

# Yes Prep Title IX Training

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April 13, 2023

## Thompson & Horton

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# Today’s Agenda

1

Title IX Update  
(9 a.m. – 11:30 a.m.)

- Athletics
- Pregnancy & Parenting
- Facilities and Gender Identity

2

Lunch  
(11:30-12 pm)

3

Title IX Team Training  
(12 p.m. – 2 p.m.)

- Intake
- Investigation
- Decisions
- Appeals
- Law Enforcement & CPS

4

Title IX and Special  
Education  
(3:00 – 5 pm)

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## Impact of Title IX on Athletics

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- Athletics are considered an integral part of an institution's education program and are therefore covered by the law.
- The regulations implementing Title IX contain specific provisions relating to athletic opportunities.
- In determining whether equal athletic opportunities are available, the Office for Civil Rights considers whether an institution is effectively accommodating the athletic interests and abilities of students of both sexes.




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## Impact of Title IX on Athletics

- The Office for Civil Rights will evaluate benefits, opportunities, and treatment with respect to equipment and supplies; game and practice times; travel and per diem allowances; coaching and academic tutoring; assignment and compensation of coaches and tutors; locker rooms, practice and competitive facilities; medical and training facilities and services.
- If an institution awards athletic financial assistance, it must provide reasonable opportunities for such awards for members of each sex in substantial proportion to the number of students of each sex participating in athletics.

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## Impact of Title IX on Athletics

The Department of Education’s 1979 “Intercollegiate Athletics Policy Interpretation” and subsequent guidance set out a three-part test that OCR uses. An institution complies with the three-part test if it meets any one of the following parts of the test:

- (1) The number of male and female athletes is substantially proportionate to their respective enrollments; or
- (2) The institution has a history and continuing practice of expanding participation opportunities responsive to the developing interests and abilities of the underrepresented sex; or
- (3) The institution is fully and effectively accommodating the interests and abilities of the underrepresented sex.

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## Examples of TIX Issues from Recent Guidance

- Boys' baseball team plays on a new turf, but the girls' softball team plays on a poorly maintained grass field
- School offers boys' and girls' varsity ice hockey but only offers a boys' JV team and denies requests to create a girls' JV team despite interest
- Boys' teams receive new athletic apparel and gear each year while girls' teams must use old apparel and purchase some of their own equipment


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## Acceptance of Voluntary Support for Athletic Teams

Schools may accept voluntary support for teams from booster clubs, parents, etc., but if that support is provided to a single-sex team, the school must ensure that the equivalent team for the opposite sex receives equivalent support.


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### Reynolds School District 7 (OR) (10221314) (Jan. 11, 2023)

- Failure to provide equivalent locker rooms and practice/competitive facilities
- Boys' baseball at the school had superior locker rooms, playing fields, dugouts, hitting facilities, bullpens, spectator seating, storage, press box and concessions stand compared to what is provided to girls' softball.

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### Reynolds School District 7 (OR) (10221314) (Jan. 11, 2023)

OCR assesses

- (1) the quality and availability of the facilities provided for practice and competitive events;
- (2) exclusivity of use of facilities provided for practice and competitive events;
- (3) availability of locker rooms;
- (4) quality of locker rooms;
- (5) maintenance of practice and competitive facilities; and
- (6) preparation of facilities for practice and competitive events.

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### Northshore School District No. 417 (WA) (10221018) (Apr. 12, 2022)

- Failure to provide equivalent practice/competitive facilities
- Competitive baseball facility had lights while the competitive softball facility did not
- Improvements, and repairs may be required to ensure that the facilities are comparable


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### Salem-Keizer School District No. 24J (OR) (10221212) (Nov. 4, 2022)

- Failure to provide equivalent athletic equipment
- Boys' baseball teams are provided with both uniform tops and bottoms, while girls' softball teams are only provided with uniform tops.
- The District provided OCR with a uniform replacement schedule which reflects the boys' baseball teams last received new uniforms during the 2021-2022 school and girls' softball received new uniforms in 2020.

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## Salem-Keizer School District No. 24J (OR) (10221212) (Nov. 4, 2022)

OCR assesses

- (1) the quality of equipment and supplies;
- (2) the amount of equipment and supplies;
- (3) the suitability of equipment and supplies;
- (4) The maintenance of equipment and supplies; and
- (5) the availability of equipment and supplies.

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## Conduct your Own Audit

Do you provide athletic gear of equivalent quality, quantity, suitability, condition, and availability for athletes on boys and girls teams?

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## Conduct your Own Audit

- Do athletes on boys and girls teams have locker rooms of equivalent quality and size?
- Are the conditions of playing fields, courts, pools, and other practice/game facilities for boys' and girls' teams equivalent?

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## Conduct your Own Audit

- Do athletes on girls and boys teams use equivalent modes of transportation when traveling to away games or competitions?
- Do boys and girls teams have coaches with equivalent qualifications who receive equivalent compensation?

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## Conduct your Own Audit

- Do you provide equivalent coverage for boys and girls teams and athletes on websites, social media, or other publicity?
- Are cheerleaders, pep bands, and drill teams provided equivalently for girls and boys teams?

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## Gender Identity and Athletics

- Title IX does not explicitly state—in the statute or regulations—whether gender identity is covered by the law and, if so, to what extent
- Before leaving office in 2020, the Trump OCR begrudgingly agreed in August 2020 that Title IX covers discrimination against individuals based LGBTQIA status. But it stated that some types of different treatment based on LGBTQ+ status would not be illegal discrimination, like preventing unfettered access to facilities such as restrooms and locker rooms and participation on athletic teams that correspond with a person's gender identity but not their sex assigned at birth.



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## Gender Identity and Athletics

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- In a July 7, 2021 Notice of Interpretation (NOI), the Biden OCR said it would investigate allegations of individuals being excluded from, denied equal access to, or subjected to sex stereotyping in academic or extracurricular opportunities, or otherwise treated differently because of their sexual orientation or gender identity
  - Although the words "bathroom," "restroom," "locker room," and "athletics" did not appear in the NOI, it seemed likely based on the Obama administration's enforcement of Title IX that OCR would expect schools to offer equal access to facilities and athletics teams
  - That didn't really happen....
- 



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## Gender Identity and Athletics

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- Texas law currently requires students to participate on the team matching the birth certificate issued to them at the time of birth
  - The Federal government has issued proposed regulations that would create a flexible test that could allow limitations on transgender and intersex athletes participating in the team matching their gender identity in very limited circumstances
  - The proposed rule says it would prevent almost all, if not all, limitations in elementary schools
  - Unclear how UIL or the the State will respond if the rule goes into effect as proposed
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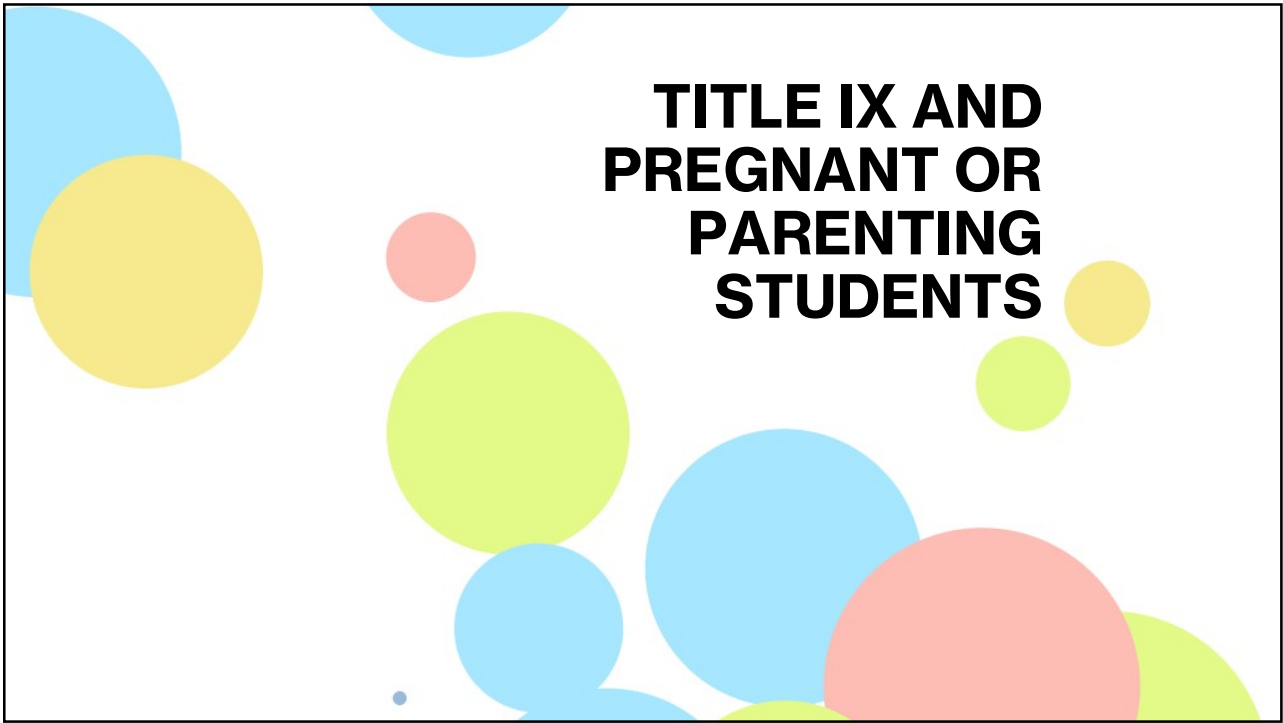


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## Pregnant and Parenting Students

Schools must not discriminate against any student or exclude any student from their education program or activity, including any class or extracurricular activity, based on a student's pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom.

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## Participation

Pregnant and parenting students must be permitted to:

- Continue participating in classes and extracurricular activities
- Choose whether or not to participate in special classes for pregnant students
- Participate in activities without a doctor's note unless such a note is required for all students
- Participate with reasonable adjustments like a larger desk, elevator access, or schedule modifications that are necessary because of pregnancy


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## Leave Policies

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- A school must provide leave to a student for pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom, for as long as the student's physician deems medically necessary
  - After that leave, the student must be reinstated to the status the student held when the leave began
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## Protection from Harassment

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- Students must be protected from harassment
  - Examples may include comments or jokes, nicknames, spreading rumors, and propositions or gestures related to the student's pregnancy or parenting status
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### **Troy University (AL) (OCR Case No. 04-21-2060)**

- University failed to provide pregnant students information regarding Title IX Coordinator and accommodations
- Requests were not addressed or were not addressed promptly
- Accommodations provided were not coordinated and were left to the discretion of the individual instructor

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### **Key Takeaways**

- Share policies and procedures with members of the school community
- Post information about rights of pregnant students, including the Title IX Coordinator's information
- Train all employees, including particularly instructors who might receive accommodation requests, on the school's responsibility
- Document requests and reasoning for granting or denying each request


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## Changes to Come

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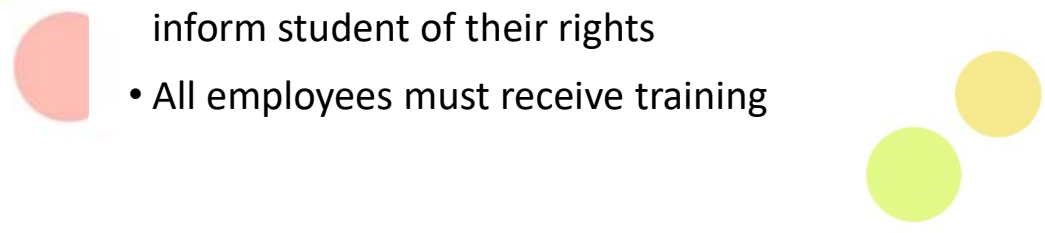
- The Pregnant Workers Fairness Act (effective June 27, 2023) requires reasonable accommodations for pregnancy, childbirth, or related conditions for employees (currently only required for a pregnancy-related disability under the ADA)
  - In 2022, the Department of Education proposed substantial revisions to the Title IX regulations as they relate to pregnancy and parenting (final rule expected any day now)
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## Proposed Title IX Rules

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- Employee who learns of pregnancy or related condition must promptly explain how to contact the Title IX Coordinator
  - Upon notice, Title IX Coordinator must inform student of their rights
  - All employees must receive training
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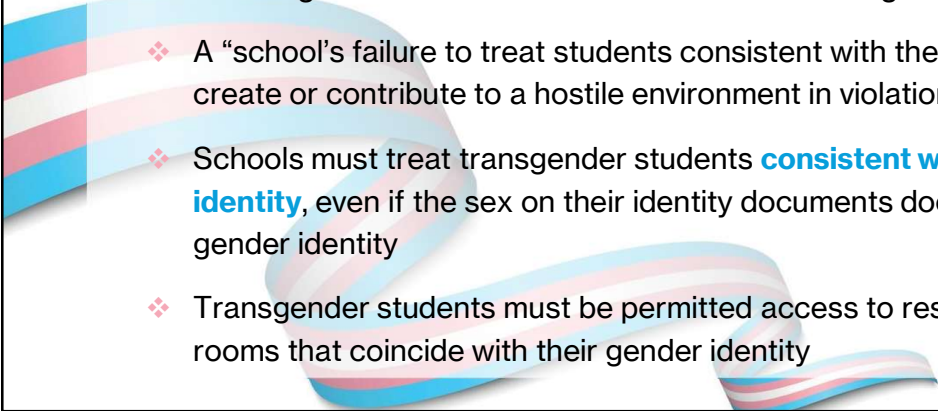
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## Obama Administration Actions

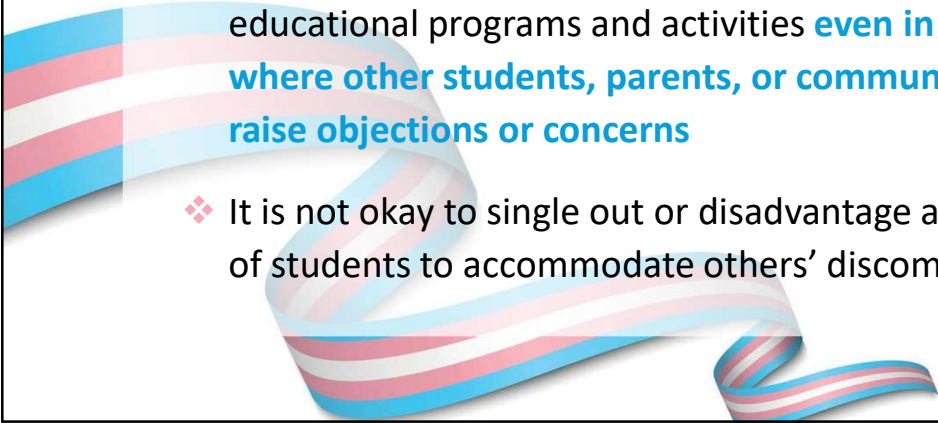
### U.S. Department of Education Office for Civil Rights (OCR) Dear Colleague Letter, May 13, 2016

- 
- ❖ Title IX prohibits “discrimination based on a student’s gender identity, including discrimination based on a student’s transgender status”
  - ❖ A “school’s failure to treat students consistent with their gender identity may create or contribute to a hostile environment in violation of Title IX”
  - ❖ Schools must treat transgender students **consistent with their gender identity**, even if the sex on their identity documents does not match their gender identity
  - ❖ Transgender students must be permitted access to restrooms and locker rooms that coincide with their gender identity

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## Obama Administration Actions

### May 13, 2016 Dear Colleague Letter (cont’d)

- 
- ❖ Schools must provide transgender students equal access to educational programs and activities **even in circumstances where other students, parents, or community members raise objections or concerns**
  - ❖ It is not okay to single out or disadvantage a particular class of students to accommodate others’ discomfort

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## Trump Administration Changed Course

**U.S. Department of Education Office for Civil Rights (OCR) Dear Colleague Letter, February 22, 2017**

- ❖ Rescinded 2016 DCL on Title IX and transgender students
- ❖ Specifically challenged the DCL’s requirement that transgender students have access to sex-segregated facilities that matched their gender identity

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## Trump Administration Changed Course

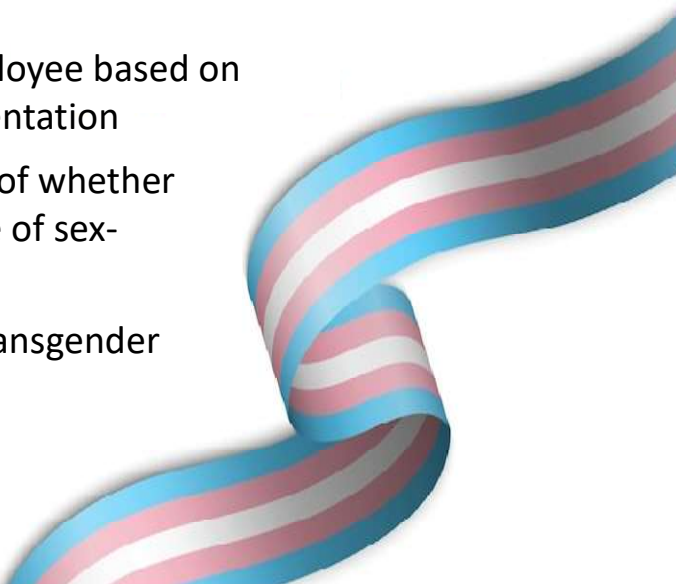
**February 22, 2017 Dear Colleague Letter (cont’d)**

“[The] withdrawal of these guidance documents does not leave students without protections from discrimination, bullying or harassment. **All schools must ensure that all students, including LGBT students, are able to learn and thrive in a safe environment.** The [DOE OCR] will continue its duty under law to hear all claims of discrimination and will explore every appropriate opportunity to protect all students and to encourage civility in our classrooms.”

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## What About *Bostock*?

- Employer cannot fire an employee based on gender identity or sexual orientation
- Did not answer the question of whether Title VII requires allowing use of sex-segregated facilities
- Did not decide what rights transgender students have



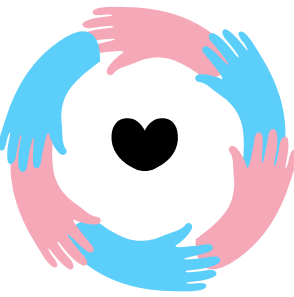

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## Texas State Law

- During the 2017 legislative session and special session, Senate Bill 3, a “bathroom bill,” was hotly debated
- SB 3 applied to government buildings, which would have included schools
- SB 3 did not pass the legislature



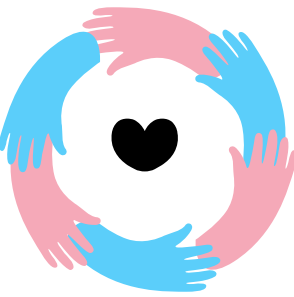

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***Adams v. The School Board of St. Johns County, Florida (11<sup>th</sup> Circuit Dec. 30, 2022)***

- First Federal appellate court to decide that a school policy separating student bathrooms based on “biological sex” passes constitutional muster and comports with Title IX
- Said bathrooms can be segregated by “biological sex” as evidenced by the student’s enrollment documents even if doing so excludes transgender students from bathrooms matching their gender identities
- Court’s jurisdiction: Alabama, Florida, and Georgia

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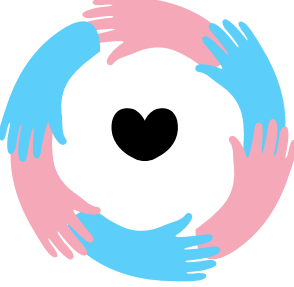

***Adams v. The School Board of St. Johns County, Florida (11<sup>th</sup> Circuit Dec. 30, 2022)***

School prevailed on Equal Protection claim

- ❖ Found that the US has a long tradition of separating sexes in certain situations, especially when it comes to the use of public bathrooms
- ❖ Policy restricting bathroom use by “biological sex” significantly furthered the student privacy interest the board claimed
- ❖ Policy did not discriminate based on gender identity because it was based on biological sex

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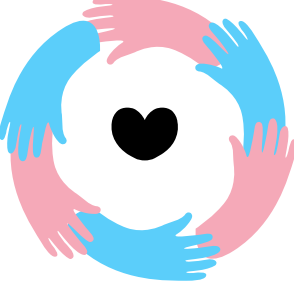



***Adams v. The School Board of St. Johns County, Florida (11<sup>th</sup> Circuit Dec. 30, 2022)***

School prevailed on TIX claim

- ❖ Title IX contains express carve-outs with regard to bathrooms, locker rooms, living facilities
- ❖ Bostock’s recent holding with regard to the meaning of “sex” can’t be imported to Title IX in light of those carve-outs

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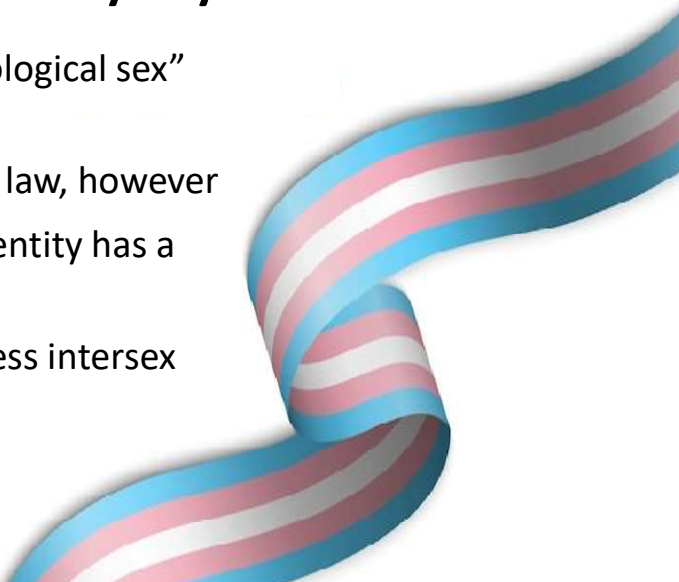
***Adams v. The School Board of St. Johns County, Florida (11<sup>th</sup> Circuit Dec. 30, 2022)***

The case conflicts with decisions by two other Federal appellate courts and does not change the law in those states (Illinois, Indiana, Maryland, North Carolina, South Carolina, Virginia, West Virginia, and Wisconsin)

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# What is “Biological Sex” Anyway?

