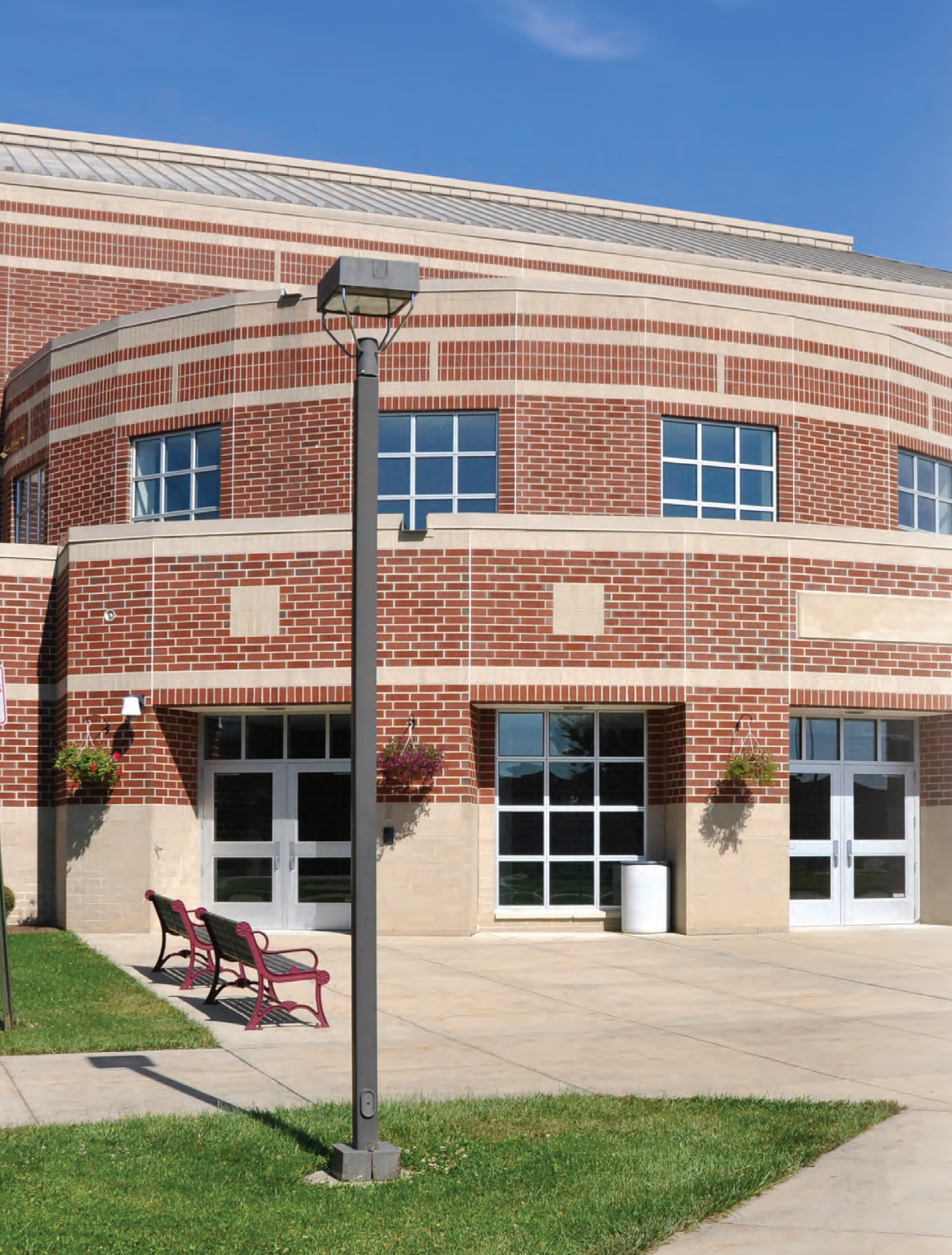

Let's Have 'The Talk' About TITLE IX

Coming to terms with the Final Rule's compliance process

By Kalani Linnell

Let's talk about sex.

To make things more interesting, let's talk about the carrots to incentivize and sticks to coerce better behavior and response from individuals and institutions when sexual conduct, harassment, assault and discrimination occur in schools and colleges.

