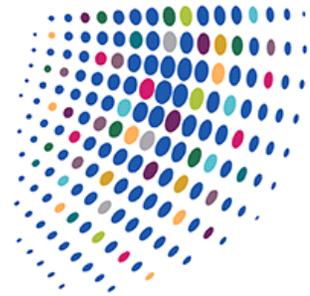


# Alerts & Publications



## Biden Executive Order on Title IX: Where We've Been and Where We're Going

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Yesterday, President Biden signed an Executive Order—*Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*—that directs the Department of Education to review the Title IX regulations issued under the Trump Administration and any other agency actions taken pursuant to those regulations by June 16, 2021. The Executive Order specifies that the review of these materials shall be “for consistency with governing law, including Title IX, and with the policy” announced in the Executive Order that “all students should 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.” The Executive Order signals that new guidance in this area is likely forthcoming and also directs the Secretary of Education to consider suspending, revising, or rescinding the existing Title IX regulations—following any necessary notice and comment process.

### Where We've Been – 2011 Dear Colleague Letter to 2020 Title IX Regulations

Nearly ten years ago, then-Vice President Biden announced broad new federal guidelines for how schools should handle students' reports of sexual harassment (including sexual violence).<sup>1</sup> The centerpiece of Biden's announcement was a 20-page letter released by the US Department of Education's Office for Civil Rights (“OCR”), frequently referred to as the “Dear Colleague Letter,” which specified how schools should respond to reports of sexual harassment to ensure compliance with Title IX.<sup>2</sup> In the years that followed the release of the Dear Colleague Letter, respondent-plaintiffs turned to the courts to challenge Title IX proceedings developed under the OCR guidance as inequitable and biased against respondents and divorced from due process principles.<sup>3</sup>

In 2017, former Education Secretary Betsy DeVos rescinded the 2011 guidance.<sup>4</sup> In its wake, on May 6, 2020, the OCR under the Trump Administration issued [regulations](#) carrying the force of law regarding how educational institutions that receive federal funding must address reports of sexual misconduct.<sup>5</sup> The regulations received significant criticism, and court challenges, for swinging the pendulum too far in favor of respondents at the expense of complainants. In particular, the regulations' critics oppose (i) the

requirement that colleges and universities permit each party's advisor to conduct direct cross-examination at a live hearing, (ii) the narrowed definition of which conduct constitutes sexual harassment, and (iii) the limited extent to which the regulations cover off-campus conduct.

## Where We're Going – State Action and Title IX Under the Biden Administration

Although the exact nature of the Biden Administration's forthcoming changes is not yet known, some states are already previewing what it might look like to restore and update the Dear Colleague Letter for the new decade. For example, in response to the Trump Administration's Title IX regulations, in June 2020, a coalition of 18 state attorneys general (including from California and Massachusetts) filed lawsuits challenging the new Title IX regulations.

California and Massachusetts went a step further and passed state laws that impose additional obligations regarding the processes that schools that receive state funding must have in place to address sexual misconduct in their programs and activities.<sup>6</sup>

- Among other things, both state laws define “sexual harassment” more broadly than the Title IX regulations. Relatedly, under these state laws, schools may be required to address sexual harassment that occurs outside the United States and regardless of whether the school exercised substantial control over the respondent or the building in which the conduct occurred.
- The laws also permit schools to decide whether to resolve complaints through a live hearing—giving schools' flexibility to decide between hearings and the single investigator model. This flexibility is currently limited, however, to matters that fall outside the scope of the Title IX regulations because the regulations require a live hearing.
- The California law also reintroduces the “responsible employee” mandatory reporter standard that was first introduced in the Dear Colleague Letter and then abandoned under the Trump Administration. This standard expands the scope of employees on college campuses who are required to report sexual misconduct.
- The California law *prohibits* direct cross-examination by parties *or their advisors*—going even further than the Dear Colleague Letter, which only “strongly discouraged” schools from permitting parties personally to question or cross-examination each other during a hearing. Again, this prohibition is currently limited to matters that fall outside the scope of the Title IX regulations because the regulations require that each party's advisor be permitted to conduct direct cross-examination.

Yesterday's Executive Order signals more changes to come regarding how educational institutions across the country will be required to address sexual misconduct affecting their programs and activities. The Biden campaign had promised that it would "restore the Title IX guidance for colleges, including the 2011 Dear Colleague Letter," and indicated that any "backstepping on Title IX is unacceptable."<sup>7</sup> This Executive Order is seemingly the first step in fulfilling that promise.

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<sup>1</sup> Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence, <https://www.ed.gov/news/press-releases/vice-president-biden-announces-new-administration-effort-help-nations-schools-ad>.

<sup>2</sup> Letter from Russlynn Ali, Assistant Secretary for Civil Rights, US Dep't of Educ., Office for Civil Rights 15 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>3</sup> See, e.g., *Doe v. Univ. of S. California*, 246 Cal. App. 4th 221, 240, 248 (2016).

<sup>4</sup> Department of Education Issues New Interim Guidance on Campus Sexual Misconduct, <https://www.ed.gov/news/press-releases/department-education-issues-new-interim-guidance-campus-sexual-misconduct>.

<sup>5</sup> Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, Final Rule (May 19, 2020), <https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf>.

<sup>6</sup> See Cal. Educ. Code §§ 66262.5 & 66281.8 (effective Jan. 1, 2022); M.G.L. c. 6, §§ 168D & 168E (effective Aug. 1, 2020).

<sup>7</sup> The Biden Campaign to End Violence Against Women, <https://joebiden.com/vawa/>.

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