



Association of
Title IX Administrators

OIE TRAINING Ohio State University

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AGENDA

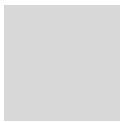
1 Supportive Measures

2 Pregnancy & Parenting Challenges

3 Proposed Regulations

4 First Amendment

5 Bias Challenges



DEFINING SUPPORTIVE MEASURES

SUPPORTIVE MEASURES

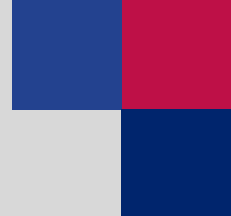
Provided to parties throughout the process:

- Non-disciplinary, non-punitive
- Individualized
- Restore or preserve equal access
- Without unreasonably burdening other party
- Protect safety of parties or environment, or deter sex discrimination
- At no cost to the party



SUPPORTIVE MEASURES vs. REMEDIES

	SUPPORTIVE MEASURES	REMEDIES
Designed to restore or preserve access	✓	✓
Requires a formal complaint	✗	✓
Available to Complainants and Respondents	✓	✗
Available on an interim basis	✓	✗
Implemented after a final determination	✗	✓
Provided to individuals and/or the community	✓	✓



GUIDING PRINCIPLES

OVERVIEW

- Supportive measures must be offered for all reports of sex-based discrimination and pregnancy, regardless of whether a formal complaint is filed
- Parties may:
 - Request supportive measures at any time
 - Decline the offer of supportive measures
 - Ask for supportive measures after initially declining them
 - Seek modifications to supportive measures at any time
- Complainant(s) and Respondent(s) have the right to supportive measures

UNREASONABLE BURDEN

- Supportive measures cannot unreasonably burden the other party
 - May not deny due process
 - May not deny a cognizable right
- A party can voluntarily agree to something that may otherwise be considered an unreasonable burden
 - Switching course sections
 - Not attending student organization meetings/events
 - Resigning from a committee



DEVELOPING CULTURALLY RESPONSIVE SUPPORTIVE MEASURES

CULTURALLY RESPONSIVE SUPPORTIVE MEASURES

1

TRAUMA-INFORMED

Adhere to trauma-informed principles

CLEAR AND ACCESSIBLE

Provide clear and accessible information that is inclusive of individual differences

2

3

INDIVIDUALIZED

Account for individual needs and differences

BIAS-FREE

Ensure bias does not impact supportive measure determinations or implementation

4

OVERVIEW

- School/institutional climate and the intersection of identity may impact if, how, and when individuals request and access supportive measures
- Power and privilege dynamics may exist between:
 - Parties
 - Parties and those supporting/advising them (i.e., parents/guardians, lawyers)
 - TIXC or designee assisting with implementation and others involved
 - Parties and others that may need to be involved (i.e., human resources, supervisors, faculty etc.)
- Consider individuals' customs, experiences, and perspectives as tools to inform appropriate supportive measures

SUPPORTIVE MEASURE CONSIDERATIONS

Individual

- Cultural expectations
- Cultural perceptions of resources
- Individual preferences
- Time commitment
- Cost/value proposition

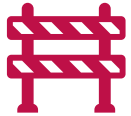
Resources

- Shared identities
- Cultural awareness
- Resource modality
- Language(s) spoken
- Accessibility and usability



DETERMINING APPROPRIATE SUPPORTIVE MEASURES

KEY QUESTIONS



WHAT NEEDS AND BARRIERS EXIST?



WHAT IS REASONABLE?



HOW CAN ACCESS BE MAINTAINED OR RESTORED?



IS THERE A COST?

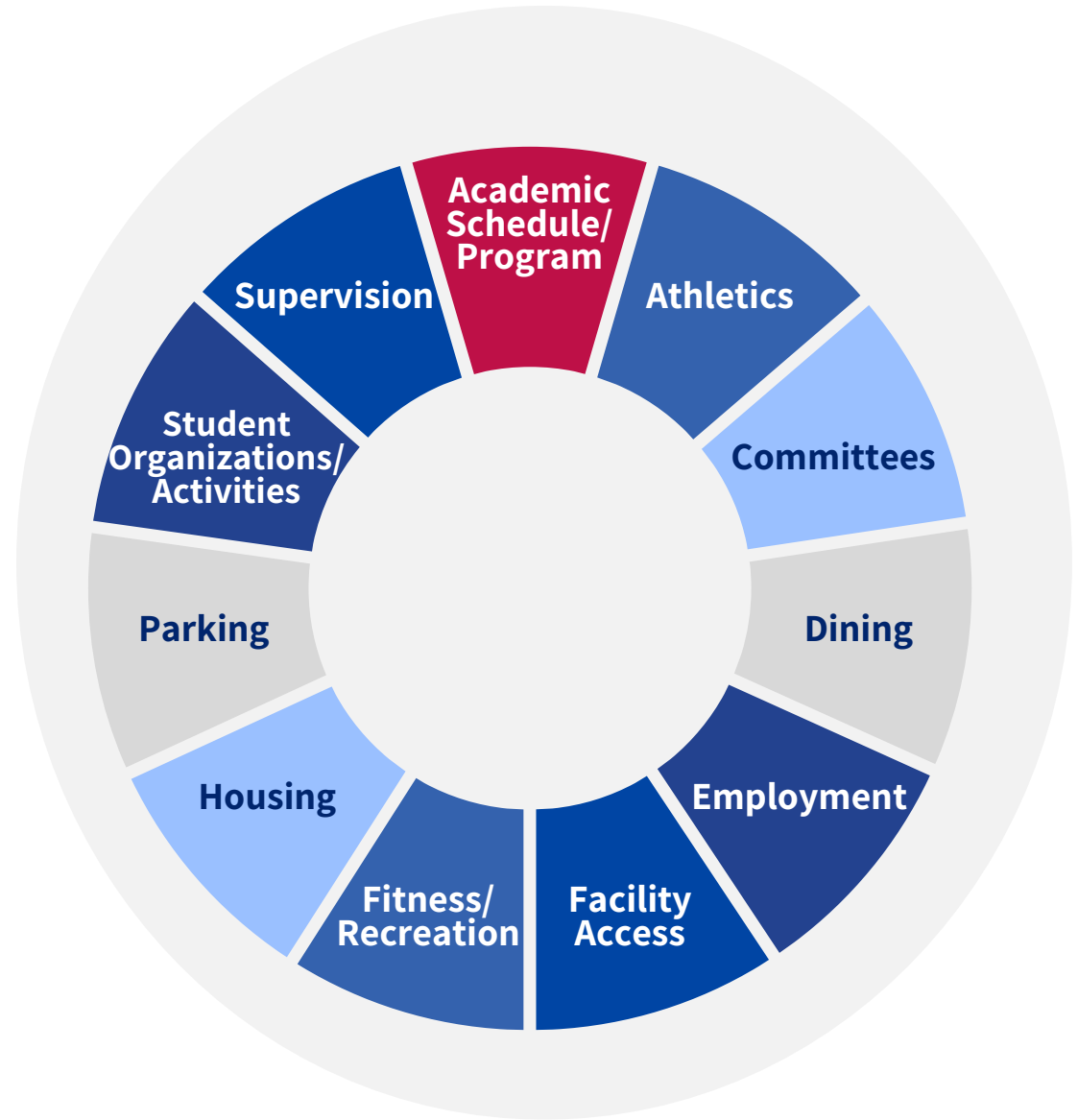


WHAT OPTIONS EXIST?



