TITLE IX: IMPLICATIONS FOR HIGHER EDUCATION

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Session Overview

- The laws
  - Title IX of the Education Amendments Act of 1972
  - Title VII of the Civil Rights Act of 1964
  - State Department of Civil Rights

- Title IX as it relates to Title VII of the Civil Rights Act of 1964

- Implications within higher education

- Issues covered under Title IX

- Recommendations
The Laws

Title IX of the Education Amendments Act of 1972
Title VII of the Civil Rights Act of 1964
State Department of Civil Rights
Title IX of the Education Amendments Act of 1972

“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.”

(20 U.S.C.A. §§ 1681 et seq.)
Prohibits discrimination of protected class: sex/gender

Employment and education statute

Enforced through the courts or the US Department of Education (OCR)

Funding statute, not a liability statute
Title IX prohibits discrimination based on sex in education programs and activities that receive federal financial assistance (public and private).

Examples of types of discriminations covered under Title IX:
- sexual harassment
- failure to provide equal opportunity in athletics
- discrimination in a school’s science, technology, engineering, and math (STEM) courses and programs
- discrimination based on pregnancy
Title IX prohibits retaliation for filing an Office of Civil Rights (OCR) complaint or for advocating for a right protected by Title IX.

Enforced by the OCR:
- Every campus is required to have an identified office/location for reporting.

Prohibits discrimination in employment, but this type of issue is typically referred to the Equal Employment Opportunity Commission (EEOC).
Title VII of the Civil Rights Act of 1964

- Prohibits discrimination based on race, color, national origin, religion, gender and sex
  
  What does sex mean: “coverage of lesbian, gay, bisexual and transgender individuals”

- Employment Statute
  
  Prohibits discrimination in all terms and conditions of employment
Michigan Department of Civil Rights
- May be enforced administratively (180 days) or filing a complaint in circuit court within 3 years
- File a complaint or request mediation

Elliot Larson Civil Rights Act
- Forbids discrimination based on a person’s religion, race, color, national origin, age, sex, height, weight and marital status
- Sex does not include LGBT
- Age does include everyone, not just over 40
- Religion does include atheists and agnostics
LGBTQ Scenario

background

- A faculty member has a student in his class that failed in a prior semester
- Student has struggled with tests and the faculty member has given the student extra time and tutoring in his office to help the student
- As literature class, the students are required to read sections of books in class out loud
- They follow the seating and when their time to read comes up they read the section of the book at that point
Scene

- When it is the student’s time to read the book section it is dealing with a gay character. No problem occurs in class.

After the end of the semester (the student failed again) a complaint for sexual harassment is filed against the professor based on gender identity. Claim was that professor singled him out because he was gay.

Process

- Professor is interviewed.
- Many classmates are interviewed.

Contributing?

- Student was being courted by NFL team and needed a grade change to pass course.
- Student was not gay.
Procedure for enforcement

- File an EEOC charge within 300 days
- EEOC investigates and issues right-to-sue letter
- Lawsuit must be filed within 90 days
Title IX as it relates to Title VII of the Civil Rights Act of 1964


- Grants employees the right to be free from discrimination

- Interpretation - includes prohibition against sexual harassment through toleration by the employer of a hostile environment caused by an employee’s coworker
  - The interpretation has been extended to the right to education free from discrimination guaranteed by Title IX

Bean, B., J.D. American Law Reports
Comparison

**TITLE VII**
- Anti discrimination statute
- Strictly employment discrimination
- EEOC enforces

**TITLE IX**
- Spending clause statute
- Covers education and employment
- Department of Education enforces
What is Sexual Violence?

