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The Intersection of the new Title IX Regulations and K-12 Special Education

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Brief Overview: New Definitions and Requirements

Actual knowledge by any K-12 employee

- **Actual knowledge** required: notice of sexual harassment or allegations of sexual harassment to "any employee of an elementary and secondary school."
- **Sexual harassment:** (1) "conditioning aid, benefit or service . . . on an individual's participation in unwelcome sexual conduct;" (2) "unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity"; (3) adopts definitions in federal law of "sexual assault," "dating violence," "domestic violence," or "stalking.
- 34 C.F.R. § 106.30(a).

Supportive Measures for Complainant and Respondent

- Supportive Measures: "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed."
  - " . . . designed to restore or preserve equal access to the recipient' education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment."
  - May include in K-12 context: "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 . . . increased security and monitoring of certain areas of the campus, and other similar measures."
  - Confidentiality required to the extent practicable.
  - District's Title IX Coordinator responsible for coordinating implementation.
- 34 C.F.R. § 106.30(a).

General Response: Prompt and Not "Deliberately Indifferent"

- District with "actual knowledge of sexual harassment in an education program or activity of the [District]. . . must respond promptly in a manner that is not deliberately indifferent." 34 C.F.R. § 106.44(a).
- Deliberately indifferent? "Only if [District's] response to sexual harassment is clearly unreasonable in light of the known circumstances." Id.
- K-12 education program or activity? "Locations, events, or circumstances over which the [District] exercised substantial control over both the respondent and the context in which the sexual harassment occurs." Id.
- Similar to current 5th Circuit precedent. See Doe v. Columbia-Brazoria ISD, 855 F. 3d. 681 (5th Cir. 2017):
  - "A school district that receives federal funds may be liable for student-on-student harassment if the district (1) had actual knowledge of the harassment, (2) the harasser was under the district's control, (3) the harassment was based on the victim's sex, (4) the harassment was so severe, pervasive, and objectively offensive that it effectively barred the victim's access to an educational opportunity or benefit, and (5) the district was deliberately indifferent to the harassment."

General Response: Procedure

- Offer **supportive measures** & follow a **formal grievance process** prior to imposing any disciplinary sanctions (or taking other actions against the respondent that aren't supportive measures)
- **Title IX coordinator must** (1) contact complainant to discuss the availability of supportive measures (with or without the filing of a formal complaint), (2) consider the wishes of complainant regarding those measures, and (3) explain the process for filing a formal complaint.
- 34 C.F.R. § 106.44(a).

Response to Formal Complaint: Grievance Process Basics

- Investigation including—
  - Equal opportunity to present witnesses and to inspect and review any evidence.
  - Written investigative report fairly summarizing evidence.
- Hearing may be conducted in K-12 context but not required—
  - Equal opportunity to submit written relevant questions to any party or witness.
  - Access to the answers & allow limited follow-up questions.
- 34 C.F.R. § 106.45

Process will take a minimum of 20+ days to resolve.

Manifestation Determination Reviews and the new Title IX "Emergency Removal" Provision

504 & IDEA's MDR Requirement for Disciplinary Removals

- Manifestation determination
  - (1) Within 10 school days of any decision to change the placement of a child with a disability because of a violation of a code of student conduct, the LEA, the parent, and relevant members of the child's IEP Team (as determined by the parent and the LEA) must review all relevant information in the student's file, including the child's IEP, any teacher observations, and any relevant information provided by the parents to determine—
    - If the conduct in question was caused by, or had a direct and substantial relationship to, the child's disability; or
    - If the conduct in question was the direct result of the LEA's failure to implement the IEP.
- 34 C.F.R. § 300.530(e)

504 & IDEA's MDR Requirement for Disciplinary Removals

- **Change of placement?** For purposes of removals of a child with a disability from the child's current educational placement, a change of placement occurs if—
  - The removal is for more than 10 consecutive school days; or
  - The child has been subjected to a series of removals that constitute a pattern—
    - Because the series of removals total more than 10 school days in a school year;
    - Because the child's behavior is substantially similar to the child's behavior in previous incidents that resulted in the series of removals; and
    - Because of such additional factors as the length of each removal, the total amount of time the child has been removed, and the proximity of the removals to one another.
- 34 C.F.R. § 300.536(a)

