

# Robbins Schwartz

## Title IX, The Latest

### Annual Legal Update for Illinois Colleges Virtual Conference

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# Title IX: The Latest

Presented by: Emily P. Bothfeld and Amanda E. Campo  
Annual Legal Update for Illinois Colleges Conference  
September 17, 2021

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## Title IX Regulations



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Although the information contained herein is considered accurate, it is not, nor should it be construed to be legal advice. If you have an individual problem or incident that involves a topic covered in this document, please seek a legal opinion that is based upon the facts of your particular case.

## Title IX Regulations: A History

- On May 6, 2020, the U.S. Department of Education released new Title IX regulations establishing how education programs that receive federal funding must respond to sexual harassment under Title IX.
- Among other changes, the new regulations prescribe a narrower definition of sexual harassment than in previous Title IX guidance, and they require higher education institutions to follow detailed procedures—to include a live hearing with cross-examination—when adjudicating formal Title IX sexual harassment complaints.
- The regulations went into effect on August 14, 2020.

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## Recently Issued Guidance

- Since taking office, President Biden and his Administration have issued key guidance documents interpreting the 2020 regulations and taken action/steps signaling an intent to amend certain aspects of the regulations in the coming months.
  - March 2021 Executive Order
  - April 2021 Letter to Stakeholders
  - June 2021 Title IX Public Hearing
  - July 2021 Question & Answer Document
  - August 2021 Letter to Stakeholders

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March 2021  
Executive Order



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March 2021  
Executive  
Order

- Issued by President Biden on March 8, 2021.
- Sets forth the Administration's policy that "all students . . . be guaranteed an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity."

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## March 2021 Executive Order

- Requires the Secretary of Education, in consultation with the Attorney General, to review all existing regulations, orders, policies, and guidance documents pertaining to Title IX within 100 days of March 8, 2021.
- Suggests that the Secretary may consider “suspending, revising, or rescinding” any regulations, orders, policies or guidance documents that are inconsistent with the Administration’s policy.

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## April 2021 Letter to Stakeholders



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## April 2021 Letter to Stakeholders

- Issued on April 6, 2021.
- Details steps the Department of Education's Office for Civil Rights ("OCR") intends to take to carry out President Biden's Executive Order.
- Provides that OCR will undertake a comprehensive review of the existing Title IX regulations, orders, guidance, policies, and other similar agency actions.

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## April 2021 Letter to Stakeholders

- OCR's review process will include:
  - A public hearing;
  - A Q&A document providing additional clarity about how OCR interprets institutions' obligations under the existing regulations; and
  - An anticipated notice of proposed rulemaking to amend the Title IX regulations.

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June 2021  
Title IX Public  
Hearing



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June 2021  
Public Hearing

- First phase of OCR's review process
- Purpose of hearing = afford the public an opportunity to provide comments on steps OCR can take to:
  1. Ensure that institutions are providing students with educational environments free from discrimination in the form of sexual harassment, which encompasses sexual assault and other forms of sexual violence;
  2. Ensure that institutions have grievance procedures that provide for the fair, prompt, and equitable resolution of reports of sexual harassment and other sex discrimination, cognizant of the sensitive issues that are often involved; and
  3. Address discrimination based on sexual orientation and gender identity in educational environments.

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## June 2021 Public Hearing

- Live commenters included:
  - Survivors of sexual harassment and assault and their families;
  - Persons accused of sexual harassment and assault and their families;
  - Advocacy groups;
  - Professors;
  - Judges;
  - Coaches; and
  - Parents of transgender youth.

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## June 2021 Public Hearing (Highlights)

- Many comments regarding the 2020 regulations focused on the impact of the regulations, both to victims of sexual harassment and to persons accused of alleged sexual harassment.
- Other comments focused on strengthening protections for victims of discrimination and harassment on the basis of sexual orientation and gender identity.
  - A number of commenters advocated for expanding Title IX to protect LGBTQ+ students explicitly.



