

UT System Training

Title IX Enforcement and Litigation Updates

Presenter:

Darren Gibson

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August 2, 2023



THE UNIVERSITY *of* TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

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Agenda

- Methods of enforcement of Title IX
- Department of Education, Office of Civil Rights
- Private litigation
- Texas Higher Education Coordinating Board
- Best practices for preparing for enforcement action



Methods of Enforcement

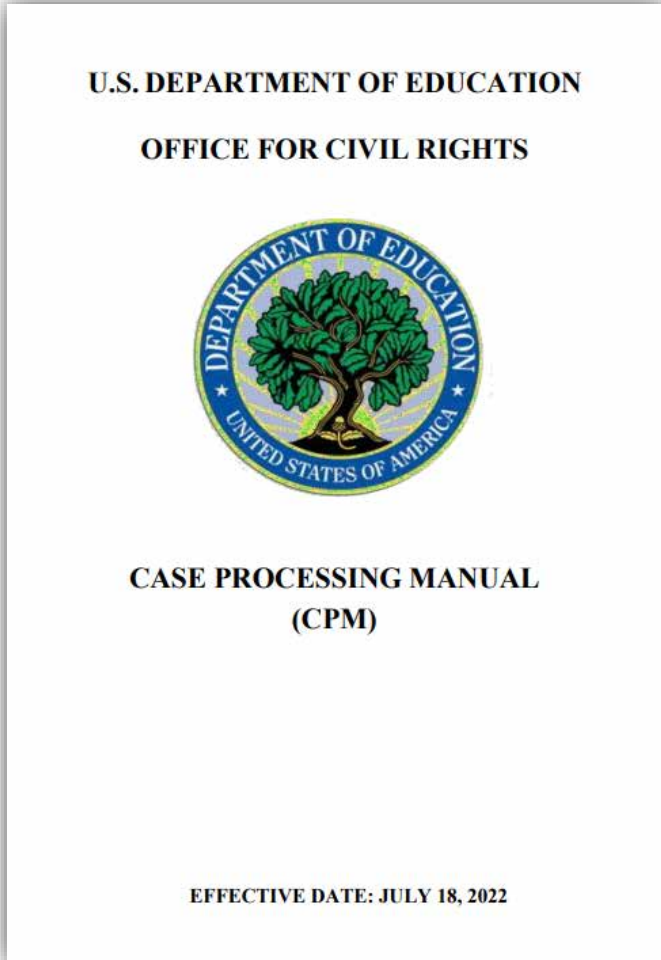
The Department of Education's Office for Civil Rights

Department of Education Office for Civil Rights

- “OCR vigorously enforces Title IX to ensure that institutions that receive federal financial assistance from the Department comply with the law.”
- “OCR evaluates, investigates, and resolves complaints alleging sex discrimination.”
- “OCR also conducts proactive investigations, through directed investigations or compliance reviews, to examine potential systemic violations based on sources of information other than complaints.”
- Although federal funding theoretically at risk, not aware of any institution sanctioned with loss of federal funding.



What Happens when OCR Gets a Complaint?



OCR case process manual is a good place to start.

OCR first evaluates complaint to examine for jurisdiction, timeliness, and possible dismissal.

OCR may offer opportunity to mediate.

Conducts investigation (request documents, conduct interviews) and consider resolution, if requested by recipient.

Reach findings (insufficient evidence vs. non-compliance determination).

Negotiate resolution agreement.

Investigations

- Obligations on institutions in OCR investigations are similar to discovery in litigation.
- Detailed requests for documents and information.
- Formal interviews conducted by OCR investigators (possibly on-site).
- Can involve a substantial amount of time and resources for Title IX Office, Legal Affairs, and related staff.

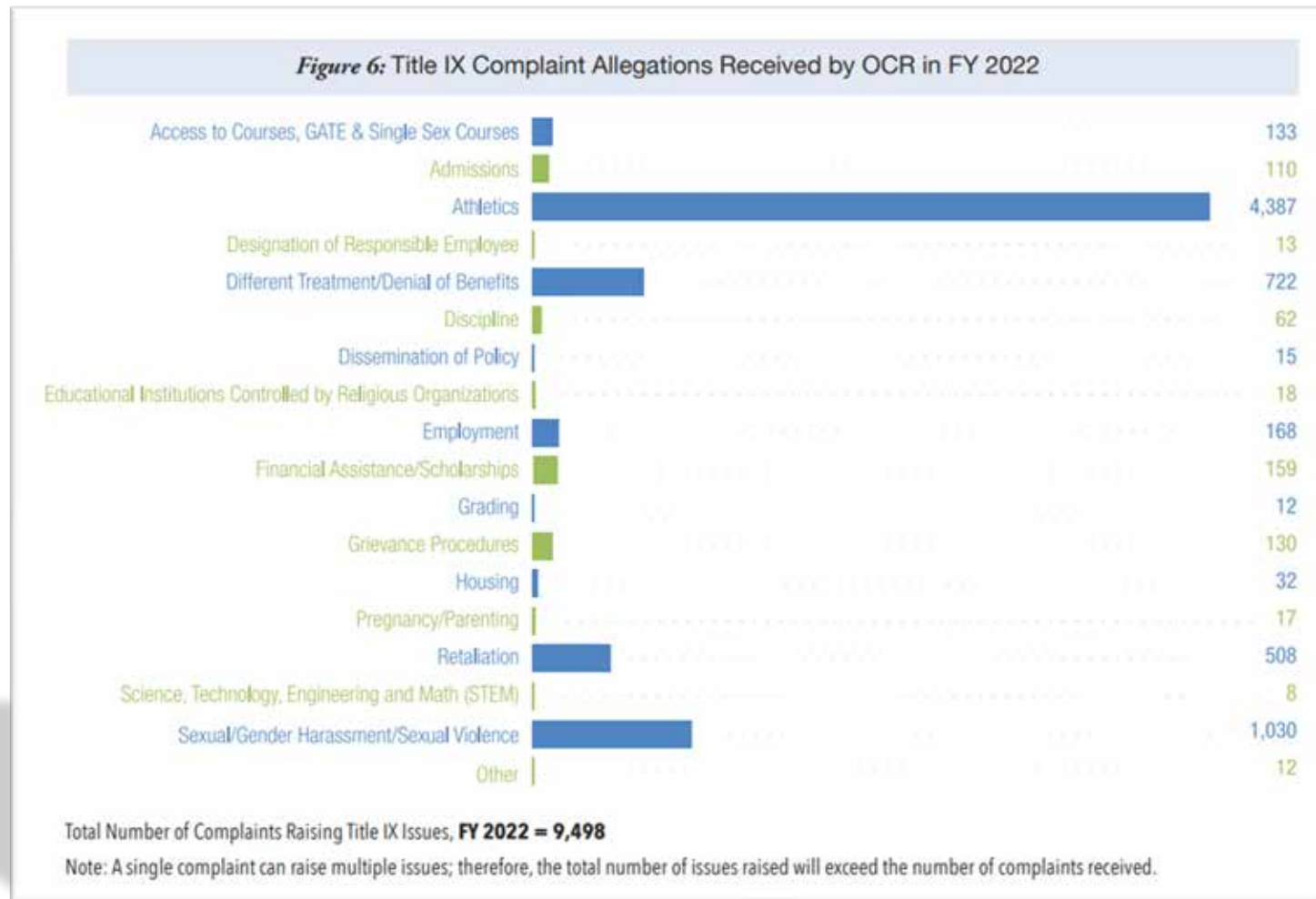


Resolution Agreements

- Recipient may negotiate resolution prior to final findings.
- With a non-compliance or mixed finding, OCR will issue a proposed resolution agreement. Given 90 days to reach agreement.
- Resolution agreement may include requirements to:
 - Modify policies and procedures
 - Conduct mandated training
 - Fund additional resources (e.g., employee positions, materials, websites)
 - Develop and implement communication and marketing plans
 - Mandate data management and recordkeeping
 - Reimburse individual complainants
 - Send reports and documentation to OCR



OCR Complaints – The Numbers



OCR Results

Eradicating Sexual Harassment and Sexual Violence

San Juan Bautista School of Medicine (PR)

Finding

Medical School failed to investigate a student's sexual assault complaint for 4 years, and policy did not comply with Title IX.

Remedy

Medical School agreed to conduct the missing sexual assault investigation, reimburse the complainant for specified coursework, train relevant employees, and update the grievance procedures to comply with Title IX.

Eastern Mennonite University (VA)

Finding

University failed to answer faculty party request for interim measures during investigation, including eliminating the requirement that faculty party be a student advisor during the investigation.

Remedy

University agreed to conduct training with an emphasis on interim measures and retaliation and to develop a plan to assess the appropriateness of the university's response to the faculty member including, if necessary, consideration of remedial options.

OCR Results

Equal Access to Athletic Opportunities and Benefits

Western Illinois University (IL)

Finding

University failed to accommodate female students and did not provide equal athletic opportunity based on sex in connection with the opportunity to receive coaching and recruitment of student athletes.

Remedy

University must conduct a full assessment of how it can equally and effectively accommodate the athletic interests and abilities of female students. University must also assess the coaching, assignment and compensation of coaches, and recruitment for its female athletes.



OCR Results

Preventing Discrimination Based on Pregnancy or Parental Status

Bryant & Stratton College (VA)

Findings

College did not have adequate policies to respond appropriately to a reasonable request from a student wishing to finish her last scheduled class early to accommodate her estimated due date.

Remedy

College agreed to adopt policies and procedures that ensured students were not unlawfully excluded from the college's educational programs or activities based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. College also agreed to train employees on policies.

Salt Lake Community College (UT)

Findings

College failed to adequately address student report that professor encouraged student to drop course due to pregnancy, failed to provide accommodations or engage in the interactive process, and failed to consider whether pregnancy caused a temporary disability requiring academic adjustment.

Remedy

College agreed to revise nondiscrimination policy; publish information on its website for pregnant students about rights and access to services; train its Title IX coordinator, Disabilities Resource Center staff, and other school employees regarding Title IX's and Section 504's protections for pregnant students; and complete and document its investigation of student's complaint.

Methods of Enforcement

The Department of Justice

Referral to the Department of Justice



- If no resolution is reached, OCR may refer case to Department of Justice to sue recipient in federal court.
- Most recent cases involving DOJ involve school districts, not universities.
- DOJ can also intervene in private Title IX cases, including numerous recent LGBTQ cases.
- DOJ files “statements of interest” in private Title IX cases regarding application of law.
 - DOJ filed statements in two Kansas state cases in 2016 regarding application of Title IX to off-campus, school-recognized fraternities.
- For example, in 2021 DOJ reached \$1.6M agreement to remedy Title IX violations at a California university. (Next Slide)

DOJ Objectives Results

\$1.6M Agreement to Remedy Title IX Violations at San José State University

Findings

The department found that SJSU failed for more than a decade to respond adequately to reports of sexual harassment, including sexual assault, of female student-athletes by an athletic trainer who had worked at SJSU from 2009 through 2020. The department further found that SJSU retaliated against two employees.

Remedies

- \$125,000 to any current or former Student-Athlete or Employee who participated in SJSU's 2009-10 or 2020-21 investigations, and/or who participated in the Department's Title IX investigation, and who alleged during these investigations that they were sexually harassed by the Athletic Trainer.
- Update and improve Title IX policies and protocols.
- Reorganize Title IX Office to give Coordinator more authority, independence, and resources.
- Training.

Private Litigation

Private Litigation

- Students can sue under various theories of liability
 - Official policy / archaic assumptions (more common in sports equity claims)
 - Deliberate indifference to sexual harassment.
 - Selective enforcement based on gender bias.
 - Erroneous outcome due to gender bias.
 - Retaliation.
- In the Fifth Circuit, employee Title IX claims preempted by Title VII.
 - Circuit split, ripe to be decided by SCOTUS.
 - Employees can still bring claims of Title IX retaliation based on Title IX protected activity.
- No administrative exhaustion requirement under Title IX.
- 2-year statute of limitations.

Private Litigation – Primary Causes of Action

- Deliberate indifference:
 - To establish a claim of sexual harassment, a plaintiff must show that: (1) the sexual harassment was “so severe, pervasive, and objectively offensive that it can be said to deprive the victim[] of access to the educational opportunities or benefits provided by the school;” (2) the school district had actual knowledge of the sexual harassment; and (3) it acted with “deliberate indifference to the harassment.” *Davis v. Monroe County Bd. of Educ.*, 526 U.S. 629, 650 (1999).
- Selective enforcement:
 - “Either punishment or the decision to initiate enforcement proceedings was motivated by gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).
- Erroneous outcome
 - “A plaintiff alleging an erroneous outcome must point to ‘particular facts sufficient to cast some articulable doubt on the accuracy of the outcome of the disciplinary proceeding’—for instance, ‘a motive to lie on the part of a complainant or witnesses, [or] particularized strengths of the [disciplined student’s] defense.’ ... The plaintiff must also demonstrate a “causal connection between the flawed outcome and gender bias.” *Klocke v. Univ. of Tex. at Arlington*, 938 F.3d 204 (2019).

Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Allegations:

Male student alleged that the university violated Title IX based on investigation and adjudication of punishment (rustication and loss of football scholarship) that was biased against student as a male, following incident in which female student alleged that male student failed to sufficiently disclose details of risks of herpes transmission from students' unprotected sex.

University denied and moved for summary judgment. SDTX granted summary judgment, but Fifth Circuit reversed findings.



Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Holdings

- Genuine issue of material fact as to whether university reached an *erroneous outcome*:
 - *Opposing Evidence*: Female Student admitted knowing that Male Student had a history of herpes before they had sex.
 - *Investigation Omissions*: Investigator declined to investigate Male Student's claim that Female Student contracted herpes from another sexual partner before having sex with Male Student.
 - *Inequitable Application of Remedies*: University sanctioned Male Student with what amounted to expulsion for failing to inform Female Student of all the risks of having sex with a herpes carrier, even though the University Student Code did not contain such a requirement, and the University ultimately never required Female Student to inform all of her sexual partners of the same.

Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Holdings

- Genuine issue of material fact as to whether University engaged in ***selective enforcement***:
 - ***Inequitable Application of Remedies***: Evidence University selectively enforced its policies against him by refusing to treat Female Student and Male Student equally when Male Student alleged—in response to Female Student's allegations—that she was guilty of the same conduct of which he was charged—failure to disclose the risk of STD transmission—yet never charged her for the same behavior.
- Genuine issue of material fact as to whether University relied on ***archaic assumptions***:
 - ***Evidence of archaic assumption***: A rational jury could find that the University's policy arose from the view that a more-knowledgeable male had a duty to educate an unwitting female about the precise risks of herpes transmission—an archaic assumption.

Private Litigation – Punishment Motivated by Gender Bias

Doe v. Texas Christian University (N.D. Tex. 2022)

Title IX Allegations

John Doe alleges TCU discriminated against him on the basis of his sex when they made adverse finding against him in Title IX sexual assault matter. TCU denied and moved for summary judgment.

Title IX Holdings

Court denied summary judgment, finding that Plaintiff raised sufficient circumstantial evidence to give rise to an inference of gender bias. Evidence indicating potential gender bias included:

- Numerous procedural irregularities (e.g., exclusion of exculpatory evidence in violation of Title IX regulations and TCU's policies, and consolidation of complaints), and
- Statements by key TCU officials tending “to show the influence of gender” as a possible motivating factor in the panel's disciplinary decision.



Private Litigation – Differential Treatment in Education

Mandawala v. Baptist School of Health Professions (W.D. Tex. 2022)



Title IX Allegations

Mandawala, a medical sonography student, alleged that he failed classes because a female supervisor treated him differently than his female peers, gave him negative performance evaluations, and made comments about sonography being a field better suited for women in violation of Title IX. School denied and moved for summary judgment.

Title IX Holdings

- Court granted summary judgment finding that Mandawala failed to establish a *prima facie* case because there was no evidence demonstrating discrimination was a substantial or motivating factor in the school's decision to fail Mandawala.
- Court further noted that even if he established a *prima facie* case, BSHP offered a non-discriminatory reason for failing him: he failed the sonography program because he did not complete the program's requirements.
- He also offered no evidence of pretext.

Private Litigation- Intersection between Title IX and ADA

Jane Doe v. Texas A&M University (S.D. Tex. 2022)



Title IX Allegations

Female student, who had Down Syndrome and participated in program for young adults with intellectual and developmental disabilities, alleged violations of Title IX and the ADA that she was sexually assaulted and harassed by other students, and University failed to provide appropriate supervision.

University denied and moved to dismiss claims.

Title IX Holdings

Student failed to allege that university was deliberately indifferent under Title IX because having a Title IX office, in and of itself, is not sufficient to create a plausible inference that the University was deliberately indifferent to a heightened risk of sexual harassment in the program.

ADA Holdings

4 out of the 6 allegations alleging violations of the ADA survived the Motion to Dismiss.

Private Litigation – Due Process and Cross Examination

Van Overdam v. Texas A&M University (5th Cir. 2022)

Title IX Allegations:

Former student alleged Title IX and due process violations after he was found responsible for sexual assault and suspended for one semester. University denied and moved to dismiss.

Title IX Holdings:

Court dismissed Title IX claim because gender bias could not be inferred simply due to male student being held responsible for one sexual assault but not another one against same female student as required to state a Title IX Claim.

Constitutional Holdings:

Constitutional due process does not require the students accused of sexual assault be granted the opportunity for attorney-led direct cross examination of their accusers during university disciplinary proceedings.



Damages in Title IX Litigation

- Successful plaintiffs may be entitled to compensatory damages, injunctive relief, and attorney's fees.
- Intentional discrimination required to recover monetary compensatory damages (e.g., lost tuition, wages, emotional pain and suffering).
 - *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60 (1992); *Mercer v. Duke University*, 401 F. 3d 199, 203 (4th Cir. 2004).
- Punitive damages are not available.
 - *Barnes v. Gorman*, 536 U.S. 181 (2002).



Texas Higher Education Coordinating Board

Texas Higher Education Coordinating Board

- Responsible for compliance oversight per SB 212 and HB 1735.
- Institutions must provide annual reports to the Texas Higher Education Coordinating Board regarding compliance with SB 212 and HB 1735.
- If the Texas Higher Education Coordinating Board determines institution “not in substantial compliance,” it may assess an administrative penalty up to \$2 million, which cannot be paid using “state or federal money.”
 - See TEC 51.258 (SB 212), 51.292 (HB 1735).





How to Be Prepared for Enforcement Actions

Preparation Before Any Complaint or Claim

- Regularly update policies and procedures
- Ensure Title IX staff are qualified and trained
- Continue to take required trainings (like the one today)
- Have well-functioning systems in place for managing Title IX compliance process
 - Case intake methods and processes (including electronic intake)
 - Case tracking and monitoring during investigation and grievance process
 - Checklists and approved forms for all stages of investigation and grievance process
 - Reporting mechanisms for completed cases in compliance with state and federal mandates
- Have robust community education and outreach programs to both comply with various legal mandates

Preparation During Investigation and Grievance Process

- Follow your policies and procedures during the investigation and grievance process
- Treat all parties equitably
- Do not make presumptions
- Be transparent with parties regarding the process (e.g., notices, updates)
- Don't allow feelings about advisor / attorney affect treatment of party
- Document process (letters and emails to parties, with copies to the file)
- Document evidence, including requests, source, and when received
- Prepare reports that are self-explanatory and stand on their own
- Presume everything you write will be seen by OCR, a judge, and a jury (draft reports, emails to colleagues, etc.)

Preparation After Grievance Process Complete

- Ensure that cases are identified as closed and all required steps have been taken.
- Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved.
- Ensure case file complete, reflects all steps of process, and reflects final outcome, remedies, sanctions, follow-up, etc.
- Ensure case outcome reflected in case tracking systems and compliance reports.
- Document lessons learned and any proposed changes to policies and/or processes based on particular matters.
- Continue ongoing, iterative efforts with respect to overall program improvement.



Questions?