504 & IDEA's MDR Requirement for Disciplinary Removals

- Determination that behavior was a manifestation. If the LEA, the parent, and relevant members of the IEP Team make the determination that the conduct was a manifestation of the child's disability, the IEP Team must—
  - (1) Either—(i) Conduct a functional behavioral assessment, unless the LEA had conducted a functional behavioral assessment before the behavior that resulted in the change of placement occurred, and implement a behavioral intervention plan for the child; or(ii) If a behavioral intervention plan already has been developed, review the behavioral intervention plan, and modify it, as necessary, to address the behavior; and
  - (2) Except as provided in paragraph (g) of this section, **return the child to the placement** from which the child was removed, unless the parent and the LEA agree to a change of placement as part of the modification of the behavioral intervention plan.
- 34 C.F.R. § 300.530(f)

IDEA's Requirement of Services During Removal

- Services
  - (1) A child with a disability who is removed from the child's current placement pursuant to paragraphs (c), or (g) of this section must—
    - (i) Continue to receive educational services, as provided in § 300.101(a), so as to enable the child to continue to participate in the general education curriculum, although in another setting, and to progress toward meeting the goals set out in the child's IEP; and
    - (ii) Receive, as appropriate, a functional behavioral assessment, and behavioral intervention services and modifications, that are designed to address the behavior violation so that it does not recur.
  - (2) The services required by paragraph (d)(1), (d)(3), (d)(4), and (d)(5) of this section may be provided in an interim alternative educational setting.
- 34 C.F.R. § 300.530(d)

Title IX's New "Emergency Removal" Provision

"(c) Emergency removal. Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act."

Savings Clause

34 C.F.R. § 106.44(c)

Commentary: *DoE*'s May 2020 FINAL RULE

- "[N]othing in [Title IX's emergency removal provision] prevents a [District] from involving a student's IEP team before making an emergency removal decision and . . . [the provision] does not require a recipient to remove a respondent where the [District] has determined that the threat posed by the respondent, arising from the sexual harassment allegations, is a manifestation of a disability such that the recipient's discretion to remove the respondent is constrained by IDEA requirements" (Unofficial Copy, pg. 742).
- USDOE. May 6, 2020. https://www2.ed.gov/about/offices/list/ocr/docs/titleix-regs-unofficial.pdf

Texas Law and Discipline of SWDs for "Harassment"

- TEC § 37.001 provides protections for students in Texas against bullying and harassment.
- However, if the alleged bully or harasser is a student with a disability, additional protections apply:
  - "The methods adopted under Subsection (a)(8) must provide that a student who is enrolled in a special education program under Subchapter A, Chapter 29, may not be disciplined for conduct prohibited in accordance with Subsection (a)(7) **until an admission, review, and dismissal committee meeting has been held to review the conduct**." TEC § 37.001(b-1).
  - Subsection (a)(7): "bullying, harassment, and making hit lists"
  - **NOTE**: this meeting is not defined as a manifestation determination review (MDR)

Texas Law and Discipline of SWDs For "Harassment"

- Texas Education Code's definition of "harassment"—
  - "'Harassment' means threatening to cause harm or bodily injury to another student, engaging in sexually intimidating conduct, causing physical damage to the property of another student, subjecting another student to physical confinement or restraint, or maliciously taking any action that substantially harms another student's physical or emotional health or safety." TEC § 37.001(b)(2).
  - Title IX's definition of sexual harassment.
  - "Unwelcome conduct" determined to be "so severe, pervasive and objectively offensive" that it effectively denies someone equal access to an education program or conduct equivalent to sexual assault, dating violence, domestic violence or stalking.