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## June 2021 Public Hearing (Highlights)

- Many commenters advocated for changes to the 2020 regulations, including:
  - The regulations' definition of sexual harassment;
  - The live hearing and cross-examination requirements for higher education institutions;
  - The applicable evidentiary standard; and
  - The regulations' jurisdictional requirements.

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## June 2021 Public Hearing (Highlights)

### Definition of Sexual Harassment

- Some supported a broader definition than that in the existing regulations, calling the current definition "unduly harmful" for student victims.
- Free speech and disability rights advocates voiced concerns that a broader definition could chill free speech and could disproportionately implicate neurodiverse individuals with difficulty reading social cues and/or understanding appropriate interpersonal space.

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## June 2021 Public Hearing (Highlights)

### Live Hearing and Cross-Examination Requirements

- Some advocated for abolishing the requirements entirely.
- Some suggested modifying the requirements to reduce the risk of re-traumatization.
- Others requested a more formal, court-like proceeding.



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## June 2021 Public Hearing (Highlights)

### Evidentiary Standard

- Some advocated that the burden of proof be "preponderance of the evidence," rather than giving institutions the flexibility to apply either the "preponderance" standard or "clear and convincing evidence" standard.
- Those advocating for maintaining the option to apply the "clear and convincing" standard emphasized that a finding of responsibility in a Title IX proceeding has lifelong consequences.

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## June 2021 Public Hearing (Highlights)

### Jurisdiction

- Some commenters, especially survivors, took issue with the regulations' new, more limited jurisdictional parameters.
- They highlighted concerns that assaults which take place on study abroad programs or during academic conferences may no longer fall within the purview of Title IX.

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## July 2021 Question and Answer Document



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## July 2021 Q&A

- Issued on July 20, 2021
- Describes OCR's interpretation of institutions' responsibilities under the 2020 amendments to the Title IX regulations.
- Reiterates that, so long as OCR's review of the current Title IX regulations is ongoing and until any new regulations go into effect, institutions must continue to comply with the existing regulations.

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## July 2021 Q&A (Highlights)



- Clarifies that the amended regulations prescribe the "minimum steps" an institution must take in response to a report of sexual harassment. (Q2)
- Provides guidance for determining whether sexual harassment "effectively denies a person's right to equal access to [an institution's] education program or activity" under the "unwelcome conduct" category of sexual harassment. (Q8)
- Describes the applicability of the Title IX regulations to alleged sexual harassment that takes place electronically or on an online platform. (Q11 & Q12)
- Clarifies that an institution may receive a report of sexual harassment from anyone, even a person who is not associated with the institution in any way. (Q16)

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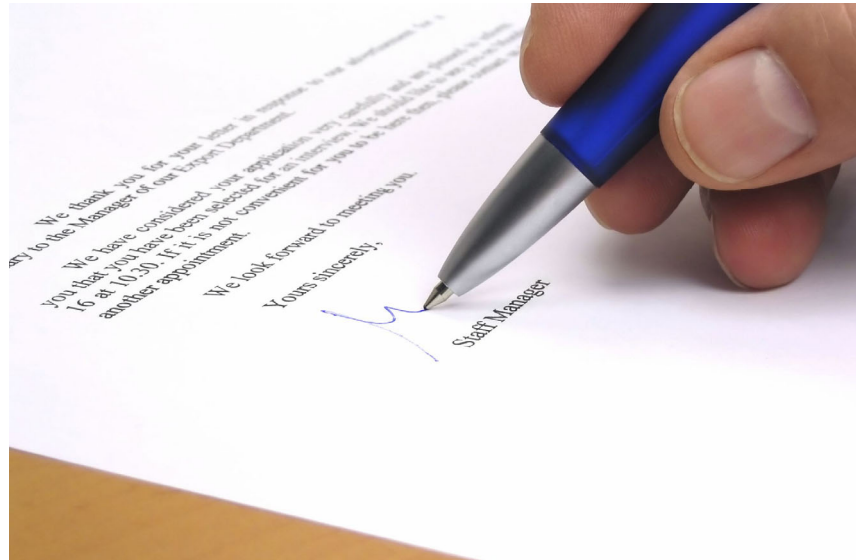
## July 2021 Q&A (Highlights)

