

HUSCH BLACKWELL

Back to School Training

August 2024

Agenda

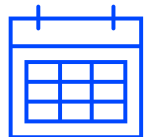
The Title IX Refresher & Update

Pregnancy Accommodations

Disability Accommodations

Political Activity

Supreme Court Update

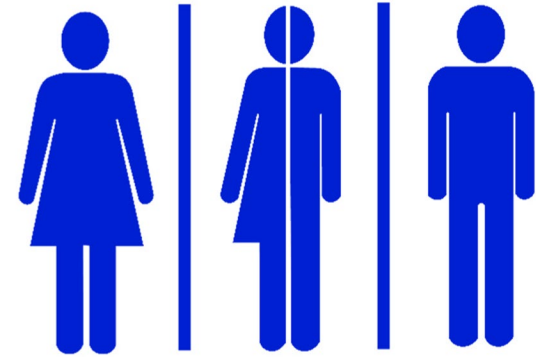


The Title IX Refresher & Update

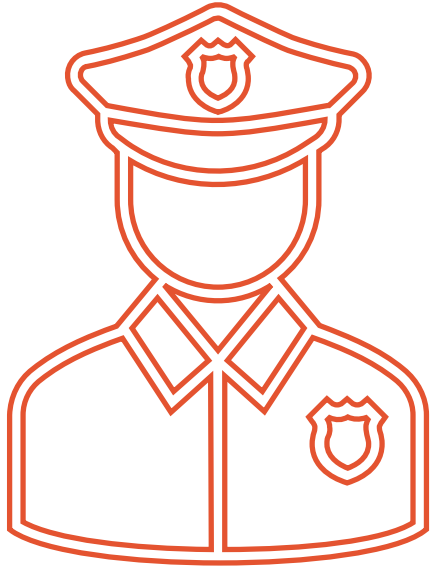
What is Title IX?

“[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. § 1681



How is Title IX implemented?



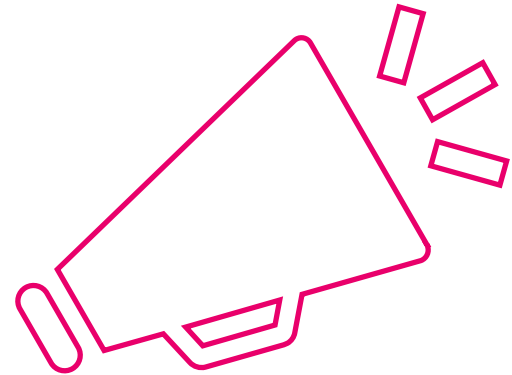
- U.S. Department of Education regulations
- Private lawsuits and related court decisions

What is the “new” Title IX regulation?

- Effective August 1, 2024, a series of revisions to 34 C.F.R. Part 106 that address several issues, including:
 - The scope of sex discrimination and sex-based harassment covered by Title IX
 - The procedures and requirements for addressing complaints of sex discrimination and sex-based harassment
 - Specific content on accommodating pregnancy and pregnancy related conditions

What portions of the new regulation have garnered the most attention?

- Definition of “sex” to include gender identity and sexual orientation
- Roll-back of some “due process” requirements from August 2020 regulations



What is the status of the new regulation?

- Numerous federal lawsuits filed by multiple states, interest groups, and private persons have sought to block all or part of the regulations
- Multiple injunctions imposed affecting 26 states and hundreds of institutions
- The 2024 regulations are currently enjoined in Kansas
- Two circuits have refused to stay injunctions
- Supreme Court review is pending
- It is possible that implementation of all, or a portion of the regulation, could remain blocked

What misconduct does the Title IX regulation address?

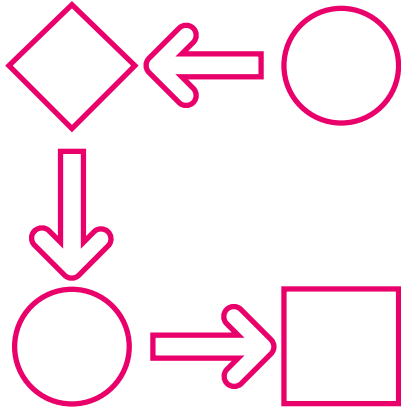
- Sex discrimination
 - Sex-based harassment



What does the Title IX regulation include in the concept of “sex”?

- Assigned sex at birth
- “Biological” sex
- Sex stereotypes
- Sex characteristics
- Pregnancy and pregnancy-related conditions
- Sexual orientation
- Gender identity*

What is sex discrimination?



- Adverse treatment of a person on the basis of sex
- Limits or excludes the person from participating in the institution's education program or activity or denies or limits the benefits thereof

Programmatic
Discrimination

Individualized
Discrimination

Sex-Based Harassment

What is programmatic discrimination?

