



# Title IX: Briefing on the Final Regulations

*May 2, 2024*

# Meet Your Facilitators



Alyssa Keehan  
(Moderator)

Director of Risk Management  
Research & Consulting

[akeehan@ue.org](mailto:akeehan@ue.org)



Andrea Stagg

Director of Consulting  
Services

[astagg@grandriversolutions.com](mailto:astagg@grandriversolutions.com)



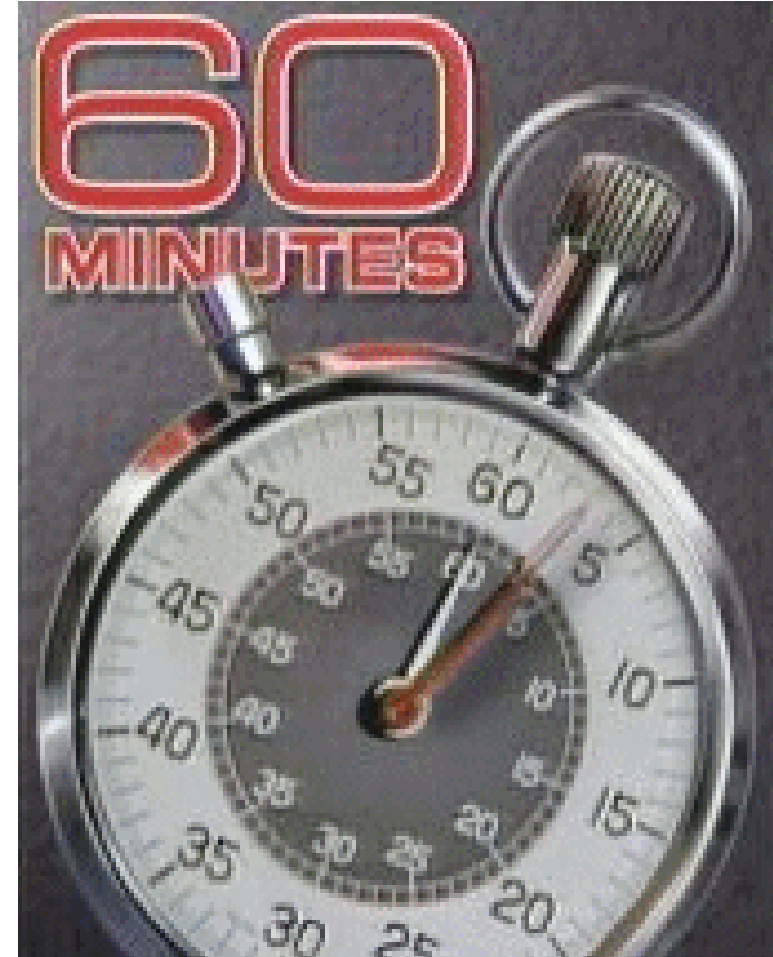
Joseph Storch

Senior Director of Compliance  
& Innovation Solutions

[jstorch@grandriversolutions.com](mailto:jstorch@grandriversolutions.com)

# This Is (Only) 60 Minutes...

- Not legal advice
- So much more to come, and much that will be unanswered
- 1,577 typed pages
- Published in Federal Register April 29
- 240,000+ comments



