2024 ICUT Title IX Training

Scott D. Schneider
Paige Duggins Clay

SCHNEIDER EDUCATION & EMPLOYMENT LAW

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What Do You Want To Make Sure We Cover Over the Next Two Days?

ⓘ Start presenting to display the poll results on this slide.

Agenda

- Today is going to be law and compliance focused
- Tomorrow will be practical

DEC 12, 2024
Dickies Arena

FORT WORTH, TX

TICKETS

DEC 13, 2024
ACL Live at The Moody Theater

AUSTIN, TX

Sold Out

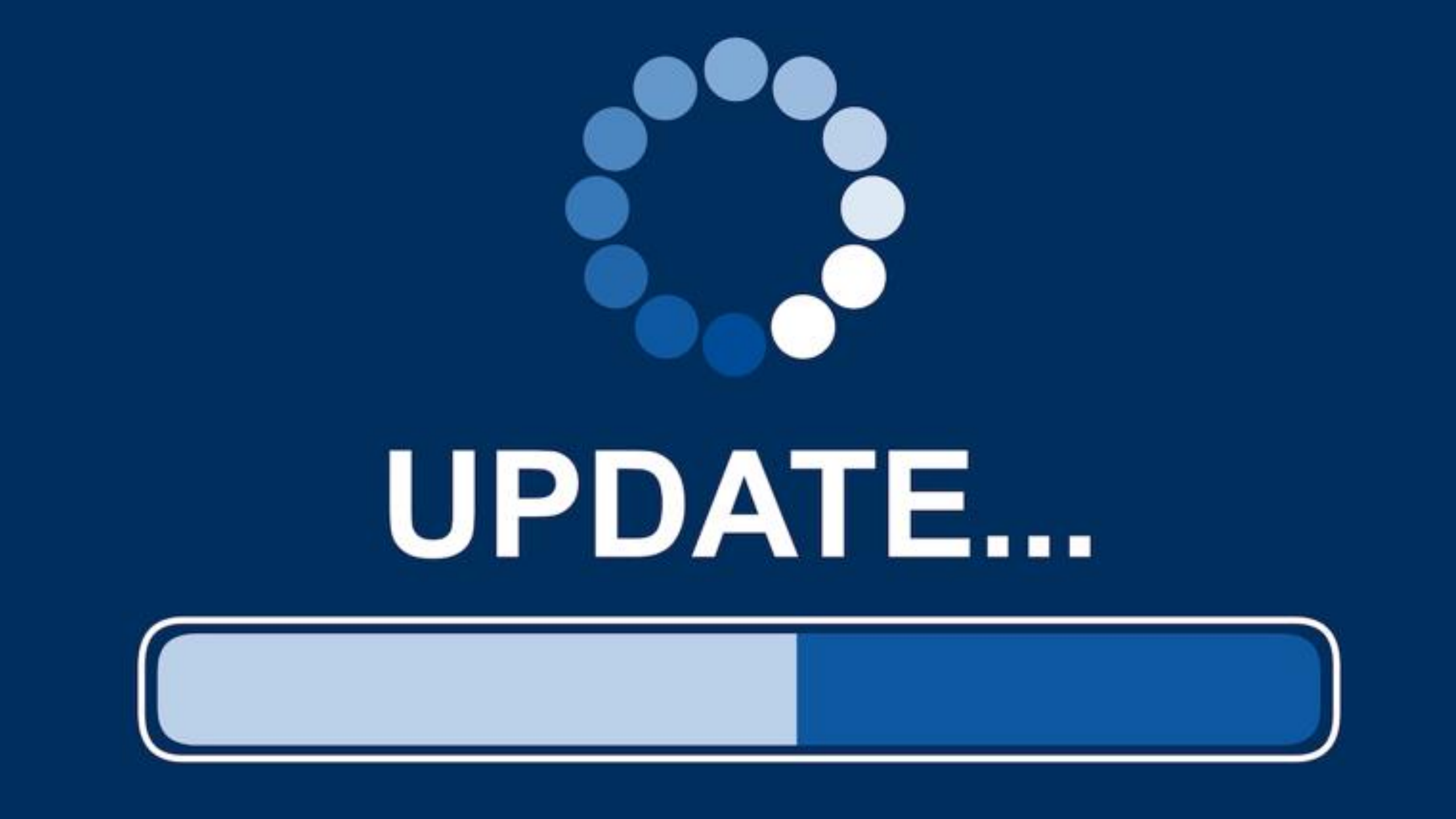
JOIN WAITLIST

CASHORTRADE

DEC 14, 2024
Moody Center

AUSTIN, TX

TICKETS


UPDATE...

Two Realistic Possibilities

1. Limited injunction
2. Full injunction

CONCLUSION

Based on the foregoing review, the Court **GRANTS** Plaintiffs' Motion **IN PART**. Pending final resolution of this case, Defendants are therefore **ENJOINED** from implementing, enacting, enforcing, or taking any action in any manner to enforce the Final Rule, Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024), which is scheduled to take effect on August 1, 2024. This preliminary injunction is limited to Plaintiffs Daniel A. Bonevac, John Hatfield, and the State of Texas.

It is **FURTHER ORDERED** that no security is required to be posted by Texas or individual Plaintiffs under Federal Rule of Civil Procedure 65.

SO ORDERED.

July 11, 2024

MATTHEW J. KACSMARYK
UNITED STATES DISTRICT JUDGE

With respect to Carroll ISD's request to stay the Final Rule's August 1, 2024 effective date under 5 U.S.C. § 705, the Court **DEFERS** ruling on this issue pending further briefing. Although similar in many respects, technical differences exist between the equitable remedy of an injunction and the statutory remedy of a stay or vacatur. *Data Mktg. P'ship v. U.S. Dep't of Lab.*, 45 F.4th 846, 859 (5th Cir. 2022) ("'Unlike an injunction, which merely blocks enforcement, vacatur unwinds the challenged agency action.'") (citation omitted)). Recent guidance from the Fifth Circuit indicates that a stay pursuant to § 705 cannot be limited to specific parties because it is inherently universal in character. *See Career Colls.*, 98 F.4th at 255 (emphasizing that a stay under § 705 is "not party-restricted" and "limit[ing] any relief to the named parties . . . do[es] not hold water").[48] The parties disagreed on this point during the July 8, 2024 hearing.[49] Therefore, the Court **ORDERS** cross-supplemental briefing on the following topics:

1. Whether a stay, like a vacatur, is the default remedy at the preliminary stage of an APA challenge to agency action;

2. Whether a stay under 5 U.S.C. § 705 exclusively contemplates a universal scope or could also allows for party-specific relief;

3. Whether complete relief to Carroll ISD is possible without a 5 U.S.C. § 705 stay given that its students may travel out of state for school-sponsored activities and the concern regarding private lawsuits not covered by the injunction; and

4. Whether non-party limitations on the scope of a 5 U.S.C. § 705 stay, such as only staying certain provisions, is appropriate in this case.

plays out in courts across the country. Under 5 U.S.C. § 705, Congress gave DoE the authority to postpone the effective date of the Final Rule pending judicial review. Maybe DoE should use that authority.

III. Conclusion

Defendants' motion for a partial stay pending appeal (Doc. 59) and Plaintiffs' motion to revise stay (Doc. 62) are DENIED FOR LACK OF JURISDICTION. The court clarifies that Defendants are enjoined from enforcing the Final Rule against Kansas, Alaska, Utah, Wyoming, K.R.'s school, the schools attended by the current and prospective members of Young America's Foundation or Female Athletes United, as well as the schools attended by the children of the current and prospective members of Moms for Liberty.

As a result of the ruling herein, Moms for Liberty is granted until July 26, 2024, to file a

The Plan

1. Each table has a section
2. Discuss the section – I'm giving you 5 minutes ☺
3. Identify a spokesperson who will succinctly discuss the important parts of section

Figure: 19 TAC §3.19(f)(2)

Potential Annual Penalties under TEC Chapter 51, Subchapter E-2		
Statute and Rule Violations	**Institutional Failure to Maintain Substantial Compliance Related to**	**Potential Annual Penalty**
Tex. Educ. Code §51.252; §3.5	Reporting Required for Certain Incidents	$60,000
Tex. Educ. Code §51.253; §3.6	Administrative Reporting Requirements	$2,000 per day
Tex. Educ. Code §51.255(c); §3.8	Failure to Report or False Report (Termination)	$30,000
Tex. Educ. Code §51.256; §3.17	Confidentiality	$60,000
Tex. Educ. Code §51.257(a); §3.18	Retaliation Prohibited	$30,000

Potential Annual Penalties under TEC Chapter 51, Subchapter E-3		
Statute and Rule Violations	**Institutional Failure to Maintain Substantial Compliance Related to**	**Potential Annual Penalty**
Tex. Educ. Code §51.282; §3.4	Policy Requirements	$5,000
Tex. Educ. Code §51.282; §3.4	Policy Accessibility	$5,000
Tex. Educ. Code §51.282; §3.4	Policy Orientation for Students	$5,000
Tex. Educ. Code §51.282; §3.4	Outreach Program for Students and Employees	$5,000
Tex. Educ. Code §51.282; §3.4	Policy Review	$5,000
Tex. Educ. Code §51.283; §3.7	Electronic Reporting Option	$5,000
Tex. Educ. Code §51.284; §3.5(e)	Amnesty for Students Reporting Certain Incidents	$30,000
Tex. Educ. Code §51.285; §3.19	Victim Request Not to Investigate	$5,000
Tex. Educ. Code §51.286; §3.10	Disciplinary Process for Certain Violations	$30,000
Tex. Educ. Code §51.287; §§3.11, 3.30	Student Withdrawal or Graduation Pending Disciplinary Charges	$30,000
Tex. Educ. Code §51.288; §3.12	Trauma Informed Investigation Training	$5,000
Tex. Educ. Code §51.289; §3.13	Memoranda of Understanding Required	$5,000
Tex. Educ. Code §51.290; §§3.14, 3.15	Responsible and Confidential Employee; Student Advocate	$30,000
Tex. Educ. Code §51.291; §3.17	Confidentiality	$60,000
Tex. Educ. Code §51.293; §3.16	Equal Access	$5,000

SCHNEIDER EDUCATION & EMPLOYMENT LAW

Pregnant and Parenting Students

By the Numbers

- Over 4 million postsecondary students are parents—roughly 1 in 4 undergraduates.
- 180,000+ students give birth *each semester.*
- Despite having higher GPAs than their childless peers, **only one third of undergrad student parents** graduate within six years.
- **Roughly 50%** of teenagers who give birth withdraw from school and do not earn their diplomas by age 22.

