

# Discrimination Based on Pregnancy or Marital Status

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Thompson Coburn LLP

Title IX Training Series | Session 4 | July 2024





# Thompson Coburn LLP

- Full-service law firm with over 400 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, New York, Birmingham, and Washington, D.C.
- **Higher education practice** provides legal counsel, compliance, policy and training services to colleges and universities.
- Our attorneys routinely assist institutions to understand and comply with Title IX and other non-discrimination laws.



# Purpose of Training Series

- The new Title IX rule, effective August 1, 2024, creates new standards by which postsecondary institutions must address potential Sex Discrimination.
- This Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.
- TC's Title IX Training Series on the 2020 Title IX rule is available here: [Title IX Training Series – YouTube](#)





# Use of Training Series

- Institutions of higher education are welcome to use this **foundational training** series at their discretion.
- TC also will be releasing a series of videos covering **best practices** in investigations and adjudications.
- **Custom training** will be important to cover institutional policies, and to accommodate state and municipal requirements, as well as the impact of litigation.



# Use of Training Series

- TC is available to prepare custom Title IX training sessions, hearing simulations, and other assistance with Title IX matters.
- We also have developed model Title IX policies, procedures, and notifications.
- For additional information contact [Scott Goldschmidt](#) or [Aaron Lacey](#).





# Curriculum for Training Series

The foundational training series includes the following four sessions:

An Introduction to the 2024 Title IX Rule

Complaints of Sex Discrimination

Complaints of Sex-Based Harassment w/ Students

Pregnancy and Related Conditions



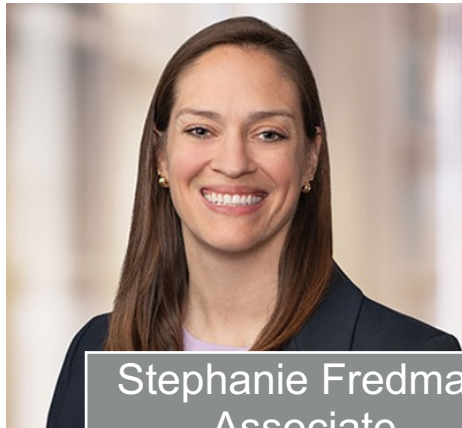
# Session Presenters



Aaron Lacey  
Co-Chair & Partner



Scott Goldschmidt  
Partner



Stephanie Fredman  
Associate



Leah Northener  
Associate





# Syllabus for this Session

A Focus on Pregnancy

Student Requirements

Employee Requirements





# A Focus on Pregnancy



TRAINING SERIES



# History and Context

- Other laws and guidance have addressed pregnancy and pregnancy related conditions for many years:
  - Title VII and the Pregnancy Discrimination Act (1978) prohibit discrimination “on the basis of pregnancy, childbirth, or related medical conditions.”
  - EEOC guidance from 2015 reinforces the prohibition of discrimination “based on current pregnancy, past pregnancy, potential or intended pregnancy, and medical conditions related to pregnancy or childbirth, including lactation.”
  - The Affordable Care Act, which amended the Fair Labor Standards Act “require[s] employers to provide reasonable break times and a private place, other than a bathroom, for covered employees who are breastfeeding to express milk for one year after the child’s birth[.]”





# An Expansion

- The Rule expands on current law to continue to address sex discrimination by considering the historical context and adding clarifications.
- The Rule states that schools “must not adopt a **policy, practice, or procedure** concerning a student’s [or employee’s] current, potential, or past parental, family, or marital status that treats students [or employees] differently on the basis of sex.”

