

HIGHER ED
**2023 YEAR-END
REVIEW**

January 18, 2024



INSTITUTIONAL COMPLIANCE
SOLUTIONS

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A photograph of a spiral-bound notepad with a yellow cover, resting on a wooden surface. The notepad is open to a page with the words 'Year End Review' written in a cursive, gold-colored font. The notepad is partially framed by a large, stylized blue geometric shape that resembles a large letter 'E' or a similar symbol, which is a prominent design element of the slide.

YOUR PRESENTERS



Courtney Bullard
ICS Founder/CEO



Steven Richard
Partner, Nixon Peabody

ABOUT US

MISSION

To provide the best Care and Support for our clients, Community Partners, employees, contractors, collaborators, vendors, and all others who encounter our company.

GOAL

To assist colleges and institutions in providing a safe and healthy learning and working environment for students, faculty and staff.



BEFORE WE GET STARTED

- Slides
- Recording
- Virtual Environment
- Overview
- Not Legal Advice



Agenda



- 01 Regulatory Updates
- 02 Resolution Agreements
- 03 Litigation Updates
- 04 Takeaways
- 05 Questions



REGULATORY UPDATES



REMINDER: 2 DIFFERENT RULE UPDATES



Athletics

NPRM released April 2023 seeking to amend Title IX regulations. If adopted proposed to prohibit categorical bans on transgender students participating in sports consistent with their gender identity but would allow some restrictions that- for each grade level, sport, level of competition - are substantially related to an important educational objective and are aimed to minimize harm.

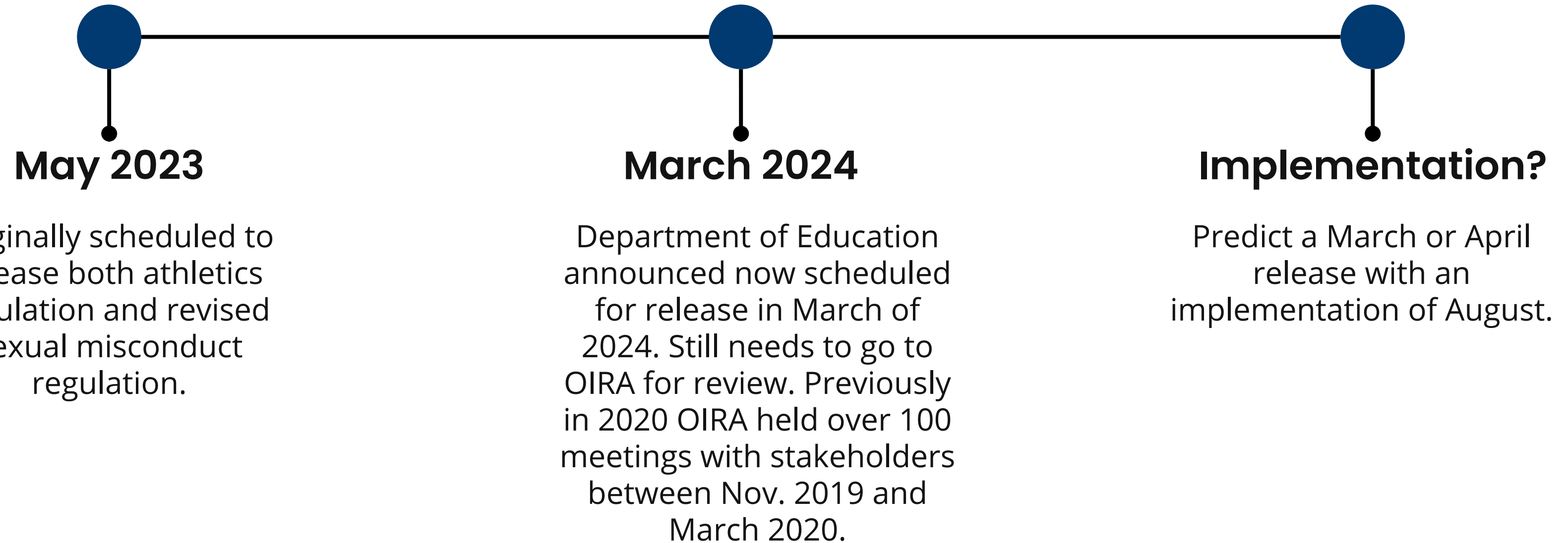


Sexual Harassment/Misconduct

Amend the 2020 regulations to alter a school's responsibilities in cases of sexual harassment and define scope of Title IX prohibition against sex discrimination to include discrimination based on SOGI.

