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Legal Update for Illinois Community College Chief Financial Officers

Presented by Emily P. Bothfeld and
Dennis L. Weedman

ICCCFO Fall Conference | October 14, 2022

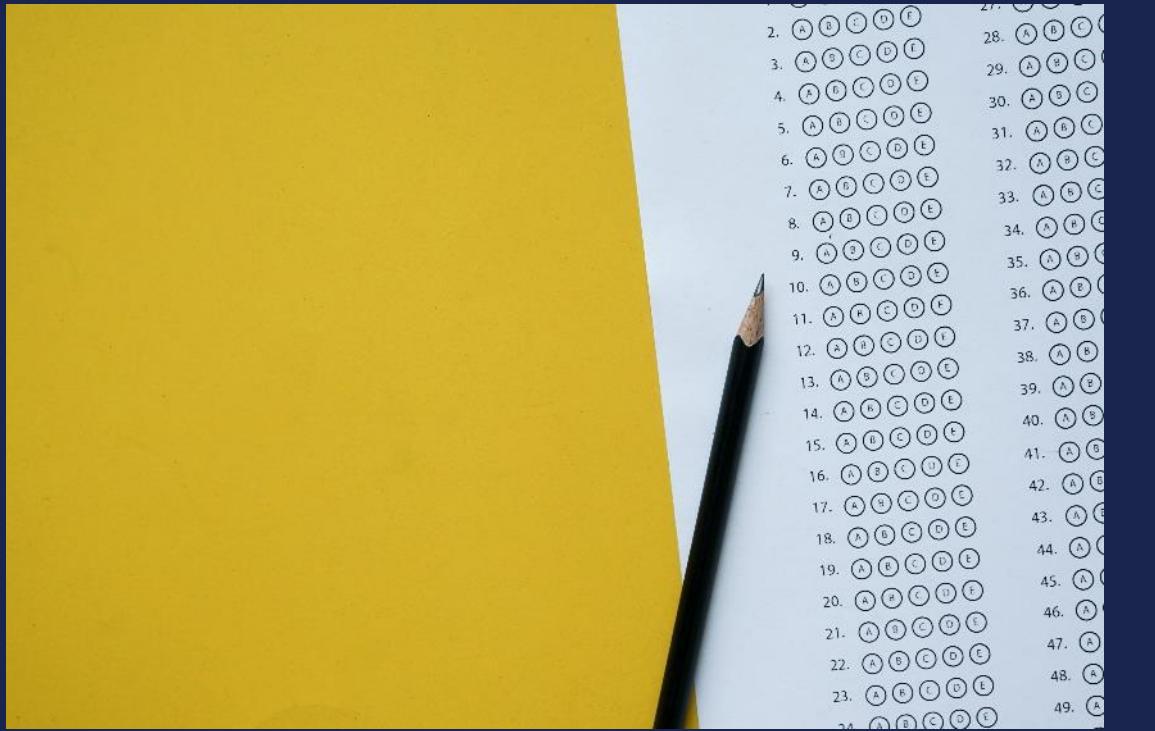
Introductions



Emily P. Bothfeld
ebothfeld@robbins-schwartz.com



Dennis L. Weedman
dweedman@robbins-schwartz.com



Agenda

- Online Exam Proctoring Litigation
- Highlights from Supreme Court's October 2021 Term

Kennedy v. Bremerton School District

Shurtleff v. City of Boston

Houston Community College System v. Wilson

- Student Equity Plan Legislation
- Proposed Title IX Changes

Online Exam Proctoring Litigation



Online Exam Proctoring

Ogletree v. Cleveland State University

- Plaintiff was enrolled in online chemistry class at Cleveland State.
- Two hours before scheduled exam, plaintiff was informed that students would be required to perform “room scan” of the room where they would be taking the test (in plaintiff’s case, his bedroom) prior to exam beginning.
- Plaintiff objected, but University reiterated that room scan would be required.
- Plaintiff complied, but then filed suit against University, alleging that room scan constituted unreasonable search under Fourth Amendment.

Online Exam Proctoring

Ogletree v. Cleveland State University

- Parties filed cross-motions for summary judgment.
- Court found in favor of plaintiff, holding that room scan was unconstitutional.
 - Room scan constituted “search” within meaning of Fourth Amendment.
 - Search was not reasonable, on basis that plaintiff’s privacy interest outweighed University’s interest in conducting room scans to preserve exam integrity.