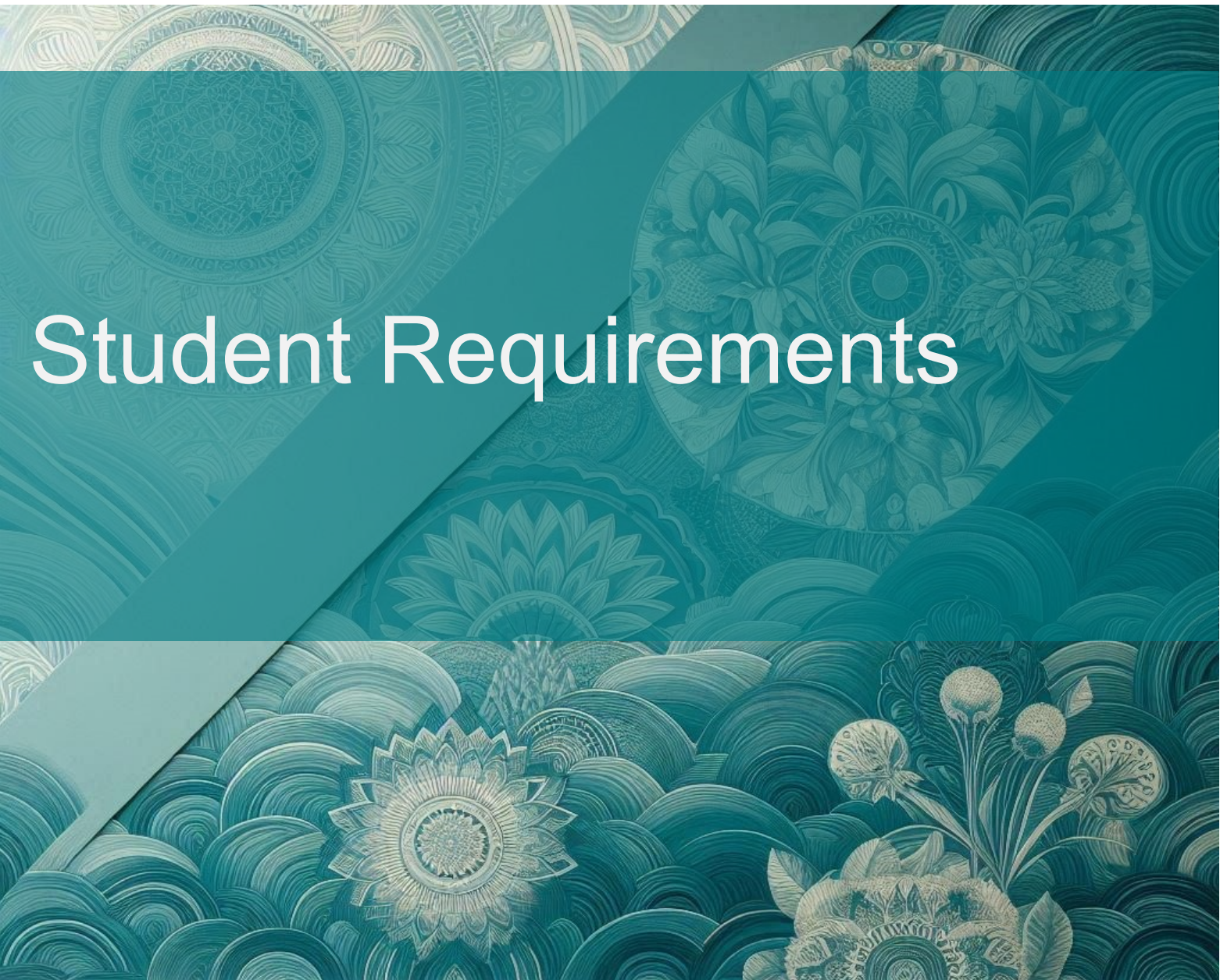


# Definitions

- Pregnancy or related conditions means:
  - Pregnancy, childbirth, termination of pregnancy, or lactation;
  - Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
  - Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.







# Student Requirements





# Nondiscrimination

- A school must not adopt or implement any policy, practice, or procedure concerning a student's **current**, **potential**, or **past** parental, family, or marital status that treats students differently on the basis of sex.
- A school must not discriminate in its education program or activity against any student based on the student's current, potential, or past pregnancy or related conditions.
  - **Note:** A school does not engage in discrimination when it allows a student, based on pregnancy or related conditions, to voluntarily participate in a separate program or activity (provided a comparable program or activity).





# Response to Notice of Pregnancy

- When a student (or person with a legal right to act on behalf of the student) informs any employee of the student's pregnancy or related conditions, the employee must promptly:
  - Provide the contact information of the Title IX Coordinator; and
  - Inform that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access to the school's education program or activity.
- Such notice does not need to be provided if the employee reasonably believes the Title IX Coordinator has been notified.



