

***US DEPARTMENT OF EDUCATION'S 2022 PROPOSED
AMENDMENTS TO TITLE IX REGULATIONS: WHAT HIGHER
EDUCATION FACULTY SHOULD KNOW ABOUT POTENTIAL
EXPANSION OF REPORTABLE CLAIMS AND MANDATORY
REPORTING ISSUES***

PNALSB Conference, Seattle, WA, April 15, 2023

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TITLE IX 1972 ORIGIN

Title IX of the Educational Amendments of 1972 (20 USC 1681 et seq.) was signed by President Nixon on June 23, 1972, and provides:

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

TITLE IX 2022 PROPOSED REVISIONS

- On June 23, 2022, in celebration of the 50th anniversary of Title IX, the Department of Education released proposed changes that would be forthcoming as Notice of Proposed Rulemaking in the Federal Register.
- These proposed revisions were intended to reverse changes made in 2020 by Trump-DeVos and align the Title IX regulations with the priorities of the Biden-Harris Administration.
- After receiving over 240,000 comments, the final action regarding these amendments is due to be released next month in May 2023.



SCOPE OF TODAY'S PRESENTATION

First, a word about what we will not be addressing during today's Title IX presentation:

- A. Sports, including transgender and nonbinary student participation – Biden-Harris administration will issue separate rules on Title IX's application to athletics in the future; Department of Education Secretary Miguel Cardona stated in September 2022 he wants “time for people to comment specifically on that.”
- B. Grievance procedure, hearing, and evidentiary issues – Proposed 2022 Title IX regulations include increased adaptability of grievance procedure that would give more choices regarding need for live hearing in higher education, revise cross-examination rules, use “preponderance” instead of “clear and convincing” test.

SCOPE OF TODAY'S PRESENTATION

Instead, our focus will be on two specific areas in 2022 proposed regulations:

- A. Scope of Reportable Claims – Expanding the definition of “sex-based harassment,” and adding language regarding an educational institution’s required response to conduct occurring outside the United States or off-campus, all leading to potential increases in what must be investigated.

- B. Reporting Requirements – Proposed expansion of mandatory reporting requirements for higher education employees and its potential impacts, including concerns raised by some about the possible “chilling effect” it may have on students' willingness to seek campus support services.

OBAMA ADMINISTRATION

A. SCOPE OF REPORTABLE CLAIMS DEFINITION (2011 DEPARTMENT OF EDUCATION “DEAR COLLEAGUE LETTER”)

1. Clarified that Title IX requirements pertaining to “sexual harassment” also apply to “sexual violence.”
2. Clarified that “sexual harassment” creates a “hostile environment.”



OBAMA ADMINISTRATION

B. REPORTING REQUIREMENT FOR HIGHER EDUCATION EMPLOYEES (2011 DEPARTMENT OF EDUCATION “DEAR COLLEAGUE” LETTER)

1. “If a school knows or reasonably should know about student-on-student harassment that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects.”
2. “[...]schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to respond properly.”
3. Off-campus incidents—discusses obligations relating to “student-on-student” sexual harassment.

OBAMA ADMINISTRATION

C. ADDITIONAL GUIDANCE DURING THE OBAMA ADMINISTRATION:

1. Executive Order (July 2014) prohibiting federal contractors from discriminating against “any employee or applicant for employment because of race, color, religion, sex, sexual orientation, gender identity or national origin.”
2. Guidance from Office for Civil Rights (OCR), 2014 expansive view of sexual harassment.
3. “Dear Colleague” letter (Dept of Justice and Dept. of Education, 2016) clarified that Title IX prohibits sex discrimination in educational programs and activities based “on a student’s gender identity, including discrimination based on a student’s transgender status.”

TRUMP-DEVOS REVISIONS

A. SCOPE OF REPORTABLE CLAIMS REVISED (2020)

1. Formally rescinded all the Obama era guidance relating to Title IX.
2. Trump-DeVos 2020 Regulations:
 - a. Reduced scope of behavior prohibited under Title IX to unwelcome sex-based conduct only if it is “so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.”
 - b. Reduced scope of behavior that schools are required to address: no requirement to address a sex-based hostile environment in its education program or activity in the U.S. if the hostile environment resulted from sex-based harassment that occurred outside the school’s education program or activity or outside the U.S.