The Pregnant Scholar

eduemplaw.com

2020 Title IX Rule

- Prohibited discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy (abortion, miscarriage, or stillbirth) and recovery
- Prohibited rules relating to students actual or potential parental, family, or marital status that treated students differently on the basis of sex.
- Limited, unclear protection for gender stereotyping related to pregnancy/parental status and the steps required to remedy it.

2024 Title IX Rule

- Prohibits discrimination in policies, practices, and procedures on the basis of *past, potential,* or current pregnancy, childbirth, termination of pregnancy (abortion, miscarriage, or stillbirth), *lactation*, recovery, *and related medical conditions*.
- Prohibits policies, practices, and procedures relating to students' *past*, current, or potential parental, family, or marital status that treat students differently on the basis of sex. *Offers clear definition of parental status.*
- Clear protection against *gender stereotyping*, including harmful motherhood or fatherhood discrimination.

Information and Accountability

- Pregnant/postpartum students *must* be informed of their rights
- Violations *must* be reported by all mandatory reporters
- Title IX Coordinators are responsible for ensuring changes are provided to ensure an equal education
- Pregnancy-related protections must be fully integrated info Title IX notice and complaint processes

Pregnancy Accommodations

- Clear right to reasonable accommodations for all pregnancy-related needs
- Pregnant/postpartum students *must* be informed of their rights to accommodations
- Title IX Coordinators are responsible for coordinating the accommodations process, and must investigate violations

Lactation Accommodations

- Lactating students are protected under Title IX non-discrimination and accommodation policies
- Educational institutions must provide reasonable breaks and lactations spaces that are:
  - Clean and not a bathroom
  - Free from intrusion and view (e.g. window coverings, locking door)
  - Appropriate and safe
  - Accessible

Documentation and Privacy Protections

- Clear guidelines on medical documentation that reduce barriers to accessing support services
- Prohibits requesting medical certification to participate unless all students have the same requirement
- Prohibits release of personally identifiable information except in limited circumstances enumerated in the Rule

Intersection with Texas Law – SB 412 (88R)

- Prohibits IHE from requiring a pregnant or parenting student, solely because of the student's status as a pregnant or parenting student or due to issues related to the student's pregnancy or parenting,
  - 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.

Tex. Educ. Code 51.982

SB 412 – Reasonable Accommodations

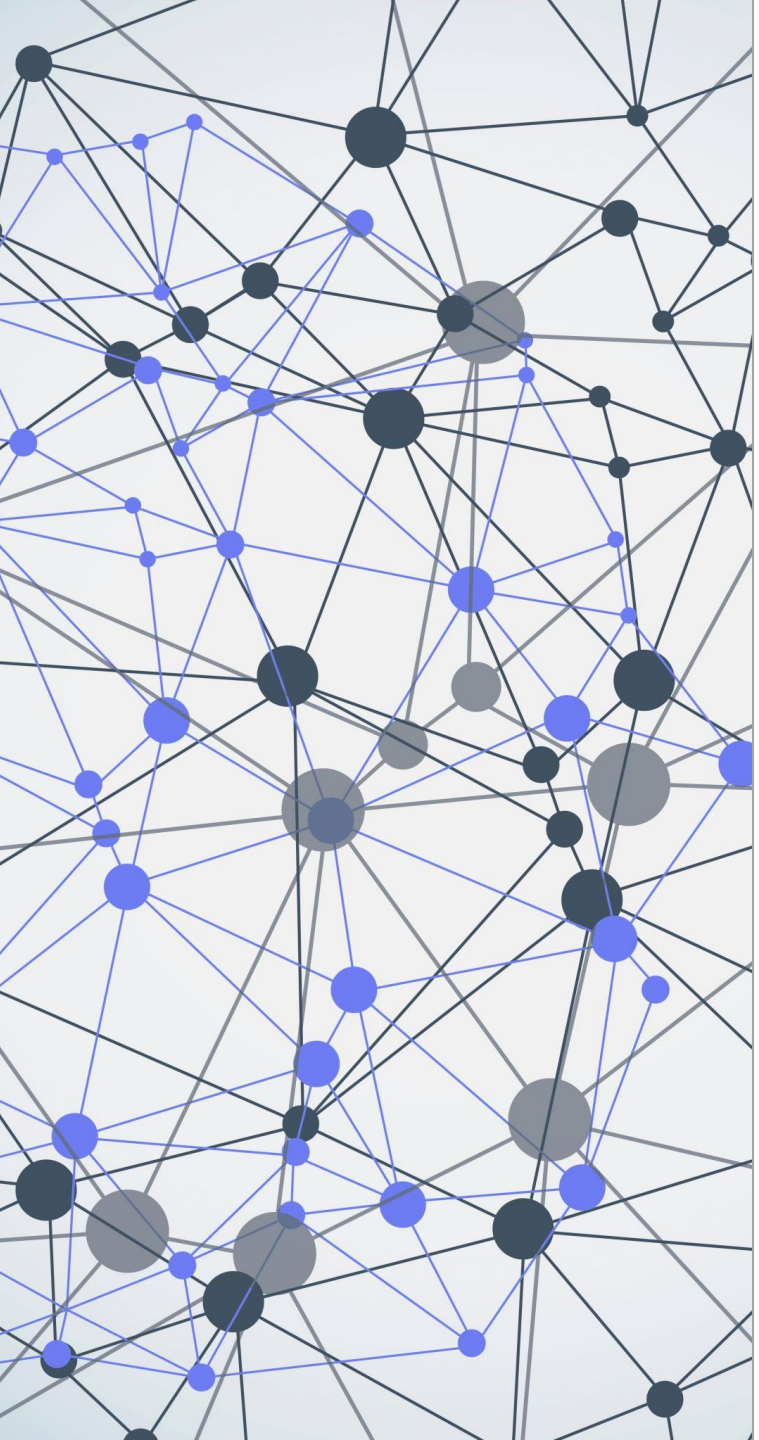
- Requires an institution of higher education to provide reasonable accommodations to a pregnant student
- Requires an institution of higher education, for reasons related to a student's pregnancy, childbirth, or any resulting medical status or condition, to –
  - excuse the student's absence,
  - allow 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

SB 412 – Required Policy and Notice

- Each institution of higher education must adopt a policy for students on pregnancy and parenting discrimination.
- Policy must:
  - Include **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.

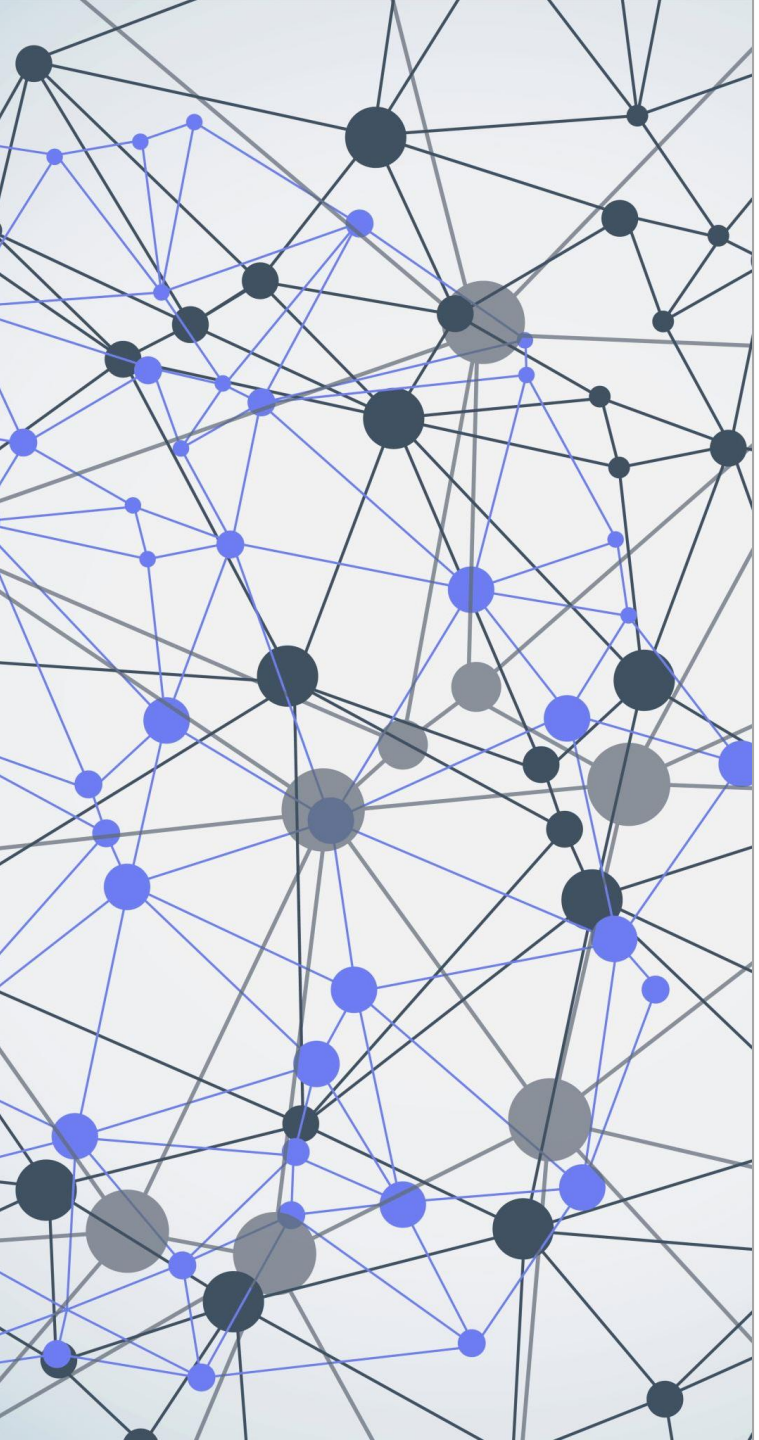
Where Are We? Where Are We Heading?

SCHNEIDER EDUCATION & EMPLOYMENT LAW



Forest/Trees

- Prevent and remediate sex discrimination
- Process for the accused & to meaningfully discern what likely happened
- To an extent, maintain the safety of the campus community



This Isn't 2012!

- Culturally
- OCR
- *Cummings* decision
- Significant risks are clear (systemic failures & due process-y claims)

Keep Calm

and

Enjoy Law School

eduemplaw.com

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Students disciplined for violating Title IX are suing universities for what?

