



THE TEXAS
STATE
UNIVERSITY
SYSTEM™

Title IX Training

Title IX, Definition of Sex, Recent State and Federal Guidance, and Intersection with Title VII

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October 30, 2025



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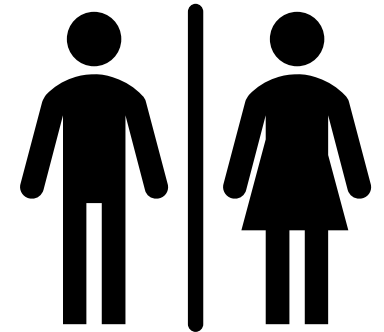
Agenda

- ✓ 2024 Title IX Rules and Injunction
- ✓ President Trump's Actions and Executive Order 14168 & 14201
- ✓ Governor Abbott's Directive and HB 229
- ✓ Recent Events and University Actions



2024 Title IX Rule re Definition of Sex

- Biden administration's 2024 Title IX Rule included significant changes that affected a wide range of compliance issues.
- 2024 Rule states:
 - Sex discrimination includes discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
 - Sex-based harassment includes harassment on these bases and further defined when sex-based harassment creates a hostile environment.
 - Preventing a person from participating in a recipient's education program or activity consistent with their gender identity subjects that person to more than de minimis harm on the basis of sex.



34 C.F.R. § § 106.2, 106.10, 106.31(a)(2) (2024)



Challenges to 2024 Rule

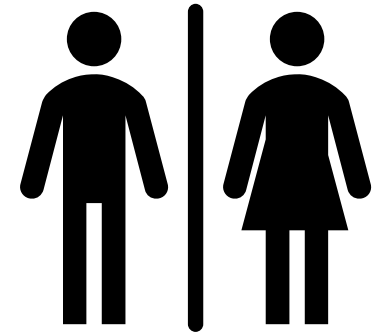
- Governor Abbott directed Texas public universities to ignore the 2024 Rule.
- Numerous lawsuits challenging 2024 Rule.
- Lawsuit by Texas AG resulted in preliminary injunction precluding application to Texas public institutions.
- Result was 2024 Rule was blocked in 26 states and at many schools in other states.
- January 9, 2025, federal judge in Kentucky issued a nationwide injunction against the 2024 Rule in the *Tennessee v. Cardona* case.





EO 14168, *Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government*

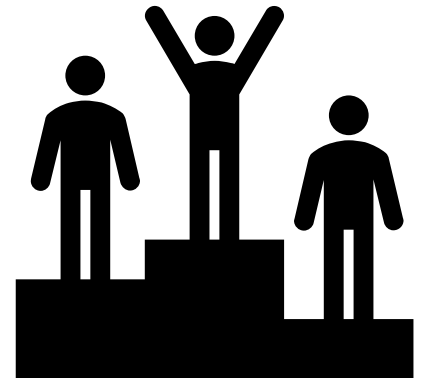
- “Sex” means biological sex and excludes gender identity.
 - “It is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality.”
- Requires government-issued IDs (e.g., passports) reflect sex, as defined by the EO.
- Precludes use of federal funds to promote “gender ideology.”
- Prohibits access to single-sex spaces based on gender identity and prohibits use of federal funds for gender affirming care in federal prisons.
- Order takes the position that *Bostock* decision does not require gender identity-based access to single-sex spaces.
- Multiple lawsuits regarding EO 14168 still pending, with provisions blocked in limited circumstances. Continued litigation expected.





EO 14201, *Keeping Men Out of Women's Sports*

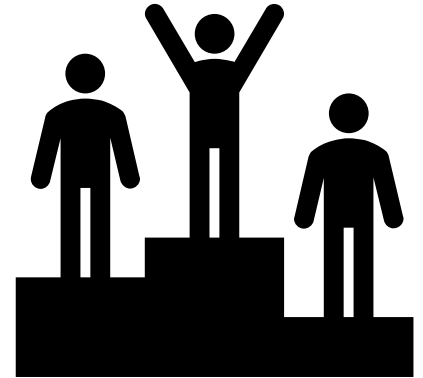
- Adopts definitions of male and female in EO 14168.
- Directs Dept. of Education to take “all appropriate action” to protect “all-female athletic opportunities and all-female locker rooms” by clearly specifying and clarifying that males cannot compete on female teams.
 - Would preclude transgender athletes who meet EO’s definition of male from competing on female teams.
 - EO does not appear to preclude transgender athletes who meet EO’s definition of female from competing on male or female teams.
- Order directs Dept. of Education and granting agencies to rescind funding to institutions that do not comply with the order.





EO 14201, *Keeping Men Out of Women's Sports* – NCAA Rules

- NCAA rules modified in response to EO 14201.
 - Anyone can participate in male sports, regardless of “sex assigned at birth or gender identity,” subject to medical exception for banned substances (e.g., testosterone).
 - Only persons who were assigned female at birth may compete on female teams, but trans athletes who are taking testosterone are precluded from such participation.