# Action Plan

Message to your  
community

Activate your  
stakeholder teams

Identify groups  
to be trained

Prepare timeline

Review and revise  
policies and  
procedures

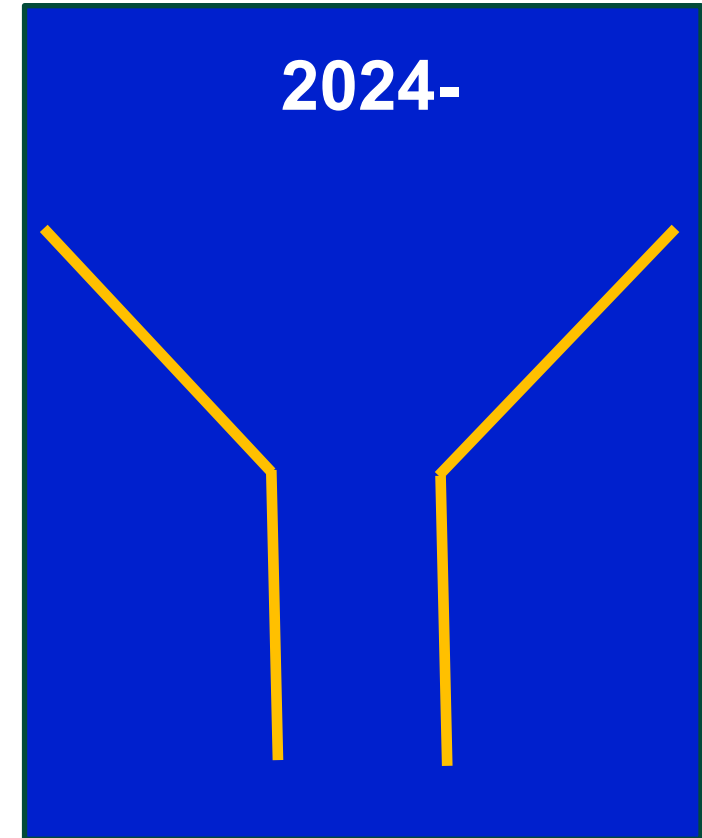
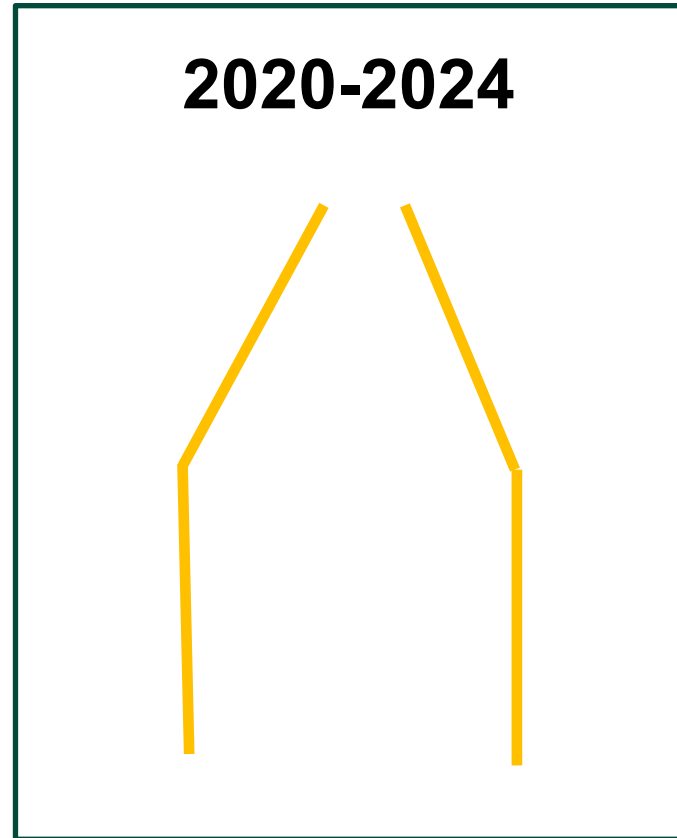
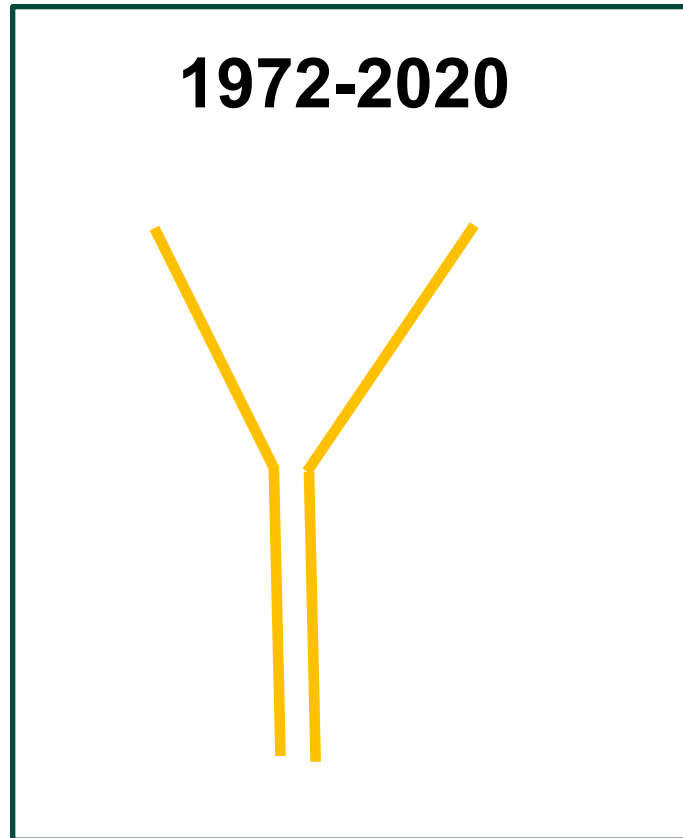
Ensure people  
are trained

