South Carolina Bar
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Developing a Title VI Program that Meets the Moment

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I. Title VI Overview
II. Why are we talking about this now?
   a. Changing nature of enforcement actions
   b. Changing focus of enforcement actions
III. Current landscape at colleges and universities
IV. Advising a higher ed institution regarding Title VI compliance

Attachments included with these materials:

- January 19, 2021, Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964 provides information about OCR's enforcement of cases involving alleged antisemitism and includes the International Holocaust Remembrance Alliance (IHRA) definition of antisemitism, which federal agencies are directed to consider in enforcing Title VI.
- May 7, 2024, Dear Colleague Letter from ED Office of Civil Rights
- July 29, 2025, DOJ Memorandum Regarding Unlawful Discrimination
- Furman University's Nonharassment and Nondiscrimination policy
- Documents related to UVA investigation and agreement

Note: These written materials also contain numerous links to federal sub-regulatory guidance and other referenced documents.

I. Title VI Overview

> *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.*

Title VI of the Civil Rights Act of 1964 (Title VI) prohibits discrimination based on race, color or national origin in any program or activity that receives federal financial assistance, requires recipients to address hostile environments and protects against

retaliation. All public K-12 schools, some private K-12 schools, all public colleges and universities and virtually all private colleges and universities are recipients of federal funds (including federal student aid) and are subject to Title VI. While Title VI primarily protects students, in some cases it applies to staff and faculty, as well.

The federal government interprets the language "race, color or national origin" to prohibit discrimination based on shared ancestry. So, while Title VI does not explicitly address discrimination based on religion, it does protect Jewish, Muslim, Hindu, Sikh and other students from harassment and discrimination based on perceived ancestral or ethnic characteristics.

A determination of whether a hostile environment exists is based on the totality of the circumstances. In its January 17, 2025, letter to Harvard University, the Education Department's Office of Civil Rights (OCR) articulated its analysis of a hostile environment complaint:

> OCR interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct that, based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from a recipient's education program or activity. Harassing acts need not be targeted at the complainant to create a hostile environment. The acts may be directed at anyone, and the harassment may also be based on association with others of a different race (the harassment might be referencing the race of a sibling or parent, for example, that is different from the race of the person being harassed whose access to the school's program is limited or denied).
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> The harassment must in most cases consist of more than casual or isolated incidents based on national origin to establish a Title VI violation. Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances. OCR will examine the context, nature, scope, frequency, duration, and location of the harassment, as well as the identity, number, and relationships of the persons involved. If OCR determines that the harassment was sufficiently severe or pervasive that it would have limited the ability of a reasonable person, of the same age and national origin as the victim, under the same circumstances, from participating in or benefitting from some aspect of the recipient's education program or activity, OCR will find that a hostile environment existed.
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> A recipient may be found to have violated Title VI if it has effectively caused, encouraged, accepted, tolerated, or failed to correct a hostile environment based

on national origin harassment of which it has actual or constructive notice. A recipient is charged with constructive notice of a hostile environment if, upon reasonably diligent inquiry in the exercise of reasonable care, it should have known of the discrimination. In other words, if the recipient could have found out about the harassment had it made a proper inquiry, and if the recipient should have made such an inquiry, knowledge of the harassment will be imputed to the recipient.

II. Why are we talking about this now?

Since October of 2023, we have seen an increase both in sub-regulatory guidance documents issued by the federal government and in enforcement activity related to Title VI concerns. And under the current Administration, there have been significant changes to the methods the government has used in enforcing Title VI. Title VI has become one of the most significant areas of risk for colleges and universities. Some of the guidance documents the federal government has issued since October 2023 are listed and linked below (this list is not all-inclusive but provides information about current areas of focus of the federal government):[1]

May 7, 2024, Dear Colleague Letter from ED Office of Civil Rights (OCR) addressed shared ancestry and ethnic characteristic discrimination. While it was issued under the Biden Administration, the letter and the guidance in it are still being used under the Trump Administration. The DCL provided the following information about how OCR analyzes concerns about a hostile environment:

> As OCR has articulated many times, OCR could find a Title VI violation in its enforcement work if it determines that: (1) a hostile environment based on race, color, or national origin exists; (2) the school had actual or constructive notice of the hostile environment; and (3) the school failed to take prompt and effective steps reasonably calculated to (i) end the harassment, (ii) eliminate any hostile environment and its effects, and (iii) prevent the harassment from recurring.
>
> OCR interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct based on race, color, or national origin that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from a school's education program or activity.

[1] Note that the information in this document is current as of November 15, 2025, but includes references to Executive Orders and agency actions that are subject to ongoing legal challenges. Information should be checked to verify current status before being relied upon. *Just Security*, a digital law and policy journal at NYU School of Law, provides a litigation tracker of legal challenges to Trump Administration actions.

The DCL also discussed how schools can respond to potential Title VI concerns in a manner consistent with the First Amendment, and it provided guidance on analyzing allegations of different treatment based on actual or perceived race, color, or national origin (including shared ancestry). In addition, the DCL included several hypotheticals involving hostile environment and different treatment concerns.

January 21, 2025 Executive Order, *Ending Illegal Discrimination and Restoring Merit-Based Opportunity* stated that "institutions of higher education [and other entities] have adopted and actively use dangerous, demeaning, and immoral race- and sex-based preferences under the guise of so-called 'diversity, equity, and inclusion' (DEI) or 'diversity, equity, inclusion, and accessibility' (DEIA) that can violate the civil rights laws of this Nation." The order stated that "illegal" DEI policies violate federal civil rights laws and ordered all executive agencies and departments to enforce civil rights laws and combat "illegal" private-sector DEI policies, programs, and activities. The order did not define what constitutes illegal DEI, though subsequent FAQs and other documents have provided some guidance. The order also directed agencies to include in every federal contract and grant award language requiring the recipient to agree that compliance in all respects with all applicable Federal anti-discrimination laws is a material term (pursuant to the False Claims Act) and requiring the recipient to certify that it does not operate any programs promoting DEI that violate any applicable federal anti-discrimination laws.

January 29, 2025, Executive Order on Additional Measures to Combat Antisemitism specifically referenced antisemitism on college campuses.

January 30, 2025, Fact Sheet also specifically referenced antisemitism on college campuses.

February 5, 2025, *Eliminating Internal Discriminatory Practices* Memo from Attorney General Pam Bondi intended to align DOJ's enforcement activities with the January 21, 2025 Executive Order on DEI. The memo directed the Department to "thoroughly evaluate . . . grants or similar funding mechanisms, procurements, internal policies and guidance, and contracting arrangements" for DEI criteria, consistency with the Executive Order. It further directed the Department to issue new guidance that would "narrow the use of 'disparate impact' theories that effectively require use of race- or sex-based preferences" and "emphasize that statistical disparities alone do not automatically constitute unlawful discrimination."

February 3, 2025, Announcement of Task Force to Combat Antisemitism with the first priority being to root out antisemitic harassment in schools and on college campuses.

February 5, 2025, *Ending Illegal DEI and DEIA Discrimination and Preferences* Memo from Attorney General Pam Bondi also intended to align DOJ's enforcement activities with the January 21, 2025 Executive Order on DEI. This memo stated that the DOJ's Civil Rights Division would "investigate, eliminate, and penalize illegal DEI and DEIA preferences, mandates, policies, programs, and activities in the private sector and in educational institutions that receive federal funds." It further directed the Department's Civil Rights Division to provide recommendations to deter the use of DEI in the private sector, including by proposing criminal investigations and civil compliance investigations. The memo also noted that the DOJ's Civil Rights Division would work with the Department of Education to pursue actions intended to ensure educational institutions comply with the Supreme Court's decision in the *Students for Fair Admissions* (*SFFA*) case.

February 14, 2025 Dear Colleague Letter from ED Office of Civil Rights signaled ED's intent to extend the *SFFA* decision to virtually all aspects of an institution's educational operations, including "admissions, hiring, promotion, compensation, financial aid, scholarships, prizes, administrative support, discipline, housing, graduation ceremonies, and all other aspects of student, academic, and campus life." It further signaled ED's intent to use Title VI to restrict DEI in programs or activities. [*Note: Some enforcement outlined in this letter was temporarily enjoined and ultimately vacated by a federal district court, (now on appeal), but the DCL signals how the Administration interprets the *SFFA* decision and plans to apply it with regard to Title VI].

March 1, 2025, Frequently Asked Questions Document About Racial Preferences and Stereotypes Under Title VI from ED Office of Civil Rights articulates OCR's interpretation of what constitutes a Title VI violation and provides specific examples, including racially segregated trainings, affinity groups excluding non-members, and race-based scholarships. [*Note: Similar to the Feb. 14 DCL, the FAQ is subject to ongoing legal challenges and the ED has signaled that it will not enforce the document pending the outcome of the litigation, but the FAQ signals how the Administration interprets the *SFFA* decision and plans to apply it with regard to Title VI].

July 29, 2025, Memorandum from Attorney General with Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination set forth what the federal government considers best practices, including with regard to DEI programs and practices that may be deemed discriminatory.

August 7, 2025 Presidential Memorandum and Fact Sheet on "Ensuring Transparency in Higher Education Admissions" directed the Secretary of Education to expand reporting requirements on admissions data for colleges and universities. The Integrated

Postsecondary Education Data System (IPEDS) will include a survey for "four-year institutions that utilize selective college admissions" intended to expose any hidden use of race as a factor in admissions decisions.

a. Changing nature of enforcement actions

Historically, the U.S. Department of Education's (ED) Office for Civil Rights (OCR) has enforced Title VI as it applies to programs or activities at educational institutions, and the vast majority of investigations were initiated when a student or parent filed a complaint with the Office of Civil Rights. However, over the past year, the way Title VI has been enforced has changed. In the past year, enforcement actions initiated by the federal government (directed investigations) have become more common.

Additionally, while some federal agencies terminated federal funding in the initial years after the Civil Rights Act was passed, in recent years, the federal government has almost always resolved Title VI (as well as Title IX matters) without terminating funding. (*See, e.g.* May 27, 2025 Congressional Research Service Memorandum) OCR typically worked with the higher ed institution to try to reach an agreed resolution to the complaint. In the past year, however, the federal government has suspended and/or terminated funding to both public and private institutions based on alleged Title VI violations, sometimes prior to a full investigation or finding of a violation.

For example, on March 3, the federal government announced a comprehensive review of Columbia University's federal grants and contracts while it investigated alleged Title VI violations and advised that it was considering Stop Work orders on $51.4 million dollars in federal contracts and would review more than $5 billion in federal grant commitments to Columbia. Four days later, the federal government advised Columbia by letter that it was terminating approximately $400 million in federal grants and contracts "due to the school's continued inaction in the face of persistent harassment of Jewish students." It also advised Columbia that more cancellations would likely follow. The Officer of Civil Rights for the Education Department and for the Department of Health and Human Services subsequently issued a Notice of Violation letter to Columbia on May 22, 2025. Columbia reached a resolution with the federal government in July, agreeing to pay more than $220 million and agreeing to changes in several areas, including admissions, campus protest policies, and it curriculum, to resolve multiple federal investigations. While the Columbia example may be an extreme example, it illustrates the way in which Title VI has become an area of risk that all educational institutions must prioritize.

The government has also begun to include language in federal grants and contracts making the recipient's agreement that it is not engaged in any illegal DEI and that it is in

compliance with federal discrimination laws a material term. With this change, the government has signaled its intent to use the False Claims Act as a Title VI enforcement tool against colleges and universities. The False Claims Act can give rise to treble damages. Moreover, anyone (including a disgruntled former employee, a student or someone with no connection to the university) can bring a *qui tam* action. In May of this year, the Department of Justice informed Harvard University that it was investigating its admissions policies for compliance with Title VI and the *Students for Fair Admissions* decision pursuant to the False Claims Act after Harvard rejected the government's April letter with policy changes that it demands in order to continue providing Harvard federal money.

b. Changing focus of enforcement actions and areas of risk

Because Title VI enforcement priorities are driven by the policies and goals of the current federal government, enforcement priorities may change from one Presidential Administration to the next. Based on guidance documents and enforcement actions initiated this year, the two primary Title VI priorities for the current Administration are 1) concerns involving allegations of antisemitism, and 2) DEI-related issues. Below are a few examples of ways in which the federal government has communicated these priorities. However, they are just a sampling of actions taken regarding these two priorities and are not intended to be all-inclusive.

Antisemitism concerns: On March 7, the Office of Civil Rights directed its staff to make resolving complaints involving allegations of antisemitism a priority. That same day, the DOJ, Department of Health and Human Services, ED, and the General Services Administration, as members of the Joint Task Force to Combat Antisemitism, announced the immediate cancelation in $400 million of federal grants and contracts to Columbia University due to the way it had handled concerns involving antisemitism. On March 10, the Office of Civil Rights sent letters to 60 institutions, placing them on notice of investigations related to alleged antisemitic harassment and discrimination. While the majority of those investigations were initiated in response to complaints that had been filed with the Department of Education, five of those investigations were directed investigations, initiated by the Department of Education without any complaint having been filed.[2] The Department of Education's Office of Civil Rights maintains a list of current enforcement actions involving shared ancestry or ethnic characteristics allegations and a database of documents related to those enforcement actions.

[2] On October 31, 2024, the Committee on Education & the Workforce, U.S. House of Representatives, issued a 325-page report detailing concerns about antisemitism on college campuses. The report discussed Title VI and identified concerns about specific universities, including Columbia, Harvard, Northwestern and UCLA. Some of the universities identified in the report were later the subjects of directed investigations.

DEI concerns: In mid-February and the beginning of March, the Education Department issued the DCL and FAQ document described above. Then, on March 14, the Department of Education announced investigations into 52 higher ed institutions for either "racial preferences and stereotypes" in graduate programs (45 of these institutions had partnered with the Ph.D. Project) or for "impermissible race-based scholarships" or for "administering a program that segregates students on the basis of race." In April, the DOJ requested extensive documentation from the University of Virginia regarding its admissions practices and scholarships. The DOJ subsequently issued the July 29, 2025, Memorandum with guidance about DEI-related practices.

III. Current landscape at colleges and universities

While having a designated Title VI Coordinator is not (yet) required, it is advisable, and it is becoming increasingly common, for colleges and universities to designate an individual for this position. The Association of Title IX Administrators (ATIXA), which provides Title VI-focused services, recently conducted a "State of the Field" survey. Approximately 975 institutions participated, and 29% of higher ed institutions and 53% of K-12 schools and districts replied that they had a designated Title VI Coordinator. More than 60% of the responding schools said they had a single coordinator for both Title IX and Title VI, and 32% responded that they had assigned Title VI compliance to the Title IX Coordinator in the previous two years.

In many ways, the past year in Title VI compliance has been reminiscent of the 2011-2013 timeframe in Title IX compliance. Institutions have reviewed nondiscrimination policies and amended them or drafted new civil rights policies to reference Title VI more specifically and to comply with best practices, though those best practices have been developing. Numerous Title VI trainings and consulting services have appeared, and law firms with an education law practice have offered webinars and authored legal updates. Title VI does not have the same regulatory structure or proscriptive requirements for grievance processes that Title IX has, though the Department of Education has signaled its intention to issue new Title VI regulations that would streamline enforcement actions and make it easier for the government to terminate federal funding for recipients found in violation of Title VI (and Title IX).

IV. Advising a higher ed institution regarding Title VI compliance

As with Title IX, the variability in sizes of institutions and resources makes it difficult to have a "one size fits all" approach to Title VI compliance. Below are some considerations. The way in which Title VI compliance is implemented will depend on the size, funding and other characteristics of the particular institution. Regardless of the size and type of institution,

however, Title VI compliance is a significant area of risk, and a comprehensive and thoughtful approach to compliance is needed to help minimize that risk.

Some Considerations:

- *Notice of Nondiscrimination*
    - Statement that the institution does not discriminate on the basis of race, color, or national origin, including shared ancestry, and that the institution prohibits discrimination in any program or activity.
    - Include Title VI Coordinator, policy and reporting information and information on how to file a complaint with OCR.
- *Designated Title VI Coordinator*
    - Consider designating one person who has the ultimate responsibility of ensuring the institution complies with Title VI. Doing so gives the community a designated person to whom they can report concerns, and it designates an individual who has ultimate responsibility of ensuring the institution's response to allegations of discrimination is documented.
    - Having all reports involving complaints of discrimination based on actual or perceived race, color or national origin flow through one person helps the institution identify and address patterns and climate issues.
    - This person also leads and monitors the institution's efforts to ensure equal access to programs and activities.
    - The Title VI Coordinator's information should be readily accessible (model after Title IX Coordinator)---on the website, in handbooks, catalogues, information provided to new applicants, students and employees.
    - Ensure this person has adequate training and authority to carry out the responsibilities of the position. The reporting structure for the Title VI Coordinator should support that. It is good practice for this person to report to the president or to a cabinet-level position. It is generally not a good idea for the Title VI Coordinator to report to the general counsel.
- *Additional Title VI Team Roles*
    - Additional Title VI roles will vary based on size and resources of institution. At smaller institutions, these roles will likely be additional responsibilities (as will the Title VI Coordinator role). Larger institutions may consider whether Deputy Title VI Coordinators would be useful. All institutions will need to consider investigators, decisionmakers and appeal officers. Some schools rely on external attorneys or consultants to fill these roles.

- Consider who will facilitate informal resolutions and educational conversations. This role may be a good fit for someone in Student Life/Student Affairs.

- *Training*
  - Ensure the Title VI Coordinator and anyone who will be involved in evaluating or adjudicating Title VI concerns receives appropriate training.
  - Required training for individuals involved in handling Title VI concerns is a common feature of OCR resolution agreements.
- *Centralized reporting structure*
  - In its 2025 notice finding Harvard in violation of Title VI, the Department of Health and Human Services emphasized the importance of a clear process for reporting concerns: "To effectively remediate discrimination on campus, a school must have a recognized, clear, and transparent process for students to report discrimination and for the university to effectively address it."
  - One way to make reporting simple, clear and transparent is to have one centralized place to report discrimination and harassment concerns, regardless of the identities of the parties (e.g. faculty, staff, students, visitors). While having a centralized reporting structure is not mandated, some finding letters and resolution agreement seem to imply that OCR prefers a centralized reporting process.
  - Larger institutions often have a civil rights office or equal opportunity office (e.g. University of South Carolina's Office of Civil Rights & Title IX). However, small institutions can establish a centralized reporting structure even without a dedicated office. (e.g. Furman University's Nondiscrimination page).
- *Policy*
  - Consider a comprehensive civil rights policy that specifically references Title VI. Some institutions have one civil rights policy that includes the Title IX policy, while some institutions choose to have a separate Title IX policy and process. There are benefits to both approaches.
  - Define terms, clarify jurisdiction (include information about referrals to other processes when appropriate), identify supportive measures, establish process for resolving complaints.
  - Prohibition of discrimination, hostile environment harassment, retaliation

- Audit existing policies, update them as needed, and coordinate Title VI/Civil Rights policy to align with existing policies
- Consider whether to reference a definition of antisemitism (either in the policy or elsewhere, such as on an informational webpage—see Northwestern University's FAQ page as an example) and if so, what definition (Some to consider: International Holocaust Remembrance Alliance (IHRA) working definition, Nexus Document, or the Jerusalem Declaration on Antisemitism (JDA). Some institutions use their own definition, and some choose not to define antisemitism (or other specific types of discrimination). Be aware that this issue can be a highly controversial one, particularly for faculty. The IHRA definition is favored by the federal government and has been used by federal agencies in Title VI matters by both the prior and current Presidential Administrations. However, it has been criticized extensively as undermining free speech and academic freedom, including by organizations such as the ACLU, the National Lawyers Guild, the Center for Constitutional Rights, and the AAUP.
- The January 2025 The Resolution Agreement between OCR and Harvard University includes the following list of elements that OCR required Harvard to include in its policy as part of its resolution. While inclusion of these items in the Resolution Agreement does not mean they are required for Title VI compliance, the inclusion of these items is instructive for institutions trying to anticipate what the government might expect. (The Resolution Agreement also included a separate list of elements to be included in the grievance process):

    1. A statement that the University will reasonably, timely, and effectively respond to all allegations of discrimination, including harassment, on the basis of national origin, about which it has notice, within the University's programs and activities.

    2. A description of the forms of national origin harassment that can manifest in a discriminatory hostile environment at the University including examples.

    3. A statement that the University will encourage members of its community to immediately report incidents of harassment.

    4. A commitment to take appropriate action to address and ameliorate discrimination and harassment based on national origin,

regardless of how the University receives actual or constructive notice of the alleged underlying incidents, including through its anonymous reporting hotline(s).

5. An explanation of how to report alleged discrimination and/or harassment and/or file a complaint including a cross reference to the appropriate complaint Procedures.

6. An assurance that all reports or complaints, including those filed anonymously and/or made against a third party not covered by the Policies, will be evaluated by the University to make an initial determination of whether and/or how it will proceed (e.g., investigation, referral to a different entity within the University, dismissal).

7. An explanation of how the University will address alleged conduct that could create a hostile environment if the report of such conduct is made anonymously and/or in the absence of a formal complaint.

8. An explanation of how the University will determine whether an informal resolution is appropriate.

9. A statement that retaliation is prohibited against persons who participate in proceedings related to an alleged violation of the Policies.

10. An assurance that if a violation is found, appropriate remedial action will be taken designed to eliminate the discriminatory conduct, to prevent its recurrence, and to address its effects on affected individuals.

11. A link to forms for submitting a harassment report or complaint to the appropriate office.

- *Institutional awareness and education*
    - Institutions should ensure everyone in the campus community knows where to report Title VI concerns. Consider modeling awareness after Title IX efforts: Share information at orientation, provide written materials to students, use poster campaigns and tabling events, etc.
- *Mandated reporting*

- While there is no federal requirement to make employees mandated reporters of Title VI concerns, some institutions are choosing to do so, following a Title IX model of reporting. His approach helps colleges and universities identify potential climate issues and intervene earlier.

- *Documentation guidelines*
  - Have clear documentation guidelines. At a minimum, institutions should document:
    1. All reports received (when and how the report was received, who made the report, all parties and witnesses, the allegations reported, the nature of the concerns and what protected class(es) is/are involved, the location of the concern)
    2. Any safety concerns/threat assessments
    3. Supportive measures offered and provided and other interim actions taken
    4. All actions taken in response to the concern
    5. Hostile environment and policy jurisdictional assessment
    6. Investigation materials and all steps taken during investigation
    7. Outcome of any investigation/formal process (including outcome letters and any sanctions imposed) or of an informal resolution process
    8. Remedies provided (Note: These remedies may be different than sanctions imposed)
    9. Appeal documentation
    10. Training, awareness and prevention efforts
    11. Climate survey results, actions taken in response (Note: climate surveys are a common feature of OCR resolution agreements)
    12. Data on patterns and on reports that do not rise to the level of a formal investigation or policy violation
- *Free speech and academic freedom concerns*
  - In considering policy language and other actions, consideration must be given to concerns about free speech and academic freedom.[3] Involving faculty and other campus stakeholders in the process is important.

[3] The American Association of University Professors and the Middle East Studies Association recently published a report, *Discriminating Against Dissent: The Weaponization of Civil Rights Law to Suppress Campus Speech on Palestine,* criticizing recent Title VI enforcement actions and expressing concern about

- Identify other campus policies, such as protest policies and policies on academic freedom, that may intersect with a civil rights policy and ensure they are not in conflict.

- *Addressing concerns beyond discipline*
  - Institutions should not focus solely on discipline to the detriment of other types of remedies. Ensure that any response to a report considers potentially impacted parties beyond the individual who reported the concern and also considers steps such as a campus communication, education and other non-disciplinary interventions.
  - The Department of Education's Office of Civil Rights has made it clear that, even when an action is protected (e.g. speech protected by the First Amendment), if the action also creates a hostile environment under Title VI, a college or university still must respond and provide remedies. In its "Race, Color and National Origin Discrimination FAQ" page, the Department of Education's Office of Civil Rights advises:

    OCR has consistently reaffirmed that the Federal civil rights laws it enforces protect students from prohibited discrimination, and are not intended to restrict expressive activities or speech protected under the U.S. Constitution's First Amendment.

    The fact that discriminatory harassment involves speech, however, does not relieve the school of its obligation to respond if the speech contributes to a hostile environment. Schools can protect students from such harassment without running afoul of students' and staff First Amendment rights. For instance, in a situation where the First Amendment prohibits a public university from restricting the right of students to express persistent and pervasive derogatory opinions about a particular ethnic group, the university can instead meet its obligation by, among other steps, communicating a rejection of stereotypical, derogatory opinions and ensuring that competing views are heard. Similarly, educational institutions can establish a campus culture that is welcoming and respectful of the diverse linguistic, cultural, racial, and ethnic backgrounds of all students and institute campus climate checks to assess the effectiveness of the school's efforts to ensure that it is free from harassment. Schools can also encourage students on all sides of an issue to express disagreement over ideas or beliefs in a respectful manner. Schools should be alert to take more targeted responsive action

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the impact on academic freedom and speech. While the report focuses largely on government enforcement actions, it highlights some of the complexities that can arise in Title VI cases.

when speech crosses over into direct threats or actionable speech or conduct.
    - If a hostile environment exists, a recipient of federal financial assistance must 1) end the harassment; 2) eliminate any hostile environment and its effects; and 3) prevent the harassment from recurring. (May 7, 2024, DCL) Remedies must be implemented with these requirements in mind.
- *Involvement of multiple departments*
    - Title VI compliance cannot be done effectively by a single person or single department. To be successful, institutions need to have a collaborative and multidisciplinary approach that may involve institutional leadership, campus security/police, Student Life, Human Resources, Academic Affairs, Residence Life, Admissions/Enrollment Services, General Counsel's office and others.
- *Reporting out to community*
    - Some institutions provide a dashboard or annual report with information about how discrimination and harassment concerns are addressed. This practice is not common, but it may be helpful if there are issues of trust within the campus community. A few examples of institutions that do share an annual report: University of North Carolina, Chapel Hill; Duke University; University of California Irvine. Some universities that have been targets of federal investigations have shared Title VI report and compliance information in other ways, such as in a "progress report."
- *Audit student organization policies, practices and communications*
    - Ensure all student organizations and institution events are open to members of the community without regard to any protected category. Communications about any student organization or events must be clear about the fact that they are open to all and not exclusionary on the basis of race, color or national origin.
- *Audit facilities and other resources*
    - Access to facilities and other resources must not be restricted based on protected categories. The DOJ's July 29 Memorandum states that, even if access is technically open to everyone, a lounge that is identified in a way that implies it is restricted based on one of these categories ("BIPOC-only study lounge") "creates a perception of segregation and may foster a hostile environment."
- *Admissions policies and data*
    - Regardless of whether an institution will need to respond to the IPEDS survey about admissions data, a review of admissions policies and

practices to ensure that race and other protected categories are not impermissibly used in admissions decisions is warranted.

- *Scholarships*
    - Similarly, review scholarship criteria and decision-making to ensure that race and other protected categories are not impermissibly used in awarding scholarships.
- *Limited English Proficiency*
    - Title VI's requirement that students with limited English proficiency have meaningful access to educational programs applies to colleges and universities, as well as K-12 schools.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

January 19, 2021

Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964

On December 11, 2019, President Donald J. Trump signed Executive Order 13899 on Combating Anti-Semitism.[1] The Executive Order reaffirms the long-standing principle that anti-Semitism and discrimination against Jews based on an individual's race, color, or national origin may violate Title VI of the Civil Rights Act of 1964 (Title VI), 42 U.S.C. § 2000d *et seq*.; directs the federal government to enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI; and requires federal agencies to consider the International Holocaust Remembrance Alliance's (IHRA) working definition of anti-Semitism and the IHRA's contemporary examples of anti-Semitism in enforcing Title VI.

This Questions and Answers (Q&A) document provides information about the Executive Order, Title VI, and enforcement of Title VI by the U.S. Department of Education's Office for Civil Rights (OCR) in cases involving anti-Semitism. It does not form an independent basis for action in matters determining a person's legal rights and obligations. Other than statutory and regulatory requirements included in the document, the contents of this document do not have the force and effect of law, and are not meant to bind the public. This document is intended only to provide clarity to the public regarding existing requirements under the law.

Question 1: What, in brief, does the Executive Order say?

Answer: The Executive Order strongly reaffirms the statutory anti-discrimination protections of Title VI, which prohibit race, color, and national origin discrimination in programs and activities receiving federal financial assistance. The Executive Order emphasizes that the executive branch will "enforce Title VI against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against all other forms of discrimination prohibited by Title VI." It states "Title VI does not cover discrimination based on religion," but "individuals who face discrimination on the basis of race, color, or national origin do not lose protection under Title VI for also being a member of a group that shares common religious practices." Accordingly, "[d]iscrimination against Jews may give rise to a Title VI violation when the discrimination is based on an individual's race, color, or national origin."

Question 2: Does the Executive Order define Jews as a race or nationality?

Answer: No. The Executive Order reaffirms that Title VI protects Jews from anti-Semitic harassment or other discrimination if it is based on their race, color, or national origin, which can include discrimination based on their shared ancestry or ethnic characteristics.

[1] Executive Order 13899 (Combating Anti-Semitism), 84 Fed. Reg. 68779 (Dec. 11, 2019), https://www.federalregister.gov/documents/2019/12/16/2019-27217/combating-anti-semitism.

Question 3: Does the Executive Order define anti-Semitism?

Answer: No. However, the Executive Order provides that federal agencies "shall consider" the non-legally binding working definition of anti-Semitism adopted on May 26, 2016, by the IHRA that: ''Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities'' in enforcing Title VI, and the IHRA's accompanying examples of anti-Semitism "to the extent that" any such "examples might be useful as evidence of discriminatory intent." The IHRA definition and examples are set out in the Appendix to this Questions and Answers document for reference.

Question 4: What does the Executive Order do that is new?

Answer: The Executive Order is the first presidential directive to all federal agencies, affirming that anti-Semitic discrimination may violate Title VI, and requiring all federal agencies to consider the IHRA definition in enforcing Title VI.

Question 5: Does the Executive Order change how OCR will handle complaints of discrimination involving anti-Semitism?

Answer: No. OCR has long recognized that anti-Semitism may violate Title VI, including in 2004 and 2010 guidance documents, which explained that Title VI reaches many instances of discrimination based on a student's actual or perceived shared ancestry or ethnic characteristics.[2] In enforcing Title VI, OCR has investigated complaints of discrimination alleging anti-Semitism in schools and colleges, and has recently considered the IHRA definition in individual investigations, as appropriate. This enforcement approach is consistent with the Executive Order. Under the Executive Order, OCR will continue to investigate anti-Semitism consistent with OCR's jurisdictional authority, case processing procedures, the applicable Title VI legal framework, and constitutional principles, just as OCR does in all its investigations.

Question 6: Does the Executive Order mean that any anti-Semitic incident violates Title VI?

Answer: No. An anti-Semitic incident does not violate Title VI merely because it is anti-Semitic, or because it involves an example of anti-Semitism contemplated by the IHRA. Rather, the Executive Order states that a "detailed analysis" is required to determine if a particular act constitutes discrimination prohibited by Title VI, as is true "with all other Title VI complaints." Nor does the Executive Order "alter the evidentiary requirements" for agencies for determining whether a recipient's conduct amounts to actionable discrimination. Thus, OCR, as required under the Executive Order, will consider the IHRA definition in handling complaints of anti-Semitism, and will continue to apply the Title VI statute, regulations, and established standards.

Question 7: Does the Executive Order restrict free speech?

[2] *See* OCR Dear Colleague Letter: Title VI and Title IX Religious Discrimination in Schools and Colleges (Sept. 13, 2004), www.ed.gov/ocr/religious-rights2004.html.

Answer: No. The Executive Order instructs federal agencies that they "shall not diminish or infringe upon any right protected under Federal law or under the First Amendment." Additionally, the Executive Order requires consideration of the IHRA definition and accompanying examples only where useful as "evidence of discriminatory intent." OCR will enforce all civil rights laws under its jurisdiction without restricting speech or expression protected by the U.S. Constitution, and has made clear that schools working to prevent discrimination must respect the free speech rights of students, faculty, and others.[3]

Question 8: Why was the Executive Order issued?

Answer: The Executive Order was issued to expand, throughout the executive branch, the Department's longstanding policy that Title VI should be enforced against prohibited forms of discrimination rooted in anti-Semitism as vigorously as against other forms of discrimination. The Executive Order recognizes that "anti-Semitic incidents have increased since 2013, and students in particular are facing increased anti-Semitic harassment in schools and on university and college campuses."

Question 9: Does the Executive Order apply to anti-Semitic responses to the coronavirus?

Answer: Yes. In a March 4, 2020 letter and a March 16, 2020 fact sheet, OCR emphasized that schools addressing the risks of COVID-19 (coronavirus) should take actions based on the Centers for Disease Control and Prevention (CDC) guidance regarding health risks, and not based on racial or ethnic stereotypes or assumptions. Those documents were prompted by anti-Asian incidents, but more recent reports of stereotyping and harassment of Jewish students are also of great concern to OCR. Actions that target and scapegoat particular individuals or groups based on ethnic or ancestral characteristics for "spreading disease" are intolerable, and schools should take special care to ensure that all students have a learning environment free from bias or discrimination.

Question 10: Are students who are members of groups that share ethnic or ancestral characteristics, regardless of religion, protected under Title VI?

Answer: Yes. Although none of the laws enforced by OCR expressly addresses religious discrimination, Title VI protects students from discrimination on the basis of real or perceived shared ethnic or ancestral characteristics, regardless of religion. OCR's webpage at www.ed.gov/ocr/religion.html provides further details about Title VI's protections against discrimination involving both shared ancestry or ethnic characteristics and religion. OCR has identified Title VI concerns in cases involving such students of various religions, including Jewish students subjected to anti-Semitic threats, slurs, and assaults; Muslim students targeted for wearing a hijab; and Middle Eastern and Sikh students taunted and called terrorists. Other federal agencies enforce laws that expressly prohibit religious discrimination by schools, colleges, and universities. For example, complaints of religious discrimination in employment can be brought to the Equal Employment Opportunity Commission

[3] OCR's commitment is embodied in a 2003 Dear Colleague Letter, www.ed.gov/ocr/firstamend.html, and in its August 26, 2020 Case Processing Manual, www.ed.gov/ocr/docs/ocrcpm.pdf, both of which emphasize that all OCR actions must be consistent with and informed by First Amendment principles.

(EEOC), in housing (including dormitories) to the U.S. Department of Housing and Urban Development (HUD), and by public schools and colleges to the U.S. Department of Justice (DOJ).

Question 11: How can someone get more information from OCR or file a complaint with OCR?

Answer: For more information or with questions, email OCR's OPEN center at OPEN@ed.gov, call OCR's hotline at 1-800-421-3481, or visit OCR's website at www.ed.gov/ocr. If you believe that a school or college has discriminated against someone based on race, color, national origin, sex, disability, or age, you can file a complaint with OCR within 180 days of the alleged discrimination. More information and OCR's complaint form are available at www.ed.gov/ocr/complaintintro.html.

Appendix: International Holocaust Remembrance Alliance
Working Definition of Anti-Semitism and Contemporary Examples of Anti-Semitism

Antisemitism is a certain perception of Jews, which may be expressed as hatred toward Jews. Rhetorical and physical manifestations of antisemitism are directed toward Jewish or non-Jewish individuals and/or their property, toward Jewish community institutions and religious facilities.

To guide IHRA in its work, the following examples may serve as illustrations: Manifestations might include the targeting of the state of Israel, conceived as a Jewish collectivity. However, criticism of Israel similar to that leveled against any other country cannot be regarded as antisemitic. Antisemitism frequently charges Jews with conspiring to harm humanity, and it is often used to blame Jews for "why things go wrong." It is expressed in speech, writing, visual forms and action, and employs sinister stereotypes and negative character traits. Contemporary examples of antisemitism in public life, the media, schools, the workplace, and in the religious sphere could, taking into account the overall context, include, but are not limited to:

- Calling for, aiding, or justifying the killing or harming of Jews in the name of a radical ideology or an extremist view of religion.
- Making mendacious, dehumanizing, demonizing, or stereotypical allegations about Jews as such or the power of Jews as collective — such as, especially but not exclusively, the myth about a world Jewish conspiracy or of Jews controlling the media, economy, government or other societal institutions.
- Accusing Jews as a people of being responsible for real or imagined wrongdoing committed by a single Jewish person or group, or even for acts committed by non-Jews.
- Denying the fact, scope, mechanisms (e.g., gas chambers) or intentionality of the genocide of the Jewish people at the hands of National Socialist Germany and its supporters and accomplices during World War II (the Holocaust).
- Accusing the Jews as a people, or Israel as a state, of inventing or exaggerating the Holocaust.
- Accusing Jewish citizens of being more loyal to Israel, or to the alleged priorities of Jews worldwide, than to the interests of their own nations.
- Denying the Jewish people their right to self-determination, e.g., by claiming that the existence of a State of Israel is a racist endeavor.
- Applying double standards by requiring of it a behavior not expected or demanded of any other democratic nation.
- Using the symbols and images associated with classic antisemitism (e.g., claims of Jews killing Jesus or blood libel) to characterize Israel or Israelis.
- Drawing comparisons of contemporary Israeli policy to that of the Nazis.
- Holding Jews collectively responsible for actions of the state of Israel.

Dear Colleague Letter: Protecting Students from Discrimination, such as Harassment, Based on Race, Color, or National Origin, Including Shared Ancestry or Ethnic Characteristics

Notice of Language Assistance

Notice of Language Assistance: If you have difficulty understanding English, you may, free of charge, request language assistance services for this Department information by calling 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), or email us at: Ed.Language.Assistance@ed.gov.

Aviso a personas con dominio limitado del idioma inglés: Si usted tiene alguna dificultad en entender el idioma inglés, puede, sin costo alguno, solicitar asistencia lingüística con respecto a esta información llamando al 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o envíe un mensaje de correo electrónico a: Ed.Language.Assistance@ed.gov.

致英语能力有限人士：如果您不懂英语，**或者使用英**语有困难，**您可以要求**获得向公众提供的免费语言协助服务，**帮助您了解教育部**资讯。**如您需要有关口**译或笔译的详细资讯，请致电1-800-USA-LEARN（1-800-872-5327）（**听**语障碍人士专线：1-800-877-8339）**或致**电邮：Ed.Language.Assistance@ed.gov。

給英語能力有限人士的通知: 如果您不懂英語，或者使用英语有困难，您可以要求獲得向大眾提供的語言協助服務，幫助您理解教育部資訊。這些語言協助服務均可免費提供。如果您需要有關口譯或筆譯服務的詳細資訊，請致電 1-800-USA-LEARN (1-800-872-5327) (聽語障人士專線：1-800-877-8339),或電郵: Ed.Language.Assistance@ed.gov

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Paunawa sa mga Taong Limitado ang Kaalaman sa English: Kung nahihirapan kayong makaintindi ng English, maaari kayong humingi ng tulong ukol dito sa inpormasyon ng Kagawaran mula sa

nagbibigay ng serbisyo na pagtulong kaugnay ng wika. Ang serbisyo na pagtulong kaugnay ng wika ay libre. Kung kailangan ninyo ng dagdag na impormasyon tungkol sa mga serbisyo kaugnay ng pagpapaliwanag o pagsasalin, mangyari lamang tumawag sa 1-800-USA-LEARN (1-800-872-5327) (TTY: 1-800-877-8339), o mag-email sa: Ed.Language.Assistance@ed.gov.

Уведомление для лиц с ограниченным знанием английского языка: Если вы испытываете трудности в понимании английского языка, вы можете попросить, чтобы вам предоставили перевод информации, которую Министерство Образования доводит до всеобщего сведения. Этот перевод предоставляется бесплатно. Если вы хотите получить более подробную информацию об услугах устного и письменного перевода, звоните по телефону 1-800-USA-LEARN (1-800-872-5327) (служба для слабослышащих: 1-800-877-8339), или отправьте сообщение по адресу: Ed.Language.Assistance@ed.gov.

UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

May 7, 2024

Dear Colleague:

I write to share information about federal civil rights obligations of schools and other recipients of federal financial assistance from the U.S. Department of Education (Department) to ensure nondiscrimination based on race, color, or national origin, including shared ancestry or ethnic characteristics, under Title VI of the Civil Rights Act of 1964 and its implementing regulations (Title VI). These protections extend to students and school community members who are or are perceived because of their shared ancestry or ethnic characteristics to be Jewish, Israeli, Muslim, Arab, Sikh, South Asian, Hindu, Palestinian, or any other faith or ancestry. This guidance responds to recent increases in complaints filed with the Department's Office for Civil Rights (OCR) alleging discrimination on these bases in schools serving students in preschool through grade 12 and colleges and universities,[1] and public reports of such discrimination. To be clear, Title VI's protections against discrimination based on race, color, and national origin encompass antisemitism and other forms of discrimination when based on shared ancestry or ethnic characteristics. OCR vigorously enforces these protections.

This guidance includes examples to help schools carry out Title VI's requirements.[2] These examples are illustrative and do not dictate the outcome of any particular matter OCR may investigate; rather, in each case, OCR engages in an individualized analysis of the particular facts at issue.

The contents of this guidance do not have the force and effect of law and do not bind the public or create new legal standards. This document is designed to provide clarity to the public regarding existing legal requirements under Title VI. The Department has determined that this

[1] Throughout this letter, "school" is used generally to refer to preschool, elementary, secondary, and postsecondary educational institutions that are recipients of federal financial assistance from the Department.

[2] The examples presented are not exhaustive, and the facts and circumstances of each case are unique. OCR preserves the discretion to investigate and assess the facts of each case individually and apply the law to the facts. OCR also preserves the discretion to determine appropriate remedies based on the specific facts and circumstances of each case.

document provides significant guidance under the Office of Management and Budget's Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432 (Jan. 25, 2007).[3]

I. Legal Framework for Evaluating Alleged Discrimination, Including Harassment, under Title VI

Title VI prohibits discrimination on the basis of race, color, or national origin in programs or activities that receive federal financial assistance.[4] All educational institutions, including pre-K, elementary, and secondary public schools and school districts, and public and private colleges, universities, and other postsecondary institutions that receive federal financial assistance, are required to comply with Title VI.

Title VI's protection from race, color, and national origin discrimination extends to students who experience discrimination, including harassment, based on their actual or perceived: (i) shared ancestry or ethnic characteristics; or (ii) citizenship or residency in a country with a dominant religion or distinct religious identity.[5] Title VI does not protect students from discrimination based solely on religion. OCR refers complaints of discrimination based exclusively on religion to the U.S. Department of Justice, which has jurisdiction to respond to certain complaints of religious discrimination in public schools.[6]

This guidance identifies two legal frameworks that courts and OCR use to determine if schools have engaged in discrimination that violates Title VI—hostile environment and different treatment. It also starts with a section on First Amendment considerations.

A. First Amendment Considerations

Nothing in Title VI or regulations implementing it requires or authorizes a school to restrict any rights otherwise protected by the First Amendment to the U.S. Constitution. OCR enforces the laws within our jurisdiction consistent with the First Amendment.[7]

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[3] If you are interested in commenting on this guidance, please email OCR your comment to OCR@ed.gov or write to the following address: Office for Civil Rights, U.S. Department of Education, 400 Maryland Avenue, S.W., Washington, D.C. 20202. For further information about the Department's guidance processes, please visit the Department's webpage on significant guidance.

[4] Title VI provides that: "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." 42 U.S.C. § 2000d, *et seq*.; 34 C.F.R. § 100, *et seq*.

[5] *See T.E. v. Pine Bush Cent. Sch. Dist.*, 58 F. Supp. 3d 332, 353-55 (S.D.N.Y. 2014) (holding that discrimination based on shared ancestry and ethnic characteristics is prohibited by Title VI); *see also* 42 U.S.C. § 2000d; 34 C.F.R. § 100.3(b)(1)(iv) and (vi); OCR, Dear Colleague Letter: Harassment and Bullying, 4-6 (Oct. 2010).

[6] *See* Title IV of the Civil Rights Act of 1964, 42 U.S.C. § 2000c, *et seq*.

[7] OCR, Dear Colleague Letter: First Amendment (July 2003).

The fact that harassment may involve conduct that includes speech in a public setting or speech that is also motivated by political or religious beliefs, however, does not relieve a school of its obligation to respond under Title VI as described below, if the harassment creates a hostile environment in school for a student or students.

Schools have a number of tools for responding to a hostile environment—including tools that do not restrict any rights protected by the First Amendment. To meet its obligation, a university can, among other steps, communicate its opposition to stereotypical, derogatory opinions; provide counseling and support for students affected by harassment; or take steps to establish a welcoming and respectful school campus, which could include making clear that the school values, and is determined to fully include in the campus community, students of all races, colors, and national origins.[8] OCR does not interpret Title VI to require any recipient to abridge any rights protected under the First Amendment. For instance, if students at a public university engage in offensive speech about members of a particular ethnic group and that speech contributes to a hostile environment within an education program about which the university knows or should know, the university has a legal obligation to address that hostile environment for students in school.[9] The university may, however, be constrained or limited in how it responds if speech is involved.

The age of the students involved and the location or forum may affect how a school can respond in a manner consistent with the First Amendment. Students of all ages have free speech rights, but courts have afforded greater flexibility to elementary and secondary school administrators as they work to ensure an appropriate learning environment considering a child's age and maturity. Public elementary and secondary schools have more leeway to regulate student speech, for example, if it could substantially disrupt or interfere with the work of the school or other students' rights,[10] is lewd or indecent,[11] or is school-sponsored speech.[12]

B. Hostile Environment Analysis

The existence of a hostile environment based on race, color, or national origin that is created, encouraged, accepted, tolerated, or left uncorrected by a school can constitute discrimination in

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[8] *See*, *e.g.*, *Feminist Majority Foundation v. Hurley*, 911 F.3d 674, 688 (4th Cir. 2018) (to address hostile environment on social media, school administrators "could have more clearly communicated to the student body that the University would not tolerate sexually harassing behavior either in person or online. The University could have conducted mandatory assemblies to explain and discourage cyber bullying and sex discrimination, and it could have provided anti-sexual harassment training to the entire student body and faculty."). A school cannot meet its obligation to address harassment under federal civil rights laws simply by referring matters to the police.

[9] *See id. at* 688-89 (holding that the university could not ignore "the sexual harassment that pervaded and disrupted its campus solely because the offending conduct took place through cyberspace.").

[10] *See Tinker v. Des Moines Indep. Community Sch. Dist.*, 393 U.S. 503, 506 (1969).

[11] *See Bethel Sch. Dist. No. 403 v. Fraser*, 478 U.S. 675, 683 (1986).

[12] *See Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 271 (1988).

violation of Title VI.[13] As OCR has articulated many times, OCR could find a Title VI violation in its enforcement work if it determines that: (1) a hostile environment based on race, color, or national origin exists; (2) the school had actual or constructive notice of the hostile environment; and (3) the school failed to take prompt and effective steps reasonably calculated to (i) end the harassment, (ii) eliminate any hostile environment and its effects, and (iii) prevent the harassment from recurring.[14]

OCR interprets Title VI to mean that the following type of harassment creates a hostile environment: unwelcome conduct based on race, color, or national origin that, based on the totality of circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from a school's education program or activity.[15]

Harassing conduct need not always be targeted at a particular person in order to create a hostile environment for a student or group of students, or for other protected individuals.[16] The conduct

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[13] *See*, *e.g.*, *Zeno v. Pine Plains Cent. Sch. Dist*., 702 F.3d 655, 670-71 & n.14 (2d Cir. 2012) (discussing school district liability for student-to-student racial harassment and failure to address hostile environments under Title VI) (relying on *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 639-44 (1999) (discussing student-on-student harassment standards for damages actions under Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681, *et seq*. (Title IX), which prohibits sex discrimination) and *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 280-90 (1998) (discussing teacher-on-student sexual harassment standard for Title IX)); *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1032-35 (9th Cir. 1998) (finding plaintiffs sufficiently alleged a violation of Title VI under a hostile environment theory where students were called racial epithets by their peers and school officials refused to accept complaints and refused to take any action to end the racist misconduct); *Doe v. Los Angeles Unified Sch. Dist.*, 2017 WL 797152, *10 (C.D. Cal. Feb. 27, 2017) (applying the hostile environment standard in *Monteiro*) ("To prove a violation of Title VI's prohibition on racially hostile environments, a party must show: (1) the existence of a racially hostile environment, (2) of which a recipient of federal funds had notice and (3) failed to adequately redress.").

[14] *See* OCR, Dear Colleague Letter on Race and School Programming, 4 (Aug. 2023); OCR, Dear Colleague Letter: Harassment and Bullying, 2, 4, 6 (Oct. 2010); OCR, Racial Incidents and Harassment against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448, 11,449 (Mar. 1994).

[15] In addition to the guidance cited in note 14, *supra*, *see Davis*, 526 U.S. at 639-44 (discussing student-on-student harassment standards for damages actions under Title IX) and *Gebser*, 524 U.S. at 280-90 (discussing teacher-on-student harassment standard for Title IX). In analyzing harassment claims under Title VI, OCR relies on the legal principles articulated in cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. (Title VII), which prohibits employment discrimination based on race, color, religion, sex, and national origin, and under Title IX, which prohibits discrimination on the basis of sex in education programs or activities receiving federal financial assistance. *See Cannon v. Univ. of Chicago*, 441 U.S. 677, 694-98 (1979) (stating that Title IX was modeled on Title VI); *Franklin v. Gwinnett Cnty. Public Schs.*, 503 U.S. 60, 75 (1992) (applying Title VII principles to Title IX case).

[16] This standard is well established under Title VII case law, on which courts often rely for interpreting Title VI. *See Waltman v. Int'l Paper Co.*, 875 F.2d 468, 477 (5th Cir. 1989) (all sexual graffiti in office, not just that directed at plaintiff, was relevant to plaintiff's claim); *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1015 (8th Cir. 1988) (evidence of sexual harassment directed at others is relevant to show hostile environment); *Walker v. Ford Motor Co.*, 684 F.2d 1355, 1358-59 (11th Cir. 1982) (hostile environment established where racial harassment made plaintiff "feel unwanted and uncomfortable in his surroundings," even though it was not directed at him).

may be directed at anyone, and the harassment may also be based on association with others of a different race (the harassment might be referencing the race of a sibling or parent, for example, that is different from the race of the person being harassed whose access to the school's program is limited or denied).[17] Additionally, a hostile environment may take the form of a single victim and multiple offenders.

The offensiveness of a particular expression as perceived by some students, standing alone, is not a legally sufficient basis to establish a hostile environment under Title VI.[18] OCR evaluates the conduct from the perspective of the student who is allegedly being harassed and from the perspective of a reasonable person in that student's position, considering all the circumstances.[19] In order to create a hostile environment, the harassing conduct, which may include speech or expression, must be so severe or pervasive that it limits or denies a student's ability to participate in or benefit from the school's program or activity.[20]

The hostile environment analysis summarized in this Dear Colleague letter applies to administrative enforcement of Title VI. *See generally* OCR, Racial Incidents and Harassment against Students at Educational Institutions: Investigative Guidance, 59 Fed. Reg. 11,448 (Mar. 1994) (addressing hostile environment analysis). *See also*, U.S. Dep't of Justice, Civil Rights Division, Title VI Legal Manual, 28-29 (Apr. 2021).

[17] *See Parr v. Woodmen of the World Life Ins. Co*., 791 F.2d 888, 892 (11th Cir. 1986) ("Where a plaintiff claims employment discrimination under Title VII based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race."); *Chacon v. Ochs*, 780 F. Supp. 680, 681 (C.D. Cal. 1991) (Title VII) (applying *Parr* to an incident of racial harassment); U.S. Equal Employment Opportunity Commission (EEOC), EEOC Compliance Manual, Section 15: Race & Color Discrimination (2016). For examples, see OCR, Dear Colleague Letter: Harassment and Bullying (Oct. 2010).

[18] *See*, *e.g.*, *Rashdan v. Geissberger*, 764 F.3d 1179, 1183 (9th Cir. 2014) (holding reference to an Egyptian student's work as "Third World"—that the student found subjectively offensive—insufficient to show Title VI national origin discrimination); *see also Sallis v. Univ. of Minnesota*, 408 F.3d 470, 476-77 (8th Cir. 2005) (determining incident of a Black employee being called "tan" and "dark"—that the employee found subjectively offensive—insufficient to create a hostile environment under Title VII). *See also* OCR, Questions and Answers on Executive Order 13899 (Combating Anti-Semitism) and OCR's Enforcement of Title VI of the Civil Rights Act of 1964, 2 (Jan. 2021) ("An anti-Semitic incident does not violate Title VI merely because it is anti-Semitic, or because it involves an example of anti-Semitism contemplated by the IHRA [International Holocaust Remembrance Alliance]…. A detailed analysis is required to determine if a particular act constitutes discrimination prohibited by Title VI, as is true with all other Title VI complaints.") (internal citations and quotations omitted).

[19] *See Davis*, 526 U.S. at 651 ("Whether [harassing] conduct rises to the level of actionable harassment thus depends on a constellation of surrounding circumstances, expectations, and relationships, including, but not limited to, the ages of the harasser and the victim and the number of individuals involved.") (internal citations and quotations omitted).

[20] *See Zeno*, 702 F.3d at 665-66 (discussing severity threshold for harassment to be actionable under Title VI); *McGinest v. GTE Service Corp.*, 360 F.3d 1103, 1116 (9th Cir. 2004) (explaining that racial incidents that appear "innocent or only mildly offensive…[may] in reality be intolerably abusive or threatening when understood from the perspective of a … member of the targeted group"). *See also* OCR, Dear Colleague Letter: Harassment and Bullying, 2 (Oct. 2010).

Whether harassing conduct creates a hostile environment must be determined from the totality of the circumstances.[21] Relevant factors for consideration may include, but are not limited to, the context, nature, scope, frequency, duration, and location of the harassment based on race, color, or national origin, as well as the identity, number, age, and relationships of the persons involved. Generally, the less pervasive the harassing conduct, the more severe it must be to establish a hostile environment under Title VI. For example, in most cases, a single isolated incident would not be sufficient to establish a Title VI violation. However, in some cases, a hostile environment requiring appropriate responsive action may result from a single severe incident.[22]

The following examples illustrate the ways OCR could, depending on facts and circumstances, apply these standards. These examples do not predict or determine the outcome of any particular complaint that OCR might receive. Each of these examples is purely hypothetical. These examples discuss tentative OCR actions based on limited hypothetical information and, therefore, should not be construed as definitive statements or binding requirements to be applied identically under similar circumstances. For each example, we have identified potential actions OCR could take; however, these examples have no binding effect on how the Department can exercise its enforcement discretion. OCR always analyzes the totality of the factual circumstances presented in each individual case.

- Example 1: A college student files a complaint with OCR alleging that she was subjected to a hostile environment because she is Jewish. In support of her complaint, she alleges that the dry-erase board on her dorm room door was defaced with swastikas. Additionally, she alleges that epithets referencing poor hygiene and racial impurity of Jewish people and white supremacist slogans stating conspiracy theories about Jewish people, were scrawled on the door and posted by fellow students as comments to her social media feed. The student informs her school counselor of these incidents and that she no longer feels comfortable going to her dorm. The counselor has a meeting with the student to discuss her concerns but fails to take any further action.

  OCR would have reason to open an investigation based on this complaint. The alleged harassment appears to be based on the student's Jewish ancestry and actual or perceived shared ethnic characteristics of Jewish people, rather than on their religious beliefs or

[21] *See Hendrichsen v. Ball State Univ.*, 107 F. App'x. 680, 684 (7th Cir. 2004) (Title IX case); *Monteiro,* 158 F.3d at 1033; *Elliott v. Delaware State Univ.*, 879 F. Supp. 2d 438, 446 (D. Del. 2012).

[22] *Cf. Vance v. Spencer County Public Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) (quoting *Doe v. School Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999) ("Within the context of Title IX of the Education Amendments Act of 1972, a student's claim of hostile environment can arise from a single incident.")); *Barrett v. Omaha Nat. Bank*, 584 F. Supp. 22 (D. Neb. 1983), *aff'd*, 726 F.2d 424 (8th Cir. 1984) (Title VII) (sexually hostile environment established by sexual assault). *See* OCR, Racial Incidents and Harassment against Students at Educational Institutions: Investigative Guidance; EEOC, Enforcement Guidance on Harassment in the Workplace, No. N-915.064 (Apr. 29, 2024) (interpreting Title VII).

practices.[23] The use of swastikas and the graffiti/taunts related to hygiene, impurity, and racial hierarchy suggest that the alleged harassing conduct depicts Jewish people as a separate, and inferior, race who share certain characteristics.[24] If OCR's investigation confirms these allegations, OCR could find that these harassing actions were unwelcome, subjectively and objectively offensive and so severe or pervasive that they limited or denied the student's ability to participate in or benefit from the services, activities, or opportunities offered by the college, including access to the dorm, *i.e.*, created a hostile environment.[25] If the evidence obtained during the investigation confirmed that the college had notice of this hostile environment and failed to take prompt and effective steps reasonably calculated to (1) end the harassment, (2) eliminate any hostile environment and its effects, and (3) prevent the harassment from recurring, OCR could find a violation of Title VI.

- Example 2: The mother of an Arab Muslim elementary school student files a complaint with OCR alleging her daughter who wears a hijab to school was harassed by other students when several classmates pulled her daughter's hijab off, threw it on the playground, started stomping on it, and called her a terrorist while teachers witnessed the incidents and did nothing. In a separate incident, a teacher said that because the girl did not wear loose fitting clothing every day, she should not be concerned because she was already being a bad Muslim. For these reasons, the student felt unsafe at school and could not concentrate in class.

  OCR would have reason to open an investigation based on this complaint. Clothing, such as wearing a hijab, is often both an expression of adherence to standards of dress within an ethnic community and a religious practice. To the extent that the clothing in this instance is not exclusively a religious practice or an expression of faith, but marks membership in a group that shares, or is perceived to share, ancestry and ethnic characteristics, and the student was subjected to slurs (*e.g.*, being called a terrorist) related to her actual or perceived race and national origin, including her shared ancestry, OCR would have reason to open an investigation.

  If OCR's investigation confirms these allegations, OCR could find that the harassing conduct created a hostile environment that limited the student's ability to participate in

[23] Because Title VI does not protect students from discrimination based only on religion, OCR may refer complaints of discrimination based exclusively on religion, such as a school's denial of a student's request to miss class for a religious holiday, to the U.S. Department of Justice, which has jurisdiction under Title IV to respond to certain complaints of religious discrimination in public schools. *See* 42 U.S.C. § 2000c-6.

[24] *See Shaare Tefila Congregation v. Cobb*, 785 F.2d 523, 529 (4th Cir. 1986) (Wilkinson, J. concurring in part and dissenting in part) ("The paintings found on the synagogue align the defendants with both the Ku Klux Klan and the Nazis, two groups infamous for the persistence in the view that Jews constitute a separate and inferior race.").

[25] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

school, *i.e.*, she felt unsafe and had difficulty concentrating. OCR would then determine whether the school district promptly and effectively took steps reasonably calculated to end the harassment, eliminate its effects, and prevent it from recurring. If it did not, then OCR could find a Title VI violation.

- Example 3: At a public university, a school organization announces that it has invited an Israeli filmmaker to screen a video about his observations from Israel. In response, several dozen students and faculty members gather in the main entryway of the building and refuse to allow anyone to get through, including the event organizers who had arrived for setup, explaining that they do not want to give a "Jewish filmmaker an opportunity to spread their propaganda." The college does not remove the protesters but arranges for the film to screen in a different college building. Upon learning of the new location, those protesting congregate outside the building, but next to the windows of the room, and begin chanting epithets about Jews. When the film ends, the protesters stand by the door, yelling to those entering or exiting. Some students, including many Israeli and Jewish students, found the yelling from outside distracting and fearsome.

  The next day, a group of protesters wrap "Do Not Cross" tape in front of the college building housing the campus chapter of the school organization. The protesters ask every student attempting to enter the building that houses the organization whether they are Jewish. If they are, the protesters run towards the student and prevent them from entering the building. That night, antisemitic graffiti featuring swastikas appears on the organization's building. The graffiti sparks fear in Jewish students in the college community, who complain to college administrators that they feel unsafe. Jewish students who encounter these protests and the graffiti ask the college's administrators to provide them security to escort them across campus and to investigate who graffitied the building. The college administrators issue a statement saying that they condemn vandalism of school property. The leader of the organization sends an email to all Jewish students on campus suggesting that they should finish the semester by going home and attending classes remotely since campus is not safe, and many Jewish students begin doing so. The college takes no further actions. A group of Jewish students file a complaint with OCR.

  OCR would have reason to open an investigation based on this complaint. The use of the term "Jewish" and epithets about Jewish people in the alleged protest of the event makes it appear that the protesters' conduct was, at least in part, based on the actual or perceived Jewish ancestry of the filmmaker and audience. Additionally, the protesters' actions the next day, including physically blocking Jewish students from entering a building and posting antisemitic graffiti, were particularly intense and caused many students to feel unsafe on campus. OCR could find that the protesters' conduct was subjectively and objectively offensive and so severe or pervasive that it limited the ability of the Jewish

students to attend and benefit from educational activities of the college.[26] Although a college has wide discretion in how to respond to harassment that might take place during student protests, OCR could find that the steps taken by the college were not prompt and effective steps that were reasonably calculated to end the hostile environment caused by the protesters, in light of students reasonably feeling unsafe attending class in person. OCR would evaluate whether the college had taken additional steps.

- Example 4: A college experiences widespread incidents of harassment in one semester. Jewish students report being spit at, called antisemitic slurs referencing facial features and materialistic tendencies, having their Star of David jewelry ripped off, having their kippahs snatched off their heads, seeing antisemitic graffiti in the Jewish fraternity house and other campus facilities where Jewish and Israel-related cultural events are routinely held, and discovering the campus center mailboxes of those with stereotypically Jewish last names stamped with the words "Stop stealing Palestinian lands" on International Holocaust Remembrance Day.

  During anti-war demonstrations, protest signs list specific Jewish students by name and use epithets that stereotype all Jewish people as racist murderers. In addition, Jewish students find flyers posted throughout campus advocating for the genocide of Jewish people and calling them Nazis. The protesters block many of the main pathways to academic buildings on campus. Several Jewish students are prevented from attending class because protesters state that "no Zionists can pass through" and the protesters accuse any student who they believe is Jewish of supporting genocide. When students wearing kippahs are walking by, protesters chant "Colonizers aren't welcome here" and "go back to Europe."

  Thereafter, a dozen Jewish students meet with the Dean of Student Services to express that these incidents of harassment during that semester made them feel unsafe, unwelcome, and concerned about continuing their education at the school. No action is taken by the Dean or other college officials, and the harassing conduct continues.

  OCR would have reason to open an investigation based on this complaint. Most of the alleged incidents of harassing conduct appear to treat Jewish students as members of a group that shares ancestry or ethnic characteristics. Some of the highly offensive taunts and slurs allegedly used against Jewish students refer to stereotypical physical characteristics and personality traits (*e.g.*, materialistic tendencies) that are alleged shared ancestry or ethnic characteristics and are related to race and national origin discrimination. Blocking students from attending classes and accusing them of supporting genocide solely on the basis that the students are perceived to be Jewish are offensive

[26] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

actions grounded in the perceived national origin and shared ancestry of these students. While some of the alleged conduct, such as ripping off jewelry containing a religious symbol and snatching kippahs from students, may also involve potential religious discrimination, the context suggests the alleged incidents are, in part, related to race or national origin discrimination, including shared ancestry or ethnic characteristics. Additional allegations, including the pamphlets calling for the return to a period that led to the mass execution of millions of Jewish people and antisemitic graffiti, are offensive conduct that may refer to a belief that Jewish people are inferior to others. The alleged targeting of students with Jewish-sounding last names appears to target those students based on their actual or perceived race or national origin, including shared ancestry (*i.e.*, their family heritage). Further, although political protest on its own does not typically implicate Title VI, protest signs in this instance allegedly also targeted specific Jewish students using ethnic stereotypes, so OCR could find that the protesters engaged in harassing conduct based on race, color, or national origin, including shared ancestry or ethnic characteristics. If confirmed by OCR's investigation, OCR could find that several incidents, in one semester, of subjectively and objectively offensive harassing conduct based on Jewish students' shared ancestry, that is so severe or pervasive that it limited or denied their access to the school's programs or activities, created a hostile environment.[27]

OCR would evaluate whether the school took prompt and effective steps reasonably calculated to (i) end the harassment, (ii) eliminate any hostile environment and its effects, and (iii) prevent the harassment from recurring.

- Example 5: A Muslim eighth grader who is of Saudi Arabian descent is followed and taunted by several classmates every day for several weeks during history class, her last class of the day. These classmates allegedly taunt the student for not eating pork; mock the student's mother's Saudi accent, limited English proficiency, and traditional Saudi clothing; and throw trash in the student's direction. The student tells the teacher that she does not want to work in groups with those particular classmates because they made fun of her mother's accent. The stress is causing her to dread the end of the day, and as a result her attention in history class is waning and causing her grades to suffer. The student's mother complains to the school principal, who checks in with the history teacher. The history teacher speaks with the harassers without addressing the discriminatory nature of their actions. The harassers agree to apologize to the student being harassed and are given after-school detention for two days for the trash-throwing in violation of the school's conduct policy. The principal offered no individualized supports to the student who experienced the harassment. The school re-publicizes its non-discrimination policy and ensures that future annual diversity trainings for employees

[27] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

will include examples of national origin discrimination involving religion. However, the school fails to put in place a method for monitoring whether further incidents happen to the affected student and makes no effort to assess whether there may be a larger school climate problem related to discriminatory harassment. The student's mother feels that the harassers' after-school detention was inadequate for the trash throwing in particular and is upset that they were not transferred to another class because the classmates continue to mock the student's mother's accent, and so complains to OCR that without a harsher punishment, the school is not sufficiently deterring future harassers.

OCR would have reason to open an investigation based on this complaint. The alleged harassment related to mocking the student's mother's Saudi accent, limited English proficiency, and traditional Saudi clothing suggests that the harassment is based on the student's national origin, specifically, the student's actual or perceived shared Arab ancestry or ethnic characteristics. If confirmed by OCR's investigation, that harassment would appear to be subjectively and objectively offensive and so severe or pervasive that it limited the student's access to her class, and thus appears to have created a hostile environment.[28]

While the school engaged in good faith efforts to address the incidents, OCR could find that the response does not appear to be sufficient to fully address the hostile environment and prevent recurrence of the harassment. The appropriate steps taken by the school included punishing the harassers for violating school conduct policies and engaging in rudimentary efforts to address the overall school climate, *e.g.*, reposting its nondiscrimination policy. Although the mother's subjective opinion that the discipline imposed on the harassers was insufficient would not be material to OCR's investigation, given the length of time the student was harassed, the fact that some of the harassment happened during history class, and the student's reported disengagement in that class and unwillingness to work in a group with particular classmates, the harassment, if confirmed by OCR's investigation, could have been severe or pervasive enough that the teacher should have been aware of the problem (*i.e.*, the school should have known about the hostile environment). Therefore, OCR could find that the teacher's lack of response before the parent complained was inadequate. Even after the school knew about the alleged hostile environment, the school's reaction may not have adequately addressed the discriminatory nature of the harassment, as the teacher did not address the discriminatory aspects of the behavior with the harassers, and the student continued to be harassed due to her mother's accent and limited English proficiency. A school's response to conduct it concludes is discriminatory must include prompt and effective steps reasonably calculated to end the harassment and prevent its recurrence.

[28] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

It also will be important for a school to monitor whether a student who was harassed experienced further incidents and to investigate or assess whether the harassing incidents were isolated to this one student or whether a hostile environment had a broader impact on the school climate. A school also must address the impact of harassment on a targeted student, which could be accomplished by offering counseling or academic adjustments—including ways to separate the student victim from the student harassers, where appropriate—when a student suffered stress that impacted their ability to learn. If harassing conduct does recur, it also will be important for the school to consider whether different consequences for the harassers or supports for the targeted student are necessary, and whether further efforts to improve school climate may be warranted. Without a mechanism in place to monitor for future incidents and assess its school climate efforts, a school's response may not be reasonably calculated to prevent recurrence.

- Example 6: A college student files a complaint with OCR alleging that he was subjected to a hostile environment because he is Israeli. The student alleged that a professor stated during office hours that "Israelis don't even deserve to live." The professor and other students make similar comments in subsequent classes. The student's complaint stated that several Israeli students in the professor's class, including the complainant, reported the professor's and classmates' comments to the college and noted that they felt threatened. The student alleged that although the college had investigated complaints of comments by college staff and students targeting other individuals based on other protected characteristics as required under its nondiscrimination policy, the college declined to speak to any students who indicated they felt threatened by their professor's or classmates' conduct. Israeli students in the class stopped attending.

  OCR would have reason to open an investigation based on this complaint. The alleged harassment appears to be based on Israeli national origin. If OCR confirms that the alleged harassing conduct occurred, then OCR could find that the conduct was subjectively and objectively offensive and so severe or pervasive that they limited the ability of the Israeli student to participate in class.[29] OCR could find that the failure to investigate allegations of harassment allowed for a hostile environment for Israeli students to persist, interfering with or limiting their access to the university's programs or activities. That failure could indicate that the college did not take prompt and effective steps reasonably calculated to end the harassment and prevent it from recurring.

  OCR could also find that the college's failure to investigate allegations of harassment based on Israeli national origin, while investigating allegations of other forms of harassment, may reflect college officials treating similarly situated individuals differently

[29] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

on the basis of race, color, or national origin without a legitimate, nondiscriminatory reason. (This different treatment legal analysis is discussed in more detail below.)

- Example 7: A group of Arab college students receives university approval to form a new student organization to empower and support Arab students. The organization hosts monthly meetings in the school quad and is open to all students.

  As student members begin gathering for one of the meetings, dozens of other students surround the student organization members and refer to them as "terrorists" and "jihad supporters." The students participating in the meeting become fearful when they realize that they are unable to leave because their fellow students encircle and shove them. The Arab students recognize their classmates in the crowd of harassers and skip class the next day because they fear encountering the harassing students in class.

  Members of the student organization complain to university administrators about the harassing conduct they experience during their meeting. The administrators express sympathy and note that "college is difficult and things are tense." University officials take no further actions.

  The student organization members cancel all future meetings because they do not believe that they can safely hold them on campus in light of the university's failure to take any steps to ensure that the meetings could safely take place. They file a complaint with OCR.

  OCR would have reason to open an investigation based on this complaint. The alleged harassment—the harassing students calling the students who attended the meeting terrorists, blocking students' ability to leave the area, and shoving students—appear to be based on the students' actual or perceived race, color, or national origin, including their Arab shared ancestry or ethnic characteristics. If confirmed by OCR's investigation, OCR could find that calling the students terrorists and supporters of Jihad was subjectively and objectively offensive and related to the students' shared ancestry or ethnic characteristics. Additionally, the alleged threatening behavior of the harassers, including shoving some students and physically restricting students from leaving the event, caused the students to fear for their safety. Such harassing conduct, if confirmed by OCR's investigation, could be so severe that it limited or denied members of the student organization the ability to participate in or benefit from the university's education activities, because, for example, students did not attend class the next day due to fear of encountering fellow students who had harassed them and the students in the group cancelled all future events due to reasonable safety concerns.

  If OCR's investigation confirms that the harassing conduct based on the students' shared ancestry or ethnic characteristic created a hostile environment about which the university

knew or should have known, then OCR would evaluate whether the university took prompt and effective steps to end the harassment, eliminate the hostile environment and its effects, and prevent the harassment from recurring.

- Example 8: At a public university, a group of approximately 100 students, including Jewish, Arab, Muslim, and other students, gather to "show solidarity with Gaza." Several dozen counter-protesters arrive at the protest. Counter-protesters shout things at Arab student protesters like "terrorist" and "second Nakba." Counter-protesters physically attack some of the student protesters. The crowd eventually dissipates.

  The day after the incident, many Arab and Muslim students across campus feel unsafe and decide to avoid campus and skip in-person classes for the foreseeable future.

  Student members of the protest report the incidents to the university administrators. The university president sends a campuswide email the next day that says, "we support peaceful protest on campus but we condemn all violence." The administrators tell students that they cannot take further action because it seems that most of the counter-protesters are not students. The students file a complaint with OCR.

  OCR would have reason to open an investigation based on this complaint. The alleged use of the terms "terrorist" and "second Nakba" in relation to Arab and Muslim students makes it appear that the counter-protesters, at least in part, made their statements based on the actual or perceived Arab ancestry of the student protesters. The alleged incidents of violence that shortly followed these verbal attacks led many students to feel unsafe on campus. If OCR's investigation confirms these allegations, OCR could find that the counter-protesters' conduct was subjectively and objectively offensive and so severe or pervasive that it limited the ability of Arab and Muslim students to attend and benefit from educational activities of the university.[30]

  If OCR's investigation confirms that the harassing conduct based on the students' shared ancestry or ethnic characteristic created a hostile environment about which the university knew or should have known, then OCR would evaluate whether the university took prompt and effective steps to end the harassment, eliminate the hostile environment and its effects, and prevent the harassment from recurring.

C. Different Treatment Analysis

If a complaint alleges that a school's representative (*i.e.*, an agent or employee such as a teacher or administrator) treated a student differently based on their actual or perceived race, color, or national origin, including shared ancestry or ethnic characteristics, OCR will make a fact-specific determination as to whether discrimination occurred. OCR may find that discrimination occurred

[30] In this example, the conduct, if confirmed by the evidence, could be considered both severe and pervasive.

where there is direct evidence that the school limited or denied educational services, benefits, or opportunities to a student or group of students on the basis of race, color, or national origin. For instance, a school may maintain a policy that, on its face, subjects students to different rules on one or more of these bases, or a decisionmaker may state that a student's race, color, or national origin was the reason the student was treated differently. Absent such evidence, OCR may engage in the analysis below to determine whether discrimination on the basis of race, color, or national origin occurred. Under this analysis, OCR will consider the following questions in reaching its decision:[31]

1. Did the school limit or deny educational services, benefits, or opportunities to a student or group of students of a particular race, color, or national origin by treating them differently from a similarly situated student or group of students of another race, color, or national origin? If not, then OCR would find that there is insufficient evidence to determine that the school has engaged in different treatment. If the students are similarly situated and the school has treated them differently, then OCR would ask:

2. Can the school provide a legitimate, nondiscriminatory basis for the different treatment? If not, then OCR could find that the school has discriminated on the basis of race, color, or national origin. If the school can articulate a legitimate, nondiscriminatory reason, then OCR would ask:

3. Is the school's explanation for the different treatment a pretext for discrimination (*i.e.*, not the true reason for the school's actions)? If so, then OCR could find that the school engaged in discrimination in violation of Title VI.

