

# PUBLICATION

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## Medical Residents and Title IX – What Teaching Hospitals Need to Know

May 19, 2017

Last month, Baker Donelson reported the surprise ruling out of the Third Circuit in *Jane Doe v. Mercy Medical Center* in which the court held that the discrimination and harassment prohibitions of Title IX apply to a private hospital's medical residency program. Even more surprising, the court ruled that a medical resident could bypass the traditional administrative scheme required for making employment claims by pursuing litigation under Title IX, which the U.S. Supreme Court previously held allows for a direct, individual cause of action. The impact of the *Doe* decision is likely significant, and requires medical residency programs to understand their new obligations and take action to protect themselves from an expected increase in sexual harassment, discrimination and retaliation claims.

### What Is Title IX?

Title IX of the Education Amendments of 1972 was signed into law on June 23, 1972. The law provides that "[n]o 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...." The purpose of the law is to prevent the use of federal money to support education programs that engage in, support or allow sexual harassment. In general, the law applies to educational institutions such as colleges, universities, and elementary and secondary schools; but the language of the law is more expansive. The law specifically applies to "any education program or activity" operated by a recipient of federal financial assistance.

In 1987, Title IX was amended by the Civil Rights Restoration Act, which provided a clear definition of *education program or activity* as "all of the operations" of certain kinds of entities, "any part of which" receives federal funding. The amendment made evident that such entities included not only colleges and universities, but also entire organizations that receive federal assistance as a whole or that are principally engaged in the business of providing education, health care, housing, social services, or parks and recreation, as well as joint ventures between such entities.

### Why Does Title IX Now Apply to Medical Residency Programs?

In *Doe*, a diagnostic radiology resident at Mercy Medical Center complained that her program director subjected her to persistent and unwanted sexual advances which interfered with her medical training. The resident alleged that, when she complained, the program director and other hospital representatives subjected her to a series of retaliatory behavior, which led to her dismissal from the program in April 2013. Exactly two years after her dismissal, the resident filed suit against Mercy, alleging quid pro quo sexual harassment, hostile environment sexual harassment and retaliation in violation of Title IX. The lower court dismissed the resident's claim, holding that the hospital was not an education program or activity subject to Title IX and that the resident could not bypass the required administrative remedies proscribed by Title VII for employment discrimination and harassment claims.

On March 7, 2017, the Third Circuit reversed on appeal and found that Title IX does in fact apply to a hospital's residency program. The court specifically found that, although medical residents are employees, they are also students and thus have recourse under Title IX. To reach this conclusion, the court stated that it "must square Title IX's definition of a 'program or activity' codified at 20 U.S.C. 1687, with Section 1681(a)'s language '*education program or activity*.'" Through a very careful parsing of the statutory language and review of the

various amendments to Title IX, and a consideration of the U.S. Supreme Court's instruction that Title IX be interpreted broadly, the court concluded that a program or activity is, in fact, an educational program or activity if "it has 'features such that one could reasonably consider its mission to be, at least in part, educational.'"

The court then applied that standard to Mercy and reached two conclusions. First, the court found that Mercy's residency program was certified by the Accreditation Council for Graduate Medical Education (ACGME), which meant that the hospital sponsored a program with an educational mission. In addition, the court took note of the fact that the hospital required its residents to participate in lectures and take in-service exams. The court also found important the fact that the hospital appeared to "[hold] out its residency program as educational in nature." Second, the court found that Mercy's residency program was sponsored by Drexel University's College of Medicine, which further bolstered its status as an educational program or activity.

It should be noted that the court did not get to the question of whether Mercy was subject to Title IX as it relates to receipt of federal financial assistance. Mercy argued on appeal that its receipt of Medicare payments was not a sufficient basis for making such a finding because those payments "stem 'from contracts of insurance'" and are not meant to supplement the costs of residency training. The court declined to address the argument because Mercy failed to raise it in the lower court.