UT System Training

Title IX & Legislative Update

Intersection with Other Laws

Presenter:

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New Laws (88th
Legislative Session)

“The 88th Legislature:
A Texas-sized
Investment in Higher
Education”
-THECB

Key Legislation Impacting Higher Education Funding

- **House Bill 8** overhauls state funding system for community colleges (increases funding by \$650 million) and creates the Financial Aid for Swift Transfer (FAST) Scholarship program, which gives economically disadvantaged high school students free access to dual credit courses.
- **House Joint Resolution 3** and **House Bill 1595** redesignate the National Research University Fund as the Texas University Fund, which will provide funding to TTU, TSU, UH, and UNT to bolster research efforts.
- **House Bill 1590** expands the Texas Leadership Scholars Program to graduate students.
- **Senate Bill 2294** expands the Texas First Diploma Program so that students qualified to graduate early can receive a scholarship (previously limited to research institutions).

Key Legislation Impacting Funding

- **Senate Bill 2139** establishes the new Texas Opportunity High School Diploma Program, under which students can earn a high school diploma through a public community college while also pursuing a postsecondary degree/certification.
- The biennial budget (**House Bill 1**) increased funding for many grant and loan repayment programs.
- **Senate Bill 25** established a new nursing scholarship to encourage participation in high-demand fields while ensuring graduates complete their education with less debt.
- **House Bill 3447** created the Texas Space and **House Bill 5174** established the Texas Semiconductor Innovation Consortium – UT System Chancellor will serve on Executive Committee of both.



New Laws (88th Legislative Session)

SB 412 – “Relating to protections for pregnant and parenting students enrolled in public institutions of higher education.”

SB 459 – “Relating to early registration for parenting students at public institutions of higher education.”

SB 412 Adds Section 51.982 to the Education Code

- Effective September 1, 2023
- Applies to parents of children under 18
- Prohibits IHEs from requiring parenting or pregnant students to:
 - take a leave of absence,
 - withdraw from a degree program,
 - limit studies, participate in an alternative program, change major, or refrain from or cease participating in any course or activity.
- **Requires IHEs to adopt a policy for students on pregnancy and parenting discrimination – must designate a point of contact and include contact information for student requesting protection or accommodation under Section 51.982.**

SB 412 Adds Section 51.982 to the Education Code

- Requires IHEs to provide specific accommodations for parenting or pregnant students who are pregnant or parenting:
 - For pregnant students, same accommodations that would be provided to a student with a temporary medical condition
 - For pregnant students, accommodations related to health and safety of the student and student's unborn child (e.g. safe distance from hazardous substances, areas, and activities)
 - Excuse student's absence
 - Allow students to make up missed assignments or assessments
 - Allow additional time to complete assignments – same as for a student with a temporary medical condition
 - Provide access to materials and recordings of lectures for excused absences under this section
 - Take LOA and return in good academic standing without reapplying (if student left in good standing)

SB 459 requires early registration for pregnant students; SB 222 does not apply to IHEs

- Effective September 1, 2023, Senate Bill 459 requires IHEs to provide early registration for parenting or pregnant students in the same manner they provide early registration for other groups of students
- Senate Bill 222
 - Adds Section 661.9125 to the Government Code
 - Provides 20-40 days of paid parental leave
 - Does not apply to IHEs as defined by Section 61.003 of the Education Code



New Laws (88th Legislative Session)

SB 18 – “Relating to the tenure
and employment of faculty
members at certain public
institutions of higher
education.”

SB 18 Amends Section 51.942 of the Education Code

- Effective September 1, 2023
- Amends Section 51.942 regarding “Faculty Tenure”
- Provides that only an IHE’s governing board, on the recommendation of the institution’s CEO and Chancellor (if applicable), may grant tenure
- No property interest in any attribute of a faculty position beyond continued employment, including regular annual salary and privileges
- Unsatisfactory rating in any area of performance evaluation results in short-term development plan that includes performance benchmarks
- Provides expedited process for summary dismissal of tenured faculty member for “serious misconduct” as defined in institution’s policies

SB 18 Amends Section 51.942 of the Education Code

- Expands grounds for dismissal to include:
 - Professional incompetence
 - Continually/repeatedly failing to perform duties or meet professional responsibilities
 - Failure to successfully complete post-tenure review professional development program
 - Engaging in conduct involving moral turpitude
 - Violation of law or university system or institution policies related to performance of duties
 - Criminal conviction affecting fitness for duty
 - Unprofessional conduct affecting performance of duties
 - Falsification of faculty member's academic credentials
 - Actual financial exigency or phase out requiring elimination of faculty member's position
 - Other good cause as defined in institution's policies



New Laws (88th Legislative Session)

SB 17 – “Relating to diversity,
equity, and inclusion initiatives
at public institutions of higher
education.”

SB 17 Amends Ch. 51 of the Education Code – Limiting DEI

- SB 17 adds Section 51.3525 and outlines responsibility of governing boards re Diversity, Equity, and Inclusion (DEI) initiatives.
- Governing boards shall ensure that units do not:
 - Establish or maintain a **DEI Office** or perform duties of DEI Office via employees or third parties
 - Require (or give preferential consideration based on) a **DEI statement**
 - Give employee applicants preference based on race, sex, color, ethnicity, national origin
 - Require students or employees to participate in **DEI training**

SB 17 Amends Ch. 51 of the Education Code – Defining “DEI Office”

- DEI Office is defined as “an office, division, or other unit of an institution of higher education established” for any of the following purposes:
 - influencing hiring or employment practices with respect to race, sex, color, or ethnicity;
 - promoting differential treatment of or providing special benefits to individuals on the basis of race, color, or ethnicity;
 - promoting policies or procedures designed or implemented in reference to race, color, or ethnicity; or
 - conducting trainings, programs, or activities designed or implemented in reference to race, color, ethnicity, gender identity, or sexual orientation.

SB 17 Amends Ch. 51 of the Education Code – Exceptions

- The following functions are not prohibited:
 - Color-blind and sex-neutral hiring processes in accordance with antidiscrimination laws
 - Policies or procedures designed or implemented in reference to race, color, or ethnicity, which are approved in writing by the institution's general counsel and the THECB for the sole purpose of ensuring compliance with court order or law
 - Trainings, programs, or activities designed or implemented in reference to race, color, ethnicity, general identity, or sexual orientation, which are developed by an attorney and approved in writing by the institution's general counsel and the THECB for the sole purpose of ensuring compliance with any court order or law

SB 17 Amends Ch. 51 of the Education Code – Exceptions

- New Restrictions do NOT apply to:
 - Academic Course Instruction
 - Scholarly Research or Creative Work
 - Student Organization Activities
 - Guest Speakers or Performers
 - Student Recruitment or Admissions
- Statements in grant or accreditation applications may still:
 - Highlight the institution's work in supporting first-generation college students, low-income students, or underserved student populations; or
 - Certify compliance with state and federal antidiscrimination laws.

SB 17 Amends Ch. 51 of the Education Code – Compliance

- Effective September 1, 2023, but does not apply until spring semester of 2023-2024 academic year, with limits on spending subject to certification applicable beginning September 1, 2024.
- Governing board must adopt policies/procedures for disciplining employees for violations.
- In order to spend appropriated funds, IHEs must submit a report certifying compliance to the legislature and THECB.
- State auditor's office will conduct compliance audits at least once every four years.
- **Student or employee required to participate in DEI training may bring a lawsuit against the institution for injunctive and declaratory relief.**

SB 17 and U.S. Supreme Court Decision on Affirmative Action

Students for Fair Admissions, Inc. v. President and Fellows Of Harvard College, et al., 143 S. Ct. 2141 (June 29, 2023), held that:

- Harvard/UNC's asserted compelling interests for race-based admissions program were not sufficiently measurable to pass strict scrutiny in violation of the Equal Protection Clause of the Fourteenth Amendment (UNC) and Title VI of the Civil Rights Act of 1964 (Harvard and UNC);
- Harvard/UNC failed to articulate a meaningful connection between the means they employed and their diversity goals;
- Harvard/UNC admissions programs failed strict scrutiny by using race as a stereotype or negative; and
- Harvard/UNC admissions programs failed strict scrutiny by lacking a logical end point.

SB 17 and U.S. Supreme Court Decision on Affirmative Action

- **Rule**: Universities may not consider a college applicant's race in achieving student diversity in higher education.
- **Guidance**: “[N]othing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise. . . . But[,] universities may not simply establish through application essays or other means the regime we hold unlawful today. . . . A benefit to a student who overcame racial discrimination, for example, must be tied to that student's courage and determination. Or a benefit to a student whose heritage or culture motivated him or her to assume a leadership role or attain a particular goal must be tied to that student's unique ability to contribute to the university. In other words, the student must be treated based on his or her experiences as an individual—not on the basis of race.” 143 S. Ct. at 2176.



Intersection of Title IX and Other Laws

Intersection of Title IX and Title VII – Standard for Sexual Harassment

- Title IX Sexual Harassment:
 - Quid Pro Quo
 - Clery Act/VAWA Offenses – Sexual assault, dating violence, domestic violence, stalking
 - Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity
 - Ø Narrower than Title VII definition, which is conduct severe or pervasive enough to affect a term, condition, or privilege of employment

Intersection of Title IX and Title VII – Addressing All Misconduct

- Employees can be respondents in Title IX complaints.
- Conduct may violate both Title IX and Title VII, or it may meet only the lower Title VII standard.
 - Does your policy have an alternative path for non-Title IX allegations?
- What if conduct is not sufficiently severe or pervasive to constitute sexual harassment, even under Title VII?
 - Policies should address misconduct that does not rise to the level of sexual harassment under either Title VII or Title IX.
 - This allows IHEs to take prompt action in response to all misconduct (and possibly avoid potential liability).

Intersection of Title IX and First Amendment

- Free speech group has recently brought claims against numerous universities, including multiple Texas universities, regarding regulation of student speech.
- Suits allege Title IX policies limiting speech go beyond “severe, pervasive, and objective offensive” standard under Title IX.
- Numerous universities have revised policies to resolve suits.
- Have you examined your Title IX and student speech policies in light of these litigation risks?

Intersection of Title IX and Senate Bill 212 – Mandatory Reporting

- SB 212 imposes broader reporting obligation than claims covered by Title IX or Title VII
- SB 212 Refresher (86th Legislature):
 - Effective January 1, 2020
 - Mandatory reporting requirement for any employee who:
 - Ø in the course and scope of employment
 - Ø witnesses or receives information regarding an incident
 - Ø reasonably believed to be sexual harassment, sexual assault, dating violence, or stalking
 - Ø alleged to have been committed by or against a student or employee
 - Mandatory termination and potential criminal penalties for violation

19 Tex. Admin. Code § 3.5 – THECB Regulations add to 51.252

- Repeats statutory requirements with a few important deviations;
- The employee is required to report an incident *regardless of when or where the incident occurred*; and
- Institutions may establish additional reporting avenues to comply with reporting obligations provided that the reports are promptly routed to the Title IX coordinator or deputy Title IX coordinator.

Hypothetical Scenarios

- Upon returning to school after a vacation, a student reports to an advisor that she was sexually assaulted by someone she met at a bar while vacationing in Europe.
- Upon returning from vacation to Disneyland, employee #1 tells employee #2 about the relaxing vacation. Employee #2 recalls that 10 years ago (shortly after employee #2 started working for the university), she went to Disneyland and was sexually harassed by a fellow park visitor.
- Such reports raises no legal obligations under either Title VII or Title IX.
- However, under SB 212 and expansive THECB rules, employees could be subject to termination if they don't report to TIX Coordinator.

Intersection of Title IX and *Garrity*

- *Garrity v. New Jersey* and its progeny outline boundaries for public employers when conducting employee witness interviews in internal investigations that raise potential criminal liability.
- *Garrity* prohibits public employers from *both* (1) requiring employees to cooperate with internal investigations by threat of job loss *and* (2) requiring the employee surrender her Fifth Amendment rights against self-incrimination by allowing information from such interviews to be used in criminal proceedings.

Intersection of Title IX and *Garrity*

Employer can either:

1. Require the employee to answer questions with adequate immunity from the use of such testimony in criminal proceedings, and then terminate employment if employee declines to do so, or
2. Make it clear that the employee's participation in the questioning is voluntary and any answers may be used in criminal proceedings, but that the employee will not be disciplined for failing to answer questions.

Questions?

UT System Training

Introduction to Case Study

Presenter:

Darren Gibson

Mindy Wetzel

August 2-3, 2023



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The Case Study—Dr. Bunsen's Chemistry Lab

**FICTIONAL CASE STUDY
FOR TRAINING PURPOSES ONLY**

**University of Texas Institution
Title IX Complaint Form**

Submitted on May 23, 2023 at 8:00:00 am CDT

Nature of Incident: **Title IX Report**
Urgency: **Urgent**
Incident Date and Time: **2023-May 13**
Incident Location: **Chemistry Department**

Reported By
Name: **Anonymous**
Title: **Graduate Student**
Email:
Phone:
Address:

Involved Individuals
Marie Curie Undergraduate Student
Complainant

Linus Pauling Post-doctoral Fellow
Respondent

What is your relationship to the University?
Anonymous Reporter (prefer not to state)

Basis and Description of Concerns:
Type of Allegation (check all that apply):
Assault, Sexual Misconduct

NARRATIVE FIELD. Please provide a detailed description of the incident/concern using specific concise, objective language (who, what, when, where, why, and how).

I work in Professor Bob Bunsen's chemistry lab. During the past year, a postdoc in our lab, Linus Pauling, started flirting with Marie, a talented undergrad who was working in the lab as part of her undergraduate research project for academic credit. Linus is the star of the lab who works on Dr. Bunsen's high-profile projects and has numerous publications.

In the fall, it seemed Linus had a crush, but it was unclear if Marie felt the same. Linus would ask Marie to lunch or coffee on campus, and Marie would laugh it off but would agree to go with Linus. At the end of the day when Marie was leaving the lab, Linus would leave with her and talk with her. I never saw them be overtly romantic, and it seemed harmless at the time.

But Marie told me the rest of the story last night, and I decided I had to report it to Title IX.

First, Linus friended Marie on Instagram and ~~SnapChat~~, and they started messaging. Marie showed me messages where Linus was telling her he had romantic feelings for her and asked her to go out with him. She politely declined by saying she wanted to be friends. Linus also said he could help her academic career by putting in a good word with Dr. Bunsen, who could provide her a job in the lab after the semester ended, additional research opportunities, and a good letter of recommendation for graduate school, which was Marie's ultimate goal after undergrad.

Marie told me she continued to be nice to Linus and "humor him" to avoid conflict and to stay in good graces with Dr. Bunsen so she could keep working in his lab.

The Case Study—The Chemistry Lab

Linus and Marie both went to an academic conference in San Francisco with Dr. Bunsen in April, and they went to dinner with Dr. Bunsen and collaborators from other universities. After a few glasses of wine at dinner, Linus made crude jokes to Marie about how good he was in bed, and she laughed it off and told him to stop. He also kept touching her leg and putting his arm around her shoulders, and she had to keep removing his hand. Marie also said that during dinner, Dr. Bunsen discussed the idea of her continuing to work in the lab after the semester was over.

Marie, who lives on campus, told me that Linus showed up unannounced to her dorm a couple of times in early May and offered to buy her coffee and help her study for her chemistry finals. Marie had no idea how he found out where she lived, and she said it was “creepy.”

After finals, she went with a friend to a bar off campus, and after a while, she noticed Linus was also there and he came over to say hi. At some point, her friend left with a guy, and she was stuck talking to Linus. He kept pouring her tequila shots to celebrate the end of the semester. He kept telling her how beautiful she was and how he could help her with her research and career.

Marie said around midnight, she told Linus she was going to walk home, and Linus offered to walk with her. Because there had been recent robberies on campus, she agreed. She remembered they were both drunk and stumbling on the walk to her dorm.

Once they got to her dorm, Linus asked if he could use her bathroom, and she agreed (as they had both been drinking). When he came out of the bathroom, he told Marie how pretty she was and started making out with her. Marie said he then “forced himself” on her. Marie was crying when she told me this.

The next day, Linus kept texting her and reaching out on social media saying he wanted to talk, but Marie blocked his texts, unfriended him, and didn’t have any further contact.

Marie said the following day (Friday), she came to the lab before going home to see her parents for a few days and told Dr. Bunsen what had happened. She told Dr. Bunsen she didn’t want any further contact with Linus. Dr. Bunsen said he would take care of it.

When Marie came back to the lab the next week for the summer term, Dr. Bunsen came into the lab and asked to see Marie in his office. After meeting with Dr. Bunsen, she came back into the lab, gathered up her things, and left without saying anything.

I reached out to her, and we had coffee later that evening. That’s when she told me the whole story, including that when she met with Dr. Bunsen earlier that day, he told her the funding for her position had run out and he couldn’t keep her in the lab anymore, but he would try to find her another position in a different lab. He also said he talked to Linus, who said everything was consensual. Dr. Bunsen explained that because it was he-said, she-said, he couldn’t take any action against Linus.

I told Marie she should make a Title IX report, but she said it wouldn’t do any good because Dr. Bunsen is protecting Linus. She wants to just move on, focus on school, and try to get into grad school. In addition, she needs Dr. Bunsen to write her a good letter of recommendation for grad school and find her work in another lab.

She doesn’t deserve to be treated this way. Someone should do something!

Was law enforcement notified or medical services sought?

No

Key Issues Raised by Anonymous Complaint

- Ability to investigate given Marie's position on filing a complaint
- Scope of Title IX
- Mandatory reporting obligations under SB 212
- Potential retaliation allegations
- Confidentiality
- Supportive measures
- *Garrity* warnings and voluntary participation



Plan the Investigation – Who Are The Witnesses?

Witnesses:

- Marie
- Linus
- Dr. Bunsen
- Students and employees working in the lab, including anonymous reporter
- Conference attendees who were at the dinner
- Marie's friend at the bar
- Marie's roommate(s)
- Others?



Plan the Investigation – What Documents Exist?

Documents and Electronic Evidence:

- Texts/messaging/emails between Marie and Linus
- Communications between witnesses re allegations
- Social media posts related to conference, study help, etc.
- Documents re Marie's position in lab (e.g., performance, funding, requests to other labs)
- Prior SB 212 training for Dr. Bunsen
- Dorm security footage

Questions?

**FICTIONAL CASE STUDY
FOR TRAINING PURPOSES ONLY**

**University of Texas Institution
Title IX Complaint Form**

Submitted on May 23, 2023 at 8:00:00 am CDT

Nature	Title IX Report
Urgency	Urgent
Incident Date and Time	2023-May 13
Incident Location	Chemistry Department

Reported By

Name:	Anonymous
Title:	Graduate Student
Email:	
Phone:	
Address:	

Involved Individuals

Marie Curie	Undergraduate Student
Complainant	

Linus Pauling	Post-doctoral Fellow
Respondent	

What is your relationship to the University?
Anonymous Reporter (prefer not to state)

Basis and Description of Concerns:

Type of Allegation (check all that apply):
Assault, Sexual Misconduct

NARRATIVE FIELD. Please provide a detailed description of the incident/concern using specific concise, objective language (who, what, when, where, why, and how).

I work in Professor Bob Bunsen's chemistry lab. During the past year, a postdoc in our lab, Linus Pauling, started flirting with Marie, a talented undergrad who was working in the lab as part of her undergraduate research project for academic credit. Linus is the star of the lab who works on Dr. Bunsen's high-profile projects and has numerous publications.

In the fall, it seemed Linus had a crush, but it was unclear if Marie felt the same. Linus would ask Marie to lunch or coffee on campus, and Marie would laugh it off but would agree to go with Linus. At the end of the day when Marie was leaving the lab, Linus would leave with her and talk with her. I never saw them be overtly romantic, and it seemed harmless at the time.

FICTIONAL CASE STUDY
TITLE IX SEXUAL HARASSMENT
FOR TRAINING PURPOSES ONLY

But Marie told me the rest of the story last night, and I decided I had to report it to Title IX.

First, Linus friended Marie on Instagram and SnapChat, and they started messaging. Marie showed me messages where Linus was telling her he had romantic feelings for her and asked her to go out with him. She politely declined by saying she wanted to be friends. Linus also said he could help her academic career by putting in a good word with Dr. Bunsen, who could provide her a job in the lab after the semester ended, additional research opportunities, and a good letter of recommendation for graduate school, which was Marie's ultimate goal after undergrad.

