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Panel: Legal Issues in Higher Education: Annual Review of Court and Administrative Developments (CLE)

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Collective Bargaining Post-*Janus* Hunter College 2019 Legal Update on Discrimination & Due Process

April 9, 2019

Presented by
Natasha J. Baker



Agenda

- **Evolving definitions**
- **Procedural requirements**
- **Evolving agency action**
- **Impact on institutions, issues to consider**



Discrimination & Harassment on the Basis of Sex

- **What does “sex” include?**
 - Gender/identity & expression?
 - Sexual orientation?
- **What does “sexual harassment” mean?**
- **Federal agency actions**
- **Pending federal cases**

- **NOTE:** **the increased scrutiny on discrimination based on sex must not diminish the enforcement of other civil rights on campus.**



Discrimination on the Basis of Sex

Inclusive Definition:

- 1989 – Price Waterhouse on “sex-stereotyping” under Title VII.
- EEOC 2012 Strategic Enforcement Plan and 2016 definition of “sex” under the EEOC LGBT Fact Sheet.
- OCR Guidance



Agency Actions Pertaining to Definition of Sex

OCR 2017-2018

- Withdrawal of transgender guidance.
- Issued a reminder on harassment and bullying.

DOJ

October 2017 memo and subsequent briefs take the position that sex does not include gender identity, expression.



Transgender Rights Under Title IX

- February 2018: Dept. confirms that its position remains that “separating [toilet] facilities on the basis of sex is not a form of discrimination prohibited by Title IX.”
 - Will no longer be investigating civil rights complaints related to bathroom access
- September 2018: Dept. is investigating whether primary-school policy allowing students to choose the bathroom that corresponds to their identity creates a “hostile environment” for female students



Discrimination on the Basis of Sex

- SCOTUS sent back Gloucester County School Board vs. G.G. in March 2017 (Title IX case)
- 6th Circuit – Harris Funeral Homes: issue is whether sex includes gender identity/transition;
- 2nd Circuit – Zarda vs. Altitude Express: issue is whether sex includes sexual orientation; accord 7th Circuit; contra 11th Circuit.



SCOTUS Writ Petition for Cert Pending

■ Harris Funeral Homes

1. Whether the word “sex” in Title VII’s prohibition on discrimination “because of...sex,” 42 U.S.C. section 2000e-2(a)(1) meant gender identity and included transgender status when Congress enacted Title VII in 1964.
2. Whether *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) prohibits employers from applying sex-specific policies to their employees’ sex rather than their gender identity.



Evolving Federal Definition Of Harassment Based On Sex

Under the proposed TIX regs:

- 1) “an employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;”
- 2) “unwelcome conduct on the basis of sex *that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access*” to educational programs and activities; or
- 3) “sexual assault” as defined in the Clery Act.



Current Definition under 2001 Guidance

- Sexual harassment must be sufficiently severe, persistent, or pervasive that it adversely affects a student's education or creates a hostile or abusive educational environment.



Issues to Consider

- **Current EEOC Definition of Hostile Environment Under Title VII (race, color, national origin, race, color, religion, sex (including pregnancy), national origin, age (40 or older), disability or genetic information)**
 - Harassment becomes unlawful where 1) enduring the offensive conduct becomes a condition of continued employment, or 2) the conduct is severe or pervasive enough to create a work environment that a reasonable person would consider intimidating, hostile, or abusive.



Update on Due Process



Notice of Proposed Rulemaking -

November 2018 – January 2019 – Comment Period

- **Narrows the definition of harassment based on sex under TIX**
- **Narrows the obligation to respond**
- **Applies to faculty and staff**
- **Changes the process to a hearing process only, with due process protections**
 - Formal complaints
 - Cross examination by parties or advisors
 - Dismissal of complaints that don't meet the definition
 - Standard of proof must be consistent with other processes



Due Process & Discrimination Trends

- **Sixth Circuit Court of Appeals (publics in MI, OH, KY, TN)**
 - **California Writ Proceedings (publics and privates)**
-
- 1. Notice of Charges & Evidence To Be Used**
 - 2. Live Hearings in Lieu of Single Investigator Model**
 - 3. Cross Examination (indirect permissible in CA)**
 - 4. Credibility Determinations Based on Live Testimony**
 - despite implicit bias and cultural concerns



Senate HELP Testimony on April 2, 2019

- Reauthorization of the Higher Education Act
- Specific focus on campus sexual assault and fact-finding procedures.
- <https://www.help.senate.gov/hearings/reauthorizing-hearing-addressing-campus-sexual-assault-and-ensuring-student-safety-and-rights>



Issues to Consider

- **Implementation.**
- **Procedures for complaints based on protected categories other than sex.**
- **Procedures involving students and employees.**
- **State law, including Administrative Procedures Act requirements.**
- **Campus procedures.**



Other Updates from OCR

The Department of Education's Office of Civil Rights ("OCR") recently revised its Case Processing Manual, the guidebook used by OCR field staff when enforcing Title IX (available [here](#)). Revisions include the following:

- OCR will no longer initiate investigations based on written material that "relies exclusively on statistical data, media reports, journals/studies, and/or other published articles."
- The Rapid Resolution Process is now available in more cases and in more stages of the process.
- The appeals process has been reintroduced.
- A new First Amendment provision that states that OCR "will not interpret any statute or regulation to impinge upon rights protected under the First Amendment."
- Removal of a provision designed to allow OCR to dismiss mass filed complaints.



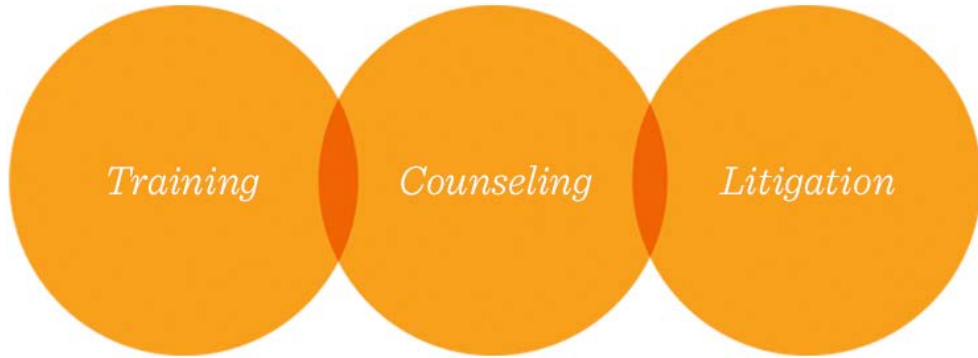
A Note on the DACA Program

- **Deferred Action for Childhood Arrivals**
- **Enforcement priority vs. pathway to permanent citizenship**
- **Under current EO, program was to formally end March 5, 2018.**
 - Existing authorizations expire March 2020.
- **Three federal district courts ordered the government to restore DACA, accept new applications and renewals**
 - Supreme Court denied review
- **Legislative solution?**



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