



2018 Annual Conference  
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## **A Higher Education For All: Title IX, Title VII and the New Administration**

### **I. New Administration – New Guidance**

#### **Composition of New Administration**

There are over 1,200 presidentially appointed positions in the federal government. Of those appointed positions, 564 key positions require Senate confirmation. Analysis and comparison between the Trump administration and the prior three administration is important to understand the landscape of how higher education decisions and policies are being handled at the federal level. The Administration's proposed budget would eliminate 46 full-time OCR employees (8%). Budget and appropriations are ultimately up to Congress, which is just beginning to address these issues. The lack of headcount and monies had only increased the rancor of Title IX issues. There are a variety of headlines that have come out of the newly composed administration from the DOE potentially scaling back civil rights investigations, that transgender students will be unprotected, Title IX will be dismantled and the Obama era sexual assault policies will be overturned. We will discuss and distinguish the fact from the fiction.

#### **New Guidance**

New field guidance has been issued directing the Office of Civil Rights (OCR) to apply a "systemic" or "class-action" approach where the individual complaint allegations themselves raise systemic or class-wide issues or the investigative team determines a systemic approach is warranted through conversations with the complainant. Additionally, there are other new investigative protocols. OCR will no longer always obtain three years of past compliant data from an institution during investigation. This means that institutions may be able to more easily resolve matters without larger systemic issues being uncovered, reduce exposure and reduce attorney time during the process. OCR will no longer use a "one size fits all" approach to the investigation of any category of complaints. It's the OCR investigative teams' responsibility...to determine on a case-by-case basis the type and scope of evidence that is necessary to support a legally sound investigation and determination.

OCR has also committed to a new method of policy-making. Instead of issuing sub-regulatory guidance through enforcement of policies, the new administration has dedicate itself

to negotiated rule-making. OCR would now pursue and adhere to mandated procedures instead of just issuing opinion letters.

## **II. State & Federal Law – Transgender Students**

### **Federal Statutes**

Title VII prohibits discrimination and harassment based on sex, but does not *expressly* prohibit this conduct based on sexual orientation or gender identity. Whereas, Title IX prohibits sex discrimination in any federally funded educational program or activity. Despite the public's general perception, Title IX's reach extends well beyond high school and collegiate sports.

### **State Statutes**

Nineteen state and D.C. have employment non-discrimination laws that cover sexual orientation and gender identity. Three states' employment non-discrimination laws cover *only sexual orientation*, though federal law *may* offer some protections. The majority of states (28 states) have no employment laws that prohibit discrimination on the basis of sexual orientation or gender identity.

## **III. Harassment & Bullying**

### **Statistics**

Findings from Gay Lesbian Straight Education Network's (GLSEN) 2011 [National School Climate Survey](#) indicate that 80% of transgender students experience a more hostile school climate and feel unsafe at school because of who they are. In a 2011 survey, 90% of transgender respondents reported experiencing harassment, mistreatment or discrimination at the workplace ([www.thetaskforce.org](http://www.thetaskforce.org)).

### **Anti-Bullying Laws**

Nineteen states and D.C. have laws prohibiting bullying on the basis of sexual orientation and gender identity. Whereas, five states also prohibit bullying on the basis of association with someone with a listed characteristic. Only two states school regulation or teacher code prohibits bullying on the basis of sexual orientation and gender identity. The vast majority of states have no laws protecting LGBT students – twenty-four states. There are numerous studies that assess the experience of transgender students in school. We will discuss and use those statistics as markers for policy, exposure and litigation.

## **IV. Bathrooms**

### **EEOC Position**

In April 2015, EEOC ruled that denying employee use of the restroom that corresponds to for the sex they identify with is direct evidence of discrimination on the basis of sex in violation of Title VII (*Lusardi v. Dept. of Army*). One year later in May 2016, EEOC issued Fact Sheet concerning bathroom access for transgender employees. The guidance reiterated its holding in

*Lusardi*. The guidance states that “[g]ender-based stereotypes, perceptions, or comfort level must not interfere with the ability of any employee to work free from discrimination, including harassment.”