Marie told me she continued to be nice to Linus and "humor him" to avoid conflict and to stay in good graces with Dr. Bunsen so she could keep working in his lab.

Linus and Marie both went to an academic conference in San Francisco with Dr. Bunsen in April, and they went to dinner with Dr. Bunsen and collaborators from other universities. After a few glasses of wine at dinner, Linus made crude jokes to Marie about how good he was in bed, and she laughed it off and told him to stop. He also kept touching her leg and putting his arm around her shoulders, and she had to keep removing his hand. Marie also said that during dinner, Dr. Bunsen discussed the idea of her continuing to work in the lab after the semester was over.

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Marie said around midnight, she told Linus she was going to walk home, and Linus offered to walk with her. Because there had been recent robberies on campus, she agreed. She remembered they were both drunk and stumbling on the walk to her dorm.

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FICTIONAL CASE STUDY
TITLE IX SEXUAL HARASSMENT
FOR TRAINING PURPOSES ONLY

Marie said the following day (Friday), she came to the lab before going home to see her parents for a few days and told Dr. Bunsen what had happened. She told Dr. Bunsen she didn't want any further contact with Linus. Dr. Bunsen said he would take care of it.

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She doesn't deserve to be treated this way. Someone should do something!

Was law enforcement notified or medical services sought?

No

UT System Title IX Training

Employee Reporting Requirements in Texas

Presenter:

Darren Gibson
August 2, 2022



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THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

Littler



Case Study – Employee Reporting Issue

Relevant Facts from Case Study:

- *“Marie said the following day (Friday), she came to the lab before going home to see her parents for a few days and told Dr. Bunsen what had happened. She told Dr. Bunsen she didn’t want any further contact with Linus. Dr. Bunsen said he would take care of it. ... [When she met with him the following week,] he also said he talked to Linus, who said everything was consensual. Dr. Bunsen explained that because it was he-said, she-said, he couldn’t take any action against Linus.”*
- Do these allegations raise SB 212 concerns?
- If so, do your policies set make clear who is responsible for investigating these concerns?
- Do your policies make clear what investigation and grievance procedures apply?
- Assuming a failure to report, how do you know if it was “knowingly”?
- Who decides the appropriate sanction?

Agenda

- ✓ **Mandatory Reporting under SB 212**
- ❑ Scope of reporting obligation under statute versus THECB Rules
- ❑ Sanctions and Definition of “Knowingly”
- ❑ Quarterly and Presidential Reports under SB 212
- ❑ THECB Substantial Compliance Rulemaking



SB 212 Refresher, Texas Education Code 51.252

- Imposes mandatory reporting requirement on any university employee who:
 - in the course and scope of employment
 - witnesses or receives information regarding an incident
 - reasonably believed to constitute sexual harassment, sexual assault, dating violence, or stalking
 - alleged to have been committed by or against a student or employee
- Mandatory termination and potential criminal penalties for violation
- Mandatory reporting obligations for Title IX Coordinator and Chief Executive
- Potential \$2 million fine from THECB for non-compliance

SB 212 – Mandatory Reporting for University Employees

- Sanctions under SB 212 are serious and severe.
- Higher ed institutions in Texas are investigating and terminating individuals based on SB 212 violations.
- There are examples of arrests and prosecutions.
 - News coverage of arrest of former Texas A&M University Central Texas police officer arrested for failing to report under SB 212.



Agenda

- Mandatory Reporting under SB 212
- ✓ **Scope of Reporting Obligation under Statute versus THECB Rules**
- Sanctions and Definition of “Knowingly”
- Quarterly and Presidential Reports under SB 212
- THECB Substantial Compliance Rulemaking

SB 212 / Section 51. 252 – Reporting Requirements

- “(a) An employee of a postsecondary educational institution who, in the course and scope of employment, witnesses or receives information regarding the occurrence of an incident that the employee reasonably believes constitutes sexual harassment, sexual assault, dating violence, or stalking and is alleged to have been committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident shall promptly report the incident to the institution's Title IX coordinator or deputy Title IX coordinator.”



Texas Higher Education Coordinating Board

- Responsible for compliance oversight per SB 212 and HB 1735.
- Institutions must provide annual reports to THECB regarding compliance with SB 212 and HB 1735
- If THECB determines institution “not in substantial compliance,” may assess administrative penalty up to \$2 million, which cannot be paid using “state or federal money.”
 - *See* TEC 51.258 (SB 212), 51.292 (HB 1735).



SB 212 and 19 Tex. Admin. Code § 3.5

- Regulations adopted by THECB regarding reporting requirements
- Repeats statutory requirements with a few important clarifications and deviations



19 Tex. Admin. Code § 3.5 – Additions to 51.252(a)

- “(1) The employee's duty to report an incident begins on the effective date of these regulations or January 1, 2020, whichever is later;
- (2) The employee is required to report an incident **regardless of when or where the incident occurred**; and
- (3) Institutions may establish **additional reporting avenues** to comply with this section provided that the reports are promptly routed to the Title IX coordinator or deputy Title IX coordinator.”

SB 212 / Section 51.252(d) – Existing Exceptions

- “(d) Notwithstanding Subsection (a), a person is not required to make a report under this section concerning:
 - (1) an incident in which the person was a victim of sexual harassment, sexual assault, dating violence, or stalking; or
 - (2) an incident of which the person received information due to a disclosure made at a sexual harassment, sexual assault, dating violence, or stalking public awareness event sponsored by a postsecondary educational institution or by a student organization affiliated with the institution.”



19 Tex. Admin. Code § 3.5 – Adds Exception (d)(3)

- “(3) a sexual harassment, sexual assault, dating violence, or stalking incident in which the person has either learned of the incident during the course of their institution's review or process or has confirmed with the person or office overseeing the review or process, that the incident has been previously reported.”



Exception impacts handling of complaints known by multiple parties – e.g., report submitted to a departmental email account, a report shared during a meeting with multiple participants, or recipient shares report with supervisor.

Agenda

- ❑ Mandatory Reporting under SB 212
- ❑ Scope of Reporting Obligation under Statute versus THECB Rules
- ✓ **Sanctions and Definition of “Knowingly”**
- ❑ Quarterly and Presidential Reports under SB 212
- ❑ THECB Substantial Compliance Rulemaking



SB 212 Employee Sanctions

Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

- (a) A person commits an offense if the person:
 - (1) is required to make a report under Section 51.252 and **knowingly** fails to make the report; or
 - (2) with the intent to harm or deceive, knowingly makes a report under Section 51.252 that is false.
- (b) An offense under Subsection (a) is a Class B misdemeanor, except that the offense is a Class A misdemeanor if it is shown on the trial of the offense that the actor intended to conceal the incident that the actor was required to report under Section 51.252.

Meaning of “Knowingly” Under SB 212

- Statute and THECB rules do not offer any definition of, or insight into, the meaning of “knowingly.”
- Look to “knowingly” in Texas Penal Code, State Board for Education Certification rules regarding the educator’s Code of Ethics, and Texas Election Codes.
- Under those standards, we suggest an employee acts “knowingly” with respect to failing to make a report required by SB 212 when that employee:
 - (1) knows that he or she has a duty to report incidents of sexual misconduct, generally, and
 - (2) knows that failure to make a report under the specific circumstances presented violates that duty.

Mandatory Termination

Sec. 51.255. FAILURE TO REPORT OR FALSE REPORT; OFFENSES.

- (c) A postsecondary educational institution shall terminate the employment of an employee whom the institution determines **in accordance with the institution's disciplinary procedure** to have committed an offense under Subsection (a)



Indicates that if employee grievance or appeal process does not support employee termination, then termination is not required.

Agenda

- Mandatory Reporting under SB 212
- Scope of Reporting Obligation under Statute versus THECB Rules
- Sanctions and Definition of “Knowingly”
- ✓ **Quarterly and Presidential Reports under SB 212**
- TCHEB Substantial Compliance Rulemaking



Quarterly Reports under SB 212

Sec. 51.253. ADMINISTRATIVE REPORTING REQUIREMENTS.

- (a) Not less than once every three months, the Title IX coordinator of a postsecondary educational institution shall submit to the institution's chief executive officer a written report on the reports received under Section 51.252, including information regarding:
 - (1) the investigation of those reports;
 - (2) the disposition, if any, of any disciplinary processes arising from those reports; and
 - (3) the reports for which the institution determined not to initiate a disciplinary process, if any.

Immediate Reports under SB 212

Sec. 51.253. ADMINISTRATIVE REPORTING REQUIREMENTS.

- (b) The Title IX coordinator or deputy Title IX coordinator of a postsecondary educational institution shall immediately report to the institution's chief executive officer an incident reported to the coordinator under Section 51.252 if the coordinator has cause to believe that the safety of any person is in imminent danger as a result of the incident.

Presidential Reports under SB 212

Sec. 51.253. ADMINISTRATIVE REPORTING REQUIREMENTS

- (c) Subject to Subsection (d), at least once during each fall or spring semester, the chief executive officer of a postsecondary educational institution shall submit to the institution's governing body and post on the institution's Internet website a report concerning the reports received under Section 51.252. The report:
 - (1) may not identify any person; and
 - (2) must include:
 - (A) the number of reports received under Section 51.252;
 - (B) the number of investigations conducted as a result of those reports;
 - (C) the disposition, if any, of any disciplinary processes arising from those reports;
 - (D) the number of those reports for which the institution determined not to initiate a disciplinary process, if any; and
 - (E) any disciplinary actions taken under Section 51.255.

Agenda

- Mandatory Reporting under SB 212
- Scope of Reporting Obligation under Statute versus THECB Rules
- Sanctions and Definition of “Knowingly”
- Quarterly and Presidential Reports under SB 212
- THECB Substantial Compliance 2023 Rule**



THECB Substantial Compliance Rule

- THECB amended 19 T.A.C. §3.19, concerning substantial compliance, effective as of May 18, 2023.
- Specifically, the rule:
 - sets October 31 as the annual due date for compliance certification, with \$2,000/day fine for failure to file and November 30 cure date;
 - sets a schedule for risk-based compliance monitoring “based on risk factors such as time since last review, stakeholder feedback, prior findings or complaints, and other factor”;
 - provides a penalty matrix for failure to achieve substantial compliance;
 - provides mitigating and aggravating factors which may affect assessed penalties;
 - and provides for appeal of assessed penalties.

THECB Substantial Compliance Rule—Factors for Substantial Compliance

1. The nature and seriousness of the compliance error;
2. The extent to which the institution complied with the statutory requirements and to what extent it did not;
3. The number of any institutional compliance errors;
4. Whether the institution had actual notice of the error;
5. Whether the institution made any effort to rectify any compliance errors or agrees to rectify any violations going forward;
6. The extent to which the institution has relevant policies and/or practices;
7. The institution's intent;
8. Severity of the error's effect;
9. Any previous compliance errors of a similar kind and the time lapse since those error(s);
10. Institutional efforts to prevent compliance errors, including the extent to which the institution provided training to employees and/or acted after learning about the error;
11. The explanation for the cause of the compliance error, including a good-faith mistake; a differing, reasonable interpretation of the law; a conflict between two provisions, or a conflict with another legal or governmental requirement (such as Title IX regulations or a mandatory report to the National Institutes of Health);
12. Any prevention and/or response efforts of the institution, made in good faith, to address a possible compliance error;
13. The degree of cooperation of the institution with the Coordinating Board in remedying a potential compliance error; and
14. Any other fact or circumstance as justice may require.

THECB Substantial Compliance Rule—Factors for Penalty Amounts

Mitigating factors

- Inability of the postsecondary educational institution to meet the requirement of law due to disaster, technical failure, medical impairment
- Evidence institution properly reported an incident to another state or federal agency with law enforcement or regulatory authority
- Any actual notice from the institution of the compliance error;
- Institutional efforts to prevent compliance errors, including the extent to which the institution provided training to employees and/or acted after learning about the error;
- Explanation for the cause of the compliance error, including a good-faith mistake; a differing, reasonable interpretation of the law; a conflict between two provisions, or a conflict with another legal or governmental requirement (such as Title IX regulations or a mandatory report to the National Institutes of Health);
- The lack of harm to any individual; and
- The extent to which the institution or system complied with Texas Education Code, Chapter 51, Subchapters E-2 and E-3.

Aggravating factors

- Harm to an individual caused by, or directly related to, the postsecondary educational institution's failure to comply with Chapter 51, Subchapters E-2 and E-3;
- Any evidence of a postsecondary educational institution's failure to act on a prior substantially similar complaint;
- Any evidence of multiple incidents of similar failures or length of time of failure by the postsecondary institution;
- Any evidence that the postsecondary educational institution or its chief executive officer knowingly provided a false certification under Texas Education Code §51.258(a);
- That the postsecondary educational institution attempted to conceal or cause others to conceal information relevant to a determination of violation under Texas Education Code, Chapter 51, Subchapters E-2 and E-3; and
- The extent to which the institution or system failed to comply with Texas Education Code, Chapter 51, Subchapters E-2 and E-3.

THECB Substantial Compliance Rule—Sanctioning Matrix

- Fines vary by violation ranging from \$5,000 to \$60,000
- \$60,000 fines related to failure to comply with employee reporting requirements under 51.252 and failure to comply with confidentiality obligations under 51.256 and 51.291.
- \$30,000 fines relate failure to report or false report (termination) under 51.255, retaliation under 51.257, amnesty for students under 51.284, disciplinary process requirements under 51.286, student withdrawal or graduation pending charges under 51.287, and designation of confidential employees and student advocates under 51.290.
- Other violations result in a \$5,000 fine.



Questions?

UT System Training

Title IX, FERPA & Texas Law: Confidentiality and Information Sharing

Presenter:

Darren Gibson

Mindy Wetzel

August 2, 2023



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Littler



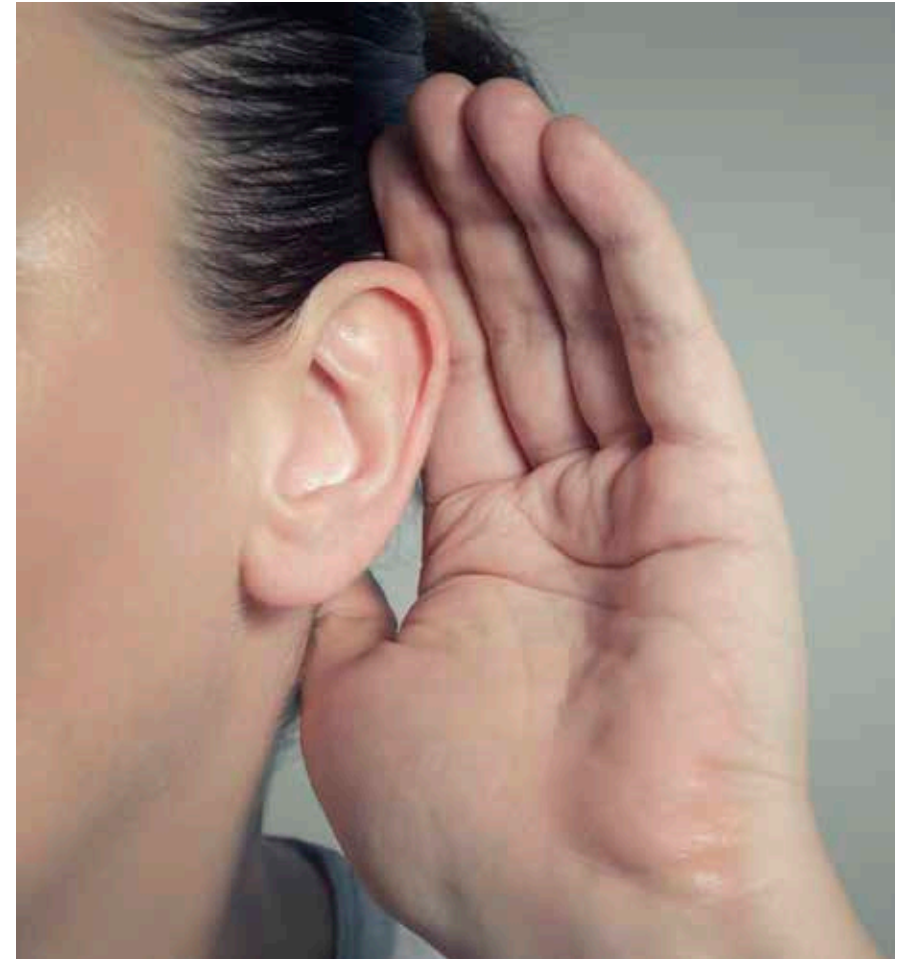
Agenda

- Confidentiality under Title IX
- Confidentiality under FERPA
- Intersection of Title IX and FERPA
- Confidentiality under HIPAA
- Intersection of Title IX and HIPAA
- Confidentiality under Tex. Educ. Code Ch. 51



Confidentiality Requirements – Title IX – 34 CFR 106.30(a)

- Information that must be kept confidential
 - Identity of Complainant
 - Identity of Respondent
 - Identity of reported witness(es)
- Exceptions
 - disclosure is permitted under FERPA;
 - disclosure is required by law; or
 - disclosure is necessary to carry out the purposes of Title IX and its regulations, including to conduct a grievance process.



Confidentiality Requirements – Title IX – 34 CFR 106.30(a)

- Any supportive measures provided to the complainant or respondent must be kept confidential, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.
- Example – No-contact Orders
 - Where respondent would need to know the identity of the complainant in order to comply, or
 - Where campus security is informed about the no-contact order in order to help enforce it.

Confidentiality Requirements – FERPA – 34 CFR Part 99

- FERPA protects the privacy of student education records:
 - Provides students the right to inspect and review their education records.
 - Provides students the right to request that a school correct records which they believe to be inaccurate or misleading.
- Education Records:
 - Broadly defined.
 - Contain information directly related to a student, and
 - Are maintained by an educational agency or institution.



Confidentiality Requirements – FERPA – 34 CFR Part 99

- Exceptions to Education Records:
 - Employment Records
 - Records created by educational personnel in sole possession of the creator
 - Materials created and maintained by a school's law enforcement unit for law enforcement purposes
 - Health Records of Adult Students
 - Records of Former Students not directly related to their attendance as a student
 - Directory Information

Confidentiality Requirements – FERPA – 34 CFR Part 99

- Acceptable Disclosures without Student Consent (related to Title IX):
 - To appropriate parties, including parents, in connection with an emergency if necessary to protect the health or safety of the student or other individuals.
 - To School officials with legitimate educational interest.
 - Disclosure to a victim of an alleged perpetrator of a crime of violence or a non-forcible sex offense – disclosure may include only final results of disciplinary proceeding, regardless of whether the institution concluded a violation was committed.

Confidentiality Requirements – FERPA – 34 CFR Part 99

- Acceptable Disclosures without Student Consent (related to Title IX):
 - Disclosure in connection with a disciplinary proceeding at an institution of postsecondary education – BUT – final results of disciplinary proceeding must not be disclosed unless the institution determines:
 - Ø Student is alleged perpetrator of crime of violence or non-forcible sex offense AND
 - Ø Student is alleged to have committed a violation of the institution's rules or policies
 - Ø AND No other names may be disclosed without prior written consent.

Confidentiality Requirements – Title IX and FERPA

- Title IX and FERPA
 - Both parties must have similar and timely access to evidence obtained through investigation and information to be presented at hearing.
 - Both parties are entitled to receive investigative report and the final results of disciplinary hearing if alleged conduct involves a violent crime or non-forcible sex offense.
 - School officials involved in Title IX investigation/hearing have a legitimate educational interest in receiving FERPA data.
 - When in doubt, Title IX governs over any conflicting FERPA provisions, but DOE says requirements do not contradict.

Confidentiality Requirements – HIPAA

- HIPAA, the Health Insurance Portability and Accountability Act of 1996, protects individually identifiable health information or protected health information (PHI)
- What is PHI?
 - The individual's past, present or future physical or mental health or condition
 - The provision of health care to the individual
 - The past, present or future payment for the provision of health care to the individual
 - Does not include employment records
 - Does not include education records or health records of adult students (covered by FERPA)
- Applies to Health plans, Health care providers, and Health care clearinghouses
 - When a school provides health care to students in the normal course of business (e.g. through health clinic), and/or conducts any covered electronic transactions in connection with that health care, it is covered by HIPAA.

