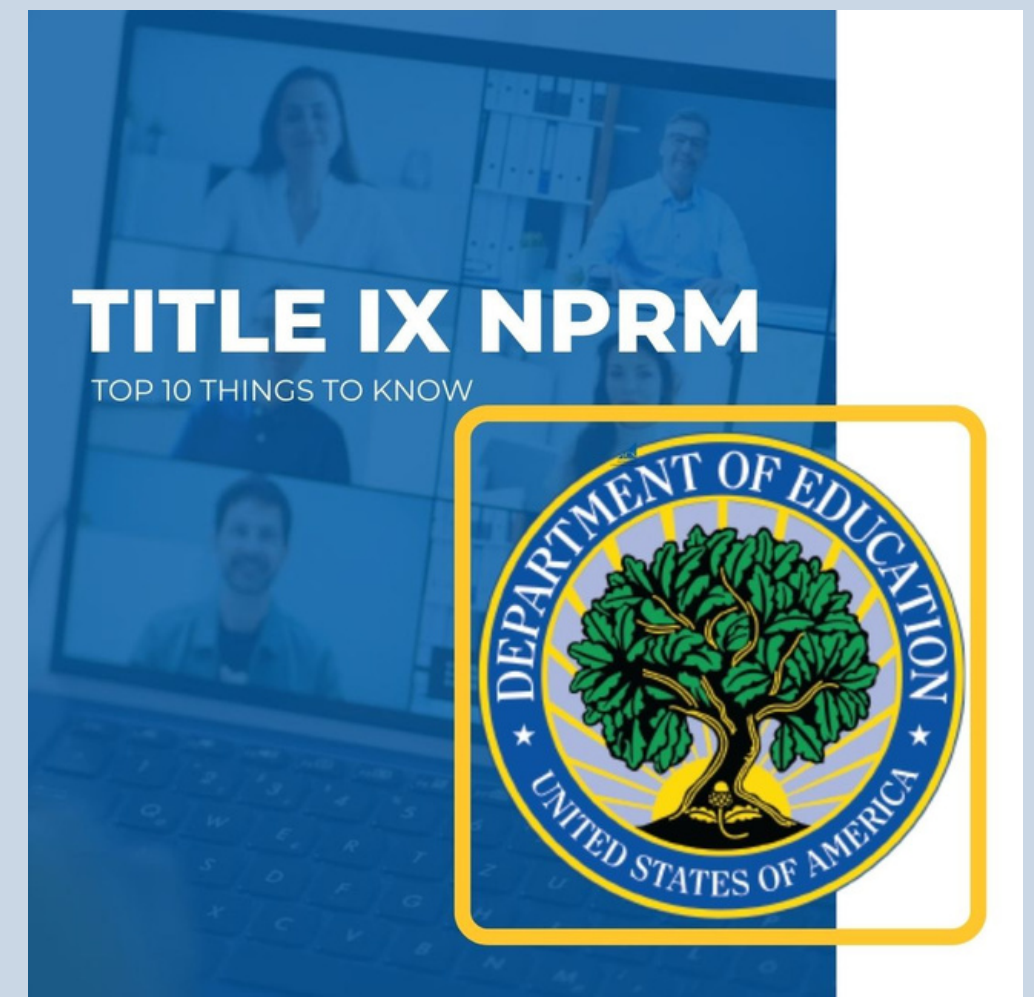


2022 HIGHER-ED YEAR-END REVIEW

January 19, 2023



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PRESENTED BY:



COURTNEY BULLARD
ICS FOUNDER/CEO

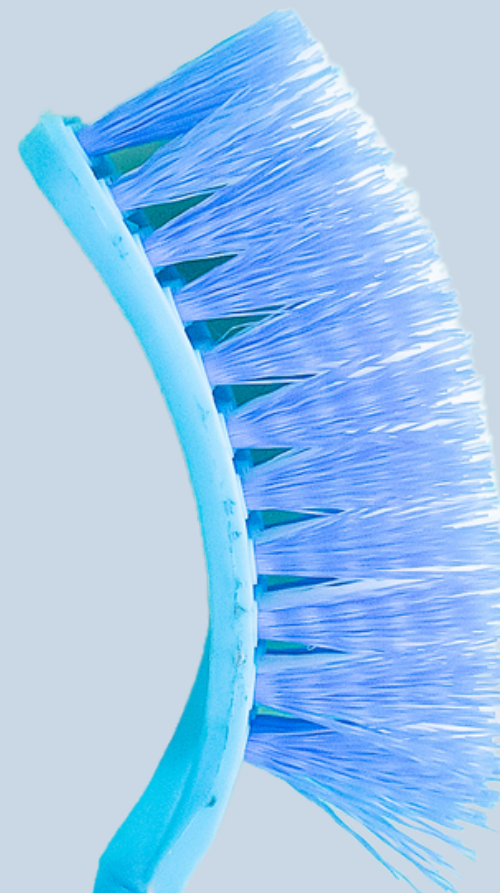
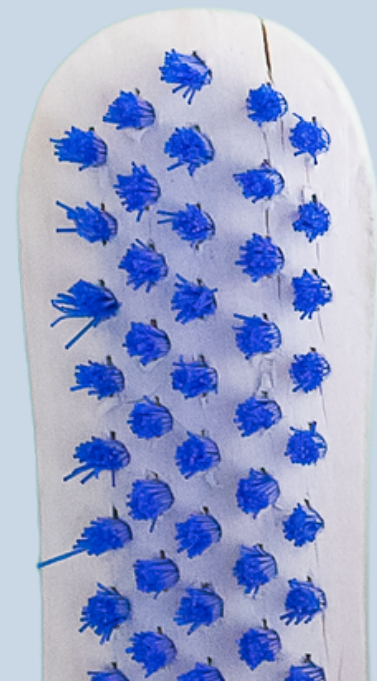


STEVEN RICHARD
NIXON PEABODY






HOUSEKEEPING:

- Virtual Environment
- Cannot cover everything
- Not Legal Advice
- Course Materials
- Recorded
- Questions



OVERVIEW:

-  Sub-regulatory
-  Regulatory
-  Case law



THEMES



Regulatory: Active OCR without capacity; lack of notice and documentation at issue; complaints beyond Title IX; 2020 Title IX regulations still in effect- do not know when new regs are coming



