

# Complaints of Sex-Based Harassment Involving a Student Party and Informal Resolutions

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Thompson Coburn LLP

Title IX Training Series | Session 3 | 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:





# The Big Picture

**Sex Discrimination Policies and Procedures:** Institutions are generally obligated to designate a Title IX coordinator, adopt a nondiscrimination policy, publish grievance procedures for the resolution of complaints alleging sex discrimination, train employees, and develop recordkeeping policies. 34 CFR 106.8.

**Responding to Complaints of Sex Discrimination:** In response to complaint of possible sex discrimination (excluding alleged sex-based harassment involving a student party), institutions must follow grievance procedures that comply with 34 CFR 106.45.

**Responding to Complaints of Sex-Based Harassment Involving a Student Party:** In response to complaint of possible sex-based harassment involving a student, institutions must follow grievance procedures that comply with 34 CFR 106.45 and 106.46.



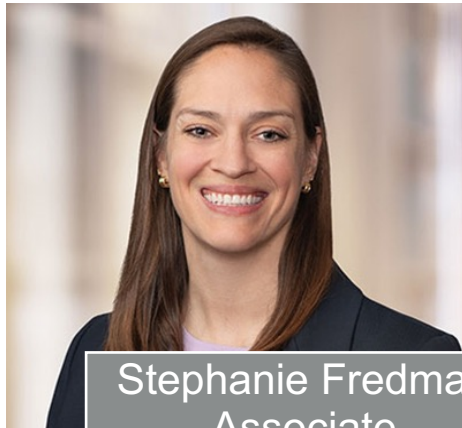
# Session Presenters



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# Syllabus for this Session

Recap: General Grievance Procedure Concepts

Additional Grievance Procedures for Sex-Based Harassment Involving a Student

Informal Resolution

Additional Considerations





# Recap: General Grievance Procedure Concepts





# Grievance Procedures

- Any complaint of sex discrimination must comply with the school grievance procedures found at 34 CFR § 106.45.
- Complaints of sex-based harassment involving student complainant or respondent must comply with 34 CFR § 106.45 and additional procedures found at 34 CFR § 106.46.



# Recap: Definitions

- Sex-Based Harassment is a form of sex discrimination and means sexual harassment and other harassment on the basis of sex, including on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity:
  - Quid Pro Quo
  - Hostile Environment
  - Specific Offenses
    - Rape, Sodomy, Sexual Assault With An Object, Fondling, Dating Violence, Domestic Violence, Stalking





# Recap: Definitions

- Complainant means:
  1. A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or its regulations; or
  2. A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or its regulations and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.



# Recap: Definitions

- Complaint is an oral or written request to the recipient that objectively can be understood as a request for the institution to investigate and make a determination about alleged discrimination under Title IX or its regulations.





# Recap: Complaints

- The following people have a right to make a complaint of sex-based harassment, requesting that the institution investigate and make a determination about alleged sex-based harassment under Title IX:
  - A complainant;
  - A parent, guardian, or other authorized legal representative with the legal right to act on behalf of a complainant; or
  - The Title IX Coordinator.



# Recap: Complaints

- A person is entitled to make a complaint of sex-based harassment only if:
  - They themselves are alleged to have been subjected to the sex-based harassment;
  - They have a legal right to act on behalf of such person; or
  - The Title IX Coordinator initiates a complaint.





# Additional Grievance Procedures for Sex-Based Harassment Involving a Student Party





# Student Employees

- When a complainant or respondent is both a student and employee, fact-specific inquiry to determine which procedure applies.
  - In making this determination, the school must consider whether the primary relationship with the school is to seek an education and whether the alleged sex-based harassment occurred while the individual was performing employment related work.





# Written Notice

Grievance procedures and Informal Resolution process

Retaliation is prohibited

Respondent is presumed not responsible until a determination is made at the conclusion of the grievance procedures.

Advisor of choice, including attorney

Equal opportunity to access the relevant and not otherwise impermissible evidence

If applicable, Code of Conduct that prohibits making or submitting false statements



# Dismissing a Complaint

Basis for  
optional  
dismissal



The school is unable to identify the respondent following reasonable efforts to do so.

The respondent is not participating in the school's education program or activity and is not employed by the school.

The complainant voluntarily withdraws some or all allegations and the school determines that without the withdrawn allegations, the conduct that remains alleged would not constitute sex discrimination even if proven.

The school determines the conduct alleged in the complaint, even if proven, and after making reasonable efforts to clarify with the complainant, would not constitute sex discrimination under Title IX.





# Dismissal

- In addition, under sex-based harassment procedures, parties must be provided simultaneous written notice of the dismissal and the basis for the dismissal.
- If a complaint is dismissed based on complainant's voluntary withdrawal of the complaint or allegations, voluntary withdrawal must be obtained in writing.



# Complaint Investigation

## Notice

- Parties must be provided written notice of date, time, location, participants, and purpose.

## Advisors

- Parties must be provided with same opportunities for advisors and others to attend any meeting or proceeding.

