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## Sexual Harassment – Guidance from the US Department of Education Office for Civil Rights

by John E. Priddy

Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, prohibits discrimination on the basis of sex in connection with participation in or access to educational programs or activities operated by recipients of federal financial assistance. In September 2017, the United States Department of Education Office for Civil Rights ("OCR") announced it will engage a rulemaking process regarding schools' responsibilities to address sexual misconduct which can include peer-on-peer sexual harassment. During this process and until new rules are adopted, the OCR has issued guidance in the form of questions and answers. The


Q&A should be utilized in conjunction with OCR, *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html> [hereafter 2001 Guidance].

### Question:

What is the nature of a school's responsibility to address sexual misconduct?

### Answer:

Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the schools knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand



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what occurred and to respond appropriately. In particular, when sexual misconduct is so severe, persistent, or pervasive as to deny or limit a student's ability to participate in or benefit from the school's programs or activities, a hostile environment exists and the school must respond.

**Comment:**

A school district must designate an employee to serve as the Title IX Coordinator. It is recommended a school district assign additional employees as "responsible employees" for students who need assistance from the Title IX coordinator.

**Question:**

What are interim measures and is a school required to provide such measures?

**Answer:**

Interim measures are individualized services offered as appropriate to either or both the reporting and responding parties involved in an alleged incident of sexual misconduct, prior to an investigation or while an investigation is pending. Interim measures include counseling, extensions of time or other course-related adjustments, modifications of class schedules, restrictions on contact between

the parties, increased supervision and monitoring while student is at school.

**Comment:**

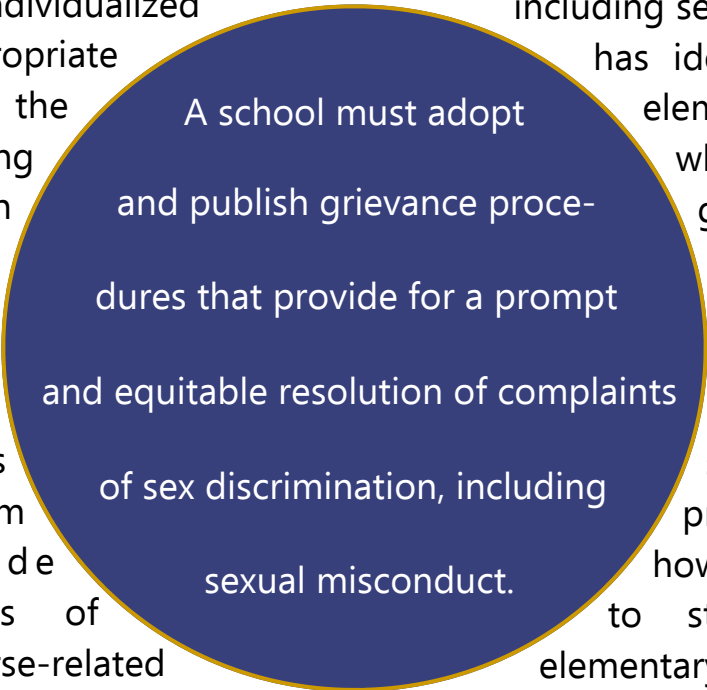
School districts should consider what appropriate actions are necessary during the investigation stage to ensure the safety and continued progress of the student's education. The Title IX Coordinator should work with the parents of an impacted student to provide individualized interim measures.

**Question:**

What are the school's obligations with regard to complaints of sexual misconduct?

**Answer:**

A school must adopt and publish grievance procedures that provide for a prompt and equitable resolution of complaints of sex discrimination, including sexual misconduct. OCR has identified a number of elements in evaluating whether a school's grievance procedures are prompt and equitable, including whether the school (i) provides notice of the school's grievance procedures, including how to file a complaint, to students, parents of elementary and secondary school students, and employees; (ii) applies the grievance procedures to



complaints filed by students or on their behalf alleging sexual misconduct carried out by employees, other students, or third parties; (iii) ensures an adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (iv) designates and follows a reasonably prompt time frame for major stages of the complaint process; and (v) provides assurance that the school will take steps to prevent recurrence of sexual misconduct and to remedy its discriminatory effects, as appropriate.

