



Representing Employees of Educational Institutions in the #MeToo Era

What Employment Lawyers Need to Know About Title IX

By Elizabeth Abdnour

As attorneys representing clients with sex discrimination concerns in the educational institution context are well aware, Title IX imposes rights and responsibilities upon employers, separate and distinct from obligations created by Title VII of the Civil Rights Act of 1964, the Equal Pay Act of 1963, and Michigan's Elliott-Larsen Civil Rights Act. This article outlines the rights of employees of educational institutions with respect to Title IX and provides practice tips to attorneys representing these clients.

Overview of Title IX in the employment law context

Title IX of the Educational Amendments of 1972 reads: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance."¹ Commonly understood to protect students, Title IX also protects employees of educational institutions that receive federal funding, as

outlined in guidance issued by the U.S. Department of Education, Office for Civil Rights in 1991:

Title IX of the Education Amendments of 1972 protects people from discrimination on the basis of sex in employment and employment practices in education programs or activities receiving Federal financial assistance.

The prohibition on discrimination in employment in the ED regulation for Title IX encompasses, but is not limited to, recruitment, advertising, hiring, upgrading, tenure, firing, rates of pay, fringe benefits, leave for pregnancy and childbirth, and participation in employer-sponsored activities. The regulation applies to all employment decisions by ED recipients, whether made directly or indirectly through contractual arrangements with referral agencies, labor unions, organizations providing or administering fringe benefits, or others.²

Title IX complements the protections available to employees under Title VII³ and the Elliott-Larsen Civil Rights Act.⁴ In addition to sexual harassment and assault, Title IX protects employees who may experience relationship violence and stalking.⁵ As long as an educational institution is receiving federal funding in some form and is not subject to one or more of the limited exemptions available under the law,⁶ Title IX protections apply to both its students and employees.⁷

Special considerations when representing employees of educational institutions who report experiencing sex discrimination at work

Ensuring client safety through interim measures

Institutions should provide appropriate interim measures or accommodations to employees who have reported experiencing a Title IX violation before or during an institution's internal investigation.⁸ According to the Office for Civil Rights:

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct.... Interim measures include counseling, ... modifications of work or class schedules, campus escort services, restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of campus, and other similar accommodations.⁹

When representing a client who has experienced a potential Title IX violation, it is appropriate to request any interim measures the client may need to continue working uninterrupted as the investigation continues. Depending on the severity of the incident, examples of appropriate interim measures include suspending or removing the respondent from the workplace; providing time off from work for the client to seek healthcare, counseling, criminal justice assistance, or legal services; or helping the client access the services of an employee

At a Glance

Commonly understood to protect students, Title IX's protections also cover employees of educational institutions that receive federal funding. Title IX complements the protections available to employees under Title VII and Michigan's Elliott-Larsen Civil Rights Act. This article discusses the rights of employees of educational institutions with respect to Title IX and provides practice tips to attorneys representing these clients.

assistance program. To initiate a request for interim measures on behalf of a client, contact the institution's designated Title IX coordinator.¹⁰

No-contact directives

One of the interim measures available to parties involved in Title IX investigations is the no-contact directive. "In some cases, it may be appropriate to further separate the harassed student and the harasser, e.g., by... directing the harasser to have no further contact with the harassed..."¹¹ Again, these requests should be directed to the designated Title IX coordinator.

Personal protection orders—institutional obligations

Clients may seek to obtain personal protection orders to protect themselves from further harassment in the workplace, whether it be from a coworker or from someone outside the institution who is engaging in harassment or stalking at the client's workplace. While some institutions have stated procedures regarding how they assist in the enforcement of court-issued protection orders, there does not appear to be such a trend within Michigan institutions.¹² The best practice in these situations is to advise both the Title IX coordinator and the institution's public safety or law enforcement unit of the order and request that they assist with any necessary implementation measures, such as separating the parties or changing work schedules as appropriate.