ⓘ Start presenting to display the poll results on this slide.

Title IX: Respondent Litigation

1. Impact of 2020 regulations
2. Return to historical norms (volume & court's consideration)

THE COLLEGE FIX
BREAKING CAMPUS NEWS. LAUNCHING MEDIA CAREERS.

BIAS LEGAL SEXUAL ASSAULT

Judge approves Title IX, due process claims by accused student against University of Iowa

GREG PIPER • AUGUST 4, 2020

Denies 'absolute immunity' to officials in Title IX proceeding

A federal judge cited potential anti-male bias in the University of Iowa's Title IX training, and its omission of exculpatory evidence in a Title IX proceeding, in refusing to dismiss a lawsuit by an expelled student.

U.S. District Judge Rebecca Goodgame Ebinger, who has ruled against other Iowa universities in **two** **similar** lawsuits, also said defendant officials have no right to "quasi-judicial immunity" for their actions in the proceeding.

Doe v. Univ. of Iowa (8th Cir. Sep. 14, 2023)

- Summary judgment affirmed for University
- Decision based "on **thorough review of the testimony and evidence** presented at the hearing, where **Doe was represented by counsel** . . . ."
- "Decision that included **exhaustive credibility determinations** . . . ."
- No evidence of bias: lawsuits + training
- *See also*, *Doe v. Rollins Coll.* (11th Cir. Aug. 14, 2023) (Title IX); *Doe v. Va. Polytechnic Inst. & State Univ.* (4th Cir. Aug. 8, 2023) (due process)

VAN OVERDAM SUES TEXAS A&M, ALLEGES GENDER BIAS IN SEX ABUSE CASES | Comments: 42

Austin Van Overdam, the Texas A&M swimmer found responsible for sexual abuse by a Title IX investigation, is launching his own Title IX lawsuit at the school, alleging that the school discriminates against male students in sexual misconduct investigations. Stock photo via Janna Schulze/SwimSwam.com

Van Overdam v. Texas A&M, 2024 WL 115229 (S.D. Tex. 2024)

- No emotional distress, reputational, or punitive damages recoverable
- Title IX claims fails: comparator not identified; cannot rebut legitimate explanation for discipline

Omokwale v. Baylor, 2024 WL 116248 (N.D. Tex. 2024)

"Here, Omokwale's First Amended Petition for Breach of Contract fails to establish the existence of a valid contract in the first instance. . . Omokwale alleges that the Fall 2021 Student Handbook alone constitutes a valid, enforceable contract for Baylor to provide her academic accommodations in her clinicals. It states that **But the student handbook, and the student policies and procedures it references, expressly disclaim that it constitutes a contract. "[t]he provisions of the Student Policies and Procedures do not constitute a contract, express or implied, between Baylor University and any applicant, student, student's family, or faculty or staff member. Baylor reserves the right to change the policies, procedures, rules, regulations, and information at any time."** And "Texas courts have held that a disclaimer such as [Baylor's] negates the existence of any implied contractual rights." This is especially true where, as here, the manual states that it is intended to provide guidelines only and does not create contractual rights."

Title IX: Complainant Litigation

1. 2020 regulations
2. Impact of *Cummings v. Premier Rehab Keller* decision

Arizona RB Orlando Bradford Arrested: Latest Details, Comments and Reaction

SCOTT POLACEK

Deliberate Indifference: Brown v. Arizona (9th Cir. Sep. 25, 2023)

1. substantial control over both the harasser **and the context in which the known harassment occurs**
2. harassment was so severe, pervasive, and objectively offensive that it denied its victims the equal access to education that Title IX is designed to protect
3. school official with authority to address the alleged discrimination and to institute corrective measures has actual knowledge of the discrimination
4. school acted with deliberate indifference to the harassment; and
5. school's deliberate indifference must, at a minimum, cause students to undergo harassment, or make them liable or vulnerable to it.

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What are the sort of facts which you would want to assess to determine whether University had “control over the off-campus housing in which Bradford was living while attending the University”?

ⓘ Start presenting to display the poll results on this slide.

Deliberate Indifference: *Brown v. Arizona* (9th Cir. Sep. 25, 2023)

- "After he finished his freshman year, Bradford moved into another off-campus house with other members of the football team. The University and football program allowed Bradford and his teammates to live off campus only with the **permission of their coaches**. Head coach Rodriguez testified in his deposition that under Player Rule 15, permission to live off campus was **conditioned on good behavior and could be revoked**. The very existence of this off-campus players' residence was therefore subject to the coaches' control. Even behavior as innocuous as being late to appointments or receiving bad grades could result in players' being forced to move back on campus."
- "The **University's Student Code of Conduct applies** to student conduct both on-campus and off-campus because off-campus misconduct can affect student health, safety, and security as much as on-campus misconduct can."
- "In addition to the Code of Conduct applicable to all students, Bradford was subject to **increased supervision through Player Rules specific to football players**. "

Rodriguez testified that the football team had a zero-tolerance policy for violence against women. He testified that a player's violence against women would lead to immediate dismissal from the team. Rodriguez testified that the "first time" he heard about Bradford "doing anything physically violent to his girlfriend" was the day he kicked him off the team. Rodriguez said that if he had known earlier, he "certainly" "would have kicked him off earlier." According to Rodriguez's undisputed testimony, had he been informed of Bradford's assaults on Student A and DeGroote during Bradford's freshman year, Bradford would have been kicked off the team, and accordingly would have lost his football scholarship. Even if he had engaged in lesser misconduct, he would never have been permitted to live off campus while a member of the team. As in *Simpson*, the University failed to impose its supervisory power and disciplinary authority over an off-campus context, despite having notice of the high risk of misconduct. *See* 500 F.3d at 1173. A reasonable factfinder could infer from Rodriguez's testimony that, had Rodriguez known of Bradford's assaults on Student A and DeGroote, Bradford's September 12 and 13 assaults on Brown at his off-campus house would never have occurred.

Doe v. Bd. of Trs. of Neb. State Colls. (8th Cir. Aug. 15, 2023)

- Chadron issued a **mutually binding no-contact order** between Doe and Ige, which was served on Ige at the end of his police interview.
- Chadron **verified that the two students did not share the same classes, and promptly initiated an investigation to determine what happened**.
- Chadron interviewed Doe, explained the investigatory process to her, banned Ige from Andrews Hall, and **accommodated Doe academically**.
- At the conclusion of the investigation, Chadron placed Doe in a more secure employment location and banned Ige from that location, placed Ige on behavioral probation, required Ige to attend weekly counseling sessions and work through an appropriate text, compelled Ige to complete an online consent and alcohol class, approved Doe to complete coursework off campus if she wanted to, offered to provide Doe with a plain-clothed escort while on campus, and solicited Doe's input with regard to providing additional assistance or accommodations.

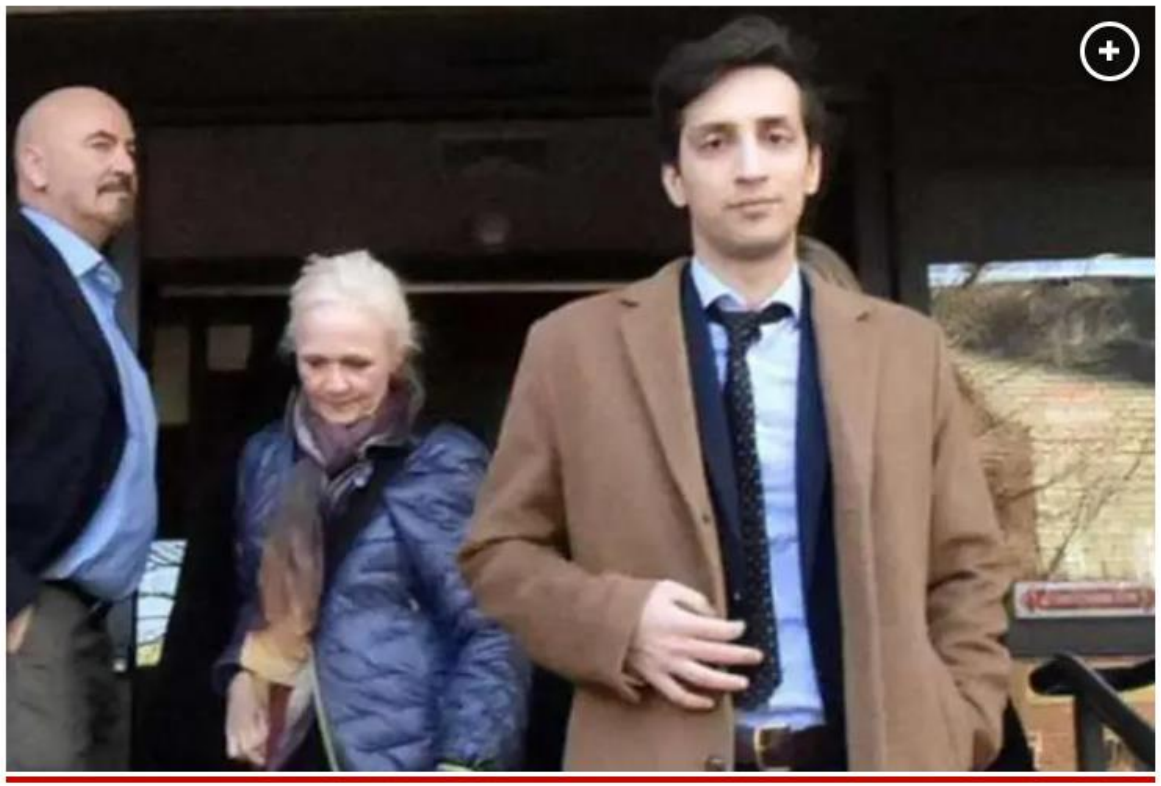
Jury finds Baylor university was negligent in its handling of ex-student's domestic violence case, awards $270K in damages

US NEWS

Former Yale student acquitted of rape sues university for $110M

By Joshua Rhett Miller

Published Dec. 16, 2019, 2:05 p.m. ET



Yale Rape Case Will Change How the Accused Are Treated

Universities and companies alike will have to do more to ensure their assessment of sexual assault allegations resembles a judicial proceeding.

November 4, 2023 at 7:00 AM CDT

By Stephen L. Carter

Stephen L. Carter is a Bloomberg Opinion columnist, a professor of law at Yale University and author of "Invisible: The Story of the Black Woman Lawyer Who Took Down America's Most Powerful Mobster."