WHAT IS EQUITABLE IN CONSIDERATION OF THE CIRCUMSTANCES?

Overlap Considerations



FUNDING FOR SUPPORTIVE MEASURES

- Some reasonable and appropriate supportive measures will have an associated cost
 - Cannot ask the party to pay
 - May take a loss on tuition, scholarship repayment, etc.
 - Institution can absorb costs

Potential Funding Sources

- Dedicated Title IX budget
- Emergency Funds
- Fundraising/Donation campaigns
- Grants
- Student fees/Student government
- One-time use funds

SAFETY CONSIDERATIONS

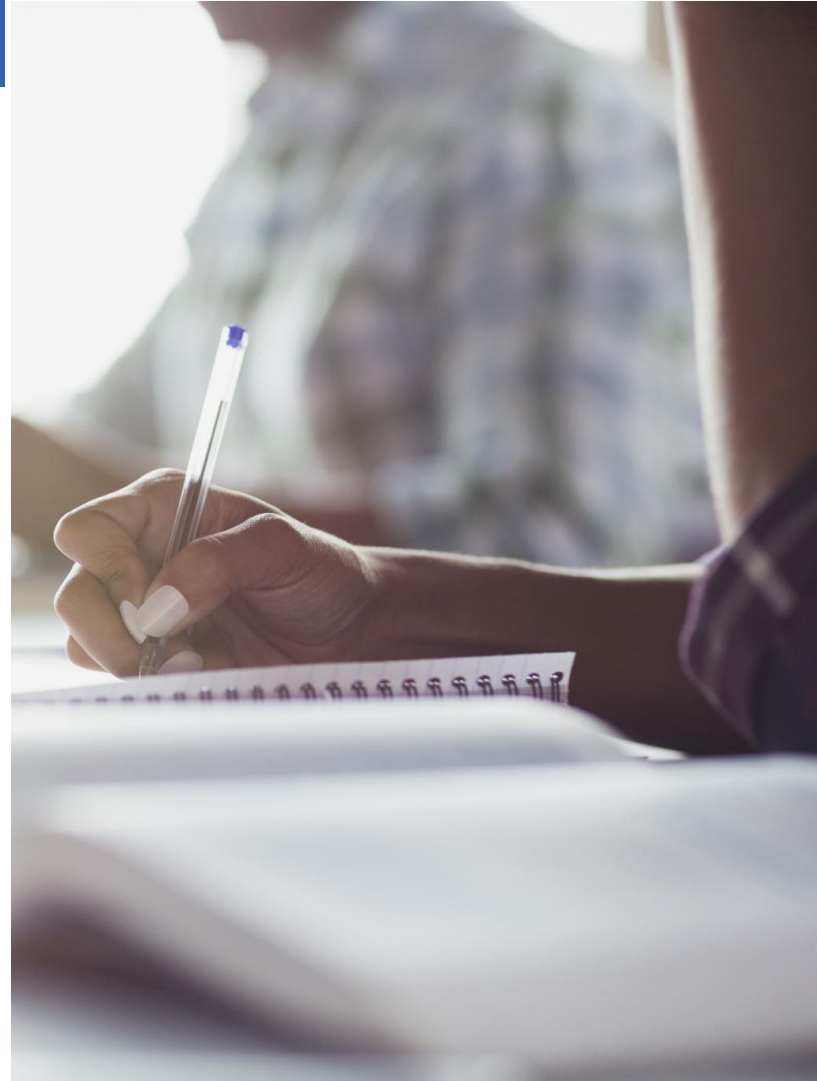
- Share agreed upon, written supportive measures with Campus Police for immediate safety concerns
- School/institution-issued no contact orders can be unilateral or mutual, depending on situation
- Understand school/institution's responsibility to honor court-issued protective orders
- Examine the difference between feeling unsafe and being unsafe or having a credible threat to personal safety
- School/institution's jurisdiction over the Respondent will dictate some of the available supportive measures

SAFETY CONSIDERATIONS

- TIXC can work with the parties to create a comprehensive safety plan
 - Predict and provide coaching regarding contact between parties, witnesses, and third parties (e.g., shared friends, common areas, parents/guardians)
 - Monitoring and supervision
- Special consideration should be given to situations involving dating or domestic violence
- Be aware of institutional or community safe housing and how to access such facilities

ACADEMIC CONSIDERATIONS

- Academic adjustments can be made based on reports to the TIXC
- TIXC should not dictate what specific adjustments should be made but can consult with teachers/faculty on potential options based on the individual course requirements and the needs of the individual
- Academic adjustments may include:
 - Extensions or alternative assignments
 - Alternative sections
 - Reassignment of academic advisor
 - Incompletes
 - Remote instruction



COORDINATING WITH LOCAL AGENCIES

- Supportive measures may extend beyond the resources or scope of what the school/institution may provide directly
- Schools/institutions should consider the external resources they may need for the purposes of supportive measures
- The external resources may include:
 - Local law enforcement
 - Hospital
 - Shelters
 - Counseling centers
 - Victim advocacy services, including legal aid
 - Children and family services

DENYING SPECIFIC SUPPORTIVE MEASURES

- Institution is not required to provide a specific supportive measure
 - Engage in interactive process with party to determine reasonable and appropriate supportive measures
- Some supportive measure requests are not reasonable or appropriate, but mere inconvenience not a good reason to deny
- TIXC should document any denial of supportive measures, including a written rationale



POLICY CONSIDERATIONS

Institutions should consider whether they will provide supportive measures:

- In circumstances when the alleged conduct does not meet Title IX jurisdiction requirements
- To guests, such as alumni or former students
- Retroactively





ACTIVITY: DETERMINING APPROPRIATE SUPPORTIVE MEASURES

EMPLOYEE: STEPHAN

- Stephan works for buildings and grounds as a maintenance technician
- He recently broke up with his long-term, live-in girlfriend, Yvette, after discovering that she had been filming him in their bathroom without his knowledge or consent
- Yvette moved out of the shared residence but remains employed by buildings and grounds as a custodial supervisor
- Yvette and Stephan park in the same parking lot and clock in/out and get their work supplies from the same building
- Stephan has returned to his vehicle at the end of his shift to find damage to his car on at least three occasions
- Last week, he started parking in a different lot and returned to find his car damaged again
- A coworker also informed Stephan that Yvette showed them a video of Stephan in the shower

EMPLOYEE: EVELYN

- Adjunct Faculty in Biology department.
- Filed formal complaint against a graduate assistant for engaging in sexual innuendo during one-on-one conversations with Evelyn
- Request to remove the graduate teaching assistant from her supervision and from her department.

