FEDERAL CIVIL RIGHTS ENFORCEMENT IN PUBLIC SCHOOLS:
POLICY AND ENFORCEMENT PRIORITIES

MANDATORY JURISDICTION
OCR ENFORCEMENT

<table>
<thead>
<tr>
<th>Federal Civil Rights Statute</th>
<th>Prohibiting discrimination on the basis of race, color, national origin</th>
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</thead>
<tbody>
<tr>
<td>Title VI of the Civil Rights Act (&quot;TITLE VI&quot;)</td>
<td>Prohibiting discrimination on the basis of sex</td>
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<td>Title IX of the Education Amendments of 1972 (&quot;TITLE IX&quot;)</td>
<td>Prohibiting discrimination on the basis of disability</td>
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<td>Section 504 of the Rehabilitation Act of 1973 (&quot;Section 504&quot;)</td>
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<tr>
<td>Title II of the Americans with Disabilities Act of 1990 (&quot;The ADA&quot;)</td>
<td>Prohibiting discrimination on the basis of disability</td>
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<tr>
<td>Age Discrimination Act of 1975</td>
<td>Prohibiting discrimination on the basis of age (for students, parents, applicants)</td>
</tr>
<tr>
<td>Boy Scouts of America Equal Access Act of 2001</td>
<td>Prohibiting denial of equal access or discrimination against Boy Scouts or those affiliated with the Boy Scouts of America</td>
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OCR UNDER THE OBAMA ADMINISTRATION

- In its own words, the Obama Administration was one of “Aggressive Enforcement”
- 8 Dear Colleague letters solely on Title VI
- 5 Dear Colleague letters solely on Section 504 & the ADA
- 7 Dear Colleague letters solely on Title IX

(See Appendix “A” of Handout for Index of all K-12 Public School Dear Colleague Letters [1970-2017])

TITLE VI ISSUES

- Eight Dear Colleague Letters on Title VI alone – numerous others include Title VI.
  1. Guidance to Ensure English Learner Students Equal Access to a High-Quality Education
  2. Equal Access to Educational Resources for All Students
  3. Rights of Students with Disabilities in Charter Schools
  4. Equal Access for Children to Public Schools Regardless of Immigration Status
  5. Prohibition against Retaliation under Federal Civil Rights Laws
  6. Guidance to Enhance School Climate and Improve School Discipline Policies/Practices
  7. Voluntary Use of Race to Achieve Diversity or Avoid Racial Isolation
  8. Equal Access to Education in Enrollment Practices
TITLE VI ISSUES CONT’D

- October 1, 2014: “sweeping” letter “in addition to another lengthy Dear Colleague letter” addressing discriminatory use of student discipline
- January 7, 2015, OCR jointly issued a letter with Civil Rights Division of U.S. Dept. of Justice (“DOJ”) regarding the rights of English language learner students.
- 40 pages long

SECTION 504 & ADA ISSUES

- Five letters focused primarily on Section 504 & ADA
  1. Educational Technology Accessibility
  2. Effective Communication for Students with Learning, Vision and Speech Disabilities
  3. Meaning of “Disability”
  4. Access to Extracurricular Activities and Sports
  5. Disability based bullying and harassment.
SECTION 504 & ADA ISSUES CONT’D

- January 25, 2013 letter addressing extracurricular activities
  - Suggested districts should create additional opportunities for students whose interests and abilities cannot be satisfied by their existing athletic programs.
  - Criticized as expansive
  - OCR responded to criticism:
    - Clarifying that districts are encouraged but NOT required to create additional opportunities
    - Noting that, OCR would not evaluate school district efforts by the higher Title IX standard; i.e., whether the needs of students with disabilities can be met as “fully and effectively” with the existing programs.

TITLE IX ISSUES

- Six letters focused primarily on Title IX
  1. Preventing Sexual Harassment and Sexual violence,
  2. Supporting the Academic Success of Pregnant and Parenting Students,
  3. Obligations of Schools to Designate Title IX Coordinators and Duties,
  4. Guidance on Volunteer Youth Service Organizations
  5. Transgender Student Protections
  6. Guidance on Gender Equity in Career and Technical Education
TITLE IX ISSUES, CONT’D

- In addition, Q & A documents re:
  - Single-Sex Elementary and Secondary Classes & Extracurricular Activities
  - Sexual Violence Guidance (more than 50 pages long)
  - May 13, 2016 Joint Letter with DOJ expanding the definition of discrimination on the basis of sex to include gender identity.

