

Signs of What's to Come – Title IX Under the Microscope Again

September 8, 2021

Although the past year seems like it lasted a million years, it was just a little over 12 months ago that new Title IX regulations became effective for all federally funded educational institutions. For those unfamiliar, Title IX of the Education Amendments of 1972 was passed to ensure that “no person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”

After a lengthy notice and comment period, the Department of Education (ED) published the [new final regulations](#) implementing the Title IX statute in May 2020 with an effective date of August 14, 2020. (Check out our [blog post](#) on the topic for additional guidance.) The new regulations were met with swift and significant pushback from student and consumer protection groups who saw the new regulations as eroding the protection of Title IX complainants, and from institutions frustrated by the brief two-month time frame to implement a complex new regime. Regardless, this pushback – and related litigation – did not stop the regulations from becoming effective as planned. (Neither snow, nor rain, nor heat, nor gloom of night, nor global pandemic, stays the regulatory machine!) By the effective date, institutions, students and other stakeholders were left to navigate regulations that replaced decades of guidance and interpretation, including the detailed Obama-era sub-regulatory guidance.

New Administration, New Approach

Actions over the past several months have made it clear that the debate over Title IX continues to be a priority. Upon taking office, the Biden Administration wasted little time before diving into the fray over the last administration's [Title IX regulations](#). In March 2021, President Biden issued an [Executive Order](#) (EO) indicating the Administration's strong commitment to protecting students from sexual discrimination and harassment. Importantly, the EO also announced a broad review of the 2020 Title IX regulations and guidance, and indicated the administration's intent to amend or pursue new rules if warranted to ensure that all students are protected, including those for whom the Title IX protections have not always been fairly or consistently applied, including members of the LGBTQ+ community.

Following that announcement, on April 6, 2021, ED issued a [letter](#) to affected institutions providing some additional context on their action plan to implement Biden's EO. That letter also previewed upcoming actions, including a potential rulemaking to amend the 2020 regulations and the publication of FAQs to provide clarity on how ED interprets the 2020 regulations. While ED has yet to establish a new rulemaking, the [FAQs](#) were subsequently published in July 2021.

Legal Challenges to the 2020 Regulations

In addition to the Department's on-going review and analysis of the 2020 regulations, the regulations have also been subject to a number of legal challenges, one of which was decided in July 2021. In *Victim Rights Law Center et al. v. Cardona*, the US District Court for the District of Massachusetts upheld most of the provisions of the 2020 amendments. However, the Court vacated a key part of the 2020 regulations relating to aspects of the live hearing requirement for the grievance process at postsecondary institutions. In accordance with the 2020 regulations, a decision-maker – the person(s) appointed by the institution to preside over hearing and issue written determinations — in a grievance process was prohibited from relying on the statements of a party if the statements were not subject to cross-examination at hearing. This prohibition was criticized by organizations concerned that it would, among other things, unfairly advantage respondents who made admissions of culpability prior to the grievance hearing and then declined to submit to cross-examination during such hearing.

As a result of the Court's decision, a Title IX decision-maker may now consider otherwise permissible statements made by parties or witnesses, even if those parties or witnesses do not participate in cross-examination at the live grievance hearing. This would appear to provide decision-makers with the discretion to consider all relevant statements made by parties and witnesses during the investigation, including those found in emails, witness statements, text messages, and police reports.

Following the July decision, ED issued another [letter](#) indicating that it would immediately cease enforcement of the prohibition against statements not subject to cross-examination. Although ED did not specifically advise institutions to modify their practices, we recommend all institutions review their Title IX policy, and any training materials for decision-makers, and remove any reference to this provision.

We are continuing to track the Department of Education's progress in its Title IX regulatory review, and we fully expect we will be seeing additional guidance and potentially a new rulemaking, in the coming months/year. If you would like assistance reviewing and/or updating your Title IX policy based on the current regulations and guidance, please reach out to the authors for more information.

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Victim Rights Law Center et al. v. Cardona, No. 1:20-cv-11104 (D. Mass. July 28, 2021)

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