The U.S. Department of Education has a lot to say on these and other Title IX topics. On May 6, 2020, the Department of Education released the Final Title IX Rule. In addition to talking about sex and schools (and sex in schools), the Title IX rule discusses fundamental fairness, the importance of access to education and academic freedom in a democratic society and other topics that make third-year law students salivate.

Sounds exciting, right? Maybe it would be, but a bunch of lawyers and politicians got involved. Now the interesting, scandal-laden and hugely meaningful topic has been transformed into a smattering of repeated and sometimes contradictory words and phrases with the allure and comprehensibility of an assembly manual for Scandinavian furniture. And, like self-assembled furniture, there are pieces missing, it will take you way longer to put together than you anticipated, and you might be confused about how the end result is supposed to look.

The unofficial version of the Final Rule is 636,609 words long. Joseph Storch of the State University of New York aptly noted that it's longer than the Old Testament

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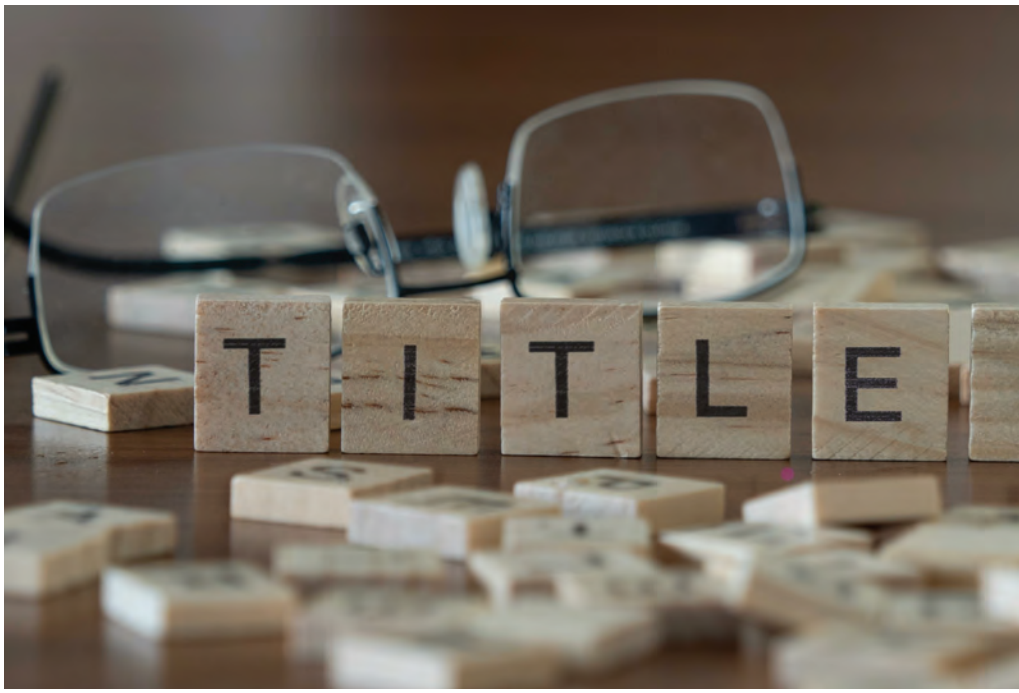


Title IX was engineered to address a very narrow set of discriminatory issues, and there's no doubt that it has contributed in a significant and measurable way.

(approximately 580,000 words) and *War and Peace* (587,287 words).

From start to finish, the Department took 957 days to construct a behemoth of a rule. Schools and colleges were given 100 days to comply with the Aug. 14, 2020, effective date.

Stakeholders ranging from victims' rights advocates, civil rights groups, educational organizations and states themselves are loudly denouncing the rule's substance, the rulemaking process and the compliance deadline.

The first lawsuit seeking injunctive and declaratory relief was filed in federal court in the District of Maryland less than 10 days after the rule's release on May 14, by the American Civil Liberties Union on behalf of plaintiffs Know Your IX, Council of Parent Attorneys and Advocates Inc., Girls for Gender Equity Inc. and Stop Sexual Assault in Schools.