Circumstances that could raise Title VI concerns under a different treatment analysis could include, for example: (1) a school disciplining Somali Muslim students more harshly than their white classmates based on fears that such students present a greater safety concern; (2) a teacher or professor giving Jewish students lower grades than non-Jewish students out of disdain for perceived stereotypical claims about Jewish students; (3) a school refusing to investigate allegations of national origin discrimination from students who are Kurdish, Hmong, or from other stateless ethnic groups based on the incorrect view that protections against national origin discrimination only extend to discrimination based on a specific nationality; or (4) a university investigating allegations of national origin harassment against Christian students with a shared

[31] *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), a case under Title VII that sets forth a three-part test that also applies in the Title VI context. The Department uses the *McDonnell Douglas* test in administrative enforcement as one way to determine whether an institution has engaged in prohibited intentional discrimination. *See also Xu Feng v. Univ. of Delaware*, 785 Fed. Appx. 53 (3rd Cir. 2019) (applying *McDonnell Douglas* to a Title VI claim); U.S. Dep't of Justice, Civil Rights Division, Title VI Legal Manual, 44-46.

ancestry (such as Greek Orthodox, Chaldean, or Coptic Christians) while ignoring similar allegations from Sikh students.

The following example illustrates the kind of incidents that could, depending upon facts and circumstances, raise Title VI concerns, and lead OCR to open a complaint for investigation.

- Example 9: A high school world history class includes weekly discussions on current events. One week, a teacher asks the class to discuss the Israel-Hamas conflict. The teacher asks the only Jewish student in the class, who he assumes is Jewish based on her last name, to explain her position on the conflict. The teacher demands that the student condemn Israel, and when the student says she is uncomfortable speaking about the issue publicly, the teacher tells her that she must write an essay explaining why Israel should be condemned. The teacher threatens the student with detention if she does not turn in the essay by the end of the week. No other student is required to take a position on the conflict or to write an essay outlining their opinions. The student reports the teacher's behavior to the school's principal. The principal tells the student that she "should not have issues answering such an easy question." The student files a complaint with OCR.

  OCR would have reason to open an investigation based on this complaint. The complaint alleges specific facts suggesting that the high school treated the Jewish student differently than non-Jewish students based on her race, including her shared ancestry and ethnic characteristics. The teacher singles out the only Jewish student, demanding that she condemn Israel and requiring her to complete an additional assignment not required of other students, seemingly because of her perceived ancestry. If OCR's investigation confirms the Jewish student is similarly situated to the other students in class and is treated differently from the other students based on the basis of race, color, or national origin (including shared ancestry and ethnic characteristics), OCR would analyze whether the school had a legitimate, nondiscriminatory reason for its decision to treat the Jewish student differently from her peers. If OCR confirmed that the school did not provide a legitimate, nondiscriminatory reason, OCR could support a finding of intentional discrimination in violation of Title VI. In this case, the principal did not provide a reason as to why the student has to do the additional assignment.

II. Expression of Views About a Particular Country

Speech expressing views regarding a particular country's policies or practices is protected by the First Amendment and does not necessarily implicate federal civil rights laws.[32] However, if

[32] Such distinctions have been drawn in Title VII cases to distinguish offensive political remarks from discriminatory harassment based on race, color, national origin, religion, and sex. *See Singh v. Town of Mount Pleasant*, 172 Fed. Appx. 675, 681 (7th Cir. 2006) (holding that a supervisor's insensitive comment about how the U.S. should handle a high-profile Cuban refugee was not national origin harassment of an employee under Title VII); *Fair v. Guiding Eyes for the Blind, Inc.*, 742 F. Supp. 151, 156 (S.D.N.Y. 1990) (finding that defendant's

harassing conduct that otherwise appears to be based on views about a country's policies or practices is targeted at or infused with discriminatory comments about persons from or associated with a particular country, then it may implicate Title VI and should be analyzed on a fact-dependent basis.[33] For example, if a professor teaching a class on international politics references or criticizes the government of Israel's treatment of non-Jewish people,[34] the nation of Saudi Arabia's response to religious extremism, or the government of India's promotion of Hinduism, so long as such comments do not target Israeli, Jewish, Saudi, Arab, or Indian students based on race, color, or national origin, that would not likely implicate Title VI.

By contrast, Title VI protections could be implicated if a professor teaching about international politics refers to Jewish people, Muslim people, or Hindu people using offensive stereotypes based on perceived shared ethnic characteristics or shared ancestry.[35] If OCR received a complaint from a student in this class, OCR would analyze whether the conduct was unwelcome, subjectively and objectively offensive, and so severe or pervasive that it created a hostile environment and whether the university took prompt and effective steps to end the harassment that created the hostile environment and prevent it from recurring.

OCR acknowledges that it may sometimes be difficult to distinguish between alleged conduct based on views regarding a particular country or its policies (which would not implicate Title VI) and alleged conduct based on students' actual or perceived shared ancestry or ethnic characteristics or their citizenship or residency in a country whose residents share a dominant religion or a distinct religious identity (which could implicate Title VI). However, these distinctions help determine when conduct falls within OCR's jurisdiction under Title VI.

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remarks "concerned his opinions on various political, moral and social issues" and were not based on plaintiff's gender, so those allegations could not constitute harassment based on sex); *Reichman v. Bureau of Affirmative Action*, 536 F. Supp. 1149, 1176 (M.D. Pa. 1982) (deeming "comments concerning the Arab-Israeli conflict and [the Israeli prime minister] to be political opinions rather than disparagements of Judaism" that would constitute unlawful religious harassment under Title VII). OCR similarly interprets Title VI to not be implicated by conduct based solely on political views.

[33] *See* 34 C.F.R. § 100.3(a). *Cf. Kamal v. Hopmayer*, 300 Fed. App'x 37, 38-39 (2d Cir. 2008) (holding that a high school principal's frequent classroom visits to discuss his military service in the first Gulf War did not state a claim under Title VI of race, color, or national origin harassment of an Iranian Muslim student absent evidence of any prejudice or negative sentiments about Iranian people, Muslim people, or any other group during those discussions).

[34] Executive Order 13899 provides that federal agencies "shall consider" the non-legally binding IHRA working definition of antisemitism and accompanying examples of antisemitism "to the extent that" any such "examples might be useful as evidence of discriminatory intent."

[35] Federal law recognizes that elementary, secondary, and postsecondary schools; school districts; and states make curricular and programming choices based on the professional judgment of educators, administrators, and school boards. Notwithstanding this authority, the laws enforced by OCR apply to all of a recipient's programs and activities. *See*, *e.g.*, Section 103(b) of the Department of Education Organization Act, 20 U.S.C. § 3403(b); Section 438 of the General Education Provisions Act, 20 U.S.C. § 1232a; 20 U.S.C. § 1221(d); 42 U.S.C. § 2000d-4a.

Exercising jurisdiction does not mean that OCR has made a determination about the merits of the allegations, which OCR would consider in any subsequent investigation.

III. Conclusion

OCR stands ready to support schools in fulfilling the promise of Title VI to protect every student's right to equal access to educational opportunities without discrimination based on race, color, or national origin, including shared ancestry or ethnic characteristics. All students, including students who are or are perceived to be Jewish, Israeli, Muslim, Arab, Sikh, South Asian, Hindu, or Palestinian as well as students who come from, or are perceived to come from, all regions of the world are entitled to a school environment free from discrimination.

OCR is available to provide technical assistance to schools and organizations that request assistance in complying with any aspect of the civil rights laws OCR enforces, including on those issues addressed in this letter. If you have any questions or would like technical assistance, please contact the OCR office serving your State or territory by using the list of OCR offices. If you require language assistance, you may contact OCR by calling 1-800-USA-LEARN (1-800-872-5327). You may also contact OCR's Customer Service Team at (800) 421-3481 or at OCR@ed.gov.

Anyone who believes that a school has engaged in discrimination may file a complaint with OCR. Information about filing a complaint with OCR, including a link to the online complaint form, is available at How to File a Discrimination Complaint with the Office for Civil Rights on the OCR website.

Thank you for your commitment to providing educational environments to our nation's students that are free of race, color, or national origin discrimination and consistent with free speech rights fundamental to our nation's tradition.

Sincerely,

Catherine E. Lhamon
Assistant Secretary for Civil Rights

Office of the Attorney General
Washington, D. C. 20530

July 29, 2025

MEMORANDUM FOR ALL FEDERAL AGENCIES

FROM: THE ATTORNEY GENERAL

SUBJECT: GUIDANCE FOR RECIPIENTS OF FEDERAL FUNDING REGARDING UNLAWFUL DISCRIMINATION

I. INTRODUCTION

One of our Nation's bedrock principles is that all Americans must be treated equally. Not only is discrimination based on protected characteristics illegal under federal law, but it is also dangerous, demeaning, and immoral. Yet in recent years, the federal government has turned a blind eye toward, or even encouraged, various discriminatory practices, seemingly because of their purportedly benign labels, objectives, or intentions. No longer. Going forward, the federal government will not stand by while recipients of federal funds engage in discrimination.

This guidance clarifies the application of federal antidiscrimination laws to programs or initiatives that may involve discriminatory practices, including those labeled as Diversity, Equity, and Inclusion ("DEI") programs.[1] Entities receiving federal funds, like all other entities subject to federal antidiscrimination laws, must ensure that their programs and activities comply with federal law and do not discriminate on the basis of race, color, national origin, sex, religion, or other protected characteristics—no matter the program's labels, objectives, or intentions. In furtherance of that requirement, this guidance identifies "Best Practices" as non-binding suggestions to help entities comply with federal antidiscrimination laws and avoid legal pitfalls; these are not mandatory requirements but rather practical recommendations to minimize the risk of violations.

Entities that receive federal financial assistance or that are otherwise subject to federal anti-discrimination laws, including educational institutions, state and local governments, and public and private employers, should review this guidance carefully to ensure all programs comply with their legal obligations.

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[1] DEI programs go by other names as well, such as Diversity, Equity, Inclusion, and Accessibility ("DEIA") and Diversity, Equity, Inclusion, and Belonging ("DEIB").

II. EXECUTIVE SUMMARY

This guidance emphasizes the significant legal risks of initiatives that involve discrimination based on protected characteristics and provides non-binding best practices to help entities avoid the risk of violations. Key points include:

- **Statutory nondiscrimination requirements:** Federal law prohibits discrimination based on protected characteristics like race, sex, color, national origin, or religion.

- **Legal pitfalls of DEI Programs:** The use of terms such as "DEI," "Equity," or other euphemistic terms does not excuse unlawful discrimination or absolve parties from scrutiny regarding potential violations.

- **Prohibition on Protected Characteristics as Criteria:** Using race, sex, or other protected characteristics for employment, program participation, resource allocation, or other similar activities, opportunities, or benefits, is unlawful, except in rare cases where such discrimination satisfies the relevant level of judicial scrutiny.

- **Importance of Sex-Separated Intimate Spaces and Athletic Competitions:** Compelling employees to share intimate spaces with the opposite sex or allowing men to compete in women's athletic competitions would typically be unlawful.

- **Unlawful Proxy Discrimination:** Facially neutral criteria (e.g., "cultural competence," "lived experience," geographic targeting) that function as proxies for protected characteristics violate federal law if designed or applied with the intention of advantaging or disadvantaging individuals based on protected characteristics.

- **Scrutiny of Third-Party Funding:** Recipients of federal funds should ensure federal funds do not support third-party programs that discriminate.

- **Protection Against Retaliation:** Individuals who object to or refuse to participate in discriminatory programs, trainings, or policies are protected from adverse actions like termination or exclusion based on that individual's opposition to those practices.[2]

III. KEY FEDERAL ANTIDISCRIMINATION PROVISIONS AND LAW

Federal antidiscrimination laws prohibit discrimination on the basis of protected characteristics, including race, color, religion, sex, and national origin. The U.S. Supreme Court has consistently held that policies or practices based upon protected characteristics are subject to

[2] Unlawful retaliation occurs when a federally funded entity takes adverse actions against employees, participants, or beneficiaries because they engage in protected activities related to opposing DEI practices they reasonably believe violate federal antidiscrimination laws.

rigorous judicial scrutiny. Race-based classifications are subject to strict scrutiny, requiring a compelling governmental interest and narrowly tailored means to achieve that interest.[3] Sex-based classifications are subject to heightened scrutiny, requiring an exceedingly persuasive justification and substantial relation to an important governmental objective.[4] Discrimination based on other protected characteristics, such as religion, is also evaluated under analogous standards.[5] Entities receiving federal funds must comply with applicable civil rights laws, including:

- **Title VI of the Civil Rights Act of 1964:** Prohibits discrimination based on race, color, or national origin in any program or activity receiving federal financial assistance. This includes most educational institutions, healthcare providers, and state and local government agencies.

- **Title VII of the Civil Rights Act of 1964:** Prohibits employment discrimination based on, or motivated by, race, color, religion, sex, or national origin, in any terms, conditions, or privileges of employment, including hiring, promotion, demotion, termination, compensation, job transfers, training, or access to employment privileges and benefits.

- **Title IX of the Education Amendments of 1972:** Prohibits discrimination based on sex in education programs or activities receiving federal financial assistance. Title IX protections extend beyond athletics and include addressing sexual harassment, sex-based harassment, admissions policies, and equal access to resources and programs.

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[3] *See, e.g.*, *Students for Fair Admissions, Inc. v. Harvard*, 600 U.S. 181, 214 (2023) (holding racial classifications by public institutions are subject to strict scrutiny and racial classifications by private institutions can serve as basis for revoking funding under Title VI); *Ricci v. DeStefano*, 557 U.S. 557, 579 (2009) ("[E]xpress, race-based decision-making violates Title VII's command that employers cannot take adverse employment actions because of an individual's race."); *see also Vitolo v. Guzman*, 999 F.3d 353, 361 (6th Cir. 2021) (holding grant program with race and sex preferences is unlawful under Equal Protection Clause).

[4] *See, e.g.*, *United States v. Virginia*, 518 U.S. 515, 531 (1996).

[5] *See, e.g.*, *Espinoza v. Montana Dep't of Revenue*, 591 U.S. 464, 479 (2020) ("The Free Exercise Clause, which applies to the States under the Fourteenth Amendment, protects religious observers against unequal treatment and against laws that impose special disabilities on the basis of religious status . . . . [S]trict scrutiny applies . . . because Montana's no-aid provision discriminates based on religious status"); *Shapiro v. Thompson*, 394 U.S. 618, 631 (1969) (holding discriminating against individual for exercising fundamental constitutional rights is subject to heightened scrutiny), *overruled on other grounds by Edelman v. Jordan*, 415 U.S. 651 (1974); *see also Church of Lukumi Babalu Aye, Inc. v. City of Hialeah*, 508 U.S. 520, 540 (1993) (relying on Equal Protection principles in holding intentional discrimination against exercise of religion is subject to strict scrutiny).

- **Equal Protection Clause of the Fourteenth Amendment:** Prohibits States from denying any person the equal protection of the laws, relevant in the context of discrimination claims involving state or local government actions.

IV. UNLAWFUL DISCRIMINATORY POLICIES AND PRACTICES

The following is a non-exhaustive list of unlawful practices that could result in revocation of grant funding. Federal funding recipients may also be liable for discrimination if they knowingly fund the unlawful practices of contractors, grantees, and other third parties.

A. Granting Preferential Treatment Based on Protected Characteristics

1. What Constitutes Unlawful Preferential Treatment?

Preferential treatment occurs when a federally funded entity provides opportunities, benefits, or advantages to individuals or groups based on protected characteristics in a way that disadvantages other qualified persons, including such practices portrayed as "preferential" to certain groups. Such practices violate federal law unless they meet very narrow exceptions.

2. Examples of Unlawful Practices

Race-Based Scholarships or Programs: A university's DEI program establishes a scholarship fund exclusively for students of a specific racial group (e.g., "Black Student Excellence Scholarship") and excludes otherwise qualified applicants of other races, even if they meet academic or financial need criteria. This extends to any race-exclusive opportunities, such as internships, mentorship programs, or leadership initiatives that reserve spots for specific racial groups, regardless of intent to promote diversity. Such race-exclusive programs violate federal civil rights law by discriminating against individuals based solely on their race or treating people differently based on a protected characteristic without meeting the strict legal standards required for race-conscious programs.

Preferential Hiring or Promotion Practices: A federally funded entity's DEI policy prioritizes candidates from "underrepresented groups" for admission, hiring, or promotion, bypassing qualified candidates who do not belong to those groups, where the preferred "underrepresented groups" are determined on the basis of a protected characteristic like race.

Access to Facilities or Resources Based on Race or Ethnicity: A university's DEI initiative designates a "safe space" or lounge exclusively for students of a specific racial or ethnic group.

B. Prohibited Use of Proxies for Protected Characteristics

1. What Constitutes Unlawful Proxies?

Unlawful proxies occur when a federally funded entity intentionally uses ostensibly neutral criteria that function as substitutes for explicit consideration of race, sex, or other protected characteristics. While these criteria may appear facially neutral, they become legally problematic under any of the following circumstances:

- They are selected because they correlate with, replicate, or are used as substitutes for protected characteristics.
- They are implemented with the intent to advantage or disadvantage individuals based on protected characteristics.

2. Examples of Potentially Unlawful Proxies

"Cultural Competence" Requirements: A federally funded university requires job applicants to demonstrate "cultural competence," "lived experience," or "cross-cultural skills" in ways that effectively evaluate candidates' racial or ethnic backgrounds rather than objective qualifications. This includes selection criteria that advantage candidates who have experiences the employer associates with certain racial groups. For instance, requiring faculty candidates to describe how their "cultural background informs their teaching" may function as a proxy if used to evaluate candidates based on race or ethnicity.

Geographic or Institutional Targeting: A federally funded organization implements recruitment strategies targeting specific geographic areas, institutions, or organizations chosen primarily because of their racial or ethnic composition rather than other legitimate factors.

"Overcoming Obstacles" Narratives or "Diversity Statements": A federally funded program requires applicants to describe "obstacles they have overcome" or submit a "diversity statement" in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics, using the narrative as a proxy for advantaging that protected characteristic in providing benefits.

C. Segregation Based on Protected Characteristics

1. What Constitutes Unlawful Segregation?

Segregation based on protected characteristics occurs when a federally funded entity organizes programs, activities, or resources—such as training sessions—in a way that separates or restricts access based on race, sex, or other protected characteristics. Such practices generally violate federal law by creating unequal treatment or reinforcing stereotypes, regardless of the stated goal (e.g., promoting inclusion or addressing historical inequities). Exceptions are narrow

and include only cases where federal law expressly permits race-based remedies for specific, documented acts of past discrimination by the institution itself, or in specialized contexts such as correctional facilities where courts have recognized compelling institutional interests.

While compelled segregation is generally impermissible, failing to maintain sex-separated athletic competitions and intimate spaces can also violate federal law. Federally funded institutions that allow males, including those self-identifying as "women," to access single-sex spaces designed for females—such as bathrooms, showers, locker rooms, or dormitories—undermine the privacy, safety, and equal opportunity of women and girls. Likewise, permitting males to compete in women's athletic events almost invariably denies women equal opportunity by eroding competitive fairness. These policies risk creating a hostile environment under Title VII, particularly where they compromise women's privacy, safety, or professional standing, and can violate Title IX by denying women access to the full scope of sex-based protections in education. To ensure compliance with federal law and to safeguard the rights of women and girls, organizations should affirm sex-based boundaries rooted in biological differences.

2. Examples of Unlawful Practices

Race-Based Training Sessions: A federally funded university hosts a DEI training program that requires participants to separate into race-based groups (e.g., "Black Faculty Caucus" or "White Ally Group") for discussions, prohibiting individuals of other races from participating in specific sessions. In contrast, a "Faculty Academic Support Network" open to all faculty interested in promoting student success avoids reliance on protected characteristics and complies with federal law.

Segregation in Facilities or Resources: A college receiving federal funds designates a "BIPOC-only study lounge," facially discouraging access by students of other races. Even if access is technically open to all, the identity-based focus creates a perception of segregation and may foster a hostile environment. This extends to any resource allocation—such as study spaces, computer labs, or event venues—that segregates access based on protected characteristics, even if intended to create "safe spaces." This does not apply to facilities that are single-sex based on biological sex to protect privacy or safety, such as restrooms, showers, locker rooms, or lodging.

Implicit Segregation Through Program Eligibility: A federally funded community organization hosts a DEI-focused workshop series that requires participants to identify with a specific racial or ethnic group (e.g., "for underrepresented minorities only") or mandates sex-specific eligibility, effectively excluding others who meet objective program criteria. Use of Protected Characteristics in Candidate Selection

3. What Constitutes Unlawful Use of Protected Characteristics?

Unlawful use of protected characteristics occurs when a federally funded entity or program considers race, sex, or any other protected trait as a basis for selecting candidates for employment

(e.g., hiring, promotions), contracts (e.g., vendor agreements), or program participation (e.g., internships, admissions, scholarships, training). This includes policies that explicitly mandate representation of specific groups in candidate pools or implicitly prioritize protected characteristics through selection criteria, such as "diverse slate" requirements, diversity decision-making panels, or diversity-focused evaluations. It also includes requirements that contracting entities utilize a specific level of working hours from individuals of certain protected characteristics to complete the contract. Such practices violate federal law by creating unequal treatment or disadvantaging otherwise qualified candidates, regardless of any intent to advance diversity goals.

4. Examples of Unlawful Practices

Race-Based "Diverse Slate" Policies in Hiring: A federally funded research institute adopts a policy requiring that all interview slates for faculty positions include a minimum number of candidates from specific racial groups (e.g., at least two "underrepresented minority" candidates), rejecting otherwise qualified candidates who do not meet this racial criterion. This extends to any policy that sets racial benchmarks or mandates demographic representation in candidate pools, such as requiring a certain percentage of finalists to be from "diverse" backgrounds.

Sex-Based Selection for Contracts: A federally funded state agency implements a DEI policy that prioritizes awarding contracts to women-owned businesses, automatically advancing female vendors or minority-owned businesses over equally or more qualified businesses without preferred group status. This includes any contract selection process that uses sex or race as a tiebreaker or primary criterion, such as policies favoring "minority- or women-owned" businesses without satisfying the appropriate level of judicial scrutiny.

Race- or Sex-Based Program Participation: A federally funded university's internship program requires that 50% of selected participants be from "underrepresented racial groups" or female students, rejecting equally or more qualified applicants who do not meet these demographic criteria. This extends to any program—such as scholarships, fellowships, or leadership initiatives—that uses race, sex, or any other protected characteristic as a selection criterion, even if framed as addressing underrepresentation.

D. Training Programs That Promote Discrimination or Hostile Environments

1. What Constitutes Unlawful DEI Training Programs?

Unlawful DEI training programs are those that—through their content, structure, or implementation—stereotype, exclude, or disadvantage individuals based on protected characteristics or create a hostile environment. This includes training that:

- Excludes or penalizes individuals based on protected characteristics.

- Creates an objectively hostile environment through severe or pervasive use of presentations, videos, and other workplace training materials that single out, demean, or stereotype individuals based on protected characteristics.

2. Examples of Unlawful Practices

Trainings That Promote Discrimination Based on Protected Characteristics: A federally funded school district requires teachers to complete a DEI training that includes statements stereotyping individuals based on protected characteristics—such as "all white people are inherently privileged," "toxic masculinity," etc. Such trainings may violate Title VI or Title VII if they create a hostile environment or impose penalties for dissent in ways that result in discriminatory treatment.[6]

E. Recommendations on Best Practices

Ensure Inclusive Access: All workplace programs, activities, and resources should be open to all qualified individuals, regardless of race, sex, or other protected characteristics. Avoid organizing groups or sessions that exclude participants based on protected traits. Some sex separation is necessary where biological differences implicate privacy, safety, or athletic opportunity.

Focus on Skills and Qualifications: Base selection decisions on specific, measurable skills and qualifications directly related to job performance or program participation. For example, rather than asking about "cultural competence," assess specific skills such as language proficiency or relevant educational credentials. Criteria like socioeconomic status, first-generation status, or geographic diversity must not be used if selected to prioritize individuals based on racial, sex-based, or other protected characteristics.

Prohibit Demographic-Driven Criteria: Discontinue any program or policy designed to achieve discriminatory outcomes, even those using facially neutral means. Intent to influence demographic representation risks violating federal law. For example, a scholarship program must not target "underserved geographic areas" or "first-generation students" if the criteria are chosen to increase participation by specific racial or sex-based groups. Instead, use universally applicable criteria, such as academic merit or financial hardship, applied without regard to protected characteristics or demographic goals.

Document Legitimate Rationales: If using criteria in hiring, promotions, or selecting contracts that might correlate with protected characteristics, document clear, legitimate rationales unrelated to race, sex, or other protected characteristics. Ensure these rationales are consistently applied and are demonstrably related to legitimate, nondiscriminatory institutional objectives.

Scrutinize Neutral Criteria for Proxy Effects: Before implementing facially neutral criteria, rigorously evaluate and document whether they are proxies for race, sex, or other protected

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[6] Federal law allows for workplace harassment trainings that are focused on preventing unlawful workplace discrimination and that do not single out particular groups as inherently racist or sexist.

characteristics. For instance, a program targeting "low-income students" must be applied uniformly without targeting areas or populations to achieve racial or sex-based outcomes.

Eliminate Diversity Quotas: Focus solely on nondiscriminatory performance metrics, such as program participation rates or academic outcomes, without reference to race, sex, or other protected traits. And discontinue policies that mandate representation of specific racial, sex-based, or other protected groups in candidate pools, hiring panels, or final selections. For example, replace a policy requiring "at least one minority candidate per slate" with a process that evaluates all applicants based on merit.

Avoid Exclusionary Training Programs: Ensure trainings are open to all qualified participants, regardless of protected characteristics. Avoid segregating participants into groups based on race, sex, or other protected characteristics. Trainings should not require participants to affirm specific ideological positions or "confess" to personal biases or privileges based on a protected characteristic.

Include Nondiscrimination Clauses in Contracts to Third Parties and Monitor Compliance: Incorporate explicit nondiscrimination clauses in grant agreements, contracts, or partnership agreements, requiring third parties to comply with federal law, and specify that federal funds cannot be used for programs that discriminate based on protected characteristics. Monitor third parties that receive federal funds to ensure ongoing compliance, including reviewing program materials, participant feedback, and outcomes to identify potential discriminatory practices. Terminate funding for noncompliant programs.

Establish Clear Anti-Retaliation Procedures and Create Safe Reporting Mechanisms: Implement and communicate policies that prohibit retaliation against individuals who engage in protected activities, such as raising concerns, filing complaints, or refusing to participate in potentially discriminatory programs. Include these policies in employee handbooks, student codes of conduct, and program guidelines. Provide confidential, accessible channels for individuals to report concerns about unlawful practices.

V. CONCLUSION

Entities are urged to review all programs, policies, and partnerships to ensure compliance with federal law, and discontinue any practices that discriminate on the basis of a protected status. The recommended best practices provided in this guidance are non-binding suggestions to assist entities in avoiding legal pitfalls and upholding equal opportunity for all. By prioritizing nondiscrimination, entities can mitigate the legal, financial, and reputational risks associated with unlawful DEI practices and fulfill their civil rights obligations.

Furman University

Non-Harassment and Non-Discrimination Policy

I. Introduction

Furman University ("Furman" or the "University") is committed to ensuring that no individual is subjected to unlawful Discriminatory Harassment or Discrimination in connection with admission, employment (including application for employment) in, treatment in connection with, or access to, the University's programs or activities because of the individual's race, color, national origin (including shared ancestry and ethnic characteristics), sex, sexual orientation, gender, gender identity, pregnancy, disability, age, religion, protected veteran status, or any other characteristic or status protected by applicable federal, state, or local law (referred to as "Protected Characteristics"). The University has adopted this Non-Harassment and Non-Discrimination Policy (this "Policy") to ensure compliance with Title VI and Title VII of the Civil Rights Act of 1964 ("Title VI" and "Title VII"), Title IX of the 1972 Federal Education Amendments ("Title IX"), Section 504 of the Rehabilitation Act ("Section 504"), the Americans with Disabilities Act (the "ADA"), other applicable laws, and the University's prohibition against Discriminatory Harassment or Discrimination based on Protected Characteristics as set forth in this Policy.

A. Scope

This Policy applies to conduct that occurs in connection with University programs or activities, regardless of location. The University may consolidate complaints alleging Discrimination or Discriminatory Harassment under this Policy with complaints alleging potential violations of other University policies where the allegations arise out of the same facts or circumstances.

Title IX sex and pregnancy discrimination matters are addressed under this Policy, while allegations involving "Sexual Misconduct," as that term is defined in the University's Sexual Misconduct Policy, are adjudicated exclusively under that policy.[1] When a report includes allegations that fall under both the Sexual Misconduct Policy and this Policy, the University will determine which procedures apply and may consolidate the allegations under the Sexual Misconduct Policy where appropriate.

B. Who May Grieve? / What May Be Grieved?

Any student currently enrolled at the University and any current employee of the University who believes that they have been discriminated against or harassed on the basis of any actual or perceived Protected Characteristic may file a grievance under this Policy. Any applicant for employment, applicant for admission as a student, or visitor to the University who believes that they have been discriminated against or harassed in violation of the principles in this Policy is

[1] *Sexual Misconduct, as that term is defined in the University's Sexual Misconduct Policy, includes dating violence, domestic violence, sexual assault, sexual exploitation, sexual harassment, sexual intimidation, stalking, and unwelcome sexual conduct. Please see the University's Sexual Misconduct Policy for additional information. The Sexual Misconduct Policy is available at* ***www.furman.edu***.

also encouraged to notify the appropriate Administrator, but such individuals are not generally afforded the procedures under this Policy. The University retains discretion on whether to extend these procedures to third-party affiliates who have a formal (including contractual) relationship with the University.

C. Administrators

Melissa Nichols
Civil Rights Officer
Title VI & Title IX Coordinator
ADA & Section 504 Coordinator
Furman University
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D. Confidentiality

The University will treat information submitted under this Policy or in connection with a grievance filed under this Policy as confidential to the extent required by applicable laws. Subject to the Family Educational Rights and Privacy Act and any other applicable privacy laws, however, the University official investigating a grievance or providing supportive measures or remedies under this Policy will inform individuals with a legitimate need to know of the grievance and may provide them related information as necessary to allow the University to conduct a meaningful and thorough investigation and to respond appropriately to the concerns reported.

E. Prohibition Against Retaliation

The University prohibits Retaliation being taken or threatened against a person because they have submitted information under this Policy or have filed a grievance or participated in a grievance investigation in good faith.

F. Amnesty

The University considers the reporting and adjudication of Discrimination, Discriminatory Harassment and Retaliation to be of paramount importance. The University may, in its discretion, provide amnesty for other (generally minor) policy violations that are discovered in connection with the grievance procedures set forth in this Policy.

G. Prohibition on Providing False Information or Interfering with an Investigation.

Any individual who knowingly files a false report or who interferes with a grievance process under this Policy may be subject to disciplinary action.

H. Academic Freedom

This policy is not intended to and shall not be used to limit or restrict, in any manner, academic freedom as it is contemplated by applicable faculty policies (including Policy122.1 and Policy 137.8). Academic Freedom includes but is not limited to, the curricular or pedagogical choices of instructors. Furman affirms its commitment to academic freedom and recognizes that an essential function of education is a probing of opinions and an exploration of ideas, some of which, because they are controversial, may cause students and others discomfort. This discomfort, as a product of free academic inquiry within an instructor's area(s) of expertise, shall not in and of itself be considered or construed to constitute Discriminatory Harassment or Discrimination.

If a report relates solely to a matter of academic freedom (that is, it does not constitute potential Discriminatory Harassment, Discrimination, or Retaliation), including, but not limited to, the selection of course materials, the content of a course, the content of a class discussion, or course assignments and projects, or faculty scholarship or creative projects, the Dean of Faculty shall evaluate the report or complaint and if they assess that no further process is required, they may either conduct any follow up that may be warranted (e.g. an educational conversation) or, if the Respondent is not a faculty member, will consult with the Decision-maker handling the matter. This policy does not supersede or replace Due Process Policy (Policy 131.5) for matters that fall within the jurisdiction of that policy.

If a report includes issues of academic freedom that are intertwined with other allegations that are subject to this Policy, the Dean of Faculty will be consulted by the Decision-maker handling the matter.

I. Definitions

1. **Administrator:** The individuals identified in Section 1(C) are Administrators. These individuals have the authority and responsibility to address concerns about Discrimination or Discriminatory Harassment. The University has designated Melissa Nichols, Civil Rights Officer, to coordinate its efforts to comply with Title VI, Title IX, Section 504 and the ADA. The University has designated Sharen Beaulieu, Associate Vice President for

Human Resources, to coordinate its efforts to comply with Title VII and other concerns involving employees.

2. **Complainant:** An individual who is alleged to have experienced conduct that violates this Policy.

3. **Decision-maker:** The formal grievance procedures in this Policy refer out to existing disciplinary processes, and Decision-makers include student accountability hearing boards (for student respondents), the Associate Vice President for Human Resources or their designee (for non-faculty employees) and the Dean of Faculty or their designee (for faculty members).

4. **Discrimination:** Differential treatment that deprives or limits an individual's access to educational, employment, or other institutional benefits, opportunities, programs, or activities on the basis of an actual or perceived Protected Characteristic.

5. **Discriminatory Harassment:** Unwelcome conduct based on a Protected Characteristic that, based on the totality of the circumstances, is both subjectively and objectively offensive and is so severe, persistent, or pervasive that it: (a) creates an environment that a reasonable person would consider hostile, intimidating, offensive or abusive; (b) has the purpose or effect of unreasonably interfering with an individual's work or academic performance; or (c) otherwise adversely limits an individual's employment or participation in a University program or activity. Determining whether a hostile environment has been created is a fact-specific inquiry.

6. **Protected Characteristic:** An individual's race, color, national origin (including shared ancestry and ethnic characteristics), sex, sexual orientation, gender, gender identity, pregnancy, disability, age, religion, protected veteran status (for non-federal employers), or any other characteristic or status protected by applicable federal, state, or local law.

7. **Remedies:** Measures provided to address safety of the Complainant and/or the Furman community, prevent recurrence and restore access to Furman's programs and activities.

8. **Respondent:** An individual who (or student organization that) is alleged to have engaged in conduct that violates this Policy.

9. **Retaliation:** Any adverse action, including direct and indirect intimidation, threats, coercion, reprisals, Discrimination, or harassment (including charges against an individual for conduct violations that do not involve Discrimination or Discriminatory Harassment under this Policy but which arise out of the same facts or circumstances as a report or Complaint of Discrimination or Discriminatory Harassment), threatened or taken against a person (i) for the purpose of interfering with any right or privilege secured by this Policy or (ii) because the person has made a report or Complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this Policy. Retaliation does not include

(a) charging an individual with making a materially false statement in bad faith in the course of a proceeding pursuant to this Policy (provided, however, that a determination regarding responsibility alone is not sufficient to conclude that an individual made a materially false statement in bad faith) or (b) good faith actions lawfully pursued in response to a report of prohibited conduct.

10. **Supportive Measures:** Non-disciplinary, non-punitive individualized services offered to Complainants, Respondents or Witnesses designed to 1) restore or preserve the individual's access to employment opportunities or benefits or to the University's programs and activities; 2) protect the safety of the individuals or the campus community; or 3) provide support during an investigation, Formal Grievance Procedure or Facilitated Resolution Procedure under this Policy.

II. Reporting and Support

A. Reporting

(a) Reporting to the University. Any person (whether or not the person reporting is the Complainant) who wishes to notify the University of concerns regarding Discrimination, Discriminatory Harassment or Retaliation should report those concerns to the appropriate Administrator. This report may be made in person, by telephone, or in writing using the contact information for the Administrators listed above. Individuals also may use the online Discrimination and Discriminatory Harassment report form to report such concerns. A report may be made at any time.

While individuals also have the option not to report alleged Discrimination, Discriminatory Harassment and Retaliation that they personally experience, if information about Discrimination, Discriminatory Harassment or Retaliation comes to the attention of the University, the University may, as described more fully in this Policy, (1) initiate an investigation even if the Complainant does not file a Complaint and/or (2) notify appropriate law enforcement authorities if required or warranted by the nature of the information of which it becomes aware.

No member of the University community may discourage an individual from reporting alleged incidents of Discrimination, Discriminatory Harassment or Retaliation.

No employee or University-affiliated organization is authorized to investigate or resolve reports of Discrimination, Discriminatory Harassment or Retaliation without the approval and involvement of the appropriate Administrator.

The University strongly encourages all employees and other members of the Furman community to report Discrimination, Discriminatory Harassment and Retaliation promptly to the appropriate Administrator. In particular, all managers and supervisors are expected to promptly report to the appropriate Administrator any allegations of Discrimination, Discriminatory Harassment or

Retaliation of which they become aware. Reporting concerns to the University does not initiate a grievance Procedure unless the Complainant files a Complaint or the Administrator determines that the nature of the information reported warrants the Administrator's signing a Complaint on behalf of the University.

Any individual who is unsure to which Administrator they should report a concern may report that concern to the Civil Rights Officer, who will assess the concern and, if it does not fall within the Civil Rights Officer's authority, will refer the concern to the appropriate Administrator. Additionally, all members of the Furman community may use any of the reporting options below.

B. Reporting Anonymously.

Individuals may also file anonymous reports by the following methods:

1. Calling the Campus Conduct Hotline at (866) 943-5787.
2. by submitting an anonymous report to Furman University Police Department through the LiveSafe app; or
3. by using the online Discrimination, Discriminatory Harassment or Retaliation Report Form.

Individuals who choose to file anonymous reports are advised that it may be very difficult for the University to follow up or take any disciplinary action on anonymous reports, where corroborating information is limited. Reporting concerns to the University does not initiate a grievance Procedure unless the Complainant files a Complaint or the Administrator determines that the nature of the information reported warrants the Administrator's signing a Complaint on behalf of the University. Anonymous reports may be used for data collection purposes.

C. Reporting to Local Law Enforcement.

The University encourages any person who is a victim of a crime, including a hate crime, or who has safety concerns, to report to law enforcement. Individuals may file a Complaint directly with local law enforcement agencies by dialing 911, by calling (864) 294-2111, or by going in person to the Furman University Police Department, located at Estridge Commons.

Individuals may inform law enforcement authorities about Discrimination, Discriminatory Harassment or Retaliation and discuss the matter with a law enforcement officer without making a University Complaint. Individuals who make a criminal complaint may also choose to pursue a University Complaint simultaneously.

D. Initial Assessment and Response Upon Receipt of Report

Upon receipt of a report, the Administrator will conduct an initial assessment and response, typically within five (5) business days of receipt of the report. During the initial assessment and response, the Administrator typically takes the following steps:

- Assessing whether the reported conduct alleges a violation of this Policy and referring the report to the appropriate office if the conduct alleged falls outside the scope of this Policy or closing the report if the reported conduct, when taken as true, does not constitute a violation of any university policy.
- Contacting the Complainant and offering to meet, if the report is made by someone other than the Complainant and the Complainant is identifiable from the report.
- Offering and coordinating appropriate Supportive Measures and providing information about available resources. Supportive Measures may include, but are not limited to, the following:
    - **(a)** counseling services;
    - **(b)** campus forums or campus education/training;
    - **(c)** public statements;
    - **(d)** course-related adjustments or academic support services;
    - **(e)** modifications of work or class schedules;
    - **(f)** campus escort services;
    - **(g)** mutual restrictions on contact between the parties (i.e., no-contact orders);
    - **(h)** changes in work or housing locations;
    - **(i)** leaves of absence;
    - **(j)** and increased security and monitoring of certain areas of the campus.
- Advising the Complainant of available resolution options and the procedure(s) involved with those options.
- Determining whether the Complainant wishes to initiate either the Facilitated Resolution Procedure or the Formal Grievance Procedure.
- Assessing the reported conduct to determine whether the Administrator will initiate a Formal Grievance Procedure on behalf of the University.
- Assessing whether any Interim Measures are necessary.

If the Complainant does not want to initiate an Facilitated Resolution Procedure or a Formal Grievance Procedure, the Administrator will consider that request, and in most cases, will not initiate any grievance procedure. The Complainant may choose to initiate a grievance procedure later, if they wish to do so.

When the Administrator believes that, with or without the Complainant's desire to participate in a grievance procedure, a response to the allegations warrants an investigation, the Administrator has the discretion to initiate an investigation. If the Administrator determines that the outcome of the investigation warrants it, the Administrator may initiate the Formal Grievance Procedure. In determining whether circumstances warrant such action, the Administrator may consult with appropriate campus partners and consider factors such as the following:

1) the seriousness of the alleged conduct (including, but not limited to, whether the conduct involved violence or the threat of violence);

2) the increased risk that the alleged perpetrator will commit additional violations of

this Policy, such as (A) whether there have been other reports against the alleged perpetrator, (B) whether the alleged perpetrator has a history of arrests or records from a prior school indicating a history of Discrimination or Discriminatory Harassment or a history of violence, (C) whether the alleged perpetrator threatened further Discrimination or Discriminatory Harassment against the Complainant or others, or (D) whether the conduct at issue was alleged to have been committed by multiple perpetrators;

3) whether the information reveals a pattern of perpetration at a given location or by or against a particular group or person; and

4) whether the alleged perpetrator is an employee of the University and/or holds a position that could place community members at risk.

The presence of one or more of these factors or other factors impacting the safety of the University community may lead the Administrator to initiate the Formal Grievance Procedure. While the University will give significant weight to a Complainant's desired response to any reported concerns regarding Discrimination or Discriminatory Harassment, the Administrator has ultimate discretion as to whether to initiate an investigation and a Formal Grievance Procedure.

Where the Administrator initiates the Formal Grievance Procedure, the Administrator is not a Complainant or otherwise a party. Furthermore, initiation of a Formal Grievance Process by the Administrator is not sufficient alone to imply bias or that the Administrator is taking a position adverse to the Respondent.

E. Interim Measures

If necessary, while any grievance investigation is ongoing, the Administrator will impose interim measures to stop Discrimination, Discriminatory Harassment or Retaliation, prevent its recurrence, and correct any discriminatory effects on the Complainant and others, if appropriate. Such interim measures may include, but are not limited to, limiting interaction between the parties, or, if deemed warranted, removing the individual against whom the grievance is filed.

(a) Student Respondents. When the University's Threat Assessment Behavioral Intervention Team (TABI) has made an individualized safety and risk analysis and determined that an elevated level of concern exists for campus safety involving a student Respondent, TABI will share their analysis with the Administrator, who may request that the Dean of Students or their designee, on an emergency interim basis during the pendency of the resolution Procedure set forth in these grievance procedures, impose on the Respondent an administrative withdrawal from the University, summarily suspend the Respondent from campus housing or impose other emergency interim measures. In consultation with the Administrator after an individualized safety analysis, the Dean of Students or their designee may also temporarily adjust the job duties of a student-employee Respondent, place such student-employee Respondent on paid administrative leave, or take such steps as are reasonable, appropriate, and

necessary to restrict the Respondent's access to University facilities. The Dean of Students will notify the Respondent of the emergency interim measure(s) in writing. These actions may be appealed to the Vice President for Student Life or their designee by requesting a "show cause" hearing in writing within three (3) business days of receipt of the notice outlining the decision. The hearing will provide the student with the opportunity to demonstrate why the interim action should not take place. The "show cause" hearing will take place within three (3) business days of receipt of the request, and the Vice President of Student Life or their designee will issue a decision on within two (2) business days of the hearing. The decision of the Vice President for Student Life regarding the imposition of these actions will be final. The emergency interim action will be effective upon the issuance of the decision of the Vice President of Student Life or upon the expiration of three business days after the notification from the Dean of Students without a request being made for a "show cause" hearing.

1. Staff and other non-student, non-faculty employee Respondents. When TABI has made an individualized safety and risk analysis and determined that an elevated level of concern exists for campus safety involving a non-student, non-faculty employee Respondent, TABI will share their analysis with the Associate Vice President for Human Resources. When such an employee Respondent's alleged actions or behaviors affect the safety, health, or general welfare of the Complainant, students, other employees, and/or the University community, the Associate Vice President for Human Resources will determine whether emergency interim measures are warranted and may request that the individual authorized to make personnel decisions regarding the employee at issue (A) take such steps as are reasonable, appropriate, and necessary to restrict the Respondent's access to University facilities or (B) temporarily adjust the job duties of or place on administrative leave such Respondent during the pendency of the resolution Procedure set forth in this Policy. The individual authorized to make personnel decisions regarding the employee will notify the Respondent of the emergency interim measure(s) in writing.

(b) Faculty Respondents. When TABI has made an individualized safety and risk analysis and determined that an elevated level of concern exists for campus safety involving a faculty Respondent, TABI will share their analysis with the Dean of Faculty. When a faculty Respondent's alleged actions or behaviors affect the safety, health, or general welfare of the Complainant, students, other employees, and/or the University community, the Dean of Faculty will determine whether emergency interim measures are warranted, including (A) taking such steps as are reasonable, appropriate, and necessary to restrict the Respondent's access to University facilities or (B) temporarily adjusting the job duties of or placing on administrative leave such Respondent during the pendency of the resolution Procedures set forth in this Policy. The Dean of Faculty will notify the Respondent of the emergency interim measure(s) in writing and they may be reviewed in accordance with Policy 131.5 (Due Process) as applicable.

III. Facilitated Resolution Procedure

The Facilitated Resolution Procedure is a voluntary procedure designed to facilitate a satisfactory resolution of the grievance in an informal manner. The Facilitated Resolution Procedure is available only if 1) both the Complainant and the Respondent voluntarily consent in writing to participate in the Facilitated Resolution Procedure; 2) the Complainant and Respondent are both students or both employees of the University; and 3) the Administrator determines that the Facilitated Resolution Procedure is an appropriate mechanism for resolving the Complaint. Either the Complainant or the Respondent may initiate the Facilitated Resolution Procedure at any time prior to a determination of whether Discrimination, Discriminatory Harassment or Retaliation occurred. The Complainant has the option to forego the Facilitated Resolution Procedure and move immediately to the Formal Grievance Procedure.

The Facilitated Resolution Procedure is designed to prevent the recurrence of the conduct at issue and provide a remedy that meets the needs of both the Complainant and Respondent while eliminating any hostile environment that may exist. If a Respondent acknowledges that they caused harm to the Complainant (even if they do not accept responsibility for the policy violation at issue), the parties may elect for the University to incorporate restorative practices in the Facilitated Resolution Procedure.

A Complainant initiates the Facilitated Resolution Procedure by contacting the Administrator by e-mail, phone, or in person within thirty (30) calendar days of the date on which the Complainant knew of or should have known of the adverse action, decision, or matter upon which the grievance is based.

If both parties agree in writing to participate in the Facilitated Resolution Procedure, the Administrator will attempt to facilitate expeditiously a satisfactory resolution. The Administrator may serve as the Facilitated Resolution facilitator or may designate a trained third-party to serve as the Facilitated Resolution facilitator. The facilitator may involve other individuals that they deem beneficial to the process (e.g. a Human Resources representative for matters involving employees).The Administrator will provide the parties written notice of the allegations and will explain the requirements of the Facilitated Resolution procedure.

The Administrator will also discuss with each of the parties the options for Facilitated Resolution, which may include, among other options, the following:

1. A restorative conversation between the Complainant and Respondent, in which the parties meet in person with the facilitator present to communicate their feelings and perceptions regarding the concerns reported and the impact of those concerns and to relay their wishes regarding the future;
2. A mediation conducted by the facilitator either meeting separately with each party or with the parties together to explore whether there is a resolution satisfactory to both parties that would resolve the allegations in the Facilitated Resolution Procedure form.

Measures that parties may agree to in the Facilitated Resolution Procedure may include (but are not limited to):

- Completion of online or in-person training;
- Regular meetings with an appropriate University official, unit or resource;
- Participation in a campus educational program;
- Permanent no contact order;
- Restrictions from participation in certain activities, organizations, programs or classes;
- Change in work location or residential assignment or restrictions on access to certain places on campus;
- Restrictions on participation in certain events or activities;
- Alcohol education classes;
- Reflection paper or written apology;
- Counseling sessions; or
- Completion of an education or behavioral plan.

If this process results in a resolution between the parties and the Administrator finds the resolution to be appropriate under the circumstances, the resolution will be reduced to writing and the process will be concluded and the matter closed. If the parties are unable to reach a resolution or, if a party decides at any time to discontinue the Facilitated Resolution Procedure, the Complainant may initiate the Formal Grievance procedure.

To be effective, any agreement reached during the Facilitated Resolution Procedure must be memorialized in writing and signed by each of the parties and approved by the Administrator. If a Respondent completes all measures agreed to in the resolution agreement, no further University process is available for the allegations in the Facilitated Resolution form. If a student Respondent fails to complete all measures agreed to in the resolution agreement, they will be charged with Failure to Comply under the University's Student Conduct Code. If an employee Respondent fails to complete all measures agreed to in the resolution agreement, they will be disciplined under applicable employee disciplinary policies.

Any statements that the parties make during the Facilitated Resolution Procedure cannot be introduced in any other investigative or adjudicative proceeding at the University, including if the Facilitated Resolution Procedure is terminated and a formal resolution process is initiated under this Policy.

A resolution reached pursuant to the Facilitated Resolution Procedure is final and is not subject to appeal. Similarly, a Complainant may not later file a Complaint regarding allegations that have been resolved pursuant to the Facilitated Resolution Procedure.

IV. Formal Grievance Procedure

If a resolution is not reached using the Facilitated Resolution Procedure, if the University does not find the Facilitated Resolution Procedure to be appropriate, or if the parties choose not to use the Facilitated Resolution Procedure, the Complainant may initiate the Formal Grievance Procedure by submitting a written grievance ("Complaint") to the Administrator. If the Administrator is the subject of the grievance, the Complainant initiates the Formal Grievance Procedure by contacting the other Administrator identified in this Policy, who will either administer the Formal Grievance Procedure or will assign someone to do so who is not the subject of the grievance.

A Complainant who chooses to initiate the Formal Grievance Procedure after participating in the Facilitated Resolution Procedure must do so within ten (10) business days of receipt of the Administrator's written notification of the termination of the Facilitated Resolution Procedure. If the Complainant chooses not to use the Facilitated Grievance Procedure, the Complainant must initiate the Formal Grievance Procedure within one hundred-eighty (180) calendar days of the date on which the Complainant knew of or should have known of the adverse action, decision, or matter upon which the grievance is based.

The formal grievance must:

- be in writing;
- be dated;
- state the problem or action alleged to be harassing or discriminatory and the date of the alleged action;
- state how the action is harassing or discriminatory or how the party believes the Respondent's action is unreasonable;
- include a summary of the steps, if any, that the Complainant has taken in an attempt to resolve the issue;
- include any supporting documentation;
- name the individual(s) against whom the grievance is filed;
- state the Complainant's requested remedy; and
- be signed by the Complainant and include the Complainant's contact information.

Each party may be accompanied by one support person of their choice to any meeting or proceeding. However, the support person must be a current Furman student or employee and cannot be the party's parent or an attorney.

Within five (5) calendar days of receiving the written grievance, the Administrator will provide written notification of receipt of the grievance to the Complainant and to the Respondent(s). The Administrator will assign an investigator (or investigators) to conduct an impartial investigation of the grievance. The investigator will interview each of the parties, interview witnesses, gather evidence and draft an investigation report.

The investigation report will fairly summarize the relevant evidence and will include items such as the Complaint, any written statements of position, summaries of relevant interviews and descriptions of relevant evidence. Once the investigator has completed review or investigation of the grievance, they will share the investigation report with the Administrator. Investigations generally shall be completed within 45 days of the filing of the Complaint.

The Administrator will refer the grievance to the appropriate individual or office for a determination of any charges and adjudication. The Administrator will share with that individual or office the investigation report and any evidence deemed relevant by the investigator. The appropriate office for adjudication will be determined by the role of the Respondent. The individual or individuals who adjudicate(s) the grievance will determine the finding as to whether a policy violation has occurred; and if the Respondent is found responsible for one or more policy violations, the sanction or sanctions to be imposed. The University will not impose disciplinary sanctions on a Respondent unless there is a determination following the conclusion of a Formal Grievance Procedure that the Respondent engaged in Discrimination or Discriminatory Harassment, the Respondent accepted responsibility for the alleged conduct, or the Respondent voluntarily agreed to such sanction as part of the Facilitated Resolution Procedure.

1. Student as the Respondent: If the Respondent is a Furman student, the grievance will be referred to the Assistant Dean for Student Conduct and adjudicated under the Procedure set forth in the Student Handbook.
2. Staff Member as Respondent: If the Respondent is a Furman staff member, the grievance will referred to the Office of Human Resources and will be adjudicated administratively by the Associate Vice President for Human Resources, who will refer to appropriate policies and procedures, including, but not limited to, the following: Policy 817.8 (Employee Regulations and Responsibilities) and 817.81 (Discipline and Termination—Support and Administrative Staff).
3. Faculty member as Respondent: If the Respondent is a faculty member of the University, the grievance will be referred to the Office of the Dean of Faculty and will be adjudicated administratively by the Dean of Faculty, who will refer to appropriate faculty policies and procedures, including, but not limited to, Policy 131.5 (Due Process).
4. Student organizations as Respondents: If a student group (including an unrecognized student organization) is a Respondent, the matter may be referred to the appropriate Student Life office for disciplinary action against the organization.

A. Requirements for all Formal Grievance Procedures:

Regardless of the status of the Respondent, the Formal Grievance Procedure shall include the following requirements:

a. Standard of evidence: The Decisionmaker shall use the preponderance of the evidence standard to determine whether Discrimination or Discriminatory Harassment occurred.
b. Evidence: The decision-maker shall consider only evidence that is relevant and not impermissible.

c. Notice of Determination: The decision-maker shall notify the Complainant and Respondent, in writing, of the determination as to whether Discrimination or Discriminatory Harassment occurred. The decision will include findings of fact, a conclusion regarding violations of this Policy, a rationale for the decision, and, if applicable, an explanation of remedies, which may include the imposition of disciplinary sanctions and/or referral to an individual's supervisor or another administrator for the determination and imposition of disciplinary sanctions.

If the Decisionmaker determines that Discrimination, Discriminatory Harassment or Retaliation occurred, the Administrator, as appropriate, shall:

1. Coordinate the provision and implementation of Remedies to the Complainant and any other person that the University identifies as having had equal access to their employment opportunities, privileges and benefits or access to the University's programs or activities limited or denied by the Respondent's conduct;
2. Coordinate, in collaboration with other University officials, the imposition of sanctions against the Respondent; and
3. Take other appropriate, prompt, and effective steps intended to ensure that Discrimination, Discriminatory Harassment or Retaliation at issue in the grievance does not continue to occur and that any hostile environment is remedied.

B. Disciplinary Sanctions

Disciplinary sanctions for Discrimination, Discriminatory Harassment and Retaliation may include:

- For staff members: disciplinary action up to and including suspension and termination;
- For faculty members: disciplinary action up to and including suspension and termination, as provided in university policies, including Policy 131.5; and
- For students: educational sanctions, probation, suspension or expulsion.

Neither a resolution reached through the Facilitated Resolution process nor a decision reached through the Formal Grievance Procedure will limit the University's ability to provide additional, non-disciplinary, Remedies to address the impact on the University community.

C. Adjustment of Deadlines

The Administrator may change the deadlines in this Policy if they determine that additional time is warranted or for other good cause, such as semester or summer breaks, to provide additional time to consider the facts and evidence, delays in receiving information from witnesses, etc. Likewise, if the application of time deadlines creates a hardship due to the urgency of the matter, the Administrator, at the request of the Complainant, will determine if an expedited procedure can be utilized. The Complainant and the Respondent will be notified if any deadlines are altered.

D. Disability Accommodations

The University will make arrangements to ensure that individuals are provided appropriate accommodations, to the extent necessary and available, to participate in the steps and procedures outlined in this Policy.

Students must make requests for accommodations to the Student Office for Accessibility Resources ("SOAR"; located in the lower level of Hipp Hall in Suite 011 and available by phone at 864-294-2320). SOAR will meet with the student, review the supporting documentation, make a decision about the request, notify the individual about approved accommodations, and make arrangements for the accommodations.

Employees must make requests for accommodations by contacting the Human Resources office at human.resources@furman.edu. Human Resources will review the supporting documentation, make a decision about the request, notify the individual about approved accommodations, and make arrangements for the accommodations.

E. Appeals

In cases involving student Respondents, the appeal process in the Student Handbook applies. For faculty Respondents, the review process in Policy 131.5 (Due Process) applies, as applicable.

Staff Respondents may appeal a decision within five (5) business days of receipt of a Notice of Determination by submitting a written appeal by email to the Civil Rights Officer. Appeals are limited to the following grounds, and the Civil Rights Officer's Review of the decision will be limited solely to these grounds:

1. Substantial new evidence is available related to the specific matter that was **not** available at the time of the original hearing;
2. A substantial violation of the hearing procedure occurred; or
3. The sanction is incommensurate with the violation for with the individual was found responsible.

The Civil Rights Officer will review the appeal and issue a written decision within twenty (20) business days.

F. External Complaints

The availability and use of this Policy does not prevent individuals who believe they have experienced discrimination in violation of federal law from filing a complaint of discrimination with external agencies such as the U.S. Department of Education, Office for Civil Rights. The OCR regional office serving South Carolina is located at:

Office for Civil Rights, Washington, D.C. Office
U.S. Department of Education
400 Maryland Avenue, SW
Washington, D.C. 20202-1475
Telephone: 202-453-6020
FAX: 202-453-6021
TDD: 800-877-8339
Email: OCR.DC@ed.gov

Complaints may also be submitted online at: https://www.ed.gov/ocr/complaintintro.html

Similarly, nothing in this Policy prevents applicants or employees from filing a complaint or cooperating with external agencies such as the Equal Employment Opportunity Commission. Individuals who believe they have been subjected to employment discrimination in violation of federal law may also file a charge with the U.S. Equal Employment Opportunity Commission (EEOC). The EEOC office serving South Carolina is:

Charlotte District Office
U.S. Equal Employment Opportunity Commission
129 West Trade Street, Suite 400
Charlotte, NC 28202
Telephone: (800) 669-4000
TTY: (800) 669-6820
ASL Video Phone: (844) 234-5122
Fax: (980) 296-5360

Individuals can file a charge of discrimination online at: https://www.eeoc.gov/filing-charge-discrimination

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

April 11, 2025

VIA email to: cliff.iler@virginia.edu

University of Virginia
P. O. Box 400225
Charlottesville, Virginia 22904

Federal civil rights laws prohibit discrimination based on race and color, among other protected characteristics. These laws constitute a core protection of our legal system: Equality of opportunity shall not be denied to any American because of immoral race-based preferences. Unfortunately, American colleges and universities have flagrantly violated these laws for decades. As the Supreme Court recently explained, "[m]any universities have for too long" "concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 231 (2023).

We write to request information regarding your admissions policies and compliance with the Supreme Court's decision in *Students for Fair Admissions*, which found certain race-based admissions policies unlawful under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause. Our inquiry is focused on possible race discrimination in undergraduate admissions at your institution. We expect your institution to cooperate fully with this inquiry.

1) Please certify that your institution does not use race as a factor in making admissions decisions.
    a. To support this certification, please provide any and all relevant documents guiding your admissions policies and procedures, including any documents related to the use or lack of use of race in evaluating applicants.
    b. We also request all documents regarding any changes in admissions policies or procedures following the decision in *Students for Fair Admissions*.
    c. We also request all admissions data for the past five academic years, including applicant test scores (SAT/ACT), GPA, extracurricular activities, essays, and admission outcomes, disaggregated by race and ethnicity.
    d. Finally, we request any statistical analyses or internal reviews conducted by your institution regarding admissions trends or outcomes by race.

2) Please certify that your institution does not use race as a factor in awarding any scholarships, financial assistance, or other benefits to prospective or current students. To support this certification, please provide any and all relevant documents about

your policies and procedures relating to scholarships, financial assistance, or other benefits programs.

Please provide all responsive documents in an accessible electronic format (such as searchable PDF, Microsoft Word, or Excel) that preserves metadata and allows for efficient review. If electronic versions are available, we prefer these over paper copies to expedite the review process. If certain documents are only available in physical form, please indicate this in your response.

Please send the requested information by April 25, 2025. If you anticipate challenges meeting this deadline, contact us by April 18, 2025, to discuss a reasonable extension. If you have any questions as to formatting or concerns with the deadline, please contact us.

We recognize that some of the requested materials may contain student information protected under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Please be advised that the Department of Justice is authorized under 34 C.F.R. § 99.31(a)(3)(ii) to obtain such information without prior consent for the purpose of enforcing federal legal requirements, including Title VI. Any information disclosed pursuant to this request will be used solely for compliance review purposes and maintained in accordance with applicable federal confidentiality requirements.

If you have any questions about this letter, please contact this office at (202) 514-2151. Thank you in advance for your attention and cooperation.

Sincerely,

CHAD MIZELLE
Acting Associate Attorney General

HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General *Washington, D.C. 20530*

April 18, 2025

VIA E-mail to: cliff.iler@virginia.edu

University of Virginia
P.O. Box 400225
Charlottesville, Virginia 22904

Federal civil rights laws prohibit discrimination based on race and color, among other protected characteristics. These laws constitute a core protection of our legal system: Equality of opportunity shall not be denied to any American because of immoral race-based preferences. Unfortunately, American law schools have flagrantly violated these laws for decades. As the Supreme Court recently explained, "[m]any universities have for too long" "concluded, wrongly, that the touchstone of an individual's identity is not challenges bested, skills built, or lessons learned but the color of their skin. Our constitutional history does not tolerate that choice." *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 231 (2023).

We write to request information regarding your admissions policies and compliance with the Supreme Court's decision in *Students for Fair Admissions*, which found certain race-based admissions policies unlawful under Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.*, and the Equal Protection Clause. Our inquiry is focused on possible race discrimination in law school admissions at your institution. We expect your institution to cooperate fully with this inquiry.

1) Please certify that your institution does not use race as a factor in making admissions decisions.
    a. To support this certification, please provide any and all relevant documents guiding your admissions policies and procedures, including any documents related to the use or lack of use of race in evaluating applicants.
    b. We also request all documents regarding any changes in admissions policies or procedures following the decision in *Students for Fair Admissions*.
    c. We also request all admissions data for the past five academic years, including applicant test scores (LSAT), GPA, extracurricular activities, essays, and admission outcomes, disaggregated by race and ethnicity.
    d. Finally, we request any statistical analyses or internal reviews conducted by your institution regarding admissions trends or outcomes by race.

2) Please certify that your institution does not use race as a factor in awarding any scholarships, financial assistance, or other benefits to prospective or current students. To support this certification, please provide any and all relevant documents about your

policies and procedures relating to scholarships, financial assistance, or other benefits programs.

Please provide all responsive documents in an accessible electronic format (such as searchable PDF, Microsoft Word, or Excel) that preserves metadata and allows for efficient review. If electronic versions are available, we prefer these over paper copies to expedite the review process. If certain documents are only available in physical form, please indicate this in your response.

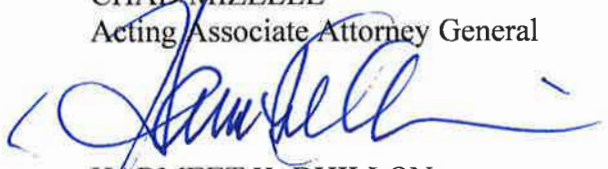
Please send the requested information by May 2, 2025. If you anticipate challenges meeting this deadline, contact us by April 28, 2025, to discuss a reasonable extension. If you have any questions as to formatting or concerns with the deadline, please contact us.

We recognize that some of the requested materials may contain student information protected under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Please be advised that the Department of Justice is authorized under 34 C.F.R. § 99.31(a)(3)(ii) to obtain such information without prior consent for the purpose of enforcing federal legal requirements, including Title VI. Any information disclosed pursuant to this request will be used solely for compliance review purposes and maintained in accordance with applicable federal confidentiality requirements.

If you have any questions about this letter, please contact this office at (202) 514-2151. Thank you in advance for your attention and cooperation.

Sincerely,

CHAD MIZELLE
Acting Associate Attorney General



HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

April 28, 2025

VIA E-MAIL TRANSMISSION ONLY

President James E. Ryan
THE UNIVERSITY OF VIRGINIA
Madison Hall
Charlottesville, Virginia

Rector Robert D. Hardie
Board of Visitors
THE UNIVERSITY OF VIRGINIA
The Rotunda
Charlottesville, Virginia

c/o Clifton M. Iler
Office of the University Counsel
Madison Hall, Third Floor
Charlottesville, Virginia 22902
cliff.iler@virginia.edu

Dear President Ryan and Rector Hardie:

On April 11, 2025, and April 18, 2025, The United States Department of Justice issued letters to your University's undergraduate institution and the School of Law, respectively, regarding the University's admissions practices, particularly regarding racial preferences since the United States Supreme Court case of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 231 (2023) and the recent Executive Orders of the President of the United States regarding the dismantling of "Diversity, Equity, and Inclusion" or "DEI" apparatuses and instruments of discrimination based on race, skin color, ethnicity, national origin, and other impermissible, immutable characteristics.

This letter should be received and considered to be in conjunction with those letters but should not be read to alter, modify, or in any way limit those inquiries and requests.

On March 7, 2025, your university's governing Board of Visitors met in closed session regarding the continued viability of the illegal DEI programs and preferences at UVa. Later, during that same meeting, the Board of Visitors voted—unanimously, the Department understands—to dissolve DEI at the University of Virginia. Per the directives of the Board of Visitors and that unanimous resolution, your office and you were required to report to the Board of Visitors within thirty days, confirming the total elimination of DEI at the University of Virginia.

The Department has received complaints that your office and the University may have failed to implement these directives and further that you have refused to produce the report on the matter.

By Friday, May 2, 2025, the Department expects you to:

1. Produce the executed, official Board of Visitors' Resolution dated on or around March 7, 2025, regarding the dissolution and dismantling of DEI, along with all written or electronic records (including audio or video recording) of the Board of Visitors public and closed session meeting and deliberations;

2. Certify that for every University division, department, school, foundation, unit, system (such as the Health System), and graduate or professional program and school (including but not limited to the School of Law, School of Medicine, and Nursing School) of the University, the dictates of the Board of Visitors' Resolution have been fully and completely satisfied and accomplished. A responsive answer will also include a description with particularity how that has been effectuated, with precision and detail. A responsive answer will further include specific identification of which departments, programs, preferences, preferential systems and positions/titles/chairs have been eliminated and terminated. Further, for every employee, student, faculty member, or administrator who formerly occupied a position with any DEI responsibilities, "mandate," duties, or title whatsoever, identify whether that individual's position and title have been eliminated, whether the individual is still associated with the University in any official or unofficial, paid or unpaid capacity, and, if so, the name and nature of that individual's current title or position;

3. Produce all Report(s) submitted by you or members of your administration to the Board of Visitors, the Rector, or any other body or group on or around April 7, 2025, regarding your administration's execution of the Board of Visitors' March 7, 2025, direction to dissolve and dismantle DEI at the University of Virginia.

You may contend—as your University has done in the past—that some or even all of the requested materials may contain student information protected under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Please be advised that the Department of Justice is authorized under 34 C.F.R. § 99.31(a)(3)(ii) to obtain such information without prior consent for the purpose of enforcing federal legal requirements.

The Department of Justice expects your complete candor and prompt response to this request. Please ensure that this letter is immediately shared with each of the members of the University's Board of Visitors.

If you have any questions, please contact this office at (202) 514-7818.

Sincerely,
HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

Gregory W. Brown
Deputy Assistant Attorney General
Jeffrey Morrison
Senior Counsel
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice
Civil Rights Division

Assistant Attorney General
950 Pennsylvania Ave, NW - RFK
Washington, DC 20530

May 2, 2025

VIA E-MAIL TRANSMISSION ONLY

President James E. Ryan
THE UNIVERSITY OF VIRGINIA
Madison Hall
Charlottesville, Virginia

c/o Clifton M. Iler
Office of the University Counsel
Madison Hall, Third Floor
Charlottesville, Virginia 22902
cliff.iler@virginia.edu

Dear President Ryan,

The United States Department of Justice has received multiple complaints regarding antisemitic discrimination, harassment and abuse, and related retaliation occurring within the University of Virginia's (UVa) educational environment directed towards UVa students and employees who are Jewish, Israeli, and Israeli-American.

The Department is particularly concerned about allegations that UVa engaged in disparate treatment and retaliation in its student discipline processes with regard to a Fourth Year, Jewish UVa student and Jefferson Scholar ("E.N."),who alleged that he was the victim of hate-based misconduct by other students, as well as alleged disparate treatment and retaliation by the University. We have received the recent joint letter addressed to you, dated April 30, 2025, regarding this specific matter from Stand With Us, the Anti-Defamation League, and the Brandeis Center.

The Department has received allegations that several UVa actively-enrolled students committed acts that may involve antisemitic animus. Furthermore, the Department is aware of allegations that several UVa active faculty members acted in support of the students charged with committing the offenses against and antisemitic bullying of the student, further compounding the trauma he and his family suffered. These incidents allegedly occurred in late October 2024. The Department has received complaints, as reflected in the letter reference above, that your administration allowed the alleged principal antagonists to remain on the UVa's Grounds and remain actively enrolled in school without any suspension or termination of privileges. Furthermore, the Department has received complaints that despite the University's obligation to apprise victims of hate-based misconduct and illegal discrimination and harassment of the status of the proceedings against the students charged with committing the transgressions, your administration has openly refused to do so.

The facts surrounding this specific controversy and of the UVa's alleged deliberate indifference and retaliatory treatment of the victim in response are, in a word, disturbing.

Please understand that while this is likely the first of several requests that your administration will receive regarding this matter, this inquiry is unrelated to the other matters regarding the University of Virginia that are currently underway. This letter should in no way be read to limit, modify, or supersede those other matters or the attendant pending requests.

By Friday, May 9, 2025, the Department expects you to:

1. Certify that your administration and the University of Virginia have fully agreed to, complied with and satisfied the demands set forth in the April 30, 2025, letter referenced above;

2. Identify all proceedings, investigations, or disciplinary processes (specifically including, but not limited to any University Judiciary Committee, UVa EOCR, or Threat Assessment Team investigations) that have been initiated (whether concluded or not) regarding this matter or any of the participants in the incidents that gave rise to this matter;

3. Produce all reports, findings, judgments, or memoranda regarding any of the processes or investigations identified in #2 above;

4. Describe with particularity the outcome of each of the matters identified in #2 above. If, for any reason, a matter identified in #2 above is open or unfinished, explain why that is the case;

5. Identify by name, title, and contact information every University of Virginia employee, faculty member, or administrator (including members of the Office of University Counsel) who investigated, reviewed, provided recommendations or conclusions, adjudicated, or had any involvement in this matter;

6. Certify or produce evidence sufficient to demonstrate that all University proceedings (specifically including, but not limited to, "student led" judiciary committee processes), disciplinary processes, investigations (including Office of Civil Rights investigations) that have ever been initiated against "E.N." or could be considered adverse to the student "E.N." have been terminated, dismissed with prejudice, and expunged from the student's records;

7. Describe with particularity the measures taken by the University of Virginia in response to the events complained of by "E.N." and his parents;

8. Describe what measures the University of Virginia has put into place to ensure the safety of "E.N." and his family on Grounds, at his upcoming and anticipated graduation, and in the coming year when "E.N." is a graduate student at UVa;

9. Certify that "E.N." and his family will enjoy safe and unfettered access to the full and complete educational environment at the University of Virginia, both virtual and physical, free of antisemitism, free of antisemitic discrimination, harassment and abuse and free of retaliation or the threat of retaliation.

If you have any questions, please contact this office at (202) 514-7818.

Sincerely,

HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

Gregory W. Brown
Deputy Assistant Attorney General
Jeffrey Morrison
Senior Counsel
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

May 22, 2025

VIA E-MAIL TRANSMISSION ONLY

President James E. Ryan
THE UNIVERSITY OF VIRGINIA
Madison Hall
Charlottesville, Virginia

Rector Robert D. Hardie
Board of Visitors
THE UNIVERSITY OF VIRGINIA
The Rotunda
Charlottesville, Virginia

c/o Clifton M. Iler
Office of the University Counsel
Madison Hall, Third Floor
Charlottesville, Virginia 22902
cliff.iler@virginia.edu

Dear President Ryan and Rector Hardie:

This is to inform you that the United States Department of Justice is commencing a compliance review investigation of the University of Virginia ("UVa") pursuant to Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d *et seq.* Title VI prohibits a recipient of federal financial assistance from discriminating on the basis of race, color, or national origin. 42 U.S.C. § 2000d. As you know, UVa currently receives federal financial assistance from the Department of Justice and other federal government sources and accordingly must abide by Title VI's anti-discrimination requirements. We have previously sent UVa requests for information regarding possible race discrimination in its undergraduate admissions and its law school admissions. We incorporate those requests into this investigation. At this time, our investigation will also focus on possible race discrimination in medical school admissions at UVa.

In conducting the compliance investigation, we will seek to determine whether UVa is violating Title VI. We have not reached any conclusions about the subject matter of the investigation. If we conclude that UVa is not violating Title VI, we will notify you that we are closing the investigation. 28 C.F.R. § 42.107. If we conclude that UVa is violating Title VI, we will inform you and work with you to secure compliance by informal voluntary means. 28 C.F.R. §§ 42.107 & 42.108. If we cannot secure compliance by voluntary means, we may take formal action to secure compliance, which could include suspending, terminating, or refusing to grant or continue your federal financial assistance, as well as commencing a civil action. 28 C.F.R. § 42.108.

We expect UVa to cooperate fully with this compliance investigation. The Department's Title VI implementing regulations require, among other obligations, that recipients of federal financial assistance permit access by the Department to sources of information and facilities as may be pertinent to ascertain compliance with Title VI and the implementing regulations. 28 C.F.R. §§ 42.106 & 42.108. These Title VI implementing regulations also require that every application for federal financial assistance be accompanied by an assurance that the program will be conducted in compliance with all requirements that Title VI and the implementing regulations impose. 28 C.F.R. § 42.105(a)(1). Pursuant to this requirement, UVa signed contractual assurances agreeing to permit the Department to examine records and access other sources of information and facilities.

