CURRENT TOPICS IN TITLE IX OF THE EDUCATION AMENDMENTS ACT OF 1972

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TCCIL Preconference
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The Role of the Federal Government
U.S. Education Department

1. Equity
2. Leadership
Congress Over Past 50 Years Enacted Two Types of Education Statutes

- Pure Civil Rights
  - VI, IX, 504, ADA
- Affirmative Action
  - Title I, IDEA, Perkins

Introduction to Title IX

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

- Title IX of the Education Amendments of 1972 20 U.S.C. §1681
Introduction to Title IX

- The Office for Civil Rights of the Department of Education enforces the law prohibiting specific discriminatory activities.
- Applies to elementary, secondary, and postsecondary schools
- Title IX covers any education program or activity receiving Federal funds
  - Entire institution – *Grove City* followed by *Civil Rights Restoration Act of 1988*

Adams Litigation against HEW (1970) – claimed failure to commence enforcement proceedings

- OCR Guidelines
What if a Community College fails to comply with Title IX?

Congress may fix terms on which it disburses grants

A federal grant is much in the nature of a contract in return for the federal funds the grantee agrees to comply with the federally imposed conditions

But New Jersey and Pennsylvania argued to the Supreme Court that USDE cannot recover misspent grant funds.


Federal auditors determined both states misspent Title I funds.
Supreme Court grantees misusing federal funds incur a debt to the Federal Government (citing Section 415 of GEPA) grants must be adjusted on account of overpayments

Citing Pennhurst grantee chose to participate in the program, and as a condition of receiving the grant, gave an assurance that it would abide by the conditions of the grant
Introduction to Title IX

- Programs and activities that receive USDE funds must operate in a nondiscriminatory manner.

- Examples:
  - admissions,
  - recruitment,
  - financial aid,
  - academic programs,
  - student treatment and services,
  - counseling and guidance,
  - discipline,
  - classroom assignment,
  - grading,
  - vocational education,
  - recreation,
  - physical education,
  - athletics,
  - housing
  - and employment.

Designation of Responsible Employee

- Each recipient must designate a Title IX coordinator to coordinate efforts to comply with and carry out responsibilities under Title IX.

- Responsibilities include:
  - Ensuring compliance with Title IX
  - Involvement in drafting/review policies for compliance
  - Educating employees/students
  - Coordinating with law enforcement when necessary
  - Investigating complaints

- Students and employees must be notified.
Complaint Procedure of Recipient

- Must adopt and publish grievance procedures for the District providing for prompt and equitable resolution of student and employee complaints alleging any prohibited action.

Dissemination of Title IX Policy

- What must the notification of the Title IX policy state?
  - School does not discriminate on the basis of sex in its education programs and activities, and that it is required by Title IX not to discriminate in such a manner.
  - Employment and Admissions are included education programs and activities.
  - Inquiries regarding Title IX and its regulations can be referred to the Title IX Coordinator.
  - Name/title, address, phone # and email of Title IX Coordinator.
Who Must Be Notified?

- Applicants for admission and employment
- Students and parents of elementary and secondary school students
- Employees
- Sources of referral of applicants for admission and employment
- All unions or professional organizations holding collective bargaining or professional agreements with the recipient

Notification Method

- Notification
  - Local newspapers
  - Newspapers and magazines operated by the recipient
  - Memoranda or other written communications distributed to every student or employee of the recipient
  - Application forms

- Initial notification must be made within 90 days of the effective date of this act or of the date the act first applies to the recipient, whichever comes later
Distribution of Title IX Policy

- Publications shall be distributed without discrimination on the basis of sex
- Admission and employment recruitment representatives shall be apprised of the policy of nondiscrimination and be required to adhere to the policy

Discrimination on the Basis of Sex

In Admission and Recruitment
In Admission and Recruitment

- No person shall, on the basis of sex, be denied admission, or be subjected to discrimination in admission, by any recipient to which this subpart applies, except as provided in §§106.16 and 106.17.

