# *Dangerous Changes Coming for Title IX*

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On October 20, the Senate confirmed Catherine Lhamon as the next Assistant Secretary for Civil Rights at the U.S. Department of Education. Lhamon’s confirmation had stalled in August in an 11-to-11 tie in the Senate Committee on Health, Education, Labor and Pensions (HELP). Senate Majority Leader Chuck Schumer (D–NY) overrode the tie and brought a vote to the Senate floor to discharge the nomination from committee by a 50-to-49 vote. The vote fell along party lines, with Vice President Kamala Harris breaking the tie, returning Lhamon to the post she held under the Obama Administration from 2013 to 2016.

Lhamon’s confirmation signals a potential return to the illiberal policies of the Obama Administration, such as the 2011 Dear Colleague Letter (DCL) pertaining to Title IX of the 1972 Education Amendments and allegations of campus sexual assault, and the 2014 guidance on school discipline.**1**

News release, “Heritage Expert: The Trump Administration Rightly Ends 2014 Dear Colleague Letter on School Discipline,” The Heritage Foundation, December 22, 2018, https://www.heritage.org/press/heritage-expert-the-trump-administration-rightly-ends-2014-dear-colleague-letter-school.﻿

 The Title IX guidance is notable in particular because President Joe Biden issued an executive order in March 2021 directing Education Secretary Miguel Cardona to examine rescinding the Trump Administration’s rewrite of the Title IX sexual-assault guidance to colleges.**2**

Bianca Quilantan, “Education Department Releases Guidance for DeVos-Era Title IX Rule,” Politico, July 21, 2021, https://www.politico.com/news/2021​/07/21/education-department-releases-guidance-for-devos-era-title-ix-rule-500439 (accessed November 12, 2021).﻿

 Yet, as the Brookings Institution’s R. Shep Melnick wrote, “Not only was the [Betsy DeVos] Education Department’s rulemaking process extraordinarily extensive and its response to comments meticulous, but its final rules return to the legal framework established by the Supreme Court over two decades ago.”**3**

R. Shep Melnick, “Analyzing the Department of Education’s Final Title IX Rules on Sexual Misconduct,” Brookings Institution, June 11, 2020, https://​www.brookings.edu/research/analyzing-the-department-of-educations-final-title-ix-rules-on-sexual-misconduct/ (accessed November 12, 2021).﻿

 A potential return to Obama-era guidance—something that Lhamon has signaled—would threaten due-process protections for students.**4**

Alexis Gravely, “Nominee Faces Criticism at Confirmation Hearing,” Inside Higher Ed, July 14, 2021, https://www.insidehighered.com/news/2021/07/14​/republicans-press-lhamon-her-past-ocr-leadership-hearing (accessed November 12, 2021), and Catherine E. Lhamon, “@BetsyDeVosED presides over taking us back to the bad old days…,” Twitter, May 5, 2020, https://twitter.com/CatherineLhamon/status/1257834691366772737.﻿

### **The 2011 Dear Colleague Letter**

The Lhamon confirmation is aligned with broader efforts by the Biden Administration signaling a return to Obama-era Title IX rules pertaining to the adjudication of sexual assault on college campuses. Title IX prohibits discrimination on the basis of sex in institutions of higher education that receive federal funds, and is enforced by Office for Civil Rights at the Department of Education.

In 2011, the Obama Department of Education published a DCL that outlined new procedural mandates for the adjudication of sexual-misconduct allegations between students by colleges and universities that receive federal funding.**5**

U.S. Department of Education Office for Civil Rights, Dear Colleague Letter from Russlynn Ali, April 4, 2011, https://www2.ed.gov/about/offices/list/ocr​/letters/colleague-201104.pdf (accessed November 12, 2021).﻿

 This affected nearly all colleges, as the vast majority, save a handful, allow students to participate in the federal student loan and grant programs authorized under Title IV of the Higher Education Act. The DCL changes were strictly enforced by Lhamon who opened nearly 400 federal investigations of colleges and universities for mishandling adjudications of sexual assault.**6**

Tyler Kingkade, “The Trump Administration Inherited Hundreds of Unresolved Title IX Complaints,” BuzzFeed News, March 6, 2017, https://www​.buzzfeednews.com/article/tylerkingkade/heres-why-so-many-title-ix-complaints-are-taking-years-to-be (accessed November 12, 2021).﻿

 In 2009, there had been fewer than ten.