Texas Law and Discipline of SWDs For "Harassment"

- **The Supremacy Clause and the doctrine of preemption**— federal law preempts state law when laws conflict, generally; however, when a state law provides greater protections for its residents than a conflicting federal law, state law generally prevails.
- If Title IX's new emergency removal provision is disciplinary action for harassing conduct that meets the definition in TEC § 37.001(b)(2), then TEC § 37.001(b-1) would require that a district convene an ARD-C meeting prior to effecting an emergency removal regardless of the length of the emergency removal.
- Does the Texas Education Code provide greater protections for Respondents who are students with disabilities than the new Title IX regulations?

Commentary: *DoE*'s May 2020 FINAL RULE

- DoE maintains that "reference in [34 C.F.R. § 106.44(c)] to [IDEA/504/ADA] will help protect respondents from emergency removals that do not also protect the respondents' rights under applicable disability laws" (Unofficial Copy, pg. 739).
- "Any different treatment between students without disabilities and students with disabilities with respect to emergency removals, may occur due to a [District's] need to comply with the IDEA, Section 504, the ADA, or other disability laws, but would not be permissible due to bias or stereotypes against individuals with disabilities." (Unofficial Copy, pg. 740).

Key Takeaways

- Like a short-term disciplinary removal (like a 3-day suspension per Texas Ed. Code § 37.005), a brief emergency removal of SWDs may be okay.
  - Consider a series of removals for similar behaviors
  - Consider TEC § 37.001(b-1)—conduct an ARD meeting to review the conduct prior to removal?
- 20+ grievance process? Emergency removals of SWDs longer than 10 days definitely require MDR.
  - District policy should reflect that SWDs are entitled to IDEA and 504 MDRs prior to initiating Title IX emergency removals.
  - Emergency removal +
- The involvement of ARD committees is best practice whenever an emergency removal is considered for a Respondent who is a SWD.

"Supportive Measures" and the ARD Process

Supportive Measures Required

Supportive Measures: "non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available" to both parties.

- ✓ May include in K-12 context: "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 . . . increased security and monitoring of certain areas of the campus, and other similar measures." 34 C.F.R. § 106.30(a).
- ✓ Title IX Coordinator is responsible for "coordinating implementation" of these supportive measures.

Special Education and Related Services?

- ✓ In the K-12 context, supportive measures ("non-disciplinary, non-punitive individualized services") look a lot like related services in an IEP: "counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services . . . monitoring of certain areas of the campus, and other similar measures." *Id.*
- ✓ Subject to IEP review? An ARD committee must revise an IEP, as appropriate, to address "the child's anticipated needs" or "other matters." 34 C.F.R. § 300.324(b)(1)(ii).

Determine When to Involve the ARD-C When Coordinating "Supportive Measures"

- ✓ Required ARD Committee members. IDEA requires a district to ensure that an IEP team for a child with a disability includes **"[a]t the discretion of the parent or the district, other individuals who have knowledge or special expertise regarding the child, including related services personnel as appropriate**." 34 C.F.R. § 300.321(a).
- ✓ "OSEP expects that each public agency will ensure that each child's IEP Team is composed of persons knowledgeable about the child and the child's full range of educational needs." *Letter to Rangel-Diaz* (OSEP 2011).
- ✓ Consider Title IX's new requirement obligating Title IX Coordinator to coordinate implementation of the new "supportive measures" requirement.

Dear Colleague Letter (OSEP, August 20, 2013)

- ❑ Is sexual harassment analogous to "bullying"?
- ❑ For the alleged victim. "Schools have an obligation to ensure that a student with a disability who is the target of bullying behavior continues to receive FAPE in accordance with his or her IEP. The school should, as part of its appropriate response to the bullying, convene the IEP Team to determine whether, as a result of the effects of the bullying, the student's needs have changed such that the IEP is no longer designed to provide meaningful educational benefit. If the IEP is no longer designed to provide a meaningful educational benefit to the student, the IEP Team must then determine to what extent additional or different special education or related services are needed to address the student's individual needs; and revise the IEP accordingly."
- ❑ For the alleged bully. "If the student who engaged in the bullying behavior is a student with a disability, the IEP Team should review the student's IEP to determine if additional supports and services are needed to address the inappropriate behavior. In addition, the IEP Team and other school personnel should consider examining the environment in which the bullying occurred to determine if changes to the environment are warranted."

