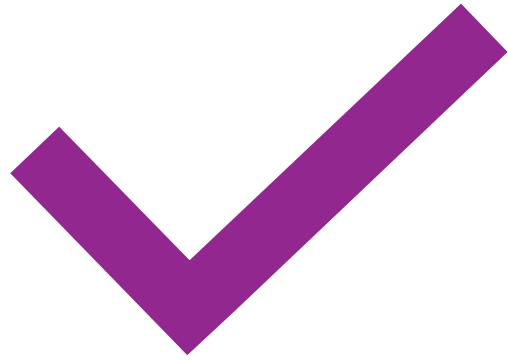




2020 LEGAL UPDATES

IRA WEISS, ESQ.



Title IX Updates

Title IX: New Regulations

On May 19, 2020, the Secretary of Education amended the regulations implementing Title IX of the Education Amendments of 1972.

These new regulations will take effect on August 14, 2020.

The updates contain many substantial and procedural changes, including new definitions, mandated training for all Title IX officials, a formal grievance process, and multi-investigator models.

Title IX: New Definitions

Sexual Harassment

- Old definition: Unwelcome conduct of a sexual nature
- New definition: Severe, pervasive, and objectively offensive conduct
 - Includes quid pro quo harassment by a district employee
 - May not include a single incident of sexual harassment other than stalking, dating violence, and sexual assault

Location of Incidents

- Old definition: Did not contain the new, narrower parameters of locations of incidents which a district must investigate
- New definition: Only includes incidents that occur in the United States during district-owned or district-sponsored activities such as educational trips organized by the district

Title IX: Mandatory Training

All employees at K-12 schools are required to report Title IX sexual harassment.

- Additionally, employee reporting requirements under the CPSL and School Code are still in effect.

Title IX officials at a school must receive training on Title IX and its regulations.

Title IX: Website Requirements



The name, contact information (including phone number, e-mail, fax (if applicable) and physical address of office) of the Title IX Coordinator. This information must be provided not only to students and employees, but also to applicants for admission and employment, parents or legal guardians of the elementary and secondary school students, and all unions