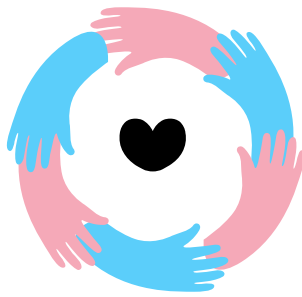
- The *Adams* majority said “biological sex” meant sex assigned at birth
- No clear definition under the law, however
- One dissenter said gender identity has a potential biological impact
- The definition does not address intersex students



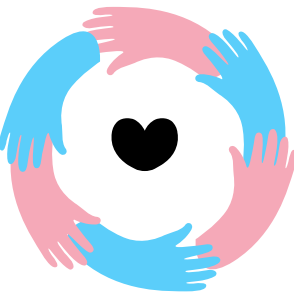

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## *Grimm v. Gloucester County School Board (4th Cir. 2020)*

- Transgender student was harmed by school board’s policy requiring students to use bathrooms based on their biological sex
  - ❖ Physical location of alternative bathrooms in nurse’s office and single-stall bathrooms were inconvenient, causing lateness to class
  - ❖ Unavailable when attended after-school events
  - ❖ Stigma of being forced to use a separate bathroom invited scrutiny and attention
  - ❖ Student suffered UTIs from avoiding bathroom use and stress resulting in suicidal ideations



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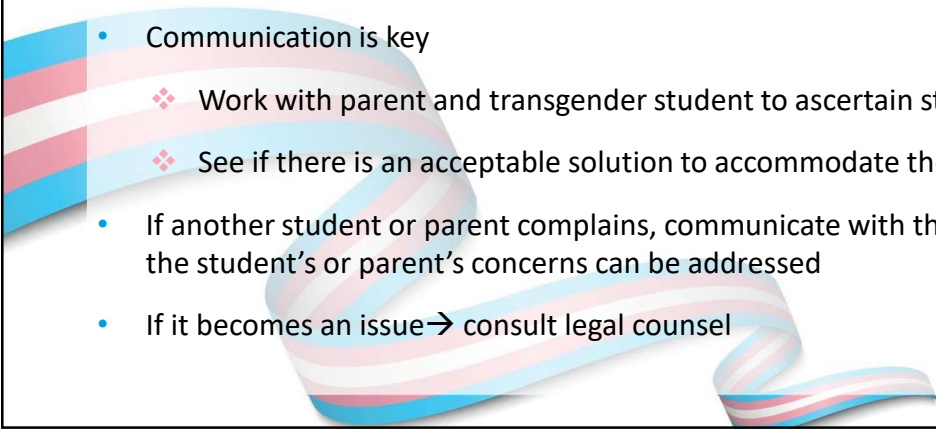
### ***Grimm v. Gloucester County School Board (4th Cir. 2020)***

- Policy requiring students to use bathrooms based on biological sex unlawfully discriminated against transgender male in violation of Title IX
- “After the Supreme Court’s recent decision in *Bostock*...we have little difficulty holding that a bathroom policy precluding Grimm from using the boys restroom discriminated against him “on the basis of sex.” Although *Bostock* interprets Title VII, it guides our evaluation of claims under Title IX.”
- Board’s policy excluded Grimm from the boys’ restrooms “on the basis of sex.”

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### **General Guidance**

- The law in Texas is unclear, but no law **prohibits** a school from granting a transgender student’s request to use the facilities associated with the student’s gender identity
- Communication is key
  - ❖ Work with parent and transgender student to ascertain students’ preferences
  - ❖ See if there is an acceptable solution to accommodate these preferences
- If another student or parent complains, communicate with them to ascertain how the student’s or parent’s concerns can be addressed
- If it becomes an issue→ consult legal counsel

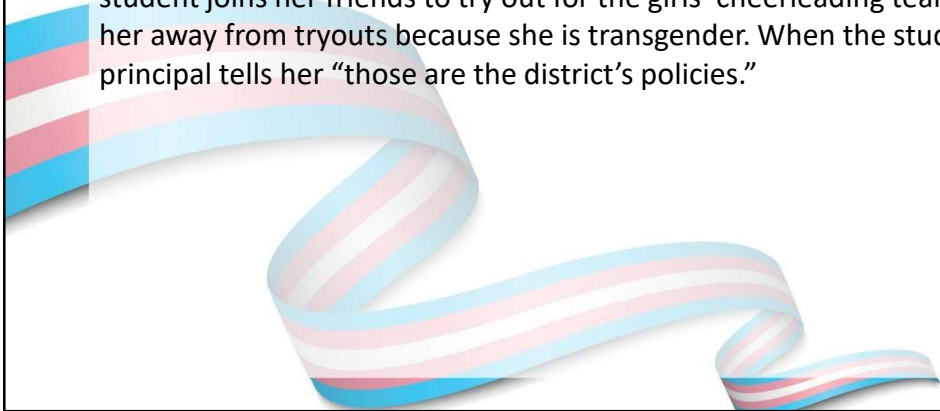


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## June 2021 “Fact Sheet”

On her way to the girls’ restroom, a transgender high school girl is stopped by the principal who bars her entry. The principal tells the student to use the boys’ restroom or nurse’s office because her school records identify her as being “male.” Later, the student joins her friends to try out for the girls’ cheerleading team and the coach turns her away from tryouts because she is transgender. When the student complains, the principal tells her “those are the district’s policies.”



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## Roadblocks to Enforcement

- 2022 Federal District Court Decision (20 states)
- Does not include Texas



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## Roadblocks to Enforcement

### Texas Attorney General Opinions

- Opinion No. KP-0372: gender identity and sexual orientation are not protected classes under any Texas statute or constitutional provision.
- Opinion No. KP-0396: “[n]either the U.S. Supreme Court, the Fifth Circuit Court of Appeals, nor any Texas court has extended the holding in *Bostock* to the Title IX context.”

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## Other Legal Paths

- in *Williams v. Kincaid* that a prison violated the Americans with Disabilities Act (ADA) by denying an incarcerated transgender woman experiencing “gender dysphoria” access to facilities matching her gender identity.

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## Intake – Summary

When the school receives notice of sexual misconduct, it will **evaluate the complaint** to determine if it is covered by Title IX

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# Intake – Summary

The purpose of an intake meeting is to **learn more about what is alleged** so that the allegations can be evaluated for Title IX applicability

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# What is Intake?

- ▶ An opportunity to determine the allegations in a report or formal complaint
- ▶ Necessary to evaluate the complaint to determine if Title IX applies

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# Allegation

“A claim or assertion that someone has done something illegal or wrong, typically one made without proof.”

Oxford Languages

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# Evaluation

“To determine the significance, worth, or condition of usually by careful appraisal and study.”

Merriam-Webster

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## What is Intake *NOT*?

- ▶ Investigation
- ▶ Interrogation
- ▶ Credibility Determinations
- ▶ Evidence Gathering\*\*

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## Exception: Evidence

- ▶ If you become aware of the existence of evidence that could be at risk of loss, can take steps to preserve evidence
- ▶ Contact law enforcement immediately where knowledge of illegal or illicit evidence

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# What Triggers Intake?

REPORT VS. COMPLAINT

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# What Triggers Intake?

- ▶ Either a report or a formal complaint by a complainant can trigger intake
- ▶ Intake is necessary where it is not clear that the complaint falls under Title IX
- ▶ Goal is to collect more information about the allegations to allow evaluation of the complaint

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# Title IX Reports

- ▶ Can be made to the Title IX Coordinator or any “Official With Authority” (all employees)
- ▶ Can be made by any person, whether or not the person reporting is the person alleged to be the victim of sexual harassment
- ▶ Can be made at any time, including during non-business hours, by using the telephone number or e-mail address, or by mail to the office address, listed for the Title IX Coordinator

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# Formal Complaint

- ▶ A document
- ▶ Filed by a complainant or signed by the Title IX Coordinator
- ▶ Alleging sexual harassment against a respondent
- ▶ Requesting that the school investigate the allegation of sexual harassment

July 2021 Q&A

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## What Are We Evaluating?

Is the alleged conduct:

1. “Title IX Sexual Harassment”
2. “in an educational program or activity”
3. “in the United States”

If yes to **all**: Title IX SH Process  
If no to **any**: Another process

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## *Sexual Harassment?*



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**“Title IX Sexual Harassment”**

**The Title IX “Big 5”**      OR      **Title IX “Hostile Environment”**

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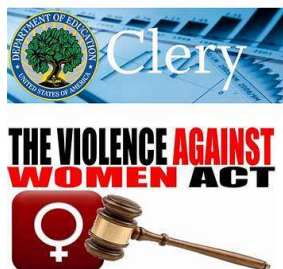
**“Title IX Sexual Harassment”**

**The Title IX “Big 5”**      OR      **Title IX “Hostile Environment”**

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# Title IX “Big 5”

- ▶ Employee Quid Pro Quo
- ▶ Sexual Assault\*\*
- ▶ Domestic Violence\*\*
- ▶ Dating Violence\*\*
- ▶ Stalking\*\*



\*\* as defined in the federal higher education laws, the Clery Act and the Violence Against Women Act

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## #1 Employee Quid Pro Quo

- ▶ An employee of the school conditioning an aid, service, or benefit of the school on an individual's participation in unwelcome sexual conduct
- ▶ Examples:
  - Requesting sexual favors for a benefit or service
  - Threatening to remove a benefit or service unless a person engages in sexual favors
  - Expecting sexual favors for a benefit or service

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## #2 Sexual Assault

- ▶ Forcible or nonforcible sex
- ▶ Forcible: without consent, including where one cannot give consent
  - Rape, sodomy, assault with an object, fondling, forced oral sex
- ▶ Non-forcible: Incest, Statutory Rape

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## Consent

Consent means the existence of clearly understandable words or actions that manifest a knowing, active, voluntary, and present and ongoing agreement to engage in specific sexual or intimate conduct by one not suffering from incapacitation

Age of consent = 17

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# Fondling

Non-consensual touching of private body parts above or under clothing for sexual gratification

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## #3 Domestic Violence

- ▶ Felony or misdemeanor crimes of violence
- ▶ Committed by a current or former romantic partner, spouse, former spouse, intimate partner, person who shares a child, person similarly situated to a spouse, adults against a person protected under domestic or family violence laws of the jurisdiction

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## #4 Dating Violence

- ▶ Committed by a person who has been in a romantic or intimate social relationship with the victim
- ▶ Consider the complainant's description of the length of the relationship, the type of relationship, and the frequency of the interaction between the persons involved in determining the nature of the relationship
- ▶ Includes, but not limited to, sexual or physical violence or threat of violence, and emotional or psychological

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## #5 Stalking

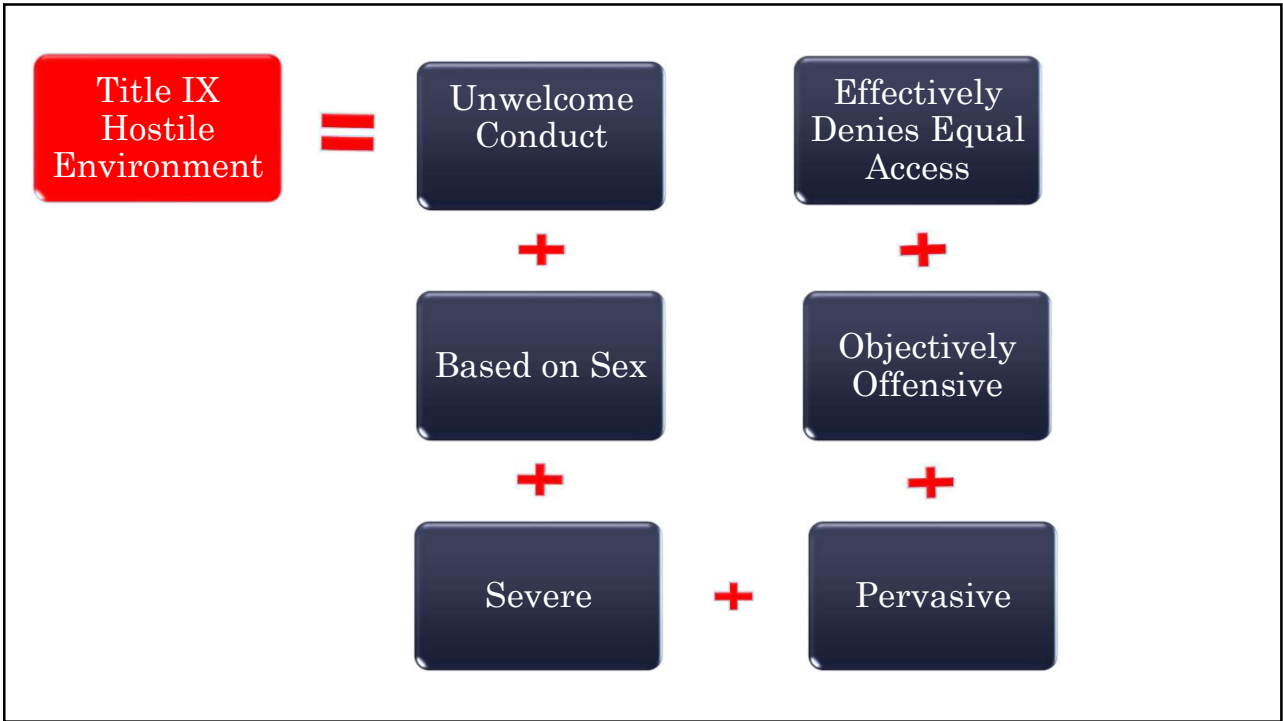
- ▶ A course of conduct based on sex (2+ times)
- ▶ Directed at a specific person
- ▶ That would cause a reasonable person to fear for the person's safety or the safety of others or to suffer substantial emotional distress
- ▶ Conduct can be direct or indirect, and does not require professional medical treatment

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“Title IX Sexual Harassment”

The Title IX “Big 5”      OR      Title IX “Hostile Environment”

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## Dictionary Definitions: Severe

- ▶ Very bad, serious, or unpleasant; causing a lot of physical pain or suffering; very harsh (Merriam-Webster)
- ▶ Strict, austere or intense with disastrous consequences. (Black's Law Dictionary)

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## Case Definitions: Severe

- ▶ “Severe” means something more than just juvenile behavior among students, even behavior that is antagonistic, non-consensual, and crass.
- ▶ Simple acts of teasing and name-calling are not enough, even where these comments target differences in gender.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)

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## Case Definitions: Severe

- To establish “severe” harassment, the conduct must be extreme and not merely rude or unpleasant.

Jenkins v. Univ. of Minnesota, 131 F. Supp. 3d 860, 881 (D. Minn. 2015), aff’d, 838 F.3d 938 (8th Cir. 2016)

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## Dictionary Definitions: Pervasive

Spread over a large area, either metaphorically, or in a literal manner. For instance, rumors can be quite pervasive amongst people. (Black’s Law Dictionary)

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## Case Definitions: Pervasive

- ▶ “Pervasive” means “systemic” or “widespread.” For sexual harassment under Title IX, it also means multiple incidents of harassment; one incident of harassment is not usually enough.

Kollaritsch v. Michigan State Univ. Bd. of Trustees, 944 F.3d 613, 620 (6th Cir. 2019), cert. denied, 141 S. Ct. 554, 208 L. Ed. 2d 175 (2020)

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## Dictionary Definitions: Objectively Offensive

- ▶ “Objective”: Existing independently of perception or an individual's conceptions (Reverso)
- ▶ “Offensive”: Unpleasant or disgusting, as to the sense (Reverso)

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## Effective Denial of Equal Access

- ▶ Total denial is not necessary
- ▶ Whether a reasonable person in the circumstances would not have educational access that is the same as a similarly situated person not suffering the alleged harassment

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## Sexual Harassment: Hostile Environment

Consider:

- ▶ the degree to which the conduct affected the alleged victim's education
- ▶ the type, frequency, and duration of the conduct
- ▶ the relationship between the alleged victim and perpetrator
- ▶ the number of individuals involved
- ▶ the age and sex of the participants
- ▶ size of school, location of incidents, and context
- ▶ other incidents of sex-based harassment

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## Education Program or Activity

The sexual harassment must occur within the school's educational program or activity

- This can be on or off campus
- It "includes locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs."

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## Education Program or Activity

- ▶ Includes situations where the off-campus incident occurs as part of the school's "operations" pursuant to 20 U.S.C. § 1687 and 34 CFR 106.2(h)
- ▶ "Operations" can include computer and internet networks, digital platforms, and computer hardware or software owned or operated by or used in the operations of the school

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## Education Program or Activity

Title IX applies to electronic, digital, or online harassment regardless of the method by which the conduct is perpetrated; if the sexual harassment occurred in an education program or activity or the educational institution has substantial control over the alleged harasser and the context of the harassment, it is covered

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# Education Program or Activity

Factors such as whether the school funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred may be helpful or useful for schools to consider to determine the scope of a school’s program or activity, but no single factor is determinative

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# In the United States



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## In the United States

- ▶ The Title IX rules do not apply extraterritorially (such as study abroad programs)
- ▶ As with any other conduct that falls outside Title IX, other code of conduct provisions can be used to address such conduct

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## What Are We Evaluating?

Is the alleged conduct:

1. “Title IX Sexual Harassment”
2. “in an educational program or activity”
3. “in the United States”

**If yes to **all**: Title IX SH Process**  
**If no to **any**: Another process**

92

## Intake Questions

- ▶ Who
- ▶ What
- ▶ When
- ▶ Where
- ▶ Why
- ▶ How



93

## Intake Questions

- ▶ What happened that you believed was sexual harassment?
- ▶ What was done? What was said?
- ▶ If physical conduct occurred, ask for the details (in what ways were you touched, where were you touched, did you agree to engage in the activity?)

94



# Intake Questions

- ▶ Who did it? (Identity and relationship)
- ▶ Where did it occur? (Get details for every situation)
- ▶ When did it occur? At what time of the day? (Get details for every situation)
- ▶ How often did it occur? Is it ongoing?

95

# Intake Questions

- ▶ Are you alleging any other violations of policy/sexual harassment or otherwise?
- ▶ Go over what happened—ask “Anything else?”
- ▶ Ask how the student is doing

96



# What if the Allegation is Title IX?

97

## Overview: T9 SH Grievance Process

For any Title IX Sexual Harassment in a program or activity and in the United States of which the school has actual knowledge, the Title IX Coordinator or their designee must

- **Step 1:** Hold a “supportive measures meeting” with the Complainant (alleged victim) and offer right to file a formal complaint
- **Step 2:** Consider if emergency removal/administrative leave warranted

Only if a Title IX Formal Complaint is filed or signed by the Title IX Coordinator or designee

- **Step 3:** Notice of Allegations
- **Step 4:** Consider if dismissal is required or warranted
- **Step 5:** Informal Resolution (in some cases)
- **Step 6:** Investigation
- **Step 7:** Decision-Making Process
- **Step 8:** Appeal

**NOTE: ALL STEPS include strict detailed requirements from the Title IX rules**

98

## If No Formal Complaint

- ▶ If conduct alleged, if proved, would be “Title IX Sexual Harassment” in a program or activity and in the United States, you must go through the formal complaint process to implement consequences
- ▶ If no formal complaint, you would be limited to implementing supportive measures *only*—you cannot use your code of conduct to address the conduct that, if proved, would be Title IX sexual harassment

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## Emergency Removal

- ▶ Emergency removal can occur regardless of whether the Title IX Grievance Process is initiated
- ▶ Emergency removal is not intended as a disciplinary sanction and is not designed to impose interim suspension or expulsion or to penalize a respondent student
- ▶ Emergency removal is meant to protect the physical health or safety of any student or individual to whom the Respondent poses an immediate threat

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## Emergency Removal

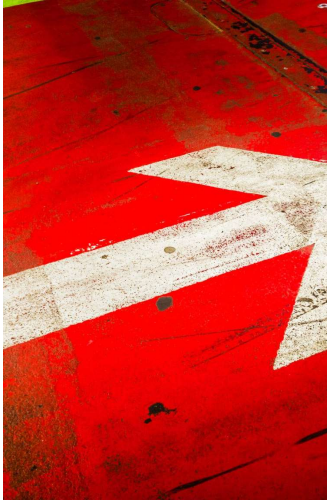
- **Safety concern:** Identify the harmful conduct that allegedly constitutes sexual harassment
  - Severity
- **Risk:** Decide how likely it is that the complainant could be harmed and how seriously
  - Probability
- Analysis should focus on the Complainant and Respondent but consider other students and individuals

101

## Emergency Removal

- ▶ Must conduct an individualized safety and risk assessment
- ▶ The assessment must find that the student is an imminent threat to the physical health or safety of another student or individual arising from the allegations of sexual harassment
- ▶ Must provide notice and immediate opportunity to challenge the decision

102



**What if the  
Allegation is not  
Title IX?**

103

## **If not Title IX**

For conduct that does not meet the Title IX definition of sexual harassment, follow the school's other procedures.

