Higher Education: Title VI Litigation and OCR Enforcement Update

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Presenter Information

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Disclaimers

- We are not giving you legal advice
- Many of these cases may still be in appeals – stay tuned
- Consult with your legal counsel regarding how best to address a specific situation
- Feel free to ask general questions and hypotheticals
- There are a variety of stakeholders listening, so please keep that in mind as you submit questions
- Watch your inbox for a link to the slides!

Quick Reminder

- Pay the closest attention to the Supreme Court, your Circuit Court, and your District Court, as these decisions are "precedential," which means future courts are supposed to follow the same logic.
- All other decisions are "persuasive." The persuasiveness depends on how thoughtful the decision is, and how similar the facts are to your own.
- Your District Court might prefer to look first to case law from other District Courts in your Circuit.
- We are not second-guessing parties or attorneys in these cases. Today we are focusing on how courts have construed facts and what they have said about those facts as construed, so as to help team members better implement their procedures.

Another Quick Reminder

- The information considered by the Court will depend on how far along the case is at the time of the decision
- Motion to Dismiss – If we assume everything in the plaintiff's complaint is rue, do they have a case?
- Motion for Summary Judgment – Court can make findings of fact based on what is in the record now that depositions and other discovery has taken place
- Appeal – Look to whether this is an appeal of a motion to dismiss, or an appeal for motion for summary judgment, and that will tell you whether we are working with established facts.

OCR Enforcement Statistics

- 2023 Stats
  - OCR received 19,201 complaints in 2023.*
    - 3,526 of these (18%) were complaints related to Title VI
  - OCR resolved 3,001 Title VI complaints in 2023
  - OCR issued **eight** policy resources on Title VI in 2023 (compared to two on Title IX and one on the ADA/Section 504)
- 2024 Stats:
  - 291 OCR investigations opened since January 1, 2024, against higher education institutions (as of October 26, 2024)
    - Discipline: 5
    - Admissions: 6
    - Racial Harassment: 30
    - Retaliation: 35
    - National Origin involving Religion: 55
    - Denial of Benefits: 69
    - "Other": 19

Title VI

- No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance.

OCR has interpreted national origin to include shared ancestry and ethnic characteristics.

Reddy v. Univ. of Pennsylvania, 2024 WL 3904048
(E.D. Pa., Aug. 6, 2024) (slide 1 of 3)

- Title VI retaliation claim
  - Post-baccalaureate student, who was the only South Asian woman in her cohort, alleged she was suspended for an academic integrity violation in retaliation for raising concerns that one of her professors was biased against her.
  - Court denied University's motion to dismiss the complaint for failure to state a claim.
- To state a claim for retaliation under Title VI, must plead facts showing:
  1. Engaged in protected activity;
  2. University subjected her to adverse action after or contemporaneously with protected activity; and
  3. Causal link between the adverse action and the protected activity.

Reddy v. Univ. of Pennsylvania
(slide 2 of 3)

1. Was Plaintiff engaged in protected activity?
   - If Plaintiff's allegations are true, the email she sent her Professor on May 2 raising concerns of racial bias, the formal bias incident report she submitted on June 7, and her meeting with University officials regarding her complaint all constitute protected activity.
2. Was Plaintiff subjected to adverse action after or contemporaneously with her protected activity?
   - Plaintiff's complaint sufficiently alleged she was charged and found responsible for an academic integrity violation soon after or near the same time that she raised complaints of discriminatory treatment.

Reddy v. Univ. of Pennsylvania
(slide 3 of 3)

3. Was there a causal link between her complaints of bias and the academic integrity violation charge and findings?
   - While Plaintiff did not allege that any decisionmakers involved in her disciplinary proceedings were aware of her formal or informal discrimination complaints, she did allege the Professor she complained about was directly involved.

- "At this early stage of the litigation, Plaintiff need only plead facts allowing the Court to reasonably infer retaliation against her for her protected conduct. Plaintiff has done so."
- Title VI retaliation claim will proceed to discovery.