It's never easy to balance the rights of the accuser with the rights of the accused. *Photographer: Spencer Platt/Getty Images*

Khan v. Yale Univ. (2nd Cir. Oct. 25, 2023)

- Argument: Quasi-judicial privilege
- After the Connecticut Supreme Court opined in response to questions certified to it that Yale's disciplinary procedure lacked necessary procedural safeguards—such as an **oath requirement, cross-examination, the ability to call witnesses, meaningful assistance of counsel, and an adequate record for appeal**—to constitute a quasi-judicial proceeding to support Doe's assertion of immunity, the Second Circuit vacated dismissal of plaintiff's claims as to statements made during the 2018 disciplinary hearing that resulted in his expulsion.
- *See also, Gonzales v. Hushen* (Colo. App. Sep. 28, 2023) (anti-SLAPP motion)

The Education Dept. Tried to Draw a Line Between Free Speech and Discrimination. It's Still Blurry.

By *Kelly Field* | MAY 28, 2024

ILLUSTRATION BY THE CHRONICLE; PHOTO BY QIAN WEIZHONG/VCG VIA GETTY IMAGES

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Please download and install the Slido app on all computers you use

A student comes to you and wants the University to respond to another student's sexually offensive material on Instagram. How do you respond?

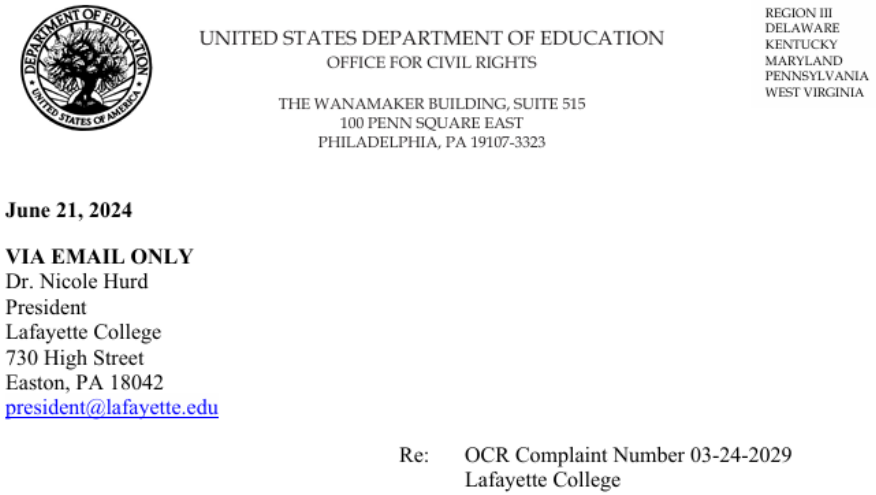
ⓘ Start presenting to display the poll results on this slide.

June 24, 2024

OCR Chides Lafayette College for Dismissing Anti-Israel Posts as 'Free Speech Issue'

The latest Title VI resolution agreement sheds light on how colleges are being asked to handle complaints about online speech. First Amendment advocates are concerned about the implications.

June 21, 2024 Resolution Agreement



UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE WANAMAKER BUILDING, SUITE 515
100 PENN SQUARE EAST
PHILADELPHIA, PA 19107-3323

REGION III
DELAWARE
KENTUCKY
MARYLAND
PENNSYLVANIA
WEST VIRGINIA

June 21, 2024

VIA EMAIL ONLY
Dr. Nicole Hurd
President
Lafayette College
730 High Street
Easton, PA 18042
president@lafayette.edu

Re: OCR Complaint Number 03-24-2029
Lafayette College

- "The Complainant alleges that the College discriminated against students on the basis of national origin (shared Jewish ancestry) by failing to respond to incidents of harassment in October 2023."
- "OCR also reviewed documentation of 11 incidents of alleged harassment **on the basis of shared Jewish ancestry** that were reported during the fall 2023 semester."

Incidents

- “Pards for Palestine organized a peaceful walkout as part of a national event against the conflict in Gaza. At the protest, a student held a poster that included the phrase, ‘**From the River to the Sea**.’ The College told OCR that College administration immediately notified the College President.”
- “A meeting was held with the President and members of the College administration to ‘discuss the hurtful nature of the poster,’ identify the student who held the poster, and the need for an immediate response to the incident. The student who held the poster was identified the same day and the College Chaplain called the student to discuss the poster at 4:30pm and 8:30pm that same day. The College told OCR that, during the phone calls, the College Chaplain spoke with the student about the poster and informed the student that the phrase was hurtful and could be viewed as antisemitic.”

Other Incidents

- "The reporting student submitted a OnePard complaint about an offensive Instagram post made by a respondent student against Jews. The post compares a Palestinian dying with Jesus dying, and states 'Same Picture, Same Land, Same Perpetrator.'"
- "An anonymous individual filed a OnePard complaint naming the respondent student and stating that they were posting offensive material on their Instagram account regarding Jews."
- "Instagram post made by a respondent student . . .The post is a meme that depicts an Israel Defense Forces soldier as the same as a Nazi soldier and states 'The irony of becoming what you once hated.'" The complaint also included another post in which the respondent student wrote about losing followers with an image stating "Lost a follower… good. I don't need ethnic cleansers on my team."
- How do you respond?

Resolution Agreement

- "Based on the evidence to date, OCR is concerned that notwithstanding the College's many efforts to respond proactively to prevent the operation of a hostile environment based on shared ancestry during fall 2023, the College's practices **particularly with respect to notice of harassing conduct on social media** were not reasonably designed, as required by Title VI, to redress any hostile environment."
- "The College appears to have operated a **categorical policy** not to address allegations of harassment on private social media – as distinct from social media of a College recognized student group as in Incident 9 – unless the harassment constituted a direct threat. This practice does not satisfy the Title VI obligation to take prompt and effective steps to redress a hostile environment about which the College knows; **that requirement is not limited to conduct that occurs on campus or outside social media**."

Resolution Agreement

- “OCR notes that the College response to a student protestor who carried a sign using a specific phrase on campus reflects College concern that the phrase could contribute to a hostile environment for students but the College declined to take responsive action to reported use of the same phrase on social media.”
- “In this and repeatedly in other instances, the College documents reflect that it **did not address** whether social media and off campus conduct individually or collectively created or contributed to a hostile environment based on shared ancestry, which does not satisfy Title VI.”

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

Fact Sheet: Harassment based on Race, Color, or National Origin on School Campuses
July 2, 2024

Where Can Harassing Conduct Occur?

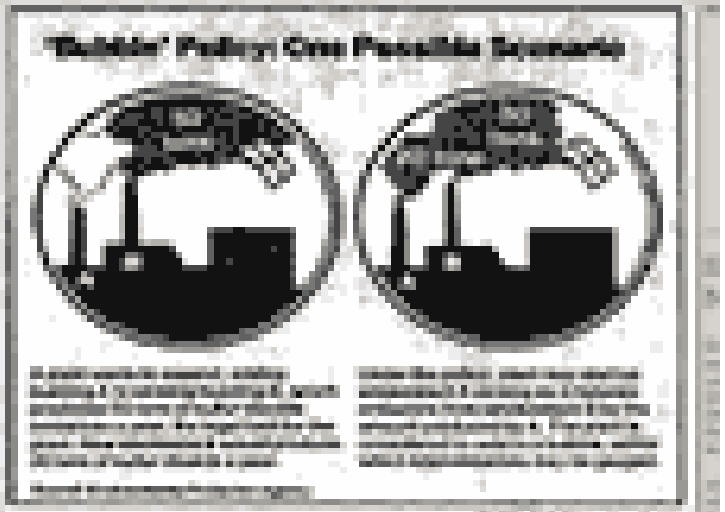
Harassing conduct may occur in many different contexts and locations, including classrooms (including virtual classes), residence halls, hallways, cafeterias, school buses, playgrounds, athletic fields, locker rooms, bathrooms, on the internet, and on social networking sites and apps.

What Must a School Do to Address a Hostile Environment based on Race, Color or National Origin?

To redress a hostile environment based on race, color, or national origin, a school has a legal duty to take prompt and effective steps that are reasonably calculated to: (1) end the harassment, (2) eliminate any hostile environment and its effects, and (3) prevent the harassment from recurring.[10]

OCR interprets Title VI and its implementing regulations consistent with free speech and other rights protected under the First Amendment to the U.S. Constitution. Nothing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment. Neither Title VI nor its implementing regulations require schools to enact or enforce codes that punish the exercise of such rights.[13]

Court Upholds Reagan on Air Standard



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Loper Bright Enterprise v. Raimando (June 28, 2024)

- APA requires courts to exercise their independent judgment in deciding whether an agency has acted within its statutory authority, and courts **may not** defer to an agency interpretation of the law simply because a statute is ambiguous
- "As relevant here, the APA specifies that courts, not agencies, will decide 'all relevant questions of law arising on review of agency action —even those involving ambiguous laws. It prescribes no deferential standard for courts to employ in answering those legal questions, despite mandating deferential judicial review of agency policy making and factfinding . . . **Courts exercising independent judgment in determining the meaning of statutory provisions, consistent with the APA, may—as they have from the start—seek aid from the interpretations of those responsible for implementing particular statutes. See Skidmore, 323 U. S., at 140.** And when the best reading of a statute is that it delegates discretionary authority to an agency, the role of the reviewing court under the APA is, as always, to independently interpret the statute and effectuate the will of Congress subject to constitutional limits."

ADMINISTRATIVE LAW

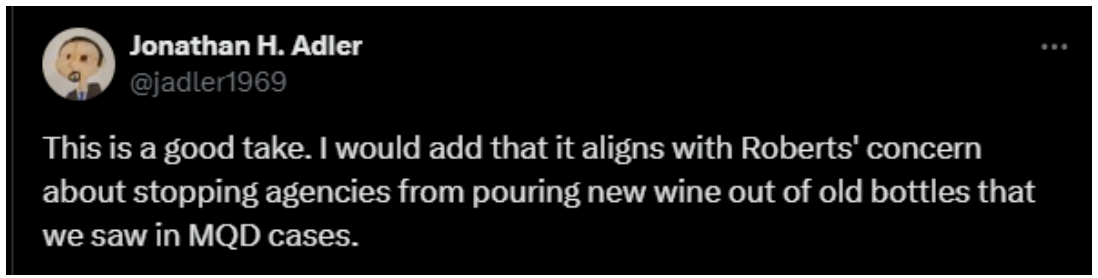
From "Deference" to "Respect"—The Real Import of Loper Bright

The decision to overturn Chevron removes an agency trump card, but does not instruct courts to ignore agency opinions--and they won't.