- Where discrimination occurs in a systematic way due to an *institutional* policy or practice
- Programmatic discrimination adversely affects persons as a group or by category, rather than by individualized decision
- Programmatic discrimination is usually *not* attributed to an individual perpetrator (i.e., “respondent”)

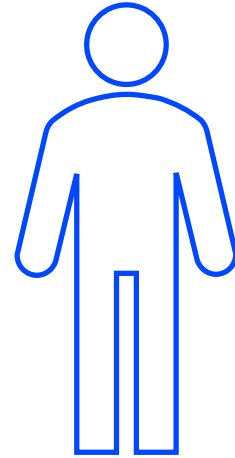
Example

An institution's business school creates a special mentorship program that pairs female students with a female mentor who is a successful business executive. Only female students are allowed to participate. The program significantly improves the odds of a participant receiving a job on graduation. In addition to the mentor relationship, the program includes special seminars held on campus, paid travel to a national summit, a small scholarship, and a plaque awarded to the participant at the program's conclusion.



What is individualized discrimination?

- A particular decision is made, or particular action taken, that results in adverse treatment of a particular person that limits or excludes them from participation or denies or limits benefits
- Typically, individualized discrimination has an identifiable “respondent” who makes the discriminatory decision



Example

A supervisor has interviewed one male candidate and one female candidate for an open position. The supervisor prefers working with men because the supervisor believes women can be “catty” and “emotional”. The supervisor decides to hire the man, and not the woman, *because* of his stereotypical beliefs about women.



What is sex-based harassment?



- Conduct that is sexual in nature or on the basis of sex
- And that constitutes:
 - Quid pro quo harassment
 - Hostile environment harassment
 - Certain specific offenses

What's the difference between sexual conduct and conduct that is on the basis of sex?

- “Sexual” means the conduct itself has a sexual nature
- “On the basis of sex” means the conduct is targeted at a person because of their sex

Example

Jean repeatedly leers at Calvin's genitals, makes crass sexual jokes to Calvin, and propositions Calvin to engage in sexual activity. Calvin is not receptive to any of this and has repeatedly told Jean to stop.



Example

Calvin repeatedly tells jokes to Jean about how women are “stupid,” denigrates Jean’s own mental ability as a woman in front of others, and makes incessant, mocking comments to Jean about cooking, cleaning, and raising babies.



What are the different categories of sex-based harassment?

Quid Pro Quo
Harassment

Hostile Environment
Harassment

Sexual Assault

Domestic Violence

Dating Violence

Stalking

Example

The coach of the tennis team repeatedly leers at a particular player's chest, lingers in the locker room whenever the player is present, tells the player unsolicited details about the coach's prior sexual conquests, and rubs the player's shoulders without permission. The player is increasingly affected by the unwelcome conduct and eventually withdraws from the team to avoid the coach's attention.



What factors do we consider in determining a hostile environment?

- The degree to which the conduct affected the complainant's ability to access
- Type
- Frequency
- Duration
- Parties' ages
- Parties' roles and other factors about each party
- Previous interactions
- Location of the conduct and context
- Other sex-based harassment at the institution

What are the specific offenses?

Rape

Statutory
Rape

Fondling

Incest

How should we think about consent?

- Consent in fact
 - Determined by whether the relevant facts establish conduct that amounts to agreement to engage in sexual activity-- as agreement is defined by the institution
- Ability to consent
 - Determined by whether a person has capacity to consent or whether they have lost such capacity

What is retaliation?

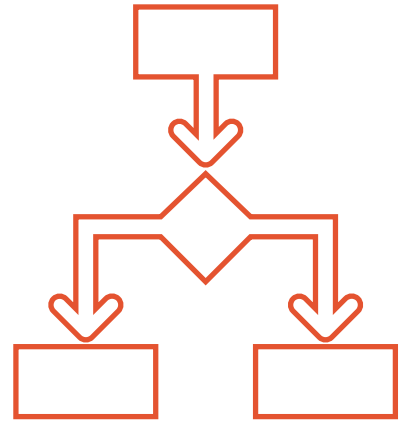
Intimidation, threats, coercion, or discrimination against any person by the recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit or service under the recipient's education program or activity, for the purpose of interfering with any right or privilege secured by Title IX [or the Title IX regulation], or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under [the Title IX regulation]

Which employees must report to the Title IX Coordinator?

- All non-confidential employees at K-12 institutions
- In higher education, all non-confidential:
 - Employees with authority to institute corrective measures
 - Administrators
 - Faculty and other teachers
 - Advisors

What about non-confidential employees who are not mandatory reporters?

- They must
 - Make a report to the Title IX Coordinator, or
 - Provide contact information for the Title IX Coordinator, and information about how to make a complaint to anyone who provides information about conduct that reasonably could be sex discrimination or sex-based harassment



Example

John works as a custodian in a residence hall. One day while John is sweeping the tile in a hallway, he sees student Marco run by being angrily chased by student Renea. As Renea passes by John, Renea looks at John as she exclaims “that dude just grabbed my chest!”.



What does the grievance process look like?



Questions



Pregnancy Accommodations

What do the new Title IX regulations say about pregnancy?

- Discrimination and harassment based on pregnancy and related conditions is “sex” discrimination and sex-based harassment
- Institutions have a duty to provide certain accommodations to persons with pregnancy and related conditions



What are pregnancy and related conditions?

