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# TITLE IX UPDATES

*Presented by:*

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*Date:*

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DIFFERENT  
BY DESIGN

# Agenda

- Biden Administration and the Department of Education
- Update on Regulations
- Recent Litigation





# Biden Administration and the Department of Education

# President Biden

- As Vice President under President Obama, Biden led the administration's campaign against campus sexual assault.
- As Senator, author of the Violence Against Women Act.
- Campaign platform included strengthening Title IX enforcement and expanding options and support for survivors.



# Department of Education

- Secretary of Education – Dr. Miguel Cardona
- Former Connecticut education commissioner
- Background in elementary and secondary education
- Commitment to public education



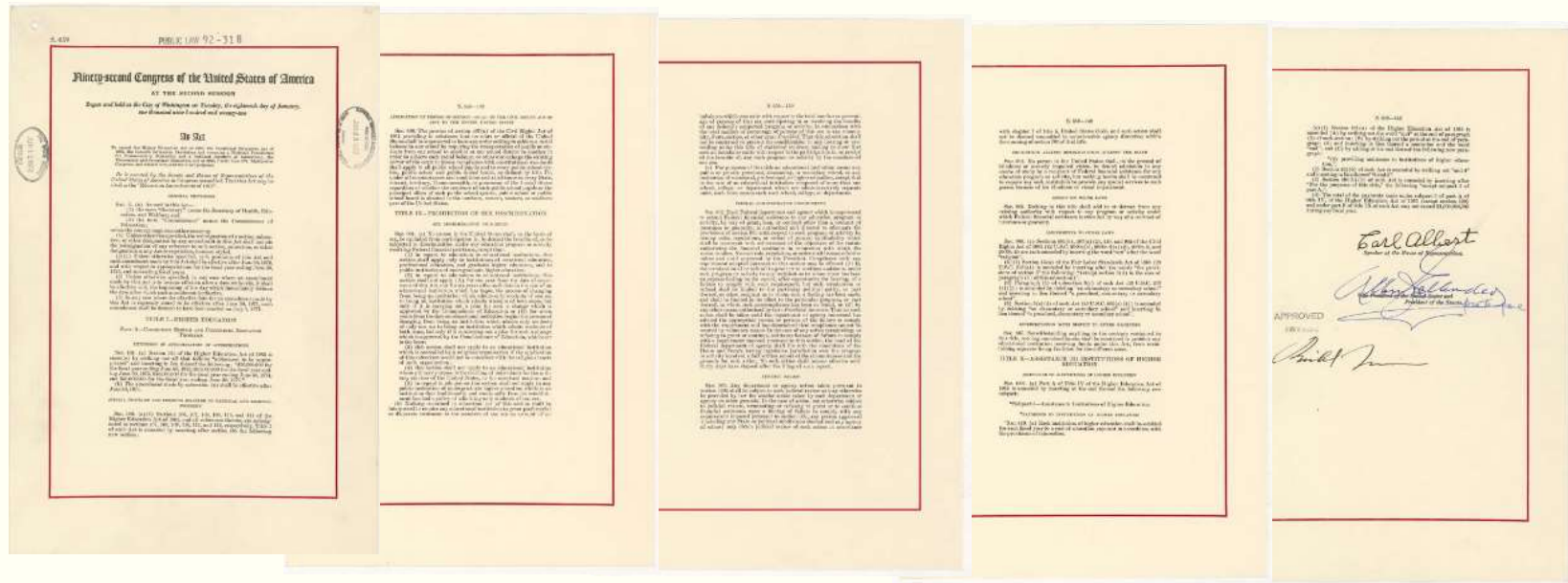
# Department of Education

- Catherine Lhamon nominated to serve as assistant secretary for civil rights.
- Previously held this position in the Obama administration from 2013-2017.



# Department of Education

- Oversaw increased enforcement of Title IX against colleges and carried out significant number of investigations.
- Lhamon likely to play major role in reworking the Title IX regulations and guidance.
- Critics claim government overreach in enforcement under Lhamon.
- Victim's rights advocacy organizations support her nomination.