The biggest change was that the DCL rules required schools to use the “preponderance of evidence” standard of proof**7**

The Dear Colleague Letter reads: “Thus, in order for a school’s grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred). The ‘clear and convincing’ standard (i.e., it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.” U.S. Department of Education Office for Civil Rights, Dear Colleague Letter from Russlynn Ali.﻿

 in sexual harassment cases, under which a hearing officer must only be convinced that the chances of the claim being true are 50.01 percent.**8**

U.S. Department of Education Office for Civil Rights, Dear Colleague Letter from Russlyn Ali; Cornell Law Schools Legal Information Institute, “Preponderance of the Evidence,” https://www.law.cornell.edu/wex/preponderance\_of\_the\_evidence (accessed October 4, 2021); and K. C. Johnson, “How American College Campuses Have Become Anti–Due Process,” Heritage Foundation Backgrounder No. 3113, August 2, 2016, https://www​.heritage.org/education/report/how-american-college-campuses-have-become-anti-due-process.﻿

 The DCL also urged schools to use a “single investigator model,” where a single person carries out the entire investigation and determines guilt and innocence. At the same time, the rules pressured schools against any use of cross-examination.**9**

Johnson, “How American College Campuses Have Become Anti–Due Process.”﻿

 Additionally, if schools allowed the accused to appeal a decision, which most do, schools were forced to allow the accuser to appeal, “effectively creating a form of double jeopardy.” The process also denied “nearly all accused students the type of discovery material that would be routine in criminal cases.”**10**

Ibid.﻿

 All of these issues were compounded by schools being rushed to complete investigations within 60 calendar days. Any school that did not comply risked loss of federal funding. Reinstating Obama-era DCL guidance could herald a return to these kangaroo courts.

### **Evidence of Wrongful Punishment**

The 2011 DCL rules eroded the due-process protections and standards of criminal procedure, such that hundreds of falsely accused students were wrongfully punished by campus adjudication processes.**11**

Samantha Harris and K. C. Johnson, “Campus Courts in Court: The Rise in Judicial Involvement in Campus Sexual Misconduct Adjudications,” Legislation and Public Policy, Vol. 22 (December 2019), p. 64.﻿

 A 2019 study by Samantha Harris and K. C. Johnson found that the number of lawsuits brought against universities by students who claimed to be wrongfully accused skyrocketed within two years of the DCL, particularly under Lhamon’s enforcement:

In the twenty-one months following the April 4, 2011 Dear Colleague letter, only seven federal lawsuits were filed, and 2013 brought just seven more complaints. That figure jumped to twenty-five lawsuits in 2014; forty-five in 2015; forty-seven in 2016; and seventy-eight in 2017. The 2018 calendar year featured an additional seventy-eight complaints; through August 16, 2019, fifty-eight federal complaints have been filed.**12**

Ibid., p. 66.﻿

The total number of cases against universities between 2011 and 2019 was over 500. The court ruled against schools in 151 of 298 decisions made at the state and federal level during the same time interval. There were also at least 74 federal cases that reached a settlement, although the terms of settlement tend to be confidential, so it is difficult to know the outcome.**13**

Ibid.﻿

One might wonder why universities, rather than the police, should have any responsibility for conducting investigations of criminal offenses. Of course, the university investigation cannot result in a student going to prison, and prior to 2011, the most serious allegations were left to the police to investigate.**14**

Emily Yoffe, “The Uncomfortable Truth About Campus Rape Policy,” The Atlantic, September 6, 2017, https://www.theatlantic.com/education/archive​/2017/09/the-uncomfortable-truth-about-campus-rape-policy/538974/ (accessed November 12, 2021).﻿

 However, the 2011 DCL rules required schools to “conduct their own proceeding for every sexual allegation, even if a police investigation or criminal-justice process is under way.”**15**

Ibid.﻿

 Even more troubling is that the universities’ proceedings, where the accused often lack legal counsel, can be used as evidence in criminal proceedings.**16**

Harris and Johnson, “Campus Courts in Court,” p. 53.﻿

### **The Biden Administration**

In 2017, Education Secretary Betsy DeVos rescinded the 2011 DCL, which had significantly weakened due-process protections for accused students. For several years, the Department of Education under Secretary DeVos worked to rewrite the Title IX rules, eventually issuing new guidance that restored due-process protection for all students. The rewrite prohibits using a “single investigator” model, allows live testimony, and includes cross-examination of complainants.

