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Possible Policy & Legal Changes for Higher Education Under the Biden Administration

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Reading the Tea Leaves



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Presenters

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John W. Borkowski
Husch Blackwell
312.526.1538
john.borkowski@huschblackwell.com



Julie Miceli
Husch Blackwell
312.526.1521
julie.miceli@huschblackwell.com

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Agenda

- **Biden Administration**
 - Appointees & Influencers
 - Toolkit
- **Anticipated Priorities**
 - COVID Relief
 - Protections for Transgender Students
 - Institutional Accountability/ Consumer Protection
 - Protections for Dreamers
 - Title IX/VAWA
 - Our Crystal Ball

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Appointees & Influencers



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Secretary of Education

• Miguel Cardona

- Connecticut Commissioner of Education since 2019
- Worked in K 12 as teacher, principal, and assistant superintendent
- Served as Co Chairperson of Connecticut Legislative Achievement Gap Task Force and Connecticut Birth to Grade Three Leaders Council
- Taught as adjunct professor at University of Connecticut



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Special Assistant to the President for Education

Maureen Tracey-Mooney



- Former-VP Biden's Deputy Domestic Policy Advisor in the first term of the Obama-Biden Administration, working on education, labor and other issues.
- Supported development of the Race to the Top Early Learning Challenge and President Obama's Preschool for All plan.
- Worked for the Newark Board of Education in New Jersey, where her work focused on the development of new teachers.
- Broad Residency (2015-2017) Director of Special Projects

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Under Secretary (Nominee)

• James Kvaal

- President of the Institute for College Access & Success.
- Served as the deputy domestic policy adviser at the Obama Biden White House
- Work in higher education included initiatives to make college tuition more affordable, protect students from unaffordable loans and college completion.
- Helped develop Obama era Gainful Employment and Borrower Defense regulations.



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Senior Counsel, Office of General Counsel



Joanna Darcus

- Former staff attorney at the National Consumer Law Center
- Focused on consumer protection litigation and a member of the Student Loan Borrower Assistance Project, focusing on higher education finance issues facing low-income people and communities of color.
- Prior to that, served as a supervising attorney at Community Legal Services of Philadelphia where she represented hundreds of low-income consumers sued by debt collectors or struggling with student loans.

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Deputy Assistant Secretary, OPE & *acting Assistant Secretary*

- **Dr. Michelle Asha Cooper**

- Held key roles and leadership positions at the Institute for Higher Education Policy, Advisory Committee on Student Financial Assistance (U.S. Department of Education), Council for Independent Colleges, Association of American Colleges & Universities, and King's College (Wilkes Barre, PA).



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Senior Advisor, Office of the Under Secretary



Julie Margetta Morgan

- Served on the Biden-Harris Transition as a member of the COVID-19 response team.
- Served as VP of Research at the Roosevelt Institute; senior domestic policy advisor for Warren for President; and co-founder and executive director of the Great Democracy Initiative.
- More than a decade of experience in student loan oversight, regulation, and policy development, including serving as senior education counsel to Sen. Elizabeth Warren.

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Chief of Staff, Office of the Under Secretary

- **Melanie Muenzer**

- Served as the Associate Vice President and Vice Provost for Academic Initiatives at the University of Oregon.
- Elected member of the board of education for Lane Community College in Eugene, Oregon.
- Previously served at the U.S. Department of Education from 2009-2015 under the Obama Administration as White House liaison, chief of staff in the policy office, and deputy assistant secretary for higher education policy.



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Observations

- Higher education currently heavy on inside beltway/Think-Tank experience
- Many appointees with experience in student loan/borrower reform space
 - **Ben Miller**, Senior Advisor to the Chief of Staff (Temp. Appt.); previously a senior policy advisor at ED Office of Planning, Evaluation, and Policy Development (OPEPD).
 - **Nick Lee**, Deputy Assistant Secretary, OPEPD (Gates Fdn. and prior role at ED Office of Management & Budget, focused on FSA programs)
 - **Sara Garcia**, Special Assistant, OPEPD (Gates Fdn. & Center for American Progress, focused on equity, access and success)
 - **Tariq Habash**, Special Assistant, OPEPD (Launched Student Borrower Protection Center, a national research and advocacy nonprofit; former senior policy associate at the Century Foundation)
- ***Not many appointees directly from higher ed institutions (yet?)**

