

# NEW RULES



2024  
TITLE  
IX

## 2024 Final Title IX Regulations

*June 14, 2024*

Emma Hempel

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# MEET YOUR FACILITATORS



## Andrea Stagg

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Director of Consulting Services, Andrea Stagg has extensive experience consulting, writing and training on Title IX, Equity & safety. Andrea was Deputy General Counsel and Director of Government Relations & Compliance at Barnard College and was counsel to three colleges within the SUNY system. She has worked with federal and state legislators to develop state laws and follow best practices in campus safety and sexual harassment prevention.



## Emma Hempel

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Emma Hempel is a Title IX Coordinator and facilitates Title IX and Equity training for Grand River Solutions. Emma serves as a Title IX Coordinator for both large and small public and private institutions across the country. Emma also specializes in and leads seminars on the Intersection of Sexual Violence and the LGBTQ Community, and Sex, Gender, Identity and Practice.





# GETTING TO KNOW YOU



1. Name
2. Pronouns
3. Where you live
4. How long have you been doing Title IX work?

*Submit your responses in one message using the chat feature!*

# AGENDA

2024

Department of Education

Title IX Regulations

Big Picture + Overview

Scope and Geography

Coordinator Obligations

Procedural Changes

Employee Reporting Obligations

Training Requirements

Intersection with Other Applicable Laws

# ACTION PLAN

Review your policy landscape

Update/adopt compliant policies

Retrain your implementation staff

Prepare to train all employees

Refresh community-facing materials





# **BIG PICTURE & OVERVIEW**

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# The History of Title IX

## A Timeline

TIX is Passed

1998 Gebser v Lago Vista

1999 Davis v Monroe

2011 Dear Colleague Letter ("DCL")

2016 DCL on Transgender Students

2017 DCL and Q&A

2021 Q&A

2022 Proposed Rule:   
:s

1972

1999

2011

2020

2024

1979 Cannon v University of Chicago

1992 Franklin v Gwinnett

2001 Revised Sexual Harassment Guidance

2014 Q&A

2015 VAWA Amendments to the Clery Act

2017: 2011 DCL guidance & 2016 DCL on Transgender Students Rescinded

2020 Trump Regulations

2020 Withdrawal of 2001 Guidance

April 2024 Biden Regulations

Aug 1 Implementation Date



# WHAT DOES THE FUTURE HOLD?

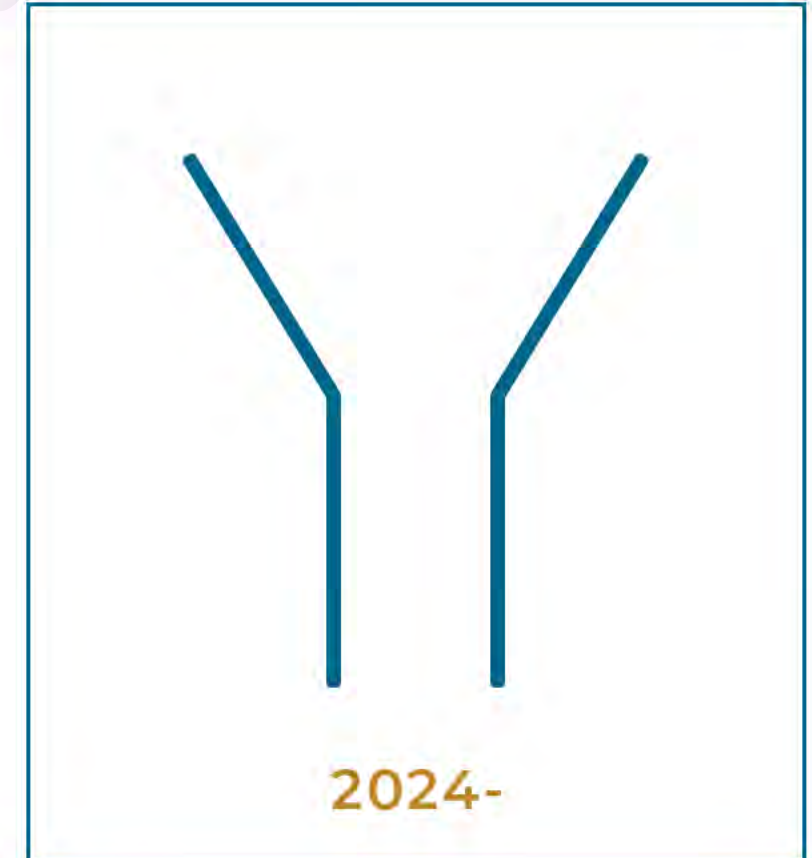
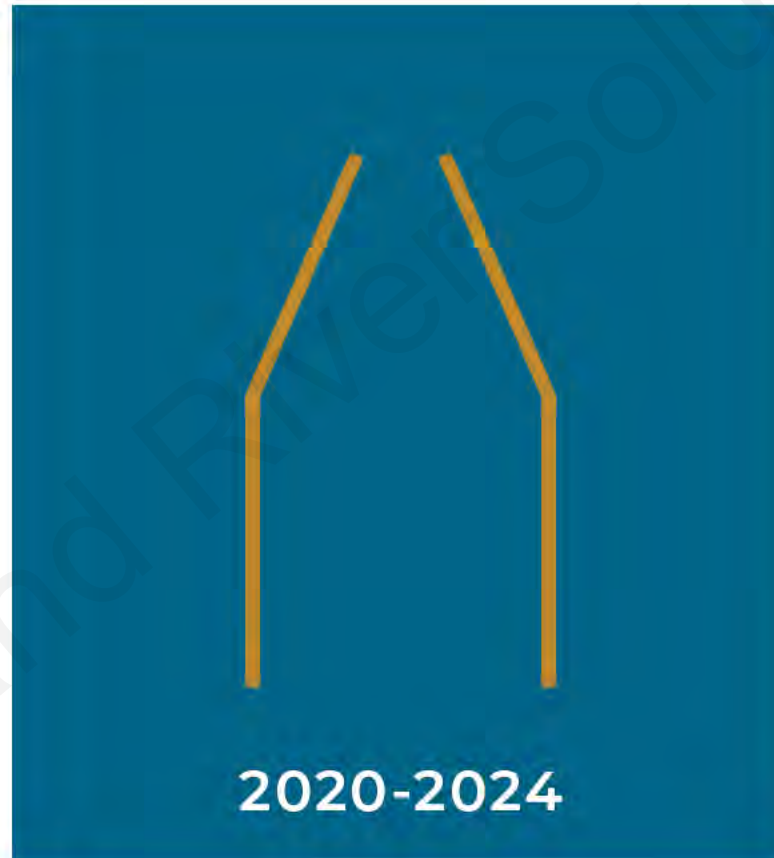
CHANGED FOR THE BETTER;  
BUT WILL THEY BE  
CHANGED...FOR GOOD?





# BIG PICTURE: SHIFTING THE TIX FUNNEL SHAPE

Top of Funnel: Access to TIX Policy  
Bottom of Funnel: Process Due



# MAIN CHANGES FOR 2024

Creates framework to respond to sex discrimination other than sexual harassment

Updated training required for all employees

Not strictly limited by geography; impact matters

Expands employee reporting obligations

Requires prompt and effective action to end sex discrimination and prevent its recurrence

# TIMING



- Implementation date is August 1, 2024.
- No retroactivity
- "The final regulations apply only to sex discrimination that allegedly occurred on or after August 1, 2024."
- "With respect to sex discrimination that allegedly occurred prior to August 1, 2024, regardless of when the alleged sex discrimination was reported, the Department will evaluate the recipient's compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sex discrimination occurred."



# SINCE 1975...



Recipients have been required to . . .