104





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106

## Rule Requirements

- ▶ Equitable investigation
- ▶ Burdens of proof and gathering evidence
- ▶ Allow advisors
- ▶ Consideration of all relevant evidence
- ▶ Serving impartially
- ▶ Presumption of non-responsibility
- ▶ Following timeframes
- ▶ Standard of evidence
- ▶ 3 Key Limits on Evidence
- ▶ Process Steps

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## Equitable Investigation

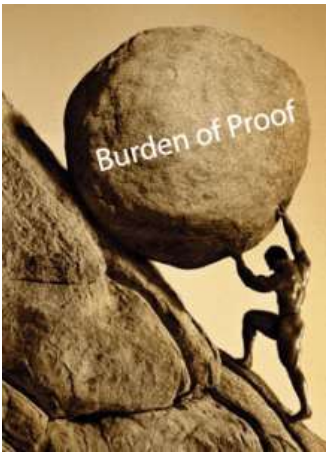
### **Treat the Complainant and Respondent equitably**

- ▶ Apply school's investigation procedures equally to Complainant and Respondent
- ▶ Must provide equal opportunity to present evidence and identify witnesses during the investigation
- ▶ Provide equal opportunity to inspect and review evidence collected in the investigation

108

# Burdens of Proof and Gathering Evidence

Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the school and not on the parties



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# Advisors

Parties must have the same opportunities to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney



110

# Advisors

School can limit the advisor's role (the proverbial "potted plant")—but best practice to have written guidelines for parties before the proceedings begin to set forth limits



111

# Reviewing the Evidence

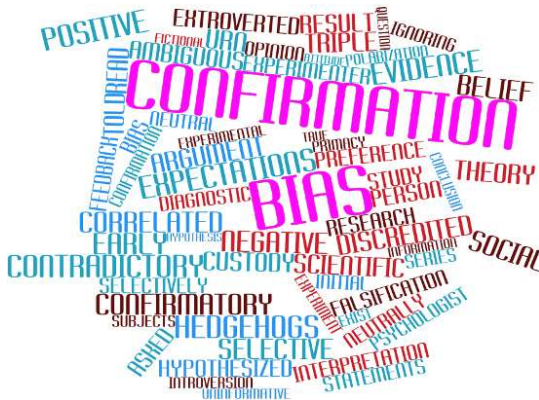
## **Objectively evaluate all evidence**

- ▶ Consider and evaluate both exculpatory and inculpatory evidence
- ▶ Credibility cannot be based on an individual's status as the Complainant, Respondent, or witness



112

# Serving Impartially



Individuals involved in the Title IX process must have no conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent and must be trained on required elements for their role

113

## Presumption of Non-Responsibility

**Presume that the respondent is not responsible for the alleged conduct throughout the investigation**

- ▶ This does not mean that you must assume the complainant is not telling the truth
- ▶ Rather, to find that the respondent is responsible for sexual harassment, there must be some evidence (“at least a feather”) to support a finding of responsibility

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## Follow Timeframes

**Conduct the grievance process within a reasonably prompt time frame**

- ▶ Respect timeframes in rule, including the requirement that the investigator provide evidence to the parties and afford them 10 days to respond increases the investigative time
- ▶ For other timeframes not set forth in the rules, see the school's timeline as set forth in policy/procedures

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## Follow Timeframes

Limited extensions can be given for good cause, including:

- ▶ Law enforcement investigation
- ▶ Absent party or witness
- ▶ Need to provide language assistance or disability accommodations to party or witness

Written notice must be given to the parties of the delay and the reasons for it – the investigator should review any need for an extension with the Title IX Coordinator or their designee

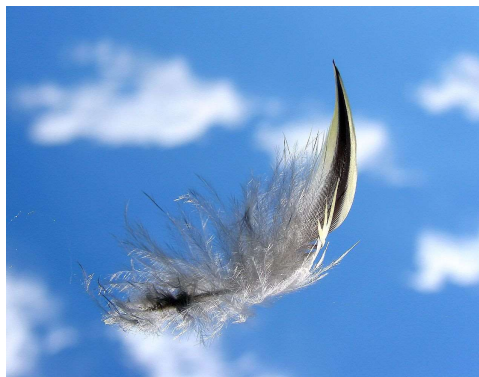
116

## Follow the Standard of Evidence

**Preponderance of the evidence** means in looking at all the evidence regarding a disputed issue or an allegation, it is more likely than not that the issue or allegation occurred

This **does not** mean that one side is determined to be “telling the truth” or “right” or “more believable”

Two individuals can experience the same incident or occurrence very differently; it is not our job to decide who is “correct”



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## 3 Key Limits on Evidence

1. **Rape Shield:** Questions and evidence about **the complainant's** sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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## Rape Shield Protection

- There can never been consent between an employee and a student so Exception No. 2 is likely inapplicable to employee-on-student harassment
- Remember age of consent in Texas is 17, so Exception No. 2 may not apply in the specific student-on-student harassment context

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## 3 Key Limits on Evidence

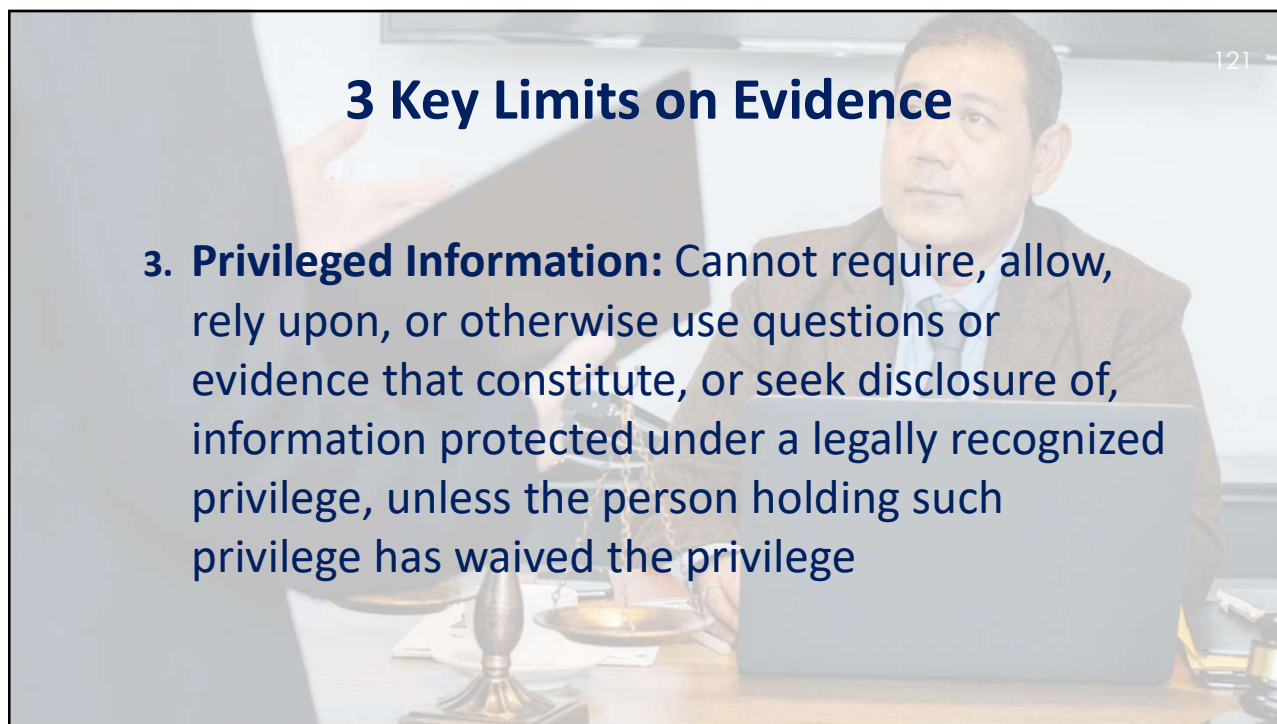
2. **Medical Information:** Cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so

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121

## 3 Key Limits on Evidence

3. **Privileged Information:** Cannot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege

A man in a brown suit and blue shirt is sitting at a desk. He is looking towards the left. On the desk, there is a laptop, a scale of justice, and some papers. The background is a blurred office setting.

121

## Do Not Violate Privilege

### Examples of Privileged Information

- ▶ Attorney-client privilege
- ▶ Physician-patient privilege
- ▶ Psychotherapist-patient privilege



122

# Do Not Violate Privilege

When does attorney-client privilege apply?

- ▶ The attorney-client privilege generally protects communications **between** only the attorney and the client (and sometimes their representatives)
- ▶ The attorney-client privilege protects only communications made **in confidence** for the purpose of obtaining legal advice from the attorney
- ▶ The attorney-client privilege protects communications from discovery only if the communications were made for the purpose of **securing legal advice**



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# Do Not Violate Privilege

- ▶ Investigators also need to know about physician/psychotherapist-patient privilege, too
- ▶ Under **federal law**, a person has a limited privilege to refuse to disclose, and to prevent another from disclosing, confidential communications made to a psychotherapist for the purposes of diagnosis or treatment of a mental or emotional condition, including drug addiction.

124

## Do Not Violate Privilege

- ▶ A psychotherapist is a person authorized to engage in the diagnosis or treatment of a mental or emotional condition, including drug addiction.
- ▶ The privilege may extend to unlicensed counselors.
- ▶ The privilege is limited to **confidential** communications made **in the course of diagnosis or treatment**.

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## New Case Assignment: First Steps

- ▶ The Title IX Coordinator or designee will notify the investigator of assignment to the formal complaint
- ▶ Typically, the Title IX Coordinator will have already provided a Notice of Allegations (NOA) to the parties, as required by the rules; if not, the Title IX Coordinator or investigation should promptly do so
- ▶ The investigator should review the formal complaint and applicable policies, identifying the specific definitions that may be at issue in the case
- ▶ The investigation should reach out to the parties for introductions and to answer questions
- ▶ The investigator should develop an initial investigation plan

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# Investigation Plan

Issues to consider:

- ▶ What are the issues and facts in dispute?
- ▶ Is there physical evidence to obtain or preserve?
- ▶ Who will be interviewed, and in what order?
- ▶ What other evidence might be obtained or helpful, and how can you get it?
- ▶ Who will conduct the interviews? How will the interviews be documented? If notes will be taken, consider a single, separate notetaker

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# Gathering Evidence

- ▶ Promptly identify and preserve likely sources of evidence
  - ❖ Paper Documents
  - ❖ Hard Drive
  - ❖ Audio or Video Recordings
  - ❖ Photographs
  - ❖ Email
  - ❖ Text messages
  - ❖ Social media (posts and comments)



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# Tip for Investigators When Gathering Evidence

- ▶ Find and preserve evidence the minute you learn it exists (especially for voicemails, text messages, Instagram posts, etc.)
- ▶ But do not engage in surreptitious activity to acquire evidence (i.e., use a fake Facebook account to “friend” someone and download).



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# Gathering and Preserving Evidence

- ▶ Investigators must understand privacy laws
  - ▶ Searches of property
  - ▶ Searches of persons
  - ▶ Possible Fourth Amendment implications



130

# Relevant Evidence

- Identify relevant evidence



(1) Does this evidence apply or relate to a disputed "fact" in this matter?

(2) If so, does it have a tendency to make the fact more or less probable?

Answer should be "yes" to both for relevance to exist

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# Types of Evidence

Recognize and understand the different types of evidence:

- ✓ **Direct Evidence**
- ✓ **Circumstantial Evidence**
- ✓ **Statistical Evidence**
- ✓ **Hearsay**
- ✓ **Rumor and Innuendo**



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## Document Evidence Gathered

- ▶ Identify/describe each piece of evidence
- ▶ Identify the source from which you obtained the evidence
- ▶ Explain whether the evidence is relevant (if not, why not)
- ▶ Determine if the evidence is directly related to the allegations in the Formal Complaint

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## Who Will Investigators Interview?



- ▶ Complainant
- ▶ Respondent
- ▶ Witnesses
- ▶ Administrators, teachers, school personnel
- ▶ Student witnesses
- ▶ Authors or recipients of relevant evidence
- ▶ **Persons identified by Complainant and Respondent**

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# Preparing for Interviews

- ▶ Determine logical order of interviews
  - Typically interview CP first, then witnesses, then RP
  - Sometimes will interview witnesses first (employee witnesses)
  - Often will interview CP and RP (and some witnesses) multiple times
  - Follow up can be conducted by email
- ▶ Determine location of interviews
  - Consider privacy, neutral location, impact of conducting interviews on campus
  - If objection to location, try to accommodate the objection



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# Preparing for Interviews



- ▶ Prepare opening statement
- ▶ Organize evidence you may need for the interview
- ▶ Prepare questions or outline of key subjects to address and check off to avoid missing issues

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# Notice of Interview



The school must provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, **investigative interviews**, or other meetings, **before the meeting** and with sufficient time to prepare to participate

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# Interview Questions

Ask questions to obtain information on key Title IX inquiries:

- Is the conduct **on the basis of sex**?
- Is the conduct at issue **sexual harassment**?
- Was the conduct **severe, pervasive, and objectively offensive**?
- Did the conduct occur in the school's **educational programs and activities**?
- What harm resulted? Was the Complainant denied equal access to the school's education program or activity?



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## Interview Tips for Investigators



- ✓ Let the witness tell his or her story
- ✓ Start with open-ended questions
- ✓ Ask for the particulars—the 5Ws and H
  - ❖ **Who? What? Where? When? Why? How?**
- ✓ Follow up with more directed questions

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## Interview Tips for Investigators

- ✓ Take excellent notes (one notetaker/one copy)
- ✓ Observe and write down body language and demeanor of witness
- ✓ Note consistencies/inconsistencies in information shared, but do not express opinion on meaning
- ✓ Obtain a witness statement, or prepare a memorandum of interview
  - ❖ Written witness statement is strongest evidence because witness cannot later change story
  - ❖ But consider the age and abilities of the witness

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## Recording Interviews

- ▶ Know Texas' recording laws, as well as the school's recording laws
- ▶ Recording presents problems
  - ❖ Lack of candor can often arise when recording
  - ❖ If you record, the recording may be evidence that will need to be provided to both parties
  - ❖ Presents issues regarding provision of potentially confidential information
- ▶ If circumstances warrant recording, treat the parties equitably—i.e., if you record the Complainant's interview, you should also record the Respondent's interview



141

## Recording Interviews

If a party wants to record the interview:

- ▶ Seek consent from all parties involved in the interview to record
- ▶ Advise that if the party records, you will also need to record the interview
- ▶ Notify the party that the school's recording could become evidence that must be shared with the other party

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## **Practice Scenario**

### **Student-on-Student Sexual Harassment**

The mother of a female kindergarten student, Jane Roe, files a Formal Complaint alleging that Jane Roe is being harassed by an older boy on her bus. Roe's mother states her daughter has been increasingly withdrawn over the past few months, and last night, Jane Roe told her that a boy on her bus has been asking her to lift her dress in front of him. She states the other students on the bus would mock and laugh at Roe.

Roe's mother does not know the name of the male student.

Roe's mother has reported the incident to the police department, which has opened an investigation.

143

## **Practice Scenario**

### **Review the Formal Complaint**

- ▶ What is the conduct that may constitute sexual harassment?
- ▶ Who are the parties involved?

144

# Practice Scenario

**What is the conduct that may constitute sexual harassment?**

- 1. The male student asking Roe to lift her dress
- 2. The other students mocking Roe

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# Practice Scenario

**Who are the parties involved? (The Complainants and Respondents)**

- 1. Jane Roe
- 2. The older male student on the bus
- 3. The other students on the bus who participated in mocking Roe

146

# Practice Scenario

**Not So Fast:**

Before you begin your investigation, a police officer contacts you. He advises there is an open law enforcement investigation of the incident and requests that the school refrain from investigating until the police complete their investigation. The officer tells you that the school’s investigation could interfere with and potentially compromise the law enforcement investigation?

**What should you do?**



147

# Practice Scenario

**Cooperating with Law Enforcement**

- ▶ Obtain a written directive from law enforcement not to investigate (to warrant a delay in the investigation)
- ▶ If there is no directive or the police do not indicate the school investigation could hinder their efforts, proceed with your investigation

**REMEMBER:** A police or CPS investigation does not mean the school does not have an independent Title IX obligation to investigate

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## The Police are the Beginning, Not the End

“[A] law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct.”

“Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.”



149

## The Police are the Beginning, Not the End

- ▶ The school cannot discharge its Title IX obligations by referring Title IX sexual harassment allegations to law enforcement
- ▶ Law enforcement purposes differ from the requirements under Title IX that schools offer education programs and activities free from sex discrimination
- ▶ The new Title IX regulations do not prohibit or discourage a complainant from pursuing criminal charges **in addition to** proceeding through the Title IX Grievance Process.

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## Practice Scenario



### Following Up With Law Enforcement

- ▶ Reach out to police on routine basis to see when their investigation is concluded
- ▶ Do not just wait for police to contact you
- ▶ Ensure the Title IX Coordinator and campus administrator are aware of the delayed investigation—this will allow them to ensure continuation of supportive measures in the interim
- ▶ When the police advise you can resume the school's Title IX investigation, resume as quickly as possible

151

## Practice Scenario

### Plan for the Investigation

- ▶ What school policies, procedures, handbooks, codes of conduct are implicated by the Formal Complaint?
- ▶ Who are the persons with knowledge of relevant facts or evidence?

152

## Practice Scenario

### Who are the potential witnesses?

1. Jane Roe
2. The older student on the bus (Jane Doe)
3. The bus driver
4. Other students/employees who may have witnessed the older boy asking Jane Roe to lift her dress
5. Other students/employees who may have participated in or witnessed the mocking

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## Practice Scenario

### Identify and Gather Evidence

- ▶ What evidence should you obtain?
- ▶ Are there potential sources of evidence where you may need to search for relevant evidence?

154

# Practice Scenario

**What evidence do you want to obtain?**

- 1. Any video footage from the bus
- 2. Student disciplinary files
- 3. Any evidence from witnesses present
- 4. Evidence regarding prior incidents of outcries by Complainant or similar alleged misconduct by the Respondent
- 5. Academic records and information regarding Complainant

155

# Practice Scenario

**Schedule Interviews**

**List the order of interviews you want to conduct**

- 1. Jane Doe, the Complainant
- 2. The bus driver
- 3. Any witness to the encounter between Jane Roe and the older boy
- 4. John Doe, the older boy
- 5. Students identified as having witnessed or participating in the mocking
- 6. Law enforcement witnesses
- 7. Medical witnesses identified by/agreed to by CP

156

## Practice Scenario

### Prepare Interview Outline

- ▶ You have already interviewed Jane Roe and learned that she alleges that John Doe would ask her to lift up her dress anytime she wore a dress, and would often touch her bare thigh and her genital area through her underwear

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## Interview Intro

- ▶ Thank witness and parents/guardians for participating
- ▶ Explain who you are – investigator, do not represent either party, goal is to collect evidence so a decision-maker can review and make a determination
- ▶ Both sides have equal opportunity to submit evidence, recommend witnesses, and review evidence
- ▶ Notify of retaliation prohibitions in school/district policies/procedures and encourage to notify you or the Title IX Coordinator promptly if there is any concern of retaliation
- ▶ Reminder of advisor expectations
- ▶ Ask for any questions before you begin

158

## Rapport Building

- ▶ Questions about the interviewee
- ▶ Softball questions
- ▶ Mirroring



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## Provide Your “Placebo” Questions

- ▶ Do you ride the bus?
- ▶ How long have you ridden the bus?
- ▶ How long are you on the bus each day?
- ▶ Do you sit in the same place every day? Where do you sit?
- ▶ Who do you sit near? Always the same or does it change?
- ▶ Why do you sit there?

160

## Background Questions

- ▶ Do you know Jane Doe?
  - Any time the answer is “yes,” follow up with who, what, when, where, how often, who present questions
- ▶ Describe your relationship
- ▶ Any concerning interactions with Jane Doe?

161

## Practice Scenario

**Only after open-ended questions fail to get the information needed, switch to more-targeted questions:**

- ▶ Do you talk to Jane Roe on the bus?
- ▶ What do you talk about?
- ▶ Have you ever noticed Jane Roe do anything different from other students on the bus?
- ▶ Have you ever asked Jane Roe to do anything on the bus?
- ▶ Have you ever touched Jane Roe on the bus?
- ▶ Where, when, why have you touched her?

162



## Practice Scenario

### Questions for John Doe:

- ▶ Has Jane Roe ever lifted up her dress on the bus?
  - Who, what, when, where, how often, who present questions
- ▶ What was your response? [Avoid: Were you surprised—leading]
- ▶ Did it happen more than once?
- ▶ Did you ever ask Jane Roe to lift up her dress?
- ▶ If so, why?
- ▶ What did she say?
- ▶ Have you asked her to lift her dress more than once? When?
- ▶ Does Jane Roe say anything when you ask her?

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## Practice Scenario

### Questions for John Doe:

- ▶ Have any of the other students on the bus seen Jane Roe lift her dress?
- ▶ Do the other students say anything?
  - Who, what, when, where, how often, who present questions
- ▶ Does Jane Roe say anything back?
- ▶ Have you heard other students saying things like that when they are not on the bus?

164

## Practice Scenario

### Questions for John Doe:

- ▶ What happens after she lifts her dress?
- ▶ Have you asked her to do anything when she lifts her dress?
- ▶ Have you ever Jane Roe on the bus without her underwear?
- ▶ Did someone remove her underwear?
- ▶ Who removed Jane Roe's underwear?
- ▶ Did you remove her underwear?
- ▶ Why? How many times?
- ▶ Did you ask her to remove her underwear?
- ▶ Why? How many times?

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## Practice Scenario

### Questions for John Doe:

- ▶ Have you ever touched Jane Roe?
- ▶ Have you ever touched Jane Roe after she lifts her dress?  
After she removes her underwear? Where?
- ▶ Have you seen Jane Roe recently?
- ▶ Did you say anything to her?
- ▶ What did you say?