STUDENT: VIVI

- Vivi is an undergraduate student residing in an on-campus residence hall
- She disclosed being sexually assaulted at an off-campus party by Weston, a student from another local institution
- Vivi reported that Weston is a friend of her roommate Gina's boyfriend, and Vivi is very uncomfortable that Gina continues to invite Weston over to their shared room to hang out even after Vivi told Gina about the assault
- Vivi wants to be moved to another residence hall room, but there are currently no vacancies for a woman on campus

STUDENT: AXEL

- Axel is a first-year student and is non-binary and a member of the boys' soccer team
- Axel reported that on a recent overnight trip for the state tournament, several of the other members of the soccer team “tea bagged” Axel while they were sleeping and recorded it on a cell phone
- The video has been shared with many other students, resulting in name-calling and other bullying behaviors
- Axel isn't sure if he wants to file a formal complaint



ACTIVITY: COACHING THE RESISTANT EMPLOYEE

COACHING THE RESISTANT EMPLOYEE

- Sealy submitted a formal complaint for fondling against their Russian History professor, Dr. McGuire, just before midterms
- Initially, Sealy considered withdrawing from the course, but decided they wanted to finish the course
- Sealy is seeking supportive measures to allow them to complete Russian History without encountering Dr. McGuire for the remainder of the term
- As TIXC, you consult with the AVP for Academic Affairs and Deputy TIXC for Faculty to determine what options might exist for Sealy
- You then provide Sealy with their options, and they determine they would like to complete the remainder of the course via independent study with a separate faculty member

COACHING THE RESISTANT EMPLOYEE

- You then contact Dr. Mitchell, History Department Chair, to arrange the independent study
- Dr. Mitchell responds by stating that he cannot possibly ask another faculty member to oversee an independent study because that would put the faculty into overload status, which is a faculty rights contract violation
- Dr. Mitchell states that Sealy will receive an incomplete for the semester and they can take the course again next semester and asks that you tell Sealy to be sure to enroll in a course taught by someone other than Dr. McGuire because there is no section switching after Add/Drop

How would you respond to Dr. Mitchell?



EVALUATING SUPPORTIVE MEASURES

REGULAR CHECK-INS

- TIXC or designee should check in with parties on a regular basis to ensure supportive measures are:
 - Meeting the desired outcomes
 - Necessary to keep in place
 - In need of modification or adjustment
- Regularity will vary depending upon whether a formal complaint is submitted
 - In-process check-ins
 - Post-process check-ins

PREGNANCY & RELATED CONDITIONS

TIXC IS POINT PERSON FOR SUPPORT



Documentation



**Policies,
Practices, and
Procedures**



**Grievance
Process**



Reporting



**Outreach and
Support**



Training

ACADEMIC POLICIES AND PROCEDURES

TIXC must be well-versed in institutional policies that may have implications for students who are pregnant or have related conditions

**Academic
Incompletes**

Add/Drop

Grade Appeals

**Internships/
Externships/
Co-Ops/Practicums**

Leaves of Absence

**Out-of-Class
Expectations**

Pass/Fail Option

Retakes

CURRENT TITLE IX REGULATIONS: STUDENTS

Institutions may not:

Have a rule which treats a student differently on the basis of a student's actual or potential

- parental,
- family, or
- marital status

Exclude any student from its education program or activity on the basis of such student's

- pregnancy,
- childbirth,
- false pregnancy,
- termination of pregnancy,
- or recovery therefrom

TITLE IX REGULATIONS

Doctor's Note to Participate

- “Schools **cannot require** a pregnant student to produce a doctor’s note in order to stay in school or participate in activities, including interscholastic sports, unless the same requirement to obtain a doctor’s note applies to all students being treated by a doctor.”
- An institution **may** require such a student to obtain the certification of a physician that the student is physically and emotionally able to continue participation in the normal education program or activity so long as such a certification is required of all students for other physical or emotional conditions requiring the attention of a physician.”

Source: U.S. Department of Education (June 2013),
Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

TITLE IX REGULATIONS

Pregnancy as Temporary Disability

- An institution shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom **in the same manner and under the same policies as any other temporary disability** with respect to any medical or hospital benefit, service, plan, or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient's educational program or activity.”

Source: 34 C.F.R. § 106.40

TITLE IX REGULATIONS

Leave Policies

- In the case of an institution which does not maintain a leave policy for its students, or in the case of a student who does not otherwise qualify for leave under such a policy, a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy, and recovery therefrom as **a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student's physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.**”

Source: 34 C.F.R. § 106.40

TITLE IX REGULATIONS

- “When the student returns to school, the student must be reinstated to the status the student held when the leave began, which should include giving the student the opportunity to make up any work missed.”
- “A school may offer the student alternatives to making up missed work, such as:
 - Retaking a semester,
 - Taking part in an online course credit recovery program, or
 - Allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave.”
- “The student should be allowed to choose how to make up the work.”

Source: U.S. Department of Education (June 2013),
Supporting the Academic Success of Pregnant and Parenting Students, p. 8.