At the time this article was composed, three additional lawsuits have been filed in other federal district courts. Pennsylvania, through Attorney General Josh Shapiro, joined 17 other states in a suit filed in federal court for the District of Columbia on June 4. That five-count complaint, searchable at 20-CV-01468, consists of 112 pages of substance.

Substantive issues aside — and, as explained below, there are substantive issues — the Department let 460 days elapse from the conclusion of the public comment period until the eventual publication of the rule. Changes were made, and the Department's attempt at addressing comments resulted in immediately identifiable internal inconsistencies. Compliance on any timeline is tough because of the detangling that must take place to achieve a basic understanding of the nuanced requirements. That understanding is, at times, a best guess at resolving an unaddressed concern voiced in one of the tens of thousands of comments or even a conflict in the regulatory text. Compliance in 100 days is a monumental undertaking.

Some provisions that have received heavier media attention and exceptionally significant requirements are summarized and briefly explained in this article. For a detailed analysis of the regulatory requirements or any portion mentioned in this article, visit the Joint Guidance page of the State University of New York's Student Conduct Institute website at https://system.suny.edu/sci/tix2020/. Over 50 education law attorneys have contributed to that guidance pro bono (I am one of them.), and it provides a better analysis than any one of us could put together independently.

As I write this, I am acutely aware of my personal and professional impressions of the rule and I am monitoring and reflecting on my biases as I digest the requirements and package the legalese into usable language for clients. The Final Rule's emphasis on procedural fairness while demanding compliance on what seems like a procedurally unfair timeline has left me and countless other school and college attorneys and administrators feeling resentful and angry. Indeed, many stakeholders who are typically adversarial to each other have found fault with the rule.

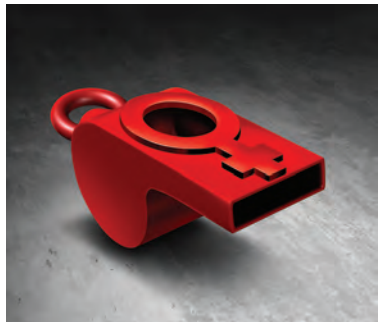
I kept two quotes in mind as I wrote this article. The first is from the regulatory text at Page 30488 of the Federal Register: "The Department believes that the final regulations protect due process for students and employees… . The final regulations effectively require that schools provide adequate due process protections to all students, *irrespective of whether school personnel themselves are ideologically supportive of such rights*, and at the same time require schools to respond supportively to protect complainants' equal educational access" (emphasis added).

The second is from *War and Peace*, which, as noted, is practically a novella compared to the Final Rule: "It's not given to people to judge what's right or wrong. People have eternally been mistaken and will be mistaken, and in nothing more than in what they consider right and wrong."

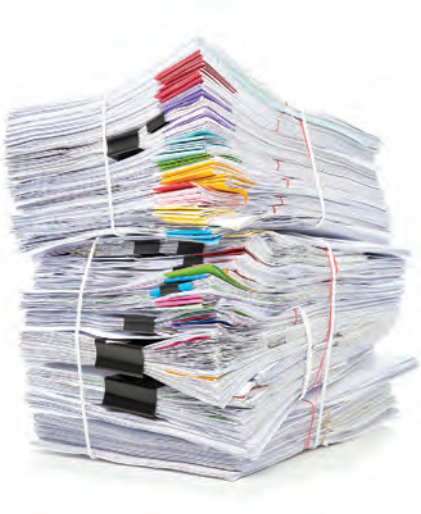
Some historical context is useful. With no law prohibiting sex discrimination, schools and colleges considered sex and discriminated on the basis of sex in admissions decisions and programming options.

Moreover, Title VII of the 1964 Civil Rights Act originally excluded educational institutions from its prohibitions on discrimination in employment. Consider some numbers: At the conclusion of the 1969-70 academic year, only 7% of students in J.D. programs were women, according to the American Bar Association (ABA). In 1987, the first year data from the U.S. Department of Education's National Center for Education Statistics is available, only 33% of faculty in post-secondary institutions were women.

Title IX was engineered to address a very narrow set of discriminatory issues, and there's no doubt that it has contributed in a significant and measurable way. By 1980, women accounted for one-third of J.D.



