



University of Pittsburgh

# THE FORUM

The Tri-State Area School Study Council Newsletter

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Fall 2020

## INSIDE THIS ISSUE

- 1 Tri-State Workshop Calendar
- 2-3 Tri-State Events—Fall 2020
- 4-5 Women’s Law Project Title IX Update
- 6-7 In Brief: School Law Update (prepared by Weiss Burkardt Kramer, LLC)

TRI-STATE AREA SCHOOL STUDY COUNCIL

*Seeking ways to increase organizational capacity in schools through problem solving, technical service, and staff development so all students will be better prepared to make contributions to both our democratic society and the world community*

UNIVERSITY OF PITTSBURGH SCHOOL OF EDUCATION

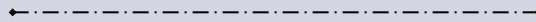
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## 2021 Workshop Calendar

All workshops are tentatively planned to be held at the Edgewood Country Club, depending on conditions. Events may be held virtually instead. Determinations will be made closer to the event date.

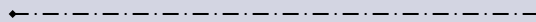


**School Board and Distinguished Educator Banquet**  
Thursday, March 4, 2021

**PASA/PSBA Workshop**  
Friday, March 5, 2021

**Dr. Jean E. Winsand Workshop for Women in School Leadership**  
Wednesday, April 1, 2021

**Dr. Samuel Francis School Law Symposium and Special Education Workshop**  
Wednesday, June 23, 2021



[Check our website for updates and new workshops!](#)

If you have suggestions for new workshops, please feel free to contact us with your ideas!



Thank you to the law firms who contribute to *The Forum* newsletter each issue:

- **Andrews & Price**, [Special Education Alert](#)
- **Tucker Arensberg Attorneys**, [Education Law Report](#)
- **Weiss Burkardt Kramer LLC**, *In Brief: School Law Update* (Located on pages 6-7 of *The Forum*)

# Tri-State Events—Fall 2020

## Tri-State Mental Health Series

*Presented by: Toya Jones, MSW, LCSW, Mary Margaret Kerr, Ed.D, Melissa Nelson, Ed.D., and Mark Lepore, Ed.D.*

This year, Tri-State presented a series of four workshops focused on mental health resources for administrators and educators. This year has brought difficulties to districts with complications from the pandemic. The speakers focused on topics that will aid educators with their own mental health and that of their students and staff.

The series built upon last year's successful trauma workshops to provide educators with insights, tools, techniques, and strategies they'll need this year. The four virtual seminars were hosted by leading experts in trauma and school mental health. Each 90-minute webinar focused on a different specific challenge educators will face as they return to school and navigate the difficulties this year presents.

Social work professor and trauma expert **Toya Jones**, Assistant Professor, Bachelor of Arts Social Work Program Director at the University of Pittsburgh, and Licensed Clinical Social Worker for the state of Pennsylvania, started the series with a webinar about workplace stress and how to help educators contribute their best, most productive work. **Dr. Mary Margaret Kerr**, Professor of Health and Human Development and Professor of Psychiatry at the University of Pittsburgh, presented a webinar focused on improving communications with families, especially those who are upset, angry, or confrontational. Mental health specialist and principal **Dr. Melissa Nelson**, Elementary Principal in Mount Lebanon School District, presented a webinar on helping children manage their feelings at such a complicated and emotional time. The series concludes with a session on what to do when trauma manifests in the classroom and requires immediate attention from a teacher. That webinar was presented by **Dr. Mark Lepore**, Director of the Clinical Mental Health Counseling Graduate Program at Clarion University.

Tri-State plans to present future workshops based on mental health resources for educators and administrators. The chaos of the year has presented unique challenges and exacerbated existing ones. Providing ongoing support will help everyone working with children.

Statistics for the Event	
# of Speakers	4
# of Registered Organizations	21
# of Total Viewers	3,071



*Clockwise from top left: Toya Jones, Dr. Mary Margaret Kerr, Dr. Mark Lepore, Dr. Melissa Nelson*

## Tri-State Events—Fall 2020

### Putting The New Title IX Rules Into Practice

*Presented by Christina Lane, Esq., Maiello Brungo & Maiello LLP*

Attorney Christina Lane presented a comprehensive overview of the new Title IX rules that districts must now follow. She covered all aspects of the new rules including how to handle the receipt of a report of alleged sexual harassment, assessment of the allegations and whether or not dismissal is warranted.

The subsequent steps of the process were addressed, with coverage on the implementation of supportive measures to the complainant and respondent, notice of the formal grievance process including a review of all investigative steps, issuance of an investigative report and the final determination. Attorney Lane also provided an excellent review of evidentiary considerations that should be thought of when caring out these events.

The change of Title IX Rules during this already difficult year has presented challenges to districts. This presentation was designed to help districts as they learn to navigate these new rules.