166

# Practice Scenario

## Post-Interview Tasks

- ▶ Prepare a summary or Memorandum of Interview
- ▶ Identify any follow-up that is needed—such as, gathering additional evidence, conducting further interviews
- ▶ Update your investigation plan as needed

167

# Practice Scenario

## Example of information to summarize in report

- ▶ John Doe sat next to Jane Roe on the school bus.
- ▶ He got in trouble and was moved toward the front of the bus with the younger students.
- ▶ The students around them were other kindergarteners.
- ▶ John Doe denies asking Jane Roe to lift her dress on the school bus or ever touching her.
- ▶ He states Roe would lift her dress on her own to make the other students laugh.
- ▶ John Doe says the other students would laugh at Roe because they thought she was being silly.

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169

## Decision-Making Process

- ▶ Oversees a written question-and-answer process in which the parties get to ask written, relevant questions and follow-up questions of other parties and witnesses
- ▶ Must provide written explanation to a party if a question is determined not relevant, including the basis for the decision
- ▶ After that process, using a preponderance of the evidence standing, issues a written determination with an independent determination of responsibility or non-responsibility for a policy violation and recommends remedies

170

## Remember Exceptions

- ▶ Medical treatment records
- ▶ Privileged information
- ▶ Information about the complainant's past sexual history or predisposition unless for limited uses authorized by the rule

171

## Written Decision Requirements

- ▶ Allegations
- ▶ Policy allegedly violated
- ▶ Procedural steps taken, from receipt of formal complaint through determination
- ▶ Findings of fact
- ▶ Application of facts to policy

172

## Written Decision Requirements

- ▶ Decision must include a statement of, and rationale for, the result as to each allegation, including:
  - Determination regarding responsibility
  - Any disciplinary sanctions imposed on the respondent
  - Whether remedies designed to restore or preserve equal access to educational program will be provided by the school (
- ▶ Must explain appeal process and permissible grounds for each party to appeal
- ▶ Must provide the written determination to the parties simultaneously

173

## Decision Maker Tip

### Decision-making disasters

- ▶ Not explaining the process to the parties and advisors beforehand
  - Party, (Parent) and Advisor Expectations
- ▶ Not making clear what “follow-up” means (K-12)
- ▶ Not ensuring procedures match your intended goals
- ▶ Not notifying the parties of the outcome

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## **Appeals**

- ▶ Each party can appeal a (1) dismissal and (2) written determination
- ▶ Can appeal on limited, specific bases (unless school agrees to allow appeal for other reasons):
  - Procedural irregularities that affected the outcome
  - New evidence that could affect the outcome
  - Conflict of interest that affected the outcome

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## **Appellate Decision-Maker**

- ▶ Provides each party notice of the appellate process and the opportunity to respond to the appeal in writing
- ▶ Reviews the written determination and other file documents as necessary, including any written response to the appeal
- ▶ Issues a written decision including the result and rationale

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## **Appeal**

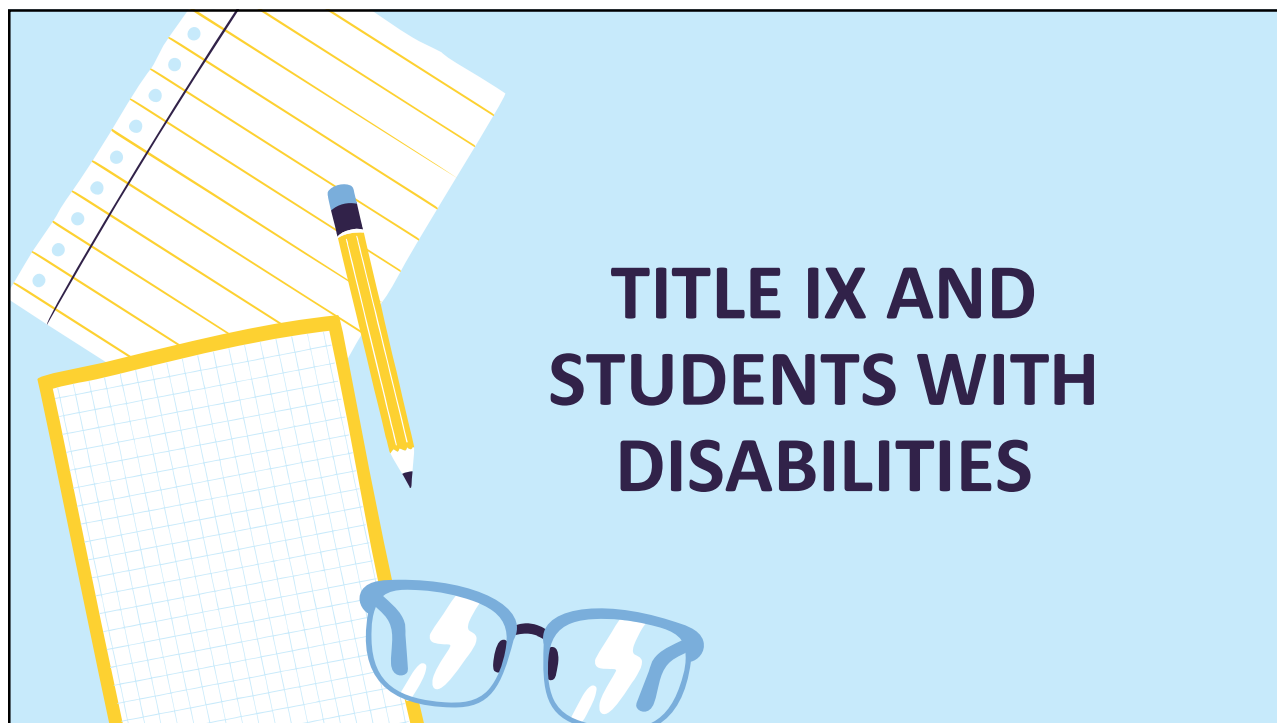
- ▶ Upon receipt of appeal, should be provided to both parties
- ▶ Both parties should be given equal opportunity to respond to the appeal
- ▶ Appellate decision-maker issues a written determination on the appeal

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## Appellate Disasters

- ▶ Not limiting the initial appeal; makes equal opportunity to respond a challenge
  - See the T&H Guidebook appeal form
- ▶ Conducting a “de novo” review
- ▶ Not providing a **thorough** rationale

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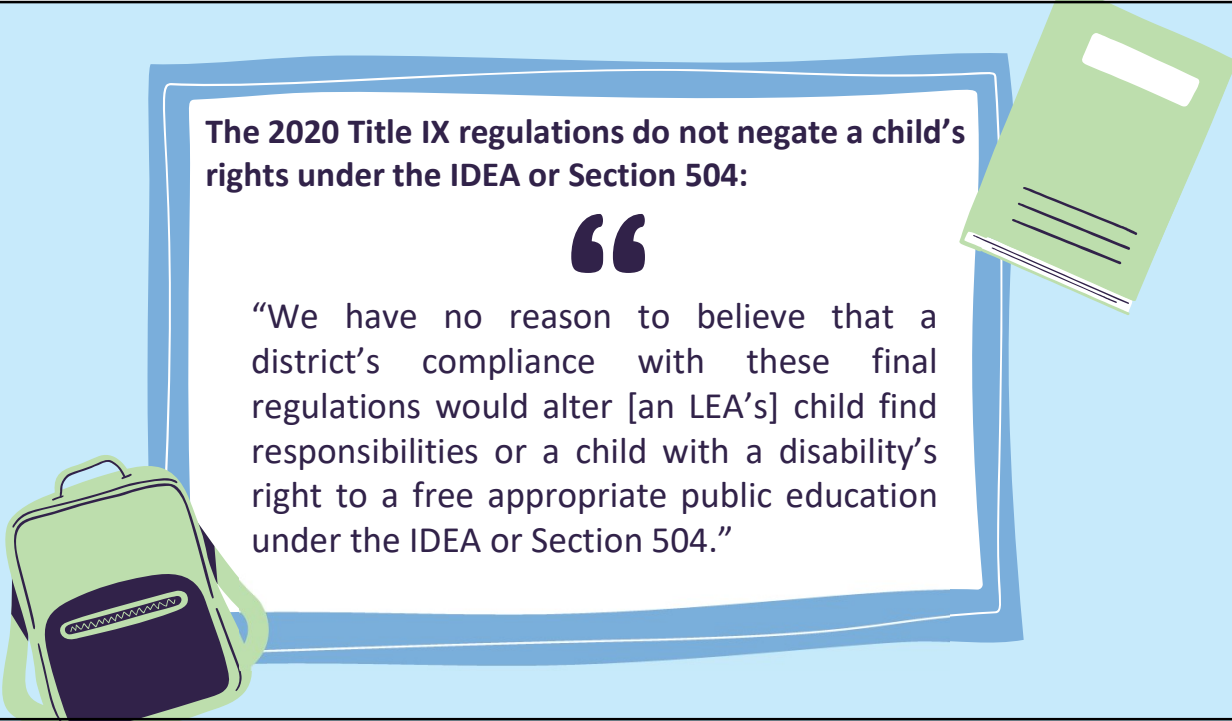
180

The 2020 Title IX regulations do not negate a child’s rights under the IDEA or Section 504:

“

“We have no reason to believe that a district’s compliance with these final regulations would alter [an LEA’s] child find responsibilities or a child with a disability’s right to a free appropriate public education under the IDEA or Section 504.”

”



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182

## TITLE IX AND THE IDEA

Children with disabilities are almost three times more likely to be sexually assaulted

Students with intellectual and mental health disabilities are most at risk – more than 4.6 times more likely to be victims of sexual assault


Students with disabilities are far more likely to be victims than perpetrators – yet not “on the radar” for prevention efforts, policies, and response procedures

183

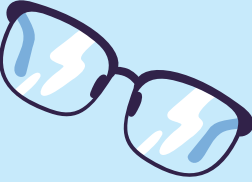
## UNDER-REPORTING

**Students with disabilities are six times less likely than their peers to report sexual assault.**

184



# UNDER-REPORTING



## Possibly because:


Assailant is their caregiver

Cognitive or developmental disabilities prevent student from recognizing or describing harassment


Lack of information regarding appropriate sexual relationships

Unaware of how or what to report


Stigma from being a survivor with a disability



185



# HARMFUL EFFECTS ON ALL STUDENTS

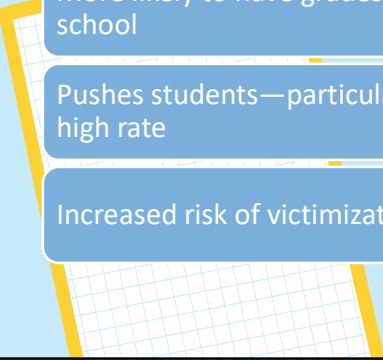


Regardless of disability, sexual harassment can cause anxiety disorders, depression, post-traumatic stress, and self-harm

More likely to have grades decline, frequent absences, and disciplinary incidents at school

Pushes students—particularly those with disabilities—out of school at alarmingly high rate

Increased risk of victimization in adulthood



186




“Consensual” sex

Defending themselves

Telling others outside of the school setting about incidents

## COMPLAINANTS WITH DISABILITIES

187



## COMPLAINANTS WITH DISABILITIES

More likely than non-disabled peers to be disbelieved, ignored, or punished

Interplay between sex- and disability-based stereotypes

May be viewed as “not credible” or “asexual”

188





189



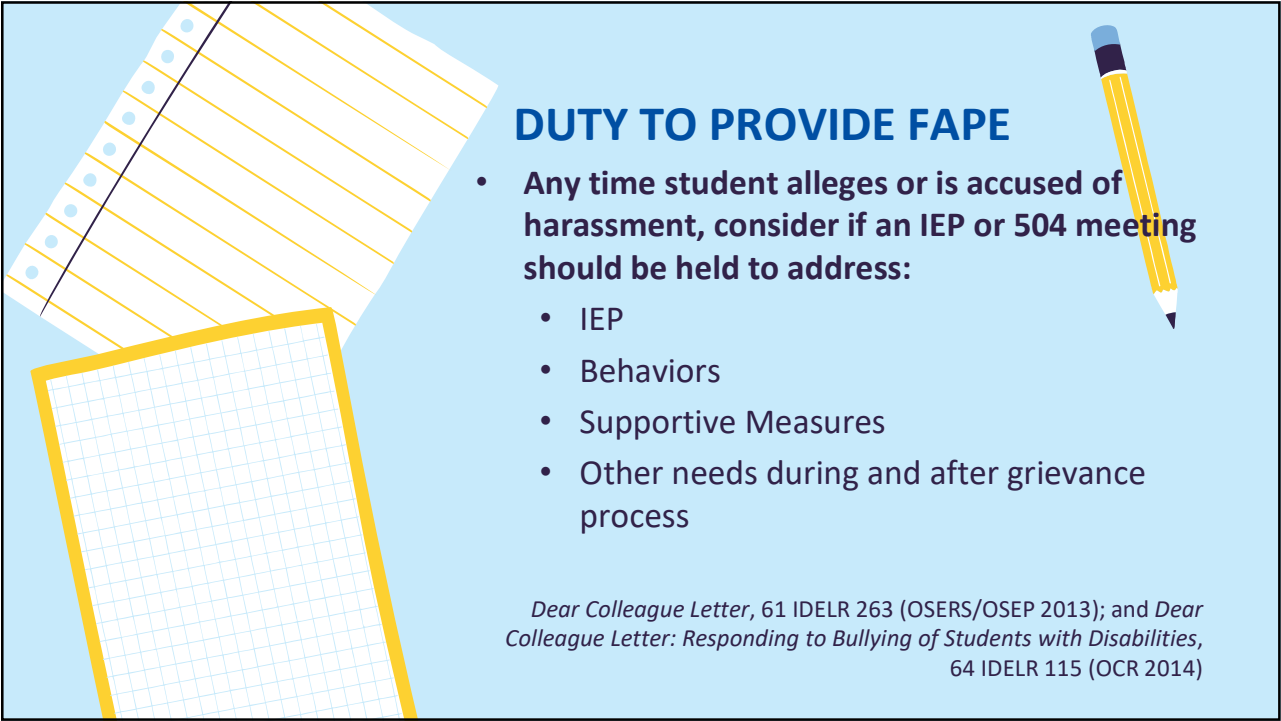
190



## SPECIAL EDUCATION CONSIDERATIONS

- **Must provide FAPE to students with disabilities regardless of the Title IX process**
- **Includes Complainants and Respondents**
- **Accessibility considerations for students, parents, advisors with disabilities**

191

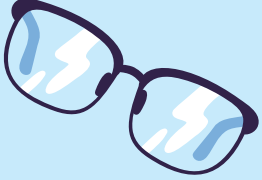



## DUTY TO PROVIDE FAPE

- **Any time student alleges or is accused of harassment, consider if an IEP or 504 meeting should be held to address:**
  - IEP
  - Behaviors
  - Supportive Measures
  - Other needs during and after grievance process


*Dear Colleague Letter, 61 IDELR 263 (OSERS/OSEP 2013); and Dear Colleague Letter: Responding to Bullying of Students with Disabilities, 64 IDELR 115 (OCR 2014)*

192

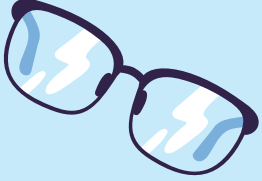



## SPECIAL EDUCATION CONSIDERATIONS

- **Special Education, Title IX, and student discipline staff members will need to be coordinated and consistent to ensure compliance with all laws at issue**
- **This may require more IEP Committee meetings than normal**
  - Scheduling may be difficult




193

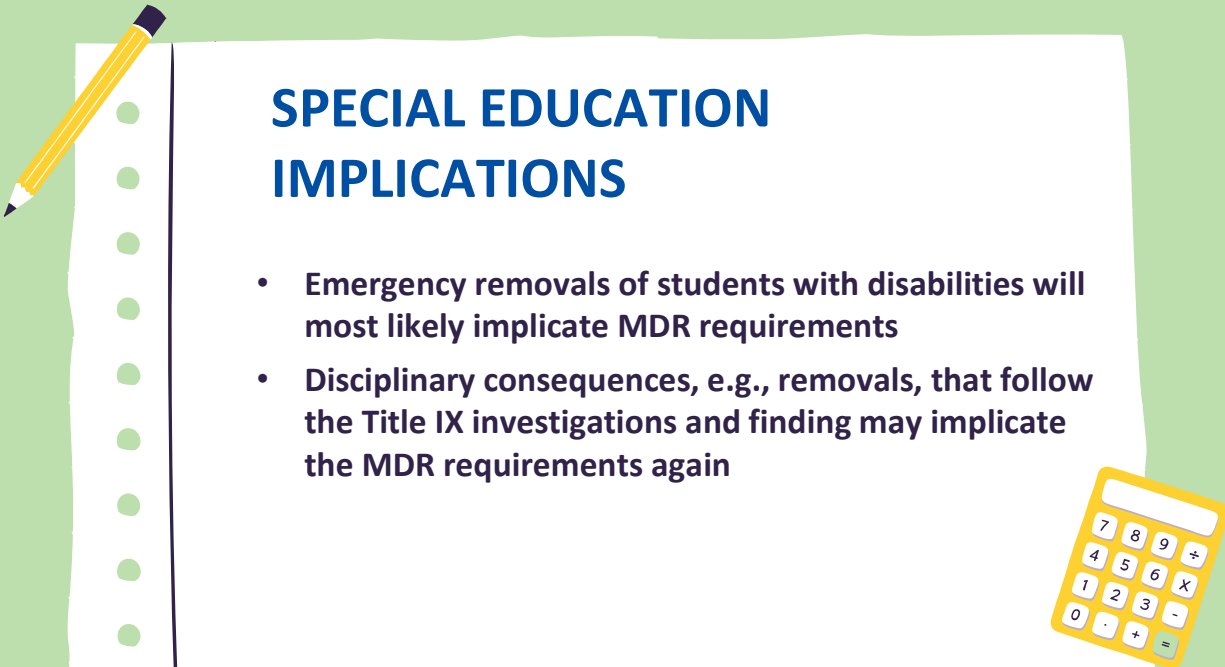


## SPECIAL EDUCATION CONSIDERATIONS

- **New Title IX grievance process is onerous**
- **Not rare for it to take 60, 90, 120 days to complete**
- **Requirements under the IDEA may make them take even longer**
- **Supportive measures, including changed schedules, may be in place for months before the process is concluded**



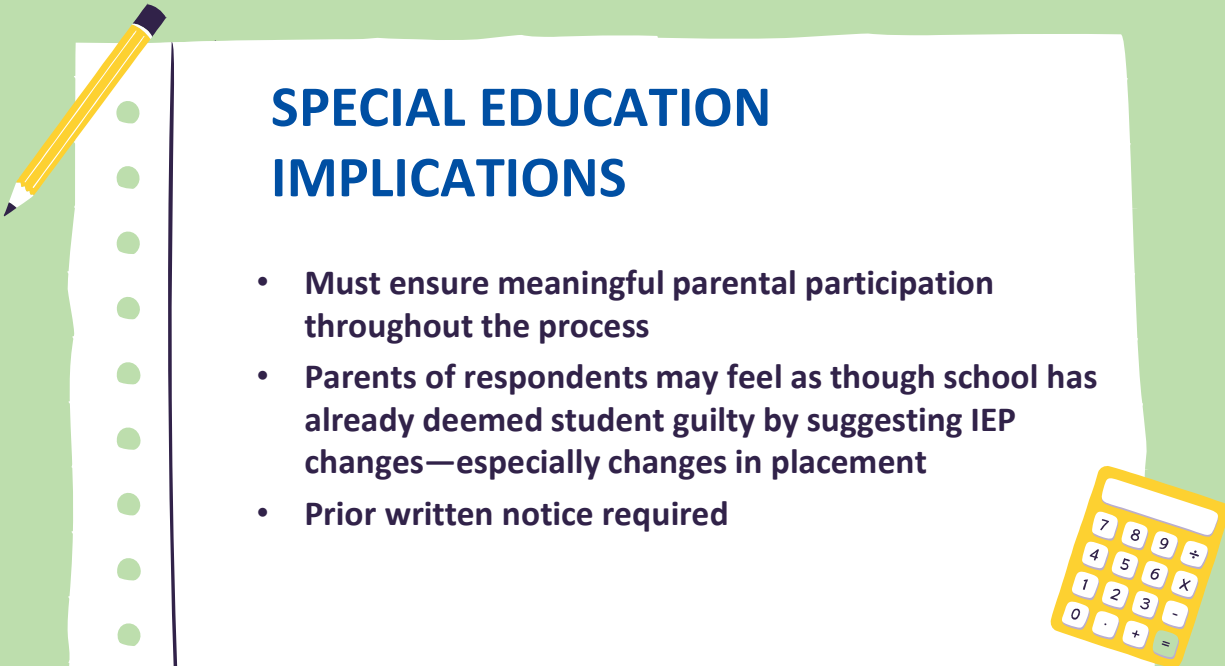
194



## **SPECIAL EDUCATION IMPLICATIONS**

- Emergency removals of students with disabilities will most likely implicate MDR requirements
- Disciplinary consequences, e.g., removals, that follow the Title IX investigations and finding may implicate the MDR requirements again