- Pregnancy
- Childbirth
- Termination of pregnancy
- Lactation
- Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
- Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions

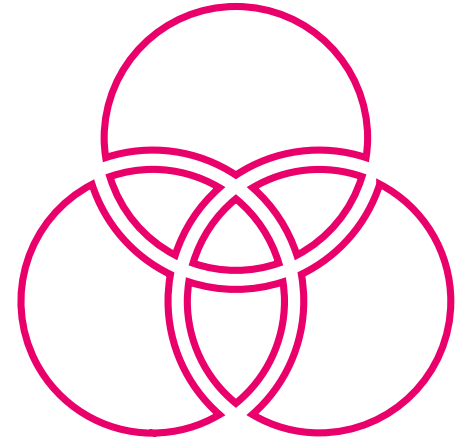
Example

A faculty member who teaches a weightlifting course learns that Jane, a student in the course, is pregnant. The faculty member is concerned that strenuous lifting might harm Jane and tells Jane that she may only perform unweighted isometric exercises for the remainder of the course. The faculty member routinely allows other students who have strains, sprains, colds, and the flu to lift heavy weights.



What do we do if pregnancy presents a health concern with a particular program or course?

- For purposes of assessing eligibility, pregnancy must be treated the same as other temporary medical conditions
- It is not discrimination for a pregnant student to voluntarily participate in a “separate portion” of a program if it is comparable



May an institution require a pregnant student to provide a doctor's certification?

- Only when certified level of physical ability or health is necessary
- Such certification is required of all students participating in the class, and
- Information obtained is not used for discriminatory purpose

Example

A school operates a military studies program that includes a course that involves physical activity similar to that which one would experience in basic training. All students are required to provide a pre-clearance letter from a physician. The school may require a pregnant student to provide a pre-clearance letter.



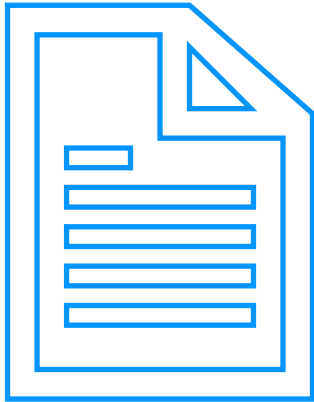
What reasonable accommodations are pregnant students allowed?

- Reasonable modifications
- Based on individualized needs
- Determined after consultation with the student
- Fundamental alteration is not required

What are some common examples of reasonable accommodations?

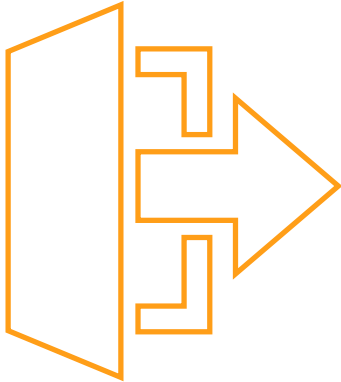
- Breaks during class to express breast milk or breast feed
- Breaks to attend to pregnancy related needs, including eating, drinking, or using the restroom
- Intermittent absences to attend appointments
- Providing alternate assignment
- Access to online/virtual education
- Changes in schedule or course sequences
- Extensions of time and rescheduling
- Counseling
- Granting an incomplete or leave of absence

Can institutions require documentation before granting an accommodation?



- Documentation must not be requested unless it is necessary and reasonable to determine modifications
- Some accommodation needs related to pregnancy are obvious or inherent and need not be documented

What about voluntary leaves?



- Must allow a pregnant student to take a voluntary leave for at least the period of time medically necessary
- When returning, student must be reinstated to academic status, and as practicable, to the extracurricular status before leave

Must an institution provide lactation space?

- Must provide access to lactation space, other than a bathroom, that is clean and private
- Space must be available both for expressing breast milk or for breastfeeding, as needed



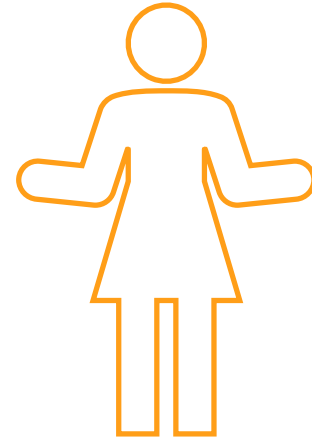
Are there reporting obligations for the needs of pregnant students?



- When student informs employee of student's pregnancy or related condition
- Employee must promptly provide student with Title IX Coordinator's contact information and inform student of Title IX Coordinator's ability to prevent sex discrimination and ensure equal access

Pregnant Workers Fairness Act (PWFA)

- Requires employers to provide **reasonable accommodations** to employees (including student-employees) and applicants with “known limitations related to **pregnancy, childbirth, or related medical conditions**”.
- Imposes a new obligation on employers to provide accommodations to pregnant workers – for pregnancy itself, in addition to related conditions/symptoms and childbirth.



What might be a reasonable accommodation under the PWFA?

- Additional, longer, or more flexible breaks to drink water, eat, rest, or use the restroom
- Changing food or drink policies to allow for a water bottle or food
- Changing equipment, devices, or workstations, such as providing a stool to sit on, or a way to do work while standing
- Changing uniform or dress code or providing safety equipment that fits
- Temporary changing of work schedule, location, etc.
- Light duty or help with lifting or other manual labor
- Temporary suspension of one or more essential functions of a job

Example

Student-employee works in an office-setting and is 20-weeks pregnant. Student-employee informs her supervisor that she is 20-weeks pregnant and requests an adjustable desk so that she can be more comfortable throughout the work period.