# Responsibility to Provide Information

- When a student (or person with a legal right to act on behalf of the student) informs the school of the student's pregnancy or related condition, the school must provide information about the following:
  - Reasonable modifications;
  - Voluntary access to separate and comparable portion of program or activity;
  - Voluntary leaves of absence;
  - Lactation spaces;
  - The School's limitations on requesting supporting documentation and certifications;
  - The School's obligation to treat pregnancy and related conditions in the same manner as other temporary medical conditions; and
  - Prohibited disclosures of personally identifiable information (34 CFR § 106.44(j));
- The school's notice of nondiscrimination must also be provided.





## Reasonable Modifications: Overview

- Reasonable modifications must be provided to a student, if needed to prevent sex discrimination and ensure equal access to the school's education program or activity.
- Each reasonable modification must be based on the student's individualized needs.
  - A school **must** consult with the student.



# Reasonable Modifications

- A modification that would fundamentally alter the nature of a school's education program or activity is not a reasonable modification.
- The student has discretion to accept or decline each reasonable modification offered by the school. If a student accepts a school's offered reasonable modification, the school **must** implement it.





# Examples of Reasonable Modifications

Breaks during class to attend to related health needs

Expressing breast milk or breastfeeding

Intermittent absences to attend medical appointments

Access to online or other homebound education

Changes in schedule or course sequence

Extensions of time for coursework and rescheduling of tests and examinations

Sit or stand or request a larger desk

Carry or keep water nearby

Counseling



# Separate Programs

- The school must allow the student to voluntarily access any separate and comparable portion of the school's education program or activity.





# Voluntary Leave of Absence

- A school **must** allow the student to take a voluntary leave of absence to cover at a minimum what is medically necessary (as determined by the student's doctor).
- Must allow the longest leave available.
- When a student returns, the student must be reinstated to the academic status and, as practicable, to the extracurricular status that the student held when the voluntary leave began.



# Lactation Space

- A school **must** ensure that a student can access a lactation space.
- A lactation space **must** be
  - A clean space other than a bathroom,
  - Private and shielded from view,
  - Free from intrusion from others (it can lock),
  - That may be used by a student for expressing breast milk or breastfeeding, as needed.





# Supporting Documentation

- A school cannot require documentation **unless** the documentation is **necessary and reasonable** for the school to determine the reasonable modifications to make or whether to take additional specific actions, such as granting a voluntary leave of absence.



# Supporting Documentation

- Examples of situations when requiring supporting documentation is **not** necessary and reasonable include, but are not limited to:
  - When the student's need for a specific action is obvious, such as when a student who is pregnant needs a bigger uniform;
  - When the student has previously provided the recipient with sufficient supporting documentation;
  - When the reasonable modification because of pregnancy or related conditions at issue is allowing a student to carry or keep water nearby and drink, use a bigger desk, sit or stand, or take breaks to eat, drink, or use the restroom;
  - When the student has lactation needs; or
  - When the specific action is available to students for reasons other than pregnancy or related conditions without submitting supporting documentation.





# Temporary Disability

- Pregnancy or related conditions must be treated in the same manner and under the same policies as any other temporary medical conditions.
  - This requirement is with respect to any medical or hospital benefit, service, plan, or policy the school administers, operates, offers, or participates in with respect to students admitted to the school's education program or activity.



# Certification Requirements

- Generally, a school cannot require a certification to participate in a program unless a certification is required from **all** students.
- Unless:
  - A specific level of physical ability is necessary for participation in the class, program, or extracurricular activity;
  - A certification is required for all students participating in the class program, or extracurricular activity; and
  - Cannot be used as a basis for discrimination.







# Employee Requirements

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The logo features the word "TITLIX" in a bold, sans-serif font. The "I" is stylized as a vertical bar with the letters "T", "I", "L", and "I" stacked vertically inside it. To the right of this is a large, dark grey "X". Below the "TITLIX" text, the words "TRAINING SERIES" are written in a smaller, all-caps, sans-serif font.



# Status

- A school must not adopt or implement any policy, practice, or procedure, or take any employment action, on the basis of sex:
  - Concerning the current, potential, or past parental, family, or marital status of an employee or applicant for employment, which treats persons differently; **or**
  - That is based upon whether an employee or applicant for employment is the head of household or principal wage earner in such employee's or applicant's family unit.





# Nondiscrimination

- A school must not discriminate against any employee or applicant for employment on the basis of **current**, **potential**, or **past** pregnancy or related conditions.



