

The New Title IX: *What Special Educators Need to Know*

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Thompson & Horton**



THE [ALMOST] NEW TITLE IX: WHAT SPECIAL EDUCATORS NEED TO KNOW

TCASE INTERACTIVE 2023

Thompson & Horton

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Presenters



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Sexual Harassment Impacts on Sped Students

Students with disabilities are more likely than their peers to experience sexual harassment and less likely to report it



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Why are we here?

Duty to ensure harassed student receive FAPE

Harassment may impede a student's ability to benefit from educational services, needs of student and IEP or Section 504 Plan may need to be reevaluated

Duty to ensure harassing student receives FAPE

Repeated misconduct may indicate unmet needs that warrant review and revision of the student's IEP or Section 504 Plan



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Where Are We Going?

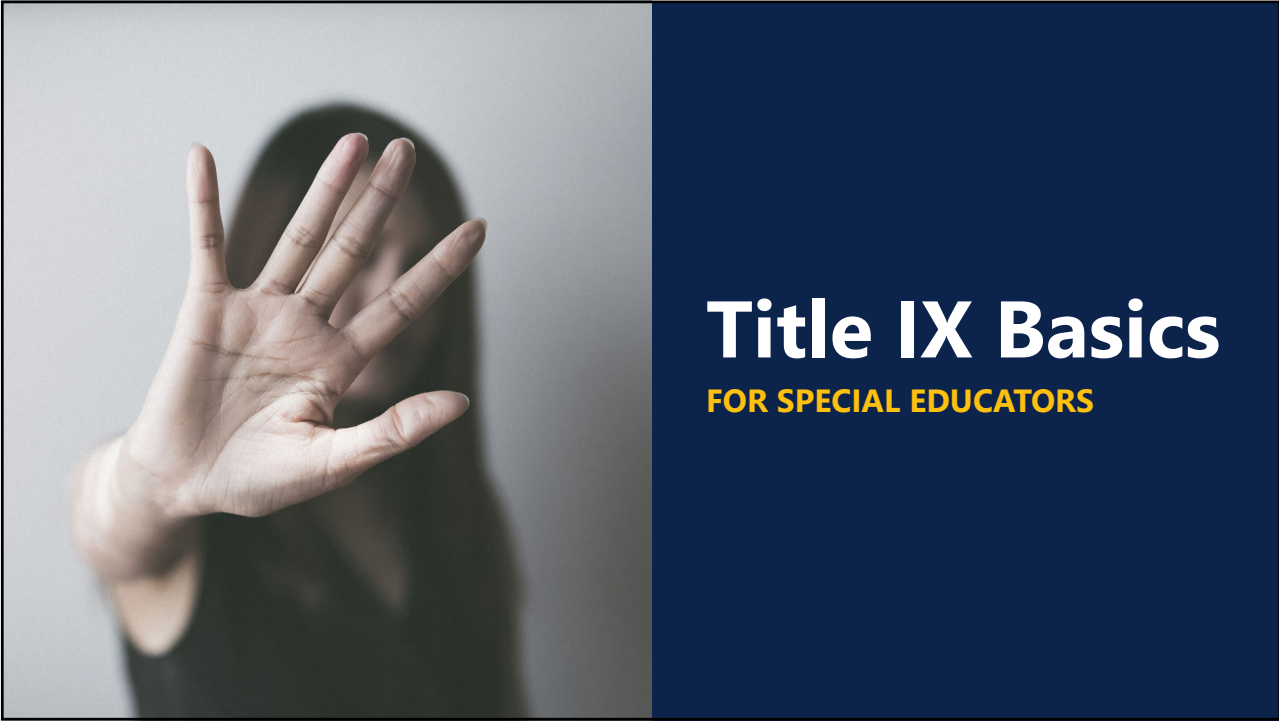
- ▶ 2020 Title IX regulations
- ▶ Updated Title IX regulations anticipated October 2023
- ▶ Implementation date is not specified
- ▶ We will at least be living with the current (2020) Title IX rules for fall semester of the 2023–24 academic year