RESOURCES

STATUS OF THE NEW REGS: STILL WAITING.....



WHAT WE EXPECT AFTER RELEASE:



- Litigation challenges especially to the athletics regs; SOGI incorporation into "sex" in the sexual harassment regs
- Implementation deadline
- OCR webinar and fact sheets

TOP 5

1 **Communicate** (Now!)
Stakeholders

2 **Update**
Policies & Procedures
(who is involved); Summer

3 **Evaluate**
Title IX team and
infrastructure

4 **Train**
Required training for
Community, Team

5 **Implement**
Regs will have an implementation
deadline; dissemination of policies is
first step

BONUS:
Take a deep breath!!!!



OCR RESOLUTION AGREEMENT TAKE-AWAYS





The mission of the Office for Civil Rights is to ensure equal access to education and to promote educational excellence throughout the nation through vigorous enforcement of civil rights.

The Office for Civil Rights enforces several Federal civil rights laws that prohibit discrimination in programs or activities that receive federal financial assistance from the Department of Education. Discrimination on the basis of race, color, and national origin is prohibited by Title VI of the Civil Rights Act of 1964; sex discrimination is prohibited by Title IX of the Education Amendments of 1972; discrimination on the basis of disability is prohibited by Section 504 of the Rehabilitation Act of 1973; and age discrimination is prohibited by the Age Discrimination Act of 1975.

OCR

OCR COMPLAINT PROCESS



Complaint submitted to OCR and reviewed to determine if have authority to investigate.

OCR determines if enough info for complaint to proceed.

OCR investigation - collect and analyze relevant evidence.

Before end of investigation, school or college may reach a settlement with the person.

If OCR determines a Title IX violation occurred, will attempt to negotiate and sign a written resolution agreement with the school. The terms of the agreement will correct any violations found by OCR. OCR then monitors.

TITLE IX/SEXUAL HARASSMENT: MONTGOMERY COLLEGE



Accused professor fired after an investigation found he sexually harassed female students by requiring them to wear only their bras in several classes to supposedly demonstrate a medical assessment.

OCR found College complied with Title IX by conducting a prompt and thorough investigation of the harassment allegations. College interviewed complainant and emailed all members of class to invite them to provide a written statement/interview. Also provided each student with copy of the relevant policy and offer to discuss supportive measures.

OCR concern was over the fact that the College did not provide affected students with notification of the outcome.

Resource



TITLE IX: ARCADIA UNIVERSITY

University learned of complaints of possible sexual harassment by Professor of female students as early as Fall of 2018, when conduct was reported by two complainants. University failed to address potential harassment for students who had been students in the classes for a period of years. "Had the University not repeatedly failed to investigate and resolve allegations of sexual harassment of which it was aware, the University may have prevented possible recurring harassment and the perpetuation of a hostile environment for its students."

Reported to HR - and HR stated that she did not pursue investigation because Professor was tenured and she did not believe it fell under Title IX because no allegation of inappropriate touching; University started an investigation in 2021 but ceased all Title IX activities after Professor resigned.

Takeaway: Importance of training for "officials with authority" and the cross over of HR/Title IX/Provost.

Resource



TITLE IX: SAN FRANCISCO CONSERVATORY OF MUSIC



Student reported sexual assault. OCR found Conservatory failed to respond to the report consistent with regs. Also found policy and notice of non discrimination did not comply with the regs.

OCR found school deliberately indifferent in its response to 2 alleged sexual assaults and alleged stalking. Respondent alleged retaliation. Referral to website that lists supportive measures not sufficient- did not engage interactive process; initiated an AAO versus a mutual no contact directive. Also failed to maintain records re: Conservatory's response.

Investigation: No NOA or information re: grievance process; did not receive evidence to review prior to completion of the investigator's report; investigator's report deficient.

