

3th Annual Special Education Workshop

November 2, 2023

Workshop Manual

Agenda

Session 1 - Year in Review: Paper

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Session 2 - Contracting for Services : PowerPoint

Session 3 - Social Media: PowerPoint

Session 4 - ...Been Waiting for the Bus All Day: PowerPoint

Session 5 - Alphabet Soup Quiz: (No Materials)

Session 6 - What Not to Say: PowerPoint

Session 7 - Parent Notice & Access: PowerPoint

Session 8 - Discipline & Discrimination: PowerPoint

Session 9 - Title IX & Special Education: PowerPoint

Session 10 - Special Education Playbook: PowerPoint

The Title IX Regulations: Implications for SWDs (and Beyond)

Session 9

2023 Special Education Workshop

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Context

- What does Title IX's "on the basis of "sex" mean for purposes of student-related activities and programs?
- Changes in administration in Washington
- Federal Guidance & Litigation
- SWDs intersection with Title IX

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Bostock (2021)

Court held:

It is sex-based discrimination under Title VII to fire someone because the individual is gay or transgender.

[This is NOT directly applicable to Title IX]

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Post-Bostock: U.S. 5th Circuit

The Fifth Circuit concluded, however, that *Bostock* did not extend to the Title VII *sexual harassment* context: “Although the Court expanded the groups of individuals protected by Title VII, *it in no way altered the preexisting legal standard for sexual harassment.*”

Newbury v. City of Windcrest, 991 F.3d 672, 677 (5th Cir. 2021) (emphasis added)

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Federal Response to *Bostock*

- Executive Order 13988
- DOJ letter to federal civil rights divisions
- ED, HHS, & EEOC guidance

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Title IX

- 2016 – ED *DCL* on Gender Identity
- 2017 – *DCL* rescinded
- 2020 – Title IX Regulations on “Sexual Harassment”
- 2021 – Admin.: *DCL* to be revisited

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Title IX

- 2021 (March) – White House Letter
- 2021 (June) – OCR “interpretation” for enforcement of Title IX
- 2021 (June) – *Dear Educator Letter*

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Title IX

- 2021 (Aug.) – Multi-State* Suit v. U.S.
- 2021 (Sept.) – Injunction Requested

* Including Louisiana

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Title IX

- 2022 (May) – USDA “policy update”
- 2022 (July) – Federal court issues injunction v. U.S.

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Title IX - More Regulations ?

May 2020 (effective Aug. 2020)

ED issues Title IX regulations, specifically addressing "Sexual Harassment"

July 2022

ED formally issues NPRM for revisions to Title IX regulations

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Title IX - New Regulations ?

October 2023

ED stated months ago that it would release revised Title IX regulations in October 2023; that did not occur.

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Where are we now generally with Title IX?

The federal court injunction which prohibits federal agencies from enforcing their Title IX guidance/interpretive/policy initiatives is in place until it's not.

In other words, until that court (E.D. Tenn.), the U.S. 6th Circuit Court of Appeals, or the U.S. Supreme Court orders otherwise, the current injunction sticks.

ED has appealed to the 6th Circuit; case argued; decision pending

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Where are we now generally with Title IX?

The current Title IX regulations for sexual harassment (2020) are the applicable regulations and in force until superseded by new ones.

Expect push-back from multiple directions regardless of how expansively or strictly you move in the Title IX arena.

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Where are we now with Title IX and SWDs?

"The [ED] emphasize[s] ... that [school district]s must meet obligations under these final regulations while also meeting all obligations under applicable disability laws including the IDEA, Section 504, and the ADA."

Preamble, 85 Fed. Reg. 30494 (May 19, 2020)

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Where are we now with Title IX and SWDs?

"[School district]s' obligation to comply both with these final regulations and with disability laws applies to all aspects of responding to a Title IX sexual harassment incident including investigation, discipline, and segregating elementary and secondary school students with disabilities from classroom settings."

Preamble at 30,497

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Where are we now with Title IX and SWDs?

As to “emergency removals” under the current Title IX regulations, a school district’s ability to use an such removals for SWDs “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.”

34 C.F.R. § 106.44(c) (emphasis added)

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Title IX - NPRM

Major Proposed Changes

- Definition: “sex-based harassment” (SBH)
- Adding “gender identity” and “sexual orientation” to SBH definition
- Adding “hostile environment harassment”

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Title IX - NPRM

Major Proposed Changes

- “Deliberate Indifference” and “Actual Knowledge” standards removed
- Expansion of who can file a complaint

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Title IX - NPRM

Major Proposed Changes

- Unified grievance procedures for all Title IX complaints
- *Title IX Coordinator consultation with IEP or 504 Team for students with disabilities during grievance process*

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"Student with a Disability"

The proposed regulations add the following definition:

"Student with a disability means a student who is an individual with a disability as defined in the Rehabilitation Act of 1973, as amended, 29 U.S.C. 705(9)(B), (20)(B), or a child with a disability as defined in the Individuals with Disabilities Education Act, 20 U.S.C. 1401(3)."

Proposed 34 C.F.R. § 106.2

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Consultation Requirement - Grievance Procedures

*"If a complainant or respondent is an elementary or secondary student with a disability, the Title IX Coordinator **must consult** with the student's Individualized Education Program (IEP) team, 34 CFR 300.321, if any, or the group of persons responsible for the student's placement decision under 34 CFR 104.35(c) (Section 504 team), if any, to help ensure that the [school district] complies with the requirements of the [IDEA] ..., and Section 504 ..., throughout the [school district]'s implementation of grievance procedures"*

Proposed 34 C.F.R. § 106.8(e) (emphasis added)

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Consultation Requirement - Supportive Measures

For a complainant or respondent who is a SWD, the Title IX Coordinator **must consult** with the student's IEP Team or 504 Team (as applicable) in implementation of *supportive measures*.

Proposed 34 C.F.R. § 106.44(g)(7)(i) (emphasis added)

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Consultation Requirement - Rationale

"Students with disabilities experience sex-based harassment in significant numbers, with certain populations of students with disabilities at higher risk, as the Department has recognized previously, including in the preamble to the 2020 amendments. 85 FR 30079. For these students, supportive measures that address the harassment's effects in relation to a student's disability may require tailoring in ways that may not be obvious to a Title IX Coordinator.

(cont'd)

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Consultation Requirement - Rationale

"In addition, in cases in which students with disabilities are respondents, care must be taken that any supportive measures are adopted with awareness of how they might impact the students' equal access to the [school district]'s education program or activity.

(cont'd)

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Consultation Requirement - Rationale

“Similarly, the rights of students with disabilities under [IDEA, 504, and ADA] in the proposed [regulation] may preclude or require tailoring of otherwise appropriate supportive measures or emergency removals, or, for students found responsible for sex-based harassment, disciplinary sanctions.”

Proposed Rules, 87 Fed. Reg. 41430 (July 12, 2022)

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Whether Old or New

Tips for SWDs' intersection with Title IX

- Ensure that Title IX Coordinator(s) collaborate with IEP Team or 504 Team (as applicable) on:
 - Supportive measures
 - Emergency removals
 - Remedies/Consequences (if respondent found responsible)

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Whether Old or New

Tips for SWDs' intersection with Title IX

- Ensure that principals, CW&A, and other administrators know that
 - Title IX is NOT a bypass of disciplinary procedural protections for SWDs
 - Emergency removals effectively equate to disciplinary removals for purposes of the 10-day yearly limit for SWDs

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