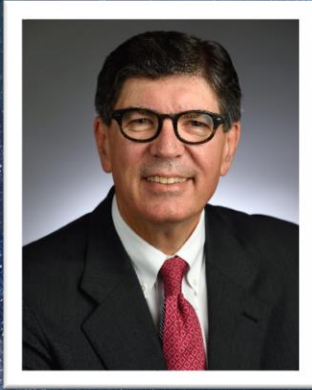


Navigating Campus Legal Issues in 2017

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You Can Say That: The First Amendment on Campus

William E. Thro
General Counsel, University of Kentucky



Public Universities

- Are Constitutional Actors
- Subject To The Limitations Of The First Amendment
- Do Not Have The Discretion To Regulate Expression That The Private Sector Enjoys



Topics Covered

- Protection Of Expression
- Employees
- Student Organizations
- Open Spaces On Campus



Protection of Expression

Government Has No Power To
Restrict Expression Because Of Its
Message, Its Ideas, Its Subject
Matter, Or Its Content.



Hate Speech

The First Amendment's Guarantee Of Free Speech Does Not Extend Only To Categories Of Speech That Survive An Ad Hoc Balancing Of Relative Social Costs And Benefits.



Cases Protecting Hate Speech

- Snyder v. Phelps—Protests At Military Funerals
- Matal v. Tam—Trademark Of A Racial Slur



Not Protected

- Incitement To Violence
- True Threat
- Harassment (By Inference)
- Fighting Words



Incitement to Lawless Action

- Advocacy Of The Use Of Force Or Of Law Violation Where Such Advocacy Is Directed To Inciting Or Producing Imminent Lawless Action And Is Likely To Incite Or Produce Such Action



True Threat

True Threats” Encompass Those Statements Where The Speaker Means To Communicate A Serious Expression Of An Intent To Commit An Act Of Unlawful Violence To A Particular Individual Or Group Of Individuals.



Threat Must Be Intended

- Fact Someone Feels Threatened Or A “Reasonable Person” Would Feel Threatened Is Not Enough
- Speaker Must Intend The Threat Or Know That It Would Be Perceived As A Threat



Harassment

- Supreme Court Has Held That Public Schools And Universities Are Liable For Harassment
- Therefore, We Can Infer That Harassment Is Not Protected



Harassment Definition

Conduct That Is So Severe,
Pervasive, And Objectively
Offensive That It Can Be Said To
Deprive The Victims Of Access To
The Educational Opportunities Or
Benefits



Fighting Words

Those Personally Abusive Epithets
Which, When Addressed To The
Ordinary Citizen, Are, As A Matter
Of Common Knowledge, Inherently
Likely To Provoke Violent Reaction



Employees

The First Amendment Protects A Public Employee's Right, In Certain Circumstances, To Speak As A Citizen Addressing Matters Of Public Concern



Academic Freedom

- Faculty Like To Talk About Individual Academic Freedom
- Case Law Says Faculty Have The Same Rights As Other Public Employees. No Greater And No Less



Student Groups

No Recognized Religious Or Political Student Organization Is Hindered Or Discriminated Against In The Ordering Of Its Internal Affairs, Selection Of Leaders And Members, Defining Of Doctrines And Principles, And Resolving Of Organizational Disputes In The Furtherance Of Its Mission, Or In Its Determination That Only Persons Committed To Its Mission Should Conduct Such Activities;



State Law on Open Spaces

- There Shall Be No Restrictions On The Time, Place, And Manner Of Student Speech That Occurs In The Outdoor Areas Of Campus Or Is Protected By The First Amendment Of The United States Constitution, Except For Restrictions That Are:
 - (A) Reasonable;
 - (B) Justified Without Reference To The Content Of The Regulated Speech;
 - (C) Narrowly Tailored To Serve A Compelling Governmental Interest; And
 - (D) Limited To Provide Ample Alternative Options For The Communication Of The Information.



Guidance

- Consult Your Campus Counsel
- Make Sure You Understand The Issues Before You Act
- Make Sure Your Administrators Are Knowledgeable About Free Speech



Questions?

