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Title IX and Transgender Individuals: Bathroom Guidance

On May 13, 2016, the U.S. Department of Justice and U.S. Department of Education jointly released guidance ("May 13, 2016 Guidance"[1]) that said Title IX of the Education Amendments of 1972 applied to discrimination based on gender identity, not just gender. Transgender students utilized the guidance to assure that they were protected from discrimination and had access to bathrooms and residence halls that are consistent with their gender identities.

On February 23, 2017, the Trump administration withdrew the May 13, 2016 Guidance. The Trump administration's position stated that this issue is a state issue rather than a federal issue.

Meanwhile, a case from the 4th Circuit titled, *Gloucester Cnty. Sch. Bd. v. G.G.*, has made its way to the U.S. Supreme Court. In that case, a transgender student named Gavin Grimm ("Grimm") at Gloucester High School in Virginia was diagnosed with gender dysphoria, and was subsequently allowed to use the boy's restroom, which aligned with his gender identity. However, the Gloucester County School Board ("Board") then passed a policy mandating that transgender students only be allowed to access single-stall unisex restrooms or restrooms that correspond with their biological sex.

Grimm sued the Board and alleged that its policy violated Title IX as well as the Equal Protection Clause of the Fourteenth Amendment. The district court granted the Board's motion to dismiss the Title IX claim and denied Grimm's motion for a preliminary injunction. A divided panel of the Fourth Circuit ruled that a transgender student could maintain a claim under Title IX of the Education Amendments of 1972 (Title IX). The case has now reached the U.S. Supreme Court, which will hear oral argument on March 28, 2017.

As referenced above, the Trump administration did withdraw the May 13, 2016 Guidance. However the Trump administration has yet to disturb the April 29, 2014 guidelines (April 29, 2014 Guidance"[2]) that address sexual violence and other forms of sex discrimination. Included in the nearly 50 page Q&A document is a passage that states, "Title IX protects all students at recipient institutions from sex discrimination, including sexual violence." "Any student can experience

[1] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf
[2] https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

sexual violence: from elementary professional school students; male and female students; straight, gay, lesbian, bisexual, and transgender students; part-time and full-time students; students with and without disabilities; and students of different races and national origins".

The April 29, 2014 Guidance also states, "Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity of femininity and OCR accepts such complaints for investigation." "Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school's obligations. Indeed, lesbian, gay, bisexual, and transgender youth report high rates of sexual harassment and sexual violence."[3] "A school should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence."[4]

With the May 13, 2016 Guidance now revoked, but the April 29, 2014 Guidance still in effect, educational institutions are left to wonder what to do. One case in the U.S. District Court for the Western District of Pennsylvania was recently decided since the revocation of the May 13, 2016 Guidance. In *Evancho et al., v. Pine-Richland School District et al.*, case number 2:16-cv-0153, three transgender students sued the Pine-Richland School District after a school board resolution was passed that requires students to use bathroom facilities that correspond to their "biological sex" or unisex private facilities. The students sought, and were granted, a preliminary injunction on February 27, 2017, because the students showed a reasonable likelihood of success on the merits of an Equal Protection Clause claim. Notably, the court stated there was not a likelihood of success on the student's Title IX discrimination claim given the uncertainly of federal policy and the pending U.S. Supreme Court case, *Gloucester Cnty. Sch. Bd. v. G.G.*

While the future is uncertain with respect to these issues at the federal level, several states, including New York, have adopted provisions prohibiting discrimination against transgender individuals. Accordingly, it is important to check applicable local and state laws that may be applicable to your institution.

Sexual Assault In Higher Education

In 2011, the Office for Civil Rights in the U.S. Department of Education issued a Dear Colleague letter ("DCL"[5]) that urged institutions to better investigate and adjudicate cases of campus sexual assault. The letter provided clarification for how the department interprets Title IX of the Education Amendments of 1972.