SPECIFIC ISSUES – USE OF GUIDANCE DOCUMENTS TO MAKE LAW ABSENT SPECIFIC REGULATORY OR STATUTORY AUTHORITY (AUER DEFERENCE)

Russlynn Ali, Assistant Secretary for Civil Rights, Dept. of Ed.
- Stated that OCR was not bound to follow Supreme Court precedent when pursuing regulatory enforcement actions.
- Issuance of guidance documents (DCL, Q&A, etc.) that “interpret” the law;
- Failure to follow APA’s “notice & comment rulemaking” process;
- Use of Auer deference to argue that Courts should defer to the regulatory interpretation.
A number of educational organizations complained about what they characterized as OCR’s heavy-handed approach, and requested clarification on guidance documents articulating expansive enforcement standards.

OCR responded to these complaints but did not substantially modify its position.

Example: Individual complaints regarding particular athletic teams result in OCR investigation involving district’s entire athletic/co-curricular program – OCR representatives stating “it is rare for OCR not to find a deficiency”. Declaration that there is an undisclosed “acceptable range for compliance” when evaluating male/female participation rates as to extra-curricular activities.

**requirements vs. aspirations**

OCR’s Dear Colleague letters have outlined more robust compliance obligations than courts have required in civil liability cases. See *Davis v. Monroe*.

What steps outlined by OCR are legally *required* and which are *aspirational*”
### REQUIREMENTS VS. ASPIRATIONS

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<th>When Must the District Take Action?</th>
<th><strong>Davis Standard for Avoiding Monetary Liability</strong></th>
<th><strong>OCR Enforcement Standard for Administrative Compliance Where Plaintiffs Seek Injunctive Relief</strong></th>
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<td>A plaintiff must establish that [a] school official ‘with authority to address the alleged discrimination … had “actual knowledge” of the discrimination.’ Gebster v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).</td>
<td>According to OCR, a school which “knows [actual knowledge] or reasonably should know” about sexual or gender based harassment that creates a hostile environment must take immediate action to eliminate it.</td>
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| What Level of Harassment Will Trigger Administrative Enforcement? | **Davis** holds that only “harassment that is so severe, pervasive, **AND** objectively offensive that it **effectively bars the victim’s access** to an educational opportunity or benefit” may result in liability. | Under the OCR standard, “harassment creates a hostile environment when the conduct is sufficiently severe, pervasive **OR** persistent so as to **interfere with or limit** a student’s ability to participate in or benefit from the services, activities, or opportunities offered by the school.” |

### REQUIREMENTS VS. ASPIRATIONS

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<th>What Remedial Steps (To Mitigate Harassment) Must the District Take?</th>
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<td>School districts must address harassment and respond in a way that is not clearly unreasonable or deliberately indifferent</td>
<td>The District must undertake remedial measures to “systematically” end harassment and prevent its recurrence.</td>
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| Must a District Heed Parents’ Requests for Specific Remedial Measures? | In **Davis**, the Court specifically rejected the notion that districts must heed parental requests for specific remedial demands. Rather, the District’s response must only be “reasonable.” | The **DCL** implies that in some cases it may be appropriate to ascertain and heed parental requests for remediation. |
BACKLASH AGAINST THE OCR POSITION

- May 16, 2016 Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault (See Appendix “C” of Handout)
  - Signed by 21 law professors including Michael McConnell, Director of Stanford Constitutional Law Center; Richard Epstein (NYU), Alan Dershowitz (Harvard Law)
  - Criticized OCR for overreach in its Title IX guidance documents
    - Use of obligatory language in guidance documents
    - Essentially creating regulations while bypassing the requisite procedures of the Administrative Procedure Act (APA)
    - Effectively voiding Supreme Court rulings and expanding the definition of sexual harassment put forth in *Davis v. Monroe*, 526 U.S. 629 (1999)

BACKLASH AGAINST THE OCR POSITION

Legal scholars criticized language of numerous OCR directives:
- “harassment does not have to … involve repeated incidents” to be actionable (2010)
  - Compare to *Davis v. Monroe* “pervasive”
- Sexual assault accusations treated as harassment, with a mandate for preponderance of evidence standard, low due process
  - Arguably too low in situations causing reputational damage
- Defining harassment to include “any unwelcome conduct of a sexual nature”
  - Compare to *Davis v. Monroe* “objectively offensive”
Law Professors concluded:

OCR has ignored constitutional law, judicial precedent and APA requirements... enforcing by means of onerous investigations and accompanying threats...