- Notify students (defined to include persons who have gained admission) of their nondiscrimination policies and to resolve student complaints of sex discrimination.
- Maintain nondiscrimination notices and adopt and publish grievance procedures
- Prohibit discrimination based on pregnancy or related conditions
- Prohibit sex-based distinctions based on parental, family, or marital status
- Prohibit discrimination on the basis of sex in employment
- Balance equity with promptness

# SCOPE AND APPLICABILITY

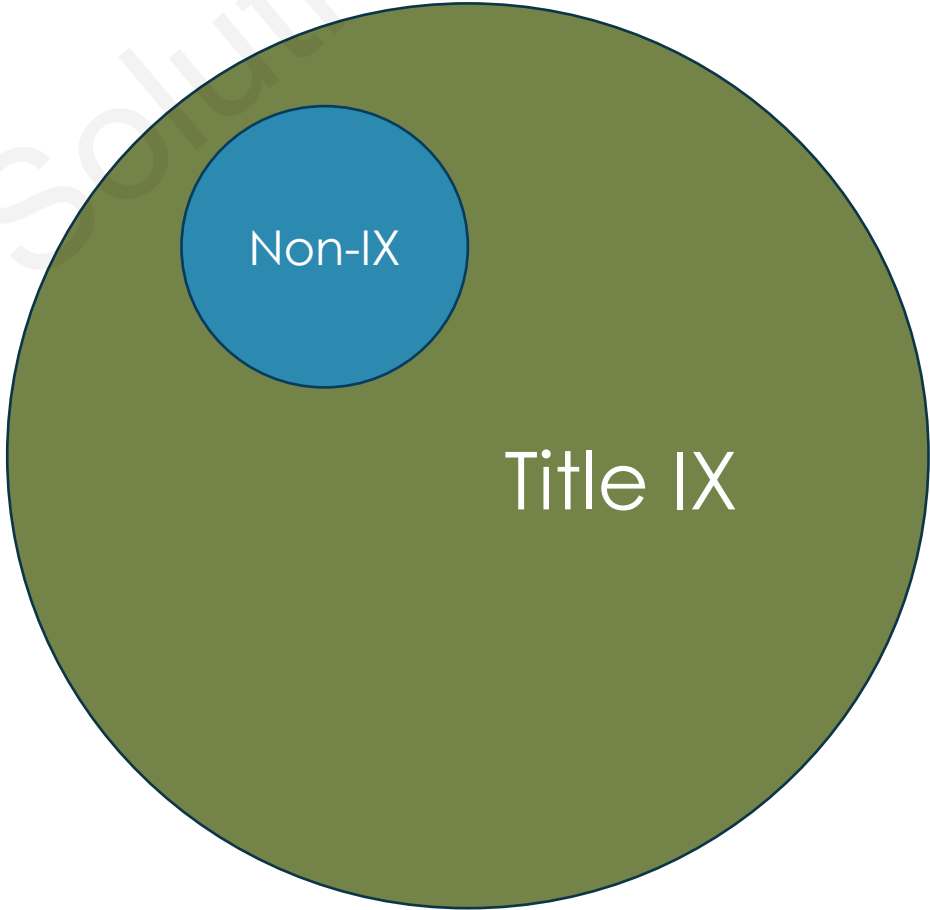


# WHICH POLICY APPLIES?

2020



2024





# WHAT IS COVERED BY 2024 TITLE IX?

- All sex discrimination – this is an umbrella term
- Not only sexual harassment (2020 amendments only addressed sexual harassment)



# DEFINITIONS – WHAT IS SEX DISCRIMINATION?

- **Discrimination on the basis of sex** includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.
- Sex-based harassment is a form of sex discrimination and means sexual harassment, and other harassment *on the basis of sex, that is:*
  - Hostile environment sexual harassment
  - Quid Pro Quo
  - Domestic violence, dating violence, sexual assault, and stalking





# LGBTQIA+

Preamble:

*Price Waterhouse/Oncale/Bostock* and Title VII → Title IX Regulations

Sex stereotypes → to treat differently on basis of sexual orientation/gender identity is to discriminate on the basis of sex

*“Indeed, Bostock’s reasoning dictates that, even assuming that ‘sex’ refers to ‘biological distinctions between male and female,’ discrimination against a person because they are gay or transgender is, in part, discrimination on the basis of sex.”*

**§106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.”**





## DEFINITIONS – WHAT ARE "SEX CHARACTERISTICS"?

The Preamble defines "sex characteristics" as "physiological sex-based characteristics."

Sex discrimination based on a person's physiological sex characteristics may include discrimination based on a person's anatomy, hormones, and chromosomes associated with male or female bodies.

ED states Title IX also covers discrimination based on (undefined) "intersex" traits [It adopts this term instead of "differences of sex development"].

ED identifies that "inappropriate disclosure of medical information about a student's intersex traits could constitute prohibited discrimination based on sex characteristics."



# EXAMPLES--WHAT ARE "SEX CHARACTERISTICS"?

- A faculty member requests a fan for their office because they are going through menopause and having hot flashes. Is this a Title IX issue?
- A faculty member responds to student emails and requests to meet within two days. They have an "open-door" policy. However, the faculty member refuses to respond to or meet with a transgender student in their class. Is this a Title IX issue?





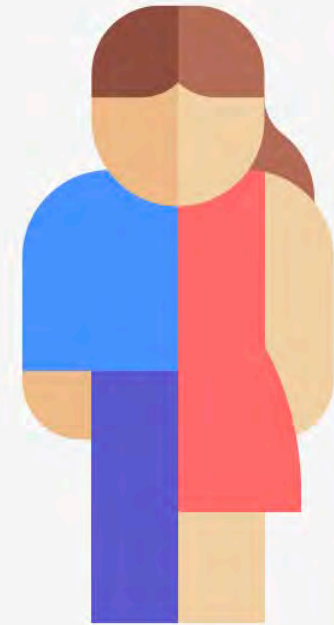
# DEFINITIONS – "SEX STEREOTYPING"

Preamble: "fixed or generalized expectations regarding a person's aptitudes, behavior, self-presentation, or other attributes based on sex."



# EXAMPLES-SEX STEREOTYPES

- A senior academic advisor discourages a student, who is a man, from applying to a new math fellowship available because the advisor thinks the opportunity should prioritize women in STEM. Is this a sex stereotype?
- After a student who is a woman gets a buzz cut, a peer begins referring to her as "man" as much as possible, saying, "Hey man" or "how are you, man," indicating that her haircut makes her appear as a man. Is this a sex stereotype?



Freepik

# DE MINIMIS TEST



De Minimis test for sex-separated programs/activities:

- Otherwise permissible sex separation is consistent with Title IX as long as it is carried out in a manner that does not impose more than de minimis harm.
- Examples: locker and bathrooms; appearance codes
- Denying a transgender student "access to a sex-separate facility or activity consistent with that student's gender identity" would be more than a de minimis harm

# HOSTILE ENVIRONMENT SEX-BASED HARASSMENT HAS 5 COMPONENTS

- The conduct is
- (1) unwelcome,
- (2) sex-based,
- (3) subjectively and objectively offensive, and
- (4) so severe or pervasive
- (5) that it results in a limitation of or denial of a person's ability to participate in or benefit from the education program or activity.

**Must have all 5 above!**



# HOSTILE ENVIRONMENT SEX-BASED HARASSMENT FACTORS TO CONSIDER IN DECISION-MAKING

- (1) the degree to which the conduct affected the complainant's ability to access the recipient's education program or activity;
- (2) the type, frequency and duration of the conduct;
- (3) the parties' ages, roles within the recipient's education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- (4) the location of the conduct and the context in which the conduct occurred; and
- (5) other sex-based harassment in the recipient's education program or activity.



# IS THIS HOSTILE ENVIRONMENT SEX-BASED HARASSMENT?

You receive a 3rd party report from a Coach who heard some rumors about a student on their team, Dani.

