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Last-Minute Department of Education Memo Says Title IX Does Not Protect LGBTQ Community

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On January 8, 2021, less than two weeks before the change in presidential administrations, and one day following the resignation of the Secretary of Education, the U.S. Department of Education issued a memorandum stating its view on Title IX and the LGBTQ community.[1]

More specifically, the memo addresses an issue we have previously covered in *Fraternal Law* regarding the applicability of the U.S. Supreme Court's *Bostock* decision to Title IX.[2] To the surprise of many, the Supreme Court held in *Bostock* that discrimination on the basis of sex includes discrimination on the basis of sexual orientation or gender identity in the context of Title VII employment discrimination. Numerous scholars and even several federal courts have already stated that if this is how the Supreme Court defines sex-based discrimination for purposes of employment, then the definition must also be extended to sex-based discrimination in the context of Title IX.

[1] Memorandum from Reed Rubinstein, Principal Deputy Gen. Counsel, U.S. Dept. of Educ., to Kimberly M. Richey, Acting Assistant Sec'y, Office of Civil Rights (Jan. 8, 2021).
[2] Micah Kamrass, *Bostock Decision and its Impact on Title IX*, 166 FRATERNAL L. 12 (Sept. 2020).

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The new memo from the Department of Education states the opposite. It argues that *Bostock* should not be applied to Title IX. The memo outlines a view that sex-based discrimination in education does not include discrimination on the basis of gender identity or sexual orientation. With this logic, the memo essentially states that recipients of federal education funding (including almost every college and university) may discriminate on the basis of sexual orientation or gender identity without violating Title IX.

Specific to social fraternities and sororities, the memo states that the Title IX classification of "single-sex" would only apply to groups where all members are the same biological sex. Stated more simply, it is the view of the Department of Education that if a sorority admits a transgender woman, then it would not be considered single-sex for purposes of Title IX. Conversely, if a sorority admits a transgender man, it would be considered single-sex for purposes of Title IX.

The interpretation of law found in the memo is contrary to common practices for most fraternities and sororities. It is also contrary to what most people believe will be the interpretation of many federal judges and the U.S. Supreme Court. It is certainly contrary to the interpretation held by the Obama/Biden administration, which most believe will also be the interpretation of the Biden/Harris administration. Since this is a memo with no binding authority issued by a lame duck administration without a Secretary of Education, it is the view of *Fraternal Law* that little, if any, value should be attributed to this memo. Nonetheless, we wanted to make sure to report about it so that you are aware of what it says.

Employer Vaccine Mandates

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To Vaccinate Or Not To Vaccinate . . . That is the Question

We start the new year with a renewed hope that the authorization of COVID-19 vaccines will help end the devastation caused by COVID-19. With the vaccines' arrival however, also comes numerous complex ethical, practical and legal questions. Fraternal organizations and other employers are struggling with whether they should *require* employees to be vaccinated for COVID-19 infection. For employers in all industries, there are many considerations that should be taken into account.

Can Employers Mandate?

The first question many employers are asking is: Can they mandate vaccinations of their employees? The Equal Employment Opportunity Commission (EEOC) recently published guidance for employers addressing the potential federal discrimination law limitations under the Americans with Disabilities Act (ADA), Title VII of the Civil Rights Act of 1964, and the Genetic Information Nondiscrimination Act (GINA). The EEOC throws up a number of "caution flags" for employers dealing with vaccine issues in the workplace, especially for those considering mandating employee vaccination. The EEOC, however, does not identify any prohibition on employers mandating COVID-19 vaccinations under federal discrimination laws as long as certain obligations are met. The most significant obligation with any employer mandate, is the obligation

to consider accommodations for employees with disabilities, pregnant employees, and employees with sincerely held religious beliefs that prevent the employee from receiving the vaccination. The EEOC also explains that if a safety-based qualification standard, such as a vaccination requirement, "screens out or tends to screen out an individual with a disability, the employer must show that an unvaccinated employee will pose a direct threat due to a 'significant risk of substantial harm to the health or safety of the individual or others that cannot be eliminated or reduced by reasonable accommodation.'" Whether an unvaccinated employee will pose a direct threat in the workplace will require a critical analysis by every employer and careful consideration of the realities of their individual workplaces.

Fraternal organizations should also consider state and local laws. State and local anti-discrimination laws may be more stringent and courts and agencies interpreting these laws may reach conclusions that differ from the EEOC. Moreover, some states have legislation that directly impacts employer vaccine policies and a growing number of jurisdictions are considering legislation that would prohibit or limit employers from mandating employee vaccinations. For example, South Carolina S.B. 117, if passed, would prohibit an employer from terminating, or taking other adverse action, against an employee who chooses not to undergo COVID-19 vaccination. In Washington State, H.B. 1065 (pre-filed), if passed, would prevent any private entity from requiring receipt of the COVID-19 vaccine for any reason, including as a condition of employment if certain criteria have not been met including, among other things, if the vaccine has not been licensed for used by the FDA. Employers should assess and monitor closely local legislation and/or executive orders on this issue.

