

Special Education and Title IX: What Could Possibly Go Wrong?



Heather R. Rutland



EICHELBAUM WARDELL
HANSEN POWELL & MUNOZ, P.C.

Why Do We Care About Sped and Title IX?

- There is a body of federal law specific to the intersection of these concepts, and plaintiff attorneys working hard to change standards.
- Claims under IDEA, Section 504 and Title IX are being increasingly brought together from the same set of facts.
- One event or series of events can serve as the basis for multiple causes of action so you must be prepared to defend your district on several fronts, and within different departments.
- A SpEd Due Process complaint is no longer the worst-case scenario...FAPE violations come in all shapes and sizes and price tags.



FAPE

- Failure to provide FAPE underlies all IDEA and § 504 claims:
 - Free
 - Appropriate
 - Public
 - Education
- FAPE is demonstrated by a student making appropriately ambitious progress (academically, behaviorally, socially)
 - Plaintiffs maintain that all harassed students will fail/have failed to make progress due to the T9 violations
 - That failure to make progress violates a student's right to FAPE
 - They argue therefore, that harassment/assault is a *de facto* finding of FAPE violation.



Title IX

- Elements of a Title IX Claim:
 - Plaintiff must show that*
 - 1) The sexual harassment was so severe and pervasive and objectively offensive that it can be said to have deprived the student access to the educational opportunities or benefits provided by the school;
 - 2) The district must have actual knowledge of the sexual harassment;
 - 3) The district must have been deliberately indifferent to the harassment.

Davis v. Monroe Cty Bd. of Educ., 526 U.S. 629 (1999).



Title IX

- KNOW YOUR POLICIES!!
- Train Special Ed administrators and staff on board policy FFH and the concept of deliberate indifference.
- They should know what to look for and what to do if a complaint is made.
- Make sure your Special Ed staff members are aware of how their actions (or inaction) can later serve as fodder for a lawsuit.



SPECIAL EDUCATION T9 COMPLICATIONS

Investigation Complications

The victim and/or the harasser may be unreliable

- Time, place, details are harder than usual to determine
 - Story may change unintentionally due to cognitive deficits
- May be completely made up; issues with reality versus make-believe
- Often even more susceptible to parental influence

Consent between students especially fraught

- Does student have the ability to consent?
 - SpEd students often more “persuadable”
 - Reading “social cues” often a deficit
- Student version versus Parent version
 - Implications of “bad” and “good” especially powerful



Special Education Concerns

- SpEd students are more vulnerable to harassment of all kinds
 - Seen as easy targets by other students
 - Less likely to fight back or resist
 - Less likely to report
 - More likely to be re-victimized
 - Easier to intimidate
 - ***May not realize they are being harassed or were assaulted***
 - ***May not understand the implications/consequences of actions***



Special Education Concerns

- **Harm from Harassment is Often Magnified**
 - Special ed students may be impacted in different and more severe ways than their Gen Ed peers
 - Current disabilities manifest more severely
 - New disabilities develop
 - Re-evaluations may be necessary
 - Revised IEPs required to ensure educational benefit
 - **SpEd students can be more traumatized by the investigation than the alleged act itself**



Infinite Possibilities for Disaster

- Dyslexic gay student subjected to homophobic slurs
- Down's syndrome student talked into oral sex by fellow student
- Life Skills student makes outcry against aide
- Male ED student continually exposes self to female classmates
- ADHD student shares pictures of girlfriend after bad breakup
- Teacher finds 2 autistic students making out; parent complains

Some of these would raise Title IX red flags, others might not

Depends on the student, the parent, and the impact on educational progress



Special Education Concerns

- **Educational benefit easily derailed**
 - District is already working hard to ensure progress for SpEd students
 - A team of experts has developed a plan, which has to be revisited/revised
 - “Progress” for many students is already a precarious proposition
- **The “optics” are especially ugly**
- **It is often easier to meet the “objectively offensive” standard when the recipient is SpEd.**



Special Education Concerns

- **Special Ed staff are rarely trained to recognize, investigate, or address incidents giving rise to Title IX claims.**
- **Title IX implicates how you investigate claims, and what you do with the information you find.**
 - Any Special Ed perpetrator will likely require a new/revised Behavior Intervention Plan (BIP) and Individualized Education Plan (IEP)
 - Many victims will as well
 - Additional evaluations likely required and ARD Committee should meet, but now parent trust is low(er)
 - Discipline under Student Code of Conduct; MDR trigger
 - Criminal charges possible against perpetrator



Special Education Concerns

- **Implications for Discipline**
 - Manifestation Determination Reviews (MDRs) required for disabled students accused of harassment
 - May find harassing behavior was function of disability so not able to discipline legally
 - May find harassing behavior the result of district failure to implement IEP, so no discipline
 - Very difficult to explain this to parents and staff
 - Must revise BIP and/or conduct Functional Behavior Analysis (FBA)
 - Even if not a Title IX violation, still SCOC...



