Title IX Compliance: Preparing for, and defending against, an OCR investigation

Rowan University
Title IX Summit
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Agenda

• About OCR and its process
• What to expect during an OCR Title IX investigation
• Lessons learned from recent OCR Title IX investigations
• How to best position your institution to defend against an OCR Title IX investigation
• Q&A
About OCR and its process
OCR’s jurisdiction

- Age Discrimination Act of 1975
- Section 504 of the Rehabilitation Act of 1973
- Title II of the Americans with Disabilities Act
- Title VI of the Civil Rights Act of 1964
- Title IX of the Education Amendment of 1972
OCR’s jurisdiction

- Colleges/universities
- State education agencies
- Elementary and secondary school systems
- State vocational rehabilitation agencies
- Public libraries
OCR’s process

• The evaluation process
  - Opening a complaint
  - Timeliness
  - Dismissals and administrative closures

• Early Complaint Resolution

• Rapid Resolution Process
OCR’s process

- Investigation and Resolution processes
- Resolutions during investigation
- Enforcement
OCR’s process

• Compliance Reviews
• Directed Investigations
• Monitoring
What to expect during an OCR Title IX investigation
OCR Title IX investigations

• Notification letter
  - Individual allegation v. class allegation
  - Contact person

• Request(s) for data
  - Timing
  - Extensions
  - Response
OCR Title IX investigations

• Interviews
  - Title IX Coordinator
  - Administrators or employees with information about individual allegations or the process
  - Interaction with complainant

• On-site visit
  - Advertisement of visit
  - Focus groups
  - Individual meetings
OCR Title IX investigations

• Resolution
  - Insufficient evidence determination
  - Non-compliance determination
  - Mixed resolution

• Agreement and Negotiations
  - How much flexibility does an institution have?

• Publicity
Related Complaints

- Complainants may raise allegations other than sexual harassment:
  - Retaliation
  - Disability discrimination
OCR Complaints Filed by Respondents

- Sample complaints
  - Sex discrimination
  - Disability discrimination
  - Racial discrimination
  - Retaliation
Lessons from recent OCR Title IX investigations
OCR investigated university’s response to complaints, reports, and incidents of sexual harassment of which it had actual or constructive notice, and a claim of retaliatory harassment.
• What did the university do well?
  - Policy review and revision
  - Expansion of educational programming and initiatives
  - Creating task force on sexual assault and relationship violence
  - Hiring additional Title IX investigative staff
  - Implementing new Title IX training requirements for faculty and staff
  - Signing memoranda of understanding with all surrounding local enforcement agencies
• What did the university do well?
  - Creating a special victims unit within the University’s police department to handle incidents of sexual assault and sexual violence
  - Issuing a campus-wide survey to assess the University’s climate with respect to sexual assault and sexual violence
  - Issuing statements in the University newspaper and through emails notifying the University community of the University’s commitment to addressing incidents of sexual assault and sexual violence
  - Creating a new University office (Office of Institutional Equity), that once in place will investigate all claims of harassment and discrimination on campus.
• Areas of focus by OCR:
  - Responses to reports, incidents, “formal” complaints
  - Delays in investigations and documentation of reasons for delays
  - Treatment of sanctions during the appeal process
  - Documentation of timeframes
  - Investigatory reports, documentation of findings
  - Information about interim measures/assistance provided
  - Documentation that parties provided right to present witnesses and evidence
• Areas of focus by OCR:
  - Written notice of the outcome
  - Documentation that complainants were given opportunity to appeal
  - Documentation of actions taken after investigation to prevent recurrence and remedy effects on complainant
• Positive actions by university investigator: used OCR’s guidance regarding what constitutes unwelcome conduct; applied preponderance standard; made credibility determinations; looked at totality of circumstances; weighed evidence in determining consent; documented interviews, findings, and analysis.
Sample case cited by OCR:

- A female student reported being raped by a male student in early 2012.
- Female student gave an initial interview to the Title IX investigator but failed to respond to contacts from university, which therefore closed her case without an investigative report.
- University knew identity of respondent and had information that he had sexually harassed four other university students.
- What did OCR expect university to do?
• Sample case cited by OCR:
  - Employee reported being repeatedly subjected to sexual harassment by another employee.
  - University interviewed the two employees and one of their co-workers, and reviewed emails between the two employees. University concluded that the preponderance of the evidence supported that the accused employee had engaged in the conduct the reporting employee described, which the investigator characterized in the report as “consistent, unwelcome romantic pursuit.”
  - What outcome did OCR expect?
Shift in OCR’s approach?

• Recent decision found insufficient evidence of a Title IX violation and noted concerns with promptness
  - Some investigations took over 100 days: Explanations for delays; violation found where delays due to staffing vacancies and unavailability of hearing officers
  - Failure to update parties of status of process

• Resolution agreement prior to conclusion of investigation:
  - Mandatory faculty and staff training
  - Annual audit of complaint files by institution and OCR for three years
  - Continue to conduct annual climate survey
Defending against an OCR Title IX investigation
Best practices

- Review compliance with procedural requirements
  - Designation of coordinator, notification, training
  - Notice of nondiscrimination
  - Grievance procedure
    - Prompt?
    - Equitable?
    - “As written” v. “In practice”
Is your notice of nondiscrimination compliant?

- Required coordinators identified?
- Name/title?
- Physical address?
- Telephone number?
- Email address?
- OCR contact?
- Anti-harassment statement?
Is your grievance procedure compliant?

- Notice of nondiscrimination?
- Definitions?
- How to file? Explanation of process?
- Designated time frames?
- Equitable process?
- Coordination with criminal process?
- Interim measures?
- Standard of review? Sexual history?
- Sanctions/remedies? Amnesty?
Best practices

• Audit your program
  - Process
  - Owners of process
  - Documentation/recordkeeping and access
  - Ensuring promptness and equity
  - Information sharing with campus about program
Best practices

• Recordkeeping
  - “Database”
  - Level of detail
  - Who’s who
  - Interim and protective measures
  - Report
  - Related documents and communication
  - Decisions, sanctions, remedies, appeals
Best practices

• Audit your website
  - Notice of non-discrimination
  - Messaging
  - Immediate assistance
  - Respondents
  - “Searchability”
  - Accessibility
  - Mobile devices
  - Resources
Best practices

- Review past cases and address issues, as appropriate
  - Notification of outcome
  - Legal standard
  - Documentation of:
    • investigation
    • interim measures
    • reports/incidents/complaints
    • Findings
    • Sanctions and remedies
  - Notification and documentation of appeal
Best practices

• Revisit educational programming
  - To whom is training offered?
  - How often?
  - What are the consequences for not participating?
  - How widespread and effective are educational campaigns?
• Consider focus groups
• Use your climate survey/climate check
Questions?
Thank you for joining us!

Panelists
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