Dani is constantly receiving sexually explicit photos via Snapchat from another teammate. Dani has asked them to stop numerous times. When they are at practice together, this individual often approaches Dani to make jokes of a sexual nature. This has happened about 3 times so far this week. Dani usually laughs it off and continues on with practice.

Why? Why not? What other information would you need to know?

# DEFINITION OF A COMPLAINANT? STUDENT?

- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination
  - Student is broad - "Admitted"
- or
- A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX **and** who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination.



§ 106.2

# DEFINITION OF A COMPLAINANT?

- A person does not need to continue to be participating or attempting to participate in the program or activity at the time they make a complaint.
- This is a change from the current regulations as amended in 2020.

§ 106.2



# WOULD THIS FALL UNDER TITLE IX?

- A recently admitted individual emails the Title IX Office sharing they were sexually assaulted last week by one of your students. They want the campus to take action.
- A nonaffiliate attends a football game on your campus and is taunted based on their gender identity by a student. The nonaffiliate does not plan to attend any future campus programs or events.





# FIRST AMENDMENT BALANCING

- "One stray remark" is not "pervasive"
- A statement "of one's point of view on an issue of debate and with which another person disagrees, even strongly so, is not the kind or degree of conduct that implicates the regulations."
- But "sex-based conduct that occurs on multiple occasions and is so persistent that, for example, it limits another student's ability to complete assigned coursework at the student's typical level of performance" might meet the standard.
- ED encourages consultation with "settled components of Title VII sexual harassment law" for guidance on the meaning of "severe or pervasive"

# FIRST AMENDMENT BALANCING: LOOKING TO TITLE VII

- "whether conduct constitutes unlawful harassment depends on all the circumstances and is only unlawful under federal EEO law if it creates a hostile work environment."
- "conduct is not necessarily unlawful merely because it is based on a protected characteristic and that conduct also must alter a term, condition, or privilege of employment, typically by creating a hostile work environment."
- "conduct that occurs outside the workplace, including on social media accounts, and that does not target the employer or its employees and is not brought into the workplace generally will not have an impact on the workplace and therefore will not contribute to a hostile work environment."

# QUID PRO QUO

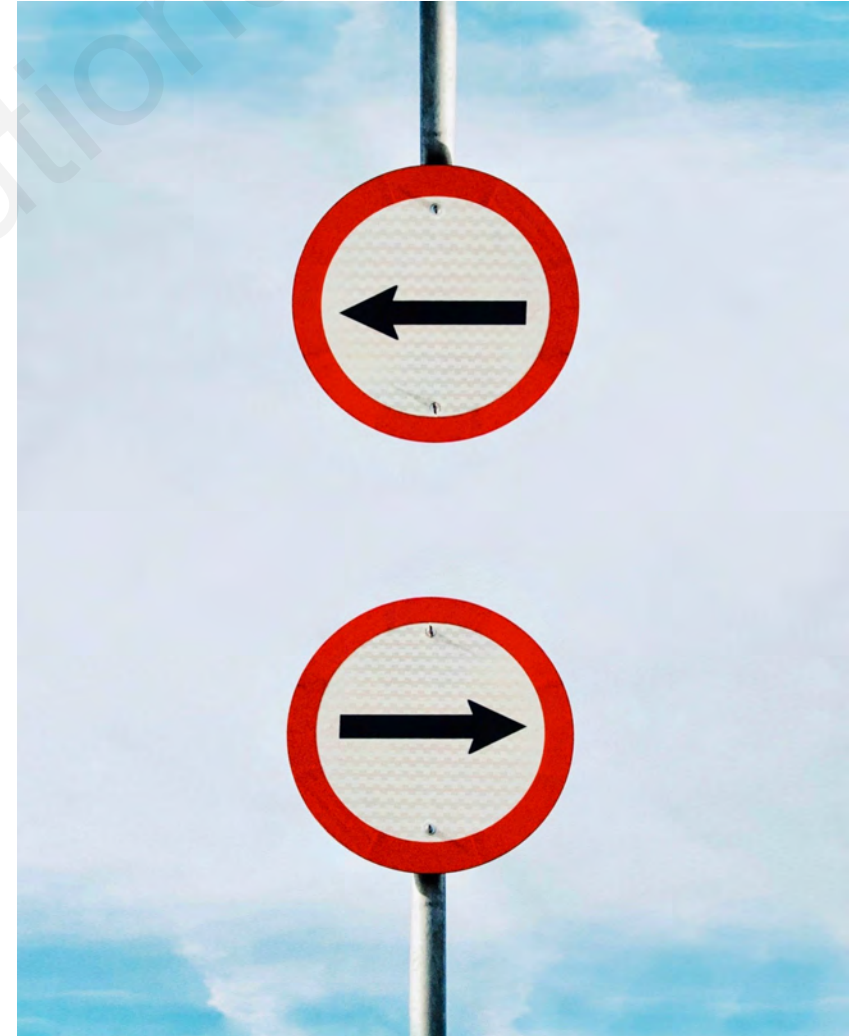
- Not just employees, also agents or other persons authorized by the recipient to provide an aid, benefit, or service under the program or activity





# QUID PRO QUO EXAMPLE (OR NOT)

- Your institution hires a vendor to run your dining services. Charlie swipes the student's ID's to allow them in to use their meal plan. Charlie is employed by the vendor. Charlie strikes up a friendship with Jackie and offers that if Jackie engages in sexual activity with Charlie, Charlie will wave Jackie through the entrance without a swipe. This will allow Jackie to get through the semester without running out of meals.
- Jackie thinks this is a great deal, and has always thought Charlie was cute.



# “SPECIFIC OFFENSES” (VAWA)

Now (actually) conformed to  
VAWA Amendments to the Clery  
Act...



# DATING VIOLENCE

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
  - I. The length of the relationship;
  - II. The type of relationship; and
  - III. The frequency of interaction between the persons involved in the relationship”

# DOMESTIC VIOLENCE

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse of the victim,
- B. by a person with whom the victim shares a child in common,
- C. by a person who is cohabitating with, or has cohabitated with, the victim as a spouse or intimate partner,
- D. by a person similarly situated to a spouse of the victim under the domestic or family violence laws of the jurisdiction in which the violence occurred, or
- E. by any other person against an adult or youth victim who is protected from that person’s acts under the domestic or family violence laws of the jurisdiction in which the crime of violence occurred.



# SEXUAL ASSAULT

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”



# SEX OFFENSES

“An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation”

# SEX OFFENSES

**A. Rape** — The penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the victim.

**B. Sodomy** — Oral or anal sexual intercourse with another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

**C. Sexual Assault With an Object** — The use of an object or instrument to unlawfully penetrate, however slightly, the genital or anal opening of the body of another person, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental or physical incapacity.

# SEX OFFENSES

**D. Fondling** — The touching of the private body parts of another person for the purpose of sexual gratification, without the consent of the victim, including instances where the victim is incapable of giving consent because of his/her age or because of his/her temporary or permanent mental incapacity.

**E. Incest** — Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by law.

**F. Statutory Rape** — Nonforcible sexual intercourse with a person who is under the statutory age of consent.



# STALKING

- The term stalking means “engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - A. fear for the person’s safety or the safety of others; or
  - B. suffer substantial emotional distress.



# PARENTAL, FAMILY, OR MARITAL STATUS

Regs address the treatment of applicants, students:

- Cannot adopt a policy, practice, or procedure, or take any employment action "concerning the current, potential, or past parental, family, or marital status of a student [or employee] or applicant that treats persons differently on the basis of sex" or "is based upon whether an employee or applicant is the head of household or principal wage earner" in their family unit



# PARENTAL, FAMILY, OR MARITAL STATUS

- Can an institution offer married men financial aid, but as a practice decline to offer financial aid to women who are married?
- May a department exercise a preference to only hire women who do not have kids?