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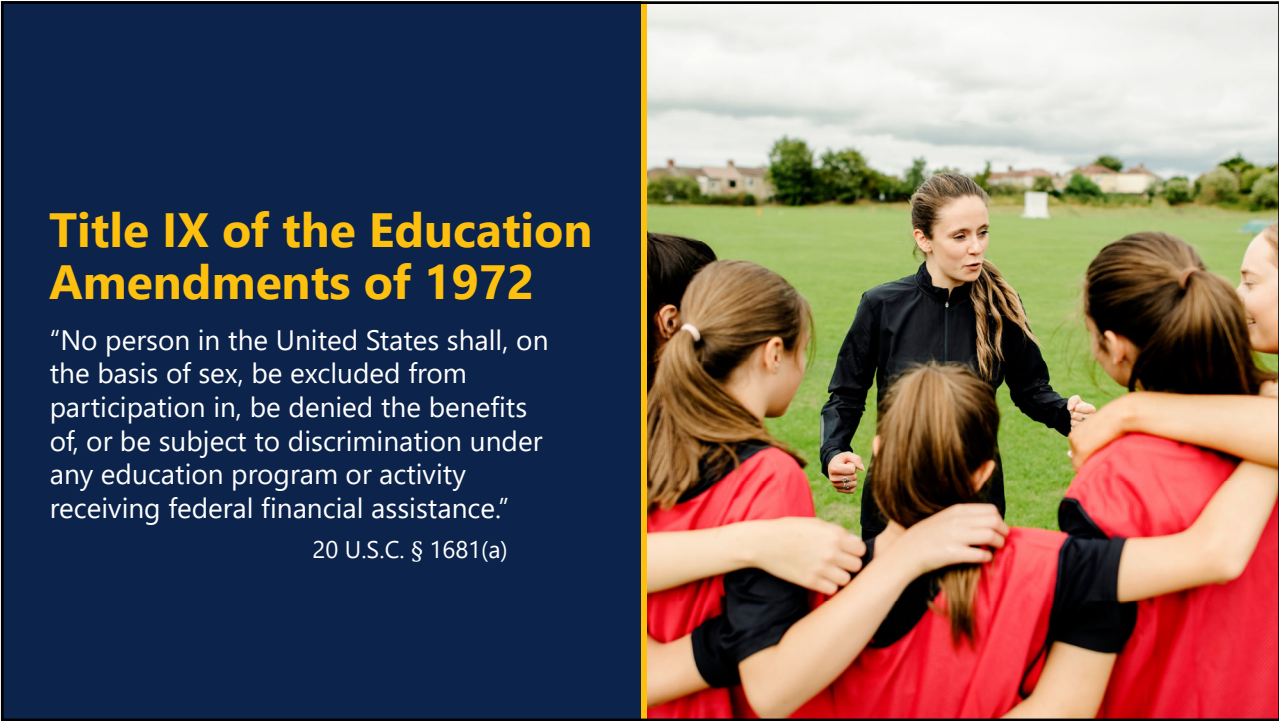
Agenda

- ✓ Title IX Basics (current and anticipated)
- ✓ Hypotheticals
 - ▶ Gender Identity
 - ▶ Child Find
 - ▶ MDRs
 - ▶ Consent
 - ▶ Supportive Measures
 - ▶ Pregnancy
- ✓ Key Takeaways