JONATHAN H. ADLER | 7.3.2024 1:36 PM

The headline result of *Loper Bright Enterprise v. Raimando* is that the Supreme Court has overturned *Chevron v. NRDC* and ended the practice of *Chevron* deference. While this is significant, count me among those who think the effects of the decision will be more modest than some portend. It may be that *Loper Bright* "places a tombstone on *Chevron* no one can miss," but the most important aspects of the decision lie in the weeds. As I suggested in February, the extent to which a given rule constrains agencies is more a function of what it does than how it is labeled.

The Chief's decision in *Loper Bright* reaffirms that judges must interpret statutes in the first instance and that courts are not obliged to follow an agency's interpretation of a statute unless that interpretation is convincing. In effect, a rule of deference is replaced with a rule of respect. That is, as was the case prior to *Chevron*, reviewing courts are required to listen to what agencies have to say, but must still exercise their independent judgment on what a statute means. As the Chief puts it repeatedly, the rule is that courts are to give agencies "due respect" rather than deference.



SEC v. Jarkesy (June 27, 2024)

The first question in the case is whether the claim that the SEC brought against hedge fund founder and investment adviser George Jarkesy — seeking penalties for misleading statements he made to investors — is a "suit at common law" to which the Seventh Amendment applies. After all, like most administrative claims, it rests on a federal statute, not the common law, and it requires the agency to establish facts that do not match any cause of action known to the common law in 1791 (when the states ratified the Seventh Amendment). Roberts explained, though, that the "right is not limited to the 'common-law forms of action recognized' when the Seventh Amendment was ratified," but rather extends to any "statutory claim if the claim is 'legal in nature.'"

Here, it "is all but dispositive [that] the SEC seeks civil penalties, a form of monetary relief, [because] money damages are the prototypical common law remedy." In particular, he explained that "only courts of law issued monetary penalties to 'punish culpable individuals," which means that "civil penalties are a type of remedy at common law that could only be enforced in courts of law." Most importantly here, because "the SEC is not obligated to return any money to victims," its civil penalties by definition "are designed to punish and deter, not to compensate." That "effectively decides that ... a defendant would be entitled to a jury on these claims."

Justice Department Secures $4.14 Million Settlement for Student-Athletes to Remedy Title IX Violations at University of Maryland, Baltimore County

Wednesday, April 3, 2024

Share

For Immediate Release

Office of Public Affairs

Settlement Requires Financial Relief and Systemic Action to Address Sexual Abuse and Discrimination of Student-Athletes by Former Coach

- The allegations centered around Chad Cradock who served as the head swimming and diving coach for UMBC for decades.
- The Department of Justice report stated he was known as "Mr. UMBC" and was so influential that university officials "…allowed [him] to do as he pleased without consequence, including engaging in physical sexual assaults and sex discrimination against his student-athletes."
- Cradock created a "hypersexualized environment" where he touched the genitals of male athletes, massaged them, kissed them, watched them urinate, invited them to private sleepovers at his home and demanded to know every intimate detail of their sex lives.
- Women were considered second class and subjected to name calling and body shaming. It accused Coach Cradock of encouraging female athletes to have sexual relationships with male athletes, blamed them if those relationships turned abusive, and he and others failed to report multiple sexual assaults.

Clery Act Reports By Year

2024

Liberty University

2024 - Case #202230330635

The Department of Education conducted this program review to assess the institution's compliance with the Clery Act and related laws. The following documents provide important information about this review:

- Final Program Review Determination
- Program Review Report
- Settlement Agreement

2020

2019

2018

2017

2016

EDUCATION

Liberty University fined $14 million for federal crime reporting violations

MARCH 5, 2024 · 4:31 PM ET

Elissa Nadworny

Students walk across Liberty University's campus in Lynchburg, Va.

Amanda Andrade-Rhoades/AFP/Getty Images

Muldrow v. City of St. Louis, Missouri (U.S. Apr. 17, 2024)

"An employee challenging a job transfer under Title VII must show that the transfer brought about **some harm with respect to an identifiable term or condition of employment**, but that harm **need not be significant**."

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Hamilton v. Dallas County, No. 21-10133 (5th Cir. 2023) (en banc)

"For almost 60 years, Title VII has made it unlawful for an employer 'to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his [or her] compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.' Despite this broad language, we have long limited the universe of actionable adverse employment actions to so-called **ultimate employment decisions**. We **end that interpretive incongruity** today."

The Fifth Circuit Reverses 27 Years of Title VII Jurisprudence

By Shearil Matthews on August 29, 2023

POSTED IN LABOR AND EMPLOYMENT LAW

On August 18, 2023, in *Hamilton v. Dallas County*,[1] the United States Fifth Circuit Court of Appeals, sitting *en banc*, handed down a significant Title VII ruling that has far-reaching implications for future employment discrimination cases in Louisiana, Mississippi, and Texas. Employees seeking to bring a discrimination claim no longer need to meet the high burden of proving they suffered an "ultimate employment decision." Instead, the Fifth Circuit has aligned with its sister circuits, and plaintiffs need only show they suffered from a discriminatory act related to hiring, firing, compensation or the terms, conditions, or privileges of employment. Indeed, in *Hamilton*, the Fifth Circuit initially applied the ultimate employment decision standard before rehearing the case *en banc* and ultimately reversing 27 years of precedence.

As the Civil Rights Division of the Justice Department noted during en banc oral argument in this case, if "a law firm is having a lunch to do CLEs and you have a policy that says we're only going to invite women but not men to this CLE lunch, that's of course actionable, and that's of course a term, condition, or privilege of employment" under Title VII. Audio of Oral Arg. 23:00–23:29. The Justice Department agreed that "a lot of law firms do that." *Id.* at 25:35. It also noted that "work assignments . . . happening on the basis of race" are likewise actionable under Title VII. *Id.* at 27:12–20.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS

Faculty, Alumni, and Students Opposed to Racial Preferences (FASORP),

Plaintiff,

v.

Northwestern University; **Hari Osofsky**, in her official capacity as dean of Northwestern University School of Law, **Sarah Lawsky**, **Janice Nadler**, and **Daniel Rodriguez**, in their official capacities as professors of law at Northwestern University; **Dheven Unni**, in his official capacity as editor in chief of the Northwestern University Law Review; **Jazmyne Denman**, in her official capacity as senior equity and inclusion editor of the Northwestern University Law Review,

Defendants.

Case No. 1:24-cv-05558

COMPLAINT

Faculty hiring at American universities is a cesspool of corruption and lawlessness. For decades, left-wing faculty and administrators have been thumbing their noses at federal anti-discrimination statutes and openly discriminating on account of race and sex when appointing professors. They do this by hiring women and racial minorities with mediocre and undistinguished records over white men who have better credentials, better scholarship, and better teaching ability. This practice, long known as "affirmative action," is firmly entrenched at institutions of higher learning and aggressively pushed by leftist ideologues on faculty-appointments committees and in university DEI offices. But it is prohibited by federal law, which bans universities that accept

LEGAL CULTURE | CONSERVATIVE LEGAL MOVEMENT

A Brief Guide to Jonathan Mitchell, the Forrest Gump of the Conservative Culture Wars

The lawyer who helped craft Texas's notorious anti-choice bounty hunter law is now working on new cases in which he hopes to push the law even further to the right.

eduemplaw.com


TRANSITION

NCAA DENIED APPEAL IN COLLEGE ATHLETE EMPLOYEE CASE

BY MICHAEL MCCANN July 11, 2024 1:02pm

eduemplaw.com

On third anniversary of NIL era in college athletics, report finds explosive growth coming

Total NIL compensation earned by college athletes will grow by more than 270 percent from 2021-22 to 2025-26, leading NIL firm Opendorse expects.

ZACH BARNETT • JUL 1, 2024

According to them, 72.2 percent of this money goes to football players. 21.2 percent is given to men's basketball players, while baseball and women's basketball players account for just 5.9 percent. Considering how many football players there are compared to the other sports, it makes sense as to why those athletes would receive more of the money, but the disparity here is massive.

When it comes to commercial NIL dollars, it's a similar case as 76.6 percent goes to football players.

OREGON ASKS COURT TO REJECT TITLE IX SUIT'S NIL 'THEORY'

BY DANIEL LIBIT July 8, 2024 3:26pm

UO beach volleyball players and club rowers are suing the school for sex discrimination. A settlement conference is set for next week.

PHOTO BY JOSEPH WEISER/ICON SPORTSWIRE VIA GETTY IMAGES

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Gut-wrenching choices, Title IX complications face college athletics in wake of House v. NCAA settlement

For 100 years, athletic departments have operated as 24-hour ATMs, and for every dollar earned, they spent

By Brandon Marcello May 30, 2024 at 9:47 am ET • 10 min read

NCAA president seeks federal help for 'national standard' on Title IX as questions mount with House settlement

Charlie Baker is looking to the government for "guidance" over Title IX concerns

By John Talty Jun 24, 2024 at 12:49 pm ET • 3 min read

eduemplaw.com

House Litigation

The House litigation challenges rules:

(a) restricting the compensation that student athletes can receive in exchange for the commercial use of their names, images, and likenesses (NIL) and (b) prohibiting NCAA member conferences and schools from sharing with student athletes the revenue they receive from third parties for the commercial use of student-athletes' NIL.

Proposed Settlement Term

- Compensating the damages classes in a manner proportionate to the plaintiffs' damages model
- Agreement to drop restrictions on universities' ability to share with student-athletes the revenue universities receive from third parties for the commercial use of the student-athletes' NIL. More specifically, schools would be permitted (but not required) to share up to 22% of the average media rights, ticket sales and sponsorship revenue of each power-conference school with student athletes
- What are Title IX implications?

34 C.F.R. § 106.37(c)(1)

(c) ***Athletic scholarships.***

(1) To the extent that a recipient awards athletic scholarships or grants-in-aid, it must provide reasonable opportunities for such awards for members of each sex in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics.

(2) Separate athletic scholarships or grants-in-aid for members of each sex may be provided as part of separate athletic teams for members of each sex to the extent consistent with this paragraph and § 106.41.

