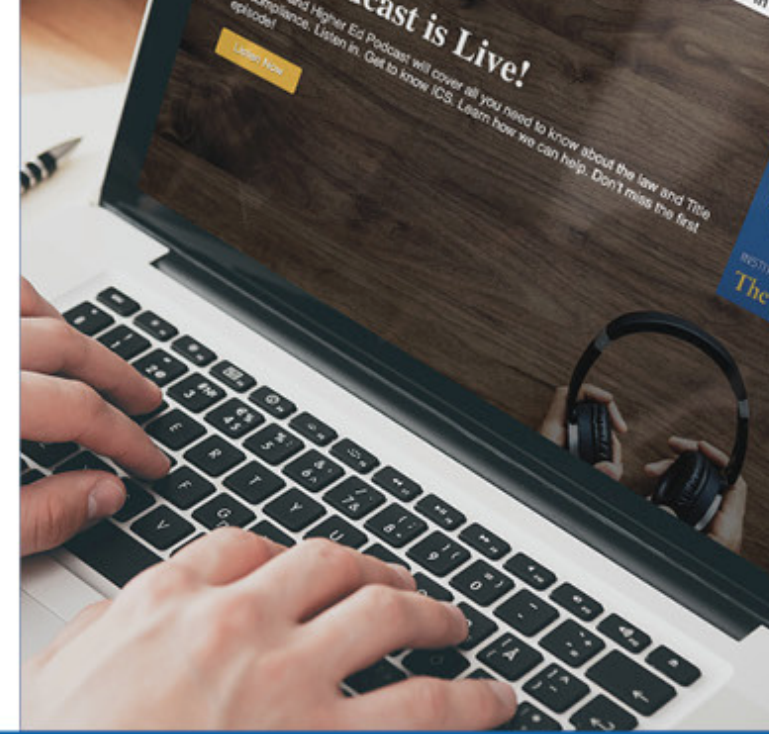


COVID

ICS
INSTITUTIONAL
COMPLIANCE SOLUTIONS



2020 YEAR-END REVIEW

JANUARY 28, 2021



ABOUT US



COURTNEY BULLARD

Founder
Institutional Compliance Solutions

BETSY SMITH

Senior Investigator & Consultant
Institutional Compliance Solutions





**LITIGATION
TRENDS**



**NEW
REGULATIONS**



**CHANGE IN
ADMINISTRATION**



**PRACTICAL
TIPS**

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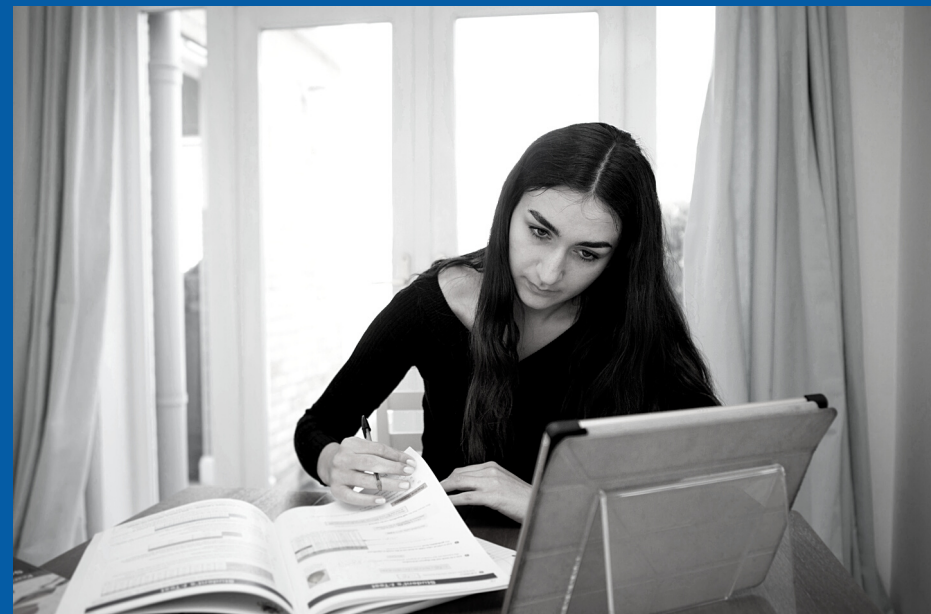
Webinar Overview