# Big Picture



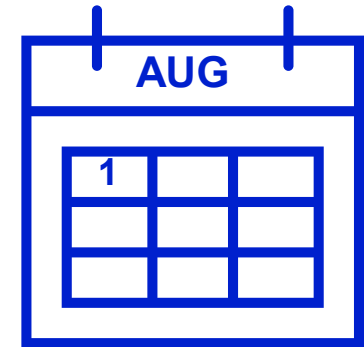
# Big Picture: Shifting the TIX Funnel Shape

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



# First Thing's First — Timing

- Implementation date is **August 1, 2024**.
- There's no retroactivity.
- “The final regulations apply only to sex discrimination that allegedly occurred on or after August 1, 2024.”
  - Date of incident, not date of report.
  - Yes, you will have 2 (or even 3) simultaneous definitions.
- “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 Thing's First — What Is This About?

Creates framework to respond to sex discrimination other than sexual harassment

Not strictly limited by geography; impact matters

Expands employee reporting obligations

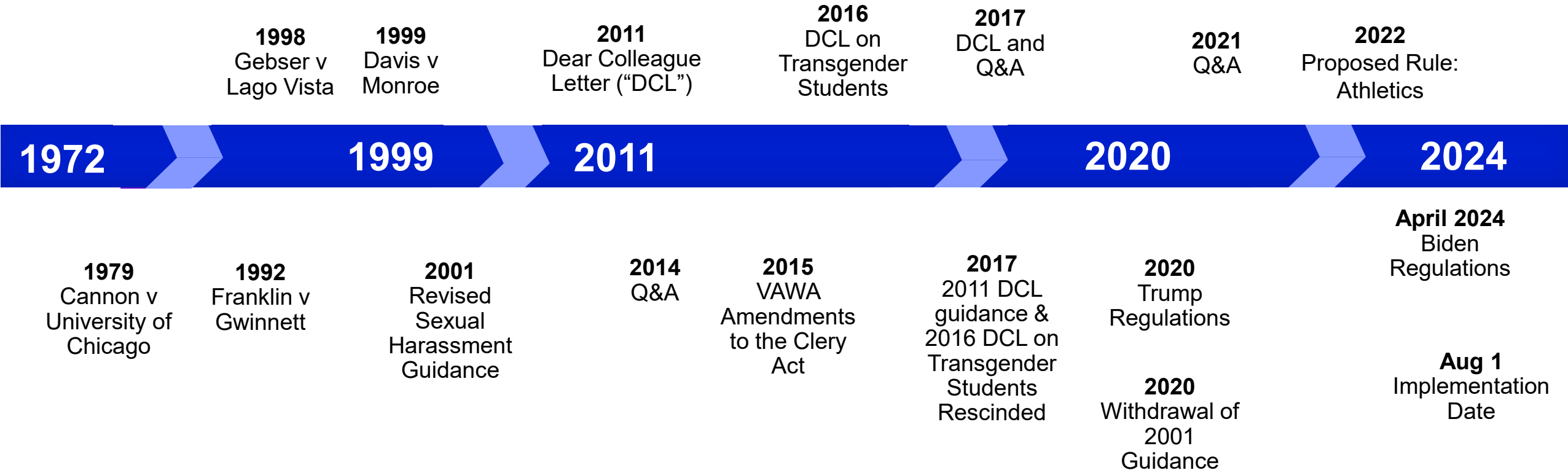
Requires prompt and effective action to end sex discrimination and prevent its recurrence

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



# The History of Title IX

## A Timeline



# 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.

# 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

# 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 Five Components

The conduct is:

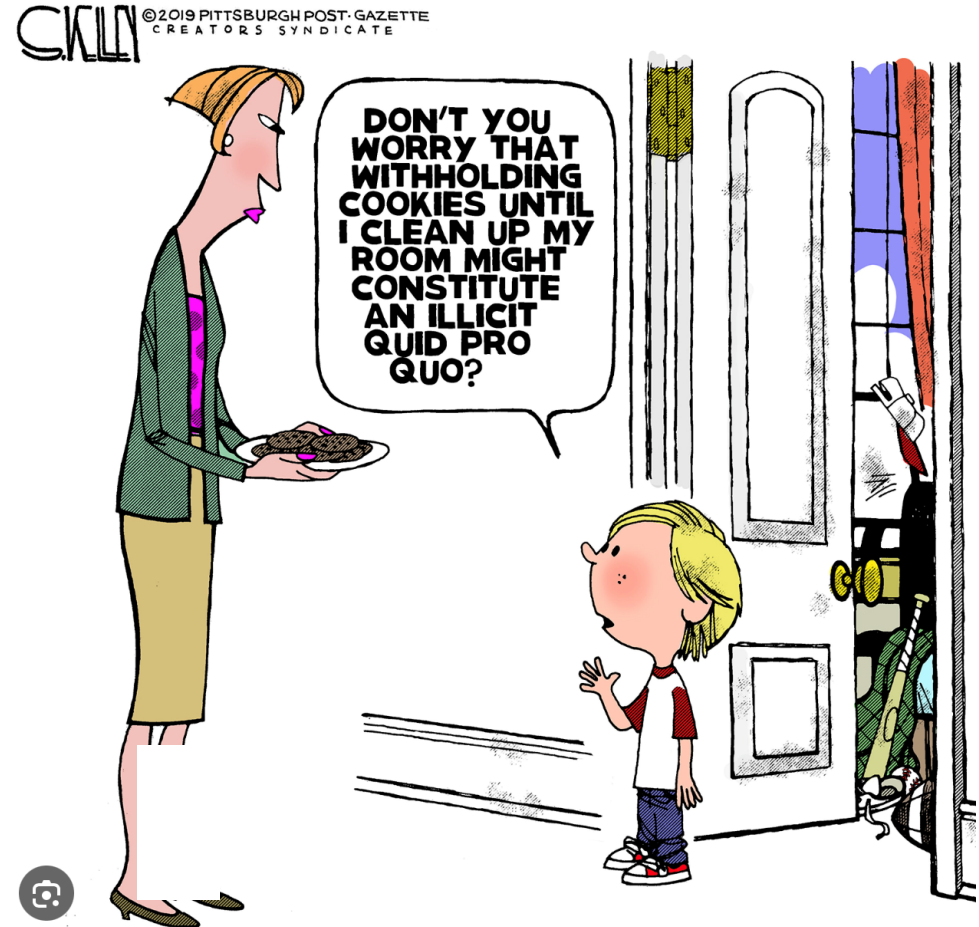
- (1) unwelcome,
- (2) sex-based,
- (3) subjectively and objectively offensive, and
- (4) so severe or pervasive
- (5) that it results in a limitation of or denial of a person's ability to participate in or benefit from the education program or activity.