# PREGNANCY



# NOT NECESSARILY NEW, BUT CLARIFIED

§ 106.40

- Depending on state law, not necessarily new, but clarified
- More people will find new for students
- Reasonable Modifications
- Voluntary leaves or separate but comparable programs
- Lactation spaces
- Comparable treatment to other medical conditions



# PREGNANCY AND RELATED CONDITIONS

- Since 1975, "pregnancy **and** related conditions" includes "pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom[.]"
- Section 106.2 (2024), "pregnancy **or** related conditions" includes:
  - (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
  - (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation; or
  - (3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or related medical conditions.

# NOTICE AND REQUIRED RESPONSE

§ 106.40

When a student\* informs any employee of the student's pregnancy or related conditions...the employee promptly:

- (1) provides the Title IX Coordinator's contact information and
- (2) informs that person that the Title IX Coordinator can coordinate specific actions to prevent sex discrimination and ensure the student's equal access....





# PREGNANCY ACCOMMODATIONS

- if a recipient provides an applicant who is recovering from back surgery an extension of time for a medically necessary period to submit a required application essay, it must do the same for a student who is recovering from childbirth



# TERMINATION OF PREGNANCY

- Consistent with the definition included in 1975 regulations: the end of pregnancy in any manner, including, miscarriage, stillbirth, or abortion

Examples of potential discrimination from Preamble:

- a high school may not exclude a student from participating in the student council solely because the student has had an abortion
- a college may not deny a professor a raise just because it learned she planned to have an abortion

# NOW WHAT?

- A student in a science program asks a faculty member if they can be excluded from a series of lab sessions involving in chemicals that may be harmful for pregnant people. The instructor is insistent that they must complete these labs in order to not fail the class:
  - o As Title IX Coordinator, what are your next steps?
  - o Who else are you bringing into the conversation?
  - o How can we be creative to ensure equal access for this student?



# PERCEIVED CHARACTERISTICS

- "Perceived" characteristics are also covered under Title IX
- Making discriminatory decisions based on assumptions about someone's sexual orientation or pregnancy status is prohibited

Example:

- If a professor refuses to allow a student to participate in a clinical course based on the mistaken belief that the student is pregnant, that professor may be discriminating against a student based on sex and denying the student access to the recipient's education program or activity based on the stereotype that a pregnant student is not physically capable of participating in the course or will not be as dedicated due to the demands of pregnancy.



# GEOGRAPHY



# DOES LOCATION MATTER?

- What is the geographic scope of your disciplinary authority?
  - o For students?
  - o For employees?
- Hostile Environment Sex-Based Harassment:
  - o Less about *where* (some of the) conduct occurred
  - o More about the impact in the program or activity
  - o OK if includes considering conduct that occurred elsewhere, outside P&A, online, even outside the US





# GEOGRAPHY

2020

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

Building owned or controlled by institution

Building owned or controlled by recognized organization

Places where we have substantial control over respondent and context

2024

Inside U.S.

On-campus

Off-campus if part of P&A

May include online conduct

Buildings? Substantial control?

Flexibility to focus on disciplinary authority

Conduct outside of Title IX jurisdiction may contribute to hostile environment

# EXPANDED SCOPE – OFF CAMPUS CONDUCT?

- Generally, not required to respond to alleged sex discrimination off-campus unless it is "within the program or activity"
- BUT "within the program and activity" includes "conduct that is subject to the recipient's disciplinary authority"
- How clear is your scope of disciplinary authority?





# DISCIPLINARY AUTHORITY - EXAMPLES

- "The University may address off-campus behaviors when the Dean of Students determines that the off-campus conduct affects a University interest. University interests include but are not limited to health and safety, protection of rights or property of others and promoting the University's mission."



# DISCIPLINARY AUTHORITY - EXAMPLES

- "Under limited circumstances, this policy may also apply in instances where the conduct occurred outside of the education program or activity."



# EXPANDED SCOPE: STUDY ABROAD? NOT EXACTLY

- No obligation under Title IX to address sex discrimination occurring outside of the United States.
- Permitted to respond as appropriate under the code of conduct or other policies pertaining to study abroad programs.
- If conduct that occurred on study abroad program contributes to a hostile environment in the US, that conduct may be relevant and considered by the campus so that it can address the sex discrimination occurring within its program in the US.





# CONSIDER ONLINE HARASSMENT

- ED does **not** expect institutions "to monitor the online activity of students or faculty"
- U.S. Supreme Court recently recognized a public K-12 institution's authority over off-campus online speech (*Mahanoy*)
- ED expects a response when an employee learns:
  - about conduct among students that took place on social media or other platforms and
  - that reasonably may have created a sex-based hostile environment in the recipient's education program or activity
- **Remember:** It's about impact and disciplinary authority, not where misconduct happens





**Will you address  
under Title IX?**



# EXAMPLE: CONDUCT ON STUDY ABROAD

- Student A reports that she was sexually assaulted by Student B while studying abroad, that Student B has been taunting her with sexually suggestive comments since their return to campus and that, as a result, Student A is unable to concentrate or participate fully in her classes and activities.
- Will you address under Title IX? Why or why not?



# EXAMPLE: ONLINE CONDUCT

- Off-campus, a student shares intimate images online of another student, without consent, through private messaging apps.
- Off-campus, students post highly offensive messages on Instagram visible to many students.
- Will you address under Title IX? Why or why not?



# EXAMPLE: PUBLIC AWARENESS EVENTS

Town holds a *Take Back the Night* event, attended by institutional officials. Does information about sex-based harassment learned at this event need to be reported to the Title IX Coordinator?

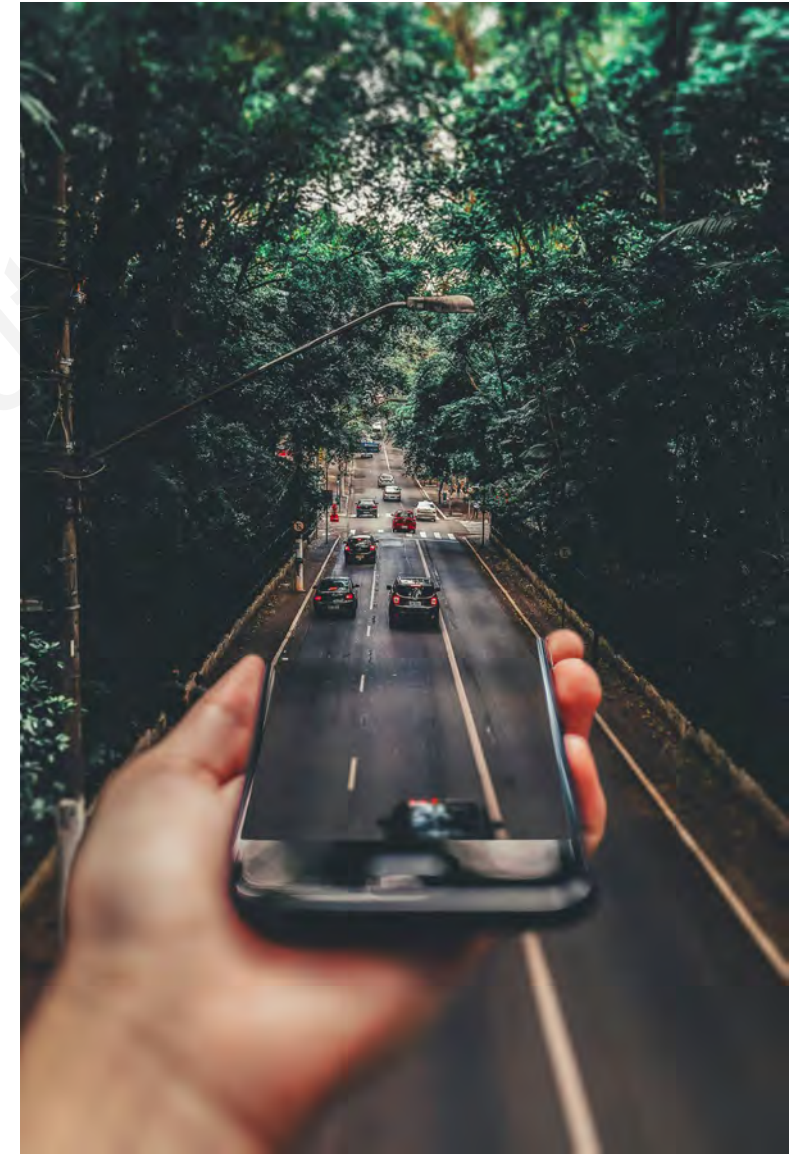
What other information is needed?



