UT LAW CLE THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

13th Annual Texas Administrative Law Seminar

August 16-17, 2018
Austin, TX

Perspectives on Title IX: Responding to Complaints of Sexual Harassment

H. Carl Myers

Author Contact Information:
H. Carl Myers
Assistant Attorney General,
General Litigation Division,
Texas Office of the Attorney General
Austin, TX

carl.myers@texasattorneygeneral.gov

Any views expressed in this paper are solely those of the author and not of the Office of the Texas Attorney General. This paper is not and should not be construed to be official opinion or legal advice by or on behalf of the Office of the Texas Attorney General.

Perspectives on Title IX: Responding to Complaints of Sexual Harassment

By H. Carl Myers,
Assistant Attorney General,
General Litigation Division,
Texas Office of The Attorney General

Sexual harassment and sexual assault are an ongoing scourge, underscored by recent media coverage of Harvey Weinstein, Bill Cosby, and the "Me Too" movement. Government agencies—particularly public universities—that do not conduct criminal investigations find themselves called upon to address reports of behavior ranging from inappropriate comments to sexual assault. In that context, "Title IX" is often uttered but seldom understood, by legal professionals and laypeople alike. The legislators who passed Title IX in 1972 probably never imagined the types of litigation it underlies today. This paper offers a high-level map of the emerging contours of Title IX's evolving application to sexual misconduct allegations.

I. The History of 'Title IX"

What we now know as "Title IX," 20 U.S.C. § 1681-1688, was one of ten provisions passed as part of the Education Amendments of 1972. President Richard Nixon signed the law on June 23 that year. His comments upon signing did not describe watershed impacts of Title IX; instead the President lamented lackluster provisions addressing court-ordered busing to end desegregation.[1] For historical context, during the month of Title IX's passage, U.S. forces bombed Haiphong, North Vietnam; gold hit a record-high of $60 per ounce; and Elvis recorded a live album in Madison Square Garden.[2] The Supreme Court would not decide *Roe v. Wade* until the following year.[3]

The statutory language of Title IX itself offered little (if any) guidance and none related to sexual misconduct:

> 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.[4]

---

[1] President Richard Nixon, Statement on Signing the Education Amendments of 1972 (June 23, 1972) (transcript available at *The American Presidency Project,* http://www.presidency.ucsb.edu/ws/?pid=3473 (last accessed July 12, 2018)).
[2] On This Day, https://www.onthisday.com/events/date/1972?p=3 (last visited July 12, 2018).
[3] 410 U.S. 113 (1973).
[4] 28 U.S.C. § 1681.

At 37 words, the provision was a model of brevity rather than clarity. The exceptions were far lengthier than the rule (for example, military schools, admissions to elementary schools, and certain church-affiliated schools were exempted).[5] The law identified no clear path for regulators or educators. As observed by a commenter in the late 1970's, "neither the text of the statute nor its legislative history provided much guidance as to the meaning of a prohibition of sex discrimination or to the form of regulation which would best enforce that congressional prohibition."[6]

II. Early Attention was on Athletics—not Allegations of Sexual Misconduct

"Congress, almost without realizing it, had approved a piece of legislation with the potential to revolutionize the treatment of female students . . . . How, or even whether, this revolution was to take place was a task delegated in June of 1973 to the Office for Civil Rights (OCR) within the Department of Health, Education, and Welfare (HEW)."[7]

Entire books have been written about the historic implementation and effects of Title IX, and this paper mercifully is not one of them. It is pragmatic to overgeneralize Title IX in its infancy as an administrative tool to improve access and funding for women in education—especially intercollegiate athletics. Congress might even have contributed to an enduring perception that Title IX relates to athletics through attempts to limit application of the law in sports. In 1974, a failed proposal attempted to exempt revenue-producing sports from Title IX's requirements.[8] Instead, Congress issued the following directive:

> The Secretary [of HEW] shall prepare and publish proposed regulations implementing the provisions of [Title IX] relating to the prohibition of sex discrimination in federally assisted education programs *which shall include with respect to intercollegiate athletic activities reasonable provisions considering the nature of particular sports.*[9]

Congress also gave itself the authority to effectively veto HEW's administrative regulations.[10]

---

[5] In 1977, a paper at the Harvard Kennedy School discussed the legislative history, amendment process, and administrative approach of the Department of Health and Welfare. Stephanie Smith, HEW AND TITLE IX: THE ELIMINATION OF SEX DISCRIMINATION IN EDUCATION (January 1, 1977) (on file with the John F. Kennedy School of Government at Harvard University).

[6] *Id.* at 4.

[7] *Id.* at 1. HEW was later split into the Department of Education (DOE) and the Department of Health and Human Services (HHS) (n.70, *infra*), when DOE's Office of Civil Rights (OCR) took over Title IX oversight.

[8] On May 20, 1974, Senator John Tower introduced the Tower Amendment which would have exempted revenue-producing athletics from Title IX's jurisdiction. The Tower Amendment was rejected. 120 Cong. Rec. 15,322-15,323 (1974).

[9] Sen. Conf. Rep. No. 1026, 93rd Cong., 2nd Sess. 4271 (1974).

[10] The General Education Provisions Act provided that Congress could disapprove final administrative regulations if it acted within 45 days of their submission to the House and Senate—effectively a legislative veto. General Education Provisions Act Section 431(d)(1), 20 U.S.C. § 1232(d) (Supp. V 1975); *see also* Smith, HEW AND TITLE IX, at 8. In 1980, U.S. Attorney General Civiletti declared this "legislative veto" procedure unconstitutional. Constitutionality of Congress' Disapproval of Agency Regulations

Title search: Perspectives on Title IX: Responding to Complaints of Sexual Harassment

Also available as part of the eCourse
Perspectives on Title IX: Responding to Complaints of Sexual Harassment

First appeared as part of the conference materials for the
13th Annual Advanced Texas Administrative Law Seminar session
"Perspectives on Title IX: Responding to Complaints of Sexual Harassment"