



Conducting Title IX Complaint Investigations

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Introduction

Through the development of case law and government agency enforcement activities, school districts' obligations under Title IX of the Education Amendments Act of 1973 ("Title IX") have expanded since the statute's inception. This paper will focus on school districts' obligations to conduct internal Title IX complaint investigations. In Section 1, it will discuss the sources of school districts' legal obligations to conduct Title IX investigations. In Section 2, it will discuss investigation strategies to assist your clients in ensuring they are conducting appropriate internal Title IX investigations, specifically those alleging sexual harassment. And, finally, in Section 3, it will discuss a specific model, The Baldrige Model, that the Kansas City Public Schools has chosen to implement when conducting investigations.

I. Sources of Legal Obligations to Conduct Investigations

Statute and Regulations

The foundation for the non-discrimination obligation under Title IX is found in the statutory and regulatory provisions. Title IX states that "no 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."¹ The statute and regulation do not define sexual harassment as sex discrimination, but through case law and enforcement guidance, it is clear that harassment is a form of discrimination under

¹ 20 United States Code § 1681(a).

Title IX and sexual harassment in schools, if sufficiently severe, can justify a private right of action for monetary damages under Title IX.²

The regulations implementing Title IX require school districts to have a designated employee responsible for coordinating efforts to comply with and carry out the school district's Title IX obligations³ and to adopt and publish a grievance procedure providing for the prompt and equitable resolution of student and employee complaints of sex discrimination.⁴ From these regulatory requirements, the obligation to investigate complaints of sex discrimination has expanded through case law and enforcement guidance. There are obviously other sources of legal obligations related to students and issues of sexual misconduct (*e.g.* state mandatory reporting laws), but this paper focuses on schools' obligations specifically under Title IX and accompanying regulations and guidance.

Case Law

A private right of action has been established to enforce Title IX's prohibition on sex discrimination, including sexual harassment. Two foundational cases involving sexual harassment in a school setting were decided in 1998 and 1999; the first involved a claim of teacher-on-student sexual harassment and the second involved student-on-student, or peer, harassment. In 1998, the Supreme Court, in *Gebser v. Lago Vista Independent School District*, held that a school district could not be held liable for damages under Title IX unless a school official had actual notice of, and was deliberately indifferent to, a teacher's sexual misconduct.⁵ In *Gebser* the Supreme Court explicitly stated that "sexual harassment can constitute

² *Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629, 649-50, 119 S. Ct. 1661, 1674, 143 L. Ed. 2d 839 (1999); see also, *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998).

³ 34 C.F.R. § 106.8(a).

⁴ 34 C.F.R. § 106.9(b).

⁵ *Gebser* at 277.

discrimination on the basis of sex under Title IX.”⁶ One year later, in 1999, the Supreme Court decided *Davis v. Monroe County Board of Education*, concluding that a private cause of action for money damages existed under Title IX when a school “acts with deliberate indifference to known acts of harassment in its programs or activities.”⁷ A plaintiff must “establish sexual harassment...that is so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victim’s educational experience, that the victim-student [is] effectively denied equal access to an institution’s resources and opportunities.”⁸

The following elements must be established by a plaintiff bringing a Title IX claim arising from sexual harassment: 1) the school district must have exercised substantial control over both the harasser and the context in which the harassment occurred; 2) the plaintiff must have suffered harassment that is so severe, pervasive, and objectively offensive that it can be said to have deprived the plaintiff of access to the educational opportunities or benefits provided by the school district; 3) the school district must have had actual knowledge of the harassment, 4) the school district must have acted with deliberate indifference to the harassment, meaning that the school’s response to the harassment was clearly unreasonable in light of the known circumstances; 5) the school district’s deliberate indifference must have subjected the plaintiff to harassment, i.e., caused the plaintiff to undergo harassment or made the plaintiff liable or vulnerable to it.⁹

With these elements in mind, a school district’s internal policies and procedures regarding complaints of sexual harassment can play an important role in preventing or

⁶ *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 283 (1998) (citing *Oncala v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80–81 (1998)).

⁷ *Davis* at 633.

⁸ *Id.* at 651.