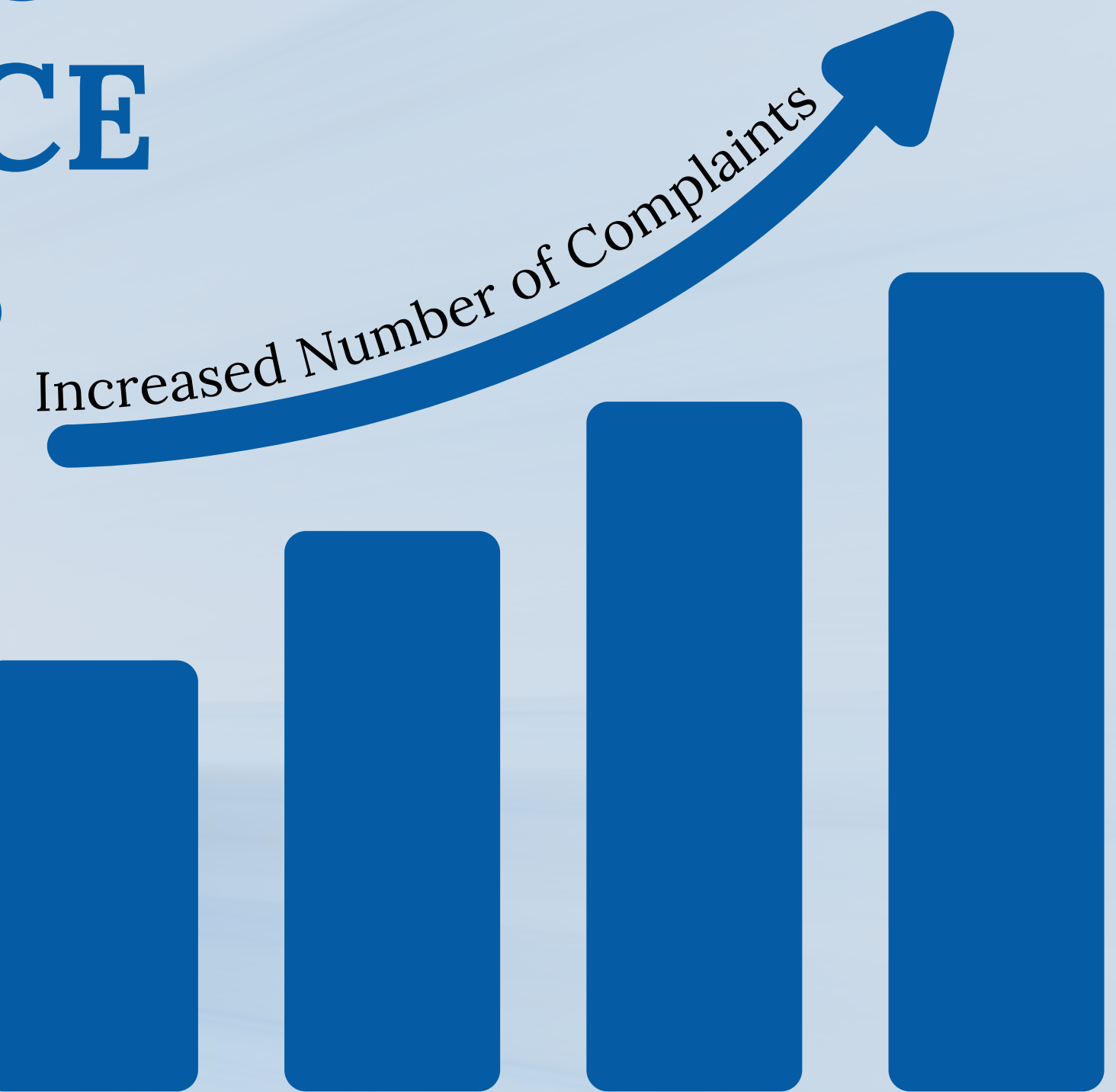
Litigation: No consistency, no certainty, courts cannot agree on Title IX liability

SUB-REGULATORY UPDATE

D O E / O C R



US DEPARTMENT OF EDUCATION, OFFICE FOR CIVIL RIGHTS



OCR BY THE NUMBERS IN 2022



Record number of discrimination complaints - Nearly 19,000 in last fiscal year. More than double the prior year.



Less staffing



Delayed investigations

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

Disability Discrimination

- Majority of complaints
- Separating disabled students from their peers
- Bullying
- Disproportionate discipline for disability-related behavior

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

Race Discrimination

Ottumwa Community School District - district failed to protect Black middle school students from racial harassment.

Peoria Unified School District - found white students invoked "Heil Hitler" salutes, harassed Asian students

Reforms included educating students to recognize and report discrimination, train school staff on response, reimburse complainants for therapy

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

Race Discrimination

Department investigating
4 complaints against
districts, including one by
NAACP, over racial
education in public
schools (Southlake)

Complaints reflecting
debate over schools' roles
in addressing systematic
racism through diversity,
equity and inclusion
programming under Title VI

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

SOGI (Sexual Orientation and Gender Identity) under Title IX

- Increase in complaints alleging discrimination based on SOGI
- Likely result of bills filed at state level

Central Bucks School System matter in Pennsylvania allegedly suspended middle school teacher for filing complaint on behalf of LGBTQ student

OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Pregnancy Discrimination

OCR Resolution Agreement with Salt Lake Community College

OCR found that the College "failed to respond equitably to complainant's complaint" and did not engage in an "interactive process" to provide necessary academic services. College failed to excuse absences and tardies. The student's late work was also marked unexcused.

OCR Resolution Agreement with Bryant & Stratton College

OCR found no alternative policy related to reasonable adjustments due to pregnancy status - relying on Student Handbook designed to assess all medical conditions. Concerns staff not sufficiently trained to respond to pregnancy status request.

OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Pregnancy Discrimination

OCR Resolution Agreement with Career Care Institute -

OCR found that the College's Title IX Coordinator's information was not available on its website, and it was unable to find a statement indicating how a complaint could be filed with the Title IX Coordinator.

Practical Note: OCR found "Institute [had] not made publicly available on its website all materials used to train Title IX Coordinators, investigators, decisionmakers, and any person who facilitates informal resolution process."

NEW OCR RESOURCE



***References Dobbs. v Jackson
Women's Health Organization***

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

Athletics and Gender Equity

OCR Resolution Agreement with Brownsville Independent School District

OCR preliminarily found that the girl's softball field had smaller bleacher areas compared to the baseball fields. While both teams had concessions stands, the revenue only benefitted the baseball team. Baseball field had press boxes, softball fields did not.

OCR Resolution Agreement with Salem-Keizer School District

OCR determined that the girl's softball teams were not provided with an additional "prep period" in comparison with boy's baseball team. The district also failed to provide equal uniforms and equal access to coaching opportunities.

