Cases, Controversies, and Quandaries

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Title IX
Final Regulatory Changes

Where are we now?

- The Final Rule is incredibly long and complicated. It was released 100 days before the effective date, the Final Rule is 2,033 pages and 636,609 words.
  - DOE took three years to draft the new rules and provided 100 days to implement.
  - Published in the Federal Register on May 19, 2020.
- The regulations became effective August 14, 2020.
  - There is no grace period, OCR started enforcement on August 14th
  - DOE issued a new Case Processing Manual on August 26th
- Nationwide injunctions are no longer a feasible route to slow implementation of the regulations.

Uniform definition of sexual harassment

- Revised and uniform definition of sexual harassment across all institutions.
- The Final Rule § 106.30 defines "sexual harassment" as conduct on the basis of sex that satisfies one or more of the following:
  - (i) An employee conditioning educational benefits on participation in unwelcome sexual conduct (i.e., quid pro quo);
  - (ii) Unwelcome conduct that a reasonable person would determine is so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the educational institution's education program or activity; or
  - (iii)Sexual assault (as defined in the Clery Act), or dating violence, domestic violence, or stalking as defined in the Violence Against Women Act (VAWA).The joint guidance has all the definitions for you see https://system.suny.edu/sci/tix2020/

Dismissal of formal complaints

- Dismissal is determined after you have a formal complaint
  - There is a big difference between what you must dismiss vs. what you may dismiss.
- Formal complaint **must** be dismissed (from the Title IX process) if conduct:
  - Would not constitute sexual harassment even if proved,
  - Did not occur in institution's program/activity, or
    - Locations, events, or circumstances in which an institution exercises substantial control over both the respondent and the context in which the sexual harassment occurs Locations include buildings owned or controlled by officially recognized student organizations. §106.44(a)
  - Did not occur against a person in the United States.
- Formal complaint **may** be dismissed (from the Title IX process) if conduct:
  - If complainant requests to withdraw their complaint
  - If respondent is no longer enrolled or employed
  - When specific circumstances prevent gathering evidence sufficient to reach a determination

Processes that have changed

- If you have a formal complaint you can offer an informal process (mediation) unless it is faculty on student issue, then the informal process is not allowed.
- Interim suspensions are now emergency removals and require a modified risk analysis and appeal, which will likely occur through a Behavioral Intervention Team.
- All investigations end with a written report.
- Investigative report evidence review and Pre-hearing evidence review
  - Before the investigator issues their report and again before the hearing, the parties must have at least 10 days to review any relevant information directly related to the allegations raised in a formal complaint gathered by the investigators, including both inculpatory and exculpatory evidence. At the end of that ten day period, the parties have the right to submit a written response, which the investigator "will consider" before completing their investigative report

Processes that have changed

- For all decisions (faculty, staff, and students) the Institution must have a live hearing with cross-examination by an advisor, which can be done virtually
  - The College or university must provide an advisor "without fee or charge" to any party without an advisor in order to conduct cross-examination (can limit to only CX)
  - The decision maker must rule on relevance of questions on the record
- A decision maker may not draw any inference from a party's refusal to participate in cross-examination. If a party is not subject to cross-examination, then:
  - No reliance on their statement in determining responsibility.
  - No inference as to responsibility.
- Live hearings may be conducted with all parties present in the same location or virtually, as long as participants can simultaneously see and hear each other.
- A recording or transcript must be created and made available for the parties to review and inspect.
- All training materials used for anyone in the Title IX process must be made public on a website. See https://www2.ed.gov/about/offices/list/ocr/blog/20200518.html

Employment challenges

- This new process applies to employees as well as students.
  - This is a huge issue because the law does not read the same.
  - Title VII and Title IX are not the same thing.
- Title VII defines sexual harassment as "severe or pervasive" not the Title IX "severe and pervasive."
- Title VII "knew or should have known" versus Title IX "actual knowledge"
- Title IX you now "must dismiss" a formal complaint if conduct is not against a person in the United States, nevertheless Title VII applies to United States citizens working abroad.
- "The recipient must keep confidential the identity of…any individual who has been reported to be the perpetrator of sex discrimination, any respondent…except as may be permitted by…FERPA…or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder." §106.71(a)
  - NSF requires notifications in grant terms and conditions. See https://www.nsf.gov/od/odi/term_and_condition.jsp