Pursuant to this authority, we request any and all documents guiding medical school admissions policies and procedures, including any documents related to the use or lack of use of race in evaluating applicants. We also request all documents regarding any changes in policies or procedures following the decision in *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 206 (2023), which found certain race-based admissions policies unlawful under Title VI and the Equal Protection Clause. We also request all admissions data for the past five academic years, including applicant test scores (MCAT), GPA, extracurricular activities, essays, and admission outcomes, disaggregated by race and ethnicity. Finally, we request any statistical analyses or internal reviews conducted by UVa regarding admissions trends or outcomes by race.

Please provide all responsive documents in an accessible electronic format (such as searchable PDF, Microsoft Word, or Excel) that preserves metadata and allows for efficient review. If electronic versions are available, we prefer these over paper copies to expedite the review process. If certain documents are only available in physical form, please indicate this in your response.

Please send the requested information by June 13, 2025. If you anticipate challenges meeting this deadline, contact us by June 9, 2025, to discuss a reasonable extension. If you have any questions as to formatting or concerns with the deadline, please contact us.

We recognize that some of the requested materials may contain student information protected under the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. Please be advised that the Department of Justice is authorized under 34 C.F.R. § 99.31(a)(3)(ii) to obtain such information without prior consent for the purpose of enforcing federal legal requirements, including Title VI. Any information disclosed pursuant to this request will be used solely for compliance review purposes and maintained in accordance with applicable federal confidentiality requirements.

If you have any questions about this letter, please contact this office at (202) 514-2151. Thank you in advance for your attention to and cooperation in this compliance investigation.

Sincerely,

HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division

By:

GREGORY W. BROWN
Deputy Assistant Attorney General
Civil Rights Division

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

June 16, 2025

VIA ELECTRONIC MAIL ONLY

Rector Rachel W. Sheridan
BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA
The Rotunda
Charlottesville, Virginia

c/o Farnaz F. Thompson
MCGUIREWOODS
888 16th Street – Suite 500
Washington, D.C. 20006

RE: Racial Discrimination at The University of Virginia

Dear Rector Sheridan:

As you know, the United States Department of Justice has commenced compliance reviews of the University of Virginia ("UVa") regarding allegations of racial discrimination, particularly the use or consideration (to any degree) of race in admissions, treatment of students, and the award of student benefits. At present, these inquiries have been directed to the University's undergraduate, law, and medical schools. The Department's notices and requests for information were transmitted on April 11, 2025 (undergraduate schools), April 18, 2025 (law school), and May 22, 2025 (medical school).

Additionally, on April 28, 2025, the Department corresponded with UVa President James E. Ryan regarding reports that his administration was refusing to comply with *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 231 (2023), the Executive Orders of the President of the United States regarding the dismantling of "Diversity, Equity, and Inclusion" or "DEI" apparatuses and instruments of discrimination based on race, skin color, ethnicity, national origin, and other impermissible, immutable characteristics, and your Board of Visitors' unanimous directive to dissolve "DEI" at the University of Virginia.

Since those letters were transmitted, the Department has received complaints that President Ryan, his administration, and certain faculty members have been actively engaged in attempts to defy and evade federal anti-discrimination laws and the directives of your Board. Indeed, evidence supplied to the Department would suggest that President Ryan and his proxies are making little attempt to disguise their contempt and intent to defy these fundamental civil rights and governing laws.

We need not remind you that compliance with federal anti-discrimination laws and the United States Constitution is not optional. Moreover, you will certainly recall Attorney General of Virginia Jason Miyares' admonition that the UVa Board of Visitors and the President of the University are public officials of the Commonwealth of Virginia who owe fiduciary duties and duties of loyalty first and foremost to the Commonwealth, not the interests or ideologies of university administrators or faculty members. The penultimate duty of any fiduciary and any public official, including members of the Board of Visitors, is strict adherence to the laws of our nation. To be sure, your Board cannot sit idly by while important federal laws are broken, and fundamental civil rights are impaired.

Please accept this letter as formal notice that the existing compliance reviews are hereby expanded and augmented to include UVa's School of Nursing (graduate and undergraduate), the Darden School of Business, the School of Education (graduate and undergraduate), the Frank Batten School of Leadership and Public Policy (graduate and undergraduate), and the McIntire School of Commerce (graduate and undergraduate). In other words, the prior requests now include the schools and components identified in this letter, and the same expectations and deadlines will apply. Please also ensure that the University's certifications and responses include boards, associations, and foundations, such as the Alumni Association and the Jefferson Scholars Foundation, as well as organizations such as the Law Review, the Honor Committee, the University Judiciary Committee, and the University Guide Service, to name but a few. Finally, the Department's prior communications and requests regarding allegations of antisemitism, anti-Zionism, and anti-Israeli (or American-Israeli) discrimination, harassment, and retaliation should also be viewed as being part of the overall inquiry and review under Title VI and other applicable laws.

We also write to make you aware that the Department has received complaints regarding employment issues at the University of Virginia, particularly acts, errors, and omissions that could, if true, constitute patterns and practices of illegal racial discrimination, harassment, and retaliation under Title VII of the Civil Rights Act of 1964. Please note that while the Department has not yet opened a formal investigation into those matters and issues, it is reviewing and examining the complaints.

The Department has reached no conclusions regarding the University of Virginia's liability regarding any of these issues. The Department expects UVa to comply with all federal anti-discrimination laws and the United States Constitution. The Department also expects the University to respond fully and unconditionally to the requests for all schools, components, affiliated associations, and foundations, including those mentioned above, by the previously extended deadline of June 23, 2025.

If necessary, the Department is prepared to take formal action to secure UVa's compliance with federal law, which could include suspending, terminating, or refusing to grant or continue UVa's federal financial assistance, as well as commencing a civil action or series of actions.

We expect to hear from you promptly and remain,

Sincerely,

HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

GREGORY W. BROWN
Deputy Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

U.S. Department of Justice

Civil Rights Division

Office of the Assistant Attorney General

950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

June 17, 2025

VIA ELECTRONIC MAIL ONLY

Rector Rachel W. Sheridan
BOARD OF VISITORS OF THE UNIVERSITY OF VIRGINIA
The Rotunda
Charlottesville, Virginia

c/o Farnaz F. Thompson
MCGUIREWOODS
888 16th Street – Suite 500
Washington, D.C. 20006

RE: Racial Discrimination in Admissions at the University of Virginia

Dear Rector Sheridan:

We write regarding a matter of considerable urgency and in furtherance of the Department's prior communications and requests for information. This letter should be viewed in conjunction with the overall Title VI compliance review and inquiries previously sent to the University of Virginia ("UVa").

Since transmission of our correspondence to you yesterday, the United States Department of Justice has received yet another complaint, this time by an active undergraduate student at the University of Virginia, that raises serious questions and concerns about UVa's ongoing use and consideration of race in current admissions processes for selective undergraduate schools or programs such as the Batten School of Public Policy and Leadership and the McIntire School of Commerce.

Please review this correspondence and the requests below carefully.

As you know, consideration of race and race-based preferential treatment in admissions or the award of student benefits by UVa, if true, would constitute a violation of *Students for Fair Admissions, Inc. v. President & Fellows of Harvard College*, 600 U.S. 181, 231 (2023), the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, Title VI of the Civil Rights Act of 1964, the Executive Orders of the President of the United States, the UVa Board of Visitors' own resolution of March 7, 2025, calling for the elimination of illegal racial discrimination and race-based admissions practices at the university, and a host of other federal and state anti-discrimination laws.

The Department has received evidence that in its Spring 2025 application process for rising Second Year students, UVa's McIntire School of Commerce invited candidates to identify themselves by race, gender, or other "DEI-type" characteristics for the purpose of enabling the school to offer "opportunities" to "underprivileged" communities. Additionally, the evidence gathered thus far demonstrates that the McIntire School of Commerce offered and continues to offer advantages and benefits, including recruitment, student support, and application enhancement programming on race- and gender-conscious bases. For example, the McIntire School's promotional materials boast that its "Commerce Cohort" "engages and supports high-achieving, high-need UVA first-years with academic mentorship, career preparation, and personal development through sessions on practical study and employment skills, critical analysis, self-reflection, and communication—all conducted through the business lens." Among the many benefits offered to the "Commerce Cohort" is "mentorship and advising from the McIntire Office of Undergraduate Admission Staff." The same materials go on to reveal that 68% of the students allowed into this specially designated "Commerce Cohort" are identified as "minority students."

The Department has learned that the mean cumulative grade point average for incoming admitted classes at the McIntire School of Commerce historically hovers around the 3.7 figure, or an A- average for UVa students. However, the program regularly admits UVa students with a grade point averages far below 3.0, and sometimes as low as 2.4. The Department understands that in the most recent admissions cycle for this prestigious program, non-minority students with perfect or near perfect UVa grade point averages were denied entrance. Without further evidence to explain these anomalies, the circumstances and evidence referenced above raise suspicions that improper race-conscious decision-making and preferential treatment are to blame and are occurring in that process.

Racial discrimination is immoral and abhorrent. Most of all, it is illegal. The mounting evidence that the Department is receiving on a near daily basis suggests that the problem identified above at the McIntire School of Commerce is not confined to that component. In fact, the Department possesses evidence that the use and consideration of race in admissions decisions and the conferring or awarding of student benefits and programming opportunities are widespread practices throughout every component and facet of the institution.

Time is running short, and the Department's patience is wearing thin. The Department must insist that the University of Virginia, through its Rector and Visitors, take immediate corrective action to bring the entire institution within compliance of governing federal anti-discrimination laws. Dramatic, wholesale changes are required, now, to repair what appears to be a history of clear abuses and breaches of our nation's laws and our Constitution by the University of Virginia under its current administration.

The Department is waiting to hear from you. In the meantime, if meaningful and immediate progress toward resolution is not secured, the Department will have no choice but to initiate additional formal action(s). The Department will also continue to engage other interested and involved federal agencies as necessary and appropriate to secure UVa's compliance with federal law. Among the remedies available to the United States in the face of UVa's continued refusal to obey the law are the suspension, termination, or refusal to grant or continue UVa's federal financial assistance.

We are confident that you appreciate the seriousness of the present circumstances and the disappointment the Department experienced upon learning of this latest complaint. We expect to hear from you promptly and remain,

Sincerely,

HARMEET K. DHILLON
Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

GREGORY W. BROWN
Deputy Assistant Attorney General
Civil Rights Division
U.S. DEPARTMENT OF JUSTICE

AGREEMENT BETWEEN THE UNITED STATES OF AMERICA AND THE RECTOR AND VISITORS OF THE UNIVERSITY OF VIRGINIA

I. DEFINITIONS

The terms used in this Agreement shall have the following meaning:

a. "Assistant Attorney General" means the Assistant Attorney General for the Office of Civil Rights within the United States Department of Justice.

b. "Civil Rights Law[s]" means Title VI of the Civil Rights Act of 1964, 42 U.S.C. § 2000d, *et seq.*, Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.*, Section 1557 of the Patient Protection and Affordable Care Act, 42 U.S.C. § 18116, and the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States.

c. "EEOC" means the United States Equal Employment Opportunity Commission.

d. "Investigations" means those inquiries opened by the United States Department of Justice on April 11, April 18, April 28, May 2, May 22, June 16, and June 17, 2025.

e. "Parties" means UVA and the United States of America.

f. "United States" means the United States of America.

g. "UVA" or "University" means The University of Virginia, the legal name of which is The Rector and Visitors of the University of Virginia, as described in Virginia Code § 23.1-2200.

II. TERMS OF AGREEMENT

1. This Agreement represents the entire agreement between the United States and UVA with respect to the subject matter hereof.

2. This Agreement is not an admission in whole or in part by either party. UVA expressly denies liability with respect to the subject matter of the Investigations.

3. This Agreement shall become effective upon execution by all the Parties (the "Effective Date").

4. The duration of this Agreement will from the Effective Date until December 31, 2028.

5. On June 26, 2025, the Assistant Attorney General suspended the Investigations pending settlement negotiations between the Parties. The Assistant Attorney General subsequently closed the Investigations dated May 2 and June 17, 2025.

6. Both Parties affirm the importance of and their support for academic freedom. The United States does not aim to dictate the content of academic speech or curricula, and no provision of this Agreement, individually or taken together, shall be construed as giving the United States authority to dictate the content of academic speech or curricula. UVA acknowledges its obligation, as a public institution subject to the First Amendment of the United States Constitution and supported by federal funds for educational and scholarly purposes, to maintain admissions, employment, discipline, and speech policies and

practices that prevent the suppression of speech and discrimination based on political viewpoint.

7. Both Parties affirm the importance of and their support for civil rights. UVA affirms its commitment to complying with federal civil rights law and agrees to apply Civil Rights Law internally according to the Department of Justice's "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" of July 29, 2025, so long as that Guidance remains in force and to the extent consistent with relevant judicial decisions.
8. The United States acknowledges the efforts UVA has made prior to the date of this Agreement to provide information to the Assistant Attorney General and bring itself into compliance with the Civil Rights Laws. The United States therefore agrees that during the pendency of this Agreement, it shall hold in abeyance the Investigations prior to the Effective Date, and shall treat UVA as eligible for grants, funding, contracts, and awards on the same basis as other universities, and no less favorable than those available to any other university.
9. UVA agrees that during the pendency of this Agreement, its president will report to the Assistant Attorney General each quarter on UVA's progress toward full compliance with the Civil Rights Laws as outlined in the guidance above.
10. UVA's president shall certify under penalty of perjury each quarterly report as to the report's accuracy and UVA's full compliance with all the provisions in this Agreement. Such certification will state:

    > I, _____, [Interim President or President] of the University of Virginia, hereby certify, to the best of my knowledge, and after reasonable review and investigation, that the accompanying quarterly report is accurate, and that the University of Virginia has maintained and implemented policies and procedures as well as training programs to ensure material compliance with the Agreement between the United States and the Rector and Visitors of the University of Virginia dated [Effective Date].

    The United States may make such inquiries as it deems necessary to verify the accuracy of such certification. If the United States concludes that the certifications are accurate, at the end of this Agreement, it will close the remaining Investigations and shall pursue no enforcement actions, grant or funding terminations, or monetary fines for alleged violations of Civil Rights Laws that took place prior to the pendency of this Agreement, and shall treat UVA as eligible for further grants, contracts, and awards in the ordinary course, without disfavored treatment based on events that took place prior to the date of the last such certification.
11. If at any time after the Effective Date, the United States in its sole discretion determines that UVA is making insufficient progress toward compliance with the Civil Rights Laws, it will so notify UVA and provide UVA with a period of 15 days to make appropriate progress. If the United States determines in its sole discretion after that time that UVA has not made adequate progress, the United States may terminate this Agreement and may pursue enforcement actions, monetary fines, or grant or funding terminations as appropriate, and may resume all Investigations held in abeyance during the pendency of this Agreement.

12. Nothing in this Agreement affects in any way the Equal Employment Opportunity Commission ("EEOC")'s right to bring, process, investigate, litigate, or otherwise seek relief in any charge filed by individual charging parties or third parties that may be filed against UVA after the Effective Date of this Agreement, in accordance with standard EEOC procedures, including individual or third-party charges filed after the Effective Date of the Agreement but which may allege conduct that occurred before the Effective Date of the Agreement. Nothing in this Agreement applies to any currently pending EEOC charges brought by individual charging parties or third-parties against UVA.

13. Nothing in this Agreement prevents the United States, during the pendency of this Agreement, from conducting new compliance reviews or investigations or otherwise seeking information related to alleged violations of Civil Rights Laws arising after the Effective Date.

14. Any action brought by either party to enforce this Agreement must be brought in the United States District Court for the Western District of Virginia. The parties agree that this court shall be exclusively appropriate as to both venue and jurisdiction over this Agreement.

15. This Agreement may be executed in multiple counterparts, each of which together shall be considered an original but all of which shall constitute one Agreement. The Parties agree to be bound by electronic and facsimile signatures.

16. This Agreement is enforceable only by the Parties. No other person or entity is, or is intended to be, a third-party beneficiary of the provisions of this Agreement for purposes of any civil, criminal, or administrative action, and accordingly, no other person or entity may assert any claim or right as a beneficiary or protected class under this Agreement. The Agreement does not create a private right for action for any non-party. The Parties agree to defend the terms of this Agreement should they be challenged in any forum.

17. The signatories represent that they have the authority to bind the respective Parties identified below to the terms of this Agreement.

SIGNATURES

Signed October 23, 2025

For The University of Virginia:

Paul G. Mahoney
Interim President of the University of Virginia
Madison Hall
1827 University Avenue
Charlottesville, Virginia 22904

For the United States:

The Honorable Harmeet K. Dhillon
Assistant Attorney General
U.S. Department of Justice, Civil Rights Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530

For the Department of Health and Human Services:

Paula M. Stannard
Director, Office for ~~Civil~~ Rights
U.S. Department of Health & Human Services
200 Independence Avenue, S.W.
Washington, D.C. 20201

SENATE OF VIRGINIA

SCOTT A. SUROVELL
MAJORITY LEADER
34TH SENATORIAL DISTRICT
PART OF FAIRFAX COUNTY

P.O. BOX 289
MOUNT VERNON, VIRGINIA 22121

COMMITTEE ASSIGNMENTS:
COURTS OF JUSTICE, CHAIR
COMMERCE AND LABOR
FINANCE AND APPROPRIATIONS
REHABILITATION AND SOCIAL SERVICES
RULES

October 26, 2025

Dr. Paul Mahoney
Interim President
University of Virginia
P.O. Box 400224
Charlottesville, VA 22904

Ms. Rachel Sheridan
Rector, Board of Visitors
University of Virginia
P.O. Box 400224
Charlottesville, VA 22904

Re: Constitutional Concerns Regarding October 22, 2025 DOJ Standstill Agreement

Dear President Mahoney and Rector Sheridan:

We are writing to you to relay our deep concerns about the University of Virginia's October 22, 2025 standstill agreement with the United States Department of Justice. While we understand the tremendous pressure the University has faced—pressure that ultimately led to President Ryan's resignation— we believe UVA capitulated to legally dubious federal overreach without mounting necessary constitutional challenges. The agreement raises serious questions under *South Dakota v. Dole* and related Spending Clause jurisprudence that warrant immediate reconsideration.

I. The Agreement Likely Violates South Dakota v. Dole

The U.S. Supreme Court's decision in *South Dakota v. Dole*, 483 U.S. 203 (1987), established that Congress may condition federal funds on state compliance only if such conditions meet five requirements: (1) pursuit of the general welfare; (2) unambiguous conditions; (3) germaneness to the federal interest; (4) no violation of independent constitutional bars; and (5) non-coercion. The DOJ-UVA agreement appears to fail at least three of these tests.

These are not merely theoretical concerns. Federal courts across the country have recently issued injunctions against similar federal attempts to condition funding on policy compliance, finding violations of both the Spending Clause and the Administrative Procedure Act.

A. Recent Federal Court Precedents

In September 2025, U.S. District Judge Allison D. Burroughs ruled that the Trump Administration's freeze of over $2.6 billion in research funding to Harvard University was unconstitutional, striking down the freeze and granting Harvard a permanent injunction. The court found the funding cuts violated Harvard's First Amendment rights and constituted impermissible coercion under the Spending Clause, noting that the government's conditions had "everything to do with Defendants' power and political views" rather than legitimate civil rights enforcement. The court also ruled the freeze violated the Administrative Procedure Act because it was "arbitrary and capricious"—federal agencies had gathered virtually no evidence prior to issuing termination orders.

Similarly, in the Maine transgender athlete case, U.S. District Judge John Woodcock issued a temporary restraining order blocking the USDA from freezing federal nutrition program funding, finding Maine was likely to succeed on claims that USDA had not complied with federal procedural requirements and that the funding freeze for food assistance programs was unrelated to the underlying Title IX athletics dispute—a classic failure of the "germaneness" requirement from Dole.

These cases establish that executive agencies cannot bypass constitutional Spending Clause requirements simply by invoking civil rights enforcement. Courts have consistently held that such conditions must satisfy Dole's tests and comply with Administrative Procedure Act requirements for reasoned decision-making.

B. Ambiguity of Conditions

The agreement requires UVA to comply with the DOJ's "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" issued July 29, 2025, and to complete "planned reforms prohibiting DEI at the university." Yet these terms remain fundamentally undefined. What specific actions constitute complete "elimination" of DEI programs? How does quarterly presidential certification work when the very standards for compliance appear to be moving targets subject to ongoing DOJ interpretation?

Dole mandates that conditions be stated "unambiguously" so recipients know what obligations they are undertaking. 483 U.S. at 207. The vagueness here is not merely academic—it creates ongoing legal exposure for University leadership through 2028 and beyond. President Mahoney or any ultimate permanent President of UVA must personally certify quarterly compliance with standards that lack clear definition, creating potential False Claims Act liability or even perjury exposure if DOJ later reinterprets its own "guidance."

C. Lack of Germaneness

The *Dole* Court emphasized that conditions must bear some relationship "to the particular national projects or programs to which the money is directed." 483 U.S. at 207-08 (emphasis added). In Dole itself, the Court upheld withholding highway funds to enforce a drinking age because of the direct connection between young drivers, alcohol, and highway safety.

Here, by contrast, the agreement conditions UVA's eligibility for all "future grants and awards" on university-wide changes to admissions, hiring, and programming across every department and function. A condition on National Science Foundation biology research grants cannot plausibly be "germane" to DEI programming in the English department or admissions policies for the law school. This sweeping approach—tying compliance in one area to funding streams wholly unrelated to that area—transforms conditional spending into general regulatory authority, precisely what Dole prohibits.

The Maine court explicitly recognized this problem when it noted that the USDA had frozen nutrition program funding based on athletics policy violations—the two were simply not related. UVA faces the same germaneness problem, but on a vastly larger scale.

D. Unconstitutional Coercion

In *NFIB v. Sebelius*, 567 U.S. 519 (2012), the Supreme Court held that threatening to withhold all Medicaid funding unless states expanded their programs was unconstitutionally coercive—a "gun to the head" that left states no real choice. Chief Justice Roberts emphasized that financial inducements become impermissibly coercive when they pass the point of "pressure" and become "compulsion." Id. at 580.

UVA receives billions in federal research funding across dozens of agencies and programs. The agreement's threat to UVA's eligibility for all future federal grants and awards—not merely funding related to admissions or DEI—**constitutes precisely the sort of comprehensive funding cutoff that Sebelius condemned**. The sequence of events confirms the coercive nature: DOJ investigations beginning in April 2025, President Ryan's forced resignation in June after stating "the stakes were too high for others on campus if he opted to 'fight the federal government,'" and UVA's capitulation in October after initially declining the "Compact for Academic Excellence" just days earlier.

This is coercion, not cooperation. The Harvard court recognized exactly this dynamic when it found the government's funding freeze constituted impermissible retaliation and coercion aimed at forcing the university to adopt the administration's preferred ideological positions. Instead of following Harvard's success on these cases, UVA simply capitulated without even putting up a fight.

II. Executive Spending Conditions Require Explicit Congressional Delegation

Even if the conditions themselves satisfied *Dole's* requirements, a threshold question remains: Did Congress actually authorize DOJ to impose these conditions, or has the Executive Branch unilaterally created new spending conditions without congressional approval?

Professor Douglas Spencer's exhaustive analysis in "Sanctuary Cities and the Power of the Purse: An Executive Dole Test," 106 Iowa L. Rev. 1209 (2021), demonstrates that executive conditions on federal spending are constitutionally problematic absent clear congressional delegation of authority to add such conditions. Spencer argues persuasively that:

1. The authority to add conditions on spending does not inherently attach to delegations to implement federal grant programs—it must be delegated separately and unambiguously;
2. Executive conditions should face stricter scrutiny than congressional conditions because "inter-branch coordination poses a greater threat to state sovereignty than either Congress or the Executive acting alone"; and
3. The delegation of condition-setting authority "should not act as a loophole in the Dole doctrine."

Spencer's framework is directly applicable here. What statute authorized DOJ to condition all federal grant eligibility on elimination of DEI programs and compliance with executive "guidance"? The Civil Rights Act of 1964 authorizes DOJ to investigate discrimination and enforce existing statutory prohibitions—it does not grant DOJ carte blanche authority to create new, university-wide policy mandates as conditions for federal funding across all agencies.

The current Supreme Court, with its emphasis on limiting administrative power through doctrines like the major questions doctrine (*West Virginia v. EPA*, 597 U.S. 697 (2022)), would likely be skeptical of DOJ's assertion of standardless discretion to rewrite university policies through "guidance" backed by threats to comprehensive federal funding.

III. The July 29 Guidance Goes Far Beyond Existing Civil Rights Law

The DOJ's July 29, 2025 "Guidance for Recipients of Federal Funding Regarding Unlawful Discrimination" to which UVA has agreed to adhere represents a dramatic, unauthorized, and an expansion of federal civil rights law that has not been settled in the courts. This is the crucial legal point: the guidance goes well beyond the requirements of Title VI, Title IX, the Equal Protection Clause, and the Supreme Court's decision in Students for *Fair Admissions, Inc. v. Harvard (SFFA)*.

A. The Guidance Exceeds SFFA's Holding

The DOJ guidance purports to rely on *SFFA* but fundamentally mischaracterizes its holding. In *SFFA*, Chief Justice Roberts explicitly stated: "nothing in this opinion should be construed as prohibiting universities from considering an applicant's discussion of how race affected his or her life, be it through discrimination, inspiration, or otherwise." 600 U.S. 181, 230 (2023). The Court held that race can be salient if an applicant discusses how personal experience with race will prepare them for college or how they will contribute to a university community.

President Ryan understood this distinction and sought to keep UVA faithful to *SFFA's* actual requirements. Under his leadership, UVA eliminated race as a factor in admissions decisions while preserving the ability for applicants to discuss their lived experiences—exactly what *SFFA* permits. This was the legal point President Ryan presumably wanted to make but was unable to articulate before being forced to resign.

The July 29 guidance, however, goes much further. It essentially forbids any consideration of race in hiring, admissions, or other programs, even when such consideration would be permissible under *SFFA*. The guidance prohibits universities from considering an applicant's discussion of how race has shaped their perspective or experiences—directly contradicting what *SFFA* explicitly allows.

B. The Guidance Has Been Challenged and Enjoined

Recognizing that the July 29 guidance exceeds statutory authority, multiple federal courts have issued injunctions blocking its enforcement. In March 2025, U.S. District Judge Julie Rebecca Rubin issued a preliminary injunction in a case brought by the American Association of Colleges for Teacher Education, blocking the Department of Education from terminating $600 million in federal funding to teacher preparation programs based on the guidance. The court found DOJ failed to follow required procedures and that the guidance's interpretation of civil rights law was likely unlawful.

These judicial rejections of the guidance underscore a fundamental problem with UVA's agreement: the University has **committed** to comply with DOJ "guidance" that federal courts have found exceeds the Department's legal authority. UVA is thus agreeing to do more than federal law requires—indeed, more than federal law allows under proper statutory interpretation. This is a bizarre capitulation that raises serious questions about the motives of all involved.

C. The Fatal Flaw in DOJ's Narrative

DOJ and UVA both claim this agreement simply requires compliance with existing law. This talking point is demonstrably false. If the agreement merely required compliance with Title VI, Title IX, the Equal Protection Clause, and SFFA as properly interpreted by courts, there would be no controversy—UVA was already in compliance with those requirements under President Ryan's leadership.

The agreement is controversial precisely because it requires UVA to comply with the July 29 guidance, which interprets civil rights law far more expansively than courts have done. The guidance prohibits programs and practices that are lawful under actual judicial interpretations of Title VI, Title IX, and SFFA. By agreeing to comply with the guidance rather than with the statutes themselves as interpreted by courts, UVA has agreed to a more restrictive regime than federal law actually requires.

This distinction is critical. An agreement to comply with federal law would be unobjectionable. But an agreement to comply with agency "guidance" that exceeds statutory authority is an agreement to go beyond what the law requires. That is exactly what UVA has done here.

IV. Why Challenge Matters: Precedent, Principle, and Virginia's Sovereignty

We understand why UVA's leadership sought to end the investigations and restore funding certainty. But by acquiescing without challenge, UVA has:

1. Established dangerous precedent for other Virginia public institutions;
2. Allowed untested legal theories to go unchallenged, emboldening further federal overreach;
3. Surrendered institutional autonomy without requiring DOJ to prove its legal authority in court; and
4. Subjected University leadership to ongoing personal legal exposure through mandatory quarterly certifications of compliance with undefined standards.

As a public university established by the Commonwealth of Virginia, UVA has obligations not merely to its current students and faculty, but to the principles of federalism and state sovereignty embedded in our constitutional structure. Virginia's taxpayers fund UVA. The Virginia General Assembly charters it. Yet the University has now agreed to ongoing federal micromanagement of its core academic functions without testing whether such federal power actually exists.

Concerns About Independent Legal Counsel

The University's capitulation in light of these serious legal problems continues to raise troubling questions about whether Attorney General Jason Miyares is both competent and capable of providing truly independent legal advice to Virginia's public universities in this area of the law, especially when dealing with the Trump DOJ. President Trump has publicly endorsed Attorney General Miyares for re-election shortly before this agreement was inked, creating an inherent conflict of interest when the AG must advise state institutions on how to respond to federal pressure from that same administration.

Did the Attorney General's office advise UVA that the DOJ's legal theories were sound? Did they encourage capitulation rather than constitutional challenge? Or was UVA denied the vigorous, independent legal representation that a state institution deserves when facing federal overreach? These questions demand answers, as they affect not only UVA but every public college and university in Virginia that may face similar federal pressure.

Virginia's public universities need legal counsel who will zealously defend state sovereignty and institutional autonomy—not counsel whose political fortunes are tied to the very administration applying the pressure. The Attorney General's responsibility is to the Commonwealth of Virginia and its institutions, not to federal political interests.

Other universities—including private institutions with fewer sovereignty concerns—declined the Trump Administration's "Compact for Academic Excellence." UVA's initial refusal on October 17 was principled and correct. Yet within five days, facing continued pressure, the University reversed course and accepted an agreement that may be even more problematic than the Compact because it operates through enforcement "guidance" rather than transparent contractual terms.

V. Direct Conflict with Virginia Law

Perhaps most troubling is that the DOJ agreement appears to place UVA in direct violation of Virginia state law. As a state agency, the University is subject to the control of the General Assembly and must comply with Virginia law. Virginia Code § 2.2-602(B) explicitly requires that:

> *"The heads of state agencies shall establish and maintain a comprehensive diversity, equity, and inclusion strategic plan in coordination with the Governor's Director of Diversity, Equity, and Inclusion."*

The statute further mandates that this DEI plan must:

- Integrate diversity, equity, and inclusion goals into the agency's mission, operations, programs, and infrastructure;
- Address potential barriers to equal employment opportunities;
- Foster pay equity;
- Promote diversity and equity in hiring, promotion, retention, and leadership opportunities; and
- Submit an annual report to the Governor and General Assembly by July 1 of each year assessing the plan's impact.

This is not optional—it is a mandatory requirement of Virginia Law, duly enacted by the General Assembly and signed by the Governor. Yet the DOJ agreement requires UVA to eliminate DEI programs as a condition of maintaining federal funding eligibility.

Moreover, this agreement was disturbingly executed with zero consultation with the General Assembly, despite the fact that the General Assembly controls the University and provides the bulk of its government funding. Virginia Code § 23.1-2200(A) is explicit and unambiguous: The Board of Visitors of the University of Virginia "shall at all times be under the control of the General Assembly." This is not a suggestion—it is a statutory command regarding the governance structure of the University.

Yet the Board and University administration entered into a sweeping agreement with the federal government that directly conflicts with state law, commits the University to eliminate legislatively mandated programs, subjects the University President to personal certification requirements, and potentially places UVA in violation of its statutory obligations—all without any consultation with the legislative body that the statute says controls the institution. This represents a fundamental breach of the governance relationship between the University and the Commonwealth.

This pattern of evading legislative oversight is not new. Senator Creigh Deeds has been attempting since August 1, 2025 to obtain answers about President Ryan's forced resignation, sending an initial letter with 46 questions to Rector Sheridan and Vice Rector Wilkinson. The Board responded through outside counsel but failed to answer 38 of the 46 questions. Senator Deeds characterized the Board's response as inadequate. When Senator Deeds sent additional follow-up questions in October, those too went largely unanswered. The Board has repeatedly claimed it cannot provide information due to "ongoing DOJ investigations," yet somehow found itself able to enter into this comprehensive agreement with DOJ without any legislative consultation or transparency.

The Board owes the General Assembly—and the people of Virginia—a specific and detailed explanation of why it entered into this agreement without any consultation with the legislative body that controls the University and provides its state funding.

How does the University plan to comply with Virginia law while simultaneously satisfying the DOJ's demand to eliminate DEI programs?

This presents a fundamental question of state sovereignty and the hierarchy of legal obligations. UVA is a creature of Virginia law, established by the Commonwealth and subject to the General Assembly's authority. The federal government cannot—through conditional spending or otherwise—compel a state institution to violate state law. To accept such federal dictation would be to subordinate Virginia's legislative authority to executive agency "guidance," undermining the very foundation of our federal system.

The University must clarify to the General Assembly:

1. Whether UVA intends to continue complying with Virginia Code § 2.2-602(B)'s DEI plan requirement;
2. If not, what legal authority permits UVA to ignore state law;
3. Whether UVA sought an opinion from the Attorney General regarding this conflict;
4. How UVA can simultaneously comply with both state law and the DOJ agreement; and
5. Whether the University has considered that violating state law to satisfy federal demands may itself create legal liability for University officials.

If the DOJ agreement requires UVA to violate Virginia law, that alone should be grounds for challenging the agreement's validity.

The Supreme Court has repeatedly emphasized that the Spending Clause is not a blank check for federal control of state institutions. As Justice O'Connor wrote in *New York v. United States*, 505 U.S. 144, 188 (1992), "the Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions." The same principle applies to executive agencies acting without clear congressional authorization.

VI. Requested Actions

In addition to answering the questions above, we respectfully request that the Board of Visitors and University leadership:

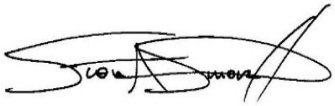
1. Commission independent constitutional analysis of the October 22 agreement from outside counsel with Spending Clause expertise;
2. Explore whether the agreement's terms permit withdrawal or judicial review of DOJ's compliance interpretations;
3. Coordinate with the Virginia Attorney General's office regarding the Commonwealth's interests in challenging federal overreach into state university governance;
4. Consider joining with other public universities facing similar pressure to mount coordinated constitutional challenges; and
5. Provide the General Assembly with detailed briefing on: (a) what statutory authority DOJ claims for these conditions; (b) what specific actions UVA must take to satisfy "elimination of DEI" requirements; (c) how UVA intends to comply with both the DOJ agreement and Virginia Code § 2.2-602(B); and (d) what legal protections exist for University officials certifying compliance.
6. President Mahoney and Rector Sheridan attend a hearing of the Senate Finance & Appropriations Committee Subcommittee on Education for further questioning.

UVA should not have to choose between its constitutional rights and its federal funding. That is precisely the choice that Dole and Sebelius prohibit. By accepting the agreement without challenge, the University has validated DOJ's dubious legal theory and made it more difficult for other institutions—including other Virginia colleges and universities—to resist similar pressure.

We urge you to reconsider this agreement and to defend the University's autonomy, Virginia's sovereignty, and the constitutional limits on federal power. Thomas Jefferson founded this University to be a beacon of enlightenment and independence. It should not become a cautionary tale of capitulation to federal overreach.

Please provide your response to us by November 7, 2025. In addition, we would welcome the opportunity to discuss these concerns with you and with the full Board of Visitors.

Respectfully,



Senator Scott A Surovell
34th District
Senate Majority Leader

Senator L. Louise Lucas
18th District
President Pro Tempore and
Chair, Senate Finance and
Appropriations Committee

cc: Members, UVA Board of Visitors
Attorney General Jason Miyares
Secretary of Education Aimee Guidera
Delegate Luke E. Torian, Chair, House Appropriations Committee
Senator Ghazala F. Hashmi, Chair, Senate Education and Health Committee
Delegate Sam Rasoul, Chair, House Education Committee
Senator Creigh Deeds, 11th District

UNIVERSITY of VIRGINIA
OFFICE OF THE PRESIDENT

October 31, 2025

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Senate Majority Leader
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Senator L. Louise Lucas 18th District
President Pro Tempore and Chair,
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Dear Senators Surovell and Lucas:

Thank you for your letter concerning the University of Virginia's October 22 standstill agreement (the Agreement) with the U.S. Department of Justice. Your letter provides a detailed analysis of the potential grounds on which the University might have sued the United States to oppose any withdrawal of federal funding based on unreasonable conditions. It does not, however, consider whether initiating a legal confrontation with the federal government would have been necessary or appropriate, particularly before we had exhausted other less costly and risky options.

As fiduciaries of the University of Virginia and servants of the commonwealth, we were bound to consider the costs and benefits to UVA of different paths forward. The course we chose suspends 5 civil rights compliance investigations into UVA, preserves our institutional autonomy, and preserves academic freedom at our institution, without agreeing to any terms that are substantially different than our own internal guidance and policies. If DOJ ultimately disagrees with our understanding and implementation of the law, their remedy is to cancel the Agreement and pursue remedies in court—at which point we could make all of the arguments proposed in your letter. It is essentially a cease fire agreement, and a far better option than leaping straight into a legal battle that might be unnecessary.

Madison Hall
Post Office Box 400224 • Charlottesville, VA 22904-4224
Phone: 434-924-3337 • Fax: 434-924-3792

You correctly note that Harvard chose to sue. Their situation was very different from ours. The government had already terminated many of their research grants. Their suit was an attempt to restore those grants. To date, the United States has not imposed any sanctions on UVA. That would surely change were we to adopt a confrontational position before exhausting other options. We would then face the loss of research grants that would result in disruption of vital research and possibly layoffs of faculty and staff. As they have with Harvard, the government could threaten our students' financial aid and the visas that some need to remain in the United States. Although Harvard has had some success in litigation, it suffered a $112.6M operating loss last year after an 8.4% drop in federal support.[1] And of course Harvard has many advantages that we do not.

I hope you will agree that any path to resolving these investigations without running those risks is worth pursuing. Accordingly, we chose to sign an agreement that obligates us to follow federal guidance on civil rights law. Your letter notes that their guidance sets certain boundaries that may not be clearly settled in the law. But there is no rule that universities cannot agree to follow federal guidance that might be susceptible to challenge in court.[2] This University and others have done so countless times—including, for example, when the Obama administration's "Dear Colleague" letters mandated particular procedures in sexual assault investigations under Title IX.

The important question, therefore, is whether following the DOJ guidance imposes substantial burdens on UVA. The answer is clearly no.

In the late summer of 2023, shortly after *Students for Fair Admissions* was decided, UVA adopted guidance about compliance with that decision in the context of admissions, scholarships, and recruiting. In the spring of 2025, UVA adopted additional guidance on compliance with civil rights laws in a variety of other contexts. Both documents were adopted prior to when I assumed the position of Interim President, and I am attaching them to this letter. In nearly all respects, they are consistent with DOJ's July 29 guidance.

Under the UVA admissions guidance, we may consider the unique talents and attributes of individual applicants even when they are demonstrated in ways linked to the applicant's race—as clearly permitted by Chief Justice Roberts's opinion for the Court in *Students for Fair Admissions.*[3] We also may use facially neutral factors such as low-income or first-generation status as admissions criteria because we value them in their own right, not for the purpose of

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[1] https://www.highereddive.com/news/harvard-university-operating-loss-trump-pressure-campaign/803164/

[2] Your letter references a variety of legal rules, such as Spending Clause constraints and the unconstitutional conditions doctrine, which constrain the federal government's ability to impose arbitrary conditions on recipients of federal funds. I'm sure you understand that those doctrines constrain the government, not the University. We are not violating the constitution or the law by failing to sue the United States.

[3] Our guidance states that racial information disclosed in an essay "will only be considered if it is connected to the candidate's experiences as an individual and thus to the candidate's ability to contribute to the University, and not on the basis of race or ethnicity alone," and that the focus must always be on "the unique skills, talents, and perspectives of individual candidates, and the ways in which those unique attributes will help each candidate contribute to the University."

increasing racial diversity.[4] The UVA guidance also commits us to cease using race as a criterion for employment. These policies are consistent with the DOJ's July 29, 2025 guidance.[5] We did not revise them after receiving the DOJ guidance or after signing the Agreement.

We agree with you that there is ongoing debate over whether facially neutral criteria might be used intentionally to pursue racial diversity. There also is debate over whether there might still be room for explicit consideration of race in employment decisions after *Students for Fair Admissions*. But the University has decided not to do either of those things. If you believe that the University should have refused to enter into the Agreement and instead sued the United States in order to preserve the theoretical possibility of doing things *that we have decided not to do*, I cannot agree.

The one material issue on which DOJ's guidance diverges from our own is that DOJ's guidance would require segregation of bathrooms and athletic competition by biological sex. We have agreed to follow their guidance only "to the extent consistent with relevant judicial decisions." As DOJ knows, we are bound on those issues by two decisions of the Fourth Circuit Court of Appeals that adopt an understanding of Title IX that is opposite from DOJ's view. One of those cases (*B.P.J. v. West Virginia Board of Education*) is currently on review in the Supreme Court. Those issues will be settled in court, not by this Agreement.

Your letter suggests that the Agreement also commits the University "to complete 'planned reforms prohibiting DEI at the university,'" and argues that such a promise is vague and overreaching. That language appears nowhere in the Agreement.

Of course, we understand that DOJ's interpretation of their guidance (and ours) might prove to be different from our interpretation at some point. If so, DOJ's remedy is to cancel the Agreement and to "pursue enforcement actions, monetary fines, or grant or funding terminations as appropriate." The key word is *pursue*. If DOJ cancels the Agreement they would have to pursue sanctions under ordinary legal process—just as they could before the Agreement was signed. And the University can end this Agreement by the simple expedient of refusing to change

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[4] Our guidance explains that "[b]ecause we are, in the words of our mission statement, committed to the 'development of the full potential of talented students from all walks of life,' and because the 2030 Plan calls upon us to strengthen the socioeconomic diversity and mobility of our student body, admission officers may have access to indicators of socioeconomic status—for example, whether a candidate qualifies for a waiver of the application fee, is a first-generation college student, received or is receiving need-based aid at another college or university, or attends a school or lives in a neighborhood with a high degree of socioeconomic disadvantage."

[5] DOJ's guidance does not "prohibit[] universities from considering an applicant's discussion of how race has shaped their perspective or experiences," as you suggest. It cautions against using essay prompts about "overcoming obstacles" and the like "in a manner that advantages those who discuss experiences intrinsically tied to protected characteristics" and "as a proxy for advantaging that protected characteristic in providing benefits." DOJ is using the word "proxy" there in its legal sense, referring to a consideration adopted "because of, not merely in spite of" a correlation with race. The guidance is very clear about that elsewhere, explaining for example that an admissions process that considers factors like socioeconomic or first generation status will violate the law "if designed or applied *with the intention* of advantaging or disadvantaging individuals based on protected characteristics." We understand DOJ's guidance to prohibit universities from prioritizing resilience displayed by overcoming race-linked obstacles *over* resilience demonstrated by overcoming other sorts of obstacles, and from prioritizing a criteria like resilience "because of, not merely in spite of," the fact that it might have a racially disparate impact. We do neither of those things, and we do not understand DOJ's guidance to forbid the sort of context-sensitive consideration of individual applicants that *Students for Fair Admissions* clearly permits.

a policy that DOJ believes must be changed. Either way, we will litigate only if and when DOJ's interpretation of the agreement or the law diverges from our own, as expressed in our institution's policies and practices.

I do not share your concern that, by agreeing simply to affirm that we are not violating the law every quarter, the University has somehow surrendered itself to onerous federal interference (particularly in light of the far more detailed and impactful agreements other institutions have reached to resolve similar claims). I also disagree with your statement that the University has agreed to do anything inconsistent with its obligation under Virginia Code § 2.2-602(B) to maintain a comprehensive diversity, equity, and inclusion strategic plan. The University will continue to comply with that obligation. We do not understand the statute to require racial preferences in hiring or promotion decisions that would be inconsistent with DOJ's guidance, and with our own.

I sincerely appreciate your concern for the University's welfare. This has been a challenging period for our institution. I would be happy to meet with you to discuss any of the issues raised in your letter or this reply.

Sincerely,

Paul G. Mahoney
Interim President

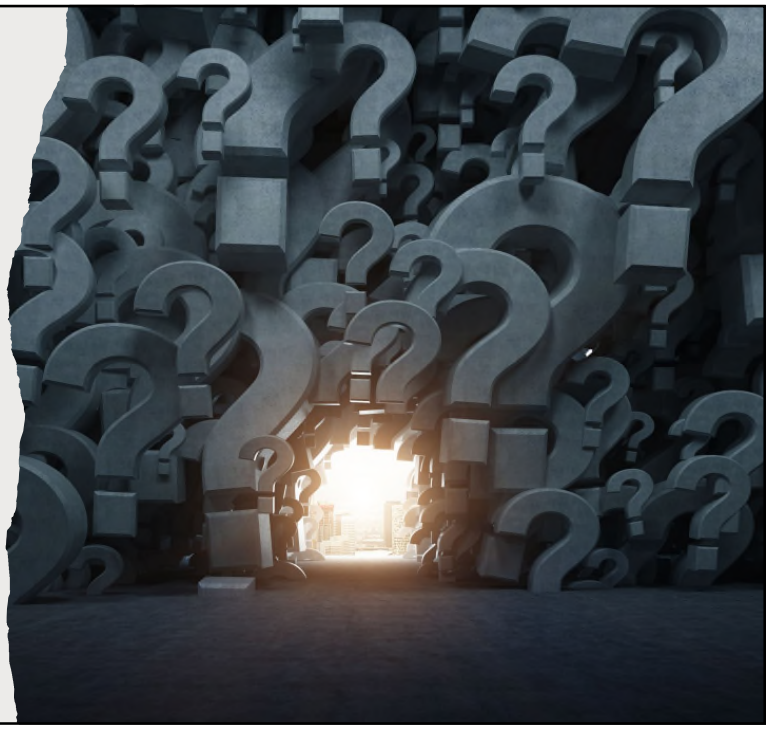
1

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.

2

Why Now?

- Uncertainty
- Increased enforcement
- Changing nature of enforcement
- Different focus of enforcement



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U.S. Department of Education Notifies Columbia University's Accreditor of Columbia's Title VI Violation

George Mason University violated Title VI with 'unlawful DEI policies,' Education Department says

Clemson among 40 universities under Title VI investigation

Northwestern University facing HHS investigation into claims of discrimination against Jewish students

U.S. Department of Education's Office for Civil Rights Sends Letters to 60 Universities Under Investigation for Antisemitic Discrimination and Harassment

Trump administration freezes $1 billion in funding for Cornell University, $790 million for Northwestern University

4

Current Landscape at Colleges and Universities

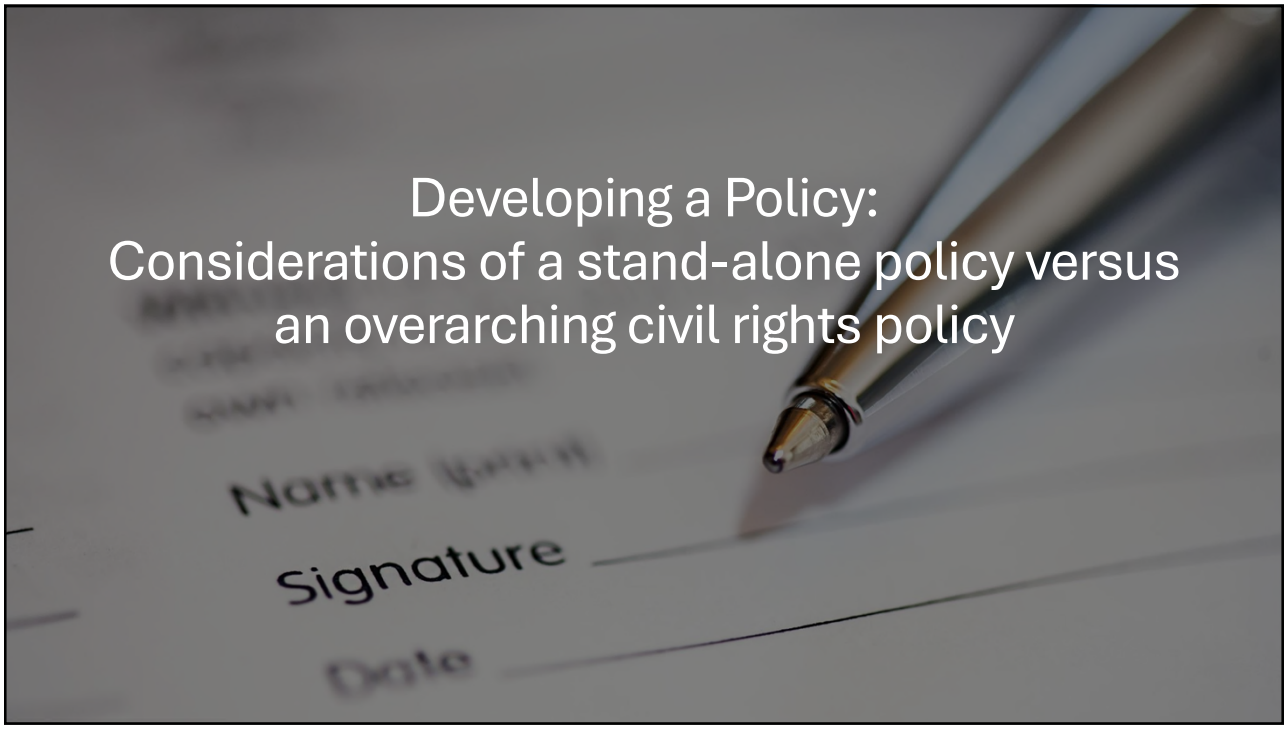
- Title VI Coordinator
- Policy drafting

5

Advising a Higher Ed Institution: Designing a Title VI Program

- Structure of office
- Building a team
- Reporting

6


Developing a Policy:
Considerations of a stand-alone policy versus an overarching civil rights policy
Signature
Date

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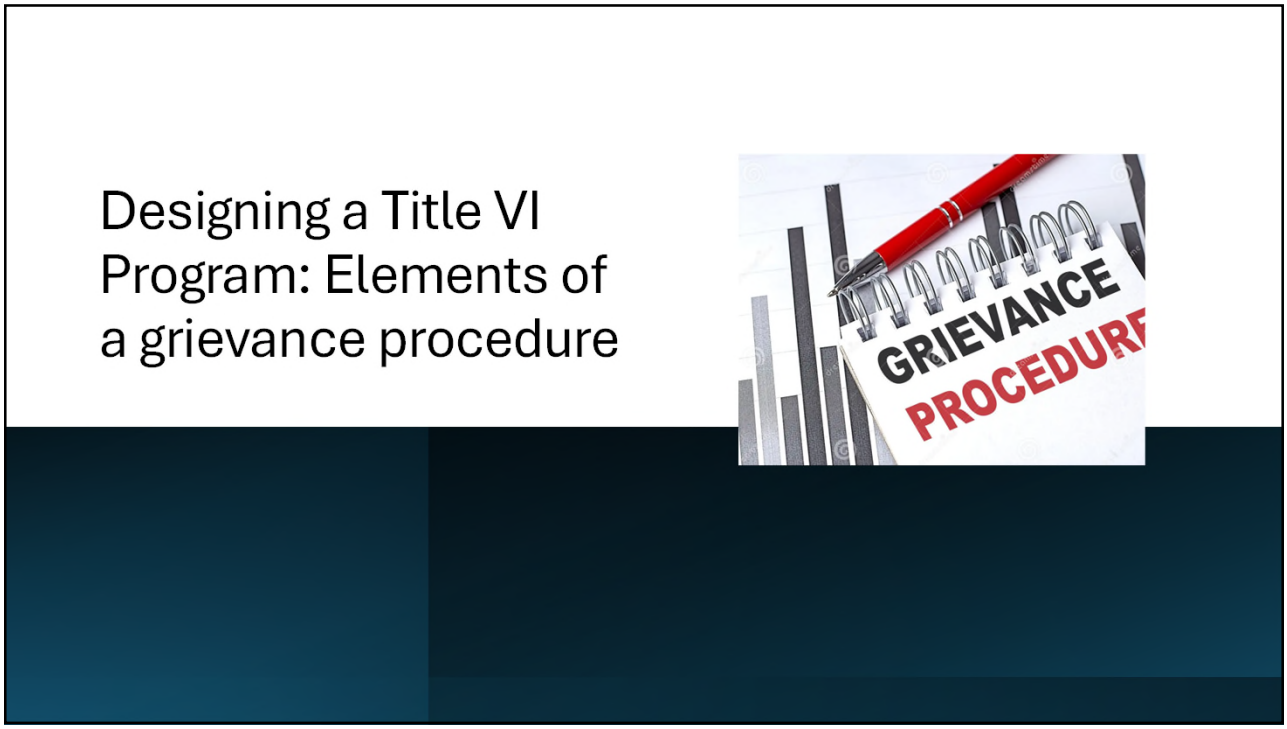

Designing a Title VI Program: Elements of a grievance procedure
GRIEVANCE
PROCEDURE

8

Remedies

- Involvement of campus stakeholders
- Addressing concerns that involve protected speech or academic freedom

9

Additional Considerations

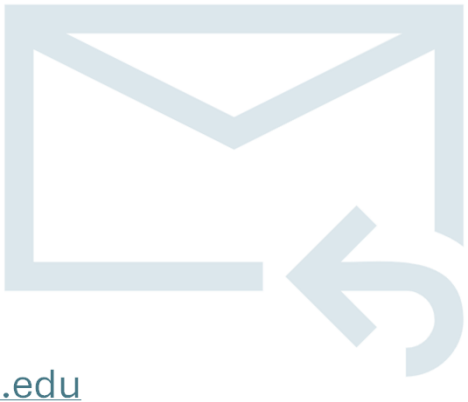
- Awareness and education
- Training
- Mandated reporting
- Climate surveys
- Reporting out to community

10

Audit

- Student organization policies, practices and communications
- Facilities and other resources
- Admissions
- Scholarships

11



- Melissa Nichols
- Civil Rights Officer
- Furman University
- Melissa.Nichols@Furman.edu

12

South Carolina Bar

Continuing Legal Education Division

Federal Compliance in Flux: Title IX, Executive Authority, and Development of Education's Evolving Enforcement Agenda

Sheila Abron

Sheila Abron

Federal Compliance in Flux: Title IX, Executive Authority, and Department of Education's Evolving Enforcement Agenda

January 23, 2026

Case Law

Sheila Abron
Federal Compliance in Flux: Title IX, Executive Authority, and Department of Education's Evolving Enforcement Agenda
January 23, 2026

2024 WL 3981994
Only the Westlaw citation is currently available.
United States Court of Appeals, Eleventh Circuit.

State of ALABAMA, State of Florida, State of Georgia, State of South Carolina, Independent Women's Network, et al., Plaintiffs-Appellants,

v.

U.S. SECRETARY OF EDUCATION, U.S. Department of Education, Defendants-Appellees.

No. 24-12444
|
Non-Argument Calendar
|
Filed: 08/22/2024

West Codenotes

Validity Called into Doubt
34 C.F.R. §§ 106.1, 106.2, 106.3, 106.6 106.10, 106.11, 106.15(b), 106.16, 106.17, 106.18, 106.21(a), 106.21(c), 106.30, 106.31(a), 106.40, 106.41(d), 106.44, 106.45, 106.46, 106.47, 106.51(b)(6), 106.57, 106.60, 106.71, 106.81.

Appeal from the United States District Court for the Northern District of Alabama, D.C. Docket No. 7:24-cv-00533-ACA

Attorneys and Law Firms

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Natalie Thompson, Alliance Defending Freedom, Washington, DC, for Amici Curiae Female Athletes United, Christian Educators Association International.

Before Wilson, Branch, and Luck, Circuit Judges.

CORRECTED ORDER

***1** BY THE COURT:

On April 29, 2024, the U.S. Department of Education promulgated a new administrative rule "interpreting" Title IX to break new ground in the 52-year history of that landmark statute. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 89 Fed. Reg. 33,474 (Apr. 29, 2024) (to be codified at 34 C.F.R. pt. 106). The rule represents a sea change to the regulations administering Title IX by, among other things, expanding the definition of discrimination on the "basis of sex" to include discrimination based on gender identity—as well as materially altering and expanding the scope of Title IX's sexual-harassment-related regulations.

Before this action, every court to consider the issue across the nation—seven district courts and two courts of appeals[1]—preliminarily enjoined enforcement of the rule.[2] The district court here, by contrast, refused to enjoin the rule a day before it was supposed to go into effect.

***2** Plaintiffs—Alabama, Florida, Georgia, South Carolina, and four private groups—appealed the same day and requested that we grant an administrative stay barring the Department from enforcing the rule in the Plaintiff States until we resolved Plaintiffs' forthcoming motion for injunction pending appeal. We granted the administrative stay, stating that "The Department is enjoined from enforcing the final rule ... pending further order of this Court." Plaintiffs thereafter promptly filed their motion for an injunction pending appeal. After careful review, and for the reasons that follow, Plaintiffs' motion is GRANTED.

I. Background

A. Title IX

Title IX, enacted in 1972, mandates that, subject to certain exceptions: "No person in the United States 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). "[Title IX's] purpose, as derived from its text, is to prohibit sex discrimination in education." *See Adams ex rel. Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 816–17 (11th Cir. 2022) (en banc).

Through an appropriation from Congress, the Department provides states with federal funds for education. 20 U.S.C. § 1682. And the Department can terminate or refuse to grant federal funds to schools that fail to comply with the statute. *Id.* Schools can also be held liable through private lawsuits. *See Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 640–41, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999) (recognizing an implied private right of action against schools under Title IX). The Department is also tasked with "issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute...." 20 U.S.C. § 1682.

After Title IX's enactment in 1972, implementing regulations were adopted, permitting separation based on biological sex in restrooms, locker rooms, and showers, as well as in sports. *See* Nondiscrimination on the Basis of Sex in Education Programs and Activities Receiving or Benefiting from Federal Financial Assistance, 45 C.F.R. § 86.33 (1974) ("the 1974 Rule") (restrooms, locker rooms, showers); *id.* § 86.41 (athletics).

B. Regulatory Provisions at Issue

On April 29, 2024, the Department implemented the final rule at issue here, which adds one new regulation and alters twenty-five existing regulations. *See* 89 Fed. Reg. at 33,882–96. Plaintiffs focus on "three central provisions" of the rule that they argue are unlawful.

First, they challenge 34 C.F.R. § 106.10, which broadens Title IX's general ban on discrimination "on the basis of sex," to include "discrimination on the basis of ... gender identity." 34 C.F.R. § 106.10.

Second, and relatedly, Plaintiffs challenge § 106.31(a)(2), which states that, even in limited circumstances in which Title IX "permits different treatment or separation on the basis of sex, a recipient must not carry out such different treatment or separation ... [that] subject[s] a person to more than de minimis harm[.]"[3] *Id.* § 106.31(a)(2). The provision then states that a policy that "prevents a person from participating in an education program or activity consistent with the person's gender identity subjects a person to more than de minimis harm ...." *Id.*

***3** And third, Plaintiffs challenge § 106.2, which adopts a broader standard of sex-based harassment. Rather than covering schools that are "deliberately indifferent" to sexual harassment that, "based on the totality of the circumstances," is so "severe, pervasive, *and* objectively offensive" that it "denies" education, the rule now eliminates the deliberate indifference language and covers sexual harassment that is "so severe *or* pervasive" that it "*limits* or denies" education. *Compare* §§ 106.30, 106.44(a) (effective until July 31, 2024), *with* §§ 106.2 (emphasis added), 106.44 (effective August 1, 2024).[4] The rule further explains that

> [s]ex-based harassment, including harassment predicated on sex stereotyping or gender identity, is covered by Title IX if it is sex-based, unwelcome, subjectively and objectively offensive, and sufficiently severe or pervasive to limit or deny a student's ability to participate in or benefit from a recipient's education program or activity (i.e., creates a hostile environment). Thus, harassing a student—including acts of verbal, nonverbal,

> or physical aggression, intimidation, or hostility based on the student's nonconformity with stereotypical notions of masculinity and femininity or gender identity—can constitute discrimination on the basis of sex under Title IX in certain circumstances.

89 Fed. Reg. at 33,516.

Finally, the rule provides that it preempts all "State or local laws or other requirements" that conflict with its terms, 89 Fed. Reg. at 33,885, and it applies to any school "program or activity" regardless of whether the activity occurs within the school. *Id.* at 33,886 (to be codified at 34 C.F.R. § 106.11).

II. Discussion

In support of their motion for an injunction pending appeal, Plaintiffs argue that they have shown a substantial likelihood of success on the merits, and that the other factors necessary for such relief—irreparable harm, balance of equities, and public interest—also weigh in favor of granting their motion. They also argue that because the provisions they argue are unlawful are central provisions of the rule, the provisions are not severable and so we should enjoin the entirety of the rule at this stage. Each of these arguments will be addressed in turn.[5]

A. Injunction Pending Appeal

For us to grant the extraordinary remedy of an injunction pending appeal, Plaintiffs must show:

> (1) substantial likelihood of success on the merits; (2) [that] irreparable injury will be suffered unless the injunction issues; (3) [that] the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) [that,] if issued, the injunction would not be adverse to the public interest.

Callahan v. U.S. Dep't of Health & Hum. Servs., 939 F.3d 1251, 1257 (11th Cir. 2019) (quotation omitted). We will address Plaintiffs' ability to meet each of these four elements in turn.

1. Likelihood of Success on the Merits

***4** The first factor we review in determining whether to grant an injunction pending appeal is whether Plaintiffs have shown "a substantial likelihood of success on the merits." *Id.*; *see Gonzales v. Governor of Ga.*, 978 F.3d 1266, 1271 n.12 (11th Cir. 2020) (noting that likelihood of success on the merits is "generally the most important of the four factors" (quotation omitted)). Because we review a district court's ruling on a preliminary injunction "under the deferential abuse of discretion standard," *Robinson v. Atty. Gen.*, 957 F.3d 1171, 1177 (11th Cir. 2020), the question we must answer is whether "it is substantially likely that [Plaintiffs] can demonstrate the district court abused its discretion when it denied the motion for a preliminary injunction," *Florida v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1286 (11th Cir. 2021). And our evaluation of the merits of Plaintiffs' challenge is governed by the Administrative Procedure Act, which requires us to "hold unlawful and set aside agency action ... found to be ... arbitrary, capricious, an abuse of discretion, ... otherwise not in accordance with law ... [or] in excess of statutory ... authority." 5 U.S.C. §§ 706(2)(A), (C). Finally, we note that in ruling on a motion for a preliminary injunction, "we do not conclusively resolve the merits of the [underlying] appeal." *Robinson*, 957 F.3d at 1177. Rather, "[t]he chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." *Id.* at 1178 (quotation omitted).

a. Sections 106.10 & 106.31(a)(2)

Plaintiffs argue that they are likely to succeed on the merits on appeal because § 106.10 broadens sex to include gender identity in violation of *Adams*, and combines with § 106.31(a)(2) to unlawfully "ban[ ] schools from requiring students to use the bathroom of their sex, rather than their gender identity." We agree that Plaintiffs have made the requisite showing.

In *Adams*, we addressed, among other matters, whether a Florida school's policy of separating male and female bathrooms on the basis of sex violated Title IX. 57 F.4th at 796, 811–17. To answer this question, we "interpret[ed] the word 'sex' in the context of Title IX and its implementing regulations." *Id.* at 811. We began by considering dictionary definitions of the word "sex" at the time of Title IX's enactment in 1972, which "overwhelming[ly]" defined sex "on the basis of biology and reproductive function[.]" *Id.* at 812. We then determined that defining "sex" in Title IX to include "gender identity" "ignored the overall statutory scheme" because it would render Title IX's many sex-based exceptions meaningless and "would provide more protection against discrimination on the basis of transgender status under

the statute and its implementing regulations than it would against discrimination on the basis of sex." *Id.* at 813–14. We thus determined that defining "sex" to include "gender identity" "could not comport with the plain meaning of 'sex' at the time of Title IX's enactment and the purpose of Title IX and its implementing regulations, as derived from their text." *Id.* at 814. Accordingly, we held that the term "sex" in Title IX "unambiguously" referred to "biological sex" and not "gender identity." *Id.* at 814–15. Moreover, we held that "[e]ven if the term 'sex,' as used in Title IX, were unclear," because Title IX was passed under the Spending Clause, the statute needed to incorporate gender identity "unambiguously," which we held it did not. *Id.* at 815–17.

Given our holding in *Adams* that "sex" in Title IX "unambiguously" refers to "biological sex" and not "gender identity," it is certainly highly likely that the Department's new regulation defining discrimination "on the basis of sex" to include "gender identity" is contrary to law and "in excess of statutory ... authority." 5 U.S.C. § 706(2); *see Loper Bright Enters. v. Raimondo*, —— U.S. ——, 144 S. Ct. 2244, 2266, 2273, 219 L.Ed.2d 832 (2024) (holding that "[c]ourts must exercise their independent judgment in deciding whether an agency has acted within its statutory authority" regardless of whether a statute is ambiguous, and that statutes "have a single, best meaning"). And the Department even acknowledges that the rule is contrary to *Adams*, but "declines to adopt" our reasoning. *See* 89 Fed. Reg. at 33820–21. Thus, the Plaintiffs have demonstrated a substantial likelihood that the district court abused its discretion in denying Plaintiffs' preliminary injunction as it relates to their challenges to §§ 106.10 and 106.31(a)(2). *See Brown v. Ala. Dep't of Transp.*, 597 F.3d 1160, 1185 (11th Cir. 2010) ("Although the grant [or denial] of ... injunctive relief is generally reviewed for an abuse of discretion, if the trial court misapplies the law we will review and correct the error without deference to that court's determination." (quotation omitted)).

***5** The Department disagrees, arguing that defining discrimination "on the basis of sex" in Title IX is merely a straightforward application of the Supreme Court's decision in *Bostock v. Clayton Cnty.*, 590 U.S. 644, 140 S.Ct. 1731, 207 L.Ed.2d 218 (2020). The Department misreads *Bostock* and our precedent. In *Bostock*, the Supreme Court was clear that "[t]he question [wa]sn't just what 'sex' mean[s], but what Title VII says about it," that its decision did not "sweep beyond Title VII to other federal or state laws that prohibit sex discrimination," and that it did not "purport to address bathrooms, locker rooms, or anything else of the kind." 590 U.S. at 681, 140 S.Ct. 1731. And in *Adams*, we noted that *Bostock* did not govern Title IX because it "involved employment discrimination under Title VII," while Title IX "is about schools and children—and the school is not the workplace." 57 F.4th at 808; *see also Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 175, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) ("Title VII ... is a vastly different statute from Title IX ...."). Additionally, we noted that "Title IX, unlike Title VII, includes express statutory and regulatory carveouts for differentiating between the sexes." *Adams*, 57 F.4th at 811. Thus, if *Bostock* applied, it "would swallow the carve-outs and render them meaningless." *Id.* at 814 n.7. We subsequently reaffirmed, in *Eknes-Tucker v. Governor of Alabama*, that "*Bostock* relied exclusively on the specific text of Title VII" and "bears minimal relevance" to cases involving "a different law ... and a different factual context." 80 F.4th 1205, 1228–29 (11th Cir. 2023). So *Bostock* does not undermine our conclusion that the Plaintiffs have shown a substantial likelihood of success on the merits as to this claim. Plaintiffs have thus satisfied the first (and most important) factor for obtaining preliminary injunctive relief. *Accord Arkansas*, 2024 WL 3518588, at *14–17; *Oklahoma*, 2024 WL 3609109, at *4–6; *Kansas*, 2024 WL 3273285, at *8–11; *Tennessee*, 2024 WL 3453880, at *2–4; *Louisiana*, 2024 WL 2978786, at *10–12; *Texas*, 2024 WL 3405342, at *5–7; *Tennessee*, 2024 WL 3019146, at *8–13.

b. Section 106.2

Next, Plaintiffs argue that "[t]he rule's redefinition of harassment in § 106.2 is likely illegal," because it is inconsistent with the definition the Supreme Court set out in *Davis*, and conflicts with our First Amendment precedent in *Speech First, Inc. v. Cartwright*, 32 F.4th 1110 (11th Cir. 2022).

In *Davis*, the Supreme Court defined what "discrimination" meant in the context of a private damages lawsuit under Title IX against a school board, in which one student alleged that another student had sexually harassed her. 526 U.S. at 632–33, 119 S.Ct. 1661. The Supreme Court held that, student-on-student "sexual harassment" was "discrimination" for purposes of Title IX, and in order for a private plaintiff to bring a suit for damages for such "discrimination," the behavior must be "so severe, pervasive, and objectively offensive that it denies its victims the equal access to education that Title IX is designed to protect," and the

recipient must be "deliberately indifferent." *Id.* at 650–52, 119 S.Ct. 1661.

Section 106.2's new definition of discrimination—which, recall, includes conduct that, "based on the totality of the circumstances ... is so severe *or* pervasive that it *limits* or denies a person's ability to participate in or benefit from the recipient's education program or activity"—flies in the face of *Davis*.[6] *See* § 106.2 (emphasis added). And while the Department points out that *Davis* arose in the context of a private lawsuit rather than an administrative lawsuit, the Supreme Court was nonetheless interpreting the same word in the same statute to address the same legal question: the meaning of "discrimination" under Title IX. It is not clear why a different, and significantly broader, definition of "discrimination" would apply in the administrative context. *See Loper Bright Enters.*, 144 S. Ct. at 2266 (noting that statutes "do—in fact, must—have a single best meaning"); *Clark v. Martinez*, 543 U.S. 371, 380, 125 S.Ct. 716, 160 L.Ed.2d 734 (2005) ("It is not at all unusual to give a statute's ambiguous language a limiting construction called for by one of the statute's applications, even though other of the statute's applications, standing alone, would not support the same limitation. The lowest common denominator, as it were, must govern.").

***6** And the new definition also raises First Amendment concerns. Indeed, the *Davis* majority, in responding to the dissent's concerns that holding schools liable for student-on-student conduct might force them to enact policies that violated the First Amendment, pointed to the "very real limitations" in its definition—noting that the standard did not include liability for "teas[ing]," "name-calling," isolated incidents, or "a mere 'decline in grades.' " *Davis*, 526 U.S. at 652, 119 S.Ct. 1661. And it warned against courts "impos[ing] *more sweeping liability than we read Title IX to require.*" *Id.* (emphasis added).

To that end, in *Speech First, Inc.*, we addressed, in pertinent part, whether a college's "discriminatory harassment" policy "likely" violated the First Amendment for purposes of obtaining a preliminary injunction. 32 F.4th at 1113. Among other things, the policy prohibited students from "engaging in," "[c]ondoning," "encouraging," or "failing to intervene" in "verbal, physical, electronic or other conduct" that touched on many different characteristics of a person including, for example, "gender identity or expression." *Id.* at 1114–15. The policy also prohibited "Hostile Environment Harassment," which it defined as "[d]iscriminatory harassment that is so severe *or* pervasive that it unreasonably interferes with, *limits*, deprives, or alters the terms or conditions of education ... employment ... or participation in a university program or activity ...." *Id.* (emphasis added). And the policy stated that a hostile environment could be created by "a single or isolated incident, if sufficiently severe," and would be evaluated based on "the totality of known circumstances." *Id.* We held that this policy likely violated the First Amendment because it "restrict[ed] political advocacy and cover[ed] substantially more speech than the First Amendment permit[ted]," thereby chilling protected speech, and it was also likely "an impermissible content-and viewpoint-based restriction." *Id.* at 1125–27. Here, the Department's new definition of "discrimination" is similar in its sweep to the "discriminatory harassment" policy in *Cartwright*, and thus raises similar First Amendment concerns.

Ultimately, the Department's regulation contravenes the Supreme Court's construction of Title IX "discrimination" set out in *Davis* and runs headlong into the First Amendment concerns animating decisions like *Davis* and *Cartwright*. Accordingly, it is highly likely that the Department's regulation is contrary to law and "in excess of statutory ... authority." 5 U.S.C. § 706(2). Thus, Plaintiffs are substantially likely to succeed in showing that the district court abused its discretion in not granting a preliminary injunction as it relates to § 106.2. *Accord Arkansas*, 2024 WL 3518588, at *17–18; *Oklahoma*, 2024 WL 3609109, at *7–8; *Louisiana*, 2024 WL 2978786, at *12; *see also Brown*, 597 F.3d at 1185.

2. Other Factors

The other factors—irreparable injury, balance of the equities, and public interest—also favor Plaintiffs. Beginning with irreparable injury, Plaintiffs suffer at least three harms if the rule goes into effect while we resolve the merits of their appeal. First, they face unrecoverable compliance costs in meeting the regulatory burdens imposed by the rule, lest they lose billions of dollars in federal funding for not complying. *See Georgia v. President of the United States*, 46 F.4th 1283, 1302 (11th Cir. 2022) (stating that "unrecoverable monetary loss is an irreparable harm"); *W. Va. ex rel. Morrisey v. U.S. Dep't of the Treasury*, 59 F.4th 1124, 1149 (11th Cir. 2023) (noting that "money damages cannot adequately compensate the States because the federal government generally enjoys immunity from suit").[7] Indeed, representatives from each of the States submitted declarations stating that the schools faced

substantial compliance costs in the form of time and money if the rule went into effect; and these costs would be doubled if the regulations are ultimately invalidated and the States have to reimplement their previous policies. *See Georgia*, 46 F.4th at 1302 (noting that costs included "time and effort" needed to comply with the rule). And the Department acknowledged the rule would lead to increased compliance costs. *See, e.g.*, 89 Fed. Reg. at 33,861, 33,851, 33,548.

***7** Second, four of the Plaintiffs are States that have laws governing public institutions of education that would conflict with the rule and would thus be unenforceable.[8] *See Abbott v. Perez*, 585 U.S. 579, 602 n.17, 138 S.Ct. 2305, 201 L.Ed.2d 714 (2018) ("[T]he inability to enforce its duly enacted plans clearly inflicts irreparable harm on the State."); *Maryland v. King*, 567 U.S. 1301, 1303, 133 S.Ct. 1, 183 L.Ed.2d 667 (2012) (Roberts, J., in chambers) ("[A]ny time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." (quotation omitted)).[9]

And third, irreparable harm flows to the private plaintiffs from the First Amendment concerns raised by the rule.[10] *See Elrod v. Burns*, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976) ("[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury.").

