



Association of
Title IX Administrators

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Intersection of Title IX & Disability

Idaho Title IX Professional Learning Communities

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Strategic Risk
Management Solutions

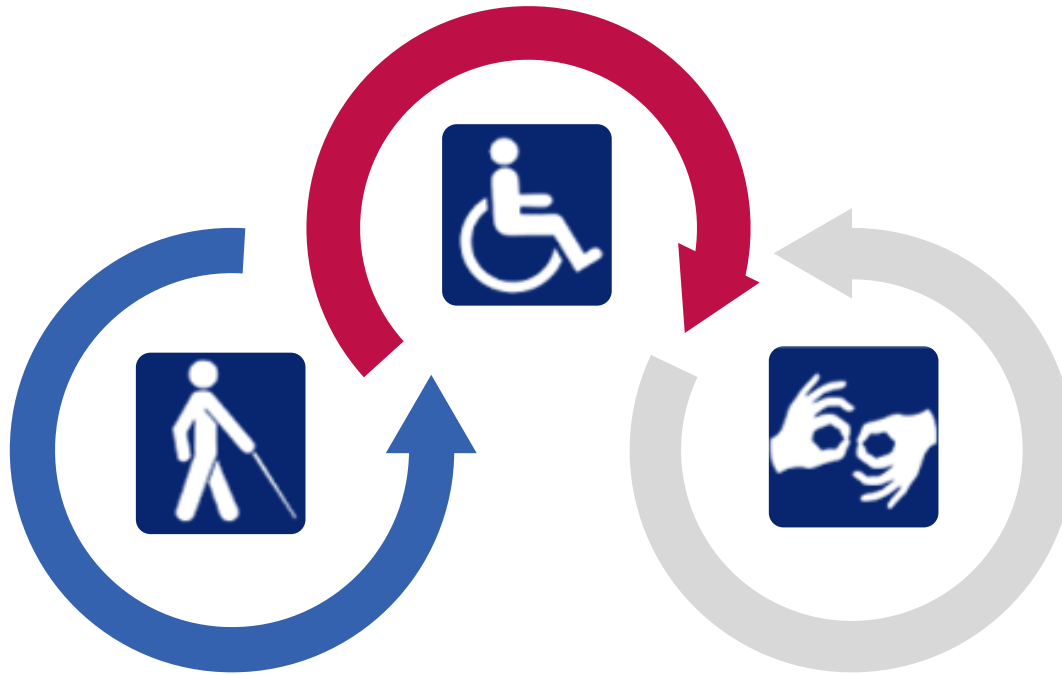


Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

AGENDA

- 1 Section 504 Overview
- 2 Other Disability Laws
- 3 Accommodation Process
- 4 Students with Disabilities as Parties
- 5 Pregnancy & Related Conditions
- 6 Q&A

SECTION 504 & THE ADA



Sec. 504 and the ADA are not designed
to ensure equal results...

but to create a “just result” and to provide equal opportunities for success.

KEY ISSUE

- All individuals with a qualifying disability must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or level of achievement as others
- Institutions may provide a different or separate aid, benefit, or service only if doing so is necessary to ensure that the aid, benefit or service is as effective as others

DISABILITY LAWS

Section 504 of the
Rehabilitation Act

Americans with
Disabilities Act

Individuals with
Disabilities
Education Act

Fair Housing
Act

State Laws

SECTION 504 OF THE REHABILITATION ACT (1973)

- **Prohibits discrimination** on the basis of disability in **all programs or activities** that receive federal financial assistance
- Forbids institutions from excluding or denying individuals with disabilities an **equal opportunity** to receive program benefits and services
- Enforced by the U.S. Dept. of Education, Office for Civil Rights
- Codified at 29 U.S.C. § 701

SECTION 504

“No otherwise qualified individual with a disability in the United States, as defined in Sec. 705(20) of this title, shall, solely by reason of her or his disability, be excluded from the participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.”