General closing observations regarding the Title IX regulations

- Each institution reviewed both Title IX and Student Conduct processes and extensively revised both this summer.
  - Even without a pandemic this would have been exceptionally challenging. This process was already long, involved, and complex, it is now much more so.
- These revisions required significant engagement with HR due to the process being extended to faculty and staff as well as students.
  - This often required modifications to Faculty Handbooks, which again was very challenging over the summer.
- Institutional Title IX Coordinators must continue to be exceptionally adept.
- The outcome of the election will have a direct impact on these regulations.
  - Biden stated on May 6, 2020 when asked about the regulations….“It's wrong,” he continued. “And, it will be put to a quick end in January 2021, because as President, I'll be right where I always have been throughout my career — on the side of survivors, who deserve to have their voices heard, their claims taken seriously and investigated, and their rights upheld.” See https://www.politico.com/news/2020/05/06/biden-vows-a-quick-end-to-devos-sexual-misconduct-rule-241715

Improving Free Inquiry, Transparency, and Accountability at Colleges and Universities Final Regulations (First Amendment)

New U.S. DOE Final Regulations on First Amendment

- In March 21, 2020 the President issued Executive Order 13864 regarding First Amendment in Higher Education
  - https://www.whitehouse.gov/presidential-actions/executive-order-improving-free-inquiry-transparency-accountability-colleges-universities/
- On September 9th the U.S. Department of Education issued a 246-page Final Rule, clarifying Executive Order 13864
  - The Final Rule clarifies that College and Universities that receive Federal research or education grants, including financial aid, must comply.
  - The Final Rule become effective 60 days from its publication date, November 9th.
    - https://www2.ed.gov/about/offices/list/ope/freeinquiryfinalruleunofficialversion09092020.pdf
    - https://www.govinfo.gov/content/pkg/FR-2020-09-23/pdf/2020-20152.pdf
- "Both Executive Order 13864 and these final regulations are intended to promote the First Amendment's guarantees of free expression and academic freedom, as the courts have construed them; to align with Federal statutes to protect free expression in schools; and to protect free speech on campuses nationwide." Unofficial Version pg. 3

Private institutions are addressed in the Final Rule

- Although private institutions are not bound by the First Amendment they must adhere to their own stated institutional policies regarding freedom of speech and academic freedom.
  - Think faculty handbooks, staff handbooks, and students codes of conduct.
- The Final Rule makes such adherence a material condition for receipt of DOE grant funds (including access to federal financial aid).
- Private institutions ultimately maintain the right to choose whether to extend free speech protections to their students and faculty, but must follow through with any rights they choose to extend.

New reporting requirements

- Both public and private institutions must report any final, non-default judgment by a state or federal court finding noncompliance with the First Amendment (for public institutions) or institutional free speech and academic freedom policies (for private institutions) to the DOE.
  - " A final judgment is a judgment that the . . . institution chooses not to appeal or that is not subject to further appeal." §75.500(b)(1)
  - DOE will provide an institution 45 calendar days to provide the Department with a copy of the final, non-default judgment.
- This Final Rule does not require an Institution to report settlements or mediated agreements.
- The Final Rule gives teeth to the March 2020 Executive Order by allowing the Department to consider such information as evidence of noncompliance with the Final Rule, and may choose to revoke federal funding.

Religious student groups

- The Final Rule prohibits any public institution that receives DOE grants from denying to any religious student organization any right, benefit, or privilege afforded to other student organizations at the public institution.
  - This is almost identical to O.S. 70 §2119.1
- Institutions should review their "all-comers" policies that may require religious groups to allow members and leaders who do not agree with their religious tenants to determine whether such rules conflict with the Final Rule.
  - Look on pages 86-88, only an all encompassing "all-comers" policy will stand under these Final Rules.
- "The U.S. Constitution does not prohibit religious student organizations from excluding students from leadership because they do not meet an organization's religious qualifications, even though such exclusion may be potentially inconvenient or disappointing. Such exclusion under these final regulations is a permissible distinction based on religious belief or conduct. The alternative—requiring faith based groups to forgo their religious tenets when selecting leadership—violates their freedoms of speech, association, and free exercise." pg. 83