Additionally, the balance of the equities and public interest favor Plaintiffs.[11] As to the balance of the equities, the Department has interpreted "sex" in Title IX to mean biological sex and has allowed schools to have separate bathrooms based on biological sex for five decades. *See, e.g.*, The 1974 Rule, 45 C.F.R. § 86.33. A preliminary injunction pending appeal maintains that longstanding status quo. *Robinson*, 957 F.3d at 1178 ("The chief function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." (quotation omitted)); *see also Oklahoma*, 2024 WL 3609109, at *12 ("Since the current regulations have been in effect for decades, there is little harm in maintaining the status quo through the pendency of this suit.").

On the other hand, as noted above, Plaintiffs face substantial compliance costs if the new rule goes into place and they are deprived of the enforcement of their existing policies and laws in the meantime. That balance shakes out in favor of the Plaintiffs. And as to the public interest, the public has no interest in enforcing a regulation that likely violates the APA and raises First Amendment concerns. *See Otto v. City of Boca Raton*, 981 F.3d 854, 870 (11th Cir. 2020) ("It is clear that neither the government nor the public has any legitimate interest in enforcing an unconstitutional ordinance.").[12]

B. Scope of the Injunction

***8** Plaintiffs argue that "the injunction should bar Defendants from enforcing the rule in Alabama, Florida, Georgia, and South Carolina" and that it should "extend to the whole rule, at least for now." The Department argues that only the challenged provisions should be enjoined.

We agree with Plaintiffs and every federal court (including the Supreme Court) to rule on this issue that a rule-wide injunction in the Plaintiff States is called for at this stage. As the Sixth Circuit reasoned, the three provisions that Plaintiffs challenge are "central provisions" that "appear to touch every substantive provision of the Rule," and the Department "never contemplate[d] enforcement of the [r]ule without *any* of the core provisions." *Tennessee*, 2024 WL 3453880, at *3–4 (emphasis in original); *accord Oklahoma*, 2024 WL 3609109, at *12 (explaining why enjoining the new rule in its entirety is appropriate); *Kansas*, 2024 WL 3273285, at *18 (same); *Arkansas*, 2024 WL 3518588, at *20–*22 (same); *see also, e.g.*, *Randall v. Sorrell*, 548 U.S. 230, 262, 126 S.Ct. 2479, 165 L.Ed.2d 482 (2006) ("To sever provisions to avoid constitutional objection here would require us to write words into the statute ..., or to leave gaping loopholes ..., or to foresee which of many different possible ways the legislature might respond to the constitutional objections we have found."). And the Supreme Court agreed with the Sixth Circuit that it was not clear "which particular provisions, if any, are sufficiently independent of the enjoined definitional provision and thus might be able to remain in effect." *Louisiana*, —— U.S. at ——, 144 S.Ct. 2507, 2024 WL 3841071 at *3.

Moreover, the Sixth Circuit's points on the practical concerns accompanying a partial injunction here are also well taken. The court noted that "it is hard to see how all of the schools covered by Title IX could comply with this wide swath of new obligations if the Rule's definition of sex discrimination remains enjoined," and it questioned "how the schools could properly train their teachers on compliance in this unusual setting with so little time before the start of the new school year." *Tennessee*, 2024 WL 3453880, at *4. Similarly, we find persuasive the Fifth Circuit's reasoning that anything less than a rule-wide injunction "would involve this court in making

predictions without record support from the [Department] about the interrelated effects of the remainder of the Rule on thousands of covered educational entities," and that this lack of guidance is especially damning given "the historical purpose of a preliminary injunction ... is to maintain the status quo pending litigation." *Louisiana*, 2024 WL 3452887, at *2.

The Department argues that the severability provisions in the new rule foreclose a rule-wide injunction where, as here, only individual provisions are likely unlawful. Each subpart (A through F) of the rule has its own severability provision stating that "[i]f any provision of this subpart or its application to any person, act, or practice is held invalid, the remainder of the subpart or the application of its provisions to any person, act, or practice shall not be affected thereby." *See, e.g.*, 34 C.F.R. § 106.9. These provisions say nothing about the situation we face here, where provisions in multiple different subparts may well be invalidated simultaneously.[13] The difficulty with severing the relevant provisions is further underscored here because, as the Sixth Circuit reasoned, the Department "did not contemplate enforcement of the Rule without *any* of the core provisions." *Tennessee*, 2024 WL 3453880, at *4.

***9** For these reasons, we grant Plaintiffs' request for a rule-wide injunction pending appeal in Alabama, Florida, Georgia, and South Carolina. In granting injunctive relief, we maintain the status quo along with every other federal court (including the Supreme Court) to rule on this issue. More specific questions about scope can be answered at a later stage.

* * *

For all the reasons discussed, Plaintiffs' Motion for Injunction Pending Appeal is **GRANTED.** We DIRECT the Clerk to expedite the appeal of the district court's order and place it on the next available argument calendar.

Wilson, Circuit Judge, dissenting from the order granting an injunction pending appeal:

Pursuant to Title XI, "[n]o person in the United States 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.A. § 1681(a). The Department of Education is "authorized and directed to effectuate to the provisions" of Title IX, and may do so by issuing rules, regulations, or orders of general applicability which shall be consistent with achievement of the objectives of the statute." *Id.* at § 1682. Consistent with its statutory directive, the Department promulgated an administrative rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance," 89 Fed. Reg. 33474 (Apr. 29, 2024).

Plaintiffs—Alabama, Florida, Georgia, South Carolina, and four private organizations—filed suit to block enforcement of the Rule, which was set to take effect on August 1, 2024. In a thorough and well-reasoned 109-page opinion, the district court denied their motion for preliminary injunction. On the same day, it denied their emergency motion for injunction pending appeal or administrative injunction. Before this court, Plaintiffs moved for an administrative injunction, which we granted to allow for fulsome review on the merits. The Department is administratively enjoined from enforcement, and Plaintiffs now seek an injunction pending appeal.

An injunction pending appeal is an "extraordinary remedy," *Touchston v. McDermott*, 234 F.3d 1130, 1132 (11th Cir. 2000), which "requires the exercise of our judicial discretion," *Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1317 (11th Cir. 2019). We are unable to grant this drastic remedy unless Plaintiffs clearly establish: "(1) a substantial likelihood that they will prevail on the merits of the appeal; (2) a substantial risk of irreparable injury ... unless the injunction is granted; (3) no substantial harm to other interested persons; and (4) no harm to the public interest." *Touchston*, 234 F.3d at 1132. In evaluating whether Plaintiffs meet their heavy burden, we are directed to "examine the district court's decision to deny a preliminary injunction for an abuse of discretion." *State of Fla. v. Dep't of Health & Hum. Servs.*, 19 F.4th 1271, 1279 (11th Cir. 2021).

The district court rejected Plaintiffs' preliminary injunction motion, finding no likelihood of success on the merits and independently, an insufficient showing of irreparable harm. But this court need not reach the merits to resolve this appeal; instead, we are directed to reject Plaintiffs' motion for injunction pending appeal because they have still not shown irreparable injury.[1] *See Siegel v. LePore*, 234 F.3d 1163, 1175–76 (11th Cir. 2000) (en banc).

***10** Plaintiffs insist that if the Rule becomes effective, they will suffer three irreparable harms: sovereign, constitutional, and compliance harms. As an initial matter, they make only a

conclusory statement—both before the district court and here—that they have suffered sovereign and constitutional harms, asserting without explanation that the Rule conflicts with state statutes and requires schools to adopt harassment policies that chill student speech. This is insufficient to meet their heavy burden of "clearly establishing" an imminent and irreparable injury. *See id.* at 1176.

Turning to compliance harms, Plaintiffs argue that the Rule imposes regulatory burdens on schools that damages cannot compensate. Namely, they assert that schools will require time and money to review the Rule, conform their poilicies to the Rule, approve these policies, train employees, and litigate. While this circuit has recognized that unrecoverable monetary loss can amount to irreparable harm, *Odebrecht Constr., Inc. v. Sec'y, Fla. Dep't of Transp.*, 715 F.3d 1268, 1289 (11th Cir. 2013), "[t]he key word in this consideration is *irreparable*," *Sampson v. Murray,* 415 U.S. 61, 90, 94 S.Ct. 937, 39 L.Ed.2d 166 (1974) (emphasis added and internal quotation omitted). An injury is only irreparable "if it cannot be undone through monetary remedies." *Ne. Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville*, 896 F.2d 1283, 1285 (11th Cir. 1990). "Mere injuries, however, substantial, in terms of money, time, and energy necessarily expanded ... are not enough." The possibility that adequate compensatory or other corrective relief will be available at a later date, in the ordinary course of litigation, weighs heavily against a claim of irreparable harm." *Sampson*, 415 U.S. at 90, 94 S.Ct. 937. This court does not doubt that there will be compliance costs associated with implementing the Rule, but Plaintiffs fail to substantiate their claim that damages could not compensate them for their expenditures. At bottom, nothing in the record supports a finding of *irreparable* injury.

Moreover, the remaining injunction factors strongly favor a denial of Plaintiffs' motion. *See Touchston*, 234 F.3d at 1132; *see also Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 23–26, 129 S.Ct. 365, 172 L.Ed.2d 249 (2008). The challenged provisions largely pertain to transgender students, who remain at risk of substantial harm in the face of discrimination the Rule aims to eliminate. And enjoining the Rule as a whole—which includes other provisions not challenged here and independent from Plaintiffs' gender-identity-based concerns[2]—certainly harms the public because it harms all students who face sex-based discrimination.

It bears repeating that the remedy Plaintiffs seek is not to be granted unless they clearly establish their burden of persuasion as to each prerequisite. *See Siegel*, 234 F.3d at 1176; *see also Touchston*, 234 F.3d at 1132. They have not provided us with a sufficient basis to disturb the district court's conclusion that they failed to sustain their burden, and I dissent from the majority's lack of discretion in granting this "extraordinary and drastic" remedy in Plaintiffs' favor. *See Siegel*, 234 F.3d at 1176.

All Citations

Not Reported in Fed. Rptr., 2024 WL 3981994

Footnotes

1 Notably, since filing the instant appeal, the U.S. Supreme Court denied the Department's request for a partial stay of court orders in two separate district courts—which both preliminarily enjoined enforcement of the rule in the respective plaintiffs' states—pending resolution of the appeals of those orders in the Fifth and Sixth Circuits. *Dep't of Educ. v. Louisiana*, 603 U.S. ——, 144 S.Ct. 2507, —— L.Ed.2d ——, 2024 WL 3841071 (2024). The Court held that "all Members of the Court today accept that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule, including the central provision that newly defines sex discrimination to include discrimination on the basis of sexual orientation and gender identity." *Id.* at *1. Four members of the Court dissented as to the scope of the injunction, arguing that the three provisions could be severed from the rule while leaving the rest of the rule intact. *Id.* at *2–*5 (Sotomayor, J., dissenting). However, the majority held that a rule-wide injunction was appropriate, reasoning that "[o]n this limited record and in its emergency applications, the Government has not provided this Court a sufficient basis to disturb the lower courts' interim conclusions that the three provisions found likely to be unlawful are intertwined with and affect other provisions of the rule." *Id.* at *1.

Puzzlingly, the dissent argues that the *Louisiana* Court "did not address the merits" or "analyze the parties' merits arguments," but instead "addressed only severability." As noted previously, the Court unanimously "accept[ed] that the plaintiffs were entitled to preliminary injunctive relief as to three provisions of the rule." *Id.* at *1; *see also id.* at *2 (Sotomayor, J., dissenting) ("Every Member of the Court agrees respondents are entitled to interim relief as to three provisions of that Rule."). And by accepting that the plaintiffs were entitled to preliminary injunctive relief, the Court had to

have found that all the requirements for a preliminary injunction were met, including likelihood of success on the merits, irreparable harm, and the balance of the equities.

2 *See* *Tennessee v. Cardona*, No. 24-5588, 2024 WL 3453880 (6th Cir. July 17, 2024) (denying DOE's motion for a partial stay of the district court's preliminary injunction that enjoined enforcement of the rule in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia); *Louisiana v. DOE*, No. 24-30399, 2024 WL 3452887 (5th Cir. July 17, 2024) (denying DOE's motion for partial stay of district court's preliminary injunction that enjoined enforcement of the rule in Louisiana, Mississippi, Montana, and Idaho); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024) (enjoining enforcement in Oklahoma); *Arkansas v. DOE*, No. 4:24-CV-636-RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024) (enjoining enforcement of the rule in Arkansas, Missouri, Iowa, Nebraska, North Dakota, and South Dakota); *Carroll Indep. Sch. Dist. v. DOE*, No. 4:24-cv-00461-O, 2024 WL 3381901 (N.D. Tex. July 11, 2024) (partially enjoining enforcement of the rule in a specific school district); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342 (N.D. Tex. July 11, 2024) (enjoining enforcement of the rule against individual plaintiffs and state of Texas); *Kansas v. DOE*, No. 24-4041-JWB, 2024 WL 3273285 (D. Kan. July 2, 2024) (enjoining enforcement of the rule in Kansas, Alaska, Utah, Wyoming, and in specific schools); *Tennessee v. Cardona*, No. 2:24-072-DCR, 2024 WL 3019146 (E.D. Ky. June 17, 2024) (enjoining enforcement of the rule in Tennessee, Kentucky, Ohio, Indiana, Virginia, and West Virginia); *Louisiana v. DOE*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024) (enjoining enforcement of the rule in Louisiana, Mississippi, Montana, and Idaho).

3 The regulation, however, exempts certain statutory carveouts—such as 20 U.S.C. § 1686, which permits schools to "maintain[ ] separate living facilities for the different sexes"—from the de minimis harm requirement (*i.e.*, schools can provide different treatment or separation on the basis of sex in these situations regardless of whether it causes more than de minimis harm). But these statutory carveouts do not include the Department's previous regulations on separate bathrooms, locker rooms, shower facilities, access to classes and activities, and appearance codes. *See* 89 Fed. Reg. at 33,816.

4 Below, Plaintiffs also challenged the rule's grievance procedures, which they argued "repeal protections for the accused, like the right to a live hearing with cross-examination and the right to not have a single official investigate, adjudicate, and punish." However, Plaintiffs' objections to these procedures "aren't the focus of this motion."

5 The district court, in addition to holding that Plaintiffs failed to meet the traditional factors for injunctive relief, suggested that Plaintiffs failed to support key issues with arguments and citation to authority. Based on our review of the record, we are unpersuaded at this stage that Plaintiffs failed to advance and support the key claims they make here. We therefore proceed to the traditional factors for issuing an injunction pending appeal.

6 The Department argues that, in the Title VII context, courts have applied a broader "severe or pervasive" standard than the standard set out in *Davis* "without raising any First Amendment concerns." That cases have adopted a broader standard in the Title VII context does not undermine the holding in *Davis*. Indeed, the Department's argument overlooks the very different contexts in which Title IX and Title VII apply. *See* *Davis*, 526 U.S. at 651, 119 S.Ct. 1661 ("Courts, moreover, must bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable among adults.").

7 The dissent argues that the compliance costs are not irreparable because the States could recover damages for their expenditures if the rule was later invalidated. But the dissent does not specify whom the States could sue to collect these damages. If the dissent is suggesting that the States could collect from the federal government, that argument is foreclosed by our precedent. *See* *W. Va. ex rel.*, 59 F.4th at 1149 (noting that "money damages cannot adequately compensate the States because the federal government generally enjoys immunity from suit").

8 The dissent argues that the States "assert[ ] without explanation that the Rule conflicts with state statutes." But far from conclusory statements, each of the States submitted affidavits that cite examples of specific state statutes that would conflict with the rule. Indeed, as the district court noted, "Alabama Code § 16-1-54(b) (the bathroom statute) and Florida's Safety in Private Spaces Act appear to conflict with § 106.31(a)(2)'s instruction that preventing a person from participating in a program or activity consistent with the person's gender identity subjects the person to more than a de minimis harm ...."

9 The Department cites *State of Florida v. Department of Health and Human Services*, 19 F.4th 1271, 1291 (11th Cir. 2021), for the proposition that "it is black-letter law that the federal government does not invade[ ] areas of state sovereignty simply because it exercises its authority in a way that preempts conflicting state laws." But that statement was made after we had already decided that the rule at issue in that case was likely lawfully enacted. *Id.* at 1286–90. Thus, that case says nothing about whether a state faces irreparable harm from having to forsake enforcement of their own laws in favor of a regulation that is likely unlawful.

10 The dissent argues that the States "assert[ ] without explanation that the Rule ... requires schools to adopt harassment policies that chill student speech." But as discussed *supra* pp. 15–17, the States raise legitimate First Amendment concerns supported by argument and authority.

11 "Where the government is the party opposing the preliminary injunction, its interest and harm—the third and fourth elements—merge with the public interest." *Florida*, 19 F.4th at 1293.

12 The dissent's analysis of the equities is singularly focused, arguing hyperbolically that enjoining the rule "harms all students who face sex-based discrimination." Notwithstanding that the injunction would leave in place the numerous sex-based protections from the former rule, the dissent does not even attempt to grapple with the potential harms caused by leaving the rule in place. Indeed, the dissent makes no mention of the privacy rights of biological males and females who have to use restrooms with members of the opposite biological sex. *See Adams by & through Kasper v. Sch. Bd. of St. Johns Cnty.*, 57 F.4th 791, 804 (11th Cir. 2022) (en banc) ("The protection of students' privacy interests in using the bathroom away from the opposite sex and in shielding their bodies from the opposite sex is obviously an important governmental objective.") Nor does the dissent discuss the harm flowing from the likely loss of First Amendment speech rights. *See Cartwright*, 32 F.4th at 1125–27.

13 Section 106.2 is included in subpart A, § 106.10 is included in subpart B, and § 106.31 is included in subpart D.

1 The Supreme Court did not address the merits when it denied the Department's motion for stay in this case's companions—filed in district courts in the Fifth and Sixth Circuits. *Dep't of Educ. v. Louisiana*, 603 U.S. ——, 144 S.Ct. 2507, —— L.Ed.2d ——, 2024 WL 3841071 (2024). It addressed only severability and did not analyze the parties' merits arguments. We should not base an extraordinary remedy on these shaky grounds when the injury prong provides a sufficient basis for denying Plaintiffs' motion.

2 In its application for a partial stay before the Supreme Court, the Department of Justice explains that "[m]ost of the Rule does not address gender identity." For example, it strengthens protections for postpartum students and employees by requiring lactation spaces and reasonable modifications for pregnant students.

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142 S.Ct. 1562
Supreme Court of the United States.

Jane CUMMINGS, Petitioner
v.
PREMIER REHAB KELLER, P.L.L.C.

No. 20-219
|
Argued November 30, 2021
|
Decided April 28, 2022

Synopsis

Background: Patient, who was deaf and legally blind, brought action against physical therapy provider under the Rehabilitation Act and the Patient Protection and Affordable Care Act (ACA), alleging provider discriminated on the basis of disability by failing to provide patient an American Sign Language (ASL) interpreter. The United States District Court for the Northern District of Texas, John H. McBryde, Senior District Judge, 2019 WL 227411, granted provider's motion to dismiss, and patient appealed. The United States Court of Appeals for the Fifth Circuit, Clement, Circuit Judge, 948 F.3d 673, affirmed. Certiorari was granted.

Holdings: The Supreme Court, Chief Justice Roberts, held that:

emotional distress damages are not recoverable in private actions to enforce the antidiscrimination provisions of the Rehabilitation Act or the ACA, and

special rule allowing emotional distress damages when breach of contract would likely result in serious emotional disturbance did not put federal funding recipients on notice that such damages were available under the Rehabilitation Act or ACA.

Affirmed.

Justice Kavanaugh filed a concurring opinion, in which Justice Gorsuch joined.

Justice Breyer filed a dissenting opinion, in which Justice Sotomayor and Justice Kagan joined.

Procedural Posture(s): Petition for Writ of Certiorari; On Appeal; Motion to Dismiss for Failure to State a Claim.

****1565** *Syllabus*[*]

***212** Jane Cummings, who is deaf and legally blind, sought physical therapy services from Premier Rehab Keller and asked Premier Rehab to provide an American Sign Language interpreter at her sessions. Premier Rehab declined to do so, telling Cummings that the therapist could communicate with her through other means. Cummings later filed a lawsuit seeking damages and other relief against Premier Rehab, alleging that its failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act of 1973 and the Affordable Care Act. Premier Rehab is subject to these statutes, which apply to entities that receive federal financial assistance, because it receives reimbursement through Medicare and Medicaid for the provision of some of its services. The District Court determined that the only compensable injuries allegedly caused by Premier Rehab were emotional in nature. It held that damages for emotional harm are not recoverable in private actions brought to enforce either statute. The District Court thus dismissed the complaint, and the Fifth Circuit affirmed.

Held: Emotional distress damages are not recoverable in a private action to enforce either the Rehabilitation Act of 1973 or the Affordable Care Act. Pp. ——– – ——.

(a) Congress has broad power under the Spending Clause of the Constitution to "fix the terms on which it shall disburse federal money." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694. Pursuant to that authority, Congress has enacted statutes prohibiting recipients of federal financial assistance from discriminating on the basis of certain protected characteristics. This Court has held that such statutes may be enforced through implied rights of action. *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S.Ct. 2097, 153 L.Ed.2d 230. Although it is "beyond dispute that private individuals may sue" to enforce the antidiscrimination statutes at issue here, "it is less clear what remedies are available in such a suit." *Ibid.*

The Court's cases have clarified that whether a particular remedy is recoverable must be informed by the way Spending

Clause "statutes operate": by "conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." ***213** *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277. Because Spending Clause legislation operates based on consent, the "legitimacy of Congress' power" to enact such laws rests not on its sovereign authority, but on "whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.' " *Barnes*, 536 U.S. at 186, 122 S.Ct. 2097 (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531). The Court has regularly applied this contract-law analogy to define the scope of conduct for which funding recipients may be held liable, with an eye toward ensuring that recipients had notice of their obligations. "The same analogy," *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097, similarly limits "the scope of available remedies." *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989. Thus, a particular remedy is available in a private Spending Clause action "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097. Pp. ——— – ———.

(b) To decide whether emotional distress damages are available under the Spending Clause statutes in this case, the Court therefore asks whether a prospective funding recipient deciding whether to accept federal funds would have had "clear notice" regarding that liability. *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526. Because the statutes at issue are silent as to available remedies, it is not obvious how to decide that question. Confronted with the same dynamic in *Barnes*, which involved the question whether punitive damages are available under the same statutes, the Court followed the contract analogy and concluded that a federal funding recipient may be considered "on notice that it is subject ... to those remedies traditionally available in suits for breach of contract." 536 U.S. at 187, 122 S.Ct. 2097. Given that punitive damages "are generally not available for breach of contract," the Court concluded that funding recipients "have not, merely by accepting funds, implicitly consented to liability for punitive damages." *Id.*, at 187–188, 122 S.Ct. 2097.

Crucial here, the Court in *Barnes* considered punitive damages generally unavailable for breach of contract despite the fact that such damages are hardly unheard of in contract cases: Treatises cited in *Barnes* described punitive damages as recoverable in contract where "the conduct constituting the breach is also a tort for which punitive damages are recoverable." Restatement (Second) of Contracts § 355, p. 154. That recognized exception to the general rule, however, was not enough to give funding recipients the requisite notice that they could face such damages. Under *Barnes*, the Court thus presumes that recipients are aware that they may face the *usual* contract remedies in private suits brought to enforce their Spending Clause "contract" with the Federal Government. Pp. ——— – ———.

***214** (c) The above framework produces a straightforward analysis in this case. Hornbook law states that emotional distress is generally not compensable in contract. Under *Barnes*, the Court cannot treat federal funding recipients as having consented to be subject to damages for emotional distress, and such damages are accordingly not recoverable.

Cummings argues for a different result, maintaining that traditional contract remedies here *do* include damages for emotional distress, because there is an exception—put forth in some contract treatises—under which such damages may be awarded where a contractual breach is particularly likely to result in emotional disturbance. See, *e.g.*, Restatement (Second) of Contracts § 353. That special rule is met here, Cummings contends, because discrimination is very likely to engender mental anguish. This approach would treat funding recipients as on notice that they will face not only the general rules, but also "more fine-grained," exceptional rules that "govern[ ] in the specific context" at hand. Brief for Petitioner 33–35. That is inconsistent with both *Barnes* and the Court's larger Spending Clause jurisprudence. *Barnes* necessarily concluded that the existence of an on-point exception to the general rule against punitive damages was insufficient to put funding recipients on notice of their exposure to that particular remedy. No adequate explanation has been offered for why the Court—bound by *Barnes*—should reach a different result here. The approach offered by Cummings pushes the notion of offer and acceptance, central to the Court's Spending Clause cases, past its breaking point. It is one thing to say that funding recipients will know the basic, general rules. It is quite another to assume that they will know the contours of every contract doctrine, no matter how idiosyncratic or exceptional. Cummings would essentially incorporate the law of contract remedies wholesale, but *Barnes* constrains courts to imply only those remedies "that [are] normally available for contract actions." *Id.*, at 188, 122 S.Ct. 2097. In urging the Court to disregard that restriction, Cummings would have the Court treat statutory silence as a license to freely supply remedies the Court cannot be

sure Congress would have chosen. Such an approach "risks arrogating legislative power," *Hernández* v. *Mesa*, 589 U. S. ——, ——, 140 S.Ct. 735, 741, 206 L.Ed.2d 29, and is particularly untenable in a context requiring "clear notice regarding the liability at issue," *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455.

Even if it were appropriate to treat funding recipients as aware that they may be subject to "rare" contract-law rules that are "satisfied only in particular settings," Brief for Petitioner 34, funding recipients would still lack the requisite notice that emotional distress damages are available under the statutes at issue. That is because the Restatement's formulation—that such damages are available where "the contract or the breach is of such a kind that serious emotional disturbance was a ***215** particularly likely result," § 353—does not reflect the consensus rule among American jurisdictions. There is in fact no majority rule on what circumstances, if any, may trigger the exceptional allowance of such damages. For instance, many states reject the broad and generally phrased Restatement exception because they award emotional distress damages only in a narrow and idiosyncratic group of cases in which the breaching conduct would also have been a tort. These cases unsurprisingly mix contract, quasi-contract, and tort principles together, suggesting that they do not establish or evince a rule of *contract* law.

Emotional distress damages are not "traditionally available in suits for breach of contract." *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097. There is correspondingly no ground, under the Court's cases, to conclude that federal funding recipients have "clear notice," *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455, that they would face such a remedy in private actions brought to enforce the statutes here. Pp. —— – ——.

948 F.3d 673, affirmed.

ROBERTS, C. J., delivered the opinion of the Court, in which THOMAS, ALITO, GORSUCH, KAVANAUGH, and BARRETT, JJ., joined. KAVANAUGH, J., filed a concurring opinion, in which GORSUCH, J., joined. BREYER, J., filed a dissenting opinion, in which SOTOMAYOR and KAGAN, JJ., joined.

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Opinion

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

***216** ****1568** Congress has broad power under the Spending Clause of the Constitution to set the terms on which it disburses federal funds. "[L]egislation enacted pursuant to the spending power is much in the nature of a contract: in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst State School and Hospital v. Halderman*, 451 U.S. 1, 17, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981). Exercising this authority, Congress has passed a number of statutes prohibiting recipients of federal financial assistance from discriminating based on certain protected characteristics. We have held that these statutes may be enforced through implied rights of action, and that private plaintiffs may secure injunctive or monetary relief in such suits. See *Barnes v. Gorman*, 536 U.S. 181, 185, 187, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002). Punitive damages, on the other hand, are not available. *Id.*, at 189, 122 S.Ct. 2097. The question presented in this case is whether another special form of damages—damages for emotional distress—may be recovered.

I

Petitioner Jane Cummings is deaf and legally blind, and communicates primarily in American Sign Language (ASL). In October 2016, she sought physical therapy services from respondent Premier Rehab Keller, a small business in the ***217** Dallas-Fort ****1569** Worth area. Cummings requested that Premier Rehab provide an ASL interpreter at her appointments. Premier Rehab declined to do so, telling Cummings that she could communicate with the therapist using written notes, lip reading, or gesturing. Cummings then sought and obtained care from another provider.

Cummings later filed this lawsuit against Premier Rehab, alleging that its failure to provide an ASL interpreter constituted discrimination on the basis of disability in violation of the Rehabilitation Act of 1973, § 504, 87 Stat. 394, as amended, 29 U.S.C. § 794(a), and the Patient Protection and Affordable Care Act, § 1557, 124 Stat. 260, 42 U.S.C. § 18116. Premier Rehab is subject to these statutes, which apply to entities that receive federal financial assistance, because it receives reimbursement through Medicare and Medicaid for the provision of some of its services. In her complaint, Cummings sought declaratory relief, an injunction, and damages.

The District Court dismissed the complaint. It observed that "the only compensable injuries that Cummings alleged Premier caused were 'humiliation, frustration, and emotional distress.' " No. 4:18-CV-649-A, 2019 WL 227411, *4 (N.D. Tex. Jan. 16 2019). In the District Court's view, "damages for emotional harm" are not recoverable in private actions brought to enforce the Rehabilitation Act or the Affordable Care Act. *Ibid.* The Court of Appeals for the Fifth Circuit affirmed, adopting the same conclusion. 948 F.3d 673 (2020).

We granted certiorari. 594 U. S. ——, 141 S.Ct. 2882, 210 L.Ed.2d 989 (2021).

II

A

Pursuant to its authority to "fix the terms on which it shall disburse federal money," *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531, Congress has enacted four statutes prohibiting recipients of federal financial assistance from discriminating based on certain ***218** protected grounds. Title VI of the Civil Rights Act of 1964 forbids race, color, and national origin discrimination in federally funded programs or activities. 78 Stat. 252, 42 U.S.C. § 2000d. Title IX of the Education Amendments of 1972 similarly prohibits sex-based discrimination, 86 Stat. 373, 20 U.S.C. § 1681, while the Rehabilitation Act bars funding recipients from discriminating because of disability. 29 U.S.C. § 794. Finally, the Affordable Care Act outlaws discrimination on any of the preceding grounds, in addition to age, by healthcare entities receiving federal funds. 42 U.S.C. § 18116.

None of these statutes expressly provides victims of discrimination a private right of action to sue the funding recipient in federal court. But as to both Title VI and Title IX, our decision in *Cannon v. University of Chicago*, 441 U.S. 677, 703, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979), "found an *implied* right of action." *Barnes*, 536 U.S. at 185, 122 S.Ct. 2097. Congress later "acknowledged this right in amendments" to both statutes, *ibid.*, leading us to conclude that it had "ratified *Cannon*'s holding" that "private individuals may sue to enforce" both statutes. *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001); see also *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 72–73, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). As to the Rehabilitation Act and the Affordable Care Act—the two statutes directly at issue in this litigation—each expressly incorporates the rights and remedies provided under Title VI. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 18116(a).

Although it is "beyond dispute that private individuals may sue to enforce" the ****1570** antidiscrimination statutes we consider here, "it is less clear what remedies are available in such a suit." *Barnes*, 536 U.S. at 185, 122 S.Ct. 2097. In *Franklin*, we considered whether monetary damages are available as a remedy for intentional violations of Title IX (and, by extension, the other statutes we discussed). 503 U.S. at 76, 112 S.Ct. 1028. We answered yes, *ibid.*, but "did not describe the scope of 'appropriate relief.' " *Barnes*, 536 U.S. at 185, 122 S.Ct. 2097.

***219** Our later cases have filled in that gap, clarifying that our consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause "statutes operate": by "conditioning an offer of federal funding on a promise by the recipient not to discriminate, in what amounts essentially to a contract between the Government and the recipient of funds." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 286, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). Unlike ordinary legislation, which "imposes congressional policy" on regulated parties "involuntarily," Spending Clause legislation operates based

on consent: "in return for federal funds, the [recipients] agree to comply with federally imposed conditions." *Pennhurst*, 451 U.S. at 16, 17, 101 S.Ct. 1531. For that reason, the "legitimacy of Congress' power" to enact Spending Clause legislation rests not on its sovereign authority to enact binding laws, but on "whether the [recipient] voluntarily and knowingly accepts the terms of th[at] 'contract.' " *Barnes*, 536 U.S. at 186, 122 S.Ct. 2097 (quoting *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531).

"We have regularly applied th[is] contract-law analogy in cases defining the scope of conduct for which funding recipients may be held liable for money damages." *Barnes*, 536 U.S. at 186, 122 S.Ct. 2097. Recipients cannot "knowingly accept" the deal with the Federal Government unless they "would clearly understand ... the obligations" that would come along with doing so. *Arlington Central School Dist. Bd. of Ed. v. Murphy*, 548 U.S. 291, 296, 126 S.Ct. 2455, 165 L.Ed.2d 526 (2006). We therefore construe the reach of Spending Clause conditions with an eye toward "ensuring that the receiving entity of federal funds [had] notice that it will be liable." *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989 (internal quotation marks omitted). "Accordingly, if Congress intends to impose a condition on the grant of federal moneys, it must do so unambiguously." *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531.

"The same analogy," *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097, similarly limits "the scope of available remedies" in actions brought to ***220** enforce Spending Clause statutes, *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989. After all, when considering whether to accept federal funds, a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table. See *Barnes*, 536 U.S. at 188, 122 S.Ct. 2097. A particular remedy is thus "appropriate relief" in a private Spending Clause action "only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." *Id.*, at 187, 122 S.Ct. 2097 (emphasis in original). Only then can we be confident that the recipient "exercise[d its] choice knowingly, cognizant of the consequences of [its] participation" in the federal program. *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531.

B

In order to decide whether emotional distress damages are available under the Spending Clause statutes we consider here, we therefore ask a simple question: Would a prospective funding recipient, at the time it "engaged in the ****1571** process of deciding whether [to] accept" federal dollars, have been aware that it would face such liability? *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455. If yes, then emotional distress damages are available; if no, they are not.

Because the statutes at issue are silent as to available remedies, it is not obvious how to decide whether funding recipients would have had the requisite "clear notice regarding the liability at issue in this case." *Ibid.* We confronted that same dynamic in *Barnes*. There, we considered whether a federal funding recipient would have known, when taking the money, that it was agreeing to face punitive damages in suits brought under those laws. We noted that the statutory text "contains no express remedies." 536 U.S. at 187, 122 S.Ct. 2097. But we explained that, following the contract analogy set out in our Spending Clause cases, a federal funding recipient may be considered "on notice that it is subject not only to those remedies explicitly provided in the relevant legislation, but also to those remedies traditionally available in suits for ***221** breach of contract." *Ibid*. We identified two such remedies: compensatory damages and injunctions. By contrast, we explained, punitive damages "are generally not available for breach of contract." *Ibid.* We thus concluded that funding recipients covered by the statutes at issue "have not, merely by accepting funds, implicitly consented to liability for punitive damages." *Id.,* at 188, 122 S.Ct. 2097.

Crucial for this case, we considered punitive damages to be "generally not available for breach of contract," see *id.,* at 187, 122 S.Ct. 2097, despite the fact that such damages are hardly unheard of in contract cases. Indeed, according to the treatises we cited, punitive damages are recoverable in contract where "the conduct constituting the breach is also a tort for which punitive damages are recoverable." Restatement (Second) of Contracts § 355, p. 154 (1979); see also 3 E. Farnsworth, Contracts § 12.8, pp. 192–201 (2d ed. 1998). That recognized exception to the general rule, however, was not enough to give funding recipients the requisite notice that they could face such damages.

Under *Barnes*, then, we may presume that a funding recipient is aware that, for breaching its Spending Clause "contract" with the Federal Government, it will be subject to the *usual* contract remedies in private suits. That is apparent from the adverbs *Barnes* repeatedly used, requiring that a remedy be "traditionally available," "generally ... available," or "normally available for contract actions." 536 U.S. at

187–188, 122 S.Ct. 2097. And it is confirmed by the Court's holding: that punitive damages are unavailable in private actions brought under these statutes even though such damages are a familiar feature of contract law.

C

Under the framework just set out, the analysis here is straightforward. It is hornbook law that "emotional distress is generally not compensable in contract," D. Laycock & R. Hasen, Modern American Remedies 216 (5th ed. ***222** 2019), just as "punitive damages ... are generally not available for breach of contract," *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097. See 11 W. Jaeger, Williston on Contracts § 1341, p. 214 (3d ed. 1968) ("Mental suffering caused by breach of contract, although it may be a real injury, is not generally allowed as a basis for compensation in contractual actions." (footnote omitted)); E. Farnsworth, Contracts § 12.17, p. 894 (1982) (describing rule of "generally denying recovery for emotional disturbance, or 'mental distress,' resulting from breach of contract" as "firmly rooted in tradition"); J. Perillo, Calamari ****1572** & Perillo on Contracts § 14.5, p. 495 (6th ed. 2009) (Calamari & Perillo) ("As a general rule, no damages will be awarded for the mental distress or emotional trauma that may be caused by a breach of contract."); C. McCormick, Law of Damages § 145, p. 592 (1935) (McCormick) ("It is often stated as the 'general rule' that, in actions for breach of contract, damages for mental suffering are not allowable."). Under *Barnes*, we therefore cannot treat federal funding recipients as having consented to be subject to damages for emotional distress. It follows that such damages are not recoverable under the Spending Clause statutes we consider here.

In arguing for a different result, Cummings recognizes that "contract law dictates 'the *scope* of damages remedies.' " Brief for Petitioner 30. And she quotes the test set out in *Barnes*: whether a certain remedy is "traditionally available in suits for breach of contract." Brief for Petitioner 31. But Cummings then argues that, notwithstanding the above authorities, "traditional contract remedies" in fact *do* "include damages for emotional distress." *Ibid.*; see Brief for United States as *Amicus Curiae* 14–20 (making the same argument); *post*, at —— – —— (BREYER, J., dissenting) (same).

That is because, Cummings explains, several contract treatises put forth the special rule that "recovery for emotional disturbance" is allowed in a particular circumstance: where "the contract or the breach is of such a kind that serious ***223** emotional disturbance was a particularly likely result." Brief for Petitioner 31 (quoting Restatement (Second) of Contracts § 353). And, she contends, such a rule "aptly describe[s the] intentional breach of [a] promise to refrain from discrimination," because discrimination frequently engenders mental anguish. Brief for Petitioner 31. This argument suffers from two independently fatal flaws.

First, Cummings subtly but crucially transforms the contract-law analogy into a test that is inconsistent with both *Barnes* and our larger Spending Clause jurisprudence. *Barnes*, recall, instructs us to inquire whether a remedy is "traditionally," "generally," or "normally available for contract actions." 536 U.S. at 187–188, 122 S.Ct. 2097. Cummings, however, would look not only to those general rules, but also to whether there is a "more fine-grained" or "more directly applicable" rule of contract remedies that, although not generally or normally applicable, "govern[s] in the specific context" or "particular setting[ ]" of the pertinent Spending Clause provision. Brief for Petitioner 33–35; see also *post,* at ——. In other words, Cummings would treat funding recipients as on notice that they will face not only the *usual* remedies available in contract actions, but also other *unusual*, even "rare" remedies, Brief for Petitioner 34, if those remedies would be recoverable "in suits for breaches of the type of contractual commitments at issue," *id.,* at 35.

Neither petitioner nor the United States attempts to ground this approach in *Barnes*, which, as discussed above, undertook nothing of the sort. Indeed, had *Barnes* analyzed the question as petitioner frames it, the decision would have come out the opposite way. As noted, although the general rule is that punitive damages are not available in contract, they *are* undoubtedly recoverable in cases where the breaching conduct is also "a tort for which punitive damages are recoverable." Restatement (Second) of Contracts § 355. Such conduct would presumably include "breaches of the type of contractual commitments at issue here," Brief for ***224** Petitioner 35–namely, the commitment not to discriminate. After all, intentional discrimination ****1573** is frequently a wanton, reprehensible tort. *Barnes* itself involved "tortious conduct," 536 U.S. at 192, 122 S.Ct. 2097 (Stevens, J., concurring in judgment), that the jury had found deplorable enough to warrant $1.2 million in punitive damages, *id.,* at 184, 122 S.Ct. 2097 (opinion of the Court). Yet *Barnes*necessarily concluded that the existence of this on-point exception to the general rule against punitive damages

was insufficient to put funding recipients on notice of their exposure to that particular remedy.

Compare in this regard the Restatement's discussion of emotional distress damages with its discussion of punitive damages:

> "**Loss Due to Emotional Disturbance**
>
> "Recovery for emotional disturbance will be excluded *unless* ... the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result." § 353 (emphasis added).
>
> "**Punitive Damages**
>
> "Punitive damages are not recoverable for a breach of contract *unless* the conduct constituting the breach is also a tort for which punitive damages are recoverable." § 355 (emphasis added).

It did not matter to the Court in *Barnes* that the second clause of section 355 "aptly describe[s] a funding recipient's intentional breach of its promise to refrain from discrimination." Brief for Petitioner 31. *Barnes* did not even engage in such an inquiry; it simply stopped at the word "unless." See 536 U.S. at 187–188, 122 S.Ct. 2097. Neither Cummings nor the United States adequately explains why we—bound by *Barnes*—should do anything different here. Indeed, reflected in the Restatement's similar treatment of emotional distress and punitive damages is the fact that "the line between these two kinds of damages is indistinct and hard to ***225** draw." 11 J. Perillo, Corbin on Contracts § 59.1, p. 546 (rev. 11th ed. 2005) (Corbin); see also D. Dobbs, Law of Remedies § 12.4, p. 819 (1973) (Dobbs).

Beyond *Barnes* itself, petitioner's "more fine-grained" approach, Brief for Petitioner 33, cannot be squared with our contract analogy case law in general. As Cummings sees things, "it makes no difference whether the governing contract rule here is an 'exception,' " *id.*, at 34, because "the governing rule is just that: the governing rule," *id.*, at 35; see also *post*, at ——. But our cases do not treat suits under Spending Clause legislation as literal "suits in contract," *Sossamon v. Texas*, 563 U.S. 277, 290, 131 S.Ct. 1651, 179 L.Ed.2d 700 (2011), subjecting funding recipients to whatever "governing rules" some general federal law of contracts would supply.

Rather, as set out above, we employ the contract analogy "only as a potential *limitation* on liability" compared to that which "would exist under nonspending statutes." *Ibid.* We do so to ensure that funding recipients "exercise[d] their choice" to take federal dollars "knowingly, cognizant of the consequences of " doing so. *Pennhurst*, 451 U.S. at 17, 101 S.Ct. 1531. Here, the statutes at issue say nothing about what those consequences will be. Nonetheless, consistent with *Barnes*, it is fair to consider recipients aware that, if they violate their promise to the Government, they will be subject to either damages or a court order to perform. Those are the usual forms of relief for breaching a legally enforceable commitment. No dive through the treatises, 50-state survey, or speculative drawing of analogies is required to anticipate their availability.

The approach offered by Cummings, by contrast, pushes the notion of "offer and acceptance," *Barnes*, 536 U.S. at 186, 122 S.Ct. 2097, past its breaking point. It ****1574** is one thing to say that funding recipients will know the basic, general rules. It is quite another to assume that they will know the contours of every contract doctrine, no matter how idiosyncratic or exceptional. Yet that is the sort of "clear notice" that Cummings ***226** necessarily suggests funding recipients would have regarding the availability of emotional distress damages when "engaged in the process of deciding whether" to accept federal funds. *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455. Such a diluted conception of knowledge has no place in our Spending Clause jurisprudence.

What is more, by essentially incorporating the law of contract remedies wholesale, Cummings's rendition of the analogy "risks arrogating legislative power." *Hernández* v. *Mesa*, 589 U. S. ——, ——, 140 S.Ct. 735, 741, 206 L.Ed.2d 29 (2020). Recall that *Barnes* authorized the recovery of "remedies traditionally available in suits for breach of contract" under Spending Clause statutes, like those we consider here, that "mention[ ] no remedies." 536 U.S. at 187, 122 S.Ct. 2097. *Barnes* thus permitted federal courts to do something we are usually loath to do: "find[ ] that a [certain] remedy is implied by a provision that makes no reference to that remedy," *Hernández*, 589 U. S., at ——, 140 S.Ct., at 742. But *Barnes* also placed a clear limit on that authority, constraining courts to imply only those remedies "that [are] normally available for contract actions." 536 U.S. at 188, 122 S.Ct. 2097. In urging us to disregard that restriction, Cummings would have us treat statutory silence as a license to freely supply remedies we cannot be sure Congress would have chosen to make available. That would be an untenable result in any context, let alone one in which our cases require "clear notice regarding

the liability at issue," *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455.

Second, even if it were appropriate to treat funding recipients as aware that they may be subject to "rare" contract-law rules that are "satisfied only in particular settings," Brief for Petitioner 34, funding recipients would still lack the requisite notice that emotional distress damages are available under the statutes at issue. That is because the Restatement's formulation—that such damages are available where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result," see Restatement (Second) of Contracts § 353—does not reflect the consensus rule among American jurisdictions.

***227** Far from it. As one commentator concluded after "[s]urveying all of the cases dealing with emotional distress recovery in contract actions" over a decade after the Restatement's publication, "a majority rule does not exist" on the question. D. Whaley, Paying for the Agony: The Recovery of Emotional Distress Damages in Contract Actions, 26 Suffolk U. L. Rev. 935, 946 (1992); see also J. Chmiel, Damages—Recovery for Mental Suffering From Breach of Contract, 32 Notre Dame Law. 482 (1957) (noting "little uniformity in the decided cases"); Corbin § 59.1, at 538, 540 ("Claims for damages for mental pain and suffering have caused much conflict and difference of opinion," and "the law cannot be said to be entirely settled"); Dobbs § 12.4, at 819–820 (although a "group of cases have tried to formulate a broader doctrine" akin to the Restatement view, "th[e] principle is a broad and relatively undefined one," and "it is not clear how far [it] is or will be accepted by the courts"). The contrary view of the dissent, see *post,* at ——— – ———, is more aspirational than descriptive.

To be sure, a number of States follow the Restatement rule and award emotional distress damages "where the injury entails ****1575** more than a pecuniary loss, and the duty violated is closely associated with the feelings and emotions of the injured party." Chmiel, 32 Notre Dame Law., at 482. That represents "the most liberal approach," Whaley, 26 Suffolk L. Rev., at 943, taken by a "strong minority" of courts, Corbin § 59.1, at 541; see also McCormick § 145, at 594–595. On the opposite end of the spectrum, however, several States squarely reject the Restatement, and altogether forbid recovery of emotional distress damages even where the contract relates to nonpecuniary matters. See, *e.g.*, *Tompkins v. Eckerd*, Civ.No. 09-2369, 2012 WL 1110069, *4 (D.S.C., Apr. 3, 2012); *Contreraz v. Michelotti-Sawyers*, 271 Mont. 300, 309, 896 P.2d 1118, 1123 (1995); *Keltner v. Washington County*, 310 Ore. 499, 504–510, 800 P.2d 752, 754–758 (1990).

Most States reject the Restatement exception in a more nuanced way: by limiting the award of emotional distress damages to a narrow and idiosyncratic group of cases, rather ***228** than making them available *in general* wherever a breach would have been likely to inflict emotional harm. Calamari & Perillo § 14.5, at 495–496. A good example is New York, which refused to apply the Restatement rule, and denied emotional distress damages, where the defendant hospital breached its contractual duty to return a newborn child to his parents by failing to prevent his abduction. *Johnson v. Jamaica Hospital*, 62 N.Y.2d 523, 528–529, 467 N.E.2d 502, 504, 478 N.Y.S.2d 838 (1984); see also *id.,* at 536–537, 478 N.Y.S.2d 838, 467 N.E.2d at 509 (Meyer, J., dissenting).

These jurisdictions confine recovery for mental anguish where nonpecuniary contracts are at issue in two main ways. First, a number permit recovery only if the breach also qualifies as "unusually evil," with the precise terminology varying from "reckless" and "willful" to "wanton" and "reprehensible." D. Hoffman & A. Radus, Instructing Juries on Noneconomic Contract Damages, 81 Fordham L. Rev. 1221, 1227 (2012) (emphasis deleted); see Corbin § 59.1, at 546–547; Chmiel, 32 Notre Dame Law., at 484–485; see, *e.g.*, *Giampapa v. American Family Mut. Ins. Co.*, 64 P.3d 230, 238–239 (Colo. 2003).

Second, many States limit recovery for mental anguish to only a narrow "class of contracts upon breach of which the injured party may, if he so elect, bring an action sounding in tort." *Smith v. Sanborn State Bank*, 147 Iowa 640, 643, 126 N.W. 779, 780 (1910); Corbin § 59.1, at 538; see, *e.g., Johnson*, 62 N.Y.2d at 528, 478 N.Y.S.2d 838, 467 N.E.2d at 504. Such cases most prominently include those "against carriers, telegraph companies, and innkeepers—all of whom are bound by certain duties that are independent of contract, but who usually also have made a contract for the performance of the duty." Corbin § 59.1, at 538; Chmiel, 32 Notre Dame Law., at 488. Others involve "contracts for the carriage or proper disposition of dead bodies," Restatement (Second) of Contracts § 353, Comment *a*, which similarly might be seen "as tort cases quite apart from the contract, since one who negligently ***229** mishandles a body could be liable in tort ... even if there were no contract at all." Dobbs § 12.4, at 819;

see also McCormick § 145, at 594–595, 597; see, *e.g.*, *Wright v. Beardsley*, 46 Wash. 16, 16–20, 89 P. 172, 172–174 (1907).

Many of these cases unsurprisingly mix contract, quasi-contract, and tort principles together. Dobbs, § 12.4, at 818, n. 10 ("The carrier who insults his passenger is liable to him in tort ... but cases often speak of an implied term in the contract as governing this point."); *Knoxville Traction Co. v. Lane*, 103 Tenn. 376, 386, 53 S.W. 557, 560 (1899) ("The gravamen of this action is the defendant's breach of its contract of carriage, ****1576** which includes ... the duty to protect the passenger from insult or injury."); *Chamberlain v. Chandler*, 5 F.Cas. 413, 414 (No. 2,575) (C.C. Mass. 1823) (opinion of Story, J.) (ship captain violated the carriage contract's "implied stipulation against general obscenity").* As such, it makes little sense to treat such cases as establishing or evincing a rule of contract law—a principle with which the United States agrees, Brief for United States as *Amicus Curiae* 31, n. 5 (arguing that cases "based on tort principles" are "not instructive" for purposes of the contract-law analogy).

In the end, it is apparent that the closest our legal system comes to a universal rule—or even a widely followed one—regarding the availability of emotional distress damages in ***230** contract actions is "the conventional wisdom ... that [such] damages are for highly unusual contracts, which do not fit into the core of contract law." Hoffman, 81 Fordham L. Rev., at 1230. As to which "highly unusual contracts" trigger the exceptional allowance of such damages, the only area of agreement is that there is no agreement. There is thus no basis in contract law to maintain that emotional distress damages are "traditionally available in suits for breach of contract," *Barnes*, 536 U.S. at 187, 122 S.Ct. 2097, and correspondingly no ground, under our cases, to conclude that federal funding recipients have "clear notice," *Arlington*, 548 U.S. at 296, 126 S.Ct. 2455, that they would face such a remedy in private actions brought to enforce the statutes at issue.

* * *

For the foregoing reasons, we hold that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes we consider here. The judgment of the Court of Appeals is affirmed.

It is so ordered.

Justice KAVANAUGH, with whom Justice GORSUCH joins, concurring.

In analyzing whether compensatory damages for emotional distress are available under the implied Title VI cause of action, both the Court and the dissent ably employ the contract-law analogy set forth by this Court's precedents. See, *e.g.*, *Barnes v. Gorman*, 536 U.S. 181, 186, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002). The dueling and persuasive opinions illustrate, however, that the contract-law analogy is an imperfect way to determine the remedies for this implied cause of action.

Instead of continuing to rely on that imperfect analogy, I would reorient the inquiry to focus on a background interpretive principle rooted in the Constitution's separation of powers. Congress, not this Court, creates new causes of action. See *Alexander v. Sandoval*, 532 U.S. 275, 286–287, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). And with respect to existing implied causes of ***231** action, Congress, not this Court, should extend those implied causes ****1577** of action and expand available remedies. Cf. *Hernández v. Mesa*, 589 U. S. ——, ——, 140 S.Ct. 735, 741-742, 206 L.Ed.2d 29 (2020); see also *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 77–78, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992) (Scalia, J., concurring in judgment). In my view, that background interpretive principle—more than contract-law analysis—counsels against judicially authorizing compensatory damages for emotional distress in suits under the implied Title VI cause of action.

Justice BREYER, with whom Justice SOTOMAYOR and Justice KAGAN join, dissenting.

Using its Spending Clause authority, Congress has enacted four statutes that prohibit recipients of federal funds from discriminating on the basis of certain protected characteristics, including (depending upon the statute) race, color, national origin, sex, disability, or age. See Civil Rights Act of 1964, Title VI, 42 U.S.C. § 2000d; Education Amendments Act of 1972, Title IX, 20 U.S.C. § 1681; Rehabilitation Act of 1973, § 504, 29 U.S.C. § 794; Patient Protection and Affordable Care Act (ACA), § 1557, 42 U.S.C. § 18116. We have held that victims of intentional violations of these statutes may bring lawsuits seeking to recover, among other relief, compensatory damages. *Franklin v. Gwinnett County Public Schools*, 503 U.S. 60, 76, 112 S.Ct. 1028, 117 L.Ed.2d 208 (1992). Today, the Court holds that the

compensatory damages available under these statutes cannot include compensation for emotional suffering.

The Court has asked the right question: "[W]ould a prospective funding recipient, at the time it engaged in the process of deciding whether to accept federal dollars, have been aware that it would face such liability?" *Ante*, at —— (internal quotation marks and alterations omitted). And it has correctly observed that our precedents instruct us to answer this question by drawing an analogy to contract law. But I disagree with how the Court has applied that analogy.

***232** The Court looks broadly at all contracts. It says that, most of the time, damages for breach of contract did not include compensation for emotional distress. *Ante*, at ——. And it then holds that emotional distress damages are not available under the Spending Clause statutes at issue here. *Ibid.* But, in my view, contracts analogous to these statutes *did allow* for recovery of emotional distress damages. Emotional distress damages were traditionally available when "the contract or the breach" was "of such a kind that serious emotional disturbance was a particularly likely result." Restatement (Second) of Contracts § 353, p. 149 (1979).

The Spending Clause statutes before us prohibit intentional invidious discrimination. That kind of discrimination is particularly likely to cause serious emotional disturbance. Thus, applying our precedents' contract analogy, I would hold that victims of intentional violations of these antidiscrimination statutes can recover compensatory damages for emotional suffering. I respectfully dissent.

I

I begin with agreement. First, like the Court, I recognize that "it is 'beyond dispute that private individuals may sue to enforce' the [four] antidiscrimination statutes we consider here." *Ante*, at —— (quoting *Barnes v. Gorman*, 536 U.S. 181, 185, 122 S.Ct. 2097, 153 L.Ed.2d 230 (2002)). Title VI (prohibiting race discrimination) and Title IX (prohibiting sex discrimination) contain implied rights of action that have been ratified by Congress. ****1578** *Alexander v. Sandoval*, 532 U.S. 275, 280, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). The Rehabilitation Act (prohibiting disability discrimination) and the ACA (prohibiting race, sex, disability, and age discrimination) expressly incorporate the rights and remedies available under Title VI. 29 U.S.C. § 794a(a)(2); 42 U.S.C. § 18116(a). We have treated these statutes as providing "coextensive" remedies. *Barnes*, 536 U.S. at 185, 122 S.Ct. 2097. Thus, the Court's decision today will affect the remedies available ***233** under all four of these statutes, impacting victims of race, sex, disability, and age discrimination alike.

Second, like the Court, I also recognize that recipients of federal funding are subject to a particular form of liability only if they are "*on notice*" that, by accepting the funds, they expose themselves to that form of liability. *Id.*, at 187, 122 S.Ct. 2097. And a funding recipient is "generally on notice that it is subject ... to those remedies traditionally available in suits for breach of contract." *Ibid.* Thus, the basic question here is whether damages for emotional suffering were "traditionally available" as remedies "in suits for breach of contract." *Ibid.*

II

Unlike the Court, though, I believe the answer to that basic question is yes. Damages for emotional suffering have long been available as remedies for suits in breach of contract —at least where the breach was particularly likely to cause suffering of that kind.

A general, overarching principle of contract remedies is set forth in the Restatement (Second) of Contracts: "Contract damages are ordinarily based on the injured party's expectation interest and are intended to give him the benefit of his bargain by awarding him a sum of money that will, to the extent possible, put him in as good a position as he would have been in had the contract been performed." § 347, Comment *a*, at 112; see also 3 E. Farnsworth, Contracts § 12.8, p. 188 (2d ed. 1998) (Farnsworth) ("The basic principle for the measurement of those damages is that of compensation based on the injured party's expectation"); 3 S. Williston, Law of Contracts § 1338, p. 2392 (1920) (Williston) ("[T]he general purpose of the law is, and should be, to give compensation: —that is, to put the plaintiff in as good a position as he would have been in had the defendant kept his contract").

This simple principle helps explain why compensatory damages are generally available as remedies and punitive damages are not. By definition, compensatory damages ***234** serve contract law's "general purpose," namely, to "give compensation." *Ibid.* But punitive damages go beyond "compensat[ing] the injured party for lost expectation" and

instead "put [him] in a better position than had the contract been performed." 3 Farnsworth § 12.8, at 193.

The same general principle also helps to explain the many cases in which damages for emotional suffering are *not* available. Most contracts are commercial contracts entered for pecuniary gain. Pecuniary remedies are therefore typically sufficient to compensate the injured party for their expected losses. See, *e.g.*, C. McCormick, Law of Damages § 145, p. 592 (1935) (McCormick) ("Most contracts which come before the courts are commercial contracts. The pecuniary interest is dominant"); 1 J. Sutherland, Law of Damages 156 (1883) (Sutherland) ("In actions upon contract, the losses sustained do not, by reason of the nature of the transactions which they involve, embrace, ordinarily, any other than pecuniary elements"); 3 Farnsworth § 12.17, at 894–895 ("[T]he real basis of this rule is that [recovery for emotional distress] is likely to result in disproportionate compensation"); cf. ****1579** Restatement (Second) of Contracts § 351(1), at 135 ("Damages are not recoverable for loss that the party in breach did not have reason to foresee as a probable result of the breach when the contract was made").

Finally, and most importantly here, the same general rule also helps to explain the cases in which contract law *did* make available damages for emotional suffering. Contract law treatises make clear that expected losses from the breach of a contract entered for *nonpecuniary* purposes might reasonably include *nonpecuniary* harms. So contract law traditionally does award damages for emotional distress "where other than pecuniary benefits [were] contracted for" or where the breach "was particularly likely to result in serious emotional disturbance." 3 Williston § 1340, at 2396; 3 Farnsworth § 12.17, at 895; see also, *e.g.*, Restatement (Second) of Contracts § 353, at 149 ("Recovery for emotional disturbance" ***235** was allowed where "the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result"); 1 Sutherland 157–158 (damages should be "appropriate to the objects of the contract"); 1 T. Sedgwick, Measure of Damages § 45, p. 61 (8th ed. 1891) (Sedgwick) (" 'Where other than pecuniary benefits are contracted for, other than pecuniary standards will be applied to the ascertainment of damages flowing from the breach' ").

Examples of contracts that gave rise to emotional distress damages under this rule have included, among others, contracts for marriage, see, *e.g.*, 1 Sutherland 156, and n. 4; contracts by common carriers, innkeepers, or places of public resort or entertainment, see, *e.g.*, McCormick § 145, at 593, and nn. 48–50; contracts related to the handling of a body, see, *e.g.*, 1 Sedgwick § 45, at 62, and n. a; contracts for delivery of a sensitive telegram message, see, *e.g.*, *id.*, at 62, and n. b; and more. In these cases, emotional distress damages are compensatory because they " 'make good the wrong done.' " *Franklin*, 503 U.S. at 66, 112 S.Ct. 1028; see also *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 307, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986).

III

Does breach of a promise not to discriminate fall into this category? I should think so. The statutes before us seek to eradicate invidious discrimination. That purpose is clearly nonpecuniary. And discrimination based on race, color, national origin, sex, age, or disability is particularly likely to cause serious emotional harm. Often, emotional injury is the primary (sometimes the only) harm caused by discrimination, with pecuniary injury at most secondary. Consider, for example, the plaintiff in *Franklin*—a high school student who was repeatedly sexually assaulted by her teacher. 503 U.S. at 63–64, 112 S.Ct. 1028. Or the plaintiff in *Tennessee v. Lane*, 541 U.S. 509, 124 S.Ct. 1978, 158 L.Ed.2d 820 (2004), who used a wheelchair and, because a building lacked wheelchair accessibility, was forced to crawl up two flights of stairs. *Id.*, at 513–514, 124 S.Ct. 1978. Or the ***236** many historical examples of racial segregation in which Black patrons were made to use separate facilities or services. Regardless of whether financial injuries were present in these cases, the major (and foreseeable) harm was the emotional distress caused by the indignity and humiliation of discrimination itself.

As a Member of this Court noted in respect to the Civil Rights Act of 1964, Congress' antidiscrimination laws seek "the vindication of human dignity and not mere economics." *Heart of Atlanta Motel, Inc.* v. *United States*, 379 U. S. 241, 291, 85 S.Ct. 348, 13 L.Ed.2d 258 (1964) (Goldberg, J., concurring). Quoting the Senate Commerce ****1580** Committee, Justice Goldberg observed:

> " 'Discrimination is not simply dollars and cents, hamburgers and movies; it is the humiliation, frustration, and embarrassment that a person must surely feel when he is told that he is unacceptable as a member of the public because of his race or color. It is equally the inability to explain to a child that regardless of education, civility,

courtesy, and morality he will be denied the right to enjoy equal treatment, even though he be a citizen of the United States and may well be called upon to lay down his life to assure this Nation continues.' " *Id.*, at 292, 85 S.Ct. 348 (quoting S. Rep. No. 872, 88th Cong., 2d Sess., 16 (1964)).

It is difficult to believe that prospective funding recipients would be unaware that intentional discrimination based on race, sex, age, or disability is particularly likely to cause emotional suffering. Nor do I believe they would be unaware that, were an analogous contractual breach at issue, they could be held legally liable for causing suffering of that kind. The contract rule allowing emotional distress damages under such circumstances is neither obscure nor unsettled, as the Court claims. *Ante*, at ——, —— – ——. To the contrary, it is clearly laid out in the Restatement (Second) of Contracts: "Recovery for emotional disturbance will ***237** be excluded unless the breach also caused bodily harm *or the contract or the breach is of such a kind that serious emotional disturbance was a particularly likely result.*" § 353, at 149 (emphasis added). And the Restatement's rule is well supported by treatise writers, who have described the law similarly. See, *e.g.*, 3 Farnsworth § 12.17, at 895; 1 Sedgwick § 45, at 62; 16 J. Murray, Corbin on Contracts § AG–59.01, p. 855 (2017) ("Emotional damages arising from racial or other forms of discrimination are clearly foreseeable. There should be no question about their recovery in a contract action where such conduct is proven"). I would therefore conclude that contract law is sufficiently clear to put prospective funding recipients on notice that intentional discrimination can expose them to potential liability for emotional suffering.

IV

In concluding otherwise, the Court invokes our decision in *Barnes*. In *Barnes*, we reaffirmed that funding recipients could be held liable for compensatory damages because compensatory damages are a "for[m] of relief traditionally available in suits for breach of contract." 536 U.S. at 187, 122 S.Ct. 2097. But, we held, they are not liable for punitive damages because punitive damages were "generally not available for breach of contract." *Ibid*.

The Court today reads *Barnes* to imply that prospective funding recipients can only be expected to be aware of "basic, general rules," not exceptions or subsidiary rules that govern specific circumstances. *Ante*, at ——. How does the Court derive that restrictive approach from *Barnes*, which did not purport to announce such a limitation? Because, the Court says, punitive damages were sometimes available in suits for breach of contract where the breach was " 'also a tort for which punitive damages are recoverable.' " *Ante*, at —— (quoting Restatement (Second) of Contracts § 355). The Court assumes that *Barnes* must have refused to consider any exceptions at all because otherwise it would have relied ***238** on this exception to hold that punitive damages *were* available. *Ante*, at ——. The Court believes that damages for emotional suffering are similar: It says they, too, are available only under an exception to the general rule, and that exception is too " 'fine-grained' " to put federal funding recipients on notice of ****1581** their potential exposure to liability. *Ante*, at —— (quoting Brief for Petitioner 33).

The Court's comparison to punitive damages is, in my view, unpersuasive. Punitive damages are not embraced by *Barnes*' contract-law analogy because they do not serve contract law's central purpose of "compensat[ing] the injured party"; instead, they "punish the party in breach." Restatement (Second) of Contracts § 355, Comment *a*, at 154; see also *Barnes*, 536 U.S. at 189, 122 S.Ct. 2097 (distinguishing punitive damages, which are unavailable, from compensatory damages, which are available, because the former do not " 'make good the wrong done' "). Accordingly, the punitive damages exception cited by the Court does not rely on contract-law principles at all, but rather, on tort law. The Restatement clarifies that, when contract and tort claims may overlap, contract law "does not preclude an award of punitive damages ... if such an award would be proper *under the law of torts*." Restatement (Second) of Contracts § 355, Comment *b*, at 155 (emphasis added); see also *id.*, at 156 (including Illustrations in which the "right to recover punitive damages is governed by Restatement, Second, Torts § 908"). This special feature makes the punitive damages exception an inapt comparator for *Barnes*' *contract*-law analogy.

The same is not true of emotional distress damages. The Restatement does not attribute the availability of emotional distress damages to tort rather than contract law. See Restatement (Second) of Contracts § 353, at 149; see also McCormick § 145, at 593–594 ("Sometimes reliance is placed upon accompanying tortious conduct such as assault or defamation ... but *not always, nor do these elements seem essential*" ***239** (emphasis added)); *e.g.*, *Aaron v. Ward*, 203 N.Y. 351, 354, 96 N.E. 736, 737 (1911) ("The action is for a breach of the defendant's contract and not for a tortious expulsion"). That makes sense because, unlike punitive damages, emotional distress damages can, and do, serve

contract law's central purpose of compensating the injured party for their expected losses, at least where the contract secured primarily nonpecuniary benefits and contemplated primarily nonpecuniary injuries. As I said above, in such cases, emotional distress damages are a form of compensatory damages that " 'make good the wrong done.' " *Franklin*, 503 U.S. at 66, 112 S.Ct. 1028; see also *Memphis Community School Dist.*, 477 U.S. at 306–307, and n. 9, 106 S.Ct. 2537.

I have already explained above why I believe federal funding recipients would be aware that intentional invidious discrimination is particularly likely to cause emotional suffering. And I have also explained why, aware of general principles of contract law, they would also be aware that damages for emotional suffering are available for breaches of contract "where other than pecuniary benefits [were] contracted for" or where the breach "was particularly likely to result in serious emotional disturbance." 3 Williston § 1340, at 2396; 3 Farnsworth § 12.17, at 895; *supra*, at ——– – ——. Nothing in our opinion in *Barnes* requires us to ignore these " 'directly applicable' " contract rules in favor of the less applicable, "general" rule on which the Court relies. *Ante*, at —— (quoting Brief for Petitioner 35). Indeed, reliance on an analogy only works when we compare things that are actually analogous. Here, the rules that govern analogous breaches of contract tell us that emotional distress damages can be available for violations of statutes that prohibit intentional discrimination.

V

Finally, we might recall *why* we look to contract rules at all. The contract-law analogy ****1582** is a tool for answering the ***240** ultimate question whether federal funding recipients can appropriately be held liable for emotional suffering. Cf. *Barnes*, 536 U.S. at 191, 122 S.Ct. 2097 (Souter, J., concurring) (warning about the limitations of the contract-law analogy). In answering that question, we must remain mindful of the need to ensure a "sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Independent School Dist.*, 524 U.S. 274, 284, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). The Court's holding today will not help to achieve that result.

Instead, the Court's decision creates an anomaly. Other antidiscrimination statutes, for which Congress has provided an express cause of action, permit recovery of compensatory damages for emotional distress. See 42 U.S.C. § 1981a(b)(3) (expressly providing for compensatory damages, including damages for "emotional pain, suffering," and "mental anguish" under Title VII of the Civil Rights Act); *Memphis Community School Dist.*, 477 U.S. at 307, 106 S.Ct. 2537 (allowing recovery under Rev. Stat. § 1979, 42 U.S.C. § 1983, of compensatory damages for " 'personal humiliation, and mental anguish and suffering' "). Employees who suffer discrimination at the hands of their employers can recover damages for emotional suffering, as can individuals who suffer discrimination at the hands of state officials. But, until Congress acts to fix this inequity, the Court's decision today means that those same remedies will be denied to students who suffer discrimination at the hands of their teachers, patients who suffer discrimination at the hands of their doctors, and others.

It is difficult to square the Court's holding with the basic purposes that antidiscrimination laws seek to serve. One such purpose, as I have said, is to vindicate "human dignity and not mere economics." *Heart of Atlanta*, 379 U.S. at 291, 85 S.Ct. 348 (Goldberg, J., concurring). But the Court's decision today allows victims of discrimination to recover damages only if they can prove that they have suffered economic harm, even though the primary harm inflicted by discrimination is rarely economic. Indeed, victims of intentional discrimination ***241** may sometimes suffer profound emotional injury without any attendant pecuniary harms. See, *e.g.*, *Franklin*, 503 U.S. at 63–64, 76, 112 S.Ct. 1028. The Court's decision today will leave those victims with no remedy at all.

* * *

For all of these reasons, I respectfully dissent.

All Citations

596 U.S. 212, 142 S.Ct. 1562, 212 L.Ed.2d 552, Med & Med GD (CCH) P 307,351, 65 NDLR P 52, 22 Cal. Daily Op. Serv. 4064, 2022 Daily Journal D.A.R. 4209, 29 Fla. L. Weekly Fed. S 239

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

* The dissent cites McCormick for the proposition that courts did not "always" rely on "accompanying tortious conduct" when allowing recovery of emotional distress damages in the innkeeper, telegraph, and burial cases. *Post*, at —— (quoting McCormick § 145, at 593–594). That misses the point. As McCormick's next sentence explains, the award of emotional distress damages in such cases was "made easier because usually the action could have been brought as for a tort, in which event the tradition against allowing damages for mental distress would be plainly inapplicable." *Id.*, § 145, at 594. Put differently, the usual rule barring recovery was not applicable in this idiosyncratic set of cases because, like cases in which punitive damages were awarded, they were "based on contract in name only," Dobbs § 12.4, at 818.

111 F.4th 705
United States Court of Appeals, Sixth Circuit.

Jane DOE, Plaintiff-Appellant,

v.

UNIVERSITY OF KENTUCKY, Defendant-Appellee.

No. 22-6012
|
Argued: October 19, 2023
|
Decided and Filed: August 7, 2024

Synopsis

Background: Student brought action under Title IX alleging that university's disciplinary appeals board ruled against her in retaliation for her earlier Title IX action alleging that university was deliberately indifferent to fellow student's alleged sexual assault against her. The United States District Court for the Eastern District of Kentucky, Joseph M. Hood, Senior District Judge, 357 F.Supp.3d 620, granted university summary judgment, upon determining that student lacked standing as she was not student at university. Student appealed. The Court of Appeals, 971 F.3d 553, reversed and remanded. On remand, the District Court, Gregory F. Van Tatenhove, J., 2022 WL 9408672, entered summary judgment in university's favor, and student appealed.

Holdings: The Court of Appeals, Bloomekatz, Circuit Judge, held that:

fact that plaintiff was no longer student at time of alleged retaliation did not bar her retaliation claim;

student conduct proceeding was "educational activity or program" covered by Title IX;

university's cancellation of disciplinary hearing and subsequent three-month delay were sufficiently adverse to support retaliation claim;

university's alleged missteps in prosecuting student's disciplinary complaint were sufficiently adverse to support retaliation claim;

university's hearing panel's alleged procedural and substantive decisions were sufficiently adverse to support retaliation claim;

university's purported deliberate indifference to its police chief's actions to prevent officer from testifying were sufficiently adverse to support retaliation claim;

fact issues remained as to whether university's purported mishandling of student conduct proceedings were retaliatory;

fact that student could not recover emotional distress damages under Title IX did not bar her retaliation claim; and

university's Eleventh Amendment immunity did not bar student's Title IX retaliation action.

Reversed and remanded.

Batchelder, Senior Circuit Judge, dissented and filed opinion.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***708** Appeal from the United States District Court for the Eastern District of Kentucky at Lexington. No. 5:15-cv-00296—Gregory F. Van Tatenhove, District Judge.

Attorneys and Law Firms

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Before: BATCHELDER, GRIFFIN, and BLOOMEKATZ, Circuit Judges.

BLOOMEKATZ, J., delivered the opinion of the court in which GRIFFIN, J., joined. BATCHELDER, J. (pp. 725-47), delivered a separate dissenting opinion.

OPINION

BLOOMEKATZ, Circuit Judge.

The University of Kentucky held not one, not two, not three, but four student conduct hearings after Jane Doe reported that a student raped her in her dorm room on campus. Each of the first three resulted in expulsions or long-term suspensions for the accused, but the University's appeals board overturned each determination for procedural deficiencies. After the third reversal, Doe filed a Title IX lawsuit against the University for its actions in response to the rape. Then, in the fourth hearing—nearly two-and-a-half years after Doe first reported the rape—the hearing panel flipped and ruled against her. Doe now claims that the University mishandled her fourth hearing in retaliation for her lawsuit. The University moved for summary judgment and the district court granted the motion, concluding that Doe could not state a prima facie case of retaliation under Title IX. Because the district court's decision rests on several legal errors and the record shows that a reasonable juror could find Doe established a prima facie case, we reverse and remand.

***709 BACKGROUND**[1]

Jane Doe was a student in a dual enrollment program between Bluegrass Community and Technical College and the University of Kentucky. That program allowed Doe to take classes at the community college and transfer those credits toward a bachelor's degree at the University. While taking classes as part of this program, Doe lived in a University dormitory.

Doe alleges that John Doe (JD) raped her in her dorm room on October 2, 2014. At the time, JD was a student at the University and a member of its football team. Doe previously dated JD and ended the relationship the month prior to the alleged rape. Within hours of the alleged rape, Doe reported it to her roommate, her mother, and the University police. Officer Laura Sizemore responded to the call and escorted Doe to the University's hospital, where Doe underwent a sexual assault examination.[2]

Officer Sizemore and Detective Vaun Brannock investigated the incident and concluded that JD raped Doe. They memorialized their findings in a police report. Given the result of the officers' investigation, the University issued JD an interim suspension and ordered him not to contact Doe.

