



September 2, 2020

**What You Missed This Summer:
Higher Ed Edition**



Our Speakers



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Disclaimer



- We are not giving you legal advice. Consult with your legal counsel regarding how best to address a specific situation.
- Use chat function to ask general questions and hypotheticals.
- We have a variety of stakeholders here, including press, so keep that in mind!
- If you registered using your email, you will get a copy of the slides. Watch for “Thank You For Attending” email.

Today's Agenda

- COVID-19 – EEOC, CDC, Remote Learning...
- CARES Act
- Supreme Court Update
- Title IX in 15 minutes or less
- Foreign Travel

COVID-19

- Many sources of information to keep up-to-date on:
 - CDC
 - EEOC
 - State and Local Governments (Rapidly changing)
 - Today's slides will quickly cover many resources with links for deeper reading
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- Consider: Is your institution keeping up-to-date on the best guidance?**
 - Consider knowing versus doing: are you taking appropriate steps to ensure training, prevention, and response?**

COVID-19: CDC Guidance

- *Considerations for Institutions of Higher of Education*
- <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/considerations.html>
- Bright side: Major guidance has not shifted since May 30, 2020.
- Consistent Guidance-Are you planning and enforcing:
 - Social distancing and mask wearing
 - Options for remote or reduced capacity on campus
 - Sanitizing and proactive cleaning
 - Ability to identify potentially infected students or employees
 - A plan to handle isolation, contact tracing, and working with local health department

COVID-19: CDC Guidance

- *“Interim Considerations for Institutions of Higher Education Administrators for SARS-CoV-2 Testing” from June 30, 2020*
- <https://www.cdc.gov/coronavirus/2019-ncov/community/colleges-universities/ihe-testing.html>
- Considerations:
 - CDC Does Not Recommend Blanket Testing for all campuses
 - What factors on your campus make broad testing or narrow testing more appropriate?
 - What kinds of tests are you utilizing?
 - Testing of symptomatic or exposed individuals? Asymptomatic?
 - What is your plan if someone tests positive?

COVID-19: CDC Guidance

- “COVID-19 Guidance for Shared or Congregate Housing” from August 22, 2020
- <https://www.cdc.gov/coronavirus/2019-ncov/community/shared-congregate-house/guidance-shared-congregate-housing.html>
- Considerations:
 - Create, review, update, and implement an emergency operations plan for dormitory or other institutional housing
 - Utilize policies and signage to instruct residents on best practices
 - Review common spaces for opportunities to social distance (lounges, laundry facilities, etc.)
 - Have a plan for quarantine or other isolation if someone has symptoms or a positive test

COVID-19: EEOC Guidance



- **“What You Should Know About COVID-19 and the ADA, the Rehabilitation Act, and Other EEO Laws”**
- Updated June 17, 2020
- <https://www.eeoc.gov/wysk/what-you-should-know-about-covid-19-and-ada-rehabilitation-act-and-other-eeo-laws>
- EEOC Guidance:
 - EEO laws including the ADA and Rehabilitation Act are still in effect
 - Employers may ask employees about officially recognized COVID symptoms when performing symptoms screenings and if employees call in sick
 - Employers may require testing to work or a doctor’s note for return to work
 - Reasonable accommodations: still follow the same procedure prior to the pandemic (See specifics in linked Q&A)

COVID-19: EEOC Guidance



- *Considerations:*
 - Are your supervisors or other employees properly trained on how to conduct symptom screenings?*
 - Are your supervisors trained on what responses to have when an employee requests an accommodation either in writing or verbally?*
 - Ensure that your interactive process for accommodations is still moving forward.*
 - Start planning for scenarios if you workforce shifts back on-site.*
 - Create an operations plan in case of an outbreak.*

CARES Act



- *OPE Creates Website of Consolidated Resources for IHEs re HEERF*
<https://www2.ed.gov/about/offices/list/ope/caresact.html>

In the months following release of the HEERF, the department upgraded its materials and guidance regarding how IHEs are to use HEERF awards. The website includes various FAQs interpreting how HEERF awards may be used.

- ❑ ***Use the above OPE website to access information regarding HEERF requirements***

CARES Act



- *OPE Fed. Reg. Interim Final Rule re HEERF Eligibility, June 17, 2020*

IFR set eligibility by defining student under CARES Act as an individual who could be eligible for Title IV funds under the HEA. *Washington v DeVos* enjoined enforcement in Washington, and *Oakley v DeVos* enjoined enforcement for California Community Colleges.

- ❑ ***Use Title IV eligibility to determine whether a student is eligible for HEERF funds (unless you are in California or Washington)***

CARES Act



- *OPE Fed. Reg. Notice of HEERF Cares Act Application Deadline, June 24, 2020*

The Coronavirus Aid, Relief, and Economic Security Act (“Cares Act”) Provided nearly 14 billion to IHEs in the form of Higher Education Emergency Relief Fund (“HEERF”). The OPE set the application deadline of **August 1, 2020**.

Don't try to apply for HEERF Funds. It's too late.

CARES Act



- *OPE Fed. Reg. Publication of Questions for IHEs re HEERF Data Collection, July 29, 2020*
www.regulations.gov/docket?D=ED-2020-SCC-0122

Office set for comment a list of questions to be answered by IHEs that took HEERF funds. Comment period ends September 28, 2020.

- Review the questions and make sure your institution can answer them***
- Consider answering the directed questions via comment***

CARES Act



- *OPE Fed. Reg. Notice re Public Posting Requirement for HEERF Grantees, August 28, 2020*

Re-set list of reporting requirements for IHE websites. Changed update requirement from every 45 days to every calendar quarter.

