

New Guidance on the Horizon

by Nicole Williams, Esq.

Both the U.S. Department of Education (USDOE) and the Pennsylvania Human Relations Commission (PHRC) have recently introduced new guidance that will inform school district policy and procedures moving forward.

In June 2022, USDOE released new proposed Title IX regulations for public comment. These proposed regulations make changes to existing definitions and propose new definitions, overhaul the current mandated grievance procedures to no longer require that different individuals take on the roles of Title IX Coordinator, investigator, and decision-maker, that evidence be provided to all parties, or that investigation reports contain certain required elements, among other changes, and clarify that Title IX covers pregnancy or related conditions and family status, as well as sex discrimination based on sex stereotypes, sex characteristics, sexual orientation, and gender identity for students and employees.

The final regulations were expected to be released in May of 2023, however, due to the overwhelming number of public comments received, the USDOE advised that it would be taking additional time to properly review and consider all comments. We now expect the final rule to be released by the USDOE in October 2023.

A separate rulemaking concerning Title IX and athletics was published by the USDOE in April 2023. It proposes that schools will not be permitted to have a categorical



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ban against students participating on a sports team consistent with their gender identity. Rather, if a school adopts a policy that would limit or deny a student's ability to participate on a team consistent with their gender identity, that policy must be

substantially related to the achievement of an important educational objective such as fairness in competition or prevention of a sports-related injury and must minimize

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Back-to-School: Special Education Reminders

by Lynne Sherry, Esq.

As school districts prepare to open the doors to students in the fall, there are a few reminders – taken from recent Office for Dispute Resolution (ODR) Hearing Officer decisions – that will help districts ensure that they are prepared to meet student needs and remain compliant with the Individuals with Disabilities in Education Act (IDEA) and Chapter 14.



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Individualized Education Program (IEP) Implementation – On Day One:

“At the beginning of each school year, each public agency must have in effect, for each child with a disability within its jurisdiction, an IEP, as defined in 34 CFR 300.320.” 34 CFR 300.323(a). An IEP must be in effect at the beginning of each school year, and the failure to have an IEP in effect on day one may result in a denial of FAPE. If an IEP has not been finalized by the end of the prior year, the IEP team must meet prior to day one in order to ensure that the student is not deprived of educational benefit. Parents, as part of the IEP team, must be involved in this process in order to provide the IDEA's mandate of meaningful parental participation. See *J.C. v. Upper Merion Area School District*, 26193-21-22 (SEA PA 08.16.2022) (McElligott, M.) (finding that because parents were not able to concretely understand what the District was proposing *before the beginning of the school year*, the District deprived the student of FAPE and tuition reimbursement was awarded for the student's private placement).

As an additional reminder, districts should ensure that all staff (special education teachers, general education teachers, related service providers, building staff, substitute teachers, etc.) are aware of the contents of a student's IEP and their responsibilities in implementing the IEP with fidelity. Districts should ensure that when students are transitioning between buildings within a district that the IEP moves with the student.

Child Find – Red Flags:

The IDEA includes a Child Find mandate, which requires districts to affirmatively “identify, locate and evaluate all children with disabilities residing within the jurisdiction who are in need of special education and related services.” 34 CFR 300.111 (c). This includes children suspected of being children with disabilities and in need of special education, even if they are advancing from grade to grade, and

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Special Education Reminders, *continued*

highly mobile children (including migrant children). In addition to districts' obligations to post "general public notice obligations" regarding Child Find, there are several areas of Child Find liability most frequently litigated. Some of these areas include: excessive absences/truancy related to disability; behavioral concerns (especially those leading to out of school discipline and/or frequent requests for parents to "pick-up" their student from school); multiple hospitalizations; an ineffective 504 plan to address student needs; severe or persistent behavioral struggles without response to interventions. See *J.S. v. Lower Merion School District*, 26336-21-22 (SEA PA 08.26.2022) (Ford, B.) (Finding that a student's worsening behaviors and attendance, coupled with a teacher's warning to administrators that the student was in need of help, amounted to a Child Find violation due to the District's failure to reassess for special education eligibility).

Meaningful Parental Participation

Per the IDEA, parents are mandatory members of the IEP team, and districts must ensure that parent(s) of a student with a disability are present at each IEP meeting or are afforded the opportunity to participate in an IEP meeting. 34 CFR 300.321 (a) (1); 34 CFR 300.322 (a). Effective communication with parents/guardians can often make or break a special education case. In cases where there is open communication and a forum for meaningful parental participation – as mandated by the IDEA – districts are often less likely to face adversarial litigation. Districts are encouraged to work with families to determine a means for open communication, such as a home-school communication log, or an agreed upon frequency for email updates regarding a student's progress. In some cases, the development of a communication plan may be appropriate or necessary to set reasonable limits on communication while maintaining participation rights under the IDEA. Meaningful participation also takes into account a parent/guardian's ability to understand and participate in development of an appropriate IEP. Where parents/guardians are denied this opportunity, liability may ensue. See *S.F. V. East Allegheny School District*, 27339-22-23 (SEA PA 04.18.2023) (McElligott, M.) (finding that because the student's IEP goals did not contain baseline data or a mechanism to measure progress, and because changes were made to the IEP without parental input, parents were prevented from meaningful participation, and compensatory education was awarded).

Attorneys at WBK are available to consult with school districts on issues surrounding IEP implementation, Child Find, and meaningful participation, among other special education topics that may arise as the school year begins. WBK will also be circulating a comprehensive review of ODR cases from the 2022-23 school year to help inform practice in all areas of special education law. ♦

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harms to the student whose ability to participate is being limited or denied. The USDOE's Notice of Proposed Rulemaking suggests that this standard would be more difficult to meet at the elementary level or for club or no-cut teams, but may be more likely to be met on competitive high school or college teams. At this time, the USDOE anticipates it will also release this final rule in October 2023.

Additionally, the PHRC established new regulations that expand the definition of sex to include pregnancy status, childbirth status, breastfeeding status, gender identity or expression, and sexual orientation. The new regulations also contain expanded definitions of religious creed and race. These new definitions apply to both the Pennsylvania Human Relations Act (PHRA) and the Fair Educational Opportunities Act. The new regulations were published on June 17, 2023 and are effective beginning August 16, 2023.

Schools will need to consider the new PHRC regulations when drafting or revising policies and conducting non-discrimination investigations. Schools will also need to stay abreast of the Title IX developments to revise and develop policies, as necessary, and conduct investigations, consistent with the new requirements of final regulations. ♦

We're Speaking

- Attorney Annemarie Harr Eagle recently presented at the 2023 Pennsylvania Association of Career and Technical Administrators (PACTA) Summer Leadership Conference held on July 25-27th at the Penn Stater Hotel & Conference Center in State College, PA. Attorney Harr Eagle provided a school law update to attendees, as well as a presentation on Title IX. ♦

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