







TITLE IX LANDSCAPE

- Title IX of the Education Amendments 1972
- Pertinent Title IX Case Law 1992, 1998, 1999, 2005, 2009
- Dear Colleague Letter October 26, 2010
- Dear Colleague Letter April 4, 2011 and OCR Q & A April 2014
- White House Task Force Sexual Assault April 2014
- Dear Colleague Letter, Title IX Coordinator Guidance and Resource Guide April 24, 2015

TITLE IX CURRENT CLIMATE

- Increased demand for institutional liability for sexual misconduct in schools
- WHY?
- **LACK OF APPROPRIATE RESPONSE**

TITLE IX CURRENT CLIMATE

25% of females and 10% of males in grades 8 through 11 experienced some form of sexual harassment at school. Of those students who stated they were harassed only 7% reported the incident to a teacher and only 23 % reported the incident to a parent. *American Association of University Women Educational Foundation (AAUW) 1993*

TITLE IX CURRENT CLIMATES

- July 2015 U.S Dept. of Education OCR List of 124 Colleges and 40 School Districts Under investigation
- United Educators 2015 Large Loss Report: Includes damage awards exceeding \$250,000
 - Reputational damage and significant expenses from OCR for Title IX violations.
 - Approximately 20 million dollars in damage awards related to sex and gender discrimination claims (school districts)

TITLE IX COMPLIANCE REQUIREMENTS

FOUR KEY ELEMENTS

1. INVESTIGATE
2. END HARASSMENT
3. REMEDY THE EFFECTS
4. PREVENT RECURRENCE

INVESTIGATION PROCESS

- Prompt
- Effective
- Equitable
- Thorough
- Reliable
- Impartial

REMEDIES

- End discrimination
- Prevent Recurrence
- Remedy effects upon complainant and community

INSTITUTIONAL "NOTICE"

- Term of Art
- "Actual Notice"- applied by Courts
- "Constructive Notice"-applied by OCR

***Goal is to move away from a Complaint driven process to a Notice driven process.**

APPROPRIATE REMEDIATION

Remediation Requirement: From the "Notice" throughout the entire process

Appropriate Remedies:

- Counseling
- Medical Services
- Housing accommodation
- Academic accommodations (re-take course, withdraws)
- Review disciplinary actions taken against Complainant
- Training or education initiatives

ACTUAL NOTICE

- Individual files a Title IX grievance
- Individual notifies Title IX Coordinator or other “responsible employee”
- Individual files a complaint with campus police or campus security
- Staff member witnesses harassment/discrimination
- Indirect notice from sources such as flyers posted on campus, media, on-line media, video etc. (YouTube, twitter, etc.)

CONSTRUCTIVE NOTICE

- “Constructive Notice” brings under its ambit all complaints about which the institution **knew, or should have known**
- “Constructive Notice” is a much broader standard than actual notice
- OCR standard more favorable to student complainants than the “actual notice” standard used to determine civil liability in courts.
- Examples: Pervasiveness of harassment; report to an employee that had a duty to report and failed to uphold duty or a complainant was made to an employee that the complainant reasonably believed the employee had the authority to receive complaint.

OCR NOTICE VS. COURT NOTICE

- OCR holds institutions accountable if **any person perceived** to be a **responsible employee** was put on notice and **took no corrective action**.
- Courts apply a different standard, which imposes liability when a **school official with authority** to take corrective action **fails to respond**, or is **deliberately indifferent**.

INSTITUTIONAL RESPONSE

- Institutional Response = Key to Risk Management
- Manner of response either increases legal and administrative liability or diminishes it
- Title IX does not hold institution liable for Title IX violation, but holds institution liable for failing to appropriately respond upon "notice"

TITLE IX RISKS

- **Reputational Risk: Loss of Community Trust**
 - Loss of student trust and engagement
 - Decline admissions and alumni/donor support
 - Impedes recruitment of students and faculty
- **Exposure to lawsuits or OCR Oversight**
 - Climate assessment
 - Training
 - Reporting
- **Loss of Federal funding or fines**

INSTITUTIONAL CHALLENGES

- *Prompt and Effective* response to Title IX Issues
- Understanding scope of Title IX and Recognizing Title IX Behavior
- Civil Rights Investigation Model (Impartial and Objective)
- Staff time and Resources and Staff Training
- Effective Remediation Measures and Prevention Programs
- Effective Title IX Policies and Procedures

INSTITUTIONAL BEST PRACTICES

- Clear Sexual Misconduct Policy
- Communicate policy to all staff, parents, and students
- Strictly enforce policy consistently
- Specify grievance procedures: Formal and Informal Complaints
- Adequate, timely and impartial investigations
- Confidentiality and Anti-Retaliation Provisions