Determination: Coordinator declined to move it to a hearing in violation of regs.

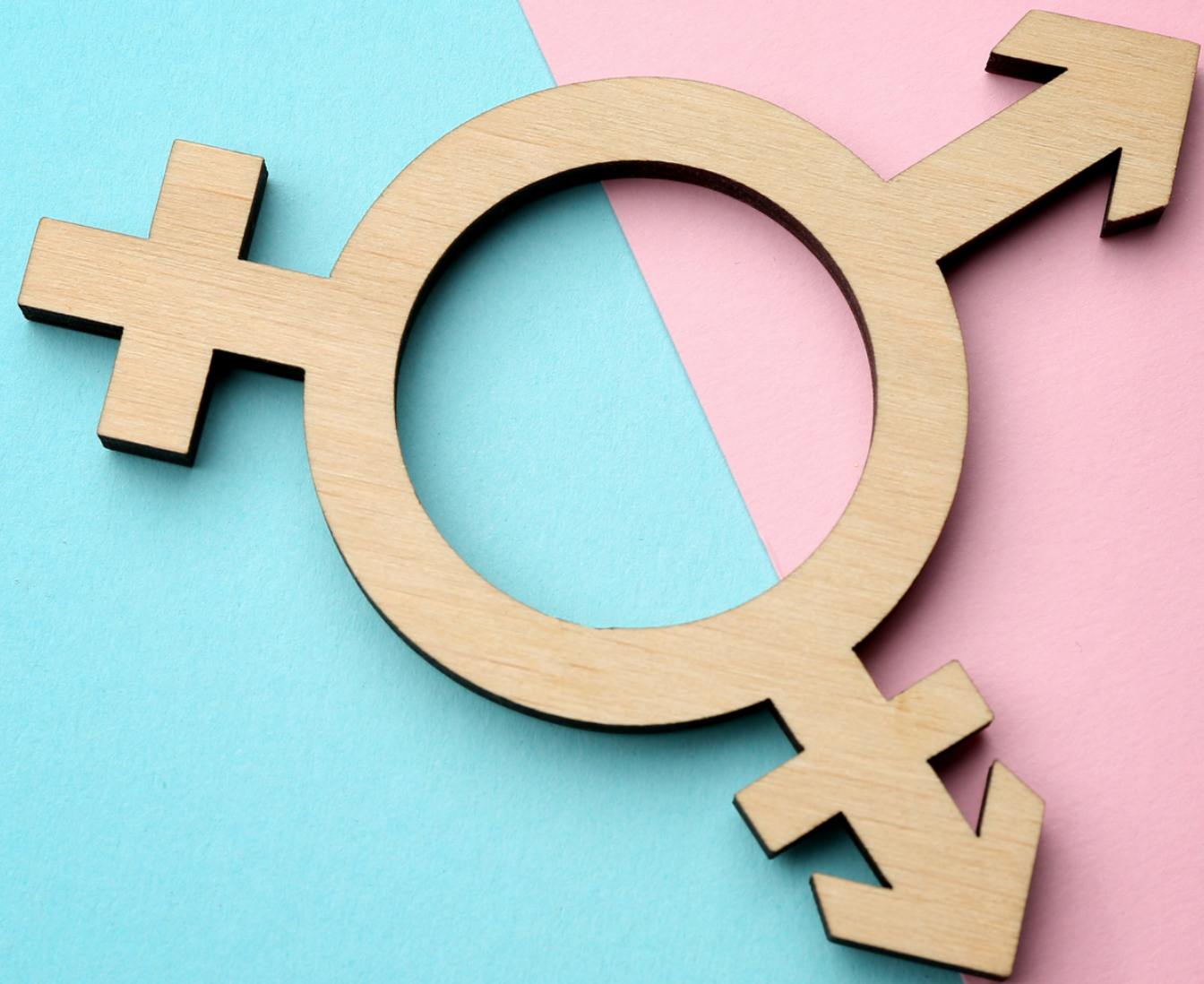
Grievance Procedures, Notice of Nondiscrimination, Training: Not compliant with regs.