Moeinpour v. Bd. of Tr. of Univ. of Alabama,
2024 WL 2164626 (N.D. Ala., May 14, 2024) (slide 1 of 2)

- Plaintiff was a research assistant at a public university's research center. The research center was primarily funded by contracts from the National Cancer Institute.
- Plaintiff alleged that over the course of nine years, she was subjected to discrimination and harassment based on her race and national origin.
- Court granted University's motion for summary judgement on Plaintiff's Title VI race/national origin harassment and retaliation claims.
  - Employment discrimination claims may not be brought under Title VI unless the "primary objective of the Federal financial assistance is to provide employment." 42 U.S.C. § 2000d-3.

Moeinpour v. Bd. of Tr. of Univ. of Alabama
(slide 2 of 2)

- Question before the court was whether the primary objective of the federal funds granted to research center was to provide employment.
  - Eleventh Circuit has not addressed this issue, so court looked to decisions from other Circuits (9th and 10th Circuits).
  - Plaintiff alleged that research provided for in a federal contract could not be performed without providing funds for the primary purpose of performing the research.
  - Court found this argument followed "the same over-extended logic that the plaintiffs in [9th Circuit case] tried to pursue."
  - "Congress obviously did not intend for every federal contract under which employees are hired to be subject to Title VI. After all, the effect of that interpretation would be to create a duplicative, co-extensive Title VI statutory enforcement scheme that runs parallel with Title VII. That was clearly not what Congress intended."
  - Because Plaintiff did not present sufficient evidence that the "primary objective" of the funds granted to the research was to provide employment, her claims were not viable under Title VI.

Mungai v. Univ. of Minnesota,
2024 WL 1216474 (D. Minn., March 21, 2024) (slide 1 of 3)

- Plaintiff, who is a Black man of Kenyan origin, filed a *Pro Se* complaint alleging he was subjected to numerous incidents of racist behavior, and that as a result, he was diagnosed with a mental illness, his grades fell, he was unable to complete his last course on time, and lost of lucrative offer of employment. He sought damages of $15,000,000.
- His allegations described racially harassing and discriminatory conduct such as:
  - Other students made finger gun motions at him
  - Students called him names ("dirty," "ugly," and "nig") in class and on campus
  - A student told him he "should date someone from [his] own country"
  - A white professor accused him of plagiarism, and later denied him extensions for an assignment because of harassment he was experiencing in retaliation for Plaintiff reporting harassment
  - A white student made a racial slur and told Plaintiff "u gon' die"
  - A white student kicked him in the back after saying "Oh my god not this guy," calling him "dirty" and using racial slurs

Mungai v. Univ. of Minnesota,
2024 WL 1216474 (D. Minn., March 21, 2024) (slide 2 of 3)

- The Court granted the University's motion to dismiss with prejudice.
- Title VI discrimination claim based on creation of a hostile environment:
  - Plaintiff must plead facts that support a reasonable inference that University was deliberately indifferent to known acts of discrimination that occurred under its control.
  - Harassment must be "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities." (Citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 642 (1999).)

Mungai v. Univ. of Minnesota
(slide 3 of 3)

- Plaintiff alleged "serious acts of hostility directed toward him."
- However, he did not adequately plead that University knew about these acts of racial hostility and was deliberately indifferent to them.
  - Plaintiff's complaint does not provide any details about what specific behavior he reported to University staff, does not name the person or position he reported the harassment to, and does not indicate the date on which reports were made.
  - Plaintiff also did not allege details concerning how the University responded, and did not provide facts to show deliberate indifference – rather, he repeatedly alleges that that he reported the described incident to University staff and "no action was taken."
- "While the Court concludes that Plaintiff's Amended Complaint is properly dismissed, the Court does not minimize the severity of some of the allegations in his complaint. The Court's order today simply reflects the fact that Plaintiff has not sufficiently pleaded the causes of action that he attempts to bring against the University."
- Appealed to 8th Circuit (April 29, 2024).

StandWithUs Ctr. for Legal Justice v. Mass. Inst. of Tech., ---F.Supp.3d---, 2024 WL 3596916 (D. Mass., July 30, 2024) (slide 1 of 4)

- Ruling on motion to dismiss for lack of standing and for failure to state a claim
- Class action challenged adequacy of MIT's response to anti-Semitic acts occurring on campus
- Plaintiffs claimed that, after Oct. 7, 2023, repeated anti-Semitic incidents occurred on campus and caused Jewish and Israeli students to fear for their personal safety

StandWithUs Ctr. for Legal Justice v. Mass. Inst. of Tech.
(slide 2 of 4)

A Title VI hostile environment claim has five elements:

1. Plaintiffs were "subject to 'severe, pervasive, and objectively offensive' ... harassment";
2. The harassment "caused the plaintiff to be deprived of educational opportunities or benefits";
3. The school "knew of the harassment";
4. The harassment occurred "in [the school's] programs and activities"; and
5. The school "was deliberately indifferent to the harassment such that its response (or lack thereof) is clearly unreasonable in light of the known circumstances."

