THE INTERSECTION OF THE NEW TITLE IX RULE, THE IDEA, AND SECTION 504

For our special education friends, there are a number of nuances to think about in the context of the new Title IX regulations. This “Q&A” summary will help you digest some of the important questions that will arise.¹

**QUESTION:** What should schools know about the relationship between the new Title IX regulations, the IDEA, and Section 504?

**ANSWER:** Every elementary and secondary school employee can now trigger a school's obligation to investigate and take action [in response to] alleged Title IX violations under the new regulations. So, every school will have to conduct training on the new regulations for all staff, including and especially its special education staff.

Most immediately, the new Title IX grievance process is fairly regimented, and it looks like it could take a minimum of 22 to 23 days to complete, exclusive of appeals. In many cases, there will be outright conflicts between the new Title IX regulations and requirements under the IDEA and Section 504. This will probably be a source of litigation in the next months and years.

Under the new regulations, when students with disabilities are involved in a Title IX investigation, special education staff will need to communicate early and often with the staff conducting the Title IX investigation to make sure the district complies with each set of laws. You will have employees from the discipline, Title IX, and IDEA [or] Section 504 worlds forced to work in perfect harmony, reconciling massive and complex laws, under much more proscriptive processes outlined in the Title IX regulations. We have always satisfied Title IX obligations within disciplinary and IDEA [or] 504 processes. Now Title IX has its own, much more onerous process that simply doesn't align with the others.

¹ This summary was compiled by attorney Bobby Truhe of KSB School Law in Lincoln, Nebraska.
QUESTION: When will we see litigation related to the new Title IX regulations?

ANSWER: Unfortunately, it won't be long before a school district is the test case in a factual scenario where an on-campus incident forces the emergency removal of a special education student from his current placement, but the conduct is also a manifestation of the child's disability. The Title IX process taking 20 plus days, at a minimum, will force the issue legally (for sure on day 11) under the disciplinary change in placement laws in the IDEA and Section 504. To avoid being a test case, schools will have to revise policies, provide training across disciplines, and make sure communication channels are clearly established come August 14, 2020, the effective date of the new regulations. In a world where COVID-19's reach will almost certainly extend into the SY 2020-21, this will be even more complex. Special educators will be a key to success in this process.

QUESTION: What should special education teachers, related service providers, and IEP team members know about the new Title IX rule?

ANSWER: In addition to being involved in the Title IX process much more often and in more ways, special education staff and service providers will have to understand the intricacies of the new Title IX definitions, such as for "sexual harassment," and the new grievance processes. That's just a starting point.

During the investigation process, schools must ensure that "supportive measures" are offered to both parties -- the accused and the complainant. In practice, the requirement to provide supportive measures during the longer Title IX grievance process is one of the murkier questions about the Title IX, IDEA, and Section 504 overlap. The regulations say that supportive measures "may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures."

Some alarm bells should be going off for special educators. Counseling services? Modifications to schedules? Leaves of absence? In many cases involving students with disabilities, these supportive measures will constitute changes in placement, trigger disciplinary removal analysis, require manifestation determinations, and require changes to services and related services. Must a student's IEP or 504 team meet prior to any interim measures being implemented? Do all Title IX interim or corrective measures belong in a child's IEP, just like the elements of a 504 plan can be included in an IEP? Should the Title IX coordinator or ultimate decision-maker in the Title IX process be included on the student's IEP team so the services and related services in the IEP line up with interim and corrective measures for both complainants and respondents under Title IX? We just don't know the answers to some of these questions yet, meaning there is a good chance that IEP and 504 teams will meet more frequently because of the new Title IX regulations.
QUESTION: How should IEP teams address instances where a student is at the center of an accusation of sexual harassment or assault, either as the complainant or the accused? (For example, should a district convene an IEP or Section 504 meeting to determine what supportive services would be appropriate for a student who experiences sexual harassment?)

ANSWER: As mentioned above, I think IEP and 504 teams will have to be involved from the beginning of a situation like that. In some cases, that may mean elbowing their way into the process earlier than usual.

