



A Robinson+Cole Legal Update

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President Directs Department of Education to Begin Dismantling Trump-Era Title IX Sexual Misconduct Regulations

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During the presidential campaign, President Biden indicated that he would revive Obama-era guidance to schools on how to investigate sexual harassment and assault under Title IX, including the 2011 “Dear Colleague Letter” that was rescinded by the Trump Administration in 2017. Today, the Biden administration began making good on that promise. The president signed an [executive order](#) on March 8, 2021, directing the Department of Education (DOE) to review the controversial regulations that became effective in August 2020, and provide findings within 100 days. The Secretary of Education must “consider suspending, revising, or rescinding—or publishing for notice and comment proposed rules suspending, revising, or rescinding” agency actions that do not guarantee an educational environment free from discrimination on the basis of sex, including in the form of sexual harassment and sexual violence. Among other considerations, the Secretary was directed to “account for the significant rates at which students who identify as lesbian, gay, bisexual, transgender and queer (LGBTQ+) are subject to sexual harassment, which encompasses sexual violence.”

The regulations released by then-Secretary of Education Betsy DeVos in May 2020 specified due process rights for those accused of sexual harassment or assault that included live hearings with the right to cross-examination. Those regulations, which went into effect in August 2020, also significantly reduced the scope of sexual harassment that schools are required to adjudicate pursuant to their Title IX policies and rescinded the requirement using a “preponderance of evidence” standard. Complainant advocates argued that the regulations went too far and had a chilling effect on reports of sexual misconduct. Last November, the American Council on Education, on behalf of numerous higher education associations, requested that the Biden administration prioritize modifying several actions taken by DeVos, including addressing the Title IX regulations that “micromanage campus processes in an inflexible manner.”

It is far from clear how the Biden administration will go about replacing the regulations. In 2018, the DOE issued a lengthy notice of proposed rulemaking under the Administrative Procedure Act. This was the first full rulemaking on a major Title IX issue since 1975, and the only one specifically addressing sexual misconduct. The DOE received nearly 125,000 comments on its proposal and held scores of meetings with interested parties before releasing final regulations two years later.

If history is a guide, although the Biden administration is eager to rescind the Title IX regulations concerning sexual misconduct, it may be some time before new guidance is released or regulations are enacted. Because the 2011 “Dear Colleague Letter” and the DOE’s 2014 “Frequently Asked Questions” were widely criticized for not going far enough to protect the due process and fundamental fairness rights of respondents, it is doubtful that the Biden administration would simply revive the Obama-era guidance. At the same time, the federal rulemaking process is complex and time-consuming, and new final regulations

will likely be years in the making. For an immediate stop-gap, we believe it is likely that Biden's DOE will issue its own "Dear Colleague Letter" that, although lacking the force of law, will provide interim guidance.

In the meantime, schools might consider leaving in place those policies that conform with the current regulations unless and until they are rescinded. Higher education institutions should also be aware of recent developments in case law and state statutes (such as the [new Massachusetts campus sexual assault law](#)) that add additional requirements to complement Title IX. Robinson+Cole is available to assist schools in staying current with respect to DOE guidance, case law and state requirements.

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