THE FLORIDA BAR EDUCATION LAW COMMITTEE

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Message from the Chair

by Nathan A. Adams, IV[1]

Education has been in the forefront of national and state news again in 2022. Public policy differences are stark across the political divide. Regardless, lawyers for educational institutions are responsible faithfully to implement newly enacted laws. We began the Florida Bar's new fiscal year discussing how to do this.

We met in person at the Florida Bar's Annual Meeting in Orlando to discuss the bills enacted into law in Florida in 2022. Sara Clements presented a CLE entitled, "2022 Legislative Session and K-12." Lacey Hofmeyer presented a CLE entitled, "2022 Legislative Session, Colleges and the SUS." Discussion was lively around how best to enforce instructional and workforce training limitations associated with CS/HB 7. This issue of the *Florida Education Law Journal* picks up this discussion even as challenges to the law are pending in federal court.

We turned next to another hot topic: student athletes. W. Scott Cole and Sacha Dyson presented a CLE entitled, "NLRB: Student Athletes as Employees." College athletics may have changed for good now that college athletes can market themselves. The legal repercussions are just beginning to reverberate.

The Committee's next meeting will be virtual on Oct. 21, 2022, beginning at 1 p.m. EST. We will hold a business meeting to start. None other than Professor of Law Peter Lake, the Charles A. Dana Chair and Director of the Center for Excellence in Higher Education Law and Policy at the Stetson University College of Law will present on the proposed rule changes to Title IX, also discussed in this issue. Then, Kristi Patrickus will make a CLE presentation related to her recent article in the Journal of College and University Law: "A Higher Education Due Process Primer: Resolving Procedural Due Process Inconsistencies in Favor of Greater Procedural Protections." David Struhs from the Foundation for Florida's Future will present, "The Impact of Covid-19 on Learning Gains in Florida.

We also plan to begin the virtual *Lunch 'N Learn* series in November. If you would like to get on the schedule to offer one, please contact me.

At the beginning of next year, we will hold an Education Review Workshop on Jan. 20, 2023, beginning at 1 p.m. EST, to help lawyers interested in taking the Education Law certification exam or brushing up on the practice of education law. Please speak with Vice-Chair David D'Agata about volunteering.

We will rejoin the Stetson University National Conference on Higher Education in person in Clearwater Beach during the week of March 2-7, 2023. Despite the conference name, Stetson hopes for this to be a K-20 conference. The Committee's participation at the Conference for the first time in 2022 was a first step in this direction.

On June 23, 2023 at 1 p.m., we are scheduled to come together in person again for the Bar's Annual Convention in Boca Raton.

Vice-Chair Lacey Hofmeyer is busy soliciting articles for the next issue of this publication while Vice-Chair Gregg Morton continues to solicit content for our social media pages. Please reach out to them with your ideas. Lacey, Gregg, David, Mary Lawson, and I are always eager to hear from you with recommendations.

Endnotes:

1 Partner with Holland & Knight LLP and Florida Bar board certified education lawyer.

Follow Us on SOCIAL MEDIA

The Education Law Committee (ELC) is on Facebook, Twitter, and LinkedIN! These accounts give ELC members an additional way to stay in touch with each other between meetings and also give the ELC the ability to conduct more public outreach about the work and achievements of the ELC and its members. If you have articles, achievements, or updates you would like to share on the ELC's new social media accounts, please send them to educationlawfloridabar@gmail.com.

You can follow the ELC's accounts by searching for @FlaBarEdLaw on Twitter and Facebook. Members of the ELC who are on LinkedIN can send a message to educationlawfloridabar@gmail.com to be added to the ELC LinkedIN group.

Pandemic Pedagogy: The Interplay between Distance Education, the ADA, and Academic Freedom in Higher Education

By Jessica Merker, J.D., Ed.S, M.Ed.[1]

The COVID-19 pandemic propelled institutions of higher education into a new digital age of teaching and learning. As global lockdowns and social distancing measures first took effect in Spring of 2020, institutions of higher education closed their brick-and-mortar doors and re-opened in digital spaces.[2] This unexpected transition to remote instruction challenged educators to quickly reimagine and redesign both their content delivery and interactions with students. While many facets of higher education were impacted by the pandemic, this article aims to explore the relationships between the doctrine of educational malpractice, distance education, and faculty accommodations under the Americans with Disabilities Act (ADA).

Historically, courts have given great deference to institutions of higher education in making decisions about academic matters. The emergency measures taken by institutions offering courses online during the early days of the pandemic were no exception to this rule. However, given this deference, the recent increase in distance education raises important questions for professors requesting a remote instruction accommodation under the ADA where courts have historically been hesitant to intervene in academic matters.

I. Distance education provides benefits to both students and educators but cannot always replace or match in-person learning.

From a pedagogical perspective distance education presents students and educators with advantages and challenges. Distance education is conducted synchronously, asynchronously, or as a hybrid between the two models. Synchronous distance education occurs in real time, with live instruction to simulate a traditional in-person learning environment. Asynchronous distance education allows students to independently access recordings, webinars, and materials following the course syllabus and deadlines. Hybrid distance education fuses the regularity and flexibility of two models with live instruction and independent modules.[3]

In practice, content areas and student learning styles affect the way students and educators experience remote education. For example, an in-person graphic design course would transition to a remote environment more easily than a medical school labor and delivery clinical rotation.[4]

While the use of technology in education is not new to the field, it is less commonly utilized in certain disciplines. The law school setting is a familiar example of a discipline in which the pandemic shift to distance education challenged traditional notions about teaching and learning.

