



RAPID RESPONSE SUMMARY SESSION

2024 Final Title IX Regulations

April 25, 2024

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MEET YOUR FACILITATORS



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THIS IS 90 MINUTES...

- This is not legal advice!
- So much more to come, and much that will be unanswered
- Join us in THE RIVER CONNECT



ACTION PLAN

Message to your
community

Activate your
stakeholder teams

Identify groups to be
trained

Prepare timeline

Review and revise
policies and
procedures

Ensure people are
trained

AGENDA

2024

Department of Education

Title IX Regulations

Big Picture

Overview

Definitions and Terms

Pregnancy

Role of the Coordinator

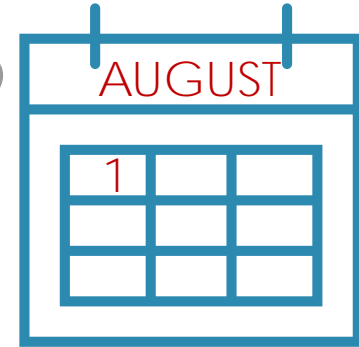
Scope

Grievance Procedures

BIG PICTURE



FIRST THING'S FIRST - 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."

FIRST THINGS FIRST – WHAT IS THIS ABOUT?

Creates framework to respond to sex discrimination other than sexual harassment

Consistent with previous regs and guidance in many ways, including pregnancy discrimination

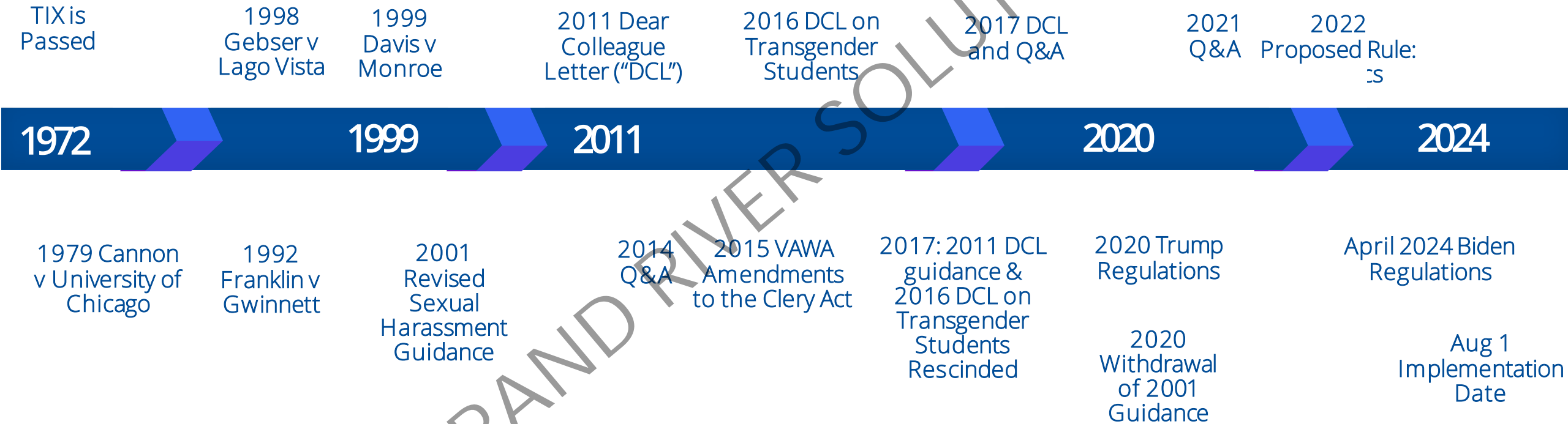
Not strictly limited by geography; impact matters

Expands employee reporting obligations

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

The History of Title IX

A Timeline



HERE WE GO AGAIN? NOT QUITE.

- Similar timeframe from publication to implementation
- Last time: May 2020, pandemic
- Where are we now?
- How big are these changes?
- Consistency with past guidance, including 2020
- Discretion, based on the actual facts before you



Where's Waldo Gathering

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

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
- No return of the exclusionary rule (was in NPRM)
 - "A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible."
- No recordkeeping requirement relating to actions taken meet obligations under the sections relating to pregnancy
- No "actual knowledge" or responses that are merely "not deliberately indifferent"



See Ya Goodbye GIF By The Rodgers &
Hammerstein Organization

SOME (NOT ALL) OF WHAT'S OUT AND WHAT'S IN

Out from 2020

- Addressing narrowly defined sexual harassment
- Signed formal complaints
- Mandatory dismissals
- Rigidity
- Informal after Formal
- Directly-related
- Required live, direct cross by advisor

In for 2024

- Addressing broadly defined sex discrimination
- Oral or written complaints
- Permissive dismissals
- Flexibility
- Informal Anytime
- Relevant
- Three paths to assess credibility

OTHER THEMES TO NOTE

- First Amendment references
- Don't sleep on VAWA
- Examples in the Preamble
- Fewer footnotes
- Making the language and information more accessible



DEFINITIONS & TERMS



TO NAME A FEW...