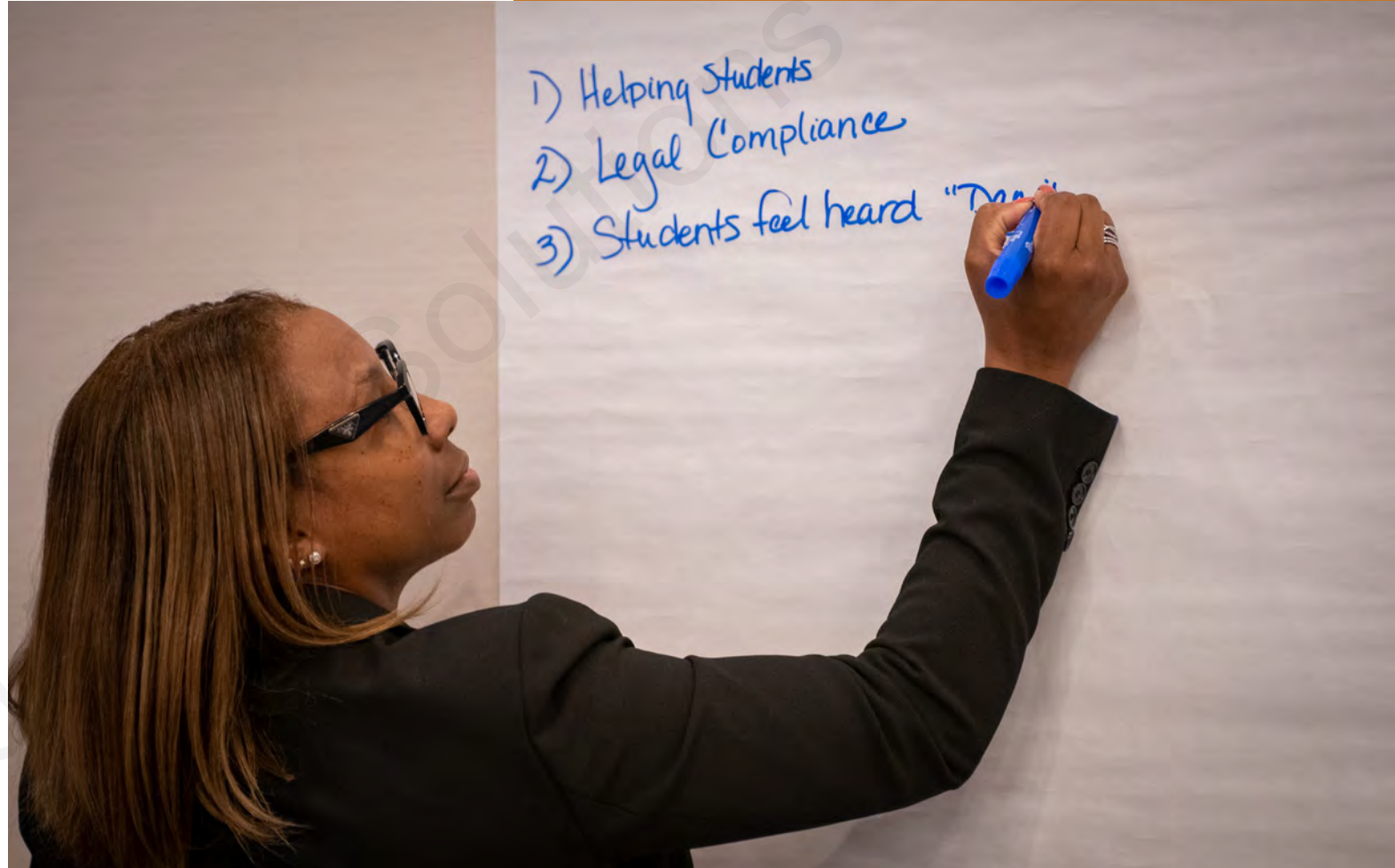


# EXAMPLE: STALKING

- A student sends frequent disturbing text messages to another student and puts an AirTag on their car, which lets them monitor their travel.
- Will you address under Title IX? Why or why not?



# ROLE OF THE COORDINATOR



# ABOUT THE COORDINATOR

- One person must be designated as coordinator, with "ultimate oversight" over the Title IX responsibilities
- Can have deputies
- Can delegate to other designees



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*This is a basic compliance construct.*



# CONNECTING PREVENTION & RESPONSE

- To promptly and effectively end any sex discrimination in its education program or activity, prevent its recurrence, and remedy its effects.
- Non-discrimination notice must be posted widely.
- Addressing disclosures and reports.





# TITLE IX COORDINATOR REQUIREMENTS

- Treat the parties equitably
- Offer and coordinate supportive measures
- Notify complainant about resolution options (alternative and grievance procedures)
- Decide whether to initiate an investigation if a Complainant doesn't want to



# WHO'S WHO?

- DM can be TIXC or Investigator
- TIXC can be the Investigator and/or DM
- TIXC can be the Informal Resolution Facilitator, but then can no longer be DM or Investigator (if parties exit IR)
- TIXC can only serve in multiple roles if they can do so without conflict of interest or bias.



# SUPPORTIVE MEASURES

Additionally, under § 106.44(g)(4), a school must provide the parties a timely opportunity to seek a modification or reversal of a decision to provide, deny, modify, or terminate supportive measures applicable to them.



# INFORMAL RESOLUTION CHANGE

## 2020 regulations:

1. Do not offer to resolve allegations via IR without a formal complaint; and,
2. Never resolve an allegation that an employee sexually harassed a student via IR.

## Final 2024 regulations:

1. No complaint required before starting IR; and,
2. Do not offer IR if the complaint includes allegations that an employee engaged in sex-based harassment of an elementary school or secondary school student or such a process would conflict with Federal, State or local law.



# STUDENTS WITH DISABILITIES

- 106.8(e)
- K-12 versus higher education
- K-12: Mandatory: Must work with one or more members of the IEP team; likely involvement of parent or guardian
- Higher education: Permissive: Coordinator may consult, as appropriate, with office that serves students with disabilities to determine how to comply with Rehab Act Section 504
- Consider whether "equitable" treatment will require modifications of grievance procedure (and if those options will be "articulated" in policy as required)



# RESOLUTION UPDATES –GRIEVANCE PROCEDURES

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# GRIEVANCE PROCEDURES





# DEFINITION OF A COMPLAINT

2020

Signed Formal Complaint Required



2024

- No "magic words"
- Oral or written
- "Objectively understood" by a reasonable person as a request to investigate
- But, informal process can begin before a complaint (after a disclosure)

§ 106.2



# STANDARD PRACTICES

- Conduct an intake meeting
- Listen and take notes on what is shared.
- Review supportive measures and options for resolution.

