Sexual Harassment and the #ME TOO Movement

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Harvey Weinstein: Catalyst of the MeToo Movement

- Producer and executive of major media company
- Accused of sexual harassment on October 4, 2017
- Over 80 women have accused him of inappropriate conduct. Claims date back to the 1970s
- A historic avalanche of sexual harassment and assault allegations toppled powerful men in various industries.
- Resulted in a profound cultural revolution and the birth of a movement that has a filter-down effect on schools.
Sexual Harassment in the Schools – It’s in the News!
Sexual Harassment in the Schools – It’s in the News!

Albany schools agree to $400,000 settlement in sexual harassment case
Former New Scotland Elementary School principal Gregory Jones was accused in 2013

When It Comes to Sexual Harassment, Schools Are Not Immune

Employees settle with Utah school district and supervisors over alleged sexual harassment

Participants march against sexual assault and harassment at the #MeToo March in Los Angeles earlier this month.
— Damian Dovarganes/AP

But experts say sexual misconduct between adults may be less prevalent in K-12.
Sexual Harassment and The Bottom Line

At least 26 public school districts in the U.S. agreed to a total of $37 million in sexual harassment/assault settlements involving students, teachers or other employees.

Students were alleged victims in 19 of the 26 settlements.

In Utah, 8 female employees sued their school district in federal court alleging they were sexually harassed by a school counselor for several years despite complaints to the school district. In 2017, the teachers reached a $340,000 settlement.
Sexual Violence Is a Form of Sexual Harassment

Sexual violence isn’t just a college problem. It happens in K-12 schools, too.

By Emma Brown  January 17, 2016  Email the author
The #Me Too Movement Goes to School

• The #Me Too & #Me TooK12 Campaigns
• The organization Stop Sexual Assault in Schools launched its own campaign, entitled #metooK12.
• Intended to call attention to sexual harassment in schools.
The #Me Too Movement Goes to School

- Sexual harassment/violence can be perpetrated by school employees, students or others not affiliated with the school.
- Reported that between 1% to 5% of all teachers sexually harass or abuse students.
- Reported that at least 25% of school districts in the U.S. have dealt with incidents of staff sexual abuse in the past 10 years.
  - Counter Pedophilia Investigative Unit stats

According to study by AAU, 48% of high school students surveyed experienced some form of sexual harassment in the 2010-11 school year and 87% said it had a negative effect on them.
Applicable Laws Governing Sexual Harassment

- Employment
  - New York Human Rights Law
  - Title VII of the Civil Rights Act of 1964
- Educational Harassment
  - Dignity for All Students Act
  - Title IX of the Education Amendments of 1972
- New York’s New Harassment Legislation
- Retaliation – NYHRL, Title VII and Title IX prohibit retaliation. Liability for retaliation is separate and distinct from liability for the discriminatory conduct
Why Do We Care?

- Workplace/educational morale and professional environment
- Adverse impact on careers/education
- Adverse impact on reputation
- Employee efficiency/student performance
- Employer/institutional liability
  - Protracted litigation
  - Damages
  - Attorneys’ Fees
- Personal liability

“The seeds of these issues are planted early in our children’s lives, as early as elementary school. We have to look there if we’re going to change the tide of sexual harassment and assault in our country.”

Emma Mayerson, Executive Director of Alliance for Girls.
NY Imposes New Anti-Harassment Requirements

- New York’s FY 2019 budget bill places new anti-harassment requirements on all New York employers, including school districts
  - Districts are required to adopt a sexual harassment prevention policy and provide annual harassment prevention training to all employees
  - NY DOL will provide a model policy and training materials
  - Requirements take effect 180 days after the bill is enacted, which is October 8, 2018
    - (Signed April 12, 2018 implementing provisions of S-7848A – the Budget)
NY Imposes New Anti-Harassment Requirements – Sexual Harassment Prevention Policy

- Working with Division of Human Rights, DOL will create and publish a model policy
- Sexual harassment prevention policy must include:
  - Prohibition of sexual harassment
  - Information concerning federal and state statutory provisions concerning sexual harassment
  - Standard complaint form
  - Procedure for timely and confidential investigation of complaints and “ensure due process for all parties”
NY Imposes New Anti-Harassment Requirements – Sexual Harassment Prevention Policy (cont)