- Physical sexual acts against a person’s will or where a person is incapable of giving consent

- All such acts of sexual violence are forms of sex discrimination prohibited by Title IX
Implications within Higher Education

- Working environments
- Classrooms
- Athletics
- Campus life
Working environment

- Hostile work environment
  - Objectionable conduct has the purpose or effect of unreasonably interfering with an employee’s work performance, or
  - Creates an offensive, hostile, or intimidating work environment

- Quid pro quo
  - Submission to request (explicit or implicit) term of employment
  - Rejection of or submission to the conduct used as a basis for employment decision
Unwelcome conduct

- Requests for sexual favors
- Physical touching
- Lewd or suggestive remarks
- Repeated requests for dates/meetings
- Sexually explicit magazines, pictures, jokes in workplace
- Questions or remarks about sexual body parts
Employer liability

Supervisors as harassers
- Employer liable where adverse employment action, regardless of actual knowledge
- If no adverse action - employer has affirmative defense:
  - Exercises reasonable care to prevent behavior
  - Employee unreasonably failed to use policies

Fellow employees
- Employer liable when knew or should have known of the conduct
  - Unless immediate and corrective action taken
Student-on-student violence

- Alleged conduct is sufficiently serious to limit or deny a student’s ability to participate or benefit...creates a hostile environment

- School fails to take prompt and effective steps to eliminate the hostile environment
Classroom - sexual harassment of students

Forms: quid pro quo and hostile environment

- Quid Pro Quo
  - School employee causes a student to believe he or she must submit to unwelcome sexual conduct in order to participate in a school program or activity
  - An employee causes a student to believe the employee will make an educational decision based on whether or not the student submits to unwelcome sexual conduct
  - Example - a teacher threatens to fail a student unless he/she agrees to date the teacher
Scenario: faculty and student

- A faculty member has a student that is struggling in class
- The faculty member commutes, and the student also commutes from an hour away
- How do you help this student?
Options

- Find extra office hours to meet with student?
- Meet with student outside of class, i.e. local park?
- Have dinner with student?
- Exchange text messages with student?

Considerations

- Contributing factors?
- Faculty member has a tight schedule and teaches at a satellite campus as well.
- Does gender matter?
Hostile environment

Unwelcome conduct of a sexual nature is sufficiently serious that it affects a student’s ability to participate in or benefit from an education program or activity, or creates an intimidating, threatening, or abusive educational environment.

Can be created by a school employee, another student, or someone visiting the school (student or employee from another school).
The conduct must be evaluated from the perspective of a reasonable person in the alleged victim’s position, considering all the circumstances.

Depending on the conduct or incident, a single incident may be sufficient to create a hostile environment...
Sexual harassment & Sexual hostile environment

Title IX provides a remedy to a student who is subjected to sexual harassment by a teacher or professor at an educational institution receiving federal funds.

For an educational facility to be liable, the plaintiff must establish that a school official with authority to address the alleged discrimination and to institute corrective measures had actual knowledge of the discrimination and failed to adequately respond.

(Daniel R. Papelino and Michael Yu, Plaintiffs-Appellants, Carl Basile, Plaintiff, v. Albany College of Pharmacy of Union University; US Court of Appeals, Decided 1/24/2011)
Title IX covers employee-on-student sexual violence

- Includes sexual violence, sexual abuse, and sexual harassment

- Verbal, nonverbal or physical conduct of a sexual nature, including but not limited to sexual activity

- In cases involving a student who meets the legal age of consent, there will still be a strong presumption that sexual activity is unwelcome and nonconsensual
Scenario - faculty and two students

- A faculty member is helping two students with their homework during some post-laboratory time. One student is touching the faculty member’s leg and being rather familiar which makes the faculty member quite uncomfortable. The second student also observes this behavior.

- The faculty member files a pre-emptive report, and emails the student regarding this inappropriate behavior.

- Within the email is a discussion of ‘psychological’ and ‘emotional’ reasons that the faculty member brings up to counsel the student.
The student files a grievance against the faculty member for sexual harassment.

Student accuses faculty member of using sexually explicit material/language in class making her uncomfortable. One example was taken directly from the class textbook.

Other students couldn’t corroborate other accusations.

What would you do?
Scenario: faculty make verbal comment to student

background

- Faculty member is advising a student in his class. Telling the student he can do better, and if he were his child he would spank him

- Student states that his mother has said the same thing to him, so the faculty member says he’d be happy to spank him.