If Complainant indicates verbally they want to move forward, then the Coordinator ***in writing:***

- Summarize allegations as it relates to your policy AND
- Confirm their request for an investigation.



# COORDINATOR INITIATED COMPLAINT (RARE)

1. The complainant's request not to proceed with initiation of a complaint;
2. The complainant's reasonable safety concerns regarding initiation of a complaint;
3. The risk that additional acts of sex discrimination would occur if a complaint is not initiated;
4. The severity of the alleged sex discrimination, including whether the discrimination, if established, would require the removal of a respondent from campus or imposition of another disciplinary sanction to end the discrimination and prevent its recurrence;
5. The age and relationship of the parties, including whether the respondent is an employee of the recipient;
6. The scope of the alleged sex discrimination, including information suggesting a pattern, ongoing sex discrimination, or sex discrimination alleged to have impacted multiple individuals;
7. The availability of evidence to assist a decisionmaker in determining whether sex discrimination occurred; and
8. Whether the recipient could end the alleged sex discrimination and prevent its recurrence without initiating its grievance procedures under § 106.45, and if applicable § 106.46.

# NOTICE, DISMISSAL, CONSOLIDATION

- Familiar notice requirements
- New "permissive" dismissal options, including when it's determined the conduct alleged, if proven, would not be sex discrimination or harassment
- Consolidation allowed for conduct arising from "same facts or circumstances," including cross-complaints



**106.45 (CHILL)**

**VS.**

**106.46 (LESS CHILL)**

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# REQUIRED PROCEDURAL ELEMENTS

- 106.46 is the process for adjudicating any sex-based harassment complaint in which a **postsecondary** student is either a complainant or a respondent
- 106.45 is for everything else (under Title IX)
- Why do different procedures apply?
  - Type of violation
  - Status of party
  - Potential sanction

# "ADEQUATE, RELIABLE, AND IMPARTIAL" INVESTIGATIONS

- Opportunity to present evidence
- Opportunity to suggest witnesses
- Evidence review
- Notice of meetings and proceedings



"equal opportunity" to "access" relevant and not impermissible evidence

# RELEVANCE

- "Relevant" means "related to" the allegations of discrimination.
- **Questions** are relevant "when they seek evidence that may aid in showing" if the alleged discrimination occurred.
- **Evidence** is relevant "when it may aid a decisionmaker in determining" if the alleged discrimination occurred.
- "Not relevant" evidence from 2020 is now called "impermissible."
- "Sexual interests" of Complainant added to familiar 2020 exclusions.



# CREDIBILITY ASSESSMENT

- DM must be able to question parties and witnesses to assess their credibility "to the extent" credibility is disputed and relevant to an allegation of sex discrimination.
- No definition, but example from ED: Credibility cases are those when the determination relies on testimonial evidence, and must choose to between competing narratives to resolve a case.
- DM may place less or no weight on statements based on refusal to answer relevant question.\*



# SEX-BASED HARASSMENT: POSTSECONDARY STUDENTS

## Option 1:

- Investigator or DM holds "individual meetings" with parties and witnesses, and must ask relevant questions posed by parties.
- Parties must be provided with recording or transcription of that meeting and given enough time to prepare questions for follow-up interviews, if needed.

## Option 2:

- Recorded live hearing, where DM can ask questions proposed by parties.

## Option 3:

- Recorded live hearing, where Parties' advisors can question any party or witness.
- Parties cannot do the questioning, and advisor of institution's choice must be provided if needed.

# OPTION 1

- Individual recorded meetings with parties and witnesses.
- Parties get transcripts or recordings of meetings and can suggest follow up questions to be asked in follow up meetings (which must also be recorded....).
- No limits described in the regulations about the number of follow ups permitted or required.

# OPTION 2

- Live hearing with trauma-informed questioning; only through the hearing officer.
- Decisionmaker determines whether the question is relevant and not otherwise impermissible before asking the question.
- Maintain records of questions asked, modified, and not asked.

# OPTION 3

- Live hearing; parties are present the whole time, witnesses only present during their testimony.
- The advisor of choice for each party (not the party), asks all direct, follow up, and or cross-examination questions of parties and witnesses.
- Decision maker determines relevance and not otherwise excluded in real time after each question. May require changes to question (but all parties have heard the question as asked).

***The process you  
have been running  
since August 2020!***



# APPEALS

Must offer:

- Appeal of a dismissal
- Appeal for the outcome of sex-based harassment involving a student
- For other sex discrimination: offer an appeal if consistent with what is offered for "comparable proceedings."

# EMPLOYEE REPORTING OBLIGATIONS

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# WHERE WE WERE THEN, ARE NOW, AND ARE GOING

- 2011: responsible employees
  - Broad
  - Limited confidentiality
- 2020: officials with authority
  - Narrow
- 2024: NEW

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# NPRM, IT WAS THIS:

• IS THE EMPLOYEE CONFIDENTIAL?

YES, no reporting is required.

IF NO, does the employee have the authority to institute corrective measures?

IF YES, report to TIXC.

IF NO, does the employee have responsibility for administrative leadership, teaching, or advising?

IF YES, is the information about a student being subjected to conduct that may constitute sex discrimination under TIX?

IF YES, report to TIXC.

IF NO, TWO OPTIONS:  
1. Report to TIX, **or**  
2. Provide the TIXC's contact information and information about how to report sex discrimination to any person who provides the 'ee with the information about conduct that may constitute sex discrimination under TIX.

IF NO, is the information about an employee being subjected to conduct that may constitute sex discrimination under TIX?

IF YES, TWO OPTIONS:  
• Report to TIX, **or**  
• Provide TIXC contact information and information about how to report sex discrimination to any person who provides the employee with the information



# NOW IT IS THIS: NOTIFICATION REQUIREMENTS UNDER 106.44(C)(2)

DOES AN EMPLOYEE HAVE TO TAKE ANY ACTION BECAUSE OF WHAT THEY LEARNED ABOUT CONDUCT THAT MAY CONSTITUTE SEX DISCRIMINATION UNDER TIX TO THE TIXC?  
(FOR POSTSECONDARY)

IS THE EMPLOYEE CONFIDENTIAL? EITHER BECAUSE OF THEIR JOB DUTIES, OR...

YES, no reporting is required.

IF NO, does the employee have either (1) the authority to institute corrective measures, or (2) responsibility for administrative leadership, teaching, or advising? [Category 1]

IF YES, report to TIXC.

IF NO, TWO OPTIONS ARE PERMITTED:

1. Report to TIXC, **or**
2. Provide the TIXC's contact information and information about how to report sex discrimination to any person who provides the 'ee with the information about conduct that may constitute sex discrimination under TIX. [Category 2]

# RESPONDING AND NOTIFICATION

There are three types of confidential employees:

1. Employees whose communications are privileged or confidential under Federal or State law and
2. Employees who are designated as "confidential" by the institution for the purpose of providing services to persons related to sex discrimination.

[and one more ...]

# CONFIDENTIALITY FOR RESEARCHERS

## 3. New additional definition of confidential employees:

- Research covered by IRB on sex discrimination (institution's or another IRB)
- Confidential with respect to that study (perhaps not in other roles)
- They do not have to share the information that other confidential resources do



# RESPONDING AND NOTIFICATION

- **Confidential employees** must share the following:
  - That they are confidential, including when they are not required to notify the Title IX Coordinator about conduct that reasonably may constitute sex discrimination;
  - How to contact the recipient's Title IX Coordinator and how to make a complaint of sex discrimination; and
  - That the Title IX Coordinator may be able to offer and coordinate supportive measures, as well as initiate an informal resolution process or an investigation under the grievance procedures.



# CONFIDENTIAL EMPLOYEES

While not in the Regulations, beware the dangers of designating anyone who is not privileged as being a "confidential employee."

Don't do it.

Seriously.