- Discusses the scope of an institution’s obligation to respond to allegations of sexual harassment where the only employee with notice of the harassment is the alleged harasser. (Q17)
- Clarifies that an institution is not required to dismiss a formal Title IX sexual harassment complaint if the respondent leaves the institution. (Q27)
- Emphasizes that COVID-19 related disruptions do not relieve an institution of its obligation to provide academic adjustments and other supportive measures to complainants and respondents. (Q34)
- Clarifies that an institution may punish a complainant for filing a false complaint only where the institution finds that the complainant acted in bad faith. (Q63)

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## August 2021 Letter to Stakeholders



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## August 2021 Letter to Stakeholders

- Issued on August 24, 2021, in response to a federal district court decision vacating a provision in the 2020 Title IX regulations.
  - On July 28, 2021, a Massachusetts District Court issued an order finding that the regulations' provision prohibiting a Title IX decision-maker from considering relevant statements of an individual solely because that individual did not submit to cross-examination was arbitrary and capricious. *Victim Rights Law Center, et al. v. Cardona*, 2021 WL 3185743 (D. Mass. July 28, 2021).
  - The Court vacated the provision and remanded it to the Department of Education for further consideration and explanation.
  - On August 10, 2021, the Court issued a further order clarifying that its prior ruling applied nationwide.

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## August 2021 Letter to Stakeholders

- Provides that the Department of Education, in accordance with the Court's order, will not enforce the portion of 34 C.F.R. Section 106.45(b)(6)(i) which prohibits the decision-maker from considering statements that are not subject to cross-examination.
 
- Clarifies that a Title IX decision-maker may now consider any statement made by a party or witness that is otherwise permitted by the regulations, even if that party or witness does not participate in cross-examination at the live hearing.

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## August 2021 Letter to Stakeholders

- **Note:** Institutions may need to revise their Title IX procedures based on the Court's decision and the Department's position.

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## Title IX Case Law Updates



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*Totten v.  
Benedictine  
University,  
2021 WL  
3290926 (N.D.  
Ill. Aug. 2,  
2021).*

- The complainant, a female student, was pursuing a bachelor's in business administration at Benedictine University.
- The respondent, a fellow student who was pursuing the same degree, sexually assaulted the complainant in August 2018.
- One week later, the complainant moved into her randomly assigned apartment on campus in Becker Hall, which was directly above the respondent's apartment.
- The respondent sexually assaulted the complainant again on two separate occasions in her apartment that fall; that winter, the complainant called campus police when the respondent forced himself into her apartment and threw her against the wall.

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*Totten v.  
Benedictine  
University*



- Shortly thereafter, the complainant filed a formal Title IX complaint against the respondent.
- The University issued a Title IX report in January 2019, finding that the respondent sexually assaulted the complainant on all three occasions.
- As a result, the respondent was banned from living on campus for the Spring 2019 semester; however, no further disciplinary action was recommended nor taken.
- The complainant alleged that she requested to take her final exams in an environment "free from harassment" but the University did not provide any reasonable accommodations.
- She further requested that she not be placed in the same classes as the respondent, but alleged that this request was not honored.

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## *Totten v. Benedictine University*

- Around the same time, a court issued an order of protection against the respondent, effective until January 2021.
- Under the terms of the order, the respondent was prohibited from committing further acts of harassment against the complainant, coming within 1000 feet of her or her residence, contacting her, and entering into her family home or place of employment.
- In the Spring 2019 semester, the complainant met with the Dean to explain that, even with the no contact order in place, the respondent had been continuing to harass her. She stated that she feared for her safety and requested to take online courses. The complainant's request was denied, and she subsequently took a leave of absence.