INSTITUTIONAL TITLE IX COMPLIANCE AUDIT

- Who is your Title IX Coordinator?
- Measure effectiveness of Title IX processes and policies
- Title IX Climate Survey
- Civil Rights Investigation Model
- Formative Assessment on Title IX: Administration, Staff, Teachers
- Title IX compliance audit and/or evaluation

TITLE IX POLICIES & PROCEDURES-BEST PRACTICES RESOURCES

- OCR 2001 GUIDANCE
- DEAR COLLEAGUE LETTER APRIL 4, 2011 and OCTOBER 26, 2010
- DEAR COLLEAGUE AND RESOURCE GUIDE APRIL 24, 2015
- OCR RESOLUTION LETTERS & AGREEMENTS
- CASE LAW
- MODEL POLICIES & PROCEDURES

SEXUAL MISCONDUCT POLICY VS. CODE OF CONDUCT

- **Relevant Definitions**
 - Incapacitation
 - Force/Coercion
 - Consent
- **Sexual Misconduct Behavior Defined**
 - non-consensual touching
 - non-consensual sexual intercourse
 - sexual exploitation

KEY ELEMENTS OF AN EFFECTIVE SEXUAL MISCONDUCT POLICY

- Definition of terms: Description of proscribed behaviors
- Statement of Jurisdiction
- Statute of limitations
- Statement of confidentiality limitations
- Complainant Procedures and Appeal Rights
- Statement of rights for complainant and alleged offenders
- Amnesty provision
- Illustrative examples
- Sanctions

INSTITUTIONAL REPORTING PROTOCOLS: SEXUAL MISCONDUCT

MANDATORY REPORTERS VS. RESPONSIBLE EMPLOYEES

- Relevant laws: Title IX, Title VII, State Child Abuse Statutes
- What is to be reported? Criminal or Discriminatory behavior
- Title IX OCR states that liability flows to institutions when "responsible employees" possess knowledge of Title IX violations
- Who defines "Responsible Employee"?
- State law child and sex abuse statutes
- Intersection Title IX and State Child Abuse Statutes

INSTITUTIONAL REPORTING PROTOCOLS

TITLE IX

- TITLE IX imposes the obligation on the institution to investigate and to provide a "prompt and effective remedy".
- Institution incurs Title IX obligations when a complainant has given "notice" to a "responsible employee" or when the institution, in the exercise of reasonable care, should have known, about the assault or harassment.
- Title IX allows institutions to determine who is a "responsible employee".

INSTITUTIONAL REPORTING PROTOCOLS

TITLE VII

- TITLE VII focuses on sexual harassment in the workplace and failure to take action can lead to financial liability for the institution.
- Title VII requires only those individuals that supervise students or employees are required to report.

**QUALITY INVESTIGATIONS:
CIVIL RIGHTS INVESTIGATION MODEL**

- What is a Civil Rights Investigation Model?
- Investigation model is active gathering of information by the investigator(s).
- Investigation model it is not the job of the parties to prove whether a policy was violated. Rather institution's role to determine whether its policies were violated.
- Gatekeeping function
- Key question is who is conducting investigations?

WHY APPLY INVESTIGATION MODEL?

- Sex-based misconduct is not only an institutional behavioral violation, but also a violation of federal civil rights law
- Civil Rights Investigation Model most effective for victim-based violations
- ✓ Investigation process involves strategic information gathering, comprehensive investigation, lends more credibility to information
- ✓ Better information leads to better decisions
- ✓ Title IX investigation required to be impartial and objective

INVESTIGATION IN TEN STEPS

1. Complaint or Notice
2. Preliminary investigation (initial strategy little "i")
3. Gatekeeper Determination
4. Charge (Delivered in person)
5. Strategize investigation
6. Formal Comprehensive Investigation
7. Witness Interviews
8. Information Gathering (Social Media)
9. Analysis
10. Finding: Policy Violation

Title IX PRACTICAL APPROACH

WORK TO UNDERSTAND TITLE IX LANGUAGE AND OCR DEAR COLLEAGUE

- **Advisory Responsibility:** Identify who at the institution is responsible for evaluating, monitoring, and advising senior leaders on updates to Title IX
- **Organizational Governance:** Examine governance structure to determine which resources are best aligned to support Title IX requirements ; Contact peers, or research best practices, for assessment and implementation
- **Policies & Procedures Implementation:** Title IX Officer/Coordinator should oversee implementation; work cross departments to ensure consistent implementation; oversight of proper implementation is critical.

PRACTICAL APPROACH

- **Policies and Procedures Updates:** Title IX Coordinator responsible for ensuring Title IX updates occur with policies and procedures; enlist key stakeholders to participate in working group.
- **Key Policy Administrators:** Determine key stakeholders at an institution who are in the position to administer policies and procedures related to Title IX ; could result in identification of key policy stakeholders in various institutional departments; may include changing job description based on additional duties.
- **Board Updates:** Determine individual responsible for updating the Board on Title IX changes institutionally, legally and legislatively.

QUESTIONS

THANK YOU

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