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EDUCATION LAW REPORT

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In This Issue

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WHAT EVERY SCHOOL DISTRICT MUST DO TO COMPLY WITH THE NEW TITLE IX REGULATIONS ADDRESSING SEXUAL HARASSMENT

BACKGROUND

On May 6, 2020, the United States Department of Education issued its long-awaited Final Regulations (the "Regulations") that focus on Title IX protections for victims of sexual misconduct. The new regulations impose a number of requirements that will significantly alter the response of many school districts to complaints of sexual harassment. Though lawsuits have been filed to enjoin the Regulations, they are scheduled to become effective on August 14, 2020. Accordingly, every school district ("District") must begin taking steps to comply with these Regulations now. This Article cannot address every requirement, but will highlight the processes and procedures every District must have in place by the beginning of the 2020-2021 school year.

WHAT IS TITLE IX?

Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 ("Title IX"), 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…" Sexual harassment is a form of sex discrimination and, while the Department of Education has previously addressed the topic through guidance documents, these are the first regulations which will have the force of law when they become effective.

WHAT IS SEXUAL HARASSMENT?

Any of the following conduct on the basis of sex constitutes sexual harassment: 1) a District employee conditioning an educational benefit or service upon a person's participation in unwelcome sexual conduct (often called *"quid pro quo"* harassment); 2) 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; or 3) sexual assault, dating violence, domestic violence, or stalking.

WHAT POLICIES, PROCEDURES AND PROCESSES MUST A DISTRICT DEVELOP TO COMPLY WITH THE REGULATIONS?

The District must adopt a policy stating that it does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and the Regulations not to discriminate in such a manner. This policy must be set forth on the District's website and each handbook or catalog it publishes. The District must also notify Interested Persons (e.g., applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions) of this policy.

Each District must also adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints that do not

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amount to sexual harassment and a grievance process for formal complaints. The District must provide Interested Persons notice of the District's 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 District will respond.

The grievance process must, among other things: 1) treat complainants (alleged victims) and respondents (accused perpetrators) equitably; 2) require an objective evaluation of all relevant evidence and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness; 3) require that Title IX Personnel not have a conflict of interest or bias; 4) start with presumption that the respondent is innocent; 5) include reasonably prompt time frames for conclusion of the grievance process; 6) describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies; 7) identify whether the preponderance of the evidence standard or the clear and convincing evidence standard will be used and apply the same standard to all cases; and 8) include appeal procedures and bases to appeal.

WHAT POSITION IS A DISTRICT REQUIRED TO CREATE TO COMPLY WITH THE REGULATIONS?

To comply with the Regulations, each District must designate employees and other individuals to serve in the following roles: Title IX Coordinator, Investigator, Decision-Maker and Facilitator of Informal Resolution Process (collectively "Title IX Personnel"). Each role is different and comes with its own set of requirements and restrictions.

As with the notification and publication requirements related to its policies and procedures, the District must notify all Interested Persons of the name and/or title, office address, electronic mail address, and telephone number of the Title IX Coordinator(s) and that it does not discriminate on the basis of sex (the Regulations provide the exact required wording). This information must be set forth on the District's website and each handbook or catalog it publishes.

WHAT ARE THE TRAINING REQUIREMENTS FOR TITLE IX PERSONNEL?

In addition to designating Title IX Personnel, each District must train them. The required training includes training on: 1) the definition of sexual harassment; 2) the scope of the school's education program or activity; 3) how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable; and 4) how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Districts must also ensure that Decision-Makers receive training on any technology to be used at a live hearing. District Decision-Makers and investigators must receive training on issues of relevance, including how to apply the rape shield protections provided only for complainants.

Finally, Districts must post the materials used to train Title IX Personnel on their websites, if any, or make the materials available for members of the public to inspect.

HOW SHOULD A DISTRICT RESPOND TO A SEXUAL HARASSMENT COMPLAINT?

Generally, the Regulations require a District to respond "promptly" and not in a "deliberately indifferent" manner (*i.e.*, not "clearly unreasonable in light of the known circumstances") when it has "actual knowledge" of "sexual harassment" in its "education program or activity" against a person in the United States.