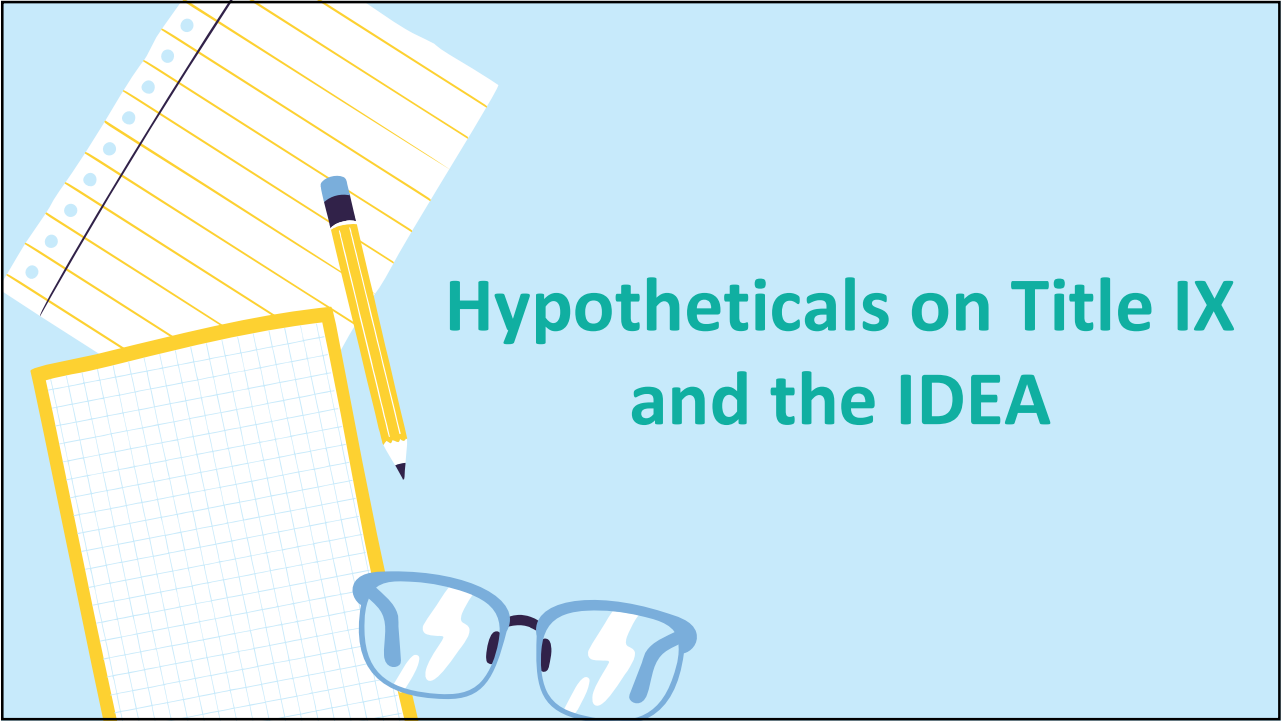
195



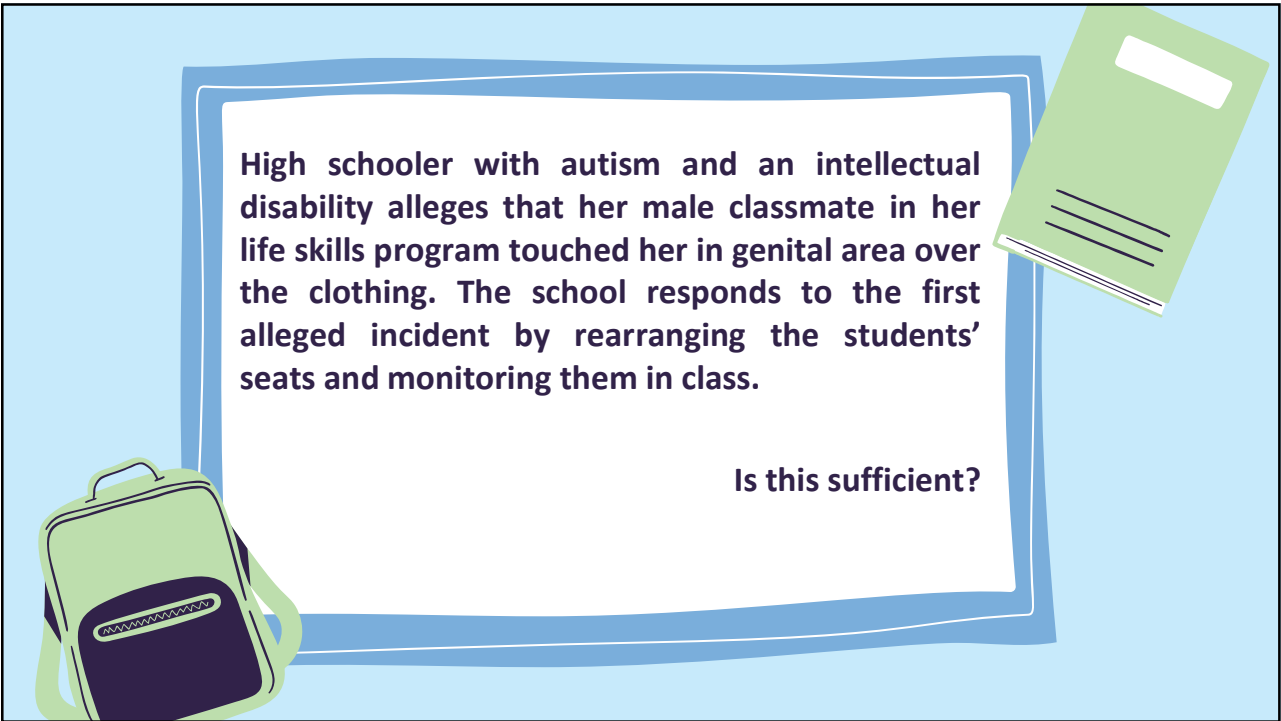
## **SPECIAL EDUCATION IMPLICATIONS**

- Must ensure meaningful parental participation throughout the process
- Parents of respondents may feel as though school has already deemed student guilty by suggesting IEP changes—especially changes in placement
- Prior written notice required

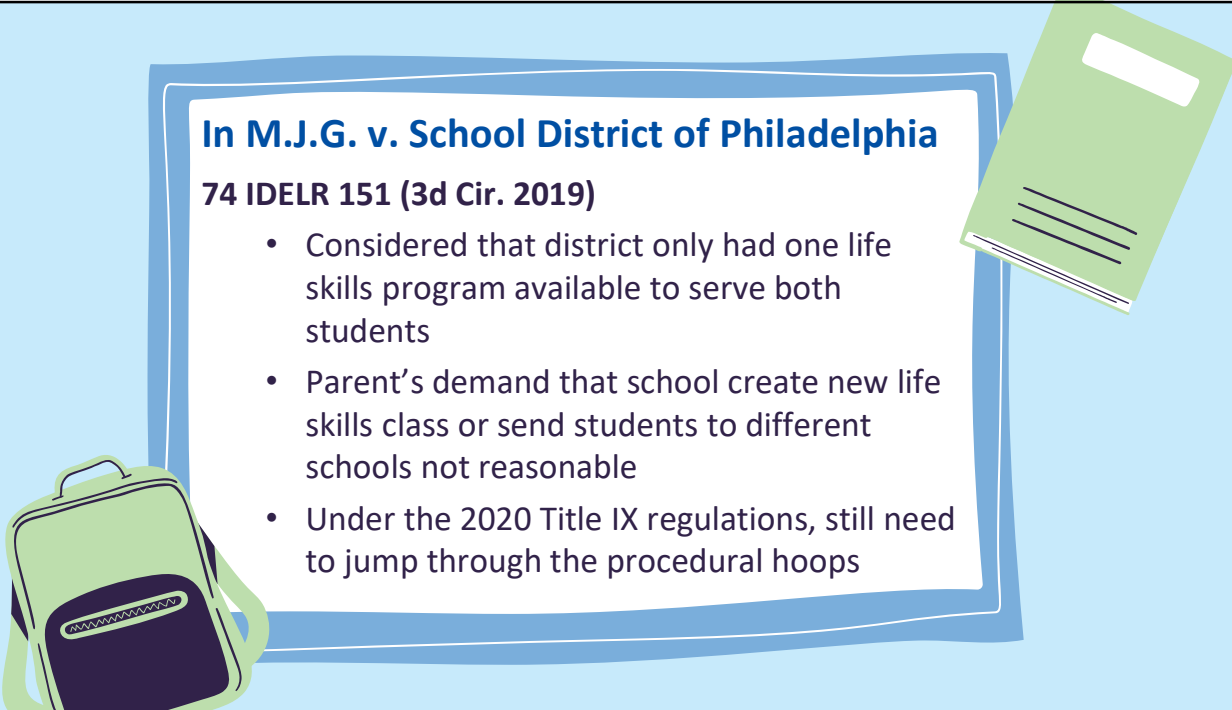
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197



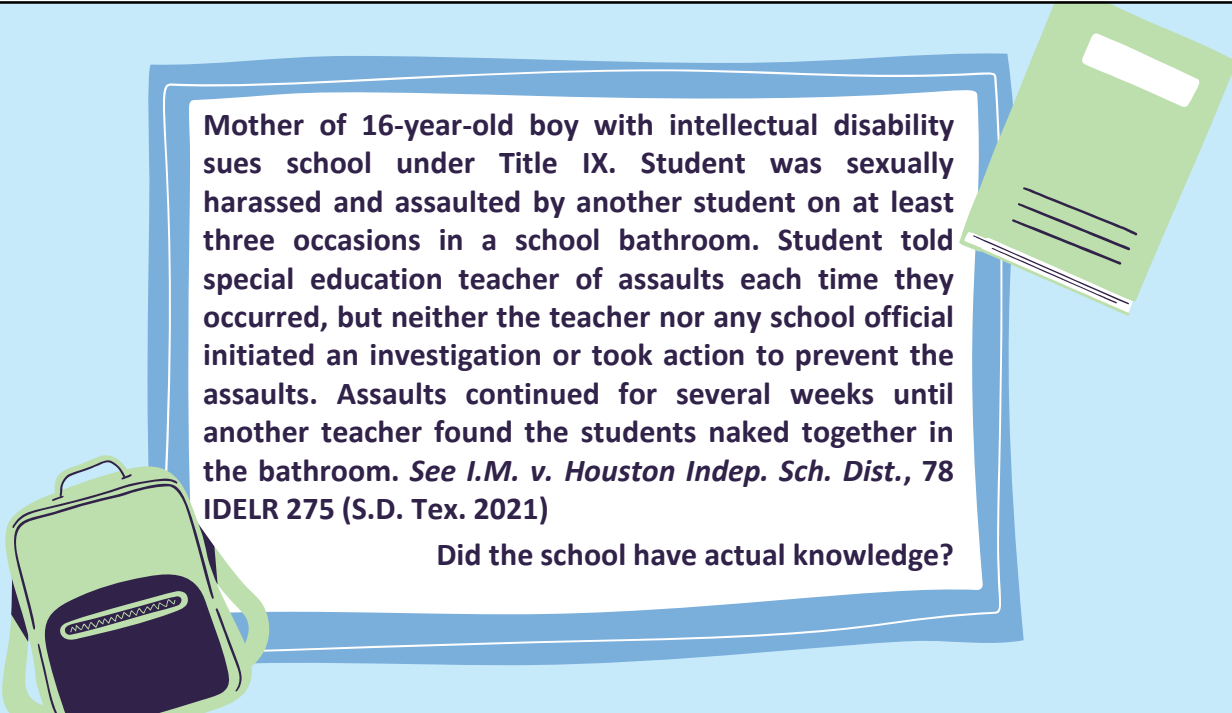
198



**In M.J.G. v. School District of Philadelphia**  
**74 IDELR 151 (3d Cir. 2019)**

- Considered that district only had one life skills program available to serve both students
- Parent’s demand that school create new life skills class or send students to different schools not reasonable
- Under the 2020 Title IX regulations, still need to jump through the procedural hoops

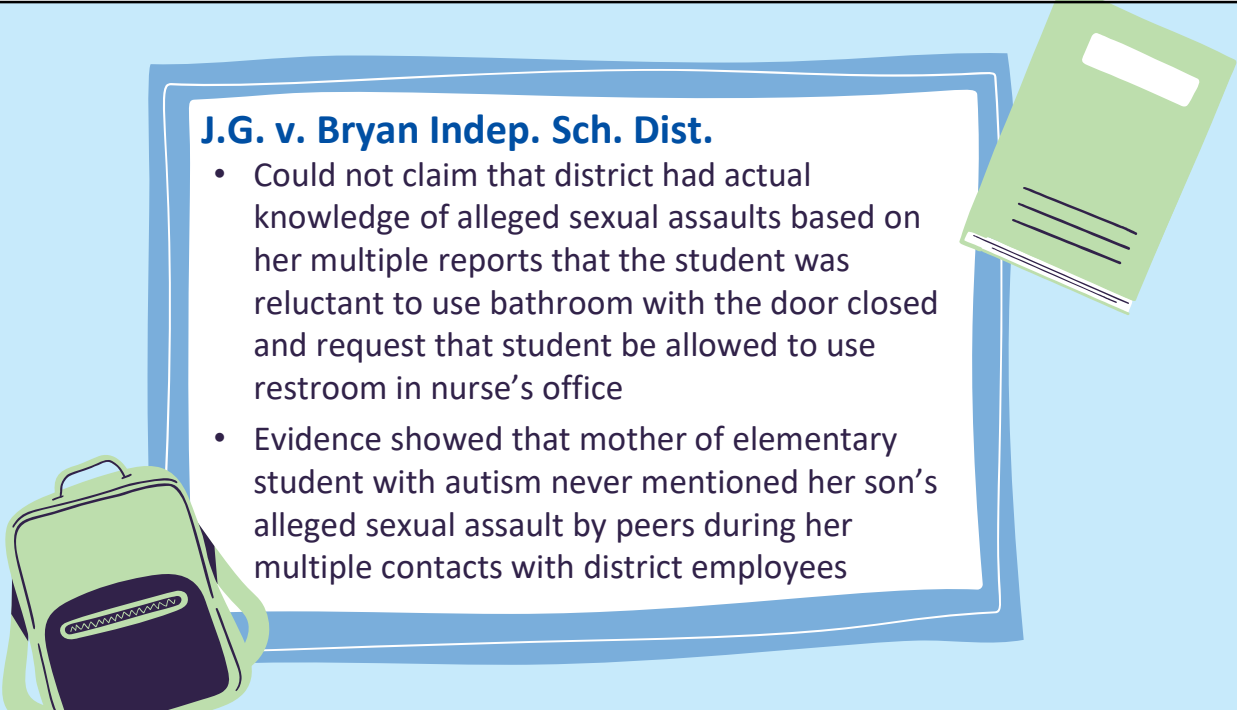
199



**Mother of 16-year-old boy with intellectual disability sues school under Title IX. Student was sexually harassed and assaulted by another student on at least three occasions in a school bathroom. Student told special education teacher of assaults each time they occurred, but neither the teacher nor any school official initiated an investigation or took action to prevent the assaults. Assaults continued for several weeks until another teacher found the students naked together in the bathroom. See *I.M. v. Houston Indep. Sch. Dist.*, 78 IDELR 275 (S.D. Tex. 2021)**

**Did the school have actual knowledge?**

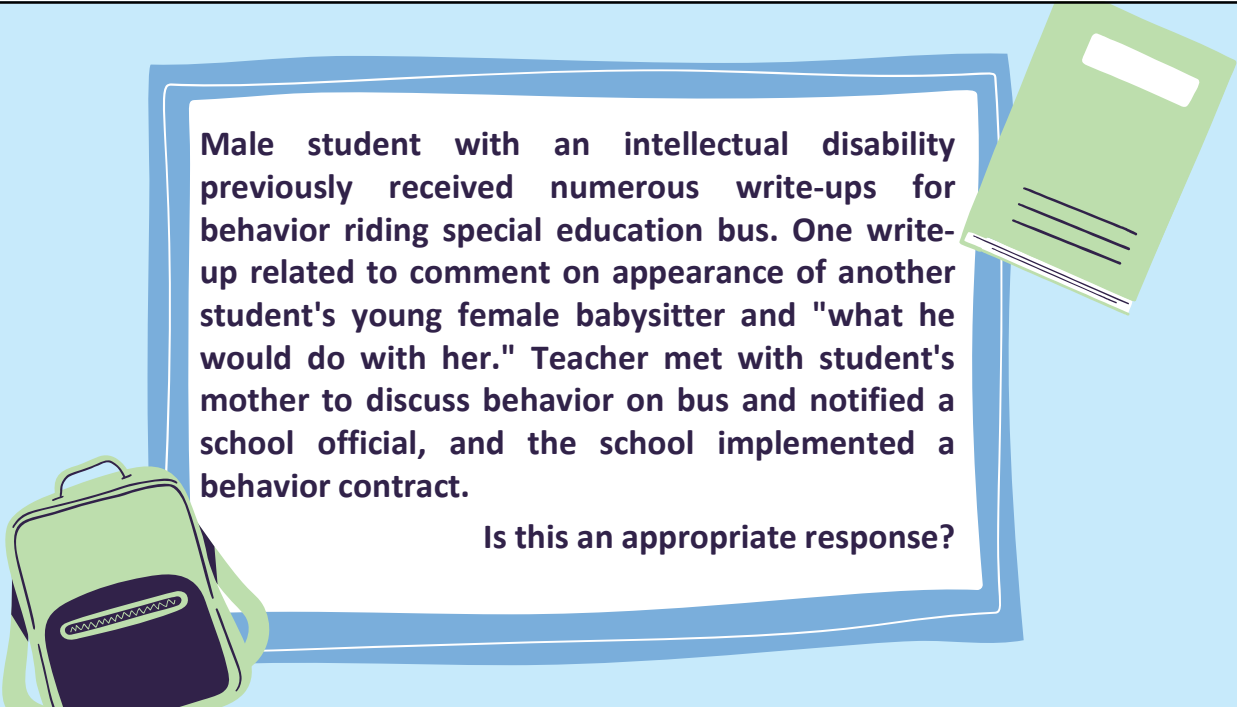
200



**J.G. v. Bryan Indep. Sch. Dist.**

- Could not claim that district had actual knowledge of alleged sexual assaults based on her multiple reports that the student was reluctant to use bathroom with the door closed and request that student be allowed to use restroom in nurse's office
- Evidence showed that mother of elementary student with autism never mentioned her son's alleged sexual assault by peers during her multiple contacts with district employees

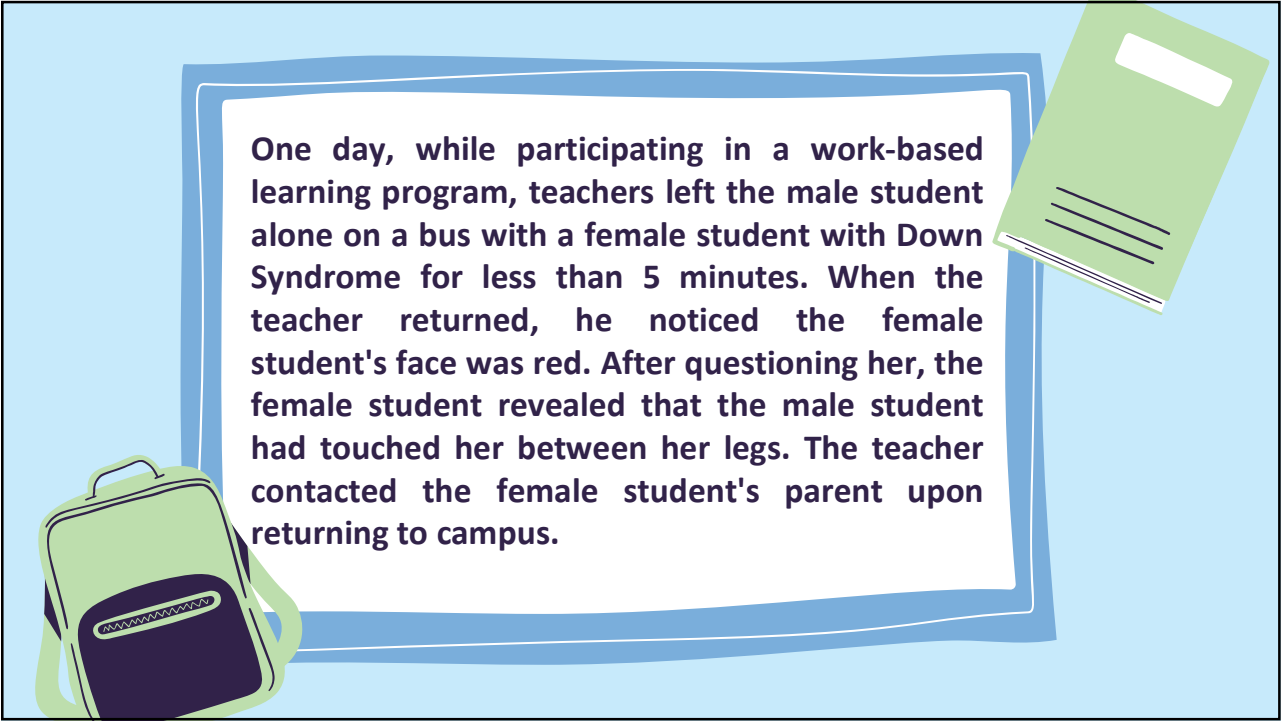
201



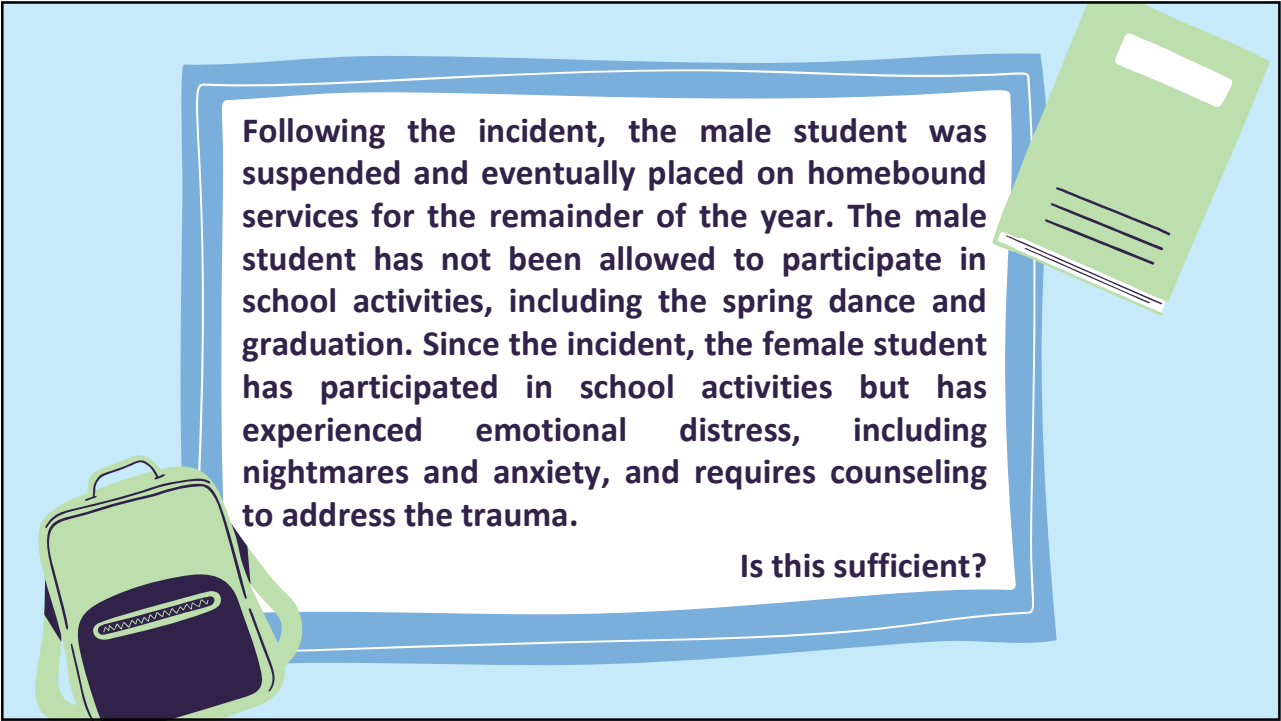
Male student with an intellectual disability previously received numerous write-ups for behavior riding special education bus. One write-up related to comment on appearance of another student's young female babysitter and "what he would do with her." Teacher met with student's mother to discuss behavior on bus and notified a school official, and the school implemented a behavior contract.

