ATIXA outlines the importance of Title IX compliance in Hospitals with the new 2020 OCR Regulations.

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Hospitals Should Be Paying Attention To Title IX Regulations

In the world of education, all eyes have been on the Department of Education’s Office for Civil Rights (OCR), the sub-agency with primary oversight for the implementation of Title IX of the Education Amendments of 1972 (Title IX). On May 6, 2020 the OCR released new Title IX regulations mandating several major changes to the internal sex-based misconduct resolutions currently used by most recipients of federal funding for education programming and activities. One group that may not have been paying close attention is hospitals. Specifically, hospitals with residency programs operated in partnership or affiliation with a medical school may have Title IX obligations pursuant to recent court decisions that determined such programs fall under the broad umbrella of “education programs and activities” identified by Title IX as subject to the statute’s provisions. Hospitals without Title IX compliance programs should begin those efforts now in order to come into compliance with their legal obligations1.

The Ground Broke In 2017

On March 7, 2017, the U.S. Court of Appeals for the Third Circuit issued a landmark ruling applying Title IX to hospitals that receive federal funds and conduct residency programs in Doe v. Mercy Catholic Medical Center. The court laid out an expansive definition for what qualifies as an “education program” that “receives Federal financial assistance” under Title IX, including medical residency programs. This holding may have profound implications not just for compliance, but also for hospitals’ exposure to liability in court under Title IX. After noting that Congress specified “education programs or activities” and not “educational institutions” in the Title IX statute, the Third Circuit provided a new framework for assessing whether hospitals and medical programs are subject to Title IX liability.

Central to the Third Circuit’s decision was a determination that Title VII, the civil rights law that prohibits sex discrimination in employment, does not preclude individuals who are both students and employees (such as a medical resident) from asserting rights under Title IX. The Fifth Circuit and Seventh Circuit courts have ruled previously that Title VII is the exclusive mechanism for employment sex discrimination, and therefore Title IX suits are overridden by the administrative remedy scheme outlined by Title VII. Many additional circuits, however, agree with the Third Circuit that Title IX claims can go forward, even when the individual making the claim might also have options under Title VII because they have an employment relationship with the entity they are suing. Cases in the First, Fourth, and Sixth Circuits have explicitly acknowledged the coexistence of Title VII and Title IX claims\(^2\). Cases in the Eighth\(^3\) and Eleventh\(^4\) Circuits have also indicated willingness to consider Title IX claims when Title VII might also be an avenue for remedy.

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\(^2\) Heatherly v. Univ. of Alabama Bd. of Trustees, 778 Fed.Appx. 690, 694 (11th Cir. 2019).
Many Residency Programs Meet Mercy’s Definition of “Education Program”

All of this means that the federal courts are increasingly open to considering an individual’s rights under Title IX, even when they also have an employment relationship with the recipient. Medical residency programs at hospitals with an affiliation or partnership with an educational institution fall squarely into that scheme – while residents are graduated, have a degree, are called “doctor,” and are paid by the hospital, they are also students. Here is how the Third Circuit laid out the elements it identified to determine Title IX liability in *Mercy*:

- Whether the program is incrementally structured through a particular course of study or training (part-time or full-time);
- Whether the program allows participants to earn a degree or diploma, qualify for a certification or examination for certification, or pursue a specific occupation or trade beyond mere on-the-job training;
- Whether the program provides instructors, examinations, an evaluation process or grades, or accepts tuition; and/or
- Whether the program is held out as educational by entities that accredit, regulate, or offer the program.

In *Mercy*, the Third Circuit ruled that programs that accept medical residents, in particular, are subject to the mandates of Title IX. There are exceptions, of course. Title IX liability may not attach to a program if it:

- Is an independent, private, separate, competing practice that confers no benefit to a college or university; and/or
- Accepts unpaid interns for vocational training purposes without any affiliation to an educational institution.
Many Residency Programs Meet Mercy’s Definition of “Education Program” - cont.

If you are unsure where your program falls in the above framework, you are not alone, and it may be prudent for you to consult with an expert in order to assess your liability under Title IX. In addition to the question of liability under Title IX, operating a program that meets the definition above also carries with it an enormous regulatory burden for hospitals to achieve compliance. The 2020 Title IX regulations from OCR specifically address entities that are not postsecondary schools, indicating many of OCR’s expectations and enforcement mechanisms will encompass hospital residency programs.

To review the collected regulatory guidance you should be aware of, please click this link or visit the “Free Resources” tab at the bottom right of www.atixa.org and select “hospitals.”
Beginning Compliance Checklist

There are quite a few requirements to meet baseline Title IX compliance. What follows is not intended to be an exhaustive list, though there are instructions at the end of this document on how to obtain an exhaustive list from us. You should consult with an expert regarding your specific program and any unique criteria for compliance in your jurisdiction. While the basic framework for Title IX compliance is the same everywhere, the devil is in the details. One size does not necessarily fit all.