Trump Administration's Title IX Guidance via DCL

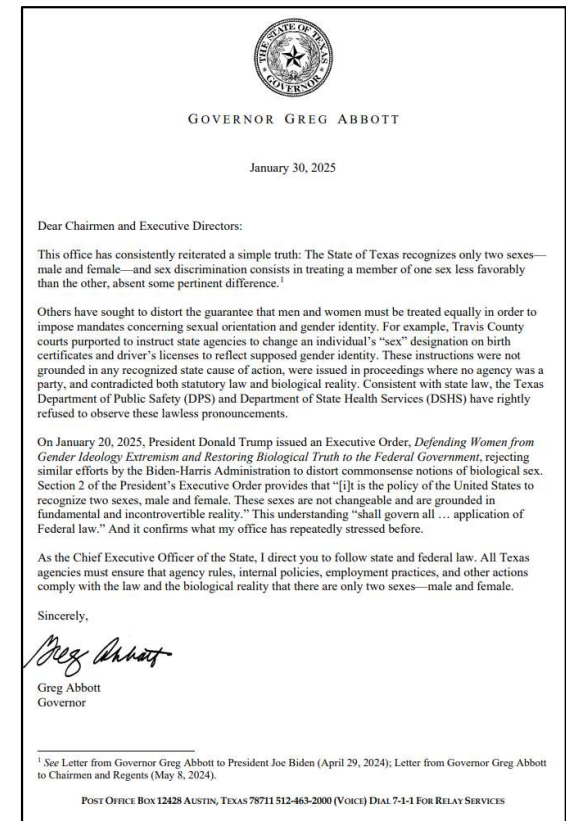
- Administration will revert back to 2020 regulations, including for pending cases.
- Declines to appeal court decisions re 2024 Rule.
- Revised DCL excludes original language stating Title IX should not be read to include discrimination on the basis of sexual orientation and gender identity within sex discrimination.
- DCL directs Dept. of Education and OCR to enforce Title IX in accordance with EO 14168.
- Dept. of Education has rescinded Biden-era Title IX guidance regarding sexual orientation and gender identity.





Governor Abbott Directive

- On January 30, 2025, Governor Abbott issued a directive to state agencies to follow EO 14168.
- “Section 2 of the President’s Executive Order provides that “[i]t is the policy of the United States to recognize two sexes, male and female. These sexes are not changeable and are grounded in fundamental and incontrovertible reality.”
- “All Texas agencies must ensure that agency rules, internal policies, employment practices, and other actions comply with the law and the biological reality that there are only two sexes—male and female.”





HB 229 Requiring Use of Sex Assigned at Birth

- Biological differences in the two sexes “warrant separate social, educational, athletic, or other spaces in order to ensure individuals’ safety and allow members of each sex to succeed and thrive.”
- Recognizes only binary male or female biological sex.
- Female and woman mean “an individual whose biological reproductive system is developed to produce ova.”
- Male or man means “an individual whose biological reproductive system is developed to fertilize the ova of a female.”





HB 229 Requiring Use of Sex Assigned at Birth

- Governmental entities that collect statistics or data that identifies sex must use binary biological sex definitions.
- Supporters assert bill is about preserving single-sex spaces, like bathrooms, locker rooms and prisons, and opportunities, like athletic competitions.
- Bill does not create a criminal or civil penalty.
- Governor Abbott signed on June 20, 2025.





Recent Events Regarding Higher Education Classroom Instruction

- September: Following allegations that professor of children's literature class at TAMU was teaching gender ideology, Chair and Dean were removed from administrative posts, faculty member was terminated, and President resigned.
 - TAMUS also conducting a system-wide course audit.
- September 25: Texas Tech University System directed faculty across its five universities to limit classroom discussion of transgender and nonbinary identities in compliance with EO 14168, Abbott's directive, and HB 229.
 - "Recent developments at universities across Texas have highlighted the importance of understanding these compliance obligations."
- According to the Texas Tribune article, UT System, UNT System, and Texas State University System are conducting some level of course review with respect to gender identity content.

Information gathered from publicly available information from Universities and media outlets.



Drag Show Bans

- March 2023: West Texas A&M cancelled a student group's planned drag show fundraiser.
- September 2023: District Court judge sided with West Texas A&M and upheld ban.
- March 2025: TAMUS and UT System announce drag show bans.
- March 2025: District judge blocked Texas A&M ban on Dragglieland drag show.
- August 18, 2025: Fifth Circuit (split panel) reversed the West Texas A&M ruling and held drag shows likely protected under the First Amendment.
- August 25, 2025: UNT ends drag-show ban in response to Fifth Circuit case.
- Litigation may not be concluded, as West Texas A&M may seek *en banc* review by the entire Fifth Circuit or appeal to the Supreme Court.

Questions





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Title IX Training

Complex Issues in Title IX Compliance

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Agenda

- Intersection of religious freedom, religious accommodations, and Title IX
- Intersection of free speech and Title IX
- Reluctant or hostile witnesses or parties
- What constitutes severe, pervasive, and objectively offensive conduct?
- Consent and incapacitation
- Investigations with overlapping Title IX and non-Title IX allegations
- Consideration of a sanctioning matrix and proposed template



Intersection of Religious Freedom, Religious Accommodations, and Title IX

- Title IX religious exemptions for institutions “controlled by a religious organization” to the extent application of Title IX “would not be consistent with the religious tenants of such organization.” 20 U.S.C. § 1681(a)(3).
- The government cannot violate the free exercise of religion or discriminate based on religion.
- *Meriwether v. Hartop* (6th Cir. 2021)
 - Meriwether is a devout Christian teaching at a public university. University informed faculty they needed to refer to students by their “preferred pronoun[s].” Meriwether refused to call a transgender student by her preferred pronouns during classroom instruction due to his religious beliefs.
 - Review of lower court’s motion to dismiss. Refusal to use chosen names and pronouns is not per se discriminatory. Faculty member may have viable first amendment claim based on academic freedom and/or freedom of religion. University’s application of its gender-identity policy was not neutral because university officials expressed hostility toward Meriwether’s religious beliefs.