First Hearing. Following its Title IX policy, the University scheduled a student conduct hearing on the matter. The hearing occurred within a week of the reported rape and was adjudicated by a panel composed of faculty members. JD could not attend and submitted a written statement instead.

The day after the hearing, the panel issued a decision finding that JD raped Doe and permanently expelled him. JD, represented by counsel, appealed the decision and prevailed. The appeals board found that the panel erred by conducting the hearing without JD present, so the decision could not stand, and the hearing had to be redone.

Second Hearing. The University held a second hearing two weeks after the reversal. Doe did not attend the second hearing, explaining that she did not want to risk being retraumatized. Instead, the University used her recorded statements from the first hearing in addition to her police report. A few days later, the second panel found JD responsible and, like the first, expelled him from the University.

JD then appealed the second hearing panel's decision and the appeals board again reversed. It ruled that the second panel committed two fatal procedural errors: First, the panel should not have allowed Doe's recorded statement from the first hearing because, in its view, the statement was irrevocably tainted. Given JD's absence from the first hearing, the appeals board ruled that the recorded "testimony from that date [was] not admissible, barring extraordinary circumstances." In re JD Letter, R. 140-30, PageID 2161. Second, Doe and her roommate's absence from the hearing denied JD the ability to cross-examine witnesses.

Third Hearing. The University held a third hearing on March 26, 2015—six months after the alleged incident occurred. Doe participated telephonically from another location on campus. The third hearing panel issued a report finding JD responsible ***710** and suspended him for five years.

Once again JD appealed, and once again the appeals board found that the panel committed procedural errors that warranted reversal. This time, the panel erred in allowing Officer Sizemore and Detective Brannock to testify in each other's presence, which violated the University's rule that witnesses be excluded from the hearing except for the period of their testimony.

Fourth Hearing. In June 2015, the University asked for Doe's availability for a fourth hearing that would take place the next month. A series of back-and-forth scheduling communications followed. At first, Doe requested an August date. Around the same time, JD dropped out of the University. Because Doe planned to reenroll in the fall, she asked the University to suspend the proceedings until then. The University refused, but it also did not schedule a hearing. By August, Doe had hired a new attorney who informed the University that Doe would provide her availability for a fourth hearing once she decided whether she would participate. Doe's lawyer further asked the University to keep her updated on JD's availability. Both parties claim to have been waiting for a response from the other, and neither followed up about scheduling the hearing. Meanwhile, Doe enrolled in a different college unrelated to the University of Kentucky.

On October 1, 2015, Doe filed a complaint in federal court against the University for deliberate indifference to sex discrimination, in violation of Title IX. Because of this lawsuit, the University paused all proceedings (though it had yet to schedule the fourth hearing). It claims that it believed Doe's complaint sought to enjoin the proceedings, even though the complaint only requested "[i]njunctive relief to be determined at trial requiring UK to comply with federal law under Title IX." Compl., R.1, PageID 11. Several months later, in her opposition to the University's motion to dismiss, which she filed on January 27, 2016, Doe faulted the University for failing to schedule a hearing. The next day, the University emailed Doe and her counsel seeking to schedule the fourth hearing. Doe's counsel responded that she was coordinating with Doe and Doe's mental health provider, and she again stated that the University should let her know when JD provided dates. The University did not follow up.

Nearly eight months after this exchange, the district court issued an order denying the University's motion to dismiss and criticizing it for failing to schedule a fourth hearing. As a result, the University sent a letter to Doe and JD about scheduling a hearing between September 15, 2016, and October 15, 2016. JD requested a late October hearing and the University agreed.

Doe alleges that the Title IX coordinator was required to hold pre-hearing meetings with both Doe and JD. The pre-hearing meeting is an opportunity for the involved parties to discuss the hearing process, receive input, and attempt to resolve the matter without conducting a hearing. But the University failed to perform the meeting leading up to the fourth hearing despite having done so before each of the prior hearings. The University says that it did not hold a prehearing meeting because it was unlikely that the parties would resolve the issue given the result of the three prior hearings.

On the morning of the hearing, the University canceled last-minute. Professor Robert G. Lawson, the hearing officer, said the hearing could not go forward that day because JD's attorney raised due process ***711** concerns about the composition of the hearing panel, although he did not say what the concerns were. Doe and the University corresponded about several potential dates in November and December for a hearing. Finally, in late December, the University rescheduled the fourth hearing for early January 2017.

At the hearing, the University was responsible for presenting the case against JD. University 30(b)(6) Depo., R. 140-5, PageID 2019 (admitting that the University's role was to "present the best case to prove that the [University] policy had been violated"). Because Doe was diagnosed with post-traumatic stress disorder after the alleged assault and was hospitalized for this condition after the third hearing, she requested that she not be required to again recount her rape to the panel. The University arranged for Doe's recorded direct testimony from the third hearing to play for the panel and for Doe to be available for live cross-examination remotely from her attorney's office. The University told Doe and her counsel that they were allowed to object during the hearing. Prior to the hearing, Doe was provided a list of witnesses that would testify on her behalf, including Officer Sizemore. Doe had specifically requested Officer Sizemore's presence.

On January 10, 2017, the University held the fourth hearing. On the morning of the hearing, Doe was informed that Officer Sizemore was not available to attend the hearing because she was on FMLA leave, so her testimony would be conveyed only via the police report. That concerned Doe because Officer Sizemore could have testified to matters beyond the police report, including that Doe's statements to police were consistent and that her behavior after the assault

was consistent with having been raped. Furthermore, the hearing panel permitted JD to use Doe's recorded statements from the first hearing to impeach her despite the appeals board having previously ruled that the statements from the first hearing were inadmissible in any later proceeding. The University representative did not object to the use of the recorded statements—indeed, he did not make *any* objections throughout the hearing. Over Doe's objections, the University representative allowed JD to ask questions about her federal lawsuit to "explore her motivations." Fourth Appeal Report, 140-40, PageID 2223. Professor Lawson, responsible for screening and asking the cross-examination questions JD submitted, asked whether Doe had "filed a federal court lawsuit against the University of Kentucky for monetary damages related to [her] claim of having been assaulted by [JD] while living on UK campus" and whether she was "concerned that if [JD was] not found responsible," that result "could have a negative effect" on her lawsuit. Hearing Tr., R. 140-48, PageID 2502.

Nine days later, as the panel deliberated, Doe's counsel received two messages from an anonymous source alleging that the University of Kentucky Police Chief, Joseph Monroe, obstructed Officer Sizemore from testifying at the fourth hearing. The source stated that Chief Monroe kept Officer Sizemore from testifying by suggesting that she had to go home for childcare duties. The anonymous source alleged that the hearing administrators were told that Officer Sizemore was on family medical leave when she wasn't. Moreover, Officer Sizemore might have testified if not approached by Chief Monroe. Doe's counsel described, but did not share, the messages in an email to a Title IX coordinator at the University, who notified other University administrators but not the hearing panel. The coordinator also called Officer Sizemore to confirm the police department's stated reason for her absence by asking her if she was indeed at home ***712** providing childcare on the day of the hearing. The coordinator then asked Officer Sizemore whether anyone told her not to attend the hearing. Officer Sizemore, interpreting the question to be about threats, said no. The coordinator did not inquire whether Chief Monroe told her about the hearing or ask if she could have been available to testify as requested. The coordinator did not mention the allegations about Chief Monroe or even allude to the existence of the anonymous messages.

Unbeknownst to Doe at the time, Officer Sizemore would have made accommodations to testify, but she wasn't asked to attend. As discovery revealed, the University had waited until the Friday before the Tuesday hearing to request Officer Sizemore's attendance from the University police department. Chief Monroe in turn did not approach Officer Sizemore until the day before the hearing. And, according to Officer Sizemore, Chief Monroe never told her about Doe's hearing and the University's request to have her testify. Instead, Chief Monroe vaguely asked her to confirm generally that she did not have childcare and would therefore be unavailable the next day. Sizemore Depo., R. 140-1, PageID 1987 (explaining that Chief Monroe told Sizemore that her "childcare issues" was "all [he] needed to know" so she "couldn't be somewhere if [she] needed to be").

Officer Sizemore only realized that Doe's hearing was happening the next day because Officer Eric Scott mentioned to her that Chief Monroe told him he "needed to attend" the hearing. Sizemore Mem., R. 140-25, PageID 2131. Officer Scott, whom JD called to testify on his behalf, served as the police liaison for, and traveled with, the football team. Officer Scott planned to testify that JD called him after the rape allegation, denied doing it, and asked Scott for advice. While Officer Scott was initially unable to testify "due to other commitments," Chief Monroe made arrangements so that Officer Scott could attend. Monroe Email, R. 131-33, PageID 1900.

Officer Sizemore stated she was confused as to why Officer Scott—who had no investigative role in the alleged rape—was going to attend, but her attendance was not required even though she was the lead investigator on the case. If she had received proper notice of the hearing, she could have made accommodations to attend. Feeling misled, Officer Sizemore sent a memo to her police captain memorializing the prior conversation with Chief Monroe. She also told Detective Brannock that she felt lied to and deceived about her ability to testify. While Officer Sizemore testified that the police report included all the relevant facts, she also stated that it did not include her perspective of whether Doe was a credible witness, and further, she could have offered her opinion on whether certain pieces of evidence were relevant to whether Doe had been raped.

Meanwhile, the fourth hearing panel issued its decision, finding that JD was not responsible for the alleged misconduct. The hearing panel based its decision on Doe's credibility versus JD's. The panel gave seven reasons why it found JD's story more plausible and Doe not credible. First, it noted that Doe testified that on the day of the attack, she retrieved JD from the lobby of her building when security

footage showed him waiting in front of the building's exterior —that is, just outside the lobby. Second, it said Doe's claim that she did not witness JD take his clothes off in her dorm room was doubtful because, even though Doe testified that she was focused on her computer and finishing a paper, pictures of the dorm room showed that it was too small for her not to notice him removing his clothes. Third, Doe escorted JD out of the building in a ***713** different outfit than the one she wore when she entered with JD; but in testimony, Doe stated that JD removed her pants and made no mention of her shirt. The panel inferred from the lack of testimony regarding a shirt that Doe had changed her shirt and that it was not consistent with rape to change in front of an attacker. Fourth, video evidence showed that Doe talked to the respondent for some time after signing him out of the dorm. This conduct struck the panel as inconsistent with an allegation that rape had occurred. Fifth, Doe corresponded with JD after the alleged rape via text. One text from Doe read, "I wish you the best."[3] Fourth Panel Report, R. 140-34, PageID 2182. Sixth, the photos taken at the hospital did not clearly show biting, restraining, or force used against her. Finally, Doe stated that she did not know JD had a girlfriend, but in recorded testimony from the first hearing, Doe stated she did not want to be a second girlfriend. For unexplained reasons, the panel did not include Officer Sizemore's police report in the list of evidence it considered in coming to its conclusion (though the report had been read at the hearing); it only included the police report JD presented (and the University stipulated to), which was from Officer Scott. Nor did the panel explain why it disagreed with the investigators' conclusion that, based on their experience with campus rape, experience with sexual assault, and review of all the evidence following the allegation, JD raped Doe. The panel also did not directly answer whether sexual activity occurred and whether it was consensual.

Doe appealed the hearing panel's decision. Doe argued that the panel allowed irrelevant questions attacking her for bringing a Title IX lawsuit, that Officer Sizemore should have been called as a witness, that JD was able to ask witnesses leading questions, that a witness on behalf of JD (Officer Scott) was allowed to submit written testimony without cross-examination, and that the panel failed to decide whether nonconsensual sex had occurred. She also noted the anonymous messages suggested there may have been interference with Officer Sizemore's testimony.

The University responded to Doe's appeal. Like Doe, it criticized the panel for not determining whether the alleged sexual assault had occurred and for concluding that Doe was not credible based on extrinsic evidence unrelated to the assault. But the University also took several positions adverse to Doe. It claimed that several of Doe's arguments were "without merit" and asked the appeals board to reject them. University Resp. to Appeal, R. 140-39, PageID 2205. For instance, it disagreed that Officer Sizemore's absence warranted a new hearing. Deflecting responsibility, the University claimed that it only learned of Officer Sizemore's absence hours before the hearing, and though it could have canceled the hearing the morning of—as it had done for JD in the past—it viewed Officer Sizemore's testimony as "not instrumental" and stated that a continuance would have further traumatized Doe. University Resp. to Appeal, R. 140-39, PageID 2207–08. Furthermore, the University told the appeals board that Officer Sizemore was not an "official witness," as she had only served as a witness in one prior hearing (and all three resulted in finding against JD), and, in any event, it entered Officer Sizemore's police report into the record. *Id*. at PageID 2207. The University also argued that Doe could have fully participated by ***714** objecting to Officer Sizemore's absence and blamed Doe for the "strategic decision" not to. *Id.* at PageID 2209. Doe only participated remotely in the hearing for the limited portion of her own testimony, so she was unaware that no University police officer involved in the investigation would be present for the hearing until *after* the panel issued its decision. On Officer Scott's report, the University argued that it stipulated to its entry into the record because the testimony was "inconsequential and non-substantive." *Id.* at PageID 2210. As for the anonymous messages about Chief Monroe, the University stated that Doe's counsel refused to turn them over to allow an investigation, so the messages did not merit a new hearing. And it told the appeals board that there was no credible evidence that any University official interfered.

While Doe's appeal was pending before the appeals board, the Title IX Coordinator personally received an anonymous message claiming that Chief Monroe interfered with Officer Sizemore's appearance at the hearing. The coordinator told other administrators, including the University's general counsel, about the message but made no effort to contact Officer Sizemore for more information. The University's general counsel only asked Chief Monroe to create a timeline of his version of events. Nor did the University inform Doe or the appeals board about the message; instead it left unchanged its prior contention to the board—that there was no credible evidence of obstruction.

On April 8, 2017, the appeals board denied Doe's appeal. According to the appeals board's report, the fourth panel did indeed decide that JD did not rape Doe. It also found that the hearing officer had reason to allow Doe to be asked questions about her lawsuit. It concluded that Officer Sizemore's absence, JD's leading questions, and the stipulation to Officer Scott's out-of-hearing testimony comported with due process and would not have changed the result of the panel. It further found that the panel's decision was not clearly erroneous because the panel was "knowledgeable about sexual misconduct"; reviewed the evidence; and found JD's story to be credible, while Doe was less credible. Fourth Appeal Report, R. 140-40, PageID 2234. It also emphasized that Doe failed to request a continuance or object at the hearing to Officer Sizemore's absence. As for the allegations of interference with Officer Sizemore's testimony, it wrote that Doe "refuse[d] to provide evidence" and that it would not overturn the decision based on her "unsubstantiated report of corruption." *Id*. at PageID 2232.

In November 2017, Doe amended her complaint against the University to add a retaliation claim for complaining of sex discrimination under Title IX. She asserted, among other things, that the University interfered with the disciplinary process to harm Doe's case, asked her about her federal lawsuit in the fourth hearing, and found JD not responsible for rape. She then voluntarily dismissed her only other claim, which was for deliberate indifference under Title IX. The University moved for summary judgment on the retaliation claim. The district court granted the motion, concluding that Doe did not make a prima facie showing that the University had retaliated against her under Title IX. Doe timely appealed.

ANALYSIS

I. Standard of Review

We review a grant of summary judgment de novo. *Jackson v. City of Cleveland*, 925 F.3d 793, 806 (6th Cir. 2019). Summary judgment is appropriate when there is no genuine dispute of material fact and the movant—here, the University—proves ***715** that it "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Celotex Corp. v. Catrett*, 477 U.S. 317, 324, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). If a reasonable jury could find for Doe, a genuine dispute of material fact exists, and summary judgment is not appropriate. *Peffer v. Stephens*, 880 F.3d 256, 262 (6th Cir. 2018) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986)). At this stage, we construe the evidence and draw all reasonable inferences in favor of Doe. *Burgess v. Fischer*, 735 F.3d 462, 471 (6th Cir. 2013) (citing *Hawkins v. Anheuser-Busch, Inc.*, 517 F.3d 321, 332 (6th Cir. 2008)).

II. Title IX Retaliation Claim

Before evaluating Doe's retaliation claim, we correct an error in the district court's view of the record that infected its decision. In reviewing the summary judgment record, the district court constrained its analysis to the specific allegations detailed in the operative complaint, rather than to the full scope of record evidence Doe presented in opposition to summary judgment. It critiqued Doe for describing additional examples of the University's retaliatory actions beyond what she included in her complaint. Because it construed these additional examples of the University's retaliation as an improper attempt to "cure the inadequacies" of the complaint, the district court did not consider this evidence and declared that it would narrow its "attention to the facts most pertinent to the claims alleged in the complaint." Op. and Mem., R. 151, PageID 2538. On appeal, Doe argues this was wrong. We agree.

When analyzing a motion for summary judgment, the district court should not limit itself to the allegations contained in a plaintiff's complaint. *Phillips v. Cohen*, 3 F. App'x 212, 220 (6th Cir. 2001). Summary judgment motions follow discovery, and our standard "expressly contemplates" that the non-moving party "may put forward evidence not contained in the pleadings in order to rebut a summary judgment motion." *Id.* (citing *Street v. J.C. Bradford & Co.*, 886 F.2d 1472, 1476 (6th Cir. 1989)). The plain text of Federal Rule of Civil Procedure 56(c) itself mandates that a court should consider the plethora of material available in the record to determine whether the moving party "is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). That includes: pleadings, depositions, answers to interrogatories, written admissions, affidavits, transcripts of evidence, and written stipulations of fact. *See id.* Certainly, the factual allegations in the complaint must put a defendant on notice of the claims the plaintiff is likely to bring. *See Fritz v. Charter Twp. of Comstock*, 592 F.3d 718, 722 (6th Cir. 2010). But there is no notice-pleading deficiency here. And Doe could oppose summary judgment by pointing to even more evidence of the University's retaliatory practices that were revealed in discovery than what she alleged in her complaint. The district court's failure to fully consider this evidence was a categorical error, and we now look at all the facts in the record to analyze Doe's retaliation claim.

Title IX provides that "[n]o 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). Title IX also protects individuals who pursue their claims under Title IX from retaliation. *See Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 173–74, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) ("Retaliation is, by definition, an intentional act. It is a form of ***716** 'discrimination' because the complainant is being subjected to differential treatment."). We generally evaluate Title IX retaliation claims analogously to Title VII retaliation claims. *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244, 251 (6th Cir. 2023); *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 (6th Cir. 2013), *abrogated on other grounds*, *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013). So, for Title IX retaliation claims based on circumstantial evidence, we apply the *McDonnell Douglas* burden-shifting framework. *See Fuhr*, 710 F.3d at 674.

Under this framework, Doe must establish a prima facie case of retaliation by showing that (1) she engaged in "protected activity," (2) the University "knew of the protected activity," (3) she suffered an "adverse school-related action," and (4) a "causal connection exists" between the cited protected activity and the alleged adverse action. *Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020); *see also Gordon v. Traverse City Area Pub. Schs.*, 686 F. App'x 315, 320 (6th Cir. 2017). This burden is "easily met." *Nguyen v. City of Cleveland*, 229 F.3d 559, 563 (6th Cir. 2000). If Doe succeeds on the prima facia case, it becomes the University's burden to articulate a "legitimate, nondiscriminatory reason for its action." *Gordon*, 686 F. App'x at 320. If the University is successful, the burden shifts back to Doe to undermine its proffered reason as pretextual. *Id.*

Doe claims that the University intentionally mishandled and unfairly adjudicated her fourth hearing to retaliate against her for bringing her Title IX lawsuit. The University does not contest that Doe's claim meets the first two prongs of the prima facie case. Doe's lawsuit is a protected activity (prong one),[4] and the University was aware of the lawsuit at the time it was filed (prong two). The parties dispute that there's a material question of fact as to whether Doe suffered an adverse school-related action (prong three) and whether a causal connection exists between that action and her lawsuit (prong four). We focus on those disputes.

A. Adverse School-Related Action

To determine whether a challenged retaliatory action is "adverse" for Title IX purposes, we ask whether the action would dissuade a reasonable person from engaging in the protected activity. *Id.* The Supreme Court articulated this standard for Title VII cases in *Burlington Northern & Santa Fe Railway Co. v. White*, 548 U.S. 53, 57, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006), and we have likewise applied it in the Title IX context, with the caveat that the adverse action must be "school-related." *See, e.g.*, *Gordon*, 686 F. App'x at 320. Doe can meet her burden by showing that the University's actions either individually or in combination would dissuade a reasonable person from pursuing the discrimination claim. *Hubbell v. FedEx SmartPost, Inc.*, 933 F.3d 558, 569–70 (6th Cir. 2019). Since *Burlington Northern*, our court has recognized that this standard "is not onerous." *Henry v. Abbott Lab'ys*, 651 F. App'x 494, 504 (6th Cir. 2016) (citing cases).

Before it even sifted through the factual record, the district court held that "none of the retaliatory items cited in the Complaint" could be considered "school-related ***717** actions" because Doe was no longer a student at the community college (in the dual enrollment program with the University) during the alleged retaliatory actions related to the fourth hearing. Op. and Mem., R. 151, PageID 2540. Reviewing the timeline, the court calculated that the fourth hearing occurred more than two years after Doe had last resided at the University or had "participated in any school-related functions" and concluded "[o]n this basis alone, Doe's claim fails." *Id.* On appeal, the University reiterates this reasoning and further contends that regardless of Doe's enrollment status, the student conduct hearings she participated in are not educational programs or activities. Both the district court's holding and the University's arguments are wrong as a matter of law.[5]

Consider first the district court's conclusion that Doe had to be a "student" at the University at the time of the retaliation. That conclusion defies the statute's text. Title IX protects any "person" from being excluded from or denied the benefits of an educational program because of sex. 20 U.S.C. § 1681. The statute says "person"—not student. And, as the Supreme Court explained, "Congress easily could have substituted 'student' or 'beneficiary' for the word 'person' if it had wished to restrict the scope of [Title IX]." *N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). Instead, Congress extended Title IX protections to students and "non-student[s]" alike. *Snyder-Hill v. Ohio*

State Univ., 48 F.4th 686, 708 (6th Cir. 2022). Nor would the University's rule make sense. A sexual assault victim who drops out of school given the trauma, or one who graduates before filing suit, would have no recourse. *See* Br. of C.L. and Survivor Advoc. Orgs. at 17–18. Accordingly, Doe can suffer an "adverse school-related action" even if she is not a student.

The University's contention that school disciplinary proceedings are not an "educational activity or program" covered by Title IX likewise runs afoul of the statute's text and Supreme Court precedent. Appellee's Br. at 49. Title IX defines the word "program" broadly. *Snyder-Hill*, 48 F.4th at 708. It includes "all of the operations" of a university that receives federal funds. 20 U.S.C. § 1687(2)(A). We recently held that an " 'education program or activity' ... extends to situations in which individuals are, for example, accessing University libraries ... [or even] attending campus tours, sporting events, or other activities." *Snyder-Hill*, 48 F.4th at 708. The Supreme Court has explained, albeit not in the Title IX context, that school discipline is "essential if the educational function is to be performed." *Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975). Thus, school disciplinary proceedings—like the four in this case—are plainly "education-related" for Title IX purposes.

The upshot: Doe may bring an action under Title IX based on the retaliatory circumstances surrounding the fourth disciplinary proceeding. Student or not, Doe availed herself of the University's disciplinary process and participated in the hearings, making the University's adverse ***718** actions regarding those hearings actionable. What Doe must show under this prong is that the University's actions, either individually or in combination, were adverse enough to dissuade a reasonable person from pursuing a Title IX claim. *See Hubbell*, 933 F.3d at 570.

Doe identifies roughly four different categories of university actions that, in her view, satisfy this standard. She points to: (1) the University's delay of the fourth hearing and failure to hold a pre-hearing meeting; (2) the University's failure to adequately prosecute the case before the hearing panel, and then its adversarial positions before the appeals board; (3) the hearing panel and appeals board's procedural and substantive decisions; and (4) the police chief's purposeful obstruction of Officer Sizemore's testimony. We examine each theory in turn, mindful that we ask whether these claims individually or in combination constitute an "adverse school-related action."

Delay in Scheduling Fourth Hearing. Construing the facts in the light most favorable to Doe, as we must, the University delayed the fourth proceeding for over a year, canceled the hearing the morning it was supposed to occur on the alleged assailant's request, did not reschedule it until several months later, and then failed to schedule a pre-hearing meeting (in violation of its own policy). That's enough to dissuade a reasonable person from making or supporting a charge of discrimination.

Pointing fingers, the University argues that while Doe and her attorney responded to emails, they did not provide the University with Doe's availability for the hearing.[6] But that hardly explains the extensive delay. The University admits that it did not push forward with the fourth hearing because of Doe's Title IX lawsuit and did not hold the hearing until the lower court admonished it for not doing so in an order denying the University's motion to dismiss. Indeed, it even canceled the fourth hearing on the morning it was supposed to take place in October 2016 because holding the hearing as scheduled "would once again open the door to a post-hearing challenge in federal court." Lawson Letter, R. 140-17, PageID 2096. This cancelation resulted in a delay of another three months.

The University's delay satisfies our adverse-action requirement. We concluded that it was a "materially adverse action" for a school to hold its employee grievance proceedings in abeyance because the employee filed a charge with the Equal Employment Opportunity Commission. *Watford v. Jefferson Cnty. Pub. Schs.*, 870 F.3d 448, 453–54 (6th Cir. 2017). By delaying the grievance process, the school forced the employee to choose between a speedy extrajudicial resolution and an EEOC charge. *Id.* at 454–55. Faced with this decision, we held that many employees may reasonably choose to forgo the EEOC process entirely. *Id.* at 454. The same is true in Doe's case. Two separate, lengthy delays and an abrupt, last-minute cancelation may dissuade a reasonable person from pursuing a Title IX claim in federal court.

Failure to Adequately Prosecute JD. Next, Doe points to a host of the University's missteps in prosecuting the case against JD and to its active undermining ***719** of multiple aspects of her appeal. Combined, a reasonable juror could find that these repeated failures, too, count as an "adverse action."

Doe asks us to first look at the University's prosecution of JD before the hearing panel, which she deems lackluster and riddled with blunders. The University, for example, allowed

Doe to be impeached with testimony from the first hearing, which was previously thrown out as "not admissible in any later proceeding." In re JD Letter, R. 140-30, PageID 2161. It also allowed JD to attack Doe's motive in pursuing disciplinary proceedings against JD, suggesting that she was incentivized by her lawsuit and potential for financial gains. The University's representative did not even object to the line of questioning. Indeed, it did not object to anything at all. Nor did it take steps to present the best case against JD. It failed to secure Officer Sizemore's testimony—it did not even notify the police department that it requested her participation until one business day before the hearing, nor did it reschedule the hearing when she did not appear, even though it had last-minute canceled the fourth hearing previously for JD's concerns. It also stipulated to Officer Scott's testimony because it viewed this testimony as inconsequential. But Officer Scott's testimony bolstered JD's credibility, which was a central issue in adjudicating the rape allegations against him. Indeed, the hearing panel relied on JD's credibility in rejecting Doe's allegations, so Officer Scott's testimony on that topic wasn't a nullity.

Then on appeal, the University actively undermined Doe's arguments to the board and even went as far as calling them "without merit." University Resp. to Appeal, R. 140-39, PageID 2205. It argued, identical to the claims it has made in federal court, that Officer Sizemore's testimony did not have evidentiary value and thus was not necessary in the hearing. In doing so, the University directly contradicted Doe's arguments that Officer Sizemore's testimony was important to Doe's credibility and to the merits of her allegations against JD. It also concluded that the anonymous messages and information contained in them should not be taken seriously and that Officer Sizemore was providing childcare at the time of the hearing. Insofar as Doe argued that the decision should be reversed on those bases, it urged the board to reject these arguments. It also blamed the panel's decision, in part, on Doe's decision to testify remotely, calling it "strategic," rather than acknowledging her trauma. *Id.* at PageID 2209. The University may proffer justifications for its actions during the hearing and appeal, which are relevant to subsequent steps of the *McDonnell Douglas* inquiry. But because these actions, if believed by a jury, would deter other victims from asserting their rights under Title IX, they satisfy the "adverse action" requirement at the prima facie stage.

Hearing Panel and Appeals Board Decisions. Doe further argues that the fourth hearing panel's procedural and substantive decisions and the subsequent appeals board's approval of those decisions clear the adverse-action threshold. We agree. That's not to say that every time the University resolves a student conduct hearing in favor of the accused it has committed an adverse action. Here, Doe points to some very specific aspects of the hearing panel and appeals board's actions that would meet that standard.

Before reaching a decision, the fourth hearing panel made several procedural decisions that Doe raises as evidence of retaliation. As mentioned, the hearing panel allowed Doe's prior testimony from the first hearing to attack her credibility, even ***720** though the appeals board had previously concluded (in response to JD's appeal when he was found responsible) that the exact same testimony would be inadmissible in all subsequent proceedings. It also allowed questioning—over her attorney's objection—about Doe's monetary incentives in filing her lawsuit and participating in the student conduct hearings, even though she had participated in three prior hearings before filing this lawsuit. Additionally, many of the substantive reasons the hearing panel gave for finding Doe not credible—despite finding her credible three times before—are specious and represent a hostility toward her that did not exist before she filed suit.

To conclude that JD raped Doe, the panel needed to find that they had sex without Doe's consent. Under University policy, "[c]onsent is defined as 'a voluntary expression of willingness, permission, or agreement to engage in specific sexual activity throughout a sexual encounter.' " Fourth Appeal Report, R. 140-40, PageID 2215. Furthermore, "[i]t is the responsibility of each person involved in the sexual activity to ensure that he or she has the *affirmative consent* of the other to engage in the sexual activity." *Id.* (emphasis added).

Doe paints the hearing panel's decision as resting on such thin inconsistencies and innocuous details that it deprived her of a fair adjudication. For instance, it noted that while Doe says she let JD into the building from the lobby, a video showed she actually retrieved him from outside the building's entrance. But the distinction between the lobby and the entrance is so trivial, questions arise as to why the panel would hang Doe's credibility on the difference. Second, it pointed to the size of Doe's dorm room to cast doubt on her testimony that JD took off his clothes without her noticing. It ignored Doe's explanation that JD did this while she was on her computer finishing an assignment. Third, the panel explained that the video showed that Doe was wearing a different shirt after the

alleged rape, and Doe's testimony only included mention that JD removed her pants. The panel insisted that it was unlikely Doe would have changed her shirt in front of someone who had just raped her. But here, the panel drew inferences from facts not in evidence simply because Doe had not mentioned anything about her shirt in recounting the alleged assault. Fourth, it found it strange that Doe talked to JD after escorting him out of the building and then later sent a text message that said, "I wish you the best." Fourth Panel Report, R. 140-34, PageID 2182. Even though the message was not actually inconsistent with her story, the panel intimated that if Doe was telling the truth, she would never have sent that message. It also ignored other texts in the conversation that arguably bolstered Doe's version of events. Finally, it noted that Doe stated that she did not know that JD had a girlfriend, which was contrary to her testimony from the first hearing where she stated that she did not want to be a "second girlfriend." *Id*. But again, the panel homed in on another slight inconsistency wholly peripheral to her claim and used it to render her entire testimony untruthful. The panel's only reference to direct evidence came at the end. It concluded that the photos taken at the hospital did not evince clear evidence of "biting, restraining, or alleged force." *Id*. Despite these procedural and substantive concerns, the appeals board affirmed the hearing panel in full and dismissed Doe's concerns that the University had not presented the best case against JD.

Viewed together, Doe has created a material question of fact as to whether the University reversed course on dubious grounds as a front for retaliation. The ***721** hearing panel considered testimony that it had previously found inadmissible. It allowed Doe's lawsuit against the University to influence its assessment of her complaint against JD. And it proceeded without Officer Sizemore's live testimony from the fourth hearing, even though she had a critical role in the rape investigation and could have placed Doe's credibility in a more favorable light. Then the appeals board dismissed these and other concerns. Taking these actions together, Doe has met her burden in showing an adverse action.

Chief Monroe's Interference. Doe further argues she suffered an adverse action when Chief Monroe interfered with Officer Sizemore testifying in Doe's favor at the fourth hearing and secured Officer Scott's testimony for JD instead. Her argument is that the University is both vicariously liable for Chief Monroe's action and that, once it learned of Chief Monroe's interference, it failed to take adequate steps to protect her from such retaliatory interference.

To the extent that Doe's argument rests on a theory of respondeat superior, it fails. As the district court correctly explained, "any conduct from Chief Monroe is *not* the University's conduct," Op. and Mem., R. 151, PageID 2544, and we have declined to impute a subordinate's unlawful conduct to the educational institution for Title IX retaliation claims unless there is evidence that the actions were taken at the behest of the institution. *See Bose*, 947 F.3d at 988. (rejecting a claim that University could be liable for professor's retaliatory actions after student refused unwanted sexual advances). Of course, all of Doe's evidence of retaliatory behavior stems from employee actions—an institution must act through its people. But the other theories involve actions taken by employees acting on behalf of the University in its institutional capacity (after all, the University admittedly conducts these hearings and serves as judge, jury, and prosecutor, and individuals serving in those capacities are doing so in the University's stead). Regarding Chief Monroe, Doe does not claim he conspired with the Title IX coordinator or any other University administrator to interfere with Officer Sizemore's testimony or that he was otherwise acting at the University's behest. Nor does she create a material question that he had decision-making authority over the hearing; he was only charged with sending the requested officers to testify. Instead, she relies on evidence that Chief Monroe, as a rogue actor, interfered with Officer Sizemore's testimony and asks us to impute his discriminatory conduct to the University. But our precedent forecloses us from doing so.

That isn't the end to Doe's argument regarding Chief Monroe, however, as she also asserts that the University retaliated against her by not adequately responding when it learned about Chief Monroe's actions. That theory rests on the University's own choices in how it responded to the anonymous messages and other evidence that Chief Monroe interfered with Officer Sizemore's testimony—not just Chief Monroe's actions standing alone. The University can face liability under this theory.

We have never directly addressed whether deliberate indifference to retaliation is a cognizable claim under Title IX. But it is well-established that "retaliation is discrimination 'on the basis of sex.' " *Jackson*, 544 U.S. at 174, 125 S.Ct. 1497. And covered institutions have long known that they may face liability when they respond with indifference to known acts of discrimination—retaliation being one such discriminatory action. *Davis v. Monroe Cnty. Bd. of Educ*., 526 U.S. 629, 643, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999). So ***722** when a university does not respond to a known retaliatory

action because a person has previously complained of sex discrimination, such inaction amounts to the institution's own intentional violation of Title IX. *See id.* at 645, 119 S.Ct. 1661; *see also Feminist Majority Found. v. Hurley*, 911 F.3d 674, 695 (4th Cir. 2018) (holding that "an educational institution can be liable for acting with deliberate indifference toward known instances of student-on-student retaliatory harassment"). Quite simply, a university cannot stand idly by when it knows about an act of Title IX retaliation.

The question, then, is whether Doe has created a material question as to whether the University was deliberately indifferent to retaliation by Chief Monroe. Based on the record evidence, she has. Doe points to evidence that the University failed to adequately investigate the allegations brought to its attention. Doe also points to testimony from Officer Sizemore, the person at the heart of the issue, that she believed she was kept from the hearing. Officer Sizemore testified that the University never notified her of either the date of the hearing or the allegations in the anonymous messages, suggesting that she was misled so that she could not present her testimony at the hearing. And the Title IX coordinator's testimony and notes don't show otherwise. Officer Sizemore testified that the coordinator had asked her the narrow question of whether she was told not to go, to which she responded that she was not. And confronted with the fact that Officer Sizemore was, as the coordinator thought, on FMLA leave, the coordinator declined to inform Officer Sizemore of the precise allegations regarding her absence from the hearing. Together, the evidence creates a question as to the adequacy of the University's investigation. And even if these circumstances were not enough to create a material question of deliberate indifference, there's more. The University defends its decision not to thoroughly investigate because Doe's attorney did not turn over the messages. But the University received a similar message directly alleging that Chief Monroe had interfered. Upon receipt of this information, the University declined to further investigate or even inform either Doe or the appeals board of the additional anonymous message. A reasonable jury crediting Doe's account could conclude that the University was deliberately indifferent to Chief Monroe's obstruction of the key witness at the hearing.

B. Causation

Given that Doe has adduced sufficient evidence of multiple adverse school-related actions, we next ask whether a causal connection exists between those actions and her protected activity of filing a Title IX suit. For that inquiry, we evaluate whether Doe has presented "evidence sufficient to raise the inference that her protected activity was the likely reason for the adverse action." *Fuhr*, 710 F.3d at 675.[7] This "burden is minimal." *EEOC v. Avery Dennison Corp.*, 104 F.3d 858, 861 (6th Cir. 1997). Doe need only "put forth some evidence to ***723** deduce a causal connection between the retaliatory action and the protected activity." *Id.* She has.

Doe's argument regarding causation relies on a classic "before-and-after" comparison. The first three times the hearing panel considered this student conduct matter, it concluded that Doe was credible, and JD was culpable. Then she filed this Title IX lawsuit. Afterward, the hearing panel considered the same student conduct matter again and came to the opposite conclusion. What changed? Doe would say it was the lawsuit. And Doe emphasizes not only the outcome of the initial three versus fourth hearings, but also the University's conduct and decisions both before and after she filed her lawsuit.

Consider the University's conduct before and after the lawsuit with respect to the various alleged adverse actions we just considered. For the first three hearings, the University scheduled them promptly. Then, before the fourth hearing, there was an extensive delay. The University admits that Doe's lawsuit was the reason it delayed scheduling her fourth hearing. For the first three hearings, the University held pre-hearing meetings, but not for the fourth. For the first three hearings, it was sympathetic to the fact that Doe might not want to attend in person given her trauma and hospitalizations, but for the fourth, it faulted her "strategic" choice not to be present. University Resp. to Appeal, R. 140-40, PageID 2231. For the first three hearings, it backed Doe's arguments on appeal, but on the fourth appeal, it undermined and argued against many of them. For the first three hearings, the minor discrepancy between Doe's testimony that she met JD in the lobby of her building when the video showed her meeting him directly outside her building did not defeat her testimony; on the fourth, the University used that trivial discrepancy to conclude she was not credible. The same is true for Doe's change of shirt; for the first three hearings, the fact that she changed her shirt after the alleged rape was inconsequential, but not during the fourth. For the first three hearings, the University concluded—based on largely the same evidence—that Doe was credible, yet for the fourth, it did not even object when JD impugned her credibility by pointing to her federal lawsuit and the potential for a financial award. Nor did it inform her or conduct a

thorough investigation when it received evidence of Chief Monroe's interference.

The University responds with various nondiscriminatory explanations for each of these actions. The delay, it says, was to accommodate Doe's needs; the changes in procedure were to protect JD's due process rights; the decision not to reschedule the hearing for Officer Sizemore was because Doe had prevailed without her in the past; the investigation of Chief Monroe was not cursory because Doe would not turn over the messages; the panel concluded Doe was not credible due to inconsistencies in her testimony, and so on. We do not dismiss the University's explanations, but they are more properly presented to a factfinder than to us. The juxtaposition of the University's conduct during the first three hearings (before her lawsuit) compared to the fourth (after her lawsuit) leads to a reasonable inference that the University engaged in these adverse actions because of Doe's lawsuit and casts doubt as to whether the University's explanations were the actual reason for its conduct. *See George v. Youngstown State Univ.*, 966 F.3d 446, 459–61 (6th Cir. 2020). That's sufficient for Doe to meet her "minimal" burden in establishing her prima facie case and to progress to the next stages of the *McDonnell Douglas* test. The district court did not consider steps two ***724** and three of *McDonnell Douglas*, so we return the case to the district court to do so consistent with our analysis of the prima facie case. *E.g.*, *Avery Dennison Corp.*, 104 F.3d at 863.

III. Purported Additional Bases for Affirmance

The University contends that, irrespective of whether Doe has established a prima facie case of Title IX retaliation, we still must affirm the district court's order on three alternative bases. It claims that Doe cannot recover for an emotional injury, there is no private right of action for retaliation under Title IX, and the University is entitled to sovereign immunity from this suit. We address these arguments in turn and reject them all.

A. Emotional Distress

The University contends that Doe's Title IX retaliation claim must fail because she alleges only emotional injuries, and the Supreme Court has foreclosed emotional distress damages under Title IX. *See Cummings v. Premier Rehab Keller, PLLC*, 596 U.S. 212, 230, 142 S.Ct. 1562, 212 L.Ed.2d 552 (2022). But it mischaracterizes Doe's injury. Doe alleges she was deprived "of equal access to the educational benefits and opportunities provided by the University." Third Am. Compl., R. 57, PageID 376. Discrimination is itself a harm. *Muldrow v. City of St. Louis*, 601 U.S. 346, 144 S. Ct. 967, 980, 218 L.Ed.2d 322 (2024) (Kavanaugh, J., concurring).

As discussed above, the student conduct proceedings the University has made available to Doe and other alleged victims is an "education-related" program established to protect against sex-based discrimination. By retaliating against her for filing this lawsuit, Doe claims that the University has punished her for seeking to vindicate her rights under Title IX. Doe's harm, then, is discrimination on the basis of sex, which is an injury recognized by Title IX. *See* 20 U.S.C. § 1681(a). So the University's argument is without merit.

B. Private Right of Action

The University next argues that Title IX does not support an implied private right of action against retaliation. As it must, the University recognizes that its argument is foreclosed by the Supreme Court's decision in *Jackson v. Birmingham Board of Education*, which recognized such a cause of action. 544 U.S. at 171, 125 S.Ct. 1497. And while the University argues that *Jackson*'s underpinnings have been eroded by subsequent Supreme Court cases, it also acknowledges, rightly, that *Jackson* remains binding until overruled by the Supreme Court. Therefore, the University has preserved the argument "for possible Supreme Court review," but we reject it based on *Jackson*. Appellee's Br. at 31.

C. Sovereign Immunity

Lastly, the University argues that it is entitled to sovereign immunity. In doing so, it concedes that in *Franks v. Kentucky School for the Deaf*, we held that "Congress made its intention to abrogate the states' Title IX immunity unmistakably clear." 142 F.3d 360, 363 (6th Cir. 1998). But the University argues that we should distinguish Title IX retaliation claims from other Title IX claims for sovereign immunity purposes. That argument falters because Title IX retaliation claims are not based in a different part of Title IX than the claim we analyzed in *Franks*, and the University was on notice that it was subject to these claims when it accepted federal funding. *See id.* *Franks* plainly applies, and we decline to limit its scope to exclude retaliation claims.

***725** CONCLUSION

We reverse the district court's order granting summary judgment in favor of the University and remand for further proceedings consistent with this opinion.

DISSENT

ALICE M. BATCHELDER, Circuit Judge, dissenting.

Once more, we enter the judicially created mire of Title IX jurisprudence. And, unfortunately, this majority opinion does not provide clarity. Perhaps this is due to either the messy facts of this case or the messy law (or both). On the facts, the majority decides for itself that JD sexually assaulted Jane Doe, and it proceeds from that premise at every turn: in presenting its version of the facts, in criticizing UK's conduct of the Title IX hearings and appeals, in finding adverse education-related action, and in its incredulity that the fourth hearing (after three appellate reversals) reversed course and found no sexual assault. I do not know whether this is cause or effect of the "messy facts," but either way, after a thorough review of this record, I cannot subscribe to the majority's version of facts. As for the "messy law," I am reminded of Justice Thomas's lamentation in *Jackson v. Birmingham Board of Education*, 544 U.S. 167, 195, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005) (Thomas, J., dissenting), that "the majority returns this Court to the days in which it created remedies out of whole cloth to effectuate its vision of congressional purpose." I respectfully dissent.

I.

"Even in cases where elusive concepts such as motive or intent are at issue, summary judgment may be appropriate if the nonmoving party rests merely upon conclusory allegations, improbable inferences, and unsupported speculation." *Theidon v. Harvard Univ.*, 948 F.3d 477, 496 (1st Cir. 2020) (cleaned up); *accord Alexander v. CareSource*, 576 F.3d 551, 560 (6th Cir. 2009) ("Conclusory statements unadorned with supporting facts are insufficient to establish a factual dispute that will defeat summary judgment."); *Harbin-Bey v. Rutter*, 420 F.3d 571, 580 (6th Cir. 2005) (explaining that circumstantial evidence of retaliation amounting to no "more than bare allegations" will not be enough to defeat a motion for summary judgment). Here, with conclusory allegations, improbable inferences, and unsupported speculation Doe has crafted an overarching conspiracy theory[1] that UK has retaliated against her from the time that she filed this action in 2015 through every action that UK has taken since that filing.

Of course, we review summary judgment rulings de novo, construing the facts in the light most favorable to the nonmovant, *see Bose v. Bea*, 947 F.3d 983, 988 (6th Cir. 2020), but we must look to the *entirety* of the record in this review. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986).[2] And Doe must do more than cast ***726** "metaphysical doubt" over the material facts regarding whether a reasonable juror would believe that she established a prima facie case of Title IX retaliation. *Id.* at 586, 106 S.Ct. 1348; *see also Chao v. Hall Holding Co., Inc.*, 285 F.3d 415, 424 (6th Cir. 2002). To draw inferences in favor of the nonmovant does *not* mean that we blindly accept the nonmovant's assertions at face value. Instead, we construe favorably the nonmovant's statements of fact that are supported by the record.

Moreover, although we review the district court's summary judgment ruling de novo, we do not scrutinize school disciplinary proceedings—such as the one at issue here—with the same scrutinous review. *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 648–49, 119 S.Ct. 1661, 143 L.Ed.2d 839 (1999); *New Jersey v. T.L.O.*, 469 U.S. 325, 342–43 n.9, 105 S.Ct. 733, 83 L.Ed.2d 720 (1985); *Tinker v. Des Moines Indep. Comm. Sch. Dist.*, 393 U.S. 503, 507, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969). School disciplinary proceedings are *not* criminal trials that require the formalities of a courtroom. *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 635 (6th Cir. 2005); *see also Bd. of Curators of Univ. of Missouri v. Horowitz*, 435 U.S. 78, 88, 98 S.Ct. 948, 55 L.Ed.2d 124 (1978) ("A school is an academic institution, not a courtroom or administrative hearing room."). So, some deference is due to the school in the way it conducts its disciplinary proceedings, particularly when the record does *not* show that the proceeding at issue was constitutionally deficient. *Davis*, 526 U.S. at 648–49, 119 S.Ct. 1661; *New Jersey*, 469 U.S. at 342–43 n.9, 105 S.Ct. 733. We do not substitute our view of school policies or impose what we think would have been the best practice when the hearing was constitutionally sufficient, that is, both parties to the proceeding were afforded due process. *Goss v. Lopez*, 419 U.S. 565, 580, 95 S.Ct. 729, 42 L.Ed.2d 725 (1975); *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 399 (6th Cir. 2017); *see also Mathews v. Eldridge*, 424 U.S. 319, 334–35, 96 S.Ct. 893, 47 L.Ed.2d 18 (1976).

In sum, we should not craft judicial remedies "out of whole cloth" or ignore parts of the record while highlighting others so that a claim survives a motion for summary judgment.

II.

While at UK, Jane Doe accused her ex-boyfriend ("JD") of sexual assault. Surveillance footage twice showed Doe and JD together on October 2, 2014. First, Doe exited her residence hall, met JD, and escorted him to her dorm. Doc. 140-34, PageID#2182. Later, Doe and JD were seen on video for a second time as they exited Doe's dorm. *Id.* This time Doe wore an entirely different outfit. *Id.* As Doe signed JD out of the dormitory, they were talking with one another. *Id.* Doe alleges that between these two appearances on surveillance video, JD raped her while they both were in her dorm room.

After talking with her roommate and calling her mother, Doe called the UK police department to report a rape. Around this time, a series of text messages were exchanged between Doe and JD.[3] Responding to Doe's call, Officer Laura Sizemore took Doe to the hospital to be examined for sexual assault.[4]

***727** UK immediately—meaning the next day, October 3—issued a no-contact order and suspended JD. As the majority recounts in some detail, the first disciplinary hearing was on October 8, from which the hearing panel found JD guilty and permanently expelled him. JD appealed to the University Appeals Board (UAB), which reversed because the hearing had been held without JD.[5] The second hearing was held on December 18, 2014; the panel again found JD guilty, and the UAB reversed again—this time because the hearing panel heard recorded testimony from Doe from the first hearing, and JD did not have an opportunity to cross-examine Doe or her witness.[6] The UAB explained that Doe's recorded testimony from the first hearing "was not admissible in any later proceeding against [JD]." Doc. 140-30, PageID#2161. The third hearing was on March 26, 2015, and the panel again found JD guilty. But on June 9 the UAB reversed once more because Officer Sizemore and Detective Brannock testified in each other's presence in blatant violation of the procedures set out in the student code of conduct. It bears mention that this third hearing was the only hearing that Officer Sizemore attended and that by the date of the third reversal, UK was in summer session.

On July 29, then-Director of the Office of Student Conduct, Dr. Denise Simpson, emailed Doe about scheduling yet another hearing with the "goal ... to schedule this hearing as soon as we can." Doc. 140-2, PageID#1995. Because JD was no longer enrolled at UK, Doe responded to the email that she "would like to request [that] the process be suspended unless/until [JD] attempts to return to UK." *Id.* at 1996. In subsequent emails, Doe asked whether the hearing could occur in August. Dr. Simpson then sent Doe a confidential, online poll regarding Doe's August-availability. However, on July 30, Doe stated that she had retained new counsel and would need to check on her attorney's availability before proceeding with scheduling the fourth hearing.

In August, Doe withdrew from BCTC. At that time, Doe's new attorney, Elizabeth Howell, sent UK a Cease Direct Contact letter, stating that "we certainly object to the fourth hearing" but will participate to the extent necessary to find JD responsible. Doc. 140-3, PageID#2001. On October 1, 2015, Doe initiated this action in federal court. Her sole claim was for Title IX deliberate indifference to harassment, and she requested as injunctive relief that UK comply with Title IX law "to be determined at trial." Doc. 1, PageID#11. The nature of the injunctive relief was unspecified. Around that time, UK faced a competing lawsuit featuring an inverse claim—one filed by a student accused of sexual assault (not JD), complaining that UK did not afford accuseds adequate due process. Doc. 8-1, PageID#116; *see also* Doc. 8, PageID#114–15 (Motion to Consolidate).

UK moved to dismiss Doe's lawsuit on January 6, 2016, claiming that Doe's injunctive relief was not specific and that it did not specify "what Ms. Doe wants the [c]ourt to compel [UK] to do through injunctive relief." Doc. 5, PageID#18. Doe ***728** filed a response to that motion on January 27, 2016, stating that she did not seek "to enjoin the on-campus proceeding against JD." Doc. 9-1, PageID#136. The very next day, UK emailed Doe's attorney, stating that "given [Doe]'s explicit representation to the federal court that she will not seek to enjoin any future student disciplinary proceedings, [UK] wishes to schedule the fourth hearing as soon as possible." Doc. 140-37, PageID#2035. Doe's attorney responded that she was coordinating with Doe and Doe's mental health provider and that she would "have a firm answer to you regarding her participation as soon as possible." Doc. 140-8, PageID#2037. Doe's attorney requested to be updated if JD's counsel provided UK with potential dates. The record reflects that neither party followed up from this email exchange.

The district court denied UK's motion to dismiss and admonished UK for delaying the fourth proceeding. The district court explained that "[e]ven if [UK] viewed this lawsuit as a bar to scheduling the fourth disciplinary hearing, that does not explain the four months between the third UAB decision and the filing of the Complaint in this case." Doc. 12, PageID#156. It is noteworthy that UK had delayed the fourth hearing *before* Doe filed this lawsuit, meaning that the delay up to that point could not have been in response to Doe's filing this lawsuit. The court also took the time to admonish UK about its constitutionally insufficient Title IX hearings that consistently deprived *accuseds* of due process. *Id.* at 154–55; *see also id.* at 154 n.2. In so doing, the court dismissed Doe's claim that UK was deliberately indifferent to her rights throughout the Title IX process. The district court said, "Although it was a protracted process due to the errors in the hearings, the facts pled show the University took significant action and did not act with deliberate indifference regarding [Doe]'s sexual assault allegations during the three hearings and appeals." *Id.* at 155. In sum, the district court explained that the Title IX process at UK was constitutionally sufficient for accusers while it was insufficient towards those accused of sexual assault.

A day later, on September 1, 2016, UK—through counsel—attempted to schedule a fourth hearing between September 15 and October 15, 2016. Based upon both Doe's and JD's counsel's schedules, the fourth hearing was set for October 19, 2016. Doc. 131-12, PageID1669–72; *see also* Doc. 131-13, PageID1673.[7] The Hearing Officer for the fourth hearing, Professor Robert G. Lawson[8] granted a continuance on the day of the hearing, stating that there were due process concerns that he needed to remedy before proceeding. Namely, Doe had requested that her testimony for the fourth hearing "be presented in the form of a record of her testimony from the prior hearing." Doc. 131-13, PageID#1674. Professor Lawson granted that request.[9]

***729** After he granted Doe's request to use her prior testimony in lieu of testifying at the fourth hearing, Professor Lawson turned Doe's recorded testimony over to JD's counsel for review. JD's counsel raised "a number of questions concerning" due process *because* of the recorded testimony and what impact the testimony would have on "the objectivity of the hearing panel." Doc. 131-13, PageID#1674. So, attempting to prevent yet another appeal and reversal on due process grounds, Professor Lawson decided that a continuance was appropriate. The fourth hearing was rescheduled for November 14 and then once more to January 10, 2017.

At this point, a bit of information about UK's Title IX hearing procedure is in order. Prior to any Title IX hearing, UK holds a pre-hearing resolution meeting. However, UK did not hold that pre-hearing meeting before the fourth hearing. A panel of three faculty members composes the hearing panel who decides the case. Per UK policy, both parties to a Title IX hearing "shall submit to the Hearing Officer any information they wish to present at the hearing, the name(s) of support person(s) and whether the support person is an attorney, [a] preliminary list of questions, and a possible list of witnesses six (6) business days prior to the hearing." Doc. 140-11, PageID#2071. After that information is submitted to the hearing officer, "[t]he Title IX Coordinator shall arrange the attendance of witnesses who are members of the [UK] community, if reasonably possible." *Id.* Hearing officers "rule[ ] on all questions of law, whether substantive, evidentiary, or procedural." *Id.* at 2070–71. The Hearing Officer is responsible for screening the questions and posing them to both parties at the hearing. Prior to the hearing, all parties have an opportunity to object to questions that they deem irrelevant.

At the fourth hearing, Doe was represented by UK Dean of Students Nick Kerhwald and her own attorney, Elizabeth Howell. Dean Kerhwald was Doe's university representative, whose role was to prove by a preponderance of the evidence that JD violated the student code of conduct. But both Kerhwald and Doe's attorney could object at the hearing. Doc. 140-11, PageID#2071, 2072; Doc. 140-28, PageID#2146; Doc. 140-16, PageID#2091. Per her attorney's requests, Doe attended the hearing via closed-circuit television connection for cross-examination, and her recorded testimony from the third hearing was used in lieu of her providing direct testimony. Dean Kerhwald argued the case for Doe, albeit without presenting any objections, and closed argumentation in the fourth hearing by stating Doe's case that JD violated the UK policy on sexual conduct. Officer Sizemore's police report was read into evidence at the fourth hearing in lieu of live testimony.[10] Officer Sizemore ***730** later stated that her live testimony, if provided, would not have differed from her police report. Doc. 140-1, PageID#1992; Doc. 131-1, PageID1592 (Beauman Cross-Examination of Sizemore). Sizemore made clear that she could have provided more opinions beyond the scope of her police report but that everything she knew, factually, was contained in her report. Doc. 140-1, PageID#1992.

During cross-examination, Professor Lawson allowed questions that explored Doe's credibility and motivations. Specifically, Doe was impeached with recorded statements from the first hearing in which she stated that she did not want to be JD's "second girlfriend." The UAB had held that this recorded testimony was not to be used in a later proceeding *against JD*. Doc. 140-30, PageID#2161. The UAB had not categorically excluded that testimony from any other use. Professor Lawson also allowed a question about Doe's financial motivations. He asked Doe if she was concerned "that if [JD] is not found responsible in this proceeding ... could [it] have a negative effect on your lawsuit?" Doc. 140-29, PageID#2151.

In finding that JD was not responsible for the charged violations, the hearing panel concluded that JD was more credible and plausible than Doe. The hearing panel found inconsistencies in Doe's version of events, stating that the evidence showed that Doe "had to go outside to retrieve [JD]," instead of JD's calling Doe from the lobby of the dormitory. Doc. 140-34, PageID#2182. The hearing panel questioned how it was possible, given that Doe and JD were together in Doe's dorm room and the small space of that room, that Doe could not have been aware that JD had disrobed. The hearing panel also explained that Doe could be seen wearing one outfit taking JD to her room but reappearing in an entirely different outfit as she escorted him out of the dormitory. In the panel's formulation, "why would [Doe] remove [her] shirt in order to change in front of [her] alleged attacker," when Doe alleged that JD removed her pants, not her top-wear. *Id.* The panel found it odd that Doe and JD continued with conversation, after Doe had signed him out of the dormitory as shown on surveillance footage. And the text messages sent between Doe and JD "did not align correctly with [Doe's] testimony." *Id.*

***731** Prior to Doe's interactions with her roommate and mother, Doe texted JD. *See* Doc. 131-1, PageID#1579–84. After telling JD to delete her number, she texted, "we aint working g shit" because he was "a hoe." *Id.* at 1579. She later texted, "Bye i wish you best !" *Id.* at 1580. In response to a heart-break emoji sent by JD, Doe replied with two laughing-face emoji's "yeah that me , thanks ! please delete my number ." *Id.* Later, Doe's roommate took her phone and texted JD, "stay your gorrilla looking ass away from [Doe]." *Id.* at 1581. The roommate further texted, "i know you raped her" "and if the cops dont get you, then i will be sure of it that youre off the foorball team and out of Uk and [Doe's] life!" *Id.* Then, when Doe herself texted JD, she asked "what did earlier mean ?" *Id.* at 1582. JD replied, "Why would she play around like that [referring to the roommate] , it's not funny or a joke to play around like that [Doe] . That's can fuck shit up for everything ." *Id.* Doe replied, "i did tell you to stop didnt i ?" *Id.* at 1583. JD said back "I have sisters dude, I wouldn't do that. Why you wanna say I did something like that." *Id.* Doe did not respond.

The panel also stated that "the photos taken at the hospital of [Doe] were not clear indications of the allegations made of biting, restraining, or alleged force used against [Doe]." Doc. 140-34, PageID#2182. Finally, the panel took issue with Doe's assertion that she did not know that JD had a girlfriend at the time of the incident. The panel members explained that they "listened to a recorded testimony of [Doe] in which she stated not being a second girlfriend, which caused an additional level of concern in regard to the credibility of [Doe]." *Id.* Doe appealed to the UAB.

As for UK's appellate process, the record clearly reflects that, *on appeal*, UK does *not* stand in the shoes of the complaining witness as it does during Title IX hearings. The student code of conduct explains that the "respondent or complaining witness may appeal the decision and/or sanction." Doc. 140-11, PageID#2073. Notably absent from who can appeal is the university. Instead of representing the complaining witness on appeal, the university may file a separate response to the appeal—not on behalf of either party. *Id.* at 2074. And this is exactly what UK did here.[11]

Doe's appeal consisted of seven claims as categorized by the appeals board. The first was that the hearing panel failed to make a finding on whether the sexual activity between Doe and JD was consensual. Doc. 140-40, PageID#2216-17. The UAB concluded that this claim lacked merit. By finding in favor of JD, the hearing panel concluded that JD did not rape Doe, and the UAB explained that the word "consent" need not appear when it can reasonably be deduced that the hearing panel found the sexual activity to be consensual.

Next, Doe claimed that UK violated her due process rights (1) as a result of a line of questioning regarding her criminal complaint ***732** against JD and civil case against UK;[12] (2) because JD submitted testimony about his background while Doe did not; and (3) because Doe's witness (her roommate) was questioned about counseling that she had received. *Id.* at 2218–2228. The UAB found that the line of questioning did not violate Doe's due process rights because Professor Lawson reasonably weighed the potential motivation in Doe's

testimony versus bias that cross-examination questions might engender. The UAB also found that Doe was not limited in what information she could have presented.[13] And the questions as to Doe's witness's counseling "provided context as to [the witness's] whereabouts and emotional state on the day in question." *Id.* at 2228.

Doe also claimed that new information had come to light that would have altered the panel's decision, related to Officer Sizemore's absence at the fourth hearing. Implicit in this claim were two accusations: (1) that Officer Sizemore's absence violated Doe's right to due process and (2) that UK Chief of Police, Joseph Monroe, acted to manipulate the outcome of the hearing by preventing Officer Sizemore from testifying. *Id.* at 2230. Regarding Officer Sizemore's absence and potential due process concerns, the UAB reasoned that Doe and her counsel as well as JD could have requested a continuance to reschedule the hearing at a time when Officer Sizemore could attend. In response to this portion of Doe's appeal, UK stated that it investigated the allegations of witness interference and concluded that no further investigation was warranted. Furthermore, UK "contacted Officer Sizemore ... regarding any pressure to not participate in the [fourth hearing]. Officer Sizemore indicated there was no pressure from any University official for her not to participate in the hearing. Officer Sizemore indicated she was unable to attend because she was unable to secure childcare for her infant child." Doc. 140-39, PageID#2208.

The UAB also stated that Officer Sizemore's report was read at the fourth hearing, and JD had forfeited the right to cross-examine Officer Sizemore as well. The UAB concluded that Officer Sizemore's absence did not have an impact on the hearing.

Regarding the allegation that Chief Monroe attempted to influence the proceeding by preventing Officer Sizemore's testimony, the UAB noted that Doe's attorney received anonymous, encrypted emails nine days after the fourth hearing containing this allegation. When asked to provide the emails, Doe's attorney refused. The UAB stated that "[Doe] cannot raise the spectre of corruption, refuse to provide evidence, and then rely on her allegations to reverse the Panel's decision." Doc. 140-40, PageID#2232. Even after Doe's attorney would not provide the anonymous emails, UK's then-Deputy Title IX Coordinator, Martha Alexander, investigated the allegations of interference. Notably, as Deputy Alexander testified, when investigating an allegation made through anonymous email, there is no complainant with whom to follow-up.

Deputy Alexander called Officer Sizemore to investigate. Doc. 140-1, PageID#1990. ***733** Apparently, Alexander believed that Sizemore had not been at work for some time, consistent with the mistaken belief that Sizemore was on FMLA leave, because when Alexander stated that she was "glad" that Sizemore was "finally back to work" and Sizemore responded that she had already been back for some time, Alexander fell silent. *Id.* Sizemore testified that Alexander "seemed pretty aggravated" after hearing that. *Id.* Then, rather than simply confirming the police department's reason for Sizemore's absence at the fourth hearing (childcare issues), Alexander asked, "Did someone tell you not to go [to the fourth hearing]?" *Id.* Sizemore responded, "[n]o." *Id.* Sizemore interpreted this question as asking if someone had threatened her not to go. She elaborated that "what popped in my head was the conversation with chief [Monroe] from prior," but she did *not* tell Alexander about that and her belief that Monroe was interfering with the hearing. *Id.* When UK eventually received copies of the anonymous email, UK decided that no further investigation was warranted. Later, another anonymous, encrypted email was sent directly to UK that was materially the same as the others, which prompted UK to ask Chief Monroe to account for a timeline of events leading up to the fourth hearing. Doc. 140-36, PageID#2193; Doc. 140-46, PageID#2476; Doc. 140-24, PageID#2128–29 (timeline).

Doe's final claim to the UAB was about the fourth hearing panel's alleged failure to "distinguish the real facts of the case which have remained unchanged over four traumatic hearings, from the irrelevant extrinsic evidence presented" by JD. Doc. 140-40, PageID#2233. The UAB reasoned that the panel heard evidence presented by both parties and a witness. The panel reviewed photographs and videos while also examining Officer Sizemore's police report. The panel found JD to be more credible than Doe. The UAB found that the panel's conclusion was not clearly erroneous.

Now, returning to Doe's lawsuit against UK, after a series of amended complaints, one claim remained before the district court: Title IX retaliation. UK moved for summary judgment, and the district court granted that motion, stating "Because Doe's assertions are too speculative to the survive summary judgment standard, the Court finds that [UK] is entitled to judgment as a matter of law." Doc. 151, PageID#2534. The district court explained that Doe had "not submitted

evidence from which a reasonable jury could conclude that she established a prima facie case of retaliation." *Id.* at 2546.[14] While flawed on ***734** the education-related nature of these Title IX proceedings, the district court's ultimate holding—that Doe did not suffer an adverse action for purposes of a Title IX retaliation claim—is correct, and, albeit on alternative grounds, I agree.

Doe speculates that at every turn, UK responded with retaliatory animus towards Doe. However, it is clear that when considered in its totality, the record contains no genuine issues of material fact. Even construing all facts and inferences in a light most favorable to Doe, this case should not go beyond summary judgment, and we should be hesitant to expand our judicially created Title IX law on this record.

III.

In 2005, the Supreme Court created an implied private right of action for Title IX retaliation claims. *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 171, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005); *see also Cannon v. Univ. of Chicago*, 441 U.S. 677, 703, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (creating an implied private right of action to enforce Title IX). The Court coupled retaliation with gender-based discrimination to create this right of action, explaining that the retaliation must be motivated by gender-based discrimination. *Jackson*, 544 U.S. at 176–78, 125 S.Ct. 1497; *see also id.* at 173–74, 125 S.Ct. 1497 ("Retaliation is, by definition, an intentional act. It is a form of 'discrimination' because the complainant is being subjected to differential treatment.").[15]

In turn, many Circuit Courts treat Title IX retaliation claims by analogizing them to Title VII retaliation claims.[16] We do the same. *See, e.g.*, ***735** *Goldblum v. Univ. of Cincinnati*, 62 F.4th 244, 251 (6th Cir. 2023); *Bose*, 947 F.3d at 988–89. If the claimant uses direct evidence to establish a prima facie case of Title IX retaliation, then the inquiry stops there, and the claim survives summary judgment. *Goldblum*, 62 F.4th at 251. Direct evidence "requires no inferences to conclude that unlawful retaliation was a motivating factor in the employer's action." *Fuhr v. Hazel Park Sch. Dist.*, 710 F.3d 668, 673 (6th Cir. 2013), *abrogated on other grounds by Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 133 S.Ct. 2517, 186 L.Ed.2d 503 (2013). However, when a plaintiff uses indirect evidence to show retaliation, then the *McDonnell Douglas* burden-shifting framework applies. *Spengler v. Worthington Cylinders*, 615 F.3d 481, 491 (6th Cir. 2010); *Goldblum*, 62 F.4th at 251.

First, according to the burden-shifting framework, Title IX retaliation claimants must establish a prima facie case of retaliation, showing that: "(1) [the claimant] engaged in protected activity, (2) the funding recipient knew of the protected activity, (3) [the claimant] suffered an adverse education-related action, and (4) a causal connection exists between the protected activity and the adverse action." *Goldblum*, 62 F.4th at 251; *see also Seeger v. Cincinnati Bell Tel. Co.*, 681 F.3d 274, 283 (6th Cir. 2012) (explaining that the burden of proof at the prima facie stage is minimal). *But see Owens v. Circassia Pharms., Inc.*, 33 F.4th 814, 835 (5th Cir. 2022) ("[T]he mere fact that some adverse action is taken after an employee engages in some protected activity will not always be enough for a prima facie case.").

Second, if the claimant establishes a prima facie case, the burden shifts to the Title IX recipient to demonstrate legitimate, nonretaliatory reasons for its actions. *Goldblum*, 62 F.4th at 251 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973)).

Third, if the recipient meets its burden, the claimant may then refute the recipient's proffered reasons by showing that the reasons are merely pretext for unlawful retaliation. *Id.* (citing *Flowers v. WestRock Servs., Inc.*, 979 F.3d 1127, 1132–33 (6th Cir. 2020)).

Because I agree with the district court that Doe failed to establish a prima facie case of retaliation, I focus only on the prima facie case, specifically the third and fourth prongs.[17]

IV.

a. Adverse Action

The majority categorizes Doe's adverse-action allegations in four ways: (1) the delay in scheduling the fourth hearing; (2) the failure to adequately prosecute JD; (3) the hearing panel and appeals board decisions; and (4) Chief Monroe's alleged interference with the Title IX proceeding. I will take each in turn and explain that, whether viewed in combination or in isolation, no reasonable juror would conclude that Doe has a genuine issue of material fact related to educational adverse action.

In the Title IX context, we define "adverse action" as something that would dissuade a reasonable person from engaging in protected activity related to education. *Gordon v. Traverse City Area Pub. Sch.*, 686 Fed. App'x 315, 320 (6th Cir. 2017); *see also* ***736** *Burlington North & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68, 126 S.Ct. 2405, 165 L.Ed.2d 345 (2006); *Goldblum*, 62 F.4th at 251; *Bose*, 947 F.3d at 987 (explaining that expulsion can be educational adverse action). None of the claimed adverse actions in this case would dissuade a reasonable person from engaging in UK's Title IX procedure or from filing a federal Title IX suit. We should not drum up adverse actions that do not exist.[18]

i. The Delay in Scheduling the Fourth Hearing

Doe's evidence demonstrates that Doe herself caused or contributed to the delayed fourth hearing, and the evidence that she claims demonstrates retaliation is evidence of mistake at most. After the third hearing decision was reversed on June 9, 2015, Dr. Simpson reached out to Doe on July 29 to schedule a fourth hearing with the "goal ... to schedule this hearing as soon as we can." Doc. 140-2, PageID#1995. Doe responded by requesting that "the process be suspended unless/until [JD] attempts to return to UK." *Id.* at 1996. Dr. Simpson and Doe exchanged a few more emails, resulting in Dr. Simpson's sending Doe an online, confidential poll to help determine Doe's August-availability. But Doe did not respond to that poll. Instead, her next communication relayed that she had retained new counsel and that she would need to check on her attorney's availability before proceeding with scheduling a fourth hearing.

Next, Doe's attorney sent a "Cease Direct Contact" letter stating that "we certainly object to the fourth hearing" but will participate to the extent necessary to find JD responsible. Doc. 140-3, PageID#2001. Then, when Doe filed this lawsuit on October 1, 2015, she requested vague injunctive relief "to be determined at trial." Doc. 1, PageID#11. Around the same time, another lawsuit was filed against UK—that one alleging that accuseds are not afforded enough due process. Doc. 8-1, pageID#116. Faced with competing lawsuits, UK was stuck in a classic "catch-22" scenario. And UK was left wondering if its Title IX procedure, itself, was constitutionally sufficient.[19]

Only in response to UK's motion to dismiss did Doe explain what she was requesting as injunctive relief, stating that she did not seek to enjoin UK's Title IX hearing process. The day after Doe responded, ***737** UK emailed Doe's attorney requesting to schedule the fourth hearing. Doe's attorney told UK that after she contacted Doe's mental health provider, she would have an answer on Doe's availability. She also requested to be updated if JD's counsel provided UK with potential dates. Neither party followed up.

To be sure, the district court admonished UK for not scheduling the fourth hearing, but the district court did so with general disdain for UK's Title IX process, lamenting that those accused of sexual assault were consistently denied adequate due process. Doc. 12, PageID#154–55, 154 n.2, 156. The district court also highlighted that UK had delayed the process *before* Doe filed this lawsuit, *id.*, during a time when Doe "certainly objected to [having] the fourth hearing." Doc. 140-3, PageID#2001. Clearly, then, UK's pre-lawsuit delay could not have been in retaliation to the lawsuit, and Doe herself objected to even having the fourth hearing.

After the admonishment, UK attempted to schedule the fourth hearing some time between September 15 and October 15, 2016. The hearing was scheduled for October 19, 2016, based on both Doe's and JD's counsel's schedules. But, on the day of the fourth hearing, it was rescheduled given the due process concerns that Professor Lawson had regarding the use of Doe's recorded testimony and what impact the recorded testimony might have on the objectivity of the hearing panel. Professor Lawson had previously granted Doe's request to use her recorded testimony from the third hearing in lieu of live testimony. To prevent another appeal (and potential reversal) on due process grounds, Professor Lawson decided that a continuance was appropriate. The fourth hearing was ultimately held on January 10, 2017.[20] This is not evidence of retaliatory adverse action.

Once more, we must look to "the record taken as a whole," *Matsushita Elec.*, 475 U.S. at 587, 106 S.Ct. 1348, and the entirety of the record demonstrates that this delay can hardly be viewed as retaliatory. At almost every step, Doe herself contributed to it.[21] At most, this delay was mistaken, which should not amount to adverse action.

***738** *ii. The Failure to Adequately Prosecute JD*

As I read the majority opinion, the majority inserts itself as another level of appellate review *within* UK's Title IX process, employing a sort-of "best practices" standard and reviewing how UK presented Doe's case at the fourth hearing de novo.

"A school is an academic institution, not a courtroom or administrative hearing room." *Bd. of Curators of Univ. of Missouri*, 435 U.S. at 88, 98 S.Ct. 948. Therefore, school disciplinary proceedings do not require the formalities of a courtroom. *Flaim*, 418 F.3d at 635. And we give deference to how a school conducts its disciplinary hearings, *Davis*, 526 U.S. at 648–49, 119 S.Ct. 1661; *New Jersey*, 469 U.S. at 342–43 n.9, 105 S.Ct. 733, especially when the record reflects that the parties involved were afforded due process. *Goss*, 419 U.S. at 580, 95 S.Ct. 729; *Univ. of Cincinnati*, 872 F.3d at 399.

To the majority, according to this new best-practices standard and a de novo review of the fourth hearing, Dean Kerhwald's representation of Doe at the fourth hearing was retaliatory. Pointing to the fact that he did not object at all during the fourth hearing, the majority takes Doe's view that Dean Kerhwald must have been retaliating against her.

In support of this argument, Doe cites to a case from the U.S. District Court for the District of Maryland. There, Morgan State University officials did not issue a second no-contact order against the assailant, which led to further harassment of the accuser. *Doe v. Morgan State Univ.*, 544 F. Supp. 3d 563, 573, 586 (D. Md. 2021). That inaction, according to the Maryland district court, could be considered an adverse action by a jury because it led to further harassment. *Id.* at 586. Here, the alleged inaction did not put Doe in harm's way, and it was not related to giving the accused access to Doe. Dean Kerhwald, while presenting the case that JD violated UK policy, exercised discretion in choosing how to represent that JD had committed a violation of that policy. *See Tinker*, 393 U.S. at 507, 89 S.Ct. 733.[22] Based on this record, the fact that Dean Kerhwald did not object during the fourth hearing cannot ***739** be considered retaliatory adverse action because his entire representation of Doe would not dissuade a reasonable person from engaging in the Title IX process at UK or from filing a federal Title IX action.