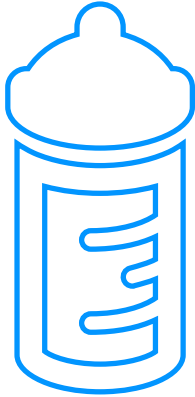
What are some other accommodation considerations?

- Pregnant employee cannot be *required* to accept an accommodation if no evidence of impaired performance
- Employer may need to approve a *temporary* suspension of essential function where function can be resumed *in the near future* (subject to “*undue hardship*” analysis)
- Prohibits *requiring* an employee to take leave if another reasonable accommodation can be provided
- Prohibits adverse employment action as a result of requesting or using a reasonable accommodation

The PUMP Act (Providing Urgent Maternal Protections for Nursing Mothers)

- The Providing Urgent Maternal Protections for Nursing Mothers Act (the “PUMP Act”) went into effect in December 2022
- Department of Labor enforcement provisions became **effective April 2023**

What does the PUMP Act do?



- Entitles employees to reasonable break time to express milk during work hours
- Expands coverage to 9 million employees not previously covered

What else does the PUMP Act require?

Reasonable Breaks

- “Each time the employee needs to pump” (DOL guidance)
- No fixed schedule – frequency and duration could change over time
- Reasonable time = dependent on facility
- For 1 year following birth of child

Compensation During Breaks

- If compensated breaks are generally provided, employee can use that time for pumping
- If uncompensated, employee must be fully relieved from work
- Performance of work during break = compensation for time spent performing work

What is the role of faculty and staff?

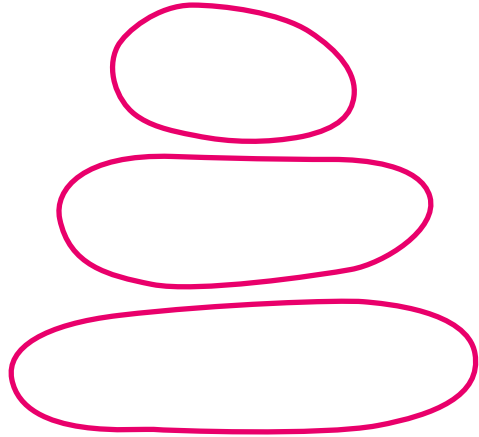
- Refer employees/student-employees seeking a pregnancy related accommodation to the Title IX Coordinator and human resources, as appropriate
- Cooperate in interactive process and implement accommodations granted
- If accommodations are creating a conflict or are failing in practice, notify the Title IX Coordinator and human resources, as appropriate
- Do not grant accommodations yourself
- Do not unilaterally refuse to implement accommodation

Questions



Student Disability Accommodations

What are the general obligations?



- Provide reasonable accommodations to students with disabilities
- Students are required to self-identify
- Once a student has self-identified, the institution must determine if the student is a qualified individual with a disability and what accommodations are appropriate

Are there differences between K-12 and higher ed?

K-12

- School required to identify, test, and accommodate students with disabilities
- Modifications of curriculum and expectations
- Students progress at their own levels

Higher Ed

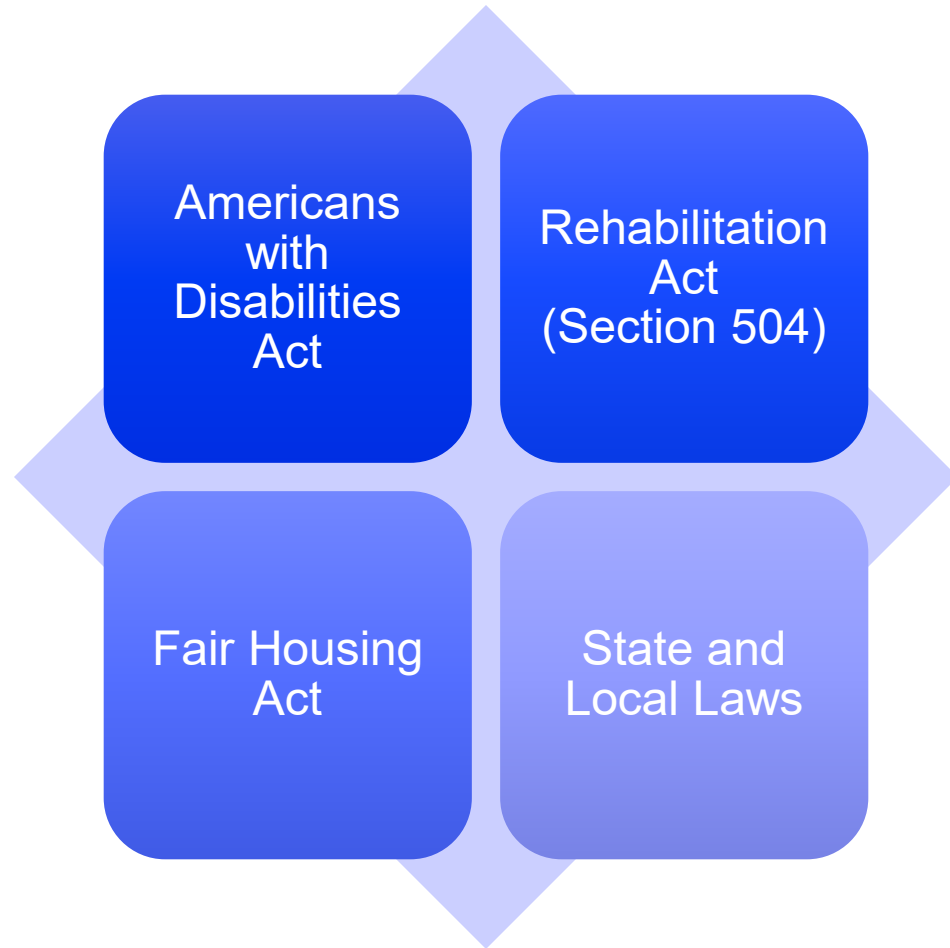
- Student has right to self-identify
- Student bears burden of requesting and providing documentation
- Accommodations cannot alter fundamental elements
- Student held to meeting academic requirements