Initial Steps

When the District has "actual knowledge" of allegations of sexual harassment, the Title IX Coordinator must: 1) promptly contact the complainant to discuss the availability of supportive measures; 2) consider the complainant's wishes with respect to supportive measures, 3) inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and 4) explain to the complainant the process for filing a formal complaint.

If a formal complaint is filed, the District must provide to all known parties: 1) written notice of the allegations with sufficient time to prepare a response before any initial interview; and 2) a copy of the District's grievance process.

In addition, the written notice must: 1) include a statement that the respondent is presumed not responsible for the alleged conduct; 2) inform the parties that they may have an advisor of their choice (*e.g.*, an attorney) and may inspect and review evidence; and 3) inform the parties of any provision in the District's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process.

Investigation

The District must investigate the allegations made in a formal complaint. When investigating a formal complaint and throughout the grievance process, the District must: 1) ensure that it bears the burden of proof and the burden of gathering evidence; and 2) not restrict the ability of either party to discuss the allegations or to gather and present relevant evidence.

The Investigator, in turn, must: 1) provide an equal opportunity for the parties to present witnesses and other inculpatory and exculpatory evidence; 2) give the parties the same opportunities to have others present at any grievance proceeding; 3) provide sufficient notice so that a party can prepare for and participate in the hearings, investigative interview or other meetings to which they are invited or expected to participate; and 4) provide an equal opportunity to inspect and review any evidence obtained as part of the investigation.

The Investigator must create an investigative report that fairly summarizes relevant evidence and share it with the parties at least 10 days prior to a hearing or other time of determination so that the parties can respond. Prior to the completion of the investigative report, the District must provide the evidence subject to inspection and review to the parties and the parties must have at least 10 days to submit a written response which must be considered by the investigator prior to completing the report.

THE DETERMINATION

After the District has sent the investigative report to the parties and before reaching a determination regarding responsibility, the Decision-Maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

The Decision-Maker(s) must issue a written determination regarding responsibility based on the standard of evidence adopted by the District's grievance process (preponderance of the evidence or clear and convincing evidence).

APPEAL

The Regulations provide that Districts must offer both parties an appeal from a determination regarding responsibility determination or from a dismissal of a formal complaint or any allegations therein, if a party asserts that: 1) a procedural irregularity that affected the outcome of the matter; 2) newly discovered evidence that could affect the outcome of the matter; and/or 3) Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter. Districts may offer additional bases for appeal.

If an appeal is filed, the Appeal-Decision Maker may not be initial Decision-Maker, the Investigator, or the Title IX Coordinator.

HOW CAN FORMAL COMPLAINTS BE RESOLVED PRIOR TO THE DETERMINATION?

Dismissal of the Formal Complaint

The Regulations provide that a District must dismiss the formal complaint if the conduct: 1) would not constitute sexual harassment even if proved; 2) did not occur in the recipient's education program or activity; 3) or did not occur against a person in the United States. Such a dismissal does not preclude action under another provision of the recipient's code of conduct.

The District may dismiss the formal complaint if: 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 recipient; or 3) specific circumstances prevent the District from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Informal Resolution Process

Though not required, Districts may offer an informal resolution process (*e.g.*, mediation) for cases involving allegations that a student sexually harassed a student if a formal complaint has been filed. An informal resolution process cannot be offered if the alleged perpetrator is an employee.

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To engage in an informal resolution process, the District must obtain voluntary, written consent from the involved individuals and their parents/guardians after providing written notice disclosing: 1) the allegations; 2) the requirements of the informal resolution process; and 3) the consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

UNDER WHAT CIRCUMSTANCES CAN A RESPONDENT BE REMOVED PRIOR TO A DETERMINATION?

Districts may remove a respondent on an emergency basis, provided that the District undertakes an individualized safety and risk analysis, determines that an immediate threat arising from the allegations justifies removal, and provides the respondent with notice and an opportunity to challenge the determination immediately following the removal.

PRACTICAL ADVICE

While this article cannot address every issue and requirement contained in the Regulations, it certainly conveys the fact that Districts have a lot to do before the 2020-21 school year begins. Districts should work with their solicitor to determine what they must do this summer to ensure that they are in compliance including: 1) review and revise Title IX policies and procedures; 2) review and revise codes of conduct and handbooks; 3) conduct training for Title IX Personnel and staff; and 4) provide via the District website information such as the Title IX Coordinator's contact information, the District's grievance process, and the District's professional development materials.