Security Charges

- In *Forsyth County* v. *Nationalist Movement* (1992), the Supreme Court determined that government actors—like public colleges or university —may not lawfully impose security fees based on their own subjective judgments about "the amount of hostility likely to be created by the speech based on its content."
- Richard Spencer's trip to the University of Florida in October 2018 cost upwards of $600,000 in security, university officials said at the time.
- In 2017, the University of Washington College Republicans invited the alt-right provocateur Milo Yiannopoulos to campus. One person was shot during protests outside Yiannopoulos' talk. The City of Seattle and UW paid more than $75,000 in police overtime for the speaking event.
- In 2017, Virginia State Police spent more than $916,000 responding to address the "Unite the Right" rally in Charlottesville. Albemarle County, the city of Charlottesville, and the University of Virginia spent at least $540,000 in their responses to the 2017 white supremacist rallies.
  - In 2018 on the anniversary, the State police alone spent $3.1 million on operations during and preparations for the anniversary weekend.

Implications due to S.B. 18

- "The First Amendment right of free expression means that public officials may not discriminate against students or employees based on their viewpoints. For example, public institutions cannot charge groups excessive security costs "simply because [these groups and their speakers] might offend a hostile mob." pg. 4
  - DOE cited Forsyth Cnty., Ga. v. Nationalist Mov't, 505 U.S. 123, 134–35 (1992); see also College Republicans of the Univ. of Wash. v. Cauce, No. C18-189-MJP, 2018 WL 804497 (W.D. Wash. Feb. 9, 2018) (holding University of Washington Security Fee Policy violates the students' First Amendment rights to freedom of speech and expression)
- The UW issue, cited by the Final Rule, is a cautionary tale. UW College Republicans received a $17,000 security bill from UW after it announced it would hold a rally with Patriot Prayer, the Pacific Northwest group whose violent clashes with Antifa protestors have made headlines.
  - Members of the Proud Boys, a Southern Poverty Law Center-designated hate group associated with Patriot Prayer, also attended the rally.
  - Police arrested five counter-protestors and used pepper spray during the February Patriot Prayer demonstration.
- Prior to the rally, the College Republicans sued UW, claiming the security fee amounted to discrimination against conservative viewpoints. UW argued that it assessed the $17,000 fee, equivalent to four hours of overtime for 24 police officers, based on past violence at Patriot Prayer rallies. In arguing its case, the university submitted a declaration from a UW Police Department employee who researched the far-right group prior to the event.
- A federal judge granted the student group a temporary restraining order just days before the event, blocking the university from charging the fee.
- UW settled for no security fee and paid $125,000.00 to cover the student's legal fees.

Two interesting cases

Knight First Amendment Inst. v. Trump (2nd Cir. July 9, 2019)

Screen capture September 22, 2020

"The First Amendment does not permit a public official who utilizes a social media account for all manner of official purposes to exclude persons from an otherwise–open online dialogue because they expressed views with which the official disagrees."

President's twitter is a public forum

- Does the government control the "property"?
  - "Temporary control by the government can still be control for First Amendment purposes."
  - Ownership is not required
  - "The Account is registered to "Donald J. Trump, '45th President of the United States of America, Washington, D.C.' "
  - "According to the National Archives and Records Administration, the President's tweets from the Account "are official records that must be preserved under the Presidential Records Act."
  - "He uses the Account to engage with foreign leaders and to announce foreign policy decisions and initiatives."
- "Because the President, as we have seen, acts in an official capacity when he tweets, we conclude that he acts in the same capacity when he blocks those who disagree with him."
- "The President excluded the Individual Plaintiffs from government–controlled property when he used the blocking function of the Account to exclude disfavored voices."

Professional standards: Keefe v. Adams (8th Cir. 2016)

- In December 2012, Keefe was expelled from Central Lakes College's nursing program for Facebook posts he made on his public personal account. Two fellow students showed some of the posts – that included describing a classmate as a "stupid b&*^%" – to an instructor, and the college determined that by posting these comments, Keefe had violated student handbook policy regarding professional behavior.
- All students enrolled in this program had to follow the Nurses Association Code of Ethics, which included guidance on issues such as "relationships with colleagues and others," "professional boundaries," and "wholeness of character.
- In February 2013, a month after his appeal against his expulsion was denied, Keefe filed a lawsuit against the dean of the college, along with other college administrators.
- The U.S. District Court of Minnesota dismissed his case in August 2014, so Keefe, with the support of advocacy groups, took the case to the Eighth Circuit. The author of the majority opinion, Judge James Loken, wrote that the court accepted the college's argument that it had the legal authority to hold students to the standards of their intended profession.
- The court wrote that this decision didn't mean that unprofessional speech was prohibited, but that the university has a right to impose "adverse consequence on the student for exercising his right to speak at the wrong place and time, like the student who receives a failing grade for submitting a paper on the wrong subject."
- The court stated "courts have upheld against First Amendment challenge academic discipline for inappropriate social media postings that violate academic professional standards."
  - The school enforced recognized nursing standards against Keefe and that their interest in enforcing those standards outweighed any First Amendment interest asserted by him.