# Updates on Regulations



# Title IX

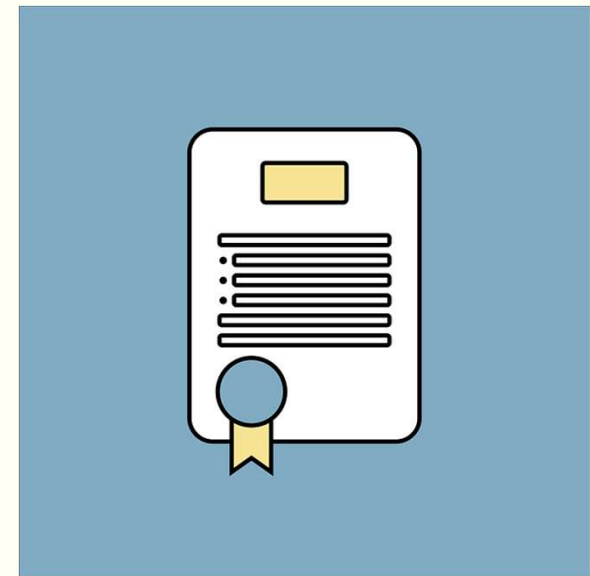
- The Title IX Regulations that went into effect on August 14, 2020 are still in effect.
- It is likely that they will be changed by the Biden administration.
- Biden campaign vowed to “immediately” put an end to the 2020 Title IX Regulations and restore the 2011 Dear Colleague Letter guidance.
- Because these are regulations, they cannot simply be revoked by executive action.

# Regulation v. Guidance

- The 2020 Title IX regulations went through the formal rulemaking process, where a rule is proposed, there is a comment period, and then a final regulation is released.
- In order to undo a regulation, the Department of Education must go through the rulemaking process again.
- The 2011 Dear Colleague Letter was not a regulation – it was only guidance from the Department.
- Guidance does not go through the notice and comment process and can be revoked through executive action.

# Executive Order 14021

- Signed by President Biden on March 8, 2021
- Policy statement that all students should be guaranteed an educational environment free from discrimination on the basis of sex, including sexual harassment, sexual assault, and discrimination on the basis of sexual orientation or gender identity.



# Executive Order 14021

- Within 100 days, Department must review all regulations, orders, and guidance that are inconsistent with the policy, including the Title IX regulations released in 2020.
- Department should review existing guidance on the regulations and issue new guidance as needed.
- Department should consider undertaking rulemaking process.
- Consider additional enforcement actions to enforce policy.

# New Regulations?

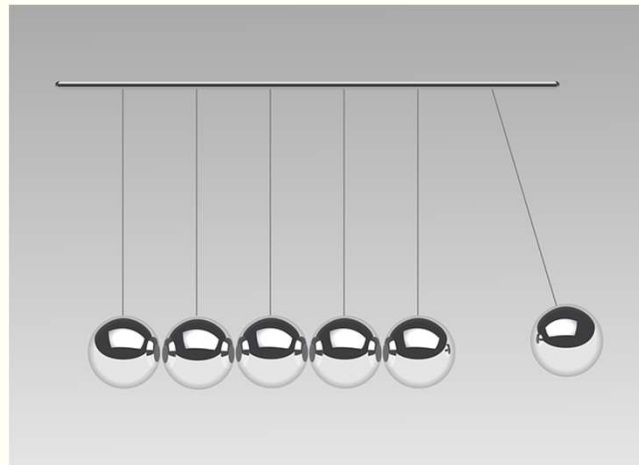
- Two potential paths forward:
  - Immediate repeal of 2020 regulations through rulemaking process and later implementation of new regulations
  - Repeal and replacement with new regulations at the same time
- Both options will take a significant amount of time, likely 2-3 years

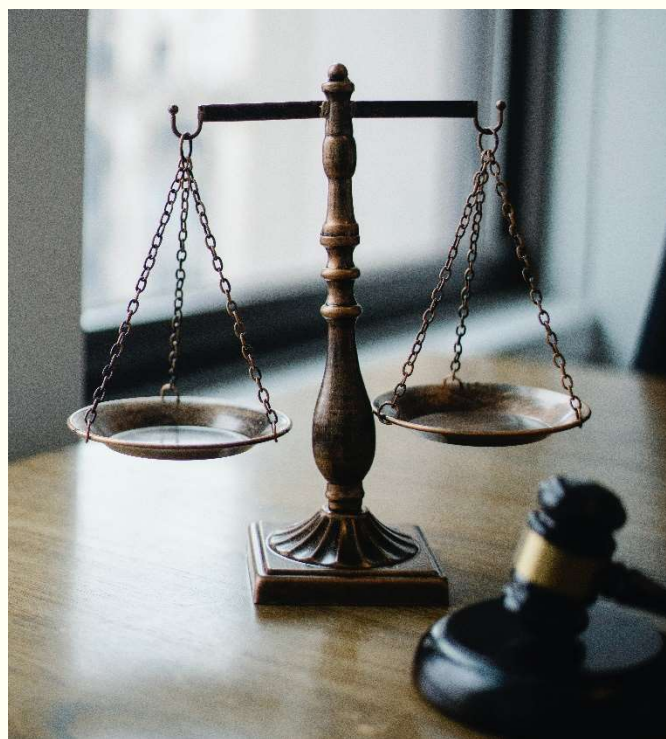
# Current Status - Public Hearings

- Department of Education's Office for Civil Rights (OCR) is holding virtual public hearings on improving Title IX enforcement this week.
- Public may comment on steps the Department can take to ensure education is free of discrimination, including sexual harassment and sexual assault.
- Public may also comment on how the Department can ensure grievance procedures are fair and equitable.
- Also seeking comment on discrimination on the bases of sexual orientation and gender identity.