Law schools have strong ties to traditional teaching practices and professors largely depend on the Socratic method. The Socratic method is a round-table instructional tool of call and response, where professors ask students questions in front of their student peers and engage in an open dialogue about the course material.[5]

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Calling All Authors!

The Education Law Committee is seeking articles for future newsletters. Our goal is to release four issues a year with articles that are helpful to both experienced practitioners and the public. The authors of past articles have received a lot of interest and positive feedback, so it is a great way to share your knowledge. There is no minimum or maximum length, but typically the articles are between two to six pages double-spaced. Additionally, if you would like to write an article for The Florida Bar Journal, we are soliciting longer articles as well. If you have an idea for article for either the newsletter or the Bar Journal, please contact educationlawfloridabar@gmail.com and let us know!

This structure encourages students to develop a fairly comprehensive understanding of the course material by reading and engaging with course texts prior to each class meeting. Because much learning occurs outside the classroom, instruction is utilized to clarify complex topics and cement understanding. Aside from the occasional pre-pandemic PowerPoint presentation, technology had not previously been a key feature of a law school classroom.

The pandemic shift to distance education launched a learning revolution for law students. Class meetings transitioned to remote instruction, which were often recorded and regularly made available for student use. Professors began using technology to make course materials more accessible for students through electronic polling to check student understanding, recorded webinars and review sessions, and discussion boards allowing students to collaborate in ways not previously possible with the Socratic method alone.

Now that most institutions of higher education have resumed operation of their in-person course offerings, these technological advances in education remain. Again, law school courses serve as a prime example of the lingering effects of remote teaching methodologies. In addition to in-person instruction utilizing the Socratic method, professors have continued to engage with students online whether through online office hours, recorded review sessions, or the creative use of online forums to manage student questions during live in-person class meetings.

This increased reliance on technology also aligns with pedagogical concepts such as Universal Design for Learning (UDL) that are making their way from the K-12 world into higher education.[6] UDL aims to provide students with a variety of educational access points to address accessibility issues arising from student learning styles and preferences differing from that of a traditional learner. Online resources increase the accessibility of course content by providing students with another access point.

However, a discussion of distance learning in higher education would not be complete without noting that even for programs that previously under-utilized technology as an educational resource, the benefits of in-person learning cannot always be replicated or sufficiently supplemented in an online setting. While the intricacies of these issues are beyond the scope of this article, accreditation difficulties, privacy concerns that accompany Zoom-based classrooms, and questions raised by students challenging their tuition and fees while campuses were closed are all important reminders of the nuances of teaching and learning and the infrastructure of higher education. The impact of distance education, which has opened doors for both students and educators, especially those with disabilities, now raises important questions regarding the future of higher education.[7]

One such area of impact is that of educators claiming accommodations under the Americans with Disabilities Act (ADA) to teach remotely now that institutions have largely returned to in-person instruction. Requests to teach remotely pose challenges to both the scope and power of the ADA and the nature of academic freedom.

II. The ADA requires reasonable accommodations, which might include remote teaching.

In 1990, Congress enacted the ADA with the goal of providing “a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities.”[8] The interplay between the ADA and higher education hinges on a balance between case law interpreting and applying the ADA and the role academic freedom has played in leaving higher education largely unregulated until more recent years.

From an employment perspective, the ADA sets forth the standard that upon request, employers must provide “reasonable accommodations” to their employees. The ADA defines reasonable accommodations as including modifications to schedules, facilities, and job restructuring.[9] The term reasonable accommodation is also defined in the Code of Federal Regulations as: “[m]odifications or adjustments to the work environment, or to the manner or circumstances under which the position held or desired is customarily performed, that enable an individual with a disability who is qualified to perform the essential functions of that position.”[10]

However, these definitions of “reasonable accommodation” are flexible as opposed to comprehensive.[11] Courts often look to the built-in defense of unreasonableness when analyzing accommodations. An accommodation may be unreasonable where it imposes an “undue hardship.”[12] An undue hardship includes “an action requiring significant difficulty or expense”[13] or one that “requires a fundamental alteration in the nature of the employer’s program.”[14] An often-cited example of a fundamental alteration is a bookstore’s ability to deny a request to stock books in braille where they otherwise do not offer that service.[15]

In practice the ADA is meant to facilitate a dialogue “between employer and employee so that together they can determine what accommodation would enable the employee to continue working.”[16] In the context of higher education where professors request accommodations to teach remotely, institutions have challenged such requests as fundamentally altering the nature of their services.[17] By stating that their services would be altered by remote instruction, institutions are emphasizing

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the in-person nature of their course offerings. What is interesting about this defense to remote teaching accommodations under the ADA, is that it necessarily implicates academic freedom.

III. Academic freedom: The doctrine of educational malpractice leaves pedagogical decisions to institutions of higher education.

Sixty-five years ago Justice Frankfurter established "four essential freedoms" as basis of academic freedom. [18] Justice Frankfurter explained that a university should be free "to determine for itself on academic grounds *who may teach*, *what may be taught*, *how it shall be taught*, and *who may be admitted to study*."[19] The educational malpractice doctrine concerns the third academic freedom, 'how it shall be taught" and provides that "courts will not second-guess the professional judgment of a university in academic matters."[20] While recent years have brought an increase in litigation involving institutes of higher education, a majority of courts still decline to opine on educational malpractice claims "regardless of how a claim is packaged."[21] In Florida, courts have been explicit that the doctrine of educational malpractice is a complete bar to suit as a non-justiciable issue.[22]

