

Change Is The Only Constant In Title IX

By [Daniela S. Harris](#)

Less than a year since the U.S. Department of Education's extensive [Title IX regulations](#) went into effect, President Biden has made it clear that change is inevitable. Over the past five months, the Biden Administration has issued two executive orders focused on eliminating sex-based discrimination in schools. The Department of Health and Human Services announced that it will be expanding its definition of discrimination based on sex to include sexual orientation and gender identity. The Department of Education's Office for Civil Rights, also under new leadership, published guidance on Title IX and announced a [virtual public hearing](#) as a first step to revising the 2020 regulations. Any member of the MUSC community who is interested in sharing their views on the issue of sexual harassment at educational institutions is encouraged to participate in the public hearing, which will be held from June 7, 2021 to June 11, 2021. The following is a quick guide to all the recent changes to the Title IX landscape.

In January, President Biden issued [E.O. 13988](#), entitled "Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation." The executive order cited [Bostock v. Clayton County, 140 S. Ct. 1731 \(2020\)](#), a landmark employment law case in which the Supreme Court held that Title VII covers discrimination on the basis of gender identity and sexual orientation. Since the *Bostock* decision, two appellate courts have similarly held that Title IX protects students on the basis of gender identity. Even prior to *Bostock*, several courts had reached the same conclusion. However, this executive order made the Administration's position explicitly clear that gender identity and sexual orientation are covered by Title IX. The executive order also directed all the heads of federal agencies to reconsider all their existing regulations, policies, guidance documents, and other agency actions that pertain to sex discrimination as well as "overlapping forms of discrimination, such as discrimination on the basis of race or disability."

On March 8, 2021, President Biden issued [E.O. 14021](#), entitled "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity." The executive order directs Miguel Cardona, the newly appointed Secretary of Education, in consultation with the Attorney General, to review and "consider suspending, revising, or rescinding" all the existing regulations, orders, guidance documents, policies, and other agency actions that are incompatible with the Biden Administration's policy to ensure an "educational environment free from discrimination on the basis of sex." The executive order specifically mandates the review of the Department of Education's [2020 final regulations](#), making it clear that the Administration is critical of the current regulations.

Additionally, E.O. 14021 recognizes the possibility of "intersecting forms of discrimination," including based on race, disability, and national origin, and that LGBTQ+ students experience sexual harassment at "significant rates." Accordingly, it directs the Secretary of Education to ensure "that educational institutions are providing appropriate support for students who have experienced sex discrimination," and "that school procedures are fair and equitable for all."

The Department of Education's ("Department") Office for Civil Rights ("OCR") has taken several steps to implement Biden's executive orders. On May 13, 2021, it published [Questions and Answers on Civil Rights and School Reopening in the COVID-19](#). This document is designed to help educational institutions interpret their obligations under Title IX; Title VI, which prohibits discrimination based on race, color, or national origin; and Section 504 of the Rehabilitation Act of 1990, which prohibits discrimination based on disability. Of the three questions that specifically addressed Title IX, all focused on the obligation to respond to reports of sexual harassment in a remote setting. The takeaway message from OCR is unambiguous. Not only must educational institutions consider complaints of sexual harassment and gender-based harassment that occur in remote learning, but they must continue to provide supportive measures to individuals regardless of location. Moreover, the pandemic is not considered a "good cause" reason to significantly delay a school's response to new and pending sexual harassment complaints.

Recently, OCR announced a [virtual public hearing](#) to gather feedback on the Department's 2020 Title IX regulations. OCR seeks to rely on the feedback generated from the public hearing to revise the 2020 regulations. The public hearing will be held from June 7, 2021 – June 11, 2021. No registration is required, and anyone can join to listen or provide comments on steps OCR can take to:

- (1) ensure that educational institutions are free from sexual harassment, which includes sexual assault and other forms of sexual violence;
- (2) ensure that educational institutions have fair, prompt, and equitable grievance procedures for resolving reports of sexual harassment and other sex discrimination; and,
- (3) address discrimination based on sexual orientation and gender identity in educational environments.

The Department of Education is not the only federal agency to shift its stance on sex-based discrimination. The Department of Health and Human Services ("HHS"), which also enforces Title IX, recently [announced](#) that the Office for Civil Rights will interpret and enforce Section 1557 of the Affordable Care Act and Title IX's prohibitions on discrimination based on sex to include both discrimination on the basis of sexual orientation and gender identity. Section 1557, which applies to covered health programs and activities, prohibits discrimination on the basis of race, color, national origin, sex, age, or disability. Similar to the legal rationale behind the executive orders, the HHS's position was informed and motivated by the Supreme Court's decision in *Bostock v. Clayton County*. HHS Secretary Xavier Becerra stated that, "Fear of discrimination can lead individuals to forgo care, which can have serious negative health consequences. It is the position of the Department of Health and Human Services that everyone – including LGBTQ people – should be able to access health care, free from discrimination or interference, period." What this means for an organization like MUSC, which is both an academic institution and a health care entity, is that our patients, as well as students and employees will have the same protections under Title IX.