Online Exam Proctoring

Ogletree Takeaways

- Not binding on Illinois institutions, but ruling could forecast similar challenges in other jurisdictions.
- Considerations when reviewing your institution's use of remote exam proctoring software
 - What software is being used?
 - What features are being used? Who controls the features?
 - Advance notice to students? How? When? Right to opt-out?

Highlights from Supreme Court's October 2021 Term



Campus Prayer:
*Kennedy v.
Bremerton School
District*

June 27, 2022

142 S. Ct. 2407



Kennedy: Factual Background

- High School football coach instituted practice of praying at the 50-yard line after each game.
- Kennedy initially prayed alone, but eventually, several student athletes chose to join Kennedy in the prayer.
- Kennedy also led the team in prayer during locker room pre-game events and occasionally gave motivational speeches that were religious in nature.
- School district directed Kennedy to stop prayer activity and religious inspired speeches.

Kennedy: Factual Background

- Kennedy agreed to stop locker room prayers and religiously motivated speeches, but refused to stop praying at the 50-yard line.
- District eventually suspended and declined to rehire Kennedy, claiming he engaged in “public and demonstrative religious conduct while still on duty as an assistant coach.”
- Kennedy filed suit, claiming the district violated his First Amendment rights to free speech and the free exercise of religion.
- Both the District Court and Court of Appeals denied Kennedy’s request for an injunction requiring the district to reinstate him.

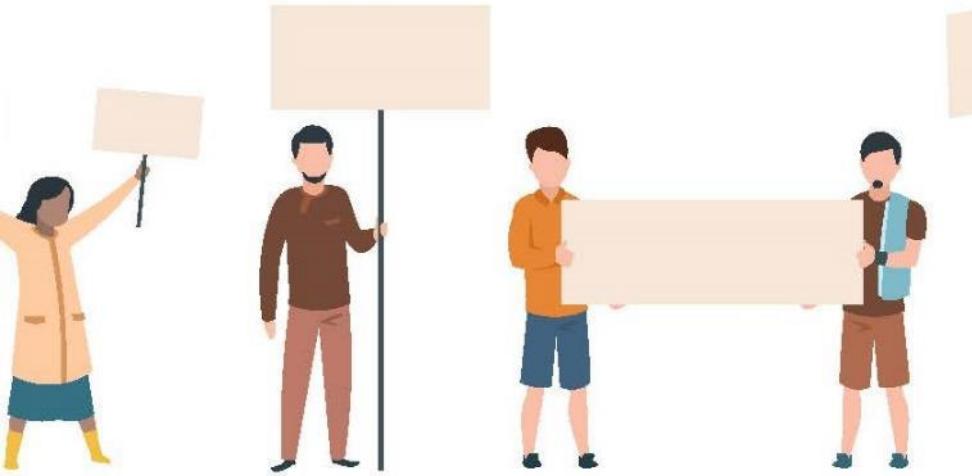
Kennedy: Holding

- The Supreme Court ruled that the district's actions violated Kennedy's First Amendment rights.
- The Supreme Court rejected the school district's position that the Establishment Clause of the First Amendment required it to stop Coach Kennedy's 50-yard line prayer.



Kennedy: Legal Analysis

- Was Kennedy's prayer "private speech?"
 - Kennedy's Position: Engaged in a sincerely held religious exercise by giving "thanks through prayer" briefly and by himself on the football field.
 - School District's Position: District was required to stop the prayers to avoid endorsement of religious activity and prevent students from coercion.



Kennedy: Legal Analysis

Court: Pickering Balancing Test:

1. Is employee speaking “pursuant to their official duties” or as a “private citizen addressing a matter of public concern?”
2. If employee is speaking as a private citizen on a matter of public concern, can employer show that its interests outweigh the employee’s private speech rights?

Kennedy: Legal Analysis

Court Ruling – Applying the *Pickering* Test – Part 1

- Kennedy's speech was **private** speech.
 - Made outside of his coaching duties.
 - Not instructing or coaching players during his prayers.
 - Coaches appeared to be “off-the-clock” during post-game period.

Kennedy: Legal Analysis

- Court Ruling – Applying the Pickering Test – Part 2
- District did not establish a compelling reason to stop Kennedy's private speech.
- Court relied (in part) on the following:
 - District never actually endorsed Kennedy's speech, and no complaints that it did.
 - No evidence of coercion or pressure on students to join the prayer.