Christina Lane

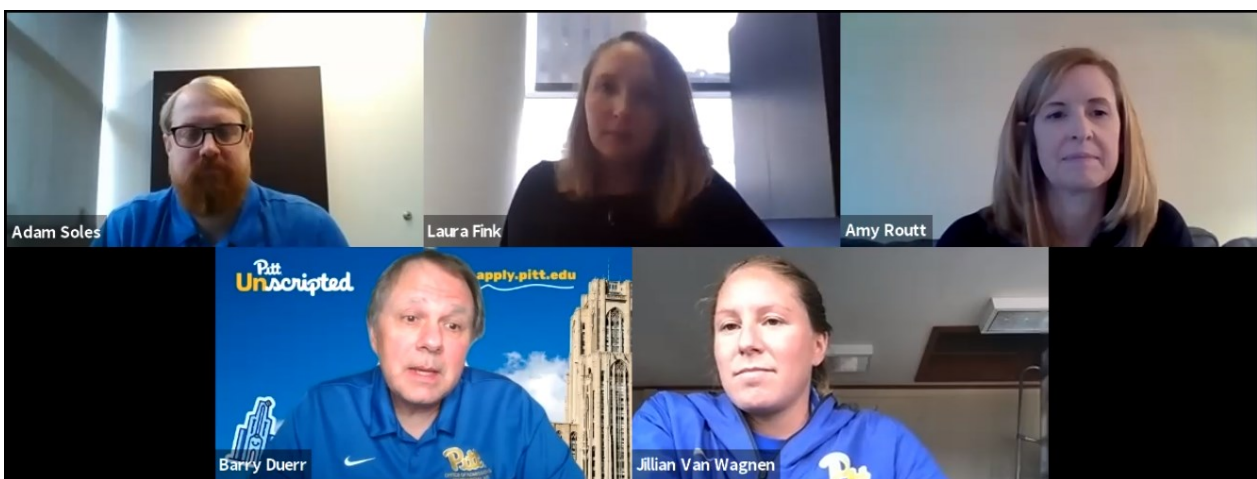
### Annual NCAA Update

*Barry Duerr, Associate Director of Admissions, University of Pittsburgh, Amy Routt, Associate Director of High School Review, NCAA, Adam Soles, Associate Athletic Director for Administration, University of Pittsburgh, Jillian Van Wagnen Assistant Coach, University of Pittsburgh, and Amy Scheuneman, Executive Director of WPIAL*

This year's Annual NCAA Update, presented with the University of Pittsburgh's Athletic Department, was held virtually over Zoom. While we were not able to have our traditional networking breakfast at the Petersen Events Center, the presentations provided valuable information about college acceptance for student athletes.

Laura Fink, of Pitt's Athletic Department, moderated an excellent discussion between Barry Duerr (Associate Director of Admissions, University of Pittsburgh), Amy Routt (Associate Director of High School Review, NCAA), Adam Soles (Associate Athletic Director for Administration, University of Pittsburgh), and Jillian Van Wagnen (Assistant Coach, University of Pittsburgh). The speakers provided insights on how high school athletes can best be scouted in this virtual environment, changes in admission criteria with test changes, and ways for guidance counselors and athletic directors to help students become college athletes. Amy Scheuneman provided an update from WPIAL.

The current environment for high school athletes is making it more difficult than ever to continue with their athletic careers. This workshop provided some help to those in districts working directly with these students.



Top: Adam Soles, Laura Fink, Amy Routt Bottom: Barry Duerr, Jillian Van Wagnen

## Can a Biden Administration Restore Protections for Student Sexual Assault Survivors?

*Women's Law Project*

President-elect Joseph Biden has made it clear he intends to restore protections for student survivors of sexual assault compromised by the Trump Administration.

According to the official Biden-Harris policy agenda, “the Biden Administration will help educate and empower young people with the knowledge and tools they need to prevent sexual violence and dating violence, with a focus on online harassment and enforcing Title IX protections.” Biden also promised to “expand requirements for comprehensive sexual assault, stalking, and dating violence prevention education on college campuses.”

In order to expand Title IX protections for students, the Biden Administration will first need to restore protections largely eviscerated by the new Title IX rule that took effect on August 14, 2020, under outgoing Secretary of Education Betsy DeVos—which gutted protections embedded in “Dear Colleague” guidances issued to schools while Biden was Vice President and in still earlier guidance documents.

During his presidential campaign, President-Elect Joe Biden expressed unequivocal opposition to the new Title IX rule. “It’s wrong,” Biden said. “And, it will be put to a quick end in January 2021.”

But how quickly can Biden actually undo the damage done by the Trump Administration?

It’s complicated.

Let’s back up for a moment: Title IX is a federal civil rights law passed as part of the Education Amendments of 1972. The law is intended to protect people from sex-based discrimination in programs or activities that receive federal financial assistance.