Is this an appropriate response?

202

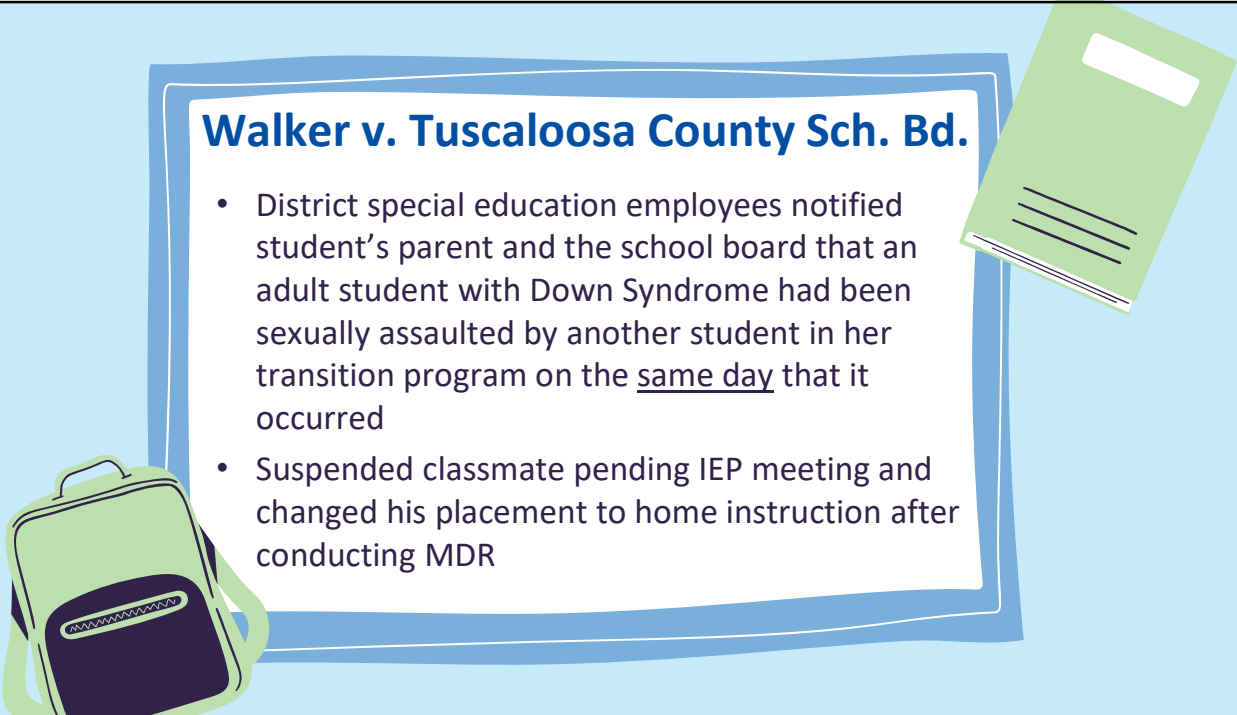


203



204

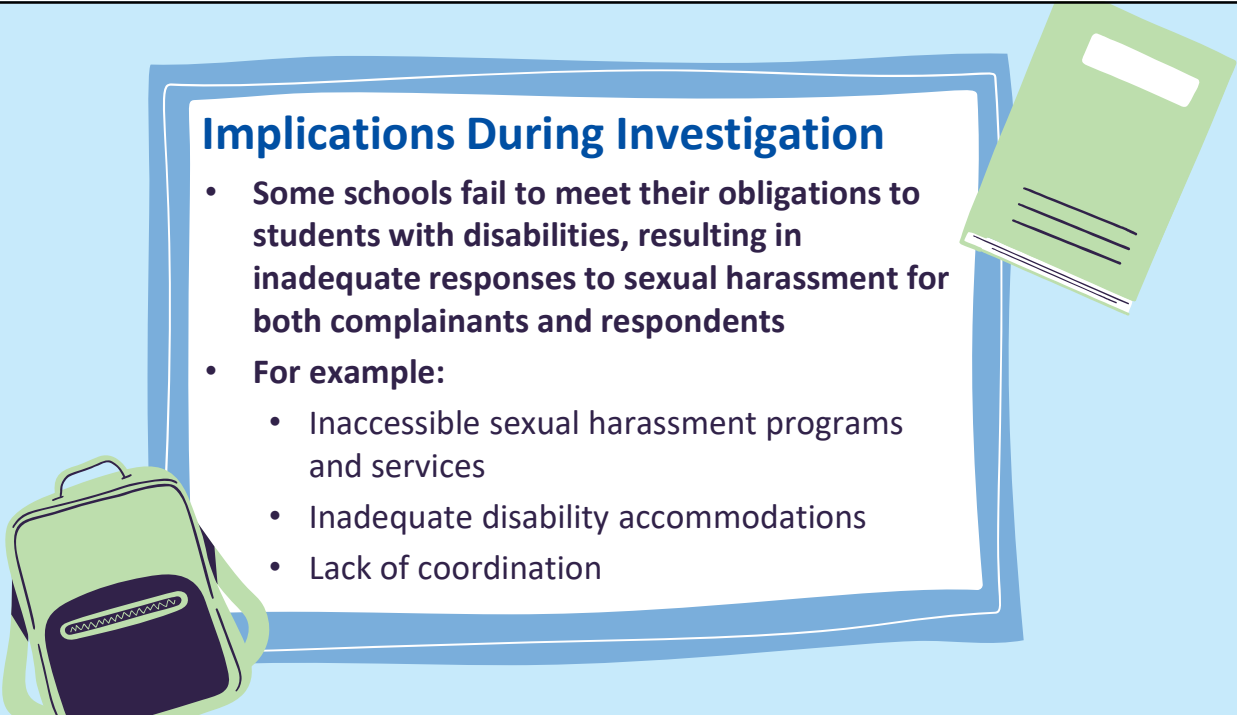




### Walker v. Tuscaloosa County Sch. Bd.

- District special education employees notified student's parent and the school board that an adult student with Down Syndrome had been sexually assaulted by another student in her transition program on the same day that it occurred
- Suspended classmate pending IEP meeting and changed his placement to home instruction after conducting MDR

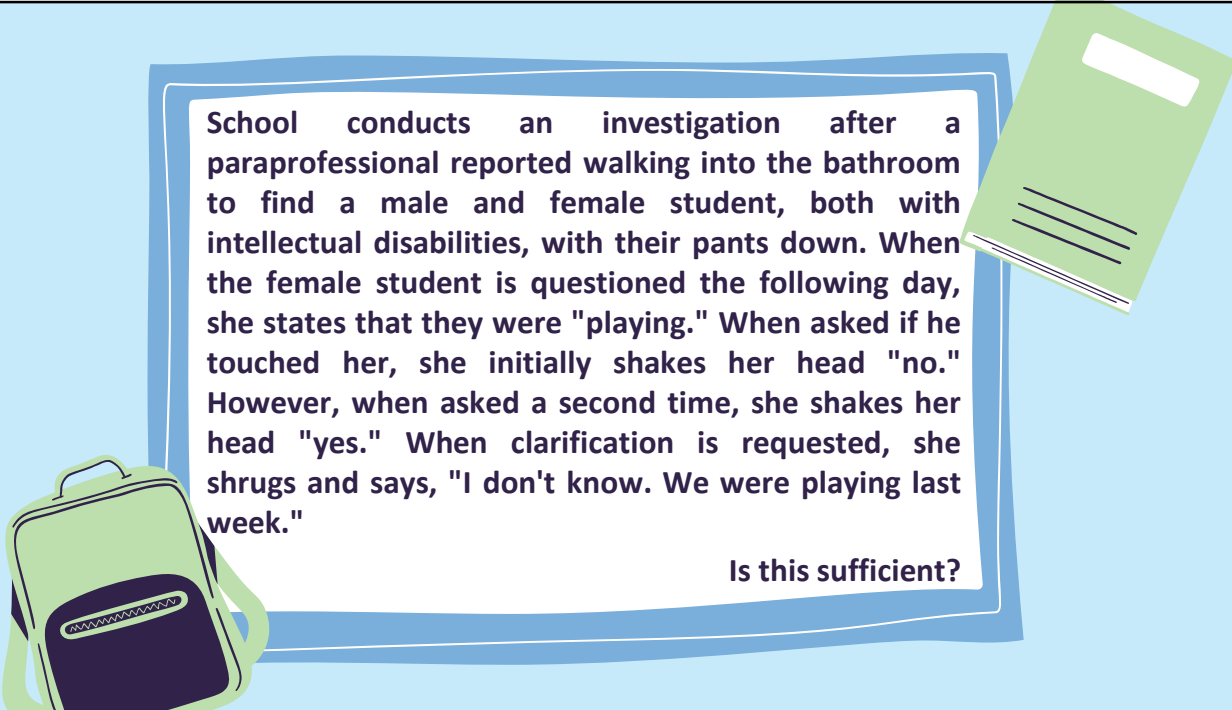
205



### Implications During Investigation

- **Some schools fail to meet their obligations to students with disabilities, resulting in inadequate responses to sexual harassment for both complainants and respondents**
- **For example:**
  - Inaccessible sexual harassment programs and services
  - Inadequate disability accommodations
  - Lack of coordination

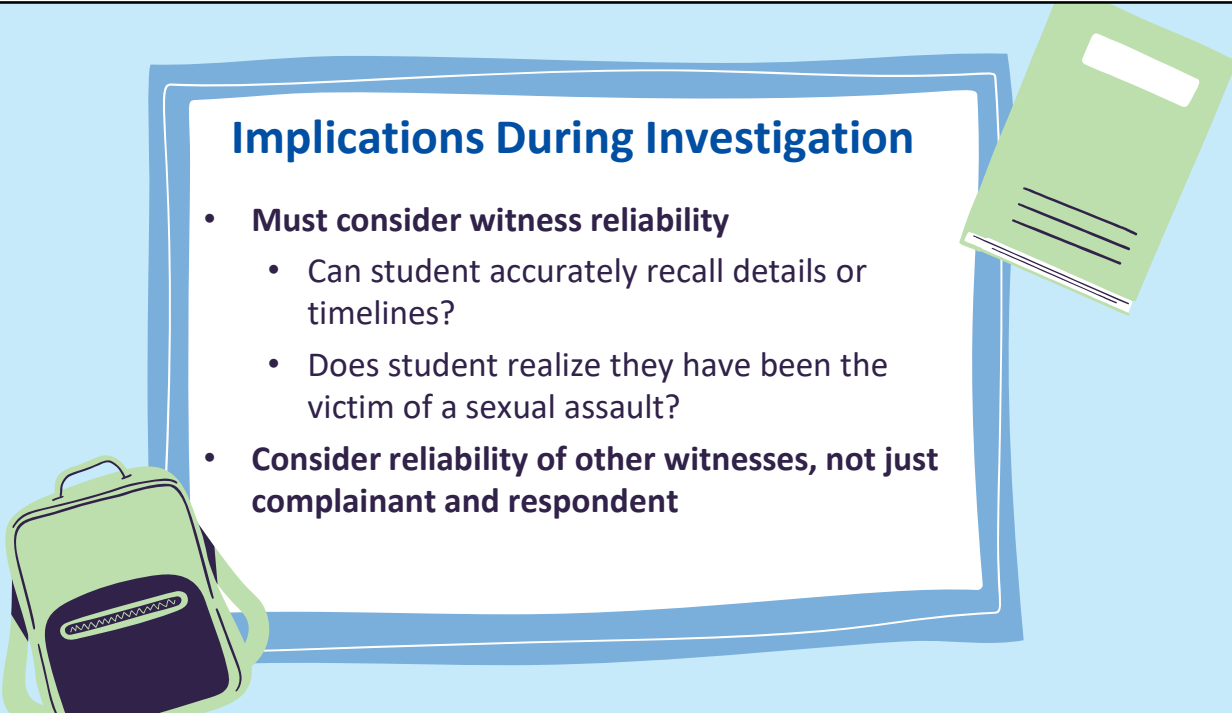
206



School conducts an investigation after a paraprofessional reported walking into the bathroom to find a male and female student, both with intellectual disabilities, with their pants down. When the female student is questioned the following day, she states that they were "playing." When asked if he touched her, she initially shakes her head "no." However, when asked a second time, she shakes her head "yes." When clarification is requested, she shrugs and says, "I don't know. We were playing last week."

Is this sufficient?

207



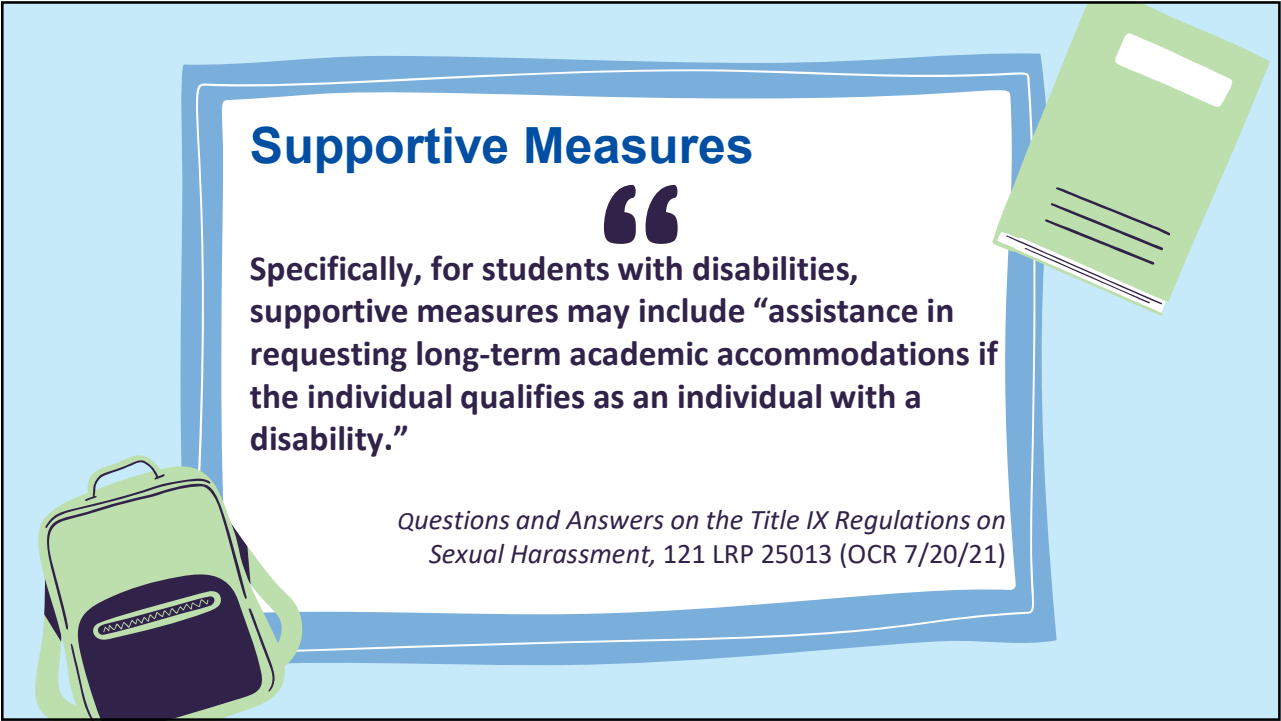
### Implications During Investigation

- **Must consider witness reliability**
  - Can student accurately recall details or timelines?
  - Does student realize they have been the victim of a sexual assault?
- **Consider reliability of other witnesses, not just complainant and respondent**



208



209





210



## Supportive Measures

- Title IX Coordinator is responsible
- Title IX Coordinator should immediately consult with IEP or Section 504 team once allegations arise if *either* complainant or respondent is a student with a disability
- IEP or Section 504 team will consult with Title IX Coordinator to determine what supportive measures will be provided to a student with a disability



211



## Supportive Measures

- Title IX Coordinator may put temporary immediate supportive measures (for less than 10 school days) before IEP or Section 504 meeting
- IEP or Section 504 team should invite Title IX Coordinator to attend and participate in any meeting where supportive measures will be discussed



212



## Supportive Measures

- **Pay attention to whether supportive measures:**
  - Constitute a change in placement
  - Trigger a disciplinary removal analysis
  - Require a manifestation determination
  - Require changes to the student’s special education and related services
  - Require revisions or modifications of the IEP or Section 504 plan


213



## Case Study


Jane is a ninth-grade student who receives special education services in the general education setting with inclusion support during ELA and Math. She has reported that John, a student in her Math class, inappropriately touched her in class on multiple occasions during group work. Due to scheduling issues, it is not possible to separate the students into separate Math classes. Therefore, the Title IX Coordinator proposes that Jane receive Math support in the resource classroom while the investigation is pending to ensure her safety.

214




### Case Study

- **Change in placement occurs when the proposed change substantially or materially affects the composition of the educational program and services provided to the child**  
*Letter to Flores, 211 IDELR 233 (OSEP 1980)*
- **This is a change in placement**




215




### Case Study

- **Convene IEP team – with Title IX Coordinator present – to determine if change in placement is necessary to provide Jane FAPE**
- **May consider removing John instead (if not a special education student)**




216




### Case Study

John, the class president and star athlete, has recently learned of the accusations against him. He is incredibly distraught and expresses to the Title IX Coordinator that the investigation has exacerbated his generalized anxiety disorder. The Title IX Coordinator suggests providing counseling services to John as a supportive measure. The Title IX Coordinator discusses this with his Math teacher who mentions that John has a Section 504 plan to address his generalized anxiety disorder.

Are counseling services an appropriate supportive measure for John?




217




### Case Study

- **Convene Section 504 team – with Title IX Coordinator present – to determine:**
  - Change in placement?
  - If so, necessary to provide FAPE?




218




## Case Study

Let's say the inappropriate touching did not happen in Math class but in their shared elective class, Photography II. Jane reported the incidents the second week of the semester before many grades had been collected. In response, the Title IX Coordinator proposes to move John to a Digital Media class during the same period.

Does his Section 504 team need to meet to discuss this supportive measure?