OCR RESOLUTION AGREEMENTS / INVESTIGATIONS:

Athletics and Gender Equity

OCR Resolution with Wenatchee Valley College

OCR's investigation revealed that the school failed to achieve "substantial proportionality" between men's and women's sports teams. The

Department also stated while the school advertised open coaches positions equally for men's and women's teams, the men's positions advertised employment incentives that were not provided for women's coaching positions.

OCR Resolution Agreement with Western Illinois University

OCR determined that there were less "participation" opportunities for female athletes; significant salary disparities between men's and women's coaches; larger number of coaches to men's vs. women's teams; and disproportionate recruiting budgets that favor men's programs.

OCR RESOLUTION AGREEMENTS/INVESTIGATIONS:

Sexual Harassment

OCR Resolution Agreement with Eastern Mennonite University

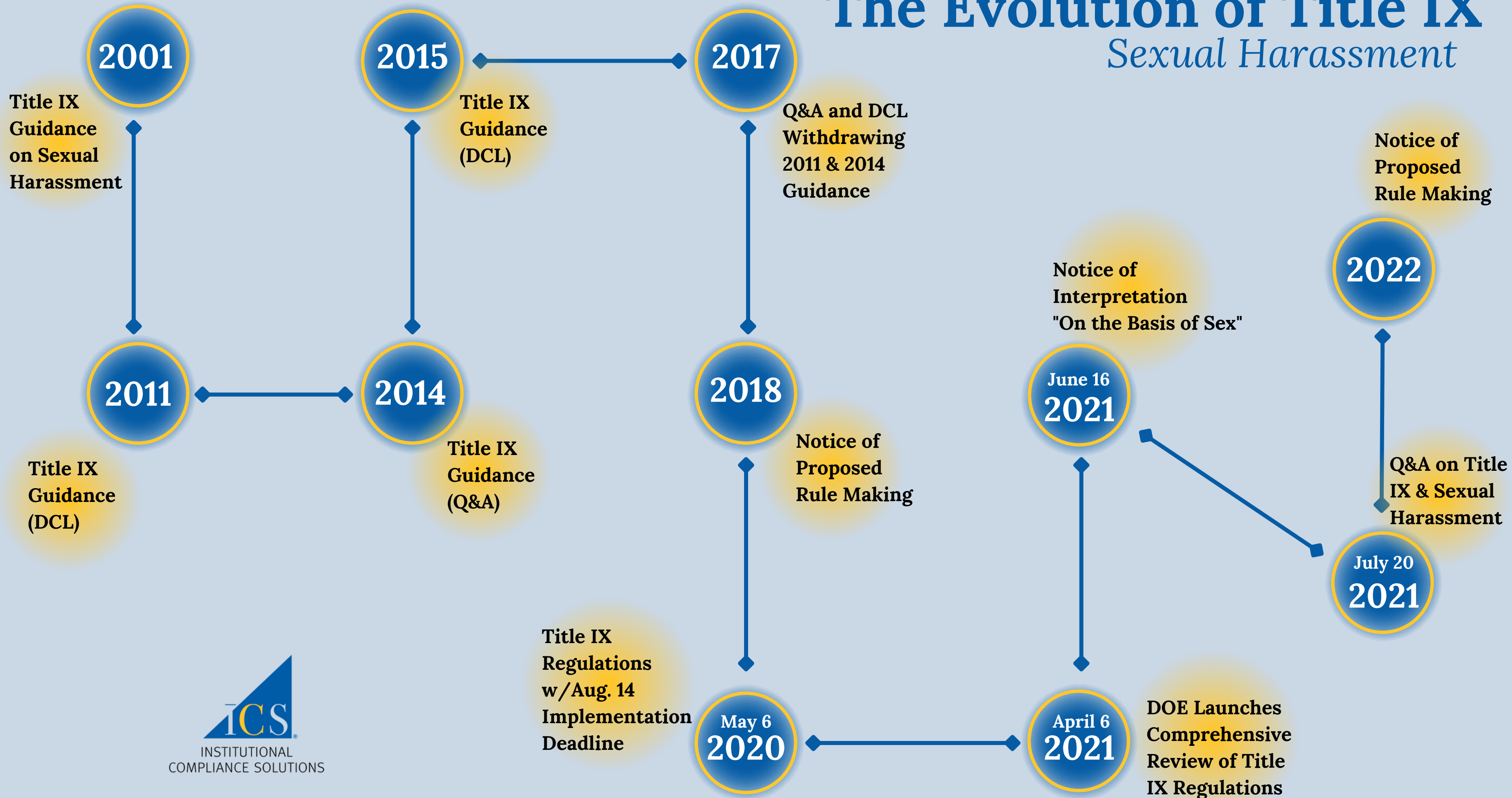
OCR found that the school violated Title IX when the University's Title IX policy "did not require the University to offer interim and supportive measures" to responding parties in a Title IX Investigation.