Sex-based discrimination has long deprived women and gender-nonconforming people from education in both formal and informal ways. However, it wasn’t until the last decade or so that Title IX, long associated with promoting gender equity in school-based athletics, was readily used as a tool to remedy sexual misconduct that violated students’ right to equal education.

The role of the Obama Administration in enforcing Title IX has often been skewed in media. The Obama Administration neither modified Title IX nor raised the evidentiary standard schools must use to adjudicate allegations of sexual misconduct. They did, however, issue several guidances that clarified the rights of students and the obligations of schools and education programs that receive federal funds to respond to allegations of sexual misconduct.

Then, in 2018, the U.S. Department of Education proposed a new 2,033-page rule that radically altered those regulations.

According to U.S. Secretary of Education Betsy DeVos, who wrote the rule in consultation with “men’s rights” groups, the new regulations were written to ensure “that every student can learn in a safe and nurturing environment.”

To say the rules were not well-received is an understatement.

*Continued on page 5*

# Women's Law Project

*Continued from page 4*

Terry Hartle, senior vice president at the American Council on Education, called the new Title IX rule the most controversial regulatory undertaking in the federal agency's history.

In the 60 day period the government is mandated to receive public comment, more than 120,000 survivors, advocates, and experts filed formal comments in response to the proposed rule, an estimated 20 times the number of comments typically submitted in response to a regulatory proposal.

The vast majority of comments were critical of the rule. Not a single victim's rights group supported it. Despite largely relieving schools of their obligations to investigate allegations of sexual misconduct, even some school administrators opposed the new rule because following it would expose them to more civil lawsuits filed by students lacking alternative remedies given the lack of federal enforcement.

At the Women's Law Project, we carefully reviewed the proposed rules and concluded they were designed to subvert the intention of Title IX, would harm students who are subjected to sexual harassment, and deter reporting. The new regulations drastically narrowed schools' obligation to respond to sexual harassment and limited both the nature of that response and the scope of prohibited behavior while mandating procedures favoring the accused.

Most troublingly, the new rules force a student to prove that sexual violence or harassment already deprived them of education, as opposed to requiring a school to intervene before the student is deprived of their education—a shift that subverts the entire premise and purpose of the law.

Despite robust criticism, profound opposition of advocates, and multiple lawsuits seeking to block implementation, the Trump-DeVos Title IX rule went into effect in August 2020. Schools have been scrambling to develop and implement new procedures that adhere to the DeVos regulations amid the chaos of the COVID-19 pandemic.

Now, Joe Biden has been elected. So what's next?

Unfortunately, there is no "quick end" to the dismantling the new rules.

The DeVos rules were enacted through a formal rule-making process, which means the Biden Administration would either need Congress to intervene—an unlikely proposition given partisan dynamics—or rely on the same rule-making process used by DeVos. That process could take as long as two years.

In October, DeVos declared confidence in the longevity of her rules even in the face of electoral defeat and emphasized how "methodical" the Administration has been about rulemaking.

One option: Once sworn in, the Biden Administration could attempt to put the DeVos rule on hold while litigation winds through the courts. However, opponents could try to have a judge order the rule be enforced as litigation proceeds.

The Biden Administration could also try to mitigate the harm of the DeVos rule by issuing an interim guidance for school administrators to rely on as a replacement rule is developed.

Biden has proposed reverting back to the 2011 Obama-era guidance issued to schools. Advocates, however, have said they'd like to see a rule that reflects cultural shifts and technological advancements since 2011—moving targets that have informed and complicated the dynamics of how sexual misconduct typically plays out in an era where students typically carry phones with cameras and immediate access to multiple apps and platforms.

Even if Biden spends the first half of his Administration strategically revamping the rule, its longevity is as vulnerable to political winds as the DeVos rules unless he finds a new approach that could better insulate the rule from future interference. ▲



## New Title IX Regulations Create New Requirements for Schools

By Danielle Guarascio, Esq.

**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.

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 a response. Previously, the “preponderance of evidence” standard was the



Danielle Guarascio

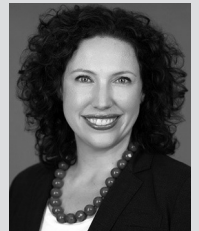
Enacting the Final Rule amid the COVID-19 pandemic adds an additional layer of challenges.

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

By Megan Turnbull, Esq.

**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.**



Megan Turnbull

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.

***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.***



Lynne Sherry

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. ♦

## New Title IX Regulations, *continued*

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. ♦

## 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 Dirsmitz 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.”

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*This issue of In Brief: School Law Update is meant to be informational and does not constitute legal advice. Should districts wish legal advice on any matter, they should contact their legal counsel or request a legal opinion from Weiss Burkardt Kramer LLC.*

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