219



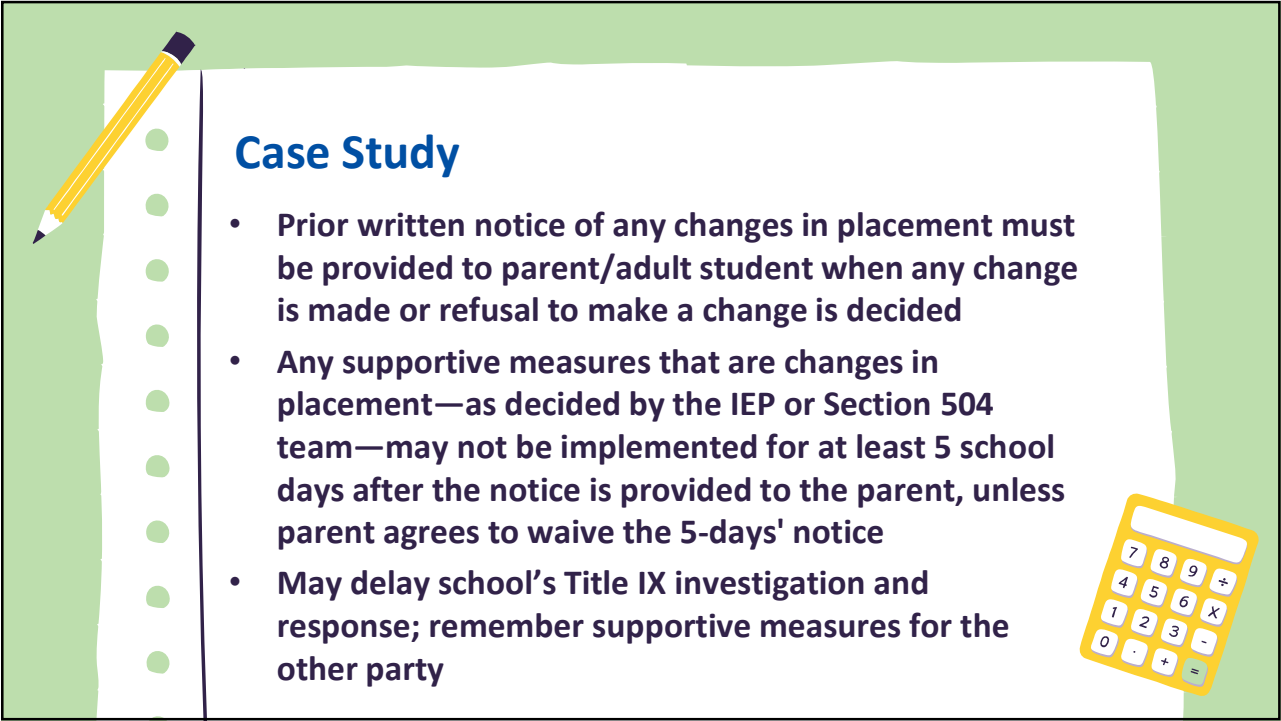
## Case Study

- Changing a general education elective may not be a change in the student's schedule of services
- The same goes for changing a student to another section of the same class
- But it never hurts to meet
- Could violate Title IX



220



A graphic with a light green background. On the left, a yellow pencil with a black eraser and a black band is positioned diagonally. To its right is a white notepad with a vertical line on the left and a series of green dots. In the center, the text 'Case Study' is written in blue. To the right of the text is a bulleted list. In the bottom right corner, there is a yellow calculator with a white display and black buttons.

**Case Study**

- Prior written notice of any changes in placement must be provided to parent/adult student when any change is made or refusal to make a change is decided
- Any supportive measures that are changes in placement—as decided by the IEP or Section 504 team—may not be implemented for at least 5 school days after the notice is provided to the parent, unless parent agrees to waive the 5-days' notice
- May delay school’s Title IX investigation and response; remember supportive measures for the other party

221

A graphic with a dark blue background. In the center, a white notepad with a yellow border and a light blue grid pattern contains the text 'Emergency Removals & the IDEA' in teal. To the left of the notepad is a white document with blue dots. To the right is a green notebook and a blue calculator with a white display and black buttons.

**Emergency Removals & the IDEA**

222

## Emergency Removals

- Under Title IX, a school may remove a student who is alleged to have engaged in sexual harassment from school on an emergency basis as long as it:
  - (1) Undertakes an individualized safety and risk analysis;
  - (2) Determines that an immediate threat to the physical health or safety of any student or individual arising from the allegations justifies removal; and
  - (3) Provides the student with notice and an opportunity to challenge the decision immediately following the removal

34 CFR 106.44(c)

223

## Special Education Implications

- Title IX's emergency removal provisions do not affect the right of a student with a disability to disciplinary protections under the IDEA, Section 504, or the ADA
- 2020 Title IX regulations: "Nothing in [34 CFR] 106.22(c) prevents a [district] from involving a student's IEP team before making an emergency removal decision."

224

## Special Education Implications

- Any disciplinary removal of a student with a disability for more than 10 school days requires manifestation determination review (“MDR”)
  - Includes emergency removals in accordance with Title IX

34 CFR 106.44(c)

225

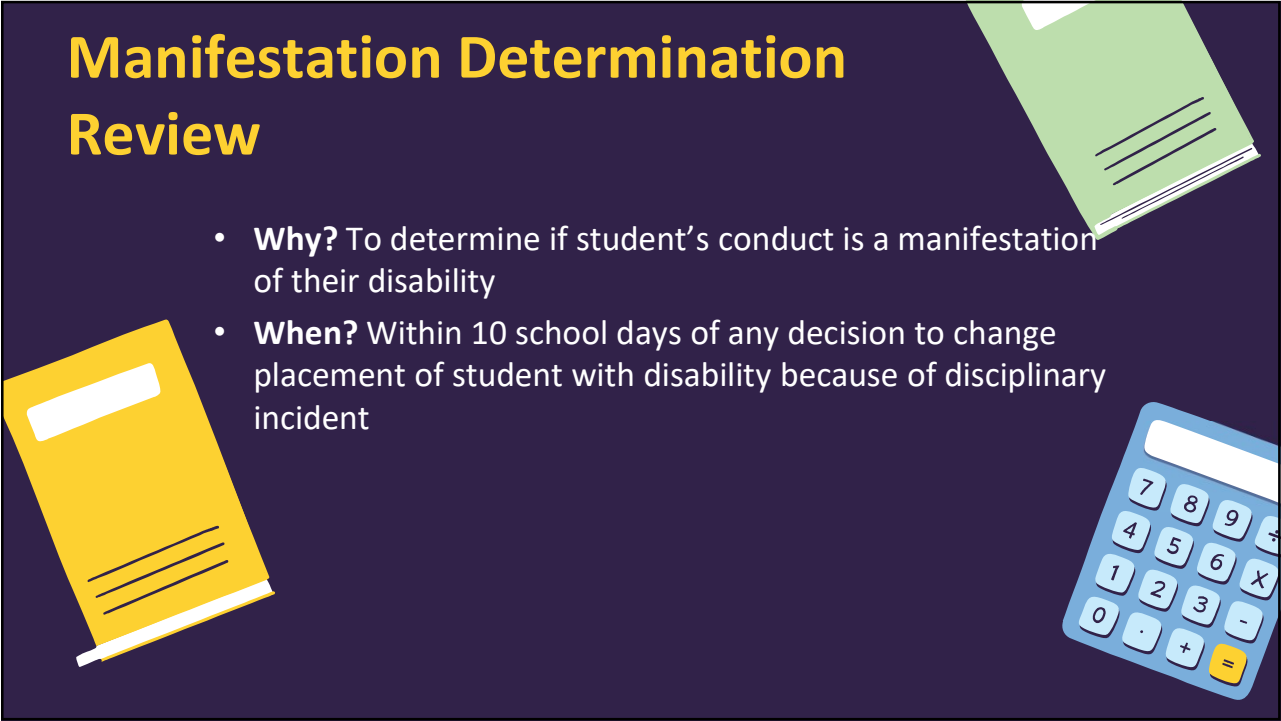
## Manifestation Determination Review

- **Who?** IEP team
- **What?**
  - Review all relevant information, including child’s IEP, any teacher observations, and any relevant information provided by parents/student
  - Consider relationship between student’s disability and the behavior subject to disciplinary action (i.e., sexual harassment)

226

# Manifestation Determination Review

- **Why?** To determine if student’s conduct is a manifestation of their disability
- **When?** Within 10 school days of any decision to change placement of student with disability because of disciplinary incident

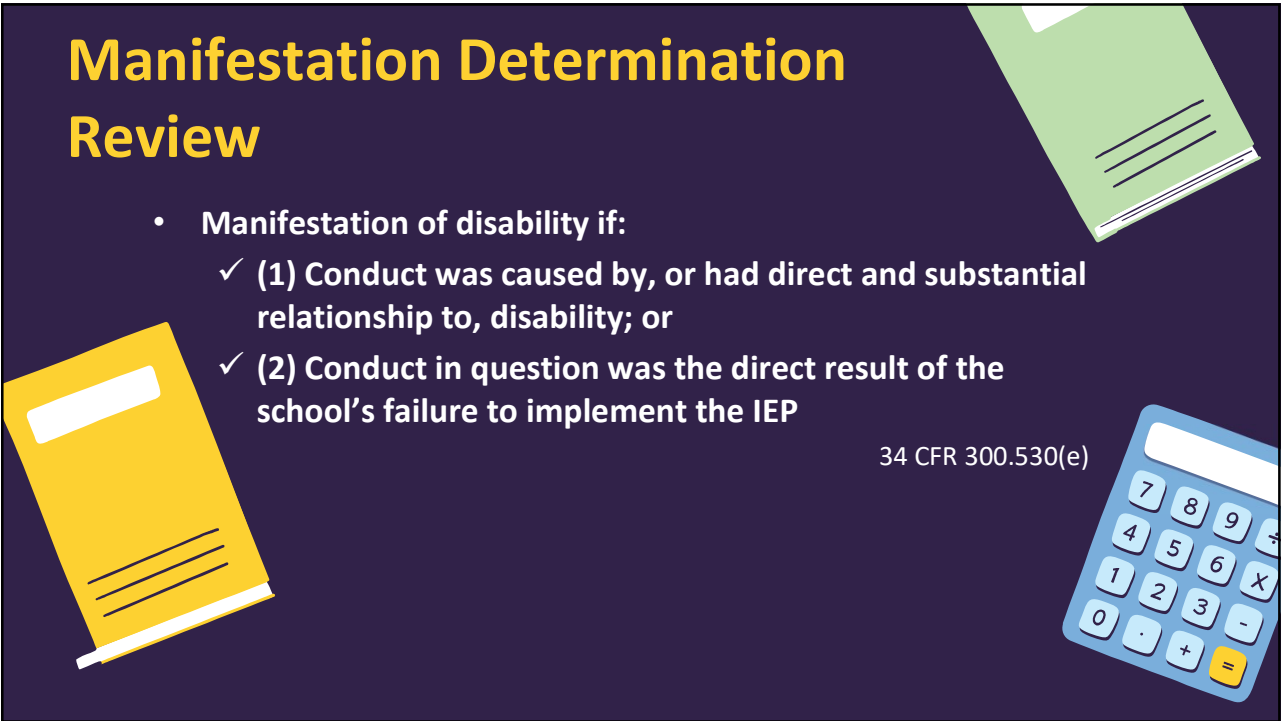


227

# Manifestation Determination Review

- **Manifestation of disability if:**
  - ✓ (1) Conduct was caused by, or had direct and substantial relationship to, disability; or
  - ✓ (2) Conduct in question was the direct result of the school’s failure to implement the IEP

34 CFR 300.530(e)



228

## Behavior Is NOT a Manifestation

- IEP team should work with family and Title IX Coordinator to determine interim alternative educational setting
- Obligation to provide FAPE remains in any setting
- Must continue to work towards and make progress on IEP goals

229

## Behavior Is NOT a Manifestation

- Additional considerations:
  - Need to perform functional behavioral assessment?
  - Need to create or revise behavior intervention plan?
  - Any other assessments needed?

230

## Behavior IS a Manifestation

- Title IX does not require a school to remove a student where the school has determined that the threat posed by the student, arising from allegations, is a manifestation of a disability

231

## Behavior IS a Manifestation

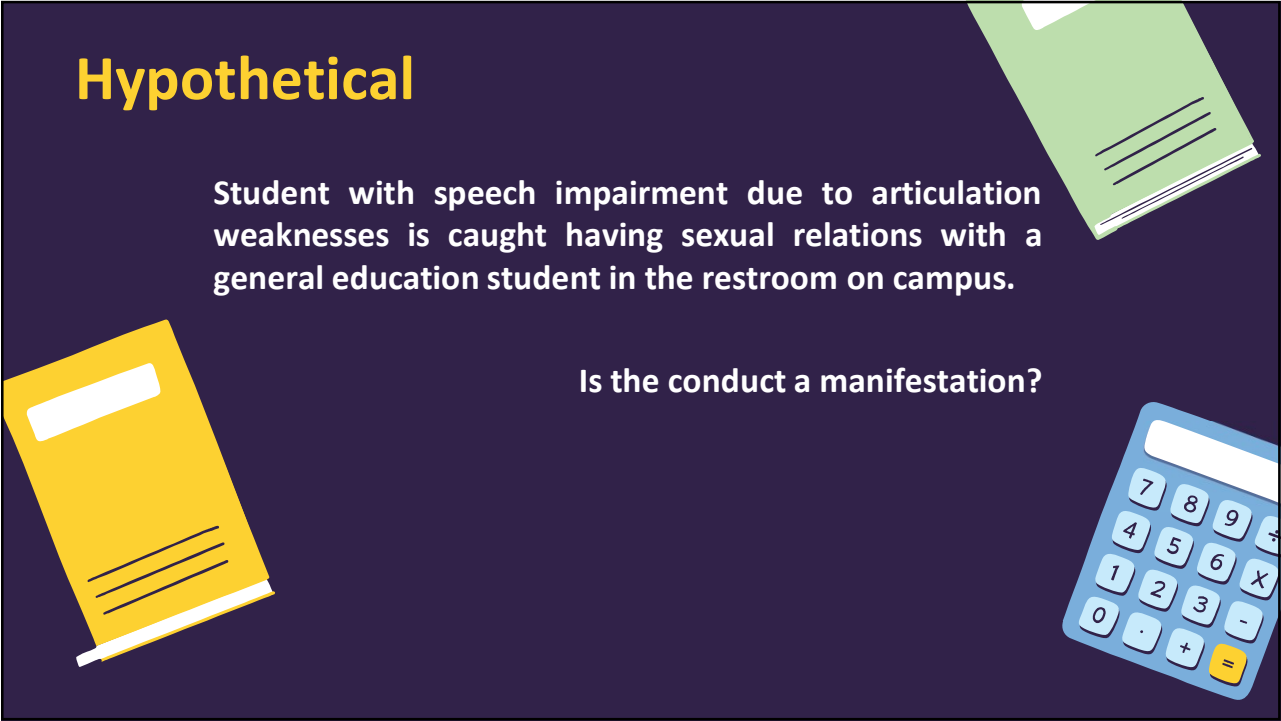
- Student must be returned to prior placement unless parent agrees to change in placement
- IEP team should work with Title IX Coordinator to determine other supportive measures to protect both parties during investigation
- Ensure additional supportive measures are not change in placement

232

# Hypothetical

Student with speech impairment due to articulation weaknesses is caught having sexual relations with a general education student in the restroom on campus.

Is the conduct a manifestation?

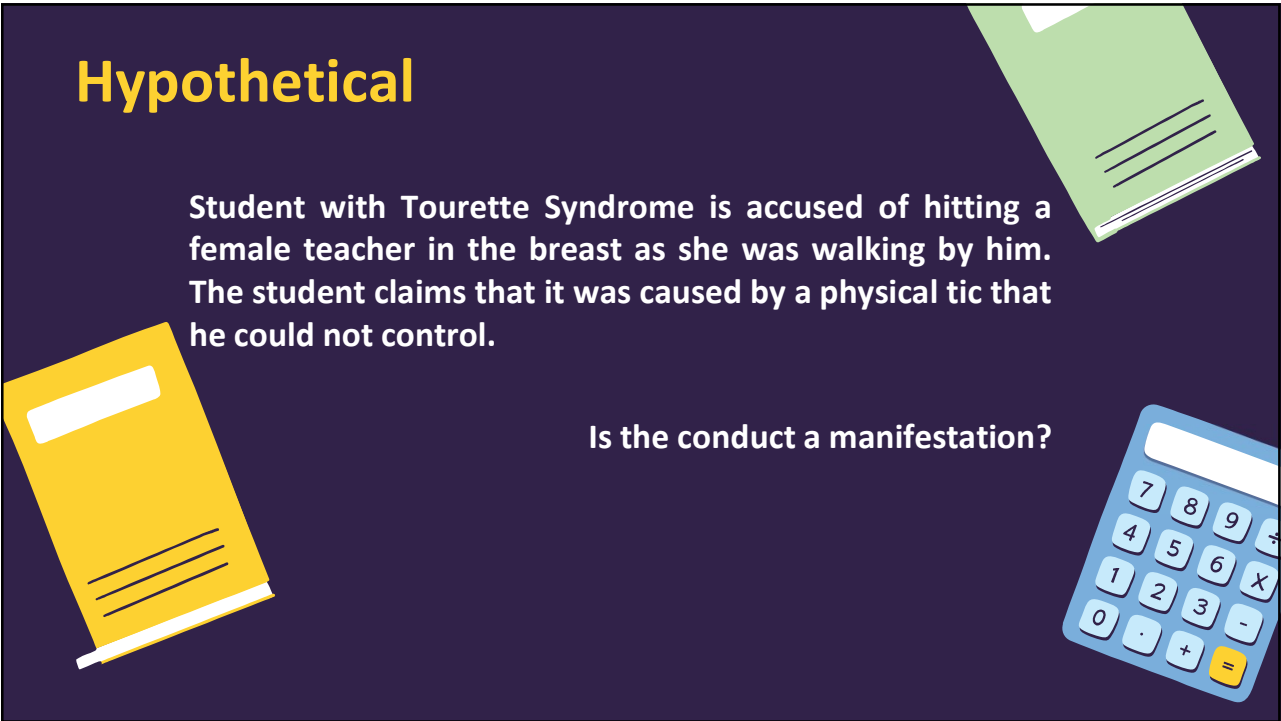


233

# Hypothetical

Student with Tourette Syndrome is accused of hitting a female teacher in the breast as she was walking by him. The student claims that it was caused by a physical tic that he could not control.

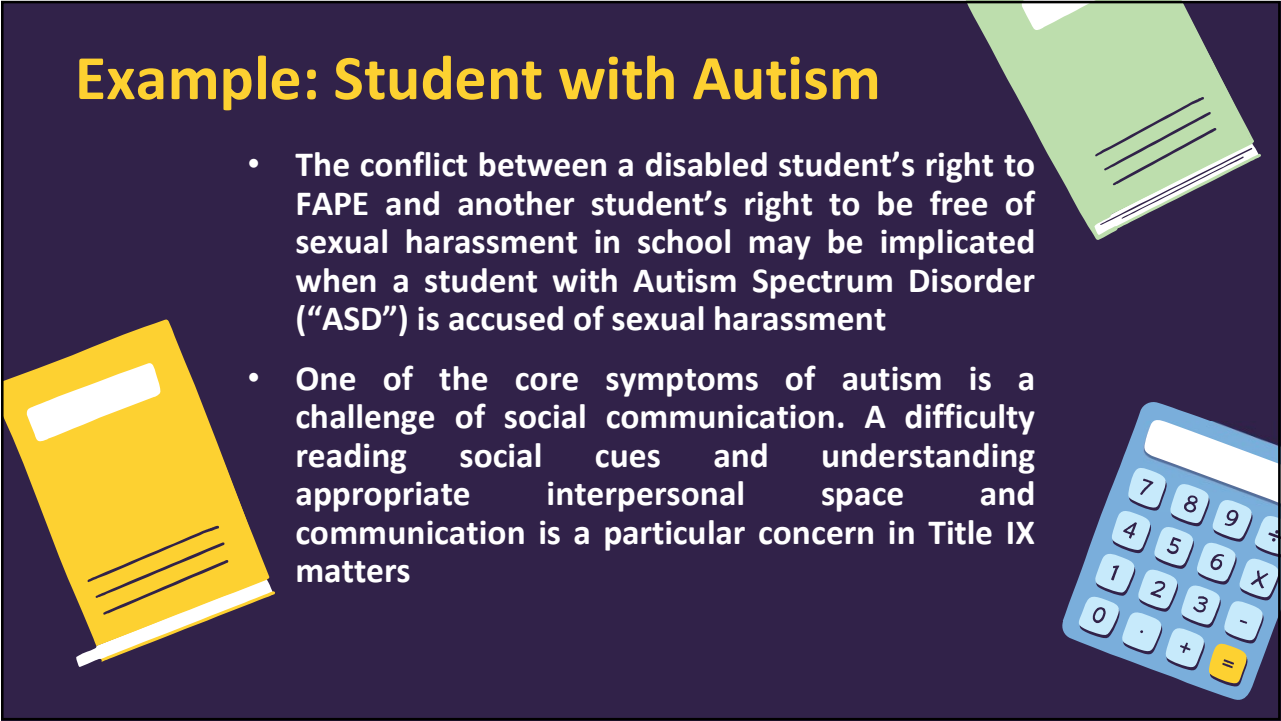
Is the conduct a manifestation?



234

## Example: Student with Autism

- The conflict between a disabled student’s right to FAPE and another student’s right to be free of sexual harassment in school may be implicated when a student with Autism Spectrum Disorder (“ASD”) is accused of sexual harassment
- One of the core symptoms of autism is a challenge of social communication. A difficulty reading social cues and understanding appropriate interpersonal space and communication is a particular concern in Title IX matters

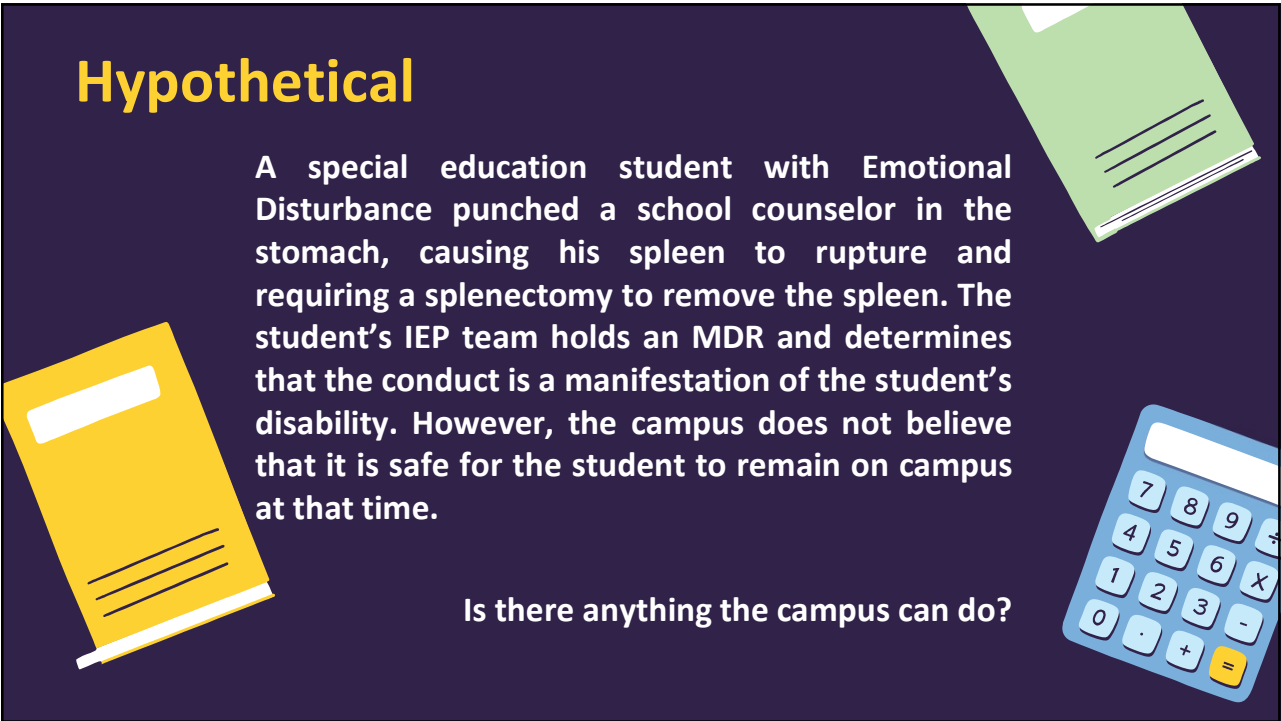


235

## Hypothetical

A special education student with Emotional Disturbance punched a school counselor in the stomach, causing his spleen to rupture and requiring a splenectomy to remove the spleen. The student’s IEP team holds an MDR and determines that the conduct is a manifestation of the student’s disability. However, the campus does not believe that it is safe for the student to remain on campus at that time.

