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Beyond Speech: Students' Civil Rights in Schools

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Abstract: Educators, including school leaders, must be able to handle legal dilemmas involving student speech, but these do not occur in a vacuum. Often, speech issues are commingled with other legal challenges. This article explores student rights beyond free speech that are guaranteed at PK-12 U.S. public schools. We clarify when educators must attend to students' unique needs, especially when courts have identified that certain students are members of protected classes. This article explains the overarching constitutional framework in which the U.S. Supreme Court has applied the 14th Amendment's Equal Protection Clause to protect the rights of students to be free from invidious discrimination. We describe how modern U.S. courts apply levels of review, including strict scrutiny, intermediate scrutiny, and rational basis review to equal protection cases. We then synthesize federal statutory law and case law that protect students. Specifically, we discuss how Title VI of the Civil Rights Act of 1964 (Title VI 1964) prohibits discrimination based on race, color, ethnicity, national origin, language proficiency, and religion. Next, we delve into the recent changes relevant to the application of Title IX of the Education Amendments of 1972 (Title IX 1972) to students based on sex, sexual orientation, and gender identity. Our final focus covers students with disabilities, including medical conditions, who are protected by the Individuals with Disabilities Education Act (IDEA 1990) and Section 504 of the Rehabilitation Act (Section 504 1973).

Keywords: law; education; civil rights; students with disabilities; race; speech; Title VI of the Civil Rights Act of 1964; Title IX of the Education Amendments of 1972; Individuals with Disabilities Education Act; Section 504 of the Rehabilitation Act of 1973

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1. Introduction

A middle school physical education teacher takes pride in teaching good sportsmanship in competition. Part of that mission involves engaging students in healthy competition in physical education class, where they participate in a range of sports and other physical activities. In a game of soccer, a new eighth-grade student, Sam, began "trash talking" by making fun of players on the opposing team based on their sex. The teacher intervened and corrected the behavior with a reminder of expectations and redirection, but Sam's name-calling continued during other competitive athletic games during class. The student continued with "trash talk" based on his classmates' nationality, religion, disability, and other characteristics. As a consequence, the teacher required Sam to sit out of class for the misbehavior and mistreatment of peers. It was only at that time that the teacher discovered that Sam is a student with a disability who receives accommodations. The physical education class is part of Sam's special education program, a fact the teacher should have learned at the start of the school year. Sam's parents are concerned that Sam will miss out on essential lessons and valuable exercise if removed from class. The teacher recognizes the value of the class for Sam's personal and academic development. At the same time, the teacher feels a responsibility to provide a class experience to other students where all can participate, free from targeting based on personal characteristics. The teacher knows that for many students, their lifelong attitudes are forming in this class. Plus, the teacher recognizes the legal and ethical duty to respond to and prevent harassment and bullying.

Sam's talk on the field raises free speech questions. Furthermore, it implicates an educator's duty to take reasonable action to protect students from discriminatory harassment, as well as to ensure the rights of students with disabilities, like Sam, to enjoy reasonable accommodations and an appropriate public education. Educators often find themselves at the intersection of various laws governing the education of students in U.S. public schools.

As illustrated by this vignette, student speech issues do not occur in a vacuum; they are often commingled with other legal issues. School leaders and educators must be able to spot and respond to complex situations that involve a variety of students' civil rights. This article explores the rights beyond speech rights that students are guaranteed at PK-12 public schools in the U.S. Namely, we clarify when school leaders and educators must attend to students' unique needs, especially when courts have identified that certain students are members of protected classes. This article explains and synthesizes the federal constitutional, statutory, and case law that protect students based on race, color, ethnicity, national origin, language proficiency, religion, sex, sexual orientation, gender identity, and disability (including medical conditions).

This article begins by describing the overarching constitutional framework that provides certain student populations with unique civil rights. In this section, we explain the U.S. Supreme Court application of the 14th Amendment's Equal Protection Clause to government distinctions based on sex, race, religion, sexual orientation, and other personal characteristics (U.S. Const. amend. XIV). To analyze the level of protection a protected class is due, courts apply three levels of review, including strict scrutiny, intermediate scrutiny, and rational basis review.

In the second section, we discuss the federal, statutory, and case law associated with each type of student classification. First, race, color, ethnicity, national origin, language proficiency, and religion are outlined, because Title VI of the Civil Rights Act of 1964 (Title VI 1964) prohibits discrimination—either explicitly or implicitly—based on these classifications. Next, we delve into the recent changes relevant to the application of Title IX of the Education Amendments of 1972 (Title IX 1972) to students based on sex, sexual orientation, and gender identity. Our final focus covers students with disabilities, including medical conditions, who are protected by the Individuals with Disabilities Education Act (IDEA 1990) and Section 504 of the Rehabilitation Act (Section 504 1973).

2. Overarching Constitutional Framework

Before outlining the specific protections to which students are entitled under federal statutory law, this section describes the relevant constitutional framework. The U.S. Constitution's 14th Amendment's Equal Protection Clause offers students unique civil rights beyond their freedom of speech. We define the concept of equal protection and discuss the three levels of review that courts apply, including strict scrutiny, intermediate scrutiny, and rational basis review.

2.1. How Have U.S. Courts Interpreted the Equal Protection Clause of the 14th Amendment?

Equal protection is a constitutional principle that relates to many students' legal rights beyond their speech rights. Any time a student is discriminated against or treated differently based on a characteristic (e.g., race, ability), the U.S. Constitution's 14th Amendment is at issue. Specifically, a portion of the 14th Amendment called the Equal Protection Clause is most relevant. This clause states that the government cannot deny its citizens "equal protection of the laws".