If the employer's employees are unionized, it needs to also consider whether the collective bargaining agreement allows it to mandate vaccines or whether it must bargain about the issue

with the union. Public sector employers, and private sector employers in jurisdictions such as California, must also consider whether mandating vaccinations raises additional privacy-related concerns.

Should Employers Mandate?

Even if an employer can mandate vaccinations, should it? Organizations will inevitably answer this question in different ways and for different reasons. Among other things, employers likely will want to consider their work environment, whether their employees are in close contact with others who may not be able to vaccinate, the risk of harm to others if they don't vaccinate, the culture in the environment and the disruption in the workplace if they mandate. Mandating vaccinations is a hot topic right now. Some individuals and organizations likely will be concerned with mandating vaccinations when the vaccine is new. Right now, both of the COVID-19 vaccines available in the US have been authorized by the FDA under Emergency Use Authorization (EUA) which is different than approval under FDA vaccine licensure. Mandating vaccination while the vaccine is under EUA may heighten the legal risk for employers.

Employers should also consider the potential workers' compensation or other liability exposure for injuries or illnesses resulting from adverse reactions or side effects from vaccinations it mandates. Employers should first consider whether there is a need for the company to mandate the vaccination (as opposed to the state mandating vaccination). A starting point may be to consider how the employer fared during the height of the pandemic when there was no vaccine. If the employer was able to reduce or eliminate the spread with other administrative controls, it may not need to incur the legal and operational risks that come with mandating vaccinations. Many employees, particularly those who are concerned, or at risk, will seek out the vaccine, regardless

of any mandate, which raises the question: Do employers ***need*** to mandate, if employees (and others, such as students) can choose to get vaccinated to protect themselves?

Can Employees Refuse?

Even if an employer mandates that its employees receive a vaccine, it can expect to receive push back from some of its employees. Some push back may be for political reasons, some may be out of fear, and some may be due to religious or medical concerns. Employees who collectively object to a term or condition of employment may have protection, at least for their objection, under the National Labor Relations Act. Employees who object for safety reasons may be protected under the Occupational Safety and Health Act and other state laws.

As mentioned above, if employees object due to a disability/medical condition, pregnancy, or a sincerely held religious belief, employers will need to consider reasonable accommodations. First, consider if the employee can be accommodated in the workplace. As with other reasonable accommodation analyses under the ADA and Title VII, this should be conducted on a case-by-case basis. Employers should not exclude an employee from the workplace or take any other action unless there is no way to provide a reasonable accommodation (absent undue hardship) that would eliminate or reduce the risk of substantial harm to the health or safety of the individual or others so that the unvaccinated employee does not pose a direct threat. Second, consider other accommodations including, remote work, reassignment to positions where accommodation may be possible to eliminate or reduce any direct threat or undue hardship, and leaves of absence under the organization's policies or applicable law, including possibly the Family and Medical Leave Act and/or state and local leave laws.

What's An Employer To Do?

This is potentially a divisive issue for employers. The distraction, dissension, and litigation risks posed by mandating may outweigh the potential benefits. As an alternative to mandates, employers may consider encouraging vaccination with a communication strategy focused on education and offering certain incentives such as ensuring that all costs associated with the vaccine are covered and perhaps providing additional time off work.[1] The CDC provides many helpful education resources on its website, such as Benefits of Getting a COVID-19 Vaccine that explains the benefits of the vaccine and the role of vaccines in ending the pandemic.

Employers who choose to offer, mandate, or provide incentives for vaccinations should consult with counsel. Stay tuned, as these are emerging and evolving legal issues. We expect to hear more at the state level as well as from the CDC, the EEOC and OSHA.

[1] Depending on how an incentive program is designed, there may be several regulatory considerations and compliance obligations.
4838-0907-0806, v.

Gruver Lawsuit Against LSU May Finally go to Trial

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Max Gruver died as a result of hazing fueled by alcohol poisoning in 2017. But the civil case brought by his parents has yet to even be scheduled for trial. Now it certainly appears to be finally headed in that direction. In addition to naming the usual suspects, the active organizers of the hazing, the chapter, house corporation, and the fraternity, Phi Delta Theta (the "Fraternity"), the Gruver's counsel also named Louisiana State University ("LSU"). It is LSU's claim that it was immune from suit that has kept the case from going to trial.