- Information re: employees’ rights and available forums for adjudicating harassment complaints administratively and judicially
- Statement that sexual harassment is employee misconduct & sanctions that may be imposed for those who engage in it
- Statement that retaliation is unlawful

Once the model policy is available, all New York employers must adopt it or one that “equals or exceeds the minimum standards provided by such model”.
NY Imposes New Anti-Harassment Requirements – Sexual Harassment Prevention Training

- Working with DHR, DOL will create a model sexual harassment prevention training program
- Such training shall be interactive and include:
  - An explanation of sexual harassment
  - Examples of conduct that constitute unlawful sexual harassment
  - Information concerning:
    - federal and state statutory provisions concerning sexual harassment and remedies available to victims of sexual harassment
    - Employees’ rights of redress and all available forums for adjudicating complaints
NY Imposes New Anti-Harassment Requirements

- The bill attempts to prohibit mandatory arbitration clauses for sexual harassment claims and renders them null and void
  - The enforceability of this rule will very likely be subject to litigation
  - Carves out arbitration requirements for sexual harassment claims that are included as part of a collective bargaining agreement
  - This provision will take effect 90 days after the bill is enacted, which is July 10, 2018
NY Imposes New Anti-Harassment Requirements – Liability

- Effectively immediately, the Human Rights Law will be amended to cover sexual harassment of non-employees (contractors, subcontractors, vendors, consultants, or others providing services under a contract) at its workplace. (NY Labor Law 296-d)
- Employers will be held liable for sexual harassment of non-employees when the employer, its agents, or supervisors knew or should have known that the non-employee was subject to such harassment in the workplace and did not take immediate and appropriate corrective action.
- The extent of the employer’s control over the non-employee will be considered.
NY Imposes New Anti-Harassment Requirements – Liability

- Effectively immediately, employees and officers of public entities (including the State, its agencies, local governments, and school districts) who are found personally liable for intentional wrongdoing related to sexual harassment must now reimburse their employer if it pays the judgment to a victim.

- If the employee does not repay their public employer within 90 days, the employer may withhold compensation from the employee’s pay. If the person is no longer employed by the public entity, the employer may pursue collection through the courts.
NY Imposes New Anti-Harassment Requirements

- Amends the NY Civil Practice Law & Rules (CPLR) such that parties to a settlement of a sexual harassment claim are prohibited from agreeing to prevent disclosure of the facts and circumstances underlying the claim, unless the victim prefers such an agreement.
  - Victims must be given 21 days to consider whether to accept any confidentiality language in an agreement, and 7 days to revoke acceptance of the agreement.
  - Provision takes effect 90 days after enactment, which is July 10, 2018.
NY Imposes New Anti-Harassment Requirements

• Nondisclosure/confidentiality agreements were part of sexual harassment suits against Weinstein

• Pros and cons of ban on confidentiality in sexual harassment settlements
  o Remove the impetus for defendants to settle sexual harassment claims
  o Pose privacy concerns for victims
  o Allows offenders to continue their harassment

• Impact on public employers subject to Freedom of Information Law (FOIL)
Title IX Of The Education Amendments 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...”

Title IX of the Education Amendments Act of 1972
20 U.S.C.§ 1681
What is Title IX?

- A federal law prohibiting discrimination on the basis of sex in any federally funded education program or activity.
- Applies to colleges, universities, elementary and secondary schools, and any education or training program operated by a recipient of federal financial assistance.
- OCR Guidance
  https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/sex.html
What does Title IX cover?

Title IX is intended to prohibit gender-based discrimination in any educational program or activity.

- Financial Aid
- Sex-based Harassment (including sexual assault)
- Recruitment & Admissions
- Athletics
- Employment
- Treatment of pregnant and parenting students
- Discipline
- Counseling
- Retaliation
Enforcement of Title IX

• The U.S. Department of Education’s Office for Civil Rights (OCR) enforces Title IX.

• OCR investigates and resolves complaints alleging sex discrimination; conducts compliance reviews; examines systemic violations; and provides technical assistance.
Enforcement of Title IX

• Between 2009 and 2016, OCR received 265 sexual harassment/sexual violence-related complaints at the elementary & secondary education level and 534 such complaints at the postsecondary level
  o In 2009, there were 11 complaints at the elementary & secondary education level and 9 at the postsecondary level
  o In 2016, there were 83 complaints at the elementary & secondary education level and 177 at the postsecondary level

• The number of complaints increased by 1,170 percent from 2009 to 2016.