Over the years, courts have interpreted the Equal Protection Clause as requiring that similarly-situated individuals be treated similarly. Thus, government institutions, like public schools, may not treat students differently because of arbitrary characteristics like race. When this concept is applied to students in public school settings, it means that school personnel must treat similarly-situated students in a similar fashion. Although the overarching concept of equal protection may seem simple, application of this legal principle is nuanced. In the last century, the U.S. Supreme Court has analyzed types of

discrimination under the Equal Protection Clause. Some kinds of different treatment in public schools are benign or even appropriate, such as treating kindergarten students differently from their older peers. However, in situations where the disparate treatment is potentially invidious, the Supreme Court has applied special scrutiny to that type of differential treatment. Stated differently, when schools' differentiated treatment of students is questioned as potentially discriminatory, prejudiced, unfair, or unjust, courts critically analyze whether an equal protection violation has occurred.

In 1954, the U.S. Supreme Court applied this concept of equal protection to students in the seminal case *Brown v. Board of Education* (1954). The Court analyzed the different treatment that African American students received at segregated schools and explained that based on the Equal Protection Clause "separate was not equal" (p. 495). Thus, the Court determined that the government's former requirement that public schools were to be segregated based on race was a direct violation of the 14th Amendment. In subsequent years, courts have applied the concept of equal protection to situations where schools have treated students differently based on a number of traits such as national origin, language proficiency, religion, sex, sexual orientation, gender identity, disability, and socio-economic status.

2.2. What Are the Three Levels of Review That Courts Apply?

Courts have analyzed cases where students are treated differently using three levels of scrutiny: strict scrutiny (the highest level), followed by intermediate scrutiny, and rational basis review (the lowest level). The higher the level of scrutiny, the more suspicious the court is that the treatment may be discriminatory or unjust. Therefore, it is easiest for a school to prevail if a court applies the lowest level of scrutiny, rational basis review. Conversely, it is rare for a court to apply strict scrutiny to a situation and determine that the school's action was legal.

When courts apply rational basis review, the school only needs a reason for treating students differently that is "rationally related to furthering a legitimate state interest," meaning a fairly good reason to treat students differently (*Massachusetts Board of Retirement v. Murgia* 1976, p. 312). Courts have applied rational basis review when students have been treated differently for many reasons, including age, socio-economic status, sexual orientation, gender identity, or ability level. In other words, if a school discriminates against a student based on one of these characteristics, a court will interpret its actions as constitutional so long as the school can show that it is acting rationally in advancing a legitimate state interest. Because the threshold for constitutionality is low, schools' differential treatment based on these characteristics often passes a rational basis review—which means the school's action is not found to violate the 14th Amendment.

To illustrate, in its controversial opinion in *San Antonio Independent School District v. Rodriguez* (1973), the U.S. Supreme Court considered an equal protection challenge to a Texas public school funding scheme that yielded unequal per pupil spending on public schools. The *San Antonio* opinion applied rational basis analysis to the challenge. The funding scheme did not violate any fundamental right protected by the U.S. Constitution, the Court explained, nor did its differential treatment disadvantage students of a suspect class, students who were members of groups historically subject to discrimination. Finding the funding system rationally related to a legitimate interest, the Court rejected the students' challenge.

The next-highest level of review is intermediate scrutiny. When courts apply scrutiny at this level, a school's action must be "substantially related to an important governmental objective" (*Clark v. Jeter* 1988, p. 461) to be found constitutional. Courts analyze whether there is another, less restrictive way to reach the same goal, and if there is, then the court will determine that the school's action is in violation of the 14th Amendment. Courts apply intermediate scrutiny to situations involving differential treatment based on sex. For example, in *U.S. v. Virginia* (1996), the U.S. Supreme Court found that excluding females from admission to the public Virginia Military Institute (VMI) constituted unlawful

discrimination. The Court required VMI to show an exceedingly persuasive justification for the prohibition of all women (not just those who did not meet the standards for entry) and that the discrimination against women served an important governmental objective. The state could not do so and therefore had to allow women who met the entry standards to be admitted to VMI.

The most difficult level of scrutiny for schools to pass is strict scrutiny. Unlike intermediate scrutiny and rational basis review, courts apply greater scrutiny when differential treatment is applied to members of groups who were historically discriminated against in the U.S., such as African Americans. The groups are called suspect classes or protected classes. Courts have applied strict scrutiny to government discrimination based on "suspect classifications" like race, ethnicity, national origin, religion, and alienage (*City of Cleburne, Texas v. Cleburne Living Center* 1985). Under the strict scrutiny test, discrimination based on suspect classifications is unconstitutional, unless the government agency can show that its discriminatory actions were narrowly tailored or necessary to serve a compelling government interest (*Grutter v. Bollinger* 2003, p. 326). Thus, in practice, courts are incredibly suspicious about differential treatment of protected classes, and schools rarely prevail when strict scrutiny is applied. As described above, the Court applied strict scrutiny in *Brown v. Board of Education* (1954), deciding that the doctrine of "separate but equal" was unconstitutional.

In summary, court precedent provides examples of how the Equal Protection Clause should be applied to a variety of classifications including sex, race, and ability. Therefore, students have differing levels of protection based on their unique traits. Students who are treated differently based on their ability levels have fewer equal protection rights in comparison to students who are treated differently based on their race. To illustrate, for a school to treat students differently based on race, it must have an *extraordinary reason*, and the differential treatment must be the only way to accomplish that goal (strict scrutiny review). However, if the school treated students differently based on disability, then the school only needs a good reason that is "rationally related" to a "legitimate" government interest (rational basis review) (McCarthy et al. 2018, p. 135). Thus, it is legal under the 14th Amendment for schools to treat students differently. Yet, when that differential treatment is challenged as being discriminatory, then courts will consider the type of classification or discrimination at issue, as well as the school's reason for treating that student differently.

