



CLIENT ALERT
July 28, 2020

New Mandates under Title IX Effective August 14, 2020
Training Opportunity

On May 6, 2020, the U.S. Department of Education, Office for Civil Rights (OCR) issued final regulations that outline when and how schools are to respond to reports of sexual assault and harassment under Title IX, the federal law that prohibits sex discrimination. This rulemaking follows years of research, careful deliberation, and input from stakeholders, including survivors, and over 124,000 public comments. Ultimately, this Final Rule was promulgated in the hopes of strengthening the regulation and bringing them closer to fulfilling their promise: equal access to education for all students.

The Final Rule defines sexual harassment as unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the school's education program or activity. This narrows the definition of hostile work environment from that which is more commonly used in employment law. Schools will be found in violation of Title IX if they are deliberately indifferent (explained as "clearly unreasonable") to such conduct.

One of the biggest changes promulgated by the Final Rule is schools can now shift the threshold that officials use to decide if an assault claim requires a response from the "preponderance of the evidence" standard to the more exacting "clear and convincing evidence" standard. Ultimately, it is clear the new regulations carry more legal weight than the previous guidance.

In preparation for the August 14, 2020 effective date, we are providing proposed, sample language (included at the end of this Client Alert) for a Board Resolution to ensure initial compliance as of that date, given the need for time to further develop, implement, and conduct training on the required updates and multitude of implications the Final Rule will impose upon School Districts' existing policy and procedures.

Key provisions of the Final Rule K-12 schools must consider include the following:

New Scope:

To be in compliance with Title IX, a school must respond promptly when: (1) the school has actual knowledge of sexual harassment; (2) that occurred within the school's education program or activity; (3) against a person in the United States.

For K-12 educational institutions, the final rule defines actual knowledge as "notice of sexual harassment or allegations of sexual harassment to . . . any employee . . ." 34 C.F.R. § 106.30(a). This includes notice of mere allegations. This approach "arguably broadens . . . an elementary or secondary school's obligation to respond to Title IX sexual harassment compared to the approach taken in previous Department of Education Guidance."

The Final Rule also expands the definition of "education program or activity" to include "locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs."

"Supportive Measures" Required:

When the sexual misconduct is within the scope of Title IX and the school has actual knowledge, the Final Rule implements a requirement for schools to offer "supportive measures" to the person alleged to be the victim. These measures may include counseling, extensions of deadlines, modification of work or class schedules, and other similar measures.

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The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures (with or without the filing of a formal complaint), consider the complainant's wishes with respect to supportive measures, and explain the process for filing a formal complaint.

In this respect, the Final Rule confirms that a complainant's wishes with respect to whether the school investigates should be respected unless the Title IX Coordinator determines that it is not clearly unreasonable to proceed with a formal complaint to initiate an investigation despite the wishes of the complainant for such an investigation not to occur.

Expanded Requirements for Investigation:

K-12 schools must investigate whenever any district employee – from teachers and guidance counselors to bus drivers – learns of a sexual assault or harassment incident, whether a student, a parent, or a bystander reports it. The Final Rule identifies numerous requirements for investigation, the most notable of which are listed below:

Sharing Direct Evidence: Schools must send both parties and their advisors evidence that is directly related to the allegations in electronic format or hard copy and allow at least 10 days for the parties to inspect, review, and respond to the evidence.

Investigative Report: Schools must send both parties and their advisors an investigative report that fairly summarizes relevant evidence in electronic format or hard copy and allow at least 10 days for the parties to respond.

Complaint Dismissal: The final rule sets out mandatory and discretionary reasons for dismissal of a formal complaint. The complaint must be dismissed if the allegations would not constitute sexual harassment, did not occur in a school's education program or activity, or did not occur against a person in the United States. The complaint may be dismissed if the complainant notifies the Title IX Coordinator in writing that he or she wishes to withdraw the complaint, if the respondent's enrollment or employment ends, or if specific circumstances prevent the recipient from gathering sufficient evidence to reach a determination.

Live Hearings: K-12 schools may, but are not required to, provide a live hearing with cross examination. However, with or without a hearing, after the school has sent the investigative report to both parties, and before reaching a determination regarding responsibility, the decision makers must provide each party the opportunity to (1) submit written, relevant questions that the party wants asked; (2) provide each party with the answers; and (3) provide for limited follow-up questions.

