



**Pepple & Waggoner, Ltd.**

ATTORNEYS AT LAW

5005 Rockside Road, Suite 260  
Cleveland, Ohio 44131-6808

t: 216-520-0088 | f: 216-520-0044  
www.pepple-waggoner.com

BARNESVILLE EXEMPTED VILLAGE SCHOOL DISTRICT  
TRAINING SESSION

Barnesville, Ohio  
September 22, 2020

“Title IX Training: New Sexual Harassment Regulations”

Presented by:  
Daniel L. Lautar, Esq.

I. Introduction

- A. Title IX is a federal civil rights law passed as part of the Education Amendments of 1972. It applies to any institution that received federal financial assistance from the U.S. Department of Education.
- B. The Office for Civil Rights (“OCR”) is part of the U.S. Department of Education and is responsible for enforcing laws requiring nondiscrimination by institutions receiving federal funding.
- C. In a press release regarding the new Title IX regulations, Assistant Secretary Kenneth L. Marcus of OCR stated:

The new Title IX regulation is a game-changer. It establishes that schools and colleges must take sexual harassment seriously, while also ensuring a fair process for everyone involved. It marks the end of the false dichotomy of either protecting survivors, while ignoring due process, or protecting the accused, while disregarding sexual misconduct. There is no reason why educators cannot protect all of their students – and under this regulation there will be no excuses for failing to do so. In a string of recent major OCR Title IX cases, and in a large number of investigations over the last few years, we have shown that we will hold institutions accountable under federal civil rights laws. This regulation provides important new tools that will strengthen our ability to do so.

- b. Where the existence of such a relationship shall be determined based on a consideration of the following factors:
  - (1) The length of the relationship.
  - (2) The type of relationship.
  - (3) The frequency of interaction between the persons involved in the relationship. 34 U.S.C. 12291(a)(10).
- 3. The term “domestic violence” includes felony or misdemeanor crimes of violence committed by a current or former spouse or intimate partner of the victim, by a person with whom the victim shares a child in common, by a person who is cohabitating with or has cohabitated with the victim as a spouse or intimate partner, by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction receiving grant monies, or by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction. 34 U.S.C. 12291(a)(8).
- 4. The term “stalking” means engaging in a course of conduct directed at a specific person that would cause a reasonable person to –
  - a. Fear for his or her safety or the safety of others; or
  - b. Suffer substantial emotional distress 34 U.S.C. 12291(a)(30).

III. Scope of the Educational Program or Activity

- A. Per 34 C.F.R. 106.45(b)(1)(iii), school districts must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the scope of the education program or activity.
- B. Goal: Accurately identify situations that require a response under Title IX.
- C. Title IX, at 20 U.S.C. 1681(a), provides: “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[.]”

- G. Extends to sexual harassment incidents that occur off campus, if any of three conditions are met:
1. If the off-campus incident occurs as part of the district's "operations";
  2. If the district exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; or
  3. If a sexual harassment incident occurs at an off-campus building owned or controlled by a student organization officially recognized by a postsecondary institution.

H. Consider whether the district funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred. However, no single factor is determinative to conclude whether a district exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred as part of "all of the operations of" a school, college, or university.

I. In situations involving some allegations of conduct that occurred in an education program or activity, and some allegations of conduct that did not, the district must investigate the allegations of conduct that occurred in the district's education program or activity. However, nothing in the final regulations precludes the district from choosing to also address allegations of conduct outside the district's education program or activity.

J. Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998).

Involved teacher-on-student harassment that consisted of both in-class sexual comments directed at the plaintiff, as well as a sexual relationship that began when the respondent-teacher visited the plaintiff's home ostensibly to give her a book. The U.S. Supreme Court in Gebser emphasized that a school district needs to be aware of discrimination (in the form of sexual harassment) "in its programs" and emphasized that a teacher's sexual abuse of a student "undermines the basic purposes of the educational system" thereby implicitly recognizing that a teacher's sexual harassment of a student is likely to constitute sexual harassment "in the program" of the school even if the harassment occurs off campus.

K. Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629 (1999).

In Davis, the U.S. Supreme Court acknowledged that Title IX protects students from "discrimination" and from being "excluded from participation in" or "denied the benefits of" any education program or activity receiving Federal financial assistance. The Davis Court characterized sexual harassment as a form of sex discrimination under Title IX, and reasoned that whether a board of education is

For example, a student using a personal device to perpetrate online sexual harassment during class time may constitute a circumstance over which the recipient exercises substantial control.

