



**NATIONAL
WOMEN'S
LAW CENTER**

Justice for Her. Justice for All.

OCTOBER 2020 | FACT SHEET

Supreme Court Vacancy: What's at Stake for Education

The nation is in the middle of a pandemic that is closing schools throughout the country and putting students and school staff at risk. Remote learning exacerbates the already unequal education system, as students who lack devices and internet access and whose parents have to work fall further behind. Families are facing eviction and hunger. Meanwhile, the Trump Administration and Senate Majority Leader Mitch McConnell refuse to work on relief for Americans so that they can instead push through Judge Amy Coney Barrett's nomination in the middle of an election and a pandemic. The Senate must stop this sham nomination process and focus on the relief and care the country needs.

If confirmed to the Supreme Court, Amy Coney Barrett will likely rule on issues that are key to educational equity, such as the treatment of survivors of school sexual harassment, the rights of transgender students, and the consideration of race, along with other factors, in college admission decisions. Judge Barrett's opinions and speeches show that she will use her position of power to limit the rights of survivors and transgender students and restrict colleges' ability to ensure racial diversity among students. For the good of students, she should not be confirmed to this lifetime appointment.

The Nomination of Judge Amy Coney Barrett to the Supreme Court Threatens Fair Treatment for Student Survivors of Sexual Assault.

Sexual harassment, including sexual assault, is pervasive in schools nationwide and threatens survivors' access to education and its promises. Students experience high rates of sexual harassment. In grades 7-12, 56 percent of girls and 40 percent of boys are sexually harassed in any given school year.¹ During college, more than one in five women and nearly one in 18 men are sexually assaulted.² Sexual assault disproportionately affects women and girls, particularly women and girls of color, as well as LGBTQ and disabled students. Black girls are more likely to be blamed, punished, or have their reports of sexual harassment swept under the rug by schools based on insidious stereotypes that label them as more "promiscuous" and "adult-like" and less deserving of protection and care.³ Title IX, the law that prohibits sex discrimination in education, obligates schools to work to ensure that sexual harassment does not compromise survivors' education. The Trump administration has worked tirelessly to unravel those protections, and in Judge Barrett the administration has found a willing helper.

Judge Barrett's opinion in Doe v. Purdue University makes it easier for those held accountable for sexual assault to sue their schools.

In *Doe v. Purdue University*, Barrett made it easier for students who are held accountable for sexual assault to sue their schools for so-called sex discrimination.⁴ When plaintiff John Doe, a male college student, was found responsible by Purdue University for sexually assaulting his classmate and then-girlfriend, he was suspended for an academic year and expelled from the Navy ROTC program.⁵ Doe sued Purdue and several school officials, alleging due process and Title IX violations.⁶ A magistrate judge dismissed the complaint for failure to state a claim, and the Seventh Circuit, in an opinion written by Barrett, reversed.⁷

In ruling for John Doe, Barrett created a more relaxed Title IX standard that allows men disciplined for sexual assault to sue their schools for sex discrimination as long as they can raise a “plausible inference” that their schools were at least partly motivated by anti-male bias.⁸ In contrast, student survivors must typically show that their school responded with “deliberate indifference” (i.e., acted clearly unreasonably) to their requests for help in order to allege sex discrimination under Title IX.⁹ Judge Barrett's ruling turns Title IX into a statute that protects sexual harassers and rapists more than it protects their victims.

In support of her conclusion that Doe adequately alleged he was the victim of anti-male bias, Barrett pointed to the fact that the U.S. Department of Education—which is charged with addressing sex discrimination, including sexual harassment, in schools—had provided guidance for schools on their Title IX obligations to address sexual harassment and had investigated Purdue in instances unrelated to John Doe for potentially failing to respond to sexual harassment in violation of Title IX.¹⁰ Barrett suggested that because the Department of Education's Obama-era 2011 Title IX guidance indicated that “a school's federal funding was at risk if it could not show that it was vigorously investigating and punishing sexual misconduct,” the guidance added plausibility to John Doe's assertion that he had experienced sex discrimination. She reached this conclusion even though the Department guidance protected survivors of all genders equally, Doe did not allege any facts indicating anti-male bias in his specific case, and many of the unfair investigatory procedures that Doe alleged were in fact prohibited by the 2011 guidance. The idea that taking sexual harassment and assault seriously plausibly suggests sex discrimination against men is a disservice to all survivors of sexual violence—regardless of their gender—and a gross misinterpretation of Title IX.

