2022 HIGHER-ED YEAR-END REVIEW

January 19, 2023
HOUSEKEEPING:

- Virtual Environment
- Cannot cover everything
- Not Legal Advice
- Course Materials
- Recorded
- Questions
OVERVIEW:

- Sub-regulatory
- Regulatory
- Case law
THEMES

**Regulatory:** Active OCR without capacity; lack of notice and documentation at issue; complaints beyond Title IX; 2020 Title IX regulations still in effect - do not know when new regs are coming

**Litigation:** No consistency, no certainty, courts cannot agree on Title IX liability
US DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS

Increased Number of Complaints
Record number of discrimination complaints - Nearly 19,000 in last fiscal year. More than double the prior year.

Less staffing

Delayed investigations
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Disability Discrimination

- Majority of complaints
- Separating disabled students from their peers
- Bullying
- Disproportionate discipline for disability-related behavior
OCR RESOLUTION
AGREEMENTS/INVESTIGATIONS:

Race Discrimination

Ottumwa Community School District - district failed to protect Black middle school students from racial harassment.

Peoria Unified School District - found white students invoked "Heil Hitler" salutes, harassed Asian students

Reforms included educating students to recognize and report discrimination, train school staff on response, reimburse complainants for therapy.
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Race Discrimination

Department investigating 4 complaints against districts, including one by NAACP, over racial education in public schools (Southlake)

Complaints reflecting debate over schools' roles in addressing systematic racism through diversity, equity and inclusion programming under Title VI
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

SOGI (Sexual Orientation and Gender Identity) under Title IX

- Increase in complaints alleging discrimination based on SOGI
- Likely result of bills filed at state level

Central Bucks School System matter in Pennsylvania allegedly suspended middle school teacher for filing complaint on behalf of LGBTQ student
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Pregnancy Discrimination

OCR Resolution Agreement with Salt Lake Community College
OCR found that the College "failed to respond equitably to complainant's complaint" and did not engage in an "interactive process" to provide necessary academic services. College failed to excuse absenses and tardies. The student's late work was also marked unexcused.

OCR Resolution Agreement with Bryant & Stratton College
OCR found no alternative policy related to reasonable adjustments due to pregnancy status - relying on Student Handbook designed to assess all medical conditions. Concerns staff not sufficiently trained to respond to pregnancy status request.
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Pregnancy Discrimination

**OCR Resolution Agreement with Career Care Institute** - OCR found that the College's Title IX Coordinator's information was not available on its website, and it was unable to find a statement indicating how a complaint could be filed with the Title IX Coordinator.

**Practical Note:** OCR found "Institute [had] not made publicly available on its website all materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates informal resolution process."
NEW OCR RESOURCE

**References Dobbs. v Jackson Women's Health Organization**
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:
Athletics and Gender Equity

OCR Resolution Agreement with Brownsville Independent School District
OCR preliminarily found that the girl's softball field had smaller bleacher areas compared to the baseball fields. While both teams had concessions stands, the revenue only benefitted the baseball team. Baseball field had press boxes, softball fields did not.

OCR Resolution Agreement with Salem–Keizer School District
OCR determined that the girl's softball teams were not provided with an additional "prep period" in comparison with boy's baseball team. The district also failed to provide equal uniforms and equal access to coaching opportunities.
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:
Athletics and Gender Equity

OCR Resolution with Wenatchee Valley College
OCR's investigation revealed that the school failed to achieve "substantial proportionality" between men's and women's sports teams. The Department also stated while the school advertised open coaches positions equally for men's and women's teams, the men's positions advertised employment incentives that were not provided for women's coaching positions.

OCR Resolution Agreement with Western Illinois University
OCR determined that there were less "participation" opportunities for female athletes; significant salary disparities between men's and women's coaches; larger number of coaches to men's vs. women's teams; and disproportionate recruiting budgets that favor men's programs.
OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Sexual Harassment

OCR Resolution Agreement with Eastern Mennonite University
OCR found that the school violated Title IX when the University's Title IX policy "did not require the University to offer interim and supportive measures" to responding parties in a Title IX Investigation.