Kennedy: Takeaways

- Does not mean colleges must always allow employees to pray on campus.
- Employees acting pursuant to and within their official duties are subject to the employer's right to regulate their speech.
 - A factual inquiry considering all circumstances is required, not just reliance on the employee's job description.



Kennedy: Takeaways

- Review your institution's policies and procedures governing speech and/or religious expression on campus.
 - Add or strengthen language stating that expressions of employees on private time are not college endorsed.
 - Assess job descriptions and language regarding employees' supervisory responsibilities for students beyond the classroom or extracurricular activities.
- Concerns about coercion of students or other employees to join in religious expression should be based on evidence, not speculation.

Flag (and Other)
Displays:
*Shurtleff v. City of
Boston, Massachusetts*

May 2, 2022
142 S. Ct. 1583



Shurtleff: Factual Background

- In 2005, Boston created a program to allow private groups to request use of a flagpole outside of Boston City Hall to raise flags chosen by the group.
- The city never denied a request . . . until 2017.
- In 2017, Shurtleff requested to fly a Christian flag, and the City Commissioner denied his request based on the Establishment Clause of the First Amendment.

Shurtleff: Factual Background

- Shurtleff claimed a violation of the Free Speech Clause of the First Amendment and sought an immediate order requiring Boston to allow the flag.
- The District Court and Court of Appeals denied Shurtleff's request, holding that flying private groups' flags from city hall amounted to government speech.
- Shurtleff appealed to the Supreme Court, asking it to decide (a) whether the flags Boston historically allowed constituted government speech, and (b) whether Boston could deny Shurtleff's flag-raising request under the First Amendment.



Shurtleff: Holding

- Supreme Court ruled in favor of Shurtleff, finding that Boston's flag raising program constituted private citizen speech and that denying Shurtleff's request constituted impermissible viewpoint discrimination.

Shurtleff: Legal Analysis

Does Boston's flag-raising program constitute government speech?

- Government speech vs. private expression:
 - Effect of government **inviting people to participate**
 - Court considered historical practice of flag flying at government buildings (indicative of City's stance that flag flying is government speech).
 - But Court noted the City's lack of meaningful involvement in selection of flags or crafting of the flag's messages to support finding of private speech.

Shurtleff: Legal Analysis

Did City's denial of Shurtleff's request constitute viewpoint discrimination, in violation of the First Amendment?

- Court held that:
 - When a government does not speak for itself, it may not exclude speech based on "religious viewpoint"; doing so "constitutes impermissible viewpoint discrimination."