OCR Resolution Agreement with St. Mary's College of Maryland

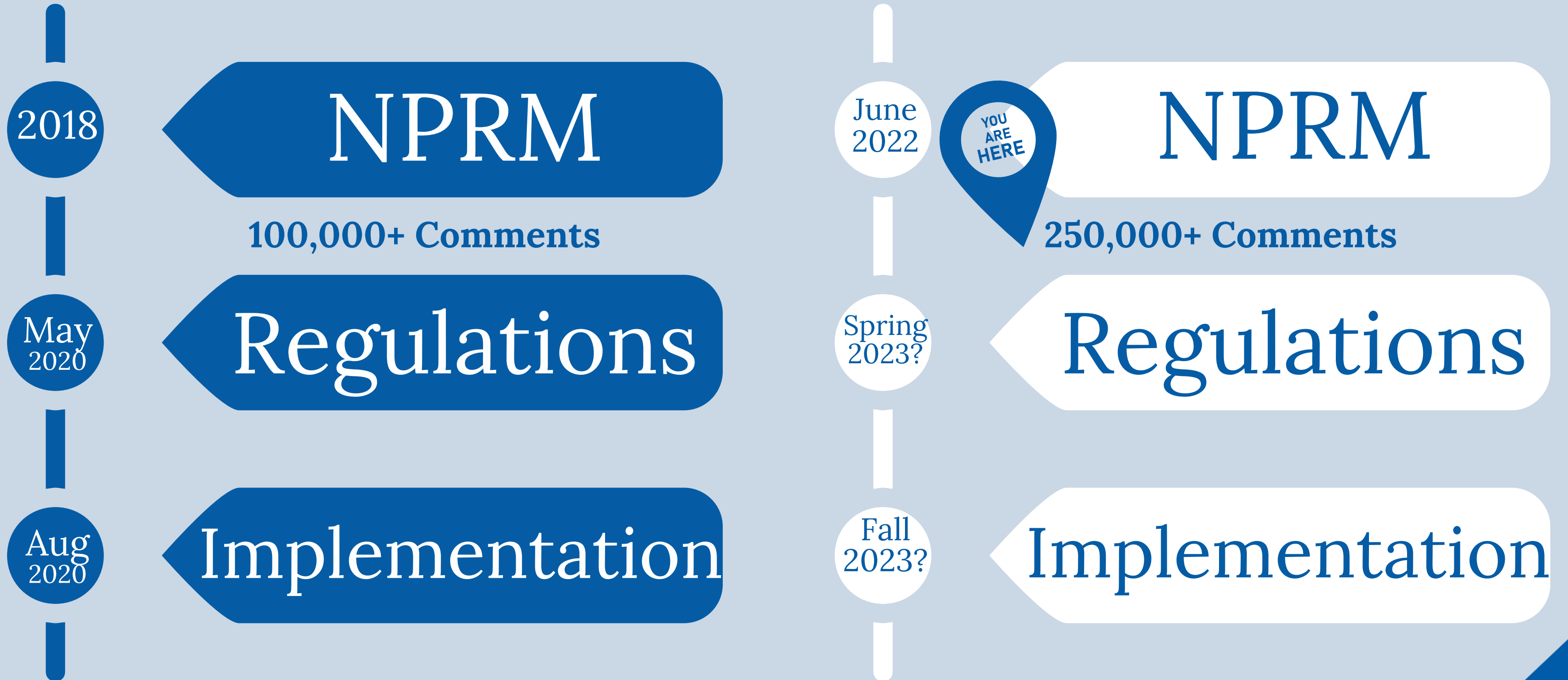
College had actual knowledge of at least one instance of sexual harassment between the parties but failed to fully investigate the Complainant's anonymous complaint. Failure to keep adequate records during staff transition led to multiple interviews of complainant. Resolution took 4 months, which was outside of stated policy timeframe - not prompt and equitable because delays were a result of bad recordkeeping.

TITLE IX REGULATIONS

The Evolution of Title IX *Sexual Harassment*



Title IX Regulations, Then & Now



Top 10

1

Scope Expanded

2

Mandated Training Expanded

3

Additional/Modified Definitions

4

Complexity of Title IX Coordinator Role

5

Sexual Harassment is now Sex Based Harassment

Top 10

6

Less Prescriptive Grievance Process

7

Informal Resolution- Initiated without "Formal Complaint"

8

Retaliation Protections

9

Discrimination Based on Pregnancy

10

Expands Recordkeeping

The rule-making is necessary to align the Title IX regulations with the properties of the Biden-Harris Administration, including those set forth in the Executive Order on Preventing and Combating Discrimination on the Basis of Gender Identity or Sexual Orientation (EO 13988) and the Executive Order on Guaranteeing an Educational Environment Free from Discrimination on the Basis of Sex, Including Sexual Orientation and Gender Identity. (EO 14021)

Summary of the Legal Basis:

We are conducting this rulemaking under 20 U.S.C. 1681 et seq.

Alternatives:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Anticipated Costs and Benefits:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Risks:

This was discussed in the notice of proposed rulemaking (NPRM) and will be discussed in the final regulations.

Timetable:

Action	Date	FR Cite
NPRM	7/12/22	87 FR 41390
Final Action	05/00/2023	

BOTTOM LINE

- ✓ Continue to follow 2020 regulations and train your team accordingly
- ✓ No timeframe for release of new Title IX regulations, only best guess



STILL WAITING

No update on the promised Title IX Athletics/Gender Identity rule, although scheduled December 2022 action.



