



ATIXA WHITEPAPER

IS YOUR HOSPITAL MEETING ITS TITLE IX OBLIGATIONS?

Authored by: Nedda Black, Esq., LMSW and Brett A. Sokolow, Esq.

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 3,000 Title IX coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.

May 8, 2017

On March 7th, 2017, a U.S. Court of Appeals issued a decision that may impact your Title IX obligations. What Title IX obligations, you might ask? After all, you're a hospital, not a school. In [Doe v. Mercy Catholic Medical Center](#), the Third Circuit issued a landmark ruling applying Title IX to hospitals that receive federal funds and conduct residency programs. This groundbreaking holding 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 your hospital's 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, a framework that is likely to be followed in other courts. As the industry leader in Title IX compliance, we offer you below some very practical advice for how to address and comply with Title IX in a healthcare setting.

Why Should You Care About Doe v. Mercy?

In *Doe v. Mercy*, a former resident of Mercy Catholic Medical Center (MCMC) filed a lawsuit against MCMC alleging that she was sexually harassed by the director of the program. She also claimed that she suffered retaliation for filing a grievance about the director's behavior, including that she submit to a psychiatric corrective plan in order to resume the program, followed by her termination. MCMC is a private teaching hospital that operates a residency program. The District Court held that Title IX did not apply, finding that MCMC was not an "education program or activity," and that Title IX cannot be used to "circumvent" Title VII's administrative requirements, as "Congress intended Title VII to serve as the 'exclusive avenue for relief' for employment discrimination."¹ Moreover, the District Court noted that residents "already have a degree, don't pay tuition, and are paid for their services and protected by labor

¹ The medical resident in this case admits to having not pursued Title VII avenues of relief.

laws.” The plaintiff appealed to the Third Circuit, which noted that Congress left “education” undefined in the statute, that case law is “scant on the issue,” and that the Supreme Court has never addressed this question. The Third Circuit then broke new legal ground and provided an in-depth analysis of the applicability of Title IX to MCMC, which has far-reaching implications for Title IX liability.

Is Your Program Subject to Title IX Liability?

According to the Third Circuit, your program may be subject to Title IX liability if it:

- Is incrementally structured through a particular course of study or training (part-time or full-time);
- 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;
- Provides instructors, examinations, an evaluation process or grades, or accepts tuition; and/or
- Is held out as educational by entities that accredit, regulate, or offer your program.

Most critically: *If your program accepts medical residents, in particular, then the Third Circuit has ruled that your program is subject to the mandates of Title IX.*

On the other hand, your program may not be subject to Title IX liability 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.

If you are unsure where your program falls in the above framework, you are not alone, and it might 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. In fact, much of the guidance issued by the federal government on Title IX since 2011 will apply, and it is extensive.

To review the collected regulatory guidance you should be aware of, please click this [link](#) or visit the Resources tab on the ATIXA site, and select “hospitals” from the dropdown menu at www.atixa.org.

What Should You Be Doing to Comply with Title IX?

If your hospital is subject to Title IX, there are quite a few requirements to meet baseline 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, as they say. 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 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.
- *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 responding party and reporting party. It should include a statement about the availability of interim measures to protect reporting parties. 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 “responsible employees” (people who are required to report any incident of sexual violence or other reportable sexual misconduct to the Title IX Coordinator).
- *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 interim measures (*e.g.*, no-contact directives and/or 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.

That sounds like a lot of work and expenditure of scarce resources. What if we decide to take our chances and wait to see what the courts in our state say about this?

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.² In other words, it 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 Judge Fisher 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. This is your cue: act now, or pay later.

The Jane Doe of *Doe v. Mercy* could have been (and could be) any medical resident of any hospital program. Here are the facts of Doe’s case. Ask yourself if this could be any medical resident in your program:

As reported in the judicial opinion, early on in her residency program, Doe noticed that the director of the program (“Roe”) was inquiring about her personal life, and he learned that she had separated from her husband. Roe looked at her suggestively, and sought out more opportunities to speak with her than was the norm. Roe expressed an interest in her beyond the professional, though they were both married. Doe expressed a desire to have their relationship remain professional. After a number of text messages were exchanged, Roe made a report to Human Resources (HR), in order to preempt a report by Doe. A meeting was called by HR, in which Doe described Roe’s conduct, including his touching her hand and what she described as unwelcome sexual attention. HR referred Doe to a psychiatrist (telling her it was

² The Third Circuit distinguished *Doe v. Mercy* from precedents in the Eighth and Second Circuits, thereby sidestepping a circuit split. The other circuits have not yet weighed in on the matter.

optional), and Doe never heard anything more from HR. Other male faculty significantly lessened their involvement in Doe's training following this encounter.

When Doe later divorced her husband, Roe's advances "intensified." He, too, was getting divorced. She continued to refuse his advances. When it came time for fellowship recommendation letters, Roe and another faculty member wrote "short, cursory, and perfunctory" letters, and Roe disparaged her to the fellowship director to "teach her a lesson." Doe complained again, and she was again referred (this time, she was escorted) to the hospital's psychiatrist. She was told that her performance on the in-service examination was poor, even though this was not true. Doe was told that she would have to agree to a "corrective plan" in order to remain in the program. She agreed, but only reluctantly. Roe's conduct continued to escalate, including "pressing his arm against her breasts" when reaching across her body. Every time Doe tried reporting it, she was advised to see the psychiatrist. Finally, Doe was terminated. Dr. Roe was at the hearing and recommended her dismissal. Doe has not been able to obtain admission to another program. Doe sued Mercy exactly two years later, alleging not only Title IX claims, but Pennsylvania state law and other claims. Mercy argued (among other things) that Title IX does not apply to them, and they lost.

The Third Circuit has said that Mercy and all similar programs are, indeed, responsible for compliance with Title IX, as medical residents are entitled to the law's protections.

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 3,000 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, and case briefings.

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:

Kate Halligan
Executive Vice President for Client Relations
ATIXA and The NCHERM Group, LLC
Phone: 610-579-3725
Email: kate@atixa.org