Title IX & Sexual Assault

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Agenda Overview

- Title IX Overview
 - Legal & Other Bases for Title IX Rules
 - The Obama Administration’s Impact
 - The Trump Administration’s Changes
- Current Title IX Complexity
- Current Summary of Where Things Stand
- Issues Giving Rise to Respondent Litigation
- Future of TIX

- “The Law”
 - Statutes
 - Title IX – 20 U.S.C. §1681, *et seq.*
 - Clery/VAWA – 20 U.S.C. §1092(f)
 - Regulations
 - Title IX – 34 C.F.R. §106.1, *et seq.*
 - Clery -- 34 C.F.R. §668.46 (j)-(m)

- Other “Non-Law”, Significant Sources
 - Guidance
 - 2001 – Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
 - 2011 – Dear Colleague Letter
 - 2014 – Questions and Answers
 - 2015 – DCL re Title IX Coordinators
 - Not Alone – The First Report of the White House Task Force to Protect Students from Sexual Assault

The Obama Administration

- 2011 Dear Colleague Letter
- 2014 Q&A Guidance
- 2014 White House Task Force Report
- 2014 VAWA Regulations
- 2016 Transgender Guidance

Model Policy Outline

1. Introduction

2. Scope of Policy

3. Options for Assistance
Following an Incident
of Sexual Misconduct

4. Title IX Coordinator

5. Definitions

6. Reporting Policies and
Protocols

7. Investigation Policies
and Protocols

8. Grievance/Adjudication
Procedures

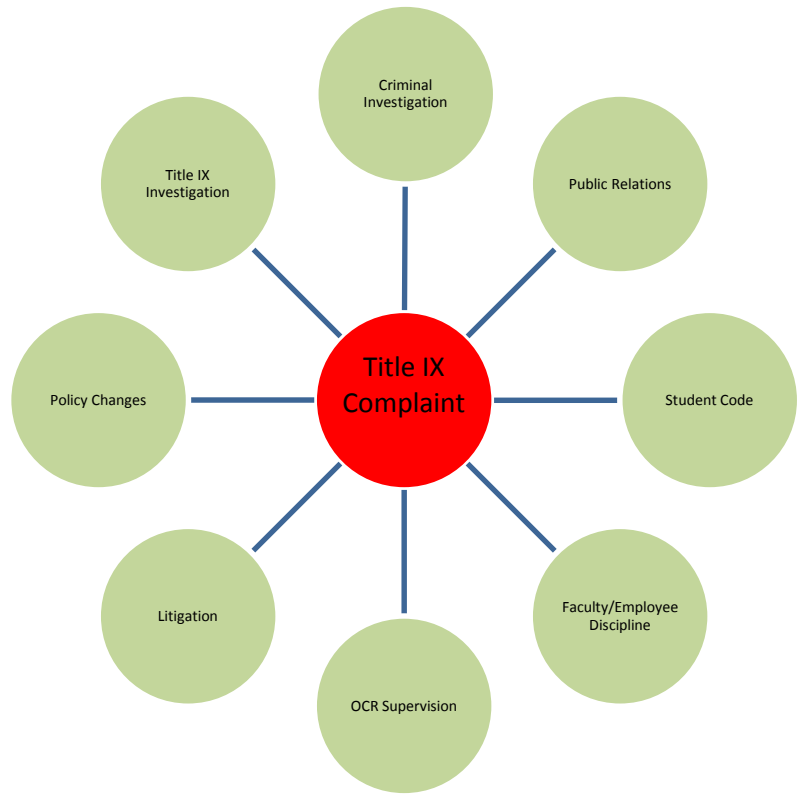
9. Prevention and
Education

10. Training

The Trump Administration

- Secretary Betsy DeVos – A K-12 Secretary
- 2017 Repeal of 2016 Transgender Guidance
- Asst. Secretary for Civil Rights Candice Jackson
 - More focused investigations
 - 90% comment
- Impact of Russian Investigation
 - Pros
 - Cons