Example

Parent of incoming first year college student contacts the Dean of Students to set up a meeting with parent and first year student to ensure that “all the elements of my son’s IEP are implemented when the semester starts”. IEP included that student would be accompanied by a paraprofessional to certain courses and would be provided supplemental tutoring after school and on weekends, at the high school’s expense.



What are the key disability laws?



What are their general principles?

No disability
discrimination in
employment

No disability
discrimination in
programs and
activities

No disability
discrimination by
places of public
accommodation

Accessibility for
facilities and
services

Reasonable
accommodations/
modifications

What is covered?



- Admissions/recruitment
- Academics
- Housing and Dining
- Athletics
- Communications
- Facilities
- Etc.

What is a disability?

A physical or mental impairment that substantially limits one or more major life activities

A record of having an impairment that is substantially limiting to a major life activity

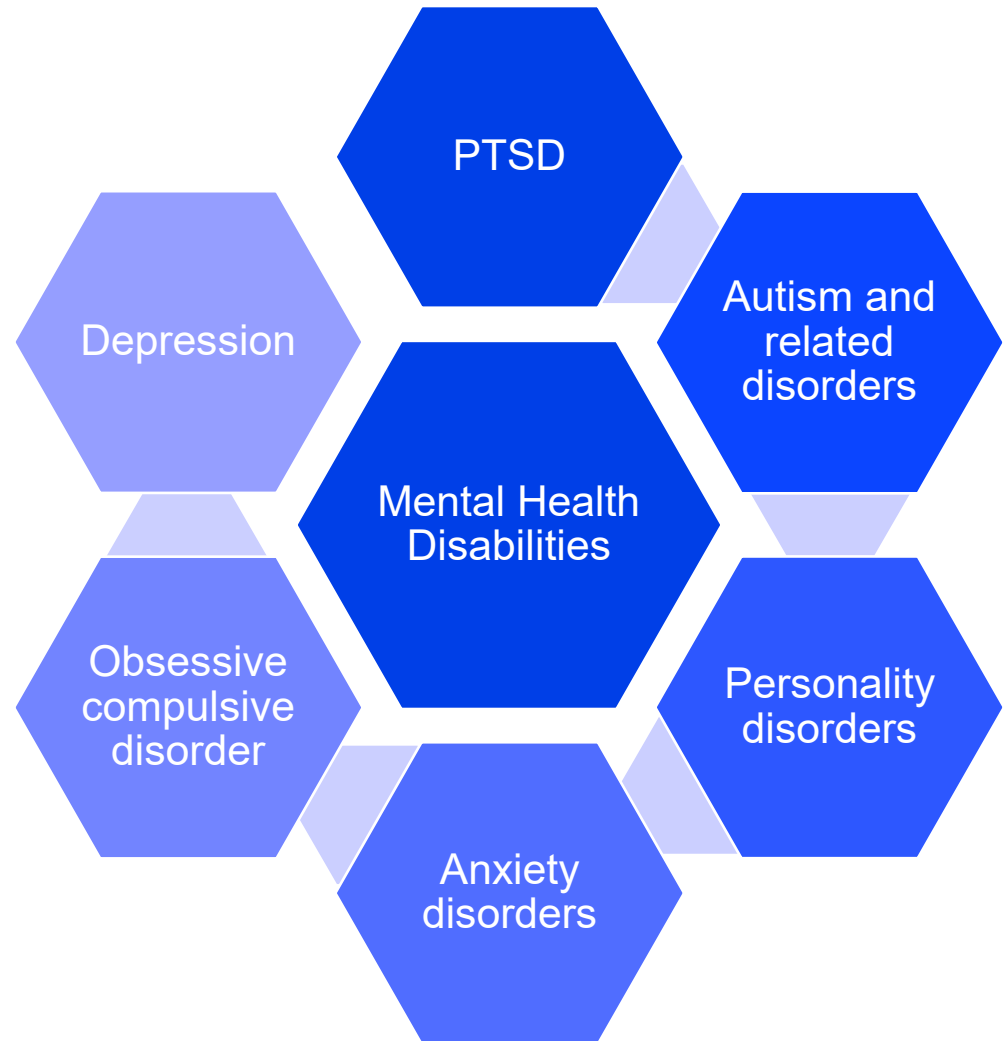
Being regarded as having an impairment that is substantially limiting to a major life activity

Example

A student presents documentation from a medical doctor establishing that the student has been diagnosed with ADHD. The documentation establishes that the ADHD limits the student's ability to concentrate for extended periods of time and that the ADHD is exacerbated when the student is in a loud or chaotic environment.