Section 704(a) Promulgation of nondiscriminatory rules and regulations

HOW IS SEC. 504 DIFFERENT FROM THE ADA?

Section 504 and the ADA are both civil rights laws; however:

- Section 504 was created to protect individuals with disabilities from discrimination for reasons related to their disabilities
 - 504 protections are applied to programs or businesses that receive federal funds
- The ADA Titles I, II, & III add to the strength of Section 504 by extending it to private institutions, workplaces, and to state and local government-funded programs
- Between the two laws, all government-funded programs are covered

INDIVIDUALS WITH DISABILITIES EDUCATION ACT (1975)

- The IDEA is a four-part piece of legislation that ensures eligible students with a disability receive a **Free Appropriate Public Education** (FAPE) that is tailored to their individual needs and in the **least restrictive environment**
- The overall goal of the IDEA is to provide children with disabilities an **equal education** to students who do not have a disability
- Provides **funding** to state and local education agencies for **special education and related services and early intervention services** for students with specified disabilities
- However, the IDEA is not a civil rights law like Sec. 504 and the ADA
- Enforced by Dept of Education's Office of Special Education Programs

WHO IS PROTECTED UNDER SEC. 504, THE ADA & IDEA ?

Under these laws, qualified individuals with disabilities are defined as:

- Persons **with a physical or mental impairment** which substantially limits one or more major life activities;
- Persons who have a **record of having a physical or mental impairment**; or
- Persons who are **regarded as having a physical or mental impairment** that substantially limits one or more major life activities.

WHO IS A “QUALIFIED INDIVIDUAL WITH A DISABILITY”?

- Someone who, with or without reasonable modifications to rules, policies, or practices or provision of auxiliary aids and services, meets the essential eligibility requirements to be able to receive the receipt of services or to participate in programs or activities of the educational entity
- All qualified individuals with a disability must be provided with aids, benefits, or services that provide an equal opportunity to achieve the same result or level of achievement as others

WHO IS A “QUALIFIED INDIVIDUAL WITH A DISABILITY”? (CONT.)

- Institutions may provide a different or separate aid, benefit, or service than requested by the qualified individual with a disability only if doing so is necessary and ensures that the aid, benefit, or service is as effective as the one requested

SPECIFIED DISABILITIES UNDER THE IDEA

- IDEA applies to an eligible child in mandatory age ranges who is evaluated as having one or more specific conditions:
 - Mental impairment
 - Hearing impairment (including deafness)
 - Speech or language impairment
 - Visual impairment (including blindness)
 - Autism
 - Traumatic brain injury
 - Other health impairments
 - Emotional disturbance
 - Orthopedic impairments
 - Specific learning disabilities
 - Deaf-blindness
 - Multiple disabilities



ACCOMMODATION PROCESS: SECTION 504 AND IDEA

K-12 ACCOMMODATION PROCESS

- In the K-12 environment, students with disabilities are not only supported by Section 504 and the ADA, but also by the Individuals with Disabilities Education Act (IDEA)
- The provisions under the IDEA are more comprehensive and prescriptive than those under Sec. 504 and the ADA
- Under Section 504 and the IDEA , schools have an obligation to:
 - Identify and locate every qualified student with a disability
 - Provide a free and appropriate public education that meets the individual needs of the student

ACCOMMODATION PROCESS: IDEA

- If a student is eligible for special education and related services under the IDEA, they must have an IEP that is designed to meet the unique needs of each child (an IEP Plan)
- The IEP:
 - Specifies the services to be provided and how often;
 - Describes the student's present levels of performance and how the student's disabilities affect academic performance; and
 - States the accommodations and modifications to be provided