Specific Prohibitions

- A recipient cannot:
  - Give preference to one person over another on the basis of sex, by ranking applicants separately on such basis;
  - Apply numerical limitations upon the number or proportion of persons of either sex who may be admitted; or
  - Treat one individual differently from another on the basis of sex.
Prohibitions – Tests

- Cannot administer any test or other criterion for admission that has a disproportionately adverse effect on the basis of sex
- Exception:
  - unless the use of test or criterion predicts validly success in the education program or activity in question and
  - alternative tests or criteria which do not have such a disproportionately adverse effect are unavailable

Prohibitions – Marital/Parental Status

- Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex
- Shall not discriminate against or exclude any person on the basis of:
  - Pregnancy
  - Childbirth
  - Termination of pregnancy
  - Recovery therefrom
Prohibitions – Marital/Parental Status (con’t)

- Disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom are treated in the same manner and under the same policies as any other temporary disability or physical condition.

- Cannot ask for marital status of an applicant for admission:
  - Includes asking if applicant is “Miss” or “Mrs.”
  - Exception: can ask for the sex of an applicant for admission only if applicants of both sexes are also asked and if the results of asking are not used in connection with discrimination prohibited by Title IX.

Preference in Admission

- Cannot give preference to applicants for admission on the basis of attendance at a school which admits only or predominantly members of one sex if the preference discriminates on the basis of sex in violation of subpart C.
Nondiscriminatory Recruitment

- A recipient to which this subpart applies shall not discriminate on the basis of sex in the recruitment and admission of students.
- May have to undertake additional recruitment efforts for one sex as remedial action
- May choose to undertake such efforts as affirmative action

Recruitment at Certain Institutions

- Cannot recruit primarily or exclusively at educational institutions, schools or entities that admit students only or predominantly members of one sex, if doing so would discriminate on the basis of sex
EXAMPLE

Does this admission requirement violate Title IX?

- A community college requires students who wish to enroll in its construction management program to have taken classes in construction technology in high school. Few female students are enrolled in the program.
- Each year a number of female students who express interest are not able to enroll because they did not take classes in construction technology in high school.

Example

- Necessary question:
  - Is the prerequisite high school course validated as essential to participate in the program and shown to predict success in the program?
  - Remedy:
    - Convene a committee to study whether taking previous classes in construction technology is essential to participate in the construction management program
    - College could offer an introductory class to all students who did not take classes in construction technology in HS
    - College could explore outreach programs or partnerships with area HS to encourage all students to take necessary prerequisite course to build a more equal pipeline
Discrimination on the Basis of Sex

Access to classes and schools
Comparable facilities
Athletics
Counseling
Single Sex Classes and Schools

Segregation of Students By Sex

Introduction

- Separate programs for members of each sex: separate course, services and facilities must be comparable with some exceptions
- Exemption may be requested by educational institutions controlled by religious organizations whose tenets conflict with requirements of Title IX
Education Programs or Activities

- No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any academic, extracurricular, research, occupational training, or other education program or activity operated by a recipient which receives Federal financial assistance.

In Education Programs or Activities

- Recipients cannot, on the basis of sex:
  - Treat one person differently from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service;
  - Provide different aid, benefits, or services or provide aid, benefits, or services in a different manner;
  - Deny any person any such aid, benefit, or service;
In Education Programs or Activities (con’t)

□ Recipients cannot, on the basis of sex:
  □ Subject any person to separate or different rules of behavior, sanctions, or other treatment;
  □ Apply any rule concerning the domicile or residence of a student or applicant, including eligibility for in-state fees and tuition;

□ Recipients cannot, on the basis of sex:
  □ Aid or perpetuate discrimination against any person by providing significant assistance to any agency, organization, or person which discriminates on the basis of sex in providing any aid, benefit or service to students or employees;
  □ Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity.
Aid, Benefits or Services Not Provided By Recipient