***Note:** Training materials did not include info about their own policy.

Resource



TITLE IX: TAFT COLLEGE



OCR found the college failed to respond to repeated allegations from a transgender student that college employees harassed the student based on sex for more than a year - including sex stereotyping and misgendering the student. OCR found that the college did not respond to the allegations to confirm their occurrence or redress the harm and therefore the college subjected the student to a hostile environment based on sex.

Resolution: Reimburse student for counseling, review/revise policies to include harassment based on sex stereotyping, training.

Resource



RESOURCES

SHARED ANCESTRY

OCR Releases List of Open Title VI - Shared Ancestry Investigations.

ADMISSIONS

OCR and DOJ jointly released resources to assist colleges and universities in complying with US Supreme Court's Decision on the use of race in higher education admissions.

ATHLETICS

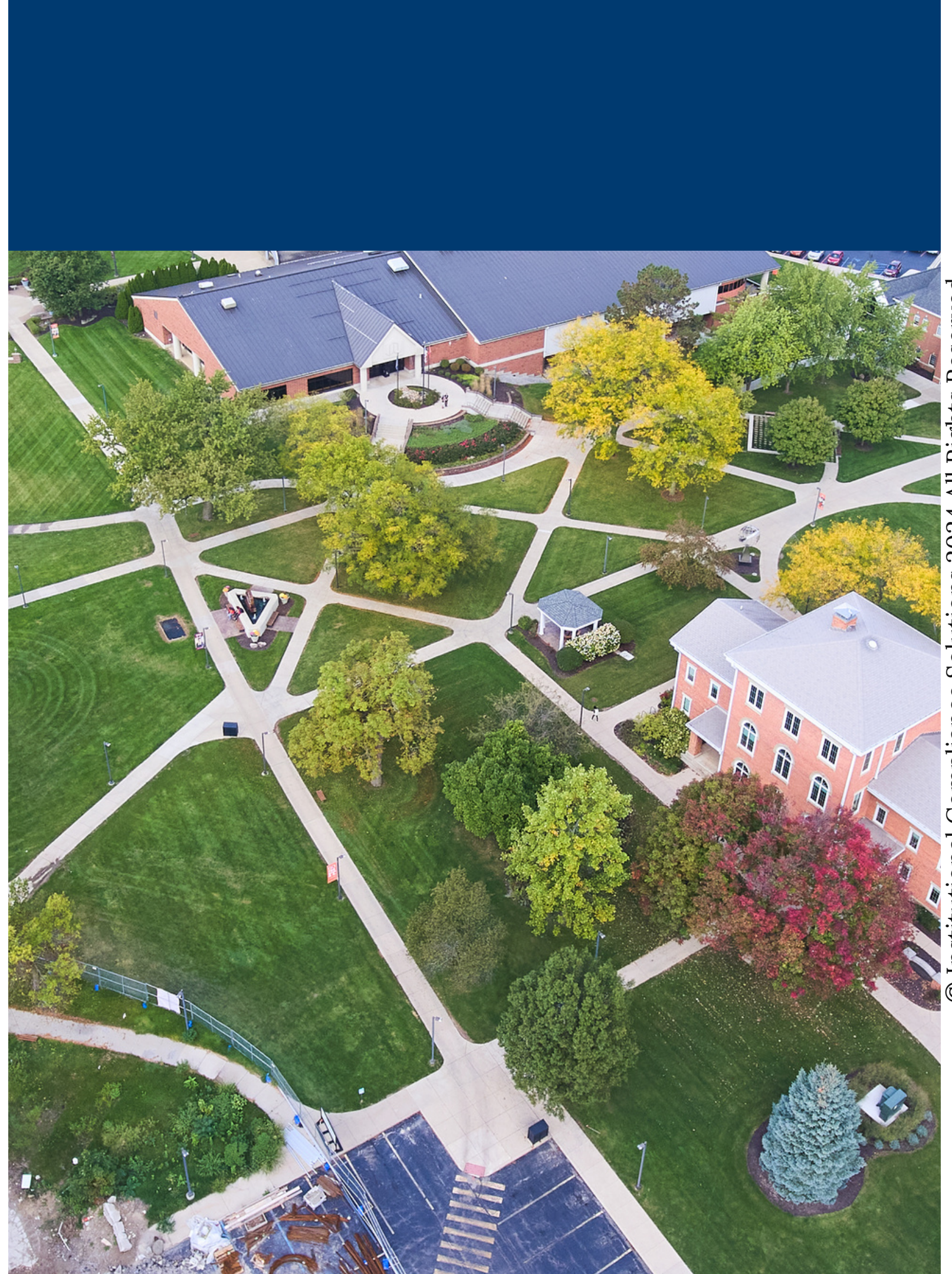
Resource on Equal Athletic Opportunities Under Title IX.