Intersection of Religious Freedom, Religious Accommodations, and Title IX

- Title IX grievance process requires Component to treat complainants and respondents equitably.
- Component needs to provide religious accommodations to parties and witnesses during the grievance process.
 - Reasonable accommodations should not fundamentally alter or provide for inequity in the grievance process.
- Common religious accommodation: extended deadlines, flexible scheduling, prayer breaks, fasting-sensitive timing



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Intersection of Free Speech and Title IX

- Universities are permitted to take action against speech that meet the definition of harassment or discrimination under Title IX.
- First Amendment generally covers speech, not conduct.
- To be considered harassment, actions must include something beyond the expression of offensive views, words, or symbols protected by the First Amendment.
- Discomfort or unpleasantness alone does not justify suppressing speech.
- “Although OCR does not have jurisdiction to enforce the First Amendment to the U.S. Constitution, as a threshold issue and throughout the processing of the complaint, OCR interprets its statutes and regulations consistent with the requirements of the First Amendment, and all actions taken by OCR must comport with First Amendment principles. OCR will not interpret any statute or regulation to impinge upon rights protected under the First Amendment or to require recipients to encroach upon the exercise of such rights.” *OCR Case Processing Manual, Section 109 (February 2025)*.



Intersection of Free Speech and Title IX

- Parties cannot be restricted from discussing allegations or gathering and presenting evidence.
- Parties can be required to maintain confidentiality, especially when dealing with an opposing Party's treatment record.
- Prohibiting witness manipulation and intimidation is not a restriction on speech.
 - Punishing retaliation or other Code of Conduct violations permitted.



Intersection of Free Speech and Title IX

Perlot v. Green, 609 F. Supp. 3d 1106 (D. Idaho 2022) – No Contact Orders and First Amendment Rights

- **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 student with whom they discussed their opposition to same sex marriage, violated their rights to free speech and free exercise of their religion. Plaintiffs moved for a TRO, preliminary injunction, and expedited hearing.
- **Holdings:** The District Court held that:
 - 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 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.



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Tips for Handling Difficult Parties or Witnesses

- Set the tone of professionalism and decorum at the outset.
- If needed, remind the parties that behavior in violation of University rules can result in disciplinary action.
- If parties refuse to cooperate, take a break and inform them that further violations will result in waive of their participation in the hearing.
- Reinforce anti-retaliation rules and how to report concerns.
- Keep questions focused, specific, and non-accusatory; avoid argumentative phrasing.



Tips for Handling Reluctant Parties or Witnesses

- Clarify purpose and process early.
- Normalize reluctance and acknowledge that hesitation is common.
- Offer supportive measures up front. No-contact directives, schedule adjustments, housing or class changes, safety planning, academic support, and workplace measures.
- Address confidentiality limits.
- Explain and remind about retaliation protections.
- Explain evidentiary value. Without pressuring, note how timely statements, documents, and phone data can help create an accurate record—especially before memories fade.



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What is Severe, Pervasive, and Objectively Offensive?

- Sex-based harassment must be “so severe, pervasive, and objectively offensive that it effectively bars the victim's access to an educational opportunity or benefit.”
- Title IX requires not simply that the harassment affected student’s education but that it “had a concrete, negative effect on student’s ability to receive an education.”
- Purely de minimis effects are not sufficient.
- Conduct is actionable under Title IX only if it is *based on sex*.
- Must be more than “offensive conduct” that is “inappropriate, immature, and offense” or “teasing or bullying.”



What is Severe, Pervasive, and Objectively Offensive?

- In evaluating cases brought under Title IX, courts also rely on Title VII cases that found harassment if it caused a hostile environment.
- The Fifth Circuit uses a totality of the circumstances test to determine whether the acts are objectively severe, pervasive, and offensive. The Court looks at the:
 - (1) frequency of the acts,
 - (2) severity,
 - (3) physically threatening or humiliating, or mere offensive utterance, and
 - (4) whether it unreasonably interferes with the learning environment.



What is Severe, Pervasive, and Objectively Offensive?

Case from the Fifth Circuit finding alleged conduct sufficient to constitute harassment:

After being allegedly raped by football players at off-campus party, student alleged:

- Classmates called student “whore” and “slut”;
- Classmates asked whether she had sex with multiple people;
- Classmate asked, “How did it feel to be fucked in every single hole of your body?”;
- Classmates excluded her from cheerleading;
- One student asked her the race of the baby she would be having;
- Alleged rapist “wore the pants that he raped [student] in to school, which had [her] blood on them from intercourse, and stood on the lunch table and said, these are the pants that I took [student’s] virginity in.”; and
- Multiple football players called her a liar and told her that she was “going to ruin everything.”

I.F. v. Lewisville Indep. Sch. Dist., 915 F.3d 360 (5th Cir. 2019)



What is Severe, Pervasive, and Objectively Offensive?

Case from the Texas District Court finding alleged conduct sufficient :

- White male student told complainant that she “was only [at University and the Honors College] to fill the black girl quota.”
- Complainant “regularly encounter[ed] white students referring to Jane Doe No. 3 and other African Americans at [University] as [the n-word].”
- Professors “facilitated racist and bigoted conversation” in courses with topics titled “Are people of color discriminated against or do they just commit more crimes?” and “Everyone is a little bit racist.”
- University used her as a minority show piece by regularly soliciting her participation in school activities.

Doe No. 1 v. Tex. Christian Univ., 2021 WL 12288641 (N.D. Tex. Jan. 12, 2021) (same standard under Title VI)



What is Severe, Pervasive, and Objectively Offensive?

Case from the Fifth Circuit finding alleged conduct insufficient:

- Classmate called student “ho” and “would beat her ass if it weren’t for cheerleading” because she was seeing classmate’s ex-boyfriend.
- Classmate wiped away tears from complainant’s face “in a facetious manner”;
- Classmate spread a pregnancy rumor; and
- Classmate smacked ex-boyfriend’s butt while complainant’s holding his hand.
- “J.H. was acting like a typical high-school girl whose ex-boyfriend began dating a younger cheerleader. That is the sort of unpleasant conflict that takes place every day in high schools, and it is not the proper stuff of a federal harassment claim.”

Sanches v. Carrollton-Farmers Branch Indep. Sch. Dist., 647 F.3d 156 (5th Cir. 2011)



What is Severe, Pervasive, and Objectively Offensive?