## Expert Witnesses

- Institutions can choose whether to permit expert witnesses – as long as equitably applied.

## Extensions

- Must allow for the reasonable extension of timeframes on a case-by-case basis for good cause.

## Evidence

- Must provide equitable access to relevant evidence or a written report summarizing relevant evidence. Parties must be provided with a reasonable opportunity to review and respond to the evidence prior to the determination of whether sex-based harassment occurred. Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence.





# Questioning Parties and Witnesses

- Must have process to adequately assess credibility of parties and witnesses to the extent credibility is both in dispute and relevant to evaluating one or more allegations of sex-based harassment.
  - Decisionmakers must be able to ask questions to parties and witnesses during at a live hearing or individual meetings.



# Questioning Parties and Witnesses

- Institutions can choose to question parties and witnesses and evaluate credibility using a live hearing option or questioning by an investigator or decisionmaker.
  - Single investigator model an option.
- Institutions can also choose different methods for different sex-based harassment complaints.
  - As long as procedures identify consistent principles.





# Questioning Parties and Witnesses

- Decisionmaker must determine whether a proposed question is relevant and not otherwise impermissible prior to the question being posed and must explain any decision to exclude a question as not relevant or impermissible.
  - Unclear or harassing questions not permitted.
  - Reasonable rules of decorum permitted if equitable.
- If Decisionmaker determines a question is relevant and not otherwise impermissible, the question must be asked unless unclear or harassing.



# Questioning Parties and Witnesses

- Decisionmaker must give party the opportunity to clarify or revise an unclear or harassing question.
  - If question is appropriately clarified or revised, it must be asked.
- School may adopt and apply reasonable rules regarding decorum, provided they equally apply.





# Questioning Parties and Witnesses

- A Decisionmaker may choose to place less or no weight on statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible.
- The Decisionmaker must not draw an inference about whether sex-based harassment occurred based solely on a party's or witness's refusal to respond to such questions.



# Investigator or Decisionmaker

- Process for questioning must:
  - Allow investigator or decisionmaker to ask questions during individual meetings;
  - Allow each party to propose questions during meetings and follow-up meetings; and
  - Provide each party with an audio or audiovisual recording or transcript with enough time for the party to have a reasonable opportunity to propose follow-up questions.





# Investigator or Decisionmaker

- **How many individual meetings must occur to satisfy regulatory requirements?**
  - “It is not necessary to specify how many individual meetings must occur because the appropriate number will vary depending on the facts and circumstances of the case and the type and number of questions proposed by the parties,... but the Department also does not anticipate that there would be an endless cycle of meetings if at some point the follow-up questions proposed by the party are duplicative of questions that have already been asked or are designed to harass as opposed to assess credibility or elicit relevant information, the postsecondary institution may decline to hold additional meetings to ask the questions.”



# Questioning by Live Hearing

- Process for questioning must:
  - Allow each party to propose questions and have those questions asked by the decisionmaker; or
  - Allow the party's advisor to ask any party or witness questions (but never the party personally).
- Subject to the requirement that a questions is relevant and not otherwise impermissible.





# Live Hearing Procedures

- Live hearings may be conducted with parties physically present in the same geographic location.
- At the institution's discretion, the hearing may be conducted in separate locations using videoconferencing tools.
- Upon the request of either party, a live hearing must be conducted in separate locations using videoconferencing.



# Written Determination

- Written notice of determination must include:
  - Description of the allegations;
  - Information about the policies and procedures;
  - Evaluation of the relevant evidence and determination of whether sex-based harassment occurred;
  - Whether sex-based harassment occurred and disciplinary sanctions and remedies if relevant; and
  - Information about appeal procedures.
- Determination of responsibility becomes final upon result or appeal or, if no appeal, date which appeal would not be considered timely.





# Appeals

- Institutions must provide opportunity to appeal dismissal or determination based on:
  - Procedural irregularity that would change the determination;
  - New evidence not reasonably available that would change the determination;
  - Conflict of interest or bias of Title IX Coordinator, investigator, or decisionmakers that would change the outcome of the matter; or
  - Any other basis offered equally to the parties by the school.
- Must also comply with the requirements in 106.45(d)(3)(i), (iv), and (v) in writing.





# Informal Resolution





# Informal Resolution

- A school may offer the parties an informal resolution process at any time prior to determining whether sex discrimination occurred, **unless** such a process would conflict with applicable laws.
- A school may not require or pressure the parties to participate in an informal resolution process.
- A school could decline to offer informal resolution despite one or more of the parties' wishes. Reasons for declining would include, but not be limited to, when the school determines that the alleged conduct would present a future risk of harm to others.



# Informal Resolution

Before initiation of an informal resolution process, the school would be required to provide to the parties a notice with these elements.

The allegations

The requirements of the informal resolution process.

That, prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to initiate or resume the school's grievance procedures.