OCR Resolution Agreement with St. Mary's College of Maryland.
College had actual knowledge of at least one instance of sexual harassment between the parties but failed to fully investigate the Complainant's anonymous complaint. Failure to keep adequate records during staff transition led to multiple interviews of complainant. Resolution took 4 months, which was outside of stated policy timeframe - not prompt and equitable because delays were a result of bad recordkeeping.
Top 10

1. Scope Expanded
2. Mandated Training Expanded
3. Additional/Modified Definitions
4. Complexity of Title IX Coordinator Role
5. Sexual Harassment is now Sex Based Harassment

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<thead>
<tr>
<th>Rank</th>
<th>Topic</th>
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<tr>
<td>6</td>
<td>Less Prescriptive Grievance Process</td>
</tr>
<tr>
<td>7</td>
<td>Informal Resolution- Initiated without &quot;Formal Complaint&quot;</td>
</tr>
<tr>
<td>8</td>
<td>Retaliation Protections</td>
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<tr>
<td>9</td>
<td>Discrimination Based on Pregnancy</td>
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<td>10</td>
<td>Expands Recordkeeping</td>
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The rule-making is necessary to align the Title IX regulations with the properties of the Biden-Harris Administration, including those set forth in the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988) and the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity. (EO 14021)

Summary of the Legal Basis:
We are conducting this rulemaking under 20 U.S.C. 1681 et seq.

Alternatives:
This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Anticipated Costs and Benefits:
This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Risks:
This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Timetable:

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<tr>
<th>Action</th>
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<tr>
<td>NPRM</td>
<td>7/12/22</td>
<td>87 FR 41390</td>
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<tr>
<td>Final Action</td>
<td>05/00/2023</td>
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BOTTOM LINE

✔ Continue to follow 2020 regulations and train your team accordingly

✔ No timeframe for release of new Title IX regulations, only best guess
STILL WAITING

No update on the promised Title IX Athletics/Gender Identity rule, although scheduled December 2022 action.
LITIGATION UPDATE AND TRENDS
WHAT DIDN'T HAPPEN - SUPREME COURT DECLINES TO REVISIT TITLE IX

The U.S. Supreme Court did not issue a writ of certiorari to address whether Davis’ causation requirement permits Title IX liability for a single incident. *Fairfax County School Board v. Jane Doe*, No. 21-968 (cert. denied 11/21/22) (seeking review of Fourth Circuit ruling that initially split a panel 2-1 and then split the full appellate court 9-6).


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MEANWHILE, FEDERAL TRIAL AND APPELLATE COURTS CONTINUE TO OFFER NUANCED OR CONTRASTING ANSWERS TO KEY QUESTIONS, SUCH AS:

- What constitutes “actual knowledge”?
- Who is “an official authorized to take corrective action”?
- What constitutes “substantial control of the alleged harasser and context in which the harassment occurs”?
- When does alleged deliberate indifference “cause students to undergo harassment” or “make them vulnerable to it”? 
Judges within the same court disagree on interpretations of Title IX’s scope and standards.

Eleventh Circuit splits 7-4 (along Republican and Democratic appointees) in upholding a Florida school district’s policy prohibiting transgender students from using bathrooms that match their gender identities – producing a majority opinion, concurring opinion, and four dissenting opinions.
**Soule v. Connecticut Association of Schools, Inc., et al**

2nd Circuit decision, affirming dismissal of a lawsuit brought by 4 cisgender female plaintiffs challenging a policy that allows transgender students to participate in gender specific sports consistent with gender identity.

**Adams v. School Board of St. Johns County, Florida**

11th Circuit holds public schools separating the use of male and female bathrooms based on biological sex does not violate Equal Protection Clause or Title IX.
Sixth Circuit splits on whether to hear as a full court an important statute of limitations question – the timeliness of Title IX claims pled well after the alleged assaults, where the plaintiffs claimed that they did not know, could not have reasonably known, that they were injured until well after the incident.

*Snyder-Hill v. The Ohio State University*, 48 F.4th 686 (6th Cir. 2022) (2-1 panel split finding claims to be timely), and 54 F.4th 963 (6th Cir. 2022) (en banc denial).
“No person 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 . . . .” 20 U.S.C. § 1681(a).

The First Circuit has stated that a person can participate or attempt to participate in an education program or activity by availing themselves to services such as libraries or labs or attending campus tours, public lectures, sporting events or other activities. *Doe v. Brown Univ.*, 896 F.3d 127, 132 n. 6 (1st Cir. 2018).

Second Circuit joins the majority view that employees are covered by Title IX. *Vengalattore v. Cornell Univ.*, 36 F.4th 87 (2d Cir. 2022).
Sixth Circuit allows non-students to sue over abuse by university physician and athletic team doctor. *Snyder-Hill v. OSU* (cited in prior slide). Dissent warns that “participating or benefitting” from an institution’s education program or activity should have limits.

Labeled under various titles in litigation – “Heightened risk,” “Pre-Assault,” or “Official Policy” claim.

The claim seeks to hold a school liable for creating a heightened risk that a student would be harassed or assaulted.

The Ninth Circuit has held that it does not foreclose the possibility that a plaintiff could adequately allege causation when a school’s alleged policy of deliberate indifference extends across a campus. (Karasek v. Regents of the Univ. of Ca., 956 F.3d 1093 (9th Cir. 2020)).
Other courts have been more limiting, focusing on common alleged harasser(s) or similar programs or activities.

