



# EDUCATION LAW NOTES

Federal and Virginia Developments in School Law

Bradford A. King, Attorney at Sands Anderson

A VASSP Bimonthly Publication • January 2019 • Vol. 2, No. 3 • www.vassp.org

## Confronting Sexual Harassment in the "Me-Too" Era: Newly Proposed Federal Regulations Released

Sexual harassment. Arguably, more attention is focused on the subject than ever before. The confirmation hearings for U.S. Supreme Court Justice Kavanaugh; harassment claims by former employees against legislators; lawsuits against national media outlet executives and on-air personalities. Each has focused the country's attention on the challenges in addressing claims of sexual harassment in the workplace. In turn, public schools increasingly deal with claims of teacher-on-student and student-on-student sexual harassment. Evidence of these concerns is revealed in sensational headlines: "Of Course Sexual Harassment is Rampant; It Starts in Our Schools" (*Fortune Magazine*, October 2017); "#MeTooK12: New Campaign Raises Awareness About Rights at School" (*Christian Science Monitor*, January 18, 2018); "Students Drive New Policies as K-12 Assault Investigations Rise" (*NPR*, August 8, 2017). Indeed, Office for Civil Rights investigations of sexual harassment complaints in public schools nationwide are up 500% since 2014. Earlier this year, OCR had at least 14 open investigations in Virginia school divisions alone.

Title IX of the Education Amendments of 1972 states that "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." Many readers will be familiar with cases brought under Title IX by female athletes compelling equal access to athletic programs at

colleges and universities. However, in a 1989 decision, the U.S. Supreme Court held that teacher-on-student sexual harassment could constitute sex discrimination under Title IX. In a 1999 decision the Supreme Court held that student-on-student sexual harassment falls within the ambit of Title IX.

Since that time, the United States Department of Education has treated sexual harassment as a form of sex discrimination under Title IX. DOE has addressed the topic, however, only through guidance – not through formal regulations, including the rule-making process that results in formal regulations. Guidance documents released under various administrations have differed in terms of the

specific responsibilities imposed upon school officials to investigate and curb sexual harassment in school buildings. On November 16, 2018, that changed when the current administration promulgated a Notice of Proposed Rulemaking to amend the regulations implementing Title IX. In a summary of the proposed new regulations, the administration wrote that a result of the various guidance documents previously issued "has been unpredictable Title IX sexual harassment systems under which complainants and respondents have been thrust into inconsistent grievance proceedings that deprive both parties of a fair process. Such systems too often overlook the importance of a school offering supportive measures to a complainant reporting sexual harassment when the reporting complainant does not wish to participate in a

***"Schools have an obligation to protect all their students from sex discrimination by responding supportively to survivors while giving due process protections to respondents."***

*U.S. Department of Education*

grievance process, and ignore the need to avoid punishing an accused person without first reaching a factual determination of responsibility in an impartial proceeding."

The administration trumpets its regulation proposal as a historic process, for the first time treating the problem of sexual harassment with the gravity it deserves – "through **notice and comment rulemaking** so stakeholders and the public can voice their perspectives on this topic that carries such high stakes for survivors, accused persons, and schools. **It is a serious process for a serious subject.** Survivors often struggle or fail to continue their educations due to emotional and physical suffering in the wake of sexual harassment. Persons accused face the prospect of ruined reputations and derailed educational opportunities when punishments are imposed based on allegations without an impartial fact-finding process. Schools have an obligation to protect all their students from sex discrimination by responding supportively to survivors while giving due process protections to respondents." (Emphasis in original.)

The administration says the proposed regulations attempt to strike the appropriate balancing of those interests. The summary of the regulations emphasized that Title IX does not prohibit sexual misconduct or sexual crimes per se, but prevents federal dollars from flowing to schools that deny students access to educational opportunities on the basis of sex and to provide individuals with effective protections against discriminatory practices. The summary emphasizes that Title IX does not punish people who commit sexual harassment – it penalizes schools that respond to sexual harassment in a way that amounts to subjecting students to sex discrimination. Importantly, existing regulations remain intact. The proposed regulations add sections specific to sexual harassment, and primarily address: (1) what constitutes sexual harassment for purposes of rising to the level of a civil rights claim under Title IX; (2) what triggers a school's legal obligation to respond to incidents of allegations of sexual harassment; and (3) how a school must respond.

*“... Principals and assistant principals — may be held liable for failing to act or acting with what the law calls ‘deliberate indifference’.”*

In a nutshell, and as is described in the regulations summary, a school must respond meaningfully to all sexual harassment reports of which it becomes aware without requiring every report to activate the school's grievance process. The proposed regulations encourage schools to offer students what are termed "supportive measures" designed to restore or preserve a complainant's access to the school's education program and activities, even when the reporting complainant does not wish to file a formal complaint. However, when a formal complaint is filed or – more importantly, when the school has "actual knowledge" of events constituting sexual harassment - the school must investigate and apply certain due process safeguards so that whatever a school decides to do with respect to disciplining a respondent and providing remedies

to a complainant is based on a fair determination of the facts. A school division – and again more importantly, individuals including principals and assistant principals – may be held liable for failing to act or acting with what the law calls "deliberate indifference." The

regulations defer to the pedagogical control of each school division, while providing so-called "due process guardrails" to ensure a fair process while affording schools flexibility to pursue informal resolutions, designate their own reasonable timeframes and investigatory processes, and coordinate with law enforcement as appropriate. Ultimately, the administration describes the proposed regulations as ensuring that "every survivor is taken seriously and that every person accused knows responsibility is not predetermined." Schools will be protected by a safe harbor from liability if they follow their grievance processes.

School officials, administrators and other employees are well served to receive comprehensive and substantive training on Title IX issues, including a review of the newly proposed regulations. They are published at <https://www2.ed.gov/about/offices/list/ocr/docs/title-ix-nprm.pdf>, and are open for comment for 60 days following their publication in the Federal Register.