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## *Totten v. Benedictine University*

- The complainant brought a lawsuit against the University alleging, among other claims, deliberate indifference under Title IX.
- The University moved to dismiss the complaint.
- The District Court denied the motion to dismiss the complainant's deliberate indifference claim, holding that the University's failure to enforce the no contact order and failure to provide accommodations that would have allowed the complainant to continue her education in a harassment-free environment, were "clearly unreasonable in light of the known circumstances."



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*Doe v. Loyola  
University  
Chicago, 2021  
WL 2550063  
(N.D. Ill. Jun.  
22, 2021).*

- Loyola University Chicago suspended a respondent for sexually assaulting another student.
- The respondent sued, alleging that the University's disciplinary process was influenced by anti-male bias, which constituted discrimination under Title IX.

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*Doe v. Loyola  
University  
Chicago*

- The University filed a motion to dismiss, and the District Court granted the motion with respect to the respondent's Title IX claims.
- In concluding that the respondent did not plausibly allege that the University suspended him because of his sex, the Court emphasized that:
  - The respondent was afforded opportunities to review investigative materials, submit evidence and proposed cross-examination questions; and
  - None of the respondent's allegations suggested that the Title IX investigator or adjudicators harbored bias toward him or credited the complainant without considering the evidence as a whole.

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## Sexual Orientation and Gender Identity Discrimination Under Title IX



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## June 2021 Notice of Interpretation

- Issued by OCR on June 16, 2021, in response to Supreme Court decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020).
- In *Bostock*, the Court considered a group of consolidated cases brought by former employees alleging that their employers fired them for being homosexual or transgender.
  - Gerald Bostock alleged that Clayton County, Georgia fired him for conduct “unbecoming” a County employee shortly after he began participating in a gay recreational softball league.
  - Donald Zarda alleged that Altitude Express fired him days after he mentioned being gay.
  - Aimee Stephens, who presented as a male when she was hired by R. G. & G. R. Harris Funeral Homes, alleged that she was fired when she informed R. G. that she planned to “live and work full-time as a woman.”
- The Court held that Title VII of the Civil Rights Act of 1964 (“Title VII”) protects employees against discrimination based on sexual orientation and gender identity.

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## June 2021 Notice of Interpretation

- Consistent with the ruling and analysis in *Bostock*, OCR interprets Title IX's prohibition on discrimination "on the basis of sex" to encompass discrimination on the basis of sexual orientation and gender identity.
- As was the case for the Court's Title VII analysis in *Bostock*, this interpretation flows from the statute's "plain terms." See *Bostock*, 140 S. Ct. at 1743, 1748-50.
- Addressing discrimination based on sexual orientation and gender identity thus fits squarely within OCR's responsibility to enforce Title IX's prohibition on sex discrimination.



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## Recent Case: *Meriwether v. Hartop*, 992 F.3d 492 (6th Cir. 2021)

- A professor brought First Amendment free speech and free exercise claims against University officials after he received a written reprimand for violating the University's policy requiring faculty to refer to students by pronouns that reflected their self-asserted gender identity.
- The District Court granted the University's motion to dismiss the professor's First Amendment claims, and the professor appealed.

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Recent Case:  
*Meriwether v.  
Hartop*, 992  
F.3d 492 (6th  
Cir. 2021)

- The 6th Circuit reversed, holding that:
  - The professor's speech related to a matter of public concern and thus was protected by the First Amendment; and
  - The University's application of its gender-identity policy was not neutral because its officials exhibited hostility toward the professor's religious beliefs.
- Although not binding on Illinois institutions, the *Meriwether* decision highlights the difficulty institutions often face in navigating conflicts between faculty's First Amendment rights and students' rights under Title IX and other anti-discrimination and harassment laws.

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Tips and  
Takeaways



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## Tips and Takeaways

- Ensure that your institution's Title IX sexual harassment policy and procedures comply with the August 2020 regulations.
- OCR has made clear that, notwithstanding its review of the existing regulations, the regulations remain in effect and OCR will enforce them.