The Title IX regulations simply do not have any deference to the IDEA [or] 504 processes. For example, new 34 CFR Sec. 106.30 states, "The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures." Many of the immediate supportive measures and corrective measures that Title IX coordinators and principals might suggest will trigger IDEA and Section 504 obligations. If the Title IX coordinator "is responsible" for coordinating those, at a minimum the coordinator must be trained on consulting with students' team members immediately, prior to making those decisions.

Even for schools that handle that collaboration perfectly, complying with the requirements of the IDEA and Section 504 will necessarily delay the Title IX investigation and response. IEP meeting scheduling is always tricky, especially when you're in a hurry. IEP amendments require meaningful parental participation, and parents of accused students will likely feel as though the school has already deemed their child guilty by suggesting IEP changes, especially if they are changes in placement. Prior written notice requirements must be followed, either way.

QUESTION: What considerations should districts make when conducting a grievance proceeding involving students with disabilities?

ANSWER: The increase in procedural requirements, such as disclosure of evidence to both parties and the right of cross-examination (even if only in writing in the K-12 world) in the new Title IX grievance process will create accessibility issues. Some of the accessibility accommodations and modifications required to allow participation in the Title IX processes may even require IEP or 504 plan changes, in addition to considerations under the ADA and language barriers, to name a few. Will the school district need to provide interpreters to the parents of students who wish to conduct written questioning of the other party? What if the child's disability or parent's disability prevents them from being able to fully engage in the Title IX grievance process? There are more accessibility questions than answers at this point!

Some things do seem predictable, though. Although the new regulations are too fresh for formal guidance, I am betting the overlap of Title IX, IDEA, Section 504, and the ADA will mean that all evidence, reports, and written decisions must be made accessible so that every student, parent, and advocate involved can review them. Logistical difficulties notwithstanding, the timelines will have to be delayed even further to sort out those types of questions because each party must be given a full 10 days to respond to the evidence and 10 more days to respond to the investigative report once they are received, under the new regulations. I would guess that a judge or [Office for Civil Rights] investigator would say the clock for those 10 days has started only once
all documents and reports are fully accessible to ensure equal opportunity for participation of both parties. Remember that Title IX applies to employees, too, so accessibility concerns will not be limited to students and their parents.

**QUESTION:** How can districts proceed with emergency removals under Title IX without violating the rights of students with disabilities under the IDEA, Section 504, and the ADA?

**ANSWER:** In short, they may not be able to do so, at least not without risking violations under one or more sets of laws. This is where overlap could turn into contradiction. If we assume a sexual assault occurs on campus and clearly triggers both Title IX and disciplinary considerations, there will be no relief in the Title IX process from the procedural requirements under the IDEA or Section 504, or vice-versa. If the student with a disability is the aggressor and an emergency removal is proposed, the student will almost certainly be entitled to a manifestation determination [review] prior to the removal extending beyond 10 school days. The investigation won’t even be completed by that point under Title IX, but the student’s team will have to use whatever information is available to make the manifestation determination. As special educators know, the special 45-day removal authority for "serious bodily injury" takes a fairly serious injury, so manifestation determinations likely will be required except for the most severe assault cases.

**QUESTION:** What steps should teams follow after conducting a manifestation determination review in relation to a Title IX allegation?

**ANSWER:** If the behavior is NOT a manifestation of the child’s disability, then the IEP team will need to work with the family (and likely the Title IX coordinator) on what the interim alternative educational setting would look like. If the behavior is a manifestation of the child’s disability, then the child must be returned to his or her prior placement, unless the parents agree to a change in placement. That may require a functional behavioral assessment and/or require review or implementation of a behavioral intervention plan. It may also trigger child find obligations outright and require additional assessments as part of a new evaluation. And then, because the parents must agree to a change in placement if the conduct is a manifestation, this begs the age-old question in these situations: What if the parents do not agree? Teams will need to square [away] what authority they have when considering what it means to return the child to his or her prior "placement" as that is defined in the IDEA, versus the idea of changing class schedules, switching class sections, etc.

IEP teams should understand the difference between using misconduct as data to support a change in placement compared to pursuing the disciplinary removal path. The latter requires a manifestation determination meeting as well as parental agreement to the change in placement. This is another reason to involve IEP and 504 team members early [in allegations of Title IX violations], so that a step zero or early analysis can be completed prior to the Title IX coordinator or an administrator choosing the path for the team.