



**HUSCH BLACKWELL**



**SAINT MICHAEL'S**  
**COLLEGE** FOUNDED  
1904



# **Annual Title IX Training**



# Regulatory Update

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- On June 23, 2022, the Department of Education released its Title IX Notice of Proposed Rulemaking
- 700-plus pages, responds to changes in Title IX regulations imposed in August 2020
- 60 days for public comments
- **When effective?**



A close-up photograph of a street sign. The sign is white with a black border and is mounted on a white post. The text 'MEMORY LANE' is written in large, black, sans-serif capital letters. The sign shows signs of wear, including rust and discoloration, particularly along the bottom edge. The background is a blurred green hedge and a blue sky with some foliage.

**MEMORY LANE**



# Obama Administration OCR

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- Issued 2011 Dear Colleague Letter
- Ramped up Title IX program compliance reviews
- Created “list of shame”
- Was not deferential
- Disciplined students begin aggressively challenging institutions -- backlash



## *DeVos's Rules Bolster Rights of Students Accused of Sexual Misconduct*

Education Secretary Betsy DeVos released final regulations for schools dealing with sexual misconduct, giving them the force of law for the first time and bolstering due-process rights.



The rules preserve Education Secretary Betsy DeVos's broad goals in overhauling Title IX. Anna  
Moneymaker/The New York Times

EDUCATION

# Biden's Title IX reforms would roll back Trump-era rules, expand victim protections

Updated June 23, 2022 · 2:40 PM ET ⓘ

DUSTIN JONES 





# Overview of Proposed Regulations

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1. Mix of provisions from the 2011 OCR Dear Colleague Letter, the 2020 Title IX regulations (currently in place) and some new provisions.
2. Not a return to 2011 – attempt to balance complainants' rights and the rights of those who are accused.
3. Modest return to long history of institutional discretion with process (from elimination of virtually all administrative discretion to discretion with guardrails)
4. With discretion comes challenging choices

# Coordinator Responsibility Under Proposed Regs

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“A recipient must:

(1) Require its Title IX Coordinator to monitor the recipient’s education program or activity for **barriers to reporting information** about conduct that may constitute sex discrimination under Title IX; and

(2) Take steps reasonably calculated to address such barriers.”

**Be sure to document your efforts in this regard.**



# Scope of Proposed Regs Coverage

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- Applies to all claims of sex discrimination
- Explicitly includes as forms of sex discrimination under Title IX: discrimination based on pregnancy, **sexual orientation, gender identity**, sex stereotypes, or sex characteristics (\*this will trigger a challenge)
- Proposed regulations' explicit definition of discrimination on the basis of gender identity: “different treatment or separation on the basis of sex in a way that would cause more than de minimis harm, including by adopting a policy or engaging in a practice that prevents a person from participating in an education program or activity consistent with their gender identity.”
- **Athletics: Stay tuned . . .**

# Hostile Environment

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- Subtly modifies the definition of hostile environment sexual harassment to align with Title VII
- Unwelcome sex-based conduct that is sufficiently severe or pervasive, that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from an education program or activity.
- Problematic: No guidance on potential tension between definition and institutional free speech obligations.

# Retaliation: A Broad Definition

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“Retaliation means **intimidation, threats, coercion, or discrimination** against any person **by a student**, employee, person authorized by the recipient to provide aid, benefit, or service under the recipient’s education program or activity, or recipient for the purpose of interfering with any right or privilege secured by Title IX . . . or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part . . . .”

# Retaliation

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- “A recipient must prohibit retaliation in its education program or activity. **When a recipient receives information about conduct that may constitute retaliation,** the recipient is obligated to comply with § 106.44. A recipient must initiate its grievance procedures upon receiving a complaint alleging retaliation under § 106.45.”
- “Prohibited retaliation includes but is not limited to:
  - a. Initiating a disciplinary process against a person for a code of conduct violation that does not involve sex discrimination but arises out of the same facts and circumstances as a complaint or information reported about possible sex discrimination, for the purpose of interfering with the exercise of any right or privilege secured by Title IX or this part; or
  - b. **Peer retaliation.”**

# Question 1

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- What are examples of peer retaliation?
- How will institution assess?

# Jurisdictional Scope

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- Harassment occurring outside of an educational program or activity can nevertheless violate Title IX if such harassment contributes to a hostile environment within an educational program or activity.
- Conduct occurring within an institution's education program and activity includes conduct that occurs off-campus when the respondent represents the institution or is otherwise engaged in conduct under the institution's "disciplinary authority."
- Net effect: End of bifurcated processes?