**Question:**

What time frame constitutes a “prompt” investigation?

**Answer:**

There is no fixed time frame under which a school must complete a Title IX investigation. OCR will evaluate a school’s good faith effort to conduct a fair, impartial investigation in a timely manner designed to provide all parties with resolution.

**Comment:**

As an additional reminder, Oklahoma law requires every person having reason to believe that a child under the age of eighteen (18) years of age is a victim of abuse shall report the matter promptly to the Department of Human Services (DHS). Reports shall be made to the DHS Hotline.

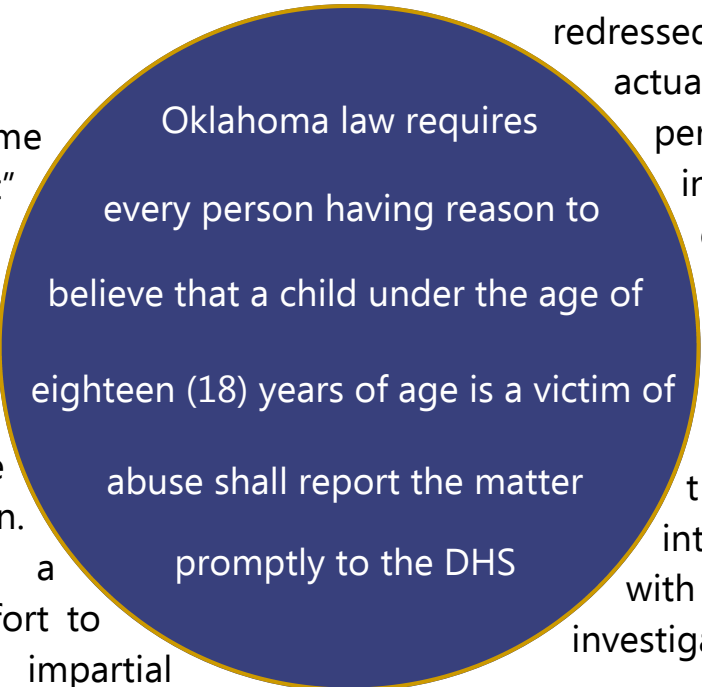
**Question:**

What constitutes an “equitable” investigation? (primarily applicable to peer-on-peer sexual harassment)

**Answer:**

In every investigation conducted under the school’s grievance procedures, the burden is on the school – not on the parties – to gather sufficient evidence to reach a fair, impartial determination as to whether sexual misconduct has occurred and, if so, whether a hostile environment has been created that must be redressed. A person free of actual or reasonably perceived conflicts of interest and biases for or against any party must lead the investigation on behalf of the school. Schools should ensure that institutional interests do not interfere with the impartiality of the investigation.

An equitable investigation of a Title IX complaint requires a trained investigator to analyze and document the available evidence to support reliable decisions, objectively evaluate the credibility of parties and witnesses, synthesize all available evidence – including both inculpatory and exculpatory evidence – and take into account the unique and complex circumstances of each case.



Any rights or opportunities that a school makes available to one party during the investigation should be made available to the other party on equal terms. Restricting the ability of either party to discuss the investigation (e.g. through a "gag order") is likely to deprive the parties of the ability to obtain and present evidence or otherwise to defend their interests and therefore is likely inequitable. Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.

Once it decides to open an investigation that may lead to disciplinary action against the responding party, a school should provide written notice to the responding party of the allegations constituting a potential violation of the school's sexual misconduct policy, including sufficient details and with sufficient time to prepare a response before any initial interview. Sufficient details include the identities of the parties involved, the specific section of the code of conduct allegedly violated, the precise conduct allegedly constituting the potential violation, and the date and location of the alleged incident. Each party should receive written notice in advance of any interview or hearing with sufficient time to prepare for meaningful participation. The investigation should

result in a written report summarizing the relevant exculpatory and inculpatory evidence. The reporting and responding parties and appropriate officials must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.