StandWithUs Ctr. for Legal Justice v. Mass. Inst. of Tech.
(slide 3 of 4)

- Court granted University's motion to dismiss for failure to state a claim, finding the University's response to protests and harassment was not deliberately indifferent
  - University began by suspending student protestors from non-academic activities, and suspended one of the pro-Palestine student groups
  - On May 6, University warned students involved in the April encampment they would face disciplinary proceedings if they did not vacate; most students left the encampment
  - However, students later "surged" and "breached" fencing surrounding the encampment; tensions continued to rise over next several days
  - On May 8, protestors defaced Israeli flags; more student protestors were suspended
  - On May 9, protestors blocked a major campus thoroughfare – nine students were arrested
  - On May 10, those present in the encampment were warned to leave; those who refused were suspended and arrested

StandWithUs Ctr. for Legal Justice v. Mass. Inst. of Tech.
(slide 4 of 4)

- University's "evolving and progressively punitive response largely tracked its increasing awareness of the hostility that demonstrators directed at Jewish and Israeli students shows that MIT did not react in a clearly unreasonable manner."
- "To fault MIT for what proved to be a failure of clairvoyance and a perhaps too measured response to an outburst of ugliness on its campus would send the unhelpful message that anything less than a faultless response in similar circumstances would earn no positive recognition in the eyes of the law."

Kestenbaum v. President & Fellows of Harvard Coll., ---F.Supp.3d---, 2024 WL 3658793 (D. Mass., Aug. 6, 2024)
(slide 1 of 4)

- Recent university graduate, who is Jewish, and nonprofit organization sued University for damages and prospective injunctive relief
- Complaint alleges University ignored discrimination against Jewish and Israeli students
  - Following the Oct. 7, 2023, Hamas attack on Israel, two student groups organized a "die-in" and harassed and assaulted Jewish students
  - Demonstrations continued throughout the fall semester, and anti-Semitic incidents persisted into the spring 2024 semester
  - In April 2024, protestors erected an encampment that was left in place until May 14
  - During one rally, protestors blockaded Jewish students in a study room
  - In another, student protestors "surrounded and intimidated Jewish students"
  - Plaintiff student was followed by protestors when he tried to walk through part of campus

Kestenbaum v. President & Fellows of Harvard Coll.
(slide 2 of 4)

University filed motion to dismiss, which court granted and in part and denied in part

- Title VI deliberate indifference:
  - Plaintiffs plausibly alleged they were subjected to severe, pervasive, and objectively offensive harassment - The complaint describes "repeated, fear-inducing conduct that amounted to more than 'off-color banter'" – some protests were confrontational and physically violent; plaintiffs dreaded walking through campus, missed classes, and stopped participating in extracurricular events
  - While University argued it could not infringe on protected First Amendment activity, as a private institution, court was "dubious" that it could "hide behind the First Amendment to justify avoidance of its Title VI obligations."

Kestenbaum v. President & Fellows of Harvard Coll.
(slide 3 of 4)

- Title VI deliberate indifference, cont.
  - While University did respond to many of the incidents, its "reaction was, at best, indecisive, vacillating, and at times internally contradictory." For example:
  - The Dean sent an email to students that a certain lounge was limited to "personal or small group study and conversation," but when demonstrators held a "vigil for martyrs" in the lounge the next day, the Dean attended it.
  - A Jewish student was openly "charged" and "push[ed]," but police officers who were present failed to react.
  - Two days after a student group was suspended, it organized the creation of an encampment in Harvard Yard.
  - "To conclude that the SAC has not plausibly alleged deliberate indifference would reward Harvard for virtuous public declarations that for the most part, according to the allegations of the SAC, proved hollow when it came to taking disciplinary measures against offending students and faculty."