Sex Discrimination

Complainant

Hostile Environment

Complaint

LGBTQIA+

Student

Quid Pro
Quo

Supportive
Measures &
No Contact
Orders

Informal
Resolution

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

DEFINITION OF A COMPLAINANT? STUDENT?

- Student is broad - "Admitted"
- A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination, 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

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.

NO CONTACT ORDER CLARIFICATION

Supportive measures may include...

- Current 2020 regs: references mutual restrictions on contact between the parties
- Proposed 2022: references restrictions on contact between the parties
- Final 2024: references restrictions on contact applied to one or more parties

Preamble

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 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
 - Specific Offenses (VAWA)

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 DECISIONMAKING

- (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.

QUID PRO QUO

- Some updates here
- Not just employees, also agents or other persons authorized by the recipient to provide an aid, benefit, or service under the program or activity
- Students??? Maybe, fact-specific
- Preamble discussion of unwelcome—consider consensual relationship policies



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



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....



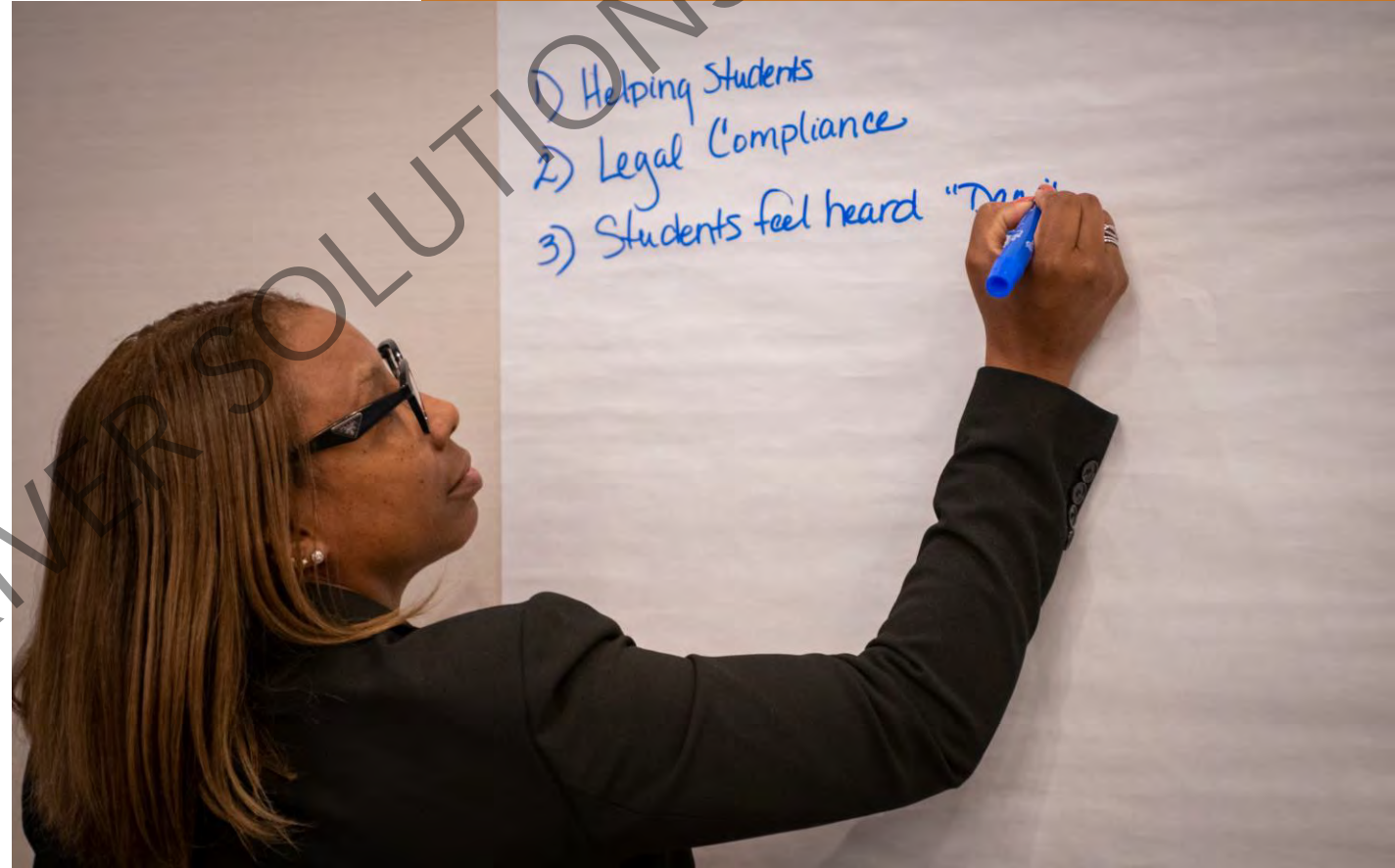
PRIVACY OF PREGNANCY



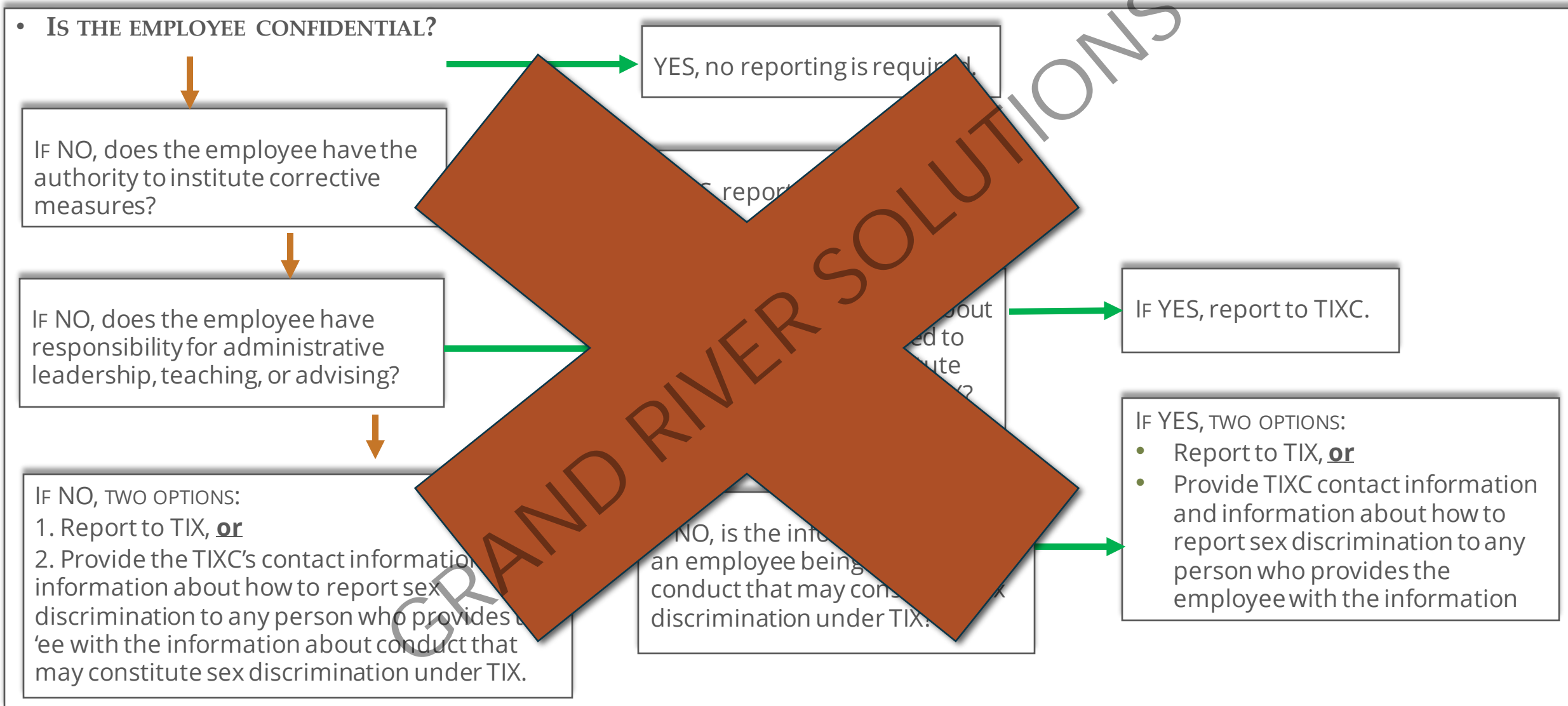
Preamble

- Dobbs is not about equal access to education or employment.
- A policy or action that specifically targets individuals who have received abortion care for adverse treatment may be discrimination.
- Regs require action when a person “informs” an employee of a student’s pregnancy or related conditions. “The requirement that the employee act only when directly informed in this manner balances a student’s interest in privacy and autonomy with the necessity of preventing or eliminating sex discrimination in a recipient’s education program or activity.”