3. Student Civil Rights under Federal Statutes

Although the overarching constitutional framework of the 14th Amendment's Equal Protection Clause protects students from discriminatory treatment in schools, Congress has expanded upon this concept and enacted a series of federal laws that provide students even more protections. In this section, we synthesize the federal statutory law and judicial opinions interpreting these federal statutes. Specifically, we discuss how Title VI prohibits discrimination based on race, color, ethnicity, national origin, language proficiency, and religion. Then, we analyze how Title IX prohibits discrimination based on sex, sexual orientation, gender identity, and pregnancy. Our final focus covers students with disabilities, including medical conditions, who are protected by IDEA and Section 504. There are times in school settings, such as in the vignette at the beginning of this article, in which student free speech rights might intersect or otherwise relate to their rights to be free from discrimination under these federal statutes. Thus, educators and administrators must understand all of these major pieces of federal legislation when disciplining student speech.

3.1. Title VI

Title VI states that "No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance" (Title VI 1964). This law provides protections from harassment and discrimination for special populations of citizens, including students. It applies to any entity receiving federal

funds, which includes all public schools and colleges and some private institutions (Title VI 1964, at (4)(a)). Violations of this law can result in the withdrawal of federal funding or ineligibility to receive such funding (Title VI 1964, 42 U.S.C. at (1)). Some lower courts have upheld an implied individual right of action when intentional discrimination under Title VI is found given the U.S. Supreme Court's finding in *Davis v. Monroe* (1999) that such a right exists for violations of Title IX (Kimmel 2017; Wood 2009), but the Supreme Court has not yet recognized this right.

As applied to schools, Title VI is meant to ensure school employees take affirmative steps to prevent and stop harassing behavior (verbal and non-verbal) towards students based on their race, color, or national origin. Over the years since its inception, the government and courts have provided detail on what is expected of school employees under this law, including how it intersects with other students' First Amendment speech rights. This section explores these topics in greater detail.

3.1.1. What Type of Protections Does Title VI Provide?

The United States Department of Education (ED)'s Office for Civil Rights (OCR) is responsible for enforcing Title VI in public schools. As such, the ED has provided guidance to explain what schools must do when speech may be considered illegal harassment under Title VI. Its guidance clarified that "[h]arassing conduct may take many forms, including verbal acts and name-calling; graphic and written statements, which may include use of cell phones or the Internet; or other conduct that may be physically threatening, harmful, or humiliating. Harassment does not have to include intent to harm, be directed at a specific target, or involve repeated incidents. Harassment creates a hostile environment when the conduct is sufficiently severe, pervasive, or persistent so as to interfere with or limit a student's ability to participate in or benefit from the services, activities, or opportunities offered by a school" (U.S. Department of Education 2010). However, earlier, but still relevant guidance from the ED does warn that "offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment" (U.S. Department of Education 2003). For example, school administrators failing to act when students throw tortilla chips and shout ethnic slurs at an opposing basketball team from a predominantly Hispanic/Latino school (Mendoza 2021) could be a violation of Title VI. On the other hand, requiring a student who is wearing a shirt stating: "Donald J. Trump Border Wall Construction Co.—The wall just got 10 feet taller" to remove his shirt would likely be a violation of the student's First Amendment speech rights rather than protecting Latinx students from harassment under Title VI as long as there were no other related incidents (Rosenberg 2018).

ED guidance has also emphasized that context is important when determining if a Title VI violation has occurred. The age of students is one factor as well as the number of incidents and whether aspects of a student's educational program were adversely affected (U.S. Department of Education 1994). Further, Title VI covers harassment to one's actual or perceived race, color, or national origin. (Title VI 1964). The law recognizes that school employees cannot reasonably be aware of all interactions between students. Therefore, a school district, through its employees, is only "responsible for addressing harassment incidents about which it knows or reasonably should have known" (U.S. Department of Education 2010).

3.1.2. Is Title VI Still Relevant in Schools Today?

Although Title VI was passed nearly 60 years ago in the midst of the civil rights movement, it remains very relevant and important today. The most recent data from the 2017–2018 school year shows approximately 25,000 reported incidents nationwide of harassment and bullying based on race, color, or national origin in public schools (U.S. Department of Education n.d. Civil Rights Data Collection: 2017–18 State and National Estimations). The data describe both the sub-groups of students being harassed as well as those reported being disciplined for harassing fellow students on the basis of

race, color, or national origin. The data show that Black students are still the most likely to be harassed and/or bullied and are less likely than White students to harass/bully other students based on race or color, or national origin. Twenty percent of students who bullied other students based on race, color, or national origin were Black while 37 percent of students who were reported to have been harassed or bullied on the basis of race, color, or national origin were Black.

3.1.3. How Does Title VI Protect Students from Harassment Based on Race/Color?

Lawsuits continue to be filed alleging racial discrimination under Title VI, and the standards that courts apply are also relevant to other forms of discrimination including color and national origin harassment. A recent federal district court case reiterated the standard for Title VI liability for racial discrimination, which requires a plaintiff to satisfy three things: (1) the harassment was so severe, pervasive, and objectively offensive that it deprived the student access to educational opportunities or benefits; (2) the school had actual knowledge of the harassment and exercised control over the harasser and environment; and (3) school employees in a position of authority to take corrective action were deliberately indifferent (*Sneed v. Austin Independent School District* 2020). In this case, a Black student alleged repeatedly facing racial epithets, slurs, and actions from students that created a climate of racial harassment. The student alleged that the school employees were aware but took minimal action to eliminate the harassment. In another recent federal district court case, plaintiffs argued that school officials aware of similar racial harassment vowed specific remedies to protect the student. When they failed to implement those remedies and the harassment continued, school officials were found to violate not only Title VI, but also 42 U.S.C. § 1983 because the school affirmatively *created* a danger by failing to implement their plan (*DJ by & through Hughes v. School Board of Henrico County* 2020).