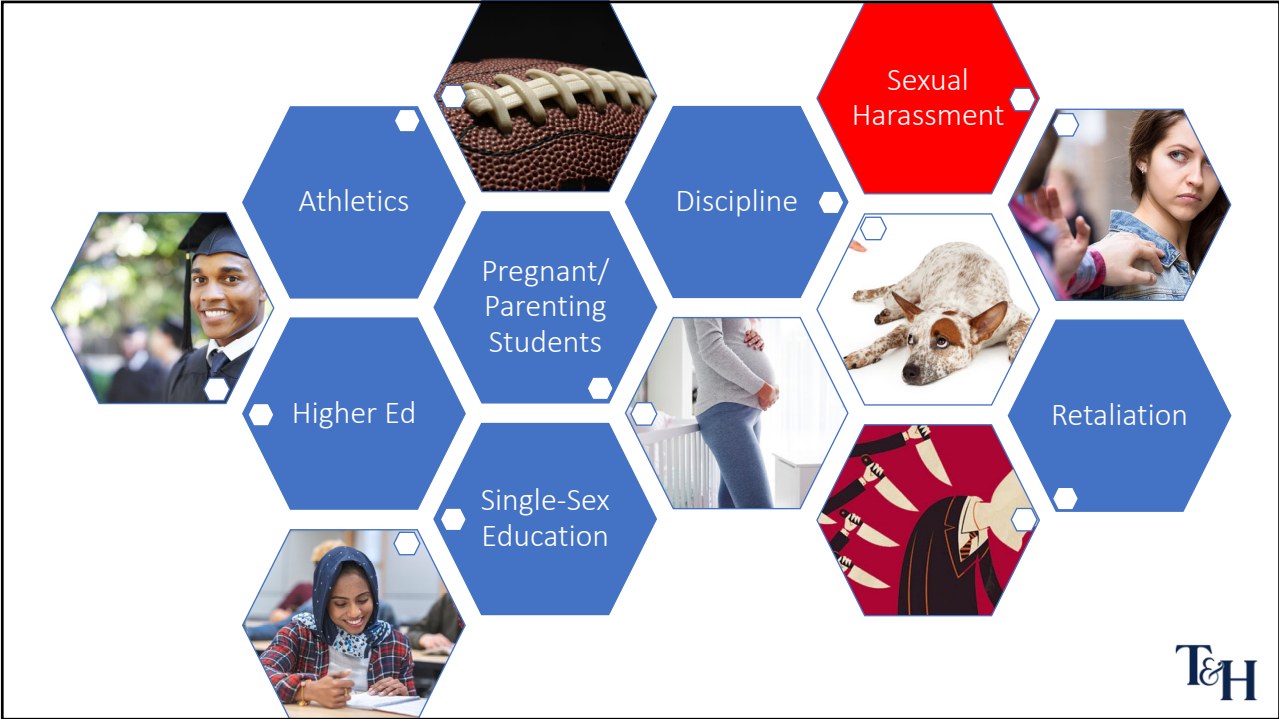
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QR CODE TO ACCESS POLLS

WEB: Pollev.com/rebeccadupre730

TEXT: Rebeccadupre730 to 22333

A smartphone displaying a QR code. The T&H logo is in the bottom right corner.

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Be honest... If we call on you, can you tell me the name of your Title IX Coordinator?

Yes! Nope.

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My school district has already started thinking about implementing the 2023 Title IX regs.

Yes. No. How can we if we don't have the final rules?

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Overview of 2020 Regulations



- ▶ Define sexual harassment and scope of protections
- ▶ Any K-12 employee's knowledge triggers duty to respond
- ▶ **Detailed grievance procedures for formal complaints must be used to discipline covered conduct**



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Overview of 2020 Regulations

Upon Notice

- Meet with alleged victim ("Complainant") to offer supportive measures and provide info on how to file a formal complaint
- Emergency removal/admin leave allowed (in limited circumstances)

After Formal Complaint


- Notice of Allegations
- Informal Resolution (if offered)
- Investigation
- Share evidence with parties for response
- Share investigative report with parties for response
- Written cross-examination
- Decision
- Appeal



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Proposed Rules


Generally	For SPED
<ul style="list-style-type: none"> Propose to broaden the application of the regulations by expanding the definition of Title IX sexual harassment and applying the grievance process to other types of Title IX disputes Propose to decrease the procedural requirements for responding to Title IX sexual harassment 	<ul style="list-style-type: none"> Propose to require the Title IX Coordinator to consult with the IEP or 504 Team “throughout the implementation of grievance procedures” and when implementing supportive measures when a party is a student with an IEP or 504 plan



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Proposed Definition of Sex-based Harassment


2020 Regs	2023 Proposed Regs
<ul style="list-style-type: none"> Quid pro quo = an employee of the school conditioning provisions of an aide, benefit, or service of the recipient on an individual's participation in unwanted sexual conduct 	<ul style="list-style-type: none"> Quid pro quo = an employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct



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Proposed Definition of Sex-based Harassment


2020 Regs	2023 Proposed Regs
<ul style="list-style-type: none"> Sexual Assault (including fondling) Domestic Violence Dating Violence Stalking 	<ul style="list-style-type: none"> Sexual Assault (including fondling) Domestic Violence Dating Violence Stalking



