



Title IX – Will Everything Old Be New Again?

Insights

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[Warning: This article does not reference viruses, vaccines, or mask-wearing.]

The education world is in a state of flux, legally speaking. Any day now, the U.S. Supreme Court will further opine on the extent to which the First Amendment protects off-campus speech in the public K-12 context, and whether or to what extent college and university athletes may personally profit from their names, images, and likenesses (NIL). These developments have and will continue to dominate headlines for the foreseeable future.

As if those were not enough, another issue with equivalently far-reaching consequences is quietly in the works for schools, colleges, and universities that receive federal funding. Just months after schools scrambled to enact sweeping new changes for addressing sexual-misconduct under Title IX, the Biden administration is preparing additional dramatic changes to the landmark statute.

How Did We Get Here?

Up until 2001, federal courts interpreted Title IX – which did not expressly refer to “sexual harassment” – in a narrow fashion. To prevail, a student had to show a school had “actual knowledge” of misconduct that was “so severe, persistent, and objectively offensive that it effectively barred the victim’s access to educational opportunity” and that the institution responded to that actual knowledge with “deliberate indifference.” In 2001, in response to criticism that this standard incentivized institutions to avoid obtaining “actual knowledge,” the Department of Education’s (ED) Office of Civil Rights (OCR) issued guidance making clear that although a court-imposed standard for obtaining damages might use the “actual knowledge” standard, OCR had more stringent standards for its investigations of educational institutions’ alleged Title IX violations.

In 2011, under the Obama administration, the OCR issued a Dear Colleague Letter that fundamentally changed Title IX compliance for those institutions to which it applies. This guidance document effectively directed schools to take sexual harassment and sexual violence more seriously or risk facing a federal investigation. A decade of intense scrutiny regarding how schools, colleges, and universities addressed sexual misconduct followed.

For example, colleges and universities were informed that they should use the lowest evidentiary standard – a “preponderance of the evidence” analysis – in sexual assault cases, that either the accuser or the accused could appeal “not guilty” findings, and that campuses should accelerate

their adjudications. The 2011 letter acknowledged that schools were not required to allow lawyers to participate at any stage of the proceedings, but if they were allowed to participate, it had to be allowed on an equal basis. The same was true for cross-examinations, as OCR strongly discouraged allowing for the cross-examination of either the accuser or the accused. The rationale was victim-oriented, with OCR stating, “Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.” The letter also clarified that schools may have an obligation to respond to student-on-student sexual harassment that initially occurred off-campus, even outside a school’s educational program or activity.

However, the Dear Colleague Letter only explained how OCR would interpret Title IX going forward. It was not the result of administrative rulemaking, a laborious process that can take years to complete. In other words, Title IX itself did not change, only OCR’s interpretation did. Still, compliance was the name of the game, and “frantically” is not too strong a word to describe the approach most institutions took to revising their Title IX practices in the wake of the 2011 guidance.

In 2017, the Trump administration rescinded the 2011 Dear Colleague Letter and in May 2020, it issued new Title IX regulations – the first to go through the formal rulemaking since 1997. In fact, the new regulations were considered the first “full” rulemaking on a major Title IX issue since 1975 and the only ever specifically dedicated to sexual harassment. Significantly, the new regulations:

- narrowed the understood definition of “sexual harassment;”
- required post-secondary schools to conduct “hearings” into allegations of sexual assault and to allow cross-examination of any witness (including potential victims);
- confirmed that off-campus conduct did not have to be addressed so long as it did not involve an educational program; and
- announced that schools now had a choice regarding the evidentiary standard, either using the lower “preponderance of the evidence” analysis or the higher “clear and convincing proof” standard, so long as it applied that same standard to other matters.

Further, training was required for specific employees and schools were required to post its policies online.

As a candidate, President Biden promised to rescind the Trump-era Title IX regulations. In March 2021, he began that process by directing ED through an executive order to review the newly enacted regulations for consistency with his administration’s policies. In April 2021, OCR formally announced a plan to gather public comments and stated it anticipated publishing a notice of proposed rulemaking in the Federal Register.

What Changes Can We Expect?