Must develop and implement a procedure designed to ensure the operator of the other education program takes no prohibited action affecting any applicant, student, or employee of the recipient if:

- Participation is required by any applicant, student, or employee in an education program or activity not operated by the recipient, or
- The recipient facilitates, permits, or considers the participation as part of or equivalent to an education program or activity operated by the recipient

Examples:
- educational consortia
- cooperative employment
- student-teaching assignments

Recipient cannot facilitate, require, permit, or consider such participation if such action occurs
A recipient cannot provide or carry out any of its education programs or activities separately on the basis of sex, or require or refuse participation by any of its students on the basis of sex.
Access to Classes and Schools

- Exceptions:
  - (1) Contact sports in physical education classes
  - (2) Ability grouping in physical education classes
  - (3) Human sexuality classes (HS level)
  - (4) Choruses

Contact Sports in Physical Education Classes

- Separation of students by sex is allowed within physical education classes or activities during participation in:
  - Wrestling
  - Boxing
  - Rugby
  - Ice hockey
  - Football
  - Basketball
  - Other sports the purpose or major activity of which involves bodily contact
Ability Grouping in Physical Education Classes

- Grouping of students in physical education classes and activities by ability is allowed
- Should be assessed by objective standards of individual performance developed and applied without regard to sex

Choruses

- Requirements based on vocal range or quality area allowed
- May result in all-male or all-female choruses
Comparable Facilities

- § 106.33 A recipient may provide separate toilet, locker room, and shower facilities on the basis of sex, but such facilities provided for students of one sex shall be comparable to such facilities provided for students of the other sex.

Athletics

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Athletics

- Reduction or elimination of teams not required by Title IX
- Elimination of teams reduces opportunities for students rather than enhancing their opportunities
- Contrary to the spirit of Title IX

§ 106.41 No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, be treated differently from another person or otherwise be discriminated against in any interscholastic, intercollegiate, club or intramural athletics offered by a recipient, and no recipient shall provide any such athletics separately on such basis.
Title IX applies to athletics in:
- Participation
- Scholarships
- Additional Athletic Program Components

Separate teams for members of each sex are allowable if:
- Selection is based upon competitive skill or
- The activity is a contact sport
Athletics – Separate Teams Exception

- Members of the excluded sex must be allowed to try-out:
  - If there is no team for members of the other sex
  - Athletic opportunities for members of that sex have previously been limited
  - Unless the sport is a contact sport

Athletics – Contact Sports

- Examples:
  - Boxing
  - Wrestling
  - Rugby
  - ice hockey
  - Football
  - basketball
  - other sports the purpose or major activity of which involves bodily contact
Athletics – Equal Athletic Opportunity

- Interscholastic, intercollegiate, club or intramural athletics provided by recipient must provide equal athletic opportunity for members of both sexes

Athletics – Equal Opportunity

- Standard for compliance is quality, not quantity
  - Total expenditures for members of each sex or expenditures for male and female teams can be unequal
  - However, failure to provide necessary funds for teams for one sex may be considered in assessing equality of opportunity for members of each sex
Athletics – Equal Opportunities

Factors to consider in determining whether equal opportunities are available:

Three-Part Test:
- Whether participation opportunities are provided in numbers substantially proportionate to female/male respective enrollments (proportionality)
- Where members of one sex have been underrepresented, whether institution can show a history of continuing practice of program expansion based on interest/abilities of that sex (progress)
- If members of one sex have been underrepresented and the school cannot show history of program expansion, whether it can demonstrate interest/abilities are fully accommodated by the present program (satisfied interest)

“Laundry List”

Factors to consider in determining whether equal opportunities are available (continued):
- Equipment and supplies;
- Scheduling of games and practice time;
- Travel and per diem allowance;
- Opportunity to receive coaching and academic tutoring;
- Assignment and compensation of coaches and tutors;
- Locker rooms, practice and competitive facilities;
Factors to consider in determining whether equal opportunities are available (continued):
- Medical and training facilities and services;
- Housing and dining facilities and services;
- Publicity
- Provision of support services (administrative/secretarial)
- Recruitment

Access to Institutions of Vocational Education

A recipient shall not, on the basis of sex, exclude any person from admission to any institution of vocational education operated by that recipient.
Counseling

- § 106.36 A recipient shall not discriminate against any person on the basis of sex in the counseling or guidance of students or applicants for admission.