ACCOMMODATION PROCESS: IDEA

- When a child qualifies for an IEP, a team is convened to design the plan
- The team must include:
 - The child's parent(s)/guardian(s);
 - At least one regular teacher;
 - A special education teacher;
 - Someone who can interpret the educational implications of the child's evaluation, such as a school psychologist;
 - Any relevant service personnel; and
 - A school administrator who has knowledge of the availability of services in the district and authority to commit those services on behalf of the child

DIFFERENCE BETWEEN AN IEP AND A 504 PLAN

- An IEP is a plan or program developed to ensure that a child who is a qualified person with a disability and is attending a K-12 school will receive specialized instruction
- A 504 plan is a plan developed to ensure that a child who is a qualified person with a disability and is attending a K-12 school receives accommodations that will ensure their academic success and access to the learning environment
- Not all students with a disability require specialized instruction
- For those students that do require specialized instruction, the IDEA guidelines control those procedural requirements

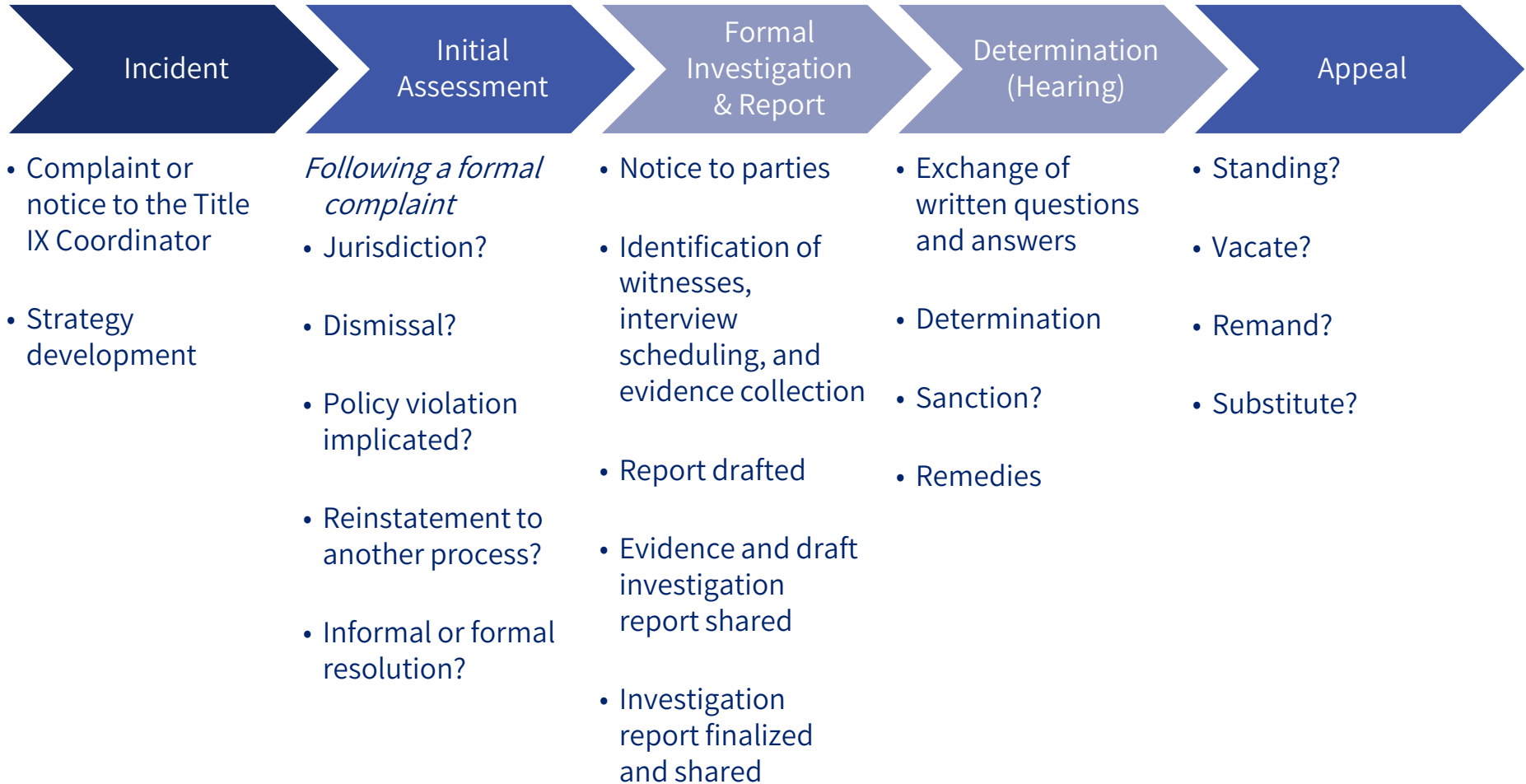


STUDENTS WITH DISABILITIES AS PARTIES IN THE TITLE IX GRIEVANCE PROCESS

STUDENTS WITH DISABILITIES AS PARTIES

- If a Complainant or Respondent is a student with a disability,
 - Throughout the grievance process the Title IX Coordinator should work closely with the student's
 - IEP team; or
 - Section 504 team
 - The Title IX Coordinator should also work with the IEP/504 team when managing supportive measures for a student with a disability
- If a student with a disability is subject to an Emergency Removal all rights under IDEA and Section 504 still apply and must be respected

THE PROCESS



ADDRESSING INVOLUNTARY WITHDRAWAL

Engaging in involuntarily removing a student or employee with a disability is complex

- As of 2011, the law no longer applies “harm to self” as a basis for involuntary withdrawal, only “harm to others”
- OCR says **due process** is necessary to challenge assumptions that behavior is a threat that would support involuntarily removing a student or employee
 - Signification due process protections also afforded to students under the IDEA

ADDRESSING INVOLUNTARY WITHDRAWAL (CONT.)

- The school must either:
 - Follow appropriate disciplinary procedures for students or employees who engage in conduct that would violate the codes of conduct;
 - Engage in applying the ADA-created “Direct Threat” Test prior to removing an individual from school or work, UNLESS there is an immediacy of harm; or