LITIGATION UPDATE AND TRENDS

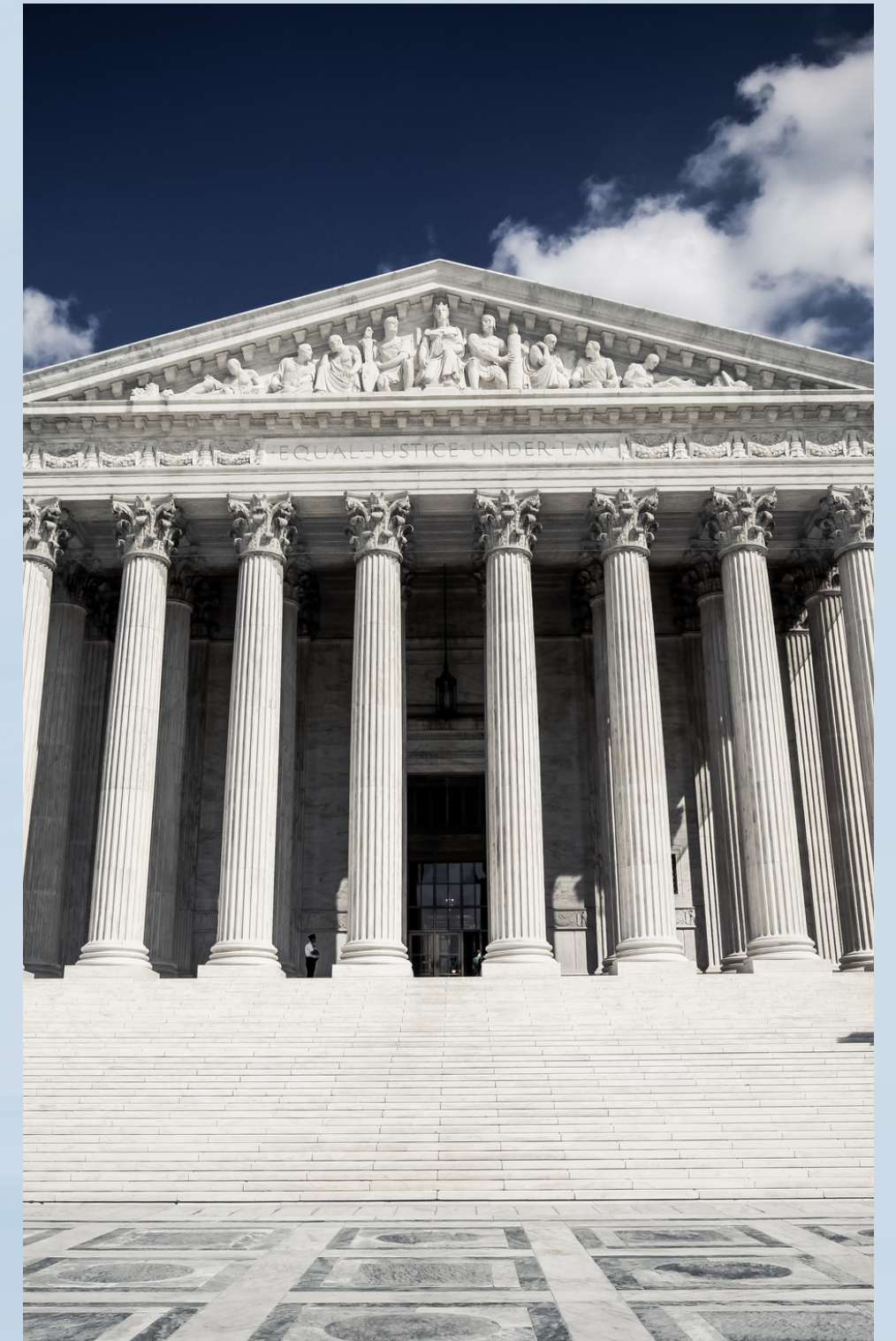
WHAT DIDN'T HAPPEN - SUPREME COURT DECLINES TO REVISIT TITLE IX



The U.S. Supreme Court did not issue a writ of certiorari to address whether Davis' causation requirement permits Title IX liability for a single incident. *Fairfax County School Board v. Jane Doe*, No. 21-968 (cert. denied 11/21/22) (seeking review of Fourth Circuit ruling that initially split a panel 2-1 and then split the full appellate court 9-6)



Many observers believed that the Court would revisit Title IX institutional liability for sexual harassment, as established a quarter century ago in *Gebser v. Lago Vista School Dist.*, 524 U.S. 274 (1998), and *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999).



MEANWHILE, FEDERAL TRIAL AND APPELLATE COURTS CONTINUE TO OFFER NUANCED OR CONTRASTING ANSWERS TO 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 context in which the harassment occurs”?
- ? When does alleged deliberate indifference “cause students to undergo harassment” or “make them vulnerable to it”?



IF JUDGES DON'T AGREE, HOW DO WE FIND CLARITY?



Judges within the same court disagree on interpretations of Title IX's scope and standards.



Eleventh Circuit splits 7-4 (along Republican and Democratic appointees) in upholding a Florida school district's policy prohibiting transgender students from using bathrooms that match their gender identities – producing a majority opinion, concurring opinion, and four dissenting opinions



TRANSGENDER/SOGI

**Soule v. Connecticut Association of
Schools, Inc., et al**

2nd Circuit decision, affirming dismissal of a lawsuit brought by 4 cisgender female plaintiffs challenging a policy that allows transgender students to participate in gender specific sports consistent with gender identity.

**Adams v. School Board of St. Johns
County, Florida**

11th Circuit holds public schools separating the use of male and female bathrooms based on biological sex does not violate Equal Protection Clause or Title IX

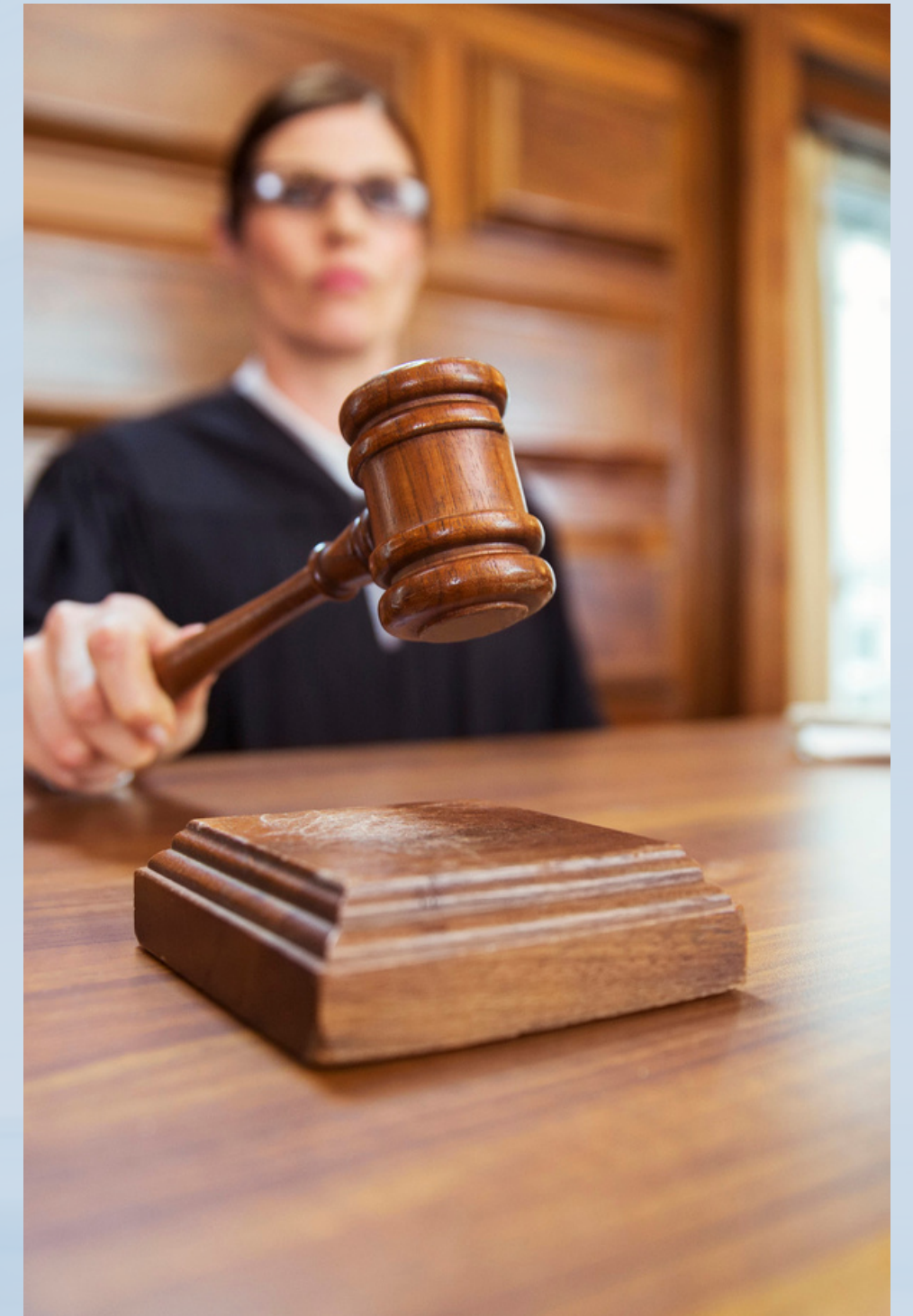
IF JUDGES DON'T AGREE, HOW DO WE FIND CLARITY?