# New Broad Mandatory Reporting Requirements

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- “Any employee who is not a confidential employee **and who has authority to institute corrective measures on behalf of the recipient** to notify the Title IX Coordinator when the employee **has information about conduct that may constitute sex discrimination** under Title IX”
- “Any employee who is not a confidential employee **and who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity** 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”

# New Mandatory Reporting Requirements

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- “Any employee who is not a confidential employee and who has responsibility for administrative leadership, teaching, or advising in the recipient’s education program or activity and has information about an **employee** being subjected to conduct that may constitute sex discrimination under Title IX to either:
  - Notify the Title IX Coordinator when the employee has information about an employee being subjected to conduct that may constitute sex discrimination under Title IX; or
  - Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with the information”



# New Mandatory Reporting Requirements

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“All other employees who are not confidential employees, if any, to either:

- Notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX; or
- Provide the contact information of the Title IX Coordinator and information about how to report sex discrimination to any person who provides the employee with information about conduct that may constitute sex discrimination under Title IX.”

# New(ish) Mandatory Training

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**“All employees** must be trained on:

- i. The recipient’s obligation to address sex discrimination in its education program or activity;
- ii. The scope of conduct that constitutes sex discrimination under this part, including the definition of sex-based harassment; and
- iii. All applicable notification and information requirements under §§ 106.40(b)(2) and 106.44.”

# New(ish) Mandatory Training

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**“all investigators, decisionmakers, and other persons who are responsible for implementing the recipient’s grievance procedures or have the authority to modify or terminate supportive measures under § 106.44(g)(4) must be trained on the following topics to the extent related to their responsibilities:**

- i. The recipient’s obligations under § 106.44\*;
- ii. The recipient’s grievance procedures under § 106.45, and if applicable § 106.46;
- iii. How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias; and
- iv. The meaning and application of the term relevant in relation to questions and evidence, and the types of evidence that are impermissible regardless of relevance under §106.45, and if applicable § 106.46.”

# New(ish) Mandatory Training

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- “**In addition to the training requirements** in paragraph (d)(1) of this section, **all facilitators of an informal resolution process** under §106.44(k) must be trained on the rules and practices associated with the recipient’s informal resolution process and on how to serve impartially, including by avoiding conflicts of interest and bias.”
- “In addition to the training requirements in paragraphs (d)(1)-(3) of this section, **the Title IX Coordinator and any designees** under paragraph (a) of this section must be trained on their specific responsibilities under paragraph (a) of this section, § 106.40(b)(3), § 106.44(f), § 106.44(g), the recipient’s recordkeeping system and the requirements of paragraph (f) of this section, and any other training necessary to coordinate the recipient’s compliance with Title IX.”

# Recordkeeping

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A recipient must maintain for a period **of at least seven years**:

1. For each complaint of sex discrimination, records documenting the informal resolution process under § 106.44(k) or the grievance procedures under § 106.45, and if applicable § 106.46, and the resulting outcome.
2. For each incident of conduct that may constitute sex discrimination under Title IX of which the Title IX Coordinator was notified, records documenting the actions the recipient took to meet its obligations under § 106.44.
3. All materials used to provide training under paragraph (d) of this section. A recipient must make these training materials publicly available on its website.
4. All records documenting the actions the recipient took to meet its obligations under §§ 106.40 and 106.57.

# Pregnancy

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- “A recipient must not discriminate in its education program or activity against any student **based on the student’s current, potential, or past pregnancy or related conditions**. A recipient may permit a student based on pregnancy or related conditions to participate voluntarily in a separate portion of its education program or activity provided the recipient ensures that the separate portion is comparable to that offered to students who are not pregnant and do not have related conditions.”
- **Another quasi-reporting obligation:** “A recipient must ensure that **when any employee** is informed of a student’s pregnancy or related conditions by the student or a person who has a legal right to act on behalf of the student, the employee promptly informs that person of how the person may notify the Title IX Coordinator of the student’s pregnancy or related conditions for assistance and provides contact information for the Title IX Coordinator, unless the employee reasonably believes the Title IX Coordinator has already been notified.”