If Judge Barrett is confirmed, it is highly likely that she will rule on the scope of Title IX's protections against sexual assault and other forms of sexual harassment.

Judge Barrett's views in *Doe* are especially troubling because as a Supreme Court Justice it is likely that she will rule on the scope of Title IX's protections for students. The issue of protections under Title IX could come to the Court in several ways.

First, the Administration has issued new Title IX regulations, which fundamentally alter how and whether schools can respond to reports of sexual harassment, sexual assault, dating violence, and stalking. These were enacted with the express goal not of reducing sexual harassment, but of reducing Title IX sexual harassment investigations in schools.¹¹ The new regulations are already being challenged in court, and Barrett may have to rule regarding them.

The new regulations restrict and undermine the rights of students who have been harassed or assaulted. Under these new Title IX regulations, schools must dismiss sexual harassment complaints that (1) do not meet a stringent, new definition of “sexual harassment”; (2) occur outside of a school program or activity, (e.g., in a private off-campus location); or (3) occur outside the United States (e.g., in a study abroad program).¹² Student survivors who are no longer enrolled at the school are similarly denied protections against sexual harassment, as the regulations require schools to dismiss any sexual harassment complaints brought by individuals who are not currently “participating in or attempting to participate in the education program or activity.”¹³ Likewise, if the respondent is no longer enrolled or employed at the school, the school is permitted to dismiss a survivor's complaint entirely.¹⁴ Institutions of higher education are only required to address incidents of sexual harassment when their Title IX coordinator or a school official with “the authority to institute corrective

measures” has “actual knowledge” of the incident.¹⁵ The regulations also afford student survivors fewer protections during investigations than the previous Title IX regulations and guidance. Under the new regulations, investigations proceed under the presumption that no sexual harassment occurred, and in hearings for these claims, schools may now choose to apply the “clear and convincing evidence” standard rather than the previous, more equitable “preponderance of the evidence” standard, making it all the more difficult for survivors to succeed in their cases.¹⁶ All parties and witnesses in higher education must submit to real-time, direct, oral cross-examination during these investigations in order to have any of their oral or written statements considered as evidence.¹⁷ This means respondents can simply choose not to be cross-examined if they want to exclude an inculpatory apology or confession from the evidence.

Second, Supreme Court review is currently being sought in at least one Title IX case which asks whether a student expelled because she rejected her professor’s overtures and was falsely accused of academic dishonesty is legally barred from bringing a Title IX lawsuit against her school.¹⁸ Additionally, students held accountable for sexual assault and harassment in schools are waging a legal war against Title IX, with more than 600 lawsuits filed by students found responsible for sexual misconduct.¹⁹ It is only a matter of time before the Supreme Court takes up these questions. Judge Barrett’s record demonstrates that if confirmed she would likely rule against protections for survivors in schools and make it easier for students held accountable for sexual misconduct to sue their schools. This pernicious combination will penalize schools that attempt to take sexual harassment seriously.

The Nomination of Judge Amy Coney Barrett to the Supreme Court Threatens Fair Treatment for Transgender Students.

Discrimination against transgender students is far too common. Eighty-five percent of transgender students experience discrimination at school,²⁰ including harassment, physical assault, and sexual violence,²¹ and half are prohibited from using names or pronouns matching their gender identity.²² Three out of four transgender students feel unsafe at school,²³ which in turn makes them more likely to miss class²⁴ and less likely to pursue higher education.²⁵ Transgender students also face disproportionate discipline at school and are more likely to be referred to the criminal legal system as a result.²⁶ Those who experience discrimination are more likely to suffer depression, often with deadly consequences,²⁷ and one in three attempted suicide in the last year.²⁸

Judge Barrett has publicly revealed her biased attitudes toward transgender students. In a 2016 lecture, then-Professor Barrett misgendered transgender students, repeatedly referring to transgender girls as “physiological males,” and echoed transphobic talking points, stating, “People will feel passionately on either side about whether physiological males who identify as females should be permitted in bathrooms especially where there are young girls present.”²⁹