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Proposed Definition of Sex-based Harassment

2020 Regs	2023 Proposed Regs
<ul style="list-style-type: none"> Unwelcome conduct, on the basis of sex, determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the education program or activity 	<ul style="list-style-type: none"> Unwelcome sex-based conduct that is sufficiently severe or pervasive that, based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the education program or activity



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Proposed Procedural Changes

Investigator and decisionmaker can be the same person

- Training still required

Must provide a summary of the relevant evidence for review by the parties

- Instead of all directly related evidence and an investigative report

Include a process to determine credibility to the extent relevant and in dispute

- Written cross examination not required

Provide parties notice of the outcome

- Detailed written decision is not required



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Proposed Changes to Supportive Measures

- ▶ Nondisciplinary, non-punitive individualized measures offered as appropriate, as reasonably available, without unreasonably burdening a party, and without fee or charge to the complainant or respondent to:

- (1) Restore or preserve that party's access to the recipient's education program or activity; or
- (2) Provide support during the recipient's grievance procedures or during the informal resolution process.

- ▶ **Including temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment.**



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Scope of the Proposed Rules

The revised process would apply to alleged sex-based harassment and discrimination, including based on:

- ▶ Sex stereotypes
- ▶ Sex characteristics
- ▶ Pregnancy or related conditions
- ▶ Sexual orientation
- ▶ Gender identity



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Proposed Rules: SPED Consultation Questions



When and how often is “throughout the grievance procedures?”



Is the whole IEP or 504 team required to meet every time?



What are the respective roles of the Title IX coordinator, Special Education administrator, and parents?



Must an IEP or 504 meeting be held before supportive measures are decided and implemented?

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Case Studies in Consultation

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SCENARIO #1 Charlie

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SCENARIO #1

Charlie

- ▶ Charlie, a 12-year-old 8th-grade transgender female student is regularly called “he” and “him” by her classmate, Riley.
- ▶ Riley is a student with a cognitive impairment who is included in elective classes.
- ▶ Riley continues to use male pronouns for Charlie even after warnings by teachers about how harmful the actions are.
- ▶ Riley’s parents say that her disability prevents her from understanding the need to use female pronouns for someone who looks and is “biologically male.”



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Is the conduct subject to the Title IX grievance procedure?

Yes! Definitely not. Not sure. Depends.

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Charlie

- ▶ Charlie is frustrated and hurt by constant deadnaming and misgendering.
- ▶ Charlie uses a Sharpie to write "HATER" on the lockers of offending students.
- ▶ She throws her laptop at the teacher's head after the teacher fails to correct another student who referred to her as "he" in a purposeful and exaggerated way.
- ▶ After discipline is proposed, Charlie's parents assert a child find violation and say that the conduct was a manifestation of her disability.



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Is Charlie protected under Section 504?

No. Being transgender is not a disability

Maybe. If Charlie has gender dysphoria, that may be a qualifying disability.

We'll have to wait and see what the Section 504 regulations say.

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Gender Identity

- ▶ Section 504 and the ADA may provide protections and require accommodations based on gender dysphoria
 - ▶ Gender dysphoria is a condition characterized by debilitating distress and anxiety resulting from the incongruence between an individual's gender identity and birth-assigned sex
- ▶ The definition of disability under ADA and Section 504
 - ▶ Excludes "transvestism, transsexualism, pedophilia, exhibitionism, voyeurism, gender identity disorders not resulting from physical impairments, or other sexual behavior disorders"
 - ▶ Williams v. Kincaid (4th Cir. 2022) recently held that gender dysphoria is a physical or mental impairment for purposes of the ADA and Section 504 and distinguished it from gender identity disorder



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SCENARIO #2

Sam



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Sam

Teacher: I need to talk to you about Sam from my class. You know Sam, the PTA President's son? Sam has a problem with butts.

Principal: Butts? What?! He's seven!

Teacher: Yeah. Sam likes to grab butts. He has been doing it almost nonstop to this one group of girls in the class. I've redirected him in the classroom every time, but he just isn't stopping.