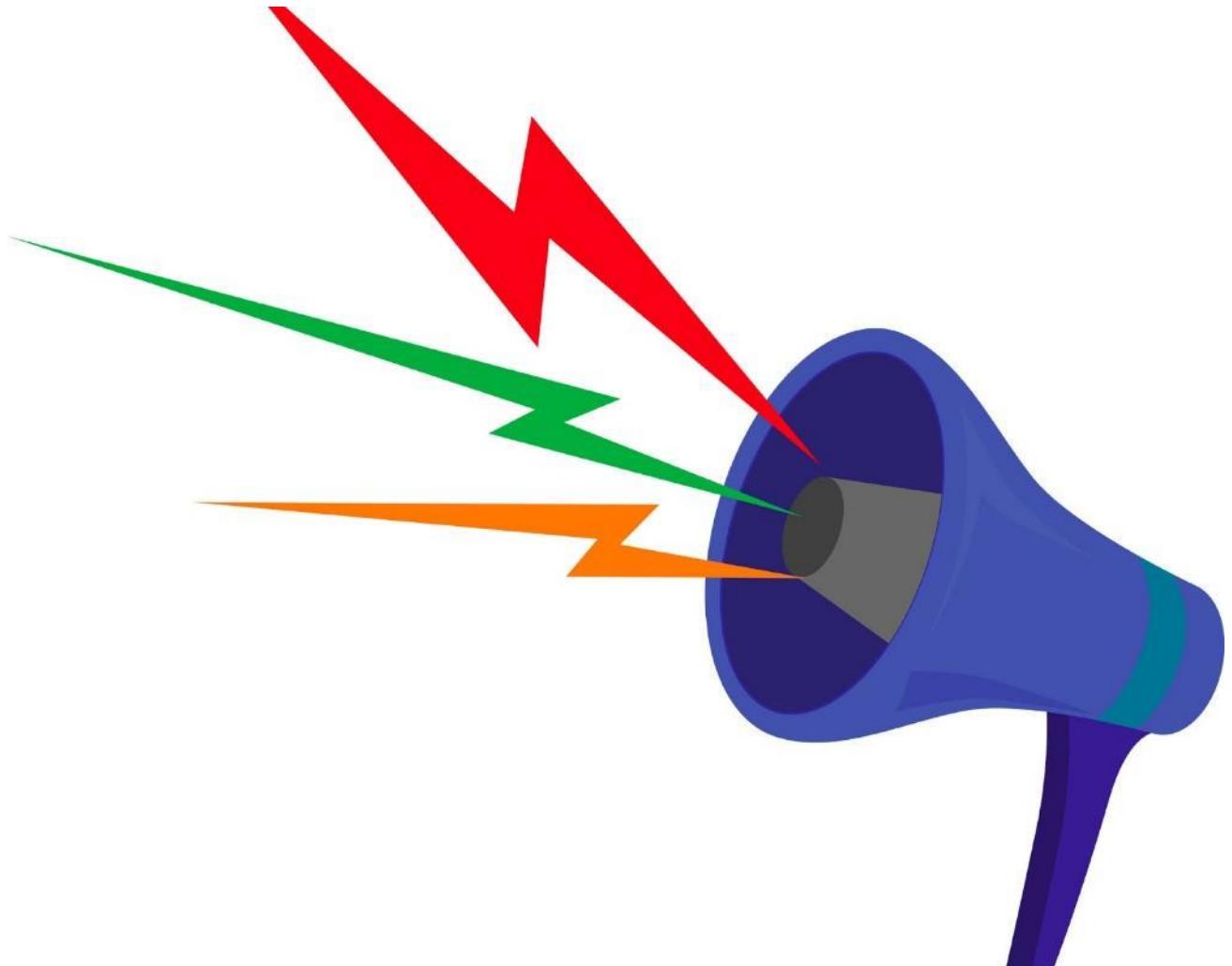
Shurtleff: Takeaways

- Government entities (including public institutions of higher education) may not impermissibly discriminate based on viewpoint when regulating expressive activities in a public forum.
- Government speech or private speech?
 - Key factor is the **amount of government control**
 - Institutions should be aware of any policies or practices that commingle the appearance of institution-sponsored speech and private speech.

Censure of Elected
Officials:
*Houston Community
College System v.
Wilson*

March 24, 2022

142 S. Ct. 1253



Wilson: Factual Background



- Wilson was elected to serve on the Board of Trustees for the Houston College Community System (“HCC”) in 2013.
- In 2017, Wilson began to voice concerns about the Board.
- Wilson hired private investigators to investigate other Board members and publicly broadcasted his concerns through robo-calls and the local radio station.

Wilson: Factual Background

- The Board adopted a resolution censuring Wilson.
- The resolution required Wilson to “immediately cease and desist from all inappropriate conduct” and warned him that any further inappropriate behavior would result in more disciplinary actions.
- Wilson then brought suit, arguing that the Board’s censure resolution violated his right to free speech under the First Amendment.

Wilson: Factual Background

The District Court granted HCC's motion to dismiss Wilson's complaint for lack of standing and for failure to state a claim.

The Court of Appeals reversed, finding that Wilson's reporting of potential "municipal corruption" was protected "speech on a matter of public concern" and that the Board's censure resolution violated his First Amendment rights.

Wilson sought Supreme Court review.



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Wilson: Holding

- The Supreme Court reversed, concluding that the Board's resolution censuring Wilson did not violate the First Amendment.



Wilson: Legal Analysis

The Supreme Court noted numerous examples of elected bodies censuring their members, including as far back as 1811 in the United States Senate.

The Court noted that, although elected bodies can censure their members for various reasons, there may be circumstances where a verbal censure could violate the First Amendment.



