



# Department of Education Holds Long-Anticipated Public Hearings on Title IX Amendments and Issues New Q&A Guidance

July 27, 2021

As discussed in a previous Cullen and Dykman [client alert](#), on March 8, 2021, President Biden issued the [Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity](#) (the “Executive Order”). Among other things, the Executive Order requires the Department of Education (the “DOE”) to periodically review all existing regulations and actions “for consistency with governing law, including Title IX,” and the Executive Order. Moreover, specific instructions were issued requiring a review of the Title IX regulations implemented during the Trump Administration, “[Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance](#),” 85 Fed. Reg. 30026 (May 19, 2020) (the “Amendments”).

As a result, the DOE’s Office for Civil Rights (“OCR”) is in the process of conducting a thorough review of the Amendments. OCR sent out a [public letter](#) to students, educators, and other stakeholders where it sketched its plans for possible revisions to Title IX in light of the new Executive Order and stated its plan to solicit public opinion (the “Letter”). In the Letter, the Assistant Secretary for Civil Rights, Suzanne B. Goldberg, highlighted the importance of taking steps to strengthen the DOE’s “commitment made by Congress to our nation’s students . . . [by prohibiting] sex discrimination in Federally funded education programs and activities.” The Letter also acknowledged that students may experience “multiple forms of discrimination at once, including based on race, disability, and national origin” as well as that “LGBTQ+ students are subject to sexual harassment, including sexual violence, at significant rates.”

As a result, the comprehensive review by OCR will aim to “ensure that schools are providing students with a nondiscriminatory educational environment” and that students “have their legal rights fully met.” OCR plans to utilize the public’s feedback to maximize its pool of resources, in addition to 124,000 written comments already received in connection with the Amendments’ rulemaking process.

During the week of June 7<sup>th</sup>, OCR hosted a series of virtual hearings to gather information and opinion from the public regarding the enforcement of Title IX of the Education Amendments of 1972. Members of the general public were able to attend and give comments regarding several concerns, namely how schools and universities implement grievance procedures, provide fair and prompt resolution of reports of sexual harassment and discrimination, address sexual orientation and gender identity, and preventing discrimination in the form of

sexual harassment in educational settings. A full transcript of the 2021 Title IX Public Hearings can be found [here](#).

## Questions and Answers: A Brief Summary

On July 20, 2021, the DOE released “[Questions and Answers](#)” addressing the Amendments and the 2021 hearings. The Amendments focus on setting forth requirements for institutional *responses* to sexual harassment. However, the DOE has made it clear that institutions should also place emphasis on *preventing* sexual harassment. The following is a brief summary of particularly notable guidance included in the new Questions and Answers and institutions are encouraged to review the Questions and Answers in their entirety.

### ***Where Sexual Harassment Occurs***

The Amendments apply to harassment in educational programs and activities, including school buildings, off-campus buildings controlled by an officially recognized student organization by a postsecondary school, off-campus settings where a school exercised substantial control over the respondent and situations in which the harassment occurred, *as well as remote-learning platforms that are a part of the school’s operations*. Technology that is a part of a school’s operations includes “computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the [school.]” The definition of “education program or activity” in the Amendments does not distinguish between harassment occurring in person versus online. However, even in remote learning platforms, harassment taking place outside of the United States is not covered under the Amendments.

### ***When Harassment Occurred***

The Amendments are not required to be applied retroactively and only apply to sexual harassment that took place on or after August 14, 2020. However, institutions should be mindful of caselaw that holds otherwise, such as [Doe v. RPI](#) in the Northern District of New York.

### ***Formal Complaints***

A Title IX Coordinator may, and in some cases is required to, file a formal complaint on behalf of a complainant who is *not associated with the school in anyway*. For example, a school may be found deliberately indifferent if a Title IX Coordinator does not sign a formal complaint despite having actual knowledge of a pattern of harassment in certain situations that involved a complainant or complainants not associated with the school. Additionally, if the complainant is not “participating in or attempting to participate in the school’s education program or activity,” as is required for that complainant to be eligible under the Amendments to file a formal complaint, a school can respond under its own code of conduct.

### ***When a Party or Witness is Unable to Participate in Title IX Process***

A school can temporarily postpone Title IX proceedings for good cause. *Good cause does not include the COVID-19 pandemic*. Thus, an institution “may not adopt a policy of putting investigations or proceedings on hold due to COVID-19.” A school must inform all parties involved of the postponement and provide fair reason.

### ***Retaliation and Amnesty***

Schools may not punish any party or witness for violating other school policies (e.g. a COVID-19 contact policy) during a reported incident of sexual harassment unless that other policy always imposes the same punishment regardless of circumstances. Otherwise, this will be considered retaliation if the punishment interferes with any Title IX right or privilege. Amnesty policies are encouraged to report instances of sexual harassment.

### **Additional Information**

Pre- and post-secondary institutions can expect further updates on this matter as it becomes available. Cullen and Dykman LLP will continue to provide update alerts to keep schools, colleges, and universities informed on the latest developments concerning Title IX regulations and enforcement.

If you have questions regarding any aspects of higher education law and any implications the new guidance has for your institution, feel free to contact Jennifer A. McLaughlin at (516) 357-3889 or [jmclaughlin@cullenllp.com](mailto:jmclaughlin@cullenllp.com), James G. Ryan at (516) 357-3750 or [jryan@cullenllp.com](mailto:jryan@cullenllp.com), Dina L. Vespia at (516) 357-3726 or [dvespia@cullenllp.com](mailto:dvespia@cullenllp.com), or Jennifer E. Seeba at (516) 296-9173 or [jseeba@cullenllp.com](mailto:jseeba@cullenllp.com).

Thank you to Julie van Westendorp for her assistance with this client alert.

Please note that this is a general overview of the law and no content within this excerpt constitutes legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

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