Confidentiality Requirements – HIPAA

- Allows release of information
 - To individuals (or their personal representatives) when they request access to, or an accounting of disclosures of, their PHI and
 - To school nurses, physicians, or other health care providers for treatment purposes, without the authorization of the student or student's parent
 - To a person reasonably able to prevent or lessen a serious and imminent threat to the health or safety of the patient or others (e.g., law enforcement, parent/family member, school administrator)



Confidentiality Requirements – Title IX and HIPAA

- 2020 regulations ban non-consensual access and use of student treatment records without voluntary written consent. 34 C.F.R. § 106.45(b)(5).
 - Not limited to records of on-campus treatment or treatment received in school health clinics
 - Limited to treatment records of parties
 - Applies only to the formal complaint process in which IHE is investigator and adjudicator
- 2020 regulations ban use of privileged information in Title IX grievance proceedings/meetings without a waiver of privilege. 34 C.F.R. § 106.45(b)(1)(x).
 - If student patient records are protected by a therapist/physician privilege or other legal privilege, institution cannot use them as evidence in the investigation report or at the hearing
- Evidence of complainant's sexual history are irrelevant, even with written and voluntary consent to access treatment records, unless one of the two limited exceptions apply. 34 C.F.R. § 106.45(b)(6).

Confidentiality Requirements – Texas Education Code – Sec. 51.252

- Required Reporting
 - University employees designated as a person with whom students may speak confidentially concerning sexual harassment, sexual assault, dating violence, or stalking or who receives information regarding such an incident under circumstances that render the employee's communications confidential or privileged under other law shall, in making a report, state only the type of incident reported and may not include any information that would violate a student's expectation of privacy.

Confidentiality Requirements – Texas Education Code – Sec. 51.252

- Required Reporting
 - A campus peace officer employed by a postsecondary educational institution who receives information regarding an incident sexual harassment, sexual assault, dating violence, or stalking against a student from an alleged victim who chooses to complete a pseudonym form, shall, in making a report under this section, state only the type of incident reported and may not include the victim's name, phone number, address, or other information that may directly or indirectly reveal the victim's identity.

Confidentiality Requirements – Texas Education Code – Sec. 51.256

- **The identity of an alleged victim** of a reported incident of sexual harassment, sexual assault, dating violence, or stalking is confidential and not subject to disclosure under PIA (Ch. 552 of Gov't Code).
- Exceptions - may be disclosed only to:
 - Ø university employees or contractors who are necessary to investigate or conduct any related hearings;
 - Ø a law enforcement officer as necessary to conduct a criminal investigation;
 - Ø the person or persons alleged to have perpetrated the incident, to the extent required by other law; or
 - Ø potential witnesses to the incident as necessary to investigate.
- Can waive in writing.

Confidentiality Requirements – Texas Education Code – Sec. 51.286

- Disciplinary Process for Certain Violations
 - Applies to disciplinary processes concerning an allegation that a student violated the institution's code of conduct by committing sexual harassment, sexual assault, dating violence, or stalking
 - Both the accused student and the alleged victim must have reasonable and equitable access to all evidence relevant to the alleged violation in the institution's possession
 - Ø Evidence includes statements made by victim or witnesses, ESI, written or electronic communications, social media posts, and physical evidence (may redact to comply with federal or state law)

Confidentiality Requirements – Texas Education Code – Sec. 51.291

- Other identities confidential and not subject to disclosure under PIA:
 - The alleged victim;
 - The person who makes report; and
 - The alleged perpetrator in a report, but ONLY IF the institution investigates report and determines it is unsubstantiated or without merit.
- Exceptions - may be disclosed only to:
 - Ø The institution as necessary to investigate report;
 - Ø A law enforcement officer as necessary to conduct a criminal investigation; or
 - Ø A health care provider in an emergency situation, as determined necessary by the university.
- Can waive in writing.

Confidentiality Requirements – Texas Education Code – Sec. 51.971

- Subsection (c) lists more confidential information
 - Information that directly or indirectly reveals the identity of
 - ∅ an individual who made a report to the compliance program office of an IHE,
 - ∅ An individual who sought guidance from the office,
 - ∅ An individual who participated in an investigation conducted under the compliance program, or
 - ∅ an individual who is alleged to have or may have planned, initiated, or participated in activities that are the subject of a report made to the compliance program office of an IHE if, after completing an investigation, the office determines the report to be unsubstantiated or without merit.
- Can waive in writing.

Confidentiality Requirements – Texas Education Code – Sec. 51.971

- Subsection (e) provides exceptions from disclosure under PIA:
 - If the information is collected or produced in a compliance program investigation and releasing it would interfere with an ongoing compliance investigation
 - If the information is collected or produced by a systemwide compliance office for the purpose of reviewing compliance processes at a component IHE of a university system

Case Study—What Confidentiality Concerns Are Raised?

- Prior to Marie filing a formal complaint?
 - Can you disclose Maria's role as alleged victim to others at university? Only as necessary for supportive measures or educational interests.
 - Can you disclose Maria's role as alleged victim to her parents? Only if necessary to protect her health or safety.
 - Can you disclose Maria's role as alleged victim to healthcare provider? Only if necessary to protect her health or safety.
 - Can you disclose to UTPD? Only if necessary to conduct criminal investigation.
- If Marie files a formal complaint?
 - Can you disclose identify of Maria as Complainant and Linus as Respondent to others at university? Only as necessary for supportive measures and to investigate and adjudicate complaint.
 - Can you disclose outcome of grievance procedure? To the parties under Title IX regulations. In addition, FERPA regulations allow disclosure if respondent found responsible for crime of violence of non-forcible sex offense.

Questions?

UT System Training

Reports Received and Triaging Next Steps

Presenter:

Kelli Fuqua

August 2, 2023



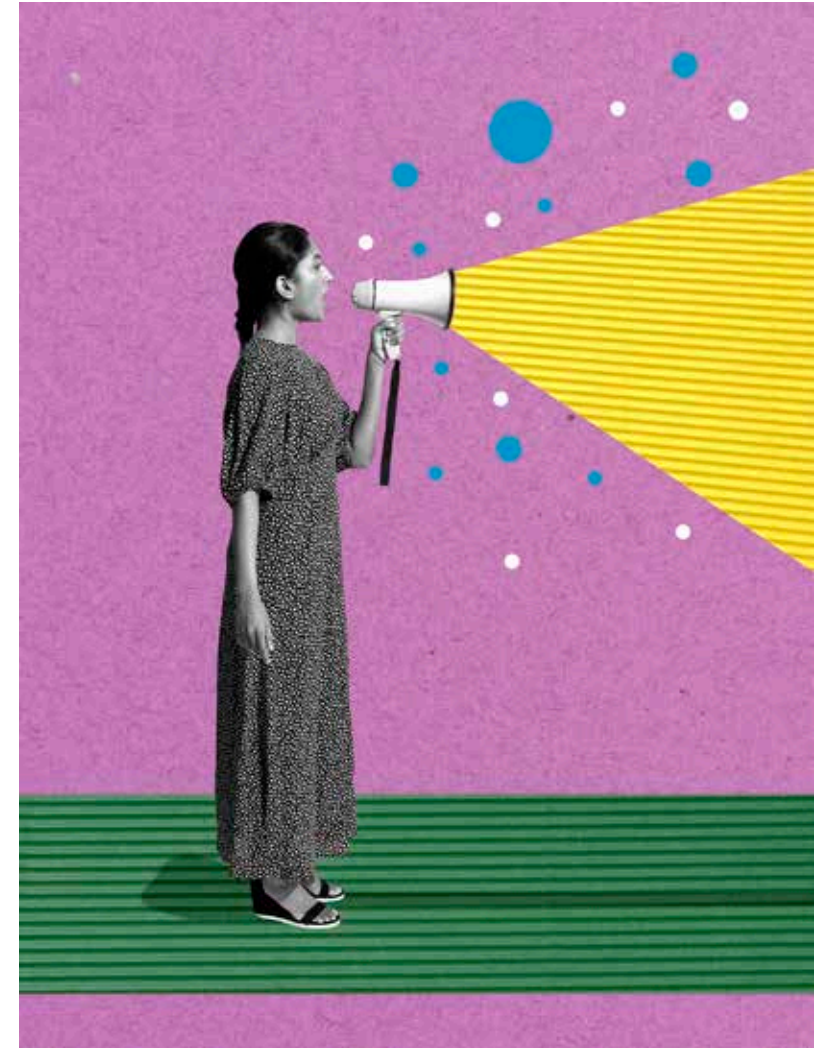
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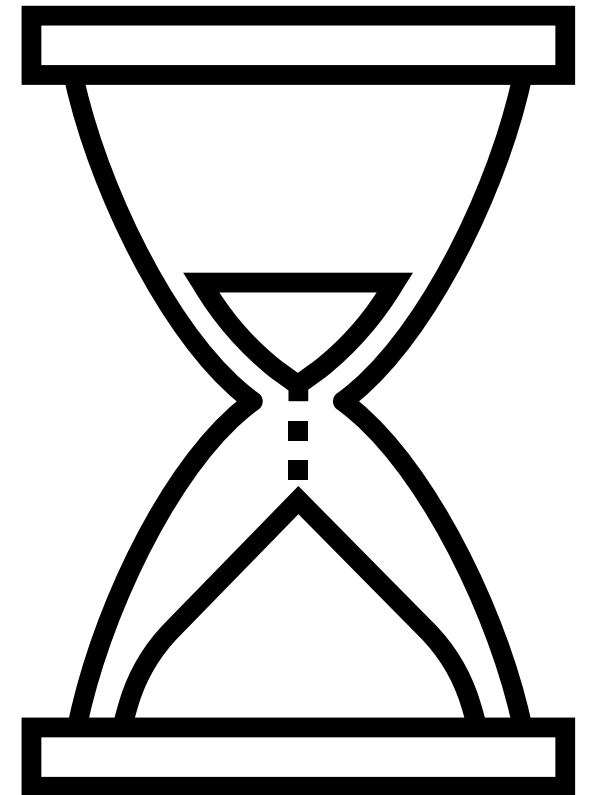
Institutional Obligations to Respond

- Title IX
- Clery Act / Violence Against Woman Act
- Texas Education Code Ch. 51 / SB 212 and HB 1735



Title IX: The Deliberate Indifference Standard

- When a school has notice of sexual harassment, the school must respond promptly, in a manner that is “*not deliberately indifferent*,” meaning that the school’s response must not be clearly unreasonable in light of the known circumstances.
 - The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
 - consider the complainant's wishes with respect to supportive measures,
 - inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,
 - and explain to the complainant the process for filing a formal complaint.



Title IX: The Deliberate Indifference Standard (cont.)

- A school is required to respond when it has *actual knowledge* of sexual harassment.
 - Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures.
 - Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.
 - This standard is not met when the only official of the recipient with actual knowledge is the respondent.
 - The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.

Supportive Measures

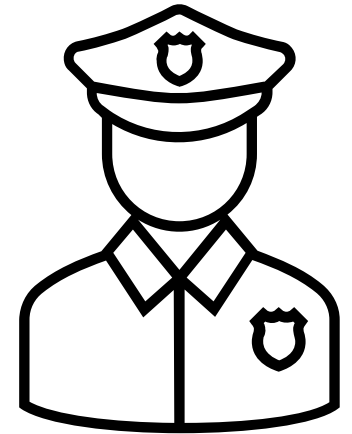
- ***Supportive measures*** means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

Supportive Measures

- Supportive Measures may include:
 - housing reassignment,
 - counseling,
 - extensions of deadlines or other course-related adjustments,
 - modifications of work or class schedules,
 - withdrawal from or retake of a class without penalty, campus escort services,
 - mutual restrictions on contact between the parties,
 - change in work or housing locations,
 - leaves of absences,
 - increased security and monitoring of certain areas of campus,
 - or other similar measures tailored to the individualized needs of the parties.

Outreach

- Immediate Assistance Available
 - Healthcare
 - Police Assistance
 - Counseling or Other Services



Emergency Removal – 2020 Title IX Regulations

- Section 106.44(c) authorizes emergency removal of students.
- If after individualized safety and risk analysis, institution “determines that an *immediate threat to the physical health or safety of any student or other individual* arising from the allegations of sexual harassment justifies removal.”
- Must provide respondent with notice and opportunity to challenge emergency removal decision immediately following removal.
- May put non-student employee on admin leave during pendency of grievance process.
- Provisions do not modify rights under Section 504 or ADA.

Emergency Removal – Preamble Guidance

- Not a substitute for reaching a determination of responsibility.
- OCR declined to adopt mandated process (e.g., licensed medical evaluation).
 - “Department desires to leave as much flexibility as possible for recipients to address any immediate threat to the physical health or safety of any student or other individual.”
- Declined to limit emergency removals only to alleged sexual assault or rape, or to prohibit emergency removals in allegations of verbal harassment.
- Examples of respondent behavior that could justify emergency removal:
 - Threats of physical violence to complainant in response to allegations.
 - Threatening physical self-harm in response to allegations.

Students at Risk of Self Harm – OCR guidance Jan. 26, 2018

- Offer mental health services and reasonable accommodations.
- Be cautious in addressing self-harming students through discipline system without first considering accommodations.
- Involuntary leave of absence permissible as last resort.
- Qualified personnel should be involved in reviewing medical information.
- Institution may consider how behavior has impacted campus community.
- Process must be reasonable and fair (e.g., notice, opportunity for student to be heard, careful consideration of information).



VAWA / Clery Act

- On March 7th, 2013, President Obama signed the Violence Against Women Reauthorization Act of 2013 (VAWA) (Pub. L. 113-4), which, among other provisions, amended section 485(f) of the HEA, otherwise known as the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).
- The Clery Act requires institutions of higher education to comply with certain campus safety- and security-related requirements as a condition of their participation in the title IV, HEA programs.
- Notably, VAWA amended the Clery Act to require institutions to compile statistics for incidents of dating violence, domestic violence, sexual assault, and stalking and to include certain policies, procedures, and programs pertaining to these incidents in their annual security reports.

Crimes Reported Under the Clery Act

Criminal Offenses	Hate Crimes (any of the crimes listed under Criminal Offenses in addition to the ones below)	Arrests and Referrals for Disciplinary Action
Murder and Non-Negligent Manslaughter	Larceny-Theft	Weapons Law Violations
Negligent Manslaughter	Simple Assault	Liquor Law Violations
Sex Offenses <ul style="list-style-type: none"> • Forcible • Non-forcible (i.e. incest and statutory rape) 	Intimidation	Drug Law Violations
Robbery	Destruction, Damage, or Vandalism of Property	
Aggravated Assault		
Burglary		
Motor Vehicle Theft		
Arson		

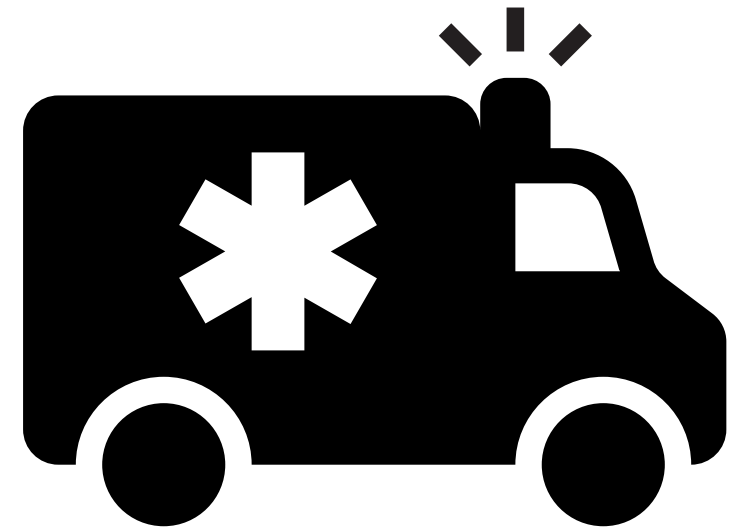
VAWA Section 304 Notice

A student who reports a VAWA crime, whether on or off campus, shall be provided a written explanation of:

- ü Possible sanctions or protective measures
- ü Procedures victim should follow, including preserving evidence, to whom to report, options regarding reporting to law enforcement, and option to be assisted by campus authorities
- ü Orders of protection
- ü Applicable institutional disciplinary procedures
- ü Confidentiality of victims
- ü Availability of counseling and supportive measures

Emergency Notifications to Campus

- Under certain circumstances, campus must issue an alert to provide members of the campus community with information necessary to make informed decisions about their health and safety.
- Two kinds of *Clery Act* alerts:
 - Timely warnings are issued for certain crimes that represent a threat to the safety of students or employees.
 - Emergency notifications are issued upon the confirmation of a significant emergency or dangerous situation occurring on the campus that involves an immediate threat to the health or safety of students or employees.



Emergency Notifications to Campus

EMERGENCY NOTIFICATION	TIMELY WARNING
Scope: Wide focus on any significant emergency or dangerous situation (e.g., crime, severe storm, chemical spill, disease outbreak)	Scope: Required for certain crimes
Why: Emergency notification is triggered by an event that is currently occurring on or imminently threatening the campus. Initiate emergency notification procedures for any significant emergency or dangerous situation involving an immediate threat to the health or safety of students or employees occurring on campus.	Why: Timely warnings are triggered by crimes that have already occurred (but may be continuing) but which represent an ongoing threat. An IHE must issue a timely warning for certain crimes that are reported to its campus security authorities ⁴ or a local law enforcement agency, and is considered by the institution to represent a serious or continuing threat to students and employees.
Where: Applies to situations that occur on campus	Where: Applies to crimes that occur on campus, in or on non-campus buildings or property, and on public property ¹⁰
When: Initiate procedures immediately upon confirmation that a dangerous situation or emergency exists or threatens.	When: Issue a warning as soon as the pertinent information is available.
An IHE that follows its emergency notification procedures is not required to issue a timely warning based on the same circumstances; however, the institution must provide adequate follow-up information to the community as needed.	

Source: [Clery Act](#) | [IHE Guide At a Glance](#) | [Readiness and Emergency Management for Schools Technical Assistance Center \(ed.gov\)](#)

Clery Crimes and Reporting Requirements

- Report to the Department and disclose in ASR statistics for three most recently completed calendar years.
- Submit crime statistics to the Department as part of the annual data collection and survey, including the number of each of the Clery and VAWA crimes that occurred on or within its Clery Geography and that are reported to local police agencies or to campus security authority (CSA).
- Clery Act reporting does not require institution initiate investigation or disclose personally identifiable information (PII) about the victim.

Source: 34 CFR 668.46(c); 2021 Clery Appendix

Obligation to Report Crimes to Police Department

- Clery Act designates members of the campus community as **campus security authorities (CSAs)**.
- When these individuals become aware of a crime that occurred on or around campus, they have an obligation under federal law to report the information to UTPD, the Title IX Office, or the Clery Compliance Manager.
- CSAs do not need to investigate a crime but simply need to report information in an accurate and timely manner.

Obligation to Report Crimes to Police Department

- CSAs may report any crime information directly to University Police Department .
- Sex offenses, domestic violence, dating violence, and stalking must be reported to Title IX. Survivors of sexual assault, domestic violence, dating violence, and stalking must be provided with written information on their rights and options, which the Title IX Office will ensure happens. The Title IX website also has helpful information, support, and resources for CSAs.
- CSAs may also use the Campus Security Authority Individual Reporting Form to report crime directly to the Clery Compliance Manager.
- ***If you are unsure for any reason whether an incident should reported, please report the incident. When in doubt, report.***

SB 212: Obligation to Respond

- Passed during the 2019 legislative session; penalties took effect on January 1, 2020.
- Requires all Responsible Employees (both faculty and staff) at a public or private post-secondary institution to promptly report any knowledge of any incidents of sexual assault, sexual harassment, dating violence, or stalking "committed by or against a person who was a student enrolled at or an employee of the institution at the time of the incident".