34 C.F.R. § 106.41(c)

(c) ***Equal opportunity.*** A recipient which operates or sponsors interscholastic, intercollegiate, club or intramural athletics shall provide equal athletic opportunity for members of both sexes. In determining whether equal opportunities are available the Director will consider, among other factors:

(1) Whether the selection of sports and levels of competition effectively accommodate the interests and abilities of members of both sexes;

(2) The provision of equipment and supplies;

(3) Scheduling of games and practice time;

(4) Travel and per diem allowance;

(5) Opportunity to receive coaching and academic tutoring;

(6) Assignment and compensation of coaches and tutors;

(7) Provision of locker rooms, practice and competitive facilities;

(8) Provision of medical and training facilities and services;

(9) Provision of housing and dining facilities and services;

(10) Publicity.

Unequal aggregate expenditures for members of each sex or unequal expenditures for male and female teams if a recipient operates or sponsors separate teams will not constitute noncompliance with this section, but the Assistant Secretary may consider the failure to provide necessary funds for teams for one sex in assessing equality of opportunity for members of each sex.

34 C.F.R. § 106.54

§ 106.54 Compensation.

A recipient shall not make or enforce any policy or practice which, on the basis of sex:

(a) Makes distinctions in rates of pay or other compensation;

(b) Results in the payment of wages to employees of one sex at a rate less than that paid to employees of the opposite sex for equal work on jobs the performance of which requires equal skill, effort, and responsibility, and which are performed under similar working conditions.

[45 FR 30955, May 9, 1980, as amended at 85 FR 30579, May 19, 2020]

Equity Implications of Paying College Athletes: A Title IX Analysis

Boston College Law Review, 2023
Elon University Law Legal Studies Research Paper Forthcoming

63 Pages • Posted: 2 Feb 2023

Andrew J. Haile
Elon University School of Law

Date Written: February 2, 2023

Abstract

After fifty years of Title IX, the gap in participation rates between men and women in college athletics has closed significantly. In 1982, women comprised only 28% of all NCAA college athletes. In 2020, they made up 44%. Despite the progress in participation rates, a substantial gap in resources allocated to men's and women's sports continues to exist. On average, NCAA colleges spend more than twice as much on men's sports as they do on women's. This gap is even greater at schools in the Football Bowl Subdivision, the most elite level of college athletics. The median FBS institution spends almost three times more on men's athletics than on women's. This situation may get even worse if colleges are allowed to start paying their athletes, which appears a realistic possibility in the not-too-distant future. Justice Kavanaugh's concurrence in the 2021 Supreme Court decision NCAA v. Alston sent a strong signal that prohibitions on paying college athletes most likely violate federal antitrust law. More recently, some states have introduced legislation that would require colleges to compensate athletes in sports that generate positive net income for their schools. While this could rectify the serious inequity of colleges making tens of millions of dollars from their athletes' labor without those athletes being allowed to share in the financial benefits they create, it could also widen the gap in resources colleges invest in men's and women's sports. With very rare exception, football and men's basketball are the only college sports that produce more revenue than expenses. Consequently, unless Title IX requires otherwise, the difference in the amount of money colleges invest in men's and women's sports could grow significantly if those colleges are allowed to compensate male athletes without compensating female athletes. This Article provides a detailed analysis of whether the current Title IX regulations require equal payments to male and female athletes. It concludes that they do not. Of course, the controlling Title IX regulations were drafted at a time when paying college athletes was not even contemplated, and therefore this result does not comport with the purpose or spirit of Title IX. Consequently, the Article goes on to argue that the regulations should be amended to treat payments to college athletes the same as scholarships. This would require that male and female athletes receive proportionately equal payments for their athletic services. Making this change to ensure equitable treatment of all athletes will advance the purposes of Title IX and will help to combat the "marketplace bias" that hampers the economic growth of women's sports.

Return to 106.37

§ 106.37 Financial assistance.

(a) ***General.*** Except as provided in paragraphs (b) and (c) of this section, in providing financial assistance to any of its students, a recipient shall not:

(1) On the basis of sex, provide different amount or types of such assistance, limit eligibility for such assistance which is of any particular type or source, apply different criteria, or otherwise discriminate;

(2) Through solicitation, listing, approval, provision of facilities or other services, assist any foundation, trust, agency, organization, or person which provides assistance to any of such recipient's students in a manner which discriminates on the basis of sex; or

(3) Apply any rule or assist in application of any rule concerning eligibility for such assistance which treats persons of one sex differently from persons of the other sex with regard to marital or parental status.

Paragraph (c) sets forth the proportionality requirement for athletic scholarships. If paragraph (a) requires proportionality for all forms of financial assistance, why set out a separate paragraph, specifically requiring proportionality for athletic scholarships?

The separate paragraph for athletic scholarships indicates different treatment for scholarships as compared to other forms of financial assistance.

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EDUCATION &
EMPLOYMENT
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Hypo: The Cast

- Jane Doe: A star athlete on the university’s women’s soccer team.
- John Smith: A fellow student and member of the men's basketball team.
- Coach Williams: The head coach of the women's soccer team.
- Dean Johnson: The university's Title IX Coordinator.
- Professor Adams: A faculty member who witnessed an incident.

The Incident

- Jane Doe, a highly regarded player on the women’s soccer team, reports feeling uncomfortable around John Smith, a member of the men's basketball team.
- Jane claims that John has been making inappropriate comments about her appearance and athletic abilities during joint training sessions at the university gym. She also states that John often follows her on social media, leaving comments that make her feel uneasy. Jane confides in Coach Williams, who advises her to report the issue to the Title IX office.
- One day, while Jane is working out in the gym, John approaches her and makes a derogatory comment about women athletes being inferior to men. Professor Adams, who is also working out at the gym, overhears the comment but does not intervene.
- Jane decides to file a formal complaint with Dean Johnson, the Title IX Coordinator, detailing her experiences and providing evidence of John's comments on social media.

Discussion Points

Team 1: Immediate Response:

- How should Coach Williams have handled Jane's initial complaint?
- What immediate steps should Dean Johnson take upon receiving Jane's formal complaint?
- Thoughts about next steps under Texas law?

Team 2: Support for Parties:

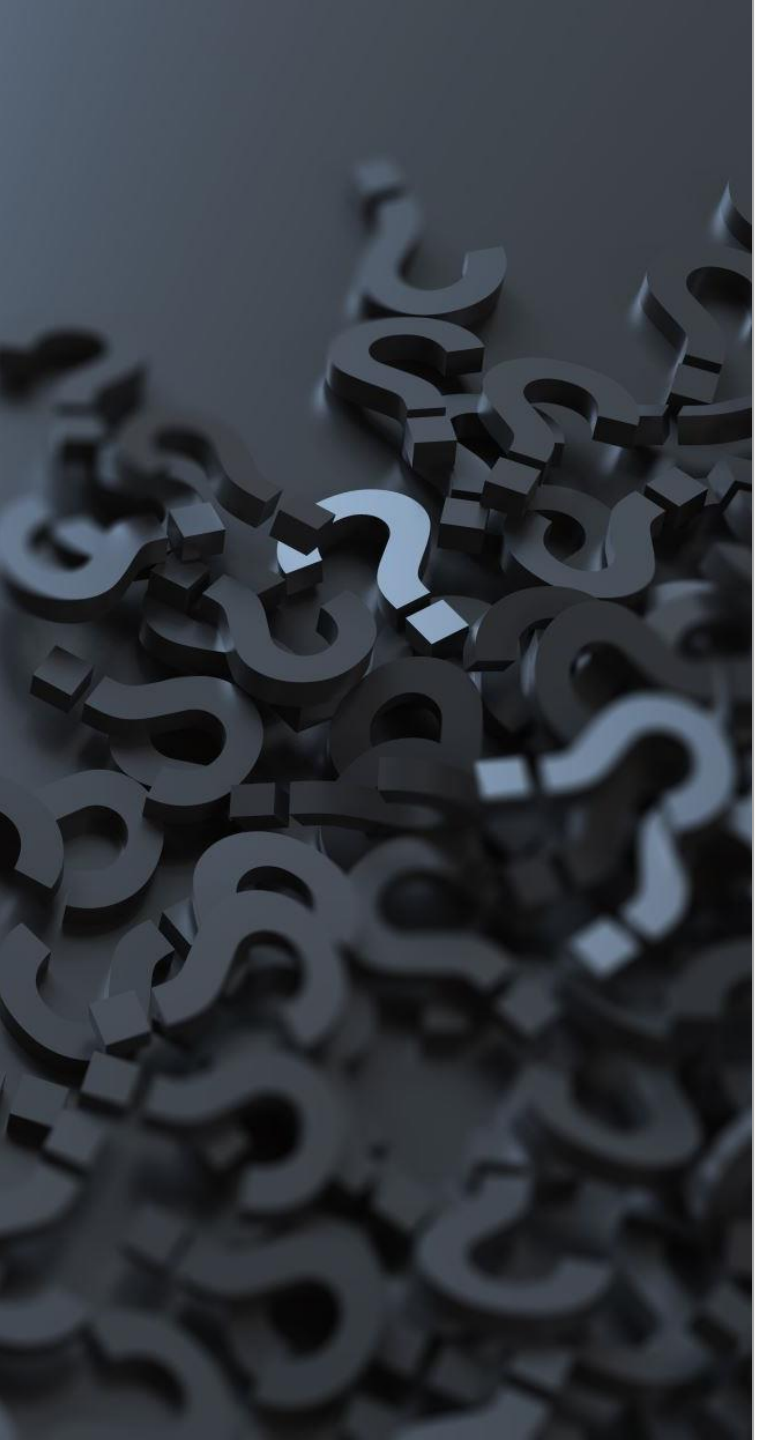
- What does initial conversation with Jane look like?
- Assuming there is an investigation, what resources and support should be offered to Jane during the investigation?
- How can the university ensure Jane's safety and well-being while the investigation is ongoing?
- Support for John?

Team 3: Investigation Process:

- What should the investigation process look like?
- How should evidence from social media be handled?
- Thoughts about relevant material issues?
- Possible witnesses?

Informal Resolution

1. An *optional* institutional alternative (should, when, how, & by whom)
2. Guidance paperwork (how does process work & consequences of participating in the process)
3. Voluntary *for both sides* (how to assess & demonstrate)



Threshold Q: Should IR Even Be An Option?

- The Easy “No”: allegations that an employee sexually harassed a student**
- The Complicated: **Are there situations where informal resolution would be not appropriate (or “clearly unreasonable”)?**
- One potential guidepost: if allegations are true, would it be appropriate for accused to remain on campus (on-going threat to campus community
- Gravity of the alleged offense, repeat offender, risk of repeating, weapons, minor victim, etc.)

