

TITLE IX: Hot Topics

Marshall W. Grate
(616) 608-1103
mgrate@clarkhill.com

Vanessa M. Kelly
(609) 785-2926
vkelly@clarkhill.com

Nicole M. Paterson
(616) 608-1139
npaterson@clarkhill.com

CLARK HILL

WHAT IS TITLE IX OF THE EDUCATION AMENDMENTS OF 1972?

- No person in the United States shall, on the basis of sex, be excluded from participation, or denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance. 20 U.S.C. § 1681, *et seq.*

INTENT OF TITLE IX

- Applies to any educational institution that receives federal financial assistance
- Intended to prevent unlawful discrimination and to provide remedies for the effects of past discrimination

SCOPE OF TITLE IX

- Protects ALL students from sex discrimination
 - No age limit; elementary to high school to higher education students are protected
- Includes recruitment, admissions, counseling, financial assistance, athletics, sex-based harassment, treatment of pregnant and parenting students, discipline, expulsion, and employment

SCOPE OF TITLE IX

- Includes male, female, straight, gay, lesbian, bisexual, and transgender students (more on this later)
- Claims may be based upon gender identity or failure to conform to stereotypical notions of masculinity or femininity
- “Same sex” discrimination claims should be handled with same procedures as opposite sex complaints

TITLE IX SEXUAL DISCRIMINATION

- Includes:
 - Sexual violence
 - Sexual harassment
 - Hostile sexual environment

TITLE IX REMEDIES

- Title IX allows a private right of recovery for monetary damages; attorney's fees
Franklin v. Gwinnett Cty Pub Schs; 42 USC 1988(b)
- Enforced by U.S. DOE, Office of Civil Rights
- Government remedy: termination of federal funding; or voluntary resolution agreement



U.S. DOE – OFFICE OF CIVIL RIGHTS

- The Office for Civil Rights (OCR) enforces several federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education, including Title IX
- OCR has investigatory authority and aggressively investigates Title IX discrimination complaints
- No cost for a person to file a complaint with OCR
- A person can file a Title IX complaint with OCR and file a private lawsuit against an educational institute; not mutually exclusive

OCR BY THE NUMBERS

Sex	7,747	46%
Disability	5,936	36%
Race & National Origin	2,439	15%
Age	581	3%

*The numbers above do not reflect the total number of complaints received in FY 2016 because some complaints cover more than one statute and because a small percentage of complaints received in FY 2016 have not yet been categorized by statute.

**6,157 of these are multiple complaints from an individual

TITLE IX CLIMATE

- LGBTQ student issues
- Transgender student accommodations
- Title IX claims are on the radar screen of plaintiff's lawyers – an issue of national prominence
 - i.e., Lawsuits filed by attorneys in Washington D.C., the National Women's Law Center, and attorney Gloria Allred
- Respondent's Rights

TITLE IX & TRANSGENDER STUDENTS

- Title IX of the Civil Rights Act of 1972 forbids institutions that receive federal financial assistance to discriminate on the basis of sex
- Title IX applies to all public elementary and secondary schools and school districts receiving federal financial assistance and programs and activities affiliated with schools that receive federal funds
- But what does “sex” within Title IX mean?
 - Does it mean biological sex at birth?
 - Does it mean the gender with which a student identifies?

WHAT DO WE KNOW?

- The most controversial issues involve bathroom, locker rooms, and other facility uses
- Other issues include:
 - Name and pronouns
 - Parental involvement
 - Student records
 - Official vs. Unofficial
 - Physical education class/sports
 - Overnight stays; dress codes and graduation gowns
 - Prom and other gender-based recognition



TITLE IX & TRANSGENDER STUDENTS

- The OCR has been aggressively investigating transgender restroom issues in schools and enforcing settlements that require schools to allow transgender students to use the restroom corresponding to their gender identity
- While the OCR cannot enforce its policies in the same manner as a court, an OCR investigation can be extremely arduous and can bring significant public attention

U.S. DEPT. OF ED. GUIDANCE

- The ED and the DOJ issued a joint “Dear Colleague Letter” (“DCL”) on transgender students on May 13, 2016
- The DCL reaffirms the ED’s position that discrimination on the basis of sex includes gender identity. Therefore, a district may be liable for violating Title IX if they treat a transgender student differently than they treat other students. Per the DCL:
 - Districts must treat a student’s identity as the student’s sex
 - Districts must not treat a transgender student differently from the way it treats other students of the same gender identity

TEXAS VS. UNITED STATES

- Texas, and several other states, filed suit against the federal government seeking injunctive and declaratory relief with regard to the guidance provided in a “Dear Colleague Letter” instructing schools to allow transgender students to use restrooms and other facilities based on gender identity
- The suit contends that the guidance “has no basis in law” and could cause “seismic changes in the operations of the nation’s school districts”



TEXAS VS. UNITED STATES

- The complaint alleges that the new Rules, Regulations, Guidance and Interpretations:
 - are being imposed without observance of procedure required by law.
 - are unlawful by exceeding Congressional Authorization
 - are unlawful by violating the 10th Amendment
 - are unlawful by violating the 14th Amendment
 - unlawfully attempt to abrogate state sovereign immunity
 - are arbitrary and capricious
 - are unlawful and violate Constitutional standards of clear notice
 - are unlawful and unconstitutionally coercive
 - were issued without a proper regulatory flexibility analysis, requesting declaratory judgement