- Make sure you are publishing the required information on your institution's primary website***

Supreme Court Update



- *Bostock v. Clayton County Georgia*

Court holds that Title VII protects individuals from employment discrimination on the basis of sexual orientation and transgender status

- ❑ ***Consider amending policies to protect sexual orientation, gender identity, and gender expression***
- ❑ ***Consider other implications of Bostock – restrooms, housing, locker rooms, athletics***

Supreme Court Update



- *Our Lady of Guadalupe Sch. v. Morrissey Berru*

“Ministerial exception,” which protects religious schools from employment discrimination lawsuits in certain circumstances, is broad enough to encompass Catholic school teachers. Test is to consider what the employee does, not whether they are actually “ministers.”

- ❑ ***If your institution is religious, consider the implication of this case on your current policies.***

Supreme Court Update



- *Espinoza v. Montana Dep't of Revenue*

State constitution could not prohibit public aid from being provided to religious educational institutions.

- ❑ ***If you are at a religious institution in a state where this applies, consult with legal counsel regarding potential affects on available funding.***

National Labor Relations Board



- *Bethany College* decision (June 10, 2020)

NLRB did not have jurisdiction over religious schools in matters involving faculty members.

- If you are at a religious institution and your faculty is unionized or unionizing, consult with legal counsel.***

Title IX: State Litigation



- Commonwealth of Pennsylvania v. Devos, Civil Action No. 2020-1468 (D.D.C. 2020)
 - 17 States are suing the Department of Education seeking to strike down the new Title IX regulations in their entirety.
 - The United States District Court for the District of Columbia denied the states' motion for a stay of implementation of the regulations on August 12, 2020.
- To-do: Move forward with complying with the new Title IX regulations.***

Title IX: Other Litigation



Join us on November 6, 2020 at 2:00 PM EST for a webinar specifically focused on a broad Higher Education Title IX litigation update.

We will likely see a bit more clarity on how the courts view the new regulations.

Title IX: OCR's Blog



- May 22, 2020: OCR indicated that while recipients may not generally rely on a statement not subject to cross-examination at a live hearing, recipients may consider statements that **constitute** the sexual harassment (i.e. statements that may be acts of stalking, acts of sexual harassment, etc.)
 - ❑ **Consideration: Ensure your policy reflects this caveat for statements not subjected to cross-examination.**
- August 5, 2020: OCR indicated that new Title IX regulations go into effect on August 14, 2020 and are not retroactive
 - OCR indicated that the new regulations will not be in effect for sexual harassment that allegedly occurred prior to August 14, 2020
 - ❑ **Consideration: how does your institution want to handle cases that fall into this category? Apply past definitions with past procedure? Or apply past definitions with new procedure?**

Title IX: OCR



- OCR withdrew the 2001 Dear Colleague Letter – most of what remained in effect related to credibility determinations
- Department of Education provided some responses through OCR's OPEN Center to specific questions on August 13, 2020
- **Disclaimer:** These answers are not binding, not located on the OCR's website or blog, and may not hold up in litigation.

- ***How much cross-examination is needed during a live hearing?***
 - Response: Regulations do not require any amount of cross-examination, only that an advisor be permitted to ask all relevant questions

Title IX: OCR



- ***What if a party does not answer a question posed by the decision-maker?***
 - Response: Decision-maker may still rely on party's statements. Cannot rely on statements when party refuses to answer cross-examination
- ***What happens when a party answers some questions on cross but not all questions?***
 - Response: "Refusal by a party or witness to answer one relevant cross-examination will trigger the Rule's prohibition against the decision-maker relying on that party's or witness's statements in reaching a determination regarding responsibility."

Title IX: OCR



- ***Is the decision-maker required to also sanction?***
 - Response: No. Institutions may split these two roles, however, the decision-maker who reached the determination on responsibility must include any sanctions in the written determination distributed to the parties
- ***Do we have to use the NIBRS definitions including rape and sodomy?***
 - Response: Institutions may use either the SRS definition or the NIBRS definition for sexual assault
- **Overall Considerations: Do you wish to implement some of this guidance in your policy? What are the legal risks involved? (May wish to involve counsel)**

Foreign Travel

- Rapidly changing restrictions
- A significant number of countries now fall under Level 3 or 4 travel restrictions from the U.S. Department of State due to COVID-19 and other world events
- ❑ ***Ensure that individuals traveling in institution-sponsored programs are aware of travel advisories and restrictions***
- ❑ ***Consider limiting or prohibiting travel at a certain Level***
- ❑ ***Check with insurance to see how coverage may be limited for international trips***
- ❑ ***Ensure contracts for international travel have appropriate termination provisions***

Foreign Travel

- President has limited individuals from certain countries from entering the US because of COVID-19, which has affected and is still affecting students and employees trying to come back to campus
- Review guidance from IFAP and SEVP when foreign students will be online-only***
- Report through SEVP within 10 business days of any procedural adaptations in response to COVID-19***



www.bricker.com/events

Events

Title IX Training – various dates and times

Level 2 Informal Resolution – Sept. 3 & Dec. 10

Level 1 Annual Clery Training – Sept. 30

Level 2 Decision-Maker Training – Oct. 1

Level 2 Investigator Training – Nov. 2

Level 2 Title IX Coordinator Training – Nov. 5

Level 2 Appeals Officer Training – Dec. 7

Upcoming Free Webinars

Oct. 2, 2:00 EST – Political Speech on the College Campus

Nov. 6, 2:00 EST – Title IX Litigation Update (Higher Ed)

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authored by
our attorneys.**



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