# More on Pregnancy

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Once a student notifies the Title IX Coordinator of the student's pregnancy or related conditions, the Title IX Coordinator must promptly:

- (i) Inform the student, and if applicable the person who notified the Title IX Coordinator, of the recipient's obligations to:
  - (A) Prohibit sex discrimination under this part, including sex-based harassment;
  - (B) Provide the student with the option of reasonable modifications to the recipient's policies, practices, or procedures because of pregnancy or related conditions, under paragraphs (b)(3)(ii) and (b)(4) of this section;
  - (C) Allow access, on a voluntary basis, to any separate and comparable portion of the recipient's education program or activity under paragraph (b)(1) of this section;
  - (D) Allow a voluntary leave of absence under paragraph (b)(3)(iii) of this section; and
  - (E) Ensure the availability of lactation space under paragraph (b)(3)(iv) of this section.

# More on Pregnancy

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- **Allow the student a voluntary leave of absence** from the recipient's education program or activity to cover, **at minimum**, the period of time deemed medically necessary by the student's physician or other licensed healthcare provider. To the extent that a recipient maintains a leave policy for students that allows a greater period of time than the medically necessary period, the recipient must permit the student to take leave under that policy instead if the student so chooses.
- Upon the student's return to the recipient's education program or activity, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the leave began.
- Ensure the availability of a lactation space, **which must be a space other than a bathroom**, that is clean, shielded from view, free from intrusion from others, and may be used by a student for expressing breast milk or breastfeeding as needed.



# Grievance Procedures Overview

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1. Proposed rules would allow educational institutions to use the “single investigator/decisionmaker” model again in many cases. **But should you?**
2. The current Title IX rules require the decisionmaker to be someone other than the investigator and Title IX Coordinator. The proposed rules would jettison that requirement, allowing the decisionmaker to be Title IX Coordinator, the investigator, or all three roles. **But should you?**
3. Another big change relates to hearings. The current rules require higher education institutions to have a hearing with live cross-examination by parties’ advisors for allegations of sexual harassment. The proposed rules would allow colleges and universities to decide whether to offer a hearing unless the law in their jurisdiction requires one. A college or university that does not provide a live hearing must require its decisionmaker to question the parties in one-on-one meetings instead of having live cross-examination at a hearing. **Should you retain hearings?**

# Grievance Procedures Overview

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4. Even if a higher education institution offers a hearing, it is not required to allow live cross-examination by advisors. Instead, institutions can have the decisionmaker question the parties and witnesses at the hearing. And because hearings and live-cross examinations by advisors are not required, higher education institutions would no longer be required to provide an advisor to every party, as mandated by the current rules. Only if a higher education institution chose to provide a hearing and allow cross-examination by advisors would it be required to provide a no-cost advisor to any party that does not have one. **But should you maintain live cross examination from advisors anyway?**

# Grievance Procedures Overview

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5. Finally, whereas the 2020 Title IX rules require appeals to be offered for several reasons, the proposed rules require appeals only for dismissals in higher education non-sex-based harassment cases, and with no guidance for the bases for appeals. For sex-based harassment in postsecondary situations, appeals are required for dismissals and determinations that sex-discrimination occurred, but not for a determination that sex-discrimination did not occur. Like the current rules, the decisionmaker in any appeal must continue to be different from the initial decisionmaker.

Practical  
**TIPS** 

# Power of 1<sup>st</sup> Impressions – Thin Slicing

- People quickly reach “macro” conclusions (pleasant, kind, hostile, creepy, competent) based on “micro” traits (smiling, eye contact, open-handed gestures, fidgeting, stiff posture, facing another direction)
- What is macro impression we are trying to communicate and what are nonverbal micro cues that can get us there?

## Acting on impulse

Ever felt that people are a bit quick to judge? That's because we are. Research shows we make up our minds about someone in a matter of seconds - and what's more, we're surprisingly good at it. Rosie Ifould explores the consequences of our snap decision-making



📷 Finding out you share the same name can create a sense of affection Photograph: Guardian

