Most business leaders have heard of the law known as “Title IX,” but few understand the broader context of the statute or how it may be relevant outside of collegiate sports. Clark Hill attorneys Erin C. Galbally, Marshall W. Grate and Nicole M. Paterson specialize in handling matters relating to Title IX (officially known as Title IX of Educational Amendment of 1972) and offer their insight on how it continues to evolve in new ways.

Q: So often we hear about Title IX as it relates to sports. How does Title IX extend beyond sports?

Erin Galbally: Athletics were the initial jumping-off point that many schools focused on relating to Title IX compliance. Schools are required to ensure proportional funding and opportunities are provided to both men and women in the area of sports in a school setting. However, Title IX applies far beyond athletics.

Title IX requires equality in all aspects of education, including in the employment context, recruitment, admissions, funding opportunities, etc. within K-12 and higher education.

Nicole Paterson: The Title IX statute is only one sentence long and simply states that no person shall be excluded, on the basis of their sex, from an education program receiving federal financial assistance. While there is focus applied to athletics, courts and the Office of Civil Rights (OCR), the agency tasked with enforcing Title IX, have translated that one sentence to apply to discrimination against both genders in a broad range of programs outside of athletics including sexual violence and harassment. While many complaints are within the sports realm, harassment and sexual violence complaints are becoming more frequent, possibly due in part to heightened media coverage.

Marshall Grate: It is important to note that Title IX is tied to federal funds. Any allegation of sexual misconduct or harassment among students is a Title IX issue. Similarly, sexual harassment or misconduct between staff and students or between staff is a Title IX issue. The statute also applies to sexual orientation including transgender individuals.

Q: What sort of client matters related to Title IX are you seeing more of?

Grate: In many instances, we are working in an advisory capacity to provide clients with proactive advice on how to manage a Title IX investigation, establishing grievance procedures and offering administrative support. The OCR, which conducts investigations into complaints, can decide to perform an audit, which may look into three years or more of Title IX compliance and documentation. We assist clients in managing that process.

(continued on page 2)
Paterson: We have also seen a significant increase in engagement for training purposes, both at the K-12 and higher education levels. More than ever, educational institutions are looking to law firms and outside resources to provide them with proactive training on Title IX compliance and best practices.

Q: What lessons have educational institutions learned? Why are clients, including school boards, more open to training?

Grate: There has been an increase in activity from the plaintiffs’ bar in using Title IX as a legal mechanism to bring lawsuits against K-12 and higher education entities. High profile cases have raised the level of interest on the part of students. The liability can be quite significant.

Galbally: More recently, in 2016, for the first time the OCR concluded an investigation and issued a letter directed to Wesley College in which it explicitly spelled out the protections that both the complainant and potential perpetrator(s) must be afforded. According to the OCR, Wesley failed to ensure that all parties received due process. This failure threatened the college’s federal funding. The lesson from Wesley College is that educational entities must ensure that the entire process is equitable from start to finish.

Q: What common mistakes do you see clients make in regard to Title IX?

Grate: In an investigation, the OCR is most often looking to answer the question, “What has the institution done to implement the basic elements of Title IX?” First and foremost, establishing a Title IX coordinator and due process — both for victims and accused — is paramount. In addition, it is critical for the institution to communicate its Title IX procedures to their community. As legal counsel, we also look at what process the organization has in place when they receive a complaint, including interim measures, particularly relating to student-on-student conduct. Namely, how is the student protected during the investigation? What type of communications are taking place with the victim during and after investigation? What actions are taken in result of the investigation? Proactively, if an educational entity does not have sufficient answers to those questions, we help them build a process. The OCR has considerable power and authority. It can unilaterally withhold federal funding if their investigators believe the institution is not within compliance of Title IX, which can have a devastating impact on an institution.

Paterson: There are several areas of potential client compliance issues: First, an institution’s policy, if poorly written, vague, or too stringent with specific timelines, can create legal issues. The OCR looks closely at an institution’s policy during an investigation, including if they appropriately complied with the policy in place. If the policy is not both legally compliant and practically sound, it can create a multitude of issues. As such, it is important to regularly review and update Title IX policies. Secondly, clients often struggle with when and how to involve law enforcement. Title IX itself does not have an independent obligation to notify law enforcement agencies, yet there are state laws with which institutions must comply. Educational institutions often struggle with when to notify law enforcement and too often they make the mistake of discontinuing their internal investigation once law enforcement is engaged. The OCR has been clear that there should be no delay in investigating the Title IX aspects of the complaint, regardless of law enforcement’s involvement.

Galbally: One aspect of Title IX that is still evolving is the level of responsibility that schools have when

“There has been an increase in activity from the plaintiffs’ bar in using Title IX as a legal mechanism to bring lawsuits against K-12 and higher-education entities.”