What are some examples of mental health disabilities?



Example

A student presents documentation from a social worker explaining that the student recently ended a long-term romantic relationship and has been “experiencing feelings of grief and depression”. The social worker recommends that the student “be given additional time for homework and testing” as the student “processes through this significantly disruptive event in their life”.



What about temporary disabilities?

- A temporary impairment does not constitute a disability unless its severity is such that it results in a substantial limitation of one or more major life activities for an extended period
- Must be resolved on a case-by-case basis, taking into consideration both the duration of the impairment and the extent to which it limits a major life activity

Example

A football player receives a concussion during a game. The team physician advises the player should rest at home for three days, avoid strenuous activity for a week, and avoid any physical contact for at least two weeks.

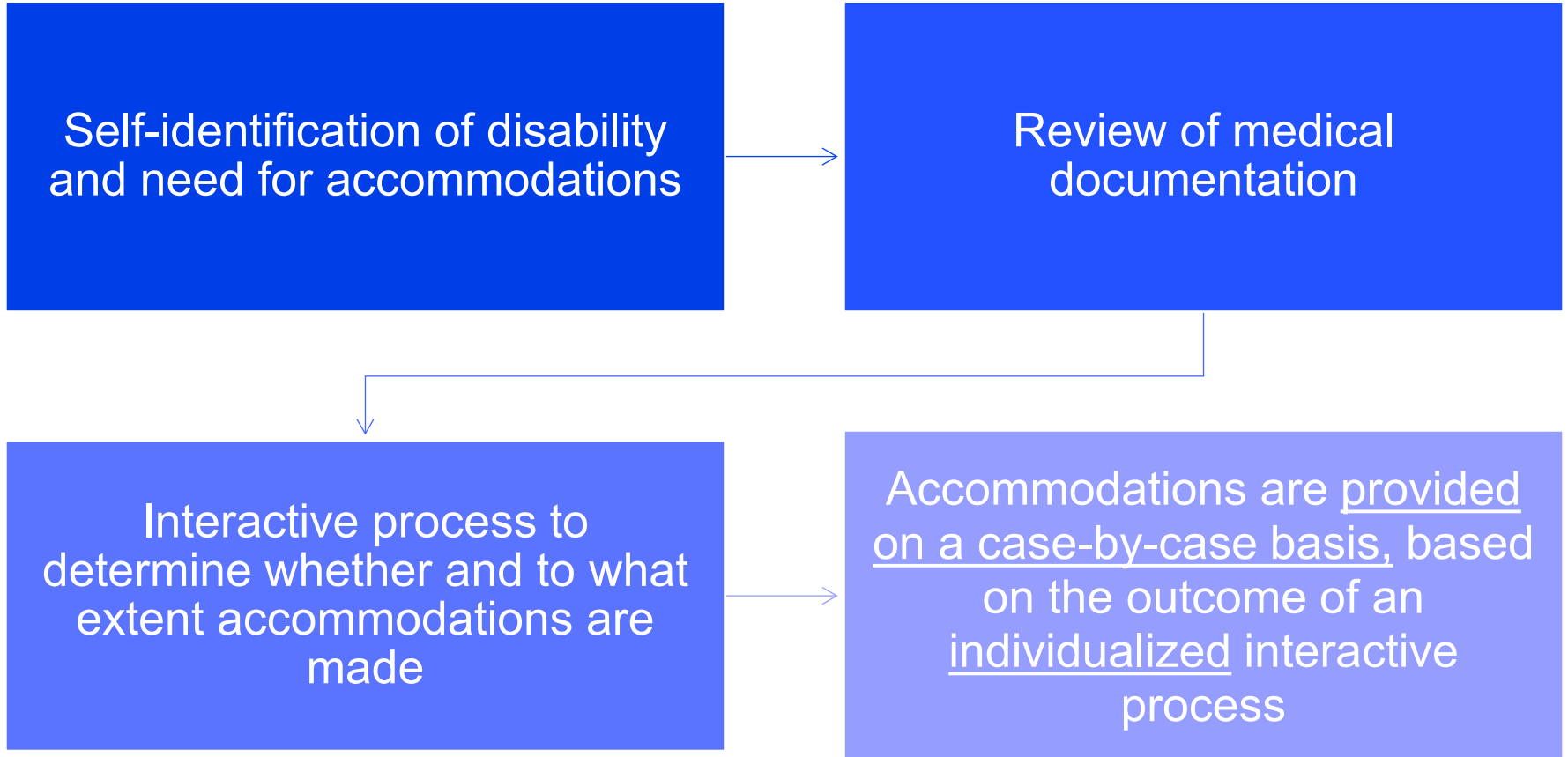


Example

A football player, with a history of prior concussions, receives another concussion and begins to experience seizures over the weeks that follow. A neurologist diagnoses the player with post-traumatic epilepsy and opines that the seizures may continue for months or years.



What is the process?



What are examples of reasonable accommodations?

Priority
registration

Reduced
course load

Extra time

Distraction
reduced
environment

Alternative
formats

Note-takers

Readers

Recording
devices

Interpreters

Screen
readers

Software
programs

Assistance
with faculty
contact

Use of
equipment
or furniture

Closed-
captioning

Remote
learning

Housing
modifications

When is an accommodation not reasonable?

