

# Dangerous Changes Coming for Title IX

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## KEY TAKEAWAYS

Catherine Lhamon's confirmation as Assistant Secretary for Civil Rights at the U.S. Education Department signals a return of Obama-era college-campus policies.

Those policies weakened the due-process protections for students in the past and could again set up campus courts that destroy free speech protections.

Due process is fundamental to a just society. Congress should limit federal agencies' ability to use "informal guidance" to interpret and enforce federal rules.

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

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Amendments and allegations of campus sexual assault, and the 2014 guidance on school discipline.<sup>1</sup> 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.<sup>2</sup> 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.”<sup>3</sup> A potential return to Obama-era guidance—something that Lhamon has signaled—would threaten due-process protections for students.<sup>4</sup>

## 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.<sup>5</sup> 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.<sup>6</sup> 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<sup>7</sup> 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.<sup>8</sup> 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.<sup>9</sup> 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.”<sup>10</sup> 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.<sup>11</sup> 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.<sup>12</sup>

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.<sup>13</sup>

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.<sup>14</sup> 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.”<sup>15</sup> Even more troubling is that the universities’ proceedings, where the accused often lack legal counsel, can be used as evidence in criminal proceedings.<sup>16</sup>

## 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.<sup>17</sup> The order specifically names the DeVos-era rules that are currently in place to be the focus of the review.<sup>18</sup>

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.<sup>19</sup> 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.<sup>20</sup> 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.<sup>21</sup>

## 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.<sup>22</sup>

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. Additionally:

- **All criminal cases should be handled by law enforcement.** All investigations of criminal activity, including sexual violence, should be handled by the proper authorities. For any allegation of misconduct on campus, students deserve a fair process of adjudication. Institutions of higher education should have fair and transparent procedures that are largely based on outcomes of criminal investigations.
- **Congress, not unelected bureaucrats, makes laws.** The growth of the administrative state has overtaken many policy areas, and education is certainly no exception. Vague language written and enforced by unaccountable bureaucrats in Washington is now the norm. Assistant Secretary Lhamon is a proven proponent of the “informal guidance” represented by these Dear Colleague Letters, guidance which does not include the deliberation and investigation required by formal rulemaking according to the Administrative Procedure Act (APA) for new federal agency mandates. The Department of Education should significantly limit its use of DCLs and agency guidance, and any regulations promulgated by the agency should adhere to the standard notice-and-comment protocols.
- **Civil rights enforcement should be housed within the Department of Justice, not the Department of Education.** Instead of maintaining Title IX enforcement responsibilities within the Department of Education, these responsibilities should be moved to the agency with expertise in enforcing civil rights law—the Department of Justice. Unlike with the Department of Education, such enforcement is one of the Justice Department’s core missions.

## 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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## Endnotes

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