# Working with Reluctant Witnesses

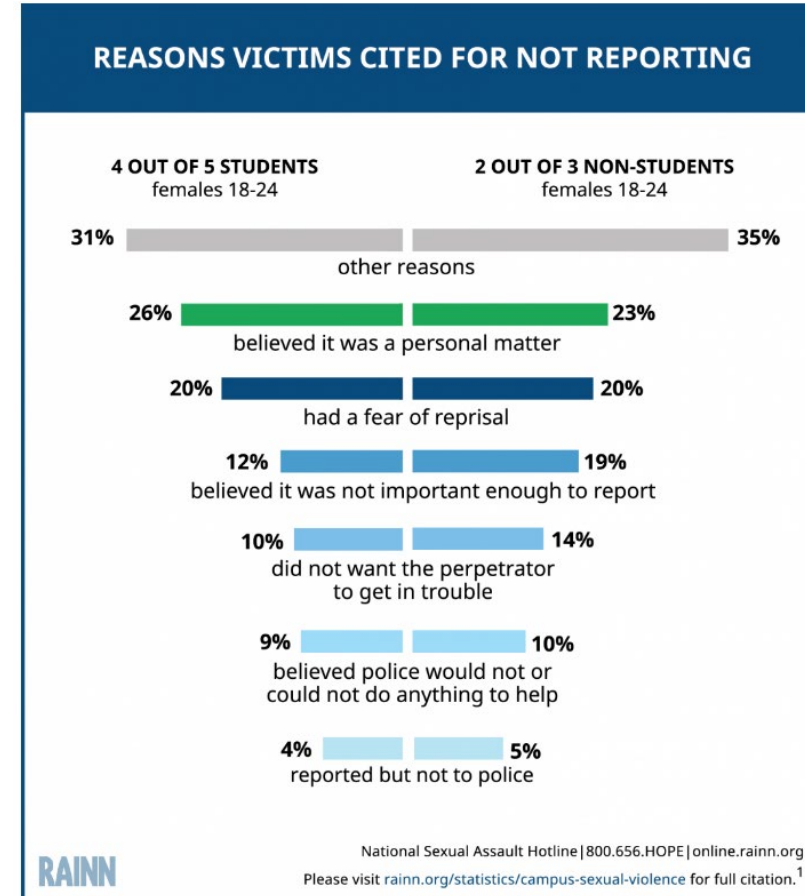
- There will be cases where complainants are not comfortable with proceeding
  - Especially true in dating violence and stalking cases
  - Same is true for witnesses
1. Identify concerns and be realistic about whether we can ameliorate them
  2. Give space and time
  3. Are informal means appropriate for resolution?
  4. If confidentiality wants to be maintained, assess and **document** whether you can honor request
  5. For witnesses, is discipline an option?

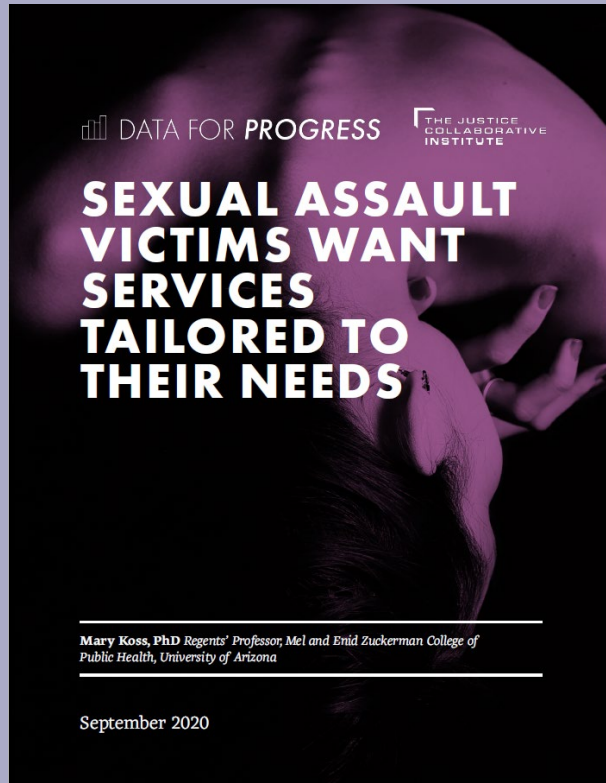


# Title IX: The Need For More Options

**Traditional investigative/adjudicative processes can often be incompatible with needs of victims/survivors:**

- Long and intrusive investigation and decision process
- Potential for re-traumatization in a variety of different forms
- Confrontation and Cross-examination
- Reluctance to expose offender to severe disciplinary sanctions
- Concerns about confidentiality, maintaining personal and social relationships, etc.





- “By offering victim-centered methods of accountability, like restorative justice, communities can both decrease reliance on policing and create a system where victims’ voices are placed center stage, where they can feel comfortable asking for what they need without fear of negative repercussions.”
- “Most victims, if asked, want a process that both prevents future harms and meets their needs, such as retaining control and protecting themselves from more trauma.”



