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Insights

More Change on the Horizon for Title IX?

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Recent actions taken by President Joe Biden make it clear that more change is on the horizon with regard to Title IX enforcement as it relates to claims of sexual harassment.

Educational institutions are well aware of the promulgation of a federal regulation in May 2020 (the "Regulation") requiring specific due process protections in the investigation and adjudication of Title IX proceedings.[1] Immediately after its release, Krieg DeVault issued an **alert** highlighting the specific aspects of the Regulation and the significant changes it would require in Title IX practice at educational institutions, in particular institutions of higher learning. By now, educational institutions at all levels should have revised their practices to comply with the Regulation, which required compliance by mid-August 2020.

President Biden has already issued two executive orders impacting Title IX. Consistent with positions he took during his presidential campaign as well as in his public life prior to that time, he issued an order on March 8, 2021, the International Day of the Woman, calling on his new Secretary of Education to review the Regulation "for consistency with governing law, including Title IX", and with the Administration's policy of guaranteeing students an educational environment free of discrimination on the basis of sex. That **executive order** calls on the Secretary to "consider suspending, revising, or rescinding – or publishing for notice and comment proposed rules suspending, revising, or rescinding – those agency actions that are inconsistent with (the Administration's policy) as soon as practicable…."

Policy changes likely to be included in a revised Title IX regulation

If the Regulation is eventually revised through a rulemaking process, it is highly likely that certain specific changes will be made – among them the rescission of the current requirement of a live hearing including cross-examination of all witnesses in the post-secondary setting, along with the provision that any witness who declines to submit to cross-examination will not be entitled to have any prior statement considered by the adjudicator. Advocacy groups have expressed significant concern that a cross-examination requirement could chill reporting of sexual harassment. In fact, the American Council on Education sent a **letter** to then President-Elect Biden and then Vice President-Elect Kamala Harris on November 18, 2020, raising this specific issue and asking that it be addressed.

Though the Regulation has been in effect for nearly a year, it has been impossible to tell whether this concern about a chilling effect will come to fruition because of the impact of the coronavirus pandemic on in-person education. Nonetheless, any rulemaking process conducted by the current administration will undoubtedly remove that requirement.

Additionally, the preponderance of the evidence standard may well become a requirement rather than an option for educational institutions under a Biden administration; and the definition of sexual harassment will probably return to its prior, broader form under the Obama era guidance ("Unwelcome conduct determined by a reasonable person to be so severe, pervasive or objectively offensive that it effectively denies a person equal access to the [school's] education program or activity"). See below regarding the wording of the Regulation, which changed the "or" to "and", thus narrowing the definition somewhat.

However, at least in part because of the thoroughness of the prior administration in providing Supreme Court precedent in support of the provisions of the Regulation, and in part because of the plethora of lawsuits that were filed by respondents prior to 2020 against schools that followed the Obama Administration guidance, it is unlikely that the pendulum will swing all the way back to the pre-2017 guidance, which created what appeared to many to be a process that was weighted unfairly against respondents.

Short-term implications

Educational institutions that altered their procedures in 2020 to comply with the due process requirements of the Regulation are now wondering what this new edict will mean. The answer? In the immediate term, very little.

Prior to the promulgation of the Regulation, educational institutions were governed only by informal guidance issued from the Department of Education and easily amended by a simple policy pronouncement from the Department. Thus, in September 2017, guidance was issued by the Trump Administration rescinding prior guidance issued by the Obama Administration. The 2017 guidance remained in effect until the effective date of the Regulation, which superseded it.

Unlike the prior guidance, the Regulation, having been properly promulgated through a lengthy notice and comment process, has the force of law and cannot be easily rescinded absent another full notice and comment process. Such a process will take at least a year, and likely longer, meaning that in practice, the requirements will not change for the 2021-22 academic year, and the eventual changes may not even be in place for the 2022-23 academic year. In the meantime, the Regulation remains in full force and effect, including its requirement of a live hearing including cross examination of witnesses as well as a somewhat more restrictive definition of sexual harassment ("Unwelcome conduct determined by a reasonable person to be so severe, pervasive *and* objectively offensive that it effectively denies a person equal access to the (school's) education program or activity") than had been included in the prior guidance.

One change may be effective immediately based on both the March 8, 2021 executive order and an earlier executive order issued by President Biden on January 20, 2021, the day of his inauguration. Both executive orders make it clear that the President intends that his Department of Education include sexual orientation and gender identity within the term "on the basis of sex". Thus, any new regulation will certainly require that educational institutions provide an atmosphere free from discrimination on the basis of those factors as well as biological male-female gender differences. And it appears that this additional protection can be enforced through the current Regulation, which does not limit the definition of sexual harassment to biological male-female gender harassment. Educational institutions should immediately examine their current policies and practices to ensure that they provide protections based on sexual orientation and gender identity.