Sixth Circuit splits on whether to hear as a full court an important statute of limitations question – the timeliness of Title IX claims pled well after the alleged assaults, where the plaintiffs claimed that they did not know, could not have reasonably known, that they were injured until well after the incident.



Snyder-Hill v. The Ohio State University, 48 F.4th 686 (6th Cir. 2022) (2-1 panel split finding claims to be timely), and 54 F.4th 963 (6th Cir. 2022) (en banc denial).



HOW BROADLY DOES TITLE IX'S STATUTORY PROHIBITION SWEEP?



“No person shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance” 20 U.S.C. § 1681(a).



The First Circuit has stated that a person can participate or attempt to participate in an education program or activity by availing themselves to services such as libraries or labs or attending campus tours, public lectures, sporting events or other activities. *Doe v. Brown Univ.*, 896 F.3d 127, 132 n. 6 (1st Cir. 2018).



Second Circuit joins the majority view that employees are covered by Title IX. *Vengalattore v. Cornell Univ.*, 36 F.4th 87 (2d Cir. 2022).



HOW BROADLY DOES TITLE IX'S STATUTORY PROHIBITION SWEEP?



Sixth Circuit allows non-students to sue over abuse by university physician and athletic team doctor. **Snyder-Hill v. OSU** (cited in prior slide). Dissent warns that “participating or benefitting” from an institution’s education program or activity should have limits.



A federal trial judge allows an independent contractor to proceed with a Title IX retaliation claim. **Conviser v. DePaul Univ.**, 2023 WL 130483 (N.D. Ill. Jan. 9, 2023).



THE “BEFORE” THEORY OF TITLE IX CLAIMS



Labeled under various titles in litigation – “Heightened risk,” “Pre-Assault,” or “Official Policy” claim.



The claim seeks to hold a school liable for creating a heightened risk that a student would be harassed or assaulted.



The Ninth Circuit has held that it does not foreclose the possibility that a plaintiff could adequately allege causation when a school’s alleged policy of deliberate indifference extends across a campus. (*Karasek v. Regents of the Univ. of Ca.*, 956 F.3d 1093 (9th Cir. 2020)).



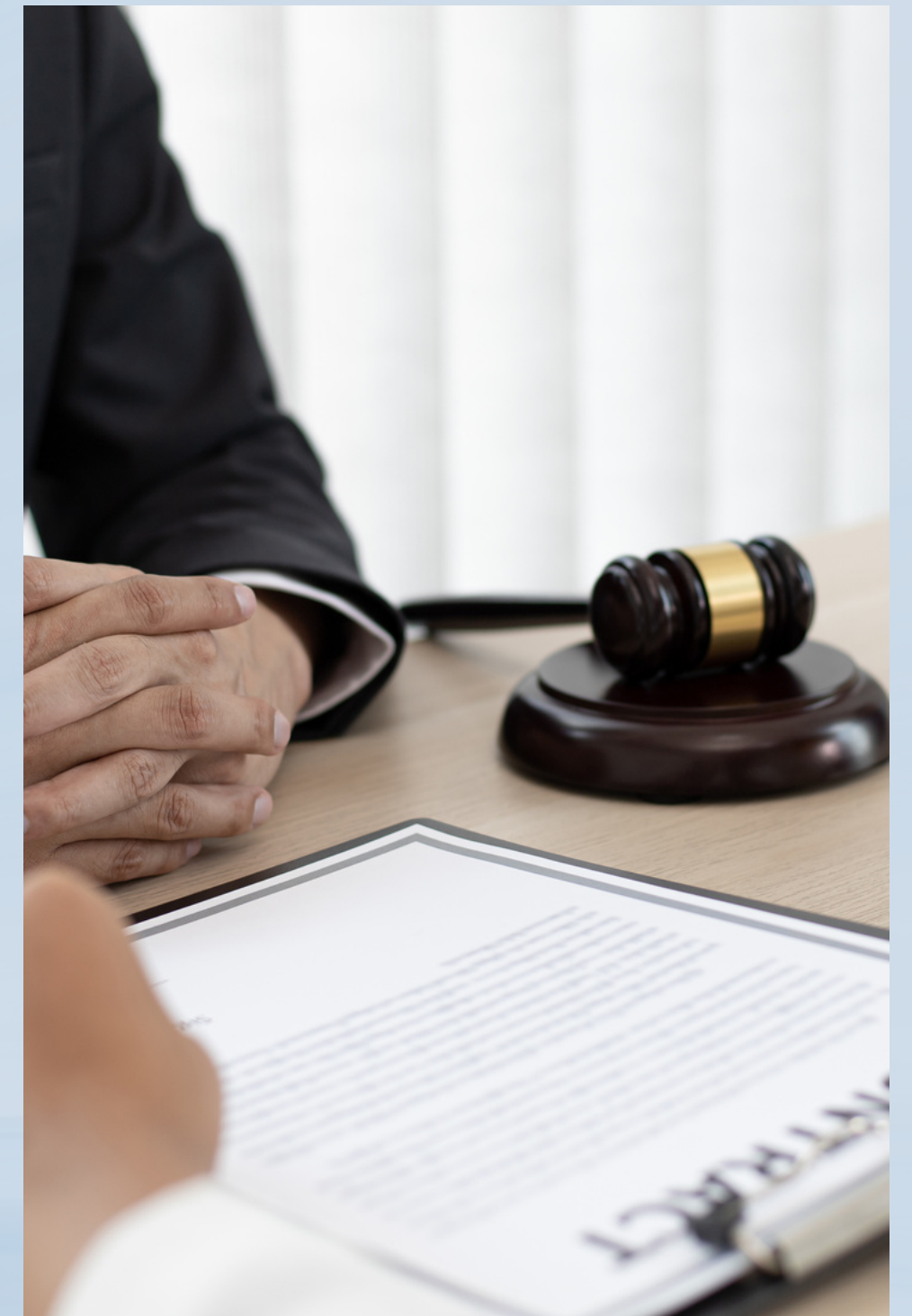
THE “BEFORE” THEORY OF TITLE IX CLAIMS



Other courts have been more limiting, focusing on common alleged harasser(s) or similar programs or activities.



The statute of limitations analysis may not be the same for a pre-assault claim focusing on a heightened risk and a post-assault claim focusing on the school’s response to a report.