2020



COVID PANDEMIC



REMOTE LEARNING AND WORKING



TITLE IX REGULATIONS





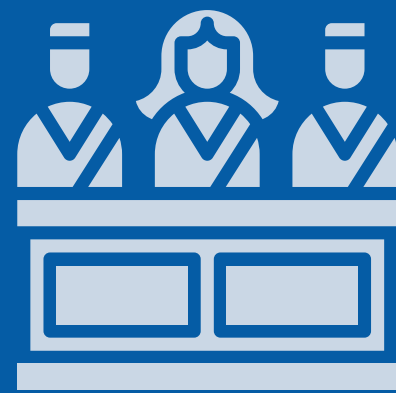
REMINDER
Judicial Standard
vs.
Regulatory Standard



LEGAL PRIMER & REMINDERS



Litigation from campus cases that date back several years



Title IX trials are almost non-existent



What constitutes a "win"?



Injunctions

LITIGATION TRENDS



- CONTINUED INCREASE IN RESPONDENT LITIGATION TRENDS
- CIRCUIT SPLITS



Complainant Litigation



- **TITLE IX: DELIBERATE INDIFFERENCE**
- **BREACH OF CONTRACT**
- **NEGLIGENCE**

COMPLAINANT LITIGATION

DELIBERATE INDIFFERENCE

- Notice- appropriate person/official with authority to take corrective action
- Pre-assault and post-assault claims (circuit split on standards)
- Denied benefit of education program or activity
- Still a high bar



PRE-ASSAULT CLAIMS

KARASEK V. REGENTS OF THE
UNIVERSITY OF CALIFORNIA
(9TH CIR.)



POST-ASSAULT CLAIMS

KOLLARITSCH V.
MICHIGAN STATE
(6TH CIR.)





DELIBERATE INDIFFERENCE

- *Doe v. Univ. of KY* (6th Cir. 2020) - Cited *Kollaritsch* re: "actionable sexual harassment" as severe (more than juvenile behavior), pervasive (multiple incidents of harassment) and objectively offensive (offensive to a reasonable person under the circumstances, not merely offensive to the victim personally or subjectively): actionable harassment + actual knowledge + further incident of actionable harassment + but for deliberate indifference Title IX injury attributable to post-actual knowledge of harassment
- *Kesterson v. Kent State Univ.* (6th Cir.) - Employees' failure to follow policy in reporting not deliberate indifference

Respondent Litigation



TITLE IX



DUE PROCESS



**BREACH OF
CONTRACT**

TITLE IX- ERRONEOUS OUTCOME/SELECTIVE ENFORCEMENT

DOE V. PURDUE UNIVERSITY
(7TH CIRCUIT- JUNE 1, 2020)

- Opinion by now Supreme Court Justice Amy Coney Barrett
- New Test: "Do the alleged facts, if true, raise a plausible inference that the University discriminated against the Plaintiff on the basis of sex?"
 - Formally adopted by the 3rd, 8th, and 9th Circuit Court of Appeals; Relied on in District of Columbia and in 6th Circuit



TITLE IX- DISCRIMINATION ON THE BASIS OF SEX/ PURDUE

- DOE V. UNIV. OF THE SCIENCES
(3RD CIR. MAY 2020)
- DOE V. AMERICAN UNIV.
(D.D.C. SEPT. 2020)
- DOE V. UNIV. OF ARKANSAS-
FAYETTEVILLE
(8TH CIRCUIT SEPT. 2020)
- SCHWAKE V. ARIZONA BD. OF
REGENTS
(9TH CIR. JULY 2020)



TITLE IX- DISCRIMINATION ON THE BASIS OF SEX/OTHER CIRCUITS

- DOE V. ROLLINS COLLEGE (M.D. FL MARCH 2020) AND DOE V. WASHINGTON UNIV. (E.D. MO. JAN. 2020) - VICTIM CENTERED APPROACH/PRO-VICTIM BIAS DOES NOT EQUAL GENDER BIAS
- DOE V. UNIV. OF DENVER (10TH CIR. MARCH 2020) - EVIDENCE SCHOOL EXHIBITED ANTI-RESPONDENT BIAS AND EMPLOYED THE BIAS YET NOT ENOUGH TO SUSTAIN CLAIM OF GENDER BIAS
- DOE V. VA. POLYTECHNIC INSTITUTE (W.D. VA. MARCH 2020) - PROCEDURAL IRREGULARITIES SUFFICIENT DUE TO DIFFERENCES IN RESPONDENT TREATMENT AS A RESPONDENT VERSUS A COMPLAINANT
- DOE V. COLGATE (N.D.N.Y. APRIL 2020) - UNEQUAL PENALTIES AND FAILURE TO INVESTIGATE INCONSISTENCIES COULD BE EVIDENCE OF BIAS