3.1.4. How Does Title VI Protect Students from Harassment Based on National Origin, Ethnicity, Language Proficiency, and Religion?

Harassment concerning national origin has also been interpreted to include harassment on the basis of ethnicity, language proficiency, and religion (U.S. Department of Education 2020a). National origin generally refers to one's legal home country or immediate family's home country. Ethnicity is similar, but typically refers to cultural characteristics that bind a specific group of people together. Recently, the COVID-19 global pandemic spawned a reported increase in national origin/ethnicity-based harassment in schools. "[F]alse information and harmful statements about Asian American and Pacific Islander (AAPI) communities have led to increasing acts of intolerance across the nation—from verbal harassment to violence" (U.S. Department of Justice and U.S. Department of Education 2021). For example, if students take and post videos of themselves yelling "virus spreaders" at Asian American classmates during class, ED would intervene if school personnel were aware of the videos, but did not act to address the harassment (U.S. Department of Justice and U.S. Department of Education 2021).

In 1974, the U.S. Supreme Court reinforced federal regulations extending Title VI's protections to English Learners as the acquisition of the English language can be closely tied to a student's national origin (Lau v. Nichols 1974). Protection is not limited to harassment of English Learners. Rather, "Title VI's prohibition on national origin discrimination requires SEAs [state education agencies] and school districts to take 'affirmative steps' to address language barriers so that EL [English language] students may participate meaningfully in schools' educational programs (U.S. Department of Education 2015).

ED has also offered specific guidance on how Title VI protects students from harassment based on their religion if such harassment is in the form of ethnic or ancestral slurs that are associated with a specific religion. This includes harassment for "how they look, dress, or speak in ways linked to ethnicity or ancestry (e.g., skin color, religious attire, language spoken); or stereotyped based on perceived shared ancestral or ethnic characteristics. Hindu, Jewish, Muslim, and Sikh students are examples of individuals who may be

harassed for being viewed as part of a group perceived to exhibit both ethnic and religious characteristics" (U.S. Department of Education 2020a).

3.1.5. How Do School Officials Know Whether They Are Protecting a Student from Harassment under Title VI or Violating Another Student's Freedom of Speech?

ED has stated that "[t]here is no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment" (U.S. Department of Education 2003). However, some school employees have reported in practice that trying to be faithful to both laws can cause confusion. In order not to be "deliberately indifferent" to harassment based on race, color, or national origin, many school districts have adopted anti-bullying policies. As long as these policies mirror the definition of harassment utilized by ED guidance and case law, schools usually will not violate the First Amendment rights of the perpetrator students. However, if such policies could be read to allow for discipline for mere offensive expression, courts generally have found those unconstitutionally overbroad. ED suggests that schools ". Encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action when speech crosses over into direct threats or actionable speech or conduct" (U.S. Department of Education 2020a). Most recently, the U.S. Supreme Court, in a case about a student's off-campus speech, recognized that even for off-campus behavior, schools may have authority to regulate a student's speech when it is considered bullying or harassment that targets particular individuals (*Mahanoy Area School District v. B.L.* 2021).

3.2. Title IX

As you read in the opening section, the U.S. Constitution prohibits sex discrimination by public entities, like K-12 public schools. Additionally, Title IX of the Education Amendments of 1972 (Title IX 1972) is a federal statute prohibiting sex discrimination in most educational programs receiving federal funds. Title IX prohibits various forms of sex discrimination, including discrimination based on sex assigned at birth, pregnancy, sexual orientation, and gender identity. Both students and school staff are protected against discrimination by Title IX. Fundamentally, the law prohibits disparate treatment and sexual harassment. Additionally, the statute requires schools to take affirmative steps to provide equal opportunity in some areas, such as in athletics. Title IX also prohibits schools subject to the statute from retaliating against individuals who make good faith reports of violations (U.S. Department of Education 2020b). The Office for Civil Rights of the U.S. Department of Education administers Title IX by promulgating regulations under the statute, issuing regulatory guidance, and by responding to complaints of violations of Title IX (U.S. Department of Education 2020b; Title IX 1972 at § 1682). Additionally, individuals enforce Title IX by suing an education institution for alleged violations of the act (*Franklin v. Gwinnett County Public Schools* 1992).

3.2.1. What Is "Sex Discrimination" under Title IX?

Though Title IX was aimed in significant part at remedying generations of sex discrimination that harmed girls and women in schooling, Title IX does not just protect women from sex discrimination. Rather, the statute's plain terms prohibit discrimination against any person based on that person's sex. Thus, men are protected from sex discrimination by Title IX as well (Title IX 1972; *Yusuf v. Vassar College* 1994 (finding that a male plaintiff stated a claim for relief under Title IX); *Doe v. University of Sciences* 2020) (reversing district court dismissal of male plaintiff's Title IX action).

