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AUGUST 24, 2020

Two Courts Deny Preliminary Injunction Against the New Title IX Rule. Are These Decisions Harbingers of What's to Come?

Two federal court judges refused to issue a preliminary injunction to stop the new Department of Education's Title IX rule (the Rule) from taking effect on its August 14, 2020 effective date. In the meantime, there remain four lawsuits[1] pending against the Department of Education challenging the Rule on a number of legal grounds. Although the legal standards for issuing a preliminary injunction are different than those used to reach a decision on the merits of a suit, the decisions on preliminary injunction give some indication of the uphill battle the pending lawsuits face.

New York Decision

In *State of New York, et. al. v. United States Department of Education, et. al.*, the plaintiffs brought suit alleging that the Rule violated various provisions of the Administrative Procedures Act and contended that the Department of Education's (DOE) actions in adopting the Rule were "arbitrary and capricious." The plaintiffs moved for a preliminary injunction to stop the implementation of the Rule while the suit is pending.

In his decision, U.S. District Judge John Koeltl, Southern District of New York, reiterated that the well-established standards for the issuance of a preliminary injunction including that the plaintiffs show that they are likely to succeed on the merits. As such, Judge Koeltl gave us a look at his view of the merits of the underlying claims in the suit. In his decision, Judge Koeltl serially addressed the plaintiffs' complaints about the Rule's definition of sexual harassment, its prescriptive grievance process, its limited definition of "program or activity," and plaintiffs' claims that the DOE generally failed to justify or adequately consider other aspects of the Rule. The decision echoes many of the comments discussed in the lengthy preamble to the Rule about each of the plaintiffs' claims.

In the end, the judge concluded that the reasons provided by the DOE for changes in past policies and the rationale for the provisions of the Rule were adequate to satisfy the court that the department's rulemaking was not arbitrary and capricious. As Judge Koeltl noted, while an agency must show that there are good reasons for its new policy, it need not show that the reasons for the new policy are better than the reasons for the old one. As such, the court determined that the plaintiffs did not show that they were likely to succeed on the merits of their claims and declined to grant an injunction.

Attorneys General Decision

In *Commonwealth of Pennsylvania, et. al. v. Elisabeth Devos, et. al.*, 17 states and the District of Columbia sued challenging the Rule and also moved for a preliminary injunction to stop the implementation of the Rule pending judicial review of the suit.

In his decision, U.S. District Judge Carl Nichols (D.C.) also cited the standards for the issuance of a preliminary injunction, including that the plaintiffs show that they are likely to succeed on the merits. Judge Nichols' decision, too, gave us some insight to his view of the merits of plaintiffs' claims in the underlying suit.

Plaintiffs in this suit proffered some claims that were the same as those in the New York case. These include claims that the definition of sexual harassment was improper, that the Rule's requirement that the harassment be connected to an educational

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1 In addition to the lawsuits brought by the State of New York and by Attorneys General from 17 states that underlie the preliminary injunctions requested and discussed in this memorandum, suits have also been brought against the U.S. Department of Education by the American Civil Liberties Union and the National Women's Law Center.

program and activity was ill considered, and that several aspects of the grievance process were objectionable. In addition, the plaintiffs added claims (1) that the mandated grievance process in K-12 schools exceeded the department's authority and was arbitrary and capricious by impermissibly intruding into the school's disciplinary procedures and failing to account for the unique environment of K-12 schools, and (2) that the Rule impermissibly restricted schools from taking a more proactive approach to sexual harassment by investigating a broader array of allegations.

Judge Nichols reviewed many of the arguments (also discussed in the preamble to the Rule) on each of these issues. The judge concluded that, while it may be that the Rule is overly prescriptive and that it might be better to fashion a rule that grants more flexibility to investigate, make determinations and discipline sexual harassment, the court is not supposed to substitute its judgment for that of the DOE to decide whether another alternative is better. Rather, it can only decide if the Rule is arbitrary and capricious.

What the Decisions Mean for the Pending Lawsuits

Both decisions refer to the well-developed rationale expressed by the DOE in the 2,000-page preamble to the Rule. Most of the issues raised by the plaintiffs in the pending suits were the subject of some of the 125,000 written comments submitted to the department when the proposed rule was published. The department's use of the preamble to lay out the issues, discuss the pros and cons raised by the comments and articulate a reasoned justification for the final Rule's provision has served it well in the defense of these suits. As Judge Koeltl wrote in his decision, the comments discussed in the preamble "showed that there were bitter disputes about which policy was the most appropriate to implement in almost every aspect of the Rule's provisions." Plaintiffs' arguments in their lawsuits repeat one side of the disputes referenced in the judge's comments.

The legal standard that a court will used in addressing the claims in the pending lawsuit is different than, and largely not as burdensome as, the standard imposed by the courts in deciding whether to issue a preliminary injunction. The legal standard used in most of the plaintiffs' claims in the existing lawsuit is whether the DOE was "arbitrary and capricious." The decisions of Judge Koeltl and Judge Nichols give us some early signals that the rationale laid out by the DOE in the preamble of the Rule for the most controversial aspects of the Rule is likely to withstand the challenge that the department's rulemaking was arbitrary and capricious.

Still, there is uncertainty about how the courts in the remaining two lawsuits might view similar claims or whether the courts will reach a different conclusion after a fuller briefing on the merits. The resolution of these cases is likely to take months. In the interim, a presidential election will occur that could have further impact on the Rule.

Educational institutions subject to the Rule might consider what their policies should look like should all or parts of the Rule be overturned by a court or revoked under a new administration so that they can move quickly to eliminate those portions of the Rule that they find most troublesome.

If you have any questions about the information presented here or any Title IX related issues, please contact Gail Norris, any member of Bond's Title IX Task Force or Higher Education practice, or the attorney in the firm with whom you are regularly in contact.

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