DUE PROCESS- CIRCUIT SPLIT



BAUM (6TH)

Accused student entitled to cross-examination

HAIKAK (1ST)

Did not adopt Baum



AVERETT V. HARDY (W.D.KY MARCH 2020)

Adequate notice and only sought out evidence of respondent guilt

DOE V. UNIV. OF CONNECTICUT (2ND CIR. JUNE 2020)

Exculpatory evidence not considered, witnesses not allowed to testify at hearing, procedural irregularities, not able to question witnesses



DOE V. UNIV. OF S. ALABAMA (S.D. AL FEB. 2020)

Due process only requires ability to cross complaint at hearing, not all witnesses



STATE LAW CLAIMS



BREACH OF CONTRACT



PRIVATE INSTITUTIONS AND DUE PROCESS Rhodes College

REGULATIONS

STANDARDS



LAW

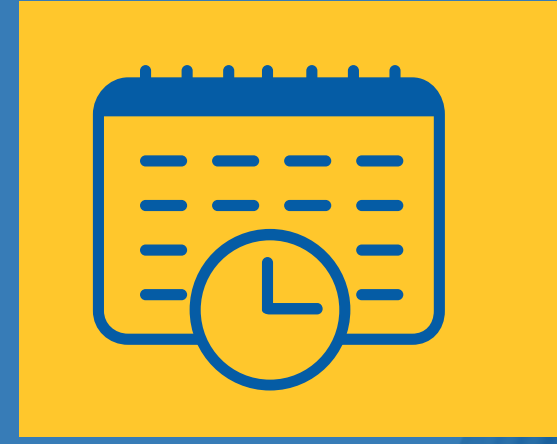


COMPLIANCE



POLICIES

NEW TITLE IX REGULATIONS



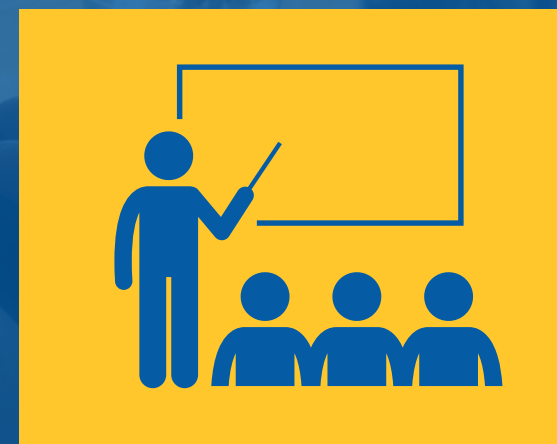
