expansive due process requirements. While Judge Gilman agreed that cross-examination was an important feature of Constitutional due process in cases concerning expulsion from a public institution, he urged the court to “refrain from imposing on all universities a rigid requirement to provide students facing expulsion with an opportunity to have a representative cross-examine adverse witnesses.” *Id.* at 590 (Gilman, J. dissenting).

¹⁷¹ No. 18-1248 (1st Cir. August 6, 2019).

witnesses. Plaintiff Haidak and Jane Roe were in a “tumultuous romantic relationship” that escalated into physical violence that prompted disciplinary charges and Haidak’s eventual expulsion from the University.¹⁷² The University’s hearing procedures provided for an inquisitional model of cross examination, where the fact finder, rather than the parties themselves, bore both the right and the burden of testing witness credibility and unveiling truths.¹⁷³ Plaintiff alleged that the University deprived him of his constitutionally-protected interest in due process by preventing him from directly cross examining his accuser.¹⁷⁴ The First Circuit disagreed, instead finding that “student disciplinary proceedings need not mirror common law trials” and that the University’s inquisitive and iterative model was not “so fundamentally flawed as to create a categorically unacceptable risk of erroneous deprivation [of a constitutionally protected due process interest].”¹⁷⁵ In so holding, the court cautioned, “This is not to say that a university can fairly adjudicate a serious disciplinary charge without any mechanism for confronting the complaining witness and probing his or her account. Rather, we are simply not convinced that the person doing the confronting must be the accused student or that student’s representative.”¹⁷⁶

7. Doe v. Claremont McKenna College (Cal. App. Aug. 8, 2018)

*Doe v. Claremont McKenna College*¹⁷⁷ addressed the question of whether a denied opportunity to confront an accuser at a sexual misconduct proceeding at a private university denied plaintiff of a “fair trial” under California law. Plaintiff filed a petition for a writ of administrative mandate to overturn a hearing board finding that he had sexually assaulted Jane Roe, while they were students at Claremont McKenna College.¹⁷⁸ Jane Roe was not present at the hearing, and thus, Doe had no opportunity to question Roe.¹⁷⁹ Nonetheless, the Board found that “the evidence presented corroborated [Jane’s] allegations more than [John’s].”¹⁸⁰ The standard of review was “whether the [Committee] has proceeded without, or in excess of, jurisdiction; whether there was a fair trial; and whether there was any prejudicial abuse of discretion.”¹⁸¹ The court concluded that Roe’s absence from the hearing deprived Doe of a “fair hearing.”¹⁸² Remanding the case, the court explained, “[T]he school’s obligation in a case turning on the complaining witness’s credibility is to ‘provide a means for the [fact finder] to evaluate an alleged victim’s credibility, not for the accused to physically confront his accuser.’”¹⁸³

¹⁷² *Id.* at 5-13.

¹⁷³ *Id.* at 22.

¹⁷⁴ *Id.* at 21.

¹⁷⁵ *Id.* at 25.

¹⁷⁶ *Id.* at 24.

¹⁷⁷ No. B281722 (Cal. App. 2d. Aug. 8, 2018).

¹⁷⁸ *Id.* at 13.

¹⁷⁹ *Id.* at 11.

¹⁸⁰ *Id.* at 11-12.

¹⁸¹ *Id.* at 15.

¹⁸² *Id.*

¹⁸³ *Id.* at 28-29. *See also Doe v. Univ. of the Sciences* No. 19-2966 at 18 (3d Cir. May 29, 2020) (“[T]he basic elements of federal procedural fairness in a Title IX sexual-misconduct proceeding include a real, meaningful hearing and, when credibility determinations are at issue, the opportunity for cross-examination of witnesses.”); *Boehm v. U. of Pa. School of Veterinary Medicine*, 573 A.2d 572, 582 (Pa. Sup. Ct. Apr. 18, 1990) (detailing elements of a “fair” college and university disciplinary proceeding); *Reardon v. Allegheny College*, 926 A.2d 477, 482 (Sup. Ct. Pa. 2007)(same).

8. Doe v. University of the Sciences (3rd Cir. 2020)

Like *Claremont McKenna*, the Third Circuit in *Doe v. University of the Sciences*¹⁸⁴ agreed that private universities must provide opportunities for live hearings and cross examination, while adding an additional wrinkle based on contract law. The University of the Sciences published a Student Handbook that promised, in part, that student disciplinary proceedings would be conducted in an “adequate, impartial, prompt, fair and equitable” manner.¹⁸⁵ Doe alleged that he was deprived of a contractual promise of basic fairness when he was denied the opportunity to confront his accusers during a hearing where he could cross-examine witnesses.¹⁸⁶ The Third Circuit agreed, allowing plaintiff’s contract claim to proceed based on a holding that “basic fairness in the context of sexual-assault investigations requires that students accused of sexual assault receive [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].”¹⁸⁷

CONCLUSION:

Title IX, as applied to colleges and universities, has evolved significantly from its origins in 1972 to the present day. Regrettably, political polarization, regulatory whiplash, and eroding judicial deference has obscured this civil rights law’s very simple promise—that federally funded educational institutions operate free from sex discrimination. This promise reflects an intention embedded in institutional missions and commitments to access and equity in higher education. While compliance, risk mitigation, and costs have too easily monopolized recent conversations, our leaders must never lose sight of this original promise, nor institutional efforts to achieve it.

This manuscript was last updated on April 20, 2023. Any statutory, regulatory, subregulatory, or judicial activity that took place after this date is not reflected in the manuscript.

¹⁸⁴ No. 19-2966 (3d Cir. May 29, 2020).

¹⁸⁵ *Id.* at 3 (emphasis omitted).

¹⁸⁶ *Id.* at 19.

¹⁸⁷ *Id.* at 19-20. *But see Doe v. Williams* (D. Mass. Sept. 7, 2022) (the College provided Doe with basic fairness through its disciplinary proceedings even though its process provided for neither a live hearing with the possibility of cross-examination of witnesses nor erroneous outcome as a basis for appeal).