Among several policy reasons cited by courts for respecting an institution's practice of education is the "lack of a satisfactory standard of care by which to evaluate an educator."[23] Courts have consistently recognized that "[t]heories of education are not uniform, and different but acceptable scientific methods of academic training [make] it unfeasible to formulate a standard by which to judge the conduct of those delivering the services."[24] Therefore, institutions of higher education and their corresponding accreditation systems are afforded the utmost deference regarding pedagogy, or the practice of teaching and learning.[25]

Where a claim involves analysis of the quality of education or requires "a court to evaluate the course of instruction or the soundness of a method of teaching that has been adopted by an educational institution" it will be viewed as an educational malpractice claim.[26] However, the doctrine of educational malpractice does not mean that students are without recourse when they are dissatisfied with their educational experiences. When a plaintiff student points to a specific contractual promise, courts are not forced to evaluate the quality of education, but instead are able to undertake a breach of contract analysis. [27] Tuition and fee claims in the midst of the COVID-19 pandemic perfectly illustrate this point. Whether the emergency response of campus closures and distance education constitutes a breach of contract where tuition and fees are unchanged is a proper contract-based question ripe for judicial resolution.[28]

For example, courts have recognized that where a private university collected tuition and "provided no education at all, or promised a set number of hours of instruction and then failed to deliver, a breach of contract action may exist."[29] On the other hand, courts have also held that an institution's emergency transition to online education was a "reasonable adjustment in response to unforeseen events, such as the anti-war movement of the early 1970s or the COVID-19 pandemic, without breaching their contractual obligations to students."[30] The importance of this analysis is to note that courts are both recognizing the urgency of pandemic driven distance education, while simultaneously respecting academic freedom. [31]

Pairing deference to an institution's academic decisions and the role of the ADA in eliminating discrimination on the basis of disability raises more questions than it answers. [32] If distance education was acceptable and did not alter the quality of education during the pandemic, can professors properly be denied remote teaching accommodations? In the alternative, if students are contracting for in-person education, does contract law allow institutions to eliminate remote instruction positions or deny such accommodations without violating the ADA? Among these questions, one thing is clear: where the quality of education is questioned as a fundamental alteration of services as a defense to a remote instruction

Endnotes:

1 Jessica Merker is a staff attorney to The Honorable Judge Northcutt of Florida's Second District Court of Appeal. She is a 2022 Stetson University College of Law graduate and former Research Fellow for the Center for Excellence in Higher Education Law and Policy under Director and Professor of Law Peter F. Lake. Prior to law school, Jessica taught high school English and Creative Writing. A special thanks to Professor Ann Piccard of Stetson Law for your continued mentorship.

2 Manar Abu Talib, et al., *Analytical study on the impact of technology in higher education during the age of COVID-19: Systematic literature review*, Education and Information Technologies (2021) https://link.springer.com/content/pdf/10.1007/s10639-021-10507-1.pdf

3 *Id*.

4 *See* Marie Walters, et al., *Impact of COVID-19 on Medical Education: Perspectives From Students*, 97, 3S Academic Medicine S40, S40-48 (March 2022) https://journals.lww.com/academicmedicine/fulltext/2022/03001/impact_of_covid_19_on_medical_education_.8.aspx

5 Rann Miller, *Using the Socratic Method In Your Classroom*, (November 11, 2021) https://www.edutopia.org/article/using-socratic-method-your-classroom, *Elizabeth Garrett, Becoming Lawyers: The Role of the Socratic Method in Modern Law Schools*, The Green Bag (1998) https://www.law.uchicago.edu/socratic-method

6 Kathleen A. Boothe, et al., "Applying the Principles of Universal Design for Learning (UDL) in the College Classroom" 7(3) The Journal of Special Education Apprenticeship, (Dec 2018) available at https://files.eric.ed.gov/fulltext/EJ1201588.pdf

7 Louis Lehot, Esq., and Catherine Zhu, Esq., *Increasing investment in EdTech scaling beyond the pandemic*, Practitioner Insights Commentaries, (July 19, 2021) (2021 WL 3025664) (detailing pandemic inspired investments in education technology).

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8 42 U.S.C. § 12101(b)(1).

9 42 U.S.C. § 12111(9).

10 29 C.F.R. § 1630.2(o)(1)(ii).

11 *See Johnson v. D.C.*, 207 F. Supp. 3d 3, 14 (D.D.C. 2016) (The ADA "does not provide a comprehensive definition of 'reasonable accommodation,' but it gives examples of what the term may include.") (internal quotations omitted).

12 42 U.S.C. § 12111(10)(a)

13 *Id.*

14 Johnson v. D.C., 207 F. Supp. 3d 3, 14 (D.D.C. 2016) (quoting Taylor, 451 F.3d at 908).

15 *See Martin v. PGA Tour, Inc.*, 994 F. Supp. 1242, 1244–45 (D. Or. 1998), aff'd, 204 F.3d 994 (9th Cir. 2000), aff'd, 532 U.S. 661, 121 S. Ct. 1879, 149 L. Ed. 2d 904 (2001).

16 *Ward v. McDonald*, 762 F.3d 24, 32 (D.C.Cir.2014).

17 *See* Colleen Flaherty, *Denied in a Heartbeat*, Inside Higher Ed. (September 29, 2021) ("Kutztown University denied a recent heart transplant patient his remote teaching accommodation request, arguing that the "fundamental alteration of the delivery of a course" is not a "reasonable accommodation" under the Americans With Disabilities Act.") https://www.insidehighered.com/news/2021/09/29/recent-heart-transplant-patient-denied-remote-teaching-ask; and Elizabeth Redden, *Cornell Says No Remote Teaching as COVID Fears Persist*, Inside Higher Ed., (August 13, 2021) ("Cornell University said this week it will not consider any faculty requests to teach remotely instead of in person, not even from those seeking accommodations for chronic illnesses or disabilities.") https://www.insidehighered.com/news/2021/08/13/cornell-wont-approve-disability-related-requests-teach-online

18 *Sweezy v. State of N.H. by Wyman*, 354 U.S. 234, 263 (1957) (Frankfurter, J., concurring).