G.G. VS. GLOUCESTER CNTY. SCH. BD. – 4TH CIRCUIT, 2016

- A U.S. Court of Appeals for the Fourth Circuit three-judge panel ruled, in a 2-1 split:
 - that the ED’s Title IX implementing regulation should be given deference because the Title IX section allowing schools to provide segregated bathroom facilities based on sex is “silent as to how a school should determine whether a transgender individual is a male or female for the purpose of access to sex-segregated restrooms”
 - that the ED’s interpretation of the regulation indicates that Title IX should be applied to transgender students
 - that “when a school elects to separate or treat students differently on the basis of sex...the school must generally treat transgender students consistent with their gender identity”



G.G. VS. GLOUCESTER CNTY. SCH. BD. – ON REMAND TO DISTRICT COURT, 2016

- On June 23, 2016, on remand, the District Court ordered the School Board to permit the transgender student to use the boys' restroom noting there was no request to use the boys' locker room



G.G. VS. GLOUCESTER CNTY. SCH. BD. – U.S. SUPREME COURT

- On August 3, 2016, five justices voted to stay the June 23, 2016 preliminary injunction
- The three justices who denied were Ginsburg, Sotomayor and Kagan
- Justice Breyer joined the other four justices “as a courtesy”
- Pending before the United State Supreme Court



COURT DECISIONS AS OF 2.13.2017

Dodds v. United States Dep't of Education, Case No. 16-4117 (6th Cir., December 15, 2016)

- United States 6th Circuit Court of Appeals upheld a preliminary injunction that ordered a Local School District to allow an 11 year old transgender student, who identified as female, to use the girl's restroom
- Majority opinion determined that settled law prohibits discrimination based on transgender status
- Binding precedential authority unless overturned by U.S. Supreme Court. Until the U.S. Supreme Court issues final decision in *Grim* case, the 6th Circuit decision in *Dodds* demonstrates that the Sixth Circuit will protect transgender student's rights under Title IX as interpreted and applied by the OCR.



NEW ADMINISTRATION

- Obama administration appealed Injunction issued by 5th Circuit
- On February 11, 2017, DOJ withdrew its challenge to the Injunction

OCR ONSITE INVESTIGATIONS

- Who is the Title IX Coordinator?
- What is the Procedure for processing Title IX complaints?
- How is the Title IX policy and procedure communicated to the school community?
- What is the administrator's Title IX training?
- What happens when someone makes a complaint that involves Title IX? Who can receive the complaint? Does the recipient know the Title IX procedures?
- How is the Complaint investigated?
- What interim measures are implemented to protect the complainant?

OCR ONSITE INVESTIGATIONS

- What communications are made to the reporting party?
- What is the time line to process the complaint?
- What is the due process procedure for the parties?
- What is the appeal process, especially for the victim?
- What coordination exists with law enforcement?
- How is the institution's decision communicated to the victim and the responding party?
- How does the institution decide disciplinary action? What are the standards?

THE RIGHTS OF THE ACCUSED – WESLEY COLLEGE

- Four students accused of participating in the filming of a sexual encounter between a male student and female student without the consent of the woman
- All four were expelled from the college within the week
- The students were never interviewed or provided with copies of the incident report or investigative findings
- Despite the written policy, the students were never provided with an opportunity to show that an interim suspension was unnecessary
- College summarily rejected an appeal despite exculpatory new evidence

WESLEY COLLEGE – THE TAKEAWAY

- OCR decision highlights
 - Due process rights must be afforded to the accused;

 - AND

 - Schools must adhere to their own Title IX compliant policies and procedures in conducting investigations

- OCR directed Wesley to (1) reinvestigate all mishandled cases for the applicable time period; (2) conduct comprehensive campus-wide training; (3) revise the Title IX grievance procedure; (4) publish an anti-harassment statement; and (5) the create a new Title IX committee

TITLE IX IN THE NEWS – BAYLOR UNIVERSITY

- Independent report commissioned by the University found a “fundamental failure” to implement and adhere to the mandates of Title IX and VAWA
 - This includes at least 17 (and up to 52) sexual and physical attacks involving football players from 2011 through 2016
 - The report cites institutional failures at every level
- In the aftermath of the report:
 - There are at least six pending federal lawsuits
 - The Title IX Coordinator tasked with implementing the report’s findings abruptly resigned
 - The Board called for the resignation of the president and terminated the football coach
 - The attorneys responsible for the independent report have been sued

TITLE IX IN THE NEWS – OTHER HIGH PROFILE CASES

- Florida State University
- University of Richmond
- Columbia University

READING THE TEA LEAVES – EARLY PREDICTIONS FOR TITLE IX UNDER PRESIDENT TRUMP

- Possible relocation of OCR to the Dept. of Justice
- Budget cuts are anticipated, which will impact the turn around time for investigations
 - In 2015, the average OCR investigation took 940 days to complete
- Speculation that the list of colleges under investigation will no longer be made public
- Investigations pending during the presidential transition may be evaluated now under a different standard and rules
 - Predictions of new guidance to replace the 2011 “Dear Colleague” letter

QUESTIONS?



Marshall W. Grate

(616) 608-1103

mgrate@clarkhill.com



Vanessa M. Kelly

(609) 785-2926

vkelly@clarkhill.com



Nicole M. Paterson

(616) 608-1139

npaterson@clarkhill.com

THANK YOU

Legal Disclaimer: This document is not intended to give legal advice. It is comprised of general information. Employers facing specific issues should seek the assistance of an attorney.

CLARK HILL