Though Title IX does not specifically name the terms "sexual orientation" or "gender identity," the statute's prohibition on sex discrimination likely includes a prohibition on discrimination based on these characteristics as well. U.S. courts commonly interpret Title IX's principles in a manner consistent with principles governing Title VII of the Civil Rights Act of 1964 (Title VII 1964), which prohibits employment discrimination because of race, color, sex, religion, and national origin (*Adams v. School Board* 2020). School employees

enjoy protection from sex discrimination, for example, under both Title IX and Title VII. In 2020, the U.S. Supreme Court held that Title VII's prohibition of discrimination based on "sex" necessarily implies a prohibition against discrimination based on sexual orientation and gender identity as well (*Bostock v. Clayton County* 2020). Several courts have held, both before and after the Supreme Court's *Bostock* decision, that Title IX's prohibition on sex discrimination in schools receiving federal funding also implies a prohibition on discrimination based on sexual orientation and gender identity (*Grimm v. Gloucester County School Board* 2020; *Adams v. School Board* 2020; *Parents for Privacy v. Barr* 2020; *Whitaker v. Kenosha Unified School District Number 1 Board of Education* 2017).

Though the weight of authority in the courts favors a finding that Title IX prohibits discrimination based on sexual orientation and gender identity, in the absence of a Supreme Court decision specific to Title IX, the ED's interpretation takes on greater importance. This interpretation has been subject to some transition in recent years. It announced in 2015 under former President Obama that it interpreted "sex" under Title IX to include sexual orientation and gender identity, a distinction the same department withdrew under former President Trump in 2017. In 2021, the U.S. Department of Education under President Biden announced that its Office for Civil Rights would interpret Title IX's prohibition on sex discrimination to include a prohibition against discrimination based on sexual orientation and gender identity (U.S. Department of Education 2021). Thus today, judicial and regulatory authority support an interpretation of Title IX as protecting students, teachers, and others from discrimination based on sexual orientation and gender identity by public schools.

3.2.2. Does Sex Discrimination Include Marital and Parental Status?

Additionally, Title IX's prohibition on sex discrimination applies to distinctions made based on marital status and parental status (Title IX Regulations 2006). So the refusal to promote a recently married woman based on the antiquated belief that married women leave their careers would likely violate Title IX, for example. Additionally, schools may not discriminate against individuals because of pregnancy. For example, in 2015 a U.S. District Court held that a plaintiff student, who alleged she had been subjected to pregnancy discrimination in the clinical portion of her paramedic program, had stated a claim for relief recognized under Title IX. Without deciding at that stage of litigation whether the defendant education institution had, in fact, discriminated against the plaintiff, the district court decisively announced in the case that Title IX prohibits discrimination based on pregnancy (*Conley v. Northwest Florida State College* 2015). In light of the legislative history of Title IX, which showed that Congress intended for the proscription on sex discrimination to touch inequity based on pregnancy, the court found the student could proceed with her pregnancy discrimination claim under Title IX (*Conley v. Northwest Florida State College* 2015).

While schools may not burden or disadvantage students because of pregnancy, they may provide additional supports, such as programs specifically designed for pregnant students. Regulations from the U.S. Department of Education allow such programs if schools operating them ensure that student enrollment is entirely voluntary and that the programs are "comparable" to educational programs for non-pregnant students (Title IX Regulations 2006 at (3)).

3.2.3. What Kinds of Actions Amount to Unlawful Sex Discrimination?

Title IX prohibits disparate treatment in which schools are treating students differently because of their sex, such as exclusion from a program or school (Title IX Regulations 2006; *Cannon v. University of Chicago* 1979). However, the U.S. Department of Education has enacted regulations that permit single sex classes or programs to persist under certain tailored circumstances (Title IX Regulations 2006). For example, the regulations generally permit single sex classes for sexuality education, school choruses, or physical education (Title IX Regulations 2006 at (a)). Districts may operate single sex schools or programs where they can offer a "substantially equal" program to students excluded (Title IX Regulations

2006 at (c)). In determining whether a substantially equal program is available to students excluded by a single sex program, the regulations require consideration of program quality, resources, instruction, staffing, and other features of opportunity (Title IX Regulations 2006).

Courts also have found that sexual harassment amounts to a kind of disparate treatment prohibited by Title IX. A school is liable for sexual harassment discrimination by a staff member against a student when an individual with authority to correct such behavior has actual knowledge of the discrimination and shows deliberate indifference to the behavior (*Gebser v. Lago Vista Independent School* 1998). Thus, courts have held that schools must have an opportunity to correct wrongful actions before being held liable under Title IX (*Gebser v. Lago Vista Independent School* 1998, pp. 291–92).

Similarly, a school can be held liable for peer sexual harassment in settings substantially under the school's control. To succeed on such a claim, a student must prove peer harassment because of sex, and the student plaintiff must show that school officials with authority to correct the behavior were deliberately indifferent to it. The student plaintiff in a peer harassment Title IX action must show the peer harassment was so severe, pervasive, and objectively offensive that it caused the student reduced access to educational opportunity as a result. Courts will find that a school acted with deliberate indifference only where school officials have taken actions "clearly unreasonable in light of the known circumstances," and will avoid "second guessing the disciplinary decisions made by school administrators" (*Davis v. Monroe County Board of Education* 1999). Courts have determined that school officials have a legal responsibility to respond to peer harassment even if it is between two same-sex peers and/or on the basis of sexual orientation or gender identity (*Patterson v. Hudson Area Schools* 2009; U.S. Department of Education 2010).

Additionally, in *Jackson v. Birmingham Board of Education* (2005), the U.S. Supreme Court recognized that Title IX's prohibition on sex discrimination necessarily prohibits retaliation for reporting wrongs under the act. To succeed on such a claim, a plaintiff must show that the education institution took action against them because of their report of sex discrimination under Title IX (*Jackson v. Birmingham Board of Education* 2005 at p. 184).