# RESPONDING AND NOTIFICATION

- **Category 1:** must notify the Title IX Coordinator when the employee has information about conduct that reasonably may constitute sex discrimination under Title IX or the regulations.
- **Category 2:** must either (1) notify the Title IX Coordinator, or (2) provide the contact information about the Title IX coordinator **and** state that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.

# RESPONDING AND NOTIFICATION

The institution can decide not to offer discretion, and instead to simplify by picking (1) or (2) as the rule for their institution.

- **Category 2:** must either
- (1) notify the Title IX Coordinator, or
- (2) provide the contact information about the Title IX coordinator **and** state that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.

# RESPONDING AND NOTIFICATION

You can say:

**Every employee must report sex discrimination they observe or learn about to the Title IX coordinator.**

If you are exempt from this requirement, we will tell you specifically, and you will be someone who is privileged/confidential by law, or someone who we designated as a private resource to provide services to people who experienced sex discrimination.



# WHAT SHOULD HAPPEN NEXT?

A student tells their academic advisor, "My professor makes all of these jokes belittling people who are queer. I don't even think they know I am queer, but I don't want to go to class anymore."

- Should the academic advisor notify the Title IX Coordinator? Why or why not?
- Would this constitute hostile environment sex-based harassment? What else would you need to know before making this determination?



# TRAINING REQUIREMENTS

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# WHAT DOES YOUR CURRENT TRAINING LANDSCAPE LOOK LIKE?

- In person?
- Online?
- Hybrid?
- Through a third-party vendor?



# TRAINING

2020

- One time
- Coordinators, investigators, decisionmaker, informal resolutions
- Core TIX Response
- Offer training?

2024

- Annual
- Coordinators, investigators, decisionmaker, informal resolutions, appeals, second look
- All employees (but different)
- Complete training!
- (more) consistent with VAWA



# UPDATED TRAINING REQUIREMENTS

- When employees change roles
- Additional topics for those implementing grievance procedures, specific to their roles.
- No required training for students (who aren't also employees); but VAWA!



# CORE RESPONSE TRAINING

1. Title IX Coordinators
2. Title IX Investigators
3. Title IX Decisionmakers
4. Title IX Appeals Officers
5. Title IX Informal Resolution Officers
6. Title IX Second Look Personnel

- Obligation to address sex discrimination in P&A (1, 2, 3, 4, 5, 6)
- Scope of Violative Conduct (1, 2, 3, 4, 5, 6)
- How to conduct Informal (1, 5)
- How to serve impartially (1, 2, 3, 4, 5, 6)
- Specific Position Responsibilities (1, 2, 3, 4, 6)
- Recordkeeping (1)
- Any other training necessary (1)
- Notification and information requirements (1, 2, 3, 4, 6)
- 106.45 and 106.46 procedures (1, 2, 3, 4, 6)
- Relevant meaning (1, 2, 3, 4, 6)

# MAKE AVAILABLE V ACTUALLY TRAINED

- All employees – not merely offered.

*“The Department appreciates the opportunity to clarify that § 106.8(d) requires a recipient to train all employees, as opposed to just making training available. While the Department recognizes that some commenters may find this burdensome, the requirement to train all employees serves the important purpose of ensuring that all employees understand their role in the recipient's compliance with its Title IX obligations and understand their responsibilities when they obtain information about conduct that may reasonably constitute sex discrimination under Title IX.” 33550*



# DON'T SLEEP ON VAWA TRAINING: RESPONSE



- Annual training for all officials who conduct any part of a prompt, fair, and impartial response from the initial investigation to the final result. At minimum, this includes investigators, hearing officers, and appeal officers (likely intake):
  - Issues related to dating violence, domestic violence, sexual assault, and stalking
  - How to conduct an investigation and hearing process that protects the safety of victims and promotes accountability



# STUDENT FACING TRAINING?

- What do the new Title IX Regulations require that we train students on?



# BUT...DON'T SLEEP ON VAWA TRAINING: PREVENTION

**Education programs shall include “primary prevention and awareness programs for all incoming students and new employees,” which shall include:**

- statement prohibiting domestic violence, dating violence, sexual assault, & stalking;
- definition of domestic violence, dating violence, sexual assault, & stalking in the applicable jurisdiction;
- definition of consent, in reference to sexual activity, in the applicable jurisdiction;
- safe and positive options for bystander intervention that may be carried out by an individual to prevent harm or intervene in cases of a risk of domestic violence, dating violence, sexual assault, or stalking;
- information on risk reduction to recognize warning signs of abusive behavior and how to avoid potential attacks; and
- ongoing prevention and awareness campaigns for students and faculty on all of the above (subject to regulations and ED guidance).

# WHAT IS THE TRAINING CONTENT?

- **Start with the practical, what makes logical sense.**
- **People implementing these grievance procedures need training on how to perform the role**
- **Everyone else also need training to understand their response obligations**
  - Reporting to the coordinator
  - Giving information to disclosing parties if they are confidential or exempt from internal reporting
  - They need to know how to respond to a student who directly informs them of pregnancy or related conditions
  - They need to know what sex discrimination is in order to recognize it!

# TRAINING FOR ALL EMPLOYEES MUST ANSWER THESE QUESTIONS

- What is the institution's obligation to address sex discrimination in its education programs and activities?
- What is sex discrimination? Including discrimination on the basis of sex, and sex-based harassment
- What do employees need to do?
  - When they know about sex discrimination
  - When a student informs them that they are pregnant



# SO LONG, FAREWELL, AUF WIEDERSEHEN

- No more requirement to post training to your website
  - Still must make it publicly available for inspection upon request
  - Does not mean you have to provide a copy
  - Nothing prohibits posting



# INTERSECTION WITH OTHER LAWS

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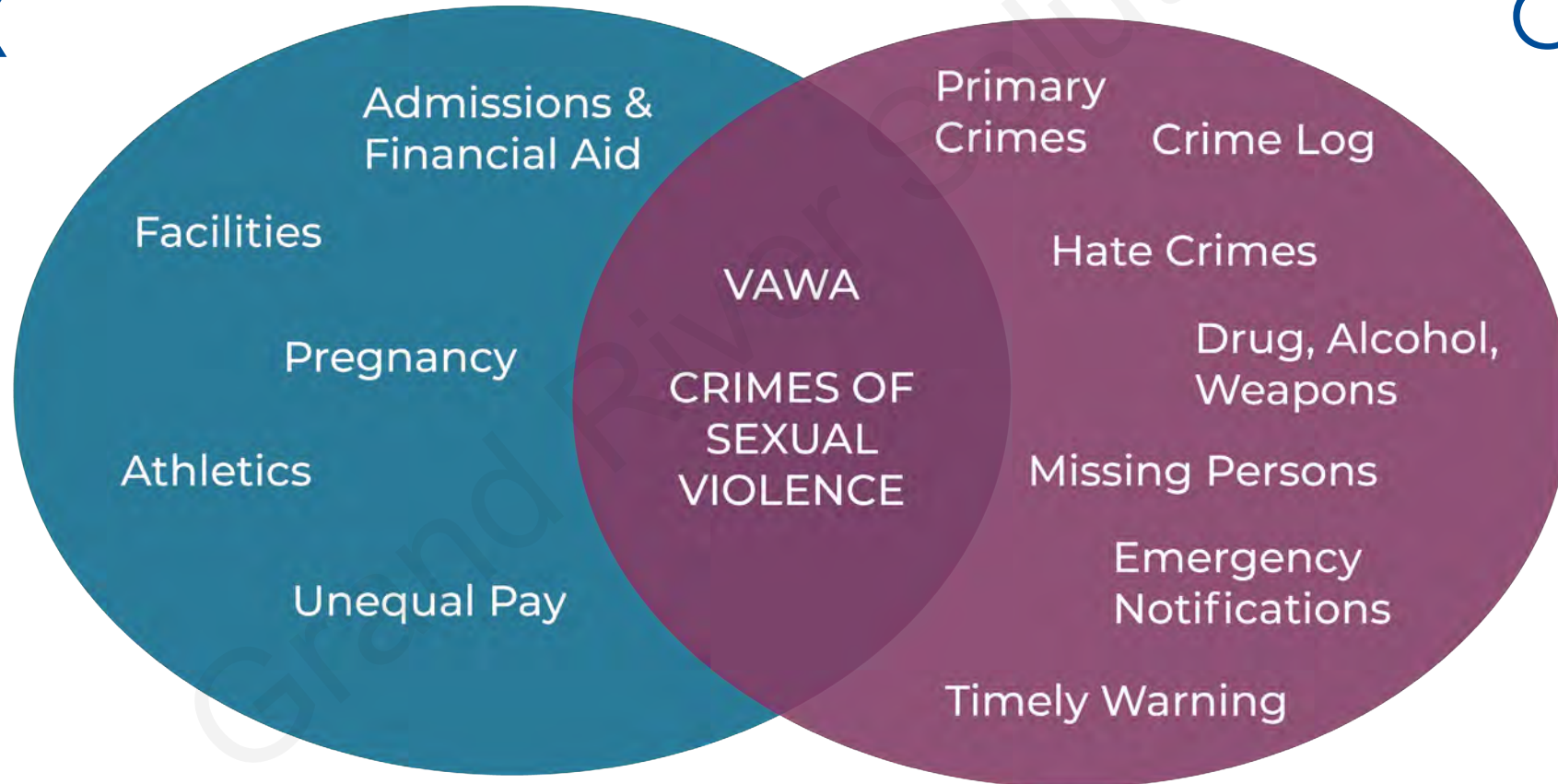