New Hypothetical

- Complainant and Respondent are good friends and attended a party together where they both drank a lot of alcohol
- They left the party together and went back to Respondent's residence hall
- While in Respondent's room, they had what drunken Respondent believed was consensual intercourse
- The next day, Complainant texted Respondent that Complainant was upset and hurt because Respondent took advantage of her when she was too intoxicated to consent
- Complainant decided to report Respondent to the Title IX Coordinator

Questions

- **Q1**: What are the reasons why IR should be an option?
- **Q2**: Should not be an option?

Three Suggested Best Practices

1. Clear policy language is important -- Make sure the policy reflects (a) who needs to consent to an informal resolution and (b) **what factors** university officials will consider
2. Show your work -- document your analysis (sorry)
3. Monitor for consistent application and implicit bias (*i.e.*, similar fact patterns should be handled consistently)
   - The benefit of blanket rules

You Say Yes! Now to Complainant

- Discuss options with Complainant
- Explain the IR process in writing
  - Form document that satisfies regulatory requirements → Have a non-lawyer human being read this for clarity
- If Complainant says “no,” that’s a wrap

1. What do you say about IR?
2. What are pros & cons to mention?
3. What should you avoid?
4. Timing?
5. What are some of the questions you may get from the Complainant?

Basics: We Love Supportive Measures!

- **So, so important!**
- In general: non-disciplinary, non-punitive support and accommodations designed to preserve access to education programs and activities **&** without unreasonably burdening the other party

- Examples?
- To issue NCO or not?

Complainant Say Yes! Now to Respondent

1. What do you say about IR?
2. What are pros & cons to mention?
3. What should you avoid?
4. Timing?
5. What are some of the questions you may get from the Respondent?
6. *** Can this be used against me in a subsequent proceeding? Sent to subsequent schools? Part of education record?

- Discuss options with Respondent
- Explain the IR process in writing
  - Form document that satisfies regulatory requirements
  - Have a non-lawyer human being read this for clarity
- If Respondent says “no,” that’s a wrap

Ensure VP (As Much As Possible)

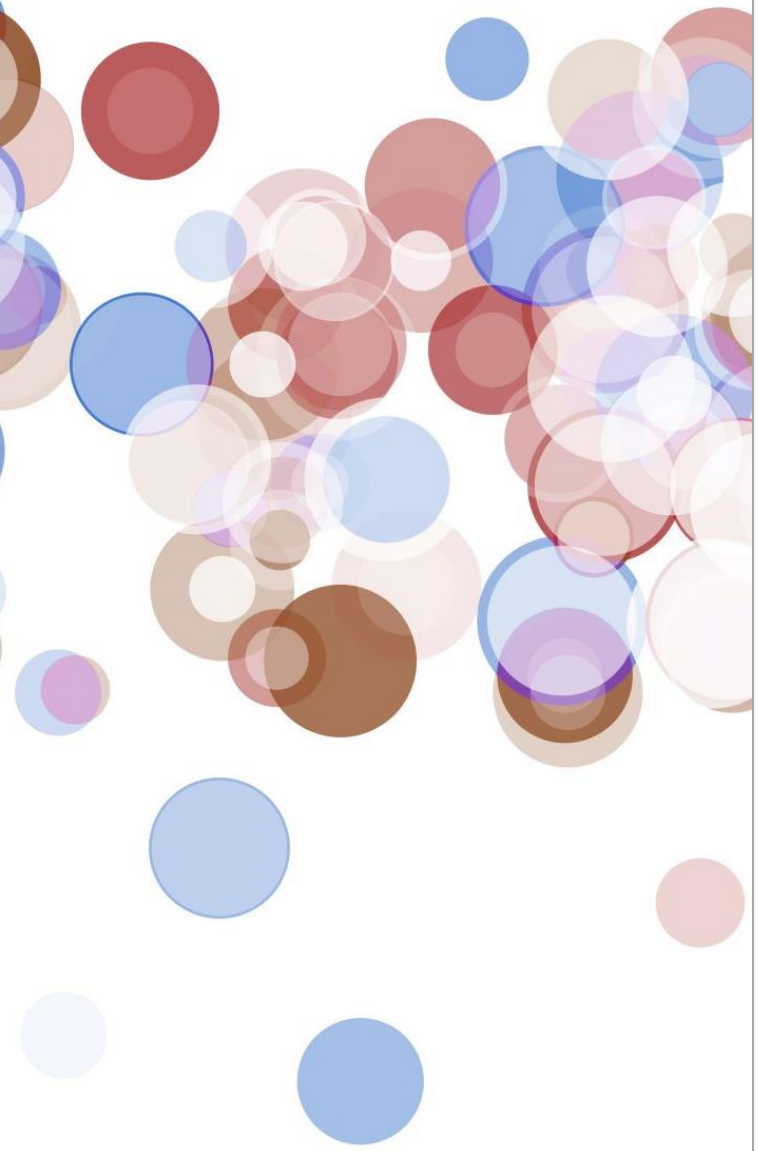
- What would be a red flag about a party's voluntary participation?
- **Rule:** when in reasonable doubt, put concern on table/stop the process
- What if…*once you're done*, a party objects that they didn't, in fact, voluntarily participate?

1. Clear communications (can't stress this enough)
2. Be timely, but don't rush
3. Require parties to sign a clear Participation Agreement
4. Periodic check-ins and monitoring (Who? How?)
5. Reiterate where appropriate that either party can stop the process

Mediation

Four Items For Preparation Of Mediator

1. Reasonable summary of report and status
   - (In a mediation, there is no need to discuss substance with parties – “Here are the materials I’ve reviewed in preparation for meeting with you, is there any additional information you wish to share with me that you believe would be helpful to reach a resolution?”)
2. Background information on parties and advisors
3. Information for assessment of potential conflicts
4. Summary of concerns raised (if any) in screening process



Personal Preference for Process Steps

1. Pre-mediation: Send an introductory communication where I discuss process, begin scheduling meetings, invite process questions
2. Meet with complainant (listen primarily & get a sense of remedies sought)
3. Meet with respondent (listen primarily & get a sense of willingness to address harm)
4. Reiterate to both freedom to end the process
5. Assess and plot next steps (party objectives & possible agreement)

Meeting With Parties (Do's)

Empowerment

- "What would you like me to tell him/her/them about how you are feeling?"

Empathetic Listening/Validate

- "Taking your time to report is not usual at all. It happens all the time. It's a lot to process."

Exploring Possible Resolution

- "What is the best result for you?"
- "If you couldn't achieve the best result, what would you need to feel comfortable about resolving this complaint?"
- "Can you walk me through what you would like to achieve through this process?"
- "Are there things you are willing to do remedy the harm Complainant has expressed?"

Meeting With Parties (Dont's)

Predict	Predict outcome
Discuss	Discuss conversations with other party without consent
Evaluate	Evaluate claims
Overload	Overload with information

Another Hypothetical

- Complainant has accused Respondent of hostile environment sexual harassment. Complainant alleges being so affected by the conduct that Complainant stopped attending their shared science class.
- Respondent admits to the alleged conduct but asserts it “wasn’t that bad” and “won’t do anything to fix this because Complainant is being ridiculous.”
- Complainant requests an on-going no contact order, educational sessions for Respondent, and that Respondent be restricted from the current shared science class and any other upper-level science courses Complainant enrolls in in the future.

Hypothetical

1. What are some follow-up questions you may have for Complainant?
2. Respondent?
3. Are you willing to persuade Respondent to move off position?
4. If so, how?

Exercises in Subtle Persuasion

"The Respondent will never agree to move off-campus" versus "I'm not sure the Respondent will agree to move off-campus, but they may agree to move to another residence hall, does that get you what you need to feel safe?"

"From speaking with the Complainant, I think that proposal is likely to do harm, can I suggest another possibility that maybe accomplishes the same goal for you?"

How Long Should Process Take?

- From regulations: “reasonably prompt” with extensions for “good cause” with written notice to parties
- Practical 1: comply with institutional policy
- Practical 2: I worry when I’m past 21 days from receiving file
  - Is there a reasonable basis for resolution?
  - Is it worth setting a firm deadline for a response?
  - Ensure parties and IX Coordinator are apprised of where things stand

Return to Hypothetical

- Complainant and Respondent are good friends and attended a party together where they both drank a lot of alcohol
- They left the party together and went back to Respondent's residence hall
- While in Respondent's room, they had what drunken Respondent believed was consensual intercourse
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- Complainant decided to report Respondent to the Title IX Coordinator

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What are some possible terms for resolution?

ⓘ Start presenting to display the poll results on this slide.

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What is role of Title IX Coordinator prior to finalizing agreement?

ⓘ Start presenting to display the poll results on this slide.

Some Outcome Examples

- Administrative accommodations such as adjusting class schedules, changing sections, etc.
- Apologies***
- Voluntary educational, mentoring, or coaching sessions
- Relocation or removal from a residence hall or other on-campus housing
- Verbal cautions/warnings
- Training
- Collaborative agreements on behavioral or institutional changes
- No on-going contact
- Voluntary withdrawal from university ***

Agreement

1. Explanation/background regarding formal complaint, allegations, and implicated polic(ies)
2. Notice that this is lieu of a formal finding of a violation or no violation of policy (emphasizing voluntariness)
3. Description of what has been agreed upon
4. What will occur moving forward including violations of informal resolution agreement
5. Future allegations of misconduct against respondent arising out of same facts as underlying complaint (reopening result?)

Agreement

6. Future discipline of Respondent
7. Confidentiality (But what if?)
8. Explicit notice that each party is agreeable to these outcomes
9. Notice regarding institution's commitment to campus free from discrimination and harassment and anti-retaliation language
10. Signatures and dates for the parties, as well as Title IX Coordinator (*when should IX C reject agreement?)

Post-Conference: Monitoring

- This is mission critical!
- Clarity on who is responsible
- Hypo: Respondent becomes non-responsive and does not participate in agreed-to educational activities.
- How do we enforce?

No Celebration!

- Either party may withdraw their consent to participate in informal resolution at any time before a resolution has been finalized.
- Advise Title IX Coordinator
- Document process ended
- Best practice: confidentiality of process which extends to facilitator (*clarity in policy & agreement)


20 Min

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What questions do you have about hearings?