• During this time period, OCR resolved 371 complaints at the elementary, secondary and postsecondary levels.

* Highlights of Activities, Office for Civil Rights 2009-2016
Enforcement of Title IX-Recent OCR Resolution Agreement

• Palo Alto Unified School District in California entered into resolution agreement in 2017; OCR’s investigation started in 2014 after receiving a complaint that the district failed to promptly respond to reports of sexual harassment by students

• Terms of resolution agreement included:
  o Conduct an investigation into the deficiencies identified by OCR with respect to its response to complaints
  o Review cases for school years 2012-13 through 2015-16
  o Revise the district’s Title IX policies to ensure they provide for prompt & equitable response to reports
  o Develop a confidential online system where students and parents can make anonymous complaints
  o Develop district-wide confidential tracking system to collect data of all Title IX complaints
  o Provide mandatory annual training for employees on Title IX and obligation to respond to student complaints
OCR Enforcement Under the Trump Administration

• OCR Internal Directive Changes Investigation Procedures

• On June 8, 2017, Acting Assistant Secretary for Civil Rights, sent a memorandum to the agency’s regional directors that changed investigation practices in connection with allegations against public school districts.

• Certain types of complaints would no longer be automatically subject to review and oversight by OCR “headquarters” in Washington, D.C.

• The practice of requiring 3 years of past complaint data to assess a school district’s compliance was eliminated; team leaders & regional directors were to determine what comparative data was necessary in future cases.
OCR Enforcement Under the Trump Administration

• A “one size fits all” investigative approach for certain types of complaints was abandoned in favor of allowing team leaders & regional directors to make case-by-case determinations of the type and scope of evidence necessary to support a “legally sound” investigation.

• “Systemic” investigations would no longer be carried out based on individual complaints absent allegations of systemic issues or unless the investigation team determines such an approach is warranted.

• “Reasonable resolutions agreements with defined, enforceable obligations...directly addressing the concerns raised in the individual complaint” as well as voluntary settlements were encouraged.
OCR Guidance

- Revised Sexual Harassment Guidance (2001)
- Sexual Harassment: It’s Not Academic (2008)
- “Dear Colleague” Letter (October 26, 2010)
- “Dear Colleague” Letter (April 4, 2011)
  *(withdrawn)*
- Questions & Answers on Title IX (April 29, 2014)
  *(withdrawn)*
- September 22, 2017 “Dear Colleague” Letter
What does Title IX require in relation to discrimination/harassment?

*School Districts must*

- Not discriminate on the basis of gender when making decisions
- Have a policy prohibiting discrimination and harassment
- Have a mechanism for students and employees to report discrimination and harassment
- Ensure that it promptly and reasonably responds to claims of discrimination and harassment
Harassment

• Harassment means the creation of a hostile environment by conduct or by verbal threats, intimidation, or abuse that has or would have the effect of unreasonably and substantially interfering with a student’s educational performance, opportunities, or benefits, or mental, emotional, or physical well-being, or reasonably causes a student to fear for his or her physical safety
Sexual Harassment

• Teacher v. Student harassment
  - Alida Star Gebser, a high school student in the Lago Vista Independent School District ("Lago Vista"), had a secret sexual affair with one of her teachers. At the time, Lago Vista had no official procedure for reporting sexual harassment nor any formal anti-harassment policy, as required by federal law. One day, after the two were discovered having sex, the teacher was arrested and fired. Claiming she was harassed in violation of Title IX of the Education Amendments of 1972, providing that no person "be subjected to discrimination" under any federally funded education program or activity, Gebser sought damages against Lago Vista.
Sexual Harassment

- Teacher v. Student harassment
    - Districts will **NOT** be liable for sexual harassment of a student by a school employee unless the following conditions are met:
      - An appropriate school official must have “actual knowledge” of discrimination/harassment;
      - The school official must have authority to take corrective action to address the alleged discrimination;
      - The school official must fail to respond adequately; and
      - The inadequate response must amount to deliberate indifference to discrimination/harassment.
Sexual Harassment

• Student v. Student harassment
  
  o *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629 (1999)
    
    – Districts will **NOT** be liable for sexual harassment of a student by another student unless the following conditions are met:
      