The statute of limitations analysis may not be the same for a pre-assault claim focusing on a heightened risk and a post-assault claim focusing on the school’s response to a report.
To be actionable under Title IX, student-on-student harassment must be “so severe, pervasive, an objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” *Davis*, 526 U.S. at 650.

There is a split regarding whether a single instance of sufficiently severe peer harassment may rise to the level of “pervasive” harassment.
Some circuits have held that “pervasive” harassment requires multiple incidents of harassment - one incident is not enough for liability.

Other circuits have held that students must only demonstrate that a school’s deliberate indifference made further harassment more likely, not that it actually led to any additional post-notice incidents of harassment.

For several years, courts focused on whether a respondent’s Title IX claim satisfied theories labeled as “erroneous outcome,” “selective enforcement,” and “archaic assumptions.”

Increasingly, courts are analyzing claims by respondents in a more streamlined fashion, no longer requiring a Title IX claim to meet a doctrinal theory. Rather, courts focus on a broad question: Whether the facts raise a plausible inference that the school discriminated against the respondent on the basis of sex?
At the same time, courts are becoming more expansive and flexible in their interpretation of respondents’ claims for breach of contract. Courts focus on this broad question: Was the process “fundamentally fair” and/or “consistent with a student’s reasonable expectations?” See, e.g., Sonoiki v. Harvard Univ., 37 F.4th 691 (1st Cir. 2022), Doe v. Stonehill Univ., 55 F. 4th 302 (1st Cir. 2022) – both reversing dismissals of contract claims.

**Takeaway:** Recognize that Courts are becoming more proactive in issuing injunctions based upon findings of irreparable harm
The Eleventh Circuit’s recent ruling in Adams conflicts with other appellate and trial court rulings. Should “biological sex” be the standard? What is “biological sex”? In Adams, the majority and dissenting opinions differed.

Will the Supreme Court review?
Should courts apply *Bostock v. Clayton County*, 140 S.Ct. 1731 (2020), where the Supreme Court ruled under Title VII that an employer cannot fire an employee on the basis of the employee’s gender identity or sexual orientation?
This month, a federal district court judge upheld West Virginia’s “Save Women’s Sports” law (applicable to K-12 and higher education) restricting transgender girls from playing on sports teams that match their gender identities, finding that the state legislature’s definitions of “girl” and “women” are constitutional and consistent with Title IX. The Biden Administration argued against the law.


Are these legislative or judicial questions to answer? Or both?
Federal judge blocks Education Department's Title IX guidance that protects transgender students

20 AGs, led by Tennessee AG, argued their states face a "credible threat" of losing federal funding due to their policies and laws.

Eastern District of Tennessee judge ruling

Guidance "directly interferes with and threatens Plaintiff States' ability to continue enforcing their state laws" that restrict transgender people from playing on sports teams and using bathrooms that match their gender identity. - Arguments took aim at guidance's use of Bostock to support its position.
In *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), the Supreme Court held that emotional damages are precluded in private actions to enforce two laws enacted by Congress under the Constitution’s Spending Clause – the Affordable Care Act and the Rehabilitation Act of 1973.

Title IX is a Spending Clause law, so schools have argued for a similar restriction in Title IX private actions. The majority of courts have agreed that *Cummings’* analysis applies to limit recoverable damages in a Title IX lawsuit. See, e.g., *Doe v. City of Pawtucket*, 2022 WL 4551953 (D.R.I. Sept. 29, 2022).

As a result of *Cummings* and its application to Title IX claims, plaintiffs are pursuing other causes of action to recover emotional damages – e.g., a state statute, negligence claims, intentional infliction of emotional distress.
Increasing number of disability claims pled with Title IX claims.

In negligence claims (that often accompany Title IX claims), courts are expanding scope of a school’s duty (e.g., special relationship analysis – can a school be held to owe duty to prevent a third-party’s assaultive conduct?).

Judges must be educated on where the Title IX boundaries lie. Judges express skepticism when schools apply a non-Title IX policy to address alleged sexual misconduct.

Know your jurisdiction, your judge, and your school’s reputation in court.
KEY TAKEAWAYS
ENTERING 2023:

Training Title IX team at a premium, and will only become more important under new regulations!

Expect continued OCR complaints and investigations

Remember: Policy + Training = Effective Implementation

Legal landscape still uncertain and inconsistent
Connect With Us!

- Institutional Compliance Solutions
- Courtney Bullard
- Betsy Smith
- Celeste Bradley

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Groups:
Title IX Coordinators Closed Group
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SPRING TRAINING DATES!

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In person on February 23rd