Goals for this Morning

• Be able to **identify** illegal sex discrimination in education
• Be able to work with your team to **develop practices** that avoid sex discrimination in your school district
• Understand key elements of a good investigation

What do you know?

Please turn to your two neighbors and:

• Tell them your name and role in your school district
• Share one example of illegal sex discrimination in the school setting
• Share one example of legal sex discrimination in the school setting
• Describe your role in avoiding illegal sex discrimination in your school district
• You have 1 minute!
Sex Discrimination Statutes

• Title IX – Educational Institutions
• Title VII – Employment
• Equal Protection Clause
• Elliott-Larsen Civil Rights Act

Enforcement

• No civil rights police
• Courts - $ penalties, orders
• Department of Education, Office of Civil Rights
• Michigan Civil Rights Commission
• The community, media, legislature?

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 educational program or activity receiving Federal financial assistance.”

The colored words are the elements of a Title IX claim.

Key Terms

• Sex - The classification of a person as male or female based on bodily characteristics, including chromosomes, hormones, internal and external reproductive organs, and secondary sex characteristics.
Key Terms

- Gender - The social or cultural expression of identity, that for most people, corresponds largely with their biological sex. Gender expression can include the clothes people wear, hair styles, social roles, etc. Gender expression varies by person, time, and place.

Today’s Focus: Title IX

- Title IX's Discrimination on the Basis of Sex
  - Disparate treatment (generally)
  - Disparate treatment in athletics
  - Sexual harassment
    - Quid pro quo
    - Hostile environment

General Disparate Treatment

- When someone is treated less favorably than others because of their sex.
Disparate Treatment in Athletics

- 3 Athletic Compliance Areas
  - Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes.
  - Whether there is an equivalence in various athletic benefits, services and opportunities.
  - Whether there is an equivalence of student financial assistance or scholarships.

OCR Athletic Test

- Participation opportunities proportionate to enrollment?
- If underrepresentation, then is there a history of program expansion to respond to developing interest and abilities?
- If underrepresentation and no history of expansion, is there evidence that the interests and abilities of underrepresented sex have been fully accommodated?

Beware of the Booster Blunder!

- Even if funding for teams is raised privately, those resources must yield equal opportunity, regardless of sex.
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Quid Pro Quo Sexual Harassment

- School employee proposes trade with student
- Single incident could trigger liability

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Hostile Environment Sexual Harassment

Unwelcome conduct of a sexual nature, including
• Sexual advances, requests for sexual favors, verbal, nonverbal, or physical conduct of a sexual nature
• Student-to-student
• Employee-to-student

Who has ever been?

Please turn to your two neighbors and, if not too uncomfortable, share whether you have:
• Been catcalled?
• Touched without permission by a stranger?
• Insulted using sexualized (e.g. slut, bitch, ho) words by a man?
• Insulted using sexualized words by a woman?
• Had a stranger say something sexual to them?
• Had a stranger tell them they were hot?
• (one minute!)

What about young women?

In a national survey, Harvard School of Education found that 87% of women aged 18-25 had experienced at least one of those.
What about young women?

In a national survey, Harvard School of Education found that 55% of women aged 18-25 had been catcalled.

62% of women aged 18-25 reported that they would feel “offended,” “scared,” or “angry” in response to being catcalled.

What about young women?

In a national survey, Harvard School of Education found that 41% of women aged 18-25 had been touched by a stranger without permission.

What about young women?

In a national survey, Harvard School of Education found that 47% of women aged 18-25 had been insulted with sexualized words (e.g. slut, bitch, ho) by a man.
What about young women?

In a national survey, Harvard School of Education found that 42% of women aged 18-25 had been insulted with sexualized words (e.g. slut, bitch, ho) by a woman.

What about young women?

In a national survey, Harvard School of Education found that 52% of women aged 18-25 had a stranger say something sexual to them.

What about young women?

In a national survey, Harvard School of Education found that 61% of women aged 18-25 had a stranger tell them they were “hot.”
Hostile Environment Sexual Harassment

Key Elements of a Claim

• Student was subjected to unwelcomed sexual harassment
• Harassment was based on sex
• That harassment unreasonably interfered with student’s education and created an intimidating, hostile, or offensive educational environment that seriously affected the psychological well-being of the student, and
• The school was responsible (liability)

OCR Enforcement vs. Private Litigation Standards

• For OCR, “when 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” under Title IX.
• The standard for private lawsuit for monetary damages is actual knowledge and deliberate indifference
Liability Triggers: School Employee-on-Student
- Age and education level of student
- Employee’s roll, authority over student
- When and where harassment took place
- Knowledge or deliberate indifference of school district

Liability Triggers: School Student-on-Student
- Harassment that is severe, pervasive, and objectively offensive.
- As a result, the victim is deprived of access to educational opportunities or benefits.
- School has actual knowledge of the harassment.
- School had the ability to exercise substantial control over the harasser and the context in which the harassment occurs; the school must have the ability to take remedial action.
- School is deliberately indifferent to the harassment and fails to respond appropriately.