In the same speech, Judge Barrett dismissed the view that discrimination against transgender students is unlawful sex discrimination, asserting that such an interpretation of Title IX would “strain the text of the statute.”³⁰ She asserted it was clear that no one “would have dreamed” that Title IX would protect transgender students from discrimination when the law was first passed.³¹ Barrett’s position is noteworthy because it is contrary to the analysis Justice Gorsuch relied on when deciding in *Bostock v. Clayton County* that discrimination against transgender people in the workplace is illegal sex discrimination under Title VII.³² There, the Court found that the word “sex” included transgender individuals, interpreting Title VII “in accord with the ordinary public meaning of its terms at the time of its enactment” to include protections against discrimination for transgender people.³³ Several federal courts have followed the Supreme Court’s analysis in *Bostock* to protect the rights of transgender students under Title IX, including the Third Circuit and Fourth Circuit.³⁴

If Judge Barrett is confirmed, it is likely that she will rule on the scope of Title IX’s protections for transgender students.

There are several cases regarding the rights of transgender students that may soon be heard by the Supreme Court. For example, in March 2020, Idaho passed a law banning transgender women and girls from competing in women’s and girls’ sports,³⁵ unless the student’s medical provider verifies that her reproductive anatomy, genetic makeup, or testosterone levels are consistent with that of a cisgender woman or girl.³⁶ The law was swiftly challenged in court and preliminarily

blocked as discriminatory and unconstitutional.³⁷ Yet, the Trump administration entered a statement of interest to defend the law in court and accused the plaintiffs of seeking “special treatment.”³⁸ That case is now on appeal to the Ninth Circuit—one step away from the Supreme Court.³⁹ Additionally, the Supreme Court previously agreed to hear a case involving a transgender student’s access to bathrooms in late 2016, until the Trump administration rescinded the Department of Education guidance protecting that right for students.⁴⁰ The Fourth Circuit very recently ruled in favor of the transgender student plaintiff, clearing the path to the Supreme Court considering the case again.⁴¹ Finally, the Trump Department of Education claimed that a Connecticut school policy allowing transgender girls to participate in girls’ athletics violates Title IX and, further, threatened to revoke federal funding if Connecticut did not immediately change its policy.⁴² Any of these cases could reach the Supreme Court and allow Judge Barrett the chance to rule against the transgender students seeking protection.

The Nomination of Judge Amy Coney Barrett to the Supreme Court Threatens Decades of Advances in Racial Diversity in Higher Education.

Diversity in education breaks down stereotypes, prepares students for success in a diverse society, and is critical for all students, especially women and students of color. A series of landmark Supreme Court decisions have reaffirmed this principle when it comes to race, recognizing the compelling interest universities have in a diverse student body.⁴³ But this principle is under attack, as the Trump administration has actively sought to undermine diversity and inclusion efforts, including by withdrawing crucial guidance on the use of race-conscious decisions in higher education.⁴⁴

The future of affirmative action in higher education is precarious. All of the recent governing precedents have garnered narrow majorities.⁴⁵ The most recent decision from the Supreme Court, *Fisher II*, ruled that consideration of race in admissions decisions was constitutional.⁴⁶ But the decision was split narrowly 4-3, signaling that any change in the composition of the Court could dramatically shift the law on affirmative action. Justice Scalia was an ardent opponent of affirmative action,⁴⁷ and Judge Barrett has repeatedly declared that her judicial philosophy closely mirrors his.⁴⁸ There is every reason to believe that if confirmed, Judge Barrett could play a pivotal role in ending any efforts to ensure racial diversity in college admissions. Furthermore, it is highly likely that Judge Barrett could hear *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, a case challenging Harvard’s holistic admissions policy—which considers race as one factor among many—as discriminatory against Asian Americans. The case is making its way through the courts, and the Trump administration just initiated similar litigation against Yale University.⁴⁹ While the district court found Harvard’s procedures to be lawful, the appeal is currently pending in the First Circuit, the last stop before the Supreme Court.⁵⁰

Conclusion

A Supreme Court with Judge Barrett on it would limit the rights of student survivors and transgender students and could prohibit institutions of higher education from taking steps to ensure a racially diverse student body. Judge Barrett should not be confirmed. Instead of prioritizing a rushed process to put their nominee onto the Court, the President and the Senate should be focused on COVID-19 relief so that schools can open safely.

1 Am. Ass’n of Univ. Women (AAUW), *Crossing the Line: Sexual Harassment at School 2* (2011) <https://www.aauw.org/app/uploads/2020/03/Crossing-the-Line-Sexual-Harassment-at-School.pdf>.

