

A Changing Title IX Landscape Brings Challenges For Schools

By **Lisa Lori and Stephanie Wolbransky** (March 17, 2021)

Over the past 10 years, colleges and universities have grappled with contradictory guidance regarding their responsibility in connection with sexual discrimination and harassment on campus.

From a so-called Dear Colleague letter issued during the Obama administration, to the narrow regulations released during the Trump administration, colleges and universities across the country have received conflicting instructions from the U.S. Department of Education on how to enforce Title IX on campus.[1]

Title IX guidance appears to be in flux again. This article addresses the responsibilities of a decision maker in a Title IX due process hearing; specifically, which regulations and procedures apply to Title IX complaints and the impact, if any, that future regulations introduced by the Biden administration may have on these cases.

In April 2011, the Department of Education under the Obama administration issued a Dear Colleague letter, which offered unofficial guidance for colleges and universities, and encouraged school administrations to "take immediate and effective steps to end sexual harassment and sexual violence." [2]

Further, the letter discussed proactive efforts schools could take to prevent sexual harassment and violence, and provided examples of remedies that schools should use to end such conduct, prevent its recurrence and address its effects.

Notably, however, the letter was merely an unofficial policy guideline created under the Obama administration and was never codified or implemented by an official rulemaking process through the Department of Education.

In 2017, almost immediately after taking office, the Trump administration rescinded the Obama administration's letter, leaving school administrators without any guidance on how to enforce nondiscriminatory practices and procedures under Title IX.

In May 2020, the Department of Education released a new set of Title IX regulations.[3]

These Trump administration regulations were intended to hold "schools accountable for failure to respond equitably and promptly to sexual misconduct incidents" and to ensure "a more reliable adjudication process that is fair to all students." [4] Former Education Secretary Betsy DeVos required all colleges and universities to update their campus policies to comply with the new federal law by August 2020.

In short, DeVos' changes required schools to implement a grievance process in the investigation of formal Title IX complaints, allowing both complainants and respondents to question each other during a live hearing.

The Trump administration regulations also limited the types of sexual misconduct that campuses could investigate. Moreover, the regulations directly contradicted many Obama-



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era policies.

Specifically, the Trump administration regulations, among other things, encouraged schools to adopt a "clear and convincing" standard of evidence, which requires a higher burden of proof than the previous "preponderance of the evidence" standard issued under Obama's guidance.

In the preamble of the Trump administration regulations, the Department of Education noted that it would not enforce the regulations retroactively. Because this policy was somewhat unclear, the department's Office for Civil Rights later issued a blog post clarifying the "retroactivity" of the Trump administration regulations and indicated that the regulations would only apply to sexual harassment incidents that allegedly occurred on or after Aug. 14, 2020.[5]

On March 1 this year, the U.S. Senate voted to confirm Miguel Cardona as education secretary to serve under President Joe Biden. In response to his confirmation, members of Congress sent him a letter imploring him to "prioritize replacing [the Trump administration regulations] prescribing how K-12 schools and postsecondary institutions must respond to sexual harassment and assault under Title IX." [6]

A week later, Biden issued an executive order that signaled his desire to do just that.

In a March 8 executive order, titled "Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity," Biden declared his administration's policy — "that all students should be guaranteed 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." [7]

Biden further directed the education secretary to, within 100 days of the date of his order, "review all existing regulations, orders, guidance documents, policies, and any other similar agency actions ... that are or may be inconsistent with" the administration's policy. Biden additionally directed the education secretary to issue new guidance that is consistent with the administration's policy and to, among other things, consider taking additional enforcement actions to enforce the policy.

While the Biden administration has not yet made any changes to the Trump administration regulations implemented under DeVos, any changes made may have an impact on the way in which current Title IX lawsuits are handled.

To understand how the Biden administration's new guidance may affect Title IX actions, a review of the current state of Title IX is necessary.

Under the Trump administration regulations, colleges and universities were directed to use their old Title IX policies to address conduct that occurred prior to the Aug. 14, 2020, effective date of the Trump regulations. However, last October, the U.S. District Court for the Northern District of New York enjoined a university from doing just that in *Doe v. Rensselaer Polytechnic Institute*. [8]

In that case, two students accused each other of unwanted sexual intercourse, which led to the female student, identified as Jane Roe, filing a Title IX complaint against a male student, identified as John Doe, in January 2020. Doe cross-filed a complaint against Roe approximately six months later. During the course of the university's investigation, the

Trump administration regulations went into effect.

In compliance with the Trump regulations, the university updated its 2018 sexual misconduct policy. However, because the conduct at issue occurred prior to Aug. 14, 2020, the university declined to follow the Trump administration regulations.

As a result, in September 2020, Doe filed a complaint in the Northern District of New York against the university, alleging that its handling of his cross-complaint and its refusal to apply the Trump administration regulations amounted to sex-based discrimination in violation of Title IX.

While the university argued that the Trump administration regulations could not be applied retroactively, the court found the regulations' retroactivity "largely irrelevant." Moreover, the court observed that the Office for Civil Rights' statements about retroactivity in the preamble of the Trump administration regulations were unclear, and that it was not required to give any deference to the OCR's blog post clarifying the department's position regarding retroactivity, since the blog was not legally binding.

Based on the court's ruling in Doe, it is unclear, should Biden enact any new Title IX procedures, whether courts will retroactively apply the procedures to investigations or hearings that occurred prior to the time when the regulations go into effect.

Given this uncertainty, the safest course is for schools to continue to follow the Trump administration regulations until such time as those regulations are rescinded and superseded by new regulations enacted under the Biden administration.

While Biden has taken on Congress' challenge to change the Trump administration regulations, it is unclear when such regulations will take effect. Notably, it took DeVos nearly three years to completely reverse Obama's guidance and put the Trump administration regulations into effect.

Since the policies have yet to be drafted, there is a question as to whether any new regulations will apply retroactively to investigations occurring now, while the Trump administration regulations remain in effect. In addition, Biden will likely make significant changes to the Trump regulations, including the possibility of reverting back to the "preponderance of the evidence" standard.

Such changes could provide greater protections for victims of sexual harassment and allow more investigations and hearings to move forward than under the Trump administration regulations.

However, even if Biden intends to rescind or repeal the Trump administration regulations and have new regulations enacted, no changes have been made to date. Thus, for now, the Trump administration regulations remain in place, despite their confusing and contradictory application, and schools should continue to follow their sexual misconduct policies drafted to comply with the regulations.

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[1] Title IX of the Education Amendments of 1972 ("Title IX") prohibits discrimination on the basis of sex in education programs or activities operated by recipients of Federal financial assistance. See 20 U.S.C. §§1681, et seq.

[2] See Dear Colleague letter, available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> (Apr. 4, 2011).

[3] See 34 C.F.R. §106.

[4] See U.S. Department of Education Press Release, Secretary DeVos Takes Historic Action to Strengthen Title IX Protections for All Students, available at <https://www.ed.gov/news/press-releases/secretary-devos-takes-historic-action-strengthen-title-ix-protections-all-students> (May 6, 2020).

[5] <https://www2.ed.gov/about/offices/list/ocr/blog/20200805.html>.

[6] See Letter to Secretary Cardona, available at https://speier.house.gov/_cache/files/1/b/1be77711-5eae-4bf8-bed0-dd59629db852/0D83F3D46B1ABB9DE425FBA985209850.2021-03-02dwc-title-ix-letter-to-cardona-final.pdf (Mar. 2, 2021).

[7] Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity | The White House.

[8] *Doe v. Rensselaer Polytechnic Institute*, 2020 WL 6118492 (N.D.N.Y, Oct. 16, 2020).