"As part of the Biden-Harris Administration's continued efforts to take aggressive action to address the alarming nationwide rise in reports of antisemitism, anti-Muslim, anti-Arab, and other forms of discrimination and harassment on college campuses and in K-12 schools since the October 7 Israel-Hamas conflict, today the U.S. Department of Education's (Department) Office for Civil Rights (OCR) released a list of the higher education and K-12 institutions under investigation for alleged shared ancestry violations of Title VI of the Civil Rights Act of 1964 (Title VI), which prohibits race, color, or national origin discrimination, including harassment based on a person's shared ancestry or ethnic characteristics."

November 16, 2023

DCL



TITLE VI:

THE UNIVERSITY OF VERMONT AND STATE AGRICULTURAL COLLEGE



Once a recipient has notice of a national origin hostile environment, OCR evaluates the appropriateness of the responsive action by assessing whether it was ***reasonable, timely and effective***.

Recipient need not adopt a grievance procedure to resolve Title VI violations, OCR will evaluate whether it followed any such procedure it chooses to adopt. Concerns University failed to investigate allegations of antisemitic harassment which amounts to University officials treating individuals differently based on national origin and may have allowed a hostile environment for some Jewish students to persist.

Takeaways: Clarify roles/responsibilities of bias response team, training for those responsible for investigating Title VI cases.

Resource



TITLE VI: RACE DISCRIMINATION

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point of view.
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Beecher: OCR concerns - District did not conduct adequate investigations of possible racially harassing conduct, the totality of the circumstances and cumulative effects of the racial harassment, and did not appear to take steps reasonably designate to prevent harassment from recurring and remedy the effects on students.

Agreement: Training! Annual of all staff, all employees who receive or involved in matters, mandatory annual age-appropriate orientation. Climate survey.



Department of Justice Enforcement

The Department of Justice has two roles to play in Title IX enforcement: coordination of federal agency implementation and enforcement, and legal representation of the United States and the funding agency. Pursuant to Exec. Order No. 12250, the Attorney General shall "coordinate the implementation and enforcement by Executive agencies" of Title VI, Title IX, Section 504 and "any other provision of federal statutory law which provides, in whole or in part, that no person in the United States shall, on the ground of race, color, national origin, handicap, religion, or sex, be excluded from participation in, be denied the benefits of, or be subject to discrimination under any program or activity receiving federal financial assistance." Exec. Order No. 12250 §1-201.

[Title IX Legal Manual](#)



Reminder: Election Year



LITIGATION



Litigation



Gebser and *Davis* at the Quarter Century Mark

- The seminal decisions addressing Title IX institutional liability for actionable sexual harassment remain *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).
- Nearly twenty years ago, the Supreme Court recognized a cause of action for Title IX retaliation in *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005).
- While the Supreme Court has not revisited *Gebser* and *Davis*, compare the administrative changes that have occurred over the past quarter century across five Presidential administrations (Clinton to Biden) with Title IX regulatory guidance and amended regulations (e.g., 2001 Guidance, April 2011 DCL, April 2014 Q&A, September 2017 Rescission, two-year process leading to August 2020 amendments, and two-year process leading to impending 2024 amendments)



The Elements of *Gebser* and *Davis* Lead to Conflicting Interpretations

Courts reach nuanced or contrasting rulings in answering key questions, such as:

- What constitutes “actual knowledge”?
- Who is “an official authorized to take corrective action”?
- What constitutes “substantial control of the alleged harasser and the context in which the harassment occurs”?
- When does alleged deliberate indifference “cause students to undergo harassment” or “make them vulnerable to it”? (Courts split in causation analysis)
- If this slide looks familiar from the program last year, the same questions again divided courts during 2023 and continue to do so into 2024.