[3] *Id. at section B-2.*
[4] *Id.*
[5] https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201605-title-ix-transgender.pdf

Specifically, the DCL:

- Provides guidance on the unique concerns that arise in sexual violence cases, such as school's independent responsibility under Title IX to investigate (apart from any separate criminal investigation by local police) and address sexual violence.
- Provides guidance and examples about key Title IX requirements and how they relate to sexual violence, such as the requirements to publish a policy against sex discrimination, designate a Title IX coordinator, and adopt and publish grievance procedures.
- Discusses proactive efforts schools can take to prevent sexual violence.
- Discusses the interplay between Title IX, the Family Education Rights and Privacy Act, and the Jeanne Clery Disclosure of Campus Security and Campus Crime Statistics Act ("Clery Act") as it related to a complainant's right to know the outcome of his or her complaint, including relevant sanctions imposed on the perpetrator.
- Provides examples of remedies and enforcement strategies that schools and OCR may use to respond to sexual violence.

The DCL supplements OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, issued in 2001 ("2001 Guidance"[6]). Notably, in its opening section, the April 29, 2014 Guidance states, "[t]he DCL and the 2001 Guidance **remain in full force** and we recommend reading these Questions and Answers in conjunction with these documents." (emphasis added).

The 2011 and 2014 guidance collectively clarify that sexual violence, including rape, sexual assault, sexual battery, and sexual coercion, is a form of sexual harassment that violates Title IX. Specifically, the guidance notes that a single instance of sexual violence may be sufficiently severe such that it creates a hostile environment that limits or denies a student's ability to participate in or benefit from the education program. Any school that knows or should have known about possible harassment must "take immediate action to eliminate the harassment, prevent its recurrence, and address its effect.

Additionally, in April 2014, the White House Task Force to Protect Students from Sexual Assault issued its first report "Not Alone", and created a website to address campus sexual violence, located at https://www.justice.gov/ovw/protecting-students-sexual-assault.

As of the date of this paper (March 1, 2017), the 2011 and 2014 Guidance has not been revoked by the Trump administration. There have been several lawsuits instituted against colleges and universities by individuals accused of sexual assault under the guidelines and disciplined as a result. In addition, a bill (Safe Transfer Act) was proposed in December 2016 to the United States House of Representatives that would require colleges to indicate on student transcripts if

[6] http://www.titleix.us/wp-content/uploads/2014/04/OCR-Revised-Sexual-Harassment-Guidance-2001.pdf

they have been punished for sexual assault. Currently, two states, Virginia and New York, have laws on the books requiring transcripts to reflect whether a student was suspended or expelled over sexual assault allegations.

During confirmation hearings for the Secretary for the United States Department of Education Betsy DeVos, she was questioned about the issue of sexual assault on campuses. During the hearings, Secretary DeVos did not comment on what changes, if any, would be made to the 2011 or 2014 guidance.

Regardless of what happens at the federal level, some state higher education systems have enacted their own policies and guidance on campus sexual assault. These policies may be unaffected by changes made at the federal level. For example, the State University of New York ("SUNY") system has adopted its own policies on sexual violence prevention.[7]

2016 U.S. Supreme Court Decision

***Fisher v. Univ. of Tex*, 136 S. Ct. 2198 (2016)** - *Fisher* challenged consideration of race in the admissions policy at the University of Texas ("UT"). On June 23, 2016, the U.S. Supreme Court (the "Court") upheld UT's race-conscious admissions program under federal law. By a vote of 4-3, the Court upheld the Fifth Circuit's decision, finding that UT's race conscious admissions program was lawful under the Equal Protection Clause. Specifically, the court offers the following insights:

- The Court's opinion preserves existing federal legal framework
    - Reaffirming that strict scrutiny applies to the use of race admissions;
    - Confirming, with respect to goals, the importance and primacy of academic judgment when an institution decides that "a diverse student body would serve its educational goals"; and
    - Clarifying that no deference is owed to an institution by a court when determining whether the use of race is narrowly tailored
- Education benefits of diversity remain a compelling interest under Federal law
- Race can still be considered in higher education admissions and enrollment
- Decision is applicable to both public and private institution that received federal funding
- Did not address application to other practices, such as financial aid, recruitment, and outreach
- Justice Alito's dissent was twice the length of the majority opinion

[7] http://system.suny.edu/compliance/topics/sexual-violence-prevention/

Sampling of 2016 & 2017 Court of Appeals Decisions in Higher Education – Title VII & Title IX