- Disproportion in classes
  - Cannot be the result of discrimination on the basis of sex in counseling or appraisal materials or by counselors

Counseling – Use of Materials

- Use of Appraisal and Counseling Materials
  - Cannot use different materials for students on the basis of their sex
  - Cannot use different materials that permit or require different treatment of students
  - Exception:
    - if the different materials cover the same occupations and interest areas
    - Use is shown to be essential to eliminate sex bias
Counseling – Use of Materials

- Internal procedures must be developed and used to ensure materials do not discriminate on the basis of sex.
- If use of materials results in a substantially disproportionate number of members of one sex in any course of study or classification, necessary action should be taken to ensure the disproportion is not the result of discrimination in the instrument or its application.

Prohibitions - Martial or Parental Status

- A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.
Pregnancy

- A recipient shall not discriminate against any student, or exclude any student, on the basis of:
  - Pregnancy
  - Childbirth
  - False pregnancy
  - Termination of pregnancy
  - Recovery from the above
  - Unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient

Pregnancy (con’t)

- Such a student may be required to obtain a physician’s certification that the student is physically and emotionally able to continue participation

- So long as that certification is required of all students for other physical or emotional conditions requiring the attention of a physician
Pregnancy (con’t)

- Separate program for pregnant students
  - Must be comparable to what is offered to non-pregnant students
  - Admittance must be voluntary
- Medical/Hospital Benefits
  - Pregnancy or other conditions must be treated in the same manner and under same policies as any other temporary disability
  - No leave policy for students: pregnancy or related conditions must be allowed as a justification for a leave of absence

Example
Does this Practice Violate Title IX?

- The director of a community college’s advance manufacturing program does not permit students to take the required machine process lab course while they are pregnant because she thinks it is too dangerous for any pregnant person to use the machines.
  - This course is prerequisite for many other required courses in the program.
Example

What must the school do to remedy this violation?
- Permit all students to enroll and fully participate in this course regardless of whether they are pregnant
- Offer training to the program’s director/other admin. and faculty on the requirements of Title IX
In Employment in Education Programs or Activities

- Recruitment
- Compensation
- Pre-employment inquiries
- Sex as an occupational qualification

Discrimination on the Basis of Sex in Employment

- No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination in employment, or recruitment, consideration, or selection therefor, whether full-time or part-time, under any education program or activity operated by a recipient which receives Federal financial assistance.
Employment Decisions

- All employment decisions in any education program or activity operated by such recipient must be made in a nondiscriminatory manner.
- Decisions shall not limit, segregate, or classify applicants or employees in any way which could adversely affect any applicant's or employee's employment opportunities or status because of sex.

Relationships With Other Agencies

- Cannot enter into any contractual or other relationship that subjects employees or students to prohibited discrimination.
  - Includes relationships with:
    - employment and referral agencies
    - labor unions
    - organizations providing or administering fringe benefits to employees of the recipient.
Application

- Recruitment, advertising, and the process of application for employment;
- Hiring, upgrading, promotion, consideration for and award of tenure, demotion, transfer, layoff, termination, application of nepotism policies, right of return from layoff, and rehiring;
- Rates of pay or compensation, and changes in compensation;
- Job assignments, classifications and structure,

Application (con’t)

- Terms of any collective bargaining agreement;
- Granting and return from leaves of absence,
- Fringe benefits
- Selection and financial support for training
- Employer-sponsored activities,
- Any other term, condition, or privilege of employment
Preferences