That the parties' agreement to a resolution at the conclusion of the informal resolution process would preclude the parties from initiating or resuming grievance procedures arising from the same allegations.

The potential terms that may be requested or offered in an informal resolution agreement, including notice that an informal resolution agreement is binding only on the parties.

What information the school will maintain and whether and how the school could disclose such information in grievance procedures, if resumed





# Informal Resolution

- Facilitator Qualifications

- Must not be the same person as the investigator or the decisionmaker in the school's grievance procedures;
- Must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent; and
- Must have received the training required under 106.8(d)(3).



# Informal Resolution

- Informal resolution agreements
  - May include, among others: terms (1) restricting contact or (2) restricting the respondent's participation in one or more of the school's programs or activities or attendance at specific events.





# 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

**HigherEdReg Rundown**  
ED's New Financial Responsibility Reporting Requirements

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

Play all Shuffle

- HigherEdReg Rundown - ED's New Financial Responsibility Reporting Requirements**  
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Thompson Coburn LLP • 3.9K views • 9 months ago





# 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



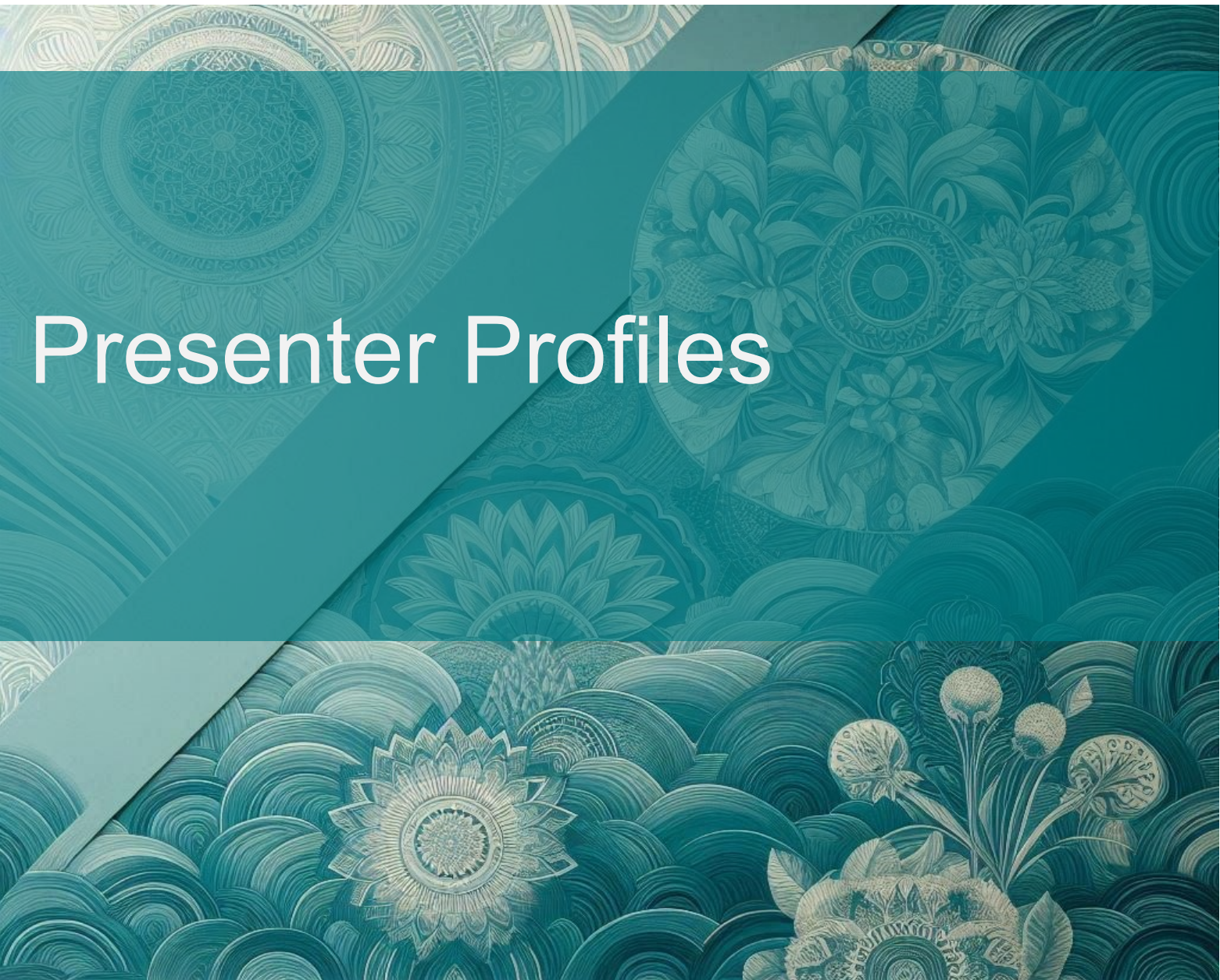


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# Presenter Profiles





# 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.
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  - Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.
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# Presenter Profile

- Practice and Experience
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