Case from Louisiana District Court finding conduct insufficient:

- Calling another student “fat” and “pig.”
- Stealing food and throwing it down dorm hall.
- Stealing student’s picture and writing “call for a good time” and posting on Snapchat.
- “Play fighting.”
- Stealing items and conditioning return on she came to his room and “cuddled with him.”
- Calling student repeatedly, even after being blocked, and telling her to “grow up” and be nicer to roommate
- Calling student a “fag.”
- Grabbing student’s “clothed buttocks” for several second.

Owens v. La. State Univ., 709 F. Supp. 3d 245 (M.D. La. 2023).



What is Severe, Pervasive, and Objectively Offensive?

Case finding conduct insufficient:

- Two statements about a student's national origin over the course of a year. (Same standard.)
 - *Chih-Kai Liao v. Univ. of Tex. San Antonio*, 2024 WL 4564278 (W.D. Tex. Oct. 23, 2024)
- Students making derogatory remarks regarding complainant's sexual orientation.
 - *Henderson v. Bd. of Supervisors of Southern Univ. and A&M College*, 2022 WL 875592 (W.D. La. Mar. 23, 2022)
- Complainant alleged owner of required field internship location hugged her and verbally insulted her on isolated occasions.
 - *Knighton v. Univ. of Texas at Arlington*, 2021 WL 9881105 (N.D. Tex. May 24, 2021)



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What is Consent?

Consent is an informed and freely and affirmatively communicated willingness to participate in particular sexual activity. Consent can be expressed either by words or by clear and unambiguous actions, as long as those words or actions create mutually understandable permission regarding the conditions of each instance of sexual activity. It is the responsibility of the person who wants to engage in the sexual activity to ensure that s/he has the consent of the other to engage in each instance of sexual activity.

Sexual Misconduct Policy, Glossary at pages 52-53



Component-Considered Consent Factors

- Consent is a voluntary agreement/assent to engage in sexual activity;
- Someone who is incapacitated cannot consent;
- Consent can be withdrawn at any time;
- Past consent does not imply future consent;
- Silence or absence of resistance does not imply consent;
- Consent to engage in sexual activity with one person does not imply consent to engage in sexual activity with another.
- Coercion, force, or threat invalidates consent; and
- Being intoxicated or under the influence is never an excuse for engaging in Sexual Misconduct.

Sexual Misconduct Policy, Glossary at pages 52-53



Indications of Lack of Consent

- ✓ Physical force is used or there is a reasonable belief of the threat of physical force;
- ✓ When duress is present;
- ✓ When one person overcomes the physical limitations of another person;
or
- ✓ When a person is incapable of making an intentional decision to participate in a sexual act, which could include instances of incapacitation.



Incapacity

- The state when a person cannot rationally decide whether to engage in sexual activity because he or she lacks ability to give knowing Consent.
 - *E.g.*, understanding the "who, what, when, where, why, or how" of the sexual interaction.
- The temporary or permanent inability to give Consent because drug or alcohol consumption, voluntary or involuntary, renders the individual mentally and/or physically helpless, unconscious, asleep, or otherwise unaware that sexual activity is occurring.
 - Incapacitation is determined through consideration of all relevant indicators of an individual's state.
 - **NOT** necessarily synonymous with intoxication, impairment, blackout, or being drunk.



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Classifying Sexual Misconduct

- Title IX Coordinators review and classify Sexual Misconduct allegations as Title IX or Non-Title IX Sexual Misconduct.
- Sexual Misconduct falls under Title IX only if the following is true:
 - Complainant or Respondent connected to Component during incident;
 - ✓ • Employee, enrolled Student, Applicant, Potential Applicant, Program Participant
 - ✗ • Nearby resident just strolling through campus
 - The conduct occurred in Component's Educational Program or Activity;
 - The conduct occurred in United States; and
 - The conduct constitutes Sexual Harassment as defined by Title IX.
- Non-Title IX Sexual Misconduct covers all other Sexual Misconduct.

Sexual Misconduct Policy, Section 5.1-5.3



Example Allegations – How to Classify

Allegation	Relevant Title IX / Non-Title IX Violation
Unwelcome sexual advances and inappropriate touching by Professor to student during private lessons	Title IX Sexual Harassment
Sexual assault in the Professor's office	Title IX Sexual Harassment
Sexual assault at student's off-campus apartment	Non-Title IX Sexual Harassment
Consensual sexual relationship between employee and student	Consensual Relationship Policy
Professor driving by student's off-campus apartment, leaving harassing notes for the student, and contacting student's boyfriend resulting in student avoiding coming to campus	Non-Title IX Stalking Title IX Sexual Harassment (impact on educational environment)
Second professor learns of unwelcome conduct and does not report it	SB212 violation / Non-Title IX Sexual Harassment



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What the Regulations Say About Sanctions

106.45(b)(1)(i)

- Must treat the parties equitably
- Must follow the grievance process before imposition of any disciplinary sanctions or other actions that are not supportive measures

106.45(b)(1)(vi)

- The grievance process must 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

106.45(b)(7)(ii)(E)

- The written determination must include any disciplinary sanctions the Component is imposing on the Respondent

106.45(b)(10)(i)(A)

- Each Component must maintain for a period of 7 years records of any disciplinary sanctions imposed on a Respondent



Potential Sanctions from TSUS Sexual Misconduct Policy

Students	Employees
No-contact orders	Withholding a promotion or pay increase
Probation (including disciplinary and academic probation)	Reassigning employment, including, but not limited to demotion in rank
Expulsion from campus housing	Terminating employment
Restricted access to activities or facilities	Barring future employment from System or Component
Mandated counseling	Temporary suspension without pay
Disqualification from student employment positions	Compensation adjustments
Revocation of admission and/or degree	No-contact orders
Withholding of official transcript or degree	Relevant training
Bar against readmission	Recommendation to revoke tenure
Monetary restitution	
Withdrawing from a course with a grade of W, F, or WF	
Relevant training	
Suspension	
Deferred suspension	
Written warning	
Expulsion	



Department of Education Guidance* on Sanctions

Is a school required to impose particular remedies when a respondent is found responsible for 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.”