      • The conduct must be severe, pervasive and objectively offensive;
      • The student must be denied an educational opportunity as a result of the harassment (*e.g.*, a drop in grades);
      • The District must have “actual knowledge” of the harassment;
      • The District cannot respond with deliberate indifference to conduct which it has substantial control; and
      • The victimized student must have suffered some damages, including emotional distress or the loss of an educational benefit.
Sexual Harassment

- Student v. Student harassment
    - “We stress that our conclusion here – that recipients may be liable for their deliberate indifference to known acts of peer harassment – does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action.”
  - School administrators continue to enjoy the flexibility they require and will be deemed "deliberately indifferent" to acts of student-on-student harassment only where the school district’s response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.
Deliberate Indifference

- A school’s response to harassment is deliberately indifferent when it is clearly unreasonable in light of the known circumstances.
  - Degree of control over the harasser is a factor
  - Involves a case-by-case analysis
  - Will depend entirely on the facts
- A school will be deemed to have actual notice of harassment when someone in a position to address the harassment is made aware of it
  - Superintendent, principal, school board member, teacher, coach, counselor, administrator, or other employee

**A school district’s goal must be to address every incident of alleged harassment.**
Recent Title IX Cases

- **Salazar v. S. Antonio Indep. Sch. Dist.,** 690 Fed. Appx. 853 (5th Cir. 2017)
  - The U.S. Court of Appeals for the Fifth Circuit reversed a $4.5 million award to a male student who had been sexually harassed and abused by a male administrator.
  - Plaintiff, a former student, filed a claim under Title IX, alleging that he had been repeatedly sexually harassed by his school principal. The District argued that the only individual who knew about the harassment was the perpetrator himself and once it became aware of his actions the school conducted an investigation and terminated the employee.
  - The Fifth Circuit held that Title IX did not impose liability on a school district when the only employee of the district with knowledge of the sexual harassment was the perpetrator.
  - The Court held, absent knowledge, the purposes of Title IX are not served by imposing liability upon the school district. To do so would be close to imposing strict liability upon the school district for harassment it was unaware of, a concept which was expressly rejected by the U.S. Supreme Court.
Recent Title IX Cases

  - Plaintiff, a former student, filed a complaint under Title IX claiming that he was sexually assaulted and sexually harassed by a teacher employed by the District. The District brought a motion to dismiss the complaint, claiming that it was unaware of the teacher’s conduct.
  - The Court denied the motion, finding that Plaintiff’s allegations that the school had notice of the teacher’s conduct were sufficient to survive a motion to dismiss.
  - The Court credited Plaintiff’s allegations that:
    - the school did not have a Title IX policy
    - failed to provide teachers and staff with training on how to comply with Title IX, or with information regarding inappropriate behavior by teachers towards their students, and
    - failed to adequately address the reporting of such behavior.
Recent Title IX Cases

- **Doe v. The League School of Greater Boston, 2018 WL 2077595 (D. Mass. May 3, 2018).**
  - A private residential school for students with autism was forced to stand trial on a Title IX claim that it didn't do enough to protect one of its students from being molested by a fellow student. At the time of the incident, the victim/student was 11 years old and the student who assaulted him was 17 years old.
  - The perpetrator had previously been accused of attempting a rape of his previous roommate. The perpetrator had also shown the plaintiff student a pornographic video of a man and woman engaging in sex. When it learned of the pornography incident, the school took away the perpetrator’s portable videogame device, which was used to view the pornography. Six months later, the plaintiff student reported that his roommate had molested him on three occasions when staff had left them unsupervised.
  - In response to plaintiff’s report of sexual abuse, the school informed the plaintiff’s mother, reported the incident to the State, conducted an investigation and separated the two boys. The investigation revealed that the sexual abuse was much more pervasive than reported.
Recent Title IX Cases

  o The court held that a jury could conclude that the school's failure to separate the plaintiff from the perpetrator and more adequately monitor his conduct amounted to deliberate indifference.
    - The Court held that it “disagrees that Davis requires knowledge of severe, pervasive, and objectively offensive harassment before a school must respond.... Davis, by its express terms, speaks to two distinct requirements – the school must have actual knowledge of sexual harassment to trigger a duty to respond, and the harassment underlying the Title IX claim must be severe, pervasive, and objectively offensive to allow for damages.”
    - “The notice requirement of Title IX claims addresses when the school’s duty to respond is triggered. Throughout Davis, the court frames the notice requirement in the form of knowledge of sexual harassment, not knowledge of severe, pervasive, and objectively offensive harassment.”
Recent Title IX Cases