# Temporary Medical Conditions

- A school must treat pregnancy or related conditions as any other temporary medical conditions for all job-related purposes, including:
  - Commencement, duration and extensions of leave; payment of disability income;
  - Accrual of seniority and any other benefit or service; and reinstatement; and
  - Under any fringe benefit offered to employees by virtue of employment.





# Voluntary Leaves of Absence

- If a school does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a school must treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time.
- At the conclusion of leave, the employee must be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.



# Lactation Time and Space

- A school must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- A school must ensure that an employee can access a lactation space, which must
  - A clean space other than a bathroom,
  - Private and shielded from view,
  - Free from intrusion from others (it can lock),
  - That may be used by a student for expressing breast milk or breastfeeding, as needed.





# Pre-Employment Inquiries

- A school cannot make a pre-employment inquiry as to the marital status of an applicant for employment, including whether such applicant is “Miss or Mrs.”
- A school may ask an applicant for employment to self-identify their sex, but only if the question is asked of all applicants and if the response is not used as a basis for discrimination.





# OCR Resources





# OCR Resources

- Fact Sheet
  - <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-factsheet.pdf>
- Summary of Key Provisions
  - <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>
- Resource for Drafting Policies
  - <https://www2.ed.gov/about/offices/list/ocr/docs/resource-nondiscrimination-policies.pdf>
- Policy Guidance Portal
  - <https://www2.ed.gov/about/offices/list/ocr/frontpage/faq/rr/policyguidance/index.html>







# TC Extra Credit





# Higher Education Resources Page

## HIGHER EDUCATION RESOURCES

As part of our ongoing commitment to the postsecondary community, Thompson Coburn's higher education practice routinely creates complimentary resources designed to assist institutions with navigating the complexities of the higher education regulatory and policy environment. We have collected a number of these resources on this page, including our most recent webinars, training series, desk guides, whitepapers, and blog posts. We hope you find these resources helpful, and if you have any questions, please do not hesitate to contact us!

## COMPLIANCE RESOURCES



### COMPLIANCE RESOURCE: FINANCIAL RESPONSIBILITY GUIDE

We provide a guide to the reporting obligations under ED's new Financial Responsibility, Administrative Capability, Certification Procedures, Ability to Benefit Rule.



### COMPLIANCE RESOURCE: TCPA AND OTHER TELEMARKETING RULES

This guide helps colleges and universities understand TCPA regulations for text messages and calls to students, ensuring permission is obtained for promotional messages.



### COMPLIANCE RESOURCE: A DESK GUIDE FOR THE 2023 FINAL FINANCIAL VALUE TRANSPARENCY & GAINFUL EMPLOYMENT RULE

We have developed this Desk Guide to assist institutions as they contemplate compliance with the final version of the GE rule.



# Webinars and Training Series



The screenshot shows a YouTube playlist page for 'Higher Education' by Thompson Coburn LLP. The page displays a list of 8 videos, each with a thumbnail, title, view count, and upload date. The first video is 'HigherEdReg Rundown - ED's New Financial Responsibility Reporting Requirements' with 482 views, uploaded 2 weeks ago. The second video is 'HigherEdReg Rundown - The Biden Administration's New Title IX Rule' with 538 views, uploaded 1 month ago. The third video is 'ED's Latest Financial Value Transparency/Gainful Employment Guidance' with 1.2K views, uploaded 2 months ago. The fourth video is 'ED's Evolving State Authorization and Professional Licensure Requirements' with 747 views, uploaded 2 months ago. The fifth video is 'The Higher Education Regulatory Outlook for 2024' with 494 views, uploaded 5 months ago. The sixth video is 'Projecting Debt-to-Earnings Rates Under ED's New Financial Value Transparency and GE Rule' with 927 views, uploaded 7 months ago. The seventh video is 'ED's New Financial Value Transparency and Gainful Employment Rule' with 3.4K views, uploaded 7 months ago. The eighth video is 'Responding to Student Borrower Defense to Repayment (BDR) Claims: 2023 Edition' with 3.9K views, uploaded 9 months ago.

