

# SNIFFEN & SPELLMAN, P.A.

---

## EDUCATION LAW ALERT

May 2020

### **United States Department of Education Releases Historical New Title IX Regulations**

After a lengthy rulemaking process and significant public input, the United States Department of Education finally released new Title IX regulations that, among other things, include a specific definition for sexual harassment, require institutions to provide support for survivors, and provide additional due process rights. According to the Department, the goal of the new regulations is to hold schools accountable for failures to respond in an equitable and prompt manner to allegations of sexual misconduct and to ensure a fair and reliable adjudication process for all students and individuals involved.

According to the Department, the following are key changes in the new regulations (quoted from source below):

- Defines sexual harassment to include sexual assault, dating violence, domestic violence, and stalking, as unlawful discrimination on the basis of sex
- Provides a consistent, legally sound framework on which survivors, the accused, and schools can rely
- Requires schools to offer clear, accessible options for any person to report sexual harassment
- Empowers survivors to make decisions about how a school responds to incidents of sexual harassment
- Requires the school to offer survivors supportive measures, such as class or dorm reassignments or no-contact orders
- Protects K-12 students by requiring elementary and secondary schools to respond promptly when *any* school employee has notice of sexual harassment
- Holds colleges responsible for off-campus sexual harassment at houses owned or under the control of school-sanctioned fraternities and sororities

- Restores fairness on college and university campuses by upholding all students' right to written notice of allegations, the right to an advisor, and the right to submit, cross-examine, and challenge evidence at a live hearing
- Shields survivors from having to come face-to-face with the accused during a hearing and from answering questions posed personally by the accused
- Requires schools to select one of two standards of evidence, the preponderance of the evidence standard or the clear and convincing evidence standard – and to apply the selected standard evenly to proceedings for all students and employees, including faculty
- Provides "rape shield" protections and ensures survivors are not required to divulge any medical, psychological, or similar privileged records
- Requires schools to offer an equal right of appeal for both parties to a Title IX proceeding
- Gives schools flexibility to use technology to conduct Title IX investigations and hearings remotely
- Protects students and faculty by prohibiting schools from using Title IX in a manner that deprives students and faculty of rights guaranteed by the First Amendment

Unlike the several informal guidance documents issued over the years, the new regulations carry the full force of law. All educational professionals responsible for implementing any aspect of Title IX should review the regulations as soon as possible.

Source: [US DOE Press Release and Regulations](#).

### **Special Education Compensatory Education Suits Starting**

Due to the COVID-19 pandemic, educational services to students with disabilities have no doubt been significantly impacted. One major issue to be addressed is how and if “compensatory education” will be provided to students with disabilities. Although compensatory education has legally been viewed as a remedy to make up for a school’s failure to provide a student with a free appropriate public education, the impact of COVID-19 has not been the fault of any school. Nonetheless, through informal guidance, the United States Department of Education has advised that if there has been any delay in providing services due to school closures, a student’s IEP team must make an individualized determination as to whether compensatory services are needed to “make up for any skills have may have been lost.”

It did not take long for the lawsuits to begin. There are currently two class actions lawsuits

(and potentially more) in Hawaii and Pennsylvania demanding that courts require schools to develop a process to determine compensatory education due to students with disabilities. For more information on the pending lawsuits, please visit the following links: [Hawaii](#); [Pennsylvania](#).

### **United States Department of Education: Permitting Transgender Female Students to Compete Against Non-Transgender Females is a Violation of Title IX**

According to the Associated Press, the United States Department of Education transmitted a letter in response to a pending Connecticut lawsuit concluding that a policy permitting transgender female students to compete against non-transgender female students is a civil rights violation. The lawsuit was brought by Alliance for Defending Freedom on behalf of three female high school runners seeking to prevent transgender athletes from competing in female sports. With respect to the Department's letter, the Associated Press further stated as follows in a May 28, 2020, article:

The office said in the 45-page letter that it may seek to withhold federal funding over the policy, which allows athletes to participate under the gender with which they identify. The policy is a violation of Title IX, the federal civil rights law that guarantees equal education opportunities for women, including in athletics, the office said.

In other news related to the case, Judge Robert Chatigny ruled that the transgender athletes were to be referred to as "transgender females" in all official court filings. The Alliance disputed Judge Chatigny's order and argued that ordering the parties to be referred to by a specific gender pronoun is tantamount to "pre-judging" the case. The Alliance has requested that Judge Chatigny recuse himself from the case because, among other things, Judge Chatigny has allegedly given up the "appearance of impartiality" generally required of judges.

Source: [Associated Press](#); [Courant.com](#)

### **Class Action Against New Jersey Department of Education Proceeds Based on Allegations the State Violated Due Process Rights of Students with Disabilities**

Pursuant to an order issued by the United States District Court for the District of New Jersey on May 22, 2020 (C.P., et. al. v. New Jersey Department of Education, Case No. 19-12807), a class of students with disabilities and their parents may continue their claims against the New Jersey Department of Education alleging it mishandled special education due process petitions. According to the order, the class appropriately asserted plausible claims that New Jersey's system for adjudicating Individuals with Disabilities Education Act ("IDEA") disputes is "profoundly broken and routinely violates" federal laws designed to protect the most vulnerable students. The Court held, among other things, that allegations existed suggesting that New Jersey failed to meet various due process deadlines as outlined in the IDEA.

A copy of the opinion is available at the following link: [C.P. v. New Jersey](#).

### **Sixth Circuit to Rehear Right to Literacy Case**

In late April, the U.S. Court of Appeals for the Sixth Circuit recognized a fundamental right to basic minimum education and access to literacy under the 14th Amendment's guarantee of substantive due process. This was the first time a federal appeals court had made such a ruling.

On May 14, 2020, the parties settled the underlying lawsuit after Michigan Governor Gretchen Whitmer proposed state legislation that would provide nearly \$95 million in additional funding for literacy programs. However, just five days later, the full Circuit Court of Appeals agreed to rehear the case *en banc*. By initiating this process, the Court essentially overturned the prior panel decision, which is no longer considered precedent.

Source: [Educationnext.org](https://www.educationnext.org).

### **Florida Department of Education School Safety Update**

On May 21, 2020, the Florida Department of Education ("FL DOE") issued a School Safety Update outlining upcoming dates for school safety specialist training, a summary of an update from Commissioner Corcoran, and various other issues. For access to the update, please visit the following link: [FL DOE Update](#).

### **From the Lighter Side: 13-year-old earns 4 degrees**

California 13-year-old Jack Rico recently graduated from Fullerton College with four associate's degrees, making him the youngest graduate in school history. He accomplished the feat in only two years, and kept a 4.0 GPA. The young scholar plans to study history at the University of Nevada, Las Vegas, where he has been offered a full scholarship. Smart kid.

Source: [abc7.com](https://abc7.com).

### **Firm News**

On May 8, 2020, **Terry J. Harmon** presented a webinar titled, "The IDEA and COVID-19," to the Florida School Boards Association.

On May 21, 2020, **Terry J. Harmon** presented "The IDEA and COVID-19: Planning for the Return to School" in a nationally-broadcast webinar through LRP Publications.

### **Past Issues of the Education Law Alert Available on Website**

You may view past issues of the Labor and Employment Law Alert on the Firm's website: [www.sniffenlaw.com](http://www.sniffenlaw.com). After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.