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An ounce of prevention is worth a pound of cure.
Consequences of Sex Discrimination

Please turn to your neighbor and make a list of at least 3 consequences of illegal sex discrimination in schools.

- Children’s lives harmed
- Employee’s lives harmed
- Terrible public relations in era of schools of choice
- Time wasted managing controversy rather than educating kids
- Money damages - $600,000 in one Michigan school district
- OCR Enforcement – Resolution Agreement, fines against federal aid theoretically possible

Preventing Sex Discrimination

- Title IX Coordinator
- Nondiscrimination Policy and Notice
- Grievance Procedures
- Pro-active culture setting
Title IX Coordinator

• Every district needs one
• Everyone needs to know
• Unconflicted
• Duties

Grievance Procedures

• Every district needs to adopt and publish them
• Must provide prompt and equitable resolution of student and employee complaints
• OCR has proposed changes to grievance procedure requirements (November 2018)
• Claimants need not go through grievance procedures
• Know the basic required elements before adoption (see handout)

What about young women?

In a national survey, Harvard School of Education found that 87% of women aged 18-25 had experienced at least one sexual harassing example surveyed (touching, catcalling, etc.).
Proactive Culture Setting?

- 76% of respondents had never had a conversation with their parents about how to avoid sexually harassing others.
- Most had not had conversations about avoiding sexual harassment in school either.

Proactive Culture Setting?

- 61% of respondents had never had a conversation with parents about "being sure your partner wants to have sex and is comfortable doing so before having sex."
- 56% of respondents had never had a conversation in school about the importance of "not pressuring someone to have sex with you."
- 62% had never had a conversation in school about not having sex after the other person has said "no."

Proactive Culture Setting?

- Please cluster up with your neighbors
  - How is your school doing as to developing a culture that avoids sexual harassment?
  - How could your district improve the culture?
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Investigations of Sex Discrimination Allegations

• Title IX? School rules? Criminal law? All of the above?
• Notice
• Finding out what happened
• Interim measures
• Confidentiality
• Outcomes and next steps

Title IX? School rules? Police?

• Who is complainant?
• Where did the alleged discrimination happen?
• When did it happen?
• Who is the alleged perpetrator?
• Is it possible that a criminal law has been breached?
• How did school find out about an alleged occurrence?
When must a school act?

- If the school knows or reasonably should know that there is harassment taking place, it must take “immediate effective action.”
- Anonymous letter?
- No specific number of days to investigate, but OCR wants good faith effort

Confidentiality Requests

- Don’t promise absolute confidentiality
- Explain to complainant that confidentiality could hinder response
- Explain no retaliation allowed

Investigations

- Policy on contacting police and parents?
- Coordinating with police
- Secure evidence – including electronic
- Written notice to responding party? (see Q&A #6)
- Interview witnesses with open ended questions
- Tell person to be honest
- Explain to complainant and alleged perp that notice of outcome will be given
- No retaliation!
Evidentiary Standard?
- Usually preponderance of the evidence for school investigations
- OCR Proposed Guidance – maybe clear and convincing
- Police – beyond a reasonable doubt

Interim measures
- Counseling
- Extensions of time or other course modifications
- Modification of class schedules
- Campus escorts
- Restrictions on contact between parties
- Leaves of absence
- Increased security or monitoring

Findings
- Investigation should lead to findings of fact and conclusions on each allegation of misconduct
- Each party should have same access to information used
- Each party should have opportunity to respond
- Each party should have same procedures available
Outcomes - Discipline

- Discipline must balance enforcing code of conduct with impact to student if separated from education (Q & A #9)
- Discipline must be proportionate to violation (Q & A #9)

Outcomes - Notice

- Written notice to reporting party should include:
  - Whether school found alleged conduct occurred
  - Individual remedies offered to reporting party
  - Sanctions on respondent that directly relate to reporting party, and
  - Other steps school has taken to eliminate hostile environment, if found.
- Written notice to respondent should include:
  - Summary of findings
  - Sanctions
  - Appeal rights and retaliation prohibition

Corrective Action

- Reasonable
- Timely
- Age-appropriate
- Effective
- Tailored to specific situation and context
- Examples:
  - Intervention with harasser
  - Services, accommodations to harassed student
  - Training for employees
  - Training for students
  - Training for parents
  - Re-evaluation!
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