⁹ *Karasek v. Regents of the Univ. of California*, 2015 WL 8527338, at *8-9 (N.D. Cal. Dec. 11, 2015), citing *Davis*.

minimizing harm to students and also reducing potential liability. Through either enforcement action by the U.S. Department of Education’s Office for Civil Rights (“OCR”) or through a civil suit, a school district’s response to a complaint of harassment may be reviewed and critiqued. The school district’s response, therefore, serves not only to ensure the future well-being of students and the educational environment, but also serves to demonstrate an appropriate response from a legal and administrative enforcement standpoint. Further, if a school district does not conduct a proper investigation and the student’s access to education continues to be impacted, the district may have liability, even absent further allegations of affirmative acts of sexual harassment.¹⁰

Case law is also instructive regarding courts’ interpretation of what constitutes sex discrimination, particularly in the area of complaints raised by transgender students. In recent cases, courts have dismissed plaintiffs’ claims regarding Title IX’s coverage of discrimination based on gender identity. In the case of *G.G. ex rel. Grimm v. Gloucester County School Bd.*,¹¹ a transgender male student claimed that the school’s rule requiring students to use restrooms consistent with their birth sex amounted to gender identity discrimination. The court rejected this argument, relying on Title IX’s regulation at 34 C.F.R. § 106.33, allowing separate restrooms on the basis of sex. The court rejected the argument that refusing to allow students to use the restroom aligned with their gender identity amounts to sex discrimination. The Department of Education submitted a letter in support of this argument, but the court refused to adopt the Department’s interpretation of Title IX absent amendments to the regulations.¹²

Schools should review their policies and grievance procedures and consider recent OCR

¹⁰ See *Doe ex rel. Doe v. Derby Bd. Of Educ.*, 451 F. Supp. 2d 438 (D. Conn. 2006).

¹¹ *G.G. ex rel. Grimm v. Gloucester County School Bd.*, 2015 WL 5560190 (E.D. Va., Sept. 17, 2015).

¹² *Id* at *7-8.

resolution agreements when making determinations about the proper threshold questions when presented with a Title IX complaint regarding a transgender student.¹³

OCR Guidance and Enforcement

In the past several years, OCR has issued various “Dear Colleague Letters” (“DCLs”) that have outlined obligations school districts have regarding Title IX complaint investigations.¹⁴

If a school knows or reasonably should know about possible harassment it must promptly investigate to determine what occurred and take appropriate steps to resolve the situation.¹⁵

School districts must seek to determine what occurred and whether the action about which the student complained created a hostile environment. OCR recognizes what your clients have no doubt experienced in practice – the specific steps in a school district’s investigation will vary depending on the nature of the allegations, the age of the students involved and other factors, including the willingness or unwillingness of the complainant to participate in the investigation.

In conducting investigations, school districts must be mindful of the standards that will be applied if an investigation is reviewed: either in a civil right of action (deliberate indifference) or during an OCR review (compliance with regulatory requirements and requirements set forth in the DCLs). A recent case analyzed whether non-compliance with OCR’s DCLs amounts to deliberate indifference in a civil right of action. In this case, a district court judge dismissed

¹³ OCR recently found a school district violated Title IX by failing to allow a transgender female student to use the girls’ locker room. OCR found restricting such access violated Title IX. OCR’s 2014 DCL includes a statement that “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.” (B-1 and B-2).

¹⁴ See “Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” published in January 2001, available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> ; Dear Colleague Letter published in April 2011 (“2011 DCL”), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>; Dear Colleague Letter and accompanying Question-and-Answer document, published in April 2014 (“Q&A Guidance”), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>; Dear Colleague Letter published in April 2015 and accompanying Title IX Resource Guide, available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf>; and <https://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf>.

¹⁵ 2011 DCL.

claims that a University's failure to follow a DCL amounted to deliberate indifference. The court said there "are undoubtedly situations in which a school's conduct in violation of the DCL also amounts to a clearly unreasonable response under *Davis*...[b]ut...the DCL does not define what amounts to deliberate indifference for the purposes of this case." The court stated it would rely on *Davis*, and not the OCR DCL, to determine whether plaintiffs adequately alleged deliberate indifference.¹⁶

Although the court held that a failure to comply with DCL requirements did not demonstrate deliberate indifference by the school, a school's obligation and interest in complying with the DCLs extends beyond the threat of private lawsuits. Complaints regarding a school district's failure to investigate a complaint of sex discrimination, including sexual harassment or sexual assault, can result in an OCR investigation that will likely extend far beyond the individual allegation. In exercising its enforcement authority under Title IX, OCR has taken a broad look at school districts' policies, practices and responses to sex discrimination complaints, often including a three-year review of how the district has handled investigations.