# OVERLAPS

The Clery Act is not Title IX  
2013 VAWA amended the Clery Act (they are not separate).

Title IX

Clery Act



# VAWA AND CLERY RESPONSE

stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement

- Title IX (historically) and VAWA response are not based on geography, they are based on identity (usually).
- Title IX (current) response and Clery counting are based on geography



# VAWA AND INVESTIGATION/DETERMINATION PROCEDURES

- Fair disciplinary procedures (institutional response)
- Fair, prompt, impartial investigation and resolution
- Procedures must be conducted by “officials” who receive “annual training.”
- Advisors of choice
- Must publish the standard of evidence (whatever it may be)
- List all sanctions for VAWA crimes

# REQUIRES PUBLICATION OF ALL AVAILABLE SANCTIONS

- \*Not a range\* (ignore prior OCR statements, since withdrawn, that institutions can use a range).
- Must specifically list all available sanctions for:
  - Domestic violence; Dating violence; Sexual assault; Stalking
  - **For suspension, list ALL possible suspension lengths.**
  - **These standards apply to student discipline and faculty/staff discipline.**

# PROVIDING WRITTEN NOTICE

Must notify victim in writing about:

Sanctions, protective measures;

Evidence preservation;

How to report the offense, on and off campus, and assistance with reporting;

Availability of orders of protection, no contact orders, etc.;

Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available;

Procedures for institutional disciplinary proceedings.

# PROVIDING WRITTEN NOTICE

- Written policy provided to all students and employees about awareness programs, confidentiality, support and resources, and disciplinary procedures
- Simultaneous written notice of outcome





# VIOLENCE AGAINST WOMEN ACT

## In short:

- Training, training, training...
- Awareness programs
- Bystander intervention training
- Ongoing prevention and awareness campaigns
- Primary prevention programs
- Risk reduction training (this is the one I often see not included)



# VAWA CRIMES, TITLE IX VIOLATIONS, AND STATE LAW

- Thinking about overlaps: some state laws and Title IX adopt Clery definitions (sort of); some use very different definitions (especially for sexual harassment)
- Multiple obligations may stem from a specific report; whose role to address each element of the federal and state obligations?
- Note also overlap with Clery Act hate crime definitions
- Who does it apply to? Only between employees? Only involving employees?
- Importance of record-keeping, information-sharing, and getting on same page

# FMLA, PUMP ACT, PWFA, SIMILAR STATE LAWS

- Intersection with Title IX and pregnancy or related conditions, including lactation, leaves of absence related.
- For student-employees, consider all applicable laws.



# LITIGATION PENDING

- Ongoing injunction on ED "NOI" implementing *Bostock*
- Several new lawsuits challenging 2024 Title IX regulations brought by at least 15 states

## Issues:

- Whether *Bostock* applies in Title IX context
- Whether ED had authority to issue these Title IX regulations
- Whether ED can preempt state laws concerning LGBTQIA+ rights



# HELPFUL LINKS

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The Federal Register notes that the Final Rule is scheduled to be officially published on 4/29/2024.

- <https://www.federalregister.gov/public-inspection/2024-07915/nondiscrimination-on-the-basis-of-sex-in-education-programs-or-activities-receiving-federal>

## Example Messages

- <https://www.k-state.edu/today/announcement/?id=96607>
- <https://www.uc.edu/about/equity-inclusion/Regulations-2024.html>
- <https://oie.jhu.edu/oie-announcements/release-of-final-title-ix-regulations-april-19-2024/>
- <https://msu.edu/issues-statements/2024-04-19-university-statement-on-federal-title-ix-regulations>

The Department has not provided a firm update on the date that the separate TIX Athletics Regulations will be released, but media have reported that this Regulation may not come out until after the next federal election (this may or may not be accurate).

- <https://www.washingtonpost.com/education/2024/03/28/title-ix-trans-athletes-biden/>

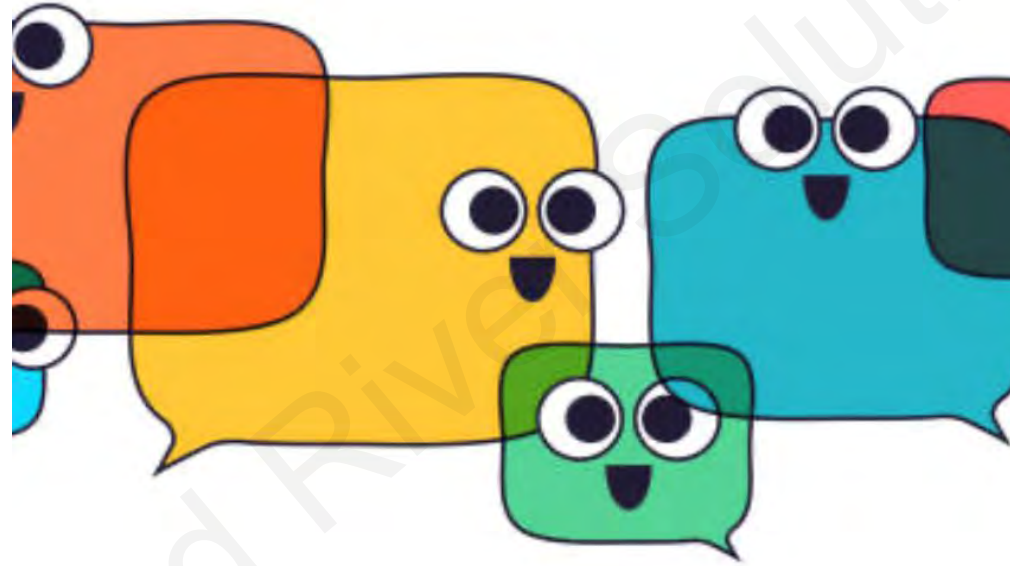
River Connect article on the Violence Prevention (mostly student facing) elements of VAWA

- <https://riverconnect.app/news/623643>

**WHAT'S NEXT?**



# LET'S DISCUSS



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