Cullen | Dykman

Attorneys General File Lawsuits Against DeVos, U.S. Department of Education Over Final Title IX Regulations

June 9, 2020

As detailed in our previous alert, on May 6, 2020, the U.S. Department of Education released its long-awaited Final Title IX Regulations (the "Final Rule") governing how schools must address allegations of sexual harassment in accordance with Title IX of the Education Amendments of 1972 ("Title IX"). Since its release, the Final Rule has been met with staunch criticism from those who believe that aspects of the Final Rule undo decades of progress made to address the issue of sexual misconduct on college and university campuses. Three prominent lawsuits have already been filed challenging the Final Rule with more expected to follow.

Legal Challenges to the Final Rule

On May 14, 2020, the American Civil Liberties Union (the "ACLU") filed a lawsuit on behalf of four organizations (Know Your IX, the Council of Parent Attorneys and Advocates, Girls for Gender Equity, and Stop Sexual Assault in Schools) challenging how institutions must respond to sexual harassment under the Final Rule and seeking an injunction to prevent its implementation. In this lawsuit, the plaintiffs allege that the Final Rule requires too high a standard of proof (as compared to other civil rights complaints, such as discrimination based on race, national origin and disability) and does not serve the objectives of Title IX. The lawsuit also takes issue with the new, narrower definition of sexual harassment, which includes "unwelcome conduct…that a reasonable person would determine is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity." The plaintiffs further argue that the provisions in the Final Rule limit an institution's obligation to respond to instances of sexual harassment that occurred during the institution's program or activity, and that the institution has "actual notice" of are contrary to Title IX and are otherwise arbitrary and capricious.

On June 4, 2020, eighteen (18) attorneys general filed a lawsuit against U.S. Secretary of Education Betsy DeVos and the U.S. Department of Education seeking to prevent the Final Rule from taking effect on August 14, 2020. Attorneys general from California, Colorado, Delaware, the District of Columbia, Illinois, Massachusetts, Michigan, Minnesota, New Jersey, New Mexico, North Carolina, Oregon, Pennsylvania, Rhode Island, Vermont, Virginia, Washington, and Wisconsin joined the lawsuit which was filed in U.S. District Court for the District of Columbia. Like the ACLU lawsuit, the attorneys general claim that several provisions of the Final Rule are arbitrary and capricious as they impose too great a limitation on the rights of victims of sexual misconduct and undermine the

purpose of Title IX. For example, the attorneys general take issue with the provisions stating that sexual harassment under Title IX is limited to acts that occur within an "education program or activity." The attorneys general also argue that the provision limiting Title IX's application to only those individuals that are enrolled or attempting to be enrolled at an institution is too narrow. They further note the timing of the Final Rule's release and effective date, stating that "because of the Rule's impracticable effective date, primary, secondary, and postsecondary schools across the country will be required to completely overhaul their systems for investigating and adjudicating complaints of sexual harassment in less than three months, in the midst of a global pandemic that has depleted school resources, and with faculty, staff, and student stakeholders absent from their campuses due to the pandemic and, in many cases, on leave due to the summer." The lawsuit asks the Court, among other things, to declare the policy unlawful, postpone the August 14th effective date pending judicial review and preclude enforcement of the Final Rule by the U.S. Department of Education.

Interestingly, the New York State Attorney General is not a party to the action filed in the District of Columbia and instead filed a separate action in the U.S. District Court for the Southern District of New York on June 4, 2020. The New York Attorney General also takes issue with a number of provisions of the Final Rule, including the new definition of the term "sexual harassment" and the limitation on when and how institutions must respond to sexual harassment, arguing that the Final Rule "radically and unjustifiably departs from the [U.S. Department of Education's] longstanding Title IX enforcement policies." The New York Attorney General also argues that the Final Rule imposes new procedural requirements and removes critical notice requirements that exceed the U.S. Department of Education's authority under Title IX. In addition to challenging many of the substantive provisions of the Final Rule, the New York Attorney General also asserts that the Final Rule provides an unreasonably short implementation deadline given the challenges all educational institutions are currently facing in the midst of the COVID-19 pandemic. A copy of the New York Attorney General's press release is also located here.

These lawsuits are still in their infancy and it remains to be seen whether any of the challenges to the Final Rule will be successful. Given the August 14th compliance deadline, it is likely that some, if not all, of the plaintiffs in these actions will seek some kind of expedited or preliminary relief to prevent the Final Rule from going into effect before a final decision is made by the courts. Cullen and Dykman will continue to monitor the litigation challenging the Final Rule and provide updated alerts in order to keep you informed of the latest developments.

Preparing for Compliance with the Final Rule

In the meantime, however, because there is no guarantee that the legal challenges to the Final Rule will be successful, colleges and universities should prepare for the August 14th compliance deadline. In this regard, there are a number of steps institutions can take now to make the process as seamless as possible.

First, institutions should consider creating a committee that will be responsible for reviewing the Final Rule and any relevant state regulations to ensure institutional compliance. This committee may consist of individuals from multiple departments including but not limited to the institution's Title IX Coordinator, and members of the legal, human resources and student affairs areas.

Collect all Title IX related policies that the institution has published to the campus community. These policies may be published in a variety of locations and mediums including but not limited to student handbooks, individual policies, or on the institution's website. It is important that all policies are reviewed to ensure compliance with the Final Rule and consistency with one another.

After a preliminary review of their Title IX policies is complete, institutions should consider the practical effects of the Final Rule. For example, the Final Rule only requires schools to investigate "formal" complaints. Institutions will need to clearly outline what their formal complaint process is if they have not done so already. In addition, institutions will need to consider who on campus will be involved in the "live hearings." These individuals, among others, will need training on the scope of that role and how they are to perform that role in compliance with the Final Rule.

Create and implement a timeline regarding final review and revision of sexual misconduct policies and training to ensure compliance with the Final Rule. In addition to reviewing and considering possible changes to Title IX policies, institutions should also consider timing and publication of campus communications regarding the Final Rule and the institution's response to it.

Cullen and Dykman provides comprehensive, practical legal counsel on all aspects of compliance with Title IX and related federal and state laws. Mindful of your campus values and culture, we are here to assist you in adapting your policies and procedures to comply with the new Title IX regulations and to provide training to students, educators and all members of the community. Cullen and Dykman also provides a wide range of external services to higher education institutions on a flat fee basis, if appropriate, including serving as outside investigators, hearing officers and facilitators of informal resolution (e.g. mediation). We advocate for higher education institutions in court, if necessary, and have successfully represented numerous colleges and universities in matters pending before the U.S. Department of Education's Office for Civil Rights.

If you have questions regarding any aspects of higher education law and any implications the Final Rule will have on your institution, please contact Kevin P. McDonough at (516) 357-3787 or via email at kmcdonough@cullenllp.com and Dina L. Vespia at (516) 357-3726 or via email at dvespia@cullenllp.com.

Practices

- Higher Education

Attorneys

- Kevin P. McDonough
- Dina L. Vespia