While the majority of OCR's sexual misconduct investigations involve institutions of higher education and the Department's enforcement efforts at the post-secondary level have garnered more of the media attention, much of OCR's sexual harassment and sexual violence guidance also applies to school districts.

As of July 2015, OCR was investigating 40 school districts regarding complaints of sexual misconduct. Additionally, components of the DCLs relate specifically to elementary and secondary schools. The guidance notes that schools should provide age-appropriate training to students regarding Title IX and sexual violence and consider whether training should be offered

¹⁶ *Karasek* at *13. *See also, Doe v. Bibb Cnty. Sch. Dist.* No 12-cv-00468, 2015 WL 5063746 (M.D. Ga. Aug. 27, 2015).

to parents. The guidance also notes that child-find obligations may be triggered when a student experiences sexual violence.¹⁷ At the elementary and secondary level, schools should also consider whether a manifestation determination may be required for a student-respondent with a disability.

A recent OCR investigation that resulted in a voluntary resolution agreement indicates that OCR investigations at the elementary and secondary level may result in requirements similar to those imposed at the post-secondary level. In a complaint that resulted in a voluntary resolution agreement in 2015, a middle school student alleged he was subjected to gender-based harassment to which the district failed to appropriately respond. The school district entered into a voluntary resolution agreement with OCR and agreed to the following: Title IX Coordinator training; district personnel training; student orientation and training; and provisions regarding the maintenance of documents.¹⁸

The agreement regarding maintaining documents requires the school district to include the following in its records: a copy of all reports of incidents involving allegations of sexual harassment of any kind; a narrative of all actions taken in response to the reports; a copy of any and all disciplinary sanctions issued; documentation demonstrating any interim and/or remedial efforts offered and provided to involved parties; and a narrative of all actions taken to prevent recurrence of any harassing incident(s). The resolution letter also highlights requirements for internal grievance procedures similar to those that have been imposed at the post-secondary level.

¹⁷ “At the elementary and secondary education level, a student experiencing sexual violence may trigger a school’s child find obligations under IDEA and the evaluation and placement requirements under Section 504” *Q&A Guidance*, Page 7.

¹⁸ See OCR Resolution Agreement #05-15-1033, available at www.ed.gov/ocr.

Other Obligations to Conduct Investigations

School districts' obligations to conduct thorough investigations extend beyond their legal obligations. Thorough investigations support a school's interest in operating a safe and productive educational environment. Investigations can also avoid or cut-off issues before they result in negative publicity and board or community pressures on the district.

II. Investigation Strategies

Understanding school districts' legal obligations to conduct internal Title IX investigations (and the consequences for failing to do so) is only the first step towards Title IX compliance in this area. Consistently applying basic principles and practices to investigations can increase the likelihood of effective investigations and overall compliance. Generally speaking, school districts' investigations must be adequate, reliable, and impartial. The purpose of any investigation is to determine whether misconduct occurred under a "preponderance of the evidence" standard. Investigators must be trained on district policy, investigation techniques, and appropriate ways of interacting with alleged victims. While there are certainly more considerations related to conducting appropriate investigations, we have outlined some key investigative strategies below.

Publication/reporting mechanisms

Investigations begin with an effective reporting process that is clearly communicated to the school community. Information about reporting options should be prominently displayed and should be communicated on districts' websites and in student, parent, faculty and staff handbooks. Schools should also consider whether they have a culture that favors reporting. If there are multiple reporting mechanisms, the various reporting options should be clearly communicated and communication between the various internal "intake" options is critical.

Embracing the “little i” investigation and the Importance of Record-keeping

As discussed above, particularly at the elementary and secondary level, the extent of an investigation into a complaint will vary greatly. Given the vast age range of students from kindergarten to seniors in high school, the types of complaints that school districts receive or issues that are brought to their attention that *may* constitute harassment, will span the gamut.¹⁹ As a result, school district responses should vary accordingly. What is critical from a compliance stand-point is that school districts carefully document reports and the reason for the action taken, or not taken. Particularly in cases of alleged verbal harassment, record-keeping becomes important when repeated complaints are made. An investigator will generally need to review the entire interaction between two students when making a determination about a hostile environment and the more clearly previous complaints have been recorded, the easier this task will be.