PUBLIC EMPLOYEE'S SOCIAL MEDIA POST JUSTIFIES DISCHARGE

Carr v. PennDOT, 2020 WL 2532232 (Pa. 2020) (Pennsylvania Supreme Court sustains the termination of employment of a public employee for a social media post).

BACKGROUND

The Pennsylvania Department of Transportation (PennDOT) hired Rachel Carr as a seasonal/non-permanent employee and then promoted her to the position of Roadway Programs Technician I. Upon her promotion, Carr was subjected to a 180-day probationary period. Shortly thereafter, while off-duty and at home, Carr posted a "rant" through her personal Facebook account to the closed Facebook group "Creeps of Peeps." She also posted several responses to comments made by members of the Facebook group to the original post. Carr's Facebook profile identified her as a Roadway Programs Technician employed by the Department.

Carr originally posted the following:

> Rant: can we acknowledge the horrible school bus drivers? I'm in PA almost on the NY boarder [sic] bear [sic] Erie and they are hella scary. Daily I get ran [sic] off the berm of our completely wide enough road and today one asked me to t-bone it. I end this rant saying I don't give a flying **** about those babies and I will gladly smash into a school bus[.]

Some of her subsequent responses to comments included the following:

> If you see a vehicle coming perpendicular you [sic] with no turn signal on, do you pull out from your stop sign anyway? Lmk when you're done googling perpendicular. Good then, you don't? Then they shouldn't either…And that's my problem? They broke traffic law[s], which I'm abiding and I'm in the wrong? Get f***ed. What world do you live in that I'd deliberate [sic] injure myself in stead [sic] of somebody else. [sic]… No I'm saying you don't care about the random f***s that drive your kids and are you serious? Haha… I care about me…

> Your children and your decision to chance them with a driver you've never been a passenger with is your problem. A vehicle pulls out in front of me or crosses the yellow line, that's their problem. A sedan, school bus or water truck. You're [sic] kids your problem. Not mine

Carr's posts were forwarded to PennDOT, resulting in Carr's termination. Carr challenged her discharge before the Civil Service Commission as an impermissible infringement upon her right to free speech. The Commission sustained the termination, concluding:

> [T]he Commission is at a complete loss to find any reasonable public interest in a rant about harming children or a bus driver. [Carr]'s remarks do not provide any educational information to the public or serve to inform them about any public matter. Furthermore, even if the Facebook rant contains an inkling of public interest, we find [that]… [Carr]'s Facebook rant caused disruption to the appointing authority's reputation and mission that outweighed [Carr's] interest in her free speech. Thus, [Carr]'s Facebook rants do not constitute protected free speech.

The Commonwealth Court reversed that decision, holding that Carr's comments involved a matter of public concern and were protected by the First Amendment. On further appeal, the Pennsylvania Supreme Court overruled the lower court's decision and sustained PennDOT's decision to terminate Carr.

DISCUSSION

The United States Supreme Court, in *Pickering v. Bd. of Educ. Of Twp. High Sch. Dist.*, 391 U.S. 563 (1968), established a balancing test when considering the government's interests as an employer and the free speech rights of government employees to determine whether an employee's speech on a matter of public concern has a reasonably foreseeable adverse effect on the government employer. In applying that test, the Pennsylvania Supreme Court has noted that "[a]s the public importance of the speech increases, the government's difficulty of justifying disciplinary action taken against the employee because of the speech will increase proportionately, and as the public importance of the speech decreases, the government's burden of showing injury before it may discipline an employee, for First Amendment purposes, will proportionately decrease."

The Court concluded that even if Carr did not intend to drive her vehicle into a school bus as suggested by her social media post, her words alone served to erode the public's trust in PennDOT's mission and, therefore, could justify her discharge. The Court observed: "Clearly, few statements could be more contrary to the Department's mission of providing safe roadways for the traveling public than Carr's comment, 'I don't give a flying **** about those babies and I will gladly smash into a school bus.'" The Court also noted that complaints subsequently received by PennDOT about Carr's social media posts demonstrated the negative impact on public trust.

