

Speaker 1:

What is next in Title IX? Will the regulations go away? The short answer is no, not immediately, as you've heard from my guests previously in episodes in 2020. It is a long process to undo a regulation, and that will likely take a few years. But we do anticipate movement with respect to guidance issued by the Department of Education in the meantime. As you know, the Trump administration archived all prior guidance in this space, and it is yet to be seen whether all or some of it will be resurrected or replaced with new guidance and what the Department of Education will do with the guidance that has been issued regarding the new regs under Trump's DOE.

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The Biden administration has taken down Title IX resources previously hosted on OCR's website, which included resources regarding investigations that were set up by the Trump DeVos administration. There is talk that the Biden administration could issue guidance stating that OCR will not enforce the new Title IX regulations. If this occurs, schools will be left to determine whether they will continue to follow the regulations. Thus far, our thoughts are that if a school is not following the law, I.E., the regulations, it will be hard to defend in a court of law regardless of OCR's enforcement posture. But that is a decision that should be carefully vetted with your legal counsel should that occur.

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Whatever happens with the Department of Education, if some of these requirements eventually go away in whole or in part with respect to Title IX litigation, I would be remiss if I did not note that President Trump left a deep imprint on the federal courts that will outlast his one term in office for decades to come. He installed more than 230 judges on the federal bench, including the three newest justices of the Supreme Court. That is not to say that these judges will blindly follow the new title IX regulations.

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However, there's no question that he did more than any other single term president to put his stamp on the judiciary and that the impact will be enduring since these judges hold lifetime positions and several are still in their thirties. The three new Supreme Court picks could be on the court 30 years from now. Beyond the Supreme Court, 30% of judges on the nation's court of appeals were appointed by President Trump. Before I finish out this episode, I think it's also important to note that Title IX is more than how a school responds to sexual harassment. Gender equity in athletics, sex and gender based discrimination and pregnancy discrimination all fall under Title IX.

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Of note is of course the Bostock case, whether or not Title IX protects discrimination based on gender identity or sexual orientation is at the forefront. Given President Biden's cabinet appointments and immediate executive order, it is clear that the Biden administration will take a vastly different position than the Trump administration on the issue. In a landmark decision by the US Supreme Court in Bostock V Clayton County, the court held that Title VII's prohibition of discrimination based on sex covers discrimination on the basis of gender identity and sexual orientation in the employment context. 10 days before leaving office, Trump's Department of Education released an internal memorandum that stated the view that sex and Title IX refers only to biological sex.

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Also recall that the Trump administration ordered a ban on transgender troops that Biden swiftly undid through an executive order. Likewise, President Biden issued an executive order on his first day in office stating that laws such as Title IX, that prohibit sex discrimination, prohibit discrimination on the basis of gender identity and sexual orientation. Court challenges to this executive order, especially in Title IX in women's sports will be likely and something to keep an eye on. We've seen litigation at the district court level on whether sexual orientation as a protected class under title IX.

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In a ruling in January, out of the Eastern District of Pennsylvania, in case against St. Joseph University, the court rejected the argument that sexual orientation is not a protected class under Title IX and cited Bostock stating Title VII rulings and struck Title IX. Also of note is the Gavin Grimm case. The Virginia School Board has asked the Supreme Court to decide whether Title IX and or the equal protection clause requires schools to allow students to use restrooms that match their gender identity instead of biological sex. Gavin Grimm was a transgender student who attended a school where the school board adopted a prohibition on boys and girls with gender identity issues from using the same common restroom as other boys and girls.

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Throughout his high school, Gavin was therefore forced to use a separate restroom. He sued the school board and after four years of litigation, including a trip to the Supreme Court and back, the district court for the Eastern District of Virginia ruled in favor of Gavin on all of his claims and the Fourth Circuit affirmed the ruling in an August of 2020 decision. The school board has now filed a petition, asking the Supreme Court to review the case, asserting that the Fourth Circuit opinion was incorrect in determining that the 4th Amendment in Title IX requires school grant him access to the boys' bathroom.

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As stated by the school board in their petition, the overriding issue is therefore whether federal law mandates the answer to the question of how a school should respond to transgender students seeking to be treated consistent with their gender identities while accommodating the compelling bodily and privacy interests of their cisgender classmates. This will certainly be one to watch to see if the Supreme Court accepts the case.

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Finally, on the Clery front. I just wanted to note that on February 3rd, the Department of Education adjusted its fines from 58,328 to 59,017 cents. As you all know from prior episodes, the Clery handbook was rescinded under the Trump administration, and we will see what happens to it under President Biden's Department of Education. So some closing thoughts, I've given you a lot of information, but certainly not all of the information that there is to know about this complex and ever-changing landscape. I've not included, for example, a breakdown of litigation trends in 2020, and that's something I'm going to cover with future guests.

Speaker 1:

For my Title IX professionals, what I want to say is it is more important than ever to have support, be it from ICS or other organizations, or colleagues as the coming months unfold. We're dealing with pre-regulation and post-regulation conduct and how that is handled. The possibility of a third standard or expectation depending on when conduct occurred, pre-regulation Obama, pre-regulation Trump, post

re-regulation Trump and post-regulation Biden. Even though the new regulations require a live hearing for higher education, and certainly a very prescriptive process for K-12, that is extremely new, it's also imperative that you work closely with your counsel on litigation trends in your jurisdiction or state law changes in your jurisdiction and how they interplay with the new regs and any future sub-regulatory guidance that may be released under the new Department of Education under President Biden.

Speaker 1:

So with all of that, I hope that you will tune into future episodes. I hope this was helpful in wrapping your mind around all that's happened in the short two months that we've been in for 2021. I also hope for those of you listening that you are safe and that you are healthy and that you're hanging in there. As I mentioned, we are going to have a self-care episode. I've said it many, many times on this podcast, but it is an area of passion for me, one that I even struggle with with work-life balance, and I think it's really important for those of you who are boots on the ground navigating this complex space in the middle of all that's happening with the pandemic, and of course, various natural disasters between ice storms and fires and snow and hurricanes and all the things that have happened. So I hope everyone's doing well. I appreciate you listening. Please find us on social media, follow us on LinkedIn, Twitter, Facebook, Instagram, and we hope to also see you live in future virtual trainings.

Speaker 2:

Feeling overwhelmed in this current virtual environment and pressure to comply with the new federal mandates? Check out all that ICS has to offer to assist you through these challenging times. ICS community access provides your institution with trainings, compliance aids, Zoom meetings, newsletters, and more, including significant discounts on ICS services. All of these items are designed to help your institution with its compliance efforts, which is more important now than ever. ICS also offers complimentary webinars and resources, as well as live interactive certified virtual trainings for Title IX investigators, decision-makers, appellate decision makers, advisors, and informal resolution facilitators. You can learn more about all of these offerings at www.icslawyer.com.

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Finally, we partner with institutions and school districts to formulate an implementation strategy for compliance with the new regulations. As always, this service is provided to our community partners at a deeply discounted rate. Contact us today for more information on how we can serve you through this transition.

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