Theme

Agenda

• Title IX Statutory and Regulatory Background
• Obama Administration and Title IX
• Trump Administration and Title IX
• November 2018 NPRM
• Community College Critique/Comments
• Questions
Title IX Statutory and Regulatory Background

Timeline

- Title IX Enacted as Part of the Education Amendments of 1972 - Originally Focused Exclusively on Classroom and Athletics, Now with Clear Impact on Overall Higher Education Environment

- Only One Set of Regulations Issued - Application of Sexual Harassment/Assault Law Imposed Through Courts and “Subregulatory Guidance” (1st Guidance in 1997)

- Title IX Equates Sexual Harassment with Sexual Discrimination

- Clinton 2001 Guidelines Created New Responsibilities but Not Vigorously Enforced by George W. Bush Administration
Obama Administration and Title IX

- 2011 Dear Colleague Letter Marked Key Change in Government Expectations of Institutional Behavior, Emphasizing Overall Culture Change

- Investigations Made Public Upon Inception; Investigations Were Institution-Wide and Remained Open for Months; Settlements Often Involved New Compliance Structures
Obama Administration and Title IX (cont’d)

- Feverish Campus and Public Attention
- Congress Debated Issue With High Profile Legislation Introduced But Not Acted Upon
- Community Colleges Generally Not Subject of Investigations
Trump Administration and Title IX

- Withdrew Obama Guidance, Referring Back to 2001 DCL and Issuing a Set of Questions and Answers to Foster Compliance

- Formally Published NPRM on November 29, 2018; More than 124,000 Comments

- American Council on Education Created Task Force to Craft Higher Education Response; Community Colleges Participated

- AACC Filed Separate Community College Response on our Behalf
Definition of Sexual Harassment – Triggers
Title IX

- Quid Pro Quo (school employee conditioning an educational benefit or service upon a person’s participation in unwelcome sexual conduct)

- Unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school’s education program or activity (derives from Supreme Court ruling), or

- Sexual assault as defined in the Clery Act regulations
Triggers to College Obligation to Respond

- Actual knowledge of sexual harassment provided to school official with authority to take corrective action

- Conduct that occurred within college education program or activity, within the United States
November 29, 2018 NPRM
Provisions That Help

- More flexibility on process—through formal Title IX grievance procedures, supportive measures, or informal resolution, including mediation

- Elimination of the inflexible “60-day rule” from prior guidance and replacement with a requirement that institutions complete the grievance process within “a reasonably prompt timeframe”
November 29, 2018 NPRM

More Provisions That Help

- Provides for an appeal of a decision by either party, if appeals are permitted - leaving institutions with the flexibility to determine whether appeals will be offered.

- Adoption of the “deliberately indifferent” (clearly unreasonable in light of circumstances) standard to determine an institution’s Title IX violation, no longer requiring colleges to bear burden of proving they acted reasonably.
November 29, 2018 NPRM
Provisions of Serious Concern

- Inappropriate legalization of campus disciplinary proceedings:
  - Requirement of “live hearings”
  - Requirement for cross examinations, must be conducted by parties’ advisors (attorneys)
  - If any party lacks an advisor (attorney), college must provide one to the party(s)

- Prohibits College use of the “single investigator” model
  - The NPRM requires a decision maker at a hearing considering a formal complaint be separate from the Title IX Coordinator or the investigator in the case
Due Process: The NPRM relies on legal terms and concepts to design the process that colleges must follow, even if the term “due process” is inappropriate in a college setting, as it suggests constitution protections that are normally afforded to criminal defendants.

Constitutional protections do apply to public colleges, but the specific process due to students is far less than what is required by a criminal proceeding where life and liberty is at risk.

Colleges are educational institutions implementing education processes, not arms of or alternatives to the criminal justice system. They are not courts of law and should not be expected to perform criminal justice functions or have disciplinary processes that resemble legal proceedings.
November 29, 2018 NPRM
More Provisions of Serious Concern

- Determinations of responsibility in Title IX proceedings must be made by applying either the preponderance of evidence standard or the clear and convincing standard, though if the school uses a clear and convincing standard to adjudicate other forms of misconduct leading to similar sanctions, clear and convincing must be used in Title IX cases.