### **How Are the Exclusive Remedies of Title VII Impacted?**

After finding that Mercy's residency program was subject to Title IX, the court next reviewed whether the resident had the right to file a private action under Title IX and whether her failure to exhaust the administrative remedies of Title VII of the Civil Rights Act was fatal to her suit. The court first determined that the resident most likely was an employee of the hospital (see, e.g., *Mayo Found. for Med. Educ. & Research v. U.S.*, 562 U.S. 44 (2011) (finding residents employees for purposes of FICA taxation)), and thus theoretically could have filed claims under Title VII. Nonetheless, despite her employment status, the court held that Title VII's "concurrent applicability" did not bar the resident from pursuing a private cause of action under Title IX.

The court relied on the precedent that permits plaintiffs filing employment discrimination claims to file those claims concurrently under various statutory schemes, even when those schemes do not involve the administrative filing requirements that are prerequisites to Title VII litigation. Thus, the court held that Title IX and Title VII are separate enforcement mechanisms, either or both of which an individual such as the resident here may use to challenge alleged sex-based employment discrimination. In reaching this finding, the court relied on four guiding principles from decisions issued by the U.S. Supreme Court: (1) Private sector employees are not limited to Title VII in relief from workplace discrimination; (2) It is Congress's job to review whether an alternative avenue for relief from employment discrimination might improperly circumvent Title VII's administrative requirements; (3) Title IX's directive that "no person" may be discriminated against based upon sex supports its reach to employees and not just students; and (4) Title IX's implied private cause of action has been held to extend explicitly to employees of federally funded education programs who allege sex-based retaliation claims. The court further noted that its holding is consistent with decisions in the First, Second, Eighth and Ninth Circuits, as well as the interpretation of the 21 federal agencies that enforce Title IX, including the Departments of Education and Health and Human Services.

### **What Are the Lessons to Learn?**

The *Doe* case illustrates the pressing need for medical centers, hospitals and other health care institutions providing accredited teaching and training programs, particularly programs formally affiliated with educational institutions, to evaluate the application of Title IX to health care education programs. Going forward, private entities that receive federal financial assistance, including through Medicare, are likely to be brought under Title IX's purview. As a result, such entities, and medical residency programs in particular, must now come to terms with Title IX's panoply of proscriptions by:

- Preparing, revising, communicating, and enforcing policies and procedures prohibiting the conduct proscribed by Title VII and Title IX. Federal law (and most state law) requires posting of non-discrimination laws. With these notices, it is important to set forth clear reporting alternatives for resident concerns and investigation of all complaints. As an example, programs can consider the guidance issued by the U.S. Department of Education to schools covered by Title IX:

A school has a responsibility to respond promptly and effectively. If a school knows or reasonably should know about sexual harassment or sexual violence that creates a hostile environment, the school must take immediate action to eliminate the sexual harassment or sexual violence, prevent its recurrence and address its effects (regardless of whether a student has filed or wants to file a complaint).

Every school must designate at least one employee who is responsible for coordinating the school's compliance with Title IX. This person is sometimes referred to as the Title IX coordinator. Schools must notify all students and employees of the name or title and contact information of the Title IX coordinator.

- Training faculty, supervisors, program directors and residents to ensure they understand the laws and their responsibilities under those laws. Training is not only beneficial for the work environment; it can also play a significant role in defending against discrimination and harassment claims. Some states (e.g., California) require formal sexual harassment training for all supervisors every two years. The U.S. Supreme Court has found that in the context of a Title VII claim, employers who establish and enforce appropriate anti-harassment policies, and who train their staff accordingly, have made a good faith effort to comply with the law.
- When in receipt of a complaint, immediately taking steps to initiate an investigation, ensure the integrity of an investigation and protect a complaining resident. The Office of Civil Rights has stated that Title IX requires a covered entity to take interim measures before the final outcome of an investigation, including, for example, separating adverse parties immediately, providing support services to the complainant, providing increased monitoring and supervision, changing schedules, etc.
- Upon conclusion of an investigation, immediately taking remedial action designed to effectively end prohibited conduct. Such remedial action can include: discharge, discipline, additional training, counseling, reassignment of supervisors, etc.