Agenda

- Title IX Overview
  - Legal update and enforcement update
- Conducting Title IX Investigations
  - School district attorney Title IX Top 10
Title IX

“[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.”
34 C.F.R. § 106.31

Title IX fundamentals

- No sex discrimination in educational programs and activities
- Institutional obligation to prevent, investigate, and redress
- Non-institutional conduct can result in sex discrimination
Sources of obligation

- Statute
- Regulation
  - Designated employee
  - Grievance procedures
- Case law
  - Deliberate indifference
- Enforcement Guidance

Enforcement guidance

- 2001 Revised Sexual Harassment Guidance
- 2008 Sexual Harassment: “It’s Not Academic” Pamphlet
- 2010 Dear Colleague Letter on Harassment and Bullying
- 2011 Dear Colleague Letter on Sexual Harassment and Sexual Violence
- 2014 Report of the White House Task Force to Protect Students from Sexual Assault
- 2014 Q&As on Sexual Violence
- 2015 Dear Colleague Letter on Title IX Coordinators
Response to guidance

- Challenge to OCR’s investigatory authority
  - Senator James Lankford
- Additional legislation proposed
  - Campus Accountability and Safety Act (CASA)
  - Hold Accountable and Lend Transparency Act (HALT)
  - The Safe Campus Act

Covered misconduct includes

- Sex discrimination
  - Disparate treatment on the basis of sex
  - Pregnancy discrimination
  - Harassment
    - Hostile environment
    - Quid pro quo
    - Sexual violence
    - Gender-based harassment
- Retaliation
Not just athletics, not just sexual misconduct

- Athletics
- Counseling
- Discipline
- Employment
- Single-sex classes
- Investigations
- Retaliation
- Sexual violence and harassment
- Pregnant and parenting students

Role of Title IX Coordinators

- April 24, 2015, OCR Dear Colleague Letter
  - School districts must have a Title IX coordinator
  - Role of Title IX coordinators
  - Letter to Title IX coordinators
  - Title IX Resource Guide
Role of Title IX Coordinators (cont.)

- Vast responsibilities
- Need to be provided requisite independence, training, guidance and resources
- Coordinate district’s efforts to comply with Title IX
  - Oversee investigation process
  - Oversee district-wide prevention and awareness efforts
  - Analyze requests for confidentiality

Enforcement and media focus

- “Sexual Violence Isn’t Just a College Problem. It happens in K-12 schools, too.”
  - Washington Post, January 17, 2016
- OCR received 65 complaints related to K-12 sexual violence in FY 2015
- Currently investigating 74 complaints related to K-12 sexual violence allegations
K-12 legislative update

- Increased focus on prevention and awareness at the ESE level
  - **Every Student Succeeds Act** allows public K-12 schools to use Title IV funds for sexual assault prevention training
  - **California** state law requires health education curricula to include sexual harassment and violence awareness and prevention
  - House and Senate in **Michigan** have passed bills requiring public high schools to teach affirmative consent

In the courts and emerging resources

- District found liable under Title IX in **Salazar v. South San Antonio Indep. Sch. Dist.** (W.D. Tex.), on appeal
- Several Title IX cases allowed to proceed to determine schools’ deliberate indifference
  - **J.H. v. School Town of Munster** (N.D. Ind. Feb. 03, 2016)
- “Know Your IX” has created a Title IX Toolkit for high school students
- “Stop Sexual Assaults in Schools”
Following the guidance

- Bear in mind the standards that will be applied if a situation is reviewed
- A court recently held that non-compliance with OCR’s DCLs did not amount to deliberate indifference in a civil right of action
- Despite this, districts’ obligation to follow the guidance remains
  - Complaints to OCR can result in lengthy investigations; and
  - Thorough investigations advance schools’ interest in operating a safe and productive education environment
School district attorney Title IX Top 10

- The Policy
- Reporting
- Assessing Title IX Staff
- Record keeping
- “Little i” investigations
- Investigations
- Consistency
- Internal reviews
- Training
- General advising

The Policy

- Asses district’s policy
  - When was the policy approved/updated?
  - Is the policy clear?
  - How is the policy published?
  - Is the policy something that can and will be followed?
  - Does the policy comply with OCR’s standards?
Policy components

- Scope
- Definitions of misconduct
  - Include age/intent factors
  - Consent presumptions
- Reporting options
- Defining responsible employees
- Investigation process
- Law enforcement
- Standard
- Notice of outcome to parties
- Remedial and disciplinary action
- Anti-retaliation provision
- Available resources
- Title IX Coordinator duties