Wilson: Legal Analysis

- The Court also considered Wilson's claim that the censure was a material (and therefore impermissible) adverse action in response to his speech.
- The Court determined that the censure was an immaterial adverse action.
 - Elected board member is expected to shoulder a degree of criticism about their public service.
 - First Amendment allows elected representative to speak freely about government policy, but it cannot be used to silence other representatives seeking to do the same.
 - The Board's censure of Wilson did not prevent him from doing his job, it did not deny him any privilege of office, and he did not allege that the censure was defamatory.
 - The censure did not inhibit Wilson's ability to speak freely.

Wilson: Takeaways

- The Supreme Court's holding in *Wilson* is limited to elected bodies (including college and university governing bodies) and censure of one member by other members of the same body.
 - It does not involve expulsion, exclusion, or any other form of punishment.
 - It entails only a First Amendment retaliation claim, not any other claim or any other source of law.
- College and university governing bodies are permitted to maintain standards of behavior and decorum
 - Generally allowed to censure members who engage in inappropriate conduct or behavior, including expressive activity that violates standards of decorum.

Student Equity Plan Legislation



Student Equity Plan Legislation



P.A. 102-149

- Signed into law on June 7, 2022
- Amended Illinois Board of Higher Education Act.
- All Illinois public institutions of higher education in Illinois must develop and submit to the Illinois Board of Higher Education (“IBHE”) an equity plan and practices to increase the access, retention, completion and student loan repayment rates of minorities, rural students, adult students, women, and individuals with disabilities who are traditionally underrepresented in education programs and activities.

Student Equity Plan Legislation

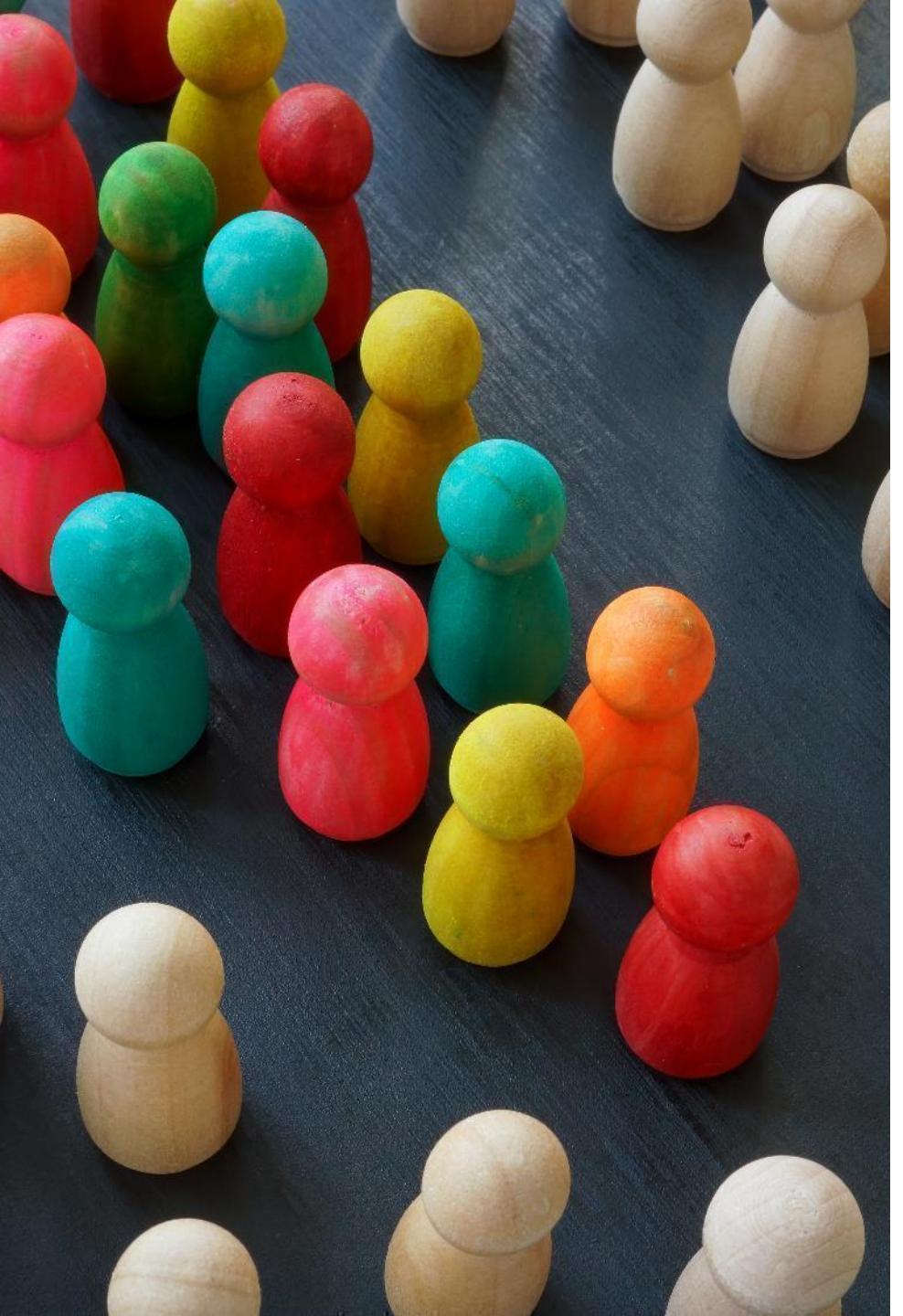
IBHE, in collaboration with the Illinois Community College Board (“ICCB”), must:

1. Require each covered institution to submit an equity plan and implement practices that, “at a minimum, close gaps in enrollment, retention, completion and student loan repayment rates for underrepresented groups and encourage all private institutions of higher education to develop and submit such equity plans and implement such practices;”
2. Conduct studies of the effectiveness and outcomes of the institution’s methods and strategies outlined in an institution’s equity plan;
3. Require components of an institution’s equity plan to include strategies to increase minority students’ student loan repayment rates;
4. Require institutions to “establish campus climate and culture surveys”; and
5. Continue to mandate all public institutions of higher education “and encourage all private institutions of higher education,” to submit data and information to determine compliance with these requirements.

Example Student DEI Initiatives

- Review of admission requirements for specialized/limited enrollment programs with an eye toward promoting uniformity/consistency to the extent practicable.
- Tailoring of recruitment and/or retention efforts to be inclusive of historically underrepresented students.
- Expansion of financial aid and scholarship offerings
- English Language Learner identification and support.
- Access for students with disabilities and pregnant students.
- Inclusive teaching strategies and curricular coverage of areas related to diversity, equity and inclusion.
- Training of recruitment team members and faculty on best practices to avoid discrimination and implicit bias.





DEI Planning Considerations

- What is the current reality at the College? Examine demographics, past history, student enrollment, achievement and matriculation data.
- Evaluate the success (or lack thereof) of current DEI initiatives. Where are the gaps between your goals and the results?
- Communicate with all stakeholders the benefits of diversity, equity and inclusion to obtain more “buy-in” and support for the initiatives.
- Carefully review and analyze student data used to support your DEI initiatives. Make sure your metrics support your initiatives.
- Understand and be aware of the legal constraints on DEI initiatives.
- Remember, “neutral” DEI policies and practices are more likely to withstand legal challenge.
- Include a process within the DEI Plan for regular review and assessment.
- Establish end date(s) for your DEI initiatives.

Proposed Title IX Changes



Background on Proposed Amendments

Notice of Proposed
Rulemaking (NPRM)
released on June 23,
2022.

U.S. Department of
Education is seeking to
amend the regulations
implementing Title IX of
the Education
Amendments of 1972.



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Big Picture Summary

Current Regulations:

- Actual Knowledge
- Deliberate Indifference
- Narrower definitions and scope
- Formal complaint to trigger action

Proposed Regulations:

- Prompt and effective action
- End, prevent, remedy
- Broader definitions and scope
- Verbal complaints permitted



Current Status

- Published in Federal Register, amendments were open for public comment for 60 days. Public comment period closed September 12, 2012.
- 235,816 public comments received.



Public Comments – Key Trends

- Definition of sexual harassment under 2020 regulations too narrow.
- 2020 regulations discourage victims from filing a grievance.
- 2020 regulations have slowed complaint resolutions considerably; institutions not able to comply with requirement to resolve complaints “promptly.”
- Compliance with 2020 regulations has required significant staffing increases, contributing to increased costs.