3.2.4. How Does Title IX Apply to School Athletic Programs?

Title IX's guarantee applies to both athletics and scholastic pursuits. Schools covered by Title IX's mandate must provide "equal athletic opportunity" to students. This can include single sex athletic teams. Where a school operates a team in a non-contact sport only for one sex, however, members of a sex historically excluded from that sport must be permitted to try out for the team (Title IX Regulations 2006). For example, a high school offering only a men's tennis team may be required to permit women to try out for the team.

In determining whether a school has adequately provided equal athletic opportunity to students, the Department of Education's regulations require consideration of various features of the programs. Title IX requires schools to generally provide equal opportunity in the form of equipment and supplies, space and time for practices and games, travel funding, facilities, medical services, staffing, academic supports, housing, dining, and publicity (Title IX Regulations 2006). Additionally, schools subject to Title IX must "effectively accommodate the interests and abilities of members of both sexes" (Title IX Regulations 2006).

3.2.5. What Responsibilities Do Schools Shoulder in Complying with Title IX?

Districts must take several affirmative steps to ensure compliance with Title IX. Each school district must identify a Title IX Coordinator who oversees the district's compliance with the law. Additionally, districts must make their anti-discrimination policies under Title IX publicly available (Title IX Regulations 2006). Furthermore, they must establish and administer grievance procedures for addressing alleged violations of Title IX policy (Title IX Regulations 2006). Public controversy has arisen over the exact terms of such grievance procedures. In August 2020, the U.S. Department of Education under former President Trump issued new regulations requiring a slew of due process measures in such

procedures. In 2021, under the administration of President Biden, the U.S. Department of Education announced plans to review such regulations and to promulgate new rules interpreting Title IX of the Education Amendments of 1972. (White House 2021).

3.2.6. How Does Title IX Relate to Student Speech Protections?

As the hypothetical scenario at the beginning of this article demonstrates, student speech can raise questions of equity and opportunity under Title IX. While students have free speech rights in U.S. public schools, they do not have the right to harass other students based on protected characteristics, like sex, pregnancy, sexual orientation, gender identity, or marital status. A teacher's failure to respond to peer name calling or other mistreatment based on sex could be interpreted by students as tolerance for such action. Deliberate indifference to such action and the harm it imposes might give rise to liability under Title IX. Apart from liability, however, comments that denigrate others based on sex can undermine student relationships, individual student confidence, and the class environment. Accordingly, the teacher may have the responsibility to address the comments under Title IX, while respecting the speaking student's right to free speech.

3.3. IDEA and Section 504

As has been discussed previously, the 14th Amendment of the U.S. Constitution provides the framework prohibiting discrimination based on certain characteristics. Congress has taken this concept further by carving out additional legal protections for students with disabilities attending public schools. Two federal statutes, the Individuals with Disabilities Education Act (IDEA 1990) and Section 504 of the Rehabilitation Act (Section 504 1973), provide legal protections and entitlements to eligible students with disabilities. A third federal law, the Americans with Disabilities Act (ADA), prohibits disability-based discrimination in public and private settings. The ADA mirrors Section 504 in many ways; however, because Section 504's protections are most relevant to students in public schools, we have limited our discussion to it. This section begins by defining who is eligible under IDEA and Section 504 and explaining that high-ability and/or gifted and talented students lack similar protections. Next, we identify legal violations under IDEA and Section 504 and clarify what results when disability-based discrimination has occurred.

3.3.1. Who Is Eligible under IDEA?

IDEA mandates that states identify, locate, and evaluate all children with disabilities (IDEA 1990 at § 1412(a)(3)(A)) to determine which students are eligible for special education and related services. Although state law could provide additional eligibility, children ages three through twenty-one are eligible under federal law. To be eligible, two criteria must be met: (1) the student must be a student with a disability based on specific disability categories outlined in the law (e.g., orthopedic impairments, traumatic brain injury, autism spectrum disorder, specific learning disabilities) and (2) the student's disabilities must adversely affect their educational performance (IDEA 1990 at § 1401(3)(A)). Thus, IDEA differs from Section 504 in that it is a funding law that is focused on protecting educational access and opportunities to students with disabilities.

3.3.2. Who Is Eligible under Section 504?

While many students might be eligible for services under both IDEA and Section 504, the eligibility characteristics vary. Specifically, Section 504 states that eligible students with disabilities "shall not be excluded from participating in, be denied the benefits of, or be subjected to discrimination by recipient programs or activities if that treatment is due to their disabilities" (Section 504 1973 at (a)). Students who are eligible under IDEA are typically also protected by Section 504, but students eligible under Section 504 are not always eligible under IDEA. The reason for the limited eligibility is that Section 504's definition of disability differs from IDEA. Instead of the need to meet the two criteria listed above, to be eligible under Section 504, a student must have a "physical or mental

impairment that substantially limits one or more major life activities, has a record of impairment, or is regarded as having an impairment" (Section 504 1973 at § 705(20)(B)). Therefore, students who are ineligible for IDEA because they are able to perform well academically may still be considered students with disabilities under Section 504 because they are limited in major life activities such as walking, hearing, learning, or caring for oneself. These students may be eligible for reasonable accommodations or modifications. An example of this could be a student who has a life-threatening allergy to eggs and needs the school to provide a modified curriculum to meet their needs (e.g., no scientific experiments that include egg drops). Under Section 504, the definition of disability is "construed broadly" (42 U.S.C. §§ 12101–12102) and could include students who may not be commonly considered to have disabilities, including students with health concerns like diabetes, mental health issues, epilepsy, HIV/AIDs, or hemophilia. Another difference between IDEA and Section 504 is that whereas IDEA is a funding statute that states may opt out of (however, none have), Section 504 is a civil rights statute which applies to any entity receiving federal funds (e.g., all public schools and colleges and some private institutions).