Anyone can file a complaint with the OCR alleging that an educational institution has unlawfully discriminated against someone, which triggers the OCR's enforcement obligations.



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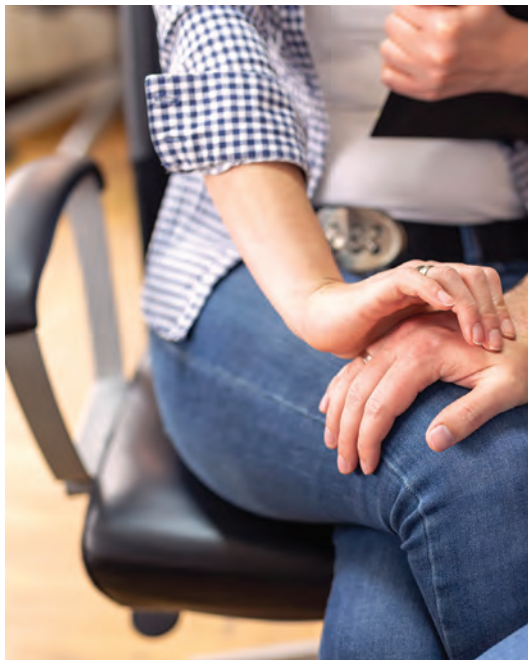
seekers. An ABA report on women in the profession reported that in 2017, 48.69% of enrolled students were women. Thirty years after that 1987 statistic about post-secondary faculty was gathered, nearly 50% of faculty were women. College admissions, access to programming and opportunities to shape research aren't the issues that have stakeholders up in arms about the new Title IX regulations, however.

Title IX of the Education Amendments of 1972 was supposed to incentivize change to policies that overtly discriminated on the basis of sex, most commonly by excluding women. As Rep. Patsy Mink (Hawaii) stated to the U.S. House of Representatives in 1971, a post-secondary institution with a discriminatory admissions policy that "discriminates against women applicants … is free to do so … but such institutions should not be asking the taxpayers of this country to pay for this kind of discrimination. Millions of women pay taxes into the Federal treasury and we collectively resent that these funds should be used for the support of institutions to which we are denied equal access."

In less than 40 words, Title IX codified that sentiment. The statute conditions the receipt of federal funds for educational programs or activities on a recipient's promise that, "[n]o 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" in the recipient's educational program or activity. 20 U.S.C. 1681(a).

Enforcement occurs in two ways. First, the statutory text expressly authorizes federal administrative enforcement, which is effectuated by the Department of Education's Office for Civil Rights (OCR). Second, the U.S. Supreme Court in 1979 interpreted Title IX to include an implied private right of action, *Cannon v. Univ. of Chicago*, 441 U.S. 677 (1979), and, later, the court extended that private right to include compensatory damages. *Franklin*

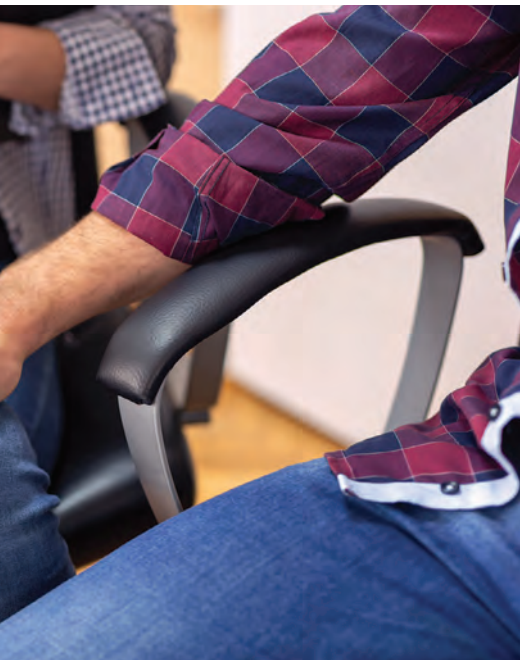


v. Gwinnett County Public Sch., 503 U.S. 60 (1992).