SB 212: Reporting Obligations

- Requires Title IX Coordinator provide a quarterly written report to President that contains all of the reports submitted to the university.
 - Reports include information about the investigation of the reports submitted to the university and the disposition of any disciplinary processes that resulted from the investigation process, including the reports for which the university determined not to initiate a disciplinary process.
- Additionally, requires annual report that will provide information on the number of reports the university received during the academic year, the number of investigations conducted as a result of those reports, the disposition of any disciplinary processes that resulted from the investigation of those reports, and the number of reports for which the institution determined not to initiate a disciplinary process.

SB 212: Penalties for Non-Compliance

- Employees failing to report incidents of sexual assault can be charged with a **Class B Misdemeanor and terminated.**
- If the person intentionally tries to cover up the incident, they could also face a Class A misdemeanor charge.
- Furthermore, the institution itself could also face a disciplinary action as a failure to comply with the bill's requirements and could incur as much as a **\$2 million penalty.**

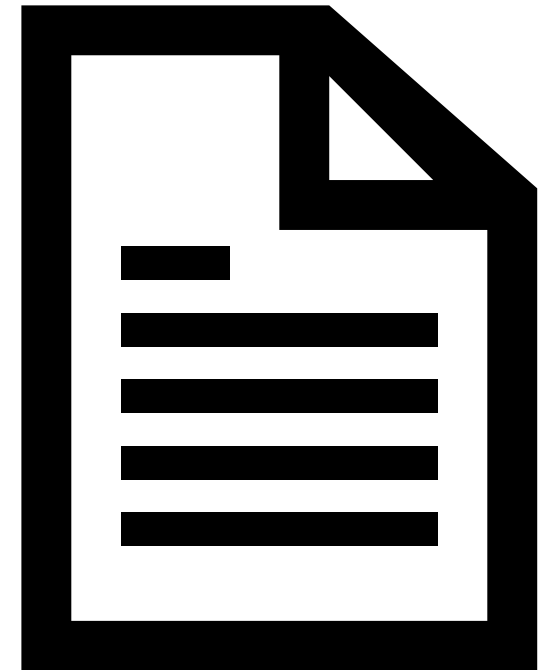
H.B. 1735

- Expands requirements for institutional sexual assault policies to include sexual harassment, sexual assault, dating violence and stalking.
- Includes requirements for institution's sexual misconduct and grievance policy.
- Requires mandatory prevention and outreach programs for.
- Requires complainant and respondent be offered counseling.
- Requires electronic reporting options be available.
- Addresses student amnesty, requests not to investigate, confidentiality, student withdrawal, and trauma-informed training of peace officers.
- Authorizes a civil penalty up to \$2 million for noncompliance.



Texas Education Code § 51.253(c)

- Institution's Chief Executive Officer required to:
 - submit a report at least once "every three months" to the institution's chief executive officer, including:
 - (1) the investigation of those reports;
 - (2) the disposition, if any, of any disciplinary processes arising from those reports; and
 - (3) the reports for which the institution determined not to initiate a disciplinary process, if any.



Texas Education Code § 51.253(c) (cont.)

- Institution's Chief Executive Officer also required to:
 - submit a report at least once “during each fall or spring semester” to the institution's governing body and the post on the institution's website, including:
 - the number of reports received under Section 51.252 (Reporting Required for Certain Incidents);
 - the number of investigations conducted as a result of those reports;
 - the disposition, if any, of any disciplinary processes arising from those reports;
 - the number of those reports for which the institution determined not to initiate a disciplinary process, if any; and
 - any disciplinary actions taken under Section 51.255 (Failure to Report or False Report; Offenses).

Case Study—What Triage and Reporting Concerns Arise?

- Reporting of alleged sexual assault for Clery purposes
- Intake with Marie including:
 - Supportive measures
 - VAWA 304 Notice
 - Referral to law enforcement, counseling, medical care / exam
 - Explanation of Title IX investigation and grievance process
- Inclusion in institution's SB 212 reporting
- Consideration of formal complaint from Title IX Coordinator?
- Evidence preservation (e.g., security videos)
- Emergency removal?
- Clery emergency notification or timely warning necessary?

Questions?

UT System Training Interim Action

Presenter:

Melissa Ackie

August 2, 2023



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Agenda

Definitions

Obligations

OCR Enforcement

Litigation



What are interim or supportive measures?

34 CFR § 106.30 Definitions

Supportive measures means **non-disciplinary, non-punitive individualized services** offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

What are interim or supportive measures? 34 CFR § 106.30 Definitions



Counseling

Extensions of deadlines or other course-related adjustments

Modifications of work or class schedules

Campus escort services

Mutual restrictions on contact between the parties

Changes in work or housing locations

Leaves of absence

Increased security and monitoring of certain areas of campus.

What are interim or supportive measures? 34 CFR § 106.30 Definitions

The recipient must maintain as **confidential** any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.



What are interim or supportive measures? 34 CFR § 106.30 Definitions



The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Obligations: Timing

OCR Q&A Supportive Measures

Does a school have to offer supportive measures to a complainant who has not filed a formal complaint of sexual harassment?

Yes. The 2020 amendments specify that the school must contact the complainant to discuss the availability of, and to offer, supportive measures, *regardless* of whether a formal complaint is filed. A school must also consider the complainant's wishes with respect to supportive measures.

Obligations: Timing

OCR Q&A Supportive Measures

When does a school need to offer supportive measures to a Respondent?

Only after a formal complaint is filed, either by a complainant or the Title IX Coordinator.

Obligations: Substance

OCR Q&A Supportive Measures

What are the supportive measures a school must offer to parties?

A school must offer supportive measures that “are designed to restore or preserve equal access to the [school’s] education program or activity. Measures should be “designed to protect the safety of all parties or the [school’s] educational environment, or deter sexual harassment.”

Obligations: Clery Act OCR Q&A Supportive Measures

Does the Clery Act require supportive measures?

Yes. A statement that the institution will provide written notification to victims about options for, available assistance in, and how to request changes to academic, living, transportation, and working situations or protective measures. The institution must make such accommodations or provide such protective measures if the victim requests them and if they are reasonably available, regardless of whether the victim chooses to report the crime to campus police or local law enforcement.

OCR Scrutinizes Interim Measures

Eastern Mennonite University (VA)

•Allegation

University discriminated against a university faculty member by failing to respond appropriately to a report of sexual harassment made against him.

•Finding

While University found to have investigated report (unsubstantiated findings), University failed to answer faculty party request for interim measures during investigation, including eliminating the requirement that he be a student advisor during the investigation.

•Remedy

University agreed to conduct training with an emphasis on interim measures and retaliation and to develop a plan to assess the appropriateness of the university's response to the faculty member including, if necessary, consideration of remedial options.

Litigation: No Contact Orders and First Amendment Rights

Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022)

•**Background:** Law students brought action against president of the University of Idaho and other school officials, alleging that university's issuance of a no-contact order, which forbade them from contacting a queer student with whom they discussed their opposition to same sex marriage at community event in response to instance of anti-LGBTQ+ harassment, violated their rights to free speech and free exercise of their religion in violation of the First Amendment and their due process rights. Plaintiffs moved for a temporary restraining order, preliminary injunction, and expedited hearing.

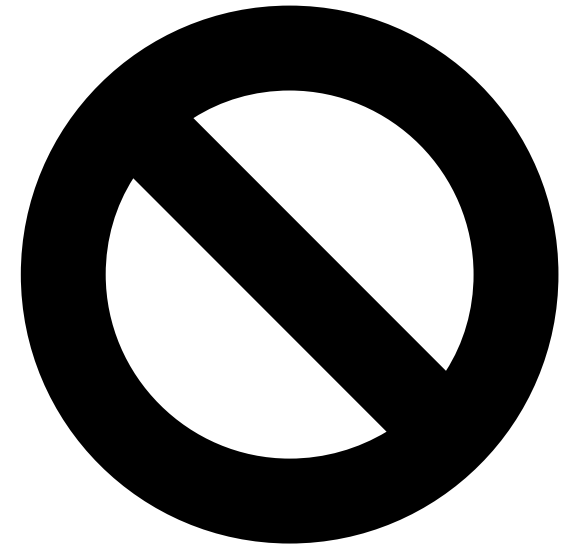


Litigation: No Contact Orders and First Amendment Rights

Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022)

Holdings: The District Court, David C. Nye, Chief Judge, held that:

- existence of disputed facts did not preclude court from ruling on motion for preliminary injunction;
- no-contact order was content-based restriction;
- comments did not constitute sexual harassment under Title IX;
- imposition of no-contact order was not least restrictive means for accomplishing goal of preventing queer student from hearing disagreeable speech that she deemed sexual harassment;
- no-contact order was not least restrictive means to restrict plaintiffs' speech to accomplish goal of creating harmonious environment amongst students;
- law students showed likely harm from public university's issuance of no-contact order; and
- no-contact order was issued with virtually no due process.



Litigation: Deliberate Indifference and Interim Measures

L.W. v. Roman Catholic Archdiocese of Indianapolis, Inc., (S.D. Ind. June 21, 2022)

- Students on football team videotaped student John Doe's genitals and posted on social media and made fun John Doe, who had physical and mental impairments.
- Defendants knew coach's son had been involved in multiple incidents of misconduct and bullying before the Video Incident but had been deliberately indifferent to those events.
- Dean assisted in deleting the Video and deliberately chose not to watch the Video before it was deleted.
- The student who took the Video received one after-school suspension.
- The student perpetrators were not precluded from participating in any football-related events.
- Defendants took no protections and made no accommodations to ensure John Doe's at school or in the locker room.
- Defendants did not have a Title IX coordinator, and no one contacted John Doe to discuss incident or offer supportive measures.
- Defendants' employees knew John Doe was bullied and sexually assaulted in the locker room during the Video Incident and failed to take any measures to prevent it from happening again.
- John Doe faced further abuse and harassment in retaliation for disclosing the Video Incident.
- Defendants failed to report either the Video Incident or the Retaliation Incident to the police, John Doe's parents, and the Department of Child Services.

Case Study—What Interim Measures Would be Appropriate?

- Prior to Marie filing a formal complaint?
 - Assistance in filing a report with campus police
 - Counseling for Marie
 - Assistance with finding other research opportunities outside of Bunsen lab
 - Change of housing locations
 - Campus escort services / increased security
- After Marie or Title IX Coordinator files a formal complaint?
 - Mutual no-contact orders
 - Counseling for Linus
 - Consideration of continuing research role in Dr. Bunsen's lab with modification to both parties' schedules
 - Assistance with obtaining letter of reference from Dr. Bunsen
 - Other?

Questions?

UT System Training

Pregnancy-Related Cases

Presenter:

Darren Gibson

Melissa Ackie

August 2, 2023

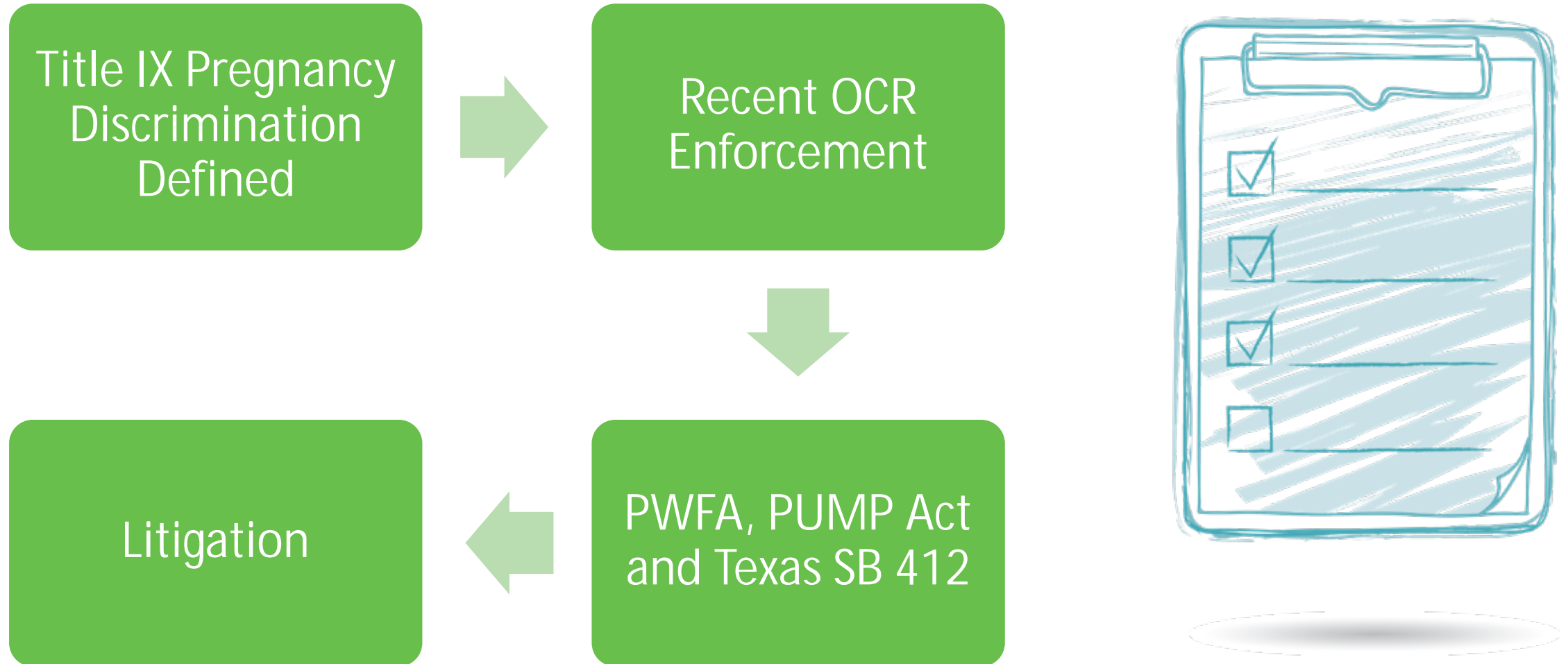


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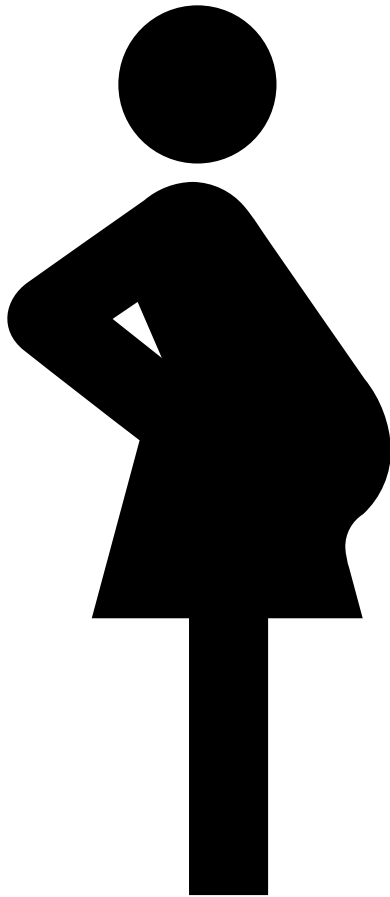
Agenda



What is Pregnancy Discrimination under Title IX?

Title IX – Sex Discrimination Defined

20 USC § 1681 *et seq.*



- Title IX prohibits any education program or activity receiving Federal financial assistance from discriminating on the basis of sex.
- Title IX (20 USC § 1681 *et seq.*) does not expressly define “sex” to include pregnancy.
- However, it is well settled both in case law, legislative history, and the Regulations, that Title IX discrimination on the basis of sex encompasses pregnancy and parental status.

Title IX – Sex Discrimination Defined

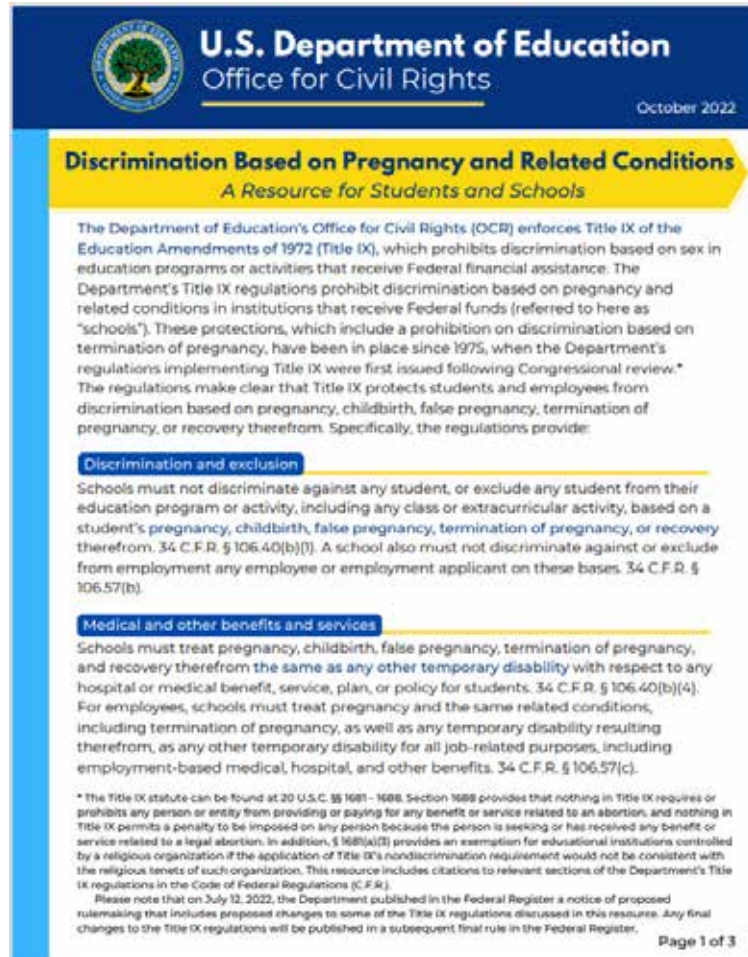
34 CFR 106.21(c)

(c) Prohibitions relating to marital or parental status. In determining whether a person satisfies any policy or criterion for admission, or in making any offer of admission, a recipient to which this subpart applies:

1. Shall not apply any rule concerning the actual or potential parental, family, or marital status of a student or applicant which treats persons differently on the basis of sex;
2. Shall not discriminate against or exclude any person on the basis of pregnancy, childbirth, termination of pregnancy, or recovery therefrom, or establish or follow any rule or practice which so discriminates or excludes;
3. Shall treat disabilities related to pregnancy, childbirth, termination of pregnancy, or recovery therefrom in the same manner and under the same policies as any other temporary disability or physical condition; and
4. Shall not make pre-admission inquiry as to the marital status of an applicant for admission, including whether such applicant is “Miss” or “Mrs.” A recipient may make pre-admission inquiry as to the sex of an applicant for admission, but only if such inquiry is made equally of such applicants of both sexes and if the results of such inquiry are not used in connection with discrimination prohibited by this part.

Department of Education Office for Civil Rights (OCR)

OCR Priority Resources Released in October 2022



- Schools must not discriminate or exclude a student based on a student's or employee's *pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery* therefrom.
- Schools must treat pregnancy, childbirth, false pregnancy, and recovery therefrom **the same as any other temporary disability**.

OCR Priority Resources Released in October 2022

- If a school does not have a leave policy for students or employees, or the student or employee does not qualify for leave under the policy, **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/employee's physician deems necessary.
- After leave expires, employee must be reinstated to the employee's preleave status or to a comparable position without reduction of compensation or loss of promotional opportunities or any other employment rights or privileges.
- Schools must treat pregnancy and the same related conditions and any temporary disability resulting therefrom as any other temporary disability for commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, along with other employment-based benefits.

U.S. Department of Education
Office for Civil Rights

Discrimination Based on Pregnancy and Related Conditions / October 2022

Leave policy

If a school does not have a leave policy for students, or the student does not otherwise qualify for leave under the policy, 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. 34 C.F.R. § 106.40(b)(5).

For employees, if a school does not have a leave policy, or if an employee has insufficient leave or accrued employment time to qualify for leave under the school's policy, the school must treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as a justification for a leave of absence without pay for a reasonable period of time. After that time, the employee must be reinstated to the employee's pre-leave status or to a comparable position without reduction of compensation or loss of promotional opportunities or any other employment rights or privileges. 34 C.F.R. § 106.57(d). In addition, schools must treat pregnancy and the same related conditions and any temporary disability resulting therefrom as any other temporary disability for commencement, duration, and extensions of leave, payment of disability income, accrual of seniority and any other benefit or service, and reinstatement, along with other employment-based benefits. 34 C.F.R. § 106.57(c).