*Guidance document currently unavailable



Risks Related to Sanctions and Private Litigation

Examples

- 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 could result in failure to consider serial / predatory behavior.
- 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?
 - Remedies may be needed beyond list, such as training for involved 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 – Defer to Decision Makers

Jane Doe v. Loyola University Maryland (D. Md. 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.

- **The Court's 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.
- Loyola carefully followed its well-crafted and gender-neutral policies and 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 was a former doctoral student at the University of South Florida, who alleged the 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.

- **The Court's Title IX Findings**

- 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.



Recommendations for Avoiding Sanctions Landmines

- ✓ Process should allow for communication of Respondent's prior misconduct history to Component Administrator for purposes of determining sanctions.
- ✓ Consider "other sanction(s) or remedies as deemed appropriate under the circumstances."
- ✓ Provide Decision Maker / Component Administrator 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.

Questions





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Title IX Training

Parenting, Pregnancy, and Lactation

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Agenda

- ✓ **Pregnancy Discrimination under Federal Law**
- ❑ Texas State Law
- ❑ Role of Title IX
- ❑ OCR Enforcement / Litigation





Pregnancy Discrimination Under Federal Law

- Title IX statute does not expressly include pregnancy.
- But Title IX regulations make it clear that pregnancy discrimination is a form of sex discrimination prohibited by Title IX for both students and employees.
- Pregnancy discrimination in employment is expressly prohibited under Title VII based on the Pregnancy Discrimination Act of 1978.
- Federal law also includes the Pregnant Workers Fairness Act (PWFA) and the Providing Urgent Maternal Protections (PUMP) for Nursing Mothers Act.

20 U.S.C. § 1681; 34 C.F.R. § 106.21(c), 106.40, 106.51(b), 106.57.



Pregnancy and Title IX Regulations

- 106.21(c) – Prohibits pregnancy discrimination in admission and recruitment.
- 106.40—Prohibits discrimination in education program or activities on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.
- 106.57—Prohibits employment discrimination on the basis of pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom.
- Regulations (§ 106.57(c)) require recipient to treat pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom similar to other temporary disabilities.



34 C.F.R. § 106.21(c), 106.40, 106.51(b), 106.57.



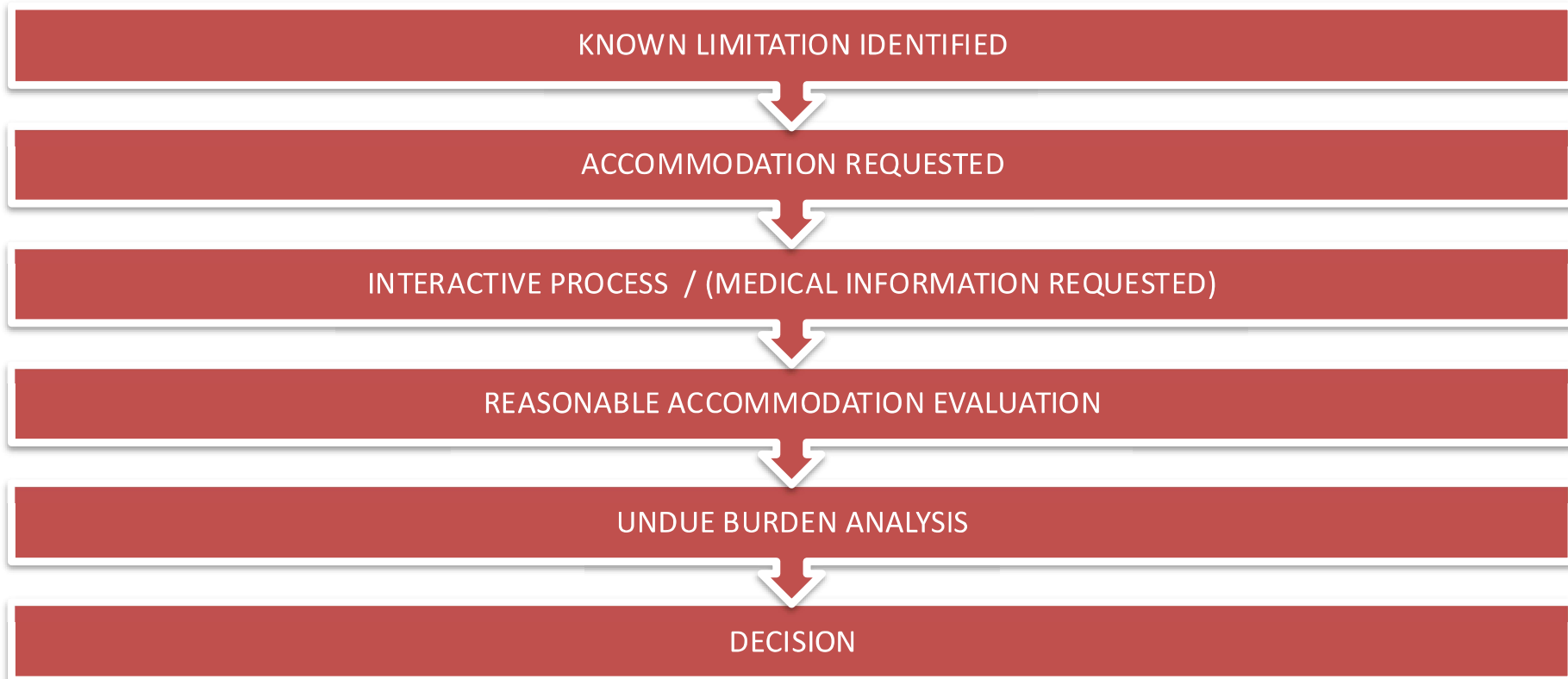
What is the PWFA?

