

**From:** (b)(6)  
**Sent:** Fri, 11 Jun 2021 20:56:08 +0000  
**To:** T9PublicHearing  
**Subject:** Written Comment: Title IX Public Hearing (Title IX Remedial Framework and Religious Exemptions)  
**Attachments:** Title IX Amendments - Gillis Education Position Statement.pdf

**CAUTION: This email originated from outside of the organization. Do not click links or open attachments unless you recognize the sender and know the content is safe.**

Hello,  
Attached please find Gillis Education's position statement in response to the Department's request for comments on the 2020 amendments to Title IX.  
Thank you!  
Tiffany Brown, JD  
Founder and CEO  
[www.gilliseducation.org](http://www.gilliseducation.org)

**Gillis Education’s Comment on the U.S. Department of Education’s Final Rule:  
“Nondiscrimination on the Basis of Sex in Education Programs or Activities  
Receiving Federal Financial Assistance”**

**June 11, 2021**

---

**Introduction**

Pursuant to the *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*, the Department of Education is actively reviewing the 2020 amendments to Title IX regulations and all other agency actions that may be inconsistent with governing law and the intent of Title IX. The Department is interested in receiving stakeholder feedback and public input on the 2020 amendments to Title IX and any Department policy related to sexual harassment, with a particular interest in comments related to discrimination based on sexual orientation and gender identity in educational environments.

The Department of Education is actively reviewing the 2020 amendments to Title IX regulations and all other agency actions that may be inconsistent with governing law and the intent of Title IX. This review is pursuant to the *Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity* (put EO # here).

The Department is interested in receiving stakeholder feedback and public input on the 2020 amendments to Title IX and any Department policy related to sexual harassment, with a particular interest in comments related to discrimination based on sexual orientation and gender identity in educational environments.

**Background**

Title IX prohibits discrimination based on sex at educational institutions that receive federal financial assistance. Title IX regulations ban discriminatory admissions policies that target women and ensure that women have equitable access to educational opportunities. Title IX regulations mandate that women have an equal opportunity to participate in school athletics and that men’s and women’s teams receive equal treatment. To ensure that women’s equal access to education is not impeded by an unsafe school environment, Title IX regulations mandate that schools have systems in place to prevent and address sex- and gender-based harassment. In addition, Title IX protects anyone who reports sex discrimination under Title IX from retaliation.

The passage of Title IX in 1972 was an important milestone in the fight for women's equality. It was passed in response to the rampant sexism in education, which has historically been prevalent across all levels of education, depriving women of the opportunity to receive a high-quality education and enjoy all of the benefits thereof. Since its passage, Title IX has been successful in achieving greater access to education for women. However, much work is needed to truly fulfill the goal of ensuring that no one is denied the benefits of education based on their sex.

### **Gillis Education's Position**

Gillis Education supports the Department's work to evaluate and enhance provisions under Title IX and its associated laws and policies. There are a number of regulations that the Department should consider revising. Numerous regulations unduly narrow protections for victims of sexual assault and inadvertently discourage victims from initiating complaints or investigations through the laws' administrative enforcement mechanisms. Namely, the Department should change its threshold for conduct that meets the definition of sexual harassment. It should also reconsider its policies regarding the evidentiary standards for proving incidences of sexual assault. The Department should further explore its regulations around religious exemptions.

#### **A. Definition of Sexual Harassment**

While the Department has expanded the scope of what is considered "sexual harassment" for Title IX purposes by including dating violence, domestic violence, and stalking, it has simultaneously narrowed liability by requiring unwelcome conduct to meet the Davis standard: conduct must be "so severe, pervasive, and objectively offensive that it can be said to deprive the victim of access to the educational opportunities or benefits provided by the school." *Davis v. Monroe County Board of Education*, 526 U.S. at 650, 119 S.Ct. 1661 (1999).