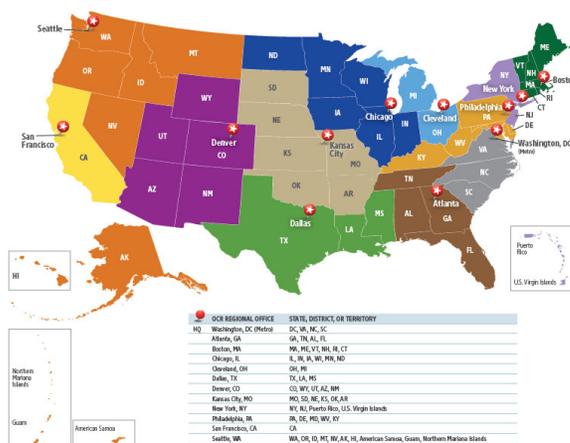
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Office for Civil Rights

- Responsible for resolving complaints from students alleging that schools who receive federal assistance violated their civil rights.
- Discrimination complaints re:
 - Race
 - Color
 - National origin
 - Sex
 - Disability
 - Age
- 12 enforcement offices; 4 divisions



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Deputy Assistant Secretary for Strategic Operations and Outreach, OCR (acting Assistant Secretary)



Suzanne Goldberg

- Inaugural EVP for University Life at Columbia University and the Herbert and Doris Wechsler Clinical Professor of Law and founding director of the Columbia Law School's Sexuality & Gender Law Clinic, and co-director of the Center for Gender & Sexuality Law.
- Was previously on the Rutgers-Newark Law School faculty and an adjunct faculty member at Fordham Law School.
- Began her legal career as a staff lawyer with Lambda Legal, working on a variety of LGBT law reform cases and legislative and public policy initiatives.

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Deputy Assistant Secretary for Policy, OCR

- **Monique Dixon**

- Deputy director of policy and director of state advocacy at the NAACP Legal Defense and Educational Fund (LDF), Inc.
- Served as co-chair of the Education Task Force of the Leadership Conference on Civil and Human Rights.
- Senior Attorney and Director of the Opportunity to Learn Program at the Advancement Project, focused on ending criminalization of minors' student misconduct through policy reform and advocacy.



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ED Toolkit



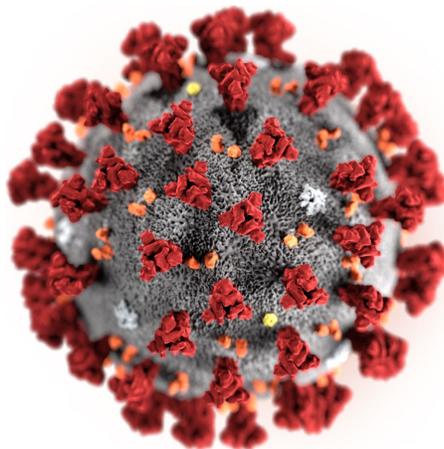
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Toolkit

- **Working with Congress on legislative initiatives**
 - COVID Relief
 - Equality Act
 - Higher Education Act
 - VAWA Reauthorization
- **Regulatory efforts**
 - Negotiated Rulemaking
 - Notice & Comment Rulemaking
- **Listening sessions/ public hearings**
- **Changing direction in pending litigation**
- **Bully pulpit**
- **Sub-regulatory guidance**
 - DCL
 - FAQs
 - IFAPs
 - Technical Assistance
- **Interagency collaboration**
 - CFPB (protections for borrowers)
 - DHS (protections for dreamers)
 - IRS (conversions)
 - VA (protections for veteran students)

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COVID Relief



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COVID Relief

- Additional COVID funding
 - CARES Act HEERF 1
 - “Coronabus” HEERF 2
 - American Rescue Plan:
 - \$36 B for public and private non-profit
 - \$386 M for for-profit institutions
 - ½ funds to be spent on emergency grants to students
- **NEW HEERF GUIDANCE OUT TODAY!!!**
- Support for schools to return to campus
 - Safer Schools and Campuses Best Practices Clearinghouse
 - Webinar series to begin March 31



Transgender Student Rights



Trump Administration

Grimm v. Gloucester County School Board

- In 2015 the ACLU and Virginia State ACLU filed a suit against Gloucester Co. School Board.
- The District Court denied Gavin Grimm's motion for a preliminary injunction, which would have allowed him to use the same restroom as other boys at school.
- In 2016 the Fourth Circuit Court of Appeals overturned the lower court's decision.
- The Gloucester Co. School Board petitioned for certiorari with the U.S. Supreme Court
- In 2017, Supreme Court granted Certiorari
- Weeks after SCOTUS set to hear the case, the Trump Administration rescinded the Dept. of Education's guidance regarding transgender students' rights under Title IX.