Reporting

- Essential for basic Title IX responsibility
- Need effective procedure for prompt reporting of sexual misconduct
- Multiple reporting mechanisms
- Culture that favors reporting
- Distinguish between “confidential” and “non-confidential” options
Reporting mechanisms

Designated
- Title IX Coordinator
- Deputy Coordinators
- Designated Administrators
- OCR

De facto
- “Responsible employees”
- Media coverage
- Third-parties
- Fellow students

Assessing Title IX staff

- Who is your district’s Title IX Coordinator?
  - What are the Coordinator’s qualifications?
  - Consider DCL requirements?
    - Independence; resources
- Who are the district’s investigators?
  - How many?
  - Outside investigators?
  - Conflicts?
Record keeping

- Each sexual misconduct investigation must be systematically and carefully documented
- The Title IX Coordinator and investigator and any appellate officer have responsibility for documenting
- Case files should be stored in a secure and easily retrievable manner
- Carefully document reports
- Be aware of miscoding reports

Why document?

- Assists in tracking repeat events
- Helps to organize referrals as opposed to complaints
- Results in a more reliable investigation
- Needed to assess district climate
- OCR compliance audit
Content of records

- A copy of reports of incidents of sexual misconduct
- Actions taken in response to the reports
- Disciplinary sanctions issued
- Interim measures provided
- Action taken to prevent recurrence of any harassing incident(s)

Little “i” investigations

- Reports that appear not to be violations or that are quickly confirmed as such
- Still should generate intake form and letter resolving
- Summary determinations are appropriate in some circumstances
Investigations

- Purpose:
  - Determine what occurred
  - Take prompt and effective steps if necessary
  - Must be adequate, reliable and impartial

Preparing for the investigation

- Assign an appropriate investigator
- Provide interim measures
- Ensure investigator understands his/her role
- Consider what testimony and other evidence is necessary to make a determination under the policy
- Keep investigation log and set 60-day target date
**Being discrete**

- Even if complaint is made to a non-confidential resource, district must still be discrete in its handling of information
- Information shared only with those whose participation is necessary for a compliant response
- Privacy vs. confidentiality

**Interim measures**

- Temporary measures to protect against further harm while investigation is pending
- Need to be re-assessed
- Can’t tolerate non-compliance
- Not a finding of guilt
Informal resolution

- Agreed outcome of case without completion of formal process
- Purely voluntary
- Cannot take the form of mediation for any sexual violence case

Ensure consistency

- At various buildings
- Between similar types of complaints
- Recommend tools (i.e. checklists, templates)
Conduct internal reviews

- Be prepared for OCR investigation
- Interview Title IX staff
- Audit case files
- Assess patterns with Title IX Coordinator
- Consider climate issues (i.e. surveys)

Training

- Take inventory of training provided to administrators, employees and students
- Provide investigator training
  - Train on policy
  - Fact-gathering and report writing
- Prevention and awareness training
  - Tailored to age of students
  - Consider training for parents
Advising

- Provide counsel to prevent common mistakes
  - Reluctant complaints
  - Assessing conflicts
  - Handling reports vs. complaints
  - Reiterating importance of other Title IX areas (i.e. pregnancy discrimination, different treatment)
  - Provision of interim measures
Conducting Title IX Investigations

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April 2016

Answers to 5 Key Questions
The INVERTED PYRAMID.

LEDE/LEAD
who what when where How
LESS IMPORTANT INFO
facts revealed in the order of importance
QUOTES INFO
END

YOUR COMPLIANCE IN CHECK?

Who, What, When, Where, and How

I.  **WHO** is here today?

II. **WHAT** are the main issues for **YOU** today?

III. **WHEN** did this become an issue?

IV. **WHERE** are **YOU** in compliance processing?

V. **HOW** will **YOU** take the next step in protecting **YOUR** client?
I. WHO

is here today?

II. WHAT

are the main issues for YOU today?
II. **WHAT** are the main issues for **YOU** today?

Protect Your Federal Funding

What’s the solution to the issue?

Compliant Title IX Investigation

1  6  7

2  5  8

3  4  9

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III. WHEN did this become an issue?

When  -  April 29, 2014
IV. WHERE are YOU in compliance processing?

Where – YOUR Client’s District
V. HOW

will **YOU** take the next step in protecting YOUR client?

Before you can begin the HOW, you must identify you have a problem, then...