- They agree to meet later at faculty member’s home and the spanking occurs
After talking with a friend, the student files a complaint with local police.

They conclude that a consensual act occurred between adults of legal age.

Conclusion

Upon learning of the incident, the University agrees to accept the faculty member’s retirement request.
When is a school considered to be on notice of an incident?

- If a responsible employee knew, or in the exercise of reasonable care should have known

Responsible Employee:
- someone with authority to take action
- someone who has been given the duty to report incidents to Title IX coordinator
- someone whom the student could reasonably believe has the authority
Response to Title IX incident

- School must take immediate and appropriate steps to stop the occurrence and prevent future occurrence
- Judgement and common sense of faculty and administrators are important elements of an response
- Ultimately, the school is responsible for taking all reasonable steps to ensure a safe and nondiscriminatory learning environment
School’s basic responsibilities - addressing an incident

- Take immediate and appropriate steps to investigate what occurred

- If the investigation reveals that sexual violence created a hostile environment, then take prompt and effective steps reasonably calculated to end the sexual violence, eliminate the hostile environment and prevent its recurrence
Criminal Investigation and Title IX Investigation

- Criminal investigation is done to determine if criminal law has been violated, and could result in subsequent trial and sentencing. Constitutional protections apply.

- Title IX investigation will never result in incarceration.

- Title IX investigation is not discretionary.
Incident(s) that occurs off-campus

- Still have to investigate because the conduct may have occurred in the context of an education program or activity or had effects on campus or in an off-campus education program or activity.

- Even if the misconduct did not occur in the context of an education program, the school must consider whether the off-campus conduct now creates a hostile environment on campus.
The Supreme Court has held that a school can be liable for monetary damages if

1. a teacher sexually harasses a student
2. an official who has authority to address the harassment has actual knowledge of the harassment, and
3. that official is deliberately indifferent in responding to the harassment
Summary judgement granted (Yan Yan v. Penn State University, 6/18/2013)

- University was not deliberately indifferent to known acts of sexual harassment
- University did not retaliate against student for making the complaint against a fellow student
- Fellow student was not a “state actor”
- Dept. Chair was not a “state actor” and did not treat student differently than other similarly situated students
Issues

- Sexual assault
- Sexual harassment
- Sexual orientation
- Bullying and micro-aggressions
- Minors on campus
Sexual assault

- Offender subjects victim to unwanted and offensive sexual touching
- Range from sexual groping to attempted rape
- Involuntary sexual contact through acts of force, coercion or victim incapacitation
- Nonconsensual sexual contact that occurs between any sex and individuals of any age
Harassment

Intentional conduct focused on an individual or identifiable group
An unlawful or improper purpose
Conduct which is outrageous, degrading, or demeaning

- Title VII
- Title IX
- Age discrimination (ADEA)
- Section 504
- ADA
- Various state civil rights laws
Sexual harassment

- More subtle form of discrimination
- Unwelcome sexual advances, requests for sexual favors - submission or rejection explicitly or implicitly affects a person’s employment
- A person becomes unable to perform the duties of their job because the workplace is permeated with sexual innuendos and other inappropriate behavior
- May be verbal, or non-verbal/physical conduct
- Includes collusion in inappropriate jokes
- Reported through the Equal Employment Opportunity Commission (EEOC)
Sexual orientation

- Harassment or differential treatment based on someone’s perceived or actual sexual orientation
- GLBTQ
- Being overlooked for promotion, baseless write-ups or improvement plans, or wrongful termination
- Subtle - expectations regarding family photos in the office, exclusive terminology when referring to group activities or functions
- Creating an “unsafe” environment
Minors as university students

- **Minor student and sexual misconduct**
  - University found to not be liable for alleged failure to prevent her own misconduct
  - 15 year old student
  - Benefield v. University of Alabama at Birmingham (7/22/02)
Retaliation Claims

Both state & federal civil rights laws prohibit retaliation against any person who has made a charge, filed a complaint, testified or participated in an investigation of discrimination claims.