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Pre-Hearing

A. Conflicts?

B. Concerns?

C. Parties should fully understand the process!

D. Framing the material issues. What are the issues which should be the focus of the hearing? Stipulations?

E. Framing the logistical challenges. What are the practical problems the hearing officer will need to navigate through?

F. Doubling down on supportive measures

Pre-Hearing Homework

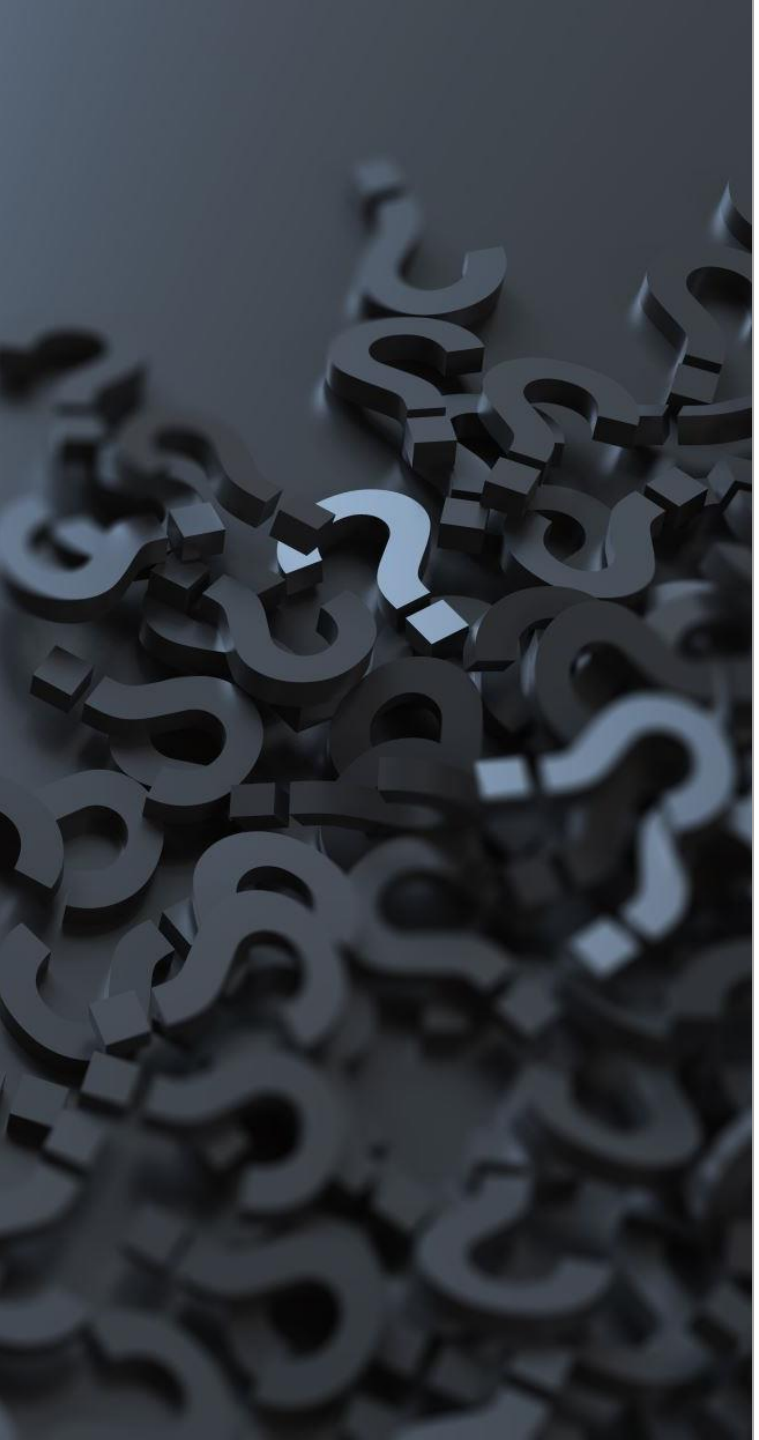
- How do **you** prepare?
- Review report and responses to report
- Know who's coming (parties and support persons)
- Review relevant policies (may go beyond Title IX)
- Anticipate questions and issues
- Prepare "must ask" questions

Opening the Hearing: Setting the Tone

1. Discuss standard of review
2. Welcome questions
3. Afford parties opportunity to identify any concerns
4. Breaks as needed
5. Affirm notice
6. Discuss purpose of hearing
7. Explain ground rules*
8. Discuss roles of
9. Participants

Typical Structure

- Chair/leader opens hearing
- Questioning of parties (Complainant then Respondent)
- Questioning of other witnesses
- Deliberation
- Written determination



Thoughts on Questioning

- Get out of the way and allow parties to share their accounts
- Identify the critical issues & formulate appropriate Q's beforehand
- Respectfully put concerns on the table & provide parties with opportunity to respond to concerns ("help me understand" versus "you are lying")
- Must ask the difficult, but necessary, questions.

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What are steps we can take to ensure hearing is treated with seriousness it deserves and everyone participates civilly?

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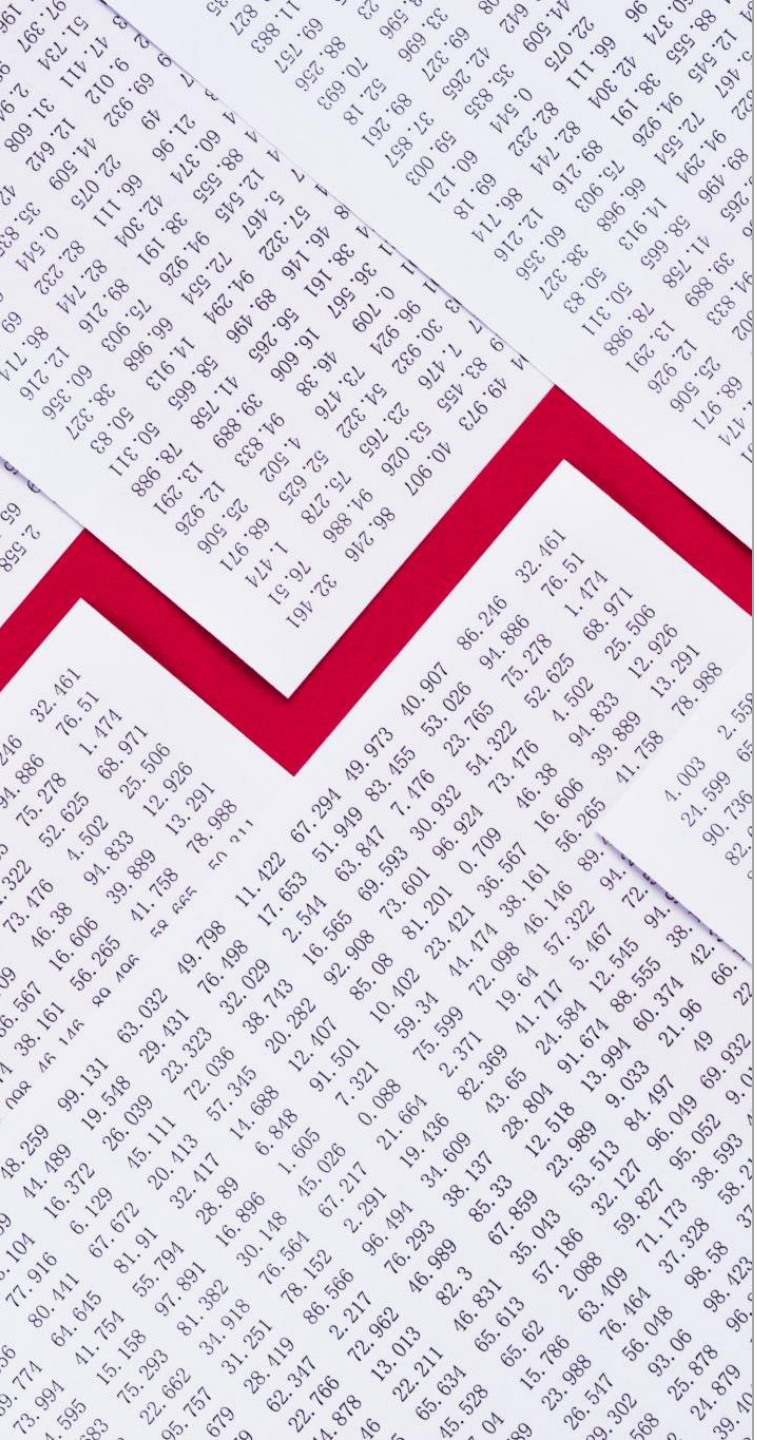
What Is Relevant?

- **Mantra:** Is the fact or information that is being offered likely to prove/disprove an issue?
- If it is likely to prove/disprove, even indirectly, it is relevant.
- If it is not likely to do so, it is irrelevant.
- **When in doubt, err on the side of allowing it and giving it the weight it is due**

Assessing Credibility

- When “he said/she said,” look for more but . . .beware of trap
- There are always competing narratives
- Must thoughtfully assess credibility
- This is always difficult
- Don’t overrely on demeanor



Seven Factors to Consider

1. Compare verifiable facts to witness statements.
2. Are there major inconsistencies in testimony?
3. Do neutral witnesses corroborate or contradict?
4. Are there documents such as diaries, calendar entries, journals, notes or letters describing the incidents?
5. What have witnesses told others?
6. Do any of the witnesses have a motivation to lie, exaggerate or distort information?
7. Is testimony inherently implausible?

Our Final Hypothetical

Sam and Casey are sophomores at Lakeview University and have been friends since freshman year. They often hang out together and are both involved in campus activities. One Friday night, they attend a large party at an off-campus house with their friends.

- At the party, Sam and Casey start drinking early in the evening. Casey, who typically drinks moderately, consumes more alcohol than usual and becomes visibly intoxicated.
- As the night progresses, Casey decides to lie down in a bedroom to rest. Sam, concerned about Casey's state, checks on them periodically. Later in the evening, Sam, also significantly intoxicated, joins Casey in the bedroom. They start talking, and Sam makes a sexual advance toward Casey. In their impaired state, Casey appears to respond positively at first, but soon becomes unresponsive and passes out.
- The next morning, Casey wakes up with fragmented memories of the night and feels uneasy about what happened. Casey confronts Sam, who insists that everything was consensual. Casey is not sure how to feel but knows they were too intoxicated to consent to anything.

Discussion Questions

- What are the material disputed issues?
- What is the difference between being drunk and being incapacitated?
- How do we assess?
- How does Sam’s drinking factor into this?
- What is the relevant evidence here?

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