

Insights

BIDEN EXECUTIVE ORDER CONFIRMS CHANGE IS COMING FOR TITLE IX

Mar 09, 2021

On his first day in office, President Biden issued an Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation that foreshadowed Title IX's protections against discrimination on the basis of sex would be extended to the LGBTQ+ community. On March 8, 2021, Biden confirmed in his Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, that his administration will ensure that discrimination on the basis of sexual orientation or gender identity will be prohibited under Title IX and that a more comprehensive overhaul of Title IX is coming.

The Executive Order directs the Secretary of Education to review all agency actions for consistency with its policy guaranteeing "an educational environment free from discrimination on the basis of sex, including discrimination in the form of sexual harassment, which encompasses sexual violence, and including discrimination on the basis of sexual orientation or gender identity." The Executive Order does not itself overturn the Title IX regulations adopted under former Secretary of Education Betsy DeVos in May 2020, nor does it set a date by which institutions should expect clarity on what tack the Biden administration will take on new Title IX regulations. Instead, it gives the Secretary of Education 100 days in which to evaluate the agency actions to determine whether the DeVos rules are consistent with Biden's policy statement, or should be suspended, revised, or rescinded.

So what can institutions of higher education expect and when?

For the thousands of institutions that had to rewrite their Title IX policies and procedures to comply with the DeVos rules, the big question arising from this latest executive order should not be whether they will have to change their Title IX programs again, but instead how much of an overhaul they will have to do and when.

How much will the Biden administration change the Title IX rules that govern how institutions of higher education must investigate and adjudicate alleged Title IX violations?

One possible option is that this administration will rescind and replace the DeVos rules with the 2011 Guidance adopted under the Obama administration, but rescinded in 2017 by DeVos. Biden expressed his intent to take this tack on the campaign trail. The full reinstatement of the 2011 Guidance could create a relatively low-pain compliance process as many institutions could simply revert to their pre-August 2020 Title IX policies and procedures. It would not, however, be without cost as litigation challenging the perceived withdrawal of procedural protections would be inevitable.

Despite Biden's campaign statements, we may not see the administration throw out the DeVos rules in their entirety and revert to rules that merely replicate the 2011 Guidance. Indeed, Jennifer Klein, the co-chair of Biden's newly created Gender Policy Council, announced that the administration's policy is that "all involved have access to a fair process. . . . accused or accuser," and that mentality would be kept in mind as the DeVos rules are re-evaluated. We may therefore see an effort to retain some of the procedural protections adopted in the 2020 DeVos rules and to integrate those into the 2011 Guidance. For example, we could see a reversion to the more inclusive definition of sexual harassment in the 2011 Guidance and a retention of the DeVos requirements of notice and access to a representative throughout the investigative and disciplinary process.

Though we may see an attempt to craft a middle ground that could appease both survivors and respondents' advocates, we are likely to see a change to centerpiece of the DeVos rules: the requirement of cross-examination during a live hearing. In 2019, Biden's appointee to head up the Department of Education's Office of Civil Rights, Suzanne Goldberg, came out strongly against the cross-examination requirements, arguing that "Campuses are not courtrooms," and that "Although [the DeVos rules' cross-examination] mandate might seem at first like a good idea, a closer look shows otherwise." She expressed concerns regarding the burden court-like disciplinary proceedings would impose on institutions, the potential inequities it could create based on access to lawyers, and the risk of retraumatizing victims through confrontational examination. If cross-examination is discarded in new regulations, we can expect respondents' advocates to challenge the rules in court based on the Sixth Circuit Court of Appeals decision finding a constitutional right to cross-examination exists for Title IX proceedings, *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018), and should anticipate another pendulum swing towards the DeVos procedural protections the next time a Republican administration takes office.

If the Biden administration incorporates some of the DeVos procedural requirements, institutions will have to engage in a careful reworking of their policies to meld old and new requirements. Though achieving a set of regulations that satisfy all is a tall order, the hope is that it would also provide some much-coveted stability and render another round of dramatic policy revisions with the next change of administration be avoidable.

When will institutions have to change their Title IX policies and procedures?

Whatever the scope of the rules change promoted by the Biden Department of Education, institutions are unlikely to have a clear picture of what the rules change will be any time soon. The Department of Education has until June 16, 2021, to report to the Office of Management and Budget regarding its review of Title IX agency actions. Because the DeVos Department of Education implemented its Title IX rules through a formal rule-making process, the Department of Education cannot modify, suspend, or rescind those rules without undertaking another rulemaking process, which could take many months. We therefore anticipate the Department of Education will kick off a rulemaking process predicated on the findings and recommendations of the Secretary of Education as quickly as it can. Due to the time it could take to complete the rulemaking process, we may see the Department of Education issue interim guidance on how it will interpret and enforce the existing rules pending completion of that rulemaking. We could likewise see the Office of Civil Rights elect not to focus its limited enforcement resources in compelling strict adherence to the more granular process demands of the DeVos rule pending issuance of such guidance and promulgation of new rules.

Though any rule changes relating to rescinding the DeVos rules are unlikely to come into effect much before the end of 2021, we may see far sooner the definition of discrimination “on the basis of sex” codified through the Equality Act or an interpretive rule adopted without notice and comment. If the Equality Act does not pass first, then federal agencies have until May 1, 2021 to evaluate how their implementation of federal anti-discrimination laws needs to be changed to prevent discrimination based on gender identity or sexual orientation. So change is coming on the definition of “on the basis of sex” far sooner than the broader changes to Title IX’s implementing rules. We therefore suggest that institutions invest now in evaluating whether their policies adequately address the definition of sexual discrimination to encompass discrimination on the basis of gender identity or sexual orientation and to be prepared to revise policies as necessary on short notice.

We will be monitoring the outcome of the Department of Education’s review of Title IX-related agency actions, and will provide further updates as reports and proposals are published. It would be prudent for all institutions of higher education to review and evaluate all non-discrimination policies and procedures in light of these changes, and to be prepared to address more comprehensive changes later this year. Institutions with questions about how the executive orders and the resulting agency actions may impact your policies and procedures can contact sarah.hartley@bcplaw.com or the BCLP Higher Education Team for guidance.

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