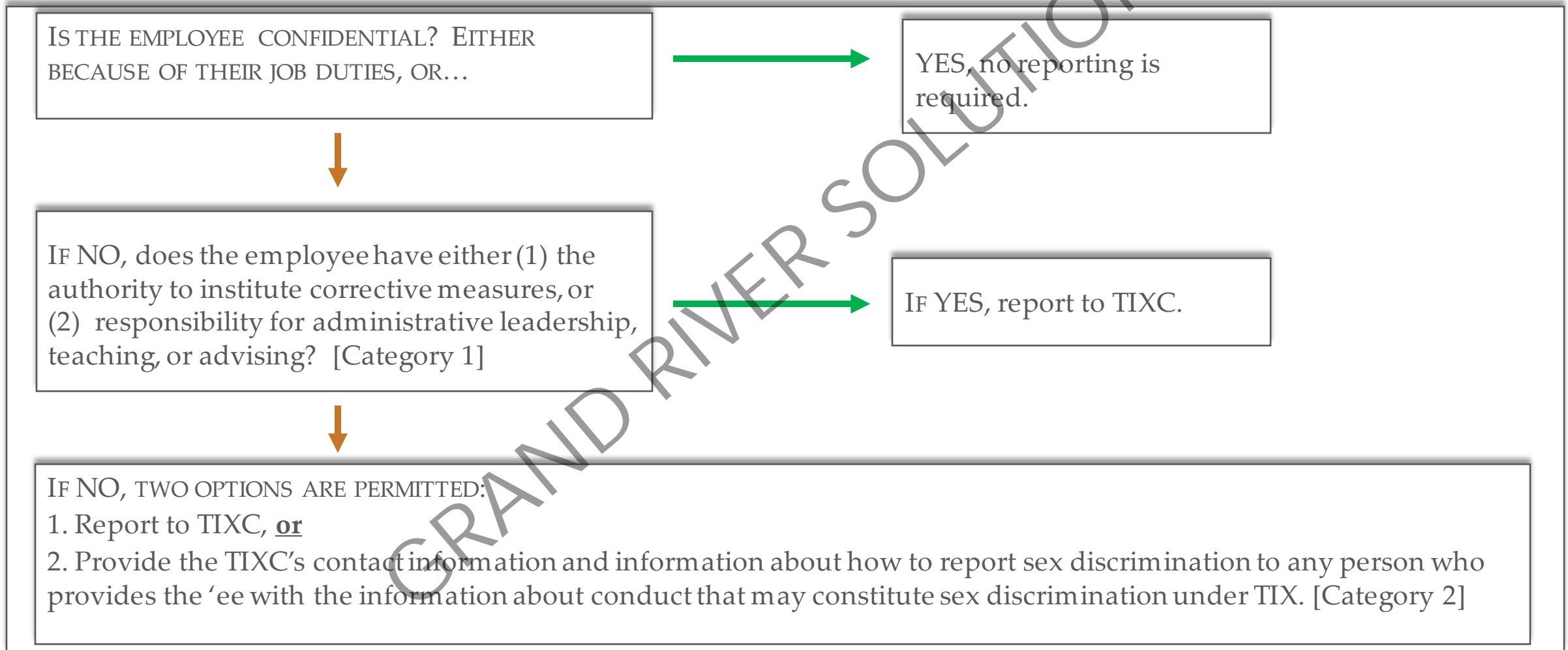
ROLE OF THE COORDINATOR



NPRM, IT WAS THIS:



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)



RESPONDING AND NOTIFICATION

- Confidential employees must share:
 - 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.

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 (1) provide the contact information about the Title IX coordinator and (2) state that the Title IX Coordinator will provide information about the grievance procedures, supportive measures, and how to make a complaint of sex discrimination.

UPDATED TRAINING REQUIREMENTS

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



COORDINATOR INITIATED COMPLAINT

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.