#### IV. The Grievance Procedure

- A. Must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging sex discrimination/harassment. Must provide notice of the grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the school district will respond.
- B. All grievance process provisions, rules, or practices must apply equally to both parties.
- C. Must treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following the grievance process before the imposition of any disciplinary sanctions or other actions that are not supportive measures against a respondent.
- D. Remedies must be designed to restore or preserve equal access to the educational program or activity. Such remedies may include “supportive measures.” However, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.
- E. Requires an objective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence – and provides that credibility determinations may not be based on a person’s status as a complainant, respondent, or witness.
- F. Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.
- G. There must be a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.

3. A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process;
4. Notice that the parties may have an advisor of their choice, who may be an attorney, and may inspect and review evidence; and
5. Notice of any provision in the school district's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process. 34 C.F.R. 106.45(b)(2).

B. Supportive measures.

1. Supportive measures are non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. 34 C.F.R. 106.30(a).
2. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures. 34 C.F.R. 106.30(a).
3. Supportive measures are designed to restore or preserve equal access to the education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the educational environment, or deter sexual harassment. 34 C.F.R. 106.30(a).
4. Supportive measures may include:
  - a. Counseling;
  - b. Extensions of deadlines or other course-related adjustments;
  - c. Modifications of work or class schedules;
  - d. Campus escort services;
  - e. Mutual restrictions on contact between the parties;
  - f. Changes in work locations;
  - g. Leaves of absence;
  - h. Increased security and monitoring of certain areas of campus.

34 C.F.R. 106.30(a).

2. Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence. 34 C.F.R. 106.45(b)(5)(ii).
  - a. The identities of complainants, respondents, and witnesses must be kept confidential, except as permitted by FERPA, required by law, or to the extent necessary to carry out the Title IX grievance process.
  - b. Credibility determinations may not be based on a person's status as complainant, respondent, or witness.
3. Cannot restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence. 34 C.F.R. 106.45(b)(5)(iii).
  - a. The school district should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.
  - b. The school district should not impose prior restraints on a party's ability to criticize the school district's handling of the investigation or approach to Title IX generally.
  - c. School districts are permitted to restrict the discussion of information that does not consist of the "allegations under investigation," such as evidence related to the allegations that has been collected and exchanged between the parties and their advisors during the investigation, or the investigative report summarizing the relevant evidence sent to the parties and their advisors.
  - d. These two requirements may overlap, such as where a party's ability to "discuss the allegations under investigation" is necessary so the party can "gather and present evidence," for example to seek advice from an advocacy organization or seek access to a building to inspect the location of an alleged incident.
  - e. Regarding elementary and secondary schools, the DOE has clarified that principals are not forbidden from warning students not to speak "maliciously" since malicious discussions intended to interfere with another party's Title IX rights would constitute prohibited retaliation.

- f. The final regulations ensure that a party's advisor of choice must be included in the party's receipt of, for instance, evidence subject to party inspection and review, and the investigative report, so that a party's advisor of choice is fully informed throughout the investigation in order to advise and assist the party.
5. Provide, to a party whose participation is invited or expected written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate. 34 C.F.R. 106.45(b)(5)(v).
- a. The DOE believes that written notice of investigative interviews, meetings, and hearings, with time to prepare, permits both parties meaningfully to advance their respective interests during the grievance process, which helps ensure that relevant evidence is gathered and considered in investigating and adjudicating allegations of sexual harassment.
  - b. Because the stakes are high for both parties in a grievance process, both parties should receive notice with sufficient time to prepare before participating in interviews, meetings, or hearings associated with the grievance process, and written notice is better calculated to effectively ensure that parties are apprised of the date, time, and nature of interviews, meetings, and hearings than relying solely on notice in the form of oral communications.
  - c. For example, if a party receives written notice of the date of an interview, and needs to request rescheduling of the date or time of the interview due to a conflict with the party's class schedule, the school district and parties benefit from having had the originally-scheduled notice confirmed in writing so that any rescheduled date or time is measured accurately against the original schedule.
  - d. Nothing in the final regulations precludes a school district from also conveying notice via in-person, telephonic, or other means of conveying the notice, in addition to sending written notice.
  - e. The DOE declined to impose a rule requiring advisors be copied on all correspondence between the school district and the parties in order to preserve the school district's discretion to limit the participation of party advisors, and to preserve a party's right to decide whether or not, for what purposes, and at what times, the party wishes for an advisor of choice to participate with the party. Nothing in the final regulations precludes the school district from adopting a practice of copying party advisors on all notices, so