Doe and the majority also take issue with the facts that Officer Sizemore did not testify at the fourth hearing and that the parties stipulated to Officer Scott's testimony. A few things are relevant here. Officer Sizemore testified at one of the other three hearings, Doc. 140-1, PageID#1985, meaning that she testified in person only once throughout this entire process. And, by her own account, everything that she knew, factually, was contained in her police report which was read into the fourth hearing's record. While Sizemore could have testified to her opinions about the matter beyond her police report, JD also forfeited the opportunity to cross-examine Sizemore about her opinions in her absence. Her absence was neither adverse nor retaliatory.

To the majority's concern that Officer Sizemore's presence at the fourth hearing was requested with inadequate notice, UK's Title IX Office was sloppy. But that does not mean that the late request was retaliatory. The record reflects that the presence of both officer-witnesses was requested on the same day, Doc. 140-21, PageID#2108; Doc. 140-6, PageID#2033, Officer Sizemore's by Doe, and Officer Scott's by JD. The Title IX Office contacted the UK police department on Friday, January 6, 2017, asking Captain Webb if both officers could attend the hearing. Captain Webb was out of the office that day and did not respond until Monday. He responded that both officers were unavailable. Chief Monroe made accommodations for Officer Scott to attend, allowing Scott to skip training, and Monroe confirmed that Sizemore had childcare issues on the day of the hearing so that she could not attend. Monroe's actions aside—more on that later—this cannot be deemed retaliatory action. The Title IX Office should have requested the witnesses earlier, but the requests were treated identically.[23] That is not evidence of retaliatory adverse action.

As to Officer Scott's stipulated testimony, the fact that it was read into the record is not evidence of retaliatory action. He was a witness called by JD. By Doe's and the majority's reasoning on this point, the fact that UK allowed JD to defend himself and call witnesses at the fourth hearing means that UK must have been retaliating against Doe.

In its response to Doe's appeal of the fourth hearing, UK called Officer Scott's testimony "inconsequential and non-substantive," Doc. 140-39, PageID#2210, but the majority claims that Officer Scott's stipulated testimony bolstered JD's credibility. The stipulation said:

> Officer Scott, if he was called as a witness today, would testify that ... [JD] had called him that afternoon after receiving these text messages and had told him that these allegations had been made against him. ... Officer Scott would testify that he told [JD] "I'll make a phone call to the police department. You need to go over there and tell them your version of what happened." So he advised him to go over, and I believe Officer Scott called the police department and told them that he was coming. Based on that, [JD] went directly to the police department.

***740** Doc. 131-22, PageID#1739. Obviously, this stipulated testimony does nothing to bolster JD's credibility. The

testimony corroborates that JD called Officer Scott after the incident, but it does not get at whether the hearing panel would believe JD over Doe as to whether the sexual encounter was consensual. And, again, this was testimony that JD requested in mounting a defense.

Next, both Doe and the majority take issue with UK's position during Doe's appeal of the fourth hearing. But both fail to recognize that UK's role changes on appeal. After a hearing panel's decision is appealed, the student code of conduct demonstrates that UK no longer acts as the prosecutor of the case. Doc. 140-11, PageID#2073; *see also* Doc. 140-5, PageID#2018–19.[24]

Compare UK's role at Title IX hearings versus on appeal. At the Title IX hearing, UK assigns a representative to "present the case on behalf of the University." Doc. 140-11, PageID#2071. "The rights of this representative shall be [the] same as those of the complaining witness." *Id.* Whereas, on appeal, the student code of conduct does not mention a UK representative who takes up the case for a student appealing a hearing panel's decision. Instead, UK has the ability to file a response to the appeal. *Id.* at 2074. Those who may appeal a hearing panel's decision are the "respondent or complaining witness," not the university. *Id.* at 2073. In other words, UK's role on appeal is akin to a third-party's role with the ability to respond to the appeal itself.

Based on this record, UK could have made different choices in presenting Doe's case. But, at most, UK's missteps are just that and give no reason to construe them as retaliatory. Even if we would have presented Doe's case differently, UK was not retaliating against Doe.

iii. Hearing Panel and Appeals Board Decisions

According to the majority, Doe has pointed to specific acts of the hearing panel and appeals board that meet our adverse action standard. This again ignores any amount of deference we are to give schools when reviewing their disciplinary proceedings. *See* *Flaim*, 418 F.3d at 635; *Doe v. Cummins*, 662 F. App'x 437, 446 (6th Cir. Dec. 6, 2016). On top of that, the majority tacitly accepts Doe's conclusory speculation about the hearing panel's and the appeals board's reasoning.

For starters, Doe and the majority take issue with two procedural decisions that are apparently attributable to the hearing panel: (1) the impeachment using Doe's recorded testimony from the first hearing and (2) questioning about monetary incentives. But the hearing panel had nothing to do with either question. The panel's only role in a Title IX hearing is to weigh the evidence and determine whether the respondent violated the student code of conduct. Doc. 140-11, PageID#2072. According to the code, "[a]ll questions of law, whether substantive, evidentiary, or *procedural*, shall be addressed to and ruled upon by the Hearing Officer." *Id.* (emphasis added). So, the real complaint is not with the panel but with Professor Lawson.

At the fourth hearing, Doe claimed that she "didn't call [JD]" and "didn't know he had a second girlfriend." Doc. 131-22, PageID#1720. Doe was then impeached with ***741** recorded testimony from the first hearing, in which she stated that she called JD after the alleged sexual assault, stating "I didn't want to be his second girlfriend." *Id.* at 1721. That testimony was previously thrown out as inadmissible, but it was inadmissible "in any later proceeding *against JD*." Doc. 140-30, PageID#2161 (emphasis added). The UAB did not categorically exclude evidence from the first hearing for any further use. Doe also claims that this impeachment and another cross-examination question about her financial motivations in suing UK are evidence of retaliatory action on behalf of the hearing officer, Professor Lawson.[25]

Both questions were relevant to Doe's credibility and motivations. In a courtroom they might have been met with more scrutiny, but we should be hesitant to second-guess an educational proceeding with the level of scrutiny that Doe and the majority would have us employ. *Davis*, 526 U.S. at 648, 119 S.Ct. 1661; *Flaim*, 418 F.3d at 635.[26] When a hearing officer commits clear procedural irregularities, there arises an inference of Title IX discrimination. *Doe v. Oberlin Coll.*, 963 F.3d 580, 586–87 (6th Cir. 2020); *Rossley v. Drake Univ.*, 979 F.3d 1184, 1193 (8th Cir. 2020); *Menaker v. Hofstra Univ.*, 935 F.3d 20, 35 (2d Cir. 2019). But Professor Lawson did not engage in clear procedural irregularities in this proceeding.[27]

In fact, Professor Lawson made several procedural rulings in Doe's favor, granting her requests to attend the hearing remotely and to use recorded testimony from the third hearing. Doc. 131-1, PageID#1400, 1404. And in correspondence with Doe's then-attorney, Elizabeth Howell, Professor Lawson explained his desire to get the process right in this hearing. He followed through on that desire by following UK Title IX procedures.[28]

***742** Next, Doe and the majority take issue with the hearing panel's and the UAB's substantive reasoning and decisions. In the majority's view, Doe claims that the hearing panel's decision rested on thin inconsistencies and innocuous details. The fourth hearing panel hinged its decision on credibility and plausibility, finding in favor of JD. Doc. 140-34, PageID#2182. The panel—after viewing surveillance footage—found inconsistencies in Doe's rendition of events, stating that contrary to Doe's assertion that JD was already in the lobby of her dorm she "actually had to go outside to retrieve him." *Id.* The panel, after hearing both testimonies, found it implausible that Doe could not have known that JD had disrobed in her dorm room, given the small size of her room. The panel also questioned why Doe would change her entire outfit in front of her alleged assailant when she testified that he only removed her pants. And the panel took issue with the fact that Doe was seen on surveillance video talking with JD directly after the alleged sexual assault after she signed him out of her dormitory. The subsequent text messages between Doe and JD did not line up with Doe's version of events, according to the panel. Moreover, the panel explained that during the fourth hearing Doe testified that she did not know JD had a girlfriend at the time of the incident. But the panel heard recorded testimony in which Doe "stated not being a second girlfriend," giving the panel even more concern as to Doe's credibility. *Id.* The panel also looked at the hospital reports and photos concluding that the evidence did not clearly show "biting, restraining, or alleged force." *Id.* at 2181. While we do not have the photos in the record, we have the hospital report, which categorized Doe's three "thin" "scratches" on the "back of [her] neck and shoulder" as an abrasion, tenderness, and abrasion/tenderness, respectively. Doc. 131-1, PageID#1575, 1577. To call the hearing panel's decision in JD's favor an adverse action is to conclude that any unfavorable outcome is an adverse action. Doe has not pointed to any evidence, besides the outcome, that requires us to scrutinize the panel's reasoning here.

Then, the UAB reviewed the fourth hearing pursuant to UK's Title IX appeals process and issued a 23-page opinion detailing why it denied Doe's appeal. The UAB reviewed for reversible procedural error and issues of new information. The hearing panel's factual findings were reviewed for clear error while the panel's legal conclusions were reviewed de novo. Doe points to the fact that the UAB adopted positions that were averse to her in denying her appeal, and claims retaliation. In every adversarial proceeding, one party's arguments prevail over the other party's arguments. If this is retaliation, then in every proceeding the losing party must have been retaliated against by the adjudicating entity.

Both Doe and the majority could have made this analysis easier by calling Doe's claim with respect to the outcome of the entire proceeding what it really is: a Title IX erroneous-outcome claim. Under that theory of liability, the plaintiff must prove that a Title IX recipient reached an erroneous outcome in a Title IX hearing because of the plaintiff's gender. *Doe v. Baum*, 903 F.3d 575, 585 (6th Cir. 2018). There are two elements to a plaintiff's erroneous-outcome claim. The plaintiff must: (1) "cast some articulable doubt" on the Title IX proceeding's accuracy and outcome and (2) demonstrate a particularized causal connection between the flawed outcome and gender bias. *Id.* (quoting *Doe v. Miami Univ.*, 882 F.3d 579, 592 (6th Cir. 2018)). But those very elements are likely why Doe did not bring an erroneous-outcome claim in the first place—based on this record such a claim would not survive ***743** a motion to dismiss, let alone a motion for summary judgment. Here, the record clearly reflects that UK denied JD due process by violating its own procedural rules in the first three hearings. To correct course and provide both parties due process, is not to retaliate against Doe.

iv. Chief Monroe's Interference

UK cannot be vicariously liable for Chief Monroe's actions under some theory of respondeat superior. We do not recognize vicarious liability or cat's paw liability in the Title IX context. *Bose*, 947 F.3d at 989–91 (following *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290–91, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998), and holding that cat's paw liability does not apply in Title IX cases). So, even though Chief Monroe is a member of the broader UK community, his actions are not imputed to UK for Title IX purposes. "[R]ecipient[s] of federal funds may be liable in damages under Title IX only for [their] own misconduct." *Id.* at 990 (citation omitted); *see also Gebser*, 524 U.S. at 288, 290–91, 118 S.Ct. 1989 (explaining that only "appropriate person[s]" who can rectify violations of Title IX can bring about liability for a Title IX recipient). In other words, only officials of the Title IX recipient entity who may take corrective action to end Title IX discrimination may bring about Title IX liability for the recipient. *Gebser*, 524 U.S. at 290, 118 S.Ct. 1989; *Bose*, 947 F.3d at 990. Chief Monroe is not a Title IX decision-maker and, therefore, is not an appropriate person who could bring about Title IX liability for UK.

But purporting to expand our Title IX law to include deliberate-indifference-to-retaliation claims, on this record the majority has created something else: a deliberate-indifference-to-a-duty-to-investigate claim. Certainly, this awkward identifier is more accurate than calling Doe's claim "deliberate indifference to retaliation." The majority recognizes this, stating that the evidence raises a question as to the adequacy of UK's investigation, not gender-based retaliation. *Contra Davis*, 526 U.S. at 644, 119 S.Ct. 1661 ("[B]oth the 'deliberate indifference' standard and the language of Title IX narrowly circumscribe the set of parties whose known acts of *sexual harassment* can trigger some duty to respond on the part of funding recipients." (emphasis added)). Supreme Court and Sixth Circuit precedent dictate that Title IX discrimination cases must be tethered to gender-based discrimination. *See, e.g.*, *Cannon v. Univ. of Chicago*, 441 U.S. 677, 694–709, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979) (creating an implied private right of action to sue under Title IX for gender-based discrimination); *Gebser*, 524 U.S. at 292–93, 118 S.Ct. 1989; *Bose*, 947 F.3d at 989–90 (applying Title IX to a claim of sexual harassment). The majority expands our Title IX law to include a claim untethered to gender-based discrimination. Doe has not shown that Monroe acted with gender-based retaliatory animus towards her, but under the majority's new rule, that does not matter. I proceed by analyzing the record under the majority's new deliberate-indifference-to-a-duty-to-investigate claim, showing that even under this new rule, there is no adverse action attributable to UK based on Chief Monroe's conduct.

Doe presents evidence in the record that she claims suggests that Chief Monroe acted to interfere with the fourth hearing by preventing Officer Sizemore from testifying. Doe relies on Officer Sizemore's speculation that she was prevented from even attending the hearing. The record clearly reflects that Sizemore had childcare issues on the day of the fourth hearing. *See* Doc. 140-1, PageID#1986–87; Doc. 131-34, PageID#1905–06. But Sizemore claims that Chief Monroe used her childcare ***744** issues as pretext for preventing her from attending the hearing and even having any knowledge of it. Monroe had called Sizemore to his office for a meeting during which he asked her if she had childcare issues and could not be somewhere if she had to be. She answered that she did have childcare issues. After Sizemore found out that Chief Monroe had not been entirely clear with her, she was "extremely upset." Doc. 140-27, PageID2137. In turn, Sizemore speculated that Chief Monroe's intentions were not innocent during that meeting, but she did not tell *anyone* about her speculation until this litigation. Sizemore's claims amount to no more than conjecture.

At most, this evidence creates a quasi-genuine issue of fact regarding whether Monroe prevented Sizemore from attending the hearing, *not* that he had retaliatory animus towards Doe based on her gender. *See Jackson*, 544 U.S. at 174, 125 S.Ct. 1497 (explaining that Title IX retaliation is retaliation on the basis of gender). Here, however, the majority claims that UK did not adequately investigate the alleged interference. But Martha Alexander, the then-Deputy Title IX Coordinator did investigate those claims.

Doe first became aware of Monroe's alleged interference via two anonymous, encrypted emails that her then-counsel would not share with UK. The emails were received on January 19, 2017, nine days after the fourth hearing. Doe's attorney relayed the allegations, but not the emails, to Alexander. Alexander called Sizemore, and rather than merely confirming that Alexander had childcare issues, she asked Sizemore whether someone told her not to attend the fourth hearing. Doc. 140-1, PageID#1990. Sizemore answered no, but Sizemore later said that she thought of her conversation with Chief Monroe during that call.[29] That thought remained unspoken though, and Sizemore did *not* relay that information to Alexander.

Later, UK directly received another anonymous, encrypted email, containing substantially the same allegations as the emails that Doe's attorney had received.[30] It read, "reassure her[ ] that she is not in trouble," insinuating that Chief Monroe would retaliate against Sizemore for telling the truth. Doc. 140-37, PageID#2195. But, as part of standard practice, during their phone call, Alexander had already reassured Sizemore of her protections for speaking the truth. Alexander told Sizemore "specifically about the University's policy against retaliation." Doc. 140-46, PageID#2476. And UK did investigate after receiving the third email by having Chief Monroe account for a timeline of events leading up to the fourth hearing, concluding that no more investigation was required. Because the emails were anonymous and encrypted, there was no complainant to follow-up with regarding the allegation of interference. And UK could not respond to information that it did not have: Sizemore's interpretations of her conversation with Chief Monroe. Therefore, that interpretive speculation is immaterial to the majority's new Title IX claim.

Even under the majority's new deliberate-indifference-to-a-duty-to-investigate claim, this alleged interference and supposed failure to investigate is not an adverse action for the prima facie stage. And we should not second-guess an educational ***745** institution's reasonable investigation. *See Tinker*, 393 U.S. at 507, 89 S.Ct. 733 ("[T]he Court has repeatedly emphasized the need for affirming the comprehensive authority of the States and of school officials, consistent with fundamental constitutional safeguards, to prescribe and control conduct in the schools.").

Assuming, for the sake of argument, that these facts amount to deliberate indifference to retaliation, Doe's claim still fails. On this score, *Bose v. Bea*, 947 F.3d at 993, is helpful. In that case, the plaintiff did not pursue a deliberate-indifference-to-retaliation claim on appeal, forfeiting it instead. *Id.* However, the *Bose*-majority posed three helpful questions to guide an actual deliberate-indifference-to-retaliation claim. *Id.* Who would be an appropriate person or entity to contact regarding the retaliation? *Id.*; *see also Gebser*, 524 U.S. at 289, 118 S.Ct. 1989. Was the appropriate person or entity adequately informed of the retaliation? *Bose*, 947 F.3d at 993. If so, was the response "clearly unreasonable in light of" being adequately informed? *Id.* (citing *Williams ex rel Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 367–68 (6th Cir. 2005) (internal quotation marks omitted)); *see also Vance v. Spencer Cty. Pub. Sch. Dist.*, 231 F.3d 253, 260 (6th Cir. 2000) (explaining that Title IX recipients are liable for damages when they "intentionally act[ ] in clear violation of Title IX by remaining deliberately indifferent to known acts of harassment").

The answer to the first question is not disputed. Martha Alexander was an appropriate person to notify of alleged retaliation. Doe's claim fails on the last two questions. Alexander was not adequately informed, meaning that Doe presented only speculation of interference and that Sizemore never relayed to Alexander that she thought Monroe was interfering. In other words, Alexander was presented with anonymous speculation and was later presented with an incomplete account from Sizemore. But assuming she was adequately informed, Alexander responded clearly reasonably. She followed up with Sizemore after being presented with anonymous allegations (not yet having copies of the anonymous, encrypted emails), and she later followed up with Monroe when UK was sent another anonymous email containing virtually the same allegations as the previous ones. Alexander, on behalf of UK, did not ignore a duty to respond, and she did not violate UK's Title IX procedures. When Title IX recipients act promptly and reasonably to alleged malfeasance, then the recipients are *not* deliberately indifferent. *Pahssen v. Merrill Cmty. Sch. Dist.*, 668 F.3d 356, 364 (6th Cir. 2012). Construed as a deliberate-indifference-to-retaliation claim, Doe's claim fails.

b. Causation

Although the district court's holding did not directly address the causation element of a Title IX retaliation prima facie case, rendering anything from the district court related to causation dicta, the majority endeavors to explain that Doe has proven as much. I agree with the majority's explanation of our Title IX causation standard. *See Fuhr*, 710 F.3d at 675; *Bose*, 947 F.3d at 988. But I cannot agree that the classic "before-and-after" comparison establishes causation in this case.

First of all, the delay was caused by factors that are akin to intervening causes. *See Kenney v. Aspen Techs., Inc.*, 965 F.3d 443, 450 (6th Cir. 2020) ("[A]n intervening cause between protected activity and an adverse employment action dispels any inference of causation."). Moreover, when the plaintiff contributes to the delay, we are supposed to consider that contribution as an intervening event that breaks the ***746** chain of causation. *Wasek v. Arrow Energy Servs.*, 682 F.3d 463, 472 (6th Cir. 2012). Here, we have many intervening causes of the delay between Doe's initial filing of this suit and her "persever[ing]" to a fourth disciplinary hearing. To name a few, Doe stated that she did not want a fourth hearing, and her attorney stated the same; Doe did not respond when UK tried to schedule a hearing; and Doe filed for vague injunctive relief. The record also shows that UK had delayed the fourth hearing *before* Doe filed this suit. Meanwhile, UK faced competing lawsuits: one claimed UK did not give accuseds enough due process and the other claimed accuseds received too much. No causal connection exists regarding the delay.

Regarding the alleged failure to prosecute JD and the procedural and substantive reasoning of the hearing panel and UAB, the context-specific nature of our causation inquiry is fatal to proving causation here. *See Dixon v. Gonzales*, 481 F.3d 324, 335 (6th Cir. 2007). And a plaintiff's contributions to alleged adverse action tend to negate causation. *Kuhn v. Washtenaw County*, 709 F.3d 612, 628 (6th Cir. 2013); *Wasek*, 682 F.3d at 472. Doe chose to attend the fourth hearing remotely. She and her attorney did not stay for the entire hearing. Doe stipulated to using her recorded testimony from the third hearing as her direct testimony in the fourth. This

is not to say that there is anything wrong with Doe's actions. She simply made decisions regarding how best to engage with the UK Title IX process. And the record reflects that she was afforded due process. Of course, Doe takes issue with certain procedural and evidentiary rulings, but she has not put on evidence demonstrating that those rulings contravened UK's Title IX procedure, nor were they violative of her due process rights. On top of that, Doe has not proffered evidence suggesting that Kerhwald's representation changed from one hearing to the next. Instead, she points solely to the outcome of the fourth hearing as evidence that Kerhwald must not have presented her case sufficiently.[31]

"What changed from the first three hearings to the fourth?" the majority asks. Yes, Doe filed this lawsuit. But the record reflects that after three hearings in which JD was denied due process, in the fourth due process was provided to both parties. The due-process-change is dispositive and cuts off any causal connection between this suit and supposed retaliation.

Finally, Doe's argument that causation exists between Chief Monroe's alleged interference and Doe's protected activity is foreclosed by *Bose v. Bea*, 947 F.3d at 989. We do not recognize vicarious liability in the Title IX retaliation context. *Id.* And UK's investigation was not clearly unreasonable. It is immaterial that UK did not relay to Doe and her attorney that UK had received another anonymous, encrypted email just as it is immaterial that the UAB did not receive the same. The email was from the same email-encryption service, and it contained virtually the same allegations, i.e., it added nothing new to the equation. *Compare* Doc. 140-32, PageID#2176 *with* Doc. 140-37, PageID#2195. Causation does not exist on this record. To conclude otherwise is to rely almost entirely on conclusory and speculative assertions. In the end, Doe and the majority find causation simply because Doe faced an adverse outcome at the ***747** fourth hearing and on appeal. That is not enough.

V.

If a Title IX retaliation claim can make it past the prima facie stage based on conjecture, speculation, and assumptions akin to a conspiracy theory, then we should do away with this stage of the *McDonnell/Douglas* burden-shifting framework altogether and always assume it is met. I would affirm the district court's grant of summary judgment based on Doe's failure to establish an adverse action attributable to UK. Because the majority sees it differently, I respectfully dissent.

All Citations

111 F.4th 705, 119 Fed.R.Serv.3d 580, 433 Ed. Law Rep. 57

Footnotes

1 Because we are reviewing a grant of summary judgment in favor of the University, we recite the facts in the light most favorable to Doe, the non-moving party. *Palma v. Johns*, 27 F.4th 419, 423 (6th Cir. 2022).

2 The exam detailed Doe's account of the alleged rape. The examiner observed lacerations on Doe's shoulder and back.

3 We note that many text messages in front of the hearing panel also show that Doe evinced resentment toward JD. For example, she told him twice to "delete [her] number and don't call [her]." Hearing Evidence, R. 131-1, PageID 1579.

4 Doe also argues that she engaged in an additional protected action: persevering through the University's lengthy Title IX proceedings. The University does not contest that this conduct constitutes a protected activity. But because Doe's arguments on appeal seem to focus on retaliation following the filing of her federal lawsuit, we also focus our analysis on that alleged protected activity.

5 We previously reversed the district court's ruling that Doe could not pursue a Title IX deliberate indifference claim because she was not "technically" a student at the University of Kentucky, but a student at Bluegrass Community and Technical College, which is affiliated with the University. *Doe v. Univ. of Ky.*, 971 F.3d 553, 558–59 (6th Cir. 2020). Because Doe participated in programs and activities furnished by the University—including living in a University residence hall—we held that she had standing to pursue her deliberate indifference claim under Title IX. *Id.*

6 The University attempts to justify the delay for another reason. It claims—for the first time—that in late 2015, it was facing "two seemingly contradictory Title IX lawsuits": this one filed by Doe, and another filed by the accused (not JD) in a different Title IX proceeding, who argued that the University's Title IX procedures were unconstitutional. Appellee's Br. at

8–10, 45–46. But the University has forfeited this argument, so we decline to consider it. *Kreipke v. Wayne State Univ.*, 807 F.3d 768, 781 (6th Cir. 2015).

7 In *Nassar*, the Supreme Court held that plaintiffs needed to show that the protected activity was the "but-for" cause of the suffered adverse action to establish a prima facie case of retaliation under Title VII. 570 U.S. at 352, 133 S.Ct. 2517. While some of our sister circuits have queried whether *Nassar* applies to Title IX retaliation claims, *Hurley*, 911 F.3d at 696 n.10, we have continued to apply the pre-*Nassar* standard for Title IX claims. *Fuhr*, 710 F.3d at 675; *Gordon*, 686 F. App'x at 320; *Bose*, 947 F.3d at 988; *see also Nassar*, 570 U.S. at 355–56, 133 S.Ct. 2517 (distinguishing Title VII's text from Title IX's "broad and general terms" that contemplate a broader swath of retaliatory conduct). Therefore, we do so here.

1 In her appellate brief, Doe alleges that almost every party involved in UK's Title IX process acted with retaliatory intent against her. These include, to name a few, the Dean of Students, the Title IX Hearing Officer, the then-Deputy Title IX Coordinator, the hearing panel, the UK appeals review board, UK's general counsel, and the UK Chief of Police. According to Doe, the only nonretaliatory party whom UK employed was Officer Sizemore. To reverse course after denying JD due process, and provide both parties with constitutionally sufficient due process, is not evidence of a vast conspiracy to retaliate against Doe.

2 And in this de novo review of summary judgment we can affirm on any basis supported by the record. *Pipefitters Local 636 Ins. Fund v. Blue Cross & Blue Shield*, 722 F.3d 861, 865 (6th Cir. 2013).

3 *See infra* Section II, pg. 730-31.

4 The medical report from that hospital visit shows that Doe claimed that JD ejaculated on her clothes or her bedding. Doc. 131-1, PageID#1575. The examiner did not find evidence of vaginal injury. *Id.* at 1576. The majority states that Doe sustained lacerations to her shoulder and back, but the medical examiner noted that Doe had "thin" "scratches" on the "back of [her] neck and shoulder." *Id.* at 1575, 1577. The examiner categorized Doe's injuries as "AB," "TE," and "AB/TE," meaning abrasion, tenderness, and abrasion/tenderness, respectively. *Id.* at 1577.

5 JD had requested a continuance, but his request was denied, Doc. 12, PageID#149–50, and following the first hearing, JD withdrew from classes and UK housing.

6 Around this time, Doe had re-enrolled in classes at BCTC.

7 JD's counsel's law partner passed away, so JD's counsel requested "another week or so" after October 15, 2016. Doc. 131-12, PageID#1671. Doe's counsel was in court "Monday and Friday" of the week of October 17–21. *Id.* at 1669.

8 Robert Lawson authored both the Kentucky Penal Code and the Kentucky Rules of Evidence and was twice dean of the University of Kentucky College of Law. John Cheves, *After 50 Years at UK, Professor who Wrote much of Kentucky Law and Investigated UK Athletics is Retiring*, Lexington Herald Leader, https://www.kentucky.com/news/local/education/article44605044.html, (June 15, 2015, 11:50 PM).

9 The record reflects that Doe was diagnosed with PTSD after the third hearing and was hospitalized. Professor Lawson explained that in granting Doe's request to use her recorded testimony, he "was trying to ease the difficulty of the process for [Doe]." Doc. 131-14, PageID1674.

10 Regarding Sizemore's absence, a series of unfortunate events occurred—some of which are immaterial to the resolution of this dispute. For starters, the record reflects that Sizemore did not attend the fourth hearing because she had childcare issues on that day. Doc. 140-1, PageID#1986–87; Doc. 131-34, PageID#1905–06. The record further reflects that Doe's attorney was informally told that Sizemore was on FMLA leave on the day of the hearing. Doc. 140-38, PageID#2199. But Sizemore claims that something was awry. Doc. 140-1, PageID#1988, 1990.

A day before the hearing, Sizemore was called into UK Chief of Police Monroe's office. Monroe asked Sizemore if she had childcare issues and if she had to be somewhere on January 10, 2017, she could not be for those issues. *Id.* at 1986–87. Sizemore responded in the affirmative. Later, when Sizemore found out that the fourth hearing took place while she had childcare issues, she was "extremely upset." Doc. 140-27, PageID#2137. When Sizemore found out that "someone was told [she] was on FMLA and ... that [she] couldn't attend this hearing and that hearing," Doc. 140-1, PageID#1989, she

thought, "that didn't look good." *Id.* So, she drafted a memo on January 17, 2017. Sizemore's memo confirms that Chief Monroe asked her if she had childcare issues. Doc. 131-34, PageID#1905–06. After the fact, and reported to nobody with Title IX authority until this litigation, Sizemore questioned the intentions of Chief Monroe, stating that "his intentions ... were not innocent at the time." Doc. 140-1, PageID#1989.

Backing up further in time, on January 6, 2017, Jeremy Enlow (UK's then-Equal Opportunity Investigator) emailed Captain Bill Webb about having two UK police officers testify at the fourth hearing. The officers requested were Laura Sizemore and Eric Scott, the football liaison. Sizemore was requested by Doe, and Scott was requested by JD. *See* Doc. 140-6, PageID#2033; Doc. 140-21, PageID#2108; Doc. 140-48, PageID#2507. Webb was not in the office that day, so he did not respond until Monday, January 9. Doc. 140-21, PageID#2108. After Enlow told Webb what Title IX matter both Sizemore and Scott were requested for, Webb responded that *both* officers were unable to attend and to contact Chief Monroe with any other questions. *Id.* at 2106. Enlow contacted Monroe, who—at that time—met with Sizemore about her childcare issues and made a police-training accommodation to allow Scott to skip the training and attend the hearing.

Ultimately, *neither officer* attended the hearing. Scott's testimony was stipulated to, and Sizemore's police report was read into the record.

11 In its response, UK summarized Doe's appellate claims in three categories: (1) new information, (2) due process concerns related to Officer Sizemore's absence and her police report, and (3) a concern that the hearing panel did not include a factual finding that sexual activity occurred. Doc. 140-39, PageID#2205. In UK's separate role on appeal, it argued that Doe's first two grounds for appeal were without merit while the third ground was meritorious. The majority takes issue with the fact that UK took some positions that were adverse to Doe on appeal. But the majority's concern fails to recognize that UK's role on appeal was *not* the same as its role during the fourth hearing. UK was free to advance arguments that it deemed meritorious while advocating against arguments that lacked merit.

12 The criminal complaint that Doe filed against JD was dismissed by the time of the fourth hearing and Doe's appeal. In fact, the grand jury in that case chose not to indict JD.

13 Baked into this claim was another claim that JD was asked leading questions about the size of the dorm room. The UAB found that, regardless of testimony about the size of the room, the hearing panel could have found—based solely on pictures of the dorm—that the room was so small that Doe could not have been unaware of JD's disrobing. Doc. 140-40, PageID#2226.

14 In so doing, however, the district court committed two errors. First, the district court stated that it restricted its view of Doe's Title IX retaliation claims to Doe's operative complaint. It is worth noting that the court still considered facts and details beyond those to which it was supposedly restricting itself. UK had argued that Doe asserted more retaliatory actions in response to UK's motion to dismiss the third complaint. While Doe clarified what retaliatory actions she was pleading in her response, that clarification did not actually contain new allegations. *Compare* Doc. 57 *with* Doc. 106. So, UK's characterization of the operative complaint and the subsequent pleadings was incorrect. Moreover, on summary judgment, we look to the record "taken as a whole." *Matsushita Elec.*, 475 U.S. at 587, 106 S.Ct. 1348. The district court's supposed restriction was error. Here, I agree with the majority.

Second, the district court stated that the passage of time destroyed the educational nature of the fourth hearing. This was also error. We addressed this issue in a prior appeal, in which we established that Doe has standing to pursue her Title IX retaliation claim. *See Doe v. Univ. of Ky.*, 971 F.3d 553, 558-59 (6th Cir. 2020); *see also id.* at 558, 559 n.4; *Goss*, 419 U.S. at 580, 95 S.Ct. 729 (explaining that school disciplinary proceedings are "essential if the educational function is to be performed"); *Bethel Sch. Dist. v. Fraser*, 478 U.S. 675, 686, 106 S.Ct. 3159, 92 L.Ed.2d 549 (1986). We also explained that Title IX requires a close connection between a plaintiff and a Title IX recipient. *Doe*, 971 F.3d at 558, 559 n.4. The text of Title IX supports our interpretation. *See* 20 U.S.C. § 1681. So, while I agree with the majority that this proceeding was education-related, I cannot join in the majority's cursory analysis of *Snyder-Hill v. Ohio State Univ.*'s impermissible expansion of Title IX law, *see* 48 F.4th 686, 707–09 (6th Cir. 2022) (expanding Title IX law to include a plaintiff class that bears an attenuated connection to a Title IX recipient); *see also id.* at 719–20 (Guy, J., dissenting), and the majority's adoption of *Snyder-Hill*'s construal of *North Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). *Compare Snyder-Hill*, 48 F.4th at 707–09 *with North Haven*, 456 U.S. at 520–22, 102 S.Ct. 1912 (explaining that employees of Title IX recipients can bring Title IX claims, not that members of the public at large can

bring these claims); *see also North Haven*, 456 U.S. at 523–30, 102 S.Ct. 1912 (explaining that the legislative history of Title IX supports that employees of Title IX recipients can bring a Title IX suit, not that a Title IX "person" is any member of the public). Title IX plaintiffs must have some connection to a Title IX recipient to bring a claim against that recipient. Doe has such a connection here, so we need not sign on to *Snyder-Hill*'s impermissible Title IX expansion, including a plaintiff class too far removed from the Title IX recipient.

15 The Department of Education has since weighed in. "No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by [T]itle IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part. Intimidation, threats, coercion, or discrimination, ... for the purpose of interfering with any right or privilege secured by [T]itle IX or this part, constitutes retaliation." 34 C.F.R. § 106.71(a).

16 *See, e.g.*, *Doe v. Sch. Dist. No. 1*, 970 F.3d 1300, 1315 (10th Cir. 2020); *Austin v. Univ. of Or.*, 925 F.3d 1133, 1136 n.3 (9th Cir. 2019); *Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020); *Doe v. Columbia Univ.*, 831 F.3d 46, 55 (2d Cir. 2016); *Frazier v. Fairhaven Sch. Comm.*, 276 F.3d 52, 67 (1st Cir. 2002).

17 The parties do not dispute the first two elements of the prima facie case for Title IX retaliation: protected activity and knowledge. Doe engaged in two protected activities which UK knew of: (1) filing her federal lawsuit against UK and (2) "persever[ing] to a fourth sexual misconduct hearing."

18 The district court discussed UK's proffered reasons as to why their actions were not retaliatory through the UAB's 23-page decision on Doe's appeal of the fourth hearing. But it did so in dicta. The ultimate holding is that Doe did not establish a prima facie case of Title IX retaliation because she did not adequately plead an adverse action. While erring on the education-related aspect, the district court still analyzed the prima facie case and what was "adverse" to Doe and how those adverse actions were not so adverse as to dissuade a reasonable person from engaging in protected activity. In more dicta, the district court found no causal connection (the last prong of the prima facie case) between Doe's alleged adverse acts and protected activity.

19 The majority claims that UK forfeited any argument based on the undisputed fact that UK faced a competing lawsuit at the time of Doe's lawsuit, but the record reflects otherwise. UK filed a motion to consolidate the competing cases, *see* Doc. 8, PageID#114, and explained that, although factually distinct, the "complaints involve[d] common issues of law, namely, does [UK's] policy and procedure in the student disciplinary process comply with constitutional due process guarantees." Doc. 8-1, PageID#119. UK explained that it was "squarely in the middle of competing student interests and harmonizing [its] duties under the Constitution, Title IX[,] and the Department of Education directives." *Id.* This motion was denied as moot after a similar motion in the competing case was also denied. Doc. 11, PageID#147. Although absent from its motion for summary judgment, this argument appears below, meaning that the argument was *not* born on appeal. Therefore, it was not forfeited.

20 The fourth hearing was rescheduled in November, as well. Like her initial complaint, in which Doe claimed that the fourth hearing was delayed because of JD's community college football schedule, Doc. 1, PageID#9, Doe's operative complaint implied that the fourth hearing's November-rescheduling was also a result of JD's community college football schedule. Doc. 57, PageID#371. Doe seems to have abandoned this bald and conclusory allegation on appeal. In turn, neither Doe nor the majority takes issue with the November rescheduling. But why not? If this delay was retaliatory, then the November-rescheduling ought to count as evidence of the supposedly retaliatory delay. Every other possible piece of evidence for the delay was construed that way. It is telling that neither Doe nor the majority views the November-rescheduling as retaliatory.

21 This fact renders inapposite *Watford v. Jefferson County Public Schools*, 870 F.3d 448 (6th Cir. 2017). There, in the Title VII context, a collective bargaining agreement (CBA) stipulated that grievance proceedings would be held in abeyance upon filing an EEOC charge. *Id.* at 453. In turn, employees were left with the choice of filing a grievance or an EEOC charge *because* of the CBA. The employees themselves did not contribute to the adverse action. However, the employees' union contributed to it, and we said that they could be liable under Title VII. *Id.* The *Watford*-panel further explained that employees were faced "with a false binary," choosing between filing a speedy, extrajudicial grievance and filing an EEOC charge. *Id.* at 454. Requiring this false binary was an adverse action. *Id.* at 454–55. Doe was faced with no such choice.

When presented with opportunities to schedule the fourth hearing earlier than January 10, 2017, the record clearly reflects that Doe herself contributed to the very delay that she claims was retaliatory.

22 Dean Kerhwald opened his argument in support of Doe by explaining that the case will come down to whether the panel views the sex acts between Doe and JD as consensual or as sexual assault. Doc. 131-22, PageID#1712. Then, per Doe's attorney's request, he directed the hearing officer to play Doe's recorded testimony from the third hearing. *Id.* at 1714–16. After Doe was cross-examined, Dean Kerhwald was given the opportunity to redirect with Doe. *Id.* at 1722. He did so, directing Doe to point out inconsistencies in JD's version of events and to highlight the allegedly forceful nature of Doe's and JD's sexual encounter. *Id.* Dean Kerhwald then questioned Doe's witness on direct examination, allowing the witness to share her version of what she saw her roommate (Doe) go through on the day in question. *Id.* at 1722–24. On redirect examination of Doe's witness, Kerhwald introduced evidence of Doe's trauma through a suicide note by having the hearing officer read Officer Sizemore's police report into the record. *Id.* at 1726–27. In his closing argument, Dean Kerhwald argued that JD initiated contact with Doe and that the police report, the texts, the videos, and the pictures support Doe's version of events. *Id.* at 1745. He argued that Doe's demeanor on video was consistent with her claim that the sexual encounter was not consensual and that her version of events was more consistent than JD's. *Id.* at 1746. Kerhwald downplayed arguments by JD's attorney. *Id.* at 1747. He stated that Doe did not work herself up after talking with her roommate and mother, but, instead, Doe immediately came to the conclusion that this was not consensual. *Id.* at 1746–47. And he argued that evidence of consent in the past is not evidence of consent to the immediate situation. *Id.* at 1746. He closed by arguing that the entirety of the evidence, including the demarcations and contusions on Doe's body along with her suicide note, demonstrate that this sexual encounter was not consensual. *Id.* at 1748.

23 Per UK Title IX policy, the request could have been made up to six business days before the hearing.

24 In UK's response to Doe's appeal, it refers to itself as "the University Complainant." Doc. 140-39, PageID#2205. Admittedly, this identifier is misleading and confusing. But a review of UK's Title IX appellate process makes clear that the University does not retain an adversarial role on appeal. Instead, it is a third party with the capability of filing a "response" to any appeal. Doc. 140-11, PageID#2074; Doc. 131-29, PageID#1836.

25 The financial motivation question was met with an objection by Doe's attorney. Ms. Howell stated, "I think that's asking for a client for legal advice. I mean she's not—she's not an attorney. She can't answer that question." Doc. 131-22, PageID#1719. So, Doe's counsel was not objecting because the question engendered bias or retaliation but for an attorney/client relationship concern.

26 Relatedly, Doe claims that Professor Lawson had "animus" towards accusers in Title IX proceedings because he advocated for a higher evidentiary burden in sexual misconduct hearings. Professor Lawson did have due process concerns regarding UK's Title IX hearings, but those overall due process concerns cannot be considered retaliatory against Doe. Doe also construes Professor Lawson's reference to her "so-called" suicide note as hostile towards her. Hostility towards a complainant in a Title IX proceeding is not permissible. But Doe's assertions against Professor Lawson and his perhaps unfortunate choice of words are nothing more than conjecture. Conclusory assertions will not give rise to a genuine issue of material fact as to whether Lawson was hostile to Doe.

27 Doe cites *Moe v. Grinnell Coll.*, No. 4:20-cv-00058-RGE-SBJ, 2021 WL 5331774 (S.D. Iowa June 2, 2021), for the proposition that Professor Lawson, as the hearing officer, retaliated against Doe during the fourth hearing. Doe's reliance on *Moe* is misplaced. At a later disposition in that case, the Southern District of Iowa denied Grinnell College summary judgment, explaining that the adjudicator in that Title IX proceeding deviated from Title IX procedure by finding the *accused* party guilty of *uncharged* conduct while using biased perspectives and stereotypes against those accused of sexual assault. *Moe v. Grinnell Coll.*, 556 F. Supp. 3d 916, 932 (S.D. Iowa 2021). Here, unlike the adjudicator in *Moe*, Lawson did not deviate from Title IX procedure and did not use stereotypes against either party. Moreover, Professor Lawson's role did not include an adjudicating responsibility, whereas the *Moe*-officer had that responsibility.

28 Moreover, that financial-motive question had little impact on the fourth hearing panel's decision. The panel's conclusion hinged on credibility and plausibility, *not* Doe's monetary motives. Doc. 140-34, PageID#2182.

29 Clearly, Sizemore understood the nature of the call—that Alexander was investigating something surrounding the fourth hearing.

30 That the appeals board was not informed of the third email is immaterial. It would not have added anything new to what the UAB already had because the email contained nearly identical claims.

31 On appeal, as mentioned, UK's role was not the same. And the majority's assumption that UK represented Doe through JD's three appeals is not supported by the record. UK—through Dean Kerhwald—filed responses to JD's appeals, *see, e.g.*, Doc. 140-30, PageID#2163, but this does not mean that UK had the same adversarial role supporting Doe as it did before each hearing panel.

121 F.4th 855
United States Court of Appeals, Eleventh Circuit.

MaChelle JOSEPH, Plaintiff-Appellant,

v.

BOARD OF REGENTS OF THE UNIVERSITY SYSTEM OF GEORGIA, Georgia Tech Athletic Association, Defendants-Appellees,

George P. Peterson, et al., Defendants.

Thomas Crowther, Plaintiff-Appellee,

v.

Board of Regents of the University System of Georgia, Defendant-Appellant.

No. 23-11037, No. 23-12475
|
Filed: 11/07/2024

Synopsis

Background: Former art professor at university brought action against university, alleging discrimination and retaliation under Title IX. The United States District Court for the Northern District of Georgia, No. 1:21-cv-04000-VMC, Victoria M. Calvert, J., 661 F.Supp.3d 1342, dismissed the action in part, and granted certification to appeal, 2023 WL 4915078. Professor took interlocutory appeal. Former head women's basketball coach at another university brought action against university, alleging discrimination and retaliation under Title VII, Title IX, and Georgia Whistleblower Act. The United States District Court for the Northern District of Georgia, No. 1:20-cv-502-TCB, Timothy C. Batten, Sr., Chief Judge, 2021 WL 10319397 and 2021 WL 10319398, dismissed action in part. The same court, Calvert, J., then entered summary judgment on remaining claims and denied reconsideration, 2023 WL 2393974. Coach appealed. Appeals were consolidated.

Holdings: The Court of Appeals, William Pryor, Chief Judge, held that:

Title IX did not create implied right of action for sex discrimination in employment;

allegation by former art professor of retaliation by university for participating in Title IX investigation of his conduct did not state claim under Title IX;

Title VII did not cover associational claims unrelated to employee's sex;

termination of coach based on turmoil surrounding women's basketball team and findings in investigation report was not pretext for discrimination; and

athletic department's coordination of witnesses for independent investigator was not sufficient to raise inference of manipulation that would undermine legitimacy of investigation coordinated by general counsel's office.

Judgment against coach's complaint affirmed; denial of motion to dismiss professor's claims reversed and remanded with instructions.

Procedural Posture(s): On Appeal; Interlocutory Appeal; Motion to Dismiss; Motion for Summary Judgment.

***859** Appeals from the United States District Court for the Northern District of Georgia, D.C. Docket Nos. 1:20-cv-00502-VMC, 1:21-cv-04000-VMC

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Before William Pryor, Chief Judge, and Luck and Ed Carnes, Circuit Judges.

Opinion

William Pryor, Chief Judge:

***860** These consolidated appeals require us to decide a common question: whether Title IX of the Education Amendments of 1972 provides an implied right of action for sex discrimination in employment. Thomas Crowther, formerly an art professor at Augusta University, and MaChelle Joseph, formerly the head women's basketball coach at the Georgia Institute of Technology, filed separate complaints of discrimination and retaliation against the University System of Georgia. The Crowther appeal also presents a question about his claim of retaliation under Title IX. And the Joseph appeal requires us to decide whether her remaining claims of discrimination and retaliation under Title VII, Title IX, and the Georgia Whistleblower Act survive summary judgment. As to the common question, we conclude that Title IX does not provide an implied right of action for sex discrimination in employment. We reverse the order denying the dismissal of Crowther's claims and affirm the judgment against Joseph's complaint.

I. BACKGROUND

We review the background of these appeals in two parts. We first describe the background of the Crowther appeal. We then address the background of the Joseph appeal.

A. Thomas Crowther

Thomas Crowther worked as an art professor at Augusta University from 2006 through spring 2021. During the Spring 2020 semester, several students complained that Crowther had sexually harassed them. While the University investigated those complaints, the chair of the Department of Art and Design issued Crowther a negative evaluation of his teaching and tried to negotiate his resignation. After the investigation found that Crowther had violated the University's sexual harassment policy, the University suspended his employment for one semester. Crowther appealed that decision through several channels to no avail. Before Crowther's appeal ended, the interim dean reassigned him to remedial tasks and refused to renew his contract for the 2021–2022 academic year.

Crowther later sued the Board of Regents of the University System of Georgia and several officials for sex discrimination and retaliation under Title IX and other provisions of federal law. He requested both damages and injunctive relief. The Board and officials moved to dismiss Crowther's complaint. The district court dismissed the claims against the officials but denied the motion to dismiss the claims against the Board under Title IX. The district court also certified the order for interlocutory appeal based on the question whether Title VII precludes claims for ***861** sex discrimination in employment brought under Title IX. *See* 28 U.S.C. § 1292(b). And we granted permission to appeal that order.

B. MaChelle Joseph

MaChelle Joseph was the head women's basketball coach at Georgia Tech from 2003 until 2019. Joseph was responsible for coaching the team, recruiting new players, hiring and managing assistant coaches, and marketing the team and their games. The head men's basketball coach performed the same kinds of duties for the men's team. Georgia Tech provided practice and competition facilities, marketing budgets and resources, staffing, travel budgets, and other resources to both teams and coaches.

During Joseph's tenure, the men's basketball program consistently received more money and resources from Georgia Tech than the women's program. The women's locker room was smaller and had old and broken lockers, limited shower, laundry, and multipurpose space, and limited access to the practice facility. The men's facility had been updated with newer and more appliances and spaces and had direct access to the practice facility. The women's coaches' office space was smaller than the men's, requiring assistant coaches to share offices or sit at desks in a hallway. Joseph spent "substantial time" fundraising to improve the locker room and office conditions. Georgia Tech budgeted approximately

$22,000 to the women's basketball team for marketing. That amount was insufficient to hire a full-time marketing professional, so Joseph had to dedicate other resources—including her own time—to market the team. The men's team had more funds and a full-time marketing professional. The Georgia Tech Athletic Association also paid the men's head coach for television and radio sets during the season but did not pay Joseph for or provide parallel opportunities. Georgia Tech also provided less money for assistant coach and staff salaries for the women's team than for the men's team. And Georgia Tech provided less money for the women's team to travel than for the men's team.

Joseph learned about these differences during the 2006–2007 academic year and began to raise concerns about the disparity with Georgia Tech's Title IX coordinator for athletics. Nonetheless, most of the budgeting and resource issues remained unchanged throughout Joseph's career.

Joseph spent large portions of her time raising over $2 million for a locker room upgrade during the 2017–2018 year. Georgia Tech did not immediately proceed with the upgrade because addressing the practice facility access concerns—one of the primary issues with the women's locker room—required also changing the men's locker room. Georgia Tech considered upgrading both locker rooms simultaneously. But the men's team had not raised money for their own renovation, so the women's upgrade waited while the Athletic Department decided what to do.

As Joseph continued to complain about the various disparities to Athletic Department leadership, other and unrelated issues arose. For example, in 2015 Joseph was reprimanded for appearing intoxicated at a home football game. In 2016, Joseph's administrative assistant filed a complaint against her, which resulted in a written warning and corrective-action plan. Then in early 2018, the National Collegiate Athletic Association informed Georgia Tech that it had received a report that Joseph or her staff paid recruits impermissible benefits. Meanwhile, Joseph and the team had not secured a spot in the National Collegiate Athletic Association tournament since 2014.

***862** On November 21, 2018, Joseph sent a letter to Georgia Tech's president, copying the athletic director and deputy athletic director. That letter alleged that officials of the Athletic Department had retaliated against Joseph because of her repeated complaints about the disparate resources for her team and "differential treatment of her as a female coach." The chief of staff for the president of Georgia Tech testified that the athletic director appeared "worn down" by Joseph's complaints about the women's basketball team around that time.

Also in the fall of 2018, the personnel administrator for the women's basketball team raised concerns about Joseph's treatment of the team's staff. In early 2019, two staff members approached Human Resources with complaints about Joseph's bullying. And in January 2019, an interpersonal conflict arose among Joseph's players. That conflict eventually escalated to a meeting with the team's personnel administrator and then with Georgia Tech's interim general counsel. At the latter meeting, several players reported concerns about Joseph's treatment of the athletes, expressing what the general counsel called "genuine terror." The general counsel advised the players to have their parents file letters on their behalf to initiate a formal investigation.

A few days later, the deputy athletic director informed the athletic director that he planned to resign because he could not deal with Joseph any longer. The athletic director responded that he had been "working on" a "path forward" regarding Joseph and discouraged the deputy from resigning. On February 7, 2019, the president instructed the athletic director to begin coordinating with human resources about the various staff complaints and resignation threats. The next day, apparently unrelatedly, Joseph filed a formal internal complaint of discrimination and retaliation. She raised the same concerns described above and alleged that the athletic director and others in the Department had retaliated against her.

Three days later, on February 11, the Athletic Department received a letter from the parent of a basketball player. The letter alleged that "Coach Jo and her staff" had isolated the player and created a "toxic" environment that impacted the player's "health and wellness." At some point, the athletic director received another letter from another player's parents. The athletic director and president discussed the contents of the letters, and the athletic director recommended hiring an attorney to investigate the allegations.

Around February 25, 2019, Georgia Tech hired an investigator for the various complaints about Joseph and the women's basketball program. Joseph first learned of the investigation on February 27 when she was placed on administrative leave, but she received no details about its subject matter. The athletic director communicated regularly

with an assigned official from Georgia Tech about the ongoing investigation. That official recommended people for the investigator to interview at Georgia Tech, but the investigator decided who he would contact. On March 11, the investigator delivered a preliminary report in a meeting, although he had not yet interviewed Joseph or the assistant coaches. After that meeting, the president's chief of staff texted the investigation point person, "Good meeting. We will have all we need." The chief of staff later clarified that the text stated that she believed that the Department would have sufficient evidence to take some kind of disciplinary action against Joseph.

On March 12, the investigator interviewed Joseph. On March 15, the investigator delivered an interim report of his findings. After reading that report, the ***863** chief of staff texted the general counsel expressing that she "hope[d] the final report ha[d] more details" because the interim report was "not as compelling as [she] had hoped." She again later clarified that she hoped that the final report would provide a "clear-cut case" for firing Joseph.

On March 20, the investigator submitted his final report. The final report revealed that the investigator had interviewed 13 current players, four former players, seven administrative staffers, five current assistant or graduate assistant coaches, three parents of current or former players, three consultants hired to work with the team during the 2018–2019 season, Coach Joseph, and four other individuals. The report found that the women's basketball players felt "insecure, nervous, anxious, and scared at various points in the season and in their careers," and described the team environment as "toxic," "suffocating," "draining and miserable," and "unhealthy." Eleven of the thirteen current players interviewed "expressed concerns regarding player emotional and/or mental well-being." Players described Joseph "targeting" team members, engaging in "extreme cursing and yelling," and throwing items—possibly even at players. Staff members reported players experiencing "sleep disturbances" and "weight loss during particularly 'bad weeks' with the team." The report stated that Joseph used insulting and demeaning language "on a daily basis." For example, the report stated that Joseph called "a player a 'whore' and accus[ed] her of having sex with everyone on campus," and told "a player that she would be in jail if not for Coach Joseph." Players also reported "feeling manipulated by Coach Joseph," blamed for the team's poor performance, and isolated from their teammates.

The report found that it was "more likely than not that Coach Joseph's actions f[ell] outside acceptable behavior under the [University System of Georgia's] Ethics Policy," that the students were credible, and that "[e]very member of the team reported serious concerns regarding player mistreatment." The report stated that the players "attributed no [coaching] purpose" to the "bullying" and "verbal abuse." Staff corroborated the players' statements, but Joseph denied anything beyond yelling "on occasion" and "cursing in games, practices, and team meetings." The report deferred to Georgia Tech as to what action should be taken.

After receiving the report, the athletic director shared it with Joseph and allowed her to respond. She produced a 13-page response. It denied most if not all the allegations raised in the report, including a line-by-line denial or defense of each of the specific name-calling allegations.

The athletic director fired Joseph on March 26, 2019. **Joseph** then filed a charge of discrimination with the Equal Employment Opportunity Commission in which she alleged sex discrimination and retaliation under Title VII. She obtained a right to sue letter, and she sued the Board of **Regents**, the **Georgia** Tech Athletic Association, and several individuals. She alleged against the Board and the Athletic Association two claims of sex discrimination under Title IX (counts 1 and 2), two claims of sex discrimination under Title VII (counts 3 and 4), and one count each of retaliation under Title IX, Title VII, and the Georgia Whistleblower Act (counts 9, 10, and 11). Joseph requested damages, declaratory judgments, and an injunction. The defendants removed the suit to the district court.

The defendants moved to dismiss and moved for judgment on the pleadings. The district court dismissed Joseph's claims of employment discrimination under Title IX as precluded by Title VII. It also narrowed ***864** Joseph's claims under Title VII based on the applicable limitations period and dismissed those claims insofar as they relied on a theory that Georgia Tech held her to a higher standard than her male colleagues. The district court also dismissed the claim under the Whistleblower Act as to the Athletic Association. After extensive discovery, the Board and the Athletic Association moved for summary judgment. The district court granted their motion.

III. STANDARD OF REVIEW

We review *de novo* both a dismissal or refusal to dismiss (when interlocutory review is available) for failure to state a claim and a summary judgment. *See Williams v. Bd. of Regents of the Univ. Sys. of Ga.*, 477 F.3d 1282, 1291 (11th Cir. 2007); *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 919 (11th Cir. 2018); *S & Davis Int'l, Inc. v. Yemen*, 218 F.3d 1292, 1298 (11th Cir. 2000); *see also Akanthos Cap. Mgmt., LLC v. CompuCredit Holdings Corp.*, 677 F.3d 1286, 1293 (11th Cir. 2012).

IV. DISCUSSION

We divide our discussion into four parts. First, we explain that Title IX does not provide Crowther or Joseph a private right of action for sex discrimination in employment. Second, we explain that Title IX does not provide Crowther a right of action for retaliation where he did not oppose an underlying violation. Third, we explain that Title VII does not provide Joseph a cause of action for the associational discrimination she alleged. Finally, we explain that because Joseph has not rebutted the proffered nondiscriminatory reasons for her termination, her claims of retaliation under Title VII, Title IX, and the Georgia Whistleblower Act fail.

A. Title IX Does Not Provide a Private Right of Action for Sex Discrimination in Employment.

The parties ask us to decide whether the rights and remedies under Title VII preclude claims for employment discrimination under Title IX. Our sister circuits are split on that question. *Compare Lakoski v. James*, 66 F.3d 751, 753 (5th Cir. 1995) (finding preclusion as to individuals seeking money damages under Title IX), *and Waid v. Merrill Area Pub. Schs.*, 91 F.3d 857, 862 (7th Cir. 1996) (same as to claims for equitable relief under Title IX or section 1983), *abrogated in part on other grounds by Fitzgerald v. Barnstable Sch. Comm.*, 555 U.S. 246, 251, 129 S.Ct. 788, 172 L.Ed.2d 582 (2009), *with Doe v. Mercy Cath. Med. Ctr.*, 850 F.3d 545, 560 (3d Cir. 2017) (finding no preclusion); *see also Vengalattore v. Cornell Univ.*, 36 F.4th 87, 92 (2d Cir. 2022) (holding that Title IX right of action was viable without deciding the preclusion question); *Lipsett v. Univ. of Puerto Rico*, 864 F.2d 881, 896–97 (1st Cir. 1988) (same); *Preston v. Virginia ex rel. New River Cmty. Coll.*, 31 F.3d 203, 206 (4th Cir. 1994) (same); *Hiatt v. Colo. Seminary*, 858 F.3d 1307, 1316–17 (10th Cir. 2017) (same). But Supreme Court precedent requires us to ask a more fundamental question: whether Title IX provides an implied right of action for sex discrimination in employment. We hold that it does not.

Whether express or implied, "private rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S. 275, 286, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001). When Congress fails to provide an express right of action, "[t]he judicial task is to interpret the statute Congress has passed to determine whether it displays an intent to create not just a private *right* but also a private *remedy*." *Id.* (emphasis added). An ***865** intent to create a remedy is necessary "even where a statute is phrased in ... explicit rights-creating terms." *Gonzaga Univ. v. Doe*, 536 U.S. 273, 284, 122 S.Ct. 2268, 153 L.Ed.2d 309 (2002). And even when a statute "was intended to protect" a certain class, "the mere fact that the statute was designed to protect [that class] does not *require* the implication of a private cause of action ... on their behalf." *Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 24, 100 S.Ct. 242, 62 L.Ed.2d 146 (1979) (emphasis added). "The dispositive question [is] whether Congress intended to create any such remedy." *Id.*; *see also Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511 ("Statutory intent ... is determinative."). Without a clear indication of congressional intent to create a cause of action, "courts may not create one, no matter how desirable [a cause of action] might be as a policy matter, or how compatible with the statute." *Sandoval*, 532 U.S. at 286–87, 121 S.Ct. 1511; *see also Gonzaga Univ.*, 536 U.S. at 280, 122 S.Ct. 2268 ("[U]nless Congress speaks with a clear voice, and manifests an unambiguous intent to confer individual rights, federal funding provisions provide no basis for private enforcement." (alteration adopted) (citation and internal quotation marks omitted)).

Since the landmark decision in *Alexander v. Sandoval*, the Supreme Court has reminded inferior courts to exercise caution in implying rights of action. For example, in *Gonzaga University v. Doe*, the Court "reject[ed] the notion that [its] cases permit anything short of an unambiguously conferred right to support a cause of action." 536 U.S. at 276, 283, 122 S.Ct. 2268 (considering whether Family Educational Rights and Privacy Act conferred a right that could be vindicated under section 1983). And in *Cummings v. Premier Rehab Keller, PLLC*, the Court circumscribed the remedies for implied rights of action under several statutes prohibiting discriminatory practices. 596 U.S. 212, 142 S. Ct. 1562, 1569–70, 1576, 212 L.Ed.2d 552 (2022) (holding "that emotional distress damages are not recoverable under the Spending Clause antidiscrimination statutes"). Where

implied rights of action exist, we must honor them, but we cannot expand their scope without assuring ourselves that Congress unambiguously intended a right of action to cover more people or more situations than courts have yet recognized.

Congress enacted Title IX under the Spending Clause and provided an express remedial scheme for withdrawing federal funding. *See* 20 U.S.C. § 1682. For most Spending Clause legislation, " 'the typical remedy for ... noncompliance with federally imposed conditions is not a private cause of action ... but rather action by the Federal Government to terminate funds.' " *Gonzaga Univ.*, 536 U.S. at 280, 122 S.Ct. 2268 (quoting *Pennhurst State Sch. & Hosp. v. Halderman*, 451 U.S. 1, 28, 101 S.Ct. 1531, 67 L.Ed.2d 694 (1981)). When deciding whether an implied right of action exists under Spending Clause legislation, "our consideration of whether a remedy qualifies as appropriate relief must be informed by the way Spending Clause statutes operate: by conditioning an offer of federal funding on a promise by the recipient." *Cummings*, 142 S. Ct. at 1570 (citation and internal quotation marks omitted). Even where Spending Clause legislation is phrased in terms of the "persons" protected, the inclusion of a funding-based remedial scheme cautions against construing the statute to create other remedies. *See Gonzaga Univ.*, 536 U.S. at 284, 289, 122 S.Ct. 2268 (noting that the conclusion that a Spending Clause statute did not confer enforceable rights was "buttressed by the mechanism that Congress chose to ***866** provide for enforcing [the statute's] provisions").

"Unlike ordinary legislation, which 'imposes congressional policy' on regulated parties 'involuntarily,' Spending Clause legislation operates based on consent: 'in return for federal funds, the recipients agree to comply with federally imposed conditions.' " *Cummings*, 142 S. Ct. at 1570 (alteration adopted) (quoting *Pennhurst*, 451 U.S. at 16, 17, 101 S.Ct. 1531). But those conditions are binding only if they are clear and the "recipient voluntarily and knowingly accepts the terms of th[e] contract." *Id.* (alteration adopted) (citation and internal quotation marks omitted). The relevant terms of that "contract" include both the duties imposed and the liabilities created because "a prospective recipient would surely wonder not only what rules it must follow, but also what sort of penalties might be on the table." *Id.* So, if an implied right of action would impose unclear conditions or remedies for Spending Clause legislation, we should not recognize that right. *Id.* ("A particular remedy is ... appropriate relief in a private Spending Clause action only if the funding recipient is *on notice* that, by accepting federal funding, it exposes itself to liability of that nature." (citation and internal quotation marks omitted)). And for a state recipient of federal funds, the clarity of the penalty is important because Title IX abrogates any recipient's sovereign immunity from claims for damages. *See* 42 U.S.C. § 2000d-7; *Atascadero State Hosp. v. Scanlon*, 473 U.S. 234, 242, 105 S.Ct. 3142, 87 L.Ed.2d 171 (1985) (requiring that abrogation to be "unmistakably clear in the language of the statute").

The Supreme Court has held that Title IX provides an implied right of action for students who complain of sex discrimination by schools that receive federal funds. In *Cannon v. University of Chicago*, the Court held that section 901 of Title IX provided an implied right of action for a prospective student because "the language of the statute explicitly conferred a right directly on a class of persons that included the plaintiff in the case" and was "phrased in terms of the persons benefited." 441 U.S. 677, 690 n.13, 692, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). *Cannon* concluded that the prospective student was clearly a member of an intended beneficiary class and that Congress intended Title IX not only to ferret out discriminatory uses of federal funding but also to protect individual students from discrimination. *Id.* at 680, 693–94, 709–10, 99 S.Ct. 1946 (first interpreting Title IX, then considering the consequences for university admissions decisions).

In *Jackson v. Birmingham Board of Education*, the Supreme Court also held that Title IX provides a private right of action for *retaliation* for an employee's complaint about discrimination against students. 544 U.S. 167, 171, 125 S.Ct. 1497, 161 L.Ed.2d 361 (2005). There, the male coach of a high school girls' basketball team complained that the school retaliated against him for complaining that the school discriminated against the girls' team. *Id.* at 171–72, 125 S.Ct. 1497. The Court concluded that "the text of Title IX prohibits a funding recipient from retaliating against a person who speaks out against sex discrimination, because such retaliation is intentional 'discrimination' 'on the basis of sex.' " *Id.* at 178, 125 S.Ct. 1497. The Court explained that the statutory goal of protecting students from discrimination "would be difficult, if not impossible, to achieve if persons who complain about sex discrimination did not have effective protection against retaliation" and that "teachers and coaches ... are often in the best position to vindicate the rights of their *students*." ***867** *Id.* at 180–81, 125 S.Ct. 1497 (emphasis added) (citation and internal quotation marks omitted).

Although the Supreme Court has reaffirmed *Cannon* several times, it has never extended the implied private right of action under Title IX to claims of sex discrimination for employees of educational institutions. To be sure, Title IX empowers administrative agencies to promulgate and enforce regulations that require educational institutions to avoid sex discrimination against their employees. *See N. Haven Bd. of Educ. v. Bell*, 456 U.S. 512, 521, 535–36, 102 S.Ct. 1912, 72 L.Ed.2d 299 (1982). The Supreme Court has held that because "[section] 901(a) neither expressly nor impliedly excludes employees from its reach," Title IX "cover[s] and protect[s]" employees through the statute's funding conditions structure. *Id.* at 521, 530, 102 S.Ct. 1912 ("[E]mployment discrimination comes within the prohibition of Title IX."). But that federal funding might be contingent on an educational institution's treatment of its employees —or that an administrative agency could issue regulations imposing that contingency—has little bearing on whether Congress intended to create a private right of action for employees under Title IX. *Cf. Sandoval*, 532 U.S. at 290, 121 S.Ct. 1511 (refusing to imply a right of action under the administrative enforcement provision of Title VI). To answer that question, we must look to congressional intent in creating "not just a private right but also a private remedy." *Id.* at 286, 121 S.Ct. 1511. *Bell* considered only the administrative remedy evident on the face of Title IX, not any implied private right of action.

None of these Supreme Court precedents—*Cannon*, *Jackson*, or *Bell*—speak to whether Title IX created an implied right of action for sex discrimination in employment. And our sister circuits that have allowed claims of sex discrimination in employment under Title IX to proceed have failed to grapple with the inquiry required by *Sandoval* (and later *Gonzaga*); they instead have relied primarily on *Bell* (and later *Jackson*) to hold that Title IX prohibits employment discrimination. *See, e.g.*, *O'Connor v. Peru State Coll.*, 781 F.2d 632, 642 n.8 (8th Cir. 1986); *Mabry v. State Bd. of Cmty. Colls. & Occup. Educ.*, 813 F.2d 311, 316–17 (10th Cir. 1987); *Lipsett*, 864 F.2d at 884 n.3, 896; *Preston*, 31 F.3d at 204 n.1, 205–06; *Waid*, 91 F.3d at 861; *Mercy Cath. Med. Ctr.*, 850 F.3d at 562; *Vengalattore*, 36 F.4th at 104–06; *see also Campbell v. Haw. Dep't of Educ.*, 892 F.3d 1005, 1023 (9th Cir. 2018); *Snyder-Hill v. Ohio State Univ.*, 48 F.4th 686, 708 (6th Cir. 2022) (non-student, non-employee claims).

It is not enough to say that *Cannon* and *Jackson* recognized an implied right of action under Title IX or that *Bell* recognized that Title IX permits agencies to demand that recipients of federal funding avoid discriminating against employees based on sex. "Because the private right of action under Title IX is judicially implied, we have a measure of latitude to shape a sensible remedial scheme that best comports with the statute." *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 284, 118 S.Ct. 1989, 141 L.Ed.2d 277 (1998). And when we consider whether a particular claim falls within the judicially implied right of action, we "examine the relevant statute to ensure that we do not fashion the scope of an implied right in a manner at odds with the statutory structure and purpose." *Cf. id.* So, to determine the appropriate scope of the implied right of action—and whether that scope includes employment discrimination—we look to the text of Title IX and its statutory context.

The text of Title IX provides that "[n]o person ... shall, on the basis of sex, ***868** 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." Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (June 23, 1972) (codified as amended at 20 U.S.C. § 1681) (emphasis added). True, the Supreme Court construed that language not to exclude employees from Title IX's administrative coverage. *See Bell*, 456 U.S. at 521, 530, 102 S.Ct. 1912. But nothing about that language indicates congressional intent to provide a private right of action to employees of educational institutions. In other words, although there can be little doubt that Title IX's focus on educational institutions and programs represents an intent to provide students new protections from sex discrimination, *see Cannon*, 441 U.S. at 680, 693–94, 709–10, 99 S.Ct. 1946, that connection is less obvious for employees.

Congress passed Title IX in June 1972 as part of a series of amendments to the Civil Rights Act of 1964 and other antidiscrimination statutes. The Equal Employment Opportunity Act of 1972 extended first Title VII's prohibition of employment discrimination to federal employees and educational institutions. Pub. L. No. 92-261, § 701–02, 86 Stat. 103, 103–04 (Mar. 24, 1972). That extension to educational institutions responded to "the widespread and compelling problem of invidious discrimination in educational institutions." *Univ. of Pa. v. Equal Emp. Opp. Comm'n*, 493 U.S. 182, 190, 110 S.Ct. 577, 107 L.Ed.2d 571 (1990). The amendment "expose[d]" employment decisions in educational institutions to the "same enforcement procedures applicable to other employment decisions" under Title VII—the "integrated, multistep enforcement procedure that enables the [Equal Employment

Opportunity] Commission to detect and remedy instances of discrimination." *Id.* (citation and internal quotation marks omitted). And Title IX extended next Title VI's protections against discrimination in federally funded programs to cover sex discrimination in educational institutions. Education Amendments of 1972, Pub. L. No. 92-318, § 901, 86 Stat. 235, 373 (June 23, 1972). But Title IX's enforcement mechanism relied on the carrot and stick of federal funding to combat sex discrimination.

Passed only three months apart, the 1972 amendments evince a congressional intent to create a comprehensive antidiscrimination remedial scheme. As amended, Title VII and Title IX work in tandem: "whereas Title VII aims centrally to *compensate* victims of discrimination, Title IX focuses more on protecting individuals from discriminatory practices carried out by recipients of *federal funds*." *Gebser*, 524 U.S. at 287, 118 S.Ct. 1989 (emphasis added) (citation and internal quotation marks omitted); *see also Lakoski*, 66 F.3d at 757.

The two statutes accomplish these goals through different remedies. Title VII creates an administrative process that requires claimants first to file a charge of employment discrimination with the Equal Employment Opportunity Commission and then obtain a right to sue letter from the Commission before filing a complaint in a federal court. 42 U.S.C. §§ 2000e-4–2000e-5. Title IX, in contrast, empowers administrative agencies to condition federal funding on compliance with its anti-sex-discrimination mandate. 20 U.S.C. § 1682. Although it also provides an implied right of action for students—who would otherwise have no statutory remedy to enforce their substantive right under Title IX—the terms of the statute do not embrace a private right of action for employees.

***869** It is unlikely that Congress intended Title VII's express private right of action and Title IX's implied right of action to provide overlapping remedies. Judicially implied rights of action require expressions of congressional intent to create *both* a right *and* a remedy. *Sandoval*, 532 U.S. at 286, 121 S.Ct. 1511. In the light of the complexity of Title VII's express remedial scheme, it would be anomalous to conclude that the implied right of action under Title IX would allow employees of educational institutions immediate access to judicial remedies unburdened by any administrative procedures. *See Cent. Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 180, 114 S.Ct. 1439, 128 L.Ed.2d 119 (1994) ("[I]t would be anomalous to impute to Congress an intention to expand the plaintiff class for a judicially implied cause of action beyond the bounds it delineated for comparable express causes of action." (citation and internal quotation marks omitted)); *cf. Gebser*, 524 U.S. at 289, 118 S.Ct. 1989. That conclusion becomes even weaker when we remember that Congress extended Title VII's remedies to employees of educational institutions only three months before enacting Title IX. And because Title IX was enacted under the Spending Clause, it is dubious that recipients of federal funds would understand that they have knowingly and voluntarily accepted potential liability for damages for claims of employment discrimination under Title IX when those kinds of claims are expressly provided for and regulated by Title VII. *See Gebser*, 524 U.S. at 286–87, 118 S.Ct. 1989 (distinguishing Title IX's "contractual framework" from Title VII's express prohibition and limiting the scope of available remedies under Title IX).

We hold that Title IX does not create an implied right of action for sex discrimination in employment. We reverse the order denying the motion to dismiss Crowther's claim of employment discrimination under Title IX and remand with instructions to dismiss that claim. And we affirm the dismissal of Joseph's claims of employment discrimination under Title IX.

B. Crowther's Retaliation Claim Based on His Participation in an Investigation of His Conduct Does Not State a Title IX Claim.

Although Crowther's case comes before us on interlocutory appeal, 28 U.S.C. § 1292(b), with a certified question concerning whether Title IX employment discrimination claims are precluded by Title VII, interlocutory jurisdiction under section 1292(b) "applies to the *order* certified to the court of appeals, and is not tied to the particular question formulated by the district court." *Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 205, 116 S.Ct. 619, 133 L.Ed.2d 578 (1996). "[A]ny issue fairly included within the certified order" falls within our discretionary jurisdiction under section 1292(b). *Id.* So, we may also consider whether Crowther's allegation of retaliation for participating in the investigation of his conduct states a claim under Title IX. The Board asks us to hold that it does not. We agree.

Jackson defines the contours of a claim of retaliation under Title IX. The Supreme Court held that "[r]etaliation against a person because that person has complained

of sex discrimination is another form of intentional sex discrimination encompassed by Title IX's private cause of action." 544 U.S. at 173, 125 S.Ct. 1497. The Court linked the act of retaliation to a complaint of sex discrimination against students. *Id.* at 174, 180–81, 125 S.Ct. 1497. Because Title IX's remedial scheme depends in large part on people being willing to report Title IX violations, those reporters are owed protection under the statute. *See id.* at 180–81, 125 S.Ct. 1497.