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Sam

Principal: Soooo... this butt grabbing, when does this happen exactly?

Teacher: Any time I assign the kids to do group work he does it. I never knew group work could get someone so excited!

Principal: Does this kid receive any special services?

Teacher: No, he's gen ed.



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What should the teacher and the principal do next? (Choose all that apply.)

- Have the teacher intervene by standing near the group during group work and giving Sam a fidget to keep his hands busy.
- Call the special ed director because of Sam's repeated misconduct during group work.
- Call the girls' parents to tell them they've been touched inappropriately.
- Call the Title IX Coordinator to report possible sexual harassment.


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SCENARIO #2

Sam

The special ed director holds a pre-referral meeting with Sam's teachers and learns that in addition to the butt grabbing, he has no friends, he often blurts out inappropriate comments during class or in response to innocuous statements by peers, he has difficulty paying attention in class and rarely completes his class work.



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What should the special ed director do next?

- Nothing, these behaviors are typical for seven-year-olds.
- Initiate MTSS or 504 process.
- Contact the parent to discuss evaluation.
- Call an ARD meeting.


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SCENARIO #2

Sam

In addition to redirecting Sam’s behavior, the teacher also held him in from recess on several occasions (to avoid butt-grabbing during unstructured time) and removed him from the afterschool meditation club she runs.



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Was it appropriate for the teacher to hold Sam out of recess and remove him from the meditation club?

Yes, these are supportive measures to prevent continuing harassment. **A**

Yes, because the teacher didn't know if the conduct was sexual she could impose reasonable discipline. **B**

No, because the conduct involved touching of someone else's private body part. **C**

No, because it is the parent's responsibility to teach the student personal boundaries. **D**

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What kind of Title IX sexual harassment could this be?

Stalking

Fondling

Hostile Environment (2020)

Hostile Environment (2023)

Dating Violence

None - these kids are too young (no "sexual" purpose).

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SCENARIO #3

Nate

Nate, a gen ed student and my
classmate. The Title IX
removal.

Early in the Title IX
the special education

Lindsey LSSP

To: Sandy Sped Director 7:00 PM

Oops

I probably should have noticed this sooner. Before the school year started – maybe in mid-August – Nate’s mom brought me an outside evaluation diagnosing him with autism and asking for support from the school. I forgot about it until a few moments ago and realized that I uploaded it to his twin brother Johnny’s cum folder. I remember from my special ed training with our T&H lawyers that I should consider a child referral when getting this kind of info. I know we may need to consider compensatory services due to my error, but I’d like to go ahead and start the referral process. Is that cool?

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Can the Title IX Coordinator remove Nate on an emergency basis?

- No, because the conduct is not serious enough under the Title IX rules
- Yes, because Nate is a general education student and the conduct is serious enough under Title IX
- Yes, but only after they complete the special ed evaluation
- Yes, but only if they hold an MDR first
- None of the above

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What behavior is the MDR committee reviewing?

- The behavior as reported from a building administrator based on the building investigation **A**
- The behavior Nate admits to have done **B**
- The alleged conduct; you are assuming it is true **C**
- Nate's rumored sex life **D**

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SCENARIO #4

Lori & Kai

Assistant Principal: Hey! How've you been, I haven't seen you in awhile. Quick update for you. I went in the bathroom this morning and your kiddos, Lori and Kai, were getting after it in the bathroom, groaning and moaning.

Special Ed Teacher: What? I think they've been dating all year, but I had no idea they were doing THAT. What are you going do?

Assistant Principal: I plan to suspend them both for inappropriate sexual behavior at school.




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SCENARIO #4

Lori & Kai

Special Ed Teacher: You know they both have IEPs, right?

Assistant Principal: So? They were still doing the deed.... I heard Lori say "Do you want to?" and Kai said "Yes, Yes!" They were both laughing and clearly were willing participants.



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Was the Assistant Principal's approach correct?

- Yes, because both parties consented.
- Yes, because the conduct only happened once so it couldn't trigger Title IX.
- No, he should have checked to see if either student's disability impacted their ability to consent before deciding it was consensual.
- No, he should have done an MDR first.