2 David Cantor et al., *Report on the AAU Campus Climate Survey on Sexual Assault and Sexual Misconduct 13-14* (Sept. 2015) https://www.aau.edu/sites/default/files/40%20Files/Climate%20Survey/AAU_Campus_Climate_Survey_12_14_15.pdf.

3 E.g., Nancy Chi Cantalupo, *And Even More of Us Are Brave: Intersectionality & Sexual Harassment of Women Students of Color*, 42 *Harv. J.L. & Gender* 1, 16, 24-29 (Winter 2018); Georgetown Law Center on Poverty and Inequality, *Girlhood Interrupted: The Erasure of Black Girls’ Childhood 1* (2018), <https://www.law.georgetown.edu/poverty-inequality-center/wp-content/uploads/sites/14/2017/08/girlhood-interrupted.pdf>.

4 *Doe v. Purdue Univ.*, 928 F.3d 652 (7th Cir. 2019).

5 *Id.* at 656.

6 *Id.* at 656, 658-59.

7 *Id.*

8 *Id.* at 669.

- 9 *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 641-43 (1999).
- 10 *Id.* at 668–69.
- 11 83 Fed. Reg. 61462, 61487 (2018); see also generally 34 C.F.R. § 106 et seq. (2020).
- 12 See National Women’s Law Center, *DeVos’s New Title IX Sexual Harassment Rule, Explained*, at 1-2 (May 2020), <https://nwl.org/resources/devos-new-title-ix-sexual-harassment-rule-explained>.
- 13 *Id.* at 3.
- 14 *Id.*
- 15 *Id.* at 2.
- 16 *Id.* at 4-5.
- 17 *Id.* at 4.
- 18 *Bost v. Bea*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/bose-v-bea> (last visited Oct. 13, 2020).
- 19 Beth Reinhard & Emma Brown, *Amy Coney Barrett, Potential Supreme Court Nominee, Wrote Influential Ruling on Campus Sexual Assault*, Wash. Post (Sept. 20, 2020), https://www.washingtonpost.com/investigations/amy-coney-barrett-potential-supreme-court-nominee-wrote-influential-ruling-on-campus-sexual-assault/2020/09/20/843e964e-fb52-11ea-830c-a160b331ca62_story.html.
- 20 The Gay, Lesbian & Straight Education Network (GLSEN), *The 2015 National School Climate Survey: The Experiences of Lesbian, Gay, Bisexual, Transgender, and Queer Youth in Our Nation’s Schools* 87 (2016), <https://www.glsen.org/sites/default/files/2020-01/GLSEN%202015%20National%20School%20Climate%20Survey%20%28NSCS%29%20-%20Full%20Report.pdf>.
- 21 Ellen Bara Stolzenberg and Bryce Hughes, *The Experiences of Incoming Transgender College Students: New Data on Gender Identity* (2017), https://www.aacu.org/liberaleducation/2017/spring/stolzenberg_hughes.
- 22 *Id.* at 3.
- 23 GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* 1 (2017), https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf.
- 24 GLSEN, *Harsh Realities: The Experiences of Transgender Youth in Our Nation’s Schools* xi (2009), <https://www.glsen.org/sites/default/files/2020-04/Harsh%20Realities.pdf>.
- 25 Nat’l Ctr. For Lesbian Rights & Gender Spectrum, et al., *Schools In Transition: A Guide for Supporting Transgender Students in K-12 Schools*, at 11, <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/files/assets/resources/Schools-In-Transition.pdf?mtime=20200713142742&focal=none>.
- 26 GLSEN, *Separation and Stigma: Transgender Youth & School Facilities* 4 (2017), https://www.glsen.org/sites/default/files/2019-11/Separation_and_Stigma_2017.pdf.
- 27 *Id.*
- 28 The Trevor Project, *Research Brief: Data on Transgender Youth* (2019), <https://www.thetrevorproject.org/2019/02/22/research-brief-data-on-transgender-youth/>.