Don't Overlook the Risk of "Official Policy" Claims

- Key language in *Gebser*: “[I]n cases like this one that do not involve official policy of the recipient entity, we hold that a damages remedy will not lie under Title IX unless an official who at a minimum has authority to address the alleged discrimination and to institute corrective measures on the recipient’s behalf has actual knowledge of discrimination in the recipient’s program or activities and fails to adequately respond.” 524 U.S. at 290 (emphasis added).
- Typically, courts look for a policy of deliberate indifference to reports of sexual misconduct, which created a heightened risk that was known or obvious. (These cases can impose liability under “pre-assault” theories).
- These claims often arise in context of claims pertaining to athletic teams or Greek life.



A Response Must Evolve to Avoid Deliberate Indifference Liability

Grace v. Bd. of Trs., Brooke East Boston, 85 F. 4th 1 (1st Cir. 2023)

- While a K-12 case, it's illustrative to higher education.
- Deliberate indifference "will often be a fact-based question for which bright line rules are ill suited."
- If the institution learns that its measures have proved to be inadequate, it may be required to take further steps to avoid liability under Title IX.
- Responsive measures are not static actions. Schools must review and evaluate whether they are working and must be changed in light of evolving circumstances.



What Constitutes Control over Harasser and Context in Which the Harassment Occurs

- Is *Brown v. Arizona* the Title IX case that will prompt the Supreme Court to revisit *Davis*?
- The case concerns the extent of an educational institution's liability under Title IX for student misconduct that takes place off campus (an issue that has led to conflicting analysis and rulings among courts).
- Plaintiff brought a suit pertaining to assaults by a fellow student that occurred in an off-campus apartment on two consecutive days. The harasser was arrested and suspended the next day, subsequently expelled, and sentenced to five years in prison.
- Plaintiff argued that university violated Title IX by not adequately responding to harasser's abuse of two prior students.



The Differing Rulings in the *Brown v. Arizona's* Litigation Path

- The district court granted summary judgment in defendants' favor, holding that the University had no control over the off-campus context in which the plaintiff was abused. The University could not be liable under Title IX, which under *Davis* imposes liability only where the educational institution has substantial control over both the harasser and the context in which the harassment occurred. *Brown v. Ariz.*, 2020 WL 1170838 (D. Ariz. Mar. 11, 2020).
- On appeal, in a split (2-1) decision, a panel affirmed the district court's ruling that the University had no control over the harasser's house and could not be held liable for the abuse to plaintiff under Title IX. *Brown v. Ariz.*, 23 F.4th 1173 (9th Cir. 2022).
- In the dissent, one panel member opined that the University exercised substantial control over the off-campus house because it retained disciplinary authority over the harasser for his assaults on plaintiff.
- The plaintiff petitioned for en banc rehearing, which was granted. In a divided opinion, the en banc panel reversed the district court's grant of summary judgment. *Brown v. Ariz.*, 82 F.4th 863 (9th Cir. 2023).



The *En Banc* Majority Ruling

- The majority opinion, authored by the judge who dissented in the original panel decision, concluded that while *Davis* did not define “context,” a “key consideration” is whether the school has “some form of disciplinary authority” over the harasser in the context of the alleged harassment.
- “[W]hile the physical location of the harassment can be an important indicator of the school’s control over the “context” of the alleged harassment, a key consideration is whether the school has some form of disciplinary authority over the harasser in the setting in which the harassment takes place. That setting could be a school playground. But, depending on the circumstances, it could be equally be an off-campus field trip, an off-campus research project in a laboratory not owned by the school, or an off-campus residence.”
- **Note and Caveat:** Think about implications under your Code of Conduct and the definition of Title IX “education program or activity.”