19 *Id.* (emphasis added).

20 *Gociman v. Loyola Univ. of Chicago*, 41 F.4th 873 (7th Cir. 2022).

21 *Gociman at* 873.

22 *Salerno v. Fla. S. Coll.*, 488 F. Supp. 3d 1211, 1218 (M.D. Fla. 2020) ("Florida law does not recognize educational malpractice cases because it is not a court's place to opine on that matter.").

23 *Ross v. Creighton Univ.*, 957 F.2d 410, 414 (7th Cir. 1992)

24 *Id.* (internal quotations omitted)

25 *Fleming v. Jefferson Cnty. Sch. Dist. R-1*, 298 F.3d 918, 925 (10th Cir. 2002), as amended on denial of reh'g and reh'g en banc (Aug. 16, 2002) ("Pedagogical means related to learning.").

26 *Gociman* at 873.

27 *Id.*

28 *De Leon v. New York Univ.*, No. 21 CIV 05005 (CM), 2022 WL 179812, at *7 (S.D.N.Y. Jan. 20, 2022) ("[T]he relationship between an institution of higher education and its students is contractual in nature.").

29 *Gociman* at 873.

30 *In re Columbia Tuition Refund Action*, 523 F. Supp. 3d 414, 426 (S.D.N.Y. 2021).

31 For further reading regarding key higher education cases to watch *see* Natalie Schwartz, *6 higher education lawsuits to watch in 2022*, Higher Ed Dive, (January 11, 2022) https://www.highereddive.com/news/6-higher-education-lawsuits-to-watch-in-2022/617005/

32 *Bucaro v. Morales*, 17 Misc. 3d 876, 881, 846 N.Y.S.2d 546, 550 (Sup. Ct. 2007).

The Individual Freedom Act and Florida Education

Lacey Hofmeyer, Esq. and Nathan Adams, Ph.D., Esq.

In the waning days of the 2022 legislative session, the Florida Legislature passed Committee Substitute for House Bill 7 (CS/HB 7), which amended, among other provisions, the Florida Civil Rights Act ("FCRA"), ch. 760, Fla. Stat.; Florida Educational Equity Act ("FEEA"), § 1000.05, Fla. Stat.; public K-12 educational instruction and materials standards, §§ 1003.42 and 1006.31, Fla. Stat.; and educator professional development standards, § 1012.98, Fla. Stat.

The bill was entitled the "Individual Freedom Act" ("IFA"), but is also referred to as the "Stop WOKE Act." Gov. Ron DeSantis signed the bill on April 22, 2022, and legal challenges were filed shortly thereafter. Without taking any side on the policy issues in the bill, this article gives the reader an overview of the legislation and information regarding the status of the three pending lawsuits challenging the IFA.

FCRA Amendment

CS/HB 7 amends the FCRA, § 760.10(8)(a), Fla. Stat., so as to expand what constitutes discrimination based on race, color, sex or national origin. The statute makes "subjecting any individual, as a condition of employment, membership, certification, licensing, credentialing or passing an examination, to training, instruction, or any other required activity that espouses, promotes, advances, inculcates, or compels such individual to believe" certain concepts outlined in the first column of **Exhibit A** ("Concepts"). Fla. Stat. ch. 760.10(8) (2022).

CS/HB 7 contains a carve-out in the employment context for discussion of the concepts "as part of a course of training or instruction, provided such training or instruction is given in an *objective* manner without endorsement of the concepts." § 760.10(8), Fla. Stat. (2022)(emphasis added). The unlawful employment and educational practices provisions would be enforced using the already existing enforcement infrastructure that is part of, respectively, the FCRA and FEEA. A person aggrieved by a violation of CS/HB 7 could bring a claim for relief in court or request an administrative hearing.

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Under the FCRA, a private litigant must first file a complaint with the Florida Commission on Human Relations ("FCHR") within 365 days of the alleged unlawful employment practice in sections 760.10 and 760.11(1), Florida Statutes. Florida's Attorney General, the FCHR or FCHR commissioner may also file a complaint. *Id*.

The FCHR has 180 days to determine whether there is reasonable cause to believe that a discriminatory practice has occurred. § 760.11(3), (4), Fla. Stat. (2022). Even if the FCHR does not reach this determination, the complainant may file suit within one year of FCHR notice. *Id*. A court may award injunctive relief prohibiting the discriminatory practice, back pay (up to two years), compensatory damages (including for mental anguish, loss of dignity and punitive damages up to $100,000), and reasonable attorney's fees and costs. § 760.11(5), Fla. Stat. (2022). A finding that a person employed by the state has violated discrimination law is grounds for that person's discharge. § 760.11(15), Fla. Stat. (2022).

FEEA Amendment

CS/HB 7 also amends the FEEA to treat as discrimination on the basis of race, color, national origin, or sex training or instruction in public K-20 education that espouses, promotes, advances, inculcates or compels a student or employee to believe essentially the Concepts. § 1000.05(4)(a), Fla. Stat. The bill carves-out discussion of the Concepts "as part of a larger course of training or instruction, provided such training or instruction is given in an objective manner without endorsement of the concepts." *Id*. The Board of Governors ("BOG") and the State Board of Education ("SBOE") have rulemaking authority. § 1000.05(6), Fla. Stat.