- A fundamental alteration of the program or education being provided
- An undue hardship on the institution
- Considered a direct threat to others
- Imminent risk to student's health and safety

Example

Veterinary student claims to have disabling allergy to animal dander. Student seeks an accommodation that would allow student to wear a full hazmat suit when interacting with any animal with fur and when in any classroom or clinical space that has not been thoroughly cleaned to remove all dander.



What is the role of faculty and staff?

- Refer students seeking an accommodation to the disability services coordinator (or equivalent title)
- Cooperate in interactive process and implement accommodations granted
- If accommodations are creating a conflict or are failing in practice, notify the disability services coordinator
- Do not grant accommodations yourself
- Do not unilaterally refuse to implement accommodations

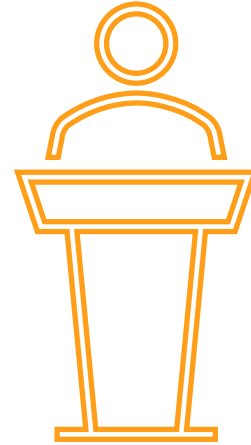
Questions



Political Activity

What is the key legal principle?

- Public and private institutions cannot engage in political campaign activity
 - Supporting particular candidates
 - Supporting particular parties or groups of candidates



Example (Prohibited Political Activity)

A private college officially “endorses” candidate John Smith and publishes the endorsement on its social media feeds. The college’s President sends an email to all employees and all students advocating that they vote for candidate Smith because his policies are “most aligned with our institution’s mission”. The institution also places “Vote for John Smith” campaign signs near its entrances.

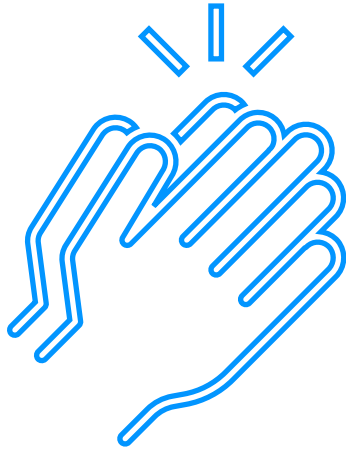


Example (Prohibited Political Activity)

A public community college invites candidates from one political party to speak on its campus and allows the political party to use its student union for meetings. When candidates of the opposing political party seek to speak on campus, the college declines and states it will “not support a political party that advocates policies harmful to our students”.



What can an institution do?



- Support non-partisan voter registration and voting drives
- Host debates and forums with equal opportunity
- Allow equal access to certain facilities
- Support ballot measures and other issues that are not solely supportive of a given candidate

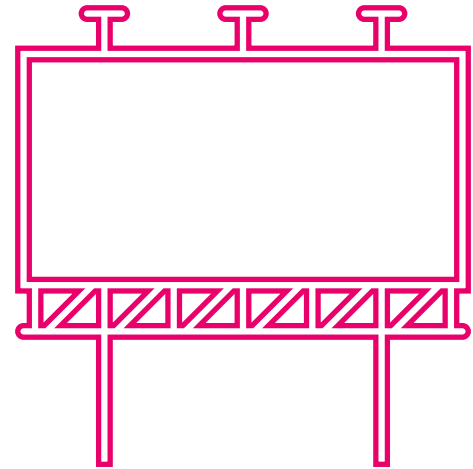
Example (Permissible)

At the upcoming election, voters will consider a ballot measure that would impose a state-wide sales tax to fund sexual assault advocacy services across the state and create additional infrastructure to promptly process DNA samples collected from victims. The University's Title IX Coordinator publicly advocates for voters to approve the measure, arguing it will benefit University students who are victims of sexual violence.



Must political signs and posters be allowed on campus?

- For public institutions, Free Speech principles dictate rights of students and employees
- For private institutions, policies govern consistent with non-profit status



Example

A public university's resident life handbook prohibits residents from placing bulletin boards, whiteboards, signs, or flags on the outside of their doors. As the election approaches, several residents tape political signs on the outside of their doors in violation of the handbook.



Example

A student group at a public university erects a large, wooden sign in favor of a political candidate. The sign is placed on the lawn in front of the Student Union and obstructs persons from using the lawn. University regulations require pre-notification of any political rally or other event that will involve the construction of a “stage, billboard, or other edifice”.



Are employees allowed to engage in campaigning?

- Employees must conduct campaigning on their own time in a manner that does not constitute institutional endorsement
- Pre-election guidance and reminders to employees are best practice



Example

A college administrator's normal work hours are from 8:00 am to 5:00 pm. One day, without taking leave, the administrator attends a 9:00 am political rally in a neighboring town. While at the rally, the administrator takes a selfie that includes the candidate's sign in the background. The administrator posts the selfie to her social media account which lists the administrator's title, includes the college's name, and includes the college's mascot and trademarked color scheme.



Example

A faculty member at the university writes a letter to the editor strongly endorsing a particular candidate for the local city counsel. The faculty member signs the letter: “Carmen Sandiego, Distinguished Professor of Law, State University”, but also includes the disclaimer: “The views expressed herein are the author’s alone and do not represent the views of State University”.