TRUMP-DEVOS REVISIONS

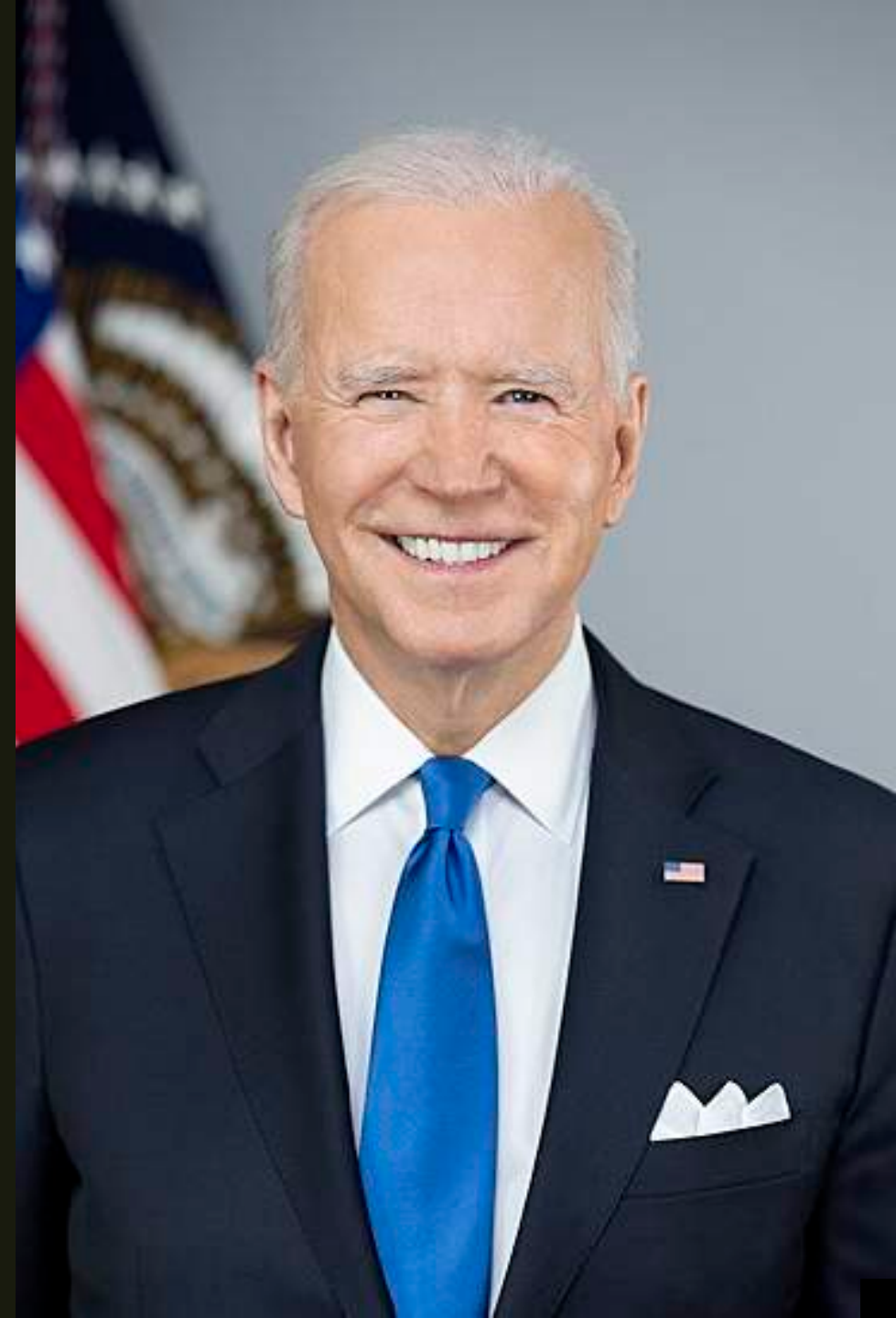
B. REPORTING REQUIREMENT FOR HIGHER EDUCATION EMPLOYEES (2020 CHANGES)

1. Educational institutions required to respond to possible sexual harassment only when they have “actual knowledge” of the harassment.
2. Educational institutions required to respond only in a manner that is “not deliberately indifferent.”

BIDEN-HARRIS PROPOSED RULES

A. SCOPE OF REPORTABLE CLAIMS (2022 PROPOSED)

1. Expansion to “sex-based harassment”: Not limited to sexual harassment, including sex stereotypes, and:
2. Application to LGBT+ community: Extension of Title IX protections for sex discrimination based on sexual orientation and gender identity, consistent with US Supreme Court’s Title XII ruling in Bostock.
3. Addition of pregnancy or related condition: Explicitly specifies “sex-based discrimination” to include students who are pregnant or have a pregnancy related condition.



BIDEN-HARRIS PROPOSED RULES

A. SCOPE OF REPORTABLE CLAIMS (2022 PROPOSED)

4. Addressing off-campus/outside the United States conduct: Proposed regulation would require educational institutions to address sex - based harassment occurring outside their educational program or outside the United States.

* Question: Full extent to which an educational institution must address sex-based misconduct outside the U.S, off-campus, and outside the education program or activity based on new "contributing" language?



BIDEN-HARRIS PROPOSED RULES

B. REPORTING REQUIREMENT FOR HIGHER EDUCATION EMPLOYEES (2022 PROPOSED)

1. Mandatory Notification Requirements: Would add language requiring "any employee who is not a confidential employee and who has ***administrative leadership responsibility, teaching, or advising*** [...] to notify the Title IX Coordinator when the employee has information about a ***student*** being subjected to conduct that may constitute sex discrimination under Title IX."
2. Confidential Employee Requirements: Obligated to explain their confidential status and provide that person with Title IX Coordinator contact information.
3. Other Notification Requirements: Employees not falling in above categories may either notify the Title IX Coordinator ***or*** provide Title IX Coordinator contact information and how to report sex discrimination under Title IX.

BIDEN-HARRIS PROPOSED RULES

B. REPORTING REQUIREMENT FOR HIGHER EDUCATION EMPLOYEES (2022 PROPOSED)

4. Potential concerns raised during public comment period: Some have voiced concerns about the proposed rules expanding mandatory reporting requirements to more college employees beyond employees with “actual knowledge,” believing it is a well-meaning but potentially concerning over-correction that may have a “chilling effect.”