Kestenbaum v. President & Fellows of Harvard Coll.
(slide 4 of 4)

- Direct discrimination
  - Complaint alleged University did not enforce policies against antisemitic speech and conduct to the same extent as other forms of discrimination
  - However, plaintiffs failed to identify reasonably comparable speakers or students who were treated more favorably when engaged in conduct similar to that of the protestors – "At bottom, plaintiffs' claim is one of viewpoint discrimination, which is not actionable under Title VI."
- Breach of Contract and the Implied Covenant of Good Faith and Fair Dealing
  - Plaintiffs allege University failed to follow the complaint-handling procedures in its non-discrimination policy and selectively enforced its policies
  - Instances alleged in complaint involving students who filed complaints but were never notified whether the complaint was accepted or never received a response were sufficient to state a breach of contract claim
  - Allegations that some student were penalized for violating University's policies but students who engaged in antisemitic conduct were not punished, while not sufficient to state a Title VI claim, did state a claim that University "breached the implied covenant by failing to evenhandedly administer its policies."

Frankel v. Regents of Univ. of California,
---F.Supp.3d---, 2024 WL 3811250 (C.D. Cal., Aug. 13, 2024)
(slide 1 of 5)

Facts alleged in complaint:

- Pro-Palestinian protestors established an encampment on University's campus; encampment was rimmed with plywood and metal barriers
- Protestors set up checkpoints and required a wristband to cross them
- Several Jewish students could not access the library or other parts of campus because of the protestors
- The encampment lasted for a week before it was cleared by police
- Protestors then established other encampments and blocked access to parts of campus
- Some students missed final exams or were evacuated during exams because of protestors

Frankel v. Regents of Univ. of California
(slide 2 of 5)

- Three Jewish students filed a complaint and motion for preliminary injunction
- Claims asserted include violation of the Equal Protection Clause, the Free Speech Clause, the Free Exercise Clause, Title VI of the Civil Rights Act of 1964, conspiracy to interfere with civil rights and failure to prevent conspiracy; and state constitutional and state law claims
- Ruling on motion for preliminary injunction
- Court ruled students were likely to succeed on the merits of their federal equal protection, free speech, free exercise, and Title VI claims

Frankel v. Regents of Univ. of California
(slide 3 of 5)

"In the year 2024, in the United States of America, in the State of California, in the City of Los Angeles, Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith. This fact is so unimaginable and so abhorrent to our constitutional guarantee of religious freedom that it bears repeating, ***Jewish students were excluded from portions of the UCLA campus because they refused to denounce their faith***. UCLA does not dispute this. Instead, UCLA claims that it has no responsibility to protect the religious freedom of its Jewish students because the exclusion was engineered by third-party protesters. But under constitutional principles, UCLA may not allow services to some students when UCLA knows that other students are excluded on religious grounds, regardless of who engineered the exclusion."

Frankel v. Regents of Univ. of California
(slide 4 of 5)

- Court only addressed the free exercise claim in the interest of judicial economy
  - Likelihood of Success on the Merits: Certain students were excluded from some University programs, activities, and campus areas because of their religious beliefs, while other students retained access, raising "serious questions going to the merits of their free exercise claim."
  - Likelihood of Irreparable Injury: "[G]iven the risk that protests will return in the fall that will again restrict certain Jewish students' access to ordinarily available programs, activities, and campus areas, the Court finds that Plaintiffs are likely to suffer an irreparable injury absent a preliminary injunction."
  - Balancing of the Equities and Public Interest: It is in the public interest to prevent a violation of constitutional rights

Frankel v. Regents of Univ. of California
(slide 5 of 5)

- Court granted a preliminary injunction
- Injunction does not require University to adopt any specific policies or procedures or to take any specific steps in response to protests
- Injunction does require that "if any part of UCLA's ordinarily available programs, activities, and campus areas become unavailable to certain Jewish students, UCLA must stop providing those ordinarily available programs, activities, and campus areas to any students. How best to make any unavailable programs, activities, and campus areas available again is left to UCLA's discretion."

Appealed to 9th Circuit (No. 24-5003).

Other Speech Conduct/Viewpoint Discrimination Cases to Note

- University of Maryland Student for Justice in Palestine v. Board of Regents of the University System of Maryland (D. Md. Oct. 1, 2024).
- Students for Justice in Palestine, at the University of Houston v. Greg Abbott (W.D. Tex. October 28, 2024).
- Jason Jorjani v. New Jersey Institute of Tech. (D.N.J. July 29, 2024).
- Stuart Reges v. Ana Mari Cauce (W.D. Wash. May 8, 2024).

