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President Biden Orders Review of Title IX Rule Regarding Campus Sexual Misconduct

March 10, 2021

On March 8, 2021, International Women's Day, President Biden issued the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity (the "Order"). The Order contains three sections - Policy, Review of Agency Actions, and General Provisions - and gives specific mandates regarding the federal rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 85 Fed. Reg. 30026 (May 19, 2020) (the "Rule").

The Rule was passed in May of 2020 and was effective as of August 14, 2020. The Rule introduced a new definition of sexual harassment under Title IX and various new requirements and restrictions regarding how education institutions respond to Title IX sexual harassment claims. A prior Client Alert describing the provisions of the Rule in more detail can be found here. An overview of the first two sections of the Order, which pertain to the Rule, is provided herein.

Section 1 of the Order addresses policy and declares that the administration's policy is 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." The inclusion of sexual orientation and gender identity is notable here, as the Trump administration issued a memorandum on January 8, 2020 stating that the term "sex" in Title IX was defined as "biological sex, male or female."

Of particular note to education institutions is the second section of the Order, entitled "Review of Agency Actions." Under this section, within 100 days of March 8, 2020, the date of the Order, "the Secretary of Education, in consultation with the Attorney General, shall review all existing regulations, orders, guidance documents, policies, and any other similar agency actions (collectively, agency actions) that are or may be inconsistent with the policy set forth in section 1 of this order" and report the findings. The Order then gives specific mandates regarding the Rule.

The Secretary of Education is instructed to review the Rule as well as "any other agency actions taken pursuant to that rule, for consistency with governing law, including Title IX," and the Order. Additionally, "[a]s soon as practicable, and as appropriate and consistent with applicable law, the Secretary of Education shall review existing guidance and issue new guidance as needed on the implementation of" the Rule "for consistency with

governing law, including Title IX, and" the Order.

The Order expressly provides that "[t]he Secretary of Education shall consider suspending, revising, or rescinding — or publishing for notice and comment proposed rules suspending, revising, or rescinding — those agency actions that are inconsistent with" the Order "as soon as practicable and as appropriate and consistent with applicable law, and may issue such requests for information as would facilitate doing so." Thus, if the Secretary finds that the Rule is inconsistent with the Order, it may be suspended, revised, or rescinded. However, because the Rule is a federal law, as opposed to just guidance, this may be a lengthy process.

The Order also states that the Secretary of Education "shall consider taking additional enforcement actions, as appropriate and consistent with applicable law, to:" (1) "enforce [the Order] as well as legal prohibitions on sex discrimination in the form of sexual harassment, which encompasses sexual violence, to the fullest extent permissible under law;" (2) "account for intersecting forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination, including discrimination on the basis of race, disability, and national origin;" (3) "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;" (4) "ensure that educational institutions are providing appropriate support for students who have experienced sex discrimination;" and (5) "ensure that their school procedures are fair and equitable for all."

President Biden's decision to reexamine the Trump administration's campus sexual misconduct policies is unsurprising to many given President Biden's active involvement in the implementation of the Violence Against Women Act and the Obama-era Title IX guidance, which did not carry the force of law and was rescinded by former Education Secretary Betsy DeVos in 2017. In fact, President Biden made his criticism of and intent to change the Rule, which has also been challenged in several recent lawsuits (particularly in light of the COVID-19 pandemic) that, to date, have failed, known on his campaign website.

Additionally, President Biden signed a second executive order to also coincide with International Women's Day, March 8. The second executive order creates a Gender Policy Council in the White House, building on the White House Council on Women and Girls, an office created during the Obama administration and later dissolved during the Trump administration.

Institutions should expect further information on this topic in the coming months and increased activity at the U.S. Department of Education. Cullen and Dykman will continue to update alerts in order to keep you informed of the latest developments surrounding Title IX. If you have questions regarding any aspects of higher education law and any implications the Order will have on your institution, feel free to 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**.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Practices

- Higher Education
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