

EDUCATION LAW NEWS

PRACTICAL IMPLICATION OF OCR'S TITLE IX "DEAR COLLEAGUE" LETTER

By Kimberly M. Colonna

All public school districts, colleges and universities that receive federal financial assistance ("schools") are required to comply with Title IX, a law that prohibits all forms of sex discrimination, including sexual harassment. The three fundamental requirements of Title IX are that schools (1) disseminate a notice of nondiscrimination; (2) designate at least one employee to coordinate Title IX responsibilities; and, (3) adopt and publish grievance procedures for student and employee sex discrimination complaints.

The Office of Civil Rights (OCR) of the United States Department of Education recently issued a "Dear Colleague" letter clarifying Title IX's requirements for schools to address sexual harassment. The letter provides significant guidance for creating and implementing a sexual harassment policy that will meet Title IX's standards as viewed by OCR.

OCR's letter first reminds schools that Title IX protects students from sexual harassment in academic, extracurricular, athletic, and other programs, on buses, during field trips, and in classes or training programs that take place off school grounds. The letter also explains that student-on-student sexual harassment that occurs outside of school programming may have effects within the school, such that schools are required to consider whether those situations create a hostile environment on campus. Additionally, OCR states that, regardless of whether anyone files a complaint about sexual harassment, a school must investigate any situation involving possible sexual harassment of which it is aware. In short, OCR takes a broad view of schools' responsibilities to protect students against sexual harassment.

OCR recognizes that an informal resolution process can be appropriate for some claims of sexual harassment. However, a student complainant must be notified of the right to have the complaint proceed according to a formal process outlined in a school's policies.

The Dear Colleague letter emphasizes that sexual harassment policies must contain the following elements:

- an investigation process that is prompt, thorough, and

impartial and that affords the complainant a prompt and equitable resolution

- a hearing during which both parties have the right to present witnesses
- the "preponderance of the evidence" standard, not a higher standard, must be used at any hearings (i.e. "it is more likely than not that sexual harassment occurred")
- the complainant and the alleged perpetrator must have similar access to any information that may be used at the hearing, must have equal rights to present character witnesses, and rules for the participation of lawyers and advocates must apply equally to both parties.

As it has in prior guidance, OCR emphasizes the importance of schools providing information and training about sexual harassment to school students, faculty, coaches, and administrators. Schools must develop written materials that define what constitutes sexual harassment, state to whom sexual harassment should be reported, explain how to file a complaint, and provide the time frames within which the school will conduct a full investigation and provide notice of the outcome. Those materials must be distributed to students and/or their parents, published on school websites, and widely posted in school buildings.

Effective implementation of sound sexual harassment policies is required to ensure legal compliance and it is likely to reduce incidents of sexual harassment by defining conduct that is inappropriate and by emphasizing that such conduct will not be tolerated. The Education Law Group of McNees Wallace & Nurick LLC is available to assist schools with questions regarding Title IX and sexual harassment policies. ■



Kimberly M. Colonna is a member of the McNees Education Law, Litigation and Injunction groups.
717.237.5278 | kcolonna@mwn.com



CYBERBULLYING: BALANCING THE RIGHTS OF STUDENT VICTIMS AND BULLIES

By Alexis I. Snyder

Educators at all levels have long been aware of the harm that bullying can cause. With the explosive growth of social networking sites and instant messaging, however, today's bullies have many more opportunities to act. What once took place in school hallways and cafeterias can now occur at any time and in any place. The internet allows bullies to reach their victims even when they are at home.

There have been a number of recent tragic stories of students who have committed suicide or violence against others as a result of cyberbullying. Even where cyberbullying does not lead to those kinds of consequences, it can significantly interfere with a student's ability to learn and to participate fully in school activities.

Unfortunately, schools that seek to prevent and punish cyberbullying often encounter legal challenges. Pennsylvania law requires all elementary and secondary schools to have anti-bullying policies and defines "bullying" to include electronic acts. In addition, Pennsylvania's statute on bullying policies expressly permits schools to enact policies that prohibit bullying which occurs outside of the school setting as long as the out-of-school acts (1) are directed at another student or students, (2) are severe, persistent, and pervasive, and (3) have the effect of substantially interfering with a student's education, creating a threatening environment, or substantially disrupting the orderly operation of the school.