- (1) For example, an investigator may discover during the investigation that evidence exists in the form of communications between a party and a third party (such as the party's friend or roommate) wherein the party characterizes the incident under investigation. If the investigator decides that such evidence is irrelevant (perhaps from a belief that communications before or after an incident do not make the facts of the incident itself more or less likely to be true), the other party should be entitled to know of the existence of that evidence so as to argue about whether it is relevant.
  - (2) The investigator would then consider the parties' viewpoints about whether such evidence (directly related to the allegations) is also relevant, and on that basis decide whether to summarize that evidence in the investigative report.
  - (3) A party who believes the investigator reached the wrong conclusion about the relevance of the evidence may argue again to the decision-maker (i.e., as part of the party's response to the investigative report, and/or at a live hearing) about whether the evidence is actually relevant, but the parties would not have that opportunity if the evidence had been screened out by the investigator (that is, deemed irrelevant) without the parties having inspected and reviewed it as part of the exchange of evidence.
7. Prior to completion of the investigative report, the school district must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. All such evidence must be subject to the parties' inspection and review and be available at any hearing. 34 C.F.R. 106.45(b)(5)(vi).
- a. School districts are neither required nor prohibited from using a file sharing platform that restricts parties and advisors from downloading or copying the evidence.
  - b. School districts may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing school districts with discretion as to how



a school district may choose to allow both parties to provide additional evidence in response to their inspection and review of the evidence, and also an opportunity to respond to the other party's additional evidence.

- h. Similarly, a school district has discretion to choose whether to provide a copy of each party's written response to the other party to ensure a fair and transparent process and to allow the parties to adequately prepare for any hearing that is required or provided under the grievance process.
8. Create an investigative report that fairly summarizes relevant evidence, and at least 10 days prior to any hearing, send same to each party and the party's advisor for their review and written response. 34 C.F.R. 106.45(b)(5)(vii).

D. Summary of general investigation procedure.

- 1. The investigator must send written notice to both parties of the allegations set forth in the complaint upon receipt of a formal complaint.
- 2. The investigator should interview the complainant and obtain a witness statement. The complainant may have an advisor of his or her choice present during the interview.
- 3. The investigator should interview the respondent and obtain a witness statement. The respondent may have an advisor of his or her choice present during the interview.
- 4. The investigator should provide both parties the opportunity to identify witnesses and submit evidence.
- 5. The investigator should interview any witnesses identified by the parties and obtain witness statements. The investigator should ask each witness to identify any other potential witnesses and provide the investigator with copies of relevant evidence.
- 6. The investigator should continue to interview identified witnesses, obtain witness statements, and collect copies of relevant evidence until the investigator has determined that, to the extent reasonably possible, the relevant witnesses have been interviewed and the relevant evidence has been collected.
- 7. Send the evidence to the complainant and respondent, and their advisors, for their inspection and review. Provide the complainant and respondent at least 10 days to submit a written response.

- E. School districts enjoy discretion with respect to whether and how to amend and supplement the investigative report, as long as any such rules and practices apply equally to both parties.
- F. Districts may provide both parties with an opportunity to respond to any additional evidence the other party proposes after reviewing the investigative report. If a district allows parties to provide additional evidence in response to the investigative report, any such additional evidence will not qualify as new evidence that was reasonably available at the time the determination regarding responsibility was made for purposes of an appeal. Similarly, a district has discretion to choose whether to provide a copy of each party's written response to the other party as an additional measure to allow the parties to prepare for the hearing (or to be heard prior to the determination regarding responsibility being made, if no hearing is required or provided).
- G. School districts must maintain, for a period of seven years, records of each sexual harassment investigation.

VII. The Hearing *(Not recommended)*

- A. Elementary and secondary schools are **NOT** required to use hearings (live or otherwise) to adjudicate formal complaints under Title IX.
- B. If an elementary and secondary school chooses to hold a hearing (live or otherwise), such school has significant discretion as to how to conduct such a hearing.
- C. Basic structure of the hearing:
  - 1. Investigator submits investigative reports to both parties. Parties then have 10 days to submit a response to the investigative report.
  - 2. Each party has the opportunity to submit written questions to be asked of other parties and witnesses, including limited follow-up questions. The opportunity for each party to submit written questions to other parties and witnesses must take place after the parties are sent the investigative report, and before the determination regarding responsibility is reached. The written submission of questions procedure may overlap with the 10-day period for responding to the investigative report, so that the written questions procedure need not extend the time frame of the grievance process.
  - 3. The decision-maker objectively evaluates the answers to such questions, and any other relevant evidence gathered and presented during the investigation;