Supplemental Resources

2020 First Amendment on Campus report by the Knight Foundation

- 81% of students widely support a campus environment where students are exposed to all types of speech, even if they may find it offensive.
- 75% believe colleges should not be able to restrict expression of political views that are upsetting or offensive to certain groups.
- 78% favor colleges providing safe spaces or areas of campus that are designed to be free from threatening actions, ideas or conversations.
- 78% believe colleges should be able to restrict the use of racial slurs and costumes that stereotype certain racial or ethnic groups (up from 71% in 2017).

https://knightfoundation.org/reports/the-first-amendment-on-campus-2020-report-college-students-views-of-free-expression/

Pen America

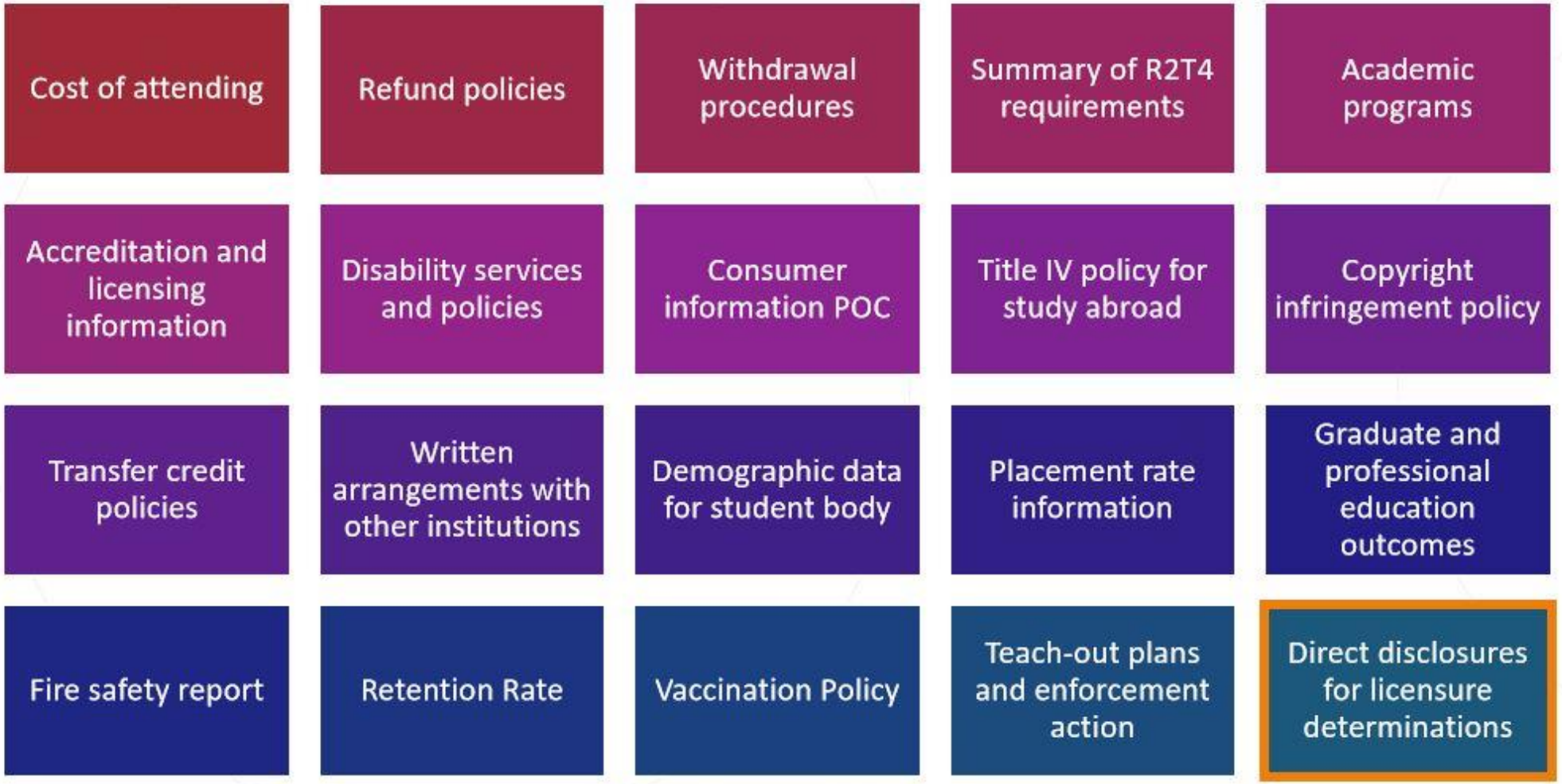
- And Campus For All: Diversity, Inclusion, and Freedom of Speech at U.S. Universities
- Campus Free Speech Guide
- Key webinars include
  - Free Speech and Black Lives on Campus
    Wednesday, June 17, 2020
  - Counter-Speech: Speaking Out to Fight Hate
    Wednesday, May 27, 2020
  - What professors need to know about online hate and harassment