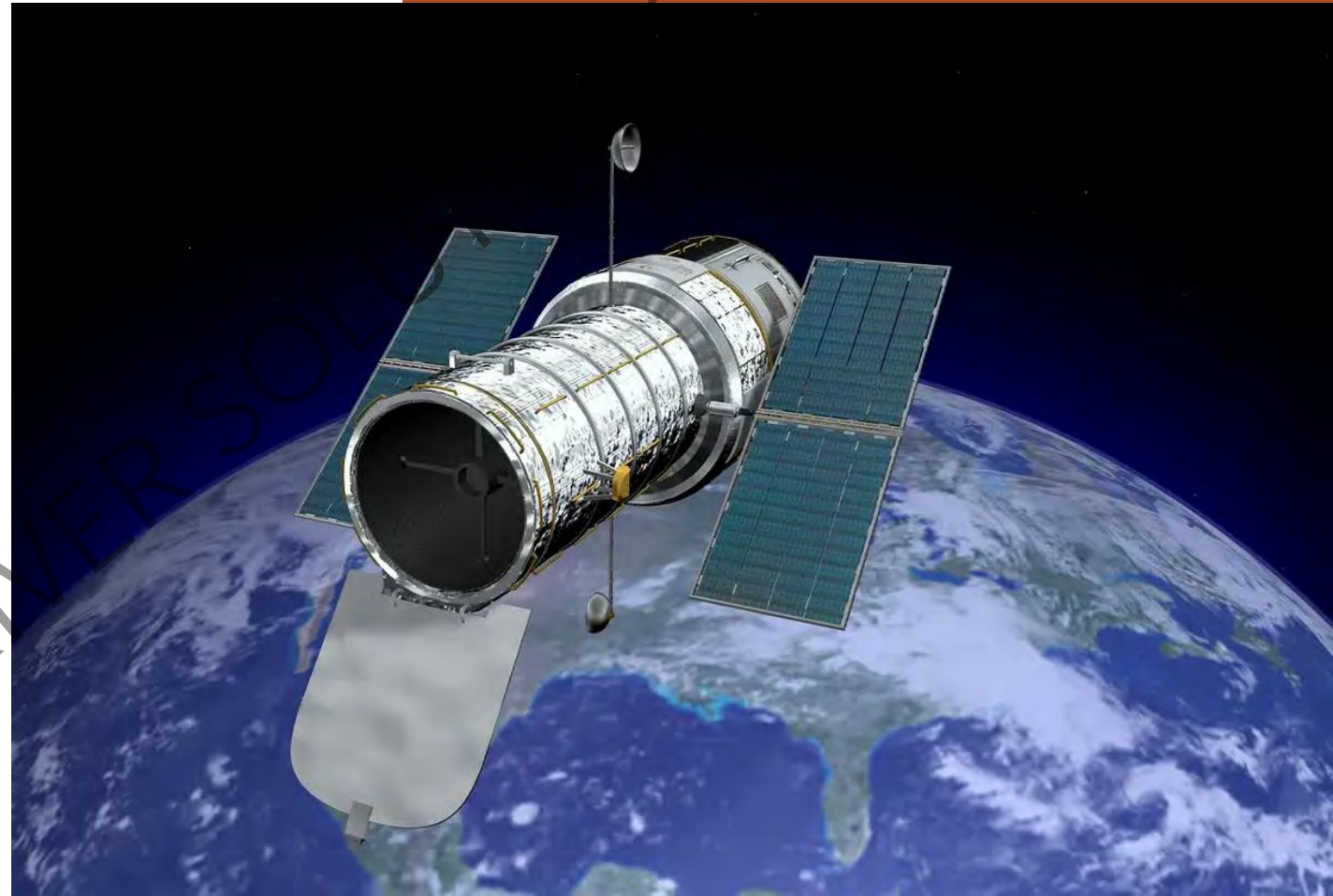
CONNECTING PREVENTION & RESPONSE

- 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.
- ED identifies "Troubling gap": When an employee knows about possible sex discrimination, but the school might not redress it unless the Title IX Coordinator learns about it or a formal complaint is filed.