- C. Under 34 C.F.R. 106.71, a school conducting a live hearing must “keep confidential the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness” in a Title IX grievance process except as permitted by FERPA, required by law, or as necessary to conduct the hearing or proceeding. Therefore, schools must ensure that technology used to comply with this provision does not result in “live streaming” a party in a manner that exposes the testimony to persons outside those participating in the hearing.
- D. 34 C.F.R. 106.45(b)(6)(i) requires that the creation of an audio or audiovisual recording, or transcript, of any live hearing held, and the recording or transcript must be made available to the parties for inspection and review.
- E. There are no technology grants under the Title IX regulations. However, commonly available equipment which could likely be used includes: webcams, laptops, or cell phones, paired with free or relatively inexpensive software solutions. There are more than a dozen free video web conferencing platforms that could be used to ensure that decision-maker(s) and parties could simultaneously see and hear the party or witness who is answering questions. The requirements for creating audio or audiovisual recordings or a transcript of hearings can be met at very low or no cost using commonly available voice memo apps or software or tape recorders.
- F. Technology problems interrupting a virtual hearing may constitute good cause to postpone a hearing.

IX. Issues of Relevance

- A. School districts that do not conduct live hearings must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, and must provide each party with the answers, and allow for additional, limited follow-up questions from each party. 34 C.F.R. 106.45(b)(6)(ii).
- B. Questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent. The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant. 34 C.F.R. 106.45(b)(6)(i) and (ii).

X. Final Determination

- A. The decision-maker must issue a written decision which sets forth the decision-maker's determination of responsibility or non-responsibility. 34 C.F.R. 106.45(b)(7).
- B. The DOE describes six items that must be included in the written determination:
1. Identification of the allegations potentially constituting sexual harassment.
  2. A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held. The written determination should also describe the process undertaken to inspect and review the evidence and disseminate the investigative report, including the adherence to mandated procedural timelines.
  3. Findings of fact supporting the determination. Notably, the decisionmaker's written determination does not need to include "all" evidence presented at the hearing, or deal with facts not supporting the determination. Rather, it requires an analysis of what findings of fact support the determination of responsibility or non-responsibility;
  4. Conclusions regarding the application of the school district's code of conduct to the facts, such that the written determination "matches up" with the language of the code of conduct itself.
  5. A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school district imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school district's education program or activity will be provided by the school district to the complainant.
    - a. Remedies that do not impact the respondent should not be disclosed in the written determination; rather, the determination should simply indicate that "remedies will be provided to the complainant."
    - ✕ b. The complainant should be informed of the sanctions imposed on the respondent because knowledge of the sanctions may impact the complainant's equal access to the school district's education program and activity.

4. Issue a written decision describing the result of the appeal and the rationale for the result; and
  5. Provide the written decision simultaneously to both parties.
- C. 34 C.F.R. 106.45(b)(1)(v) requires schools to conclude the appeal process under designated, reasonably prompt time frames

## XII. Informal Resolution Process

- A. Nothing in the final regulations requires schools to offer an informal resolution process. Schools remain free to craft or not craft an informal resolution process that serves their unique educational needs.
- B. Informal resolution cannot be offered unless a formal complaint is filed. However, an informal resolution can be obtained at any time prior to reaching a final determination.
- C. School districts must provide to the parties a written notice disclosing:
  1. The allegations;
  2. The requirements of the informal resolution process, including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint; and
  3. Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
- D. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.
- E. Districts are prohibited from requiring the parties to participate in an informal resolution process. Districts must obtain the parties' voluntary, written consent to the informal resolution process. Districts are also explicitly prohibited from requiring students or employees to waive their right to a formal grievance process as a condition of enrollment or employment or enjoyment of any other right.
- ✗ F. Cannot offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

1. A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein;
2. The respondent is no longer enrolled or employed by the school district; and/or
3. Specific circumstances prevent the school district from gathering evidence sufficient to reach a determination as to the allegations contained in the formal complaint.

Example: A complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the school district (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complainant), and the school district has no way to gather evidence sufficient to make a determination.

C. Notice of dismissal.

34 C.F.R. 106.45(b)(3)(iii) requires school districts to send the parties written notice of any dismissal decision, and the reason(s) therefore.

D. Appeal of dismissal.

Pursuant to 34 C.F.R. 106.45(b)(8), school districts must give both parties equal rights to appeal a dismissal decision.

XIV. Serving Impartially

- A. Avoid prejudgment of the facts at issue. 34 C.F.R. 106.45(b)(1)(iii). Do not prejudge the facts at issue and objectively evaluate inculpatory and exculpatory evidence before reaching determinations regarding responsibility.
- B. The Title IX Coordinator, investigator, decision-maker(s), or any person designated to facilitate an informal resolution process, cannot have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent. 34 C.F.R. 106.45(b)(1)(iii).
  1. A school district, irrespective of size, may use existing employees to fulfill the role of Title IX Coordinator, investigator, and decision-maker(s), as long as these employees do not have a conflict of interest or bias and receive the requisite training.