- The Pregnant Workers Fairness Act (PWFA) applies only to accommodations.
- The PWFA requires a covered employer to provide a “reasonable accommodation” to a qualified employee’s or applicant’s known limitations related to, affected by, or arising out of pregnancy, childbirth, or related medical conditions, unless the accommodation will cause the employer an “undue hardship.”
- Went into effect on June 27, 2023. EEOC issued its final regulation on April 15, 2024, which went into effect on June 18, 2024.
- On August 15, 2025, Fifth Circuit overturned district court decision enjoining enforcement of the PWFA against Texas state agencies.
 - *State of Texas v. Bondi*: “The House’s proxy-voting rule did not violate anyone’s fundamental rights. There is a reasonable relationship between the rule and the result it seeks—majoritarian rule. And the constitutional text, history, and tradition indicate that the Quorum Clause contains no physical-presence requirement that the House’s rule could have flouted.”

[What You Should Know About the Pregnant Workers Fairness Act | U.S. Equal Employment Opportunity Commission](#)



PWFA Accommodation Process





PWFA Reasonable Accommodation

- Employee may be eligible for accommodation *even when they are unable to perform the essential functions* if the inability to perform the essential functions is temporary, the essential functions can be performed in the near future, and the inability to perform the essential functions can be reasonably accommodated.
- Presumptive reasonable accommodations:
 - Allowing employee to carry or keep water near, and to drink as needed
 - Allowing employee to take additional restroom breaks, as needed
 - Allowing employee whose work requires standing to sit and vice versa, as needed
 - Allowing employee to take breaks to eat and drink, as needed



ADA v. PWFA Key Differences

	ADA	PWFA
Covered Individual	Qualified individuals (employees and applicants) with disabilities.	Employees and applicants who have known limitations related to pregnancy, childbirth, or related medical conditions.
Medical Documentation	May only ask for medical documentation when disability and/or need for accommodation is not known or obvious.	May only require certification if it is reasonable under the circumstances for the employer as to whether to grant the accommodation.
Knowledge of Limitation	Includes an individual who is perceived by others as having a disability (“regarded as”).	Requires that employee or employee's representative has communicated physical or mental condition to employer.



What is the PUMP Act?

- Providing Urgent Maternal Protections for Nursing Mothers (PUMP) Act, effective December 29, 2022.
- Expands the FLSA to provide protections for breastfeeding parents with main updates to include:
 - protections for employees who were not previously covered, particularly salaried employees; and
 - time spent expressing breast milk must be considered hours worked if the employee is also working.
- Includes updated DOL wage poster.





PUMP Act requirements:

- Private space, other than a bathroom, that is functional for pumping. Must be shielded from view and intrusion from colleagues and the public.
- Reasonable break time of 20 minutes or less (if non-exempt) and without docking of salary (salaried employees).
 - If working on breaktime, must be paid.
 - If paid breaks provided, must include employees who pump during breaks.





Agenda

- Pregnancy Discrimination under Federal Law
- ✓ **Texas State Law**
- Role of Title IX
- OCR Enforcement / Litigation





State Law Protections for Pregnant and Parenting Students

- Enacted last legislative session (2023).
- Adds protections for pregnant and parenting students and requires institution to adopt a policy on pregnant and parenting students.
- Institution may not require a pregnant or parenting student to:
 - (1) take a leave of absence or withdraw from the student's degree or certificate program;
 - (2) limit the student's studies;
 - (3) participate in an alternative program;
 - (4) change the student's major, degree, or certificate program; or
 - (5) refrain from joining or cease participating in any course, activity, or program at the institution.

Tex. Educ. Code § 51.982



State Law Protections for Pregnant and Parenting Students

- Requires institution to provide accommodations similar to those provided to students with temporary disability.
- Requires institution to:
 - (1) excuse the student's absence;
 - (2) allow the student to make up missed assignments or assessments;
 - (3) allow the student additional time for assignments in same manner as students with a temporary medical condition; and
 - (4) provide the student with access to instructional materials and video recordings of lectures for classes to the same extent as any other student with an excused absence.
- Also requires institution to allow student to take a leave of absence and provide early registration for parenting students.

Tex. Educ. Code § 51.982-51.983.



State Law Protections for Pregnant and Parenting Students

- Texas Education Code requires policy on students to identify the “point of contact” for accommodations, and requires institution to designate “a liaison officer for current or incoming students” with children under 18.
- Liaison shall provide students information regarding:
 - (1) resources to access medical and behavioral health coverage and services and public benefit programs;
 - (2) parenting and child care resources;
 - (3) employment assistance;
 - (4) transportation assistance;
 - (5) student academic success strategies; and
 - (6) any other resources developed by the institution to assist the students.

Tex. Educ. Code § § 51.982, 51.9357



Texas Law re Pregnancy Discrimination in Employment

- Statute makes clear that sex discrimination includes “discrimination because of or on the basis of pregnancy, childbirth, or a related medical condition.”
- “A woman affected by pregnancy, childbirth, or a related medical condition shall be treated for all purposes related to employment, including receipt of a benefit under a fringe benefit program, in the same manner as another individual not affected but similar in the individual's ability or inability to work.”

Tex. Labor Code § 21.106



Texas Law re Right to Express Breast Milk

- Law applies to public employers, including IHEs.
- Law makes it clear that employee has a right to express breast milk at work.
- Employer shall have a policy on expression of breast milk by employees to support practice and “make reasonable accommodations for the needs of employees who express breast milk.”
- Employer shall:
 - (1) provide a reasonable amount of break time for an employee to express breast milk each time the employee has need to express the milk; and
 - (2) provide a place, other than a multiple user bathroom, that is shielded from view and free from intrusion from other employees and the public where the employee can express breast milk.