- Preferences shall not be granted to applicants for employment based on attendance at any educational institution that admits only or predominantly members of one sex
- Preferences given must not have the effect of discriminating on the basis of sex

Nondiscriminatory Recruitment and Hiring

- A recipient shall not discriminate on the basis of sex in the recruitment and hiring of employees.
- If recipient is found to be discriminating on the basis of sex in the recruitment or hiring of employees:
  - The recipient shall recruit members of the discriminated to overcome the effects of such past or present discrimination
Recruitment Patterns

- A recipient shall not recruit primarily or exclusively at entities which furnish as applicants only or predominantly members of one sex if such actions have the effect of discriminating on the basis of sex.

Compensation

- No policies or practices, on the basis of sex, can:
  - Make distinctions in rates of pay or other compensation
  - Results in the payment of unequal wages to employees of one sex and those of the opposite sex for equal work that required equal performance.
Job Classification and Structure

- A recipient shall not:
  - Classify a job as being for males or for females;
  - Maintain or establish separate lines of progression based on sex;
  - Maintain or establish separate lines of progression for similar jobs, position descriptions, or job requirements which classify persons on the basis of sex
    - Allowed if sex is a bona-fide occupational qualification for the position.

Fringe Benefits

- Definition: Any medical, hospital, accident, life insurance or retirement benefit, service, policy or plan, any profit-sharing or bonus plan, leave, and any other benefit or service of employment not subject to the provision of §106.54.
Prohibitions of Fringe Benefits

- A recipient shall not:
  - Discriminate on the basis of sex in making fringe benefits available to employees or to spouses, families, or dependents of employees;
  - Administer a fringe benefit plan which does not provide either for equal periodic benefits for members of each sex, or for equal contributions to the plan by such recipient for members of each sex; or
  - Administer a pension or retirement plan which establishes different optional or compulsory retirement ages based on sex.

Marital or Parental Status

- Cannot apply policy or take any employment action:
  - Concerning the potential marital, parental, or family status of an employee or applicant for employment which treats persons differently on the basis of sex; or
  - That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in his/her family.
Pregnancy

- A recipient shall not discriminate against or exclude from employment any employee or applicant for employment on the basis of:
  - Pregnancy
  - Childbirth
  - false pregnancy
  - termination of pregnancy,
  - or recovery therefrom.

Pregnancy as a Temporary Disability

- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom and any temporary disability resulting therefrom as any other temporary disability for all job related purposes, including commencement, duration and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, and under any fringe benefit offered to employees by virtue of employment.
Pregnancy Leave

- If no leave policy or employee has insufficient leave, pregnancy and conditions stated in slide 84 are sufficient to justify leave of absence without pay for a reasonable period of time.
- At end of leave, employee shall be reinstated to same status prior to leave or to a comparable position
  - No decrease in rate of compensation
  - No loss of promotional opportunities, or any other right or privilege of employment.

Pre-Employment Inquiries

- **Marital status**
  - Cannot make pre-employment inquiry as to the marital status of an applicant for employment
  - Cannot ask whether applicant is “Miss or Mrs.”
Pre-Employment Inquiries

- **Sex**
  - Can make pre-employment inquiry of sex of an applicant for employment
  - Only if it is made equally of applicants of both sexes and
  - If the results are not used to discriminate

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Sex as a Bona-Fide Occupational Qualification

- A recipient may take prohibited action in discriminating based on sex in employment if:
  - Sex is a bona-fide occupational qualification
  - Consideration of sex is essential to successful operation of the employment function concerned.
- Employee's sex can be considered in relation to employment in a locker room or toilet facility used only by members of one sex
Sex as a Bona-Fide Occupational Qualification

- Not allowed:
  - Alleged comparative employment characteristics
  - Stereotyped characterizations of one or the other sex,
  - Preference based on sex of the recipient, employees, students

Sexual Harassment/Violence Obligations under Title IX
Sexual Harassment

- Prohibited by Title IX of the Education Amendments of 1972 under the circumstances described in the Guidance.
- Students are protected in any of the academic, educational, extracurricular, athletic, and other programs or activities of schools, regardless of the location.
- Both male and female students are protected.

