

Title IX Changes May Be on the Horizon ... Again

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Amanda M. Brahm



Brendan N. Gooley

On March 8, President Biden issued a new executive order that requires Education Secretary Miguel Cardona to examine the Title IX regulations that went into effect on August 14, 2020. Cardona's review will likely result in changes to the Department of Education's Title IX guidance. This is not surprising because in May 2020, then-Education Secretary Betsy DeVos released new Title IX regulations that reversed Obama-era guidance and President Biden was critical of these changes during his campaign last year.

Within 100 days, Cardona must review all of the Education Department's regulations, orders, guidance documents, and policies to ensure they do not discriminate on the basis of sex. Specifically, Cardona was directed to analyze the department's policy on Title IX of the Education Amendments of 1972 and "consider suspending, revising or rescinding" any policies that fail to protect students from discrimination on the basis of sex.

The current Title IX regulations departed from the Obama administration's policies on campus sexual assault and harassment in many important ways. Of particular note, under the current Title IX regulations, a school may apply the "clear and convincing" evidence standard when deciding whether sexual misconduct took place on campus. Contrastingly, the Obama administration required schools to apply the lower "preponderance of evidence" standard. The introduction of a higher standard of evidence drew criticism from those who believe the current regulations were drafted with an eye on advantaging accused students. Similarly, the current regulations' live hearing and cross-examination requirements conflicted with Obama-era guidance, which discouraged cross-examination. The Biden administration will likely attempt to reverse these changes.

President Biden's executive order also signals that his administration may announce a broad interpretation of Title IX that reaches additional forms of sex discrimination. Indeed, the executive order points out that discrimination on the basis of sexual orientation and gender identity may intersect with "forms of prohibited discrimination that can affect the availability of resources and support for students who have experienced sex discrimination." It therefore seems likely that the Biden administration will require schools' Title IX policies to expressly extend to discrimination on the basis of sexual orientation or gender identity.

Exactly what changes the Biden administration intends to make to the current Title IX regulations and how quickly it could make those changes is unclear. As we saw under the Trump administration, the rule-making process is lengthy and it could take years for a new rule to go into effect. Groups that supported the Trump administration's changes will almost certainly take action to try to stop changes proposed by the Biden administration. However, if the administration wishes to effect change more quickly, it could either seek a stay of the new rule or choose not to defend the numerous pending lawsuits that are challenging it. If there is a stay of the new rule, the Biden administration could publish interim guidance that revives the Obama administration's guidance.

For now, schools should leave their current policies in place unless or until the current regulations are rescinded. It will be important to keep watch for developments over the next several months as Cardona conducts his review.