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

New Title IX Regulations: 2024 Edition

As school administrators familiar with these articles, you must be thinking, "Didn't we just receive new Title IX regulations just a few short years ago?" The answer is of course, yes. In early May of 2020, the U.S. Department of Education ("DOE") issued "new" Title IX regulations. The then "new" Title IX regulations, along with the DOE's commentary, exceeded 2,000 pages and significantly changed school districts' obligations regarding incidents of sexual assault and harassment involving students and employees under Title IX. As stated by the DOE in 2020:

> *"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 revised DOE regulations became effective Aug. 14, 2020. As I reported in 2020, the new regulations redefined substantive terms under Title IX. The changes mandated by the new regulations necessitated 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. However, the new regulations also required major adjustments for school principals who are often the "frontline" managers addressing student and employee misbehavior, including conduct falling within the definition of sexual harassment under Title IX. Therefore, school principals not only had to make sure they and their staffs were well trained on the new regulations, but on a day-to-day basis they had to be able to identify conduct falling under Title IX, implement the appropriate procedures and take appropriate action.

Fast forward four years, and the regulations have now been revised, again. Hence, another set of new Title IX regulations.

As you are aware, Title IX was signed into law more than 50 years ago. Title IX was passed as part of the Education Amendments of 1972. Title IX prohibits sex discrimination by schools that receive federal funding. 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 with 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 educationprogram or activity receiving Federal financial assistance, ..." 20 U.S.C.A. § 1681 (Emphasis added).

The DOE is responsible for interpreting Title IX and issuing such regulations.

On April 19, 2024, the DOE released its final rule regarding the latest new regulations. In formulating this version of the regulations, the DOE recognized that the 2020 amendments to the regulations represented a partial change from the way that the DOE had enforced Title IX with respect to responding to sexual harassment. The DOE noted that even if these amendments are not strictly required to effectuate the prohibition, the DOE has, in the exercise of its discretion, determined that they further Title IX's prohibition on sex discrimination. As stated by the DOE, the new regulations are issued to provide greater clarity regarding: the definition of "sex-based harassment"; the scope of sex discrimination, including recipients' obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity; and recipients' obligations to provide an educational environment free from discrimination on the basis of sex. Additionally, according to the DOE, the regulations also better account for the variety of recipients and education programs or activities covered by Title IX and provide discretion and flexibility for recipients to account for variations in school size, student populations and administrative structures.

Before issuing the proposed regulations, the DOE received feedback on its Title IX regulations, as amended in 2020, from a wide variety of stakeholders: students, parents, educators, state government representatives, advocates, lawyers, researchers and representatives from elementary schools, secondary schools and postsecondary institutions. After releasing the proposed regulations in July 2022, the department received and reviewed more than 240,000 comments from the public. **The regulations become effective Aug. 1, 2024.**

According to the DOE Fact Sheet (USDOE, 2024) issued with the new 2024 regulations, the new regulations:

- **Provide full protection from sex-based harassment**. The final regulations strengthen vital protections from all forms of sex-based harassment, including sexual violence and unwelcome sex-based conduct that create a hostile environment by limiting or denying a person's ability to participate in or benefit from a school's education program or activity.
- **Require schools to take prompt and effective action to end any sex discrimination in their education programs or activities — and to prevent its recurrence and remedy its effects.** The final regulations promote accountability and fulfill Title IX's nondiscrimination mandate by requiring schools to act promptly and effectively in response to information about conduct that reasonably may constitute sex discrimination, including sexual violence and other forms of sex-based harassment. These regulations also require that schools train employees about the school's obligation to address sex discrimination, as well as employees' obligations to notify or provide contact information for the Title IX coordinator.
- **Require schools to provide supportive measures to complainants and respondents affected by conduct that may constitute sex discrimination, including sexual violence and other forms of sex-based harassment.** Under the final regulations, schools are required to offer supportive measures, as appropriate, to restore or preserve a party's access to the school's education program or activity or provide support during a school's grievance procedures or the informal resolution process. Supportive measures cannot be unreasonably burdensome to a party and cannot be imposed for punitive or disciplinary reasons.
- **Require schools to respond promptly and effectively to all complaints of sex discrimination with a fair, transparent and reliable process that includes trained, unbiased decision-makers to evaluate all relevant and not otherwise impermissible evidence.** The final regulations strengthen requirements for schools to conduct reliable and impartial investigations of all sex discrimination complaints. The final regulations maintain several major provisions from the current regulations to ensure consistency for schools while updating required procedures to protect against sex discrimination more effectively in the nation's elementary schools, secondary schools and postsecondary institutions.

The current rendition of the new regulations also provides schools with some flexibility to adapt the regulations' grievance procedures to their educational communities. Specifically, the new regulations will enable schools to meet their Title IX obligations while providing appropriate discretion and flexibility to account for variations in school size, student populations and administrative structures. For instance, schools have the option to use a single-investigator model, and schools may choose to use this model in some, but not all, cases as long as it is clear in their grievance procedures when this model will be utilized. Schools also have the option to offer an informal resolution process for sex discrimination complaints unless the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student, or unless such a process would conflict with federal, state or local law. Further, the regulations reflect a framework that accounts for differences in the age, maturity, needs and level of independence of students in various educational settings. The regulations include some requirements that apply in all educational settings as well as specialized requirements that are tailored to the unique situation of sex-based harassment complaints involving postsecondary students. This framework is designed to ensure that all elementary and secondary schools and postsecondary institutions provide for the prompt and equitable resolution of sex discrimination complaints in their respective settings.