IMPLEMENTATION DEADLINE

August 14, 2020



PRESCRIPTIVE

2033 pages

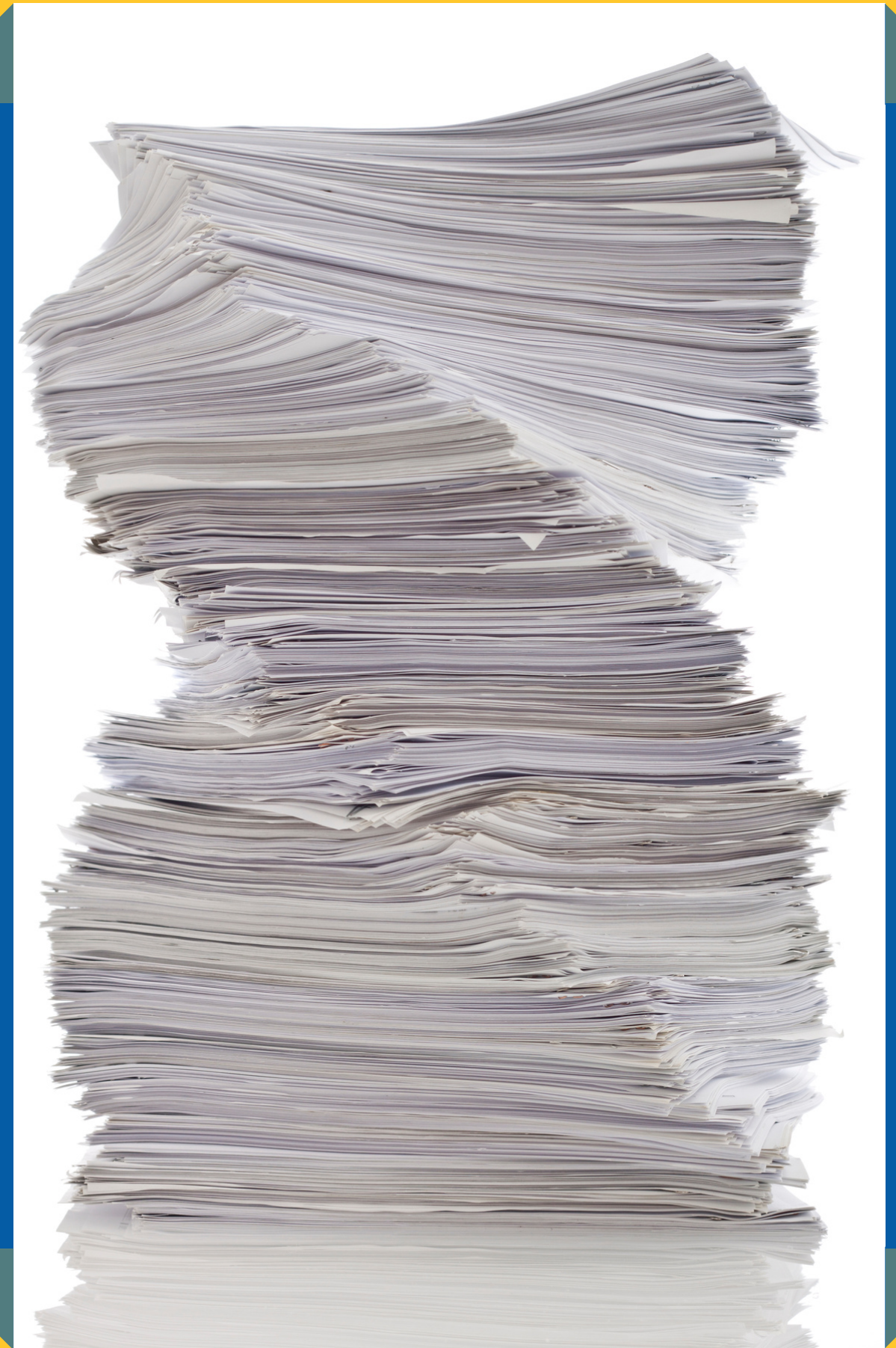


REQUIRED

Identification and training of Title IX officials



PREAMBLE TO THE REGULATIONS



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OVERVIEW OF NEW REGULATIONS

- Specific definitions
- Designate and Train Roles
- Formal Complaint
- Supportive Measures
- Review Periods
- Advisors
- Live Hearings
- No Single Investigator
- Informal Resolutions
- Appeals



Actual Knowledge

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient

- No more "responsible employee"





Deliberate Indifference

"Clearly unreasonable in light of the circumstances"

- **Must promptly offer supportive measures**
- **Cannot impose discipline without a formal process**
- **Must investigate allegations in a formal complaint**