What is Sexual Harassment?

- Sexual harassment is conduct that:
  - Is sexual in nature
  - Is unwelcome
  - Denies or limits a student’s ability to participate in or benefit from a school’s education program (i.e., creates a hostile environment)
Examples of Sexual Conduct

- Making sexual propositions or pressuring students for sexual favors
- Touching of a sexual nature
- Writing graffiti of a sexual nature
- Displaying or distributing sexually explicit drawings, pictures, or written materials
- Performing sexual gestures or touching oneself sexually in front of others
- Telling sexual or dirty jokes
- Spreading sexual rumors or rating other students as to sexual activity or performance
- Circulating or showing e-mails or Web sites of a sexual nature.

Unwelcome Sexual Conduct

- Definition: If the student did not request or invite the conduct and considered it to be undesirable or offensive.
- Factors affecting whether a student was capable of welcoming the sexual conduct:
  - Age of student
  - Nature of conduct
  - Other relevant factors
- Student’s submission to the conduct or failure to complain does not always mean the conduct was welcome
Sexual Conduct: Denying or Limiting a Student’s Ability to Participate

- Types of sexual conduct that can deny or limit a student’s ability to participate in or benefit from a school’s program:
  - When a teacher or other school employee conditions an educational decision or benefit on the student’s submission to unwelcome sexual conduct
  - When a teacher, school employee, other student, or third party creates a hostile environment that is sufficiently serious to deny or limit a student’s ability to participate in or benefit from the school’s program

Factors Not Considered:
- If student resists and suffers the threatened harm or submits to and avoids the threatened harm.

Who can engage in the conduct?
- Teachers and other school employees can engage in conduct conditioning an educational decision or benefit on the student’s submission to unwelcome sexual conduct and conduct creating a hostile environment
- Students and third parties can engage in only conduct creating a hostile environment
Hostile Environment Factors

- Consider:
  - Adverse affect conduct had on student’s education
  - Type, frequency, or duration of conduct
  - Identity, age, and sex of harasser(s) and victim(s)
  - Relationship between harasser and victim
  - Number of individuals who engaged in harassing conduct and at whom the harassment was directed

Factors (con’t)

- Size of the school, location of the incidents, and context in which they occurred
- If other incidents occurred at the school involving different students.

- Conduct does not have to be repetitive
- If severe enough, single or isolated incidents can create a hostile environment
- Objective/subjective consideration – “reasonable person in alleged victim's position”
Liability for Student-to-Student Harassment

- **Davis v. Monroe County Board of Education (1999)**
  - A student may recover monetary damages from a school district in a case of student-on-student sexual harassment where suit is brought under Title IX

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**Liability for Student-to-Student Harassment**

- **Elements:**
  - District has "actual notice" of the harassment and is "deliberately indifferent" to the harassment
  - Harassment must be so "severe, pervasive, and objectively offensive" that it deprived the student victim of access to educational opportunities or benefits provided by the school district
Liability for Student-to-Student Harassment (con’t)

- Elements (continued):
  - School must have authority to take remedial action against the harasser
  - Harassment must occur "under the operations" of the school district

Liability for Student-to-Student Harassment

- School must:
  - Take effective corrective actions to stop the harassment
  - Prevent its recurrence
  - Remedy the effects on the victim that could reasonably have been prevented had it responded promptly and effectively.
“A recipient shall adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part”

- 34 CFR § 106.8(b)
Grievance Procedures

- **Purpose:**
  - To determine whether a particular act, policy, or practice of a recipient complies with Title IX regulations
  - To provide the steps necessary to correct the policy or practice that does not comply with Title IX regulations and to remedy any effects of discrimination

Grievance Procedures (con’t)

