

# LITIGATING A TITLE IX CLAIM<sup>1</sup>

## Representing Students and Teachers in Discrimination and Retaliation Cases

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Attorney Silva represents employees and students in Title IX gender or sex discrimination, harassment, and retaliation cases throughout the State of Florida. Attorney Silva has represented students with Title IX claims against high schools, vocational schools, and universities and has represented professors, teachers, and coaches with gender and retaliation claims against universities and high schools. Attorney Silva contributed to a book on pregnancy discrimination regarding Title IX and pregnancy and speaks on Title IX and litigation related topics.

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Ms. Silva is licensed to practice in United States Supreme Court; the State of Florida; the Eleventh Circuit Court of Appeals; the United States District Court for the Middle District of Florida; the United States District Court for the Northern District of Florida; and the United States District Court for the Southern District of Florida. Ms. Silva was on the executive board of the Florida Chapter of the National Employment Lawyers Association (FL NELA) for seven years and served as the 2009-2010 President. Ms. Silva was the 2012-2013 President of the Thomas S. Biggs American Inn of Court and is currently serving on the Inn executive board.

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<sup>1</sup> Materials updated and edited from prior presentations and legal briefs.

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## **Title IX, Education Amendments of 1972 (Title 20 U.S.C. Sections 1681-1688)**

*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.*

### (3) Educational institutions of religious organizations with contrary religious tenets

this section shall not apply to an educational institution which is controlled by a religious organization if the application of this subsection would not be consistent with the religious tenets of such organization;

### (4) Educational institutions training individuals for military services or merchant marine

this section shall not apply to an educational institution whose primary purpose is the training of individuals for the military services of the United States, or the merchant marine;

### (5) Public educational institutions with traditional and continuing admissions policy

in regard to admissions this section shall not apply to any public institution of undergraduate higher education which is an institution that traditionally and continually from its establishment has had a policy of admitting only students of one sex;

### (6) Social fraternities or sororities; voluntary youth service organizations

this section shall not apply to membership practices -

(A) of a social fraternity or social sorority which is exempt from taxation under section 501(a) of title 26, the active membership of which consists primarily of students in attendance at an institution of higher education, or

(B) of the Young Men's Christian Association, Young Women's Christian Association, Girl Scouts, Boy Scouts, Camp Fire Girls, and voluntary youth service organizations which are so exempt, the membership of which has traditionally been limited to persons of one sex and principally to persons of less than nineteen years of age;

### (7) Boy or Girl conferences

this section shall not apply to -

(A) any program or activity of the American Legion undertaken in connection with the organization or operation of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(B) any program or activity of any secondary school or educational institution specifically for -

(i) the promotion of any Boys State conference, Boys Nation conference, Girls State conference, or Girls Nation conference; or

(ii) the selection of students to attend any such conference;

(8) Father-son or mother-daughter activities at educational institutions

this section shall not preclude father-son or mother-daughter activities at an educational institution, but if such activities are provided for students of one sex, opportunities for reasonably comparable activities shall be provided for students of the other sex; and

(9) Institution of higher education scholarship awards in "beauty" pageants

this section shall not apply with respect to any scholarship or other financial assistance awarded by an institution of higher education to any individual because such individual has received such award in any pageant in which the attainment of such award is based upon a combination of factors related to the personal appearance, poise, and talent of such individual and in which participation is limited to individuals of one sex only, so long as such pageant is in compliance with other nondiscrimination provisions of Federal law.

(b) Preferential or disparate treatment because of imbalance in participation or receipt of Federal benefits; statistical evidence of imbalance

Nothing contained in subsection (a) of this section shall be interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of an imbalance which may exist with respect to the total number or percentage of persons of that sex participating in or receiving the benefits of any federally supported program or activity, in comparison with the total number or percentage of persons of that sex in any community, State, section, or other area: \*Provided\*, That this subsection shall not be construed to prevent the consideration in any hearing or proceeding under this chapter of statistical evidence tending to show that such an imbalance exists with respect to the participation in, or receipt of the benefits of, any such program or activity by the members of one sex.

(c)"Educational institution" defined

For purposes of this chapter an educational institution means any public or private preschool, elementary, or secondary school, or any institution of vocational, professional, or higher education, except that in the case of an educational institution composed of more than one school, college, or department which are administratively separate units, such term means each such school, college, or department.

Sec. 1684. Blindness or visual impairment; prohibition against discrimination

No person in the United States shall, on the ground of blindness or severely impaired vision, be denied admission in any course of study by a recipient of Federal financial assistance for any education program or activity, but nothing herein shall be construed to require any such institution to provide any special services to such person because of his blindness or visual impairment.

Sec. 1686. Interpretation with respect to living facilities

Notwithstanding anything to the contrary contained in this chapter, nothing contained herein shall be construed to prohibit any educational institution receiving funds under this Act, from maintaining separate living facilities for the different sexes.

Sec. 1688. Neutrality with respect to abortion

Nothing in this chapter shall be construed to require or prohibit any person, or public or private entity, to provide or pay for any benefit or service, including the use of facilities, related to an abortion. Nothing in this section shall be construed to permit a penalty to be imposed on any person or individual because such person or individual is seeking or has received any benefit or service related to a legal abortion.

