

TITLE IX AND EMPLOYMENT LAW

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Title IX, Education Amendments of 1972

(Title 20 U.S.C. Sections 1681-1688)

Section 1681. Sex

(a) Prohibition against discrimination; exceptions. 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, except that:

(1) Classes of educational institutions subject to prohibition

in regard to admissions to educational institutions, this section shall apply only to institutions of vocational education, professional education, and graduate higher education, and to public institutions of undergraduate higher education;

(2) Educational institutions commencing planned change in admissions

in regard to admissions to educational institutions, this section shall not apply (A) for one year from June 23, 1972, nor for six years after June 23, 1972, in the case of an educational institution which has begun the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education or (B) for seven years from the date an educational institution begins the process of changing from being an institution which admits only students of one sex to being an institution which admits students of both sexes, but only if it is carrying out a plan for such a change which is approved by the Secretary of Education, whichever is the later;

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

this section shall not apply to any 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) Institutions 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 the 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.

Section 1682. Federal administrative enforcement; report to Congressional committees

Each Federal department and agency which is empowered to extend Federal financial assistance to any education program or activity, by way of grant, loan, or contract other than a contract of insurance or guaranty, is authorized and directed to effectuate the provisions of section 1681 of this title with respect to such program or activity by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute authorizing the financial assistance in connection with which the action is taken. No such rule, regulation, or order shall become effective unless and until approved by the President. Compliance with any requirement adopted pursuant to this section may be effected (1) by the termination of or refusal to grant or to continue assistance under such program or activity to any recipient as to whom there has been an express finding on the record, after opportunity for hearing, of a failure to comply with such requirement, but such termination or refusal shall be limited to the particular political entity, or part thereof, or other recipient as to whom such a finding has been made, and shall be limited in its effect to the particular program, or part thereof, in which such noncompliance has been so found, or (2) by any other means authorized by law: *Provided, however,* that no such action shall be taken until the department or agency concerned has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means. In the case of any action terminating, or refusing to grant or continue, assistance because of failure to comply with a requirement imposed pursuant to this section, the head of the Federal department or agency shall file with the committees of the House and Senate having legislative jurisdiction over the program or activity involved a full written report of the circumstances and the grounds for such action. No such action shall become effective until thirty days have elapsed after the filing of such report.

Section 1683. Judicial Review

Any department or agency action taken pursuant to section 1682 of this title shall be subject to such judicial review as may otherwise be provided by law for similar action taken by such department or agency on other grounds. In the case of action, not otherwise subject to judicial review, terminating or refusing to grant or to continue financial assistance upon a finding of failure to comply with any requirement imposed pursuant to section 1682 of this title, any person aggrieved (including any State or political subdivision thereof and any agency of either) may obtain judicial review of such action in accordance with chapter 7 of title 5, United States Code, and such action shall not be deemed committed to unreviewable agency discretion within the meaning of section 701 of that title.

Section 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.

Section 1685. Authority under other laws unaffected

Nothing in this chapter shall add to or detract from any existing authority with respect to any program or activity under which Federal financial assistance is extended by way of a contract of insurance or guaranty.

Section 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.

Section 1687. Interpretation of "program or activity"

For the purposes of this title, the term "program or activity" and "program" mean all of the operations of --

(1)(A) a department, agency, special purpose district, or other instrumentality of a State or of a local government; or

(B) the entity of such State or local government that distributed such assistance and each such department or agency (and each other State or local government entity) to which the assistance is extended, in the case of assistance to a State or local government;

(2)(A) a college, university, or other postsecondary institution, or a public system of higher education; or

(B) a local educational agency (as defined in section 2854(a)(10) of this title, system of vocational education, or other school system;

(3)(A) an entire corporation, partnership, or other private organization, or an entire sole proprietorship --

(i) if assistance is extended to such corporation, partnership, private organization, or sole proprietorship as a whole; or

(ii) which is principally engaged in the business of providing education, health care, housing, social services, or parks and recreation; or

(B) the entire plant or other comparable, geographically separate facility to which Federal financial assistance is extended, in the case of any other corporation, partnership, private organization, or sole proprietorship; or

(4) any other entity which is established by two or more of the entities described in paragraph (1), (2) or (3);

any part of which is extended Federal financial assistance, except that such term does not include any operation of an entity which is controlled by a religious organization if the application of section 1681 of this title to such operation would not be consistent with the religious tenets of such organization.

Section 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 ?

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).

Professors can sue under Title IX. Nelson v. Univ. of Maine Sys., 923F.Supp. 275 (1996); No. 95-0179-B (D.Me. June 1997).

Gays and Lesbians can sue for harassment based on sexual orientation 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).

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).

Athletic Association not covered by Title IX. National Collegiate Athletic Association v. Smith, 525 U.S. 459 (1999).

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

May not be able to bring Section 1983 action based upon Title IX. Fitzgerald v. Barnstable School Committee, _ U.S. ___, No. 07-1125(12/2/08). 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 (7th Cir. 1985)(Title VI), cert. denied, 475U.S. 1095 (1986).

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 or FCHR.

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 (5th Cir. 1997); Lakoski v. Thomas M. James, M.D., 66 F.3d 751 (5th 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).

However, these courts have made a distinction between suits seeking money damages and those seeking declaratory or injunctive relief- the latter remaining an open question.

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.

Also see Cannon v. University of Chicago, 441 U.S. 677(1979)(implied private right of action under Title IX for woman denied admission to federally funded school because of sex); Franklin v. Gwinnett County Pub. Schs., 503 U.S. 60 (1992)(implied private right of action under Title IX for student harassed by teacher to seek money damages); and Jackson v. Birmingham Bd. Of Ed., 544 U.S. 167 (2005)(implied private right of action under Title IX to seek money damages for retaliation).

Note: Florida Educational Equities Act (FEEA) is patterned after Title IX. See e.g., Schultz v. Bd. of Trustees of Univ. of West Florida, 2007 WL 1490714 (N.D.Fla. 2007).

Retaliation

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

BURCH v. REGENTS OF THE UNIVERSITY OF CALIFORNIA, 433 F.Supp.2d 1110 (E.D.Cal. 2006)(advocacy is not equivalent to a complaint of discrimination).

Analysis

Analyzed the same as in Title VII cases. Direct evidence, mixed motive, McDonnell-Douglas burden shifting analysis.

Interpretation

However, Title IX is interpreted in many aspects to follow Title VI, which some courts have held to include implied causes of action and remedies.

Damages

Back pay; lost benefits; compensatory; attorney fees and costs, but unlike Title VII there is no statutory cap on damages under Title IX. Punitive damages ? Barnes v. Gorman, 536 U.S. 181, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002).

Roybal v. New Mexico Highlands University, (D.N.M 1999) \$78,000. \$70,000 backpay and \$8,000 scholarship money.

Nelson v. University of Maine, No.95-0179-B (D.Me. 1997) \$30,000 compensatory damages; \$50,000 punitive damages; \$94,000 attorney's fees.

Mercer v. Duke University, 401 F.3d 199 (4th 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).

Moe-Humphreys v. Board of Regents of the Univ. of Calif., (N.D. Cal. 2007)

Multinovich v. Fresno State

Vivas v. Fresno State

Johnson-Klein v. Fresno State

Flood, et.al. v. Florida Gulf Coast University, (M.D.Fla. 2008)

Morrison v. Florida Gulf Coast University, (M.D.Fla. 2008)

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