Conducting the investigation

Before commencing an investigation, investigators should carefully plan for the investigation. Investigators should ensure they do not have a conflict of interest that will prevent them from conducting an impartial investigation. An investigator should also be aware of whether he or she, or someone else, is responsible for discussing interim measures with the

¹⁹ See *Davis*, 651-52. Whether conduct rises to the level of actionable harassment “depends on a constellation of surrounding circumstances, expectations, and relationships,” *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 82, 118 S.Ct. 998, 140 L.Ed.2d 201 (1998), including, but not limited to, the ages of the harasser and the victim and the number of individuals involved...Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults...It is thus understandable that, in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it. Damages are not available for simple acts of teasing and name-calling among school children, however, even where these comments target differences in gender. Rather, in the context of student-on-student harassment, damages are available only where the behavior is so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect.

complainant and ensuring measures are in place when necessary. Also, investigators should be certain they understand their role under the school district's policy and process. For example, under some policies the investigator is tasked with making a recommendation as to whether the misconduct occurred. In other policies, the investigator is solely tasked with gathering evidence and summarizing that evidence for the decision-maker. Investigators should ensure that they have a clear understanding of the complainant's allegations. It is also critical during the course of the investigation that an investigator be aware of fairness and due process considerations. Complainants and respondents must have equal opportunities to provide evidence and identify witnesses, as well as equal access to information and evidence that is considered.

Keeping good records throughout an investigation and communicating with the parties are also critical to an investigation's success. Investigators should ensure that accurate notes are kept from complainant, respondent and witness interviews. Investigators should take care to regularly apprise parties of the progress of the investigation. Investigators should also be prepared to answer questions about the investigation. Most of these communications will be with both parents and students at the elementary and secondary level.²⁰

Training

OCR has continually conveyed the importance of Title IX training and educational programming. Schools should ensure the Title IX coordinator has adequate training and that employees understand their reporting obligations and the school district's procedures. Training should also be provided with practical information about how to prevent and identify sexual harassment and sexual violence. Training and awareness programs should also be provided for

²⁰ Under the Family Education Rights and Privacy Act (FERPA), parents of children under the age of 18 attending an elementary or secondary school hold the rights to privacy and the rights to inspect educational records provided by FERPA. 34 C.F.R. § 99.3.

students, keeping in mind that training should be tailored for the age of audience. Finally, school districts should ensure that persons implementing the Title IX grievance procedures and conducting the necessary investigations have training on how to properly conduct an investigation. This training may come in the form of training sessions with the Title IX Coordinator or counsel and may also be provided using a co-investigator model for training purposes.

III. Applying the Baldrige Model to Title IX Investigations

In determining the most effective and compliant ways to conduct Title IX investigations, one model that the Kansas City Public Schools has adopted is the Baldrige Model. What follows is a method for making use of the Baldrige Model to help schools comply with the requirements of a Title IX investigation.

The Baldrige Excellence Framework is a leadership and performance management framework that can be applied to organizations of various types. The framework focuses on effective leadership, strategic planning, customer engagement, and results. Education organizations use the Baldrige Model to improve their schools and their students' education through improved productivity and effectiveness and by measuring outcomes.

The Baldrige Model suggests adopting the IGOE Planning Tool (or "Input/Guideline/Outcome/Enablers") to develop policies, protocols, and procedures. Schools should start with the end outcome that is to be accomplished: in this case, compliance with Title IX requirements for investigations of complaints. Unless the school knows what it wants to accomplish, it cannot meet its goal of compliance.

Input and guidelines must be gathered from those with specific knowledge in designated areas. To illustrate, the school attorney has knowledge of Title IX requirements. Thus the attorney should provide the school district with input on the required legal guidelines for compliance. Schools districts should designate the enablers who will implement certain aspects of the final Policy. One of those will be the Title IX Coordinator and others will collect data once the plan is implemented so that periodic reviews can be conducted to determine whether or not the implemented plan is meeting the required outcome.

Finally, as the school district moves forward, the district should integrate what the district has learned from its process and make required adjustments to fine tune the implemented plan. Through the process, school districts learn what is and is not working and make the changes needed for improvement.

Conclusion

In order to ensure Title IX compliance and avoid liability, school districts must remain mindful of the various requirements for handling internal complaints of sex discrimination. Staying informed of developments in case law and enforcement efforts, following specific protocols for handling investigations and, in some instances, adopting specific models such as the Baldrige Model can assist in these efforts.