Appeals: Both parties have the right to appeal a determination of responsibility and the school's dismissal of a complaint. Along with clarifying the right to an appeal, the Final Rule also confirms that a school may choose to offer informal resolution options such as mediation, arbitration, or restorative justice as long as it receives both parties' voluntary, written consent. Informal resolution cannot be offered unless a formal complaint has been filed. Furthermore, no informal resolutions may be offered in the context of a complaint alleging that an employee harassed a student.

Best Practices:

National education groups are still parsing the regulation, issued as part of a 2,033-page document, and say it will take time to fully understand the changes and the impact they have on K-12 institutions. Until these new regulations are fully understood, it would be best for each School District to review their current policy and any corresponding practices, procedures, and regulations in the event policies or practices need to be updated in order to comply with the Final Rule, which becomes effective August 14, 2020.

Impact:

The new law will significantly alter the way public school entities address issues and/or complaints under Title IX.

Such changes include, but are not limited to:

1. Modification to existing Policies and Administrative Regulations to address and incorporate the Final Rule, which we anticipate as an effort to be undertaken by the Pennsylvania School Boards Association.

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2. School Districts will need to ensure these policy changes are timely adopted and disseminated to students, parents, faculty, administrators and Title IX Coordinators.
3. Students and staff will need to be provided in-service training and/or professional development on these changes.
4. Faculty and student handbooks will need to be updated in accordance with applicable policy changes.
5. Title IX Coordinators, Administrators and other staff tasked with the responsibility of investigating complaints will need to receive updated training regarding the new changes in the law, meeting timelines, the requirements for conducting effective and legally compliant investigations and documenting the information that is uncovered as a result of such investigations.

Title IX regulations have new requirements:

- Addressing the designation of a Title IX Coordinator, the adoption of grievance procedures, and notice/dissemination of policies. (§106.8)
- Important new definitions added by the Final Rule. (§106.30)
- Addressing the requirements for school districts to respond to each report or complaint of sexual harassment of which the district has actual knowledge. (§106.44)
- Requiring school districts to establish and administer a grievance process for formal complaints of sexual harassment; also addressing training and recordkeeping requirements. (Section 106.45)
- Non-retaliation and confidentiality requirements (§106.71)

It is critical that the districts do not wait until the very last minute to prepare for this new cumbersome, legally, and procedurally fraught process to unfold. Districts must take immediate steps to begin training to be in compliance for the new Title IX regulations.

Training:

- The new Title IX regulations specifically mandate training.
- Specific training requirements are outlined in §106.45(b)(1)(iii): “A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.”

Policy/Administrative Procedures:

For those Districts that are part of the Pennsylvania School Board Association (PSBA) Policy Service, you will be receiving a comprehensive revision along with administrative regulations to comply with the new requirements that are to be in effect on August 14, 2020.

In order to be in compliance with the new regulatory changes, your policy is going to have to check certain boxes that must be identified within the body of the policy.

Outlined below is a non-exhaustive list of policy items that schools must address:

- A district must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under Title IX, which employee(s) must be referred to as the “Title IX Coordinator.” (See § 106.8(a))
- OCR now has included a specific definition of sexual harassment that needs to be included in your policy. The language may or may not line up with existing language in other policies; that is why it is so critical to get the revised policy in place as quickly as possible.
- Your policy must contain the following definition of Sexual Harassment:
Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

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- a. An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct;
 - b. Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or
 - c. "Sexual assault" as defined in 20 U.S.C. § 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. § 12291(a)(10), "domestic violence" as defined in 34 U.S.C. § 12291(a)(8), or "stalking" as defined in 34 U.S.C. § 12291(a)(30).
- The Title IX Coordinator will not be permitted to serve as the decision-maker or the appeal decision-maker when the district is addressing a formal complaint of sexual harassment.

NOTE: The Title IX definition of sexual harassment is generally understood to be narrower (i.e., cover less conduct) than the broader definitions of sexual harassment that apply under other fair employment practices laws or state laws such as the Pennsylvania Human Relations Act.