The Fraternity, which is now working with the Gruvers on anti-hazing measures, the Chapter, and House Corporation, as well as five (5) of the individual members named as defendants, have all settled with the Gruvers and the claims against them have been terminated. Uniquely, LSU was accused of having violated Title IX, which prohibits universities from discriminating on the basis of sex in the provision of educational programming. The Gruver Complaint sets forth the argument that LSU more rigorously applied its policy prohibiting hazing against women's groups and much more leniently on men's groups. LSU filed an early Motion to Dismiss the claim against it, but the federal district court judge, in denying that Motion, summarized the Gruver's argument as follows:

> As a result of LSU's policy and practice, responding differently to the hazing of male students than the hazing of female students, the hazing of female Greek students is "virtually non-existent," while the hazing of male Greek students is "rampant."[1]

[1] Gruver v. Louisiana, 401 F. Supp. 3d 742, 745 (M.D. La. 2019).

Note that, when considering a Motion to Dismiss, a court is required to consider the facts stated in a complaint as true. However, the facts of the different treatment of the hazing by men and women still remain to be proven at trial.

The trial court's denial of LSU's Motion to Dismiss was issued on July 19, 2019, just two days after Matthew Naquin, the alleged ringleader of the "bible study" hazing that lead to Gruver's death, was convicted of negligent homicide. Naquin was sentenced to five years in jail, two and a half years of which were suspended. He remained free on bond until he dropped his appeal and entered prison on January 17, 2020. But as a result of good behavior and other programs available to him, he served less than three months, and was released from jail on April 14, 2020. He now is subject to three years of supervised probation. Naquin is one of the five members who have been terminated from the Gruvers' civil suit.

In the meantime, LSU appealed the denial of its Motion to Dismiss to the U.S. Fifth Circuit Court of Appeals. As reported in the July 2020 issue of *Fraternal Law*, the appellate court denied LSU's argument that it was entitled to immunity under the Eleventh Amendment to the U.S. Constitution.[2] In sum, the Court noted that LSU cannot both accept federal educational dollars and simultaneously reject the conditions attached to those dollars. Therefore, the immunity LSU sought, which might otherwise exist if LSU had not been taking federal funds for over thirty years, did not apply.

LSU refused to accept the logic of that position and sought to appeal to the U.S. Supreme Court. But on December 7, 2020, the U.S. Supreme Court refused to consider LSU's appeal,

[2] Gruver v. La. Bd. of Supervisors for the La. State Univ. Agric. & Mech. Coll., 959 F.3d 178 (5th Cir. 2020).

making no comment on the merits of the argument but rejecting the appeal out of hand.[3] The Supreme Court did not even request a response to LSU's appeal from the Gruvers.

Trial may still be many months away. But the trial court has set a Scheduling Conference for January 28, 2021, and the parties are to provide the Court with status reports by January 14th. Whether there will actually be a trial remains to be seen. Perhaps LSU and the other remaining defendants may find it wiser to settle rather than to risk a jury verdict.[4]

CDC Links COVID-19 Cases to Fraternities and Sororities

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As colleges and universities across the country begin to welcome back students and resume classes for the spring semester, the Centers for Disease Control and Prevention (CDC) issued two reports related to the spread of COVID-19 within and by fraternities and sororities on campus.

Perhaps unsurprisingly, the CDC reported that the overall incidence rate of the COVID-19 virus significantly increased (56%) on college campuses that offered in-person instruction in the Fall 2020 semester, whereas the incidence rate was much lower in counties in which the local colleges and universities opted to provide the majority (if not all) of their courses via remote learning.[1]

[3] Bd. of Supervisors of La. State Univ. v. Gruver, No. 20-494, 2020 U.S. LEXIS 5859 (Dec. 7, 2020).
[4] For more information about this case, *see* Timothy M. Burke, *Jury Convicts Matthew Naquin of Negligent Homicide in the Death of Max Gruver*, 160 FRATERNAL L. 1 (July 2019); Micah Kamrass, *LSU loses Motion to Dismiss Over the Gruver Estate's Title IX claims*, 160 FRATERNAL L. 2 (July 2019); Tim Burke, *Lawsuit Over Max Gruver's Death Will Continue Against LSU*, 1605FRATERNAL L. 22 (July 2020).

[1] Andrew J. Leidner *et al.*, *Opening of Large Institutions of Higher Education and County-Level COVID-19 Incidence — United States, July 6–September 17, 2020*, 70 MOBILITY & MORTALITY WEEKLY REP. 14 (2021).