- Can use discrimination complaint procedures for complaints of sex harassment/sex violence
- Recommended to develop grievance procedures tailored specifically to allegations of harassment
- Must effectively provide for prompt and equitable resolution of complaints
Guidelines for Adopting Grievance Procedures

- One for students must be adopted
- One for employees must be adopted
- Or one consolidated procedure can be adopted

Requirements for Grievance Procedures

- Requirements that must be specified/described:
  - Notice to students and employees of the procedures, including how and where to file a complaint
  - Application of the procedures to complaints alleging discrimination and harassment on all protected bases carried out by employees, students, or third parties
  - Adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence (preponderance of the evidence)
  - Whether there is a right to a hearing
Requirements for Grievance Procedures (cont.)

- Designated and reasonably prompt timeframes for the major stages of the complaint process and appeal(s) (DCL estimates 60 days)
- Notice to the parties in writing of the outcome of the complaint and the basis for the decision;
- Assurance that the College will take steps to prevent the recurrence of any discrimination and harassment and to correct its discriminatory effects on the complainant and others, if appropriate

Requirements for Grievance Procedures (Cont.)

- Prohibition against retaliation
- A description of the role of the Title IX coordinator and contact information for that person, including his or her name or title, address, and telephone number
- Steps for appeal
- Channels for pursuing action outside of the agency
Requirements for Grievance Procedures (Sexual Harassment/Violence)

- Reporting policies and protocols, including provisions for confidential reporting (Confidentiality vs. maintain safe environment)
- Notice of potential remedies/sanctions and sources of counseling, advocacy and support
- Schools must disclose to the complainant information about the sanction imposed on the perpetrator when the sanction directly relates to the harassed student.
  - But, Clery Act (20 U.S.C. §1092(f)) requires that both parties be informed of the outcome, including sanction information, of any institutional proceeding alleging a sex offense. Therefore, colleges and universities may not require a complainant to abide by a non-disclosure agreement, in writing or otherwise.
- The grievance procedures may include voluntary informal methods (e.g., mediation) for resolving some types of sexual harassment complaints.
  - Complainant must be notified of the right to end the informal process at any time and begin the formal stage of the complaint process.
  - Cases involving allegations of sexual assault, mediation is not appropriate.
- Interim measures to protect complainant

OCR will examine whether the college:

- Maintains documentation of any proceedings
- Provides training for those implementing grievance procedures (Title IX coordinator, investigator, adjudicator) in:
  - Handing of complaints of sexual harassment/violence
  - School’s grievance procedures;
  - Confidentiality requirements
Requirements for Grievance Procedures (Sexual Harassment/Violence)

- OCR will examine whether the college (cont.):
  - Does not allow conflicts of interest (real or perceived) by those handling the procedures
  - Informs students at regular intervals of the status of the investigation
  - Includes a range of potential remedies and sanctions
  - Addresses confidentiality for the complainant/victim; and
  - Disallows evidence of past relationships

Dissemination of Grievance Procedures

- Must disseminate at least annually
- Suggested Methods:
  - In student handbooks and course catalogs
  - District calendar, newsletter and student newspapers
  - On staff bulletin boards and in administrative offices and faculty rooms
  - Inserted in the first employee pay envelope of each school year
  - Ask teachers to distribute and explain during scheduled class time
Violence Against Women Reauthorization Act of 2013

- Amends Clery Act
- Institutions must compile statistics for:
  - Dating violence
  - Domestic violence
  - Sexual assault and
  - Stalking
- Statement that these acts are prohibited

ASR must include:
- Definition of “consent”
- Description of safe and positive options for bystander intervention
- Information on risk reduction
- Ongoing prevention and awareness campaigns for students and employees
- Policies and procedures after a sex offense occurs
ASR Policies and Procedure requirements highlights:

- Proceeding official must have received training on the issues related to date violence, domestic violence, sexual assault, and stalking
- Provide accuser and accused with same opportunities to have other present during any proceeding (activities related to resolution), including opportunity to have advisor of their choice present.