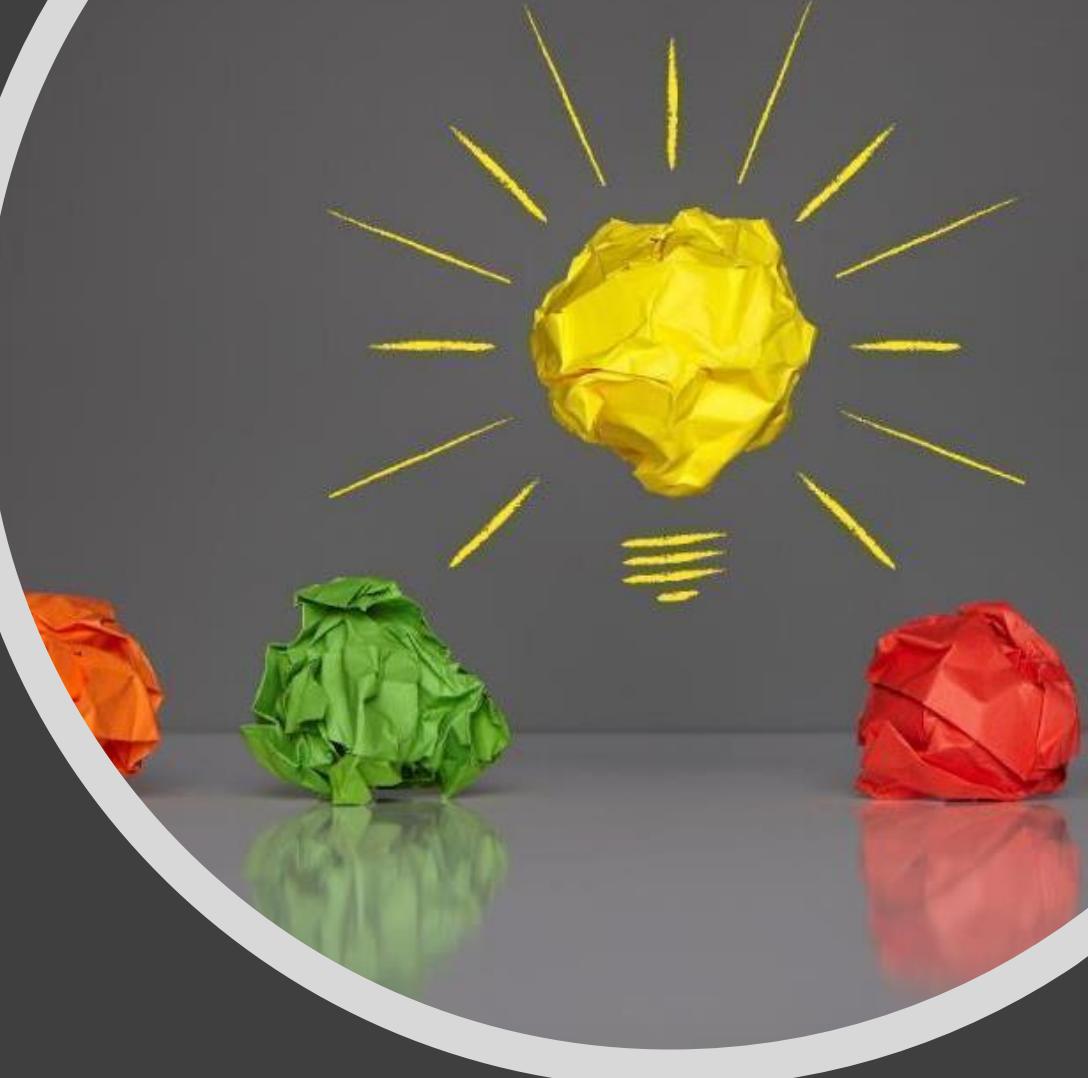
Next Steps

- Options following comment period:
 - Termination of rulemaking process (unlikely)
 - Supplemental NPRM
 - Final Rule
- Effective date of possible changes: **TBD**



How to Prepare... Again

- Review makeup of current Title IX team and consider whether changes will be warranted if proposed regulations are finalized
 - Size of team?
 - Decision-maker separate from investigator?
- Review existing grievance procedures for allegations of sex-based discrimination and sexual harassment falling outside of Title IX.
- Maintain compliance with current training requirements under both Title IX and Illinois Preventing Sexual Violence in Higher Education Act.



A blurred background image of a classroom setting. Several students are visible from behind, their hands raised towards the top of the frame. Some hands have pens or pencils resting on them. A teacher's head is partially visible in the center background, looking towards the raised hands.

QUESTIONS & ANSWERS



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