3.3.3. Are There Similar Legal Protections for High-Ability and/or Gifted and Talented Students?

Unlike students with disabilities, students who are considered high-ability or gifted and talented do not have legal entitlements or protections under federal law. State law may outline requirements pertaining to the education of these students; however, there is no federal statute that requires that schools identify and provide an individualized education for high-ability/gifted and talented students (McCarthy et al. 2018, p. 162).

3.3.4. What Are IDEA Violations?

Special education is the most litigated area of education law (Katsiyannis and Herbst 2004), so it is crucial that educators prevent IDEA violations from occurring. Yell (2019) has simplified the complex law into six key principles, and these are the main areas where courts have found schools out of compliance.

First, states must identify, locate, and evaluate all eligible students who are suspected of having disabilities (IDEA 1990 at § 1412(a)(3)(A)). This mandate is commonly referred to as "child find." Relatedly, the mandate of "zero reject," requires that all students—regardless of the severity of their disabilities—must be served.

Second, schools must conduct evaluations to determine whether students suspected of qualifying are in need of special education and related services (IDEA 1990 at § 1414)). A team of educators/administrators and the parents/guardians then use the data from that evaluation to develop a written plan outlining the special education and related services that the student needs; the plan is called an individualized education program (IEP).

The third guarantee under IDEA is that schools must provide all eligible students with disabilities a free appropriate public education (FAPE) (IDEA 1990 at § 1412(a)(1)(A)). In 2017, the U.S. Supreme Court clarified that schools "must offer an IEP reasonably calculated to enable a child to make progress appropriate in light of the child's circumstances" (*Endrew v. Douglas County School District* 2017). A FAPE includes related services such as assistive technology, psychological services, interpreters, or transportation. Related services include what is required to assist a student with a disability to benefit from special education. The U.S. Supreme Court distinguished that these services may include nursing services such as catheterization regardless of the expense (*Irving Independent School District v. Tatro* 1984), but not medical services, those that might only be provided by a physician (*Cedar Rapids Community School District v. Garret F.* 1999).

Fourth, students with disabilities must be educated in the least restrictive environment (LRE) which means that they are placed with children without disabilities to the maximum extent appropriate (IDEA 1990 at § 1412(a)(5)(A)). There is a preference for the general education setting, and students may only be placed in separate classes or schools if the nature or severity of the disability warrants removal. Therefore, IEP teams must consider the continuum of alternative placements and then must determine what supplemental aids

and services (e.g., resource rooms, pull-out services) are needed in order to provide the least restrictive placement.

The fifth principle of IDEA is parent/guardian participation. Unlike other areas of education, parents/guardians of students with disabilities have a legal right to participate in their child's educational decision-making (*Winkelman v. Parma County School District* 2007). For example, they are members of the IEP team, must be provided with notice of their legal rights, and are entitled to challenge school decisions.

The final principle relates to disputes between schools and parents/guardians. Specifically, IDEA provides several procedural protections for students with disabilities and their parents/guardians. When disagreements arise, there are a series of dispute resolution processes for parents/guardians/students and schools. For example, parents/guardians who do not believe the school has provided a legally-compliant FAPE could engage in a resolution session, mediation, or file a due process complaint with the state educational agency. Once parties have exhausted their administrative remedies, which means that they have completed the state's resolution procedures, they can file lawsuits in state or federal courts (IDEA 1990 at § 1415).

Another type of procedural protection involves the many due process protections that students with disabilities are afforded when schools discipline them. As a result of the U.S. Supreme Court case, *Honig v. Doe* (1988), schools must follow heightened due process procedures when removing students with disabilities from their placement for more than ten days. Specifically, a manifestation determination review must occur where the parents/guardians and relevant IEP team members meet. In this meeting, they evaluate "(1) whether the student's conduct was caused by or had a direct and substantial relationship to the student's disability or (2) whether the student's conduct was the direct result of the school's failure to implement the IEP" (McCarthy et al. 2018, p. 186).

3.3.5. What Are Section 504 Violations?

Interestingly, students who qualify under Section 504 are also entitled to a FAPE, but it is not identical to a FAPE under IDEA (34 C.F. R. § 104.33(b)(1)). For example, a student who qualifies under Section 504 would be entitled to a manifestation determination review for a disciplinary issue; however, if their conduct was not a manifestation of their disability, they would not be entitled to continue receiving a FAPE while they were expelled. Additionally, only students who qualify for Section 504 because they have an impairment that substantially limits one or more major life activities are entitled to reasonable accommodations and modifications. Under Section 504, students are not entitled to an IEP, but schools should provide accommodation plans called Section 504 plans. Accommodations could include a peanut-free lunch table, increased time to complete assignments, a reduction in classroom distractions, or access to one's medication like epipens or insulin. Thus, some of the legal violations under Section 504 are similar to those that were explained above in connection with IDEA, but they are not exactly the same.

More commonly, schools violate Section 504 because the building or programming was inaccessible to students with disabilities or they engaged in some type of disability-based discrimination. To be considered disability-based discrimination, students must be excluded from participation in school activities or programs (e.g., homecoming, athletics), denied benefits (e.g., Advanced Placement coursework), or discriminated against "solely by reason of" their disabilities (e.g., harassed/bullied on the basis of their disability) (Section 504 1973 at (a)).