Professional Licensure Final Regulations

How did we get here?

- In 2016, during the Obama administration a negotiated rule-making developed a DOE rule which recognized multistate agreements such as the State Authorization Reciprocity Agreement (SARA), a voluntary regulatory framework that makes it simpler for institutions to gain approvals to operate in every state where they enroll students receiving federal financial aid. Almost all U.S. states currently participate in SARA, with the exception of California.
- These Obama-era regulations were due to go into effect in July 2018 but were delayed by the department for two years after some higher education groups complained that institutions weren't sure how to implement them. The rules came into effect in May 2019 after a judge ruled the DOE illegally delayed them.
- Regulating universities that operate across state lines is complicated. A panel of negotiators selected by the DOE reached consensus on new distance education rules, which were published in late October 2019.
- The new 2019 Rule jettisoned most of these distance education disclosures. However, disclosures relating to professional licensure not only were preserved, they now apply to **all programs, without regard to whether they are offered online or on ground**. The effective date was August 14, 2020.

Consumer Information

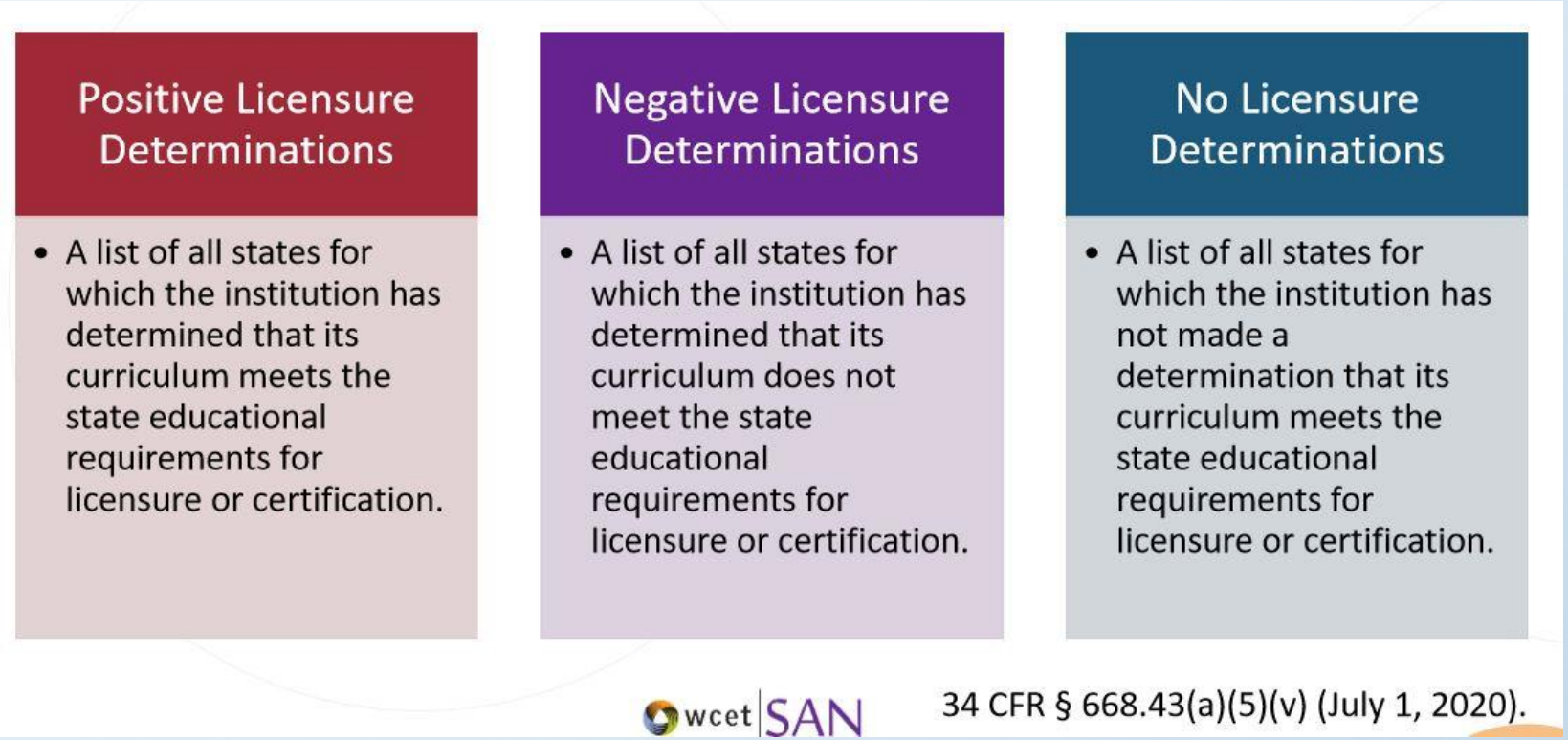


wcet SAN

34 CFR 668.43 (July 1, 2020).

What must your institution do?

Decide which Institutional programs are ones "designed to meet **educational** requirements for a specific professional license or certification that is required for employment in an occupation, or is advertised as meeting such requirements…" Categorize these programs for each state and U.S. territory in one of three pots below.



Just a few graduate degrees that must be considered

- Speech Language Pathology
- Doctor of Physical Therapy
- Occupational Therapy
- Clinical Psychology
- Masters of Social Work
- School Counseling
- Athletic training