  - A Missouri school district’s motion to dismiss a Title IX action arising from a coach's sexual abuse of a student was denied.
  - The plaintiff alleged that the school officials had knowledge of various acts of increasingly-severe misconduct committed by the coach (who was criminally convicted).
  - The superintendent and the principal knew the following:
    - When Plaintiff was in the eighth grade, the coach wrote letters to Plaintiff and indicated that they were "meant" to be together, and that Plaintiff should destroy the letters. They also learned that the coach asked to coach softball — a sport that she had never coached before — after Plaintiff joined the team. The administrators responded to this information by telling the coach not to have further contact with Plaintiff.
    - The administrators learned that their admonition was not heeded because the coach was texting Plaintiff, calling her "sweetheart" and referring to herself as "momma." Plaintiff's mother was dissuaded from contacting the authorities, and the coach was again instructed not to contact Plaintiff.
Recent Title IX Cases

• **KC v. Mayo, 2018 WL 2107201 (W.D. Mo. May 7, 2018)**
  - Once Plaintiff entered high school, the coach had chocolates and flowers delivered to her during school. Administrators learned of this, and responded by reiterating that the coach was not to contact Plaintiff. Administrators were then shown texts from the coach advising another teacher that she was fixing a bedroom in her house for Plaintiff because Plaintiff was going to live with her, and asking the teacher not to tell Plaintiff’s parents. The coach was talked to again. The coach’s sexual misconduct toward Plaintiff continued until she was arrested a year later.
  - The facts allegedly reported to the superintendent and the principal (and, therefore, the District) were sufficient to impart knowledge that the coach was harassing Plaintiff (if not worse)
  - The district's failure to discipline or remove the coach could therefore be seen as deliberate indifference, subjecting the district to liability for the abuse the student endured.
Can Consensual Relationships Be Harassment?

- Technical answer vs. Practical answer
  - Consent vs. “consent”
  - When good relationships go bad
- Third-party harassment
- Favoritism/morale problems
- Contemporaneous complaint not needed to show “unwelcomeness”
- Consideration of policy on consensual relationships
  - Address the reassignment of employees
Hostile Environment Sexual Harassment

A “hostile environment” claim of sexual harassment involves:

- discriminatory conduct “because of” sex/gender
- conduct which is/was unwelcome
- conduct which is/was severe or pervasive
- conduct which altered the learning conditions of the student and
- conduct which created an abusive learning environment
Hostile Environment Factors

- **Prior U.S. DOE OCR Guidance:** Factors to Consider in Determining if a Hostile Environment Exists:
  - The degree to which the conduct affected one or more students’ education;
  - The type, frequency and duration of the conduct;
    - Was the conduct severe or pervasive?
      - Verbal/visual vs. physical
      - A few isolated incidents vs. continual/pattern
  - The identity of and relationship between the alleged harasser and the subject(s) of the harassment;
  - The number of individuals involved;
Hostile Environment Factors

- The age and sex of the alleged harasser(s) and the subject(s) of the harassment;
- The size of the school, location of the incident(s) and context in which they occurred;
- Other incidents at the school; and
- Incidents of gender-based, but nonsexual harassment.

**Other Factors to Consider**

- Conduct has to be unwelcome
  - No real requirement that the offender has to be “on notice”
  - Third-party harassment
- Intent of the offender is not an excuse
“Welcomeness” vs. “Unwelcomeness”

- Contemporaneous complaint or protest is not necessary to establish “unwelcomeness”
  - Tolerance vs. Welcomeness
  - Intent vs. Impact
Pervasiveness and Severity

- Offensive conduct has to rise to some level of gravity
- Usually, there must be more than a single act of bad behavior to violate the law
- Should not wait until conduct rises to unlawful harassment before addressing.
Sexual Harassment in Work Environment

• Prohibited under federal and state law (Title VII, NYHRL, etc)

• Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitute sexual harassment when submission to such conduct is made either explicitly or implicitly a term or condition of an individual’s employment
Sexual Harassment in Work Environment