***Xingzhong Shi v. Montgomery*, 2017 U.S. App. LEXIS 2405 (11th Cir. 2017)** - A former associate professor's Title VII claim against two university administrators failed because the relief granted under Title VII was against an employer, not against individual employees whose actions would constitute a violation. The professor did not exhaust his administrative remedies for certain claims because his EEOC charge was not filed within 180 days of the challenged decisions, and an intake questionnaire filed regarding a particular claim was not made under oath or affirmation and thus, it did not constitute a charge within the statutory requirements. In any event, the professor failed to state a prima facie case of discrimination under Title VII concerning his termination since he did not show that someone outside of his protected class replaced him or that someone who committed similar misconduct was retained.

***Doe v. Columbia Univ.*, 831 F.3d 46 (2d Cir. 2016)** - The temporary presumption afforded to plaintiffs in employment discrimination cases under Title VII applied to sex discrimination plaintiffs under Title IX of the Education Amendments of 1972 as well. A complaint under Title IX, alleging that plaintiff was subjected to discrimination on account of sex in the imposition of university discipline, was sufficient with respect to the element of discriminatory intent if it pled specific facts that supported a minimal plausible inference of such discrimination. The student's complaint pled sufficient specific facts giving support to a plausible inference of sex discrimination to survive a motion to dismiss, if Title IX's other requirements were met, because the complaint alleged that the university's hearing panel, its dean, and its Title IX investigator, were all motivated in their actions by pro-female, anti-male bias.

***Kazar v. Slippery Rock Univ. of Pa.*, 2017 U.S. App. LEXIS 2581 (3d Cir. 2017)** - Where a university did not renew a professor's contract due to her failure to receive her doctoral degree in a timely fashion, her First Amendment retaliation claim failed because she did not establish that her participation in a program that supported lesbian, gay, bisexual, and transgender issues was a substantial factor in the university's decision to not renew her contract. The professor's equal protection claim failed because she did not identify similarly situated individuals. The professor's Title IX gender discrimination claim failed because she did not show that the decision not to renew her contract based on her failure to timely obtain her Ph.D. was pretextual since she repeatedly failed to fulfill the Ph.D. requirement for her position, and she did not identify a similarly situated male who was treated differently.

***Kittle-Aikeley v. Strong*, 844 F.3d 727 (8th Cir. 2016)** - The district court properly permanently enjoined the technical college from drug testing students who were not enrolled in safety-sensitive programs because the college's collection and testing of urine was a search under the Fourth Amendment, and the college had not demonstrated that fostering a drug-free environment was a special need because no crisis sparked the board of regents' decision to adopt

the drug-testing policy and the college did not believe it had a student drug-use problem greater than that experienced by other colleges. By requiring all incoming students to be drug tested, the technical college defined the category of students to be tested more broadly than was necessary to meet the valid special need of deterring drug use among students enrolled in safety-sensitive programs.

***Lei Ke v. Drexel Univ.*, 645 Fed. Appx. 161 (3d Cir. 2016)** – A former medical student's claims under 42 U.S.C.S. § 1981 and Title VI of the Civil Rights Act of 1964 failed because he did not raise a genuine fact issue with respect to intentional discrimination. Comments allegedly made by an internship sponsor did not establish that the student was dismissed because of his race, as the sponsor was not involved in the dismissal decision and the internship grade was not a factor in the dismissal. The student's claim of racially motivated breach of contract failed because his contract had been modified upon his readmission after a prior dismissal so that he was subject to more stringent conditions than those stated in the student handbook. Retaliation claims failed because the student did not allege that he engaged in protected activity.

***Hatcher v. Bd. of Trs. of S. Ill. Univ.*, 829 F.3d 531 (7th Cir. 2016)** - In a lawsuit based on the denial of tenure, a former professor did not state a Title VII retaliation claim based on the fact that she reported sexual harassment on behalf of a student because the professor did not thereby engage in a Title VII protected activity since she was not opposing unlawful employment discrimination. The professor adequately pleaded a Title VII retaliation claim based on her filing of an EEOC gender discrimination charge because filing the EEOC charge was a protected activity, and the university chancellor denied the professor tenure, despite recommendations for it, shortly after the EEOC charged was filed. The professor's First Amendment retaliation claim based on her report on behalf of a student about sexual harassment failed because the professor's speech was made pursuant to her faculty role and not in her role as a citizen.