Practice tips

Title IX jurisdiction

There is a popular misconception that Title IX does not apply to private educational institutions and, therefore, its protections are not available to employees in those settings.

However, attorneys should consider whether the private institution in question:

- Receives any federal grant money
- Receives any federal grants or scholarships for its students
- Receives any federal work-study funding
- Uses or rents federal land or property at below market value
- Receives federal training
- Receives any other source of federal funding¹³

Any of the above circumstances require Title IX compliance unless the institution has specifically been approved for an exemption by the federal government. Therefore, where it may seem at first glance that a school does not fall under the umbrella of Title IX, further scrutiny of its funding sources may be useful.

As an example, the U.S. District Court for the Fourth Circuit held that Bob Jones University, a private institution in South Carolina, received federal financial assistance when it accepted students who paid for their tuition with federal loans. Although the money was paid directly to the students, the university was considered the indirect recipient.¹⁴ In the K-12 context, the National School Lunch and National School Breakfast programs are federally funded programs available to both public and private schools.¹⁵

Anatomy of a Title IX investigation

With the Department of Education's proposed Title IX rule not yet finalized at the time of writing and given ongoing Sixth Circuit litigation, institutional Title IX investigation procedures are in a current state of flux. However, in general, attorneys representing parties in the process can expect the following procedures. First, the institution will receive notice of the alleged Title IX violation and assess jurisdiction and

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whether it will initiate a formal investigation process. If the institution proceeds with a formal investigation, attorney involvement may be limited, as some institutions do not allow direct attorney participation in the process and limit attorneys to the role of silent advisor. This may be the case even if the institution uses a direct hearing process, which most institutions are implementing at least with respect to Title IX investigations involving students in light of the 2018 Sixth Circuit ruling in *Doe v Baum*.¹⁶

Attorneys will want to consult individual institutional policies to determine their role in the process. Some institutions use the same process for student and employee Title IX investigations, and some have separate procedures. Likewise, some institutions allow for appeals and some do not.

Obtaining employment/personnel records

Michigan employment attorneys are familiar with advising employees to use the Bullard-Plawecki Employee Right to Know Act to access personnel records. When representing employees of public institutions, however, attorneys may want to consider advising clients to seek information via Michigan's Freedom of Information Act (FOIA) instead. Unlike Bullard-Plawecki, FOIA requires specific timelines for institutional response: an institution must provide an initial response within five business days, with the option of notifying the requester of an extension of 10 business days. In situations where time is of the essence and a public employer is not complying with a Bullard-Plawecki request in a timely manner, attorneys may find a FOIA request to be more effective.

Representing respondents

Title IX protects not only those employees of educational institutions who have experienced sex discrimination, but also those accused of perpetrating it. The Office for Civil Rights



2017 Q&A guidance outlined specific due process protections for respondents in institutional Title IX proceedings:

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident. Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.¹⁷

In addition to the procedural requirements, educational institutions must also ensure that the interim measures or accommodations being provided to claimants are reasonable and that similar considerations are made for respondents as appropriate: "Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms."¹⁸

Conclusion

Attorneys who work with employees of educational institutions with sex discrimination concerns—whether they represent the individual reporting the discrimination or the individual accused of it—will be well-served to consider the provisions and requirements of Title IX in addition to other state and federal laws and regulations. As Title IX guidance continues to evolve, additional rights and responsibilities impacting both employers and employees in the educational institution context will continue to develop. ■



Elizabeth Abdnour is a Lansing-based attorney representing clients in civil rights, Title IX, employment, special education, and landlord-tenant matters. She has a JD from New York University School of Law and a BA from Michigan State University.