### **DOJ and North Carolina Bathroom Laws**

The Department of Justice took the EEOC’s position. In March 2016, NC passed legislation requiring that bathrooms be used “by individuals based on their biological sex.” (H.B. 2). The DOJ reacted and sent a letter in May 2016 to NC stating that “compliance with and implementation of” NC’s bathroom law constitutes a violation of Title VII. In response, the DOJ sued NC for violation of Title VII, Title IX and the Violence Against Women Reauthorization Act of 2013 (*United States v. State of North Carolina, et al.*, M.D.N.C. 1:16-cv-425). May 25, 2016, eleven states sued the Obama Administration: Lawsuit states the administration “conspired to turn workplaces and educational settings across the country into laboratories for a massive social experiment, flouting the democratic process, and running roughshod over commonsense policies protecting children and basic privacy rights.”

The states suing the administration – Alabama, Arizona, Georgia, Kentucky, Louisiana, Maine, Mississippi, Oklahoma, Tennessee, Texas, Utah, West Virginia and Wisconsin – and two school districts say the administration: “skirted the notice and comment process” and enacted mandates that are inconsistent with federal law. U.S. District Judge in Texas ordered the federal government to respond to the injunction by tomorrow, July 27, 2017.

On July 1, 2016 ten more states sued the Obama administration in the Eighth Circuit: Arkansas, Kansas, Michigan, Montana, Nebraska, North Dakota, Ohio, South Carolina, South Dakota and Wyoming. Similarly, the second suit seeks to nullify the mandates coming from the Obama Administration based upon the fact that there is no legislation directly applicable as to this area

## **V. DOJ and DOE Title IX Guidance**

### **Title IX and DOJ & DOE under Obama Administration**

Title IX prohibits sex discrimination in educational programs and activities by recipients of federal financial assistance. The Obama DOJ interprets this prohibition to include discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status. In May 2016 the DOJ and DOE issued *significant guidance*. First, once notified by student or guardian of differing gender identity school must treat individual consistently with desired gender identity. There is “no medical diagnosis or treatment requirement that students must meet as a prerequisite to being treated consistent with their gender identity.” Additionally, schools must provide equal access to transgender students, even in situations in which other students, parents, or community members complain.

Locker rooms and restrooms: Schools can provide separate facilities based on gender for locker rooms and restrooms, “but must allow transgender student’s access to such facilities consistent with their gender identity.” Schools are permitted to have sex-segregated athletic teams when selection is based on competitive skill or when the activity involves a contact sport. Schools cannot, adopt requirements that rely on overly broad generalizations or stereotypes about

transgender students and other students of the same sex. Schools can provide separate housing on the basis of sex, but must allow transgender students to access housing consistent with their gender identity.

### **DOJ & DOE under Trump Administration**

The new administration did not agree with the Obama Administrations DOJ & DOE guidance. The Attorney General of the United States, Jeff Sessions issued a memorandum in October 2017, that reversed a three-year old Justice Department policy that protected transgender workers under federal law. In a memorandum, the Attorney General wrote that “Title VII’s prohibitions on sex discrimination encompasses discrimination between men and women but does not encompass discrimination based on gender identity per se, including transgender status.” The Justice Department, according to this memorandum, will take this position in all pending and future matters. In so doing, the Justice Department stated that the prior administration had misinterpreted civil rights laws.

The new administration has also taken steps to roll back protections to students and military personnel. All of this created more confusion for employers, educators and business owners.

### **VI. Insurance Available to Mitigate Exposure to Title IX Claims**

Educators looking to limit liability should look at three lines of insurance: Directors & Officers, Errors & Omissions or Employment Practices Liability. Sexual assaults and harassment can be a covered risk. Higher educational institutions should look at educators’ legal liability policies, non-profit D&O policies, stand-alone sexual misconduct policies and for endorsements on CGL policies. In order to mitigate risk institutions should know whether they have insurance in place. Whether the insurance coverage they obtained is the right coverage in the event of a variety of potential claims. Administrators need to be up to date the challenges that are particular to Title IX and higher educational institutions.