Anyone can file a complaint with the OCR alleging that an educational institution has unlawfully discriminated against someone, which triggers the OCR's enforcement obligations. The statute provides for a steep penalty: cessation of federal funding. But, in order to terminate federal funding, a person with authority to take compliance action must be advised of the recipient's failure to comply with a Title IX requirement and the recipient must refuse to voluntarily comply with the law.

Consequently, the federal government has never terminated funding based on an unresolved complaint of unlawful sex discrimination in a recipient's educational program despite countless instances of alleged and proven sex discrimination.

Title IX's implementing regulations were promulgated in 1975, requiring recipients to appoint an employee to coordinate Title IX compliance, adopt and publish a notice of nondiscrimination, make assurances of compliance, and provide a grievance proce-



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dure for prompt and equitable resolution of student and employee sex discrimination complaints. And, until this year, judicial interpretation and guidance from the Department of Education has supplemented the relatively sparse legislative and regulatory mandates. That guidance changed with every administration and Supreme Court case. Ever since the Supreme Court found that peer-on-peer sexual harassment can constitute discrimination on the basis of sex, schools and colleges found it difficult to keep up with the changes, which created confusion about whether a student could request that an institution not investigate or adjudicate a complaint and other nuances.

The new regulations hone in on this specific type of sex discrimination and create two types of responses. Both types of responses must not be "clearly unreasonable" in light of the circumstances known at the time. The initial response includes the offer of nonpunitive supportive measures to a person who is reported to have experienced sexual harassment. If the person desires an investigation and adjudication for the perpetrator of the reported conduct, a formal complaint must be signed. If the person requests that the report be kept confidential, the institution may only proceed with filing a formal complaint over the complainant's wishes if the school's failure to investigate the allegations would be "deliberately indifferent." The formal complaint triggers a second response, which is a grievance process that culminates in a live hearing with cross-examination in post-secondary institutions and a nonlive hearing in other institutions. The grievance process includes two 10-day time periods. For elementary and secondary schools, the minimum 20-day process is longer than and much different from the commonwealth's codified expulsion hearing process. 22 Pa. Code 12.6; 22 Pa. Code 12.8.

The following list is a sample of some new regulatory requirements:

- Actionable sexual harassment, which cannot be investigated or adjudicated unless a formal complaint is filed, is defined in the Final Rule in three ways:
  - Unwelcome conduct that is so severe, pervasive and objectively offensive that it effectively denies a person equal access to the education program or activity;
  - Quid pro quo sexual harassment; or
  - Sexual assault and other sex crimes as defined in federal law.

- A presumption of nonresponsibility of the respondent must be imposed upon allegations of sexual harassment. There is no corresponding presumption regarding the complainant's allegations.

- The regulations do not define "consent."

- Sexualized misconduct falling below the definitional threshold may be addressed using other code of conduct provisions. Most civil rights statutes set a floor when defining discriminatory conduct. Covered entities can add more protected classes or include more conduct in the required response. The Department states that the regulations do not prescribe the grievance or disciplinary procedure for conduct other than Title IX Sexual Harassment, and dismissal from the Title IX grievance process is mandatory in cases where the allegations, if proven, fall short of the new definition.

- Schools that are recipients of federal funds must follow the Department's comprehensive and time-consuming grievance process prior to implementing any punitive or disciplinary sanctions unless an emergency to physical health or safety arising from the sexual harassment allegations justifies suspension or expulsion before an adjudicatory decision. Under the regulations, a compliant response need not include disciplinary sanctions at all.

- The grievance process is expressly adversarial, but with three parties: the educational institution (purportedly bears the burden of proof), the complainant and the respondent.
  - The complainant and respondent are entitled to advisors, who may be attorneys.
  - Schools must provide an advisor if a party does not have one. Parties are not permitted to examine or cross-examine

Predictable processes for institutional response to deplorable conduct presume that the conduct will continue to occur.