- Districts also cannot use the Title IX definition of sexual harassment as the sole definition of improper sexual harassment within its policies and procedures (including its student and employee handbooks).
- Your policy must have a nondiscrimination statement:
The District does not discriminate on the basis of sex in the education program or activity that it operates, and the District is required by Title IX and 34 C.F.R. Ch. 106 not to discriminate in this manner. The requirement not to discriminate in the District's education program or activity extends to admission (as applicable) and to employment.
- Provide an avenue for individuals to report sexual misconduct, to include during non-business hours, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator.
- Outline the process for submitting a "formal written complaint" signed by the complainant.
- Under Section 106.30(a) of the Title IX regulations, "formal complaint" means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school district investigate the allegation of sexual harassment.
 - o A "complainant" means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
 - o At the time of filing a formal complaint, the complainant must be participating in or attempting to participate in the relevant education program or activity of the school district.
- Outline the range of supportive/interim measures available to all parties without expense even if no formal complaint has been filed.
- Outline in your policy the presumption that the responding party is not responsible for the alleged conduct until a determination is made.
- Outline that the burden of collecting evidence and proving a violation of policy is on the recipient, not the parties.
- Decide whether the District will use the *preponderance of the evidence* or *clear and convincing evidence* as the Standard of Evidence used to determine all violations of the policy. The most commonly used is *preponderance of the evidence*.
- Outline the possible range of sanctions and remedies that could apply for policy violations.
- Outline appeal rights as required by OCR.

Investigation Phase:

- Conduct a preliminary inquiry to determine reasonable cause whether any of OCR's three requirements for dismissal are present.
- Adhere to all notice requirements. Proper notice to parties must be given before any investigative interview takes place.
- You must include a statement that parties may request to see and review evidence collected in an investigation.
- Provide clear written notice before each and every interview including the date, time, and location of same, as well as identify the participants and the purpose of the meeting.
- The Policy needs to delineate that different officials need to serve as investigator, decision-maker, appeals officers, coordinator, and advisors in each case.
- Provide all parties an equal opportunity to inspect and review evidence obtained during the investigation that is "directly related" to the allegations and 10 days to review and respond.

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- Provide the final investigation report to the parties at least 10 days before any hearing to decide whether the respondent is ultimately responsible for the alleged policy violations.

Adjudication/Hearing Process:

- This is a brand new requirement that will require significant training for school personnel involved in the formal “hearing” process.
- The Decision-Maker(s) must issue a written determination simultaneously to all parties for each alleged policy violation.

Record Keeping:

- There are significant record keeping requirements in place for maintaining all documents, information/records, etc. that is available in the case. The retention period must be at least seven (7) years.
- Ensure all training materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process available on the recipient’s public website.

Practical Implications:

What are schools going to do if their policies are not ready within the next 2 weeks? In order to be on the safe side and ensure that no district runs afoul or finds itself in a Catch-22 with meeting a deadline, it is recommended that all school districts immediately pass a motion to proactively and positively move forward to meet these new regulatory requirements effective August 14, 2020.

A Sample Resolution could be as follows:

Motion made by _____ and seconded by _____ that:

1. Effective August 14, 2020, and until the School Board adopts a comprehensive Policy, the School District shall comply with and implement all requirements to the Title IX regulations;
2. Any existing policies or practices that are inconsistent with or in violation of any of the requirements, terms or conditions of the Title IX regulations are hereby superseded effective August 14, 2020;
3. The Superintendent hereby has the following power and authority regarding Title IX:
 - a. To designate one or more Title IX Coordinators;
 - b. To designate one or more investigators under Title IX;
 - c. To designate an initial decisionmaker(s) and an appeal decisionmaker(s) under Title IX;
 - d. To designate a facilitator;
 - e. To establish supportive measures as required by Title IX;
 - f. To make arrangements for and provide required training;
 - g. To amend the Student Code of Conduct as required by Title IX;
 - h. To adopt and/or amend the Employee Code of Conduct as required by Title IX;
 - i. To ensure that all notices are provided;
 - j. To ensure that all required postings to the website are posted; and
 - k. To adopt Administrative Regulations that will ensure compliance with Title IX.

Beard Legal Group and the Levin Legal Group are available to provide training opportunities for Superintendents, Title IX Coordinators, Investigators, Building Principals, Board Members, as well as anyone else involved in the new Title IX process.