**Higher Education**  
Thompson Coburn LLP  
75 videos 854 views Last updated on Jun 17, 2024

Play all Shuffle

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# Compliance Materials



## Financial Responsibility Reporting Guide (2024)

Last Updated: May 27, 2024

On July 1, 2024, the U.S. Department of Education's new *Financial Responsibility, Administrative Capability, Certification Procedures, Ability To Benefit* rule takes effect (the "2024 Rule").<sup>1</sup> The 2024 Rule implements a wide range of changes relating to financial responsibility, including the significant revision and expansion of the reporting obligations at 34 CFR § 668.171, which require institutions to report certain "triggering events" to the Department.<sup>2</sup> These reporting requirements are meant to alert the agency that an institution "may not be able to meet its financial responsibilities."<sup>3</sup> If an institution fails to report a triggering event within the requisite timeframe, the Department may take administrative action, to include determining that the institution is not financially responsible, or initiating a proceeding to fine, limit, suspend, or terminate the institution's participation in the federal financial aid programs (the "Title IV Programs").<sup>4</sup> If an institution reports a triggering event (or the Department otherwise becomes aware that an event has occurred), the Department may determine that the institution is not financially responsible and take various administrative actions, depending on the nature and significance of the event reported. Institutions should review the 2024 Rule carefully for additional information regarding the consequences of reporting triggering events and the opportunities to mitigate such consequences.

Below, we provide a guide to the reporting obligations under the 2024 Rule, as set forth in the regulatory text. Because the 2024 Rule, like the existing financial responsibility reporting framework, distinguishes between a Mandatory Triggering Event and a Discretionary Triggering Event, we have divided the chart to identify which triggering events fall into each category. Pending further guidance from the Department, we suggest that institutions continue to submit financial responsibility notifications via email to [PSAFRR@ed.gov](mailto:PSAFRR@ed.gov).<sup>5</sup> The Department has not specified any required form or content for the notices. However, in a dated [Q&A document](#) issued by the prior administration, the Department offered recommendations.<sup>6</sup>

On May 17, 2024, the current administration posted a [Q&A website](#) that addresses certain aspects of the new reporting requirements implemented by the 2024 Rule. We strongly encourage institutions to review the Department's Q&A website and any other relevant guidance to determine, among other things, whether the agency is interpreting the regulatory text in a manner that may expand or otherwise modify the reporting obligations as described in the 2024 Rule (and detailed in the chart below).

- 1 The final 2024 Rule was published in the Federal Register on October 31, 2023. See 88 Fed. Reg. 74568 (Oct. 31, 2023). It revises the financial responsibility regulations at 34 CFR §§ 668.23, 668.171, 668.174, 668.175, and 668.176. The 2024 Rule also revises the financial responsibility factors applicable to institutional changes in ownership, currently in § 668.15, moving them to § 668.176.
- 2 Triggering events, as explained by the Department, are external events or financial circumstances that may not appear in an institution's annual financial statements and are not yet reflected in the institution's calculated composite score. See 88 Fed. Reg. 74569 (Oct. 31, 2023).
- 3 88 Fed. Reg. 74568 (Oct. 31, 2023).
- 4 34 CFR § 668.171(f)(2) (July 1, 2024).
- 5 The Department established this email address for reporting purposes in guidance issued on March 15, 2019, detailing how institutions should report events under the 2016 version of the rule (the "2016 Rule"). As of May 27, 2024, the Department has not issued any further guidance concerning how to report triggering events.
- 6 As of May 27, 2024, the Department has not issued any further guidance concerning the form or content of notices of triggering events.

### A Desk Guide for the 2023 Final Financial Value Transparency & Gainful Employment Rule

*Includes a step-by-step guide for projecting Debt-to-Earnings (D/E) rates under the final rule*

November 2023





# REGucation (our blog)



## Title IX (Joe's Version) Dropped This Morning

👤 Scott Goldschmidt 👤 Stephanie Fredman 📅 April 19, 2024



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### CONTRIBUTORS

We interrupt your Tortured Poets Department\*\* listening party to inform you that the Biden administration has released its long awaited [Title IX rules](#). The new rules, published this morning in unofficial form, will be formally published in the Federal Register shortly.

In its [press release](#) announcing the new rules, the Department also published a [fact sheet](#), a [summary](#) of the major provisions of the final regulations, and a [resource](#) for drafting Title IX nondiscrimination policies, notices of nondiscrimination, and grievance procedures.

Thompson Coburn's Higher Education team is currently in the process of reviewing the final rules\*, including the preamble which provides the Department's response to the significant, relevant issues raised in public comments and a statement providing the basis and the purpose of the rule. We will be providing additional information about the rule and resources for institutions of higher education in the coming weeks.