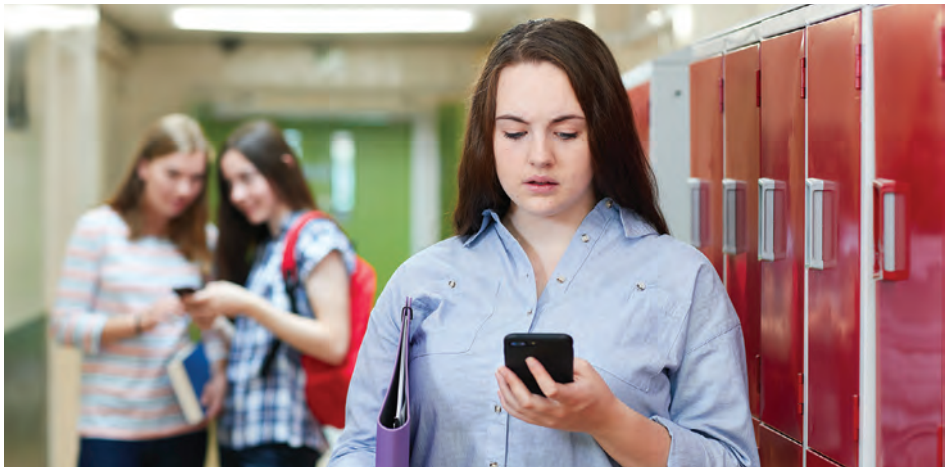
witnesses. All questions must come through the advisor.

- For post-secondary institutions, statements that are not tested through cross-examination at a live hearing may not be relied on by decision-makers even if the rules of evidence would otherwise permit inclusion of the statement.

- Commenters have pointed out that the regulations have practical impediments and legal conflicts with other state and federal laws. The Department responded that the regulations preempt state law on compulsory education, among other topics, but that the regulations do not supersede disability discrimination laws, such as the Individuals with Disabilities Education Act and Section 504.

- Title IX coordinators previously wore many hats, and some schools used the Title IX coordinator as an investigator and decision-maker. The functions must now be separate, and appellate decision-makers must also be different, which poses a practical obstacle for small schools.

- A K-12 school's Title IX response is triggered when any school employee, including a coach, has knowledge of conduct that may constitute sexual harassment. Headlines reporting otherwise misconstrue the "actual knowledge" definition, which sets a floor for imposing liability, and fail to identify that a school's response does not always include a full adjudicative process. These are just a few of the notable requirements that define whether a recipient's response to knowledge of sex discrimination violates Title IX. Importantly, the text of the regulations cannot be fully understood without reference to the preamble, and reasonable minds can differ on the requirements and implications of the requirements. A comprehensive analysis of every section of the Final Rule is available at the Student Conduct Institute's Joint Guidance website.



In a nutshell, Title IX requires schools and colleges to avoid sex discrimination by having nondiscriminatory policies and by responding to reports of discrimination in a way that is not clearly unreasonable. The goal of Title IX and other civil rights statutes is to eradicate discrimination in systems that are essential to democratic participation. Schools and colleges are the bedrock of our communities and they work to equip students with the skills, knowledge and training necessary to effectively participate in society.

Incentivizing effective responses to reports of discrimination is laudable and institutions should be held accountable for failing to respond. The Department has focused on a predictable process in response to sexual harassment allegations.

Predictable processes for institutional response to deplorable conduct presume that the conduct will continue to occur. If that presumption exists from the time children enter elementary school, then we also presume that adults will continue to engage in sexual misconduct, harassment and discrimination.

Compliance with the Final Rule's responsive process is onerous and burdensome, but we are not constrained to the regulatory text in how we work to eradicate the vile effects of discrimination. All of us, as attorneys, parents, community members and citizens, are in a position to both

counsel clients on best practices for preventing the occurrence of unlawful discrimination and to actively contribute to a more equitable system.

So, let's talk about sex. Let's talk about sexual exploration and coming of age, predatory misconduct, revenge porn and sexting, parties fueled by intoxicating substances, stalking, consent and cat-calling. To make matters more interesting, let's talk about educating our children on these topics, incentivizing protective and preventative measures and, on the rare occasion when all of the safeguards fail and someone is victimized by discrimination on the basis of sex, let's try to restore the educational status of both the victim and the perpetrator using a responsive method that is fair and just. Let's talk about sex and the pervasiveness of sex discrimination in schools, but let's figure out how talk about sex discrimination in the past tense. ⚖

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