

Spring 2022 Legal Update for Illinois Community College Chief Student Services Officers Commission

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March 10, 2022

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Agenda

COVID-19 Updates

Mental Health Early Action on Campus Act
Update

Title IX Update

Legal Considerations for Equity Planning

Non-Native English Speakers

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COVID-19 Updates



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Some Things
Change, Some
Things Remain
the Same...

Governor Pritzker announced that statewide indoor mask mandate for most settings, including higher education institutions, would be lifted on February 28, 2022.

9 Feb. 2022

4 Mar. 2022

Governor Pritzker reissued COVID-19 disaster proclamation (effective for 30 days) and extended E.O. 2021-22, which mandates higher education institutions to require proof of vaccination or weekly testing from employees and students.

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So...Now
What?

Considerations related to
maintaining (or re-instituting) an
indoor mask requirement

Considerations related to
maintaining (or re-instituting) a
vaccination/testing requirement

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Mental Health
Early Action on
Campus Act
Update



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Mental Health
Early Action on
Campus Act,
110 ILCS 58/

- Passed in 2019 and went into effect on July 1, 2020.
- Broadly requires Illinois public higher education institutions to address gaps in mental health services through training, peer support and community-campus partnerships.

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Mental Health
Early Action on
Campus Act,
110 ILCS 58/

- Identifies eleven mental health goals, divided into six categories:
 - Awareness
 - Online screening tool
 - Training
 - Peer support program
 - Strategic partnerships
 - Clinical benchmark ratio

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Mental Health
Early Action on
Campus Act,
110 ILCS 58/

- Contains funding section which expressly states the Act is subject to appropriation.
- Funding section also states that no section of the Act may be funded by student fees created on or after July 1, 2020, but that public colleges and universities may seek federal funding or private grants, if available, to support the provisions of the Act.

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MHEACA Funding

- In December 2019, the Commission on Government Forecasting and Accountability released an initial report with recommendations to the General Assembly on the amount of funds necessary to implement the Act.
- The Commission estimated the total amount of appropriations necessary for institutions to fully implement the Act to be between \$18 million and \$19.3 million.
- Notwithstanding the Commission's report, the Act has remained unfunded.

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Mental Health Early Action on Campus Appropriations Act

- SB 4055 and HB 5424 were introduced in January 2022 by State Senator Celina Villanueva and State Representative La Shawn K. Ford, respectively.
- Would provide \$19 million in funding to Illinois public colleges and universities in FY 2023 for purposes of implementing the Act.
- Would require Commission on Government Forecasting and Accountability, in conjunction with ICCB and IBHE, to make recommendations to the General Assembly on amounts necessary to implement the Act for FY 2024-2027.

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Mental Health Early Action on Campus Appropriations Act

- Current status:
 - HB 5422 assigned to Appropriations-Human Services Committee on March 1, 2022, with committee hearing scheduled for March 20, 2022.
 - SB 4055 referred to Assignments Committee on February 10, 2022.