# Disclaimer



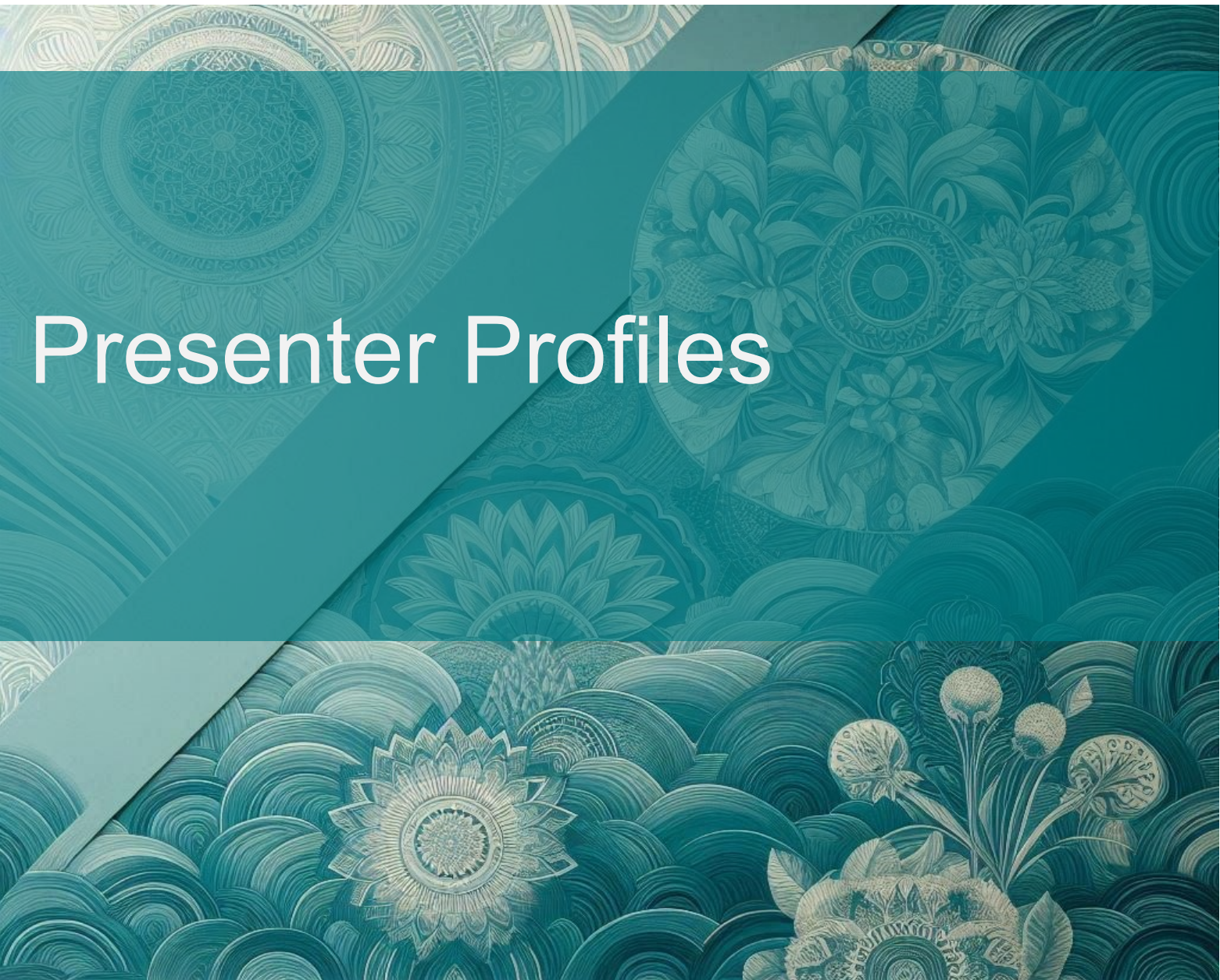


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# Presenter Profiles





# Presenter Profile

- Practice and Experience
  - Assists institutions of higher education to navigate a wide range of legal and regulatory challenges, including those involving discrimination laws.
  - Represents institutions in administrative proceedings before the Department and other postsecondary regulators.
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Partner & Co-Chair  
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