PROPOSED REGULATIONS (NPRM)

- Must not **adopt** or **apply**
 - Any **policy, practice, or procedure**, or
 - Take any employment action,
 - Concerning a student or employee’s potential parental, family, or marital status
 - Which treats students or employees differently on the basis of sex
- Must not discriminate in its education program or activity against any student or employee based on **current, potential, or past pregnancy or related conditions**
- Also applies to applicants for admission and employment

PROPOSED REGULATIONS: OUTREACH AND INTAKE

- Any employee who becomes aware of a student's pregnancy or related condition is required to provide the student with the Title IX Coordinator's name and contact information

Title IX Coordinator (TIXC) should inform the individual of the institution's obligation to:

- Prohibit sex discrimination
- Provide supportive measures and modifications
- Allow access, on a voluntary basis, to any separate and comparable portion of the institution's education program or activity
- Allow a voluntary leave of absence
- Ensure lactation space availability
- Maintain grievance procedures for alleged discrimination



RELATED CHALLENGES

PREGNANCY AND STUDENT ATHLETES

- Pregnant student-athletes must be permitted to participate in athletics without restriction or modification
- NCAA is the only collegiate governing body to have a specific policy on pregnant student-athlete participation
 - Most others follow the NCAA's lead
 - TIXC and athletic staff, including coaches, should be familiar with NCAA policy

KEY RIGHTS OF PREGNANT STUDENT-ATHLETES

- Athletics financial aid awards cannot be conditioned on not becoming pregnant and are protected during the term of the award
- A student-athlete who has taken leave for pregnancy related conditions must be reinstated
- “Misconduct” involving pre-marital sex cannot be used as a justification for limiting a pregnant student-athlete’s participation
- Discrimination prohibitions apply to recruiting
- A pregnant student-athlete cannot be retaliated against for reporting or complaining about pregnancy discrimination

EQUITABLE SUPPORT FOR NON-BIRTHING PARENTS

- As a gender equity law, Title IX:
 - Focuses on providing support and resources to reduce disparities in access to the education program
 - Seeks to remedy the inequities sex and gender discrimination create
- Narrow application to only the birthing or pregnant individual may run afoul of Title IX, if it discriminates on the basis of sex
- TIXC may receive requests for support from non-birthing parents
- TIXC may choose to engage in an individualized evaluation of circumstances to determine if requested supportive measures are reasonable and appropriate

PARENTING

How is parenting protected by Title IX?

- Any parent is protected if attending to:
 - The pregnancy-related medical needs of the birthing parent
 - The birth-related immediate post-partum health/medical needs of the child
- No rule for how long post-partum medical protections apply
 - Six months is a reasonable estimate
 - Exceptions that can justify a longer protection period
- Sick/unhealthy birth parents/children are not otherwise covered by Title IX pregnancy/parenting protections

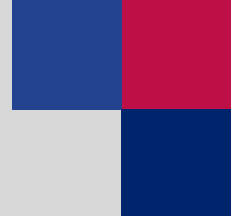
NON-MEDICAL CHILDCARE NEEDS

- Institution not legally required to provide childcare or supportive measures for childcare needs
 - May voluntarily and equitably provide supportive measures under institutional policy
- Requests for childcare support are usually for excused absences, remote learning options, or access to hybrid work environments
- TIXC may choose to evaluate each request case-by-case, considering the proximity of time to the pregnancy, necessity, etc.
- Modifications should have clear start and end dates and applicable parameters

FERTILITY TREATMENTS/IVF

- More frequent requests for fertility treatment support
- Supportive measures may be protected by Title IX or institutional policy
- Physician needs to document medical necessity





CASE STUDIES

VALERIE

- Valerie is an incoming first-year student. She has been awarded a prestigious Hopper Scholarship based on her academic performance and leadership potential.
- The Hopper Scholars are a group of twenty students from each incoming undergraduate class selected to receive a full-ride scholarship (tuition, books, room, and board) and participate in a cohort-model program focused on academic excellence and civic engagement.
- To maintain their scholarship, Hopper Scholars are required to enroll in a set curriculum, reside on campus in the Hopper Scholars living learning community, and engage in leadership development and civic engagement opportunities planned by the Hopper Scholars advisor in conjunction with the institution's president who established the program.
- Prior to arriving on campus for her first term, Valerie learns that she is pregnant, and her due date is in late March of the following year.

VALERIE

- Valerie emails the Hopper Scholars advisor to inquire about her options for continuing with the program now that she is pregnant.
- The advisor informs Valerie that she will be unable to participate in the program and her scholarship will be revoked because she cannot live in on-campus housing with a child and residing in the living learning community is an essential component of the scholarship program.
- Shocked and panicked because she knows she will be unable to attend your institution without her scholarship, Valerie contacts the Title IX office for assistance.

VALERIE

- If these conditions are true, would revoking Valerie's scholarship be considered discrimination on the basis of sex under Title IX?
 - Why or why not?
- What immediate remedies would be appropriate in this situation?
- What long-term remedies should the institution consider?

CHEYENNE

- Cheyenne is the captain of the dance team that performs at home football and basketball games, school pep rallies, and a variety of other university and community events throughout the year. They also compete in state-wide and national competitions.
- Cheyenne became pregnant shortly after the school year began. Her doctor has approved her to continue with her full participation in dance team activities.
- The dance team uniforms are midriff-bearing, and Cheyenne’s “bump” begins to become noticeable during basketball season. Cheyenne requests a larger size uniform, and the coach provides another uniform without issue.

CHEYENNE

- However, several other dance team members begin pressuring the coach to remove Cheyenne as dance team captain because they don't believe that an unwed mother is an appropriate role model or leader.
- Some students have gone so far as to bring posters to dance team performances calling for Cheyenne's removal and publicly slut shaming her.
- For example, there were posters that said "Where's your pole, Cheyenne?"
- At one performance, a group of students started to chant, "Hey ho, preggo's gotta go!"
- Cheyenne's wants the student's behavior to stop.

CHEYENNE

- How would you navigate resolving this situation?
- Can you discipline the heckling students?
- What supportive measures may be appropriate?
- Is Informal Resolution a potential option?

MIRAY

- In late January, the International Student Services Program advisor reaches out to you as the Title IX Coordinator about a student concern.
- Miray, a junior from Turkey, is studying in the radiation therapy program on an F-1 visa. This term Miray is enrolled in four in-person courses: two off-site clinical courses, one lecture course in the radiation therapy program, and one general education lecture course. The clinical hours are required both for her academic program and for her licensure.
- Miray came to speak with the advisor about needing to reschedule two large exams for her general education course later in the semester, as she will be needing to take a leave of absence after she gives birth.

MIRAY

- She shared that her first child is due in late March and that she anticipates being out of classes for 2-3 weeks. Her husband will be present and able to support her with the baby.
- Miray also expressed that she is stressed after speaking with the faculty member for her radiation therapy lecture course who told her she would need to abide by the class attendance policy and miss no more than three class sessions.
- She has asked for assistance in creating a plan that will allow her to remain in school full time to maintain her F-1 visa status.

MIRAY

- If true, what discriminatory actions are present under the Title IX policy?
- What supportive measures are available to Miray?
- What happens if she cannot return to class after three weeks?
- How would you communicate with faculty?
- Who else do you need to communicate with in this situation?