## **Who can sue under Title IX ?**

**Private Parties can sue to enforce prohibitions of Title IX.** Guardians Association v. Civil Service Commission of City of New York, 463 U.S. 582, 103 (1983);

**Students can sue under Title IX.** Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)(student harassed by teacher may seek money damages in private suit for violations of Title IX).

**Teachers and Coaches can sue under Title IX.** Jackson v. Birmingham Bd. Of Ed., 544 U.S. 167 (2005).

**Gays and Lesbians can sue under Title IX.** Schroeder ex. Rel. Schroeder v. Maumee Bd. of Educ., 296 F.Supp.2d 869 (N.D.Ohio 2003)(student's allegation that school officials failed to take "any meaningful action" to protect plaintiff from harassment based on his perceived sexual orientation states a valid claim under Title IX).

Montgomery v. Indep. School Dist. No. 709, 109 F.Supp2d 1081 (D.Minn. 2000)(school district's failure to protect gay student from peer harassment and harassment based on gender based stereotyping, *i.e.*, his failure to conform to male stereotype, is actionable under Title IX).

Ray v. Antioch Unified School Dist., 107 F.Supp.2d 1165 (N.D.Ca. 2000)(school district's failure to stop student peer harassment based on harassing students' perception that plaintiff is gay is actionable under Title IX).

See Oncale v. Sundowner

## Who can be sued under Title IX ?

**Recipients of federal funding.** Davis v. Monroe Cty. Bd. Education, 526 U.S. 629 (1999).

No Eleventh Amendment immunity for Title IX purposes. Pederson, et. al. v. Louisiana State University, 213 F.3d 858 (2000).

**Individual school officials *cannot* be sued under Title IX.** Williams v. Board of regents of Univ. System of Ga., 477 F.3d 1282 (11<sup>th</sup> Cir. 2007)(only funding recipients can be held liable for violations of Title IX); Smith v. Allen, 502 F.3d 1255 (11<sup>th</sup> Cir. 2007)(same);Hartley v. Parnell, 193 F.3d 1263, 1270 (11<sup>th</sup> Cir. 1999)(same).

Can bring Section 1983 action based upon Title IX violation. Fitzgerald v. Barnstable School Committee, 555 U.S. 246 (2009). Generally, lower courts determine whether Congress intended to foreclose Sec. 1983 remedy for rights created by a federal statute. Courts look to the remedial measures provided by the statute itself. *See, e.g.*, Alexander v. Chicago Park Dist., 773 F.2d 850, 856 (7<sup>th</sup> Cir. 1985)(Title VI), cert. denied, 475U.S. 1095 (1986).

Doe v. School Board of Broward County, Florida, 2010 WL 1655918 (C.A.11 Fla.

Supervisor has to participate or there has to be causal connection between actions and Title IX deprivation.

## Statute of Limitations

Congress did not provide a statute of limitations for Title IX. The “most closely analogous” statute of limitations under state law governs the cause of action. M.H.D. v. Westminster Schools, 172 F.3d 797 (C.A.11 (Ga.) 1999) quoting Reed v. United Transp. Union, 488 U.S. 319, 323 (1989).

## Conditions Precedent

There are no conditions precedent to filing a lawsuit under Title IX, such as filing an administrative complaint with a government agency like the EEOC.

However, individuals complaining about Title IX violations can file an administrative complaint with the U.S. Department of Education, Office for Civil Rights.

An administrative complaint must be filed within 180 days of the discrimination unless the discrimination is a continuing action or if there is good cause to waive the filing deadline. Good cause has been defined as learning of the discrimination more than 180 after it occurred.

### **Title IX v. Title VII**

Some courts have held that to the extent a Title IX plaintiff is asserting a discriminatory loss of employment benefit (i.e., loss of coaching duties or loss of pay), the claim must rest exclusively under Title VII and not Title IX. Lowery v. Texas A & M University System, 117 F.3d 242 (5<sup>th</sup> Cir. 1997); Lakoski v. Thomas M. James, M.D., 66 F.3d 751 (5<sup>th</sup> Cir. 1995); Gisbon v. Hickman, 2 F.Supp.2d 1481 (M.D.Ga. 1998); Hazel v. School Board of Dade County, Florida, 7 F.Supp.2d 1349 (S.D.Fla. 1998); Cooper v. Gustavus Adolphus College, 957 F.Supp. 191 (D.Minn. 1997); Howard v. Board of Education of Sycamore Community Unit School District, 893 F.Supp. 808 (N.D.Ill. 1995); and Storey v. Board of regents, 604 F.Supp. 1200 (W.D.Wis. 1985).

But see North Haven Bd. of Ed. v. Bell, 456 U.S. 512 (1982). Bell addressed Title IX's prohibition of employment discrimination in a challenge to the validity of administrative regulations. Bell was not a claim by an individual for money damages.