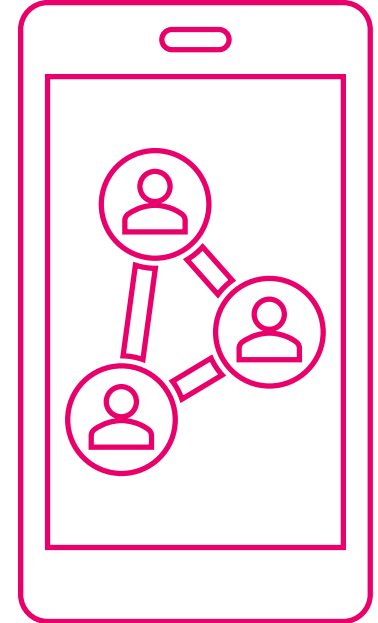
Questions



Supreme Court Update

Lindke v. Freed

- City manager had a Facebook profile he used to post personal and professional material
- Citizen leaves negative comments about city manager's handling of COVID-19
- City manager "blocked" citizen which caused citizen's negative comments to be removed



Outcome

- Question: Does a public official violate the First Amendment by blocking a citizen from the official's social media account?
- Answer: Only if the official has (1) actual authority to speak on the government's behalf on a particular matter; and (2) the official is purporting to exercise that authority when speaking on the relevant social media

Example

The university's Director of Public Safety is specifically tasked with determining when to issue emergency notifications and timely warnings under the Clery Act. The Director has a social media account that the Director uses to issue notifications and warnings. After the Director issues a timely warning about burglaries in the residence halls, a student comments in response: "Campus safety needs to hire competent guards who will patrol the hallways". The Director blocks the student, which causes their comment to be removed.



Example

A community college's President has the authority to determine whether the college will cancel classes due to inclement weather. The President has an official social media account. With a blizzard imminent, the President posts on the account: "Classes are cancelled tomorrow. Enjoy the snow!". A local taxpayer comments: "If I have to work, you and the students should be in school!". The President blocks the taxpayer, causing the taxpayer's comment to be removed.



United States v. Rahimi



- Federal statute bars anyone subject to a domestic-violence restraining order from possessing a gun
- A criminal defendant argues the law violates the Second Amendment because there is no tradition of such gun regulation

Outcome

- Question: Is a law banning a person who is subject to a domestic-violence restraining order from possessing a gun allowed by the Second Amendment?
- Answer: Yes. When a person has been found by a court to pose a credible threat to the physical safety of another, the Second Amendment allows that person to be temporarily disarmed.

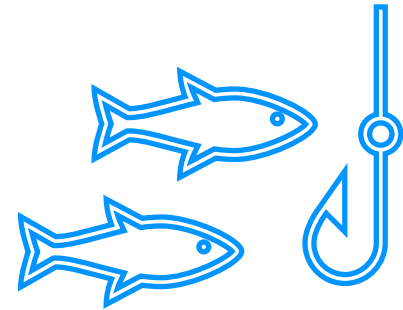
Example

A student is arrested for physically assaulting his girlfriend in an on-campus apartment. Local prosecutors charge the student with domestic violence. After a hearing, the local court issues a temporary restraining order banning the student from contact with his girlfriend. Campus police later receive a tip that the student keeps a loaded pistol in his vehicle in the campus parking lot. Police visually inspect the car from the outside, and see a handgun on the floor.



Relentless v. Department of Commerce *Loper Bright Enterprises v. Raimondo*

- Federal agency issues regulation requiring fishing boats to pay for the cost of a federal monitor on-board
- Agency claims the regulation is authorized by a federal statute
- Petitioners claim the agency is wrong and courts should not give deference to its interpretation



Outcome

- Question: Are federal courts required to defer to an agency's interpretation of an ambiguous federal statute?
- Answer: No. Courts must interpret the law *de novo* and without formal deference to an agency's interpretation. *Chevron* deference is overruled.

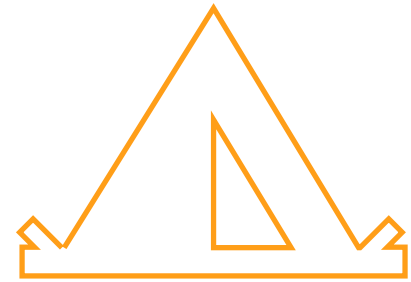
Examples of Potentially Affected Regulations

- **Title IX regulations**
- **ACA Section 1557 regulations governing non-discrimination in healthcare**
- **Clery Act regulations**
- **Title IV regulations**



City of Grants Pass v. Johnson

- Oregon city prohibits sleeping and camping in certain public spaces
- The Ninth Circuit holds the law constitutes cruel and unusual punishment when applied to the homeless



Outcome

- Question: Do criminal penalties for sleeping or camping in public spaces, when applied to homeless persons, constitute cruel and unusual punishment?
- Answer: No. The enforcement of generally applicable prohibitions on sleeping and camping in public spaces are constitutional and do not punish homeless persons because of their homeless status.

Example

A public university is located in the downtown area of a large city. Several homeless persons have set up tents on the public sidewalks adjacent to campus. University police have jurisdiction to enforce criminal laws on these sidewalks. The city council passes a law making it a crime to camp on a public sidewalk or in a public park.



Questions



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