IMPORTANT INFORMATION ABOUT THE UPCOMING REGULATIONS

SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
 - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
 - Replaces “**sexual harassment**” and includes
 - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a proposed rule regarding athletic eligibility based on gender may come later

HOSTILE ENVIRONMENT § 106.2

- Hostile Environment Harassment
- Unwelcome sex-based conduct that is
 - Sufficiently severe **OR** pervasive, that, based on the totality of the circumstances **AND**
 - Evaluated subjectively and objectively
 - Denies or limits a person's ability to participate in or benefit from the University's education program or activity

HOSTILE ENVIRONMENT (CONT.)

- OCR's proposed definition also provides factors for evaluating whether a hostile environment exists including:
 - Complainant's ability to access the education program or activity
 - The type, frequency, and duration of the conduct
 - The parties' ages, roles, and previous interaction(s)
 - The location and context of the conduct
 - The control the University has over the Respondent
- Potential intersection with First Amendment

APPLICABILITY

- **Education program or activity**
 - Broadly interpreted to include:
 - Academic, extracurricular, and athletic programs
 - Activities on school network, bus, class, or facilities
- De Minimis Harm
 - Policy or practice preventing participation in a program or activity consistent with gender identity “subjects a person to more than de minimis harm on the basis of sex”

§ 106.31; NPRM pg. 668

APPLICABILITY (CONT.)

- **Jurisdiction** includes:
 - Conduct subject to University's disciplinary authority,
 - Conduct in a building owned or controlled by a student organization officially recognized by a postsecondary institution
- Removes geographical restrictions
 - Conduct outside the United States may need to be addressed under Title IX
 - Downstream (in-program) effects
 - Charging decisions may become more complicated

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668

SPOO VS. SORP

SPOO (2020 Regulations)

Severe **AND** Pervasive **AND** Objectively Offensive

SORP (2022 NPRM)

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively
AND Subjectively



REPORTING & RESPONSE REQUIREMENTS

- Reporting & Response Requirements
- Reporting Categories
- Exceptions
- Additional Requirements

REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (§ 106.44)

EMPLOYEE ROLE	DISCLOSURE FROM	NOTIFY TITLE IX COORDINATOR	PROVIDE TIXC INFO
Confidential Employees	<ul style="list-style-type: none"> • Student • Employee 	NO	YES
Employees with the authority to institute corrective measures	<ul style="list-style-type: none"> • Student • Employee 	YES	YES
Employees with responsibility for administrative leadership, teaching, and advising	• Student	YES	YES
	• Employee	CHOOSE ONE OR THE OTHER	
All other employees who are not confidential employees	<ul style="list-style-type: none"> • Student • Employee 	CHOOSE ONE OR THE OTHER	

REPORTING EXCEPTIONS

- No self-reporting requirement for employee Complainants
- Postsecondary public awareness events (§ 106.44(e))
 - Institution not obligated to respond to information provided during public event, including on online platforms
 - Unless information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution's community, institution must respond
 - Must incorporate information/trends revealed at public awareness events into prevention education

§ 106.44; NPRM pg. 674-675

TRAINING REQUIREMENTS (§ 106.8)

- Various training requirements for:
 - All employees
 - Investigators, Decision-makers, and others responsible for implementing grievance procedures or modifying/terminating supportive measures
 - Informal Resolution Facilitators
 - Title IX Coordinator
 - No training requirement for students under NPRM
- All training materials must be made available on institution's website



INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Removals
- Informal Resolution

NOTICE & COMPLAINTS

- “Complaint” replaces “Formal Complaint”
- Notice (and complaints) can be verbal or written
 - Complaints **do not** have to be submitted to Title IX Coordinator/Title IX Team Member
- Complaints can be made by a Complainant or the TIXC
 - If a parent, guardian, or other authorized legal representation has the authority to act on behalf of a person, then that person can also file a complaint
- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

§ 106.2; NPRM pg. 651

§ 106.6; NPRM pg. 665

§ 106.45; NPRM pg. 682

INTAKE & INITIAL EVALUATION

- Upon notification of sex discrimination allegations, TIXC must:
 - Treat parties equitably
 - Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
 - Offer and coordinate supportive measures
 - Initiate grievance procedures or informal resolution as requested
- Initial Evaluation
 - Provides TIXC with greater latitude to collect information before formal grievance process begins

§ 106.44(f); NPRM pg. 675-76

DISMISSALS (§ 106.45)

All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified *after reasonable steps to do so*
- The Respondent is no longer participating in the educational program or employed by the University
- The Complainant withdraws all or a portion of the complaint and any remaining conduct ≠ discrimination under Title IX
- It is determined that the conduct, even if proven, would ≠ discrimination under Title IX
 - *Prior to dismissing the complaint, the University must take reasonable efforts to clarify the allegations with Complainant*

REMOVALS (§ 106.44)

- **Administrative Leave**

- Institutions may place **employee** Respondents on administrative leave during grievance process

- **Emergency Removal**

- Institutions may remove **student** Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
 - An immediate and serious threat exists and arises from the allegations
- Removes the “physical” threat requirement from the 2020 Regulations

INFORMAL RESOLUTION (§ 106.44)

- Informal Resolution Requirements:
 - Voluntary by parties
 - TIXC must agree
 - Provide notice to parties in advance (detailed requirements)
 - Facilitator may not be Investigator or Decision-maker
 - Not permitted in complaints with a student Complainant and an employee Respondent
- Informal Resolution can occur **without** a formal complaint
 - Can look like a supportive measures only response
- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful



GRIEVANCE PROCEDURES

- Investigating
- Decision-making
- Appeals
- Advisors
- Evidence

WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
Higher Education	<p>Sex discrimination complaints that are NOT sex-based harassment</p> <p>Sex-based harassment complaints that do not involve a student</p>	<p>All sex-based harassment complaints involving a student Complainant or Respondent, including:</p> <ul style="list-style-type: none">▪ Student-on-student▪ Student-on-employee▪ Employee-on-student

§ 106.45 VS. § 106.46

- Section 106.45 is a bare-bones civil rights process
 - Section 106.46 is a more robust process that incorporates all of the elements of § 106.45 and retains many features from the 2020 regulations
- Two separate policies are permitted, but not required
- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
 - No requirement for a separate Decision-maker
 - Permissible for the Investigator to serve as the Decision-maker
 - Permissible for the TIXC to serve as the Investigator (and/or DM)

GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

§ 106.45

- Notice does not have to be written
- No waiting period between notice and interview

§ 106.46

- Written notice required
- Sufficient time to prepare before an interview required
- May be accompanied by an Advisor of choice
- Presumption of non-responsibility
- Prohibition against false statements, if any

INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

§ 106.45

- Written or verbal description of relevant evidence
- Reasonable opportunity for parties to respond

§ 106.46

- Equitable access to all relevant evidence **or** to an investigation report that summarizes the evidence
- Reasonable opportunity to review and respond
- Review must take place before the hearing, if any

DECISION-MAKING

	§ 106.45	§ 106.46
Second 10-day period	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Not required
Credibility Assessment	<ul style="list-style-type: none"> • Decision-maker is required to assess credibility • Does not have to occur during a hearing or live questioning 	<ul style="list-style-type: none"> • Decision-maker(s) required to assess credibility through live questioning during a live hearing or through individual meetings
Live Hearing	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Permissible • Required in some jurisdictions

NPRM pg. 682-90

DECISION-MAKING (CONT.)