- 29 Jacksonville University, *Hesburgh Lecture 2016: Professor Amy Barrett at the JU Public Policy Institute*, at 41:18, YouTube (Nov. 3, 2016), <https://www.youtube.com/watch?v=7yjTEdZ81ll>.
- 30 *Id.*
- 31 *Id.*
- 32 140 S. Ct. 1731 (2020).
- 33 *Bostock*, 140 S. Ct. at 1738 (2020).
- 34 *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1306 (3rd Cir. 2020); *Grimm v. Gloucester Cty. Sch. Bd.*, 2020 WL 5034430 (4th Cir. Aug. 26, 2020); *Hecox v. Little*, 2020 WL 4760138 (D. Idaho Aug. 17, 2020).
- 35 Madeline Holcombe, *Federal Judge says Idaho cannot ban transgender athletes from women’s sports teams*, CNN (Aug. 18, 2020), <https://www.cnn.com/2020/08/18/us/idaho-transgender-athletes-ban-blocked/index.html>.
- 36 Idaho Code Ann. § 33-6201 et seq. (2020).
- 37 See *Hecox v. Little*, No. 1:20-cv-00184-DCN (D. Idaho 2020), appeal docketed, No. 20-35813 (9th Cir. Sept. 16, 2020).
- 38 See Dep’t of Justice, Office of Public Affairs, *The Department of Justice Files Statement of Interest Defending the Constitutionality of Idaho’s Fairness in Women’s Sports Act* (June 19, 2020), <https://www.justice.gov/opa/pr/department-justice-files-statement-interest-defending-constitutionality-idaho-s-fairness>; see also Statement of Interest, *Hecox v. Little*, No. 1:20-cv-00184-DCN (D. Idaho June 19, 2020).
- 39 See *Hecox v. Little*, No. 1:20-cv-00184-DCN, 2020 U.S. Dist. LEXIS 149442, at *4 (D. Idaho Aug. 17, 2020), appeal docketed, No. 20-35813 (9th Cir. Sept. 16, 2020).
- 40 See *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 369 (2016); *Gloucester Cty. Sch. Bd. v. G.G.*, 137 S. Ct. 1239 (2017).
- 41 *Grimm v. Gloucester Cty. Sch. Bd.*, 2020 U.S. App. LEXIS 27234, at *8 (4th Cir. Aug. 26, 2020); see also *Grimm v. Gloucester Cty. Sch. Bd.*, 2020 U.S. App. LEXIS 30339, at *8 (4th Cir. Sept. 22, 2020).
- 42 U.S. Dep’t of Educ., Office for Civil Rights, Letter of Impending Enforcement Action (May 15, 2020), available at <http://www.adfmedia.org/files/SouleDOEImpendingEnforcementLetter.pdf>.
- 43 See *Regents of the Univ. of California v. Bakke*, 438 U.S. 265 (1978); *Grutter v. Bollinger*, 539 U.S. 306 (2003); *Gratz v. Bollinger*, 539 U.S. 244 (2003); *Fisher v. Univ. of Texas* (Fisher I), 570 U.S. 297 (2013); *Fisher v. Univ. of Texas* (Fisher II), 136 S. Ct. 2198 (2016).
- 44 Office of Public Affairs, *Attorney General Jeff Sessions Rescinds 24 Guidance Documents*, DEPARTMENT OF JUSTICE (July 3, 2018), <https://www.justice.gov/opa/pr/attorney-general-jeff-sessions-rescinds-24-guidance-documents>.
- 45 See *Bakke*, 438 U.S. at 265 (five-Justice majority, with one concurrence and five partial concurrences, partial dissents); *Grutter*, 539 U.S. at 306 (5–4 decision); *Gratz*, 539 U.S. at 244 (6–3 decision); *Fisher II*, 136 S. Ct. at 2198 (4–3 decision).
- 46 *Fisher II*, 136 U.S. 2198.
- 47 See, e.g., *Grutter*, 529 U.S. at 349 (“[T]he Constitution proscribes government discrimination on the basis of race, and state-provided education is no exception.”)
- 48 Emma Newburger, *Amy Coney Barrett pays homage to conservative mentor Antonin Scalia—‘His judicial philosophy is mine too’*, CNBC (Sept. 26, 2020), <https://www.cnbc.com/2020/09/26/amy-coney-barrett-pays-homage-to-mentor-antonin-scalia.html>.
- 49 *SFFA v. Harvard*, 397 F. Supp. 3d 126 (D. Mass. 2019).
- 50 *SFFA v. Harvard*, No. 19-2005 (D. Mass. filed Oct. 11, 2019).