***870** *Jackson* does not contemplate protections for an accused discriminator who participates in a Title IX investigation of his own conduct. That situation bears none of the features of the *Jackson* implied right of action: it does not protect students, and it does not encourage reporters to come forward. It is unsurprising then that at least one other circuit has refused to recognize retaliation actions for participation in an investigation where the would-be plaintiff is accused of discrimination. *See Du Bois v. Bd. of Regents of the Univ. of Minn.*, 987 F.3d 1199, 1204–05 (8th Cir. 2021).

Crowther asks us to read *Jackson* too broadly. He contends that his Title IX retaliation claim survives even if his claim of employment discrimination does not because he alleges "retaliation." But Crowther's claim looks nothing like the right of action implied in *Jackson* because he seeks to protect only his participation in the Title IX investigation of complaints *against* him, not his reporting of other violations. Under the same logic regarding implied rights of action that we described above, we decline to extend *Jackson* in this way. *See Cummings*, 142 S. Ct. at 1576–77 (Kavanaugh, J., concurring) ("[W]ith respect to existing implied causes of action, Congress, not this Court, should extend those implied causes of action and expand available remedies."); *Du Bois*, 987 F.3d at 1204–05. We reverse the order denying the motion to dismiss Crowther's retaliation claim under Title IX and remand with instructions to dismiss that claim as well.

C. Title VII Does Not Cover Associational Claims Unrelated to the Employee's Sex.

Next, Joseph's complaint purports to allege two claims of sex discrimination under Title VII: one based on her sex and another based on her association with the women's basketball team. Joseph contends that the Board of Regents and the Athletic Association discriminated against her because she is a woman and because her players are women. But Joseph provides little to no explanation of how her allegations are connected to her sex, beyond a few conclusory statements that she was treated differently for failing to conform to sex-based stereotypes. Instead, for both her claims, she alleges resource disparities between the facilities, budget, and institutional support of the men's team and those of the women's team.

The district court granted summary judgment against Joseph's claims of sex discrimination under Title VII on the ground that she failed to produce evidence that *her* sex was the but-for cause of the resource disparity. On appeal, Joseph makes no argument that her claims of employment discrimination are based on her sex; instead—under a heading *purporting* to argue that her claims were based on her sex—Joseph focuses only on her association with the women's team. She contends that Title VII allows a claim of discrimination based on an employee's association with a protected group, instead of the employee's sex.

Joseph relies on a line of "associational" cases under Title VII to support her argument that Title VII's prohibition covers discrimination based on an individual's association with a protected group. Under this theory, it does not matter whether Joseph is male or female. What matters is that the disparate treatment alleged was based on an associated person's sex.

Joseph's argument misconstrues the line of precedents that support associational claims. We defined the scope of these claims in *Parr v. Woodmen of the World Life Insurance Co.*, where a company refused to hire a white man because he was married to a black woman. ***871** 791 F.2d 888, 889 (11th Cir. 1986). We held that "[w]here a plaintiff claims discrimination based upon an interracial marriage or association, he alleges, by definition, that he has been discriminated against because of *his* race." *Id.* at 892. In other words, claims based on interracial association necessarily implicate the race of both the complainant and the associate. So, any discrimination based on that association is based on the race (or sex or religion or national origin) of both parties. *See Matamoros v. Broward Sheriff's Off.*, 2 F.4th 1329, 1335 (11th Cir. 2021) (discussing *Parr* and its focus on the individual's protected trait in the context of a Florida statute). *Bostock v. Clayton County* confirms this interpretation. *See* 590 U.S. 644, 140 S. Ct. 1731, 1741, 207 L.Ed.2d 218 (2020) ("An *individual* employee's sex is not relevant to the selection, evaluation, or compensation of employees. ... If the employer fires [a] male employee for no reason other than the fact he is attracted to men, the employer discriminates against him for traits or actions it tolerates in his female colleague." (emphasis added) (citation and internal quotation marks omitted)). And Joseph's evidence does not suggest that her sex mattered in association

with the women's team. So, we affirm the summary judgment against Joseph's claims of sex discrimination under Title VII.

D. Joseph's Claims of Retaliation Under Title VII, Title IX, and the Georgia Whistleblower Act Fail.

The parties agree that the common burden shifting framework applies to Joseph's claims of retaliation under Title VII, Title IX, and the Georgia Whistleblower Act. *See Patterson v. Ga. Pac., LLC*, 38 F.4th 1336, 1344 (11th Cir. 2022). And we will assume that this framework applies here. Under the burden-shifting framework, "[t]he plaintiff must first make out a prima facie case of retaliation, showing (1) that she engaged in statutorily protected activity, (2) that she suffered an adverse action, and (3) that the adverse action was causally related to the protected activity." *Id.* at 1344–45 (citation and internal quotation marks omitted). If the plaintiff satisfies her burden on those three elements, then "the burden shifts to the employer to articulate a legitimate, non-discriminatory reason or reasons for the retaliation." *Id.* at 1345. If the employer provides legitimate reasons for taking adverse action against the plaintiff, then "the plaintiff must show that each reason is merely a pretext." *Id.* In sum, "a plaintiff must prove that had she not engaged in the protected conduct, she would not have been fired." *Gogel v. Kia Motors Mfg. of Ga., Inc.*, 967 F.3d 1121, 1135 (11th Cir. 2020) (en banc) (alteration adopted) (citation and internal quotation marks omitted).

Joseph alleges that she engaged in protected activity in her two letters to the Athletic Department. And she contends that Georgia Tech opened the investigation and fired her in sufficient proximity to those letters to raise an inference of causation. *See Patterson*, 38 F.4th at 1352 ("The general rule is that close temporal proximity between the employee's protected conduct and the adverse action is sufficient circumstantial evidence to create a genuine issue of material fact of a causal connection." (alteration adopted) (citation and internal quotation marks omitted)). The Board and Athletic Association responded to Joseph's allegations by producing evidence that Joseph's termination was instead based on the turmoil surrounding the women's basketball team and the findings in the investigation report. Because the pretext question is decisive, we assume that Joseph established a prima-facie case of retaliation.

***872** To establish that an employer's reason for taking an adverse action is pretextual, a plaintiff must prove "that the reason was false." *Gogel*, 967 F.3d at 1136 (citation and internal quotation marks omitted). "At least where the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it." *Patterson*, 38 F.4th at 1352 (citation and internal quotation marks omitted). "A plaintiff cannot rebut a reason by simply quarreling with the wisdom of that reason or substituting her business judgment for that of the employer." *Id.* (citation and internal quotation marks omitted). "The plaintiff instead must demonstrate such weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons for its action that a reasonable factfinder could find them unworthy of credence." *Id.* (citation and internal quotation marks omitted). At summary judgment, "it is the plaintiff's burden to provide evidence from which one could reasonably conclude that but for her alleged protected act, her employer would not have fired her." *Gogel*, 967 F.3d at 1136.

Joseph makes three arguments for pretext. None of them persuades us. We address each in turn.

First, Joseph contends that the athletic director had already decided to terminate her before launching the investigation. She argues that the athletic director's comments to his deputy that he had been "working on ... a path forward," the president's chief of staff's impression that the athletic director intended to use the parents' letters to "negotiate" Joseph's resignation, and the speed with which the athletic director responded to the first parent letter—in contrast to a previous, self-reported allegation against the men's basketball coach—all point to a predetermined outcome of the investigation. But the athletic director clearly had a legitimate reason for initiating the investigation based on the parents' letters, and Joseph's suggestions to the contrary establish only that the letters arrived during administrative discussions about Joseph and the women's basketball team. *See Berry v. Crestwood Healthcare LP*, 84 F.4th 1300, 1309 (11th Cir. 2023) (noting that an "intervening discovery of misconduct [can] undercut[ ]" an inference of retaliation). Moreover, the general counsel recommended conducting an independent investigation, and the president approved that recommendation. So, even if Joseph's evidence raised a genuine question about the athletic director's motives, independent decisionmakers agreed that the investigation was necessary.

Second, Joseph attacks the independence of the investigation and report. She contends that the athletic director "manipulated the investigation" by selecting a "biased"

official who recommended witnesses that would criticize Joseph. But again none of the evidence she points to supports her conclusion.

At most, the evidence suggests that the Athletic Department supported the investigation and helped the investigator coordinate witnesses and schedules. And Joseph offers no evidence that bias infected either the investigation itself or the decision to fire her. *See Pennington v. City of Huntsville*, 261 F.3d 1262, 1270 (11th Cir. 2001) ("Where a decisionmaker conducts his own evaluation and makes an independent decision, his decision is free of the taint of a biased subordinate employee."). Indeed, the athletic director testified that he did not "oversee the investigation," nor did he speak to the investigator before the investigation began; instead, the general counsel's office handled coordination of the investigation. That coordination is insufficient to raise an inference of manipulation ***873** that would undermine the legitimacy of the investigation report.

Finally, Joseph argues that the athletic director did not honestly believe that the report's conclusions warranted her termination. Joseph attacks the athletic director's conclusion that the report conveyed that "the entire team" had complained about Joseph's conduct or the team environment. And Joseph asserts that the report's failure to provide the specific context for "certain words or actions" that interviewees had complained about raised an inference that the athletic director did not actually conclude that Joseph "engaged in inappropriate coaching practices." But the report provides multiple examples of inappropriate behavior, verbal abuse, and a toxic environment.

The report conveyed that "every [current] member of the team reported serious concerns regarding player mistreatment." That the report did not discuss every possible fact does not undermine its conclusion. *Cf. Berry*, 84 F.4th at 1309. The athletic director certainly could have believed that conclusion warranted Joseph's termination, and he testified that he did believe it. *See Alvarez v. Royal Atl. Devs., Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) ("The inquiry into pretext centers on the employer's beliefs."). Joseph points to no evidence suggesting that the athletic director—or any of the other decisionmakers involved—disbelieved the report's findings, and her arguments that the athletic director *should not* have believed the report do little more than "quarrel[ ] with the wisdom" of his belief. *See Patterson*, 38 F.4th at 1352 (citation and internal quotation marks omitted).

Patterson is instructive. There, the plaintiff offered evidence that created a material factual dispute that her employer's reliance on a deadline was a false reason for firing her and that her employer did not follow its normal practices in investigating her absences from work. *Id.* at 1353. And, immediately before firing her, the plaintiff's employer told her that her description of her protected activity "made things clear" to him about her loyalty to the company. *Id.* at 1354 (internal quotation marks omitted). Those facts raised reasonable inferences of pretext.

In contrast, Joseph has produced no evidence that the behavior in the report was not actually against Georgia Tech policy or that the investigation and report did not involve many serious complaints. Even her brief discussion of a previous investigation of a self-reported accusation against the men's basketball coach proves nothing about the typical response to the kinds of complaints lodged against Joseph. Her strained inferences of a predetermined outcome, manipulation, and disbelief cannot rebut the Board's legitimate reasons for terminating her. We affirm the summary judgment against Joseph's claims of retaliation.

V. CONCLUSION

We **AFFIRM** the judgment against Joseph's complaint.

We **REVERSE** the denial of the motion to dismiss Crowther's claims and **REMAND** with instructions to dismiss. **SO ORDERED.**

All Citations

121 F.4th 855, 436 Ed. Law Rep. 524, 30 Fla. L. Weekly Fed. C 1655

End of Document

2025 WL 1873012
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United States District Court, W.D. Oklahoma.

Kathy R. NIX, Plaintiff,

v.

The State of **OKLAHOMA** EX REL., **OKLAHOMA** CITY **COMMUNITY COLLEGE**, Defendant.

Case No. CIV-25-102-D
|
Signed July 7, 2025

Attorneys and Law Firms

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Cameron Skinner, Samuel R. Fulkerson, Ogletree Deakins Nash Smoak & Stewart, Oklahoma City, OK, for Defendant.

ORDER

TIMOTHY D. DeGIUSTI, Chief United States District Judge

***1** Before the Court is Defendant's Motion to Dismiss Plaintiff's First Amended Complaint and Brief in Support [Doc. No. 10]. Defendant seeks dismissal pursuant to Fed. R. Civ. P. 12(b)(6). For the reasons set forth below, the motion is granted in part and denied in part.

Factual Background

Defendant is the State of **Oklahoma** ex rel., **Oklahoma** City **Community College** ("Defendant" or "OCCC"), a governmental entity. Plaintiff, Kathy Nix, is OCCC's former employee. Ms. Nix sues OCCC alleging claims for retaliation under (1) the Rehabilitation Act of 1973 ("Rehabilitation Act") (29 U.S.C. § 701, et seq.), and (2) Title IX of the Education Amendments Act of 1972 ("Title IX") (20 U.S.C. §§ 1681-1688).

According to the complaint, from 2001 through her dismissal in September 2024, Ms. Nix "managed OCCC's website." She did not, however, "have the knowledge or ability to make changes in the website herself. Her role consisted of review and recommendations."

In June 2023, Ms. Nix "directed Modern Campus," a "content management system," to update OCCC's website to ensure 100% Americans with Disabilities Act of 1990 ("ADA") compliance for the visually impaired. Ms. Nix had been accustomed to making such requests in the past. This time, however, OCCC's recently hired Executive Director, Sarah Barrow, "became upset" because Ms. Nix did not obtain Ms. Barrow's prior approval.

Around the same time, Ms. Nix reviewed certain graphic design changes proposed by Robert Ruiz, OCCC's Interim Marketing Director. Ms. Nix "discovered [that the proposed changes were] 80% noncompliant under the ADA[.]" Ms. Nix then approached Ms. Barrow about the problem but was told "you are going to do what I'm telling you to do whether you like it or not."

After that conversation, Ms. Nix began to discuss ADA compliance with staff "outside of her chain of command." Specifically, she spoke with OCCC's Disability Coordinator and OCCC's Chief Development Officer.

Shortly thereafter, several OCCC employees informed Ms. Nix about a screenshot of a conversation held over Microsoft Teams between Ms. Barrow and OCCC's Director of Communications. In the screenshot, Ms. Barrow complained "about Ms. Nix fussing over OCCC's website," adding that Ms. Nix was "way overpaid and just whines."

On September 6, 2023, Ms. Nix reported to OCCC's Title IX reporting office that she was experiencing workplace harassment and discrimination. According to the complaint, "Ms. Nix had a good faith belief that she had been discriminated against ... on the basis of her reports of non-compliance with the ADA when she reported workplace harassment and discrimination to OCCC's Title IX office."

Two days later, Ms. Nix was dismissed. In the complaint, Ms. Nix states that performance-based rationalizations were later invented to justify her discharge.

Standard of Decision

"To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' " *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. Determining whether a complaint states a plausible claim for relief is a "context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.* at 679. In assessing plausibility, a court should first disregard conclusory allegations and "next consider the factual allegations in [the] complaint to determine if they plausibly suggest an entitlement to relief" under the legal theory proposed. *Id.* at 681; *see Lane v. Simon*, 495 F.3d 1182, 1186 (10th Cir. 2007).

Analysis

1. *Retaliation under the Rehabilitation Act*

***2** The Rehabilitation Act "prohibits discrimination against handicapped persons in any program or activity receiving federal financial assistance." *U.S. Dep't of Transp. v. Paralyzed Veterans of Am.*, 477 U.S. 597, 599 (1986). To state a claim for retaliation under the Rehabilitation Act, a plaintiff must show 1) that she engaged in a protected activity; 2) that she suffered a materially adverse action either after or contemporaneous with her protected activity; and 3) a causal connection between the protected activity and the adverse action. *Reinhardt v. Albuquerque Pub. Sch. Bd. of Educ.*, 595 F.3d 1126, 1131 (10th Cir. 2010).

In its motion to dismiss, Defendant asserts that Plaintiff has failed to allege facts sufficient to show that Ms. Nix engaged in protected activity. According to Defendant, the so-called "Manager Rule" renders Ms. Nix's actions unprotected under the Rehabilitation Act.

The Manager Rule was recognized by the Tenth Circuit in *McKenzie v. Renberg's Inc.*, 94 F.3d 1478 (10th Cir. 1996). There, the Circuit addressed the definition of "protected activity" in the context of a claim for retaliation under the Fair Labor Standards Act.[1] The court held that protected activity requires a plaintiff to "step outside his or her role of representing the company and either file or threaten to file an action adverse to the employer, actively assist other employees in asserting [statutory] rights, or otherwise engage in activities that reasonably could be perceived as directed towards the assertion of [those protected rights]." *Id.* at 1486-87 (editing citations to the Fair Labor Standards Act). According to Defendant, because Ms. Nix managed the website, nothing in her complaint demonstrated that she stepped outside of her role representing the company.

***3** In her Response, Plaintiff challenges Defendant's argument both factually and legally. Factually, Plaintiff points out that she did not directly control the website, she complained to employees outside of her chain of command, and ultimately reported the OCCC's alleged discrimination to the school's Title IX office. Importantly, the complaint did not allege that Ms. Nix oversaw the website's ADA compliance. Plaintiff therefore asserts that the Manager Rule is inapplicable because she stepped outside of her role to actively engage in activities directed toward the assertion of statutorily protected rights.

At this stage in the litigation, the Court accepts all well-pled facts and adopts all reasonable inferences in the light most favorable to the nonmoving party. Each of the facts that Plaintiff highlights could reasonably be interpreted as falling outside the purview of Ms. Nix's role with the OCCC. The Court therefore finds that the Manager Rule is inapplicable, and Plaintiff has alleged minimally sufficient facts to demonstrate a claim upon which relief can be granted for retaliation under the Rehabilitation Act.

Having found for Plaintiff that she has alleged sufficient facts to avoid dismissal, the Court has no need to address Plaintiff's legal argument—that the Manager Rule has either been narrowed by later Supreme Court precedent—*see supra* Footnote 1—or else is not applicable to claims for retaliation under the Rehabilitation Act.

2. *Retaliation Under Title IX*

Defendant argues that Ms. Nix failed to allege a cause of action for retaliation under Title IX. In Defendant's understanding, Title IX provides a private cause of action for individuals who have been retaliated against for complaining specifically about discrimination on the basis of sex. And because according to Plaintiff's complaint, "Ms. Nix had a good faith belief that she had been discriminated against ... *on the basis of her reports of non-compliance with the ADA*," remedies under Title IX are unavailable.

Plaintiff responds, arguing that Title IX affords broader protection. In support, she cites *Neely v. City of Broken Arrow,*

Oklahoma, No. 07-CV-0018-CVE-FHM, 2007 WL 1574762, at *2 (N.D. Okla. May 29, 2007) (addressing Title VII), and *Robinson v. Wichita State Univ.*, No. 16-2138-DDC-GLR, 2018 WL 836294 (D. Kan. Feb. 13, 2018).

In *Neely*, the court ruled "that a plaintiff can successfully maintain a retaliation claim even if the conduct which the plaintiff opposed (i.e. the underlying conduct) does not actually violate Title VII." *Neely*, 2007 WL 1574762, at *2. According to Plaintiff, the same should be true of Title IX. In *Robinson*, the court found that "[e]ducational institutions [ ] can incur liability under Title IX if they retaliate against a person who has complained about discrimination aimed at the complainant." *Robinson*, 2018 WL 836294, at *3. Because the *Robinson* court used broad language, Plaintiff argues that she has a cause of action for retaliation under Title IX even though the complained-of underlying discrimination was not based on sex.

Upon consideration of the relevant caselaw, the Court agrees with Defendant.[2] In *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167, 183 (2005) the Supreme Court recognized a private actionable claim for retaliation under Title IX. The Supreme Court specifically held that "Title IX encompasses claims of retaliation" so long as "the funding recipient retaliates against an individual because [s]he has complained *about sex discrimination*." *Id.* at 171 (emphasis added); *see also Doe through Doe v. Rocky Mountain Classical Acad.*, 99 F.4th 1256, 1262 (10th Cir. 2024) ("To state a Title IX retaliation claim, Plaintiff must allege that [the defendant] retaliated against him *because* he complained of sex discrimination.") (emphasis original) (citing *Jackson*, 544 U.S. at 184); *Hiatt v. Colorado Seminary*, 858 F.3d 1307, 1315 (10th Cir. 2017) (Title IX "prohibits retaliation against individuals because they have complained of sex discrimination.").

***4** Plaintiff's two cited cases are taken out of context. In *Neely*, the court stated, "[a] plaintiff need [ ] show that he had a reasonable and good faith belief that he opposed or participated in the investigation of conduct made unlawful under Title VII." *Neely*, 2007 WL 1574762, at *2. The *Neely* court thereby made clear that the underlying discrimination in that case bore some relation to the plaintiff's claim for retaliation under the pertinent statute. The same is true in *Robinson*. *See Robinson*, 2018 WL 836294, at *3 ("the Complaint allege[d] that plaintiff helped others assert rights under Title IX."). Therefore, neither case provides a basis by which to conclude a plaintiff may have a cause of action for retaliation arising from a statute that bears no relation to the complained-of discrimination.

Here, Ms. Nix did not complain about underlying discrimination on the basis of sex, but on the basis of disability. Her decision to complain to OCCC's Title IX office does not give her a cause of action sounding in Title IX. Defendant's motion to dismiss is therefore granted as to this point, and Plaintiff's claim for retaliation under Title IX is dismissed.

IT IS THEREFORE ORDERED that Defendant's Motion to Dismiss Plaintiff's First Amended Complaint and Brief in Support [Doc. No. 10] is **GRANTED** in part and **DENIED** in part as set forth herein.

IT IS SO ORDERED this 7th day of July, 2025.

All Citations

Slip Copy, 2025 WL 1873012

Footnotes

1 Defendant cites *Weeks v. Kansas*, 503 F. App'x 640, 643 (10th Cir. 2012) (unpublished), for the proposition that the Tenth Circuit has also applied the Manager Rule to cases alleging retaliation in the Title VII context. Defendant therefore argues this Court should extend the Manager Rule to retaliation claims under the Rehabilitation Act for the same reasons.

Weeks, however, does not clearly dictate Defendant's proposed outcome. In fact, *Weeks* seems to indicate that *McKenzie*'s ongoing relevance is in doubt. As then-Circuit Judge Gorsuch, wrote,

> "A few years ago, and well after *McKenzie*, the Supreme Court suggested that all one has to do to oppose an unlawful employment practice in Title VII cases is to 'antagonize ...; contend against; ... confront; resist; or withstand' [the unlawful practice]. *Crawford v. Metro. Gov't of Nashville & Davidson Cnty.*, 555 U.S. 271, 276 (2009). Whether and how this general standard meshes with *McKenzie's* preexisting and more particular [Manager] [R]ule for retaliation

> claims ... *is not clear.* But this [was not raised] in the district court—or, for that matter in this court [and we therefore do not rule on it]." *Weeks*, 503 F. App'x at 643 (emphasis added).

Id; *see also* *Loudon v. K.C. Rehab. Hosp., Inc.*, 339 F. Supp. 3d 1231, 1238, n. 3 (D. Kan. 2018) ("Post-*Crawford*, the Tenth Circuit declined to address *Crawford's* impact. [Citing *Weeks*]."); *Robinson v. Wichita State Univ.*, No. 16-2138-DDC-GLR, 2018 WL 836294, at *4 (D. Kan. Feb. 13, 2018) (stating *Weeks* presented "materially different facts" than cases invoking the Manager Rule); *but see* *DeMasters v. Carilion Clinic*, 796 F.3d 409, 424 n.8 (4th Cir. 2015) (stating the Tenth Circuit "adopted the 'manager rule' in the Title VII context [in *Weeks*]").

2 *Twombly*, 550 U.S. at 555 ("[T]he tenet that a court must accept as true all of the allegations contained in the complaint is inapplicable to legal conclusions.").

End of Document

National Association of College and University Attorneys

The Title IX Regulations

Unofficial Version Published on the U.S. Department of Education Website on May 6, 2020

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Definitions			
Actual Knowledge	"Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient…."		§106.30
	"This [actual knowledge] standard is not met when the only official of the recipient with actual knowledge is the respondent."		§106.30
	"The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient."		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment).		§106.8
Clear and Convincing Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used.	p. 1319
		Preamble Definition: [H]aving confidence that a conclusion is based on facts that are highly probable to be true.	p. 1314
		Preamble Definition: A clear and convincing evidence standard of evidence is understood to mean concluding that a fact is highly probable to be true. *E.g.*, *Sophanthavong v. Palmateer*, 378 F.3d 859, 866-67 (9th Cir. 2004) (a clear and convincing evidence standard requires "sufficient evidence to produce in the ultimate factfinder an abiding conviction that the truth of its factual contentions are [*sic*] highly probable.") (internal quotation marks and citation omitted; brackets in original).	p. 1314, n. 1473
Complainant	"[A]n individual who is alleged to be the victim of conduct that could constitute sexual harassment"		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.	p. 411 *See also* p. 708
		Alumni Complainants: A complainant who has graduated may still be "attempting to participate" in the recipient's education program or activity; for example, where the complainant has graduated from one program but intends to apply to a different program, or where the graduated complainant intends to remain involved with a recipient's alumni programs and activities.	p. 411 *See also* p. 709
		Complainants on Leaves of Absence: [A] complainant who is on a leave of absence may be "participating or attempting to participate" in the recipient's education program or activity.	p. 411 *See also* p. 709
		Prospective Enrollees: [A] complainant who has left school because of sexual harassment, but expresses a desire to re-enroll if the recipient appropriately responds to the sexual harassment, is "attempting to participate" in the recipient's education program or activity.	p. 411 *See also* p. 709
Consent	The Assistant Secretary will not require recipients to adopt a particular definition of consent with respect to sexual assault.		§106.30
		Definition Required: Recipients must clearly define consent and must apply that definition consistently[.]	p.364 *See also* p. 365
		Discretion to Craft Definition: The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.	p. 363 *See also* pps. 545, 1195

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Absence of or Negation of Consent: [T]he Department leaves flexibility to recipients to define consent as well as terms commonly used to describe the absence or negation of consent (e.g., incapacity, coercion, threat of force).	p. 487 *See also* p. 541-42
		Burden of Proof: [T]o the extent recipients "misuse affirmative consent" (or any definition of consent) by applying an instruction that the respondent must prove the existence of consent, such a practice would not be permitted.	p.364
		Burden of Proof: The final regulations do not permit the recipient to shift that burden to a respondent to prove consent, and do not permit the recipient to shift that burden to a complainant to prove absence of consent.	p. 365
		Intersection with Rape Shield Protections: The second of the two exceptions to the rape shield protections refers to "if offered to prove consent" and thus the scope of that exception will turn in part on the definition of consent adopted by each recipient.	p. 1195
Days		[B]ecause the Department does not require a specific method for calculating "days," recipients retain the flexibility to adopt the method that works best for the recipient's operations; for example, a recipient could use calendar days, school days, or business days, or a method the recipient already uses in other aspects of its operations.	p. 591 *See also* pps. 1043, 1105, 1480
Deliberate Indifference	A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		§106.44(a)
Directly Related		The Department declines to define certain terms in this provision such as …"evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.	p. 1017

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		We note that "directly related" in § 106.45(b)(5)(vi) aligns with requirements in FERPA, 20 U.S.C. 1232g(a)(4)(A)(i).	p. 1017
Education Program or Activity	"[E]ducation program or activity" includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.		§106.44(a)
Final Determination		A "final" determination means the written determination containing the information required in § 106.45(b)(7), as modified by any appeal by the parties.	p. 1340
Formal Complaint	[A] document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment		§106.30
	At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Informal Resolution		The Department believes an explicit definition of "informal resolution" in the final regulations is unnecessary. Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.	p. 1370
Preponderance of the Evidence		No Regulatory Definition: The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative	p. 1319
		Preamble Definition: [The] conclusion is based on facts that are more likely true than not.	p. 1314
		Preamble Definition: A preponderance of the evidence standard of evidence is understood to mean concluding that a fact is more likely than not to be true. *E.g.*, *Concrete Pipe & Prod. of Cal., Inc. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622 (1993) (a preponderance of the evidence standard "requires the trier of fact to believe that the existence of a fact is more probable than its nonexistence") (internal quotation marks and citation omitted).	p. 1314, n. 1472
Respondent	[A]n individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Student, Employee, and Faculty Respondents: [A]ny "individual" can be a respondent, whether such individual is a student, faculty member, another employee of the recipient, or other person with or without any affiliation with the recipient.	p. 416
Remedies	Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.		§106.45(b)(1)(i)
Sex (i.e. "Because of Sex")		No Regulatory Definition: The Department did not propose a definition of "sex" in the NPRM and declines to do so in these final regulations.	p. 553 *See also* pps. 556, 557, 560
		Anyone May Experience Discrimination: Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation.	p. 556 *See also* pps. 554, 558, 561
		Sex Stereotyping: Nothing in these final regulations, or the way that sexual harassment is defined in § 106.30, precludes a theory of sex stereotyping from underlying unwelcome conduct on the basis of sex.	p. 557

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Sexual Harassment	Conduct on the basis of sex that satisfies one or more of the following: (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct; (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity; or 2015 (3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as defined in 34 U.S.C. 12291(a)(8), or "stalking" as defined in 34 U.S.C. 12291(a)(30).		§106.30
Supportive Measures	[N]on-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.		§106.30

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	[Supportive] measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.		§106.33
	Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures.		§106.33

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Jurisdiction			
Jurisdiction	A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		§106.44 (a)
Actual Knowledge	*See* regulatory definition *supra* p. 1.		
		Fact-Specific Inquiry: [D]etermining which employees may be officials with authority is fact-specific.	p. 311
		Designate Officials with Authority to Implement Corrective Measures: A recipient also may empower as many officials as it wishes with the requisite authority to institute corrective measures on the recipient's behalf, and notice to these officials with authority constitutes the recipient's actual knowledge and triggers the recipient's response obligations. Recipients may also publicize lists of officials with authority.	p. 300 *See also* p. 320
		Designating Mandatory Reporters: [N]othing in the proposed or final regulations prevents recipients (including postsecondary institutions) from instituting their own policies to require professors, instructors, or all employees to report to the Title IX Coordinator every incident and report of sexual harassment.	p. 300 *See also* pps. 316, 320, 604

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Mandatory Reporter ≠ Employee with Authority to Implement Corrective Measures: [T]he mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient.	p. 321
		No Formal Complaint Required: [A] recipient may have actual knowledge of sexual harassment even where no person has reported or filed a formal complaint about the sexual harassment.	p. 673
Sexual Harassment	*See* regulatory definition *supra* p. 8.		
		Quid Pro Quo and *Per Se* Harassment: [The] other categories (*quid pro quo*; sexual assault and three other Clery Act/VAWA offenses) . . . do not require elements of severity, pervasiveness, or objective offensiveness.	p. 425 *See also* pps. 432, 461, 469
		Verbal Harassment: The three-pronged definition of sexual harassment in § 106.30 captures physical and verbal conduct serious enough to warrant the label "abuse[.]"	p. 476
		Evaluating Severity, Pervasiveness, and Objective Offensiveness: Elements of severity, pervasiveness, and objective offensiveness must be evaluated in light of the known circumstances and depend on the facts of each situation, but must be determined from the perspective of a reasonable person standing in the shoes of the complainant.	p. 477
		No Showing of Intent Required: The *Davis* standard does not require an "intent" element; unwelcome conduct so severe, pervasive, and objectively offensive that it denies a person equal educational opportunity is actionable sexual harassment regardless of the respondent's intent to cause harm.	pps. 515-16
		Sexual Exploitation: [S]exual exploitation constitutes sexual harassment as defined in § 106.30.	p. 559

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Education Program or Activity	*See* regulatory definition *supra* p. 5.		
		Off Campus ≠ Outside Institution's Education Program or Activity: "[O]ff campus" does not automatically mean that the incident occurred outside the recipient's education program or activity.	p. 630 *See also* p. 636
		Key Questions: Whether sexual harassment occurs in a recipient's education program or activity is a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.	p. 654 *See also* pps. 624, 625-26
		Factors to Consider: whether the recipient funded, promoted, or sponsored the event or circumstance where the alleged harassment occurred	p. 625
		Factors to Consider: [N]o single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred, or whether an incident occurred.	p. 624 *See also* p. 644
		Recognized, Off-Campus Student Organizations: [W]here a postsecondary institution has officially recognized a student organization, the recipient's Title IX obligations apply to sexual harassment that occurs in buildings owned or controlled by such a student organization, irrespective of whether the building is on campus or off campus, and irrespective of whether the recipient exercised substantial control over the respondent and the context of the harassment outside the fact of officially recognizing the fraternity or sorority that owns or controls the building.	p. 625-26

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Recognized, Off-Campus Student Organizations: Where a postsecondary institution has officially recognized a student organization, and sexual harassment occurs in an off campus location *not* owned or controlled by the student organization yet involving members of the officially recognized student organization, the recipient's Title IX obligations will depend on whether the recipient exercised substantial control over the respondent and the context of the harassment, or whether the circumstances.	p. 627
		Cyber Harassment: "[P]rogram or activity" encompass "all of the operations of" such recipients, and such "operations" may certainly include computer and internet networks, digital platforms, and computer hardware or software owned or operated by, or used in the operations of, the recipient.	p. 644
		Off-Campus Conduct that has Effects in Education Program or Activity: [A] recipient may be deliberately indifferent to sexual harassment that occurred outside the recipient's control where the complainant has to interact with the respondent in the recipient's education program or activity, or where the effects of the underlying sexual assault create a hostile environment in the complainant's workplace or educational environment.	p. 636 *See also* p. 632
		Discretion to Levy Separate Conduct Charges for Misconduct Outside Education Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.	p. 631 *See also* p. 634
		Complainant Connection to Education Program or Activity: [A] complainant must be participating in, or attempting to participate in, the recipient's education program or activity at the time of filing a formal complaint.	p. 411 *See also* p. 708.

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Against a Person in the United States		No Extraterritorial Application: Title IX does not have extraterritorial application.	p. 658
		Study Abroad: We acknowledge the concerns raised by many commenters that the final regulations would not extend Title IX protections to incidents of sexual misconduct occurring against persons outside the United States, and the impact that this jurisdictional limitation might have on the safety of students participating in study abroad programs. However, by its plain text, the Title IX statute does not have extraterritorial application.	Pps. 656-67
		Study Abroad: We emphasize that nothing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 660
Deliberate Indifference	*See* regulatory definition *supra* p. 4.		
		[Even in the absence of a Formal Complaint signed by the complainant], some circumstances may require a recipient (via the Title IX Coordinator) to initiate an investigation and adjudication of sexual harassment allegations in order to protect the recipient's educational community or otherwise avoid being deliberately indifferent to known sexual harassment.	p. 389
What triggers an institution's obligations?			
General Obligations: Actual Knowledge	A recipient with actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States, must respond promptly in a manner that		§106.44(a)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	is not deliberately indifferent. A recipient is deliberately indifferent only if its response to sexual harassment is clearly unreasonable in light of the known circumstances.		
Obligation to Initiate a Formal Grievance Process: Formal Complaint	In response to a formal complaint, a recipient must follow a grievance process that complies with §106.45.		§106.44 (b)(1)
	At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed.		§106.30
		Institutional Form Prohibited: [E]ven if a recipient desires for complainants to only use a specific form for filing formal complaints, these final regulations permit a complainant to file a formal complaint by either using the recipient-provided form (or electronic submission system such as through an online portal provided for that purpose by the recipient), or by physically or digitally signing a document and filing it as authorized (i.e., in person, by mail, or by e-mail) under these final regulations.	p. 1638
		Detailed Facts Not Required: The § 106.30 definition of "formal complaint" requires a document "alleging sexual harassment against a respondent," but contains no requirement as to a detailed statement of facts.	p. 384

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		No Statute of Limitations: [T]here is no time limit on a complainant's decision to file a formal complaint.	p. 385 *See also* p. 372, 689, 708
		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
		Filing by Title IX Coordinator: When a Title IX Coordinator believes that with or without the complainant's desire to participate in a grievance process, a non-deliberately indifferent response to the allegations requires an investigation, the Title IX Coordinator should have the discretion to initiate a grievance process.	p. 386 *See also* pps. 389 707
		Filing by Title IX Coordinator: The Title IX Coordinator may consider a variety of factors, including a pattern of alleged misconduct by a particular respondent, in deciding whether to sign a formal complaint.	p. 701
		Filing by Title IX Coordinator: [T]he Title IX Coordinator may take circumstances into account such as whether a complainant's allegations involved violence, use of weapons, or similar factors.	p. 702

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		Filing by Title IX Coordinator (Limitations): [The decision of the Title IX Coordinator to file a Formal Complaint] should be reached thoughtfully and intentionally by the Title IX Coordinator, not as an automatic result that occurs any time a recipient has notice that a complainant was allegedly victimized by sexual harassment.	p. 387
		Filing by Title IX Coordinator (Limitations): The Title IX Coordinator's decision to sign a formal complaint may occur only after the Title IX Coordinator has promptly contacted the complainant (i.e., the person alleged to have been victimized by sexual harassment) to discuss availability of supportive measures, consider the complainant's wishes with respect to supportive measures, and explain to the complainant the process for filing a formal complaint. Thus, the Title IX Coordinator's decision to sign a formal complaint includes taking into account the complainant's wishes regarding how the recipient should respond to the complainant's allegations.	p. 701
		Third Parties Cannot File Formal Complaints: Other than a Title IX Coordinator, third parties cannot file formal complaints.	p. 354
		Anonymous Complaints: Where a complainant desires to initiate a grievance process, the complainant cannot remain anonymous or prevent the complainant's identity from being disclosed to the respondent (via the written notice of allegations).	p. 394
		Anonymous Complaints: When a formal complaint is signed by a Title IX Coordinator rather than filed by a complainant, the written notice of allegations in § 106.45(b)(2) requires the recipient to send both parties details about the allegations, including the identity of the parties if known . . . . [T]he grievance process may proceed if the Title IX Coordinator	Pps. 395-96

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		determines it is necessary to sign a formal complaint, even though the written notice of allegations does not include the complainant's identity.	
		Unwilling Complainant: If the Title IX Coordinator signs a formal complaint against the wishes of the complainant, then the recipient likely will have difficulty obtaining evidence from the complainant that is directly related to the allegations in a formal complaint.	p. 1477
		Unknown Respondent: A recipient must investigate a complainant's formal complaint even if the complainant does not know the respondent's identity, because an investigation might reveal the respondent's identity, at which time the recipient would be obligated to send both parties written notice.	p. 413
Obligation to Provide Supportive Measures: Actual Knowledge, With or Without Formal Complaint	The Title IX Coordinator must promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures with or without the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.		§106.44(a)
	With or without a formal complaint, a recipient must comply with §106.44.		§106.44(b)(1)
		Examples of Supportive Measures: Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of	p. 1370

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		absence, increased security and monitoring of certain areas of the campus, and other similar measures.	
		Oral or Written Notice: No written document is required to put a school on notice (i.e., convey actual knowledge) of sexual harassment triggering the recipient's response obligations under § 106.44(a).	p. 384
		Third Party Reports: [A]ny person (including third parties) can report[.]	p. 351 *See also* pps. 605, 614
		Anonymous Reports: [T]he final regulations do not prohibit recipients from implementing anonymous (sometimes called "blind") reporting.	p.391
		Fact-Specific Analysis: [T]he determination of appropriate supportive measures in a given situation must be based on the facts and circumstances of that situation.	p. 569
		Interactive Process: A recipient should engage in a meaningful dialogue with the complainant to determine which supportive measures may restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.	p. 669 *See also* p. 880, 921, 1022
		Confidentiality: If a complainant desires supportive measures, the recipient can, and should, keep the complainant's identity confidential (including from the respondent), unless disclosing the complainant's identity is necessary to provide supportive measures for the complainant (e.g., where a no-contact order is appropriate and the respondent would need to know the identity of the complainant in order to comply with the no-contact order, or campus security is informed about the no-contact order in order to help enforce its terms).	p. 393 *See also* p. 614, 921, 1469

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		Burden on Parties: The plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose *any* burden on the other party; rather, this provision specifies that the supportive measures cannot impose an *unreasonable* burden on the other party.	p. 565
		Burden on Parties: [T]he [supportive] measure cannot punish, discipline, or unreasonably burden the respondent.	p. 566
		Burden on Parties (Examples): Removal from sports teams (and similar exclusions from school-related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the recipient is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth.	p. 570
		Burden on Parties (Examples): [W]here both parties are athletes and sometimes practice on the same field, consideration must be given to the scope of a no-contact order that deters sexual harassment, without unreasonably burdening the other party, with the goal of restricting contact between the parties without requiring either party to forgo educational activities. It may be unreasonably burdensome to prevent respondents from attending extra-curricular activities that a recipient offers as a result of a one-way no contact order prior to being determined responsible; similarly, it may be unreasonably burdensome to	p. 578 *See also* p. 750

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		restrict a complainant from accessing campus locations in order to prevent contact with the respondent.	
		Burden on Parties (Examples): A school may conclude that transferring the respondent to a different section of that class (e.g., that meets on a different day or different time than the class section in which the complainant and respondent are enrolled) is a reasonably available supportive measure that preserves the complainant's equal access and protects the complainant's safety or deters sexual harassment, while not constituting an unreasonable burden on the respondent (because the respondent is still able to take that same class and earn the same credits toward graduation, for instance). If, on the other hand, that class in which both parties are enrolled does not have alternative sections that meet at different times, and precluding the respondent from completing that class would delay the respondent's progression toward graduation, then the school may determinate that requiring the respondent to drop that class would constitute an unreasonable burden on the respondent and would not quality as a supportive measure, although granting the complainant an approved withdrawal from that class with permission to take the class in the future, would of course constitute a permissible supportive measure for the recipient to offer the complainant.	p. 754 *See also* p. 881
		Supportive Measures Cannot Amount to Sanctions: If a recipient has listed ineligibility to play on a sports team or hold a student government position, for example, as a possible disciplinary sanction that may be imposed following a determination of responsibility, then the recipient may not take that action against a respondent without first following the § 106.45 grievance process.	p. 570-71

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		One Way No Contact Order May Be Appropriate in Limited Circumstances: §106.30 does not mean that one-way no-contact orders are never appropriate. A fact-specific inquiry is required into whether a carefully crafted no-contact order restricting the actions of only one party would meet the § 106.30 definition of supportive measures. For example, if a recipient issues a one-way no-contact order to help enforce a restraining order, preliminary injunction, or other order of protection issued by a court, or if a one-way no-contact order does not unreasonably burden the other party, then a one-way no contact order may be appropriate. . . . [E]mergency removal . . . could include a no-trespass or other no-contact order issued against a respondent.	p. 577
		Title IX Coordinator Implements Supportive Measures: [T]he Title IX Coordinator must serve as the point of contact for the affected students to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements within the recipient's own system does not fall on the student receiving the supportive measures.	p. 575 *See also* p. 880
		Documentation Required for *not* Providing Supportive Measures: [I]f a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances under §106.45(b)(10)(ii).	p. 567 *See also* pps. 598-99, 706
		Compliance Standard: A recipient will have sufficiently fulfilled its obligation to offer supportive measures as long as the offer is not clearly unreasonable in light of the known circumstances.	p. 670

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Dismissal of Formal Complaint Prior to Full Resolution			
Grounds for Dismissal (Mandatory)	If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, did not occur in the recipient's education program or activity, or did not occur against a person in the United States, then the recipient 2022 must dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; such a dismissal does not preclude action under another provision of the recipient's code of conduct.		§106.45(b)(3)(i)
Grounds for Dismissal (Discretionary)	The recipient may dismiss the formal complaint or any allegations therein, if at any time during the investigation or hearing: a complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; the respondent is no longer enrolled or employed by the recipient; or specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to		§106.45(b)(3)(ii)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	the formal complaint or allegations therein.		
		Meritless or Frivolous Allegations: Permitting a recipient to deem allegations meritless or frivolous without following the § 106.45 grievance process would defeat the Department's purpose.	p. 688
		Discretionary Dismissals: By granting recipients the discretion to dismiss in situations where the respondent is no longer a student or employee of the recipient, the Department believes this provision appropriately permits a recipient to make a dismissal decision based on reasons that may include whether a respondent poses an ongoing risk to the recipient's community, whether a determination regarding responsibility provides a benefit to the complainant even where the recipient lacks control over the respondent and would be unable to issue disciplinary sanctions, or other reasons. The final category of discretionary dismissals addresses situations where specific circumstances prevent a recipient from meeting the recipient's burden to collect evidence sufficient to reach a determination regarding responsibility; for example, where a complainant refuses to participate in the grievance process (but also has not decided to send written notice stating that the complainant wishes to withdraw the formal complaint), or where the respondent is not under the authority of the recipient (for instance because the respondent is a non-student, non-employee individual who came onto campus and allegedly sexually harassed a complaint), and the recipient has no way to gather evidence sufficient to make a determination, this provision permits dismissal.	pps. 965-66

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Written Notice Required for Dismissals	Upon a dismissal required or permitted pursuant to paragraph (b)(3)(i) or (b)(3)(ii) of this section, the recipient must promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.		§106.45(b)(3)(iii)
Discretion to Proceed with Conduct Action Pursuant to Institution's Community Standards	[A] dismissal [under this section] does not preclude action under another provision of the recipient's code of conduct.		§106.45(b)(3)(i)
		Discretion to Maintain and Enforce Community Standards: [T]he three-pronged definition of sexual harassment in § 106.30 provides clear requirements for recipients to respond to sexual harassment that constitutes sex discrimination prohibited under Title IX, while leaving recipients flexibility to address other forms of misconduct to the degree, and in the manner, best suited to each recipient's unique educational environment.	p. 432 *See also* pps. 441, 457, 472, 481, 492, 496, 545
		Flexibility in Structuring Non-Title IX Proceedings: [I]f a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so. Alternatively, a recipient may respond to non-Title IX misconduct under disciplinary procedures that do not comply with § 106.45. The final regulations leave recipients flexibility in this regard, and prescribe a particular grievance process only	p. 482 *See also* p. 645, 687, 962, 963

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		where allegations concern sexual harassment covered by Title IX.	
		Behavioral Expectations for Students and Faculty: [A] recipient's own code of conduct that might impose behavioral expectations on students and faculty distinct from Title IX's non-discrimination mandate."	p. 457
		Outside Program or Activity: [N]othing in the final regulations precludes the recipient from choosing to also address allegations of conduct outside the recipient's education program or activity.	p. 631 *See also* p. 633, 635-36, 653
		Outside of U.S.: [N]othing in these final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to address sexual misconduct against a person outside the United States.	p. 660
General Requirements of Formal Grievance Process			
Equitable Treatment	A recipient's response must treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant, and by following a grievance process that complies with § 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.		§106.44(a)
Equitable Treatment	Treat complainants and respondents equitably by providing remedies to a complainant where a determination of		§106.45 (b)(1)(i)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	responsibility for sexual harassment has been made against the respondent, and by following a grievance process that complies with this section before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in § 106.30, against a respondent.		
		Equal vs. Equitable: [W]ith respect to remedies and disciplinary sanctions, strictly equal treatment of the parties does not make sense, and to treat the parties equitably, a complainant must be provided with remedies where the outcome shows the complainant to have been victimized by sexual harassment; similarly, a respondent must be sanctioned only after a fair process has determined whether or not the respondent has perpetrated sexual harassment.	p. 793
Objective Evaluation of Relevant Evidence	[O]bjective evaluation of all relevant evidence – including both inculpatory and exculpatory evidence		§106.45 (b)(1)(ii)
		Different Evidence for Different Circumstances: [T]he type and extent of evidence available will differ based on the facts of each incident.	p. 808
		Evaluating Evidence: "The Department is confident that recipients' desire to provide students with a safe, nondiscriminatory learning environment will lead recipients to evaluate sexual harassment incidents using common sense and taking circumstances into consideration, including the ages, disability status, positions of authority of involved parties, and other factors."	p. 457

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		Privileged Information Excluded: [The regulations] preclude use of any information protected by a legally recognized privilege (e.g., attorney-client).	p. 811
No Conflicts of Interest or Bias	[A]ny individual designated by a recipient as a Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process, [must] not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.		§106.45 (b)(1) (iii)
		Evaluating Bias: Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists.	pps. 827-28
		Initiation of Formal Complaint ≠ Bias: [W]hen a Title IX Coordinator signs a formal complaint, that action does not place the Title IX Coordinator in a position adverse to the respondent; the Title IX Coordinator is initiating an investigation based on allegations of which the Title IX Coordinator has been made aware, but that does not prevent the Title IX Coordinator from being free from bias or conflict of interest with respect to any party.	p. 356 *See also* pps. 399, 400, 697, 1265
		Pursuing Investigation ≠ Bias: Deciding that allegations warrant an investigation does not necessarily show bias or	p. 399

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		prejudgment of the facts for or against the complainant or respondent.	
		No *per se* Conflicts Based on Job Title: [T]he Department declines to define certain employment relationships or administrative hierarchy arrangements as *per se* prohibited conflicts of interest under § 106.45(b)(1)(iii).	p. 826
		Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the	p. 827-28

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		person from obtaining the requisite training to serve impartially in a Title IX role.	
		Statistics Not Determinative of Bias: [T]he mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate or imply bias on the part of Title IX personnel.	p. 829
		Trauma-Informed Approach: [Trauma]-informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.	p. 1088
		Trauma-Informed Approach: [E]xperts believe that application of [trauma-informed] practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.	p. 842
		Trauma-Informed Approach: Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as what the commenter means by "being sensitive" does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party.	p. 842
Adequate and Unbiased Training	A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process		§106.45(b)(1)(3)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.		
	A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.		§106.45(b)(1)(3)
	A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.		§106.45(b)(1)(3)
Presumption of Not Responsible	Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process		§106.45 (b)(1)(iv)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Prompt Timeframe	Include reasonably prompt time frames for conclusion of the grievance process, including reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes		§106.45 (b)(1)(v)
		Institutional Discretion to Set Time Frames: [T]he recipient may select time frames under which the recipient is confident it can conclude the grievance process in most situations, knowing that case-specific complexities may be accounted for with factually justified short-term delays and extensions.	p. 890
		Per se Unreasonable Timeframe: Taking 45 days to respond to a request for access to records would not provide a reasonably prompt time frame for the conclusion of a grievance process.	p. 1471
Prompt Timeframe (Reasons for Delay)	[The process must] allow[] for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action. Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities		§106.45 (b)(1)(v)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		No Specified Number of Days for Delay: [T]he Department declines to specify a particular number of days that constitute "temporary" delays or "limited" extensions of time frames.	p. 900
		Example of Good Cause: [T]he reasons for a party or witness's absence is a factor in a recipient deciding whether circumstances constitute "good cause" for a short-term delay or extension.	p. 902
		Example of Good Cause: [C]oncurrent law enforcement activity *may* constitute good cause for short-term delays.	p. 896 *See also* p. 1484
		Example of Good Cause: [T]he need for parties, witnesses, and other hearing participants to secure transportation, or for the recipient to troubleshoot technology to facilitate a virtual hearing, may constitute good cause to postpone a hearing.	pps. 1227-28
		Not Good Cause: Delays caused solely by administrative needs, for example, would be insufficient to satisfy this standard.	p. 900
		Accommodating Schedules: While recipients must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the recipient's obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness.	p. 891
Describe Range of Sanctions and Remedies	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)(1) (vi)
Describe Standard of Evidence	State whether the standard of evidence to be used to determine responsibility is		§106.45(b)(1) (vii)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	the preponderance of the evidence standard or the clear and convincing evidence standard		
	apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment;		§106.45(b)(1) (vii)
Describe Mandatory Appeals Process and Bases for Appeals	Include the procedures and permissible bases for the complainant and respondent to appeal		§106.45(b)(1) (viii)
Describe Range of Supportive Measures	Describe the range of supportive measures available to complainants and respondents		§106.45(b)(1) (ix)
		Range, not List: [T]he Department is only requiring a recipient's grievance process to describe the *range* of supportive measures available rather than a list of supportive measures available.	p. 917
No Intrusion on Legally-Cognizable Privileges	[The process must] [n]ot require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.		§106.45(b)(1)(x)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Pre-Hearing Investigation			
Emergency Removal	Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.		§106.44 (c)
		Purpose: [E]mergency removal is for the purpose of addressing imminent threats posed to any person's physical health or safety, which might arise out of the sexual harassment allegations.	p. 727
		When Appropriate: [E]mergency removal is not appropriate in every situation where sexual harassment has been alleged, but only in situations where an individualized safety and risk	p. 728 *See also* pps. 734, 755, 759

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		analysis determines that an immediate threat to the physical health or safety of any student or other individual justifies the removal, where the threat arises out of allegations of sexual harassment as defined in § 106.30.	
		When Appropriate: [T]he recipient should not remove a respondent from the recipient's education program or activity pursuant to § 106.44(c) unless there is more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety.	p. 758
		Examples: For example, if a respondent threatens physical violence against the complainant in response to the complainant's allegations that the respondent verbally sexually harassed the complainant, the immediate threat to the complainant's physical safety posed by the respondent may "arise from" the sexual harassment allegations. As a further example, if a respondent reacts to being accused of sexual harassment by threatening physical self-harm, an immediate threat to the respondent's physical safety may "arise from" the allegations of sexual harassment and could justify an emergency removal.	pps. 728-29 *See also* p. 954
		Limitations: An emergency removal under § 106.44(c) does not authorize a recipient to impose an interim suspension or expulsion on a respondent *because* the respondent has been accused of sexual harassment. Rather, this provision authorizes a recipient to remove a respondent from the recipient's education program or activity … when an individualized safety and risk analysis determines that an imminent threat to the physical health or safety of any person, *arising from* sexual harassment allegations, justifies removal.	p. 730
		No Specific Procedures Required: We do not believe that prescribing procedures for the post-removal challenge is	p. 744

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		necessary or desirable, because this provision ensures that respondents receive the essential due process requirements of notice and opportunity to be heard while leaving recipients flexibility to use procedures that a recipient deems most appropriate.	
		Length: The Department declines to put any temporal limitation on the length of a valid emergency removal[.]	p. 747
		Deference: OCR will not second guess a recipient's removal decision based on whether OCR would have weighed the evidence of risk differently from how the recipient weighed such evidence.	p. 766
Administrative Leave	Nothing in this subpart precludes a recipient from placing a non-student employee respondent on administrative leave during the pendency of a grievance process that complies with § 106.45. This provision may not be construed to modify any rights under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.		§106.44 (d)
		With or Without Pay: [T]hese final regulations do not dictate whether administrative leave during the pendency of an investigation under § 106.45 must be with pay (or benefits) or without pay (or benefits).	p. 768
		Student Employees: With respect to student-employee respondents, we explain more fully, below, that these final regulations do not necessarily prohibit a recipient from placing a student-employee respondent on administrative leave if doing so does not violate other regulatory provisions.	p. 771 *See also* p. 773.

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		Student Employees: Administrative leave may jeopardize a student-employee's access to educational benefits and opportunities in a way that a non-student employee's access to education is not jeopardized. Accordingly, administrative leave is not always appropriate for student-employees.	p. 773
		Student Employees: If a recipient removes a respondent pursuant to § 106.44(c) after conducting an individualized safety and risk analysis and determining that an immediate threat to the physical health or safety of any students or other individuals justifies removal, then a recipient also may remove a student-employee respondent from any employment opportunity that is part of the recipient's education program or activity.	p. 774
Notice Requirement	Written notice required		§106.45(b)(2)
Contents of Notice	Notice of the recipient's grievance process that complies with this section, including any informal resolution process		§106.45(b)(2)(A)
	Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview.		§106.45(b)(2)(B)

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		Exception: The Department notes that the final regulations do not prevent a recipient from questioning an employee-respondent about sexual harassment allegations without disclosing the complainant's identity, provided that the recipient does not take disciplinary action against the respondent without first applying the § 106.45 grievance process (or unless emergency removal is warranted under § 106.44(c), or administrative leave is permitted under §106.44(d)).	pps. 956-57
	[S]tatement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process		§106.45(b)(2)(B)
	The written notice must inform the parties that they may have an advisor of their choice, who may be an attorney		§106.45(b)(2)(B)
	The written notice must inform the parties that they may inspect and review evidence		§106.45(b)(2)(B)
	The written notice must inform the parties of any provision in the recipient's code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process		§106.45(b)(2)(B)

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	Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate		§106.45(b)(5)(v)
Duty to Supplement Notice	If, in the course of an investigation, the recipient decides to investigate allegations about the complainant or respondent that are not included in the notice provided pursuant to paragraph (b)(2)(i)(B) of this section, the recipient must provide notice of the additional allegations to the parties whose identities are known.		§106.45(b)(2)(ii)
Consolidation of Formal Complaints	A recipient may consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances. Where a grievance process involves more than one complainant or more than one respondent, references in this section to the singular "party," "complainant," or "respondent" include the plural, as applicable.		§106.45(b)(4)

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		Consolidation of Formal Complaints: [R]ecipients have discretion to consolidate formal complaints in situations that arise out of the same facts or circumstances and involve more than one complainant, more than one respondent, or what amount to counter-complaints by one party against the other.	Pps. 968-69
		Consolidation of Formal Complaints: If there are multiple complainants and one respondent, then the recipient may consolidate the formal complaints where the allegations of sexual harassment arise out of the same facts or circumstances, under § 106.45(b)(4). The requirement for the same facts and circumstances means that the multiple complainants' allegations are so intertwined that their allegations directly relate to all the parties.	p. 1498
Gathering Evidence (Burden Rests with Recipient)	Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.		§106.45(b)(5)(i)
		Trauma-Informed Investigations: [N]othing in the final regulations precludes a recipient from applying trauma-informed techniques, practices, or approaches so long as such practices are consistent with the requirements of § 106.45(b)(1)(iii) and other requirements in § 106.45.	p. 591
		Trauma-Informed Investigations: Because cross-examination occurs only after the recipient has conducted a thorough investigation, trauma-informed questioning can occur by a recipient's investigator giving the parties opportunity to make statements under trauma-informed approaches prior to being cross-examined by the opposing party's advisor.	p. 1087

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Gathering Evidence (Restrictions re: Medical Records)	The recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent		§106.45(b)(5)(i)
Gathering Evidence (Equal Opportunity)	Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.		§106.45(b)(5)(ii)
		Recipient Can Also Present Evidence: [T]he Department recognizes that the recipient is not a party to the proceeding, but this does not prevent the recipient from presenting evidence to the decision-maker, who must then objectively evaluate relevant evidence (both inculpatory and exculpatory) and reach a determination regarding responsibility.	p. 971
		Gathering Evidence (Limitations): [P]arties to a Title IX grievance process are not granted the right to depose parties or witnesses, nor to invoke a court system's subpoena powers to compel parties or witnesses to appear at hearings, which are common features of procedural rules governing litigation and criminal proceedings.	pps. 1026-27
Gathering Evidence (No Gag Orders)	Recipient must [n]Not restrict the ability of either party to discuss the		§106.45(b)(5)(iii)

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	allegations under investigation or to gather and present relevant evidence.		
		Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.	p. 986
		Witness Tampering: As to witness intimidation, such conduct is prohibited under § 106.71(a). As to whether a party approaching or speaking to a witness could constitute "tampering," the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an "interference" with the investigation. However, where a party's conduct toward a witness might constitute "tampering" (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a).	p. 989-90
		Intersection with Retaliation: [T]his provision in no way immunizes a party from abusing the right to "discuss the allegations under investigation" by, for example, discussing those allegations in a manner that exposes the party to liability for defamation or related privacy torts, or in a manner that constitutes unlawful retaliation.	p. 987 *See also* p. 991
Right to an Advisor of Choice	Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their		§106.45 (b)(3) (iv)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
	choice, who may be, but is not required to be, an attorney.		
		"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing.	p. 1155
		Advisor of Choice ≠ Right to Effective Representation: [P]roviding parties the right to select an advisor of choice does not align with the constitutional right of criminal defendants to be provided with effective representation.	p. 992 *See also* p. 1147, 1483-84
		Correspondence with Advisors: The Department appreciates commenters' request that advisors be copied on all correspondence between recipients and the parties, but declines to impose such a rule.	p. 1005
	The recipient may not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding		§106.45 (b)(3) (iv)
	The recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.		§106.45 (b)(3) (iv)
		Rules of Decorum: [T]he final regulations do not preclude a recipient from adopting and applying codes of conduct and rules of decorum to ensure that parties and advisors, including assigned advisors, conduct cross-examination questioning in a respectful and non-abusive manner, and the decision-maker remains obligated to ensure that only relevant questions are posed during cross-examination.	pps. 1149-50 *See also* pps. 1114, 1114-15, 1145, 1150
		Rules of Decorum: To meet this obligation a recipient also cannot forbid a party from conferring with the party's advisor,	p. 1145

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		although a recipient has discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other.	
		Misbehaving Advisors: [T]he final regulations do not preclude a recipient from enforcing rules of decorum that ensure all participants, including parties and advisors, participate respectfully and non-abusively during a hearing. If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may require the party to use a different advisor.	p. 1075
		Misbehaving Advisors: If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), the recipient may provide that party with an advisor to conduct cross-examination on behalf of that party. If a provided advisor refuses to comply with a recipient's rules of decorum, the recipient may provide that party with a different advisor to conduct cross-examination on behalf of that party.	p. 1155
		Examples of Restrictions on Advisor Participation: Section 106.45(b)(5)(iv) (allowing recipients to place restrictions on active participation by party advisors) and the revised introductory sentence to §106.45(b) (requiring any rules a recipient adopts for its grievance process other than rules required under § 106.45 to apply equally to both parties) would, for example, permit a recipient to require parties personally to answer questions posed by an investigator during an interview, or personally to make any opening or closing statements the	p. 997

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		recipient allows at a live hearing, so long as such rules apply equally to both parties. We do not believe that specifying what restrictions on advisor participation may be appropriate is necessary, and we decline to remove the discretion of a recipient to restrict an advisor's participation so as not to unnecessarily limit a recipient's flexibility to conduct a grievance process.	
Right to Inspect and Review (and Respond to) Evidence	Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.		§106.45 (b)(3)(vi)
		Directly Related: The Department declines to define certain terms in this provision such as …"evidence directly related to the allegations," as these terms should be interpreted using their plain and ordinary meaning.	p. 1017
		Institutional Discretion: [T]he school has some discretion to determine what evidence is directly related to the allegations in a formal complaint.	p. 1471 *See also* p. 1492
		Directly Related ≠ Relevant: "[D]irectly related" may sometimes encompass a broader universe of evidence than evidence that is "relevant."	p. 1017 *See also* p. 1041

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		Directly Related ≠ Relevant: [T]he universe of that exchanged evidence should include all evidence (inculpatory and exculpatory) that relates to the allegations under investigation, without the investigator having screened out evidence related to the allegations that the investigator does not believe is relevant.	p. 1018
		Illegally Obtained Evidence: If a recipient knows that a recording is unlawfully created under State law, then the recipient should not share a copy of such unlawful recording. The Department is not requiring a recipient to disseminate any evidence that was illegally or unlawfully obtained.	p. 1465-66
		Redactions: [A] recipient may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent).	p. 1019 *See also* p. 1473
		Obligation to Summarize Relevant Evidence: The requirement for recipients to summarize and evaluate relevant evidence, and specification of certain types of evidence that must be deemed not relevant or are otherwise inadmissible in a grievance process pursuant to § 106.45, appropriately directs recipients to focus investigations and adjudications on evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true (i.e., on what is relevant).	p. 980
		Determining Relevance: [A] layperson's determination that a question is not relevant is made by applying logic and common sense, but not against a backdrop of legal expertise.	p. 1159

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		Not Relevant: information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing.	p. 980
		NDAs Permitted: [R]ecipients may impose on the parties and party advisors restrictions or require a non-disclosure agreement not to disseminate any of the evidence subject to inspection and review.	p. 1019 *See also* pps. 1449, 1483 , 1496
	Prior to completion of the investigative report, the recipient must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report.		§106.45 (b)(3)(vi)
		Hard or Electronic *Copy* Required: We believe it is important for the parties to receive a copy of the evidence subject to inspection and review.	p. 1025
		Corrections: [T]he parties may make corrections, provide appropriate context, and prepare their responses and defenses before a decision-maker reaches a determination regarding responsibility.	p. 1023 *See also* p. 1015
		Corrections: [I]f relevant evidence seems to be missing, a party can point that out to the investigator, and if it turns out that relevant evidence was destroyed by a party, the decision-maker	p. 1003

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		can take that into account in assessing the credibility of parties, and the weight of evidence in the case.	
	The recipient must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.		§106.45 (b)(3)(vi)
The Investigative Report	Create an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.		§106.45 (b)(3)(vii)
		Relevant Evidence Only: [A]ll evidence summarized in the investigative report under § 106.45(b)(5)(vii) must be "relevant."	p. 1017 *See also* p. 815
		Redactions: [A] recipient may permit or require the investigator to redact from the investigative report information that is not relevant.	p. 1020
		May Include Facts and Interview Statements: A recipient may include facts and interview statements in the investigative report.	p. 1498
		May Include Recommended Findings or Conclusions: The Department does not wish to prohibit the investigator from including recommended findings or conclusions in the investigative report. However, the decision-maker is under an	p. 1031

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		independent obligation to objectively evaluate relevant evidence, and thus cannot simply defer to recommendations made by the investigator in the investigative report.	
		May Include Credibility Assessment but not Determination: If a recipient chooses to include a credibility analysis in its investigative report, the recipient must be cautious not to violate § 106.45(b)(7)(i), prohibiting the decision-maker from being the same person as the Title IX Coordinator or the investigator. Section 106.45(b)(7)(i) prevents an investigator from actually making a determination regarding responsibility. If an investigator's determination regarding credibility is actually a determination regarding responsibility, then § 106.45(b)(7)(i) would prohibit it.	p. 1498
		Consolidated Complaints: In the context of a grievance process that involves multiple complainants, multiple respondents, or both, a recipient may issue a single investigative report.	p. 1038
		Corrections: The parties then have equal opportunity to review the investigative report; if a party disagrees with an investigator's determination about relevance, the party can make that argument in the party's written response to the investigative report under §106.45(b)(5)(vii) and to the decision-maker at any hearing held; either way the decision-maker is obligated to objectively evaluate all relevant evidence and the parties have the opportunity to argue about what is relevant (and about the persuasiveness of relevant evidence).	p. 815 *See also* p. 1041
The Live Hearing			
Live Hearing Required	For postsecondary institutions only, the recipient's grievance process must provide for a live hearing.		§106.45 (b)(6)(i)

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		Single Investigator Model Prohibited: [T]he final regulations . . . foreclose[es] recipients from utilizing a "single investigator" or "investigator-only" model for Title IX grievance processes.	p. 1247
		Hearing *Boards* Not Required: [T]he final regulations do not require hearing boards (as opposed to a single individual acting as the decision-maker)[.]	p. 813
		Students in Title IX Roles: [T]he final regulations do not preclude a recipient from allowing student leaders to serve in Title IX roles.	p. 829
Live Hearing (may be Virtual)	Live hearings pursuant to this paragraph may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.		§106.45(b)(6)(i)
Live Hearing (Recording or Transcript Required)	Recipients must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.		§106.45(b)(6)(i)
Questioning of Parties and Witnesses by Advisor	At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.		§106.45 (b)(6) (i)
		Direct Examination: Whether advisors also may conduct direct examination is left to a recipient's discretion.	p. 1154

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		"Representation" of Parties: A recipient may, but is not required to, allow advisors to "represent" parties during the entire live hearing.	p. 1155
		Rules of Decorum: A recipient may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant.	p. 812
		Rules of Procedure: [A] recipient may, for instance, adopt rules that . . . decide whether the parties may offer opening or closing statements, specify a process for making objections to the relevance of questions and evidence, place reasonable time limitations on a hearing, and so forth.	p. 1226
		"Rules of Evidence": [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.	p. 812
		"Rules of Evidence": The Department notes that where evidence is duplicative of other evidence, a recipient may deem the evidence not relevant.	p. 1136 *See also* pps. 1114, 1227
		"Rules of Evidence": [W]here a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker cannot exclude or refuse to consider the relevant evidence, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decisionmaker's evaluation treats both parties equally.	p. 1137
		"Rules of Evidence": The final regulations do not preclude a recipient from adopting a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing.	p. 1159

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		"Rules of Evidence": [T]he recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing.	p. 1159
		"Rules of Evidence": [A] decision-maker [is not required] to give a lengthy or complicated explanation [of a relevancy determination]; it is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations.	p. 1161
		Revising Relevancy Determination: [N]othing in the final regulations precludes a recipient from adopting a rule that the decision-maker will, for example, send to the parties after the hearing any revisions to the decision-maker's explanation that was provided during the hearing.	p. 1160
		No Subpoena Power: [R]ecipients have no ability to compel a party or witness to participate.	p. 1083 *See also* pps. 1176, 1178, 1330
Cross-Examination (Direct, in Real Time)	Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.		§106.45 (b)(6) (i)

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		Rules of Decorum: [R]ecipients retain discretion under the final regulations to educate a recipient's community about what cross examination during a Title IX grievance process will look like, including developing rules and practices (that apply equally to both parties) to oversee cross-examination to ensure that questioning is relevant, respectful, and non-abusive.	Pps. 1062-63 *See also* pps. 1054, 1059-60, 1065, 1072, 1074, 1075, 1226
		Rules of Decorum: The Department reiterates that recipients retain the discretion to control the live hearing environment to ensure that no party is "yelled" at or asked questions in an abusive or intimidating manner.	p. 1089
		Abusive Questioning (Caution): The Department appreciates commenters who described experiences being questioned by party advisors as feeling like the advisor asked questions in a disempowering, blaming, and condescending way; however, the Department notes that such questioning may feel that way to the person being questioned by virtue of the fact that cross-examination is intended to promote the perspective of the opposing party, and this does not necessarily mean that the questioning was irrelevant or abusive.	p. 1075
		Rules of Procedure (No Waiver of Questions): [T]he Department declines to allow a party or witness to "waive" a question.	p. 1183
		Faulty Memory ≠ Lying: [C]ross examination that may reveal faulty memory, mistaken beliefs, or inaccurate facts about allegations does *not* mean that the party answering questions is necessarily lying or making intentionally false statements.	p. 1053
Cross-Examination (Relevancy Requirement)	Only relevant cross-examination and other questions may be asked of a party or witness.		§106.45 (b)(6) (i)
		Determining Relevance: [A] layperson's determination that a question is not relevant is made by applying logic	p. 1159

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		and common sense, but not against a backdrop of legal expertise.	
		Not Relevant: information protected by a legally recognized privilege; evidence about a complainant's prior sexual history; any party's medical, psychological, and similar records unless the party has given voluntary, written consent; and (as to adjudications by postsecondary institutions), party or witness statements that have not been subjected to cross examination at a live hearing.	p. 980
		Not Relevant: [T]he rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* [otherwise allowed by these regulations].	p. 1200
		Other Questions: [A] recipient may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, a recipient may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice.	pps. 980-81
Cross-Examination (On-the-Spot Evidentiary Rulings)	Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.		§106.45 (b)(6) (i)
		No Prior Submission of Written Questions: [S]ubmission of written questions [for the purposes of ascertaining relevance], even during a live hearing, is not compliant with § 106.45(b)(6)(i).	p. 1132
		Training on Relevancy Required: In response to commenters' concerns about how to determine "relevance" in the context	p. 810

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		of these final regulations, we have revised § 106.45(b)(1)(iii) specifically to require training on issues of relevance (including application of the "rape shield" protections in § 106.45(b)(6)).	
Cross-Examination: (Conducted by Advisor Only)	If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.		§106.45 (b)(6) (i)
		Personal Representation Prohibited: The Department has revised § 106.45(b)(6)(i) to expressly preclude a party from conducting cross-examination personally; the only method for conducting cross-examination is by a party's advisor.	p. 1132
		Attorney Advisor Not Required: [A] recipient may fulfill its obligation to provide an advisor for a party to conduct cross-examination at a hearing without hiring an attorney to be that party's advisor, and that remains true regardless of whether the other party has hired a lawyer as an advisor of choice.	p. 1150
		Parameters: [A]dvisors conducting cross-examination will be either professionals (e.g., attorneys or experienced advocates) or at least adults capable of understanding the purpose and scope of cross-examination.	p. 1109
		Equal Competency Not Required: The Department understands commenters' desire that both parties have advisors of equal competency during a hearing. However, the Department does not wish to impose burdens and costs on recipients beyond what is necessary to achieve a Title IX grievance process.	p. 1150
		No Fee or Charge Permitted: [W]here a recipient must provide a party with an advisor to conduct cross-examination at a live hearing that advisor may be of the recipient's choice, must be	p. 1120

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		provided without fee or charge to the party, and may be, but is not required to be, an attorney.	
		Advance Notification Permitted: The final regulations do not preclude recipients from adopting a rule that requires parties to inform the recipient in advance of a hearing whether the party intends to bring an advisor of choice to the hearing.	p. 1154
		Advisor "No Shows": [I]f a party . . . appears at a hearing without an advisor the recipient would need to stop the hearing as necessary to permit the recipient to assign an advisor to that party to conduct cross-examination.	p. 1154 *See also* p. 1171
Cross-Examination (Rape Shield Protections Apply)	Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.		§106.45 (b)(6) (i)
		Only Applies to Complainants: The Department declines to extend the rape shield language to respondents.	p. 1191
		Only Applies to Complainants (Caution): [S]ome situations will involve counter-claims made between two parties, such that a respondent is also a complainant.	p. 1191
		Application: [T]he rape shield language deems irrelevant *all* questions or evidence of a complainant's sexual behavior *unless* offered to prove consent (and it concerns specific instances of	p. 1200

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		sexual behavior with the respondent); thus, if "consent" is not at issue – for example, where the allegations concern solely unwelcome conduct under the first or second prong of the § 106.30 definition – then that exception does not even apply, and the rape shield protections would then bar *all* questions and evidence about a complainant's sexual behavior, with no need to engage in a balancing test of whether the value of the evidence is outweighed by harm or prejudice.	
Cross-Examination (Refusal to Submit to Cross)	If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.		§106.45 (b)(6) (i)
		General: [O]nly statements that have been tested for credibility will be considered by the decision-maker in reaching a determination regarding responsibility.	p. 1168
		Hearsay Generally: The Department disagrees that this provision needs to be modified so that a party's statements to family or friends would still be relied upon even when the party does not submit to cross-examination. Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and	Pps. 1172-73