	§ 106.45	§ 106.46
Cross-examination	<ul style="list-style-type: none"> • Not required 	<ul style="list-style-type: none"> • Required • Can occur through the Decision-maker or through party Advisors (during a live hearing)
Written Outcome	<ul style="list-style-type: none"> • Permitted but not required 	<ul style="list-style-type: none"> • Required
Appeal	<ul style="list-style-type: none"> • Permitted but not required • May be otherwise required 	<ul style="list-style-type: none"> • Required

LIVE HEARINGS

- Under § 106.46 if a University conducts live hearings:
 - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, **OR**
 - Each party's Advisor must be allowed to ask **any party** and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly

§ 106.46(f); NPRM pg. 694

OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the University must provide that determination to the parties
 - Under § 106.45
 - Does not have to be in writing
 - Under § 106.46
 - **Written** determination must include:
 - Description of alleged sex-based harassment
 - Information about policies and procedures
 - Decision-maker's evaluation of credible evidence and determination
 - Disciplinary sanctions and/or remedies, as appropriate
 - Appeal procedures

APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
 - Outcome becomes final on the date the University provides a written determination of an appeal, or if an appeal is not filed, the date on which appeal would no longer be timely
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker

STANDARD OF PROOF

- Standard of Proof
 - Language shift from “burden of proof” or “standard of evidence”
- Must use preponderance of the evidence *unless*
 - Clear and convincing is used in all other **comparable proceedings, including other discrimination complaints (Title VII, Title VI)**
 - Employee Respondent vs. Student Respondent complaints are not comparable

§ 106.6(g); NPRM pg. 688

ADVISORS

- Under § 106.45, Universities are not required to permit Advisors
 - Universities are not prohibited from doing so, as long as all parties are treated equitably
 - Advisors may otherwise be required
 - VAWA
 - Union/CBA Agreements
- Under § 106.46, all parties have the right to be accompanied by an Advisor of choice
 - An Advisor is not required unless an institution has chosen to implement live hearings with Advisor-led cross-examination
 - If a party does not have an Advisor, the University must provide an Advisor at no cost

§ 106.46(e)(2); NPRM pg. 692

THINGS TO DO BEFORE IMPLEMENTATION

- Plan your policy re-development team to expedite policy revisions
- Review current policies, practices, publications, and websites
 - Create a checklist of changes that will need to be made to each
- Educate community about future changes
 - Note: The final changes may be different from the NPRM
- Ensure you determine how the proposed regulations intersect with other policies and governing laws

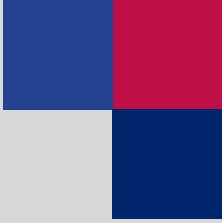
FIRST AMENDMENT REVIEW



THE FIRST AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

1791



UNPROTECTED SPEECH

- ✦ Fighting Words
- ✦ Obscenity
- ✦ Incitement of Imminent Lawless Action
- ✦ True Threat
- ✦ Defamation
- ✦ Hate Speech

SEMINAL CASES

- **FIGHTING WORDS**
 - **Chaplinsky v. New Hampshire**, 315 U.S. 568 (1942)
- **OBSCENITY**
 - **Miller v. California**, 413 U.S. 15 (1973)
- **INCITEMENT OF IMMINENT LAWLESS ACTION**
 - **Brandenburg v. Ohio**, 39 U.S. 444 (1969)
- **TRUE THREAT**
 - **Virginia v. Black**, 538 U.S. 343 (2003)
- **DEFAMATION**
 - **Milkovich v. Lorain Journal Co.**, 497 U.S. 1 (1993)
 - **Hustler Magazine v. Falwell**, 485 U.S. 46 (1988)

FIGHTING WORDS

CHAPLINKSY V. NEW HAMPSHIRE, 315 U.S. 568 (1942)

- Chaplinsky was convicted under a state statute for verbally attacking the City Marshall by calling him a “damned racketeer” and a “damned Fascist”
- This case took place during WWII, at a time in which accusations of racketeering or fascism were taken quite seriously
- The Court held that Chaplinsky’s epithets were “fighting words” which were “likely to provoke the average person to retaliation, and thereby cause a breach of the peace”
- There have been no other holdings on fighting words since 1942

Do you think there are words that would rise to that level today?

OBSCENITY

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- Marvin Miller sent advertisements for adult books and films he had for sale through a mass mailing campaign which depicted sexual acts.
- Recipients who received the mail did not willingly request or grant permission to receive the mailed advertisements.
- The Court ruled in favor of the State of California, saying Miller engaged in obscenity.

OBSCENITY (CONT.)

MILLER V. CALIFORNIA, 413 U.S. 15 (1973)

- The court found obscenity was determined by:
 - Whether the average person, applying contemporary standards of the community, would find that the work only appeals to the prurient interest of others
 - Whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law
 - Whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value

INCITEMENT OF IMMINENT LAWLESS ACTION

BRANDENBURG V. OHIO, 39 U.S. 444 (1969)

- The leader of the Ku Klux Klan was convicted under the Ohio statute for threatening that “if our President, our Congress, our Supreme Court, continues to suppress the white, Caucasian race, it’s possible that there might have to be some revengeance [sic] taken”
- The Court found in favor of the Klan, stating “**speech that merely advocates rather than actually incites violence shall be protected by the First Amendment**”
- The Court stated that a governmental entity may not forbid or proscribe advocacy of the use of force or law violations except where such advocacy incites or produces imminent lawless action and is likely to produce such action

TRUE THREAT

VIRGINIA V. BLACK, 538 U.S. 343 (2003)