Is there anything the campus can do?

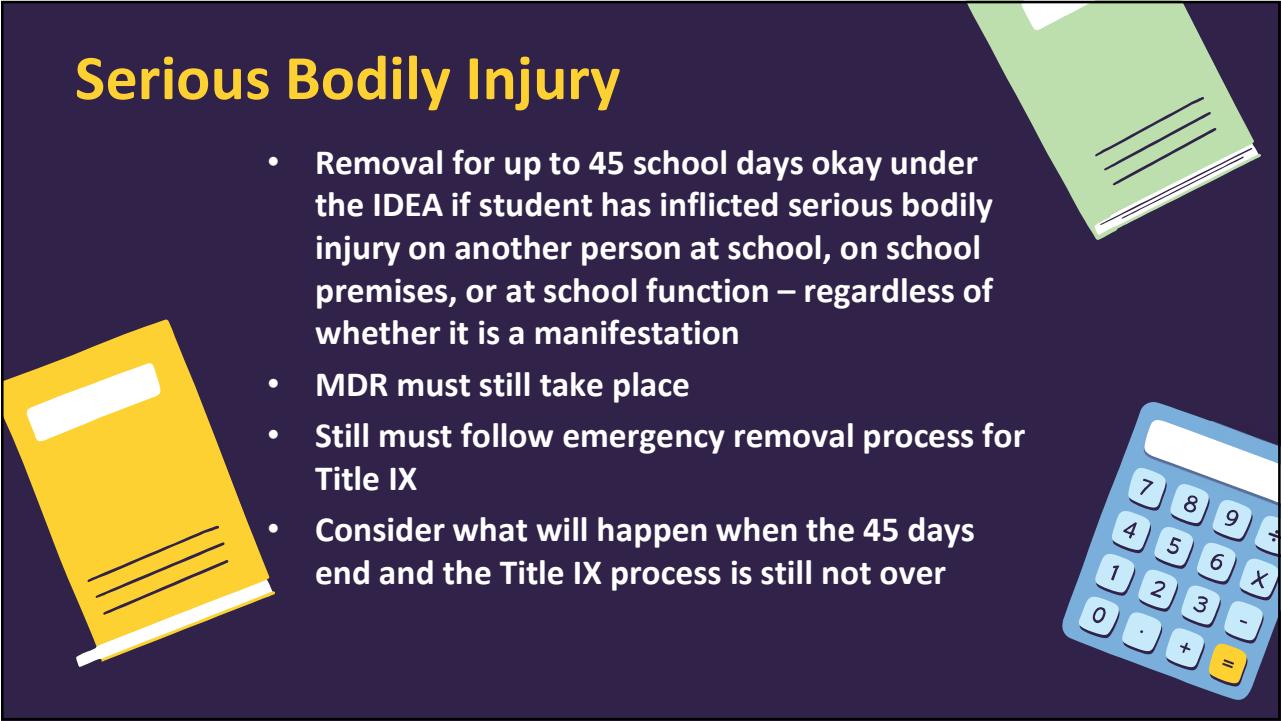


236



## Serious Bodily Injury

- Removal for up to 45 school days okay under the IDEA if student has inflicted serious bodily injury on another person at school, on school premises, or at school function – regardless of whether it is a manifestation
- MDR must still take place
- Still must follow emergency removal process for Title IX
- Consider what will happen when the 45 days end and the Title IX process is still not over



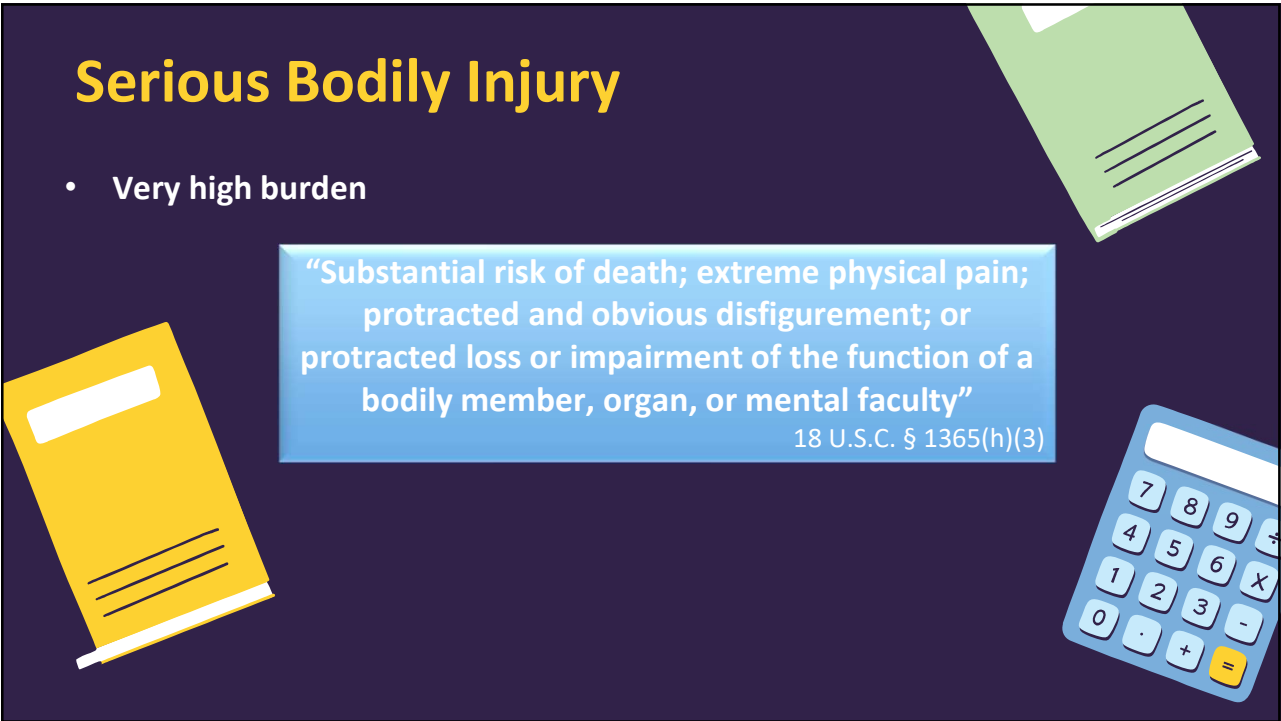
237

## Serious Bodily Injury

- Very high burden

“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”

18 U.S.C. § 1365(h)(3)



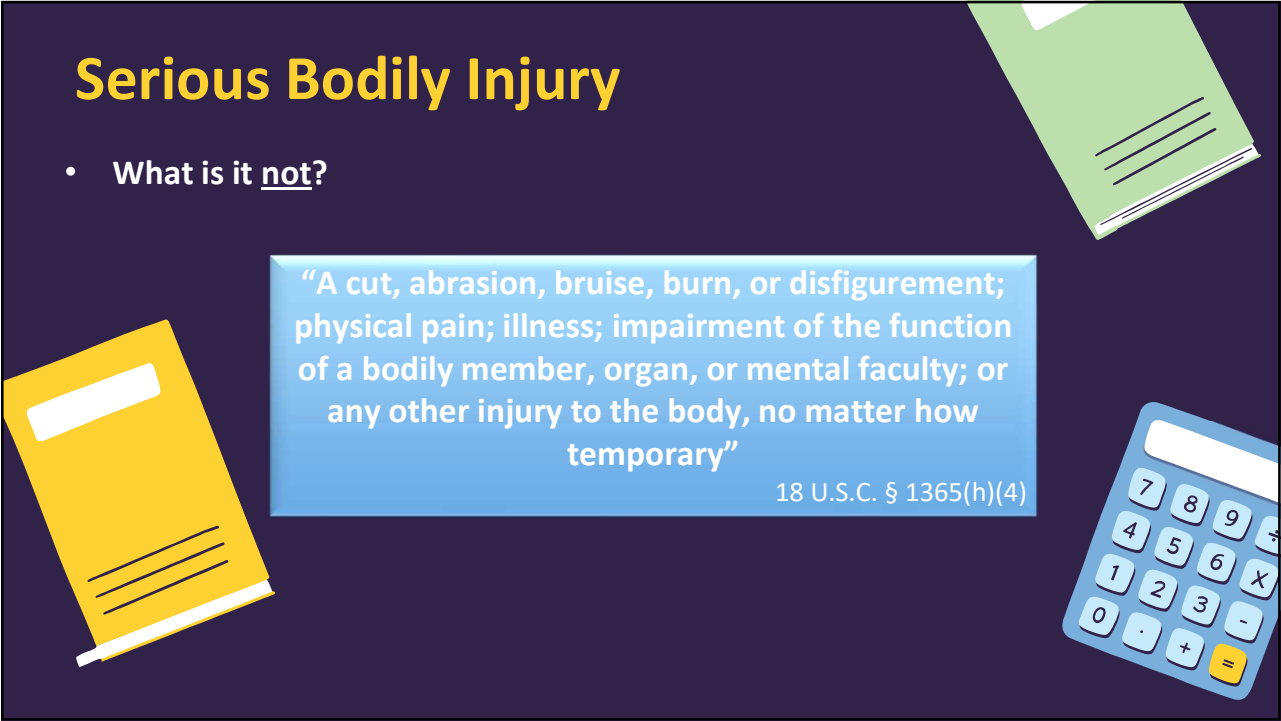
238

# Serious Bodily Injury

- What is it not?

“A cut, abrasion, bruise, burn, or disfigurement; physical pain; illness; impairment of the function of a bodily member, organ, or mental faculty; or any other injury to the body, no matter how temporary”

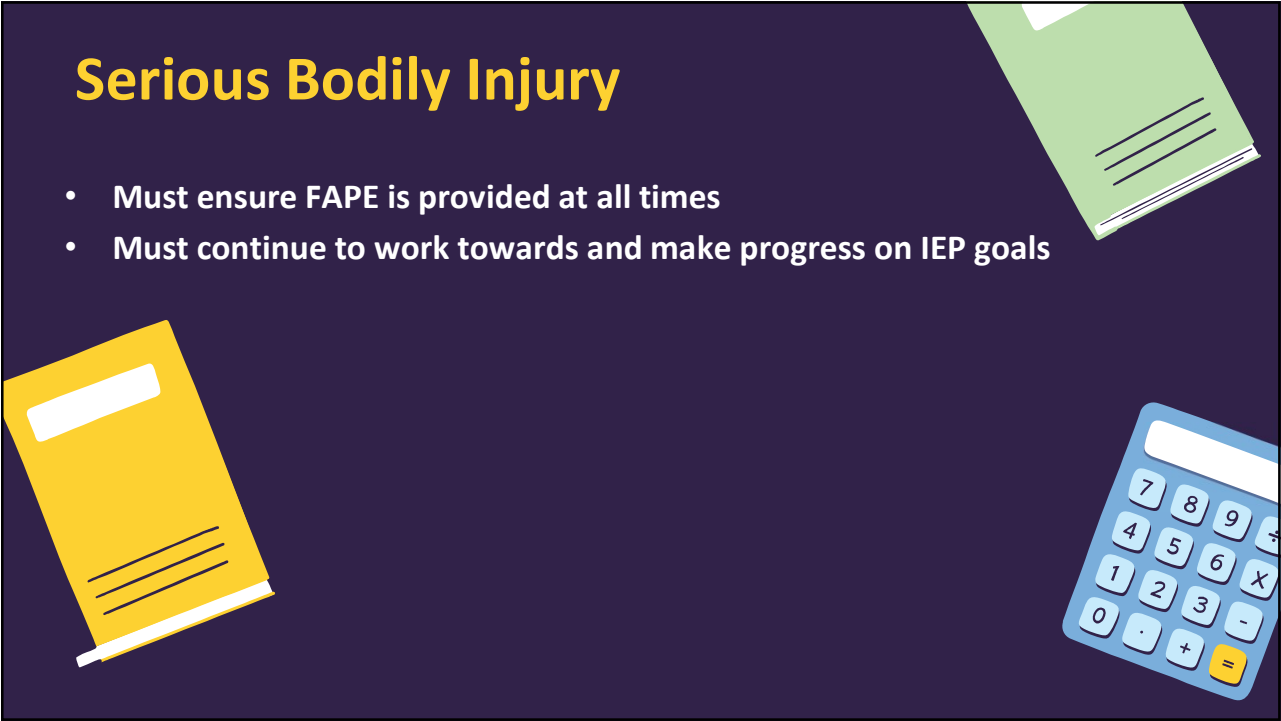
18 U.S.C. § 1365(h)(4)



239

# Serious Bodily Injury

- Must ensure FAPE is provided at all times
- Must continue to work towards and make progress on IEP goals



240

## Hypothetical

Student with a learning disability follows peer into the bathroom, engages in a fight, and breaks the student's nose, causing the peer to have to have surgery on her nose. The school held an MDR and determined that the student's conduct was not a manifestation of her learning disability. The campus removed the student to an IAES for 45 days due to serious bodily injury.

Was the removal appropriate?

241

## Serious Bodily Injury

- *Pocono Mountain School District, 109 LRP 26432 (SEA PA 12/12/08)*
  - Although student's behavior was injurious, frightening, and intimidating, a broken nose does not fit within IDEA's definition of "serious bodily injury"
  - Returned student to initial placement

242

## Hypothetical

Student with a learning disability struck his paraprofessional, causing her to sustain a concussion. Her medical provider advised her that she needed to stay home from work for a week to allow her brain to heal and to avoid bleeding and possibly permanent brain damage. Her medical records show that, during the week following the injury, she experienced severe headaches, nausea and light sensitivity, lack of energy, difficulty focusing, and impaired thought processes.

Was the removal appropriate?

243

## Serious Bodily Injury

- *In re: Student with a Disability, 115 LRP 44815 (SEA NH 12/17/14)*
  - Student who struck paraprofessional inflicted serious bodily injury where the paraprofessional suffered a severe concussion, including symptoms such as intense headaches, nausea, light sensitivity, lack of energy, difficulty focusing, and impaired thought process
  - Also considered the fact that doctor ordered her to stay home to avoid possible permanent brain damage

244

## Hypothetical

Student with autism who had behavior goals, a history of attacking others, and a paraprofessional to address these behaviors, attacked a principal, causing her to fall, and continued to kick her in the stomach and knee. The principal suffered a migraine and extreme pain in her arm, knee, left foot, and a burning in her back. She also suffered a strain on her right and left shoulder tendons, upper right and left arms, and lower back, and her knee was swollen and bruised. She was given muscle relaxers and pain medication and had to participate in physical therapy.

Was the removal appropriate?

245

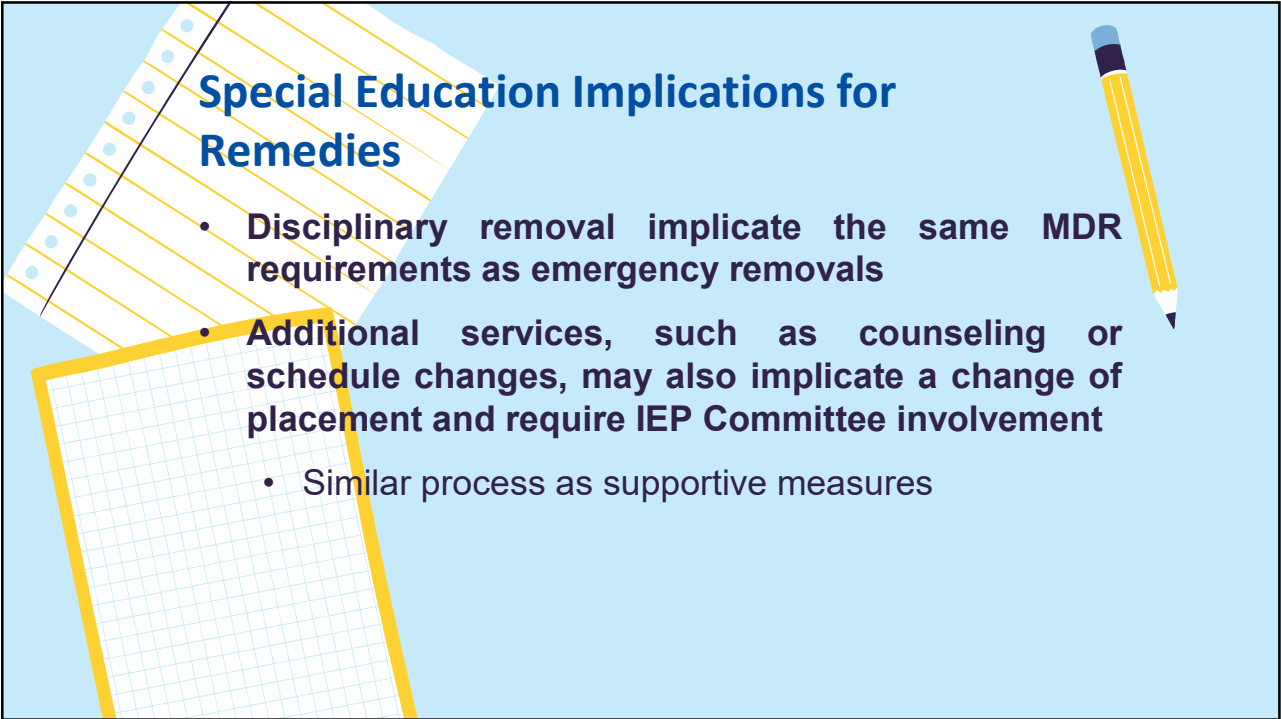
## Serious Bodily Injury

- ***Southfield Public Schools, 118 LRP 11554 (SEA NH 2/7/2018)***
  - Finding "serious bodily injury" where administrator had extreme pain from the bite, punches, and kicks inflicted by the student, was prescribed muscle relaxers and pain relievers, sustained injuries limiting her range of motion in her arms and the use of her leg, and required physical therapy to regain full use of her arms

246



247



248




249

An illustration of a notepad with a yellow cover and a grid pattern, a yellow pencil with a black eraser and a black band, and a pair of blue-rimmed glasses with white lenses. The background is light blue.

### Accessibility During the Title IX Process

- Increased procedural requirements leave room for more accessibility issues
- Ensure students with disabilities have access to Title IX grievance process – including all evidence, reports, and written determinations
- IEP team must consider barriers to access

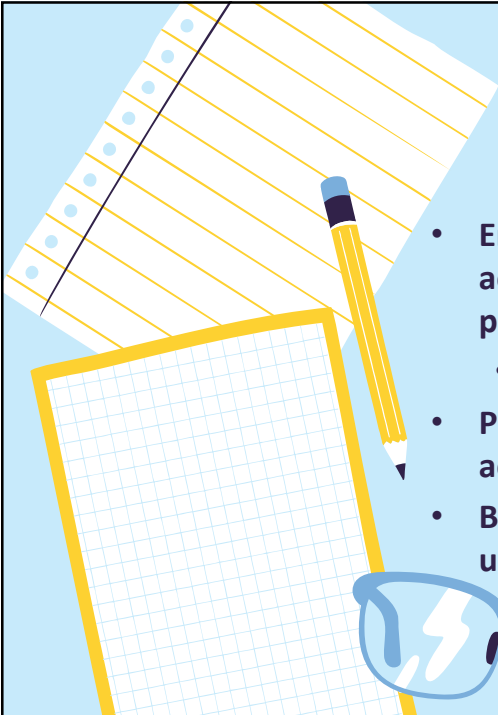
250



## Accessibility During the Title IX Process

- **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**
  - Will the school 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?

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## Accessibility During the Title IX Process

- **Ensure school resources relating to Title IX are easily accessible to student with disabilities and their parents**
  - And employees!
- **Promptly consider requests for disability accommodations**
- **But... accommodations may not give student an unfair advantage**

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## Accessibility During the Title IX Process

- Title IX Coordinator should consult with school's special education staff to identify appropriate accommodations
- Document accommodations considered and rationales for each decisions
- Notify student in writing of decision

253



## Accessibility During the Title IX Process

- Timelines may require delay to sort out these issues
- 10-day response period should not begin until *all* documents and reports are fully accessible by the student with a disability and the parent

254

[illegible]

255

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