



Title IX Today: Where We've Been Where We're Going

January 27, 2022
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\$1.00

Shakespeare

HAMLET

NOTES

Cliff's Notes
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What We'll Cover
.....What We Won't

2021 Updates & Developments

- FBI phase-out of SRS; use NIRBS definition of Sexual Assault
- Administration announces review & amendment of revised rule
- Supreme Court holding in Bostock applied to Title IX
- Cardona finds §106.45 “exclusionary rule” arbitrary & capricious
- Cardona upholds validity of all other challenged aspects of rule
- OCR publishes Q&A on Sexual Harassment
- OCR emphasizes commitment to protecting LGBTQ+/trans/intersex students

Definition of Sexual Assault: January 1, 2021

- Sexual Assault as defined in 20 USC 1092(f)(6)(A)(v): “an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting (UCR) system of the FBI.
- FBI UCR consists of two crime reporting systems: SRS and NIBRS; FBI retired SRS effective January 1, 2021
- NIBRS defines “sex offenses”: any sexual act including rape sodomy, sexual assault with an object, or fondling directed against another person, without the consent of the victim, including instances where the victim is incapable of giving consent, as well as the nonforcible sex offenses of incest and statutory rape.

NIBRS Definitions

- Rape (except statutory rape): The carnal knowledge of a person, without the consent of the victim,
- Sodomy: oral or anal sexual intercourse with another person...
- Sexual Assault w/an Object: to use an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person....
- Fondling: the touching of the private body parts of another person for the purpose of sexual gratification.....
 - without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or permanent or temporary mental or physical incapacity.

Administration Announces Review & Amendment of Revised Rule

- Jan. 2021: Biden Exec Order *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*
- March 2021: Biden Exec Order...*Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- Public Hearings held in June
- December announcement anticipating proposed rules in April 2022

Bostock

- Supreme Court case on Title VII holding that employers may not discriminate based on sexual orientation or gender identity. Court held that discrimination based on “sex” includes gender identity and orientation
- Holding: An employer who fires an employee merely for being gay or transgender, violates Title VII



Bostock

- OCR extends interpretation of “sex” in Bostock to Title IX
 - June 22, 2021, ED issues official interpretation in Federal Register

Cardona

- §106.45(b)(6)(i) “exclusionary rule” arbitrary & capricious
- Statements not subject to cross-examination *MAY* be relied on
 - SANE Reports
 - Police report
 - Medical reports (with consent)
 - Party statements
 - Witness statements
 - Emails, texts, etc.

- Court upholds validity of all other challenged aspects of rule

July 2021 Q&A on Sexual Harassment

- Most “substantial” guidance released by current admin focused specifically on sexual harassment and revised regs
- Significant as much for what it doesn’t say as for what it does
- OCR clarifies the Q&A represents its interpretation of the Regs as enforced by OCR

OCR reinforces commitment to protecting LGBTQ+/trans/intersex students

- Jan. Exec Order *Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation*
- March 8 Exec Order *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*
- April 6, 2021 OCR letter: reiterates commitments; emphasizes discrimination based on sexual orientation/gender identity; notes such students more vulnerable and experience multiple forms of discrimination at once;
- October 2021 Intersex Students; Reiterates prior guidance/position; Provides “tips” for supporting intersex students

Built Rite **United States Map Puzzle** *INLAID*



But Wait!....

.....There's More!

Key Take-Aways

1. Updated Definition of Sexual Assault
2. OCR reiterates concern for LGBTQ+ harassment; sexual orientation and gender identity fall under Title IX as protected classes
3. Cardona vacates portion of rule disallowing consideration of statements not subject to cross

Bottom-Line: Where We Stand Today

- All other aspect of the Rule remain in full force and effect until we have new rules
- Update policies and procedures to reflect changes over last year
- Ensure you understand and are compliant with any applicable state rules
 - Federal rules preempt when there's a conflict, but many state requirements are additive
- OCR is reviewing recipient websites for compliance with training mandate/disclosure
- Consider that court decisions also shape legal requirements and obligations and generally courts uphold due process protections
- Proposed rules anticipated in April, final rule unlikely until Fall of 2022 at earliest

Questions?

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