Title IX Complexity



Grievance/Adjudication

- Adopt and publish procedures providing for **prompt and equitable resolution** of complaints
- Provide notice to students of the grievance process, including where to file complaints
- Provide for **adequate, reliable, and impartial** complaint investigation

Grievance/Adjudication

- Provide **simultaneous, written notice** to parties of outcome of complaint and any appeal
- Provide **assurance** that school will take steps to prevent recurrence and remedy effects
- Include statement of school's jurisdiction over Title IX complaints

- **Include:**
 - definitions of sexual harassment and explanation of hostile environment
 - reporting **policies** and **protocols**
 - identification of **employee(s) responsible** for **confidentiality requests** - *often the Title IX Coordinator*
 - notice that Title IX prohibits retaliation

Grievance/Adjudication

- Provide notice of:
 - **student's right** to file criminal and Title IX complaints simultaneously
 - **interim measures** to protect student in educational setting
- Establish:
 - **preponderance of evidence** as standard in resolving complaints
 - that **mediation** is **never appropriate** in sexual violence cases

- Provide **complainants** with:
 - notice of potential remedies
 - protection after determination that violation occurred
 - option to attend the hearing, but inform them that it will occur regardless of their presence
 - sources of counseling, advocacy, and support
 - notice of **right to terminate informal** complaint resolution efforts at any time to **proceed with formal** process

Grievance/Adjudication

- Provide **both parties** with equal opportunities:
 - to present evidence and witnesses
 - to be represented by counsel
 - to have a lawyer or other advisors to participate
 - to present expert testimony
 - to be present at the hearing
 - to cross examine witnesses
 - to appeal

Grievance/Adjudication

- Provide **both parties** with:
 - similar and timely access to information used at hearing
 - written notice of how either party may appeal
 - notice of any change in hearing results that occurs prior to results being final
 - simultaneous, written notice of final results
 - notice about outcome of appeal

Grievance/Adjudication

- Provide the **respondent** with:
 - notice of potential sanctions
 - due process (if school is state-supported)
- Provide the **broader student population** with:
 - remedies when the respondent is not affiliated
 - require grievance procedures be applied
- **Apply grievance policies & procedures:**
 - to sex discrimination complaints filed by students against employees, other students, or third parties
 - to harassment complaints filed by students against employees, other students, or third parties

Grievance/Adjudication

- **Identify** the persons who may attend and/or participate at hearing and the extent of their participation
- **Explain** the results of the adjudication process, including remedies for complainant and for school community
- **Prohibit** school from requiring party to abide by nondisclosure agreement as to hearing outcome
- **Require** school to adopt and publish grievance procedures

Grievance/Adjudication

- Require same type of appellate review for both parties
- Describe **appellate procedures**
 - Grounds
 - Standards for review
 - Person or entity who will hear the appeal
 - Reasonably prompt time frames

Grievance/Adjudication

- **Notify** students and employees of procedures
- **Designate** reasonably prompt time frames for major stages of the process
- **Notify** complainant of:
 - Whether alleged conduct occurred
 - Any sanctions imposed on respondent as a direct result of the complaint
 - Steps taken to eliminate hostile environment, if one exists, and prevent recurrence