Is your house on fire?
• **Step 1** – There is a catalyst that causes you to identify there is an opportunity for improvement. REACT with an APPROACH to the problem. (Initiation of a process.)

![Image of a person reacting to a fire]

Reacting to the problem (0-5%)
Run with the hose and put out the fire.

http://www.nist.gov/baldrige/

• **Step 2** – General improvement orientation. Study and research options to develop a desired outcome. DEPLOY this process where the opportunity exists.

![Image of a person deploying fire hoses]

General improvement orientation (10-25%)
Install more fire hoses to get to the fires quickly and reduce their impact.

http://www.nist.gov/baldrige/
• **Step 3 –**
  Systematic evaluation and improvement.
  Through CYLCES of LEARNING, gather data pre and post deployment to evaluate the situation from its’ baseline and the changes made from the process.

  **Systematic evaluation and improvement (30-45%)**
  Evaluate which locations are most susceptible for fire.
  Install heat sensors and sprinklers in those locations.
  

• **Step 4 –**
  Evaluate and analyze the LEVEL and TRENDS of your process segmented results as COMPARED to your initial baselines and to recognized BENCHMARKS.

  **Learning and strategic improvement (50-65%)**
  Install system wide heat sensors and a sprinkler system that is activated by the heat preceding fires.
  
• **Step 5** – INTEGRATE things you learned from your analysis and make innovative adjustments to fine tune your process and maximize the affects of your journey.

Organizational analysis and innovation (70-100%)

Use fireproof and fire-retardant materials. Replace combustible liquids with water-based liquids. Prevention is the primary approach for protection, with heat sensors and sprinklers as the secondary line of protection.

http://www.nist.gov/baldrige/

Organize your How – Quality Performance (Baldrige Model)

http://www.nist.gov/baldrige/
Our Hypothetical Case Study

- First grade female autistic student that is receiving special education services are required by the Individuals With Disability Education Act.
- Student is shy and does not orally communicate very well with school staff.
- Child’s Mother is able to understand her child.
- Shortly after Thanksgiving break, child informs her Mother that a boy is bothering her every time she goes to use the bathroom.
- She informs Mother that the boy touches her on the bottom and puts his hand down her top and touches her.
- The child also reports to Mother that she is afraid of this boy.
Our Hypothetical Case Study

- Mother contacts school counselor about the allegations.
- The counselor discusses the allegations with the boy.
- A few days later, after the meeting with the accused, the Mother of the autistic child informs the counselor that her child says that the unwanted touching has continued and in fact has escalated.
- The counselor again meets with the boy and this time includes his father in the meeting.
- During winter break, the autistic child asked her older sibling if she must go back to school after winter break. After the older sister tells the child that she must go back to school, that night the autistic child takes out a knife and tries to kill herself.

Hypothetical Case: Missouri Due Process Case

- She is taken to the hospital, given treatment for cuts, and also given anti-depression medication. This is the first time that the child required this type of medication.
- On the day before school is to start after winter break and after the first incident, the child asks her Mother if she must go to school the next day. She is told that she must do so.
- If the middle of the night, the Mother is waken by the screams of her daughter who is on top of her with a knife and threatens to kill her Mother and then herself.
- She is taken to the hospital and must stay several days in a mental health facility.
- The school is informed of what occurred during the winter break.
- The school offers to put the child on homebound services and in fact does provide home bound services for the child. This enables the child to receive all of her special education services required by her IEP.
Our Hypothetical Case Study

• The child’s IEP Team meets in March. During the meeting it does not discuss the incidents that took place during the winter break nor does the Team discuss what if any impact the incidents had upon the child’s ability to receive a free, appropriate, public education. The team continues the homebound placement.
• During this meeting, the IEP team does obtain the consent from the child’s parents to obtain her child’s hospital records.
• One month later, the IEP team meets again. By this time the medical records of the child have been delivered to the school. The team does not discuss the medical records of the child and continues with the child’s homebound placement.
• At no time was the school’s Title IX Coordinator involved in the investigation of the allegations made by the autistic child.
• The evidence supports the allegations made by the autistic child. In fact the other child confessed.
• The other child was given five days of out of school suspension after the second incident. He is still in school.

Investigative Process

I. Investigation of Title IX Complaint
   A. Determine if Misconduct occurred
   B. Impartial Investigation
   C. OCR Requirements
   D. Interim Measures
   E. Criminal Investigations
   F. Remedies and Interventions
   G. Posting Outcomes
   H. Timeframes

II. Documentation

III. Conclusion
Check Your Compliance

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