 - Conduct a manifestation determination under the IDEA before removing or seeking an alternative placement of a student with a disability due to conduct issues

“DIRECT THREAT” TEST

- “Direct Threat” means a significant risk to the health or safety of self or others that cannot be eliminated by a modification of policies, practices or procedures, or by the provision of auxiliary aids or services.
- OCR says DUE PROCESS is necessary to challenge factual assumptions that behavior being exhibited represents is “Direct Threat” of harm to others that would support involuntarily removing a student or employee from the institution
- A “Direct Threat” analysis applies to any individual who poses a “significant risk” of substantial harm or safety to others that cannot be eliminated or reduced by reasonable accommodation.

APPLICATION OF THE DIRECT THREAT TEST

1. To rise to the level of a direct threat, there must be a **high probability of substantial harm and not just a slightly increased, speculative, or remote risk.**
2. Then there must be an Individualized **and** objective assessment of the student's ability to safely participate in the school's program
3. This assessment must be based on a reasonable medical judgment relying on the most current medical knowledge **or** the best available objective (non-medical) evidence

APPLICATION OF THE DIRECT THREAT TEST (CONT.)

4. The assessment must determine:
 - The nature, duration, and severity of the risk;
 - The probability that the potentially threatening injury will actually occur; and
 - Whether reasonable modifications of policies, practices, or procedures (accommodations) would sufficiently mitigate the risk.

MANIFESTATION DETERMINATION

- Under the IDEA, if seeking to remove a student with a disability for longer than 10 days, the student is entitled to a Manifestation Determination to review relevant information regarding the student's disability and services provided to determine if the student's behavior was:
 - the result of the student's disability or
 - the result of an inappropriate placement
- Student can not be removed if either is answered affirmatively
- Parent/guardian entitled to an appeal hearing

POLICY IMPLICATIONS

- The Direct Threat Test (as proscribed by the ADA) may only be applied when a student’s conduct represents an “unreasonable threat of harm to others”
- The student conduct process should be applied when the student’s conduct creates a disruption to the education environment or violates other behavior standards
- Both approaches provide due process before involuntary removal from the institution
- Thus, offer appropriate due process and follow your process.