Districts and colleges must submit plans and data on how they are compliant with the statute. § 1000.05(7)(a), Fla. Stat. The Office of Equal Educational Opportunity of the Florida Department of Education ("FDOE") may conduct periodic compliance reviews. § 1000.05(7)(b), Fla. Stat. As to the state universities, Senate Bill 2524 amended section 1001.92, Florida Statutes ("State University System Performance-Based Incentive.") to penalize any state university that is found to have violated section 1000.05(4)(a), Florida Statutes. That institution will be ineligible to receive to receive performance funding during the next fiscal year following the year if a violation is substantiated by a court of law, a standing committee of the Legislature, or the BOG. § 1001.92(5), Fla. Stat. (2022).

In addition, a person aggrieved by a violation of section 1000.05, Florida Statutes, has a right of action for equitable relief (i.e., an injunction) and the prevailing party is entitled to an award of attorney's fees and costs. § 1000.05(9), Fla. Stat. This remedy is available against K-20 education institutions, but, according to the state, not individual instructors. Order Denying Preliminary Injunction in Part, at 6, *Falls v. DeSantis*, No. 4:22-cv-166-MW/MJ (N.D. Fla. June 27, 2022) (citing § 1008.32(5)), Fla. Stat.

K-12 Educational Instruction and Materials Standards

CS/HB 7 also amends K-12 educational instruction and materials standards, § 1003.42(2)-(3) and 1006.31(2)(d), Fla. Stat., requiring that all K-12 instruction and instructional materials comply with six principles of individual freedom set forth in the second column of Exhibit A. Instructional personnel may facilitate discussions, in an age-appropriate manner, how the freedoms of persons have been infringed by sexism, slavery, racial oppression, racial segregation and racial discrimination, but may not indoctrinate or attempt to persuade a student as to a particular point for view. § 1003.42(2)(h), (3), Fla. Stat. (2022).

By December 1 of each year, districts must submit an implementation plan to the commissioner through the Required Instruction Reporting Portal and post the plan on the district website. R. 6A-1.094124(7), Fla. Admin. Code. Failure to comply with the requirement may result in the imposition of sanctions described in Rule 1008.32. R. 6A-1.094124(9), Fla. Admin. Code.

Under section 1008.32(5), Florida Statutes, those penalties include, (a) reporting to the Legislature that the school district is unwilling or unable to comply with law or state board rule and recommend action to be taken by the Legislature; (b) withholding the transfer of state funds, discretionary grant funds, discretionary lottery funds, or any other funds specified as eligible for this purpose by the Legislature until the school district complies with the law or state board rule; (c) declaring the school district ineligible for competitive grants; or (d) requiring monthly or periodic reporting on the situation related to noncompliance until it is remedied.

Educator Professional Development Standards

CS/HB 7 also amends educator professional development standards, § 1012.98(4)(b)(1), Fla. Stat., by requiring school districts to develop a professional development system subject to review and approval by FDOE for compliance with section 1003.42(3), Florida Statutes.

Challenges to the Law

On the same day that the legislation passed CS/HB 7, five plaintiffs, including a UCF professor, K-12 teachers, and an incoming kindergarten student filed a lawsuit alleging violations of academic freedom, student access to information and free expression and vagueness. *Falls v. DeSantis,* Case No. 4:22-cv-00166 (N.D. Fla. June 24, 2022). The Court denied four plaintiffs' request for preliminary injunction, but the Court reserved jurisdiction and

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asked for further briefing on the professor's claims in order to rule. Order Denying Preliminary Injunction in Part, *Falls v. DeSantis*, Case No. 4:22-cv-00166 (June 24, 2022). To date, no order has been entered as to the request for preliminary injunction by the professor. The court allowed two teachers and the kindergartner's claims to proceed against SBOE and the professor's claims to proceed against BOG. Order, *Falls v. DeSantis*, Case No. 4:22-cv-00166 (N.D. Fla. July 8, 2022). The court dismissed the other defendants including the single employer. *Id.*

Employers and a DEI consultant filed a second lawsuit challenging HB 7 in the same court for viewpoint discrimination and vagueness and as overbroad. *Honeyfund.com v. DeSantis,* (N.D. Fla. No. 4:22-cv-00227). The Court found that each of the plaintiffs had standing to bring suit, albeit not against Governor DeSantis. Order, *Honeyfund.com v. DeSantis*, No. 4:22-cv-00227 at 10, 13, 15 (N.D. Fla. August 18, 2022). The Court enjoined the Attorney General and commissioners of the FCHR from enforcing amended section 760.10(8), Florida Statutes. In so doing, the court ruled that the plaintiffs are likely to prevail on the merits on the action because, at bottom, the "[Individual Freedom Act] attacks ideas, not conduct… ." *Id.* at 27. Additionally, the Court found that the Concepts are impermissibly vague in violation of the Due Process Clause of the Fourteenth Amendment, but not overly broad in violation of the First Amendment. *Id.* Anticipating appeal, the Court declined to stay the injunction, meaning the state will need to seek a stay from a higher court.

On the same day that the Court entered this order, a third lawsuit was filed by professors at FAMU, USF, UF, UCF, FSU, and FIU against the BOG's members and the University Boards of Trustees associated with each of the professors' place of employment. Complaint, *Pernell v Fla. Bd. of Governors*, No. 4:22-cv-00304 (N.D. Fla. Aug. 18, 2022). The Complaint alleges viewpoint discrimination, vagueness and equal protection violations. *Id.* at 82 -90. As of August 24, 2022, no preliminary injunction motion had been filed or briefing begun.