***Wheat v. Florida Parish Juvenile Justice Com'n*, 811 F.3d 702 (5th Cir. 2016)** - Summary judgment was properly granted to a college with respect to claims under 42 U.S.C. § 1983 by a full-time faculty member ("FM"), alleging that changes in his working conditions were due to unlawful age discrimination and retaliation, as the FM did not show that there was a municipal policy or policymaker who was responsible for the decisions in order to show abrogation of immunity under Tex. Educ. Code Ann. § 130.0011. Moreover, as the part-time instructor did not provide evidence to show a pretext by proof of sufficient comparators, and there was no retaliatory adverse employment action shown by, inter alia, the abatement of her grievance, her claims of age discrimination and retaliation under 29 U.S.C. § 623(a)(2) and (d) of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634, also lacked merit.

***Jolibois v. Fla. Int'l Univ. Bd. of Trs.*, 654 Fed. Appx. 461 (11th Cir. 2016)** - In a Title VII action, the district court did not err in finding that the employer offered legitimate, non-discriminatory reasons and the employee failed to show they were pretext where (1) failure to abide by the CBA requirements, or breach of

some other internal policy, alone, did not constitute a sufficient showing of pretext, and (2) the ample evidence of the employee's numerous poor evaluations and his refusal to submit the required performance improvement plan (PIP) supported the employer's proffered reason for the denial of the sabbatical, the requirement of the PIP, suspension, and later termination. The employee failed to properly plead a substantive due process claim based on free speech.

***United States ex rel. Miller v. Weston Educ., Inc.*, 840 F.3d 494 (8th Cir. 2016)** - Where former employees alleged that a college fraudulently induced the Department of Education to provide funds by falsely promising to keep accurate student records, summary judgment was inappropriate as to the employees' fraudulent inducement claim under the False Claims Act ("FCA") because a reasonable jury could find that the college knew that it had to keep accurate grade and attendance records and intended not to do so, and the college's promise to keep accurate records was material. An employee's FCA retaliation claim failed because, inter alia, she did not demonstrate retaliatory action by the college. The employees' wrongful discharge claims failed because a reasonable person would not find one employee's working conditions intolerable, and 34 C.F.R. § 668.14(b)(1) (2010) was too vague to support clearly mandated public policy.

***Shott v. Rush Univ. Med. Ctr.*, 652 Fed. Appx. 455 (7th Cir. 2016)** - Summary judgment dismissal of the professor's employment discrimination suit was proper because the professor could not show that she was denied promotion for unlawful reasons when she never formally applied for promotion, the professor had not shown that the court abused its discretion in imposing the limits on discovery, and the court did not err in determining that the professor failed to identify any similarly situated comparators.

***Bridges v. Scranton Sch. Dist.*, 644 Fed. Appx. 172 (3d Cir. 2016)** - A Fourteenth Amendment substantive due process claim failed because a school district did not have a duty to protect a student from alleged bullying by another pupil. There was no special relationship between the student and the district, and the state-created danger exception did not apply. A teacher's alleged verbal abuse and bullying of the student did not violate substantive due process because her conduct did not "shock the conscience". Because there was no underlying constitutional violation, the district could not be held liable under 42 U.S.C. § 1983 for failure to train. A racially hostile environment claim under Title VI of the Civil Rights Act of 1964 failed because the teacher did not do or say anything that could be reasonably construed as racially motivated.

***Kahan v. Slippery Rock Univ. of Pa.*, 2016 U.S. App. LEXIS 20142 (3d Cir. 2016)** - The associate professor's allegations did not establish a prima facie case of gender discrimination. No reasonable juror could conclude that he was subjected to a hostile work environment. His substantive due process claim and his procedural due process claim failed. He provided no evidence tying the nonrenewal of his contract to his complaints about grade inflation. The evidence

demonstrated his contract was not renewed due to his failure to turn in his grades on time.

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