RESPONSE CONSIDERATIONS

- Involve your accessibility/disability services office and a student's IEP team when applicable
- Offer appropriate due process and follow your process if you plan to involuntarily remove from school or job
- Use clearly written policies and referrals based on **behaviors**, not disabilities or conditions
- Address **actual** significant disruptions to the school, not simply **risk** of disruption
- Be consistent in referrals – the same disruptive behavior should warrant a conduct process regardless of the individual

RESPONSE CONSIDERATIONS (CONT.)

- Absent a manifestation determination:
 - Sanctioning should also be consistent
 - Do not treat students or employees with disabilities differently than other students or employees other than providing reasonable accommodations under the law



PREGNANCY & RELATED CONDITIONS

PREGNANCY, SEC. 504, & TITLE IX: 2013 DCL*

June 25, 2013 DCL on pregnancy and parenting students:

- Educators must ensure pregnant and parenting students are **not discriminated against**
- Educators must ensure that pregnant and parenting students are **fully supported in preparation for graduation and careers**
- Secondary school administrators, teachers, counselors, and parents must be well-educated on the rights of pregnant and parenting students as provided under Title IX

*Dear Colleague Letter from the U.S. Department of Education's Office for Civil Rights

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Pregnancy defined:

- “Pregnancy and related conditions”:
 - A recipient shall not discriminate against any student, or exclude any student from its education program or activity, including any class or extracurricular activity, on the basis of such student's **pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom**, unless the student requests voluntarily to participate in a separate portion of the program or activity of the recipient.” (34 C.F.R. 106.40)

PREGNANCY, SEC. 504, & TITLE IX: OCR GUIDANCE

Doctor's Note to Participate

- **“Schools cannot require a pregnant student to produce a doctor’s note in order to stay in school or participate in activities**, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- “That is, schools cannot treat a pregnant student differently from other students being cared for by a doctor, even when a student is in the later stages of pregnancy; **schools should not presume that a pregnant student is unable to attend school or participate in school activities.**”

Source: U.S. Department of Education (June 2013), *Supporting the Academic Success of Pregnant and Parenting Students*, p. 8.

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Physician Certification

- A recipient **may require** such a student to **obtain the certification of a physician** that the student is physically and emotionally able to continue participation in the normal education program or activity **so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.”**
- “Thus, for example, a student who has been hospitalized for childbirth must not be required to submit a medical certificate to return to school if a certificate is not required of students who have been hospitalized for other conditions.”

Source: 34 C.F.R. 106.40

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Pregnancy as Temporary Disability

- A recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”

Source: 34 C.F.R. 106.40

PREGNANCY, SEC. 504, & TITLE IX: REGULATORY LANGUAGE

Leave Policies

- In the case of a recipient which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**”

Source: 34 C.F.R. 106.40

PREGNANCY, SEC. 504, & TITLE IX: OCR GUIDANCE

- “When the student returns to school, she must be reinstated to the status she held when the leave began, which should include giving her the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester,
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.”
- “The student should be allowed to choose how to make up the work.”

Source: U.S. Department of Education (June 2013), *Supporting the Academic Success of Pregnant and Parenting Students*, p. 8.

ADDITIONAL SPECIAL ISSUES TO ADDRESS

- Nursing rooms, mothers' lounges, etc.
- Children at school and in the classroom...No
- Labs, chemicals, exposure to diseases, etc.
 - Reasonable restrictions for health and safety (as deemed by a physician) are permitted
- Residence halls (if applicable)
 - Cannot remove prior to birth of child
 - Refund



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Questions?

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