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		potentially lead to an erroneous outcome to rely on statements untested via cross-examination.	
		Statements Against a Party's Interest: The Department declines to add exceptions to this provision, such as permitting reliance on statements against a party's interest.	p. 1168
		Death or Disability of Party or Witness: [W]ritten statements cannot be relied upon unless the witness submits to cross-examination, and whether a witness's statement is reliable must be determined in light of the credibility-testing function of cross-examination, even where nonappearance is due to death or post-investigation disability.	p. 1177
		Police or SANE Reports: [P]olice reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.	p. 1181
		Text Messages and Emails: This provision does apply to the situation where evidence involves intertwined statements of both parties (e.g., a text message exchange or e-mail thread) and one party refuses to submit to cross-examination and the other does submit, so that the statements of one party cannot be relied on but statements of the other party may be relied on.	p. 1182
		Video Evidence: [W]here a complainant refuses to answer cross-examination questions but video evidence exists showing the underlying incident, a decision-maker may still consider the available evidence and make a determination.	p. 1106 *See also* p. 1169
		Video Evidence that Includes Statements: I]f the case does not depend on party's or witness's statements but rather on other evidence (e.g., video evidence that does not consist of "statements" or to the extent that the video contains non-statement evidence) the decision-maker can still consider that other evidence and reach a determination, and must do so	p. 1169

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		without drawing any inference about the determination based on lack of party or witness testimony.	
		Statements of Parties who Decline to Participate: Where a grievance process is initiated because the Title IX Coordinator, and not the complainant, signed the formal complaint, the complainant who did not wish to initiate a grievance process remains under no obligation to then participate in the grievance process, and the Department does not believe that exclusion of the complainant's statements in such a scenario is unfair to the complainant, who did not wish to file a formal complaint in the first place yet remains eligible to receive supportive measures protecting the complainant's equal access to education.	p. 1172
Standard of Evidence	preponderance of the evidence or clear and convincing evidence		§106.45(b)(1)(vii)
		General: [T]he standard of evidence reflects the "degree of confidence" that a decision-maker has in correctness of the factual conclusions reached.	p. 1306
		Preponderance of the Evidence: [A determination] based on facts that are more likely true than not	p. 1314
		Clear and Convincing: having confidence that a conclusion is based on facts that are highly probable to be true	p. 1314
		>50% Required for Showing of Preponderance: Where the evidence in a case is "equal" or "level" or "in equipoise," the preponderance of the evidence standard results in a finding that the respondent is not responsible.	p. 1298
		Choosing Standard of Evidence: The Department expects that recipients will select a standard of evidence based on the recipient's belief about which standard best serves the interests of the recipient's educational community, or because State law requires the recipient to apply one or the other standard, or	p. 1320

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		because the recipient has already bargained with unionized employees for a particular standard of evidence in misconduct proceedings.	
Standard of Evidence (Same for Student and Employee Respondents)	Recipient must "apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment."		§106.45(b)(1)(vii)
Decision Maker	The decision-maker(s) . . . cannot be the same person(s) as the Title IX Coordinator or the investigator(s).		§106.45 (b)(7)
		Title IX Coordinator as Investigator: Section 106.45(b)(7)(i) does not prevent the Title IX Coordinator from serving as the investigator; rather, this provision only prohibits the decision-maker from being the same person as either the Title IX Coordinator or the investigator.	p. 1257 *See also* pps. 1265, 1266
		Separate Decision Maker: [T]he decision-maker must not only be a separate person from any investigator but the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.	p. 1056 *See also* p. 1063

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
		Role of the Decision Maker: [T]he decision-maker has the right and responsibility to ask questions and elicit information from parties and witnesses on the decision-maker's own initiative to aid the decision-maker in obtaining relevant evidence both inculpatory and exculpatory, and the parties also have equal rights to present evidence in front of the decision-maker so the decision-maker has the benefit of perceiving each party's unique perspectives about the evidence.	p. 1114
		Hearing Officer vs. Decision Maker: With respect to the roles of a hearing officer and decisionmaker, the final regulations leave recipients discretion to decide whether to have a hearing officer (presumably to oversee or conduct a hearing) separate and apart from a decision-maker, and the final regulations do not prevent the same individual serving in both roles.	p. 1266
Determination of Responsibility	Written determination required		§106.45 (b)(7)(i)
Determination of Responsibility (Content)	Identification of the allegations potentially constituting sexual harassment		§106.45 (b)(7)(ii)
	A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held		§106.45 (b)(7)(ii)
	Findings of fact supporting the determination		§106.45 (b)(7)(ii)

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		Not Required: We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached.	p. 1326
		Weighing Credibility: [A]dmissible, relevant evidence must be evaluated for weight or credibility by a recipient's decision-maker.	p. 981 *See also* p. 1114, 1137
		Weighing Credibility: [T]he degree to which any inaccuracy, inconsistency, or implausibility in a narrative provided by a party or witness should affect a determination regarding responsibility is a matter to be decided by the decision-maker, after having the opportunity to ask questions of parties and witnesses, and to observe how parties and witnesses answer the questions posed by the other party.	p. 1053
		Weighing Credibility: [C]redibility determinations are not based solely on observing demeanor, but also are based on other factors (e.g., specific details, inherent plausibility, internal consistency, corroborative evidence). Cross-examination brings those important factors to a decision-maker's attention.	p. 1081
		Weighing Credibility: [A] party's answers to cross-examination questions can and should be evaluated by a decision-maker in context, including taking into account that a party may experience stress while trying to answer questions. Because decision-makers must be trained to serve impartially without prejudging the facts at issue, the final regulations protect against a party being unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory.	p. 1089

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		Corroborating Evidence Not Required: [N]either the preponderance of the evidence standard, nor the clear and convincing evidence standard, requires corroborating evidence.	p. 1295 *See also* p. 1306
	Conclusions regarding the application of the recipient's code of conduct to the facts		§106.45 (b)(7)(ii)
		[D]ecisionmakers [must] lay out the evidentiary basis for conclusions reached in the case, in a written determination regarding responsibility.	p. 814
	A statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the recipient imposes on the respondent, and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant		§106.45 (b)(7)(ii)
		Description of Remedies *not* Included: [T]he nature of remedies provided does not appear in the written determination.	p. 1334 *See also* p. 1341
	The recipient's procedures and permissible bases for the complainant and respondent to appeal.		§106.45 (b)(7)(ii)
Determination of Responsibility (Simultaneous Notification)	Simultaneous notification of parties required		§106.45 (b)(7)(iii)
		Finality: [T]he written determination becomes "final" only after the time period to file an appeal has expired, or if a party does	p. 1338

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		file an appeal, after the appeal decision has been sent to the parties.	
Determination of Responsibility (Agency Deference)	The Assistant Secretary will not deem a recipient's determination regarding responsibility to be evidence of deliberate indifference by the recipient, or otherwise evidence of discrimination under title IX by the recipient, solely because the Assistant Secretary would have reached a different determination based on an independent weighing of the evidence.		§106.44(b)(2)
		Deference: [T]he Department will refrain from second guessing a recipient's determination regarding responsibility based solely on whether the Department would have *weighed* the evidence differently.	p. 713 *See also* pps. 714, 716, 1138, 1339-40
Sanctions		Specific Sanctions Not Required: The Department does not wish to dictate to recipients the sanctions that should be imposed when a respondent is found responsible for sexual harassment.	p. 1344 *See also* pps. 908. 1346, 1428
		Specific Sanctions Not Required: The Department declines to adopt a rule that would mandate suspension or expulsion as the only appropriate sanction following a determination of responsibility against a respondent; recipients deserve flexibility to design sanctions that best reflect the needs and values of the recipient's educational mission and community.	p. 1392
		Proportionality: [T]hese final regulations do not impose a standard of proportionality on disciplinary sanctions.	p. 908
		Mitigating Considerations: [A] respondent's lack of comprehension that conduct constituting sexual harassment violates the bodily or emotional autonomy and dignity of a	p. 434

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		victim does not excuse the misconduct, though genuine lack of understanding may (in a recipient's discretion) factor into the sanction decision.	
		Zero Tolerance Policies: [N]othing in these final regulations precludes a recipient from adopting a zero tolerance policy.	p. 1302
		Sanctioning Pedagogy: Because the final regulations do not require particular disciplinary sanctions, the final regulations do not preclude a recipient from imposing student discipline as part of an "educational purpose" that may differ from the purpose for which a recipient imposes employee discipline.	p. 1285
		Restorative Justice as Sanction: [A] recipient could use a restorative justice model *after* a determination of responsibility finds a respondent responsible; nothing in the final regulations dictates the form of disciplinary sanction a recipient may or must impose on a respondent.	p. 1388
		Transcript Notations: The Department intentionally did not take a position in the NPRM on transcript notations or the range of possible sanctions for a respondent who is found responsible for sexual harassment.	p. 1344 *See also* p. 1428
		Transfers: The Department does not regulate what information schools must share when a student transfers to a different school and declines to do so here.	p. 1476
		Effective Date of Sanction: [T]he final regulations obligate the recipient to offer supportive measures throughout the grievance process (unless failing to do so would not be clearly unreasonable) thus maintaining a status quo through the grievance process that may continue a short time longer while an appeal is being resolved. The Department believes that in order for an appeal, by either party, to be fully effective, the recipient must wait to act on the determination regarding responsibility while maintaining the status quo between the	p. 1338-39

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		parties through supportive measures designed to ensure equal access to education.	
Remedies	Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made.		§106.45(b)(1)(i)
	Remedies must be designed to restore or preserve equal access to the recipient's education program or activity. Such remedies may include the same individualized services described in § 106.30 as "supportive measures"; however, remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent.		§106.45(b)(1)(i)
		Remedies Evaluated Against Deliberate Indifference Standard: [A] recipient's selection and implementation of remedies will be evaluated by what is not clearly unreasonable in light of the known circumstances.	p. 800
		No Specific Remedies Required: The Department declines to require remedies for respondents in situations where a complainant is found to have brought a false allegation.	p. 804
		Types of Remedies: [R]emedies may consist of the same individualized services listed illustratively in § 106.30 as "supportive measures" but remedies need not meet the limitations of supportive measures (i.e., unlike supportive measures, remedies may in fact burden the respondent, or be punitive or disciplinary in nature).	p. 799 *See also* p. 909
		Types of Remedies: [R]emedies may include the same individualized services described in § 106.30 as "supportive	p. 1333

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		measures" but that remedies need not be non-disciplinary or non-punitive and need not avoid burdening the respondent. Beyond this, the Department believes recipients should have the flexibility to offer such remedies as they deem appropriate to the individual facts and circumstances of each case, bearing in mind that the purpose of remedies is to restore or preserve the complainant's equal access to education.	
		Types of Remedies: Whether or not the commenter's understanding of prevention and community education programming would be part of an appropriate remedy for a complainant, designed to restore or preserve the complainant's equal access to education, is a fact-specific matter to be considered by the recipient.	p. 600
		Title IX Coordinator Implements Remedies: [The] Title IX Coordinator is responsible for effective implementation of remedies.	p. 914 *See also* p. 1334
		Title IX Coordinator Implements Remedies: [W]here the final determination has indicated that remedies will be provided, the complainant can then communicate separately with the Title IX Coordinator to discuss what remedies are appropriately designed to preserve or restore the complainant's equal access to education.	p. 1334 *See also* p. 1341
		Disclosure of Remedies to Respondent Prohibited: That remedy (which does not directly affect the respondent) must not be disclosed to the respondent.	p. 1459
Appeals			
Mandatory Appeals	A recipient must offer both parties an appeal from a determination regarding responsibility, and from a recipient's		§106.45 (b)(8)

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	dismissal of a formal complaint or any allegations therein		
Grounds for Appeal	(A) Procedural irregularity that affected the outcome of the matter (B) New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and (C) The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter.		§106.45 (b)(8)
		Procedural Irregularity: [P]rocedural irregularity … could include a recipient's failure to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence.	P. 815
		Erroneous Relevancy Determinations: [P]arties may appeal erroneous relevance determinations, if they affected the outcome.	p. 1159
Grounds for Appeal	A recipient may offer an appeal equally to both parties on additional bases.		§106.45(b)(8)

Topic	Final Regulation	Selected Preamble Excerpts *Note: Preamble does not have legal or regulatory force*	Regulation Section or Preamble Page No.
Requirements for the Appeals Process	Requirements for Appeals: (A) Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; (B) Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator; (C) Ensure that the decision-maker(s) for the appeal complies with the standards set forth in paragraph (b)(1)(iii) of this section; (D) Give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome; (E) Issue a written decision describing the result of the appeal and the rationale for the result; and (F) Provide the written decision simultaneously to both parties.		§106.45(b)(8)

Informal Resolution			
Informal Resolutions Permitted	[T]he recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication [under the circumstances described in the regulations]		§106.45 (b)(9)
		Discretionary: [N]othing in the final regulations requires recipients to offer an informal resolution process.	p. 1382
		Formal Complaint Required: [R]ecipients may not offer informal resolution unless a formal complaint has been filed.	p. 1367 *See also* pps. 1371, 1388, 1391
		Voluntary and *Appropriate*: [A] recipient *may* choose to offer the parties an informal process that resolves the formal complaint without completing the investigation and adjudication, but such a result depends on whether the recipient determines that informal resolution may be appropriate and whether both parties voluntarily agree to attempt informal resolution.	p. 13667
		Advisor Input: [W]e decline to mandate that the parties confer with an advisor before entering an informal resolution process, or to mandate that recipients provide the parties with advisors before entering an informal resolution process.	p. 1374
		Kinds of Informal Resolution: Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and recipient flexibility to craft resolution processes that serve the unique educational needs of their communities.	p. 1370

		Kinds of Informal Resolution (Administrative Disposition): Commenters' descriptions of an administrative disposition model, or a proposed voluntary resolution agreement, are permissible under the final regulations if applied as part of an informal resolution process in conformity with §106.45(b)(9), which requires both parties' written, voluntary consent to the informal process.	p. 1224
		Kinds of Informal Resolution (Cannot Waive Hearing): The Department declines to authorize one or both parties, or the recipient, simply to "waive" a live hearing [as part of an informal resolution].	p. 1224
		Outcome: [I]nformal resolutions . . . may result in disciplinary measures designed to punish the respondent.	p. 1370
		Withdrawal: [W]e have revised § 106.45(b)(9) to expressly allow either party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.	p. 1376 *See also* pps. 1384, 1391
		Finality: The Department expects informal resolution agreements to be treated as contracts; the parties remain free to negotiate the terms of the agreement and, once entered into, it may become binding according to its terms.	p. 1384
		Confidentiality: [A] recipient may determine that confidentiality restrictions promote mutually beneficial resolutions between parties and encourage complainants to report, or may determine that the benefits of keeping informal resolution outcomes confidential are outweighed by the need for the educational community to have information about the number or type of sexual harassment incidents being resolved.	p. 1379 *See also* p. 1372
		Participants as Fact Witnesses in Later Proceeding: With respect to informal resolution facilitators potentially serving as witnesses in subsequent formal grievance processes, we leave this possibility open to recipients.	p. 1367
		Liability Exposure: With respect to recipients' potential legal liability where the respondent acknowledges commission of	p. 1391-92

		Title IX sexual harassment (or other violation of recipient's policy) during an informal resolution process, yet the agreement reached allows the respondent to remain on campus and the respondent commits Title IX sexual harassment (or violates the recipient's policy) again, the Department believes that recipients should have the flexibility and discretion to determine under what circumstances respondents should be suspended or expelled from campus as a disciplinary sanction, whether that follows from an informal resolution or after a determination of responsibility under the formal grievance process. Recipients may take into account legal obligations unrelated to Title IX, and relevant Title IX case law under which Federal courts have considered a recipient's duty not to be deliberately indifferent by exposing potential victims to repeat misconduct of a respondent, when considering what sanctions to impose against a particular respondent.	
Informal Resolutions (Limitations)	A recipient may not require as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints. . . Similarly, a recipient may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed."		§106.45 (b)(9)
Informal Resolution (Written Notice Requirement)	To proceed with informal resolution, the recipient must provide the parties with "written		§106.45 (b)(9)

	notice disclosing: the allegations, the requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations, provided, however, that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint, and any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared."		
Informal Resolution (Voluntary, Written Consent Required)	To proceed with informal resolution, the recipient must "[o]btain[] the parties' voluntary, written consent to the informal resolution process."		§106.45 (b)(9)
Informal Resolution (Prohibition)	[Recipients may not use] informal resolution to resolve allegations that an employee sexually harassed a student.		§106.45 (b)(9)
Retaliation			
Retaliation Prohibited	No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with		§106.71

	any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.		
Per se Retaliation	Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by title IX or this part, constitutes retaliation.		§106.71
		"For the Purpose of Interfering with any Right or Privilege": [I]f a recipient punishes a complainant or respondent for underage drinking, arising out of the same facts or circumstances as the report or formal complaint of sexual harassment, then such punishment constitutes retaliation if the punishment is for the purpose of interfering with any right or privilege secured by Title IX or its implementing regulations. If a recipient always takes a zero tolerance approach to underage drinking in its code of conduct and always imposes the same punishment for underage drinking, irrespective of the circumstances, then imposing such a punishment would	Pps. 1876-77

		not be "for the purpose of interfering with any right or privilege secured by" Title IX or these final regulations and thus would not constitute retaliation under these final regulations.	
		Actual Knowledge Not Applicable: [T]he actual knowledge requirement in these regulations applies to sexual harassment and does not apply to a claim of retaliation.	p. 1878
		Per Se Retaliation (Witness Intimidation): If a respondent reacts to a written notice of allegations by intimidating witnesses, such conduct is prohibited as retaliation.	p. 932 *See also* p. 1223
		Examples (Threatening Visa Status): [T]hreatening to take retaliatory immigration action for the purpose of interfering with any right or privileged secured by Title IX or its implementing regulations may constitute retaliation.	p. 1875
		Responding to Retaliation: A recipient's ability to respond to retaliation will depend, in part, on the relationship between the recipient and the individual who commits the retaliation.	p. 1875
Per Se Retaliation—Exception	Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding under this part does not constitute retaliation prohibited under paragraph (a) of this section, provided, however, that a determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.		§106.71
		Example (False Statements): [I]t could constitute retaliation to punish a party for false statements if that conclusion is reached solely based on the determination regarding responsibility.	p. 928

Application to Employees			
Application to Employees		General: [T]he Department's final regulations apply to employees.	p. 1519 *See also* pps. 1510, 1536, 1556
		Regulations Apply to All Classes of Employees: The Department believes that irrespective of position, tenure, part-time status, or at-will status, no employee should be subjected to sexual harassment or be deprived of employment as a result of allegations of sexual harassment without the protections and the process that these final regulations provide.	p. 1531
		Employees vs. Independent Contractors: The Department defers to State law with respect to employees, and State law will govern whether a person is an employee as opposed to an independent contractor.	p. 1533
		Volunteers: These final regulations also may apply to volunteers, if the volunteers are persons in the United States who experience discrimination on the basis of sex under any education program or activity receiving Federal financial assistance.	p. 1544
		Employee Only Allegations: The Department disagrees that the formal complaint process would be unworkable for cases involving only non-students.	p. 1539
		Employees Entitled to Same Benefits and Protections: Employees should receive the same benefits and due process protections that students receive under these final regulations, and these final regulations, including the due process protections in § 106.45, apply to employees.	p. 1519
		Independent Obligations to Comply with Title IX and Title VII: The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both	p. 1514 *See also* pps. 1515, 1520, 1523, 1524, 1547, 1548, 1551

		Title VII and Title IX will need to comply with both sets of obligations.	
		Parallel Title VII Process: Nothing in these final regulations precludes a recipient-employer from addressing conduct that it is severe or pervasive, and § 106.45(b)(3)(i) provides that a mandatory dismissal under these final regulations does not preclude action under another provision of the recipient's code of conduct. Thus, a recipient employer may address conduct that is severe or pervasive under a code of conduct for employees to satisfy its Title VII obligations.	p. 1524 *See also* pps. 1516, 1547, 1548
		Union Contracts and Faculty Handbooks: These final regulations do not preclude a recipients' obligation to honor additional rights negotiated by faculty in any collective bargaining agreement or employment contract, and such contracts must comply with these final regulations.	p. 1520
		Union Contracts and Faculty Handbooks: [S]ome collective bargaining agreements may need to be renegotiated for a recipient to comply with these final regulations[.]	p. 1527
		Academic Medical Center Employees: The Department understands that academic medical centers are unique entities, but Congress did not exempt academic medical centers that receive Federal financial assistance from Title IX.	p. 1537
Recordkeeping			
Record Keeping (Investigations and Determination)	Maintain for 7 Years: Each sexual harassment investigation including any determination regarding responsibility		§106.45 (b)(10)
Record Keeping (Recordings and Transcripts)	Maintain for 7 Years: and any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section		§106.45 (b)(10)

		No Copy Required: [T]he parties have equal opportunity to inspect and review the recording or transcript of a live hearing, but that inspection and review right does not obligate the recipient to send the parties a copy of the recording or transcript.	p. 1335
Record Keeping (Sanctions)	Maintain for 7 Years: any disciplinary sanctions imposed on the respondent		§106.45 (b)(10)
Record Keeping (Remedies)	Maintain for 7 Years: any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity		§106.45 (b)(10)
Record Keeping (Appeals)	Maintain for 7 Years: Any appeal and the result		§106.45 (b)(10)
Record Keeping (Informal Resolution)	Maintain for 7 Years: Any informal resolution and the result therefrom		§106.45 (b)(10)
Record Keeping (Training Materials)	Maintain for 7 Years: All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process.		§106.45 (b)(10)

Record Keeping (Supportive Measures)	Maintain for 7 Years: For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.		§106.45 (b)(11)

		Maintenance ≠ Party Access: In response to commenters' concerns that this provision giving the parties access to records might contradict the requirement to keep supportive measures confidential, the Department has revised § 106.45(b)(10)(i) to remove the language making records available to parties.	p. 1406
Start of Retention Period		[T]he date of the record's creation begins the seven year retention period.	p. 1406
Preemption and Intersection with Other Laws			
Preemption	To the extent of a conflict between State or local law and title IX as implemented by §§ 106.30, 106.44, and 106.45, the obligation to comply with §§ 106.30, 106.44, and 106.45 is not obviated or alleviated by any State or local law.		§106.6(h)
Intersection with Other Laws (First Amendment)	Nothing in this [regulation] requires a recipient to. . . [r]estrict any rights that would otherwise be protected from government action by the First Amendment of the U.S. Constitution		§106.6(d)(1)
		Pure Speech may be Harassment: [E]xpressive speech, and not just physical conduct, may be restricted or punished as harassment.	p. 426
		Pure Speech may be Harassment: [T] he § 106.30 definition of sexual harassment is designed to capture non-speech conduct broadly (based on an assumption of the education-denying effects of such conduct), while applying the *Davis* standard to verbal conduct so that the critical purposes of both Title IX and the First Amendment can be met.	p. 507

		Overbreadth: [S]everity and pervasiveness are needed elements to ensure that Title IX's non-discrimination mandate does not punish verbal conduct in a manner that chills and restricts speech and academic freedom.	p. 471
		Prior Restraints: [A] recipient should not, under the guise of confidentiality concerns, impose prior restraints on students' and employees' ability to discuss (i.e., speak or write about) the allegations under investigation, for example with a parent, friend, or other source of emotional support, or with an advocacy organization.	p. 986
Intersection with Other Laws (Due Process)	Nothing in this [regulation] requires a recipient to. . . [d]eprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments of the U.S. Constitution		§106.6(d)(2)
Intersection with Other Laws (U.S. Constitution)	Nothing in this [regulation] requires a recipient to. . . Restrict any other rights guaranteed against government action by the U.S. Constitution.		§106.6(d)(3)
		5th Amendment and Self-Incrimination: To make clear that respondents may remain silent in circumstances in which answering a question might implicate a respondent's constitutional right to avoid self incrimination, and to protect other rights of the parties, § 106.6(d)(2) states that nothing in Title IX requires a recipient to deprive a person of any rights that would otherwise be protected from government action under the Due Process Clauses of the Fifth and Fourteenth Amendments.	p. 957

		5th Amendment and Self-Incrimination: [T]hese regulations do not require a recipient to restrict any rights that would otherwise be protected from government action under the U.S. Constitution, which includes the Fifth Amendment right against self-incrimination.	Pps. 883-84
Intersection with Other Laws (Title VII)	Nothing in this part may be read in derogation of any individual's rights under title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq. or any regulations promulgated thereunder.		§106.6(f)
		There may be incidents of sexual harassment that implicate both Title VII and Title IX, and this Department will continue to administer Title IX and its implementing regulations and to defer to the EEOC to administer Title VII and its implementing regulations. Nothing in these final regulations precludes the Department from giving due weight to the EEOC's determination regarding Title VII under 28 CFR 42.610(a). The Department recognizes that employers must fulfill their obligations under Title VII and also under Title IX. There is no inherent conflict between Title VII and Title IX, and the Department will construe Title IX and its implementing regulations in a manner to avoid an actual conflict between an employer's obligations under Title VII and Title IX.	p. 719 *See also* pps. 1514, 1515, 1520, 1523, 1524, 1547, 1548, 1551

Intersection with Other Laws (FERPA)	The obligation to comply with this part is not obviated or alleviated by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99.		§106.6(e)
		Directly Related (as Defined in FERPA and Applied to Title IX Proceedings): The Department previously stated: "Under this definition, a parent (or eligible student) has a right to inspect and review any witness statement that is directly related to the student, even if that statement contains information that is also directly related to another student, if the information cannot be segregated and redacted without destroying its meaning." The Department made this statement in response to comments regarding impairing due process in student discipline cases in its notice-and-comment rulemaking to promulgate regulations to implement FERPA. The evidence and investigative report that is being shared under these final regulations directly relate to the allegations in a complaint and, thus, directly relate to both the complainant and respondent.	p. 1488
		Direct Conflict: [I]f there is a direct conflict between the requirements of FERPA and the requirements of Title IX, such that enforcement of FERPA would interfere with the primary purpose of Title IX to eliminate sex-based discrimination in schools, the requirements of Title IX override any conflicting FERPA provisions.	p. 1456 *See also* p. 1455, 1461

		Enforcement: As the Department administers both FERPA and Title IX, the Department will not interpret compliance with its regulations under Title IX to violate requirements in its regulations under FERPA.	p. 1468
Intersection with Other Laws (Clery Act)		The Department does not perceive a conflict between a recipient's obligation to comply with reporting obligations under the Clery Act and response obligations under Title IX.	p. 662
Intersection with State Laws (Anonymous Reporting)		Recipients who are obligated under State laws to offer anonymous reporting options may not face any conflict with obligations under the final regulations.	p. 393
Intersection with State Laws (Consent)		The Department believes that the definition of what constitutes consent for purposes of sexual assault within a recipient's educational community is a matter best left to the discretion of recipients, many of whom are under State law requirements to apply particular definitions of consent for purposes of campus sexual misconduct policies.	p. 363 *See also* p. 1197
Intersection with State Laws (Emergency Removal)		State or local law may present other considerations or impose other requirements before an emergency removal can occur. To the extent that other applicable laws establish additional relevant standards for emergency removals, recipients should also heed such standards.	p. 731 *See also* p. 771
Intersection with State Laws (Sexual Harassment)		The Department does not view a difference between how "sexual harassment" is defined under these final regulations and a different or broader definition of sexual harassment under various State laws as creating undue confusion for recipients or a conflict as to how recipients must comply with Title IX and other laws. While Federal Title IX regulations require a recipient to respond to sexual harassment as defined in §106.30, a recipient may also need to respond to misconduct that does not meet that definition, pursuant to a State law.	p. 442

		[I]f a recipient is required under State law or the recipient's own policies to investigate sexual or other misconduct that does not meet the § 106.30 definition, the final regulations clarify that a recipient may do so. Similarly, if a recipient wishes to use a grievance process that complies with § 106.45 to resolve allegations of misconduct that do not constitute sexual harassment under § 106.30, nothing in the final regulations precludes a recipient from doing so.	p. 481-82
Intersection with State Laws (Mandatory Reporters)		The final regulations do not contravene or alter any Federal, State, or local requirements regarding other mandatory reporting obligations that school employees have.	p. 606
Intersection with Accrediting Bodies and other Non-Legal Authorities (NCAA Guidelines)		The Department is not under an obligation to conform these final regulations with NCAA compliance guidelines and declines to do so. Any recipient may give coaches and trainers authority to institute corrective measures on behalf of the recipient such that notice to coaches and trainers conveys actual knowledge to the recipient as defined in § 106.30. Additionally, or alternatively, any recipient may train coaches and athletic trainers to report notice of sexual harassment to the recipient's Title IX Coordinator.	p. 330
Conflicts with Union Contracts		[I]n the event of an actual conflict between a union contract or practice and the final regulations, then the final regulations would have preemptive effect.	p. 994

Notifications			
Designation of a Title IX Coordinator	Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the "Title IX Coordinator." The recipient must notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, of the name or title, office address, electronic mail address, and telephone number of the employee or employees designated as the Title IX Coordinator pursuant to this paragraph.		§106.8(a)
		[A] recipient has discretion to designate more than one employee as a Title IX Coordinator if needed in order to fulfill the recipient's Title IX obligations.	p. 574

Title IX Coordinator Contact Info	(i) Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator under paragraph (a) of this section and the policy described in paragraph (b)(1) of this section on its website, if any, and in each handbook 2011 or catalog that it makes available to persons entitled to a notification under paragraph (a) of this section.		§106.8(b)(2)
Dissemination of Policy	Notification of policy. Each recipient must notify persons entitled to a notification under paragraph (a) of this section that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by title IX and this part not to discriminate in such a manner. Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless subpart C of this part does not apply) and employment, and that inquiries about the application of title IX and this part to such recipient may be referred to the recipient's Title IX Coordinator, to the Assistant Secretary, or both.		§106.8(b)(1)

Publication of Grievance Procedures	Adoption of grievance procedures. A recipient must adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any action that would be prohibited by this part and a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30. A recipient must provide to persons entitled to a notification under paragraph (a) of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.		§106.8(c)
Training Materials	A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.		§106.45(b)(10)
		Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.	p. 1408

		Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.	p. 1409
Training			
Title IX Coordinators, Investigators, Decision-Makers, and Facilitators of an Informal Resolution Process	A recipient must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training on the definition of sexual harassment in § 106.30, the scope of the recipient's education program or activity, how to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable, and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.		§106.45(b)(1)(iii)

		Definition of Consent: This includes "how to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45."	p. 365
		Curing Perceived Bias Through Training: The Department acknowledges the concerns expressed both by commenters concerned that certain professional qualifications (e.g., a history of working in the field of sexual violence) may indicate bias, and by commenters concerned that excluding certain professionals out of fear of bias would improperly exclude experienced, knowledgeable individuals who are capable of serving impartially. Whether bias exists requires examination of the particular facts of a situation and the Department encourages recipients to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents), bearing in mind that the very training required by § 106.45(b)(1)(iii) is intended to provide Title IX personnel with the tools needed to serve impartially and without bias such that the prior professional experience of a person whom a recipient would like to have in a Title IX role need not disqualify the person from obtaining the requisite training to serve impartially in a Title IX role.	p. 827-28

Decision Makers	A recipient must ensure that decision-makers receive training on any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, as set forth in paragraph (b)(6) of this section.		§106.45(b)(1)(iii)
Investigators	A recipient also must ensure that investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence, as set forth in paragraph (b)(5)(vii) of this section.		
Frequency		No Frequency Requirement: [T]he final regulations do not impose an annual or other frequency condition on the mandatory training required in § 106.45(b)(1)(iii).	p. 833
Neutrality of Materials	Any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.		§ 106.45(b)(1)(iii)

Make Training Materials Publicity Available on Website	A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.		§106.45(b)(10)
		Keep Up to Date: [T]his provision requires the recipient to publish training materials which are up to date and reflect the latest training provided to Title IX personnel.	p. 1408
		Obtain Permission to Post Proprietary Information: To the extent that commenters' concerns that a recipient may be unable to publicize its training materials because some recipients hire outside consultants to provide training, the materials for which may be owned by the outside consultant and not by the recipient itself, the Department acknowledges that a recipient in that situation would need to secure permission from the consultant to publish the training materials, or alternatively, the recipient could create its own training materials over which the recipient has ownership and control.	p. 1409
Exemptions			
Religious Exemption	An educational institution that seeks assurance of the exemption set forth in paragraph (a) of this section may do so by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization.		§106.12(b)

	An institution is not required to seek assurance from the Assistant Secretary in order to assert such an exemption. In the event the Department notifies an institution that it is under investigation for noncompliance with this part and the institution wishes to assert an exemption set forth in paragraph (a) of this section, the institution may at that time raise its exemption by submitting in writing to the Assistant Secretary a statement by the highest ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.		§106.12(b)
		Asserting the Exemption: When the Department notifies a recipient that it is under investigation for noncompliance with this part or a particular section of this part, the recipient identifies the provisions of this part which conflict with a specific tent of the religious organization.	p. 1660
		Burden on Recipient Institution to Show Entitlement to and Scope of Exemption: [R]ecipients are not entitled to any type of formal deference when invoking eligibility for a religious exemption, and recipients have the duty to establish their eligibility for an exemption, as well as the scope of any exemption.	p. 1661

		Limitation: [T]his does not prevent OCR from investigating or making a finding against a recipient if its religious tenets do not address the conduct at issue. In those cases, OCR will proceed to investigate, and if necessary, make a finding on the merits.	p. 1653 *See also* p. 1660
Effective Date			
Effective Date		Effective Date: [T]he final regulations are effective August 14, 2020.	p. 1869
Prospective Application		Prospective Application: These final regulations will apply prospectively to give recipients adequate notice of the standards that apply to them.	p. 1345 *See also* p. 1348

Prepared by NACUA, May 17, 2020.

Agency Information

Sheila Abron
Federal Compliance in Flux: Title IX, Executive Authority, and Department of Education's Evolving Enforcement Agenda
January 23, 2026

Know Your Rights: Pregnant or Parenting? Title IX Protects You From Discrimination At School

PDF (412K)

Title IX of the Education Amendments of 1972 ("Title IX"), 20 U.S.C. §1681 *et seq.*, is a Federal civil rights law that prohibits discrimination on the basis of sex—including pregnancy and parental status—in educational programs and activities.

All public and private schools, school districts, colleges, and universities receiving any Federal funds ("schools") must comply with Title IX.*

Here are some things you should know about your rights:

***Classes and School Activities* — your school MUST:**

- Allow you to continue participating in classes and extracurricular activities even though you are pregnant. This means that you can still participate in advanced placement and honors classes, school clubs, sports, honor societies, student leadership opportunities, and other activities, like after-school programs operated at the school.
  - Allow you to choose whether you want to participate in special instructional programs or classes for pregnant students. You can participate if you want to, but your school cannot pressure you to do so. The altern

provide the same types of academic, extracurricular and enrichment opportunities as your school's regular program.

- Allow you to participate in classes and extracurricular activities even though you are pregnant and not require you to submit a doctor's note unless your school requires a doctor's note from all students who have a physical or emotional condition requiring treatment by a doctor. Your school also must not require a doctor's note from you after you have been hospitalized for childbirth unless it requires a doctor's note from all students who have been hospitalized for other conditions.

- Provide you with reasonable adjustments, like a larger desk, elevator access, or allowing you to make frequent trips to the restroom, when necessary because of your pregnancy.

***Excused Absences and Medical Leave* — your school MUST:**

- Excuse absences due to pregnancy or childbirth for as long as your doctor says it is necessary.

- Allow you to return to the same academic and extracurricular status as before your medical leave began, which should include giving you the opportunity to make up any work missed while you were out.

- Ensure that teachers understand the Title IX requirements related to excused absences/medical leave. Your teacher may not refuse to allow you to submit work after a deadline you missed because of pregnancy or childbirth. If your teacher's grading is based in part on class participation or attendance and you missed class because of pregnancy or childbirth, you should be allowed to make up the participation or attendance credits you didn't have the chance to earn.

- Provide pregnant students with the same special services it provides to students with temporary medical conditions. This includes homebound instruction/at-home tutoring/independent study.

***Harassment* — your school MUST:**

- Protect you from harassment based on sex, including harassment because of pregnancy or related conditions. Comments that could constitute prohibited harassment include making sexual comments or jokes about your pregnancy, calling you sexually charged names, spreading rumors about your sexual activity,

and making sexual propositions or gestures, if the comments are sufficiently serious that it interferes with your ability to benefit from or participate in your school's program.

***Policies and Procedures* — your school MUST:**

- Have and distribute a policy against sex discrimination. It is recommended that the policy make clear that prohibited sex discrimination covers discrimination against pregnant and parenting students.
- Adopt and publish grievance procedures for students to file complaints of sex discrimination, including discrimination related to pregnancy or parental status.
- Identify at least one employee in the school or school district to carry out its responsibilities under Title IX (sometimes called a "Title IX Coordinator") and notify all students and employees of the name, title, and contact information of its Title IX Coordinator. These responsibilities include overseeing complaints of discrimination against pregnant and parenting students.

***Helpful Tips for Pregnant and Parenting Students*:**

- Ask your school for help—meet with your school's Title IX Coordinator or counselor regarding what your school can do to support you in continuing your education.
- Keep notes about your pregnancy-related absences, any instances of harassment and your interactions with school officials about your pregnancy, and immediately report problems to your school's Title IX Coordinator, counselor, or other staff.
- If you feel your school is discriminating against you because you are pregnant or parenting you may file a complaint:
  - Using your school's internal Title IX grievance procedures.
  - With the U.S. Department of Education, Office for Civil Rights (OCR), even if you have not filed a complaint with your school. If you file with OCR, make sure you do so within 180 days of when the discrimination took place.
  - In court, even if you have not filed a complaint with your school or with OCR.
- Contact OCR if you have any questions. We are here to help make sure all students, including pregnant and parenting students, have equal educational opportunities!

If you want to learn more about your rights, or if you believe that a school district, college, or university is violating Federal law, you may contact the U.S. Department of Education, Office for Civil Rights, at (800) 421-3481 or ocr@ed.gov. If you wish to fill out a complaint form online, you may do so at: http://www.ed.gov/ocr/complaintintro.html.

* A school that is controlled by a religious organization is exempt from Title IX when the law's requirements would conflict with the organization's religious tenets.

U.S. Department of Education
Office for Civil Rights

Top

Office for Civil Rights (OCR)

Page Last Reviewed: January 15, 2025

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529 Plans

Repay Your Loans

1098 Tax Forms

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504 Plans

FERPA

IEPs (Individualized Education Program)

Teaching Resources

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Teaching Abroad

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Letter to Chief State School Officers, Title IX Obligations in Athletics

[OCR-00002]

U.S. Department of Education, Office for Civil Rights
X00036
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Chief State School Officers FR

Elimination of sex discrimination in athletic programs sept. 1975 Memo to Chief State School Officers, LEA Superintendents, and PSE Presidents on Title IX obligations in athletics, including athletic scholarships; intercollegiate, club, and intramural programs. Cheerleading and drill teams are covered by extracurricular activities provision of Title IX. Physical education and health classes are covered by instructional programs provisions. Required first year activities are obsolete except for institutions covered by Title IX for the first time. Should be read in conjunction with 1979 intercollegiate athletics policy interpretation.

Doc. No. 00036 DATE: November 11, 1975

Typed From Original Copy

September 1975

TO : Chief State School Officers, Superintendents of Local Educational Agencies and College and University Presidents

FROM : Director, Office for Civil Rights

SUBJECT: Elimination of Sex Discrimination in Athletic Programs

Title IX of the Education Amendments of 1972 and the Departmental Regulation (45 CFR Part 86) promulgated thereunder prohibit discrimination on the basis of sex in the operation of most federally-assisted education programs. The regulation became effective on July 21, 1975.

During the forty-five day period immediately following approval by the President and publication of the regulation on June 4, 1975, concerns were raised about the immediate obligations of educational institutions to comply with certain sections of the Departmental Regulation as they relate to athletic programs. These concerns, in part, focus on the application of the adjustment period provision (86.41 (d)) to the various non-discrimination requirements, and additionally, on how educational institutions can carry out the self-evaluation requirement (86.3(c)).

This memorandum provides guidance with respect to the major first year responsibilities of an educational institution to ensure equal opportunity in the operation of both its athletic activities and its athletic scholarship programs. Practical experience derived from actual on-site compliance reviews and the concomitant development of greater governmental expertise on the application of the Regulation to athletic activities may, of course, result in further or revised guidance being issued in the future. Thus, as affected institutions proceed to conform their programs with the Department's regulation, they and other interested persons are encouraged to review carefully the operation of these guidelines and to provide the Department with the benefit of their views.

Basic Requirements

There are two major substantive provisions of the regulation which define the ba responsibility of educational institutions to provide equal opportunity to membe both sexes interested in participating in the athletics programs institutions offer.

Section 86.41 prohibits discrimination on the basis of sex in the operation of any interscholastic, intercollegiate, club or intramural athletic program offered by an educational institution. Section 86.37(c) sets forth requirements for ensuring equal opportunity in the provision of athletic scholarships.

These sections apply to each segment of the athletic program of a federally assisted educational institution whether or not that segment is the subject of direct financial support through the Department. Thus, the fact that a particular segment of an athletic program is supported by funds received from various other sources (such as student fees, general revenues, gate receipts, alumni donations, booster clubs, and non-profit foundations) does not remove it from the reach of the statute and hence of the regulatory requirements. However, drill teams, cheerleaders and the like, which are covered more generally as extracurricular activities under section 86.31, and instructional offerings such as physical education and health classes, which are covered under section 86.34, are not a part of the institution's "athletic program" within the meaning of the regulation.

Section 86.41 does not address the administrative structure(s) which are used by educational institutions for athletic programs. Accordingly, institutions are not precluded form employing separate administrative structures for men's and women's sports (if separate teams exist) or a unitary structure. However, when educational institutions evaluate whether they are in compliance with the provisions of the regulation relating to non-discrimination in employment, they must carefully assess the effects on employees of both sexes of current and any proposed administrative structure and related coaching assignments. Changes in current administrative structure(s) or coaching assignments which have a disproportionately adverse effect on the employment opportunities of employees of one sex are prohibited by the regulation.

Self-Evaluation and Adjustment Periods

Section 86.3(c) generally requires that by July 21, 1976, educational institutions (1) carefully evaluate current policies and practices (including those related to the operation of athletic programs) in terms of compliance with those provisions an

where such policies or practices are inconsistent with the regulation, conform current policies and practices to the requirements of the regulation.

An institution's evaluation of its athletic program must include every area of the program covered by the regulation. All sports are to be included in this overall assessment, whether they are contact or non-contact sports.

With respect to athletic programs, section 86.41 (d) sets specific time limitations on the attainment of total conformity of institutional policies and practices with the requirements of the regulation up to one year for elementary schools and up to three years for all other educational institutions.

Because of the integral relationship of the provision relating to athletic scholarships and the provision relating to the operation of athletic programs, the adjustment periods for both are the same.

The adjustment period is not a waiting period. Institutions must begin now to take whatever steps are necessary to ensure full compliance as quickly as possible. Schools may design an approach for achieving full compliance tailored to their own circumstances; however, self-evaluation, as required by section 86.3 (c) is a very important step for every institution to assure compliance with the entire Title IX regulation, as well as with the athletics provisions.

Required First Year Actions

School districts, as well as colleges and universities, are obligated to perform a self-evaluation of their entire education program, including the athletics program, prior to July 21, 1976. School districts which offer interscholastic or intramural athletics at the elementary school level must immediately take significant steps to accommodate the interests and abilities of elementary school pupils of both sexes, including steps to eliminate obstacles to compliance such as inequities in the provision of equipment, scheduling and the assignment of coaches and other supervisory personnel. As indicated earlier, school districts must conform their total athletic program at the elementary level to the requirements of section 86.41 no later than July 21, 1976

In order to comply with the various requirements of the regulation addressed to nondiscrimination in athletic programs, educational institutions operating athletic programs above the elementary level should:

(1) Compare the requirements of the regulation addressed to nondiscrimination in athletic programs and equal opportunity in the provision of athletic scholarships with current policies and practices;

(2) Determine the interests of both sexes in the sports to be offered by the institution and, where the sport is a contact sport or where participants are selected on the basis of competition, also determine the relative abilities of members of each sex for each such sport offered, in order to decide whether to have single sex teams or teams composed of both sexes. (Abilities might be determined through try-outs or by relying upon the knowledge of athletic teaching staff, administrators and athletic conference and league representatives.)

(3) Develop a plan to accommodate effectively the interests and abilities of both sexes, which plan must be fully implemented as expeditiously as possible and in no event later than July 21, 1978. Although the plan need not be submitted to the Office for Civil Rights, institutions should consider publicizing such plans so as to gain the assistance of students, faculty, etc. in complying with them.

Assessment of Interests and Abilities

In determining student interests and abilities as described in (2) above, educational institutions as part of the self-evaluation process should draw the broadest possible base of information. An effort should be made to obtain the participation of all segments of the educational community affected by the athletics program, and any reasonable method adopted by an institution to obtain such participation will be acceptable.

Separate Teams

The second type of determination discussed in (2) above relates to the manner i which a given sports activity is to be offered. Contact sports and sports for whic teams are chosen by competition may be offered either separately or on a unitary basis.

Contact sports are defined as football, basketball, boxing, wrestling, rugby, ice hockey and any other sport the purpose or major activity of which involves bodily contact. Such sports may be offered separately.

If by opening a team to both sexes in a contact sport an educational institution does not effectively accommodate the abilities of members of both sexes (see 86.41(c) (i)), separate teams in that sport will be required if both men and women express interest in the sport and the interests of both sexes are not otherwise accommodated. For example an institution would not be effectively accommodating the interests and abilities of women if it abolished all its women's teams and opened up its men's teams to women, but only a few women were able to quality for the men's teams.

Equal Opportunity

In the development of the total athletic program referred to in (3) above, educational institutions, in order to accommodate effectively the interests and abilities of both sexes, must ensure that equal opportunity exists in both the conduct of athletic programs and the provision of athletic scholarships.

Section 86.41(c) requires equal opportunity in athletic programs for men and women. Specific factors which should be used by an educational institution during its self-evaluative planning to determine whether equal opportunity exists in its plan for its total athletic program are:

- the nature and extent of the sports programs to be offered (including the levels of competition, such as varsity, club, etc.);

- the provision of equipment and supplies;

- the scheduling of games and practice time;

- the provision of travel and per diem allowances;

- the nature and extent of the opportunity to receive coaching and academic tutoring;

- the assignment and compensation of coaches and tutors;

- the provision of locker rooms, practice and competitive facilities;

- the provision of medical and training facilities and services;

- the provision of housing and dining facilities and services;

- the nature and extent of publicity.

Overall Objective

The point of the regulation is not to be so inflexible as to require identical treatment in each of the matters listed under section 86.41(c). During the process of self-evaluation, institutions should examine all of the athletic opportunities for men and women and make a determination as to whether each has an equal opportunity to compete in athletics in a meaningful way. The equal opportunity emphasis in the regulation addresses the totality of the athletic program of the institution rather than each sport offered.

Educational institutions are not required to duplicate their men's program for women. The thrust of the effort should be on the contribution of each of the categories to the overall goal of equal opportunity in athletics rather than on the details related to each of the categories.

While the impact of expenditures for sex identifiable sports programs should be carefully considered in determining whether equal opportunity in athletics exists for both sexes, equal aggregate expenditures for male and female teams are not required. Rather, the pattern of expenditures should not result in a disparate effect on opportunity. Recipients must not discriminate on the basis of sex in the provision of necessary equipment, supplies, facilities, and publicity for sports programs. The fact that differences in expenditures may occur because of varying costs attributable to differences in equipment requirements and levels of spectator interest does not obviate in any way the responsibility of educational institutions to provide equal opportunity.

Athletic Scholarships

As part of the self-evaluation and planning process discussed above, educational institutions must also ensure that equal opportunity exists in the provision of athletic scholarships. Section 86.37(c) provides that "reasonable opportunities" for athletic scholarships should be "in proportion to the number of students of each sex participating in interscholastic or intercollegiate athletics."

Following the approach of permitting separate teams, section 86.37(c) of the regulation permits the overall allocation of athletic scholarships on the basis of sex. No such separate treatment is permitted for non-athletic scholarships.

The thrust of the athletic scholarship section is the concept of reasonableness, not strict proportionality in the allocation of scholarships. The degree of interest and participation of male and female students in athletics is the critical factor in determining whether the allocation of athletic scholarships conforms to the requirements of the regulation.

Neither quotas nor fixed percentages of any type are required under the regulation. Rather, the institution is required to take a reasonable approach in its award of athletic scholarships, considering the participation and relative interests and athletic proficiency of its student of both sexes.

Institutions should assess whether male and female athletes in sports at comparable levels of competition are afforded approximately the same opportunities to obtain scholarships. Where the sports offered or the levels of competition differ for male and female students, the institution should assess its athletic scholarship program to determine whether overall opportunities to receive athletic scholarships are roughly proportionate to the number of students of each sex participating in intercollegiate athletics.

If an educational institution decides not to make an overall proportionate allocation of athletic scholarships on the basis of sex, and thus, decides to award such scholarships by other means such as applying general standards to applicants of both sexes, institutions should determine whether the standards used to award scholarships are neutral, i.e. based on criteria which do not inherently disadvantage members of sex. There are a number of "neutral" standards which might be used including financial

need, athletic proficiency or a combination of both. For example, an institution may wish to award its athletic scholarships to all applicants on the basis of need after a determination of a certain level of athletic proficiency. This would be permissible even if it results in a pattern of award which differs from the relative levels of interests or participation of men and women students so long as the initial determination of athletic proficiency is based on neutral standards. However, if such standards are not neutral in substance or in application then different standards would have to be developed and the use of the discriminatory standard discontinued. For example, when "ability" is used as a basis for scholarship award and the range of ability in a particular sport, at the time, differs widely between the sexes, separate norms must be developed for each sex.

Availability of Assistance

We in the Office for Civil Rights will be pleased to do everything possible to assist school officials to meet their Title IX responsibilities. The names, addresses and telephone numbers of Regional Offices for Civil Rights are attached.

/s/

Peter E. Holmes

Top

Office of Finance and Operations (OFO)

Page Last Reviewed: November 4, 2024

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Letter to Students, Educators, and other Stakeholders re *Victim Rights Law Center et al. v. Cardona* Notice of Language Assistance

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

August 24, 2021

Dear Students, Educators, and other Stakeholders,

I write with an important update regarding the Department of Education's regulations implementing Title IX of the Education Amendments of 1972, as amended in 2020. On July 28, 2021, a federal district court in Massachusetts issued a decision in *Victim Rights Law Center et al. v. Cardona*, No. 1:20-cv-11104, 2021 WL 3185743 (D. Mass. July 28, 2021). This case was brought by several organizations and individuals challenging the 2020 amendments to the Title IX regulations.

The court upheld most of the provisions of the 2020 amendments that the plaintiffs challenged, but it found one part of 34 C.F.R. § 106.45(b)(6)(i) (live hearing requirement for the Title IX grievance process at postsecondary institutions only) to be arbitrary and capricious, vacated that part of the provision, and remanded it to the Department for further consideration. In a subsequent order issued on August 10, 2021, the court clarified that its decision applied nationwide. The court vacated the part of 34 C.F.R. § 106.45(b)(6)(i) that prohibits a decision-maker from relying on statements that are not subject to cross-examination during the hearing: "If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility…." Please note that all other provisions in the 2020 amendments, including all other parts of 34 C.F.R. § 106.45(b)(6)(i), remain in effect. The affected provision at 34 C.F.R. § 106.45(b)(6)(i) is only applicable to postsecondary institutions and does not apply to elementary or secondary schools, which are not required to provide for a live hearing with cross-examination.

In accordance with the court's order, the Department will immediately cease enforcement of the part of § 106.45(b)(6)(i) regarding the prohibition against statements not subject to cross-examination. Postsecondary institutions are no longer subject to this portion of the provision.

In practical terms, a decision-maker at a postsecondary institution may now consider statements made by parties or witnesses that are otherwise permitted under the regulations, even if those parties or witnesses do not participate in cross-examination at the live hearing, in reaching a determination regarding responsibility in a Title IX grievance process.

For example, a decision-maker at a postsecondary institution may now consider statements made by the parties and witnesses during the investigation, emails or text exchanges between the parties leading up to the alleged sexual harassment, and statements about the alleged sexual harassment that satisfy the regulation's relevance rules, regardless of whether the parties or witnesses submit to cross-examination at the live hearing. A decision-maker at a postsecondary institution may also consider police reports, Sexual Assault Nurse Examiner documents, medical reports, and other

documents even if those documents contain statements of a party or witness who is not cross-examined at the live hearing.

The Office for Civil Rights is in the process of identifying all documents on our website that discuss this vacated provision and will make updates to those documents as appropriate in the coming weeks. Any statements in an OCR document about the vacated part of § 106.45(b)(6)(i) should not be relied upon.

As OCR announced in an April 6, 2021, letter to students, educators, and other stakeholders, OCR is undertaking a comprehensive review of the Department's existing Title IX regulations, orders, guidance, policies, and other similar agency actions to fulfill the policy set out in President Biden's Executive Order, dated March 8, 2021, on *Guaranteeing an Educational Environment Free From Discrimination on the Basis of Sex, Including Sexual Orientation or Gender Identity*. This process is ongoing, and OCR anticipates publishing a notice of proposed rulemaking to amend the Department's Title IX regulations.

OCR also recently issued a question-and-answer resource to clarify how OCR interprets schools' obligations under the 2020 amendments and a related appendix, which provides examples of Title IX procedures that schools may find helpful in implementing the 2020 amendments. The resource will be updated to reflect the court's decision in *VRLC v. Cardona*, and we hope it will continue to be a valuable tool to assist schools in carrying out their obligations under Title IX.

Thank you for your efforts to ensure equal educational opportunities for all of our nation's students.

Sincerely,

Suzanne B. Goldberg
Acting Assistant Secretary for Civil Rights

PRESS RELEASE

U.S. Department of Education and U.S. Department of Justice Announce Title IX Special Investigations Team

Friday, April 4, 2025

For Immediate Release

Office of Public Affairs

Today, amid a staggering volume of Title IX complaints, the U.S Department of Education (ED) and the U.S. Department of Justice (DOJ) announce the Title IX Special Investigations Team (SIT) to ensure timely, consistent resolutions to protect students, and especially female athletes, from the pernicious effects of gender ideology in school programs and activities.

The Title IX SIT will streamline Title IX investigations by creating a specialized team of investigators from across ED and Department of Justice offices. The establishment of the Title IX SIT will allow personnel to apply a rapid resolution investigation process to the increasing volume of Title IX cases and also enable ED and the Justice Department to work together to conduct investigations that are fully prepared for ultimate Justice Department enforcement.

“Protecting women and women’s sports is a key priority for this Department of Justice,” said Attorney General Pamela Bondi. “This collaborative effort with the Department of Education will enable our attorneys to take comprehensive action when women’s sports or spaces are threatened and use the full power of the law to remedy any violation of women’s civil rights.”

“Today’s establishment of the Title IX SIT will benefit women and girls across this nation who have been subjected to discrimination and indignity in their educational activities,” said Secretary of Education Linda McMahon. “From day one, the Trump Administration has

prioritized enforcing Title IX to protect female students and athletes. Traditionally, our Office for Civil Rights (OCR) takes months, even years, to complete Title IX investigations. OCR under this Administration has moved faster than it ever has, and the Title IX SIT will ensure even more rapid and consistent investigations. To all the entities that continue to allow men to compete in women's sports and use women's intimate facilities: there's a new sheriff in town. We will not allow you to get away with denying women's civil rights any longer."

The Title IX SIT includes:

- ED Office for Civil Rights investigators and attorneys
- DOJ Civil Rights Division attorneys
- ED Office of General Counsel attorneys
- ED Student Privacy and Protection Office case workers and an FSA Enforcement investigator

Background:

President Trump's Executive Order Keeping Men out of Women's Sports articulates United States policy, consistent with Title IX, to protect female student athletes from having "to compete with or against or having to appear unclothed before males." President Trump's Executive Order Defending Women From Gender Ideology Extremism states the truth that "The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system."

Updated April 4, 2025

Topic

CIVIL RIGHTS

Component

Office of the Attorney General

Press Release Number: 25-343

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UNITED STATES DEPARTMENT OF EDUCATION
OFFICE FOR CIVIL RIGHTS

THE ACTING ASSISTANT SECRETARY

February 4, 2025

Dear Colleague:

This letter[1] is to clarify that, in light of a recent court decision, the United States Department of Education's (ED) Office for Civil Rights (OCR) will enforce Title IX under the provisions of the 2020 Title IX Rule,[2] rather than the 2024 Title IX Rule.[3] Accordingly, lawful Title IX enforcement includes, *inter alia*, the definition of sexual harassment, the procedural protections owed to complainants and respondents, the provision of supportive measures to complainants, and school-level reporting processes as outlined in the 2020 Title IX Rule.

On January 9, 2025, the United States District Court for the Eastern District of Kentucky issued a decision that vacated the entirety of the 2024 Title IX Rule nationwide.[4] Prior to that decision, federal courts in other jurisdictions had enjoined the 2024 Title IX Rule, which amounted to a prohibition against its enforcement in 26 states.[5] Although the United States Department of Justice is responsible for determining whether to appeal the United States District Court for the Eastern District of Kentucky's vacatur order, that judgment was immediately effective and no portion of the 2024 Title IX Rule is now in effect in any jurisdiction.

In addition, on January 20, 2025, President Trump issued an Executive Order, Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government. President Trump ordered all agencies and departments within the Executive Branch to "enforce all sex-protective laws to promote [the] reality" that there are "two sexes, male and female," and that "[t]hese sexes are not changeable and are grounded in fundamental and incontrovertible reality." ED and OCR must enforce Title IX consistent with President Trump's Order.

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[1] This letter replaces and supersedes the January 31, 2025, letter issued on Title IX enforcement.
[2] 85 Fed. Reg. 30026 (2020).
[3] 89 Fed. Reg. 33474 (2024).
[4] *Tennessee v. Cardona*, No. 24-0072-DCR, 2025 WL 63795, at *6 (E.D. Ky. Jan. 9, 2025).
[5] *See Alabama v. U.S. Sec. of Educ.*, No. 24-12444, 2024 WL 3981994 (11th Cir. Aug. 22, 2024); *Oklahoma v. Cardona*, No. CIV-24-00461-JD, 2024 WL 3609109 (W.D. Okla. July 31, 2024); *Arkansas v. Dep't of Educ.*, No. 4:24-CV-636-RWS, 2024 WL 3518588 (E.D. Mo. July 24, 2024); *Texas v. United States*, No. 2:24-CV-86-Z, 2024 WL 3405342 (N.D. Tex. July 11, 2024); *Kansas v. Dep't of Educ.*, No. 24-4041-JWB, 2024 WL 3273285 (D. Kan. July 2, 2024); *Louisiana v. Dep't of Educ.*, No. 3:24-CV-00563, 2024 WL 2978786 (W.D. La. June 13, 2024).

In light of the recent federal court decision vacating the 2024 Title IX Rule, and consistent with President Trump's *Defending Women* Executive Order, the binding regulatory framework for Title IX enforcement includes the principles and provisions of the 2020 Title IX Rule and the longstanding Title IX regulations outlined in 34 C.F.R. 106 et seq., but excludes the vacated 2024 Title IX Rule. Accordingly, open Title IX investigations initiated under the 2024 Title IX Rule should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq.

Resources pertaining to Title IX and the 2020 Title IX Rule are available here.

Sincerely,

/s/
Craig Trainor
Acting Assistant Secretary for Civil Rights
United States Department of Education

Executive Orders

Sheila Abron
Federal Compliance in Flux: Title IX, Executive Authority, and Department of Education's Evolving Enforcement Agenda
January 23, 2026

The WHITE HOUSE

PRESIDENTIAL ACTIONS

DEFENDING WOMEN FROM GENDER IDEOLOGY EXTREMISM AND RESTORING BIOLOGICAL TRUTH TO THE FEDERAL GOVERNMENT

The White House

January 20, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, including section 7301 of title 5, United States Code, it is hereby ordered:

Section 1. Purpose. Across the country, ideologues who deny the biological reality of sex have increasingly used legal and other socially coercive means to permit men to self-identify as women and gain access to intimate single-sex spaces and activities designed for women, from women's domestic abuse shelters to women's workplace showers. This is wrong. Efforts to eradicate the biological reality of sex fundamentally attack women by depriving them of their dignity, safety, and well-being. The erasure of sex in language and policy has a corrosive impact not just on women but on the validity of the entire American system. Basing Federal policy on truth is critical to scientific inquiry, public safety, morale, and trust in government itself.

This unhealthy road is paved by an ongoing and purposeful attack against the ordinary and longstanding use and understanding of biological and scientific terms, replacing the immutable biological reality of sex with an internal, fluid, and subjective sense of self unmoored from biological facts. Invalidating the true and biological category of "woman" improperly transforms laws and policies designed to protect sex-based opportunities into laws and policies that undermine them, replacing longstanding, cherished legal rights and values with an identity-based, inchoate social concept.

Accordingly, my Administration will defend women's rights and protect freedom of conscience by using clear and accurate language and policies that recognize women are biologically female, and men are biologically male.

Sec. 2. Policy and Definitions. 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. Under my direction, the Executive Branch will enforce all sex-protective laws to promote this reality, and the following definitions shall govern all Executive interpretation of and application of Federal law and administration policy:

(a) "Sex" shall refer to an individual's immutable biological classification as either male or female. "Sex" is not a synonym for and does not include the concept of "gender identity."

(b) "Women" or "woman" and "girls" or "girl" shall mean adult and juvenile human females, respectively.

(c) "Men" or "man" and "boys" or "boy" shall mean adult and juvenile human males, respectively.

(d) "Female" means a person belonging, at conception, to the sex that produces the large reproductive cell.

(e) "Male" means a person belonging, at conception, to the sex that produces the small reproductive cell.

(f) "Gender ideology" replaces the biological category of sex with an ever-shifting concept of self-assessed gender identity, permitting the false claim that males can identify as and thus become women and vice versa, and requiring all institutions of society to regard this false claim as true. Gender ideology includes the idea that there is a vast spectrum of genders that are disconnected from one's sex. Gender ideology is internally inconsistent, in that it diminishes sex as an identifiable or useful category but nevertheless maintains that it is possible for a person to be born in the wrong sexed body.

(g) "Gender identity" reflects a fully internal and subjective sense of self, disconnected from biological reality and sex and existing on an infinite continuum, that does not provide a meaningful basis for identification and cannot be recognized as a replacement for sex.

Sec. 3. Recognizing Women Are Biologically Distinct From Men. (a) Within 30 days of the date of this order, the Secretary of Health and Human Services shall provide to the U.S. Government, external partners, and the public clear guidance expanding on the sex-based definitions set forth in this order.

(b) Each agency and all Federal employees shall enforce laws governing sex-based rights, protections, opportunities, and accommodations to protect men and women as biologically distinct sexes. Each agency should therefore give the terms "sex", "male", "female", "men", "women", "boys" and "girls" the meanings set forth in section 2 of this order when interpreting or applying statutes, regulations, or guidance and in all other official agency business, documents, and communications.

(c) When administering or enforcing sex-based distinctions, every agency and all Federal employees acting in an official capacity on behalf of their agency shall use the term "sex" and not "gender" in all applicable Federal policies and documents.

(d) The Secretaries of State and Homeland Security, and the Director of the Office of Personnel Management, shall implement changes to require that government-issued identification documents, including passports, visas, and Global Entry cards, accurately reflect the holder's sex, as defined under section 2 of this order; and the Director of the Office of Personnel Management shall ensure that applicable personnel records accurately report Federal employees' sex, as defined by section 2 of this order.

(e) Agencies shall remove all statements, policies, regulations, forms, communications, or other internal and external messages that promote or otherwise inculcate gender ideology, and shall cease issuing such statements, policies, regulations, forms, communications or other messages. Agency forms that require an individual's sex shall list male or female, and shall not request gender identity. Agencies shall take all necessary steps, as permitted by law, to end the Federal funding of gender ideology.

(f) The prior Administration argued that the Supreme Court's decision in *Bostock v. Clayton County* (2020), which addressed Title VII of the Civil Rights Act of 1964, requires gender identity-based access to single-sex spaces under, for example, Title IX of the Educational Amendments Act. This position is legally untenable and has harmed women. The Attorney General shall therefore immediately issue guidance to agencies to correct the misapplication of the Supreme Court's decision in *Bostock v. Clayton County* (2020) to sex-based distinctions in agency activities. In addition, the Attorney General shall issue guidance and assist agencies in protecting sex-based distinctions, which are explicitly permitted under Constitutional and statutory precedent.

(g) Federal funds shall not be used to promote gender ideology. Each agency shall assess grant conditions and grantee preferences and ensure grant funds do not promote gender ideology.

Sec. 4. Privacy in Intimate Spaces. (a) The Attorney General and Secretary of Homeland Security shall ensure that males are not detained in women's prisons or housed in women's detention centers, including through amendment, as necessary, of Part 115.41 of title 28, Code of Federal Regulations and interpretation guidance regarding the Americans with Disabilities Act.

(b) The Secretary of Housing and Urban Development shall prepare and submit for notice and comment rulemaking a policy to rescind the final rule entitled "Equal Access in Accordance with an Individual's Gender Identity in Community Planning and Development Programs" of September 21, 2016, 81 FR 64763, and shall submit for public comment a policy protecting women seeking single-sex rape shelters.

(c) The Attorney General shall ensure that the Bureau of Prisons revises its policies concerning medical care to be consistent with this order, and shall ensure that no Federal funds are expended for any medical procedure, treatment, or drug for the purpose of conforming an inmate's appearance to that of the opposite sex.

(d) Agencies shall effectuate this policy by taking appropriate action to ensure that intimate spaces designated for women, girls, or females (or for men, boys, or males) are designated by sex and not identity.

Sec. 5. Protecting Rights. The Attorney General shall issue guidance to ensure the freedom to express the binary nature of sex and the right to single-sex spaces in workplaces and federally funded entities covered by the Civil Rights Act of 1964. In accordance with that guidance, the Attorney General, the Secretary of Labor, the General Counsel and Chair of the Equal Employment Opportunity Commission, and each other agency head with enforcement responsibilities under the Civil Rights Act shall prioritize investigations and litigation to enforce the rights and freedoms identified.

Sec. 6. Bill Text. Within 30 days of the date of this order, the Assistant to the President for Legislative Affairs shall present to the President proposed bill text to codify the definitions in this order.

Sec. 7. Agency Implementation and Reporting. (a) Within 120 days of the date of this order, each agency head shall submit an update on implementation of this order to the President, through the Director of the Office of Management and Budget. That update shall address:

(i) changes to agency documents, including regulations, guidance, forms, and communications, made to comply with this order; and

(ii) agency-imposed requirements on federally funded entities, including contractors, to achieve the policy of this order.

(b) The requirements of this order supersede conflicting provisions in any previous Executive Orders or Presidential Memoranda, including but not limited to Executive Orders 13988 of January 20, 2021, 14004 of January 25, 2021, 14020 and 14021 of March 8, 2021, and 14075 of June 15, 2022. These Executive Orders are hereby rescinded, and the White House Gender Policy Council established by Executive Order 14020 is dissolved.

(c) Each agency head shall promptly rescind all guidance documents inconsistent with the requirements of this order or the Attorney General's guidance issued pursuant to this order, or rescind such parts of such documents that are inconsistent in such manner. Such documents include, but are not limited to:

(i) "The White House Toolkit on Transgender Equality";

(ii) the Department of Education's guidance documents including:

(A) "2024 Title IX Regulations: Pointers for Implementation" (July 2024);

(B) "U.S. Department of Education Toolkit: Creating Inclusive and Nondiscriminatory School Environments for LGBTQI+ Students";

(C) "U.S. Department of Education Supporting LGBTQI+ Youth and Families in School" (June 21, 2023);

(D) "Departamento de Educación de EE.UU. Apoyar a los jóvenes y familias LGBTQI+ en la escuela" (June 21, 2023);

(E) "Supporting Intersex Students: A Resource for Students, Families, and Educators" (October 2021);

(F) "Supporting Transgender Youth in School" (June 2021);

(G) "Letter to Educators on Title IX's 49th Anniversary" (June 23, 2021);

(H) "Confronting Anti-LGBTQI+ Harassment in Schools: A Resource for Students and Families" (June 2021);

(I) "Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of Bostock v. Clayton County" (June 22, 2021);

(J) "Education in a Pandemic: The Disparate Impacts of COVID-19 on America's Students" (June 9, 2021); and

(K) "Back-to-School Message for Transgender Students from the U.S. Depts of Justice, Education, and HHS" (Aug. 17, 2021);

(iii) the Attorney General's Memorandum of March 26, 2021 entitled "Application of *Bostock v. Clayton County* to Title IX of the Education Amendments of 1972"; and

(iv) the Equal Employment Opportunity Commission's "Enforcement Guidance on Harassment in the Workplace" (April 29, 2024).

Sec. 8. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

THE WHITE HOUSE,

January 20, 2025.

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PRESIDENTIAL ACTIONS

Keeping Men Out of Women's Sports

The White House

February 5, 2025

By the authority vested in me as President by the Constitution and the laws of the United States of America, and to protect opportunities for women and girls to compete in safe and fair sports, it is hereby ordered:

Section 1. Policy and Purpose. In recent years, many educational institutions and athletic associations have allowed men to compete in women's sports. This is demeaning, unfair, and dangerous to women and girls, and denies women and girls the equal opportunity to participate and excel in competitive sports.

Moreover, under Title IX of the Education Amendments Act of 1972 (Title IX), educational institutions receiving Federal funds cannot deny women an equal opportunity to participate in sports. As some Federal courts have recognized, "ignoring fundamental biological truths between the two sexes deprives women and girls of meaningful access to educational facilities." *Tennessee v. Cardona*, 24-cv-00072 at 73 (E.D. Ky. 2024). *See also Kansas v. U.S. Dept. of Education*, 24-cv-04041 at 23 (D. Kan. 2024) (highlighting "Congress' goals of protecting biological women in education").

Therefore, it is the policy of the United States to rescind all funds from educational programs that deprive women and girls of fair athletic opportunities, which results in the endangerment, humiliation, and silencing of women and girls and deprives them of privacy. It shall also be the policy of the United States to oppose male competitive participation in women's sports more broadly, as a matter of safety, fairness, dignity, and truth.

Sec. 2. Definitions. The definitions in Executive Order 14168 of January 20, 2025 (Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government), shall apply to this order.

Sec.3. Preserving Women's Sports in Education. (a) In furtherance of the purposes of Title IX, the Secretary of Education shall promptly:

(i) in coordination with the Attorney General, continue to comply with the vacatur of the rule entitled "Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance" of April 29, 2024, 89 FR 33474, *see Tennessee v. Cardona*, 24-cv-00072 at 13-15 (E.D. Ky. 2025), and take other appropriate action to ensure this regulation does not have effect;

(ii) take all appropriate action to affirmatively protect all-female athletic opportunities and all-female locker rooms and thereby provide the equal opportunity guaranteed by Title IX of the Education Amendments Act of 1972, including enforcement actions described in subsection (iii); to bring regulations and policy guidance into line with the Congress' existing demand for "equal athletic opportunity for members of both sexes" by clearly specifying and clarifying that women's sports are reserved for women; and the resolution of pending litigation consistent with this policy; and

(iii) prioritize Title IX enforcement actions against educational institutions (including athletic associations composed of or governed by such institutions) that deny female students an equal opportunity to participate in sports and athletic events by requiring them, in the women's category, to compete with or against or to appear unclothed before males.

(b) All executive departments and agencies (agencies) shall review grants to educational programs and, where appropriate, rescind funding to programs that fail to comply with the policy established in this order.

(c) The Department of Justice shall provide all necessary resources, in accordance with law, to relevant agencies to ensure expeditious enforcement of the policy established in this order.

Sec. 4. Preserving Fairness and Safety in Women's Sports. Many sport-specific governing bodies have no official position or requirements regarding trans-identifying athletes. Others allow men to compete in women's categories if these men reduce the testosterone in their bodies below certain levels or provide documentation of "sincerely held" gender identity. These policies are unfair to female athletes and do not protect female safety. To address these concerns, it is hereby ordered:

(a) The Assistant to the President for Domestic Policy shall, within 60 days of the date of this order:

(i) convene representatives of major athletic organizations and governing bodies, and female athletes harmed by such policies, to promote policies that are fair and safe, in the best interests of female athletes, and consistent with the requirements of Title IX, as applicable; and

(ii) convene State Attorneys General to identify best practices in defining and enforcing equal opportunities for women to participate in sports and educate them about stories of women and girls who have been harmed by male participation in women's sports.

(b) The Secretary of State, including through the Bureau of Educational and Cultural Affairs' Sports Diplomacy Division and the Representative of the United States of America to the United Nations, shall:

(i) rescind support for and participation in people-to-people sports exchanges or other sports programs within which the relevant female sports category is based on identity and not sex; and

(ii) promote, including at the United Nations, international rules and norms governing sports competition to protect a sex-based female sports category, and, at the discretion of the Secretary of State, convene international athletic organizations and governing bodies, and female athletes harmed by policies that allow male participation in women's sports, to promote sporting policies that are fair, safe, and in furtherance of the best interests of female athletes.

(c) The Secretary of State and the Secretary of Homeland Security shall review and adjust, as needed, policies permitting admission to the United States of males seeking to participate in women's sports, and shall issue guidance with an objective of preventing such entry to the extent permitted by law, including pursuant to section 212(a)(6)(C)(i) of the Immigration and Nationality Act (8 U.S.C. 1182(a)(6)(C)(i)).

(d) The Secretary of State shall use all appropriate and available measures to see that the International Olympic Committee amends the standards governing Olympic sporting events to promote fairness, safety, and the best interests of female athletes by ensuring that eligibility for participation in women's sporting events is determined according to sex and not gender identity or testosterone reduction.

Sec. 5. General Provisions. (a) Nothing in this order shall be construed to impair or otherwise affect:

(i) the authority granted by law to an executive department or agency, or the head thereof; or

(ii) the functions of the Director of the Office of Management and Budget relating to budgetary, administrative, or legislative proposals.

(b) This order shall be implemented consistent with applicable law and subject to the availability of appropriations.

(c) This order is not intended to, and does not, create any right or benefit, substantive or procedural, enforceable at law or in equity by any party against the United States, its departments, agencies, or entities, its officers, employees, or agents, or any other person.

(d) If any provision of this order, or the application of any provision to any person or circumstance, is held to be invalid, the remainder of this order and the application of its provisions to any other persons or circumstances shall not be affected thereby.

THE WHITE HOUSE,

February 5, 2025.

THE WHITE HOUSE

1600 Pennsylvania Ave NW
Washington, DC 20500

South Carolina Bar
Continuing Legal Education Division

Title IX Hearing & Complaints: The Various Roles of Counsel

Ashley Story
Sheila Abron
Melissa Nichols
&
Meliah Bowers Jefferson

No Materials Available