- Doctor of Nurse Practice (all nursing degrees)
- Geology
- All manner of education degrees

Student notification requirement

- Prior to enrollment (after application), the University must directly notify (via email) a prospective student if:
  - The institution has made a determination that the program they are applying for **does not meet** state licensure requirements in the state in which the prospective student is located; or
  - if the institution **has not made a determination** regarding whether the program meets state licensure requirements in the state in which the prospective student is located.
- DOE "expects that the institution will provide this disclosure before a student signs an enrollment agreement or, in the event that an institution does not provide an enrollment agreement, before the student makes a financial commitment to the institution." 34 CFR § 668.43(c)(1) (July 1, 2020); 84 FR 58886 (Nov. 1, 2019).

Want to learn more?

- Professional Licensure Disclosures: Implementation Handbook for Institutional Compliance with the 2019 Federal Regulations
  Author: Shari Miller
- https://wcet.wiche.edu/sites/default/files/WCET-Webcast-Professional-Licensure-slides.pdf
- https://www.sreb.org/sites/main/files/file-attachments/wcet_san__federal_regulations_professional_licensure_quick_primer.pdf?1600285136
- https://www.sreb.org/post/sara-files

Executive Order on Combating Race and Sex Stereotyping

(Employee Diversity Training)

New Executive Order

- On September 22, 2020 President Trump issued an Executive Order (https://www.whitehouse.gov/presidential-actions/executive-order-combating-race-sex-stereotyping/), which is a follow on to the OMB memo issued earlier this month at https://www.whitehouse.gov/wp-content/uploads/2020/09/M-20-34.pdf.
- The Executive Order will impact employee diversity training in federal agencies, **federal contractors**, and for **those who use federal grants to support training**.
- Note that this Executive Order does not impact education outside of employee training.