Additional information for students, parents and guardians, and schools

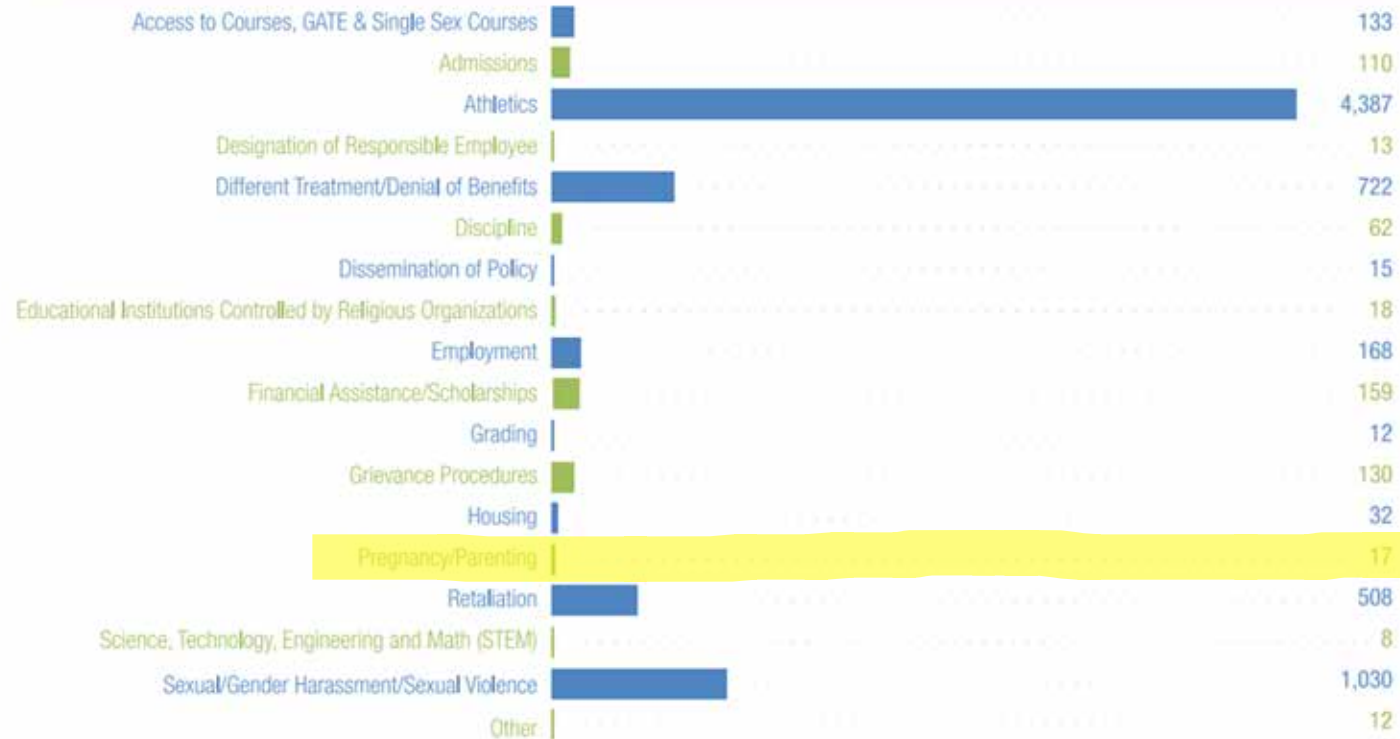
OCR's *Supporting the Academic Success of Pregnant and Parenting Students Under Title IX of the Education Amendments of 1972* (2013, first published in 1991) (OCR Pamphlet), www2.ed.gov/about/offices/list/ocr/docs/pregnancy.pdf, also has useful information about the rights of students and the obligations of schools under Title IX to students who are pregnant or experiencing or recovering from pregnancy-related conditions, including termination of pregnancy. Examples include:

- Title IX protects students against harassment by school employees or other students because of their pregnancy and related conditions. OCR Pamphlet at 8.
- A school must ensure that its teachers' policies and practices do not discriminate against students because of pregnancy and related conditions. For example, a teacher may not refuse to allow a student to submit work after missing a deadline because of absences due to pregnancy or childbirth. Additionally, if a teacher's grading is based in part on class attendance or participation, the student should be allowed to earn the missed credits and be reinstated to the student's pre-leave status. OCR Pamphlet at 11.

Page 2 of 3

OCR Complaints – The Numbers

Figure 6: Title IX Complaint Allegations Received by OCR in FY 2022



Total Number of Complaints Raising Title IX Issues, **FY 2022 = 9,498**

Note: A single complaint can raise multiple issues; therefore, the total number of issues raised will exceed the number of complaints received.

OCR receiving relatively few pregnancy/parenting complaints

OCR Objectives Results

Preventing Discrimination Based on Pregnancy or Parental Status

Bryant & Stratton College (VA)

Findings

College did not have adequate policies to respond appropriately to a reasonable request from student wishing to finish her last scheduled class early to accommodate her estimated due date.

Remedy

College agreed to adopt policies and procedures that ensure students are not unlawfully excluded from the college's educational programs or activities based on pregnancy, childbirth, false pregnancy, termination of pregnancy, or recovery therefrom. College also agreed to train employees on policies.

Salt Lake Community College (UT)

Findings

College violated Title IX when it failed to appropriately address student report that professor had encouraged student to drop a course due to pregnancy, failed to provide any accommodations or otherwise engage in the interactive process, and violated Section 504 by failing to consider whether her pregnancy caused a temporary disability requiring academic adjustment.

Remedy

College agreed to revise its nondiscrimination notice and grievance procedures to comply with Title IX; publish information on its website for pregnant students about their Title IX rights and access to services; train its Title IX coordinator, Disabilities Resource Center staff, and other school employees regarding Title IX's and Section 504's protections for pregnant students; and complete and document its investigation of the student's complaint of pregnancy discrimination.

OCR Resolution in 2023

Troy University (AL)

Findings

OCR's investigation confirmed that the student notified the university of her pregnancy and reflected repeated instances in which the student experienced negative consequences stemming from a lack of accommodations for her pregnancy.

Remedy

- Providing the student adjustments to grades negatively impacted by the university's handling of her requests, as well as reimbursement for documented expenses related to courses she has had to retake since the semester when she was pregnant.
- Reviewing and, where necessary, revising or drafting policies and procedures on how to address requests for adjustments from pregnant students to ensure that it complies with Title IX.
- Updating its website to provide information such as the Title IX rights of pregnant students, the process for requesting adjustments, and a link to the grievance procedures that apply to complaints of pregnancy-related or other sex discrimination.
- Faculty and staff training regarding the Title IX rights of pregnant students and the university's obligations regarding pregnant students, as well as a survey to gauge the effectiveness of the training. And,
- Tracking of students' requests for pregnancy-related adjustments and the university's responses to the requests.

Texas Senate Bill 412

TX Senate Bill 412 – Protections for Pregnant and Parenting Students

Quick Facts

Institutions cannot require pregnant or parenting students to

- Take a leave of absence or withdraw from the student's degree or certificate program;
- Limit the student's studies;
- Participate in an alternative program;
- Change the student's major, degree, or certificate program; or
- Refrain from joining or cease participating in any course, activity, or program at the institution.



TX Senate Bill 412 – Protections for Pregnant and Parenting Students

Quick Facts



Institutions shall provide reasonable accommodations to a pregnant student, including accommodations that:

- Would be provided to a student with a temporary medical condition
- Are related to the health and safety of the student and the student's unborn child

TX Senate Bill 412 – Protections for Pregnant and Parenting Students

Quick Facts

Institutions shall, for reasons related to a student 's pregnancy, childbirth, or any resulting medical status or condition:

- Excuse the student 's absence;
- Allow the student to make up missed assignments or assessments;
- Allow the student additional time to complete assignments in the same manner as the institution allows for a student with a temporary medical condition; and
- Provide the student with access to instructional materials and video recordings of lectures for classes for which the student has an excused absence under this section to the same extent that instructional materials and video recordings of lectures are made available to any other student with an excused absence.



TX Senate Bill 412 – Protections for Pregnant and Parenting Students

Quick Facts



Institutions shall allow a pregnant or parenting student to:

- Take a leave of absence; and
- If in good academic standing at the time the student takes a leave of absence, return to the student's degree or certificate program in good academic standing without being required to reapply for admission.

TX Senate Bill 412 – Protections for Pregnant and Parenting Students

Quick Facts



Institutions shall adopt a policy for students on pregnancy and parenting discrimination. The policy must:

- Include the contact information for the employee or office of the institution that is the designated point of contact for a student requesting each protection or accommodation under this section;
 - Be posted in an easily accessible, straightforward format on the institution's Internet website; and
 - Be made available annually to faculty, staff, and employees of the institution.
- *Deadline to Adopt Policy: January 15, 2024*

Pregnant Worker Fairness Act (PWFA)

and

Providing Urgent Maternal Protections for Nursing Mothers Act (PUMP Act)

Quick Overview

Pregnant Worker Fairness Act (42 USC § 2000gg *et seq.*)

- Modeled after the Americans with Disabilities Act (ADA), the PWFA expands the protections for pregnant employees and applicants by requiring employers with 15 or more employees to make reasonable accommodations to known limitations related to pregnancy, childbirth, or related medical conditions.
- Requires the interactive process.
- An employer *cannot require* a covered employee to take paid or unpaid leave if another reasonable accommodation is available.
- Private right of action available.
- Same remedies available as Title VII.

Quick Overview

Providing Urgent Maternal Protections for Nursing Mothers Act (29 USCA § 218d)

The PUMP Act expands the Fair Labor Standards Act (FLSA) to provide workplace protections for lactating employees by requiring employers to provide all employees who are nursing with reasonable time and private space, other than a bathroom, to express breast milk.

Break Time Requirements

- Flexibility.
- Frequency, duration, timing, location of private space, nursing needs over time (which may fluctuate,) and specific pumping setup.

Lactation Space Requirements

- Private space.
- Functional space.

Posting Requirements

- Updated DOL Minimum Wage Poster.



Litigation

Orr v. South Dakota Board of Regents (District South Dakota, May 16, 2023)

Allegation

Non-tenured faculty member alleged University violated Title IX by discriminating on the basis of sex when University denied tenure because of his commitment to his family and use of paternity leave. University denied allegation and moved for summary judgment.

Findings

Court granted summary judgment, finding:

- University articulated legitimate and non-discriminatory reason for denying tenure, specifically he was deficient in research category.
- He failed to show pretext because he admitted his book was on indefinite hold with publisher due to lack of progress.
- Not similarly situated to alleged comparators.



Jessica Childers v. Casey County School District Board of Education, et al. (Western District of Kentucky, July 19, 2023)

Allegation

Plaintiff Childers alleged that a School District violated Title IX by discriminating against her on the basis of her sex after the district failed to renew her contract after she returned from maternity leave and utilized an accommodation to express milk during her breaks. School District denied and moved for summary judgment.

Findings

Court granted summary judgment, finding:

- No causal connection between non-renewal and termination and her pregnancy-related accommodations.
- School District provided a legitimate, non-discriminatory and non-retaliatory basis for nonrenewal and termination by producing evidence of her non-tenure and poor performance.
- Plaintiff's disagreement with performance assessment was insufficient to establish pretext.
- No HWE because not severe or pervasive

Kessler v. Ohio State University

(Southern District of Ohio, November 21, 2022)

Allegation

Non-tenured professor alleged University violated Title IX when Dean threatened to withdraw her academic appointment in retaliation for her participation in an investigation and corroboration of complainant's concerns.

Dean allegedly told her he was disappointed with the amount of information shared in her interview, she had not respected a senior faculty member, and he would revoke her academic appointment if she failed to adhere to his directives.

Findings

Court denied University summary judgment on retaliation claim, finding:

- Dean had the authority to withdraw plaintiff's academic appointment and threat sufficient for OSU to be liable under Title IX.
- Genuine dispute of material fact whether dean threatened to withdraw her academic appointment and took other actions as retaliation for her participation in an investigation.



Questions?

UT System Title IX Training

Trauma Informed Investigations

Presenter:

Kelli Fuqua, Darren Gibson

August 3, 2023

Littler



THE UNIVERSITY of TEXAS SYSTEM
THIRTEEN INSTITUTIONS. UNLIMITED POSSIBILITIES.

A row of six wooden blocks spelling out the word "TRAUMA" in bold, black, uppercase letters. The blocks are arranged horizontally on a light-colored surface. In the background, several other wooden blocks with various letters (C, A, V, D) and symbols (X) are scattered and out of focus.

TRAUMA

Need for Training on Trauma-Informed Approach

What Is A Trauma Informed Investigation?

- Considers the potential neurobiological effects of trauma on parties and witnesses
- Goal: objective and impartial investigation that minimizes reliance on sex stereotypes and generalizations



Why Conduct Trauma-informed Credibility Assessments?

- Safety: Avoid re-traumatizing interviewees and perpetuating a hostile environment
- Accountability: Conduct better investigations
- Required by state law for university peace officers. TEC §51.288 (HB 1735).



Why Conduct Trauma-informed Credibility Assessments? (cont.)

- OCR approach in 2015
 - See, e.g., OCR’s Questions and Answers about Title IX and Sexual Violence (April 14, 2014), University of Virginia Resolution Agreement, OCR Docket No. 11-11-6001 (Sep. 17, 2015).
 - Requiring annual training of panel members on “potential impact of trauma on the behavior of victims of sexual harassment or sexual violence, including how it may impact participation in the investigative process and the hearing by the Review Panel.”
- DOE under prior administration concerned about trauma-informed approach may result in misapplication of sex stereotypes or presumption of responsibility.
 - OCR’s “Q&A on Campus Sexual Misconduct” (Sept. 22, 2017): “Training materials or investigative techniques and approaches that apply sex stereotypes or generalizations may violate Title IX and should be avoided so that the investigation proceeds objectively and impartially.”

Trauma Informed Approach in Current Title IX Regulations

- Preamble to Regulations
 - “While the final regulations do not use the term ‘trauma-informed,’ nothing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.”
 - “[R]ecipients have discretion to include trauma-informed approaches in the training provided to Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolutions so long as the training complies with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45, and nothing in the final regulations impedes a recipient’s ability to disseminate educational information about trauma to students and employees. As attorneys and consultants with expertise in Title IX grievance proceedings have noted, trauma-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases...”
- See also OCR’s “Q&A on the Title IX Regulations on Sexual Harassment” (July 20, 2021) : “A school may use trauma-informed approaches to respond to a formal complaint of sexual harassment.”

Training Requirements in Title IX regulations (34 CFR § 106.45(b)(1)(iii))

- “Require that any individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.”
- “Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.”



Understanding Trauma

Potential Effects of Trauma

- Scientists have proposed that neurobiological effects of trauma result in brain chemistry interfering with the brain function in encoding of memory.
- Theory is that individuals who experience trauma may be unable to recall events in chronological order; may not recall some details at all; ability to recall details may improve over time; and affect may initially seem evasive or counterintuitive.
- Response to trauma may include fighting, fleeing, or freezing.
- See, e.g., Rebecca Campbell, Ph.D., “The Neurobiology of Sexual Assault” (National Institute for Justice Research for the Real World Seminar, Dec. 3, 2012); Harvey Simon, M.D., “Stress & Anxiety – The Body’s Response” (N.Y. Times Jan. 30, 2013); James W. Hopper., “Why Many Rape Victims Don’t Fight or Yell” (Washington Post, June, 23, 2015).

What is Trauma?

- Psychological trauma is the unique individual experience of an event or enduring conditions, in which:
- The individual's ability to integrate his/her emotional experience is overwhelmed, or
- The individual experiences (subjectively) a threat to life, bodily integrity, or sanity.
- Esther Giller, Sidran Institute. [What is Psychological Trauma?](#) (1999)
 - “[T]rauma is defined by the *experience of the survivor*. Two people could undergo the same noxious event and one person might be traumatized while the other person remained relatively unscathed.”



The Impact of Trauma

Factors That Tend to Increase Traumatic Impact of Event:

- Severity
- If it is interpersonal (as opposed to non-interpersonal, such as accidents and natural disasters)
 - Interpersonal traumas may impact interviewee's views regarding safety, intimacy, and trustworthiness of others.
- When it is chronic or repeated
 - Persistent traumas may leave the survivor feeling overwhelmed, helpless, and with a sense that the trauma is inescapable.

Critique Of Trauma-informed Theory

- See “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic, September 2017.
- Argues trauma-informed, neurobiology-focused approach is based on “bad science.”
- Presents alternative views by scientists that “[h]igh levels of emotional stress enhance explicit, declarative memory for the trauma itself; they do not impair it.”
- Article elicited response from yet other scientists arguing in favor of psychological effects on trauma.
- See Emily Yoffe, “The Bad Science Behind Campus Response to Sexual Assault,” The Atlantic (Sept. 8, 2017); Jim Hopper, “Sexual Assault and Neuroscience: Alarmist Claims vs. Facts,” Psychology Today (posted January 22, 2018).



Conducting Trauma-Informed Investigations

Trauma-Informed Grievance Procedures

- Campus investigators and adjudicators need not determine precisely what effects trauma may or may not have in the case.
- Instead, they need to understand the potential effects of trauma and check personal biases regarding potential impact.
- Avoid assumption that individuals are necessarily “lying” if they cannot recall every detail in chronological manner.
- Allow for trauma response as potential explanation for recall / behavior of complainant during interview and investigation process.
- However, if complainant exhibits behaviors that may be related to trauma, that doesn’t equate to policy violation.
- Fact-finders should not accept everything complainant recalls as absolutely “true,” or to fail to examine inconsistencies.
- Avoid assumptions of truthfulness or responsibility based on assumptions of “victim” and “perpetrator”.



Counterintuitive Interviewee Behavior

- Why didn't she scream?
- Why didn't she try to run away?
- Why didn't she fight back?
- Why didn't she call the police?
- How can it be rape if she didn't say "no"?
- Why did she stay with him if he was abusing her?



Behavior During Interviews



- Some interviewees' behavior during interviews may appear odd.
- Remember that they may continue to be affected by trauma when recalling a traumatic event
- Various "normal" responses include:
 - Emotional, crying, hysterical
 - Flat affect – seeming numb, disassociating
 - Laughing, light-heartedness, inappropriate
 - Cycling of emotions
 - Exhibiting distrust of investigator

Trauma And Memory

- She can't get her story straight...
- How could she not remember something as significant as that?
- He is obviously making it up as he goes along...
- Why can't she simply provide a clear narrative of what happened?



Trauma And Memory

- Explicit Memory: can be consciously and intentionally recalled
 - Facts, general knowledge, autobiographical (placing self in space & time)
- Implicit Memory: Remember unconsciously and effortlessly
 - Emotional responses, body sensations, reflexive actions

Trauma And Memory

- Under extreme stress, the initial sorting of explicit and implicit layers continues, but processing is interrupted.

Memories of a Traumatic Event	Memories of a Non-Traumatic Event
<ul style="list-style-type: none">• Stored in amygdala (“implicit”)• Non-linear recall of events• Poor recall of contextual information (like the layout of a room)• Details are fuzzy• Focus may be on what someone did to survive event; what are perceived as important details to interviewee may seem odd to investigator	<ul style="list-style-type: none">• Stored in hippocampus (“explicit”)• Linear recall of events• Specific details• “Significant details” make sense to investigator

When To Conduct An Initial Interview

- There is evidence that waiting two days (two full sleep cycles) to interview an interviewee may result in more coherent, detailed information.
- The brain will have had a chance to recover and consolidate memories during that period.



Trauma-informed Interview Tips



- Think about presentation and atmosphere.
- Be mindful of first impressions (in writing, on the phone, or in person).
 - Where is the interview taking place?
 - Consider privacy, light, noise, accessibility, etc.
- Be transparent and explain process and role to establish trust.
- Allow for variety of reactions to trauma.
- Allow witness to tell their story in their way, using follow-up questions to fill in gaps.