Tex. Government Code 619



Agenda

- Pregnancy Discrimination under Federal Law
- Texas State Law
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Role of Title IX Coordinator

- While state law requires “contact person” or liaison for student, not necessarily the Title IX office or Title IX Coordinator.
 - For example, contact person at Texas State is the CARE Center Coordinator in the Dean of Students Office.
- While the 2024 regulations re sex discrimination are not in effect, THECB rules (19 TAC 4.375) clarify that Title IX prohibits sex discrimination the basis of pregnancy.
- Assisting with compliance with federal and state law to avoid students making claims to OCR or employees making claims to EEOC.



Role of Title IX Coordinator

- Consider whether complaints of denials of accommodations by students are complaints of sex discrimination (although not sexual harassment) under Title IX.
- May want to consider providing ways for students to have complaints regarding pregnancy / parenting discrimination heard, including the right to challenge a denial of an accommodation request.
- Currently, TSUS Sexual Misconduct Policy does not clearly include non-harassment sex discrimination claims to fall within the definition of Non-Title IX Sexual Misconduct.
- For example, Texas State policy re *Protections for Pregnant and Parenting Students*, UPPS 07.11.07, allows for grievances related to the policy be filed with Office of Equal Opportunity and Title IX, and indicates complaints should be reported pursuant to policy on *Prohibition of Discrimination*.



Agenda

- Pregnancy Discrimination under Federal Law
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OCR Resources

- “Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School”
 - <https://www.ed.gov/laws-and-policy/civil-rights-laws/sex-discrimination/know-your-rights-pregnant-or-parenting-title-ix-protects-you-from-discrimination-at-school> (page last reviewed by OCR Jan. 15, 2025).
- Helpful resource directed to students.
- Explains discrimination and exclusion on the basis of pregnancy and parental status.
- Includes guidance on how schools must handle classes and school activities; excused absences and medical leave; harassment; and policies and procedures.
- Tells students how to file a complaint with OCR.



OCR Investigation of Hinds Community College (MS)

- OCR investigated complaint filed by student alleging:
 - College discriminated against her by not providing academic adjustments during her pregnancy and:
 - College did not respond promptly to her complaint that her instructors and program supervisor subjected her to harassment based on her pregnancy.
- Through Resolution Agreement, College agreed to:
 - (1) review and revise its practices, policies, and procedures for pregnant students;
 - (2) update its website and other areas for disseminating information;
 - (3) train all full-time faculty and relevant staff on the Title IX rights of pregnant students;
 - (4) conduct surveys to assess the effectiveness of trainings;
 - (5) develop a tracking system for pregnancy-related adjustments for students;
 - (6) compile a list of all pregnancy-related requests for adjustments; and
 - (7) reimburse the complainant for tuition and related mandatory costs associated with repeating the final semester of her program.

Source: NACUA Case updates



OCR Investigation of Troy University (AL)

- OCR investigated a complaint by a student who alleged the University did not make reasonable adjustments in response to her pregnancy-related requests and that she received lower or failing grades as a result.
- Through the Resolution Agreement, the University agreed to:
 - (1) review and revise its practices, policies, and procedures for pregnant students;
 - (2) update its website and other information dissemination;
 - (3) train all faculty and those staff involved in providing Title IX resources for pregnant students on the students' rights and the University's obligations under Title IX;
 - (4) assess the effectiveness of that training through a survey;
 - (5) develop a tracking system for requests for pregnancy-related adjustments and the University's responses;
 - (6) compile a list of these requests and responses; and
 - (7) provide individual remedies to the complainant, including removing certain grades from her transcript and reimbursing related documented expenses.

Source: NACUA Case updates



Doe v. The Pennsylvania State University (M.D. Pa. 2023)

- Former employee of the Nittany Lion Inn (owned by Penn State) alleged she became pregnant after she was sexually assaulted by a co-worker, who then harassed her, demanding she terminate the pregnancy.
- Plaintiff reported harassment and requested to work different shifts than her alleged harasser.
- Manager reduced the number of shifts they worked together and offered to transfer her from dishwashing shifts to housekeeping, but plaintiff quit, saying she felt she was being pushed out.
- Court ruled that a reasonable juror could find that the alleged harassment was severe or pervasive.
- Court permitted claim under Title VII to proceed, finding a question as to whether the manager took sufficient measures to end the alleged harassment, but it granted summary judgment Title IX claim, finding no juror could conclude that the manager was deliberately indifferent.

Source: NACUA Case updates

Questions





THE TEXAS
STATE
UNIVERSITY
SYSTEM™

Title IX Training

Title IX Enforcement

Darren G. Gibson, Partner
Emi M. Passini, Senior Associate
Michael Best & Friedrich LLP

October 30, 2025





Agenda

- ✓ **OCR Oversight and Investigations**
- ❑ Examples of Recent OCR investigations and Outcomes
- ❑ Private Litigation
- ❑ Preparation for Enforcement Actions



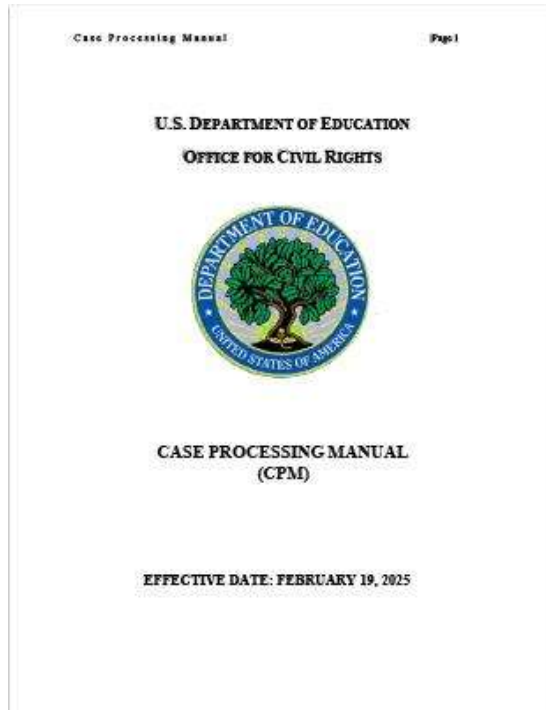
Department of Education Office of Civil Rights