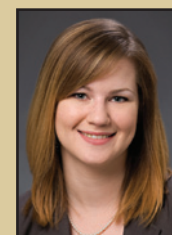
Nevertheless, when crafting cyberbullying policies, schools must be careful not to violate students' Free Speech rights under the First Amendment. Regrettably, the case law regarding cyberbullying and free speech does not provide schools with clear guidance. Courts disagree as to whether the standards that typically apply to free speech in schools should govern students' "cyberspeech." The Third Circuit, whose decisions apply to Pennsylvania schools, has been particularly unclear about whether schools may discipline a student for speech that occurs on-line. In February 2010, the Third Circuit issued opinions in two cases involving disciplinary actions taken against students for cyberspeech that occurred off-campus. The facts of the two cases were remarkably similar—both of the plaintiffs were students who had created parody

MySpace profiles of school officials—yet the decisions issued reached opposite conclusions. In one case the Court ruled that the school had the right to discipline the student, and in the other case, the Court ruled that the school had violated the student's free speech rights by disciplining the student. In April 2010, the Third Circuit vacated both of those opinions and granted a rehearing of both cases. The cases, which had previously been heard by separate small panels of judges, will now be considered by all of the Third Circuit judges. The Court has not yet issued new opinions following the rehearings.

Attempts to predict how the courts will rule on these issues are further complicated by the fact that the highest courts for Pennsylvania have only considered cases in which students were punished for online speech that was directed at teachers and administrators. Neither the Pennsylvania appellate courts nor the Third Circuit has ruled on a case in which a student was punished for the online bullying of another student. Decisions from other states are of little help because cases across the country have resulted in inconsistent decisions.

Despite the uncertainty surrounding the First Amendment and cyberbullying, schools should take action when they discover that cyberbullying by a student has had an impact on the educational experience of another student. Several legal scholars have suggested that schools could be held responsible under a variety of laws if they fail to take action to protect students from cyberbullying. Additionally, the U.S. Department of Education's Office of Civil Rights recently issued a Dear Colleague Letter asserting that a school's failure to curb bullying based on a student's race, color, national origin, sex, or disability can constitute a violation of various anti-discrimination laws, such as Title VI, Title IX, and Section 504.

The Education Law attorneys at McNees Wallace & Nurick stand ready to help you navigate this uncertain area of the law. If you are considering promulgating or amending a cyberbullying policy, or if you are faced with the need to discipline a student for cyberbullying, please contact us for guidance. ■



Alexis I. Snyder practices in the Education Law, Litigation and Injunction groups.
717.237.5284 | asnyder@mwn.com

McNees Education Law Group

Kimberly M. Colonna, Chair
717.237.5278/kcolonna@mwn.com

Brian F. Jackson
717.237.5467/bjackson@mwn.com

Elizabeth A. Maguschak
570.455.8300/emaguschak@mwn.com

Jeffrey F. Champagne
717.237.5305/jchampagne@mwn.com

Stephen R. Kern
717.237.5350/skern@mwn.com

Alexis I. Snyder
717.237.5284/asnyder@mwn.com

Devin J. Chwastyk
717.237.5482/dchwastyk@mwn.com

Adam R. Long
717.237.5209/along@mwn.com

David M. Watts, Jr.
717.237.5344/dwwatts@mwn.com

© 2011 McNees Wallace & Nurick LLC

SPECIAL EDUCATION NEWS is presented with the understanding that the publisher does not render specific legal, accounting or other professional service to the reader. Due to the rapidly changing nature of the law, information contained in this publication may become outdated. Anyone using this material must always research original sources of authority and update this information to ensure accuracy and applicability to specific legal matters. In no event will the authors, the reviewers or the publisher be liable for any damage, whether direct, indirect or consequential, claimed to result from the use of this material.