Lessons from the Lawsuits

Unless CS/HB 7 is fully enjoined without stay, practitioners looking to apply it may want to consider the briefs in each of these cases (especially the state's) for purposes of interpreting the Act. For example, in *Falls v. DeSantis*, the state lays out the compound character of several of the Concepts and dismisses arguments that discussion of slavery, Jim Crow or the civil rights movement violate HB 7. Defs.' Memo of Law in Support of Motion to Dismiss, at 14, *Falls v. DeSantis*, No. 4:22-cv-166-MW/MJ (N.D. Fla. June 1, 2022). The defendants emphasize the plain meaning of key terms. *Id.* In *Honeyfund.com v. DeSantis*, the state also defines key terms in the Concepts by reference to a dictionary. Defs.' Memo in Opp. to Pls.' Motion for Preliminary Injunction, at 26-29, No. 4:22-cv-227-MW/MAF (N.D. Fla. July 21, 2022). Those are set out in Exhibit B.

Conclusion

New developments in these lawsuits challenging CS/HB 7 are sure over the next few months. Anticipate appeals of all of them and potential additional suits. Keep your ear to the ground as the wheels of justice turn. If we can be helpful as you consider CS/HB 7 and its implications, please do not hesitate to reach out to us.

Exhibit A. HB 7

Section 2 - Discriminatory Claims	Section 3 - Principles of Individual Freedom
1. Members of one race, color, national origin, or sex are **morally superior** to members of another race, color, national origin, or sex.	2. No race is **inherently** superior to another race.
2. A person, by virtue of his or her race, color, national origin, or sex is **inherently** racist, sexist, or oppressive, whether consciously or **unconsciously**.	1. No person is **inherently** racist, sexist, or oppressive, whether consciously or unconsciously, solely by virtue of his or her race or sex.
3. A person's moral character or status as either **privileged** or oppressed is **necessarily** determined by his or her race, color, national origin, or sex.	
4. Members of one race, color, national origin, or sex cannot and should not attempt to treat others **without respect to** race, color, national origin, or sex.	

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5. A person, by virtue of his or her race, color, national origin, or sex bears **responsibility** for, or should be discriminated against or receive adverse treatment because of, actions committed in the past by other members of the same race, color, national origin, or sex.	5. A person, by virtue of his or her race or sex, does not bear **responsibility** for actions committed in the past by other members of the same race or sex.
6. A person, by virtue of his or her race, color, national origin, or sex should be discriminated against or receive adverse treatment to achieve diversity, equity, or inclusion.	3. No person should be discriminated against or receive adverse treatment solely or partly on the basis of race, color, national origin, religion, disability, or sex.
7. A person, by virtue of his or her race, color, sex, or national origin, bears personal **responsibility** for and must feel guilt, anguish, or **other forms of psychological distress** because of actions, in which the person played no part, committed in the past by other members of the same race, color, national origin, or sex.	6. A person should not be instructed that he or she **must feel** guilt, anguish, or **other forms of psychological distress** for actions, in which he or she played no part, committed in the past by other members of the same race or sex.
8. Such virtues as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist, or were **created** by members of a particular race, color, national origin, or sex **to oppress** members of another race, color, national origin, or sex.	4. Meritocracy or traits such as a hard work ethic are not racist but fundamental to the right to pursue happiness and be rewarded for industry.

Exhibit B: Defined Terms

Term	Definition
Morally Superior	"**Superior**" as "of higher rank, quality or importance." And to be "***morally* superior**" is to be of higher quality in 'conforming to a standard of right behavior.'" "Therefore, as relevant here, the Act prohibits endorsing the idea that members of one race are better than members of a different race at conforming to right standards of behavior."
Unconsciously Inherently Biased	"**Unconsciously**" means "not knowing or perceiving" or "not aware." "**Inherent**" means to be "involved in the constitution or essential character of something." Thus, this provision "prohibits endorsing the concept that an individual--*simply because of his or her race*--is automatically racist from birth, even if the individual is unaware of it."
Necessarily Privileged	"**Necessarily**" means "unavoidably." "**Privileged**" means to have "a right or immunity granted as a peculiar benefit, advantage, or favor." Thus, this provision "prohibits endorsing the idea that an individual's race unavoidably -- i.e., without exception -- determines whether the individual occupies the status of holding 'a peculiar benefit, advantage or favor' over individuals of a different race."
Without Respect To	"**Without respect**" means without " a relation or reference to a particular thing or situation." Thus, this provision "prohibits endorsing the idea that members of one particular race, sex, etc. cannot or should not attempt to treat others as individuals without 'relation or reference to' the other individuals' listed characteristics."
Responsibility	"**Responsibility**" for something is "moral, legal, or mental accountability" for it. Thus, the provision "prohibits endorsing the idea that members of one race bear 'moral, legal or mental accountability' for actions committed in the past simply because those actions were committed 'by other members of the same race.'"

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Other Forms of Psychological Distress and Must Feel	"**Distress**" is "pain or suffering affecting the body, a bodily part, or the mind." And "**psychological**" distress is "pain or suffering" of "the mind." Thus, this provision "prohibits endorsing the idea that, because a person is of a particular race, he or she is obligated to feel guilt, anguish, or other mental suffering."
Created … to oppress	To "**create**" is "to bring it into existence." To "**oppress**" is "to crush or burden by abuse of power or authority." Hence, the provision "prohibits endorsing the concept that the enumerated *theoretical principles*--such as 'fairness'--were "br[ought] into existence' by members of a particular race for the purpose of 'crush[ing] or burden[ing]' members of a different race 'by abuse of power or authority'" (italics original).

TITLE IX AFTER FIFTY YEARS: A REGULATORY UPDATE FOR FLORIDA INSTITUTIONS OF EDUCATION

by Blaze M. Bowers, J.D.