- **Designate a Title IX Coordinator.**
  - This person is your compliance officer and is responsible for receiving reports of potential violations of Title IX and carrying out all duties and responsibilities pertaining to ensuring that your program remains in compliance with Title IX.

- **Publish and Disseminate a “Notice of Non-Discrimination.”**
  - A notice of non-discrimination should be published and disseminated widely. The notice should include the name and contact information of the Title IX Coordinator, as well as the Offices for Civil Rights for both the Department of Education and the Department of Health and Human Services.

- **Draft, adopt, and publish a policy that fully informs all students, staff, and faculty of their rights in the event of an incident or report of sex- or gender-based discrimination.**
  - The policy should include clearly stated definitions of all conduct that is a reportable offense. It should include equitable rights for the respondent and complainant. It should include a statement about the availability of supportive measures to maintain full access to the education program and ensure the safety of the parties and the community. It should also contain a statement of jurisdiction (what sort of conduct is covered and what is not covered), as well as a statement regarding confidentiality and the prohibition against retaliation by or against anyone who participates in a Title IX investigation or proceeding.

- **Mandated Reporters.**
  - A statement should also be included specifying which employees the hospital has designated as people who are required to report any incident of sexual violence or other reportable sexual misconduct to the Title IX Coordinator. This will be based partially on legal requirements and partially on internal policy.
Investigation.

- Draft and implement detailed procedures for prompt, equitable, impartial, and thorough resolution of any report of discrimination, harassment, or sexual misconduct. The procedures should detail all formal and informal resolution mechanisms provided by the hospital. All policies and procedures designed to comply with Title IX should be widely distributed and published, in written and digital form, and it should be posted prominently on the program’s website, along with the contact information of your Title IX Coordinator.

- Provide regular training to students, staff, faculty, and employees regarding Title IX compliance.
  - Training should be provided on a regular basis (at least annually) to all students/residents, staff, faculty, and employees regarding Title IX compliance. Ignorance of the law is not an excuse for non-compliance. Mandated reporters in particular need to be trained on recognizing incidents of sexual violence and other reportable misconduct, and they need to be trained on what to do if they receive a report of misconduct. Training is required, in particular, for Title IX Coordinators, any deputy coordinators, investigators, and any administrator with decision-making responsibility on Title IX-related allegations, including grievance hearing panels and appeals officers.

Respond promptly, equitably, and impartially to, and thoroughly investigate, all reports.

- If your facility is subject to Title IX, you have an obligation to take prompt action to remedy any hostile environment. Medical interns and residents have a right to a learning environment that is free from sex- and gender-based discrimination. Where appropriate, provide supportive measures (e.g., no-contact directives and/or an escort to and from the program’s facility) in order to provide temporary relief while you conduct a more thorough investigation into the allegations in the report. Provide notice to all parties of their rights and keep them apprised of developments, including the outcome of the grievance process.

Ensure that grievance resolutions satisfy Title IX.

- Title IX obligates your facility to stop harassment that is occurring, to act reasonably to prevent its reoccurrence, and to remedy the effects of harassment or discrimination on the victim and the larger hospital community.
Now Is The Time To Take Title IX Obligations Seriously

You can always choose to take your chances and wait, but before you make your decision, keep in mind that *Doe v. Mercy* did not result in a circuit split. In other words, the issues presented won't be going to the Supreme Court any time soon, so the Third Circuit's decision is the law for the foreseeable future. The Third Circuit did not make this decision lightly, and the presiding judge referred to medical residents as a "vital component of American medical education." As such, he insisted that medical residents deserve all the protections that are available to attendees of any educational program. Further, doctors with faculty appointments (even courtesy appointments), post-doc, and fellowship programs will also likely be subject to Title IX.

Most hospitals don’t have Title IX programs or the infrastructure to support them. An HR program that complies with Title VII isn't enough. We strongly recommend that you begin building your Title IX compliance program now, and ATIXA is here to help.

To engage more deeply with Title IX, please consider joining ATIXA. ATIXA is the premier professional association for Title IX administrators, with more than 3,500 members. ATIXA is a thriving professional community with monthly training events, professional certifications, an annual conference, active listservs, and extraordinary member resources, including model policies, training templates, books, articles, case briefings, and access to consultants with in-depth knowledge of and experience with Title IX and related laws.

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5 The Third Circuit distinguished *Doe v. Mercy* from precedents in the Eighth and Second Circuits, thereby sidestepping a circuit split.
Membership information can be found at www.atixa.org/join.

If you are interested in comprehensive compliance checklists, or to learn more about our comprehensive consulting or training packages, please contact:

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