- The NPRM may effectively mandate an evidentiary standard of proof across all campus disciplinary hearings, regardless of Title IX applicability.
November 29, 2018 NPRM
More Provisions of Serious Concern

- Institutions must provide both parties the absolute right to inspect “any evidence…directly related” to the allegations (whether used by institution or not)
  - No authority to redact confidential (medical, counseling, etc.) information
  - Overbroad standard for admissible evidence
  - Requires creation of electronic file sharing platform to accommodate evidence sharing, with no way to absolutely restrict copying
NPRM language appears to force institutions to dismiss complaints if they fall outside of the new parameters of Title IX, even if that violation is a violation of Student Conduct Codes.

NPRM contemplates the possibility of focusing the new approach beyond sexual harassment allegations involving student respondents, extending to employee matters (leading to conflicts with faculty governance, unions, etc.)

The requirements of the NPRM will significantly increase college regulatory burden and costs, and will redirect time and resources away from academic mission activities.
Community College Critique/Comments

- Community colleges need some flexibility to implement OCR requirements in a fair and equitable way; we face different challenges in addressing sexual harassment/sexual assault from other sectors of higher education.

- Largely non-residential, alcohol-free campuses; younger students (dual enrollment) and older students (average age 27) on campus; larger percentage of adjunct instructors requiring constant training resources and attention
  
  - Example: Live hearings are not required at K-12 institutions due to younger students – these same students in dual enrollment would be subjected to the live hearing/cross examination that NPRM avoids in K-12 space
What Differentiates CCs From Other Sectors?

- Only 1 percent of 7 million community college students live on campus, compared to about 22 percent of postsecondary students overall.

- Community college students are generally older than students in other sectors (average age 27), and most of the campuses are alcohol-free.
What Differentiates CCs From Other Sectors?

- Community colleges accounted for 10 percent of all reported crimes, and only 6 percent of sexual offenses under the Clery Act, despite accounting for 41 percent of all undergraduates.

- Additional differences include:
  - Limited sworn law enforcement on Community College campuses
  - Staffing levels
  - Financial resources
Questions to Consider

- How Do Colleges Manage the Personnel and Budget Demands of Title IX?

- How Should Boards of Trustees Engage With Title IX?

- What can Presidents do to raise the awareness and institutional commitment to meeting federal (and state) expectations with respect to compliance?
Advocacy Points for the OCR

✓ Enforcement Generally

- Enforcement has clearly been a cause for concern over the years. A helpful message might be that OCR will not be resolving complaints against institutions under a tight framework ‘mandated’ by the 2011 DCL and instead will undertake a holistic review of institutional good faith efforts to address and remedy sexual misconduct.
Advocacy Points for the OCR

- Consistency Among OCR Regional Offices
  - OCR should direct regions to offer more flexibility in enforcement in acknowledging that a one-size-fits-all approach is not practical – especially for community colleges;
  - OCR has already taken steps in terms of guidance to the regions to focus on individual complaints, rather than using a single complaint to place an entire program under review.
  - We appreciate OCR’s efforts to promote consistency among the regions in its enforcement practices and hope for continued focus on this after the interim regulatory period.
Advocacy Points for the OCR

OCR Support Needed

- After the new regs are finalized, OCR should provide:
  - Robust technical assistance and clear/timely answers to questions on a consistent basis across regions
  - Federal support for creating and delivering “evidence based” educational programs
  - Materials for training Title IX investigators and hearing boards
Advocacy Points for the OCR

- Recognize that Colleges Take these Matters Seriously

- Colleges have made significant investments in personnel and programs (Title IX Coordinators, investigators, educators, support services, etc.), in policies, and in education. The eventual changes will not cause Colleges to decrease resource allocation. Colleges will continue to devote resources to initiatives aimed at addressing and remedying sexual misconduct.
What to Do Now?

Remain Focused on Guiding Principles of NPRM

- Increased Control for Reporting Parties
- Maintain a Fair and Balanced Process
- Reduce Risk of Improper Punishment
- Tailored and Effective Interim Protective Measures

- Become More Proficient at Administering Alternative Dispute Resolution Models
  - Mediation, Arbitration (if NPRM is adopted), Restorative Justice, other informal conflict resolution methods
- And, Stay Tuned!!
Thank You!