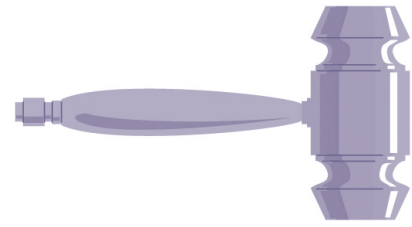


# Legal Corner



By Michael I. Levin, Esq., PA Principals Association General Counsel

## New Title IX Regulations



In May 2020, the U.S. Department of Education (“DOE”) issued new Title IX regulations. The effective date of the regulations is August 14, 2020. As you are aware, Title IX prohibits sex discrimination by schools that receive federal funding. Title IX was passed as part of the Education Amendments of 1972. Congress enacted Title IX with two principal objectives in mind: to avoid the use

of federal resources to support discriminatory practices in education programs and to provide individual citizens effective protection against those practices, stating:

“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 (Emphasis added).

The DOE is responsible for interpreting and enforcing Title IX and issuing regulations to ensure the requirements of Title IX are fulfilled. The new Title IX regulations along with the DOE’s commentary exceed 2,000 pages. The new regulations significantly change school districts’ obligations and the obligations of principals regarding incidents of sexual assault and harassment involving students and employees under Title IX. As stated by the DOE:

“These final regulations are premised on setting forth clear legal obligations that require recipients to: promptly respond to individuals who are alleged to be victims of sexual harassment by offering supportive measures; follow a fair grievance process to resolve sexual harassment allegations when a complainant requests an investigation or a Title IX Coordinator decides on the recipient’s behalf that an investigation is necessary; and provide remedies to victims of sexual harassment.”

The changes mandated by the new regulations necessitate school districts undertaking significant revisions to existing school policies and procedures, designating additional Title IX-specific personnel, as well as providing

extensive training to their school staffs. School districts should be well on their way to making such revisions, designations and training. However, the new regulations will also require major adjustments for school principals “on the ground.” School principals are usually the “frontline” in addressing student and employee misbehavior, including conduct falling within the definition of sexual harassment under Title IX. Therefore, school principals will not only have to make sure they and their staffs are well trained on the new regulations, but on a day-to-day basis they will have to be able to identify conduct falling under Title IX, implement the appropriate procedures and take appropriate action. For example, **if a high school student is accused of a serious sexual assault or rape, the principal will no longer be able to hold an “informal hearing” under school district policy and 22 Pa. Code, §12.8(c) and, if the allegations are believed, suspend the student for up to 10 days and refer the student for an expulsion hearing.** Yes, you read that correctly. I placed the text in bold to make sure you saw it.

The new regulations redefine substantive terms under Title IX. For example, sexual harassment is now defined more broadly to include any of three types of misconduct on the basis of sex, all of which jeopardize the equal access to education that Title IX is designed to protect: (1) any instance of quid pro quo harassment by a school’s employee; (2) any unwelcome conduct that a reasonable person would find so severe, pervasive and objectively offensive that it denies a person equal educational access; and (3) any instance of sexual assault, dating violence, domestic violence or stalking. Under the new regulations, a school’s Title IX liability arises from its failure to address sexual harassment by an employee, student or other person. A school must respond to sexual harassment promptly and in a manner that is not deliberately indifferent.

Schools are not required to take any action unless they have “actual knowledge” of allegations of sexual harassment. In the K-12 setting, actual knowledge will now be found whenever a report is filed with the school’s Title IX coordinator, or **whenever any employee has notice of such allegations. Thus, under the new regulations, all K-12 employees are “mandatory reporters” in terms of instances of sexual harassment.** For example, custodians, maintenance workers, food services workers and bus drivers are mandatory reporters. If they see conduct that may constitute sexual harassment or hear about conduct that may constitute sexual harassment, the school entity is deemed to have knowl-

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edge and act or be subject to liability. As noted, the new regulations require extensive training.

The new regulations create a formalized hierarchy and specific position titles, including: (1) Title IX coordinators; (2) investigators; (3) decision-makers; and (4) facilitators. The employees designated in each of these positions must receive training on the definition of sexual harassment; the scope of the school entity's education program or activity; how to conduct an investigation and grievance process; including hearings, appeals and informal resolution processes; and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias. In addition, decision makers must receive training on any applicable technology, issues of relevance of questions and evidence, including those related to the complainant's sexual predisposition or prior sexual behavior. Investigators must receive training on issues of relevance to create appropriate investigative reports.