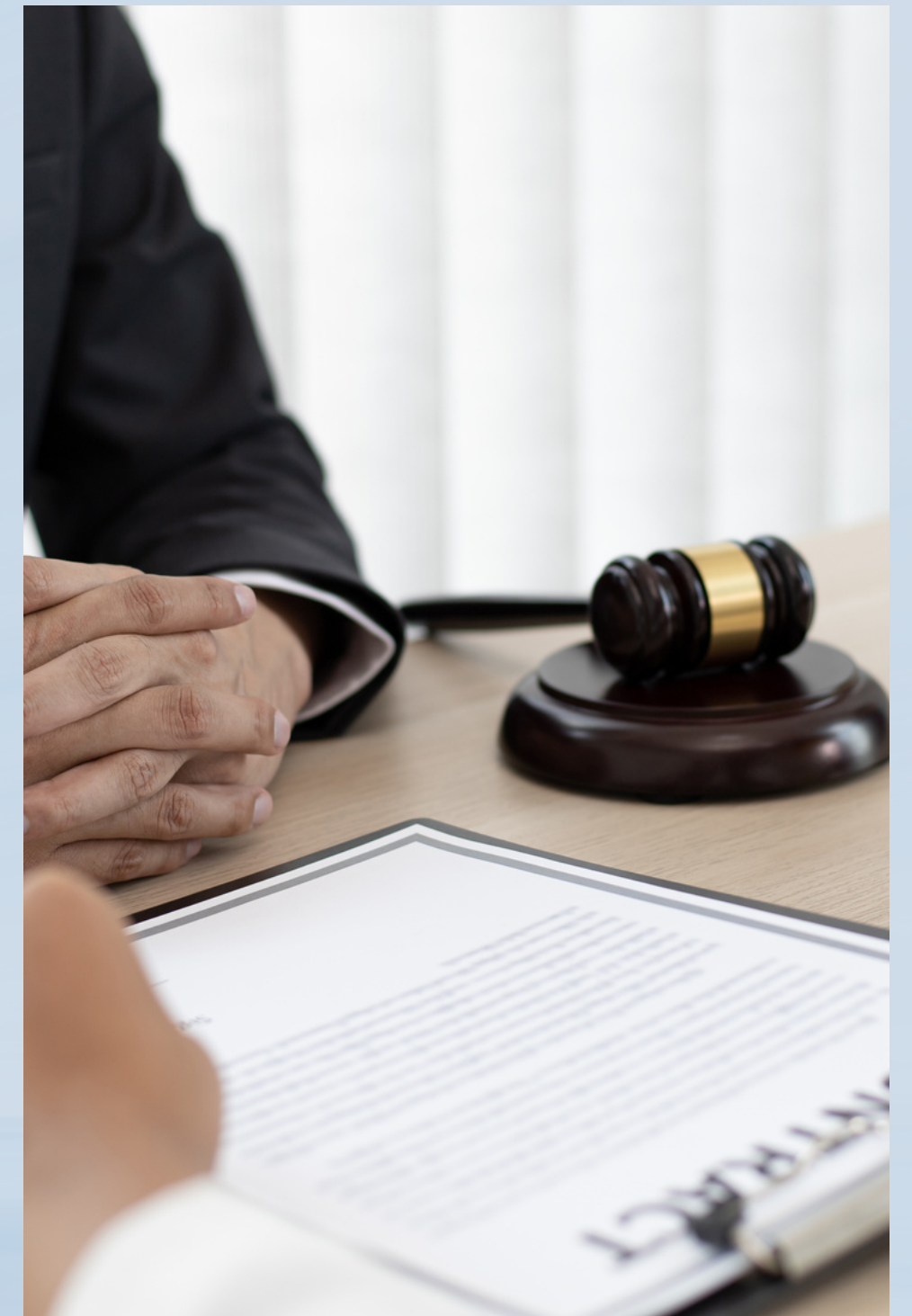
WHAT CAUSATION MUST BE SHOWN IN A POST-ASSAULT RESPONSE CLAIM?



To be actionable under Title IX, student-on-student harassment must be “so severe, pervasive, an objectively offensive that it effectively bars the victim’s access to an educational opportunity or benefit.” ***Davis***, 526 U.S. at 650.



There is a split regarding whether a single instance of sufficiently severe peer harassment may rise to the level of “pervasive” harassment.



WHAT CAUSATION MUST BE SHOWN IN A POST-ASSAULT RESPONSE CLAIM?



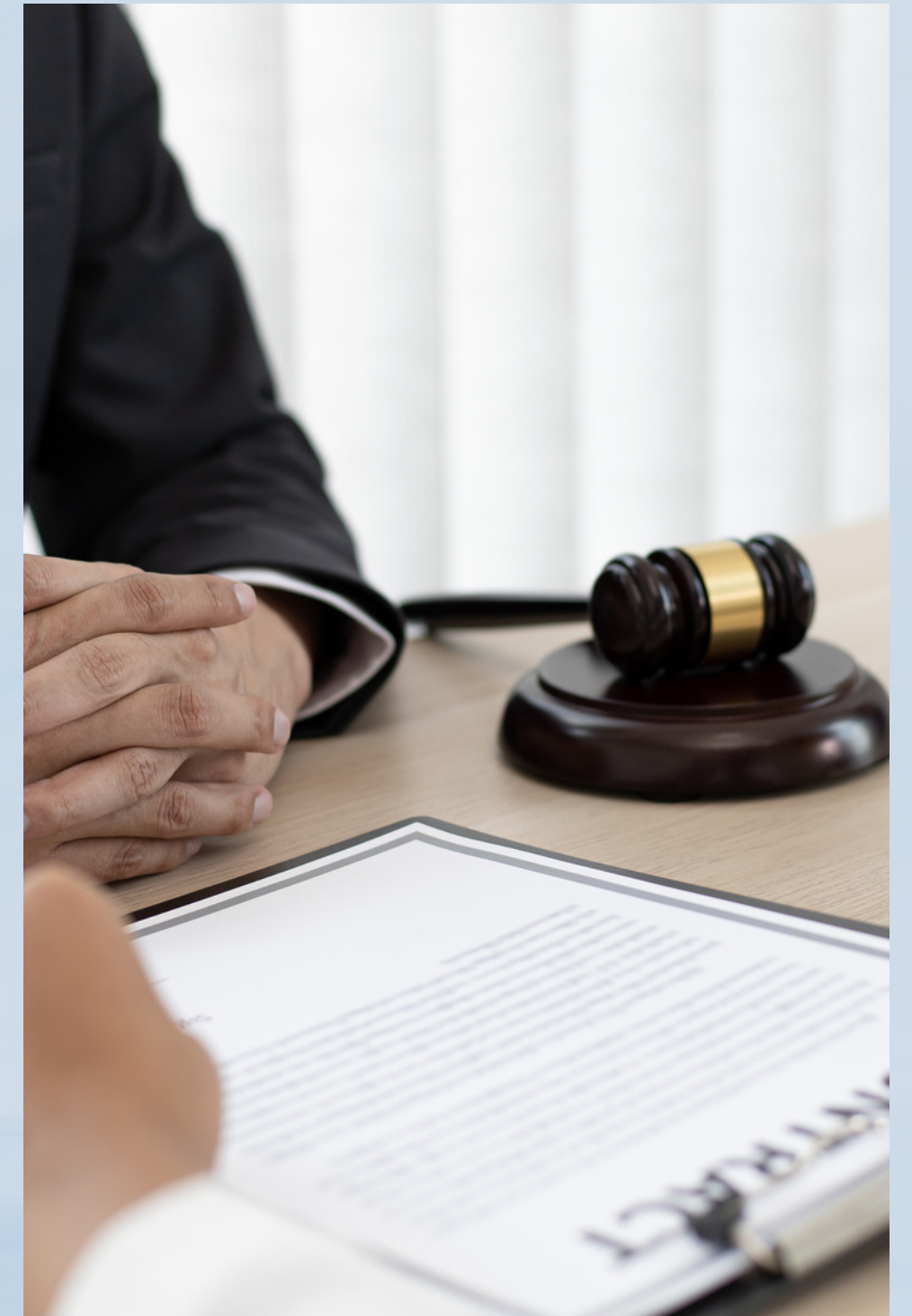
Some circuits have held that “pervasive” harassment requires multiple incidents of harassment - one incident is not enough for liability.