**Must have all 5 above!**



# 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



# 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.”

# 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.”



# Other Themes to Note

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





# 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)

# 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”

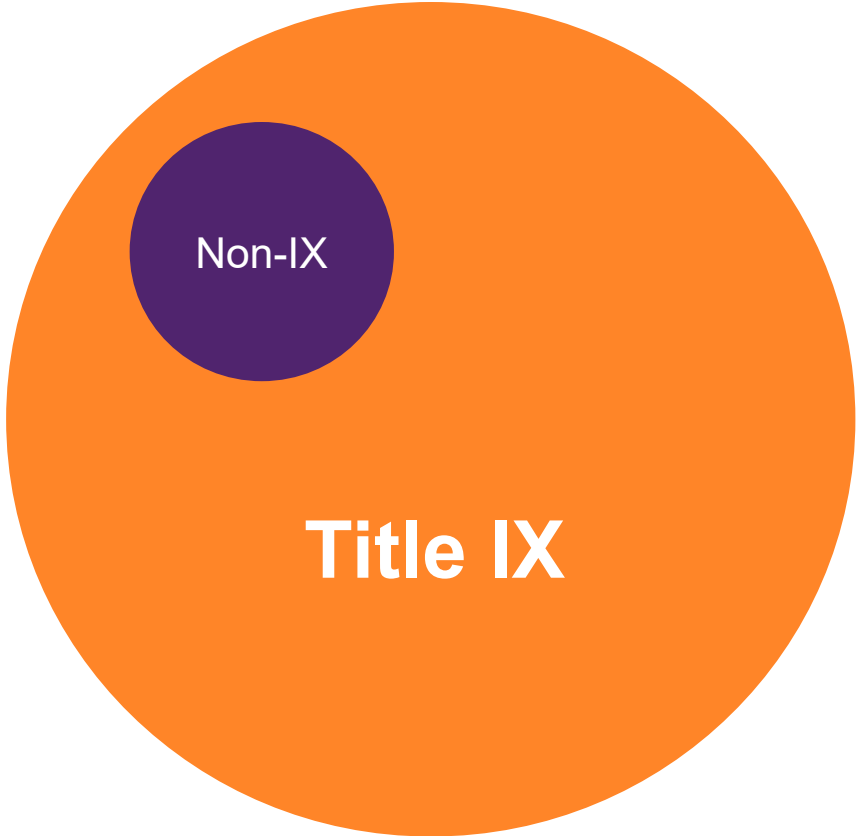


# The Two-Track Policies Are Dead; Long Live the Two-Track Policies!

2020



2024



# 106.45; +106.46 Elements if Applicable

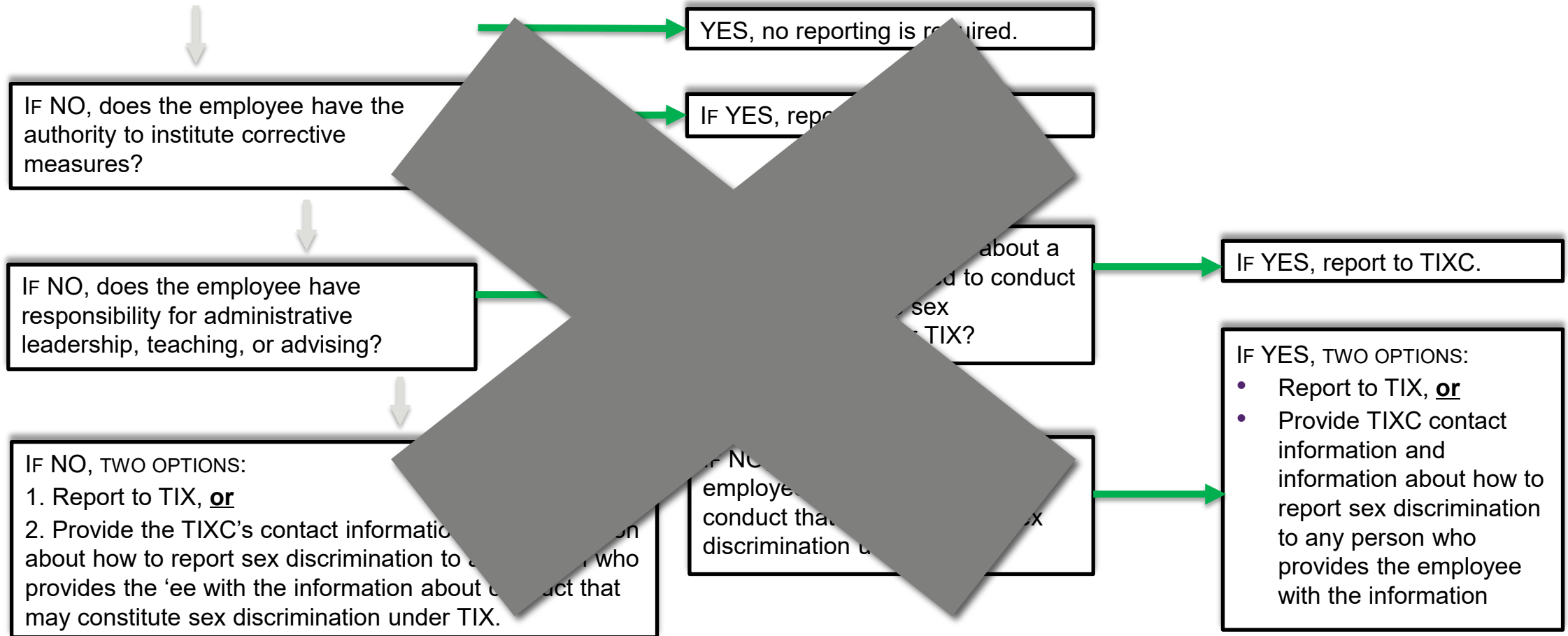
- 106.46 is the process for adjudicating any sex-based harassment complaint in which a **postsecondary** student is either a complainant or a respondent.
- 106.45 is for everything else (under Title IX).
- Must “articulate consistent principles” for why different procedures will apply to resolving some, but not all, complaints
  - Type of violation
  - Status of party
  - Potential sanction

# Role of the Coordinator

- 1) Helping Students
- 2) Legal Compliance
- 3) Students feel heard "Dm"