To present a claim, the plaintiff must prove:

1. The plaintiff engaged in protected activity (filed a complaint)
2. The plaintiff’s activity was known to the employer
3. The employer took action that was adverse to the plaintiff (failed to promote, terminated, etc.) and
4. There was a casual connection between the protected activity and the adverse employment action.

If the Plaintiff proves the claim, the employer must advance a legitimate, nondiscriminatory reason for the adverse action. The Plaintiff must then prove that the employer’s stated reason was a pretext for unlawful discrimination.
Other related laws

- **Age Discrimination in Employment Act (ADEA)**
  - Protected class - workers age 40 and older
  - State and state universities are exempt from this statute
  - Claims filed through the EEOC within 300 days

- **Americans with Disabilities Act (ADA)**
  - Protected class - disability
  - Education institutions covered as employers and public accommodation
  - Enforced by EEOC

- **Section 504 of the Vocational Rehabilitation Act**
  - Protected class: disability
  - Employment and education statute - similar to Title IX
  - Enforced through US Dept. of Education - OCR
New law: Service Animals for Persons with Disabilities

- January 18, 2016 effective date
- Clarifies the rules for use of service animals
- It will make it easier for establishments to determine who is legally entitled to accommodation
- Veterans with PTSD using service dogs
- Voluntary registration provides dog with an official patch and the handler with photo id
Recent decisions - sex discrimination

Chojnowski v Huron Clinton Metropolitan Authority, ___ Mich App ___ (Docket No. 317655; March 26, 2015)

Three female park rangers filed sex discrimination and retaliation claims against supervisor, who imposed verbal discipline against them for minor uniform violations and called one of them “Officer Floppy” due to the winter hat she wore.

Chojnowski failed to set forth evidence of sex discrimination because she failed to suffer an adverse employment action. Chojnowski writes that “[a]t first reading, it would appear that a minor discipline for a uniform violation even though it may have taken place on (5) different occasions, would not qualify as an adverse employment action . . .” She nevertheless argues that, when viewed under the totality of the circumstances, defendants’ conduct was so unreasonable that she suffered severe anxiety. However, it bears repeating that an adverse employment action must be "materially adverse to the employee-that is, it must be more than a mere inconvenience" and "there must be an objective basis for demonstrating that the employment action is adverse because a plaintiff's subjective impressions are not controlling." Chen, 284 Mich.App. at 201-202. Chojnowski admits that she was never formally disciplined. She did not get demoted, lose pay, or suffer any other "material loss of benefits."

Judge Ronayne Krause, concurring: it appears that Police Chief George Phifer is likely a bafflingly incompetent and counterproductively over-aggressive, manager subject of retaliation. Being, in the words of the vernacular, a colossal jerk is not actually unlawful per se
Recent decisions - Sexual harassment

*Cotton v. Banks, MCA March 30, 2015*

- Sued for wrongful termination, claiming he was discriminated against on the basis of sex, demanding sexual favors as a condition of employment and creating a hostile work environment.

- Court held he pled a claim for retaliation and that the MCRA did not abrogate his common law right to file an action for intentional infliction of emotional distress.
New proposed EEOC Regulations on Retaliation

**Major change is how to prove a claim**

1. Protected activity: participation in EEOC activity or opposition by the individual to discrimination,
2. Adverse action taken by the employer, and
3. Casual connection between the protected activity and the adverse action.

Requirement that the employer knew of participation or opposition in protected activity is not required.
Final thoughts

- If something can be misunderstood or misconstrued, think twice

- Assume that whatever you do, someone will take it the wrong way...so don’t do it

- What we used to consider as above and beyond, exemplary service can now be considered predatory
Recommendations

- Use common sense
- Be observant and ask questions
- Be the person to speak up and challenge the norm
- Start inclusive conversations
- Set expectations for inclusivity and safe environments in offices, classrooms, and laboratory settings
References

- Revised Sexual Harassment Guidance
  - www.2.ed.gov/print/about/offices/list/ocr/docs/shguide3.html

- Questions and Answers on Title IX and Sexual Violence

- Dear Colleague Letter