But the CDC also found that, for at least one Arkansas university, "transmission was likely facilitated by on- and off-campus congregate living settings and activities, with a majority of the gatherings (91%) and links between them (72%) associated with fraternities or sororities."[2] Moreover, the CDC found that "among linked gatherings, women accounted for 86% of cases," which may reflect gender-specific activities, including sorority rush week, which "held an in-person outdoor bid day event and occurred before fraternity rush week, which was both held later and virtually."[3]

Given these findings, the CDC continues to urge the implementation of various mitigation measures, such as limiting the size of social gatherings, adhering to social distancing recommendations, requiring the use of masks, encouraging personal hygiene practices, and increasing testing efforts. Additionally, if schools have not already done so, moving fraternity and sorority rush events, along with other general organizational events (such as member meetings) to a virtual platform is strongly recommended.

[2] Kristyn E. Vang *et al.*, *Participation in Fraternity and Sorority Activities and the Spread of COVID-19 Among Residential University Communities — Arkansas, August 21–September 5, 2020*, 70 MOBILITY & MORTALITY WEEKLY REP. 20 (2021).
[3] *Id.*

A New President: What Does It Mean for Fraternities and Sororities?

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On January 20, 2021, the Biden/Harris administration will be sworn in. With the change in administrations, some have wondered how this may impact fraternities and sororities.

While this can be somewhat difficult to project, the best guide to how the Biden/Harris administration may view certain pertinent issues is an examination of how the Obama/Biden administration viewed those issues. Certainly, President-elect Biden and Vice President-elect Harris are no strangers to the issues of higher education and fraternities and sororities. While President-elect Biden was not a member of a fraternity during his undergraduate years, his late son Beau was a member of Psi Upsilon, which helped endow a scholarship in Beau's name at the University of Pennsylvania following Beau's death. Vice President-elect Harris is a proud member of Alpha Kappa Alpha Sorority, Inc.

Two areas where the Biden/Harris administration could signal a sharp departure in policy from the Trump/Pence administration both center on issues of Title IX. The first is the matter of gender-identity and single-sex organizations. The Obama/Biden administration Department of Education issued guidance stating that fraternities could admit transgender men and sororities could admit transgender women without jeopardizing their single-sex status, if the organizations chose to do this. The Trump/Pence administration revoked this guidance, and in the waning days of their term explicitly stated they do not believe single-sex groups can admit transgender individuals under Title IX. It is safe to expect the Biden/Harris position to be more similar to the guidance from the Obama/Biden administration on this matter.

The other Title IX related question centers on questions of due process. President-elect Biden was deeply as Vice President in the creation of the Obama-era Title IX regulations. Citing a belief that those regulations tilted the balance of due process rights too far toward the accuser and too far away from the accused, the Trump administration dramatically overhauled the Title IX due process regulations, which went into effect earlier this school year. As a candidate for president, President-elect Biden criticized the new Title IX regulations. It is therefore safe to also assume the Biden/Harris administration will seek to revise these regulations. However, the revisions may not be as dramatic as some may expect. Many of the changes found in the 2020 regulations were based on federal court decisions that will remain in effect, regardless of future changes to Title IX regulations from the Executive Branch.

From the perspective of Congress, it is difficult to forecast any major changes as a result of the change in control of the Senate.

Secretary of Education Resigns Days Before Inauguration

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Betsy DeVos, the often-controversial Secretary of Education, announced her resignation in a one-page letter to President Trump on January 7, 2021. She left office just 12 days before the Biden Harris administration will be sworn in.

In her letter of resignation, she commented on what "we", obviously meaning she and President Trump, had accomplished. Much related to pre-K through 12 education but with regard to higher education, she called out:

> "We have returned due process to our nation's schools and defended the First Amendment rights of students and teachers. We have dramatically impacted the

> way students interact with Federal Student Aid. We have lifted up students by restoring year-round Pell, expanding Second Chance Pell, delivering unprecedented opportunities for students at HCBUs, and so much more."

But like so many others she reacted strongly to the events that occurred on the grounds of and in the Nation's Capitol on January 6th:

> "We should be highlighting and celebrating your administration's many accomplishments on behalf of the American people. Instead, we are left to clean up the mess caused by violent protestors overrunning the U.S. Capitol in an attempt to undermine the people's business. That behavior was unconscionable for our country. There is no mistaking the impact your rhetoric had on the situation, and it is the inflection point for me."
>
> "Impressionable children are watching all of this, and they are learning from us. I believe we each have a moral obligation to exercise good judgement and model the behavior we hope they would emulate. They must know from us that America is greater than what transpired yesterday. To that end today I resign from my position, effective Friday, January 8, in support of the oath I took to our Constitution, our people and our freedoms."

The DeVos letter can be found in its entirety on Department of Education letterhead accompanying many articles available on the internet, For example *"DeVos Resigns as Education Secretary says 'Impressionable Children are Watching', by Cory Turner NPR web site, posted 1/7/2021 9:46 PM.*

The goal of *Fraternal Law* is to provide a discussion of fraternity law, but its contents are not intended to provide legal advice for individual problems of Greek organizations. The latter should be obtained from your attorney.

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