- Two main types:
  - Quid Pro Quo - Submission to or rejection of the conduct by the individual is used as a basis for employment decisions affecting the individual
  - Hostile Work Environment - Conduct has the purpose or effect of interfering with an individual’s work performance, or creating an intimidating, hostile, or offensive working environment
Hostile Work Environment

• What constitutes a hostile work environment under Title VII and NYHRL?
  • Subjects individual to discriminatory conduct because of sex or gender
    • Recently, the Second Circuit has also identified that sexual orientation is protected under Title VII
  • Conduct which is/was unwelcome;
  • Severe or pervasive;
  • Altered work conditions of the employee; and
  • Created abusive environment
District Liability for Supervisor Harassment


- District is generally liable for the acts of quid pro quo harassment by supervisors

- District may be liable for hostile work environment harassment by supervisors:
  - Where a supervisor takes a tangible job action (i.e., uses supervisory authority to further the harassment), there is no defense to liability
  - If there is no tangible action, the District may avoid liability by proving an affirmative defense
    - The District exercised reasonable care to prevent and promptly correct any harassing behavior (e.g., effective policy, training, investigation, and corrective action); and the employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the District
District Liability for Co-Worker Harassment

- District may be liable for hostile work environment harassment by co-workers if it knew of the harassing behavior or reasonably should have known of the harassing behavior and:
  - The District failed to make available a reasonable avenue of complaint; or
  - The District failed to take appropriate, prompt remedial measures reasonably designed to end the harassment
TITLE IX COORDINATOR
DOE “Dear Colleague Letter”

- Issued by OCR to school districts state-wide on April 24, 2015.

- Overview of Title IX’s requirements for recipients of federal funds to have a designated coordinator to oversee Title IX compliance and programming.
Designation of Title IX Coordinator

• Under the regulations for Title IX, an educational institution must designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under the law.
• The position may not be left vacant.
District’s Title IX Coordinator

• Responsibilities and Authority
  o Coordinating the school’s compliance with Title IX.
  o Coordinating the school’s grievance procedure for resolving Title IX complaints.
  o Coordinating Title IX investigations
    – Including sex discrimination/sexual harassment

• Factors to Consider
  o Conflicts of Interest
  o Independence
  o Full-Time Coordinator
  o Multiple Coordinators
Support and Visibility of Title IX Coordinator

• Make the role of Title IX Coordinator visible in the school community:
  o Notice Posting Requirement

• Make sure the Title IX Coordinator is knowledgeable about Title IX and the school district’s policies and procedures.
Title IX Coordinator Training

• Should be knowledgeable about Title IX and other overlapping Federal and State laws/regulations

• Training of the Title IX Coordinator should include an overview of:
  o Regulatory provisions;
  o Applicable OCR guidance;
  o The district’s Title IX policies and grievance procedures
OCR Complaints

• Individuals have 180 days from the date of the most recent sexual harassment to file a complaint with OCR
  o OCR cannot order a school to pay damages to a victim, but it may require a school to reimburse the student for certain expenses.

• If a complaint is filed and a school district is found in violation of Title IX, OCR is required to first seek a voluntary resolution agreement.

• If the school district refuses to take corrective action, OCR may:
  o Initiate administrative procedures to terminate federal funding to the district; or
  o Refer the case to the DOJ to pursue enforcement in federal court
Title IX Lawsuit

• An individual may file a lawsuit in court, regardless of whether they’ve filed a complaint with OCR.
• The number of Title IX lawsuits in elementary and secondary schools has risen over the past several years.
• If found liable, the following remedies can be enforced through court order:
  o Injunction;
  o Monetary damages (in cases of intentional discrimination);
  o Termination of federal funding
What Can School District Administrators Do To Avoid Claims?

- Understand and follow your policies
  - Does the District have an updated policy that covers all types of gender discrimination, including sexual harassment, discrimination based on gender identity, and sexual violence?
  - Is the scope of the policy clear?
  - Does the policy include contact information for the Title IX Coordinator?
  - Does the District’s policy prohibit on-line and off-campus harassment?
  - Is the District’s policy clearly written and widely publicized?
What Can School District Administrators Do To Avoid Claims?