Note: educational institutions controlled by a religious organization may be entitled to an exemption from this new mandate under the terms of 10 U.S.C. 1681(a)(3) and 34 C.F. R. § 106.12(a) if the requirements of the January 20 executive order conflict with the religious tenets of the controlling religious organization. However, further legal analysis should be conducted prior to relying on this exemption.

Other than with respect to the terms of the January 20 executive order, it is unlikely that the Administration can require changes in Title IX policy and practice in the immediate future. There has been public speculation that the Administration may seek to cause the effective rescission of the Regulation by declining to defend the lawsuits that have been filed challenging its terms. However, the prior Administration's promulgation process was careful and thorough, and the Regulation's provisions were based on a requirement of equal treatment under the law. Thus, the Regulation is likely to be upheld in court regardless of the current Administration's legal posture.

Similarly, the Regulation cannot easily be suspended by Congress under the Congressional Review Act ("CRA"), allowing Congress to review and suspend regulations issued in the waning months of a presidential administration. The CRA, however, likely would not have applied to this particular regulation due to the timing of its effective date, more than 6 months prior to the end of the Trump Administration. Further, the action of the courts in declining to stay the operation of the Regulation after lawsuits were filed to oppose it may effectively negate the potential impact of the CRA.

It has also been suggested that the Administration will attempt to influence the practices of educational institutions by declining to enforce the provisions of Title IX. However, educators should be aware that this

potential inaction by the Department will do little to protect them if they depart from the due process requirements of the Regulation. Private parties to a Title IX proceeding still have access to the courts; and the existence of the Regulation, having the force of law, may provide a strong justification for a private cause of action.

Potential for private lawsuits

A primary question being asked by educational institutions is this: while they await regulatory action by the Biden Administration, is it safe to relax their guard with respect to the due process provisions of the Regulation because the Biden Administration is loath to enforce it?

The clear answer is no, it is not. As indicated above, parties still have a private right of action under Title IX, and the Regulation provides strong support for arguments based on deprivation of due process, at least in the case of public institutions. (Note: The due process clause of the 14th Amendment to the U.S. Constitution applies specifically to state actors, thus implicating public educational institutions.) A strong due process argument is available to a person who believes he or she has been denied due process by the actions of a public institution and can show a deprivation of life, liberty or property as a result of those actions. This was the finding of the 7th Circuit Court of Appeals in ***John Doe v. Purdue University***, 928 F.3d 652 (7th Cir. 2019). Importantly, the case was decided prior to the promulgation of the Regulation. Further, the decision was written by Justice Amy Coney Barrett, a known conservative jurist, prior to her ascension to the U.S. Supreme Court, suggesting that this is a legal theory likely to stand if challenged in the highest court in the land.

What about private institutions? Are they safe from the threat of private lawsuits?

Not necessarily. As we saw in the class action lawsuits filed in the spring of 2020 related to the refund policies of educational institutions forced by the coronavirus pandemic to turn to remote learning, plaintiffs will likely use contract theory to make an argument similar to the 14th Amendment due process theory in ***Doe v. Purdue***. They may allege a contractual obligation on the part of an educational institution to provide them with the same rights as other students, including complainants in sexual harassment cases. In the case of primary and secondary institutions, plaintiffs can legitimately allege that the state guarantees the right to an education, though the 7th Circuit has specifically found that not to be the case in Indiana with respect to post-secondary education. This could provide grounds to challenge an expulsion in a primary or secondary school context.

Private institutions of higher education, as well as private primary and secondary schools, should carefully review their enrollment agreements with students and any apparent guarantees made in other policy documents, including student handbooks. Even course syllabi, some of which have become much more prescriptive than in previous years, should be reviewed to ensure that they do not imply a right the institution does not intend to confer that might implicate a Title IX related lawsuit.

Conclusion

One thing is clear: the federal requirements related to Title IX are going to change again. They will move closer to the Obama-era guidance, but it is unlikely that they will reach the level of imbalance between the parties that it was believed the Obama-era guidance required. And it will quite possibly be at least 2023 before a change is in place. In the meantime, other than with respect to including sexual orientation and gender identity in their definition of sexual harassment, educational institutions should proceed cautiously in relation to departures from the requirements of the Regulation.

For more information, please contact **Deborah J. Daniels**, **Elizabeth M. Roberson**, or any member of Krieg DeVault's **Higher Education Industry Group**.

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[1] See "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance", 85 Fed. Reg. 30026 (May 19, 2020) (the "Regulation"), at https://www.govinfo.gov/content/pkg/FR-2020-05-19/pdf/2020-10512.pdf.