In *Davis*, the Supreme Court interpreted this language to "suggest that the behavior be serious enough to have the systemic effect of denying the victim equal access to an educational program or activity." 526 U.S. at 652, 119 S.Ct. 1661. The Court further explained that "a single instance of sufficiently severe one-on-one peer harassment could be said to have such an effect, [but] we think it unlikely that Congress would have thought such behavior sufficient to rise to this level in light of the . . . amount of litigation that would be invited by entertaining claims of official indifference to a single instance of one-on-one peer harassment." *Id.* at 652-53, 119 S.Ct. 1661.

A threshold that requires such widespread, severe discrimination ignores the reality that harassment impeding one's access to educational opportunities can come in a variety of forms, can be experienced in different ways, and often occurs with little ironclad proof.

Additionally, some claims of sexual assault that meet the severe, pervasive, and objectively offensive may not pass Title IX muster because the complainant may not be able to show how they were denied access to education. Not all sexual assault has *tangible* effects on a victim's education. This policy would create a chilling effect and decrease the likelihood that victims seek justice after being violated.

## **B. Evidentiary Standards for Sexual Assault Proceedings**

The 2020 amendments create a greater burden of proof for victims of sexual assault. The 2020 amendments allow educational institutions to choose whether to use a "preponderance of evidence standard" or a "clear and convincing evidence standard" for cases of sexual assault. The clear and convincing evidence standard is more burdensome and is often unrealistic in cases of sexual assault, and it would create issues of underreporting across college campuses. As previously noted, sexual assault typically occurs in private, without witnesses, and rarely leaves overt traces of conclusive proof.

Gillis Education believes that under this policy, educational institutions will choose the stricter evidentiary standard in order to prevent complainants from pursuing action. These institutions have an interest in preventing complainants from initiating administrative enforcement actions in order to protect their reputation and to shield themselves from liability. This interest could incentivize institutions to find accused students not responsible in misconduct proceedings.

Therefore, we ask that the Department codify language from the 2011 guidance that declares Title IX proceedings should be governed by the more lenient preponderance of evidence standard. Ultimately, the use of the higher criminal standard is inconsistent with Title IX's requirement of equitable grievance procedures.

## **C. Defining Consent**

The 2020 amendments allow recipients to define consent for themselves in order to "select a definition of sexual consent that best serves the unique needs, values, and environment of the recipient's own educational community." We believe that, given the choice, many recipients will select an extremely broad definition of consent that will intentionally exclude many instances of sexual assault from its scope. We request that

the Department create its own definition of sexual consent to be used by all recipients. This definition should emphasize that consent must be clearly and freely communicated, and that consent cannot be given by individuals who are underage, intoxicated or incapacitated by drugs or alcohol, asleep, or unconscious.

#### **D. Religious Exemptions**

The 2020 amendments make it much easier for religious educational institutions to claim a religious exemption from Title IX. Under the 2011 Department guidance, religious educational institutions had to “self certify” by submitting a written statement to the Department in order to receive a religious exemption. The 2020 amendments did away with this practice. Instead, the amendments state that religious institutions are free to use the religious exemption as a defense if they are ever sued for Title IX violations, even if they never submitted a written statement to the Department requesting an exemption. Historically, an institution’s request for an exemption has been guaranteed.

The Department should reinstate a process whereby religious educational institutions must request exemption status through a written statement. The Department should also investigate whether religious exemptions to Title IX should exist at all. Gillis Education believes that any institution that violates civil rights should not receive federal financial assistance. The religious exemption, *prima facie*, is at odds with one of the reasons Title IX was implemented: to prohibit unfair discrimination under any circumstances.

#### **Conclusion**

For the above reasons, Gillis Education asks that the Department reconsider Title IX’s remedial framework and religious exemption process. If you have questions or comments, please contact Tiffany Brown at 301-917-7684.

Sincerely,

Tiffany Brown, JD  
CEO and Lead Consultant

Leah Field  
Consultant

Gillis Education LLC  
[www.gilliseducation.org](http://www.gilliseducation.org)