HONG. JENNIFER DUKE. BOITUMELO MCCALLUM. DEMETRIA BRACEY. CHAKA BALDWIN. GENEVIEVE COMEAU. ALYSSIA WILEY. JENNIFER FORETICH. TAMARA SONYA WILLIAMS. ANARAE SCHUNK. RACHEL KATE JOINER. ROBIN EHLMAN. ALLISON MYRICK. JANA MACKEY. SHAO TONG. MARSY NICHOLAS. TYNESHA STEWART. SAMANTHA MACQUILLIAM. TINA CROUCHER. REBECCA ELDEMIRE. HAILEY NICHOLLS. ALINA SHEYKHET. MICHELLE DANIELLE MIELECKI. SHAKENA "AMY" VARNELL. ANDREA O'DONNELL. LAUREN MCCLUSKEY. MENGCHEN HUANG. EMILY RACHEL SILVERSTEIN.

## In Plain Sight

The killing of a student, one in a growing list of victims, opened her university's eyes to the unseen danger of intimate-partner violence.

By EMMA PETTIT

HEATHER CAMPBELL. EMMALEE FERGUSON. DANIELLE HAGBERY. CAITLIN MCGUIRE. DANIELLE LATIF. KATHLEEN ROSKOT. AHYANNA BAKER-GRIFFIN. ROSEMARIE REILLY. CINDY NANNAY. CHINA BARBER. SARA LAMONT. MICHEL DAVID. MACKENZIE MADDEN. ROSA SPEAGLE. SAVANNAH MCNEALY. KRISTY FLOWERS. CLARE ORTON. JENNIFER LYNN ROQUETA. SARAH HAWLEY. CHALALAI CHAIHIRUNKARN. DANNETTE WILLORY. MORIAH PIERCE. LAUREL R. CHASMAR. SUSAN CLEMENTS. KATY STRAALSUND. ASIA ADAMS. TIANA NOTICE. AIMEE GIRO. LACROY MCQUEEN. LINSI LIGHT. IRIS ACOSTA. JOSSELYN BISHOP. OLIVIA GREENLEE. AGATHA HALL. SALEHA



# IPV: Big Picture Takeaways

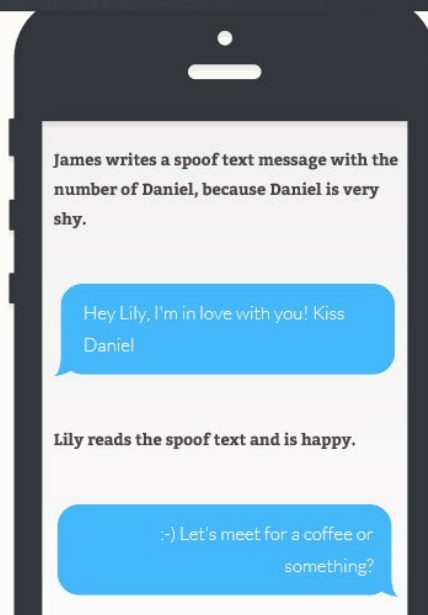
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1. Involve campus or external experts in IPV cases (experts **trained** to recognize the full array of domestic-violence signifiers).
2. Significance of **face-to-face meeting**.
3. Resources for students.
4. **Importance of coordinated, working institutional relationship.**
5. Report to **BIT**.
6. Lethality Assessment

# SPOOF TEXT MESSAGES

FALSIFY SENDER NUMBERS OF  
TEXTS ANONYM AND EASY!

GET STARTED »



After the no-contact order was imposed, Doe deleted Roe’s contact – including the “hundreds of text messages that they had sent to one another,” Simon wrote:

Jane took a different tack. She decided to retain all of the text messages, and candidly this gave her the upper hand because it enabled her to control what texts would be produced and considered in the administrative process. ...

Jane ... provided [investigator Lynn] Kalamaros with some, but not all, of the text exchanges between the two. The ones she shared with Kalamaros placed John in a very bad light and without context. Kalamaros, for example, had no idea that Jane had invited John to Champaign two weeks earlier, that they were having sleepovers and meeting up for “naps,” or that Jane expressed her love for John in no uncertain terms.

# Some Thoughts on Text Messages

1. Can be powerful evidence in these cases, but beware.
2. Be skeptical of print outs – **ask to see originals for full context**
3. **Corroborate with opposing party**
4. Request access or full context
5. Check contact information
6. Is there any process where complete messages can be provided via subpoena?

# Credibility: 7 Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Have there been similar complaints against the respondent? \*\*\*
7. Do any of the witnesses have a motivation to lie, exaggerate or distort information?