OCR has brazenly nullified the Supreme Court definition of sexual harassment... [leading] to pervasive and severe infringements of free speech rights and due process protections

May 17, 2016 letter by U.S. Senator James Lankford to Secretary of Education John King re: May 13, 2016 OCR Dear Colleague letter expanding sex discrimination to include gender identity.

(See Appendix “D” of Handout)

Criticized because:

- It advances substantive and binding regulatory policies that may only be imposed on schools through an act of Congress followed by the promulgation of rules compliant with notice-and-comment procedures of the APA
- It prescribed onerous and at times nonsensical obligations on recipient schools”
The Civil Rights Division (CRT) of the Department of Justice (DOJ), created in 1957 by the enactment of the Civil Rights Act of 1957, enforces federal statutes prohibiting discrimination on the basis of race, color, sex, disability, religion, familial status and national origin.

The DOJ is overseen by the Attorney General, Jeff Sessions and has a staff of about 120,000 employees and a budget of about $45 billion dollars and includes agencies like the FBI, DEA. ATF, Bureau of Prisons, Tax, Antitrust, Environment, the 94 U.S. Attorneys and Marshall’s Offices, and many others.

Under the AG is a Deputy Attorney General [criminal & national security], and an Associate Attorney General [civil].

The CRT reports to the Associate Attorney General.

The CRT has 11 divisions:
- Appellate (APP)
- Criminal (CRIM)
- Disability Rights (DRS)
- Education (EOS)
- Employment (ELS)
- Federal Coordination & Compliance (FCS)
- Housing (HCE)
- Immigration and Employee Rights (IER)
- Policy & Strategy (POL)
- Special Litigation (SPL)
- Voting (VOT)
CIVIL RIGHTS DIVISION V. OFFICE OF CIVIL RIGHTS

- **CRT**
  - $148 million dollar budget (2016);
  - 569 FTE (almost all attorneys);
  - All based in Washington, D.C.;
  - Partners with the EOUSA (94 districts);
  - Litigation authority.
- **OCR**
  - $107 million dollar budget (2016);
  - 563 FTE;
  - Regional or field offices;
  - Enforcement through threat to withhold federal funds.

JOINT ENFORCEMENT – MEMORANDA OF UNDERSTANDING

- There are a series of memoranda of understanding between the Department of Justice’s Civil Rights Division and the Department of Education’s Office of Civil Rights that essentially create joint responsibility for enforcing various statutes:
  - “This MOU addresses the collaborative interagency effort to vigorously enforce Title IX.”
  - The MOU is designed to “increase transparency and prevent duplication of effort.”
JOINT ENFORCEMENT

- Under the MOU:
  - CRT & OCR may cross refer cases;
  - They may share information received in the course of an investigation;
  - “If a Party obtains information suggesting that an educational institution is not complying with an existing Title IX obligation to the other party (including an obligation created by court order, consent decree, voluntary resolution agreement, or settlement agreement), that Party will share that information with the other party … .”

FEDERAL PRIORITIES

Trump's new proposed budget cuts federal government down to size
By Justin Bogie, opinion contributor - 02/27/17 06:50 PM EST
PRE-2017 OFFICE OF CIVIL RIGHTS PRIORITIES

- Racial disparity in student discipline and in the allocation of resources (Title IV and Title VI) using a “pattern & practice” theory based purely on disparate impact as revealed by data analysis;
- Disability-Based bullying, harassment & discrimination (§504, ADA-Title II, IDEA);
- LGBT/Gender-based bullying, harassment & discrimination including sexual harassment and assault (Title IX);
- Effective communication for students with hearing, vision & speech disabilities (§504, ADA-Titles II & III, IDEA).

ANTICIPATED OFFICE OF CIVIL RIGHTS PRIORITIES

- Regulatory Moratorium per Executive Order
  - 2 for 1;
  - Review of costs;
  - Regulation Definition- “an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or to describe the procedure or practice requirements of an agency.”
- Systematic review of the process of regulatory interpretation through the use of guidance documents;
- Specific review of existing guidance documents, agency “notices”, “Dear Colleague Letters”, advisory Memoranda and FAQs.
JOINT DEAR COLLEAGUE LETTERS: TRANSGENDER BATHROOM GUIDANCE

TEXT OF THE FEBRUARY 22, 2017 DCL.