PRACTICAL ADVICE

First Amendment case law recognizes that, when acting as an employer, government has a greater interest to regulate the speech of its employees than it possesses in connection with regulation of the speech of the citizenry in general. Thus, courts have acknowledged that when a person enters government service, the person by necessity must accept certain limitations on his or her freedom of speech. The Pennsylvania Supreme Court's decision in *Carr* demonstrates the limitations of a government employee's free speech rights whenever their exercise conflicts with the interests of the government employer.

In determining whether an employee's speech outside the work setting can justify disciplinary action, the first inquiry requires a determination of whether the speech involves a matter of public concern. Speech implicates a "public concern" if its content or context addresses a matter of political, social, or other area of interest to the community. This contrasts with an employer's discipline for speech on matters of purely private interest, where there is no threat to debate of public issues. If the speech is found to encompass a public concern, the second inquiry requires a determination of whether the speech has a potential to adversely affect the government employer's operation. This entails a balancing of the employee's free speech with the entity's interest in preventing impaired performance, workplace disruption and interference with the entity's operations.

PRIVATE SNAPCHAT MESSAGES SENT AFTER SCHOOL HOURS DO NOT CONSTITUTE CYBERBULLYING OR TERRORISTIC THREATS

(Pa. Commw. Ct., May 13, 2020): The Pennsylvania Commonwealth Court affirmed a lower court's conclusion that private Snapchat messages between two students, making fun of a third student, did not constitute cyberbullying or terroristic threats.

BACKGROUND

Over the course of 10 days, J.S. and another student ("Student 1") at Manheim Township School District ("School District") engaged in an extended series of private messages, sent after school hours, over social media application Snapchat. The messages made fun of another student ("Student 2") by stating that Student 2 looked like a school shooter because of his long hair and affinity for death metal band Cannibal Corpse. These were private messages between J.S. and Student 1. Student 2 was not included in these messages.

The private messages included two memes (captioned photographs or videos) created by J.S. One meme (the "Photographic Meme") consisted of a still photograph of Student 2 singing into a microphone, with following caption: "I'm shooting up the school this week. I can't take it anymore I'm DONE!" The other meme (the "Video Meme") included a video of Student 2 playing a guitar and singing into a microphone, with the following caption: "IM READY [Student One] AND MANY MORE WILL PERISH IN THIS STORM. I WILL TRY TO TAKE [Student One] ALIVE AND TIE HIM UP AND EAT HIM."

Without asking for permission from J.S., Student 1 posted the Photographic Meme to Student 1's public Snapchat page. Twenty to forty other students saw the meme before Student 1 removed it at J.S.'s request.

After learning about the Snapchat messages, local police interviewed J.S. and his family. The police determined J.S. had not made a threat and reported this to the School District. The School District interviewed J.S., who explained that the memes were intended to be funny and remain private.

Despite J.S.'s explanation, the School District charged J.S. with violating the School District's policies against terroristic threats and cyberbullying, respectively.

DISCUSSION

Under the School District policies, a terroristic threat is "a threat to commit violence communicated *with the intent* to terrorize another…" R.R. 3a (emphasis added). The policies defines "bullying" as an "intentional electronic, written, verbal or physical act or series of acts directed at another student" that "occurs in a school setting." A "school setting" is the school grounds, school vehicles, designated bus stops, and school sponsored activities "regardless of location" or "use of school-owned communication device, networks or equipment."

The School District held a hearing on the charges, but did not present Student 1 as a witness against J.S. However, the School District did admit testimony from administrators that Student 1 stated he felt "terrorized" by the memes. The School District upheld the charges against J.S.

J.S. appealed the School District's findings to the trial court, which reversed the School District. The trial court identified three errors made by the School District, which the Commonwealth Court later affirmed:

First, J.S. had the due process right to cross examine Student 1, who was the victim of J.S.'s bullying according to the School District. The School District did not produce Student 1 for cross examination.

Second, the courts determined J.S. did not make a terroristic threat because he had no intent to terrorize Student 1 and no intent to publically display the memes.

Third, J.S.'s conduct did not violate the anti-bullying policy because there was no evidence that the memes were created within a school setting.

PRACTICAL ADVICE

When disciplining students for social media posts, school districts should make sure the conduct at issue constitutes a violation of district policies and that the conduct has a sufficient nexus with school activities. Consultation with your solicitor is encouraged.