3.3.6. What Occurs as a Result of Alleged Disability-Based Discrimination in Schools?

Whereas students/parents/guardians who claim IDEA violations file complaints with the state educational agency, those who allege disability-based discrimination under Section 504 file complaints with federal agencies, including the U.S. Department of Education's Office for Civil Rights and the Department of Justice. If after an investigation it is determined that the school is out of compliance, then the federal agency

typically identifies actions the school may take voluntarily to become compliant. However, if the school does not remedy its discriminatory practices, then federal funding could be revoked or the student/parents/guardians may file a lawsuit. Unlike IDEA, students/parents/guardians can win monetary damages in Section 504 lawsuits. Further, as long as the students/parents/guardians' complaint is not primarily about a denial of FAPE, then the plaintiffs do not have to exhaust administrative remedies in Section 504 litigation (*Fry v. Napoleon* 2017). Stated differently, if the gravamen of the dispute is about disability-based discrimination—such as denial of wheelchair ramps—then plaintiffs do not need to exhaust all administrative remedies first. Practically speaking, this means that lawsuits filed claiming a Section 504 violation may be resolved more quickly than IDEA lawsuits.

3.3.7. How Do IDEA and Section 504 Relate to Speech Protections?

Two situations arise when disability law may intersect with First Amendment freedom of speech protections. First, students who have been identified as having a disability and eligible under either IDEA or Section 504 could be harassed or bullied based on their disability. Although IDEA does not explicitly mention protection based on harassment or bullying, courts have identified that disability-based harassment could result in a denial of FAPE in violation of IDEA as well as Section 504. A majority of federal courts analyzing peer disability-based harassment claims have relied on the *Davis v. Monroe* (1999) test for Title IX harassment. In 2014, the ED explained that a school could be liable for disability-based harassment under Section 504 if "(1) a student is bullied based on disability; (2) the bullying is sufficiently serious to create a hostile environment; (3) school officials know or should know about the bullying; and (4) the school does not respond appropriately" (U.S. Department of Education 2014, p. 4). Although the "should have known" requirement differs from the *Davis* test, this is consistent with earlier ED guidance which, importantly, is not binding precedent. (Decker and Eckes 2015). However, there have been federal court decisions where schools have been held liable for failing to respond adequately to peer disability-based harassment. (*T.K. v. New York City Department of Education* 2016).

The second situation when speech and disability law may collide is when a student with a disability is the perpetrator of the harassment. As described above, if educators wish to assign a consequence then they must ensure they are not violating the student's legal rights. Specifically, if the consequence involves removing the student from their FAPE for more than ten consecutive or cumulative academic days in a year (e.g, in or out-of-school suspension), then a manifestation determination review must occur to determine whether the student's speech was a manifestation of their disability. It is possible that certain students with disabilities may lack the social or cognitive awareness to understand the ramifications of their speech, and thus, it could be a direct result of their disability that they harassed another student. For students protected by IDEA, regardless of whether the speech was a manifestation of their disability, they must not be denied their special education and related services for more than ten days. However, for students covered by Section 504, they do not have the same entitlement to a FAPE if the speech is not a manifestation of their disability.

4. Conclusions

As the vignette at the start of this article makes clear, legal issues involving student speech often emerge in school controversies commingled with other legal issues. The physical education teacher in the scenario faces a circumstance in which the student Sam's speech raises concerns regarding discriminatory peer harassment. As discussed earlier, peer harassment can reach the level of actionable discrimination if it amounts to severe or pervasive poor treatment, because of sex, directed at another student. If officials at the school with authority to correct the behavior show deliberate indifference to this treatment, and if a student experiences a loss of educational opportunity as a result, a Title IX violation

has occurred. The same is true of Sam's statements regarding race, which may implicate Title VI. Similarly, if Sam subjects peers to harassment based on disability under the same conditions, and if the school has actual knowledge and shows deliberate indifference to such treatment, the school has violated the Individuals with Disabilities Education Act and Section 504 of the Rehabilitation Act of 1973. Given these legal considerations and the physical education teacher's equally powerful conviction to care for students and create a positive class community, the teacher should take steps to address Sam's comments.

If the nature of Sam's comments in class is harassing or otherwise substantially disruptive, it is unlikely that Sam's speech is protected by the First Amendment. However, as a student with a disability eligible for special education services under IDEA, Sam has rights to procedural protections and curricular supports. If physical education is part of Sam's IEP, Sam has a right to participate in the class, and removals from the class have legal implications. Repeated removal from class could amount to a change in placement in violation of Sam's rights under IDEA. Before a change in placement, Sam has a right to a manifestation determination to identify whether his disability or any failure to provide him FAPE has caused Sam's undesirable behavior. It could be that Sam's disability is unrelated to the behavior, of course, but Sam has a right to this process, and failure to provide Sam due process under IDEA could amount to a violation of the law. Even if the physical education teacher chooses not to remove Sam from class, repeated misbehavior of this sort may be an indication that Sam's IEP team should consider a functional behavioral assessment and behavior intervention plan aimed at helping Sam participate in class appropriately.

Thus, the physical education teacher likely has a pedagogical, ethical, and legal responsibility to address Sam's behavior. Working with Sam's special education teacher of record and the administrator overseeing student behavior management at the school, the physical education teacher can work to identify and address Sam's behavior. The special education teacher, for example, can help communicate with the IEP Team, including Sam's parents, to understand and build solutions for Sam. The building administrator can help the physical education teacher consider options for proactively teaching expectations for behavior and can help the teacher support all students in the class. Of course, legal authorities require school officials to respect student rights and to take reasonable steps to protect them from discriminatory treatment. However, like many steps school professionals may take to meet the legal requirements that govern public schools, these measures also will serve the teacher's goals of creating a safe and productive class environment where students can form bonds and learn valuable skills.

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