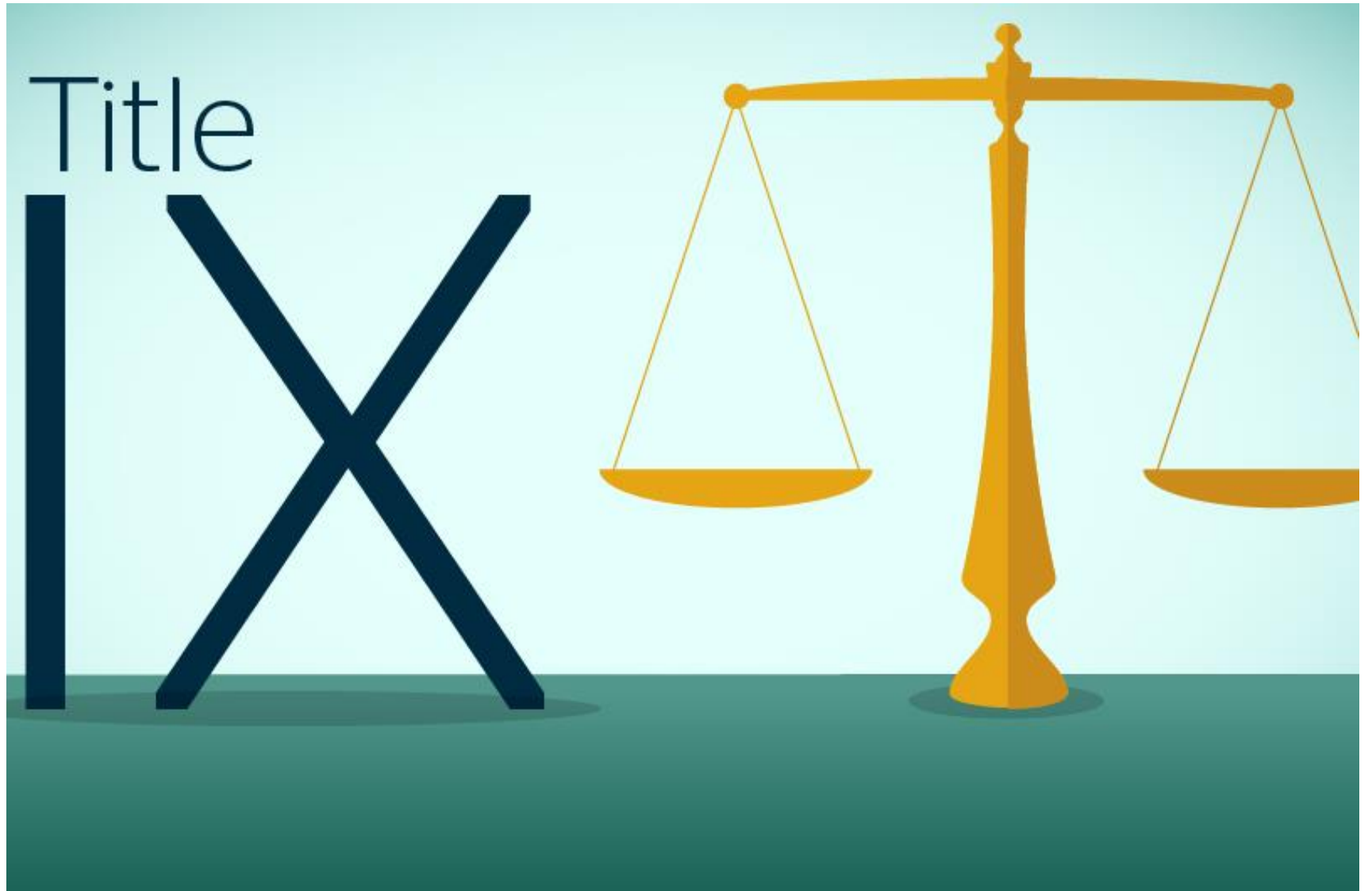
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Recommendations

- Document what the college currently has in place in terms of mental health awareness, training, on-campus services, peer support, strategic partnerships and clinical benchmark ratios.
- Identify what, if any, additional non-monetary measures the college could take to implement certain provisions of the Act.
- Develop a plan/timeline for steps the college would need to take to be in compliance with the Act.
 - Note that the benchmark ratio language is “attempt to meet,” so the Act contemplates flexibility/growth over time.
- Evaluate what federal funds or private grants might be available for mental health initiatives.

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Title IX Update



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Title IX

- Timeline for proposed amendments to 2020 Title IX Regulations:
 - Notice of Proposed Rulemaking (“NPRM”) anticipated **April 2022** (a month earlier than previously indicated)
 - 60-day public comment period
 - Review of comments by Department of Education
 - [Supplemental NPRM, comment period, review of comments]
 - Final rule issued, with effective date no less than 30 days after date of publication in Federal Register (unless good cause exists for earlier effective date).

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Title IX



- Possible changes:
 - Broadened definition of “sexual harassment”
 - Heightened responsibilities with regard to alleged sexual harassment of individuals who are not “participating or attempting to participate” in the institution’s education program or activity
 - Institutional flexibility regarding live hearings, cross-examination and/or right to legal representation
 - New requirements related to prevention education and reporting practices

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Title IX

- The Biden Administration has also indicated it plans to include in the proposed Title IX amendments a range of protections for transgender students, including the right to access school bathrooms that match their gender identity and the right to participate in school sports

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Title IX

- In the meantime...
 - Ensure institutional policy/procedures comply with August 2020 regulations.
 - Ensure Title IX personnel have been appropriately trained.
 - Don't forget PSVHEA annual training requirement
 - Continue implementing 2020 regulations for any instance of alleged sexual harassment that occurred on or after August 14, 2020.
 - Monitor Department of Education guidance and be on the lookout for NPRM in April 2022.

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Questions?