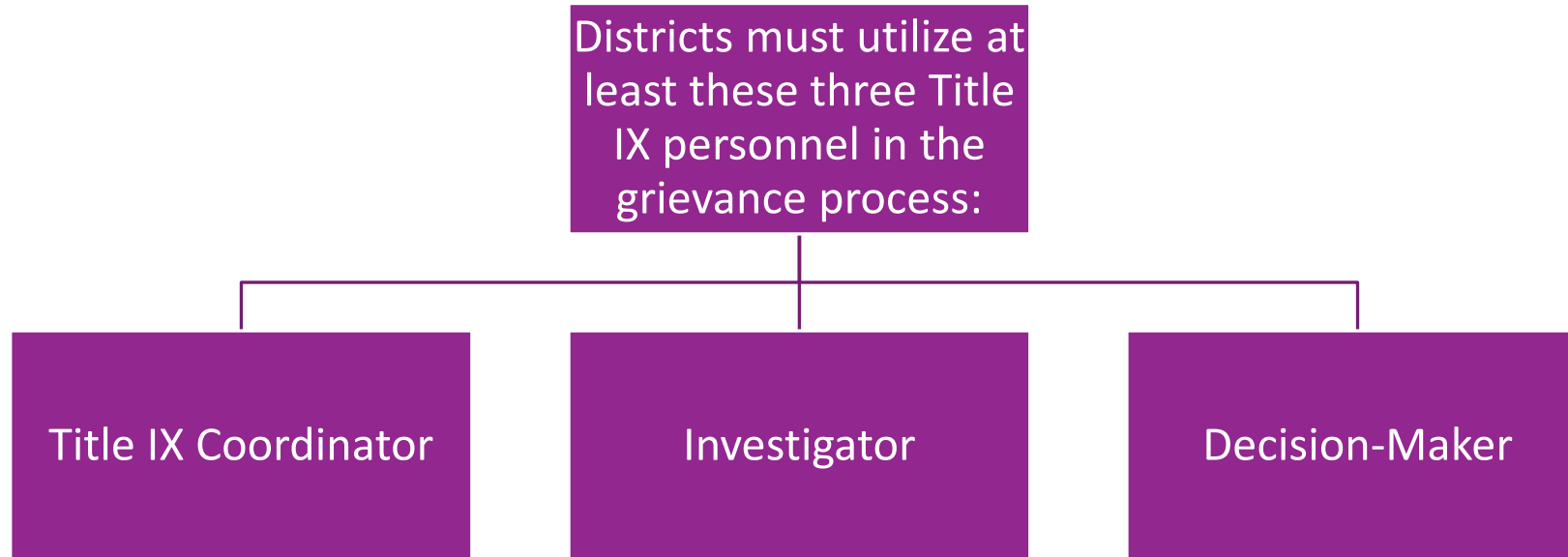


Grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the district will respond



Training materials

Title IX: Personnel



These roles must be filled by different individuals.

Designated Title IX personnel dealing with a complaint must be free of conflicts of interest regarding parties to the complaint.

Title IX: Addressing a Complaint

Schools are responsible only for addressing *known* violations or complaints. This means (1) *actual* knowledge of sexual harassment (2) that occurred within the school's education program or activity (3) against a person in the United States.

The Title IX Coordinator must promptly contact the complainant confidentially to:

- Discuss the availability of supportive measures;
- Consider the complainant's wishes with respect to supportive measures;
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; and
- Explain to the complainant the process for filing a formal complaint.

Title IX: Grievance Procedure

All schools which receive a formal complaint must proceed with a formal grievance process, but a live hearing with cross examination is only optional for K-12 institutions and is not required.

“Formal complaint” can be filed by an alleged victim (or his or her parents) or the Title IX Coordinator.

The school may determine the evidentiary standard used in the process: preponderance of the evidence or clear and convincing evidence.

- The same standard of evidence must be applied to complaint processes involving either employees or students; the standards for each cannot be different.

Title IX: Investigation Report



Introductory paragraph – include the date the complaint was received and by whom; summarize the complaint and identify under what policy or policies the complaint is being investigated



Policy/Rule paragraph – identify the types of conduct prohibited by the applicable policies that apply and the applicable definitions



Investigation summary – identify the types of documents and evidence reviewed and the interviews conducted (student witnesses can be identified as Student A, Student B...)

Title IX: Decision

The decision-maker, who cannot be the Title IX Coordinator or the investigator, must issue a written determination regarding responsibility with findings of fact, conclusions about whether the alleged conduct occurred, rationale for the result as to each allegation, any disciplinary sanctions imposed on the respondent, and whether remedies will be provided to the complainant.

The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

The appeal process must be available to either party.

Title IX: Additional Requirements

A school receiving a sexual harassment report must provide the accused with the allegations, in writing, and the evidence gathered.

If the accused is a minor, the school must also provide this writing to the parents of the accused.

Schools must retain written records of sexual harassment complaints and the actions taken in response for seven (7) years.

Retaliation, which includes charging an individual with code of conduct violations that do not involve sexual harassment but arise out of the same facts or circumstances as a report or formal complaint of sexual harassment, is strictly prohibited.

A district must keep confidential the identity of the complainants, accused, and witnesses except as may be permitted by FERPA, as required by law, or as necessary to carry out a Title IX proceeding.



COVID-19 ISSUES

COVID-19: Notice to Employees

Schools should consider providing notice to staff regarding mandatory quarantine and/or testing following travel to hot spots.

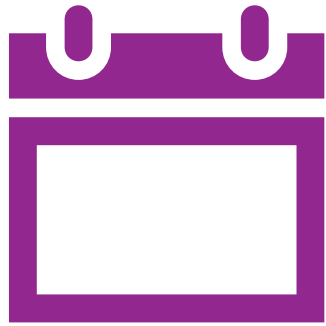
- Currently, the PA Department of Health recommends a quarantine for individuals who have traveled to areas where there are high amounts of COVID-19 cases. Your county may have a similar recommendation or order in place.
- Consider also:
 - Requiring quarantine for air travel
 - Requiring notice to the school for any out-of-state travel plans
 - Permitting an employee to return to work with two (2) negative COVID-19 tests at least 48 hours apart instead of a 14 day quarantine
 - Whether an employee can telework during the time of quarantine
 - Whether an employee will qualify for paid sick leave under The Emergency Paid Sick Leave Act (EPSLA)

COVID-19: EPSLA

Requires employers to provide paid sick leave for an employee who is unable to work or telework for any of the following reasons:

- (1) An employee is subject to a federal, state, or local quarantine related to COVID-19;
- (2) An employee has been advised by a health care provider to self quarantine due to COVID-19;
- (3) An employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- (4) An employee is caring for an individual who is subject to a quarantine under (1) or (2);
- (5) An employee is caring for a son or daughter if the school or place of care of the son or daughter has been closed or is unavailable due to reasons related to COVID-19;
- (6) An employee is experiencing any substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

COVID-19: EPSLA



The legislation is in effect until December 31, 2021.