See the attached flyer for more details or contact:

Michael Levin at mlevin@levinlegalgroup.com

Regina Fisher at rfisher@beardlegalgroup.com

While the Beard Legal Group Client Alert is designed to provide information on topics of concern to Pennsylvania Public Schools, it is not legal advice and School Districts should contact their Solicitor, Labor of Special Counsel for advice related to their specific circumstances.

Levin Legal Group PC and Beard Legal Group PC present:

TITLE IX TRAINING



On May 6, 2020, the U.S. Department of Education, Office for Civil Rights (OCR) issued final regulations that outline when and how schools are to respond to reports of sexual assault and harassment under Title IX, the federal law that prohibits sex discrimination. This rulemaking follows years of research, careful deliberation, and input from stakeholders, including survivors, and over 124,000 public comments. Ultimately, this Final Rule was promulgated in the hopes of strengthening the regulations and bringing them closer to fulfilling their promise: equal access to education for all students.

The Amended Title IX regulations have a mandatory training requirement §106.45(b)(1)(iii):

“A recipient must ensure that Title IX Coordinators, investigators, decisionmakers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in §106.30, the scope of the recipient’s education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudice of the facts at issue, conflicts of interest, and bias. A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section. A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.”

Public School Entities have until August 14, 2020 to comply with these training requirements. Districts will also need to post specific items on their websites. This will include, but not be limited to:

- A non-discrimination policy
- Name and contact information for the District’s Title IX Coordinator
- Training materials used by Title IX staff

As evident from information outlined in two recent Education Law Reports issued by Beard Legal Group PC, the new/amended Title IX regulations can be overwhelming and difficult to decipher.

To assist school districts in this task, the law firms of Levin Legal Group and Beard Legal Group have pooled their 70 years of collective experience in the school arena to provide a legal compliance training module for Title IX Coordinators, investigators, decision makers and any person associated with the District’s Title IX obligations.



Our training module features:

- Approximately Six (6) hours of training.
- Part I: The History Behind Sexual Harassment as a Legal Doctrine
- Part II: A Deep Dive into the New Regulations
- Part III: Applying the New Requirements to the Existing School Environment
- At least one (1) hour of Q&A beyond the 6 hour content presentation.
- Copy of PowerPoint and training materials which can be posted on Districts’ websites.
- A comprehensive analysis of PSBA’s Title IX Policy and accompanying Administrative Regulations.
- A Title IX Flow Chart and sample checklists detailing the key responsibilities of Title IX Coordinators, Decision Makers, and Investigators.
- Sample Non-Discrimination Statement to include in Districts’ Policies.
- Sample Complaint Forms, Incident Reports and Tracking documents, Outcome Letters and Outlines of Investigative Reports.
- Recommended Best Practices to adhere to and comply with under the new Title IX requirements.

Levin Legal Group PC and Beard Legal Group PC present:

TITLE IX TRAINING



Training Module and Toolkit Costs:

Levin Legal Group and Beard Legal Group are offering two training options:

- Live in-person training (Observing Centers for Disease Control as well as Pennsylvania Department of Health and Pennsylvania Department of Education Guidance)
- On-line/Webinar format.

Program/Seminar Cost

\$1,750 per School District irrespective of number of attendees from each school. A limit of 250 total attendees per location/session.

Each registered school district will also receive a private Q&A opportunity (at no additional cost) to answer or clarify any aspect of the training or implementation of the new Title IX requirements. This one-hour opportunity will be available up through the end of the 2020-2021 school term via Zoom, Google, Microsoft Teams, or by phone.

Should a registering school district have an employee/team member in need of the training but who may not have been available for the original training or someone who is new to the Title IX team, an additional full on-line training session can be arranged for \$200 per team member.

For more information and scheduling, contact:

Levin Legal Group PC
 1800 Byberry Road, Suite 1301
 Huntingdon Valley, PA 19006
 (215) 938-6378
www.levinlegalgroup.com

Beard Legal Group PC
 3366 Lynnwood Drive
 Altoona, PA 16602
 (814) 943-3304
www.BeardLegalGroup.com



Michael I. Levin, Esquire



Carl P. Beard, Esquire



Paul J. Cianci, Esquire



Elizabeth A. Benjamin, Esquire



Allison S. Petersen, Esquire



Ronald N. Repak, Esquire