### **Burden of Proof**

Title IX cases use the same patterns of proof as Title VII cases. Pederson, et. al. v. Louisiana State University, 213 F.3d 858 (2000). If you are unfamiliar with Title VII of the Civil Rights Act of 1964, as amended, you should consider co-counseling with an attorney who has experience with Title VII cases.



## Interpretation

Title IX is interpreted in many aspects to follow Title VI of the Civil Rights Act of Section 504 of the Rehabilitation Act, which courts look to for implied causes of action and remedies under Title IX.

## Retaliation

Jackson v. Birmingham Bd. Of Ed., 544 U.S. 167 (2005).

Papelino v. Albany College of Pharmacy of Union University, 633 F.3d 81, 91 (2d Cir. 2011)(retaliation can follow post graduation);

## Underlying Violations

### **A. Pregnancy/ Family Responsibilities Discrimination**

Absent policy:

Students get leave as long as medically necessary

Employees get reasonable leave

Students and Employees should be returned to same status following pregnancy related leave.

Students can sue for pregnancy discrimination under Title IX. Chipman v. Grant County School District, 30 F.Supp.2d 975 (E.D.Ky. 1998)(female students moved for preliminary injunction after being excluded from national honor society after becoming pregnant and having children out of wedlock) .

At least one court has held that employees can sue for pregnancy discrimination under Title IX. Ivan v. Kent State University, 863 F.Supp. 581 (N.D.Ohio 1994)(graduate student's loss of employment due to her pregnancy could be analyzed under Title IX).

34 C.F.R. §106.57(a)(1)(“A recipient shall not...take any employment action...Concerning the potential marital status, parental or family status of an employee.”

## Equitable Relief

Palmer ex rel. Palmer v. Santa Rosa County, Fla., School Board, 2005 WL 3338724 at \* 4, n. 9 (N.D. Fla. Dec. 8, 2005) (“A plaintiff who eligibility to participate in sports activity or is no longer a student may lack standing to assert an individual Title IX claim for injunctive relief.”) (citing Cook v. Colgate University, 992 F.2d 17, 20 (2d Cir. 1993)).

## Damages

Monetary damages available for intentional discrimination. Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992) Back pay; lost benefits; compensatory damages; attorney fees and costs, but unlike Title VII there is no statutory cap on damages under Title IX.

Punitive damages likely unavailable. Barnes v. Gorman, 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

Mercer v. Duke University, 401 F.3d 199 (4<sup>th</sup> Cir. 2005)(\$350,000 in attorneys’ fees with nominal damage award affirmed). Mercer v. Duke Univ., 181 F.Supp.2d 525, 531 (M.D.N.C.2001), *vacated in part & remanded*, 50 Fed.Appx. 643 (4th Cir.2002)( In light of the Supreme Court's decision in Barnes, punitive damages award vacated).

## Representing Minors in Litigation

Cheung v. Dulles, 16 F.R.D. 550, 552 (D.Mass. 1954)(A next friend is not a party to the lawsuit).

Gonzalez ex. rel. Gonzalez v. Reno, 86 F.Supp.2d 1167, 1185 (typically the next friend is a parent).

Fed.R.Civ.P. 17(a)(3) allows for a reasonable time for the real party in interest to ratify, join, or be substituted into the lawsuit. *See i.e.*, J.S. v. Attica Central Schools, 2011 WL 4498369, \*15 (W.D.N.Y. 2011) and Covey v. Lexington Public Schools, 2010 WL 3515697, \*1 (W.D.Okla. 2010).

## Multi-Client Representation

Check your State’s ethic Rules

## FERPA

In general, the Family Education Rights and Privacy Act (FERPA), 20 U.S.C. §1232(g), protects educational records or personally identifiable information from improper disclosure. *Doe v. Woodford County Bd. of Educ.*, 213 F.3d 921, 926 (6th Cir.2000).

FERPA is part of the General Education Provisions Act (GEPA). 20 U.S.C. §1221.

GEPA states in relevant part that “Nothing in this chapter shall be construed to affect the applicability of ... Title IX of the Education Amendments of 1972 [20 U.S.C. 1681 et seq.]” 20 U.S.C. §1221(d). The U.S. Department of Education interprets this provision to mean that “if there is a direct conflict between the requirements of the FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.” *Bigge, et. al. v. Dist. Schl. Bd. Citrus Co., Fla.*, 2011WL6002927 (M.D.Fla. 2011).

The type of education records which FERPA expressly protects includes records relating to individual scholastic performance, financial aid, or scholastic probation which are kept in individual student files. *Bauer v. Kincaid*, 759 F.Supp. 575, 591 (W.D.Mo. 1991). Education records protected under the FERPA also could include disciplinary records of students. *United States v. Miami University*, 294 F.3d 797 (6th Cir. 2002).

However, student complaints regarding discrimination do not constitute educational records under the FERPA because the complaints relate to activities and observations and are thus discoverable. *Ellis v. Cleveland Municipal School District*, 309 F.Supp.2d 1019, 1022 (N.D.Ohio 2004)(records, while involving students as alleged victims and witnesses, related to activities and behaviors of teachers and were therefore not educational records under FERPA).