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Legal Considerations for Equity Planning



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Constitutional Considerations

- “No state shall . . . Deny to any citizen within its jurisdiction the equal protection of the laws.” U.S. Const. amend. XIV.
- The adoption or implementation of college policies or practices that treat students differently based on a legally protected category must satisfy constitutional requirements under the 14th Amendment’s Equal Protection Clause.
 - Admission policies?
 - Scholarships/financial aid?

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Standards of Constitutional Review

Strict Scrutiny (Race or Ethnicity)

- The Supreme Court has held that government classifications based on race or ethnicity are only constitutional under the Equal Protection Clause if they survive “strict scrutiny.” *Grutter v. Bollinger*, 539 U.S. 306, 326 (2003).
- To satisfy this standard, racial/ethnic classifications must be aimed at a “compelling governmental interest” and must be “narrowly tailored” to reach that goal.

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Standards of Constitutional Review

Intermediate Scrutiny (Sex)

- In contrast to the strict scrutiny that applies to race-conscious policies or programs, policies or programs that condition benefits based on sex trigger "intermediate scrutiny," which means that such programs must:
 - Serve "important" or "exceedingly persuasive" (rather than "compelling") governmental objectives; and
 - Be "substantially related" (rather than "narrowly tailored") to the achievement of those objectives.
- This standard is less demanding than strict scrutiny, but nonetheless requires the justification to be "exceedingly persuasive" and "genuine, not hypothesized or invented post hoc in response to litigation." *U.S. v. Virginia*, 518 U.S. 515, 533 (1996).

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Standards of Constitutional Review

Rational Basis Scrutiny (Other Classifications)

- “Rational basis” is the lowest standard of constitutional review, and is applied to classifications based on characteristics other than race/ethnicity and sex.
- Rational basis requires only that the purpose or interest be “legitimate,” and that the means be “rationally related” to the accomplishment of that interest.
- “The U.S. Supreme Court has consistently recognized that the educational benefits associated with increasing student diversity – improved teaching and learning and preparation for a 21st Century workforce, for instance -- are as a matter of law compelling establishes an important baseline to guide higher education institutions in their framing of related institutional goals.”³

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Statutory Considerations

- Federal and State civil rights laws applicable to Illinois public higher education institutions include, but are not limited to:
 - Title II of the Americans with Disabilities Act
 - Section 504 of the Rehabilitation Act of 1973
 - Title IX of the Education Amendments of 1973
 - Title VI of the Civil Rights Act of 1964
 - The Illinois Human Rights Act

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Compliance with Civil Rights Laws

- These laws protect students from discrimination based on a legally protected characteristic in various aspects of education, including but not limited to:
 - Admission/enrollment
 - Academics
 - Participation in extracurricular activities and athletics
 - Tuition/financial aid
 - Discipline

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Legally Protected Categories

Race	Sex	Color	Religion
National Origin	Citizenship Status	Ancestry	Age
Order of Protection Status	Marital Status	Physical or Mental Disability	Pregnancy
Sexual Orientation	Gender Identity or Expression	Genetic Information	Military or Veteran Status

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Legal Considerations for Equity Planning

- In July of 2019, the members of the Higher Education Civil Rights Coalition developed “The Civil Rights Principles for Higher Education,”¹ a set of policy recommendations that were created to achieve equity and protect civil rights in Higher Education.
- These Principles closely mirror the priorities of many campuses with regard to Diversity, Equity, and Inclusion (“DEI”) initiatives.

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Legal
Considerations
for Equity
Planning

PRINCIPLE #1 **Civil Rights Enforcement**

PRINCIPLE #2 **Access**

PRINCIPLE #3 **Persistence and Completion**

PRINCIPLE #4: **Affordability**

PRINCIPLE #5: **Campus Climate**

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Legal
Considerations
for Equity
Planning

PRINCIPLE #1: CIVIL RIGHTS ENFORCEMENT

Ensure robust implementation and enforcement of civil rights laws throughout the institution and ensure that federal funds are directed only toward programs that do not discriminate based on any legally protected category.

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Legal Considerations for Equity Planning

PRINCIPLE #1: CIVIL RIGHTS ENFORCEMENT

Tips:

- Develop and implement comprehensive non-discrimination policies and procedures.
- Identify the individual(s)/office(s) responsible for managing the college's compliance efforts with applicable civil rights laws, and ensure such individual(s) have received adequate training on the pertinent legal requirements.
- Publicize/distribute the college's non-discrimination policies/procedures and information about the office/department responsible for the college's compliance efforts.

