

**BEFORE THE STATE BOARD OF EDUCATION
Special Called Telephonic Meeting
May 24, 2016**

Title IX and the DOJ/DOE Guidance Letter of May 13, 2016

Congress has enacted a number of laws to prohibit discrimination – for instance:

Title VI of the Civil Rights Act of 1964 prohibits discrimination on the basis of race, color, and national origin;

Section 504 of the Rehabilitation Act of 1973 prohibits discrimination based on disability;

The Age Discrimination Act of 1975 prohibits discrimination based on age; and

Title IX of the Education Amendments of 1972 prohibits discrimination based on sex.

Each of these laws, at one time or another, have received interpretations via the federal agencies that administer these laws and further review and interpretation by the federal courts. Court interpretations are sometimes welcomed by Congress and sometimes not. For example, after a series of 8 or 9 Supreme Court decisions interpreting and narrowing the scope of the referenced laws, Congress felt compelled to enact the “Civil Rights Restoration Act of 1987.” The Act states in Section 2 that the Congress finds:

- (1) certain aspects of recent decisions and opinions of the Supreme Court have unduly narrowed or cast doubt upon the broad application of title IX of the Education Amendments of 1972, section 504 of the Rehabilitation Act of 1973, the Age Discrimination Act of 1975, and title VI of the Civil Rights Act of 1964; and**
- (2) legislative action is necessary to restore the prior consistent and long-standing executive branch interpretation and broad, institution-wide application of those laws as previously administered.**

Turning specifically to Title IX - it is just one part of the Education Amendments of 1972 that was signed into law by President Richard Nixon. Basically, Title IX prohibits sex discrimination in any federally-funded education program or activity. Periodically, the U.S. Department of Education’s Office for Civil Rights (OCR) has issued guidance documents on the interpretation and implementation of Title IX.

On April 4, 2011, the OCR issued a “Dear Colleague Letter” (DCL) regarding student-on-student sexual harassment and sexual violence. Three years later, in April 2014 the OCR supplemented the 2011 DCL by issuing another “significant guidance document” on Title IX and Sexual Violence. The OCR stated that “Although this document and the DCL (dated April 4, 2011) focus on sexual violence, the legal principles generally also apply to other forms of sexual harassment.”

The 2014 supplement presents information through a series of questions and answers. One of these questions:

Does Title IX protect all students from sexual violence?

The short Answer: “Yes.” Including straight, gay, lesbian, bisexual and transgender students; students with and without disabilities; and student of different races and national origins.

...

Title IX’s sex discrimination prohibition extends to claims of discrimination based on gender identity or failure to conform to stereotypical notions of masculinity or femininity and OCR accepts such complaints for investigation. Similarly, the actual or perceived sexual orientation or gender identity of the parties does not change a school’s obligations.

Most recently, on May 13, 2016, the U.S. Department of Justice’s Civil Rights Division and the OCR issued a joint “significant guidance document” entitled Dear Colleague Letter on Transgender Students. The DCL provides, in part, “This guidance does not add requirements to applicable law, but provides information and examples to inform recipients about how the Departments evaluate whether covered entities are complying with their legal obligations.”

The May 13 DCL addresses compliance with Title IX:

As a condition of receiving Federal funds, a school agrees that it will not exclude, separate, deny benefits to, or otherwise treat differently on the basis of sex any person in its educational programs or activities unless expressly authorized to do so under Title IX or its implementing regulations. The Departments treat a student’s gender identity as the student’s sex for purposes of Title IX and its implementing regulations. This means that a school must not treat a transgender student differently from the way it treats other students of the same gender identity. The Departments’ interpretation is consistent with courts’ and other agencies’ interpretations of Federal laws prohibiting sex discrimination.

In support of that last sentence, the DCL cites to several court decisions including the April 19, 2016 decision of the U.S. 4th Circuit Court of Appeals in a case originating in Virginia titled *G.G. v. Gloucester Cnty. Sch. Bd.* The Gloucester County School Board case is the most prominent and recent court case addressing issues involving a transgender student named “Gavin.”

As described in the opinion by the 4th Circuit Court of Appeals:

[Gavin] is a transgender boy now in his junior year at Gloucester High School. [Gavin's] birth-assigned sex, or ... "biological sex," is female, but [Gavin's] gender identity is male. ... Since the end of his freshman year, [Gavin] has undergone hormone therapy and has legally changed his name [Gavin] lives all aspects of his life as a boy. [Gavin] has not, however, had sex reassignment surgery.

The district court declined to afford deference to the Department of Education's interpretation of the regulations at issue. The 4th Circuit disagreed and determined that the DOE's interpretation was entitled to deference. The 4th Circuit reversed the District Court and remanded on the issue of a preliminary injunction. This case is presently awaiting a decision on the school district's request for reconsideration by the 4th Circuit. If the 4th Circuit Court of Appeals is correct, the interpretation of Title IX by the DOJ/DOE is entitled to "deference" by the federal courts.