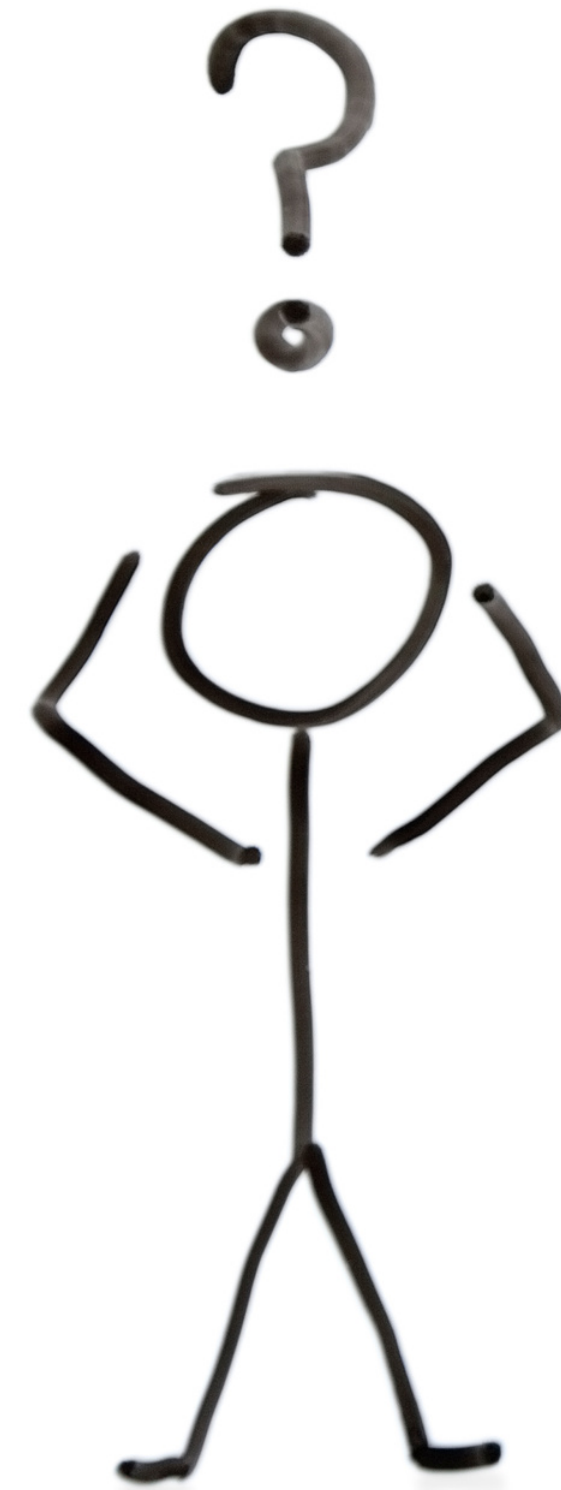
EMPLOYEE RESPONDENTS: Title IX v. Title VII



SUB REGULATORY GUIDANCE RE: NEW REGULATIONS

PRE REGULATIONS CONDUCT VS. POST REGULATIONS CONDUCT

- DOE V. RPI
- OCR BLOG POST



The Change in Administration



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Why Significant?



**BIDEN WAS VP TO
PRESIDENT
OBAMA**



**BIDEN
AND
VAWA**



**BIDEN
AND
TITLE IX**



Dr. Jill Biden
First Lady



Dr. Miguel Cardona
Education Secretary



Suzanne Goldberg
Office for Civil Rights- Acting Secretary



Catherine Lhamon
Domestic Policy Counsel



Dr. Rachel Levine
Assistant Secretary of Health



WHAT'S NEXT IN TITLE IX?

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OCR GUIDANCE:

EXPECT:

- Additional sub-regulatory guidance
- Potential resurrection of Obama-era guidance
- Guidance stating OCR will not enforce new regulations



EXPECTED CHANGES OVER TIME

- MORE ACTIVE OFFICE FOR CIVIL RIGHTS
- INCREASE IN CLERY ENFORCEMENT/FINES
- UPDATED/CHANGED REGULATIONS

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POSSIBLE CHANGES UNDER PRESIDENT BIDEN

- Sexual Harassment definition broadened
- Jurisdiction expanded
- Review periods reduced from 2 to 1 in investigations
- Modified cross examination/hearing requirements
- Continued emphasis on supportive measures



But Remember...

Trump and Federal Judge
Appointees.





TITLE IX DEVELOPMENTS

- Athletics
- Transgender Student Rights



- ***Bostock v. Clayton County***
 - Supreme Court held Title VII prohibition on discrimination based on sex covers discrimination on the basis of gender identity and sexual orientation
- **Executive Order Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation - Jan. 20, 2021**
 - Laws that prohibit sex discrimination, including Title IX, prohibit discrimination on basis of gender identity or sexual orientation
 - Court challenges expected in application to Title IX and women's sports



Executive Orders by Biden



CLOSING THOUGHTS

A LOT OF SUB-
REGULATORY
GUIDANCE
EXPECTED

CONSULT
DISTRICT/
STATE LAW
LITIGATION

2021 BUSY
YEAR IN THE
TITLE IX-
NOT JUST RE:
SEXUAL
HARASSMENT



Upcoming ICS Events

- Policy to Practice Series of Trainings (25% off)
- Virtual Certified Trainings
- Community Access