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Trump Administration (con't)

- ED led by Betsy DeVos, rescinded the "Dear Colleague" letter from the Obama Administration.
- The Trump Administration filed a brief with SCOTUS in favor of preventing the extension of workplace protections to transgender citizens.
- 2020: *Bostock v. Clayton County* case



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Supreme Court Landmark Decision

- ***Bostock v. Clayton County Georgia***, 140 S. Ct. 1731 (2020).
 - Through its interpretation of “sex” in Title VII, the Court extended protections to gay and transgender employees.



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H-B

Biden Plan to Advance LGBTQ+ Equality in America & Around the World

- Ensure young LGBTQ+ people are supported and protected in our schools & college campuses by:
 - Guaranteeing transgender students have access to facilities based on their gender identity.
 - Protecting LGBTQ+ students from sexual assault, harassment, and bullying.
 - Ending school discipline policies that disproportionately impact LGBTQ+ students.
- Would seek to reinstate “Dear Colleague Letter on Transgender Students,” requiring schools to:
 - Protect transgender students from harassment
 - Accommodate preferred names and pronouns
 - Give transgender students access to locker rooms and restrooms of their choice



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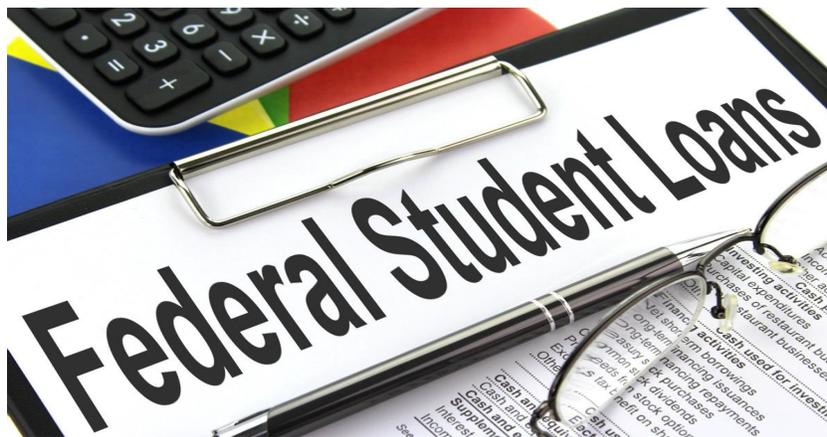
Actions Already Taken

- 1.20.21 EO on Preventing and Combating Discrimination Based on Gender Identity or Sexual Orientation
 - All persons should receive equal treatment under the law without regard to their gender identity or sexual orientation
 - Includes access to restroom, locker room, or school sports that aligns with their gender identity
 - Impact:
 - Anticipate more robust federal agency investigations of complaints of discrimination based on gender identity and sexual orientation

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Institutional Accountability/ Consumer Protection



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Enforcement-Based Accountability

- Likely increase in TIV program reviews
- Pressure from interest groups for ED to utilize seldom-used authorities in TIV compliance and enforcement actions:
 - Limit TIV participation and fines for non-compliance
 - Terminate Title IV institutional eligibility for “substantial misrepresentation”
 - Utilize subpoena authority in compliance and enforcement activities
- Likely effort to provide automatic student debt relief for total and permanent disability (high portion of veteran students)



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ED Transparency & Impact



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- Increased demand for consumer protection information around:
 - Composite score appeals (financial health)
 - CDR appeals
 - Institutions with TIV limitations such as HCM I & II, letters of credit, provisional certification
- May lead to ED providing more public “lists” similar to Obama-era OCR Title IX investigation list
- Unintended consequences of lack of context for some of these “perceived negatives”

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Borrower Relief Expansion

- Push by interest groups for:
 - Reinstatement of Obama-era “Closed School Discharge Rule,” allowing automatic discharges where institution closes prior to program completion
 - Providing 100% debt-relief for borrowers defrauded by institutions
 - *Yesterday: Biden team to cancel \$1B in student-loan held by 72,000 borrowers
 - 200,000+ claims still pending (in litigation)
 - Holding college executives personally liable for defrauding students
 - Recovering financial losses from individuals who own or substantially control institutions that go bankrupt or engage in fraud



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Consumer Protections: Income versus Debt



- Potential for reinstatement of gainful employment regulations that set a floor for income-to-debt ratios for completers of certain programs (largely community college and for-profit programs)
- Potential considerations:
 - Expansion to more educational programs (all institutions)
 - Expansion to all students, not just Title IV recipients
 - Data to be used for transparency purposes and/or enforcement purposes

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Deferred Action for Childhood Arrivals