June 23 marked the fiftieth anniversary of Title IX of the Education Amendments of 1972.[1] In fifty years, Title IX has undergone regulatory overhauls;[2] been subject to U.S. Supreme Court review;[3] and provided for opportunities, progress toward equity, and hope for countless Americans in education.[4] Title IX—a mere thirty-seven words[5]—has helped shape American education, athletics, and regulatory frameworks in notable and dramatic ways.

The Biden Administration's Department of Education (DOE) shared proposed, new Title IX regulations on the hallmark anniversary that will amend the Trump-era 2020 rules.[6] The proposed regulations would change the scope, definitions, and procedural requirements under Title IX in crucial ways—which will require Florida institutions to carefully review and revise policy and practices upon the rules' final promulgation. Additionally, Title IX litigation and administrative updates pose critical questions relating to the future of Title IX and education regulation. The following is an update on the proposed, new rules; federal administrative changes; and Title IX-related case law.

I. BIDEN DOE'S PROPOSED, NEW TITLE IX REGULATIONS

DOE officially published proposed, new regulations in the Federal Register on July 12 for a public comment period.[7] The regulations expand and reshape the scope of current Title IX applicability, definitions, reporting requirements, and procedural standards.

A. PROPOSED CHANGES TO THE SCOPE AND APPLICABILITY OF TITLE IX

The new rules would amend the scope of Title IX and change crucial definitions. Current regulations cover only "sexual harassment." The proposed rule broadens discrimination protections to "sex-based harassment," including but not limited to sexual harassment.[8] This would officially bring Title IX regulations into line with Biden DOE regulatory guidance.

The new rules would cover sex-based conduct that is "sufficiently severe ***or*** pervasive," a broader definition than the current "severe, pervasive, ***and*** objectively offensive" standard for denying or limiting someone's ability to participate in or benefit from a school's educational programs or activities.[9] Schools would be required to act promptly and effectively to end any sex discrimination that has occurred in its education programs or activities, prevent its recurrence, and remedy its effects—moving away from the current "actual knowledge" and "deliberate indifference" standards and requirements.[10]

Sex-based discrimination would be definitionally expanded to include discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity;[11] not just sexual harassment as under the 2020 rules—in what is perhaps the most anticipated regulatory change among the Department's proposed rules. Such an interpretation

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of “sex” was read into Title VII under the Supreme Court’s 2020 *Bostock* decision[12] and has been incorporated into Biden-era regulatory guidance.[13] Though DOE and some courts[14] have taken steps in attempting to enforce Title IX in line with this expanded definition already, this change would officially codify such protections.

Schools would be responsible for addressing covered harassment that occurs off-campus where the school has disciplinary authority over the respondent when a hostile learning environment has been created. This includes conduct that occurs outside of the United States—a significant departure from Trump-era rules.[15]

B. PROPOSED CHANGES TO TITLE IX REPORTING REQUIREMENTS

The proposed rules also alter and expand reporting processes and requirements for school employees. Separating employees into categories, the proposed rules break down into the following guidelines:

1. Confidential employees would have no reporting requirement but would be required to share the Title IX coordinator’s contact information and reporting information.[16]
2. School employees who have the power to initiate corrective measures would be required to report conduct that may constitute discrimination to the Title IX coordinator.[17]
3. Employees with administrative, teaching, or advising responsibilities would be required to report potential discrimination to the Title IX coordinator if it related to a student.[18] If such an employee received information relating to another employee subjected to discrimination, that employee may report to the Title IX coordinator or provide the employee with the coordinator’s contact information and information about how to report sex discrimination, depending on school policy.[19]
4. For employees who do not fit into any of the above categories, schools would have the discretion to decide whether those employees are required to report to the Title IX coordinator or provide the coordinator’s contact information and information about how to report sex discrimination, depending on school policy.[20]

The new regulations would also permit students to report sex-based violations even after they have left the college or university in question.

C. PROPOSED CHANGES TO TITLE IX PROCEDURAL STANDARDS

Procedural guidelines governing responses to reports of sex-based discrimination would change under the proposed regulations. Formal complaints could be based on written and oral complaints of discrimination; not just written.[21] Live, in-person hearings would no longer be required but permitted.[22] A “single investigator model” would be allowed once more—meaning that one individual may serve as investigator and decision-maker for a Title IX investigation.[23] The exclusionary rule—which was invalidated by the Biden DOE—would be replaced. “Instead of prohibiting the decisionmaker from considering all prior statements in these cases, [the proposed regulations] would provide that if a party does not respond to questions related to their credibility, the decisionmaker must not rely on any statement of that party that supports that party’s position.”[24]

The “preponderance of the evidence” standard of proof would apply in investigations;[25] however, schools could use a “clear and convincing” standard if those schools use the “clear and convincing” standard in all other comparable proceedings.[26]

II. TITLE IX DAMAGES UPDATE

The U.S. Supreme Court held that plaintiffs filing private actions under the Rehabilitation Act of 1973 and the Affordable Care Act could not recover emotional distress damages in *Cummings v. Premier Rehab Keller*.[27] While *Cummings* did not specifically address Title IX claims, the Court’s rationale referenced the *Barnes v. Gorman* Spending Clause and damages case,[28] reviewed Title IX precedent, and ruled on Spending Clause grounds[29]—all points persuasively indicating that emotional distress damages would most probably be unrecoverable in a private Title IX action as well. Title IX is one of four federal anti-discrimination laws predicated on the U.S. Constitution’s Spending Clause, as it conditions a school’s receipt of federal aid on enforcement of its anti-discrimination requirements. Florida practitioners should look to this persuasive authority carefully when considering the damages available in a private Title IX action.