- Barry Black and others were convicted of violating a Virginia statute that makes it a felony “for any person..., with the intent of intimidating any person or group..., to burn...a cross on the property of another, a highway or other public place,” and specifies that “any such burning...shall be prima facie evidence of an intent to intimidate a person or group”
- The Court held that while a State, consistent with the First Amendment, may ban cross burning carried out with the intent to intimidate, treating any cross burning as prima facie evidence of intent to intimidate renders the statute unconstitutional

DEFAMATION

MILKOVICH V. LORAIN JOURNAL CO., 497 U.S. 1 (1993)

- Milkovich, Maple Heights High School’s wrestling coach, testified at a hearing concerning a physical altercation at a recent wrestling meet
- After the hearing, Theodore Daidium published an article in the local newspaper saying that anyone at the wrestling meet “knows in their heart” that Milkovich lied at the hearing
- Milkovich sued Daidium and the paper for defamation, alleging that the article accused him of perjury, damaged his occupation, and constituted libel
- The Supreme Court found against the newspaper, stating that Milkovich was not a public figure and the defamatory statements were factual assertions, not constitutionally-protected opinions

BUT...SEE ANOTHER CASE

HUSTLER MAGAZINE V. FALWELL, 485 U.S. 46 (1988)

- Jerry Falwell, a world-famous minister, brought a lawsuit against Hustler magazine for defamation for portraying him in a cartoon parody which suggested he had an incestuous relationship with his mother and preached only when he was drunk
- The Court found the parody to be protected speech, saying public figures like Falwell, and public officials, may not have a defamation claim without showing actual malice by the author, because such a standard is necessary to give adequate breathing space to the First Amendment



THE IMPORTANCE OF ANALYZING THE ACTIVITY BEFORE TAKING ACTION

- ✦ Considerations
- ✦ Three-Step Analysis

CONSIDERATIONS

- Free expression in public schools does not guarantee unfettered access to property simply because it is owned or controlled by a government entity
- Public schools have the right to impose reasonable regulations compatible with the educational mission by carefully applying the type of expression to the location of the expression and using a viewpoint neutral time, place and manner approach based on the location
- Not all locations on campus have the same type of standards on restricting expression

THREE-STEP ANALYSIS

STEP 1: Are there 1st Amendment implications in the activity presented?

- Does it include any components of “expression” (not conduct)
 - Consider: not just speech, but leafleting, signs, bulletin boards, chalking, clothing, etc.
- Does it have a religious component?
- Does it involve a campus newspaper, radio, TV station?
- Does it involve a group activity on school property, i.e., demonstration, protest, walkout, rally?
- Is there a request for meeting room space in one of the classrooms?



THREE-STEP ANALYSIS (CONT.)

STEP 2: Are there any clear exceptions to the 1st Amendment at issue?

- Each potential exception requires a separate analysis to the specific set of facts presented
- Courts will apply exceptions very narrowly
- Must be applied with extreme caution

THREE-STEP ANALYSIS (CONT.)

STEP 3: Analysis of facts identified in Steps 1 & 2 in consideration of the location on campus (the “forum”)

- Any restriction based solely on the message to be delivered will always be prohibited (unless it’s one of the exceptions)
- The school can apply a content (message) neutral “time, place, and manner” limitation, but it must do so with careful consideration of the facts and the location and document the decision

UNDERSTANDING BIAS

INTRODUCTORY CONCEPTS



What is bias?



Sources/
causes of bias



Common
types of bias



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WHAT IS BIAS?

- A preference or tendency to like or dislike
- Can be systematic in our thinking process
- A thought process developed over time through repeated personal experience
- Implicit or explicit
- Can be intentional, but generally unintentional
- Formed from stereotypes, societal norms, cultural experiences, expectations of the people around you

BIAS ORIGINATION

Past Experiences

Family

Societal &
Institutional
Norms

Stereotypes

Politics, Religion

Self Identity,
Affinity Groups

COMMON BASIS FOR POTENTIAL BIAS

- Ability
- Age
- Citizenship status
- Ethnicity
- Gender
- Gender Identity/Expression
- Health status
- Marital status
- Mental health status
- National origin
- Parental status
- Physical attributes
- Race
- Religion
- Sexual orientation
- Socioeconomic status (can include finances, education, housing, etc.)

TWO TYPES OF BIAS

Explicit

- Conscious bias
- Clear feelings and attitudes
- Behaviors are conducted with intent
- In its extreme, it is characterized by overt negative behaviors that can be expressed through physical and verbal harassment or through exclusion

Implicit

- Unconscious bias
- Operates outside of the person's awareness
- Can be in direct contradiction to a person's espoused beliefs and values
- Can be pervasive

COMMON FORMS OF IMPLICIT BIAS

- Confirmation Bias
- Attribution Bias
- Beauty Bias
- Conformity
- Affinity Bias
- Halo Effect
- Horn Effect
- Contrast Effect
- Gender Bias
- Racial Bias





WHAT ABOUT SUBTLE BIAS – MICROAGGRESSION?

WHAT ARE MICROAGGRESSIONS?

- Brief, everyday exchanges that send denigrating messages to certain individuals because of their group memberships
- Often unintentional
- Not always direct
- Can be described in three categories:
 - Microassaults
 - Microinsults
 - Microinvalidations

FORMS OF MICROAGGRESSIONS

- **Verbal:** comment(s) or question(s) that is/are hurtful or stigmatizing to a certain marginalized group of people
 - Example: saying “you’re so smart for a woman”
- **Behavioral:** occurs when someone behaves in a way that is hurtful or discriminatory to a certain group of people
 - Example: a bartender ignoring individuals who identify as transgender while only serving individuals who identify as cisgender
- **Environmental:** subtle discrimination that occurs within society/organizations/campuses/schools
 - Example: an institution that only has buildings named after white people

Source: Medical News Today. (n.d.). *What to know about microaggressions*.
<https://www.medicalnewstoday.com/articles/microaggressions>

MICROASSAULTS

- An explicit derogation of an individual or groups of individuals primarily by verbal or nonverbal attacks meant to hurt the intended victim(s)
 - Verbal example: name-calling and the use of epithets
 - Nonverbal example: crossing the street or clutching a handbag in the presence of certain individuals
- Most likely to be conscious and deliberate, although they are generally expressed in limited *private* situations (micro) that allow the perpetrator some degree of anonymity
- Can also include a person intentionally behaving in a discriminatory way while not intending to be offensive
 - Telling racist jokes then saying, “I was joking”