Although each public school entity will decide for itself which employees will fill these roles, it is likely that principals may be "investigators" and/or possibly "facilitators. An investigator cannot be a "decision maker" in the same case. Consequently, this will change the procedures and processes for principals when the alleged wrongdoing by a student involves sexual conduct. Ordinarily, a principal might investigate allegations of student misconduct and then make a decision after an informal hearing. That is prohibited for any matter that involved alleged sexual harassment. Principals, forget what you have learned about student discipline procedures – it has been overgrown by the new Title IX procedures.

Based upon the foregoing, school principals not only will be required to be trained to recognize and identify sexual harassment as defined but also to be trained in such procedures as are required, and their proper role in such matters. In turn, principals will be responsible to ensure that their staffs are trained as well. The new regulations also impose numerous significant procedural changes.

In addition to designating the Title IX coordinator, schools are now required to designate investigators and "decision-makers." The new regulations require that the school district's "decision maker" in terms of a Title IX complaint cannot be the same person as its Title IX coordinator or investigator, thus prohibiting a "single-investigator model." Essentially, this requires that several administrators will be necessary to address each Title IX complaint.

The new regulations require that once a K-12 employee has notice of such allegations, the Title IX coordinator must be promptly notified and he/she must promptly contact the complainant to discuss supportive measures and explain the process for filing a formal complaint.

The new procedural requirements also include schools adopting and publishing "grievance procedures" that provide for a prompt and equitable resolution of student and employee Title IX complaints and specific timelines for each step. Most notably, schools must follow such grievance processes before imposing *any* disciplinary sanctions against the accused. Moreover, under the new regulations, it is the



school district who has the burden of proof, not the complainant or the accused.

As part of the grievance process, once a formal complaint is received, the school district must conduct a formal investigation, or, in limited circumstances, offer a voluntary informal resolution process.<sup>1</sup> The formal investigation, undertaken by a designated "investigator" must produce a specifically detailed investigation report. However, before the report may be completed, the school district must provide the applicable allegations and evidence to each party and allow for written responses. Thereafter, the investigator must send the investigative report to each party for review and written response before either a hearing (if applicable<sup>2</sup>) or the school district's determination regarding responsibility (if no live hearing). The actual decision as to the accused's responsibility must then be made by the school district's "decision maker." If no live hearings are to be held, after the investigative report is completed, but before determining responsibility, the decision-maker must allow each party to submit written questions, provide each party with answers and allow for follow-up questions. Once a determination is made, the decision maker must send to both parties a written determination explaining the conclusions reached, offering each the opportunity to appeal the determination. Such an appeal must be reviewed by yet another administrator – i.e., decision maker.

Although the aforementioned substantive changes are critical, and training will be extensive, perhaps the most critical changes for school administrators, and especially school principals, will be these procedural modifications proffered by the new regulations.

Under the new regulations, we expect that many principals will be assigned to serve as investigators or decision makers in terms of such Title IX complaints. However, even if not designated as such, all principals will have to address student discipline and personnel matters through the prism of these new rules and processes. The difficulty will be that

school principals will also still have to abide by and adhere to existing laws, policies and agreements applicable to addressing student and personnel conduct. For example, allegations of student conduct in violation of an applicable code of conduct or school law which also implicate sexual harassment under Title IX will require the administrator to address the issue under Title IX's procedures and timelines. Although the school district will be required to adhere to the new Title IX requirements, the school district at the same time is not allowed to violate or ignore existing law, policy and procedures. Similarly, the prompt imposition of "supportive measures" will still have to be addressed in terms of student IEPs and Section 504 plans, which require applicable procedures to implement. In terms of employee respondents, the imposition of the Title IX grievance and investigative process may "conflict" with the school district's stated duties outlined in a CBA, the School Code or due process procedures (i.e., Loudermill).

In the end, Title IX subjects school districts to serious liability for failing to promptly address claims of sexual harassment and adhering to the aforementioned processes. However, Title IX does not expressly or implicitly absolve

school districts from their responsibilities under the numerous state and federal laws applicable to its students and employees. While clear policies and adequate training will hopefully provide sufficient guidance, and time will provide experience and hopefully wisdom, school principals on the front lines will have to remain ever mindful in circumstances presenting Title IX issues that such processes must be adhered to and where applicable, other processes may also be in play. When such instances arise, principals must use common sense, rely on their training and experience, but also be prepared to seek guidance from their chief administrators and their school district solicitors.

#### End Notes

<sup>1</sup> Under the regulations, such informal processes are not available when the alleged victim is a student and the accused is an employee.

<sup>2</sup> Under the regulations, K-12 school entities are permitted, but not required, to hold live hearings as part of the grievance process.

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