- “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.
- Updated Feb. 19, 2025.
- OCR first evaluates whether information received is subject to further processing (categories generally not processed: anonymous, courtesy copies, solely advice requests, oral only)
- New Section 109: OCR will interpret and act consistent with First Amendment principles and will not construe statutes/regulations to impinge protected rights-
- Options for dismissal, rapid response, investigation, mediation, and resolution.
- Investigation may include requesting documents and conducting interviews.
- Reach findings (insufficient evidence, non-compliance, mixed determination).
- Resolution agreement to be signed within 90 days.



Investigations

- Obligations on institution 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 of Title IX Office, Legal Affairs, and related staff.





Resolution Agreements

- Allegations may be resolved at any time prior to the issuance of a final determination when the recipient expresses an interest and OCR determines it is appropriate.
- With non-compliance or mixed finding, OCR will issue proposed resolution agreement, and recipient has 90 days to reach a final agreement.





Resolution Agreements

- Resolution agreement may include (examples):
 - Modified policies and procedures
 - Conduct mandated training
 - Fund additional resources (e.g., employee positions, materials, websites)
 - Develop and implement communication and marketing plans
 - Mandated data management and recordkeeping
 - Reimbursement to individual complainants
 - Monitoring, reports and documentation to OCR





Administrative Proceeding or Referral to DOJ

- If no resolution is reached, OCR may:
 - refer case initiate administrative proceedings or refer to DOJ.
 - Initiate administrative proceedings to suspend, terminate, or refuse to grant or continue federal financial assistance.
- OCR may refer to DOJ for denial of access to OCR or failure to comply with OCR agreement.
- DOJ can also intervene in private Title IX cases.
- DOJ also files “statements of interest” in private Title IX cases regarding application of law.



Article VI: Initiation of Enforcement Action



Agenda

- OCR Oversight and Investigations
- ✓ Examples of Recent OCR investigations and Outcomes
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Examples of Recent OCR Investigations and Outcomes

- Wagner College (Aug. 2025) – result of a directed investigation concerning sex discrimination into the college for allegedly allowing males to compete in women’s sports.
 - Includes revisions to athletic policy, issuance of a public statement about its compliance with Title IX (including information such as Wagner not allowing male students to complete in female athletic programs or occupying female intimate facilities)
- University of Pennsylvania (July 2025) – result of OCR’s investigation that found UPenn violated Title IX by allowing a male to compete in female athletic programs and occupy female-only intimate facilities.
 - Includes restoration of swimming records and titles misappropriated to male athletes, issuance of a public statement about compliance with Title IX (including information such as UPenn not allowing male students to compete in female athletic programs or occupying female intimate spaces)
- Hinds Community College (April 2024) – result of a complaint alleging failure to provide pregnancy related academic adjustments and harassment based on her pregnancy.
 - Includes policy revisions, faculty training, better accommodation tracking, and financial reimbursement for the affected student.



Agenda

- OCR Oversight and Investigations
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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
 - 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).



Damages in Title IX Litigation

Cummings v. Premier Rehab Keller, P.L.L.C.,
142 S. Ct. 1562 (2022).

- Emotional distress damages are not recoverable under Spending Clause antidiscrimination statutes (Title IX, Title VI, Rehabilitation Act).
- Relying on a contract-law analogy, the Court reasoned that funding recipients consent to conditions in exchange for federal funds and are only on notice for remedies traditionally available in contract.
- Does not affect Title VII claims where Congress expressly authorized emotional distress damages.
- Punitive damages are not available.
 - *Barnes v. Gorman*, 536 U.S. 181 (2002).





Recent Cases from Texas

Doe v. Rice Univ. (5th Cir. May 11, 2023)

- Affirmed USDC’s dismissal of breach-of-contract claims but reversed and remanded summary judgment in favor of university regarding issues of material fact, namely regarding plaintiff-appellant’s (respondent) claims of gender bias by the university.
- Respondent brought Title IX and breach-of-contract claims after the university’s responding office determined that while respondent had not violated the sexual misconduct policy, respondent had “failed to adequately notify [complainant] of the fact that she was at risk of contracting [an STI] from [him].”
- Respondent was placed on interim suspension following the filing of a formal complaint and eventually lost his athletic scholarship and withdrew from the university, as he was allowed on campus only for academics as part of the university’s sanction.
- At issue was whether respondent notified complainant regarding his STI. As it related to respondent’s Title IX claim, the court expressed due process concerns regarding the conduct respondent defended against (“failure to notify” complainant) and the conduct respondent was ultimately sanctioned for (“failure to *adequately* notify” complainant).
- Notably, the court held a rational jury could hold the university’s policy (and violation for which respondent was penalized) rested upon “archaic assumptions,” namely that a “more-knowledgeable male” (respondent) had a duty to educate an “unwitting female” (complainant) regarding the dangers of STI transmission.



Agenda

- ❑ OCR Oversight and Investigations
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Preparation Before Any Complaint or Claim

- Regularly update policies and procedures
- Ensure Title IX staff 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 during each stage of investigation and grievance process
- Treat all parties equitably and do not make presumptions
- Be transparent with parties regarding 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 and sanctions.
- 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