MICROINSULTS

- Verbal and nonverbal communications that subtly convey rudeness and insensitivity
- Demeans a person's racial heritage or identity
- Common examples:
 - Commenting on how someone is not like others of their ethnicity
 - Commenting on how articulate or well-spoken someone is given their race
 - Touching a colleague's hair without permission
 - Implying that a person got their job based on a diversity quota or action
 - Not attempting to pronounce someone's name correctly because it's unfamiliar

MICROINVALIDATIONS

- Communications that subtly exclude, negate, or nullify the thoughts, feelings, or realities of a person
- Common examples:
 - Invalidating someone's feelings by saying the one(s) who caused the offense "didn't mean it like that"
 - Inappropriately telling someone that you have friends like them
 - Mistaking people of the same race for each other
 - Staying silent when something should be addressed or corrected



**HOW DOES THIS PLAY OUT IN THE
INSTITUTION?**

FACTORS IMPACTING NEED FOR A “BIAS RESPONSE”

- Differing viewpoints in the university are encouraged and supported
- Institutions are challenged to be more aware and proactive about social justice issues
- Traditionally disenfranchised groups continue to experience bigotry, discrimination and hate-filled speech
- Institutions are creating systems to address these expressions that have a detrimental impact on individuals and the institutional culture
- BUT – balancing an individual’s right to state their opinion with supporting a diverse and inclusive campus can create a tightrope in balancing “rights”



CHALLENGES TO BIAS RESPONSE PROTOCOLS

- Several national organizations challenge institutions' efforts by alleging their responses to bias and bigotry:
 - Chill speech
 - Silence speech
 - Create intimidating and “behind the curtain” processes

APPLYING LEGAL STANDARDS

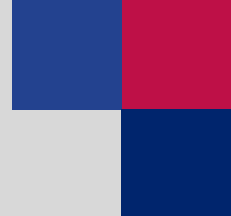
Campuses often discipline a student or staff member for sexual harassment or other form of protected class harassment. In order to be exempt from First Amendment protections, the harassing behavior must rise to the level of a Hostile Environment.

A hostile environment analysis requires consideration of:

- Unwelcome conduct based on a protected class
- That is sufficiently severe, pervasive* and objectively offensive
- Sufficient to limit an individual's access to their education, benefits or participation in activities

(Davis v. Monroe County Bd. of Education, 526 U.S. 629, 1999)

* Varying standards under Title IX and Title VI & VII



RECENT SIGNIFICANT RULINGS

COUNTERMAN V COLORADO

U.S. S.CT., JUNE 27, 2023

- Counterman sent hundreds of Facebook messages to C.W., a local singer. They had never met. C.W. did not respond.
- C.W. tried repeatedly to block Counterman, but he created a new account and continued to contact her.
- Several of his messages suggested violent harm for her.
- She cancelled many of her performances, was constantly fearful, declined all social engagements
- The State charged Counterman with “repeatedly engaging in any form of communication with another person in a manner that would cause a reasonable person to suffer serious emotional distress
- Trial court found him guilty – he appealed, arguing the First Amendment required the State to show that his statements were objectively threatening (which they did) and, that he was aware of their threatening character.

COUNTERMAN V COLORADO

U.S.S.CT., JUNE 27, 2023

- The Court of Appeals affirmed his conviction, the state Supreme Court denied review, but the U.S. Supreme Court took cert.
- The Court held that in true threat cases the State must prove that the perpetrator of the threat must have some subjective understanding of his statements' threatening nature. However, the First Amendment only requires a showing of recklessness
- Applying this subjective element to speech cases has a cost: although it may lessen chill of protected speech, it makes prosecution of other dangerous communication harder.
 - But the court felt this subjective standard (of recklessness) was required in order not to chill too much protected non-threatening expression

CHEN V. ALBANY

(9TH CIR. 2023)

Facts

- Epple and Chen were high school students
- Epple created a private Instagram for content other people might not find funny or appropriate
 - Cruel, racist, and violent posts
 - Images of lynching, slavery and the KKK
 - Racial epithets and slurs

CHEN V. ALBANY

(9TH CIR. 2023)

Facts (cont.)

- Knowledge of the account eventually spread around the high school
- Other students became very upset
 - Afraid to attend class
 - Missing class
 - Withdrawing from the high school
 - Feeling devastated, scared or bullied
 - Suffering academically
- “The impact has been significant and ongoing”

CHEN V. ALBANY

(9TH CIR. 2023)

Facts (cont.)

- The school suspended Chen and Epple for five days
 - Ultimately, the School Board voted to expel, based on harassment and bullying
- Chen sued the school and officials, arguing his First Amendment rights were violated

CHEN V. ALBANY

(9TH CIR. 2023)

Decision

- The court began its analysis by concluding that the First Amendment would not prevent a school from disciplining the speech in this case
 - Posts were vicious, violent, and targeted at specific individuals
- The central question became whether the off-campus nature of the speech would place it outside the school's authority to discipline

CHEN V. ALBANY

(9TH CIR. 2023)

Decision (cont.)

- Sufficient nexus test
 - Degree and likelihood of harm to the school
 - Whether it was reasonably foreseeable that the speech would reach and impact the school
 - Relation between the content and the context of the speech and the school

CHEN V. ALBANY

(9TH CIR. 2023)

Decision (cont.)

- Degree and likelihood of harm to the school
 - Degree of harm was significant here
 - Reactions of other students
- Reasonable foreseeability of reach and impact
 - Social media posts easily sharable
 - “Plainly foreseeable”
 - Intention for privacy not relevant
- Third factor
 - Weighed in favor of School Board’s disciplinary authority
 - Severe bullying or harassment of individuals

CHEN V. ALBANY

(9TH CIR. 2023)

Decision (cont.)

- “Extraordinary nature of abuse”
- Speech rose above being merely uncomfortable or unpopular
- Created “substantial disruption” of the education process
- No concern that discipline would chill protected speech

CHEN V. ALBANY

(9TH CIR. 2023)

Takeaways

- Rules about disciplining off-campus behavior continues to evolve
- Interesting implications for social media posts, even if made in a so-called private space
- Bullying implicated a duty to protect other students
 - Importance of safe harbor of protected speech in anti-discrimination and anti-harassment policies

DISCUSSION TOPICS

DISCUSSION TOPICS

- Best Practices for addressing disclosures in essays, writings, class discussions
- Best Practices for when to investigate Duty to Report violations
- Best practices with vendors, volunteers (non-affiliates with some level of connection with the University)
- Best practices for addressing process abuse
 - Disruption or delay of process
 - Cross-claims
 - False allegations
- When or when not to include Sexual Harassment as a charge along with other Sexual Misconduct charges.



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Association of
Title IX Administrators

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