Special Education Concerns

- **Failure to Protect claims**
 - “Failure to supervise” claims common – for both students
 - Harassment may be result of inappropriate BIP or failure to implement BIP/IEP
 - Did school have any prior knowledge of the aggressor?
- **Parent trust may never be restored**
- **Sex education especially difficult issue for SpEd students**
 - Biology versus social mores
 - Cognitive roadblocks to understanding
 - Struggle to appreciate consequences
 - Social cues, impulse control, sensory issues...



Special Education Concerns

- **Student-on-student harassment quickly becomes a Special Ed matter.**
 - The Due Process hearing under IDEA is the typical starting point
 - Can be an early opportunity to settle ALL claims
 - Settlement asks often factor in “loss” of any Title IX recovery
 - Each side can access the discovery process; see evidence before get to federal court
 - Discovery can expose other weak spots
 - Admin Hearing Officer likely find for parents under IDEA if go to hearing
 - HOs are people, too – even though no T9 jurisdiction
 - May have to litigate whether harassment occurred in an administrative proceeding – even if the claim is about education
 - Loss means approx. \$50k-70k in district fees – *plus* parent fees
 - Still vulnerable to federal Title IX claim, especially with sworn testimony and HO findings of fact.



Recommendations

- **Take all complaints and allegations seriously**
 - Do not dismiss the source of any outcry
 - Do not dismiss any allegation, no matter how over-the-top
 - Be quick to review any available video footage
- **All employees should know who the district Title IX coordinator is and what triggers an investigation**
- **Be ready to take action to stop the alleged harassment that also comports with all IEPs**
 - Separating students can end up violate their IDEA rights
 - Failure to sufficiently separate can mean deliberate indifference



Recommendations

- **Conduct a least abbreviated Title IX training for SpEd staff.**
 - Even if they are not conducting the investigation, they should know what's important and whom to contact.
- **Develop a plan for the student(s) involved during an investigation.**
 - Moving students may not be as easy as in Gen Ed
 - Disruptions of any kind can have negative impact
 - Must still comply with student's IEP
 - If change in placement occurs, ARD required; pay attention to timelines and "10-day" rule
 - Deliberate indifference can be a problem at this level
 - At the very least, increased supervision should occur
- **Ensure that your Special Ed staff knows the circumstances that could trigger a Title IX investigation, and what to do *during* the investigation.**



Recommendations

- Be prepared to contact law enforcement, CPS, etc.
- Continue to assure students and parents that you take all allegations seriously.
- Maintain confidentiality and follow district policies and procedures throughout investigation process.
- **Be mindful of what ends up in writing;** contact your attorney for help in this regard.
 - Carefully document your efforts after the claim to avoid deliberate indifference allegations.
 - Plan on Plaintiff’s counsel serving you with discovery in IDEA Due Process.



Investigation is Complete... Now What?

- **Take appropriate actions depending on your findings.**
 - This includes revising BIPs, conducting FBAs, and revisiting IEPs...for all students impacted
- **Lack of evidence of sexual harassment doesn’t mean it didn’t happen.**
 - The student(s) may each be impacted by the experience of an allegation in ways that require changes to IEP and/or BIPs
 - Student (and parent) versions of the truth may be all that matters
 - Student discipline still possible
- **Keep close eye on both accuser and accused for future behaviors of concern.**
 - This is where many districts get into trouble
 - Students who want to be together will find a way
 - Failure to supervise will be primary complaint – if it happens/happens again, parent will claim you failed despite having knowledge of threat



Next Steps after Investigation...

- **Notify parents immediately and keep them informed.**
 - Special Ed parents are often used to more communication
 - An ARD may be required; send notices promptly
 - Parents may need help understanding legal nuances depending on findings
 - “Unsubstantiated” does not mean we do not believe their child
 - Title IX elements may not have been met, but we may still take action
- **Even lame ideas can be seen as “taking action,” as long as you do not end up placing a student in future peril.**
- **Keep the legal requirements for Title IX in mind:**
 - **Must deprive the student of educational opportunity.**
 - ARD Committee actions and data collection efforts can disprove educational deprivation
 - If can show student continues to progress, it weakens damages claims



Takeaways

- Title IX violations can result in a denial of FAPE, exposing district to several lawsuits.
- Prevention is ultimate goal – adequate student supervision required.
 - Both in the plan AND the execution
 - Staff training and accountability measures are critical to ensure implementation
- SpEd staff must be able identify and take steps when possible Title IX violation, and then make decisions and revisit IEPs based on findings of any investigation.
- Take prompt action in keeping with IEP immediately and make plans after the investigation as appropriate for the individual student.



The information in this handout was prepared by Eichelbaum Wardell Hansen Powell & Muñoz, P.C. It is intended to be used for general information only and is not to be considered specific legal advice. If special legal advice is sought, consult an attorney.



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