OCR Resolutions - Overview

- 7 resolution agreements with postsecondary institutions on race and national origin discrimination
- Key Investigative Priorities: Did the institution...
  - Assess the creation of a cumulative hostile environment?
  - Assess reports for which it had constructive notice?
  - Assess reports of off-campus and social media conduct that could constitute or contribute to a hostile environment?
  - Meet its obligation to respond to incidents that could constitute or contribute to a hostile environment?

OCR Resolutions – Examples of Hostile Conduct

- Targeted vandalism
- Cultural and religious harassment
- Verbal and physical harassment
  - "Hate speech" and social media posts
- Discriminatory rhetoric in the classroom
- Protest-related conduct

OCR Resolutions – Process & Policy Concerns (1 of 3)

- Different policies and grievance processes based on status of a party as a student or employee
  - Different reporting instructions
  - Different definitions of harassment
  - Different resolution mechanisms
  - Different interim and supportive measures available
- Policy lacked statements regarding the institution's Title VI obligation to respond to actual or constructive notice of harassment

OCR Resolutions – Process & Policy Concerns (2 of 3)

- "Official" reporting to the campus civil rights office, but "unofficial" reporting to other departments (Student Life, Campus Climate, Public Safety)
  - No mechanism for collaboration or information sharing between offices
- Varied resolution timelines for reports with no clear policy provisions on the timeline for resolution

OCR Resolutions – Process & Policy Concerns (3 of 3)

- Failure to assess whether incidents both individually and cumulatively created a hostile environment
  - Even if the conduct constituted protected speech
    - "While the University may not discipline speakers for protected speech, the University retains a Title VI legal obligation to take other steps as necessary to ensure that no hostile environment based on shared ancestry persists." (Univ. of Michigan Resolution Letter)
- Lack of process "designed to remedy any existing hostile environment from shared ancestry-based harassment"
- Failure to take steps "reasonably calculated to eliminate the hostile environment, remedy its effects, and prevent its recurrence"

OCR Resolutions – Other Red Flags

- Communications to campus
  - Proactive communications offering support and resources did not provide information on how to report incidents of discrimination or harassment
- Training
  - Training materials on discrimination and harassment did not include references to shared ancestry or ethnic characteristics
  - Training materials were inconsistent in describing how and where to report discrimination

OCR Resolutions – Best Practices for Title VI Compliance

- Updates to the discrimination and harassment policy
  - Clearly defined provision on shared ancestry discrimination
  - Jurisdictional inclusion of off-campus and online conduct
  - Detailed grievance procedures and timeline
  - Prohibition against retaliation
  - Centralized reporting and oversight
  - Remedial actions and preventative measures
- Proactive vs. Reactive responses
- Balancing Speech Rights/Constitutional obligations and Title VI obligations

Upcoming Higher Ed Webinars

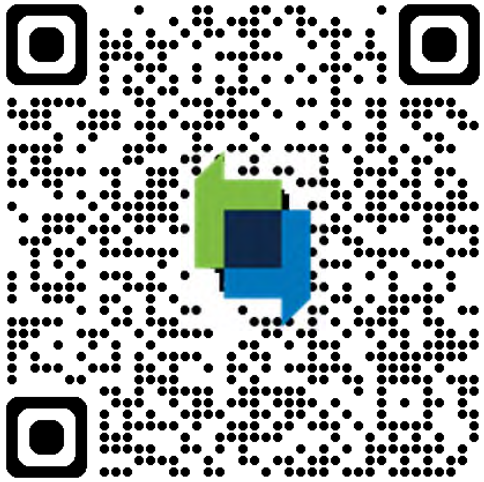
December 13, 2024: Launching an Esports Program (Higher Education Panel Discussion)

January 15, 2025: Protecting Student Privacy in the Age of AI

February 19, 2025: Creating Neuroinclusive Grievance Procedures

March 13: 2025: Athletics Hot Topics

April 10: 2025: AI and Student Conduct on Campus



Upcoming Title IX In Focus Webinars

February 27, 2025: Employee Sexual Misconduct Cases

March 27, 2025: The Romanticizing of Stalking Behavior

April 24, 2025: Sexual Misconduct Hearings

May 29: 2025: Title IX Litigation Update

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