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Lori & Kai

After being told there would be consequences imposed for the on-campus sexual behavior, Lori's parent claimed that the conduct was sexual assault, harassment, and abuse. Lori's parent said Lori does not have the capacity to consent. Kai reported that the conduct was a mutual two-sided interaction. Numerous employees reported first-hand knowledge that Lori and Kai had been "a thing" all school year.



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Does the incident trigger the Title IX sexual harassment process?

No, because Lori only alleged the conduct was sexual assault after being confronted with consequences for the mutual behavior.

No, because multiple employees reported that Lori and Kai had been "a thing" all year

Yes, because Lori claims the conduct was sexual assault.

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Doe v. Dennis-Yarmouth Sch. Dist.,

2022 WL 36480 (D. MA 2022)

- ▶ Sixteen-year-old Jane Doe, was enrolled in Dennis-Yarmouth's Wave Program for students with mental disabilities
- ▶ After Jane was allowed to go to the bathroom unsupervised, Jane's assistant discovered her and a male Wave Program student in the boys' bathroom with their clothes off
- ▶ The Does allege that Jane was sexually assaulted, harassed, and abused
- ▶ The school did not investigate. The Title IX Coordinator later wrote that the "encounter between [Jane] and the other student had been viewed as a mutual two-sided interaction" that did not warrant investigation



T&H

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Doe v. Dennis-Yarmouth Sch. Dist.,

2022 WL 36480 (D. MA 2022)

- ▶ Post-Assault: The Does alleged that the school's actions following Jane Doe's assault showed deliberate indifference
- ▶ Given Jane's disability and reduced mental capacity, the alleged determination that the sexual activity between Jane and [the respondent] was "mutual" illustrates an "investigation [that] was so deficient as to be unreasonable."



T&H

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SCENARIO #4

Lori & Kai

Upon learning that Kai is the respondent in a Title IX investigation, Kai's parents assert that he does not have the capacity to understand whether Lori consented. In fact, he does not have the capacity to consent and is really a victim here



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Who is responsible for sexual assault under Title Title IX?

Neither student is responsible for sexual assault, because they were both willing participants.

Neither student is responsible for sexual assault; although Kai could not consent, Lori would not reasonably have known that because of her disability.

Lori is responsible for sexual assault, because Kai could not consent due to his disability.

Both students are responsible for sexual assault because neither could consent due to disability.

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Lori & Kai

SCENARIO #4

Title IX Coordinator: Lori's mom demanded that Kai be taken out of their shared class. I told her I can't move Kai at this point, but I can change Lori's schedule.

Special Education Teacher: They are both in my life skills class. There is only one. If you take Lori out, we can't implement her IEP.



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What supportive measures should the Title IX Coordinator implement?

- Move Lori to a resource class with an aide.
- Move Lori to a life skills class at a different campus.
- Move Lori and Kai to different parts of the classroom, add a para to monitor them, do not allow them out of class at the same time.
- Call an ARD meeting to consider these options as a team.
- None of the above

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SCENARIO #4

Lori & Kai

Title IX Coordinator: If I cannot change the class, we need to have both students talk with the counselor about boundaries. I think twice a week would be good.

Special Education Teacher: Lori already has counseling on her IEP.

Title IX Coordinator: Well she clearly needs more! Also, go ahead and amend their IEPs to add goals related to following school rules.

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Can additional counseling be provided to Lori as a supportive measure?

- Yes, but only if the ARD committee adds it to her IEP.
- Yes, but only if her parents agree and it is done by an LSSP.
- Yes, but only if it does not interfere with her special education services.
- Maybe, call an ARD meeting to consider these issues as a team.
- None of the above

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SCENARIO #4

Lori & Kai

THREE MONTHS LATER


Special Ed Teacher: I think Lori might be pregnant. OMG, do you think it could be Kai's baby?

Assistant Principal: Why do you think that?

Special Ed Teacher: She has been really sensitive to smells and she is constantly asking for pickles and watermelon. She also has a bulge in the belly region. I could be wrong though...

Assistant Principal: I'll let the nurse know so that she can pull Lori from class and administer a pregnancy test.

Special Ed Teacher: Great, thanks. I didn't know we had those.



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Can a school district employee provide Lori with a pregnancy test or require that she take a pregnancy test?

