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In Brief: School Law Update

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New Title IX Regulations Create New Requirements for Schools

By Danielle Guarascio, Esq.

Danielle Guarascio

Signed into law in 1972, Title IX reads: "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. Code § 1681 et seq.

On November 29, 2018, the U.S. Department of Education (hereinafter "Department") published a notice of proposed rulemaking in the Federal Register to amend the regulations under Title IX. The regulations went through a formal notice-and-comment process to incorporate insight from various stakeholders and on May 19, 2020, the Secretary of Education issued a Final Rule under Title IX. The new regulations took effect on August 14, 2020.

The Final Rule replaces an Obama-era directive on school sexual assault that the Department rescinded in September 2017. The Department withdrew the Dear Colleague Letter on Sexual Violence issued by the Office of Civil Rights (hereinafter "OCR") on April 4, 2011 and the Questions and Answers on Title IX and Sexual Violence issued by OCR on April 29, 2014.

Enacting the Final Rule amid the COVID-19 pandemic adds an additional layer of challenges.

The Final Rule carries more legal weight than the previous guidance. The new regulations provide the mechanisms that schools must use to respond to allegations of sexual harassment.

The Final Rule dramatically expands the requirements for Title IX, addressing changes to its regulatory definitions; grievance, informal resolution, personnel, training, and investigative requirements; and formal hearing and appeals processes. The regulations now require "actual notice," of harassment by an education institution to trigger a school's Title IX responsibilities and provide that a school's response will violate Title IX only if it amounts to "deliberate indifference." In addition, the new regulations narrow the definition of sexual harassment.

In updating Title IX's regulatory definitions, the Department borrowed language and definitions from previous U.S. Supreme Court's landmark Title IX decisions, including: Gebser v. Lago Vista Independent School District, 524 U.S. 274 (1998), and Davis v. Monroe County Board of Education, 526 U.S. 629 (1999). Gebser held that monetary damages may be recovered for teacher-student sexual harassment in an implied private action under Title IX if a school district official who at a minimum has authority to institute corrective measures on the district's behalf has "actual notice" of, and is "deliberately indifferent" to, the teacher's misconduct. Similarly, in Davis, the Court found that a school may be liable for monetary damages for student-student sexual harassment when the conditions of Gebser are satisfied and the student demonstrates that the conduct was "so severe, pervasive , and objectively offensive" that it denied the victim equal access to educational opportunities or benefits. The borrowed language appears to demonstrate the Department's intent to realign the current application of Title IX with how it was previously applied.

Further, the Final Rule emphasizes due process principles for all parties. Schools are now empowered to choose the threshold that officials use to decide if an assault claim requires

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Tax Exemption and Mixed-Use Incentive Program Act: A New Tool in the Fight Against Blight

By Megan Turnbull, Esq.

Megan Turnbull

The cost of blight is not always obvious; however, one local 2013 study estimated that tens of millions of dollars are lost annually in Mon Valley communities considering lost real estate and earned income tax revenue, as well as additional municipal services costs. When the trickle-down effect on non-blighted properties is considered, the loss is magnified by nearly five-fold.

On September 30, 2020, Pennsylvania school districts and municipalities acquired a new blight remediation tool in the form of the Tax Exemption and Mixed-Use Incentive Program Act. The new law allows local taxing districts to adopt tax incentive programs specifically designed to encourage the rehabilitation of blighted properties in their communities, as well as spur on certain mixed-use development for more sustainable growth. The value of qualified improvements are phased onto the tax rolls over a ten (10) year period while a unique safeguard against blight relapse is secured in the form of a lien for the first five (5) years.

Like all tax incentive programs, taxing bodies should study both the opportunities and challenges prior to adoption. The attorneys of WBK are prepared to help.

Navigating COVID-19 Compensatory Services (CCS)

By Lynne Sherry, Esq.