STUDENTS WITH DISABILITIES

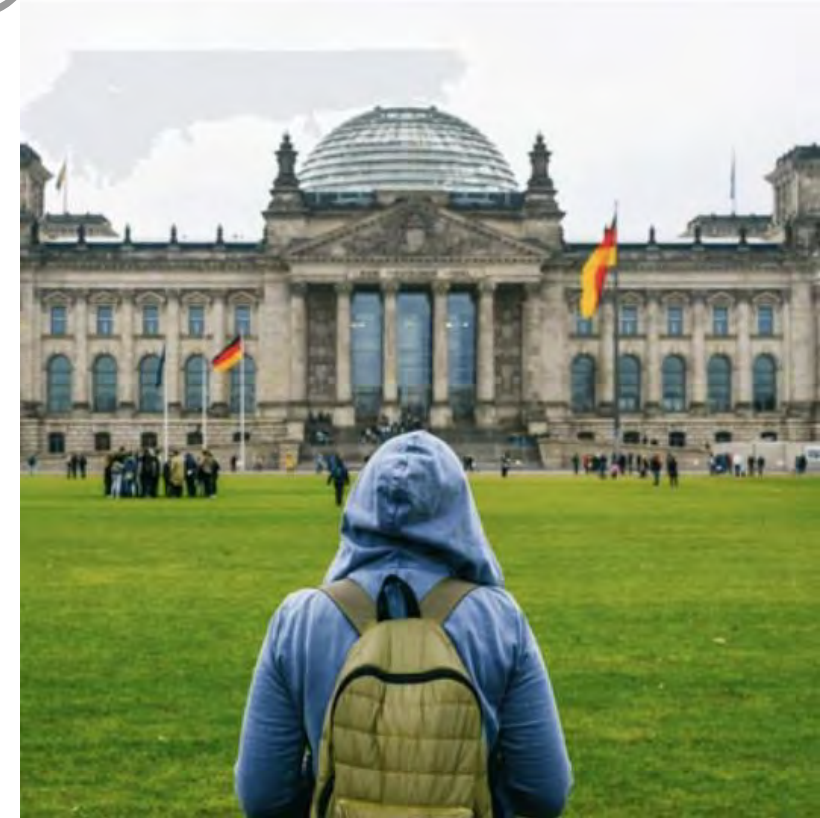
- 106.8(e)
- K-12 versus higher education
- K-12: Mandatory: Must work with one or more members of the IEP team; likely involvement of parent or guardian
- Higher education: Permissive: Coordinator may consult, as appropriate, with office that serves students with disabilities to determine how to comply 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)

SCOPE



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.



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"



DOES LOCATION/PARTICIPATION MATTER?

Hostile Environment Sex-Based Harassment:

- Less about *where* (some of the) conduct occurred
- More about the impact in the program or activity
- OK if includes considering conduct that occurred elsewhere, outside P&A, online, even outside the US

Complainant definition:

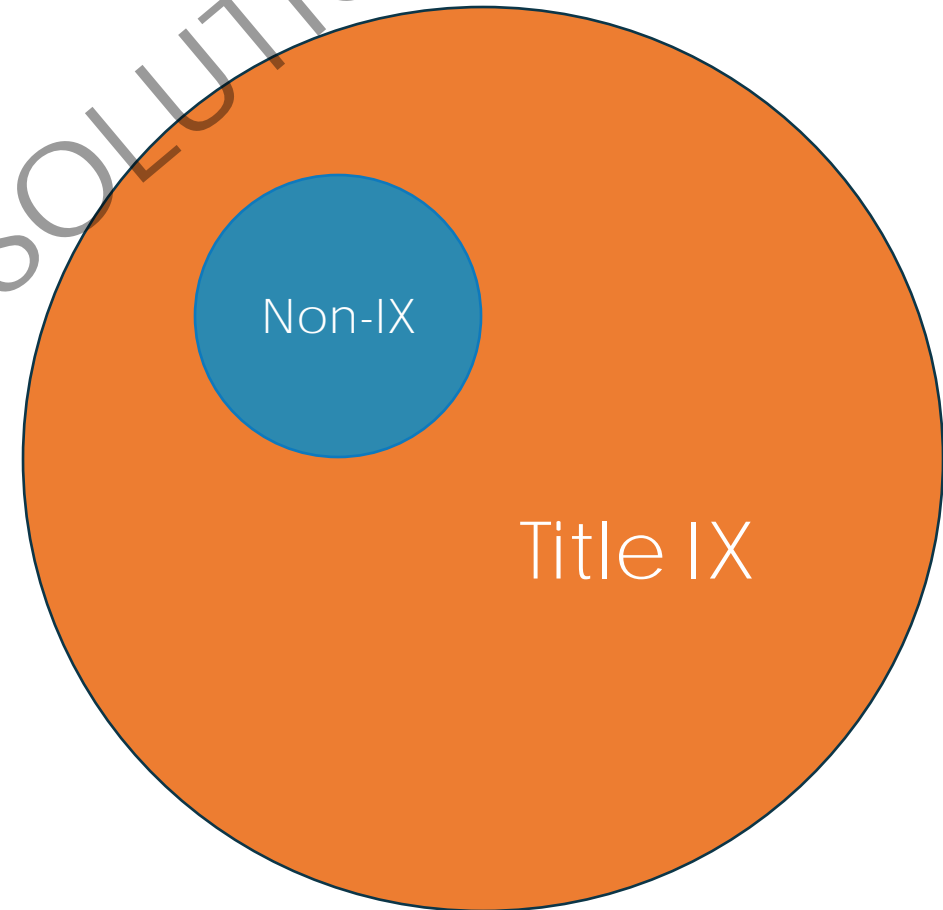
- Not about whether person is participating in the P&A when they make their complaint.
- Yes about whether the conduct occurred in the P&A (for non-students, non-employees)