Yes, if required by local policy.

The school district can provide Lori a pregnancy test, but it is her choice whether to take it.

No, a student may not be required to take a pregnancy test.

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SCENARIO #4

Lori & Kai

Lori's Mother: As you know, our daughter is 6.5 months pregnant. Her doctor just ordered that she remain on bed rest until the baby is born.

Assistant Principal: Oh really? I'm not sure what we can do for Lori at home. I need you to send me the doctor's orders to see if we can even provide accommodations or services in the home.



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Can the school require Lori's family to produce the doctor's order?

Yes, but only if district routinely requires medical certification from all students for other conditions requiring medical attention.

No, Lori is clearly pregnant and requiring a doctor's note would be unnecessarily burdensome.

Yes, but only if they pay the medical bill associated with it.

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What is the role of the IEP Committee in determining services for Lori during the period of bed rest and postpartum?

The IEP Committee does not play a role since the bed rest is not due to an IDEA-eligible disability.

The IEP Committee must determine the appropriate services for the student during any periods of confinement due to pregnancy or pregnancy-related conditions.

All of the IEP services and goals must be implemented even at home; reducing or modifying the services would be a denial of FAPE.

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Pregnancy and Parenting

- ▶ A school district may not allow harassment of pregnant or parenting students
- ▶ A school district may not treat pregnant or parenting students differently based on that status
- ▶ Many of the requirements in the proposed Title IX rules codify existing expectations on schools from OCR

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Section 504 & Pregnancy



In addition to Title IX, Section 504 of the Rehabilitation Act also imposes obligations. Although a "normal, healthy pregnancy is generally not considered a disability," pregnancy-related disabilities may be covered.



Schools must modify academic requirements to ensure no discrimination.

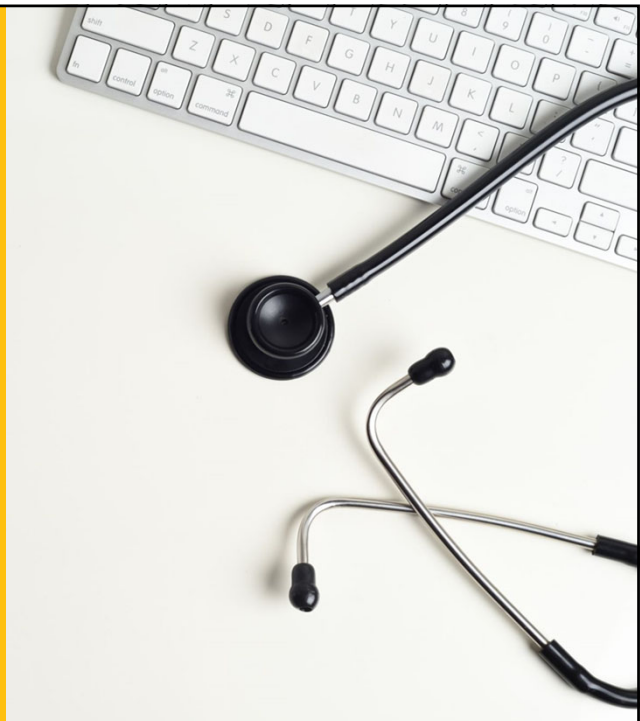


Need not eliminate or lower essential requirements of a program or activity or to make modifications that would result in a "fundamental" alteration of its programs or activities or would impose an undue financial or administrative burden.

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Accommodations Required

- ▶ Under current rules, schools must provide reasonable accommodations, including modifying a grading policy.
- ▶ Instructors cannot refuse to allow a student to submit work after missing a deadline due to pregnancy or related conditions.
- ▶ If grading is based on attendance or participation, the student is allowed to earn the missed credits.



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Key Takeaways



1

School districts must comply with both the IDEA and Title IX, even when they are at times confusing and even seemingly conflicting

2

Consultation should be occurring now in any case in which a student with an IEP is a part, even under the current Title IX rules

3

For the most effective consultation, train special education employees on Title IX and train Title IX and student discipline employees on special education

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THOMPSON & HORTON RESOURCES



Title IX Tips

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Title IX Analysis and Insight

▶ titleIXtips.com



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