# What does the future hold?

- Will we continue to see the pendulum swing every time there is a change in administration? Will we see an equilibrium?





# Recent Litigation



# *Shank v. Carleton College*

- Shank v. Carleton College (8th Cir. 2021)
- Plaintiff was an undergraduate who claimed she was sexually assaulted by two different students in different incidents.
- Plaintiff claimed that the College's response to the sexual assaults was clearly unreasonable. Specifically, claims related to limiting Plaintiff's role in the adjudicatory process related to Student One, permitting Plaintiff to meet one-on-one with Student One, failing to remove posters of Student One from campus, and not promptly finding new accommodations for Plaintiff.

# *Shank v. Carleton College*

- “Viewing the facts in the light most favorable to Shank, Carleton's lack of procedures for this type of situation points out a weak spot in the college's sexual assault policy ... But the question is not whether Carleton's policy should have been more comprehensive. Rather, it is whether the college's response to the sexual assault by Student One amounted to deliberate indifference.”
- Even if it was not a good idea, permitting the one-on-one meeting was not deliberate indifference, and even if it was deliberate indifference, there was no evidence that it caused Plaintiff to experience sexual harassment or made her vulnerable to it.

# *Shank v. Carleton College*

- Even though there was no dispute the posters exacerbated Plaintiff's trauma, Court found that this was not deliberate indifference.
- Further, there was no evidence that not moving Plaintiff's housing sooner denied her educational opportunities.
- College's response to Plaintiff's complaint about Student Two was not deliberate indifference because Plaintiff declined to file a formal complaint. College still issued a no contact order.
- Court affirmed summary judgement for College on Plaintiff's Title IX claims.

# *Doe v. University of Arkansas*

- Doe v. University of Arkansas – Fayetteville (8<sup>th</sup> Cir. 2020)
- A senior at the University of Arkansas-Fayetteville was accused of sexual assault by a fellow student, who claimed she was too intoxicated to consent.
- The University's Title IX coordinator issued a decision finding the respondent had not violated school policy, because the evidence did not demonstrate the complainant was too intoxicated to consent.
- The complainant appealed the Title IX coordinator's decision. A three- member hearing panel found it "more likely than not" that the respondent had violated the University's policies, and found him "responsible" on the charge of sexual assault.

## *Doe v. University of Arkansas*

- The respondent filed suit against the University and two of the three hearing panel members, alleging violations of his rights under the Due Process clause and Title IX.
- On review, the 8<sup>th</sup> Circuit held the hearing panel's finding that the complainant was incapacitated was against the substantial weight of the evidence.
- The court noted the Title IX coordinator had found the complainant's consumption of alcohol "had not substantially impacted her decision-making capacity, awareness of consequences, and ability to make fully informed judgments."

# *Rowles v. University of Missouri*

- Rowles v. Curators of the University of Missouri, et al. (8<sup>th</sup> Cir. 2020)
- Rowles was a Ph.D. candidate in the University's cultural anthropology department.
- As a teaching assistant, an undergraduate filed a sexual harassment claim against him, but it was deemed unsubstantiated.
- The next year, he met a female undergraduate student at the University's recreation center.
- After Rowles asked her on a date and she declined, he continued to send her flirtatious Facebook messages, attend the dance class she taught, and ask for private dance lessons. Rowles also sent her a three page letter expressing his romantic feelings for her.
- The undergraduate student filed a Title IX complaint alleging sexual harassment and stalking. The University initially suspended Rowles for four years, and later reduced the sanction to two years upon appeal.

# *Rowles v. University of Missouri*

- Rowles subsequently filed suit against the Curators of the University of Missouri and four individual Title IX investigators.
- He asserted nine claims, including multiple First Amendment violations, due process claims, race discrimination claims, and a claim for sex discrimination under Title IX.
- With regard to his Title IX sex discrimination claims, Rowles argued the investigation reached an outcome that was against the weight of the evidence, because the complainant did not allege that he “intimidated, threatened, or touched her inappropriately,” but rather only indicated that he made her feel “uncomfortable.”
- Rowles also advanced a “selective enforcement” theory.