THE TWO TRACK POLICIES ARE DEAD; LONG LIVE THE TWO TRACK POLICIES!

2020



2024



GRIEVANCE PROCEDURES

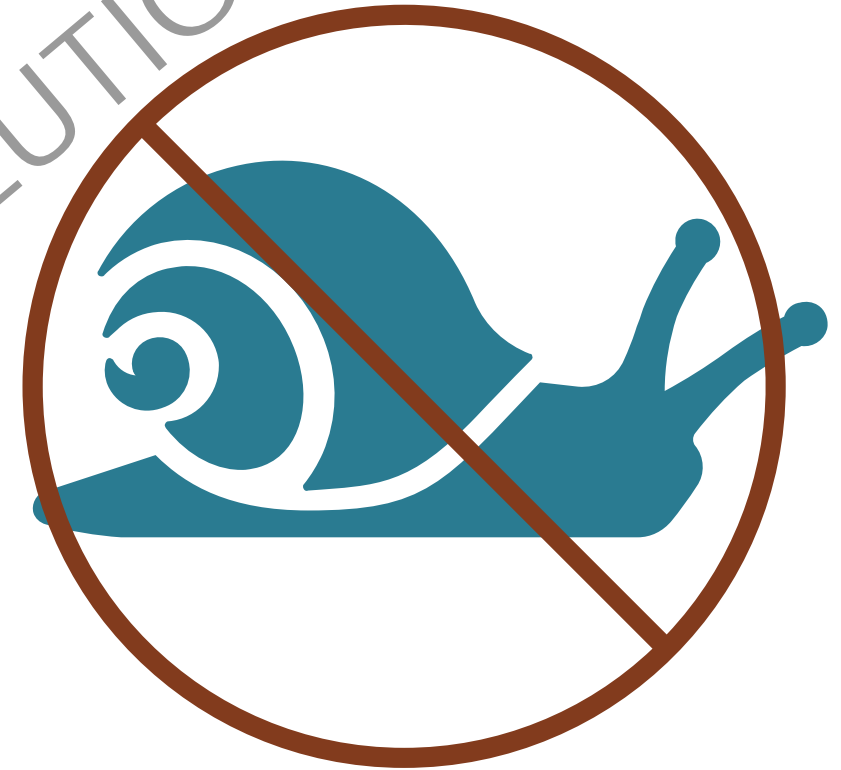


106.45; +106.46 ELEMENTS IF APPLICABLE

- 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)
- Must "articulate consistent principles" for why different procedures will apply to resolving some, but not all, complaints
 - Type of violation
 - Status of party
 - Potential sanction

"PROMPT AND EQUITABLE" RESOLUTIONS

- Equitable treatment of parties
- DM can be TIXC or Investigator
- "Reasonably prompt timeframes" for "major stages" (good cause extensions allowed)
- Reasonable steps to protect privacy
- Objective evaluation of relevant and not otherwise impermissible evidence
- Familiar evidentiary exclusions*



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



"ADEQUATE, RELIABLE, AND IMPARTIAL" INVESTIGATIONS

- Sex discrimination (106.45)
 - Evidence option
 - Description of the evidence option
 - "Accurate" summary
 - Option to access evidence
- "Reasonable opportunity" to respond
 - Does not need to follow ED-prescribed timeframes (i.e. 10 days)
- Sex harassment (106.46)
 - Evidence option
 - Investigation report option
 - "Accurate" summary
 - Option to access evidence
- 2013 VAWA meets 2020 rules
 - Notice of meetings
 - Access to advisor (potted plant)
 - Expert witness
 - Good cause extensions
- "Reasonable opportunity" to respond before hearing, if applicable

"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

- ED rested approach on *Mathews* balancing test.
- Recipients must offer a process in sex discrimination cases that enables DM to question parties and witnesses to assess their credibility "to the extent" credibility is disputed and relevant to an allegation of sex discrimination.
- Per ED, credibility cases are those when a recipient "has to choose between competing narratives to resolve a case." *Doe v. Baum*, 903 F.3d 575 (6th Cir. 2018).