SCOTUS EXTENDS TITLE VII PROTECTIONS TO LGBT EMPLOYEES

Bostock v. Clayton County, Georgia, SCOTUS Docket No. 17–1618, No. 17–1623, No. 18–107 (June 15, 2020). The Supreme Court of the United States held that Title VII of the Civil Rights Act of 1964 prohibits employment discrimination against lesbian, gay, bisexual and transgender people.

BACKGROUND

In a landmark decision released on June 15, 2020, the Supreme Court of the United States held that a federal civil rights law protects gay, lesbian, and transgender employees from workplace discrimination.

The decision relied on Title VII of the Civil Rights Act of 1964, which prohibits discrimination in the workplace on the basis of race, color, religion, sex, or national origin. In short, the Court held that sexual orientation and gender identity are related to "sex," such that a prohibition of sex discrimination also includes a prohibition on sexual orientation or gender identity discrimination.

The issue arose before the Supreme Court when it granted certiorari and consolidated argument in a trio of cases rising out of the federal Circuit Courts of Appeal. All three cases involved questions of whether sexual orientation discrimination by employers violated Title VII. The namesake case, Bostock, involved a man who was fired from a government position in Georgia after joining a gay softball league.

Justice Neil Gorsuch, writing for the 6-3 majority of justices, wrote: "An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questioned in members of a different sex. Sex plays a necessary and undisguisable role in the decision, exactly what Title VII forbids."

"For an employer to discriminate against employees for being homosexual or transgender, the employer must intentionally discriminate against individual men and women in part because of sex. That has always been prohibited by Title VII's plain terms."

Members of the Court who dissented from the opinion argued that the majority had abandoned its judicial role and was legislatively extending Title VII into an area that was not contemplated when the law was enacted in the 1960's.

PRACTICAL ADVICE

The decision is being hailed as a symbolic victory for the LGBT community and will have an impact on millions of people in the American workforce, including those who are employed at public schools. Teachers, staff, and other public school employees who are members of the LGBT community can be "out" in the classroom and on campus and rest assured that they will not suffer from employment discrimination as a result. Proponents of the decision are celebrating that allowing teachers and staff to safely be "out at work" could have a positive impact on LGBT students.

Schools should be sure that their anti-discrimination policies, trainings, and employee handbooks prohibit employment discrimination on the basis of sex, and should specify that "sex" includes sexual orientation and gender identity.

The dissenting Justices warned that the majority's ruling could have adverse impacts on issues surrounding the use of bathrooms and locker rooms by transgender students. Justice Gorsuch responded by writing that the majority opinion was narrow: "[W]e do not purport to address bathrooms, locker rooms, or anything else of the kind. The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual "because of such individual's sex." It remains to be seen how this landmark decision for equality will extend into these controversial areas impacting schools.

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Tucker Arensberg's Municipal and School Law Group represents local school districts and municipalities in a variety of legal matters. Our attorneys are solicitors or special counsel for several school districts/jointures and municipalities in Western Pennsylvania. In addition, our attorneys serve as special labor counsel to numerous school districts and municipalities in Western Pennsylvania and have held appointments as special counsel to school boards, zoning boards, civil service commissions and other municipal sub-entities.

The range of services called for in our representation of public bodies is quite broad. Included in that range are: public and school financing, including the issuance of bonded indebtedness; labor, employment and personnel issues; public bidding and contracting; school construction and renovation; taxation, including real estate, earned income and Act 511; pupil services and discipline; zoning and land use and litigation and appellate court work.

The Tri-State Area School Study Council at the University of Pittsburgh was established in 1948 as a continuing partnership between school districts and the University. We are the third oldest and second largest Study Council in the country. We seek to work with you to address the issues of practice we all face as we lead educational organizations to improve focus and build organizational capacity. Priorities established by the membership include: 1) timely information dissemination on current research and exemplary practices; 2) research and development technical assistance on projects to meet district needs; 3) professional development programs and workshops on current topics; 4) participation in District clinical experiences to prepare future school leaders and; 5) practitioner participation in academic preparation programs. For more information, please contact Dr. Diane Kirk, Director, 412.648.1716.