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## Tips and Takeaways

- Ensure that your institution's Title IX personnel have been appropriately trained.
  - Title IX Coordinator(s)
  - Investigator(s)
  - Hearing Officer(s)
  - Appellate Decision-Maker(s)
  - Informal Resolution Facilitator(s)
- Continue to post training materials on your institution's website.



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## Tips and Takeaways

- Review your institution's Title IX sexual harassment grievance procedure language regarding the implications associated with a party or witness not submitting to cross-examination at the live hearing.
- Consider removing language prohibiting the hearing officer from relying upon statements made by a party or witness who does not submit to cross-examination.

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## Tips and Takeaways

- Respond to reports of alleged harassment based on sexual orientation and gender identity.



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## Tips and Takeaways

- Monitor Department of Education guidance and be on the lookout for proposed amendments to the Title IX regulations.
- No set timeline, but anticipated in May 2022.

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## Questions?



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thank you!

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Emily practices in the area of education law with a focus on student and higher education matters. She counsels school districts and higher education institutions on a variety of issues, including matters related to student discipline, Title IX, free speech, student disability rights, student data privacy and policy development. She has extensive experience representing educational institutions in responding to complaints filed with the U.S. Department of Education's Office for Civil Rights, Illinois State Board of Education, Office of the Illinois Attorney General and Illinois Department of Human Rights. Emily regularly represents school districts and higher education institutions in state and federal court on civil rights and constitutional claims and breach of contract claims.

Prior to joining Robbins Schwartz, Emily represented students with disabilities in special education matters. Emily attended the George Washington University Law School, where she was a member of the George Washington International Law Review and the GW Law Moot Court Board. Prior to attending law school, Emily taught high school mathematics and science in Hangzhou, China.

### RECENT PUBLICATIONS

"Disabled Athlete Can't Support ADA Claims," *Chicago Daily Law Bulletin* (2018)

### RECENT PRESENTATIONS

*Legislative Update: A Review of New (and Proposed) Laws Affecting Illinois Community Colleges' Risk Management Practices*, Illinois Community College Chief Financial Officers Fall Conference (October 2019)

*A Student's "Right" to a College Education: Due Process Rights in Academic and Non-Academic Discipline*, Illinois Community College Chief Student Services Officers' Summer Meeting (June 2019)

*Updates and Recent Developments out of the U.S. Department of Education*, Chicago Bar Association Education Law Committee Spring Seminar (March 2019)

*Legal Hot Topics for Nursing Program Administrators and Faculty*, Illinois Organization of Associate Degree Nursing (March 2019)



### PRACTICE AREAS

Education Law  
Higher Education  
Special Education  
Student Discipline

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J.D., *with honors*, George Washington University Law School

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U.S. Court of Appeals for the Seventh Circuit

U.S. District Court for the Northern District of Illinois

Supreme Court of Illinois

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Illinois Council of School Attorneys

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Amanda practices in labor and employment law, with a focus on traditional labor. She counsels and represents public and private employers in labor relations, employee discipline, and federal and state employment discrimination matters under the Americans with Disabilities Act, Family and Medical Leave Act, Age Discrimination in Employment Act, Illinois Human Rights Act, Title VII, and other anti-discrimination laws. Amanda also counsels employers regarding contract interpretation, grievance arbitrations, and unfair labor practices. She also assists educational institutions with compliance under Title IX and applicable state laws.

During law school, Amanda clerked at a firm representing public employers in labor matters, where she assisted with grievance and interest arbitrations.

### **RECENT PUBLICATIONS**

Author, "Student Political Activism and Its Changes in the Age of Social Media," *Chicago Daily Law Bulletin* (2020)

Co-Authored "Social Media and Public Employers: Do You Need to "Share" a New Policy?," *Clark Baird Smith Newsletter: Ted Clark Legal Corner* (2019)



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