> "Further, the regulations reflect a framework that accounts for differences in the age, maturity needs and level of independence of students in various educational settings."

The new regulations also expressly protect students, employees and applicants from discrimination based on pregnancy or related conditions. To this end, the regulations update protections for students, employees and applicants against discrimination based on pregnancy, childbirth, termination of pregnancy, lactation, related medical conditions or recovery from these conditions. Specifically, the new regulations require that schools provide reasonable modifications for students based on pregnancy or related conditions, allow for reasonable break time for lactation for employees and access to a clean, private lactation space for students and employees. The regulations also require that when a student, a parent of a minor student or other authorized legal representative informs a school employee of a student's pregnancy or related conditions, the employee then must provide the individual with information about the school's obligations to prevent discrimination and ensure equal access. The regulations also prohibit schools from disclosing personally identifiable information they obtain through complying with Title IX, including information about reasonable modifications for pregnancy or related conditions, with limited exceptions.

In addition, the new regulations expressly prohibit discrimination against LGBTQI+ students, employees and others. The regulations expressly prohibit discrimination and harassment based on sexual orientation, gender identity and sex characteristics in federally funded education programs, applying the reasoning of the Supreme Court's ruling in *Bostock v. Clayton County*.

Although the new regulations do not include new rules governing eligibility criteria for athletic teams, the new regulations clarify that a school must not separate or treat people differently based on sex in a manner that subjects them to more than *de minimis* harm, except in limited circumstances permitted by Title IX, such as in the context of sex-separate living facilities and sex-separate athletic teams.

Finally, the new regulations reinforce that schools must not intimidate, threaten, coerce or discriminate against someone in order to interfere with their Title IX rights or because they reported sex discrimination, including sexual violence or other forms of sex-based harassment, or participated in, or refused to participate in, the school's Title IX process. The regulations make clear that schools must protect students from peer retaliation by other students.

As noted above, in addition to several "clarifications," there are several takeaways from the new regulations. First is that sex discrimination under Title IX includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation and gender identity. Second, in addressing sex-based harassment, the new regulations define hostile environment harassment as unwelcome sex-based conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity. Third, a

recipient with knowledge of conduct that reasonably may constitute sex discrimination in its education program or activity must respond promptly and effectively, as opposed to having "actual knowledge" of sexual harassment and responding in a manner that is not deliberately indifferent.

In addition, the new regulations require certain employees to notify the Title IX coordinator when the employees have information about conduct that reasonably may constitute sex discrimination. For example, any non-confidential employee at an elementary school or secondary school is obligated to notify the Title IX coordinator. Also, a recipient must require its Title IX coordinator to monitor the recipient's education program or activity for barriers to reporting information about conduct that reasonably may constitute sex discrimination and take steps reasonably calculated to address such barriers. The new regulations identify three categories of confidential employees who are not required to notify the Title IX coordinator about conduct that reasonably may constitute sex discrimination. Instead, these employees must provide information to anyone who informs the confidential employee of conduct that reasonably may constitute sex discrimination about their status as confidential for purposes of Title IX, how to contact the Title IX coordinator, how to make a complaint and how the Title IX coordinator can help.

Similar to the 2020 regulations, the new 2024 regulations require and impose significant training obligations upon school district administrators and hence, school principals. As in 2020, Title IX coordinators, investigators, decision-makers and other persons facilitating an informal resolution process 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 appeals and informal resolution processes, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest and bias. Similar to 2020, in addition to the required training, the substance of the new provisions is simply too extensive to be condensed into an article.

Many principals will continue to be assigned to serve as investigators or decision-makers in terms of Title IX complaints, similar to the 2020 regulations. Even in instances where they do not serve in such capacities, school principals will be subject to recognizing and reporting events or conduct that reasonably may constitute sex discrimination. Moreover, all principals will continue to be required to address student discipline and personnel matters through the prism of the Title IX rules and processes.

Title IX subjects school districts to serious liability for failing to promptly recognize and address claims of sexual harassment and adhering to the aforementioned processes. As I indicated in 2020, although 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 of when Title IX 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. ■

REFERENCE:

United States Department of Education (USDOE). (2024). *FACT SHEET: U.S. Department of Education's 2024 Title IX Final Rule Overview*. https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf

Supporting Student Teachers

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the school district to coordinate a plan for developing teacher capacity, well-prepared teachers will be ready to fill the needs of the school; teacher shortages will be addressed. With appropriate support and practice, new teachers will develop confidence, self-efficacy and capacity. Prioritizing this work contributes to teacher quantity and quality. The children deserve our best effort!

For further information, please contact Dr. Minsinger at **minsing1@duq.edu**. ■

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***ABOUT THE AUTHOR: Jerry Minsinger, Ed.D.**, is an adjunct professor and student teacher supervisor at Duquesne University. Prior to his current position, he served 25 years as a principal at the elementary, middle, secondary and special school levels in the Pittsburgh Public Schools. Dr. Minsinger began his career as a middle school teacher. He earned his doctorate, letter of eligibility and principal's certificate from the University of Pittsburgh. Additionally, he obtained his master's and bachelor's degrees in education from the University of Pittsburgh. Dr. Minsinger has been a member of the PA Principals Association since 1997.*

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