Grievance/Adjudication

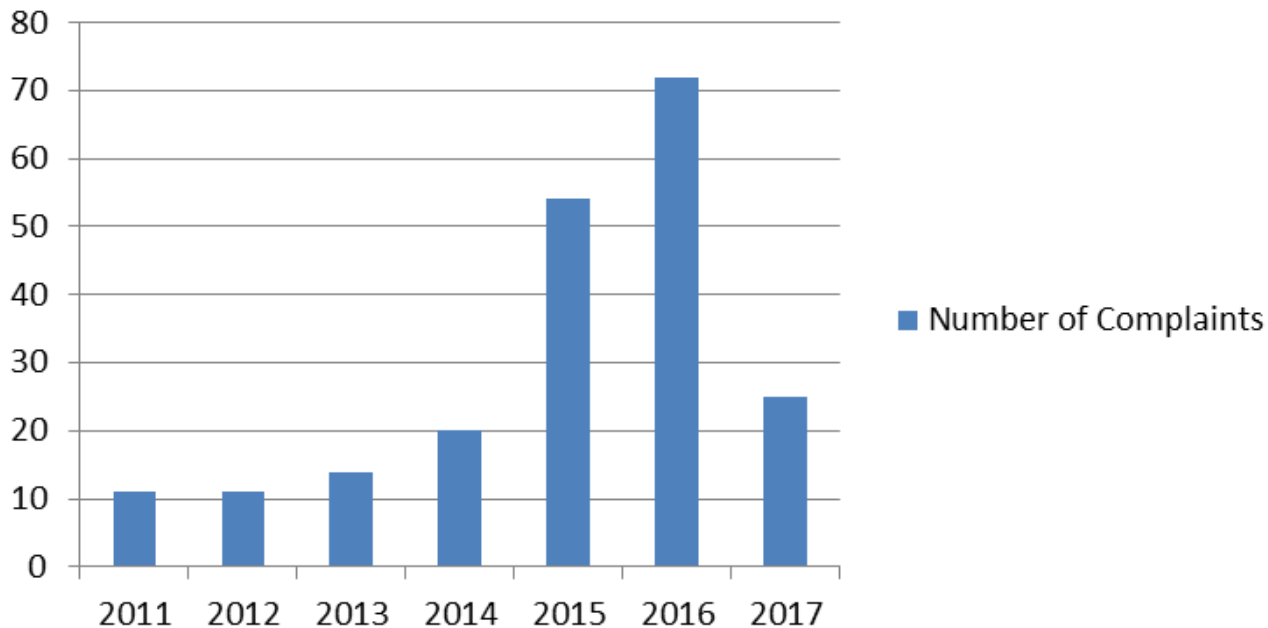
- **Require** hearing be conducted by officials who receive annual training on:
 - Issues relating to:
 - Domestic violence
 - Dating violence
 - Sexual assault
 - Stalking
 - How to conduct an investigation and hearing process to protect complainant safety and promote accountability

Summary

- Colleges have lots of great folks
 - Dedicated to student safety
 - Dedicated to ending sexual misconduct
 - Wanting to follow the rules
- Colleges educate people
- Colleges are faced with lots and lots of rules
- Colleges don't do sophisticated investigations
- Colleges don't run sophisticated court systems

The Title IX Litigation Wave

Number of Complaints



- Breach of Contract
- Gender Bias
- Defamation
- Violation of Title IX – “Gotcha” claims
 - Hostile Environment
 - Deliberate Indifference
 - Erroneous Outcome
 - Selective Enforcement

- Promissory Estoppel
- Negligence
- Fraud
- Intentional Infliction of Emotional Distress
- Negligent Infliction of Emotional Distress

The Future

- More respondent claims
- Less OCR complaints
- More focus on preventive efforts on campus
- Less victim-orientation in campus processes
- More case law as a source of direction for TIX officials on campus
- Less federal regulation by guidance

The Last Four Days

- Title IX Guidance Subject to Notice and Comment Process
- Current Guidance To Be Rescinded
- Temporary Guidance To Be Adopted
- MUCH Shorter Resolution Agreements

More Future Thoughts

- Commitment to Reducing Campus Sexual Assaults Continues
- Enhanced Due Process Protections Likely
- VAWA Limits ED Flexibility
- Reporting/Education/Training Guidance Components Likely to Remain
- One Certainty: Uncertainty!

Title IX & Sexual Assault

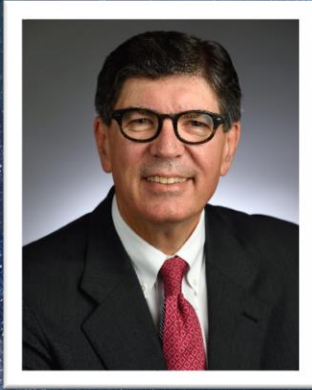
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