The Dissents Warn of Distortion of *Davis*

- Three members of the *en banc* panel wrote separate dissenting opinions.
- They noted that the majority's "disciplinary authority" test is a "sharp and troubling departure from the two-pronged analysis articulated in *Davis*," leaving a "single disciplinary-control requirement" that is "irreconcilable with the Supreme Court's instruction in *Davis* that a school must have control over both the harasser and the context of the harasser."
- They also noted that the majority's "disciplinary authority" test is "unmoored from Title IX's targeted directive of prohibiting discrimination in education programs and activities."



Where does the *Brown Case* Stand?

- The Supreme Court has granted the State of Arizona and Arizona Board of Regents an extension until January 24, 2024 to file a petition for a writ of certiorari.
- It's important to note that, during the en banc review, the United States as amicus curiae, supported the plaintiff's petition for a rehearing and the analysis reached in the majority's ruling.
- Expect many amici to weigh in on both sides.
- Perhaps this is the case in which the Supreme Court revisits Title IX liability.



What about Negligence Liability of Off-Campus Conduct?

- The 9th Circuit certified a question to the Washington Supreme Court regarding whether and to what extent that a university could face “special relationship” liability under negligence law for a student-on-student assault.
- The Washington Supreme Court, in a divided 5-4 ruling, held that while a special relationship exists between universities and students under that state’s law, it applies only to curriculum-based activities and that university students do not require the same level of supervision as K-12 students. *Barlow v. State*, 2024 WL 41531 (Wash. Jan. 4, 2024).
- “While sexual assaults are horrific, a university simply has no power to dictate students’ movements off campus and away from the oversight of campus security and administration.”
- The majority equated a college campus to a business owner and invitee relationship, to find that a special relationship can exist as to campus activities.
- The dissent disagreed, writing that the school’s duty to protect “is not confined to the campus borders if the harm is reasonably foreseeable.”



Discrimination on Basis of Perceived Sexual Orientation

- In *Grabowski v. Ariz. Bd. of Regents*, 69 F.4th 1110 (9th Cir. 2023), the Ninth Circuit reversed a dismissal of a Title IX claim premised on allegations of discrimination on the basis of “perceived sexual orientation.”
- The plaintiff, who was a first-year student athlete, alleged that his teammates subjected him to frequent “sexual and homophobic bullying” because they “perceived him to be gay” and that the university responded with deliberate indifference.
- Applying the Supreme Court’s Title VII analysis in *Bostock v. Clayton Cty.*, 140 S.Ct. 1731 (2020), and adopting similar reasoning by the Fourth Circuit, the court held that discrimination on the basis of sexual orientation is a form of sex-based discrimination under Title IX.
- How far will courts (and ultimately Supreme Court) apply *Bostock* to Title IX?



Is a Title IX process “quasi-judicial” and what are the implications?

- Students suing each other for defamation: The Connecticut Supreme Court, in answering questions certified to it by the Second Circuit, unanimously ruled that a university’s sexual-misconduct hearing was not quasi-judicial, and that the accused student could proceed with his allegations of defamation brought against a fellow student who accused him of sexual assault. *Khan v. Yale Univ.*, 85 F.4th 86 (2d Cir. 2023); see also 347 Conn. 1, 295 A.3d 855 (2023).
- Students suing each other for abuse of process: In June 2023, a Pennsylvania Federal Magistrate Judge issued a report and recommendation concluding that Title IX disciplinary proceedings are quasi-judicial and that such a proceeding, “if abused, gives rise to an abuse of process claim.” The complainant alleged that the respondent filed a baseless and retaliatory Title IX cross-complaint against her. *McCarthy v. Jauregui*, Case No. 3:21-cv-1759 (M.D. Pa. June 2, 2023) (Doc No. 43).
- What will be characterization of new processes under amended Title IX regulation?



Trends that We're Seeing In Courts and Looking Ahead

- Courts remain receptive to contract claims in respondent lawsuits (focusing on issues such as “reasonable expectations” in interpretation of procedures and fundamental fairness of process).
- More cases are surviving past summary judgment and proceeding to trial (often resulting in large verdicts).
- We can expect a proliferation of litigation after the issuance of amended Title IX regulations with their expanded jurisdictional definitions and boundaries.
- To conclude where we started – Is it time for the Supreme Court to revisit *Gebser* and *Davis* to clarify Title IX liability in context of today's realities?



Questions?



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