Trauma-informed Interview Tips – Cont.



- Do not insist on perfect recall of traumatic events.
- Do not convey judgment that deteriorates trust.
 - “Why didn’t you fight back?” versus
 - “Do you recall your verbal and physical response to the assault?”
- Explain that process requires evidence regarding consent to support a finding of responsibility to explain detailed questions.
- Recognize witnesses may recall more details later.

Case Study and Trauma-Informed Investigation

How would the case study investigation be impacted by trauma-informed practices?

- Investigation would allow for the possibility that trauma may impact Marie's behavior during the investigation.
- Investigation would take into account potential re-traumatization of an investigation on Marie, particularly given her desire not to move forward with an investigation.
- If investigation proceeds, investigator should conduct interview use trauma-informed interview techniques to build trust with Marie and allow her to tell her story.
- Investigation should not make presumptions about truthfulness or responsibility based on Marie's role as a complainant or Linus's role as a respondent.

Investigating Issues of Incapacitation and Consent

- More than 90% of sexual assault victims on college campuses do not report the assault.
(Cullen, F., Fisher, B., & Turner, M., 2000)
- About 1 in 3 women and 1 in 6 men have been the victim of a contact sexual assault.
(CDC NIPSVS, 2011)
- In 8 out of 10 cases of rape, the victim knew the perpetrator.
(Miller, T. R., Cohen, M. A., & Wiersema, B. ,1996)
- More than 25% of transgender individuals had been sexually assaulted after the age of 13.



Sexual Assault in College –cont.

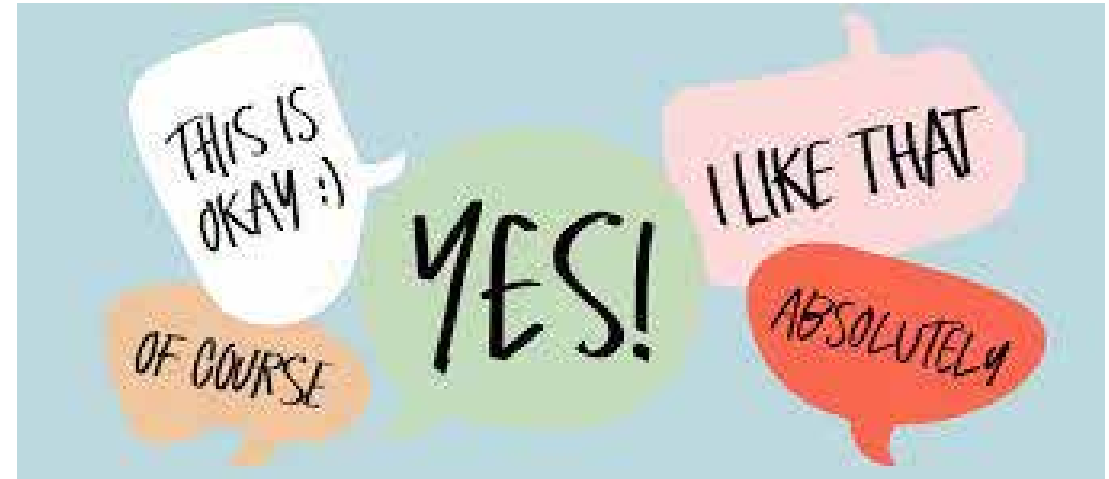
- Many victims do not characterize their experience as a crime due to:
 - Embarrassment;
 - Lack of understanding of the legal definition of rape;
 - Sympathy for the rapist; and
 - Self-blame.
- The most common reason for not reporting incidents of sexual assault and sexual misconduct was that it was not considered serious enough. Other reasons included because they were **“embarrassed, ashamed or that it would be too emotionally difficult,”** and because they **“did not think anything would be done about it.”**

(AAU Campus Climate Survey on Sexual Misconduct, 2015)

Affirmative Consent

Participants provided with a definition of affirmative consent will be more likely to:

- Assign more responsibility and endorse greater consequences for the perpetrator
- Perceive a higher degree of victim suffering
- Be willing to intervene and provide victim support
- Report consent was not granted and label the encounter as a sexual assault
- These effects will be greater for those who read a vignette in which consent is less ambiguous



What is Consent? UT System Model Policy

- Consent – A **voluntary, mutually understandable agreement** that clearly indicates a willingness to engage in each instance of sexual activity. **Consent to one act does not imply consent to another.** Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another. **Consent can be withdrawn at any time.** Any expression of an unwillingness to engage in any instance of sexual activity establishes a presumptive lack of consent.

What is Consent? UT System Model Policy

- Consent is not effective if it results from: (a) the use of physical force, (b) a threat of physical force, (c) intimidation, (d) coercion, (e) incapacitation or (f) any other factor that would eliminate an individual's ability to exercise his or her own free will to choose whether or not to have sexual activity.
- A current or previous dating or sexual relationship, by itself, is not sufficient to constitute consent. Even in the context of a relationship, there must be a voluntary, mutually understandable agreement that clearly indicates a willingness to engage in each instance of sexual activity.

Consent: Important Points

- Consent to one act does not constitute consent to another act.
- Consent on a prior occasion does not constitute consent on a subsequent occasion.
- The existence of a prior or current relationship does not, by itself, constitute consent.
- Consent can be withdrawn or modified at any time.
- Silence, passivity, or lack of resistance does not necessarily constitute consent.
- Consent cannot be given when a person is incapacitated.



Example

Mike and Laura sat on the sofa and started watching television. Mike then began kissing Laura and touching her breasts. To begin with Laura kissed back, until Mike started kissing her harder. At this point, Laura said wasn't sure she wanted to go any further, but Laura said nothing, and Mike proceeded to have sex with her. Laura stated she froze and was unable to speak or move.

- Any physical force?
- Any verbal coercion?
- How did they go from kissing to sex?



What is Incapacitation

- The state in which a person cannot make rational decisions as to whether or not to engage in sexual activity because the person lacks the ability to give knowing Consent (i.e., to understand the "who, what, when, where, why, or how" of the sexual interaction).
- Incapacitation is determined through consideration of all relevant indicators of an individual's state and is not synonymous with intoxication, impairment, blackout, and/or being drunk.
- The inability, temporarily or permanently, to give consent, because the individual is mentally and/or physically helpless due to drug or alcohol consumption, either voluntarily or involuntarily, or the individual is unconscious, asleep or otherwise unaware that the sexual activity is occurring.

What Is Incapacitation Cont.

- In addition, an individual is incapacitated if he/she/they demonstrate that they are unaware of where they are, how they got there, or why or how they became engaged in a sexual interaction. Where drugs or alcohol is involved, incapacitation does not equate to drunkenness, intoxication, or being high.



Indicators Of Incapacitation

- Lack of control over physical movements,
- Lack of awareness of circumstances or surroundings, or
- The inability to communicate for any reason.

Indicators Of Incapacitation

- An individual may experience a blackout state in which he/she/they appear to be giving consent, but do not actually have conscious awareness or the ability to consent. It is especially important, therefore, that anyone engaging in sexual activity be aware of the other person's level of intoxication. The relevant standard that will be applied is whether the Respondent knew, or a sober reasonable person in the same position should have known, that the other party was incapacitated and therefore could not consent to the sexual activity.



No: How it sounds and What it looks Like*

- No
- I'd rather be alone right now
- Stop
- Don't touch me
- I'm not ready
- Let's just go to sleep
- I changed my mind
- I would really like to but
- Not now
- I don't feel like it
- Maybe later



No: How it sounds and What it looks Like*

- Pushing away
- Crying
- Turning away
- Lying there in fear
- Passed out
- Silence
- Screaming
- I have a boyfriend/girlfriend/someone

Case Study and Consent

How would consent be important in the case study investigation?

- The investigation should go beyond simply asking both parties whether Marie consented to the sexual encounter.
- Other issues include:
 - Whether non-consensual touching occurred at the conference
 - Parties' communications and conduct leading up to the alleged sexual assault
 - Impact of drinking and possibility of incapacitation
 - Use of physical force or threats of physical force
 - Potential physical evidence (e.g., SANE exam, dorm security videos)
 - Both parties' words and actions that night before, during, and after alleged assault
 - Was Linus's belief that the interaction was consensual reasonable in light of the circumstances

Investigation Triage

- Intake and formal complaint
 - Be mindful of potential effects of trauma in conducting intake and assessing formal complaint.
 - Do not impose expectations of “typical” victim behavior or necessarily require perfect chronological memory of every detail.
 - Be prepared to conduct multiple intakes, if necessary.
- Supportive measures
 - Consider potential effects of trauma in providing supportive measures and resources.
- Informal resolutions
 - Design process that minimizes possibility for re-traumatization, to the extent possible.
- Dismissals
 - Plan for potential impact of a dismissal on parties, as event can be traumatizing moment for complainant.
 - Ensure resources also available to respondent, particularly when adverse finding may lead to emotional response.

Questions?

UT System Training Sanctions

Presenter:

Melissa Ackie

August 2-3, 2023



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Agenda

Title IX Regulations on Sanctions

Types of Sanctions

Process for Determining Sanctions

Risks Related to Sanctions and Litigation

Recommendations and Application to Case Study



Title IX Regulations on Sanctions

What the Title IX Regs Say about Sanctions

34 C.F.R. § 106.45

A grievance process must—

(i) Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent. Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as “supportive measures”; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent...



What the Title IX Regs Say about Sanctions

34 C.F.R. § 106.45

The grievance process must ...

(vi) Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility...



What the Title IX Regs Say about Sanctions

34 C.F.R. § 106.45

Determination regarding responsibility

(i) The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the recipient must apply the standard of evidence described in paragraph (b)(1)(vii) of this section.



What the Title IX Regs Say about Sanctions

34 C.F.R. § 106.45

The written determination must include—

(E) A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant;



Types of Sanctions

Potential Sanctions from UT System Model Policy, Section 6.8

Distinguish Students from Employees

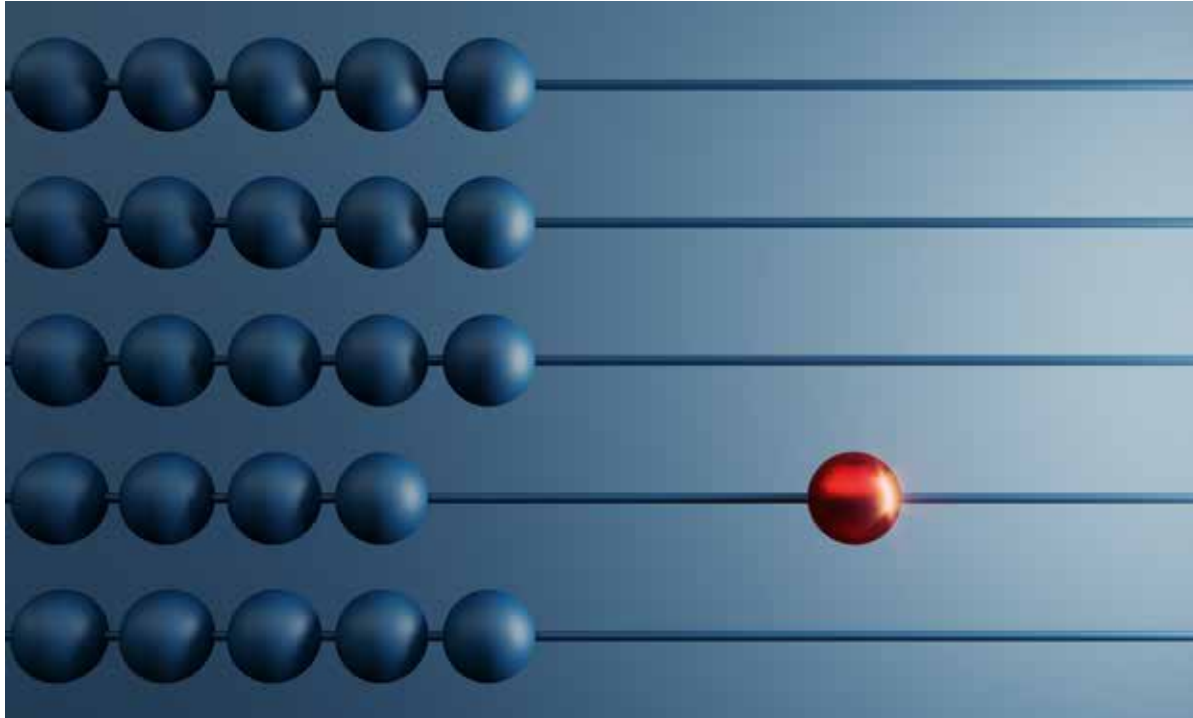
Students

- Educational training;
- No shared classes or extra-curricular activities;
- Disciplinary probation;
- Withholding of grades, official transcript, and/or degree;
- Bar against readmission, bar against enrollment, drop from one or more classes, and/or withdrawal from the University;
- Suspension of rights and privileges, including but not limited to participation in athletic or extracurricular activities;
- Denial of degree;
- Suspension, noted on transcript as “Disciplinary Suspension”;
- Expulsion, with permanent notation on transcript;
- Revocation of degree and withdrawal of diploma; or
- Other sanction(s) or remedies as deemed appropriate under the circumstances.

Employees

- Employment probation;
- Job demotion or reassignment;
- Suspension with or without pay for a specific period of time;
- Dismissal or termination;
- Ineligible for rehire; and/or
- Other sanction(s) or remedies as deemed appropriate under the circumstances.

Example: Potential Employee Sanctions – UT Austin Policy



Mandated training

Written reprimands or corrective action

Imposition of conditions on teaching, supervising, or other official duties;

Financial penalty;

Unpaid time off;

Suspension with or without pay;

Demotion;

Reassignment of duties; other professional sanctions; or

Termination

Process for Determining Sanctions

Overview of Title IX Adjudication Process

- Live Hearing
- If the decision-maker makes a finding of responsibility, there is need for sanctions.
- Decision-maker determines appropriate sanction for substantiated conduct.
 - Remedies must be designed to restore or preserve equal access to the recipient's education program or activity; and
 - Refer to policy for range of potential remedies.
- Notify both parties of hearing determination, and if there are sanctions, notify Respondent, Complainant, or both (see next slide) of specific sanctions.



Guidance on Sanctions

Department of Education, Office for Civil Rights

Is the institution obligated to notify all parties of the sanctions against Respondent?

In sex offense cases under the Clery Act, yes.

In other cases, *only when the sanction directly relates to the harassed student* due to privacy concerns.

Guidance on Sanctions

Department of Education, Office for Civil Rights

Is a school required to impose particular remedies when a respondent is found responsible for sexual harassment?

No. The 2020 amendments do not dictate that a school provide any remedies for the complainant or disciplinary sanctions for the respondent after a finding of responsibility. Each school is free to make disciplinary and remedial decisions that it “believes are in the best interest of [its] educational environment.”

Risks Related to Sanctions and Private Litigation

Example Risks Related to Sanctions

- Prior misconduct history by Respondent may affect sanctions.
 - “A recipient may not adopt a rule excluding relevant evidence because such relevant evidence may be unduly prejudicial, concern prior bad acts, or constitute character evidence.” 2020 Rule Preamble.
 - Failure to consider prior conduct (including possibly at other institutions) could result in failure to consider serial / predatory behavior and create additional risk.
- Important to consider comprehensive set of possible remedies to restore access to complainant and ensure enforcement.
 - For example, are trespass warnings necessary to keep respondent off campus if suspended/expelled?
 - Who is monitoring completion of sanctions to ensure compliance (e.g., training)?
 - Remedies may be needed beyond list, such as training for a student organization involved in the incident or precluding respondent from living on campus or being part of certain student organization.
- Disparate treatment of respondents in sanctioning can create risk of liability.
 - Helpful to have a sanctions matrix that considers nature and severity of the violation, as well as aggravating and mitigating factors, to guide decision-makers and assist in consistency.

Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Allegations:

Male student alleged that the university violated Title IX based on investigation and adjudication of punishment (rustication and loss of football scholarship) that was biased against student as a male, following incident in which female student alleged that male student failed to sufficiently disclose details of risks of herpes transmission from students' unprotected sex.

University denied and moved for summary judgment. SDTX granted summary judgment, but Fifth Circuit reversed findings.



Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Holdings

- Genuine issue of material fact as to whether university reached an *erroneous outcome*:
 - *Opposing Evidence*: Female Student admitted knowing that Male Student had a history of herpes before they had sex.
 - *Investigation Omissions*: Investigator declined to investigate Male Student's claim that Female Student contracted herpes from another sexual partner before having sex with Male Student.
 - *Inequitable Application of Remedies*: University sanctioned Male Student with what amounted to expulsion for failing to inform Female Student of all the risks of having sex with a herpes carrier, even though the University Student Code did not contain such a requirement, and the University ultimately never required Female Student to inform all of her sexual partners of the same.

Private Litigation – Punishment Motivated by Gender Bias

Doe v. Rice University (5th Cir. 2023)

Title IX Holdings

- Genuine issue of material fact as to whether University engaged in ***selective enforcement***:
 - ***Inequitable Application of Remedies***: Evidence University selectively enforced its policies against him by refusing to treat Female Student and Male Student equally when Male Student alleged—in response to Female Student's allegations—that she was guilty of the same conduct of which he was charged—failure to disclose the risk of STD transmission—yet never charged her for the same behavior.
- Genuine issue of material fact as to whether University relied on ***archaic assumptions***:
 - ***Evidence of archaic assumption***: A rational jury could find that the University's policy arose from the view that a more-knowledgeable male had a duty to educate an unwitting female about the precise risks of herpes transmission—an archaic assumption.

Private Litigation – Defer to Decision-Makers

Jane Doe v. Loyola University Maryland (D. Maryland 2021)

Allegations

Male Student and Female Student lodged competing claims of sexual misconduct against each other over the same occurrence. Both claim non-consensual sex. Both alleged sexual violence. Both received identical sanctions of a one-semester suspension, no contact order, and a substance education requirement. Female student filed suit against University challenging the University's process and its decision.

University denied and filed a Motion to Dismiss.

Title IX Findings

- It is neither the province of the court to re-try plaintiff's disciplinary proceeding nor to require a particular outcome of a disciplinary proceeding.
- The court found that Loyola carefully followed its well-crafted and gender-neutral policies and that the record did not support a conclusion that an erroneous outcome had been reached.
- Plaintiff also failed to allege any facts that would amount to gender bias, which was also fatal to her erroneous outcome claim.



Private Litigation – Defer to Decision-Makers

Garrett v. University of South Florida Board of Trustees (11th Cir. 2020)

Allegations

Plaintiff is a former doctoral student at the University of South Florida, who alleged that University inadequately responded to her report of sexual misconduct (non-consensual sexual touching) by a fellow student when they issued a deferred suspension and a no-contact order. Plaintiff alleged the University subjected her to additional sexual harassment by failing to issue harsher sanctions.

Title IX Findings

- The court held that there was no genuine issue of material fact regarding whether USF was deliberately indifferent to plaintiff's report of sexual misconduct.
 - USF assigned plaintiff a victim advocate and opened a formal inquiry into her report.
 - It also was not clearly unreasonable for USF to offer the respondent a deferred suspension and no-contact order when he accepted responsibility.



Private Litigation – Risk of Light Sanctions

Jane Doe v. Board of Trustees of Nebraska State Colleges (D. Nebraska 2021)

Allegations

Female student brought a Title IX deliberate indifference action against the Board of Trustees, based on allegations that college officials inadequately responded to a report that a fellow student sexually assaulted plaintiff on two separate occasions. While College found the respondent responsible for sexual assault and imposed sanctions of a mutual “no contact” order, counseling, and behavioral probation, plaintiff alleged the sanctions did not have the effect of shielding her from campus encounters with her assailant.

College denied and Moved for Judgment on the Pleadings.

Title IX Findings

- Evidence of repeated encounters, coupled with plaintiff’s allegation that College enrolled her in online courses without her consent, were sufficient for a jury to determine whether plaintiff was deprived of an education program or benefit.
- A jury could reasonably conclude that the discipline imposed on plaintiff’s assailant, in terms of a constraint on his freedom to move about campus, was not sufficient to protect plaintiff from further threats or intimidation.
- The court also felt the jury was best suited to determine whether College’s response subjected plaintiff to a heightened risk or vulnerability to sexual harassment.