*John Priddy presented on sexual harassment claims under Title IX at the Oklahoma Schools Insurance Group Annual Conference on November 16, 2017. He is available to speak at school districts to provide training and information regarding dealing with sexual harassment claims under Title IX. He can be contacted at [jpriddy@rflaw.com](mailto:jpriddy@rflaw.com).*

## Corporal Punishment of Students with Disabilities

by Cheryl A. Dixon

House Bill 1623, otherwise known as the Bryan Young Act, has been codified as a new law in Oklahoma statutes at Title 70, Section 13-116 effective on November 1, 2017. This law **prohibits** school district personnel "from using corporal punishment on students identified with the most significant cognitive disabilities" unless the student's parent or legal guardian provide written consent. Corporal punishment is defined as "the deliberate infliction of physical pain by hitting, paddling, spanking, slapping or

any other physical force used as a means of discipline.”

The criteria by which students qualify as having “significant cognitive disabilities” are to be established by the Oklahoma State Department of Education (“OSDE”). However, as of the date of this writing, the OSDE has not yet begun the rule making process to define a “significant cognitive disability,” and it is not anticipated that such will occur until sometime in the future. In the meantime, however, OSDE is recommending that districts use the “Criteria Checklist for Assessing Students with Disabilities on Alternative Assessments” EdPlan form to determine whether a student meets the criteria for having a “significant cognitive disability.” If your district is one which continues to utilize corporal punishment as a means of discipline, it is important for you to take note of this new law and ensure that all staff, especially those working with your district’s special education students, are aware of it.

In a previous article I discussed emerging issues in special education in the state of Oklahoma. One of those issues involved the increase in special education due process filings against school districts for suspending students and/or

implementing shortened school days to address student behavior. The Oklahoma State Department of Education, Special Services Division, also issued a Memo regarding this issue on December 20, 2016. Therefore, we also recommend implementing alternative means of discipline, other than long term suspensions or shortened school days, for your district’s special education students as these means of discipline.

If your district is facing ongoing behavioral issues from a special education student we highly recommend involving a behavioral expert to assist the district. Contact your school district’s attorney to discuss this issue and/or get a referral to a qualified, effective behavioral expert in Oklahoma.

## Fair Use and Reproduction of Copyrighted Materials for Classroom Use

*by Adam S. Breipohl*

When school district employees make copies of copyrighted works for use in class, they may assume that doing so is permissible under United States copyright law because the purpose of the copying is educational rather than to earn a profit.

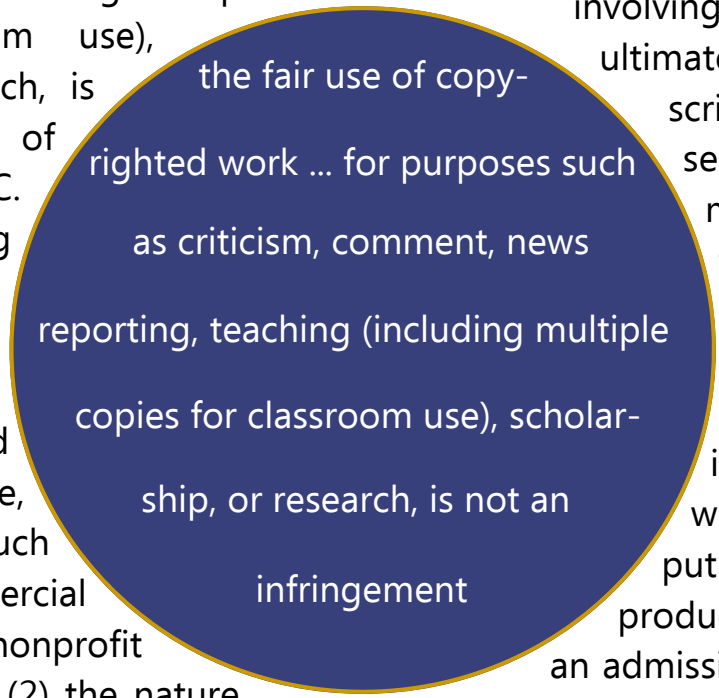
prohibits personnel  
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parent or legal guardian provide  
written consent.