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DACA

- Created by Obama Administration to protect undocumented immigrants who:
 - were brought to the U.S. as children,
 - obeyed the law once here, and
 - stayed in school or enlisted in the military
- Provides temporary work permits
- Protection from Deportation

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DACA & the Trump Administration

- Attempted to terminate the DACA program
- Overturned by the Supreme Court in *Dept. of Homeland Security v. Regents of the Univ. of California*, 591 U.S. __ (2020).
 - Addressed whether DHS complied with procedural requirement to provide reasoned explanation for its action
 - Decision to terminate DACA was “arbitrary and capricious”
 - DHS did not consider whether to retain protections from deportation, even if the benefits were terminated.
 - DHS did not properly consider how ending the program would affect recipients

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What is going to happen with DACA?

- Courts accepting DACA applications and renewal requests
- Biden Administration
 - Memorandum to preserve DACA
- New initiatives:
 - Eligibility for federal student loans
 - Investments in HBCU/Hispanic Serving Institutions/Minority Serving Institutions
- Pending Legislation



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Claw Back Title IX Rule



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Biden Vowed to Undo Title IX Reforms

- Trump administration rules:
 - Focused on providing protections to student respondents and restricted how schools can investigate sexual harassment allegations
- Biden plans to return to and build on Obama administration policies
 - Emphasized the rights of accusers
 - Allowed more ways for schools to adjudicate sexual misconduct allegations

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Last Week's Executive Order

- "Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," March 8, 2021
 - Within 100 days, ED and AG to review all regulations, orders, guidance documents, policies and agency actions and provide findings to Director of OMB
 - Specific mention of Trump-era Title IX regulations and guidance
 - As soon as practicable, ED to consider:
 - Issuing new guidance
 - Suspending, revising or rescinding – or publishing for notice and comment proposed rules to do so
 - Taking additional enforcement action to further EO's policies



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Next Steps on Title IX



- Policy pivot towards **prevention**
- New rules will not be quick or easy
 - Trump-era framework put in place through formal rule-making process
 - DeVos said her team was "methodical about our rule-making and regulatory moves" to make it more difficult for a subsequent administration to make changes.
 - Absent congressional action, Biden administration will have to go through the same procedures to overhaul regulations
 - Could take as long as two years

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Potential Shortcut?

- 18 states and District of Columbia have sued to block regulations
 - Will likely continue into the spring
 - These lawsuits offer potential shortcut
 - Biden administration can put the rule on hold, then issue its own framework to replace it
 - Republic attorneys general or other groups could intervene in litigation
 - Another lawsuit filed in N.D. CA just last week

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Violence Against Women Act Reauthorization (2021 Bill)

- VAWA is a 1994 law that enhances protections for women who have experienced sexual and domestic violence
- Expired in 2018; briefly renewed; expired again in 2019
 - Previously reauthorized in 2000, 2005, and 2013
 - 2013 reauthorization led to amendments to the Clery Act regulations
- House voted this week to reauthorize VAWA



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Spilling the Tea: VAWA Higher Education Provisions



- Reinstates grants from the AG to college campuses for training, improve response and communication,
- Requires GAO to examine survivors participating in Title IV student aid and report on:
 - Adequacy of forbearance, deferment, grace periods for loans
 - Adequacy of institutional policies on transfer of credits
 - Defense to repayment options for institutions that commit unfair, deceptive or abusive acts or practices or substantially misrepresent information
 - Limitations on survivors' ability to seek relief or restitution on federal student loan debt
- Requires ED to report to Congress on:
 - An evaluation of programs, events, and educational materials related to domestic violence, dating violence, sexual assault and stalking, and
 - Assess best practices and guidance which shall be made publicly available online as a resource

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Crystal Ball



What Else is in the Crystal Ball?

- **OCR Enforcement**
 - OCR to update case processing manual and remove rules to reduce complaints
 - OCR restaffing
 - Increased enforcement activity
- **Racial Equity**
 - Biden administration's focus on equity may lead to shifts in guidance and enforcement on topics such as racial disparities in student discipline, education curricula on racial justice, and equity in access to educational resources
 - Pivot on affirmative action in admissions
 - Potential guidance for institutional scholarships and awards
- **Digital Accessibility**
 - Potential rules on digital accessibility from Access Board and others
 - Increased enforcement
- **Clery Handbook**
 - Biden is committed to increasing fines for Clery Act violations, or failing to report statistics about campus safety, as well as develop stronger enforcement protocols at ED.
 - ED could reinstate former handbook or development or new one.
 - Possible rulemaking (perhaps not top priority with other rulemaking goals)

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Questions?



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