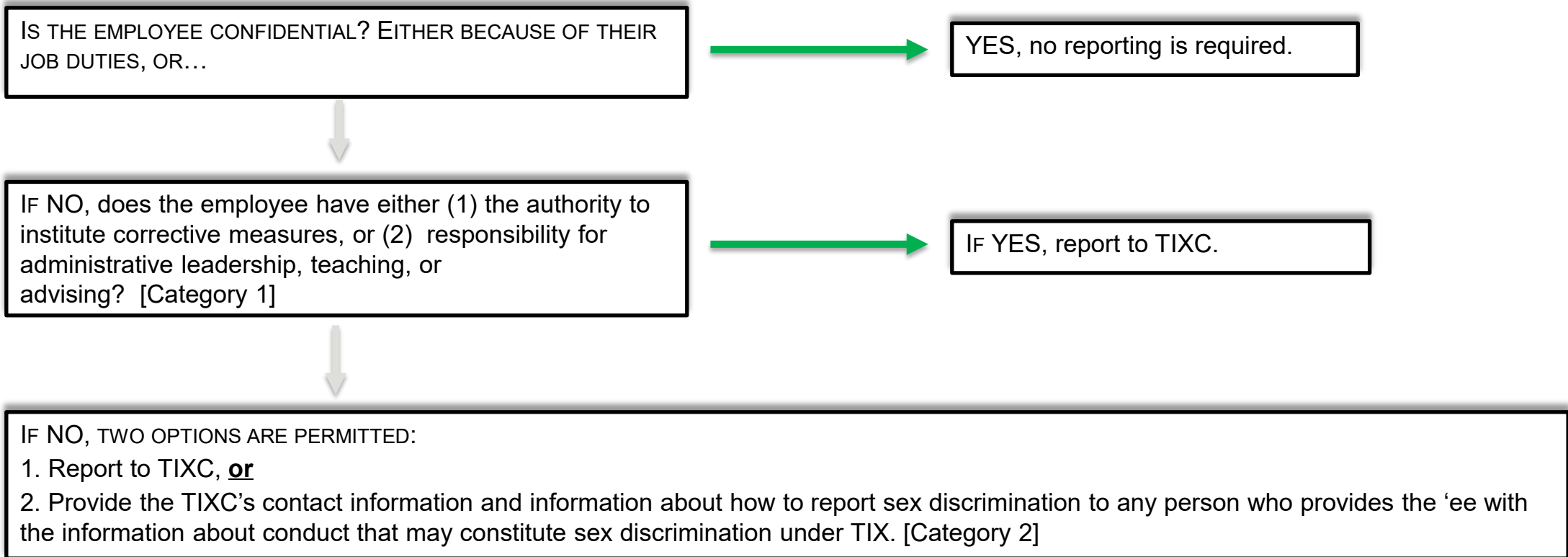
# NPRM, it Was This:

Is the employee confidential?



# 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

- **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

- **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.

# Confidentiality for Researchers

- **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

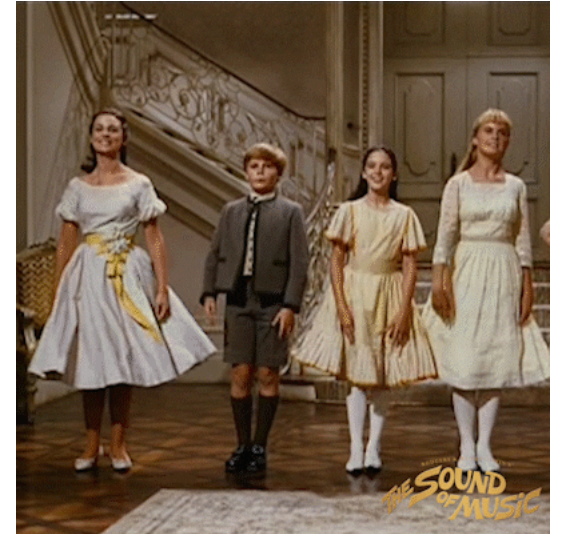
# Updated Training Requirements

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



# So Long, Farewell, Auf Wiedersehen

- No requirement to post training
- No return of the exclusionary rule (was in NPRM)
- No recordkeeping requirement relating to actions taken meet obligations under the sections relating to pregnancy
- No “mandatory dismissals”
- No formal complaints required – oral or written are OK
- Fewer barriers to informal resolution



*See Ya Goodbye GIF By The Rodgers & Hammerstein Organization*

# 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
- Lots to do; good time to lead...



*Where's Waldo Gathering*

***Some Gratitude...***