ENDNOTES

- 20 USC 1681(a).
- US Dep't of Education, Office for Civil Rights, *Nondiscrimination in Employment Practices in Education: Nondiscrimination in Employment Under Title IX* (August 1991) <<https://www2.ed.gov/about/offices/list/ocr/docs/hq53e8.html>> [https://perma.cc/6E8H-G2BK]. All websites cited in this article were accessed April 13, 2019.
- 42 USC 2000e-2(a)(1): "It shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."
- MCL 37.2102(1): "The opportunity to obtain employment, housing and other real estate, and the full and equal utilization of public accommodations, public service, and educational facilities without discrimination because of religion, race, color, national origin, age, sex, height, weight, familial status, or marital status as prohibited by this act, is recognized and declared to be a civil right."
- US Dep't of Education, Office for Civil Rights, *Q&A on Campus Sexual Misconduct* (September 2017), p 3, n 11: "34 C.F.R. § 106.8(b); 2001 *Guidance* at (V)(D); see also 34 C.F.R. § 668.46(k)(2)(i) [providing that a proceeding which arises from an allegation of dating violence, domestic violence, sexual assault, or stalking must "[i]nclude a prompt, fair, and impartial process from the initial investigation to the final result"]." <<https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>> [https://perma.cc/92TJ-4BKH].
- Title IX exemptions are beyond the scope of this article, but more information from the US Dep't of Education, Office for Civil Rights, about the exemptions is available at <<https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/index.html>> [https://perma.cc/7HSF-9K44].
- A discussion of the similarities and differences between specific protections available under Title VII, Title IX, and the Equal Pay Act are beyond the scope of this article. However, attorneys may find instructive the EEOC's *Procedures for Complaints of Employment Discrimination Filed Against Recipients of Federal Financial Assistance*, 29 CFR 1691 *et seq.*
- Q&A on Campus Sexual Misconduct*, pp 2–3 and US Dep't of Education, Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties: Title IX* (January 2001), p 16 <<https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>> [https://perma.cc/MA4V-Y87Z].
- Q&A on Campus Sexual Misconduct*, p 2.
- 34 CFR 106.8(a): "Each recipient shall designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under this part, including any investigation of any complaint communicated to such recipient alleging its noncompliance with this part or alleging any actions which would be prohibited by this part. The recipient shall notify all its students and employees of the name, office address and telephone number of the employee or employees appointed pursuant to this paragraph."
- Revised Sexual Harassment Guidance*, p 16.
- E.g., Harvard University, *Harvard Title IX: No Contact and Protective Orders* <<https://titleix.harvard.edu/no-contact-and-protective-orders/>>; Cornell University, *Cornell University Title IX: Order of Protection* <<https://titleix.cornell.edu/resources/order-of-protection/>>; and Kenyon College, *Protection Orders* <<https://www.kenyon.edu/directories/offices-services/ocr/title-ix-vawa/additional-resources/protection-orders/>>.
- US Dep't of Justice, Civil Rights Division, *Title IX Legal Manual* (August 6, 2015), Sec. III(A) Federal Financial Assistance <<https://www.justice.gov/crt/title-ix>> [https://perma.cc/8NJF-VKGE].
- Bob Jones Univ v Johnson*, 396 F Supp 597, 603 (D SC, 1974).
- US Dep't of Agriculture, Food and Nutrition Service, *National School Lunch Program (NSLP)* (December 19, 2018) <<https://www.fns.usda.gov/nslp/national-school-lunch-program-nslp>> [https://perma.cc/73DV-ZA3D] and *School Breakfast Program (SBP)* (December 20, 2018) <<https://www.fns.usda.gov/sbp/school-breakfast-program-sbp>> [https://perma.cc/U9J2-VHMB].
- Doe v Baum*, 903 F3d 575, 581 (CA 6, 2018): "When it comes to due process, 'opportunity to be heard' is the constitutional minimum . . . So, consistent with this command, our circuit has made two things clear: (1) if a student is accused of misconduct, the university must hold some sort of hearing before imposing a sanction as serious as suspension or expulsion, and (2) when the university's determination turns on the credibility of the accuser, the accused, or witness, that hearing must include an opportunity for cross examination."
- Q&A on Campus Sexual Misconduct*, p 4.
- Id.*