Lynne Sherry

Following mandated school closures in March 2020, state and federal guidance made clear that the provisions of the IDEA requiring a free appropriate public education (FAPE) for students with disabilities had not been waived.

In response to potential regression for students with disabilities during the time of alternative instruction due to COVID-19, the Pennsylvania Department of Education (PDE) issued guidance around COVID-19 Compensatory Services (CCS) which most recently updated October 14, 2020. https://www.education.pa.gov/K-12/Special%20Education/FAQContact/Pages/COVID-19-Compensatory-Services.aspx

CCS is defined by PDE as the services needed to remedy "a student's skill and/or behavior loss and/or lack of progress" from the inability of an LEA to provide FAPE during times of alternative instructional models. The services contemplated by CCS should be determined by IEP teams only after a "recoupment period," whereby students have a chance to recoup lost skills or behavior or otherwise make progress deemed appropriate. Recoupment services can be provided through a district's MTSS or IEP process and can occur throughout the school day.

PDE's guidance outlines timelines to assess the need for compensatory services. "As soon as appropriate, but no later than the first two weeks of resuming normal operations," districts must gather baseline data, compare this data to the pre-COVID-19 progress monitoring, and determine if there is a regression in skills, behavior, or progress. For students showing regression, these students should be provided recoupment opportunities. No later than the third month after resuming "normal operations," the IEP team should review the progress of any student who regressed during COVID-19 alternative instruction and who received recoupment services.

PDE recommends that IEP teams consider a variety of data sources in considering the need for CCS. IEP teams should make CCS determinations on an individualized basis and should determine the amount of CCS needed and how it will be delivered. If the team determines that CCS should be provided, the LEA must issue a Prior Written Notice outlining the CCS.

Each school district and student is unique and will present different CCS considerations. While districts will follow a similar framework for making CCS decisions, determinations will be individualized for each student. Special education attorneys at WBK are available to consult with school districts on issues surrounding CCS generally and in situations involving individual students.

We're Speaking…

- Attorneys Ira Weiss and Megan Turnbull will be presenting a virtual CLE through PSBA on November 18, 2020. The topic of their presentation will be "Did You See What That Teacher Posted? Disciplining Employees for Their Speech After Carr v. Penndot."
- Attorney Weiss will be teaching Competent Management of Human Resources at the University of Pittsburgh School of Education in the upcoming spring semester. Last semester, Attorney Weiss taught a course titled Competent Management of Student Personnel Services.
- Attorney Rebecca Heaton Hall will be co-presenting with Jessica Dirsmith at the Association of School Psychologists of Pennsylvania & Pennsylvania State University, Virtual 2020 Fall Conference on the topic of "Legally Aligned Assessment of Emotional Disturbance."

New Title IX Regulations, *continued*

a response. Previously, the "preponderance of evidence" standard was the required threshold, now schools may opt to utilize a "clear and convincing evidence" standard, which is a higher bar to prove claims of misconduct. Before approving this higher standard of evidence, schools are encouraged to consult with their Solicitor. Additionally, the Final Rule requires schools to provide students with "supportive measures" that will restore and preserve equal access to the education program or activity without unreasonably burdening the other party. Another change is that the new Title IX regulations explicitly define the scope of schools' responsibilities to respond to complaints of sexual harassment. A school's obligations now extend to incidents that do not occur in the school building only if the incident occurs as part of the school's operation or if the school exercised substantial control over the respondent and the context of the alleged sexual harassment that occurred off of school grounds. Incidents that occur outside of the United States are not subject to a mandatory response under the new Title IX regulations.

Enacting the Final Rule amid the COVID-19 pandemic adds an additional layer of challenges, forcing districts to navigate learning during the ongoing pandemic while continuing to focus on compliance with the new regulations. As a result of remote learning, districts will have to confront new issues, including handling complaints; conducting interviews and hearings; and applying the new regulations to online harassment. Our office is happy to assist with any questions you may have regarding the new Title IX regulations.

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