• Avoid engaging in inappropriate behavior (i.e., “model” appropriate standards of conduct)
  – Inappropriate conduct on the part of an administrator is more likely to result in liability
• Correct inappropriate behavior promptly
• **Immediately report/investigate** all complaints
• Be responsive during complaint process
• Review and evaluate programs for equity
Conducting Effective Investigations

- Administrators’ acts or failures to act can bind the District
- An investigation of a sexual harassment allegation must be prompt, fair and complete
- Documentation is key
- The adequacy of an investigation of alleged sexual harassment can be tested by both the complainant and the accused in a variety of legal contexts.
Mechanics of an Effective Investigation
Steps in the Investigative Process

• Complaint/report comes in... then what?
  o Pre-assessment
  o Gathering of evidence/witness interviews
  o Evaluation of evidence/determination
  o Follow-up with complainant and accused
Be Prompt!

- As soon as complaint is made or information acquired
  - The longer the delay in commencing the investigation, the more likely the response will be found not to be effectively remedial and prompt
- Whether or not student/employee formally complains – beware of informal complaints
- Even if student/employee asks you not to take any action, an investigation may be required
Pre-Assessment

• Review complaint/incident
• Assess whether removal/separation is necessary
• Consider the kinds of information you’ll need
  o Interviews of parties
  o Interviews of witnesses
  o Documentation, voicemails, text messages, emails, records of individuals swiping in and out of buildings, etc.
  o Consider whether video evidence might exist
    – Think about this EARLY because it may be lost quickly
Removal

• Ask
  - Does accused present a threat or risk the integrity of the investigation?

• Should have approval process so one person is not making the decision
Reporting to Law Enforcement

- If the alleged conduct could potentially constitute a crime (e.g., sexual assault, indecent exposure, etc.) report the allegation to law enforcement
- Take interim measures to remove the accused employee from the workplace
- The school district is not required to and should not defer to law enforcement’s conclusions or decision not to file criminal charges.
“Big I” Investigation

• What additional information is required to make an informed decision?
• Can this information be obtained at the building level without compromising the results?
  - Scope
  - Witnesses
  - Confidentiality
  - Bias

- Remember – anytime you are speaking with a represented employee about something that may lead to discipline for that employee, union representation is required, unless waived in writing (Note: Union representative role is limited to that of advising employee about his/her rights under the law or under the CBA)
Conducting the Investigation

- Gather as much “hard” evidence as possible
- Interview the complainant first
  - Identify the full scope of the complaint
- Then interview witnesses/accused
- Then interview any additional witnesses, if any, identified by the accused
- Interview each witness separately
What is the Right Demeanor for an Investigator?

- Fair
- Objective
- Concerned for both complainant and respondent
- Unrevealing of personal views
- Not leaping to conclusions
- Not promising a particular result
Questioning the Parties and Witnesses

When speaking with a party:
• Do not ask questions rapid-fire
• If person pauses, do not hurry him/her
• Allow breaks as requested
• Do not interrupt
  o Go back if you have to, to fill in the blanks
• Get to specifics but do so with sensitivity
  o “He touched me down there”.
    – “I realize that this is difficult but we need to make sure that we understand what happened. When you say ‘down there’, are you saying that he placed his hand inside your underwear and touched your vagina?”
Sensitive Questioning

• Non-judgmental or minimally judgmental ways to elicit relevant information
  o “What happened next?”
  o “Did . . . . happen?” (as opposed to “why did or didn’t something happen)
    – The “why” may be relevant, but be really sure it is relevant before asking
  o “[Complainant/Respondent] says that . . . . happened. Would you like to say anything in response to that?”
  o “Would you tell us how you were feeling or what you were thinking about when . . . happened”
Sensitive Questioning

• Both parties should be allowed the opportunity to explain what happened from start to finish, but
  ○ A party may be more comfortable answering only specific questions

• If there are written statements already, do your homework in advance and know what facts you would like clarified
Sensitive Questioning

• You need to understand the party’s account of the facts, but doing so needs to be done thoughtfully
  - Not all things you are curious about may be appropriate questions
  - Even appropriate questions can be asked the wrong way
Interviewing the Complainant

- Give the complainant opportunity to provide statement
- Gently, ask for witnesses
  - Remember to do this for every allegation
  - You want to know not only who saw or heard the alleged conduct, you also want to know who was there at the time
  - If others did not see or hear the same thing, that may be relevant in and of itself
Interviewing the Complainant

• Be certain to ask about prior occurrences
  o Have there been prior instances of the same offensive conduct?
  o Were they reported?
  o To whom?
  o Any action taken?