Leave entitlement is 80 hours for full-time and paid sick leaves for part-time employees equal to the number of hours they typically work over a two-week period.



Employer cannot require use of accumulated sick time concurrently or prior to EPSLA.



Failure to pay is a violation of the FLSA and employers are further prohibited from discriminating or retaliating against an employee for using EPSLA or filing a complaint regarding the same.

COVID-19: FFCRA

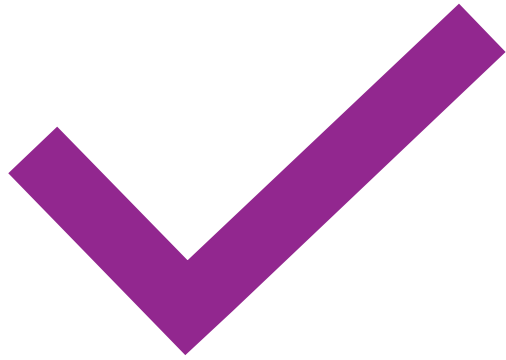
- The Families First Coronavirus Response Act (FFCRA) is an expansion of FMLA.
 - The Act is in effect until December 31, 2020.
 - Who is eligible?
 - An employee (employed for at least 30 days) who is unable to work or telework due to a public health emergency (limited to COVID-19) and has a “need for leave to care for the son or daughter under 18 years of age of such employee if the school or place of care has been closed, or the child care provider of such son or daughter is unavailable, due to a public health emergency. “
 - What do they get?
 - Paid FMLA leave at a rate of 2/3rd of their regular rate of pay after the first 10 days of leave
 - Paid leave cannot exceed \$200/day or \$10,000 in the aggregate

COVID-19: Reopening Schools

PDE has declared that the pandemic emergency triggers 24 P.S. 5-520.1 of the School Code which authorizes temporary revisions of schedule without losing subsidy.

On July 16, 2020, PDE, along with the Pennsylvania Dept. of Health, released updated health guidance for school leaders to use when crafting Health and Safety Plans for the resumption of in-person instruction. This guidance builds on prior versions of school reopening guidance distributed by the PDE.

NOTE: this is a time of rapid change and shifting guidance from PDE.



NEW CASE LAW

Student Speech:
B.L. by and
through Levy v.
Mahanoy
School District

In 2017, student B.L. made the junior varsity cheerleading squad at Mahanoy Area High School (“MAHS”), a school located in Schuylkill County, Pennsylvania. B.L., upset that she did not make the varsity cheer squad, vented her frustrations on a Saturday, while at a local store with a friend, by posting a photo to Snapchat which was visible to approximately 250 of her friends, many of whom were fellow MAHS students and some of whom were cheerleaders. The photo depicted B.L. and her friend, both with their middle fingers raised, with the caption “f*** school f*** softball f*** cheer f*** everything.”

Student Speech:
B.L. by and
through Levy v.
Mahanoy
School District

Cheerleaders at MAHS were required to acknowledge the team rules which included requiring cheerleaders to “have respect for [their] school, coaches, ... [and] other cheerleaders”; avoid “foul language and inappropriate gestures”; and refrain from sharing “negative information regarding cheerleading, cheerleaders, or coaches ... on the internet.” Because the video referenced the school and its activities and included an obscene gesture and language, the cheerleading coaches at MAHS immediately removed B.L. from the cheerleading squad.

Student Speech:
B.L. by and
through Levy v.
Mahanoy
School District

This discipline was upheld by the school but overturned by the district court which found that the school had violated B.L.'s First Amendment rights by removing her from the JV cheerleading squad.

The Third Circuit Court of Appeals affirmed the district court decision holding that a student's Snapchat post which occurred off-campus and on a weekend was protected speech under the First Amendment of the U.S. Constitution, the student did not waive her First Amendment protections and as a result, the student could not be disciplined for the speech.