ASR Policies and Procedure requirements highlights (cont.):

- Cannot limit choice of provider, but can establish participation limitation
- Notification of meetings when both parties will be present
- Equal access to any information which will be used during informal/formal disciplinary meetings and hearing
- Simultaneous notification in writing to both parties of results, appeal procedures, any change in result and when results become final
Who Can File a Complaint with OCR?

- Anyone who believes there has been an act of discrimination on the basis of sex against any person or group in a program or activity which receives ED financial assistance.
- The person or organization filing the complaint does not have to be a victim of the alleged discrimination but may complain on behalf of another person or group.
Complaint Requirements

- Sent to the OCR enforcement office that serves the state where the alleged discrimination occurred
- Must be filed within 180 days of the date of the alleged discrimination
  - Unless the time for filing is extended for good cause by the Enforcement Office Director

Complaint Requirements (con’t)

- Complaint letters should explain:
  - Who was discriminated against
  - In what way
  - By whom or by what institution or agency
  - When the discrimination took place
  - Harmed party
  - Who can be contacted for further information
  - Contact info of the complainant(s) and the alleged offending institution or agency
  - Other background information as possible about the alleged discriminatory act(s)
OCR Involvement

- OCR enforcement offices may be contacted for assistance in preparing complaints
- OCR keeps the identity of complainants confidential

What is the Relationship between Title IX and Transgender Students?
1. October 16, 2010 USDE Dear Colleague Letter (DCL) on Harassment and Bullying
3. Recent lawsuits regarding Title IX and transgender students

DCL on Harassment and Bullying

- On October 16, 2010 USDE issued a DCL:
  - Title IX protects all students, including LGBT students, from sex discrimination.
DCL on Transgender Students

May 2016 joint DCL on transgender students:

- “treat a student’s gender identity as the student’s sex for purposes of Title IX”
- “school must not treat a transgender student differently from the way it treats other students of the same gender identity”
- must “treat students consistent with their gender identity even if their education records or identification documents indicate a different sex.”

Schools have a responsibility to:

1. Maintain a safe and nondiscriminatory environment for all students, including transgender students
2. Use names and pronouns consistent with gender identity
3. Permit transgender students to participate in sex-segregated activities and use facilities consistent with gender identity
Restrooms and Locker Rooms

A school may provide separate facilities on the basis of sex, but must allow transgender students access to facilities consistent with their gender identity.

Discipline

- May not discipline students or exclude them from participating in activities for appearing or behaving in a manner that is consistent with their gender identity or that does not conform to stereotypical notions of masculinity or femininity
  - yearbook photographs
  - school dances
  - graduation ceremonies
Family Educational Rights and Privacy Act (FERPA) prevents the nonconsensual disclosure of personally identifiable information (PII) from a student's education records (e.g., a student's birth name or sex assigned at birth).

What about directory information?

- may disclose directory information if it would not generally be considered harmful or an invasion of privacy.
- may not designate students' sex, including transgender status, as directory information.
- must allow eligible students or parents time to request that the school not disclose a student’s directory information.
Best Practices for Protecting Privacy Could Include:

- **Develop support team**
  - Ensure correct pronoun use
  - Develop plan for transitioning while at school
  - Discuss extent of parent involvement
  - Eliminate arbitrary gender dividers

- **Restroom/locker room privacy**
  - Provide all students with option for greater privacy

- **Approaching requests to amend records**
  - Changing name/pronoun in file
  - Developing second file
  - Section for "preferred name"
  - Students who transition post-graduation, option to amend file

Recent Lawsuits

- Pending lawsuits regarding the Administration’s Title XI interpretation and whether transgender students have a right to use the bathroom conforming to their gender identity rather than their sex assigned at birth.

  - **North Carolina v. United States**, No. 16-238 (E.D.N.C. filed May 9, 2016);
  - **United States v. North Carolina**, 16-425 (M.D.N.C filed May 9, 2016);
Questions?

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