These protections may be short-lived. In line with executive orders issued by President Biden earlier this year, the Department of Education plans to conduct a review of “all existing regulations, orders, guidance documents, policies, and any other similar agency actions” that may be inconsistent with the Biden Administration’s policy on sexual discrimination and harassment.**17**

News release, “Department of Education’s Office for Civil Rights Launches Comprehensive Review of Title IX Regulations to Fulfill President Biden’s Executive Order Guaranteeing an Educational Environment Free from Sex Discrimination,” U.S. Department of Education, April 6, 2021, https://www​.ed.gov/news/press-releases/department-educations-office-civil-rights-launches-comprehensive-review-title-ix-regulations-fulfill-president-bidens​-executive-order-guaranteeing-educational-environment-free-sex-discrimination (accessed November 12, 2021).﻿

 The order specifically names the DeVos-era rules that are currently in place to be the focus of the review.**18**

Presidential Documents, “Executive Order 14021: Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity,” Federal Register, Vol. 86, No. 46 (March 11, 2021), p. 13803, https://www.federalregister.gov/documents​/2021/03/11/2021-05200/guaranteeing-an-educational-environment-free-from-discrimination-on-the-basis-of-sex-including (accessed November 15, 2021).﻿

Biden’s order also advises that Secretary Cardona “consider suspending, revising, or rescinding” agency actions that are inconsistent with the Administration’s policy on sexual discrimination and harassment. Not to mention, while on the campaign trail in May 2020, Biden explicitly stated that he would bring a “quick end” to the DeVos rule change.**19**

“Education Department Announces Path Forward in Overhauling Title IX Campus Sex Assault Rules,” Spectrum News/NY1, April 6, 2021, https://www​.ny1.com/nyc/all-boroughs/news/2021/04/06/biden-education-title-ix-cardona (accessed November 12, 2021), and news release, “President Biden Announces His Intent to Nominate Catherine Lhamon for Assistant Secretary for Civil Rights at the Department of Education,” The White House, May 13, 2021, https://www.whitehouse.gov/briefing-room/statements-releases/2021/05/13/president-biden-announces-his-intent-to-nominate-catherine​-lhamon-for-assistant-secretary-for-civil-rights-at-the-department-of-education/ (accessed November 12, 2021).﻿

 It is obvious that the current Department of Education plans to return to the illiberal interpretation and weaponization of Title IX.

### **The Need for Due Process**

The goal shared by all is to prevent sexual violence, and no one should minimize the trauma experienced by its victims. Those who suggest that supporters of due process actually “want no process or consequence for abusers” have created a strawman.**20**

Fatima Goss Graves, “The Long Con Targeting Student Survivors of Sexual Assault,” The Hill, October 6, 2021, https://thehill.com/opinion/education​/575521-the-long-con-targeting-student-survivors-of-sexual-assault (accessed November 12, 2021).﻿

 Just as free speech must be protected no matter how hateful that speech is, everyone must receive the full protection of due process under the law, no matter how heinous the offense of which he or she is accused. Due process is not a partisan issue; it is fundamental to rule of law in a just society.

### **Policy Recommendations**

The 14th Amendment of the United States Constitution reads:

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.**21**

U.S. Constitution, 14th Amendment, § 1.

In line with the guaranteed protections of the 14th Amendment, the Department of Education should retain the language in the 2020 rewrite of the Title IX rule.

### **Conclusion**

The Lhamon confirmation and other actions from the current Administration signal a return to 2011-era rules for adjudicating allegations of sexual assault on campus—and a potential weakening of due-process protections for students. Foundational to a free society are due process and free speech protections, which could again be under attack if campus kangaroo courts return.

Students must have full protection of their due-process rights. Rolling back the protections of the 2020 rewrite of Title IX will undermine the procedures for fair adjudication while failing to prevent sexual violence. And, more innocent students could be wrongly punished.



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