Employee Speech: Carr v. Department of Transportation

Rachel Carr was a PennDot employee on probationary status in March 2016 as a result of a recent promotion. During this probationary period, but while off-duty and at home, Carr logged on to her personal Facebook account, which identified her as a Roadway Programs Technician employed by PennDot, and posted the following in a closed Facebook group:

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 shit about those babies and I will gladly smash into a school bus[.]

When other members of the group began to respond, Carr's subsequent replies included the following:

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

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] Didn't call myself a hero

Employee Speech: Carr v. Department of Transportation

When members of the group reported Carr's comments to PennDot, the agency ultimately terminated Carr's employment for inappropriate behavior.

The Civil Service Commission upheld the termination and Carr appealed to the Commonwealth Court.

The Commonwealth Court reversed the adjudication, finding that "the Department's generalized interest in the safety of the traveling public does not outweigh Carr's specific interest in commenting on the safety of a particular bus driver."

PennDot appealed to the Supreme Court of Pennsylvania, which agreed to hear the case.

Employee Speech: Carr v. Department of Transportation

The Pennsylvania Supreme Court overturned the Commonwealth Court's decision and upheld Carr's dismissal.

The court used a balancing test to determine whether the employee's interest in speaking on matters of public concern, which is protected under the Pickering decision, outweighed the government's interest in "providing effective and efficient services to the public."

The court recognized prior decisions by the U.S. Supreme Court in both Pickering and Garcetti have established that when a citizen enters government service, he or she must accept certain limitations because the state has a heightened interest in regulating the speech of its employees.

Employee Speech: Carr v. Department of Transportation

In Carr, the court recognized that even if Carr never intended to drive her vehicle into a school bus, if her words alone could erode the public's trust in her employer's mission, the Department acted reasonably in terminating her employment.

- Carr identified herself in her Facebook profile as an employee of the Department of Transportation
- The fact that the Department received complaints via social media about Carr's posts highlights the reasonableness of its concerns regarding the loss of public trust.

Employee Speech: Carr v. Department of Transportation

The court noted that the comments “were essentially a rant based on her personal observation of a particular bus driver rather than an explanation of safety concerns that she became aware of as a Department employee.”

Balancing the limited public importance of Carr's posts, and their detrimental effect on the Department, the court found that termination of Carr’s employment was proper.

Hiring Practices: Barthelemy v. Moon Area School District

The Plaintiffs, nine (9) male public school teachers in the Moon Area School District (“District”), filed Equal Pay Act (“EPA”) claims alleging the District paid the Plaintiffs less than similarly situated female teachers.

Upon hire, the District placed teachers onto a “Step” (based on the number of years worked in the District) and a “Lane” (based on the individual’s level of education) on a salary step schedule pursuant to the Collective Bargaining Agreement between the Union and the District.

Hiring Practices: Barthelemy v. Moon Area School District

The District also implemented unwritten Guidelines for placing lateral hires into a Step and Lane.

- The guidelines were intended to reflect prior teaching experience outside of the District such that a teacher with four or more years of prior teaching experience could be hired at Step 2 or higher, even if it is their first year working for the District.
- Prior teaching experience in a parochial or private school was usually not credited under these procedures, although it was occasionally considered.
- The unwritten Guidelines would place teachers with one to three years of prior teaching experience at Step 1. Those with four to six years would be placed at Step 2. And teachers with seven or more years of prior teaching experience would be placed at Step 3.
- However, in some instances, lateral hires were placed above the Step which the Guidelines prescribed—so-called “above-Step” hires.

Hiring Practices: Barthelemy v. Moon Area School District

The United States District Court for the Western District of PA denied both the Plaintiffs' and the Defendant's Motion for Summary Judgment. The case is set to proceed to trial.

Lesson: under the Equal Pay Act, hiring teachers at different salaries can result in liability if difference in starting salaries between male and female teachers is not explained by policy or CBA. Discretion without standards can lead to expensive claims.

Thank you!

Ira Weiss, Esquire
iweiss@wbklegal.com

Weiss Burkardt Kramer LLC
445 Fort Pitt Blvd., Suite 503
Pittsburgh, PA 15219
Phone: (412) 391-9890