

# Title IX: Where is it today?

# Disclaimer

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# Title IX And The New Administration

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**Dear Colleague Letter**

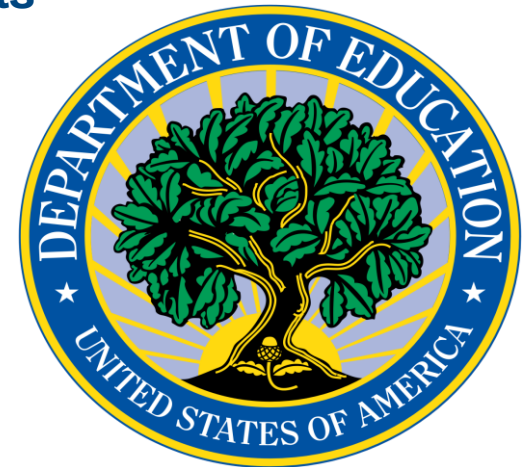
**“2017 Q & A on Campus Sexual Misconduct”**

**Higher Standard of Proof—Clear and Convincing**

**Mediation**

**Modification of Appellate Rights**

**Timing for Investigations**



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***SurvJustice v. DeVos*, (Docket No. 3:18-cv-00535),  
ND Cal.**

**Alleges that department of Education and its  
leaders, including Secretary of Education Betsy  
DeVos, violated the Fifth Amendment's due  
process protections and the Administrative  
Procedure Act.**

# “PROSPER Act”

## Potential Suspension of Investigations



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# **Transgender Students**

## **Bathroom Access**

### **Investigations**

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# Title IX –Is the Tide Turning?



# **Title IX & Sexual Assaults**

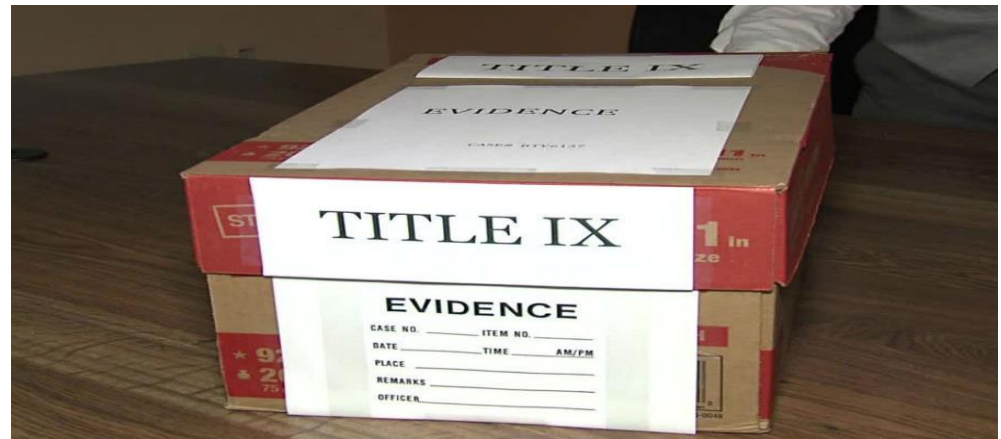
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**2011 Dear Colleague Letter**

**Obama Administration Guidelines**

**Rise in Lawsuits and Investigations**

# Challenges by Accusers under Obama Administration



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**Acquitted---but not cleared**

**Lower standard of proof means  
schools may still proceed  
Yale University & Saifullah Kahn**

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## Standard of Proof

***John Doe v. University of Colorado, (D. Colo. 16-cv-01789)(questioning adherence to preponderance of evidence standard)***

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***Doe v. University of Miami, et als.***  
**Slip op, 17-3396 (6<sup>th</sup> Cir. 2/9/18)**

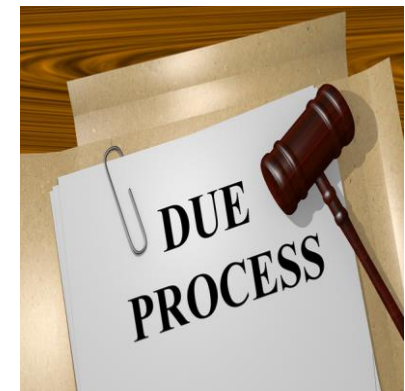
**4 Theories of Potential Liability**

**Erroneous Outcome**  
**Selective Enforcement**  
**Deliberate Indifference**  
**Archaic Assumptions**

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# Due Process & Title IX

*Z.I. v. University of Vanderbilt*  
*John Doe v. Columbia University*  
*John Doe v. Johnson & Wales*  
*University*



# Lawsuits by Accusers on the Rise

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**Occidental Univ. Definition of  
“Incapacitated”**

**USB—Trauma Based Approach**

**ISU—Suspended during investigation  
then cleared**

**Pomona Univ. to Pay Atty’s Fees**

# False Allegations

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**Ohio State Univ. Title IX Official Can Be personally Liable**

**James Madison Univ. Magistrate recommends payment of \$850,000 in legal fees**



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# **Other Causes of Action**

## **Breach of Contract**

## **Negligent Infliction of Emotional Distress**

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**FERPA**  
**Release of Information**  
***Daily Tar Heels, et als v. UNC***

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# LGBTQ & Title IX

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# **Betsy DeVos & Jeff Sessions' Position on LGBTQ Students**

## **Review of Transgender Complaints on case by case basis**



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***“Where students, including transgender students, are penalized or harassed for failing to conform to sex stereotypes, that is sex discrimination based on Title IX. In the case of bathrooms, however, longstanding regulations provide that separating facilities on the basis of sex is not a form of discrimination based on Title IX.”*** Elizabeth Hill,  
Spokesperson for Department of Education



# No investigation of complaints regarding bathroom access for transgender students

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## The Costs to Schools

**Wisconsin Settles Lawsuit \$800,000**

**Pennsylvania Settles Federal Lawsuit**



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# Federal Courts

*Whitaker v. Kenosha Unified School District*, (7<sup>th</sup> Cir. 2017, No. 16-3522)

*Students & Parents for Privacy v. US Department of Education*, (E.D. Ill., No.16-4945, December 2017)





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**Titles VII & IX protected categories do NOT expressly include sexual orientation or gender identity.**

**But ...**

**Several federal courts have held that Title VII includes claims based on sexual orientation or transgender status. Discrimination or harassment based on “sex stereotypes” about how a man or woman should behave is “sex” discrimination and violates the law.**

***Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)**

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**Title VII interpretation of “discrimination based on sex.”**

***Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989)**

**U.S. Court of Appeals for the Seventh Circuit – *Kimberly Hively v. Ivy Tech Community College*, No. 15-1720 (7<sup>th</sup> Cir. April 4, 2017)**

***Gloucester County School Board v. G.G.*, 822 F.3d 709 (2016)**

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***Johnston v. Univ. of Pittsburgh*, 97 F. Supp. 3d 657 (W.D. Pa. 2015) (Gibson, J.) (finding plaintiff did not state a claim under Title IX or the Equal Protection Clause)**

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# State & Local Laws

**Vermont: Schools, public buildings, restaurants, offices must have all gender access bathrooms**

**Hoboken, NJ: Mayor orders gender neutral bathrooms**

**Anchorage Alaska: Anti transgender bathroom bill rejected by voters**



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# Questions



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