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Legal Considerations for Equity Planning

PRINCIPLE #2: ACCESS

Remove barriers to enrollment and promote meaningful access for historically marginalized students, (including students of color, Native students, low-income students, English learners, students with disabilities, adult learners, pregnant and parenting students, opportunity youth, immigrant students, LGBTQ students, homeless students, youth in or exiting foster care, currently incarcerated individuals, and individuals who have had prior contact with the justice system), and address barriers in access to a post-secondary education caused by historic and present-day race-based exclusionary policies and practices.

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Legal
Considerations
for Equity
Planning

PRINCIPLE #2: ACCESS

Tip: Review admission requirements for specialized/limited enrollment programs with an eye toward promoting uniformity/consistency to the extent practicable.

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Legal Considerations for Equity Planning

PRINCIPLE #3: PERSISTENCE AND COMPLETION PROGRAMS

Increase student persistence in and completion of postsecondary education.

- Policies and programs that are designed to provide student support (academic or otherwise) should also comport with relevant federal principles. As a practical matter, the legal defense of retention programs that qualify as race- or ethnicity-conscious often will be challenging to defend in cases where the educational benefits or opportunities offered are not provided, broadly, to all students demonstrating comparable need (regardless of their race or ethnicity background).
- Where analysis finds that all other factors (e.g., parental educational attainment, standardized test scores, grades, etc.) being equal, minoritized racial group membership or gender, statistically result in a lower success rate at the institution, it may be justifiable to focus targeting efforts for students of the relevant race and gender, so long as the program is inclusive, with participation by other students who demonstrate need.

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Legal
Considerations
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Planning

PRINCIPLE #4: Affordability

Make college affordable for low-income students and ensure that federal student aid takes into account the totality of a student's economic circumstances and full college cost.

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Legal Considerations for Equity Planning

PRINCIPLE #4: Affordability

Tip: Evaluate financial aid and scholarship offerings and requirements, noting that any restrictions based on race or sex may be required to satisfy strict/intermediate scrutiny.

- Neutral alternatives often advance institutional diversity goals associated with mission-driven aims and may also foster a more inclusive and broadly diverse student body, without triggering strict or intermediate scrutiny.
- Alternative Ideas: a record of inclusive conduct and multicultural skills and socio-economic status. (There are many others, such as urban and rural geographic background, zip code, first in family to attend a four-year college or pursue STEM fields, other significant disadvantage in pursuit of or success in higher education, an institution's surrounding community, etc.)

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Legal Considerations for Equity Planning

PRINCIPLE #5: Campus Climate

Ensure a safe and inclusive campus climate free of harassment and violence, including sexual harassment, gender-based harassment and violence, and other forms of harassment and violence based on race, national origin, religion, disability, or any combination thereof, and ensure that campus programs, policies, and practices are inclusive, equitable, fair, and advance the safety and well-being of all students

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Legal Considerations for Equity Planning

PRINCIPLE #5: Campus Climate

Tips:

- Develop and implement comprehensive policies and procedures for addressing sexual and other forms of harassment.
- Ensure that staff members tasked with investigating reports or complaints of alleged harassment are properly trained.
- Notify students of how to report alleged harassment and of the college's grievance procedure for investigating complaints of alleged harassment.
- Document the college's response to reports and other compliance efforts.
- Consider administering climate surveys to identify areas for improvement.

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Legal Considerations for Equity Planning: Non-Native English Speakers

English Language Learners (ELLs)

- At the K-12 level, schools are obligated to ensure that ELLs have equal access to education.
- EL identification and support at the college level are far less regulated than in K-12 education. Rather, at the postsecondary level, colleges and universities generally have their own ways of identifying ELs, usually based on the SAT Critical Reading and TOEFL scores, or initial placement tests.

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Legal Considerations for Equity Planning: English Language Learners

ADA and English Language Learners (ELLs) – Best Practices

Determine college specific English proficiency levels

Ensure students are being evaluated on their knowledge of the course content, rather than on their English language abilities.

EL is not a disability designation under the ADA or Rehabilitation Act, and therefore supports are not guaranteed by Federal Law in the same manner as accommodations for students with disabilities.

- But note: Because of the challenges that are universally experienced when trying to learn a new language, it can be difficult to determine if a student is simply struggling with the language, or if the student *also* has learning disabilities.
- Colleges should ensure that non-native English speakers have the same opportunity to request disability-related accommodations as native English speakers.

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Questions?



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thank you!

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