III. CHALLENGES TO REGULATORY AUTHORITY POSE POTENTIAL TITLE IX QUESTIONS

The U.S. Supreme Court brought into question the limits of regulatory authority in its recent *West Virginia v. Environmental Protection Agency* opinion.[30] The Court held that the Clean Water Act did not delegate expansive powers to the EPA to regulate carbon emissions under the major questions doctrine. According to the concurrence, authored by Justice Gorsuch, this doctrine dictates that “administrative agencies must be able to point to [‘]clear congressional authorization[‘] when they claim the power to make decisions of vast [‘]economic and political significance.[‘]” Relying upon the major questions doctrine,[31] Chief Justice Roberts wrote for the majority, “the only interpretive question before us, and the only one we answer,

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is more narrow: whether the [']best system of emission reduction['] identified by EPA in the Clean Power Plan was within the authority granted to the Agency in ... the Clean Air Act. For the reasons given, the answer is no."

This curtailment of federal agency power should be considered when looking to Title IX. Title IX regulations rely upon Congress' statutory language in Title IX of the Education Amendments of 1972. It is plausible that a challenge like that in *West Virginia v. EPA* could be brought against DOE as it seeks to promulgate new Title IX regulations.

For example, on July 15 a federal judge out of Tennessee granted a preliminary injunction—enjoining enforcement of DOE's regulatory guidance on Title IX which expanded the definition of "sex" in lines with *Bostock* and Title VII in twenty states. The judge issued this injunction on federalism grounds and under arguments that the guidance's enforcement violated the Administrative Procedure Act's limitations on federal agency rulemaking processes.

Florida institutions and education lawyers will need to consider the conflicts between federal and state anti-discrimination laws, the potential limits on DOE regulatory power, and the direction of the U.S. Supreme Court in reviewing these issues.

IV. WHAT IS NEXT

The public comment period for DOE's proposed regulations will remain open until September 12, 2022. It can be expected that the Biden DOE will look to issue final regulations—subject to revision following the comment period—no earlier than late 2023. Regulations governing athletics are not included in these proposed rules and will be issued separately in the future. Until then, higher education stakeholders can express their opinions and concerns regarding the proposed Title IX rules here. Florida institutions, practitioners, and lawyers will need to watch this turbulent regulatory landscape in the coming months and years.

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Endnotes:

1 *See* Title IX of the Education Amendments of 1972, 20 U.S.C. § 1681 (2018).

2 *See* United States Department of Education, Office of the Assistant Secretary for Civil Rights, Dear Colleague Letter (2011), https:/www2.ed.gov/print/about/offices/list/ocr/letters/colleague-201104.html; see also 34 CFR 106.

3 *See Gebser v. Lago Vista Independent School District*, 524 US 274 (1998); *Davis v. Monroe County Bd. of Ed.*, 526 U.S. 629 (1999); *Franklin v. Gwinnett County Public Schools*, 503 US 60 (1992).

4 Laura Camera, *Title IX Marks 50 Years of Gains and Goals for Gender Equity in Education*, U.S. News and World Report, June 22, 2022, https://www.usnews.com/news/education-news/articles/2022-06-22/title-ix-marks-50-years-of-gains-and-goals-for-gender-equity-in-education.

5 *See* 20 U.S.C. § 1681 (2018).

6 *See* 34 CFR 106.

7 *See* 87 FR 41390 (new, proposed 34 CFR 106), https://www.federalregister.gov/documents/2022/07/12/2022-13734/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal.

8 *See* 87 FR 41390 at 41410.

9 *Id.*

10 *Id.* at 41432.

11 *Id.* at 41410.

12 *See Bostock v. Clayton County.*, 140 S. Ct. 1731 (2020).

13 *See* The Department's Enforcement of Title IX of the Education Amendments of 1972 with Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, 86 FR 32637, June 22, 2021, https://www.govinfo.gov/content/pkg/FR-2021-06-22/pdf/2021-13058.pdf (this citation was added post-publication in order to show that the Dep't. of Education has, indeed, adopted Bostock's holding in its interpretation of Title IX.); see also EEOC, *What You Should Know*: *The EEOC and Protections for LGBT Workers* (June 30, 2020), https://www.eeoc.gov/laws/guidance/what-you-should-know-eeoc-and-protections-lgbt-workers.

14 *See Adams by and through Kasper v. Sch. Bd. of St. Johns County*, 968 F.3d 1286, 1310 (11th Cir. 2020), opinion vacated and superseded sub nom. *Adams v. Sch. Bd. of St. Johns County*, Fla., 3 F.4th 1299 (11th Cir. 2021), reh'g en banc granted, opinion vacated, 9 F.4th 1369 (11th Cir. 2021).

15 *See* 87 FR 41390 at 41401.

16 *Id.* at 41441.

17 *Id.* at 41572.

18 *Id.*

19 *See* 87 FR 41390 at 41572.

20 *Id.* at 41572-41573.

21 *Id.* at 41494.

22 *Id.* at 41482.

23 *Id.* at 41544.

24 *Id.* at 41502.

25 *Id.* at 41483.

26 *Id.*

27 *See Cummings v. Premier Rehab Keller, P.L.L.C.*, 142 S. Ct. 1562, 1576 (2022).

28 *See Barnes v. Gorman*, 536 U.S. 181, 187 (2002).

29 *See* U.S. Const. art. I., § 8, Cl. 1.

30 *See West Virginia v. Environmental Protection Agency*, 597 US _ (2022).

31 *Id.* at 11.