# *Rowles v. University of Missouri*

- The 8<sup>th</sup> Circuit held Rowles failed to state a claim of sex discrimination under Title IX.
- The court held Rowles's characterization of the complainant's claims omitted multiple material and undisputed facts that had led the University to conclude he had violated the harassment and stalking policies.
- The court also found no merit to Rowles's selective enforcement claims.



# *Rossley v. Drake University*

- Rossley v. Drake University, (8<sup>th</sup> Cir. 2020)
- Plaintiff was expelled after University found he had sexually assaulted another student.
- “To survive summary judgment, then, Rossley was required to set forth sufficient evidence to allow a reasonable jury to find that Drake disciplined him on the basis of sex.”
- Court affirmed summary judgment because there was “no genuine dispute of material fact whether being male was a motivating factor for Rossley's expulsion from Drake.”

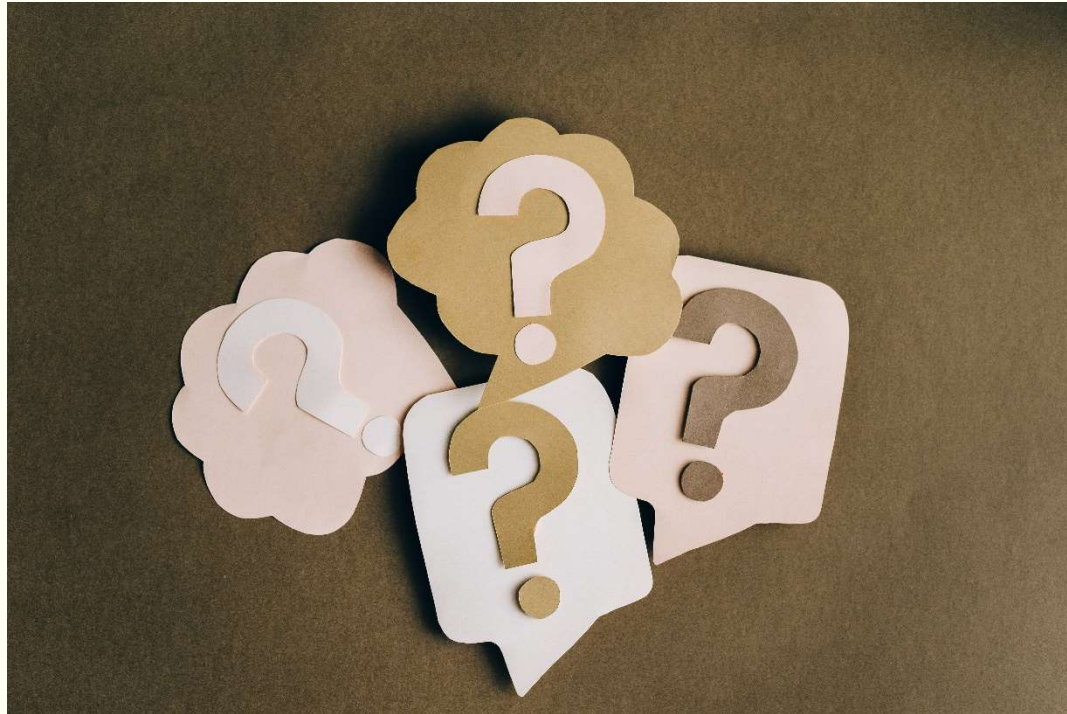
# *Rossley v. Drake University*

- “We instead affirm the district court's grant of summary judgment on Rossley's Title IX claim. In so holding, we note that the pressure that was being put on Drake to investigate and adjudicate IX complaints by females against males does not appear to have approached that described in Doe v. University of Arkansas-Fayetteville, 974 F.3d at 865, nor was it combined with the clearly irregular investigative and adjudicative processes that were found to support a prima facie claim of sex discrimination in Doe v. Columbia University, 831 F.3d at 56-57, and in Menaker, 935 F.3d at 34-37.”

# *Johnson v. Marian University*

- Johnson v. Marian University, (7<sup>th</sup> Cir. 2020) (unpublished)
- Plaintiff was found responsible for sexual assault and suspended for two years.
- Court affirmed summary judgment for the University.
- Upheld the standards set in *Doe v. Columbia College Chicago* and *Doe v. Purdue University*
- Title IX claims boil down to whether the University discriminated against the Plaintiff on the basis of sex.
- Plaintiff cannot rely on generalized claims of bias.

# QUESTIONS??



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