Recommendations for Avoiding Sanctions Landmines

Recommendations for Sanctions Process

- Process should allow for communication of respondent's prior misconduct history to decision-maker for purposes of determining sanctions.
- Consider "other sanction(s) or remedies as deemed appropriate under the circumstances."
- Provide decision-makers with sanctions matrix based on type of violation with example aggravating and mitigating factors for each.
- Document and calendar any follow-up on sanctions to ensure purpose of sanctions achieved (e.g., ensuring training completed).
- Consider privileged sanctions audit to establish guardrails for setting similar sanctions for similar violations.

Sanctioning Students Versus Employees

- If Title IX governs, the Rule indicates the decision-maker is to issue sanctions for respondent, regardless if the respondent is a student or employee.
- Same consistent concerns apply to both students and employees, as inconsistent sanctions for similar violations can give rise to liability in both instances.
- While employee conduct more often involves quid pro quo and hostile environment claims (rather than VAWA crimes), employee sanctions generally involve adverse employment actions, including termination.
- Conduct that does not rise to the level of Title IX sexual misconduct may nevertheless be sufficient to justify serious sanction against employee.
- Be cautious of sanctioning student speech, as different free speech concerns apply students versus employees, particularly when speech in the context of employee's job.

Questions?

UT System Title IX Training SHSM & Health-Related Environments

Presenter:

Darren Gibson
August 3, 2023



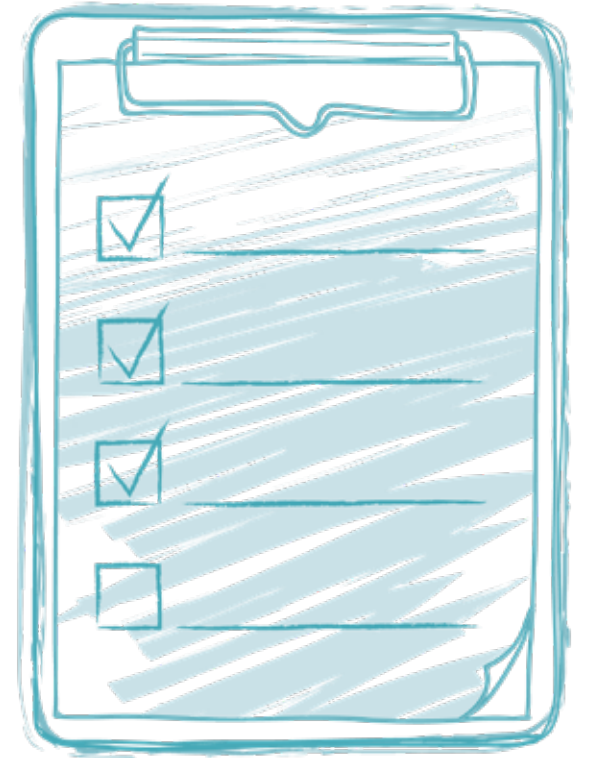
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Agenda

- q Title IX in Academic Medical Centers (AMCs)
- q Jurisdictional issues with clinical settings and affiliated institutions
- q Title IX and SB 212 as applied to AMCs
- q Unique aspects of sexual misconduct investigations in AMCs
- q Sponsored research and sexual harassment



Title IX Applies to Academic Medical Centers

- Same rules regarding sexual misconduct apply to academic medical centers, including Title IX, SB 212, and Clery/VAWA.
- Same requirements for investigations and grievance process, including live hearing requirement for matters covered by Title IX.
- Courts have held that educational trainee roles (e.g., medical residents) are more akin to students than employees for purposes of Title IX analysis.



Title IX and Medical Residents

- Numerous cases have made it clear that Title IX applies in the academic medical center context, include those institutions that do not have a medical school.
- *Doe v. Mercy Catholic Med. Center*, 850 F.3d 545 (3d Cir. 2017) (holding Title IX applied to a resident at a research hospital unaffiliated with a medical school)
- *Aguiluz v. Univ. of Tex. Health Science Center San Antonio*, 2021 WL 148057 (W.D. Tex. Jan. 15, 2021) (holding that medical resident may bring Title IX claims given educational nature of position, and distinguishing from normal employee, whose Title IX claims would be preempted by Title VII)
- *Sadeghian v. Univ. of South Ala.*, 2018 WL 7106981 (S.D. Ala. Dec. 4, 2018) (holding medical resident could pursue Title IX lawsuit against university)

Who Has Jurisdiction? Real Word Examples Involving Multiple Institutions

- University employed providers practicing at affiliated hospitals
- Student enrolled at multiple institutions
- Residents of other institutions on campus for rotation
- Shared housing between multiple institutions
- Alleged misconduct by faculty against employees of corporate research partner
- Graduate student from one institution completing research at second institution when PI moves



Jurisdictional Issues and Affiliated Institutions

- How to define the educational program or activity?
- Do you control the respondent?
- Sexual misconduct by UT employees / trainees against employees of affiliated entities
- Sexual misconduct against UT employees / trainees by employees of affiliated entities
- Who conducts the investigation?
- Whose policies apply?

Who Has Jurisdiction?

- Under 2020 regs, complainant's home institution has Title IX jurisdiction.
 - “At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.”
- Does not address joint affiliation (*e.g.*, joint degree program, dual credit).
- Does not necessarily alleviate obligation of other institution to protect its community, particularly as it pertains to employees and Title VII legal obligations.

Cases Involving Multiple Institutions

Considerations and Options:

- Joint investigation or multiple investigations.
 - If separate, risks of different outcomes.
 - If joint, need agreement on process for investigation and grievance process.
- Deferring to investigation of another institution – plusses and minuses.
- Who has authority over sanctions?
- Are these issues addressed in agreements regarding joint programs, visiting students / faculty, housing agreements, corporate affiliation agreements?



SB 212 Case Study

- Dr. Sarah Smith is a fourth-year resident in the surgery residency program. Her mentor is Dr. Jill Carter, a faculty member and the Residency Program Director. Over the course of Dr. Smith's residency, the two had become close colleagues and good friends.
- Dr. Smith reported to Dr. Carter that the prior night, she had gone out on a date with Dr. Stan Bloom, an anesthesiologist who worked at the teaching hospital, but who was employed by the hospital, not the university. At the end of the date, Dr. Bloom and Dr. Smith went back to her place for a drink, and Dr. Smith alleges Dr. Bloom sexually assaulted her.
- Dr. Smith begged Dr. Carter not to tell anyone at the university, because she had been sexually assaulted in college and had a very bad experience with the Title IX investigation. In addition, she believed nothing would happen since Dr. Bloom didn't work at the university. Rather, she asked Dr. Carter to help her go to the police and help her through a SANE exam, which Dr. Carter did. Dr. Carter also ensured Dr. Smith could take the requisite time off to recover from the experience. Dr. Smith was very thankful for Dr. Carter's support. Dr. Carter did not make any report of the incident to UT, per Dr. Smith's wishes.
- A few months later, when someone else made allegations of sexual harassment against Dr. Bloom, the Title IX office became aware of Dr. Carter's knowledge of the prior incident with Dr. Smith.

Case Study

- Are the allegations covered by Title IX?
- Are the allegations covered by SB 212?
- Does the university have an obligation to investigate ...
 - the sexual assault allegation?
 - the potential failure to report?
- How does the university work with the affiliate hospital on this matter?
- What if the complainant does not want the university to move forward with any investigation?
- Are there options besides a formal complaint and investigation?



Unique Aspects of Investigations in Health Institutions

Unique Aspects Of Investigations In AMCs

- Dual nature of educational and employment roles among participants.
- Title IX matters in AMCs often include imbalance of power between faculty and trainees (e.g., residents/fellows, graduate students).
 - Professionalism / reputational concerns may mean complainants/ witnesses decline to participate.
- Risk of “retaliation” with a little “r”, particularly given parties’ rights of access to evidence.
 - Complainant often reliant on respondents for professional support and reference (e.g., medical resident, graduate student, post-docs).

Unique Aspects Of Investigations In AMCs – cont.

- High likelihood that well-paid faculty will be represented by counsel during process.
- Involvement of affiliate institutions—*e.g.*, non-UT teaching hospitals, clinical settings.
 - How does that complicate investigation?
 - Does partner institution have a right to know outcome of investigation?
- Intersection with medical practice concerns, patients, privileges, clinical peer review, licensing boards, and HIPAA.
 - Example of faculty member being accused of inappropriate sexual relationship with patient.
- Intersection with research funding agencies, particularly federal research funding agencies requirements regarding preventing sexual harassment in funded projects.

Climate Issues In Programs Or Departments

- Claims that mix sexual harassment and general toxic work environment allegations.
- How to address under Title IX regulations?
 - If allegations don't rise to level of sexual harassment, mandatory dismissal under Title IX regs. 34 CFR 106.45(b)(3).
 - However, institution not precluded from addressing under policies and procedures.
 - Title VII may obligate the institution to investigate and address, even if allegations do not rise to level of Title IX.

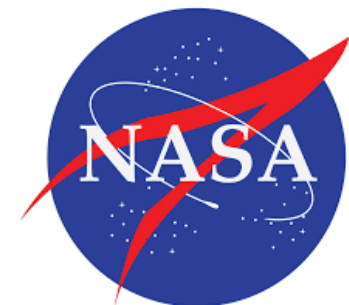


Climate Issues In Programs Or Departments

- Institution continues to investigate and not required to follow mandated Title IX grievance process.
- HOWEVER, consider whether policies clearly address such behavior and what your institution can do even if allegations of “toxic work environment” substantiated.
 - Do your policies define “toxic work environment” or unprofessional behavior?
 - Do policies provide clear authority to take action based on such conduct?
 - Do policies differ between employees and faculty?

Sponsored Research and Sexual Harassment

- Federal funding agencies have rules that address sexual misconduct within sponsored research.
- NIH, NSF, and NASA have specific rules regarding awardee obligations regarding sexual misconduct allegations in funded research programs.
- Participants may also bring complaints directly to funding agencies.
- Agencies may require awardee to respond to information requests and apprise agency of investigation and outcomes.
- Title IX coordinator / investigators should work closely with institution's compliance / sponsored research office to assess sponsored research obligations and ensure compliance.



Sponsored Research and Sexual Harassment -- Resources

- NSF Office of Equity and Civil Rights (OECR)
 - <https://www.nsf.gov/od/oecr/index.jsp>
 - Information on NSF awardee civil rights compliance program, harassment notification term and condition, application of Title IX to NSF-sponsored research,. And compliance review program
- NIH Office of Extramural Research
 - <https://grants.nih.gov/grants/policy/harassment.htm>
 - Information for NIH expectations, policies, and requirements, as well as definitions, reporting, NIH actions/oversight, FAQs, and additional resources
- NASA Title IX Compliance Program
 - <https://www.nasa.gov/offices/odeo/title-IX-compliance-program>



Questions?

UT System Training

Title IX & Texas Law: Athletics Participation

Presenter:

Darren Gibson

Mindy Wetzel

August 2-3, 2023



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Agenda

- SB 15 – “Save Women’s Sports Act”
- Pending Title IX Rule regarding Gender Identity in Athletics
- Recent Cases
- NCAA Approach



Senate Bill 15 - "Save Women's Sports Act" - Basics

- Adds Section 51.980 to the Education Code.
- Effective September 1, 2023.
- Builds on legislation passed in 2021 (House Bill 25) that banned trans women and girls in K-12 schools from participating on sports teams aligned with their gender identities (Amended Chapter 33 of the Education Code to add Section 33.0834).



Senate Bill 15 - "Save Women's Sports Act" – New Rule

- Intercollegiate athletic teams sponsored or authorized by IHEs may not allow:
 - a student to compete on the team that is designated for the biological sex opposite to the student's biological sex; or
 - a male student to compete on the team in a mixed-sex intercollegiate athletic competition in a position that is designated by rule or procedure for female students.
- Except: female students may be allowed to compete in an intercollegiate athletic competition that is designated for male students if a corresponding intercollegiate athletic competition designated for female students is not offered or available.

Senate Bill 15 - "Save Women's Sports Act" – Definitions

- "Athletic competition" means any athletic display between teams or individuals, such as a contest, exhibition, performance, or sport.
- A student's biological sex is the biological sex "correctly stated" on:
 - The student's official birth certificate; or
 - If unobtainable, another government record that accurately states the student's biological sex; and
- A student's biological sex on the student's official birth certificate is considered to have been "correctly stated" only if the statement was:
 - Entered at or near the time of the student's birth; or
 - Modified to correct a scrivener or clerical error in the student's biological sex.



Senate Bill 15 - "Save Women's Sports Act" – Additional Provisions

- Provides that IHEs may not retaliate against a person for reporting a violation.
- Allows individuals to bring civil actions for injunctive relief against IHEs for violations.
- Requires THECB to adopt rules implementing Section 51.980, which comply with Texas and federal law regarding confidentiality of student medical information.

SB 15 – Where Can Transgender Student Athletes Compete?

Sports Team	Transgender Female Athletes	Transgender Male Athletes
Female Sports Team (corresponding male team available)	No	Yes
Male Sports Team (corresponding female team available)	Yes	No
Female Sports Team (no corresponding male team available)	No	Yes
Male Sports Team (no corresponding female team available)*	Yes	Yes
Mixed-Sex Team Position Dedicated for a Female Athlete*	No	Not addressed
Mixed-Sex Team Position Dedicated for a Male Athlete*	Not addressed	Not addressed

*Presumes statute's use of "male" and "female" student refers to student's "biological sex" as defined in the statute.

SB 15 – Examples

- Can a transgender female student compete on the women’s softball team? No
- Can a transgender male student compete on the men’s baseball team? No
- Can a transgender female (or cisgender male) compete on the women’s volleyball team (presuming no corresponding male team)? No
- Can a transgender male (or a cisgender female) compete on the men’s football team? Yes, because there is no corresponding women’s team

*Presumes statute’s use of “male” and “female” student refers to student’s “biological sex” as defined in the statute.

Title IX Regulations Anticipated in October 2023 – Recent History

- In 2020, Supreme Court ruled that Title VII's prohibition of employment discrimination on the basis of sex also included sexual orientation and gender identity. *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020).
- In March 2021, Biden issued Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity, directing Secretary of Education to review all Title IX regulations and policy documents.
- In June 2021, the DOE published a Notice of Interpretation to state that Title IX's prohibition on sex discrimination encompasses discrimination on the basis of sexual orientation and gender identity, applying *Bostock* to Title IX.
- In July 2022, the U.S. District Court for the Eastern District of Tennessee preliminarily enjoined and restrained the DOE from implementing this Notice of Interpretation.

Title IX Regulations Anticipated in October 2023 – Recent History

- In July 2022, the DOE proposed amendments to Title IX regulations to clarify that Title IX's protections against sex discrimination and harassment also prohibit discrimination in educational activities and programs on the basis of "stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity."
- In April 2023, the DOE proposed an amendment to Title IX regulations that would prohibit blanket bans on transgender students participating on athletic teams consistent with their gender identity.
- Publication of final Title IX regulations is expected in October 2023.

Title IX Regulations Anticipated in October 2023 – Deeper Dive

- April 2023 proposed regulation would amend the Title IX regulation governing athletics at 34 CFR 106.41 by adding section (b)(2):
 - If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level:
 - (i) be substantially related to the achievement of an important educational objective, and
 - (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

Title IX Regulations Anticipated in October 2023 – Deeper Dive

- Summary of current existing rule in 34 CFR 106.41:
 - No person shall be excluded from participation in, denied benefits of, treated differently, or be discriminated against in athletics.
 - No recipient may provide athletics separately on the basis of sex, except that separate male and female teams are acceptable when selection is based upon competitive skill or for contact sports.
 - Additionally, if a recipient operates a team in a particular sport for members of only one sex and opportunities for that sex historically limited, members of the excluded sex must be allowed to try out for the team offered (unless it's a contact sport).
 - Finally, for separate male and female athletic teams, recipients must provide overall equal athletic opportunity.

Title IX Regulations Anticipated in October 2023 – Deeper Dive

“Substantially Related to the Achievement of an Important Educational Objective”

- The DOE recognizes a few important educational objectives:
 - Prevention of sports-related injury
 - Fairness in competition
- *Does not include*
 - Communicating or codifying disapproval of a student or a student’s gender identity
 - Adopting criteria for the purpose of excluding transgender students from sports
- Substantially Related means “direct, substantial relationship between”
 - Cannot rely on overly broad generalizations about talents, capacities, or preferences of male and female students

Title IX Regulations Anticipated in October 2023 – Deeper Dive

“Minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied”

- Even if recipient adopts sex-related criteria that are substantially related to the achievement of an important educational objective, recipient must also reasonably adopt or apply alternative criteria that would be a less harmful means of achieving the recipient’s important educational objective, if available.
- Recipient must design sex-related criteria to minimize the potential harms imposed on affected students (e.g., difficulty of obtaining documentation, risk of invasion of privacy or disclosure of confidential information).

Recent Federal Appellate Court Decisions

Federal courts have generally held that Title IX prohibits discrimination against transgender students and requires schools to treat transgender students consistent with their gender identity, including in the context of gender-based activities.

- *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586 (4th Cir. 2020), cert denied, 141 S. Ct. 2878 (2021);
- *Parents for Privacy v. Barr*, 949 F.3d 1210 (9th Cir. 2020);
- *Doe by & through Doe v. Boyertown Area Sch. Dist.*, 897 F.3d 518 (3d Cir. 2018);
- *Whitaker By Whitaker v. Kenosha Unified Sch. Dist. No. 1 Bd. of Educ.*, 858 F.3d 1034 (7th Cir. 2017);
- *Dodds v. United States Dep't of Educ.*, 845 F.3d 217 (6th Cir. 2016);
- *Soule v. Conn. Ass'n of Sch.*, 57 F.4th 43 (2d Cir. 2022).

Recent Federal Appellate Court Decisions - Outlier

Adams v. Sch. Bd. of St. Johns Cnty., 57 F.4th 791, 809 (11th Cir. 2022) (en banc)

- Upheld school's policy prohibiting transgender students from using the bathroom consistent with their gender identity.
- Held that the policy did not facially discriminate based on transgender status and could be analyzed simply as a rule providing for separate restrooms based on sex.
- Held that neither Title IX nor the Equal Protection Clause mandates a policy permitting transgender students to use restrooms consistent with their gender identity.

NCAA Approach

2010-2022 National Collegiate Athletics Association policy on transgender student athlete participation:

- Transgender male athletes taking testosterone for gender dysphoria may compete on a men's team – may not compete on a women's team unless the team is mixed.
- Transgender female athletes who have been taking testosterone suppression medication for one calendar year for gender dysphoria may compete on a women's team. If treatment has lasted less than one year, transgender female athlete may compete on men's team or mixed team.

In January 2022, the NCAA updated their policy on transgender student athlete participation – now determined on a sport-by-sport basis by the national governing body for each sport (or international federation/International Olympic Committee if no national governing body).

NCAA Approach

- Beginning August 1, 2022, transgender student athletes must provide documentation that they are in compliance with previous NCAA policy AND
 - + Must meet the specific sport standard for documented testosterone levels at beginning of competition season and six months later,
 - + Must provide documentation of testosterone levels to the NCAA Committee on Competitive Safeguards and Medical Aspects of Sports in order to compete in NCAA championships.
- Beginning August 1, 2024, same criteria apply, but transgender student athletes are no longer required to provide documentation that they are in compliance with previous NCAA policy.

Potential Tension Between SB 15 and Proposed Title IX Regulations

- Is important objective satisfied? Governor Abbott has described SB 15 as designed to protect female athletes from unfair competition.
- On June 14, 2023, the Texas Attorney General filed a lawsuit against the Secretary of Education and DOE/DOJ over its interpretation of Title IX as including sexual orientation and gender identity, arguing that noncompliance puts Texas schools at risk of losing federal funding.
 - *State of Texas v. Cardona* (N.D. Tex.)
 - DOE and DOJ have not responded yet.



Questions?