• Especially with student witnesses, do not assume that they will know what information is relevant to share with you – you need to ask
Interviewing the Complainant

• At the conclusion of the interview:
  o Invitation to contact you with additional information
  o Do not promise complete confidentiality
  o Communicate a realistic timetable
  o Let complainant know that retaliation is prohibited, and she/he should inform you if retaliation occurs
Interviewing Witnesses

• Introductions
• A short explanation of what is going on
• Open-ended questions first
• Specific questions later
• Invite the witness to share anything else he/she thinks is relevant or would like considered
• Invite the witness to contact you if he/she later remembers or would like to share anything else
• Encourage the witness to try to keep the matter confidential
Interviewing the Accused

• Prepare for the interview
  o Make certain you have reviewed relevant documentation
  o Review notes of complainant’s and witnesses’ interviews
  o Open-ended questions first, specific questions later
  o Get the accused’s side of the story, including identification of any witnesses the accused believes will support his/her story

• Employees covered under Section 3020-a of the Education Law may decline to answer questions if it could lead to disciplinary charges, also known as “Cadet Rights”
Determining Responsibility

• Your role is not to pick a side or to promote an agenda

• Your loyalty must be exclusively to the integrity of the process and reaching the warranted outcome

• Recognize any biases and actively override them
What If It’s a He Said/She Said?

• Most cases involve credibility determinations

• The investigators job is to resolve credibility issues and draw conclusions
Determining Credibility of any Party or Witness

- Demeanor
- Opportunity
- Accuracy
- Contradictions
- Admissions and denials
- Probability of information given
- Motivation/bias
- Corroborating statements or evidence
Determining Credibility

• Look for corroboration
  o Text messages
    – Increasingly, this is the place for proof
  o Social media
  o Incidental witnesses
    – Have no dog in the fight
    – Can be very important regarding capacity
      • Who did they bump into?
      • What did they notice?
    – May be able to confirm timing or location
Post-Assessment

- Review personnel/academic file
- Review investigation report
  - Ask questions if you see gaps
- Consult legal
- Consult supervisor or counselor
- Meet with employee and union/student and parent
- Determine appropriate action
- Inform employee/union student/parent
- Follow-up with complainant
Written Report

• Documentation – If it’s not in writing, it didn’t happen

• Recount the investigation steps

• Allegation by allegation, explain the rationale for the investigatory conclusions
  - What have you determined occurred and why did you conclude that these facts occurred

• Make a determination of responsibility or not, allegation by allegation

• Recommend sanction(s) or forward to appropriate administrator for recommendation
Investigation File

- Copy of complaint
- Investigation notes and witness statements (take copious notes and obtain written statements if possible)
- Other documents gathered during investigation (copies of e-mails, text messages, printouts of social media web site pages, etc.)
- Report of findings
- Disciplinary action taken (if applicable)
- Other remedial actions taken
Confidentiality Concerns

• Family Educational Rights and Privacy Act (“FERPA”)
  ○ Applies to “educational records,” which include written complaints of harassment/bullying, investigation documents, and disciplinary documents

• Investigation documents containing personally identifiable information about a student should not be provided to third parties without redacting the personally identifiable information
Confidentiality Concerns

• Accused student/employee (or parents) should not be provided with a copy of complaint filed by the complaining student, without redacting the name and other personally identifiable information.

  • However, a student and/or his parents should be informed when making a complaint that the District cannot promise complete confidentiality during the investigation, and that it may be necessary to disclose the name of the complaining student in order to conduct a fair and thorough investigation.
Confidentiality Concerns

• Parents of the complaining student should not be provided with specific disciplinary information regarding the accused
  o Still should follow up to let parents know the issue has been addressed

• Teachers and administrators should only share information with other school employees who need to know that information
Takeaways

• As a result of the Me Too movement, students and employees are more likely to feel empowered to report sexual harassment.

• Assessing potential liability, school districts will face two key issues:
  • When did someone at the school with the power to intervene on behalf of the victim become aware that sexual harassment was occurring; and
  • Did that person immediately take action to remedy the situation?

• Where a school district has knowledge that its remedial action was ineffective, it is required to take further remedial action to eliminate the harassment.
Sexual Harassment and the #ME TOO Movement

MASLA
41st Annual Summer Conference
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