- “These guidance documents take the position that the prohibitions on discrimination “on the basis of sex” in Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. § 1681 et seq., and its implementing regulations, see, e.g., 34 C.F.R. § 106.33, require access to sex-segregated facilities based on gender identity. These guidance documents do not, however, contain extensive legal analysis or explain how the position is consistent with the express language of Title IX, nor did they undergo any formal public process.”

- “In addition, the Departments believe that, in this context, there must be due regard for the primary role of the States and local school districts in establishing educational policy.”

- “Please note that this withdrawal of these guidance documents does not leave students without protections from discrimination, bullying, or harassment. All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment. The Department of Education Office for Civil Rights will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms. The Department of Education and the Department of Justice are committed to the application of Title IX and other federal laws to ensure such protection.”
**CAMPUS SEXUAL ASSAULT – APRIL 4, 2011 DCL (RESCINDED)**

- “The sexual harassment of students, including sexual violence, interferes with students’ right to receive an education free from discrimination and, in the case of sexual violence, is a crime.”
- “This letter begins with a discussion of Title IX’s requirements related to student-on-student sexual harassment, including sexual violence, and explains schools’ responsibility to take immediate and effective steps to end sexual harassment and sexual violence. * * * This letter concludes by discussing the proactive efforts schools can take to prevent sexual harassment and violence, and by providing examples of remedies that schools and OCR may use to end such conduct, prevent its recurrence, and address its effects.”
- Due process issues;
- Off campus issues – Univ. of Texas study just released states “that 87% of all incidents occurred off-campus.”

**INTERIM GUIDANCE SEPTEMBER 22, 2017 “Q&A ON CAMPUS SEXUAL MISCONDUCT”**

- “The Department intends to engage in rulemaking on schools’ Title IX responsibilities concerning complaints of sexual misconduct, including peer-on-peer sexual harassment and sexual violence.
- 2017 Interim Q&A to be used in conjunction with 2001 and 2006 guidance.
- “[W]hen sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, a hostile environment exists and the school must respond.”
- “The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of the school’s sexual misconduct policy. If the complaint presented more than a single allegation of misconduct, a decision should be reached separately as to each allegation of misconduct. The findings of fact and conclusions should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.”
DOJ CRT EDUCATION COMPONENT – EOS

- Educational Opportunities Section (EOS);
  - Title IV of the Civil Rights Act of 1964;
  - Equal Educational Opportunities Act of 1974;
  - Americans with Disabilities Act;
  - Title VI of the Civil Rights Act of 1964;
  - Title IX of the Education Amendments of 1972;
  - §504 of the Rehabilitation Act;
- The Section also intervenes in private suits alleging violations of education-related anti-discrimination statutes and the 14th Amendment; and
- Represents the Department of Education in litigation.

EOS PRIORITIES – RESOLUTION OF DESEGREGATION ORDERS

- On January 20, 2017, DOJ was a party to nearly 175 desegregation cases in public school districts in the United States many 40 to 50 years old.
- Since that time, using the enumerated factors, in the Supreme Court’s decision in Green v. New Kent County School Board, we have taken 7 schools into unitary status.
DOJ CRT EDUCATION COMPONENTS – DRS

- Disability Rights Section;
  - DRS enforces the Americans with Disabilities Act ("ADA") Title I-III requirements as well as §§ 504 and 508 of the Rehabilitation Act.
- Title I: Prohibits disability discrimination by private employers (shared with EEOC);
- Title II: Prohibits state and local governments from refusing to allow a person with a disability to participate in a service, program, or activity based on disability.
- Title III: Prohibits disability discrimination in places of "Public accommodation.

Conflict between DOJ & the EEOC
Title VII & Gender Identity
“The United States, through the Attorney General, enforces Title VII against state or local government employers, 42 U.S.C. 2000e-5(f)(1), and the United States is also subject to Title VII in its capacity as the Nation’s largest employer. 42 U.S.C. 2000e-16. The United States thus has a substantial and unique interest in the proper interpretation of Title VII. Although the Equal Employment Opportunity Commission (EEOC) enforces Title VII against private employers, 42 U.S.C. 2000e-5(f)(1), and it has filed an amicus brief in support of the employee here, the EEOC is not speaking for the United States and its position about the scope of Title VII is entitled to no deference beyond its power to persuade.” EEOC v. Arabian Am. Oil Co., 499 U.S. 244, 257-58 (1991).”

THANK YOU

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