SEX 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.

"QUESTIONING PROCESS" AND OUTCOME

- Rapid shift to remote hearings in 2020 is likely now a default.
- DM must explain decisions to exclude questions that are found not relevant.
- Decorum: Relevant questions must be asked unless they are "unclear" or "harassing" (must give questioner chance to fix).
- DM may place less or no weight on statements based on refusal to answer relevant question.
- Similar 2020 requirements for written determinations.
- Similar 2020 appeal grounds for sex harassment.
- Appeal mandated for sex discrimination that is "the same" as offered for "comparable proceedings."

PROCESS AND PRACTICE CHECK-UP

- "Articulate" what grievance procedures apply based on consistent principles.
- Clarify rules around privacy, confidentiality, FERPA, and "widespread disclosure."
- Consider updates in the roles of confidential resources, advisors, and support persons.
- Revisit your resolution frameworks, including timeframes for major steps, grounds for delay, evidence-sharing practices and use of recording/transcription, evidentiary rules, and hearing guidance and scripts.



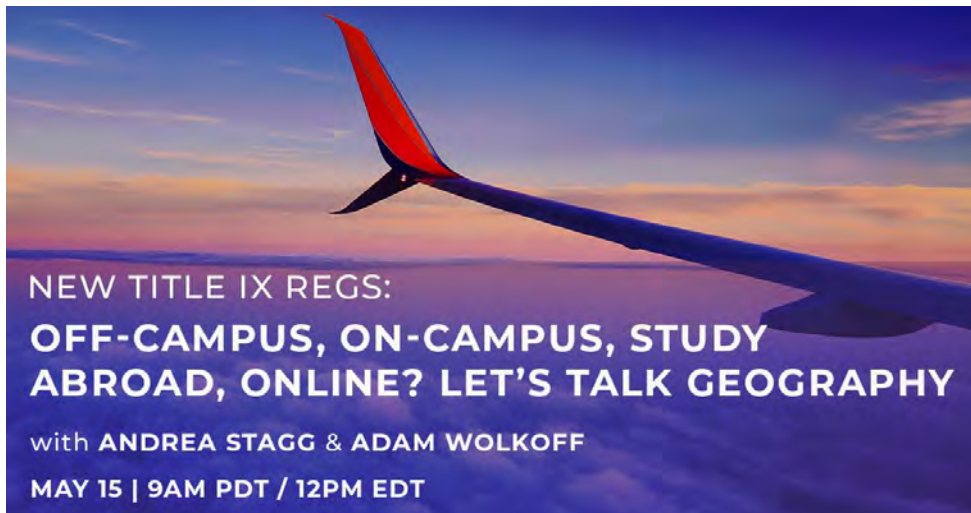
NEW TITLE IX REGS:
**EMPLOYEE
REPORTING
OBLIGATIONS**
with **ANDREA STAGG**

APR 30 | 9AM PDT / 12PM EDT



**BEYOND SEXUAL
HARASSMENT:
CONDUCT COVERED
BY THE 2024
TITLE IX REGULATIONS**
with **ANDREA STAGG &
ADAM WOLKOFF**

MAY 6 | 12PM PDT / 3PM EDT



NEW TITLE IX REGS:
**OFF-CAMPUS, ON-CAMPUS, STUDY
ABROAD, ONLINE? LET'S TALK GEOGRAPHY**
with **ANDREA STAGG & ADAM WOLKOFF**

MAY 15 | 9AM PDT / 12PM EDT



NEW TITLE IX REGS:
UPDATES TO TRAINING REQUIREMENTS
with **ANDREA STAGG & JOSEPH STORCH**

MAY 23 | 8AM PDT / 11AM EDT

SOLUTIONS

55



Training

Policy/Process

Consulting/Phone a Friend

Case Tracker

VISIT YOUR SOURCE FOR 2024 REGS INFO

grandriversolutions.com/new-regs



HELPFUL LINKS

- 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>

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