— MARSHALL W. GRATE

“Title IX requires equality in all aspects of education, including in the employment context, recruitment, admissions, funding opportunities, etc. within K-12 and higher education.”

— ERIN C. GALBALLY

Galbally: [Continued on page 3]
in which the student enrolls? Does the new school have to research why the school expelled the student?

**Q:** What should members of the broader business community know about Title IX? Are there applications to business law?

**Grate:** Title IX does require an institution to protect staff and students from sexual harassment from outside parties, including third parties, so there is a chance a business that does work with an educational entity could become engaged in a Title IX matter, although rare. There is an increasing “creep” of scope of the law. Health care institutions that receive Medicare/Medicaid funding could face Title IX issues. A recent case, Doe v. Mercy Catholic, expanded Title IX to a private hospital. Because it was a teaching hospital and received federal funds through Medicaid, the hospital was liable under Title IX. In general, Title IX continues to expand and we have seen an erosion of legal standards originally articulated by the U.S. Supreme Court.

**Q:** What do you wish your clients knew before engaging you?

**Grate:** Clients need to be aware of Title IX and its requirements and to take seriously any allegation that invokes Title IX. We advise clients to suspend disbelief and be guided by facts during their Title IX investigations. Any educational institution that receives federal funds has to have a system in place, particularly in higher education to ensure no one can ‘hide’ within the institution. At a college or university, the Title IX coordinator has to have real authority to act on issues. Even the best institutions can encounter Title IX legal issues.

**Galbally:** It is important that clients engage legal counsel early in the process. The role of a Title IX coordinator can be overwhelming. Proactivity is key. Schools and businesses should engage counsel before there is a problem.

**Paterson:** As attorneys, we acknowledge that educational institutions face extreme financial pressure and due to that pressure, it is not uncommon for educational institutions to reach out in a later stage of a legal situation. Educational institutions will continue to have to weigh the potential legal costs against the impact of an adverse finding as well as the reputational implications. There are multiple stages in the investigation process; While we encourage proactivity and early involvement, it is never too late to engage counsel.

“Educational institutions have to weigh the potential legal costs against the potential organizational impact of an adverse finding, including damage to its reputation.”

– NICOLE M. PATERSON

For more information about Title IX and how to navigate the many nuances of the statute, contact the Clark Hill Team.

ERIN C. GALBALLY
Senior Attorney
Phone: 215.640.8510
Email: egalbally@clarkhill.com

MARSHALL W. GRATE
Senior Attorney
Phone: 616.608.1103
Email: mgrate@clarkhill.com

NICOLE M. PATERSON
Associate Attorney
Phone: 616.608.1139
Email: npaterson@clarkhill.com

(continued on page 4)
Erin C. Galbally guides her clients through complex labor, employment, and Title IX matters with a focus on achieving optimum results. As a Senior Attorney, she provides daily counsel and long term strategy to public and private sector employers on all aspects of the employee-employer relationship, including collective bargaining, grievance arbitration, compliance under the FMLA, ADA, Title VII and related state laws, employee discipline, and workplace investigations. Erin regularly appears before the EEOC and the Pennsylvania Human Relations Commission. She has a winning record in litigating employment matters in state and federal court and representing clients in arbitration. Contact Erin at 215.640.8510 or egalbally@clarkhill.com.

Marshall W. Grate is a Senior Attorney in Clark Hill’s Grand Rapids office where he is a member of the Education & Municipal Law, and Labor & Employment Law practice groups. Marshall is an ATIXA certified Title IX investigator. Marshall specializes his practice in public school law, labor and employment law, municipal corporations, and private sector employers. Marshall has broad experience in all labor and employment matters, and focuses on school code compliance, FERPA, constitutional legal issues that affect public schools, personnel administration, wage and hour issues, employment discrimination (EEOC), teacher tenure cases, the Family and Medical Leave Act (FMLA), unfair labor practices, collective bargaining, mediation, fact finding and labor arbitration. Marshall has successfully defended clients in both bench and jury trials and administrative proceedings. He is licensed to practice in all state and federal courts in Michigan and Indiana and is admitted to the Sixth and Seventh Circuit of the United States Court of Appeals, as well as the United States Supreme Court. Contact Marshall at 616.608.1103 or mgrate@clarkhill.com.

Nicole M. Paterson is an Associate with the Labor & Employment and Education & Municipal Practice Groups in Clark Hill’s Grand Rapids office and an ATIXA certified Title IX investigator. Nicole represents a diverse group of clients operating in both a union and non-union environment, including school districts, long-term care facilities, hospitals, non-profit organizations, municipalities and corporations. Nicole has successfully defended employers before the Michigan Department of Civil Rights, the Equal Employment Opportunity Commission, the Michigan Employment Relations Commission, the National Labor Relations Board, the Department of Labor, and state and federal courts. Contact Nicole at 616.608.1139 or npaterson@clarkhill.com.