How the E.O. applies to Higher Education

- Almost every College and University that conducts even moderate research, is a federal contractor, regardless of size.
  - If an institution enters into federal contracts above $10,000.00 or signs on as a subcontractor to a federal contract for this amount, it will be considered a federal contractor and will be required to draft E.O. 11246, VEVRAA, and Section 503 federally-mandated affirmative action plans and to comply with this Executive Order.
  - Federal Procurement Database System lists federal contractors and is located at https://www.fpds.gov/fpdsng_cms/index.php/en/ (this site migrates to https://beta.sam.gov/ on October 17, 2020)
- The Executive Order requires the federal government to start drafting regulations to this effect and requests that Attorney General Barr review whether there are Title VII concerns, in essence whether these employee trainings create a hostile work environment.
  - Interesting to ask AG Barr, because the DOJ does not typically regulate Title VII.
- Will we see state legislation on this issue limiting the use of state funds?
  - Nothing impacts the use of donor funds - yet.

What it prevents

"The contractor shall not use any workplace training that inculcates in its employees any form of race or sex stereotyping or any form of race or sex scapegoating, including the concepts that:

(a) one race or sex is inherently superior to another race or sex;

(b) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously;

(c) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex;

(d) members of one race or sex cannot and should not attempt to treat others without respect to race or sex;

(e) an individual's moral character is necessarily determined by his or her race or sex;

(f) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;

(g) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or

(h) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race."

Defines "divisive concepts"

(a) "Divisive concepts" means the concepts that (1) one race or sex is inherently superior to another race or sex; (2) the United States is fundamentally racist or sexist; (3) an individual, by virtue of his or her race or sex, is inherently racist, sexist, or oppressive, whether consciously or unconsciously; (4) an individual should be discriminated against or receive adverse treatment solely or partly because of his or her race or sex; (5) members of one race or sex cannot and should not attempt to treat others without respect to race or sex; (6) an individual's moral character is necessarily determined by his or her race or sex; (7) an individual, by virtue of his or her race or sex, bears responsibility for actions committed in the past by other members of the same race or sex; (8) any individual should feel discomfort, guilt, anguish, or any other form of psychological distress on account of his or her race or sex; or (9) meritocracy or traits such as a hard work ethic are racist or sexist, or were created by a particular race to oppress another race. The term "divisive concepts" also includes any other form of race or sex stereotyping or any other form of race or sex scapegoating.

But rest assured

- "Nothing in this order shall be construed to prohibit discussing, as part of a larger course of academic instruction, the divisive concepts listed in section 2(a) of this order in **an objective manner and without endorsement.**"

Proposed Academic Visa Changes

Proposed regulations

- Back in July U.S. Immigration and Customs Enforcement rescinded its July 6th directive -- which came in response to a lawsuit filed by Harvard University and the Massachusetts Institute of Technology -- reverting the guidance back to an original policy issued in March that suspended requirements prohibiting international students from taking no more than one online class at a time.
  - Rescinding the July guidance gave institutions the ability to adjust the mode of instruction to all online in response toCOVID-19 without putting their current international students at risk of violating their immigration status.
- Here we go again, on September 25, 2020, last Friday, the Department of Homeland Security proposed a new set of rules Friday (85 FR 60526) that would limit student visas to a maximum of four years, requiring international students to apply for extensions when their term is up.
  - There is a 30-day public comment period before the rule is set or withdrawn. Talk to your international student services and institutional counsel about making comments.
- Under the current "duration of status" rule, international students can remain in the country as long as they are enrolled in school and abiding by their relevant immigration status rules.

Proposed regulations

- Under the proposed rule, most students would have to apply for an extension of stay after four years, students who were born in or are citizens of countries on the State Sponsor of Terrorism list — North Korea, Iran, Sudan and Syria — would have to apply after two, as well as those that are citizens of countries with "a student and exchange visitor total overstay rate of greater than 10 percent."
  - The regulations include some interesting extension language…"If the DHS Secretary determines that U.S. national interests warrant limiting admission to a 2-year maximum period in certain circumstances, then it would publish a Federal Regulation Notice to give the public advance notice of such circumstance."
- The proposed rule states "failing grades, in addition to academic probation or suspension, is an unacceptable reason for program extensions."

NAFSA Statement

- Esther D. Brimmer, executive director and CEO of NAFSA: Association of International Educators, said "[s]adly, this proposal sends another message to immigrants, and in particular international students and exchange visitors, that their exceptional talent, work ethic, diverse perspectives, and economic contributions are not welcome in the United States,"
- For an objective summary of these proposed rules see https://www.nafsa.org/professional-resources/browse-by-interest/proposal-replace-duration-status

Thank you!

Questions