Other Special Education Removals and Title IX

IDEA's "Serious Bodily Injury" Analysis and Emergency Removal for Sexual Assault?

- IDEA's "special circumstances," include—
  - "School personnel may remove a student to an interim alternative educational setting for not more than 45 school days without regard to whether the behavior is determined to be a manifestation of the child's disability, if the child . . . has inflicted serious bodily injury upon another person while at school, on school premises, or at a school function under the jurisdiction of an SEA or an LEA." 34 C.F.R. § 300.530(g).
  - Serious Bodily Injury?* See 18 U.S.C. § 1365(h)(3)—
    - "The term "serious bodily injury" means bodily injury which involves substantial risk of death; extreme physical pain; protracted and obvious disfigurement, or protracted loss or impairment of the function of a bodily member, organ, or mental faculty."
- 34 C.F.R. § 300.530(i)(3).

IDEA's "Serious Bodily Injury" Analysis and Emergency Removal for Sexual Harassment?

- Title IX's definition of "sexual assault"? See 20 U.S.C. 1092(f)(6)(A)(v)("The Clery Act"): "'Sexual assault' means an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation."
  - FBI—"Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the victim including instances where the victim is incapable of giving consent." Uniform Crim Reporting (UCR) Program. National Incident-Based Reporting System (NIBRS). https://ucr.fbi.gov/nibrs/2012/resources/nibrs-offense-definitions

IDEA's "Serious Bodily Injury" Analysis and Emergency Removal for Sexual Harassment?

- QUESTION: Is a sexual assault enough to trigger IDEA's special circumstances removal?
- West Orange Cove Consolidated ISD, 63 IDELR 148 (SEA 2014).
  - "Although in this case it is certain the teacher experienced pain, or bodily injury, there is no evidence that her injury rose to the level of serious bodily injury when considered in light of the entire definition. The District also argues that the teacher suffered psychological trauma as a justification for determining the student caused serious bodily injury. While it is apparent the event was disconcerting to the teacher at the time, and perhaps for a time thereafter, the teacher did not appear to have 'protracted' loss of a mental faculty in that she returned to her duties in the classroom after missing one day of work and did not appear to be under any continued stress from the event during the hearing. The District's argument that the student inflicted serious bodily injury upon another is wholly without merit. Therefore, emergency removal to the DAEP irrespective of the manifestation determination was not warranted."

IDEA's "Substantially Likely to Cause Injury" Analysis and Emergency Removal for Sexual Harassment?

- District can request a hearing if it believes a child is likely to injure other students in his current placement. 34 C.F.R. § 300.532(a).
  - Hearing officers have considered a student's deteriorating emotional health and repeated threats without an actual engagement in physical violence as precursors for removal.
- Expedited DPH? Maintaining the child's current placement substantially likely to result in injury to the child or others. 34 C.F.R. § 300.532(b)(3).
  - HO can "order a change in placement of a student with a disability to an appropriate interim alternative educational setting for not more than 45 school days."

Final Thoughts

- Most of what happens in school falls far short of the definition of sexual harassment in the new Title IX regulations. These offenses are more likely violations of the Student Code of Conduct as the typical conduct is unlikely to meet the "so severe" standard. In these cases, proceed under the code of conduct and typical disciplinary procedures.
- Any suspect conduct should be referred to the Title IX Coordinator, who will promptly determine whether the facts rise to the level of sexual harassment. If the allegations involve SWDs, the Title IX Coordinator should consider at minimum an initial consultation with the district's special education leadership.
- Emergency removal of any length of a Respondent who is a SWD should be coordinated with the student's ARD committee.
- Most of the supportive measures outlined in the new regulations do not require IEP amendment. If they do, then the ARD committee must consider.

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