While the doctrine of “fair use” under the United States Copyright Act does provide districts and their employees some latitude in this area, districts must take care to ensure that their activities do not go outside the bounds of fair use and thereby create legal risk for the district.

The U.S. Copyright Act states that “the fair use of a copyrighted work ... for purposes such as criticism, comment, news reporting, teaching (including multiple copies for classroom use), scholarship, or research, is not an infringement of copyright.” 17 U.S.C. § 107. In determining whether fair use applies, courts look to four specific factors: (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work (i.e. there is more latitude for the fair use of works that are primarily factual in nature such as textbooks, as opposed to works that are more creative in nature, such as novels or poems); (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for or value of the copyrighted work.

Therefore, even though most, if not all, copying by school employees will be for a

nonprofit educational purpose, this does not mean that fair use automatically applies. Instead, all four factors are considered and a holistic determination of whether the use qualifies as “fair use” is made. For example, if a drama teacher uses the script of a play to work on acting skills, set design, production, etc. with students during class, making copies of each act of the script for each enrolled student to use in the class sessions involving those scenes and ultimately using the entire script over the course of a semester, fair use is more likely to apply than if the teacher makes many copies of the entire script and distributes them indiscriminately to the whole student body to put on an evening production of the play with an admission fee. The purpose is educational in both cases, but in the latter example, the fact that the work is creative in nature, the entire work is being copied, and the copying eliminates the need for the school to buy copies of the script for the production, all weigh against the use, outweighing the first factor. Due to the fact-specific and subjective nature of the test for fair use, a school district’s reliance on fair use as a defense for its practices carries a certain amount of legal risk, especially in a close case.



However, more definitive guidance as to what is allowed under fair use for reproducing parts of certain media does exist. When the Copyright Act of 1976 was being considered by Congress, uncertainty emerged over the extent to which copying portions of books and periodicals for classroom use would be fair use under the new law, so educational institutions, authors, and publisher reached an "Agreement on Guidelines for Classroom Copying in Not-For-Profit Educational Institutions with Respect to Books and Periodicals," which was later included in the legislative comments to the statute. The rules included in this agreement are very detailed, providing for specific word limits for excerpts of various works, limits on the number of times excerpts from the same work may be used in one class term, etc. However, it is important to note that the purpose of these rules is merely to provide "safe harbor" for certain activities

that are clearly fair use, not to impose definitive limits on fair use. For example, it is possible that a teacher's copying and distribution of an excerpt from a novel longer than the word limit listed in the agreement could still be fair use. When reproducing copyrighted works that are covered in the agreement, the safest practice would be to follow the agreement's guidelines when possible.

Overall, school districts must be careful to ensure that their reproduction of copyrighted materials falls under the fair use exception to avoid copyright infringement. Districts that have questions regarding intellectual property laws should consider contacting their legal counsel.

*\*Adam Breipohl is available to speak at your school district to provide training and guidance regarding compliance with copyright law. He can be reached at [adamb@rfrlaw.com](mailto:adamb@rfrlaw.com).*

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*Chalkboard* is a Rosenstein, Fist & Ringold publication that addresses current education law issues. *Chalkboard* is published monthly through the school year and is sent without charge to all education clients of Rosenstein, Fist & Ringold and all other persons who are interested in education law issues. We invite you to share *Chalkboard* with your friends and colleagues. We think you will find *Chalkboard* to be informative and helpful with the difficult task of operating our educational institutions.

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