Then-Vice President Biden was closely linked to the Obama administration's 2011 Title IX policy. He co-chaired a White House task force to address student sexual assault and helped announce the 2011 guidance. Given that background, some potential changes to Title IX can be expected.

Most expect the Biden administration to revise Title IX's definition of "sexual harassment" which is currently defined consistent with the federal caselaw referenced above as conduct that is "so severe, pervasive, and objectively offensive" that it denies a person access to an education. For purposes of comparison, the Obama-era guidance defined it as "unwelcome conduct of a sexual nature." As Title VII is currently understood, "sexual harassment" is conduct that is severe or pervasive enough that it creates a hostile, intimidating, or abusive environment. In addition, it is considered likely that schools will again be required to address off-campus student-on-student sexual harassment even if it originates outside of an educational program or activity.

The Biden administration may also seek to reaffirm that Title IX's protections extend to LGBTQ persons. As background, in June 2020, the U.S. Supreme Court held in *Bostock v. Clayton County* that Title VII's protections extend to gay and transgender employees. Paraphrased, the Court stated that an employer could not discriminate on the basis of an employee's sexual orientation or gender identity without discriminating against that person "on the basis of sex." Afterwards, under former Secretary of Education Betsy DeVos, ED issued guidance stating that the *Bostock* decision did not affect its interpretation of Title IX and that Title IX may or may not be implicated when a gay or transgender person was treated differently on the basis of their sex. On President Biden's first day in office, he issued an executive order clarifying his administration's position that *Bostock* does require a reinterpretation of Title IX (and other federal anti-discrimination statutes and regulations). Accordingly, this is another change the Biden administration may seek through revised regulations.

Whether other Trump-era Title IX regulations will be affected, especially those related to due process, is unclear. For example, whether Title IX hearings will continue to be mandatory for post-secondary institutions, whether there will be a right to legal representation during those hearings, and whether cross-examination of witnesses will be permitted remains up in the air. Advocates for potential victims are lobbying to end both practices. Advocates for the potentially unfairly accused are lobbying to keep both practices in place.

As a candidate, President Biden suggested he wanted to go further than merely restoring the 2011 Title IX guidance. According to his campaign documents, additional revisions could include expanding requirements for schools to offer and fund peer-facilitated and student-led prevention education as well as requiring schools to improve reporting practices – including the adoption of amnesty policies. However, it will likely take some time before schools receive any indication on whether these or similar additions will be part of any new Title IX regulations.

Timing Really Is Everything

After the 2011 Dear Colleague Letter was issued, schools rushed to adopt new practices and procedures. Hearings were held, decisions were made, and then the mostly male students

procedures. Hearings were held, decisions were made, and then the mostly-male students sanctioned for sexual harassment or assault under the new Title IX standards filed lawsuits across the country alleging the schools violated their due process rights and/or acted with anti-male bias. Some of these cases have survived attempts at early dismissal, which could potentially complicate any overhaul of the current regulations. In addition, given the ever-increasing cost of litigation, if these lawsuits are viable, schools could find themselves pressured to settle claims with the very students it found (or would have found) responsible for sexual misconduct in the first place.

What Should You Do Right Now?

As noted above, formal administrative rulemaking can take years to complete. Until then, the Trump-era regulations will remain in place. A public hearing regarding the 2020 Title IX changes is currently scheduled for later this month. While it would be unusual, ED could issue guidance that OCR will not continue to enforce certain of those regulations. However, it has not done so at this time nor is such a move anticipated.

For the time being, schools should reiterate that the 2020 Title IX rules and regulations remain in effect and should continue to emphasize the importance of compliance. However, it may be worth engaging in dialogue with your school community regarding changes to Title IX that may be on the horizon. Many institutions and leaders are expected to participate in the notice-and-comment period of rulemaking by suggesting improvements to existing law, suggesting certain portions or policies remain the same, or questioning the appropriateness of any suggested additions.

Finally, school leaders should closely follow any interim guidance issued by ED as to revised OCR interpretations or standards.

Should you have questions or need assistance in managing any of these issues, you should contact your Fisher Phillips lawyer, the author of this article, or any member of our Education Practice Group. To ensure you stay up to speed with the latest developments, make sure you are subscribed to Fisher Phillips' Insight System to get the most up-to-date information.

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