Other circuits have held that students must only demonstrate that a school’s deliberate indifference made further harassment more likely, not that it actually led to any additional post-notice incidents of harassment.



On this question, Sixth Circuit distinguishes between K-12 and higher education. Single incident qualifies in K-12 setting. **Doe v. Metropolitan Gov. of Nashville and Davidson Cty.**, 35 F.4th 459 (6th Cir. 2022).



TRENDS IN RESPONDENT LAWSUITS



For several years, courts focused on whether a respondent's Title IX claim satisfied theories labeled as “erroneous outcome,” “selective enforcement,” and “archaic assumptions.”



Increasingly, courts are analyzing claims by respondents in a more streamlined fashion, no longer requiring a Title IX claim to meet a doctrinal theory. Rather, courts focus on a broad question: Whether the facts raise a plausible inference that the school discriminated against the respondent on the basis of sex?



TRENDS IN RESPONDENT LAWSUITS



At the same time, courts are becoming more expansive and flexible in their interpretation of respondents' claims for breach of contract. Courts focus on this broad question: Was the process “fundamentally fair” and/or “consistent with a student’s reasonable expectations?” See, e.g., *Sonoiki v. Harvard Univ.*, 37 F.4th 691 (1st Cir. 2022), *Doe v. Stonehill Univ.*, 55 F. 4th 302 (1st Cir. 2022) – both reversing dismissals of contract claims.



Takeaway: Recognize that Courts are becoming more proactive in issuing injunctions based upon findings of irreparable harm



TITLE IX AND TRANSGENDER/GENDER IDENTITY STUDENTS – THE STILL EVOLVING LANDSCAPE



The Eleventh Circuit’s recent ruling in *Adams* conflicts with other appellate and trial court rulings. Should “biological sex” be the standard? What is “biological sex”? In *Adams*, the majority and dissenting opinions differed.

Will the Supreme Court review?



TITLE IX AND TRANSGENDER/GENDER IDENTITY STUDENTS – THE STILL EVOLVING LANDSCAPE



Should courts apply **Bostock v. Clayton County**, 140 S.Ct. 1731 (2020), where the Supreme Court ruled under Title VII that an employer cannot fire an employee on the basis of the employee's gender identity or sexual orientation?



TITLE IX AND TRANSGENDER/GENDER IDENTITY STUDENTS – THE STILL EVOLVING LANDSCAPE



This month, a federal district court judge upheld West Virginia’s “Save Women’s Sports” law (applicable to K-12 and higher education) restricting transgender girls from playing on sports teams that match their gender identities, finding that the state legislature’s definitions of “girl” and “women” are constitutional and consistent with Title IX. The Biden Administration argued against the law.



B.P.J. v. West Vir. St. Bd. of Educ., 2023 WL 111875 (S.D. W. Va. Jan. 5, 2023).



Are these legislative or judicial questions to answer? Or both?



TITLE IX AND TRANSGENDER/GENDER IDENTITY STUDENTS – THE STILL EVOLVING LANDSCAPE



Federal judge blocks Education Department's Title IX guidance that protects transgender students



20 AGs, led by Tennessee AG, argued their states face a "credible threat" of losing federal funding due to their policies and laws.



Eastern District of Tennessee judge ruling



Guidance "directly interferes with and threatens Plaintiff States' ability to continue enforcing their state laws" that restrict transgender people from playing on sports teams and using bathrooms that match their gender identity. - Arguments took aim at guidance's use of Bostock to support its position



RECOVERABLE DAMAGES UNDER TITLE IX LAWSUITS



In *Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562 (2022), the Supreme Court held that emotional damages are precluded in private actions to enforce two laws enacted by Congress under the Constitution's Spending Clause – the Affordable Care Act and the Rehabilitation Act of 1973.



Title IX is a Spending Clause law, so schools have argued for a similar restriction in Title IX private actions. The majority of courts have agreed that *Cummings*' analysis applies to limit recoverable damages in a Title IX lawsuit. See, e.g., *Doe v. City of Pawtucket*, 2022 WL 4551953 (D.R.I. Sept. 29, 2022).



As a result of *Cummings* and its application to Title IX claims, plaintiffs are pursuing other causes of action to recover emotional damages – e.g., a state statute, negligence claims, intentional infliction of emotional distress.



OTHER TRENDS THAT WE'RE SEEING IN COURT



Increasing number of disability claims pled with Title IX claims.



In negligence claims (that often accompany Title IX claims), courts are expanding scope of a school's duty (e.g., special relationship analysis – can a school be held to owe duty to prevent a third-party's assaultive conduct?).



Judges must be educated on where the Title IX boundaries lie. Judges express skepticism when schools apply a non-Title IX policy to address alleged sexual misconduct.



Know your jurisdiction, your judge, and your school's reputation in court.



KEY TAKEAWAYS ENTERING 2023:

 Training Title IX team at a premium, and will only become more important under new regulations!

 Expect continued OCR complaints and investigations

 Remember: Policy + Training = Effective Implementation

 Legal landscape still uncertain and inconsistent

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In person on
February 23rd

The logo for the Title IX Coordinator Bootcamp, featuring a blue circular emblem with the text 'TITLE IX COORDINATOR BOOTCAMP' and three stars. To the right is the ICS logo, which consists of a blue triangle and the text 'ICS INSTITUTIONAL COMPLIANCE SOLUTIONS'.