

New Revisions to the “Final” Title IX Regulations: Anticipating the NPRM Pendulum Swing



Bindu Jayne, Title IX Coordinator, Swarthmore College

Josh Richards, Partner, Saul Ewing

Gina Maisto Smith, Chair, Institutional Response Group, Cozen O'Connor

Moderator

Peter Lim, Member, Institutional Response Group, Cozen O'Connor



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Abstract



- This session will discuss the highly anticipated release of the NPRM in the spring of 2022 from the unique perspectives of litigation counsel, Title IX counsel, and Title IX Coordinator
- The session will address key issues related to scope and jurisdiction, employee reporting frameworks, intake and outreach, and evidentiary considerations in investigations and hearings
- The speakers will discuss key changes in the NPRM, implications for current or new procedural protections, and practical implementation considerations that incorporate effective practices
- The session will conclude with advice about policy development in light of the NPRM



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50th Anniversary of Title IX

June 23, 2022



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To Those We Serve



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The 411 on the NPRM



- Released on June 23, 2022, the 50th anniversary of Title IX
- 50 pages of proposed regulations, coupled with 650 pages of comments and discussion
- 60-day public comment period commences when the NPRM is published in the Federal Register
- OCR has reflected some openness to feedback and comments

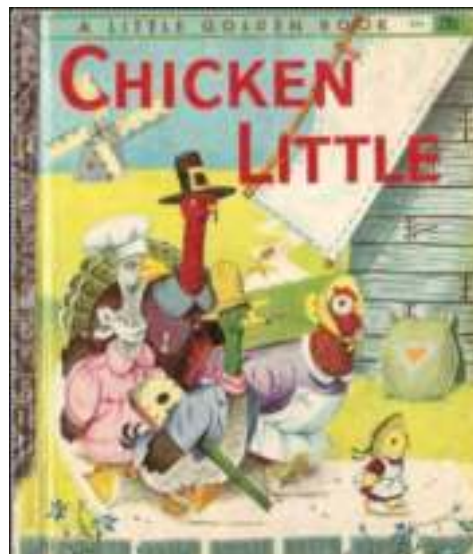
“OCR has tentatively determined . . .”



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So Now What?

The long awaited NPRM, the sequel, is here.



But new “final” regulations will not be in effect for years.



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Shift in Framework (Again)



2020: Deliberate Indifference

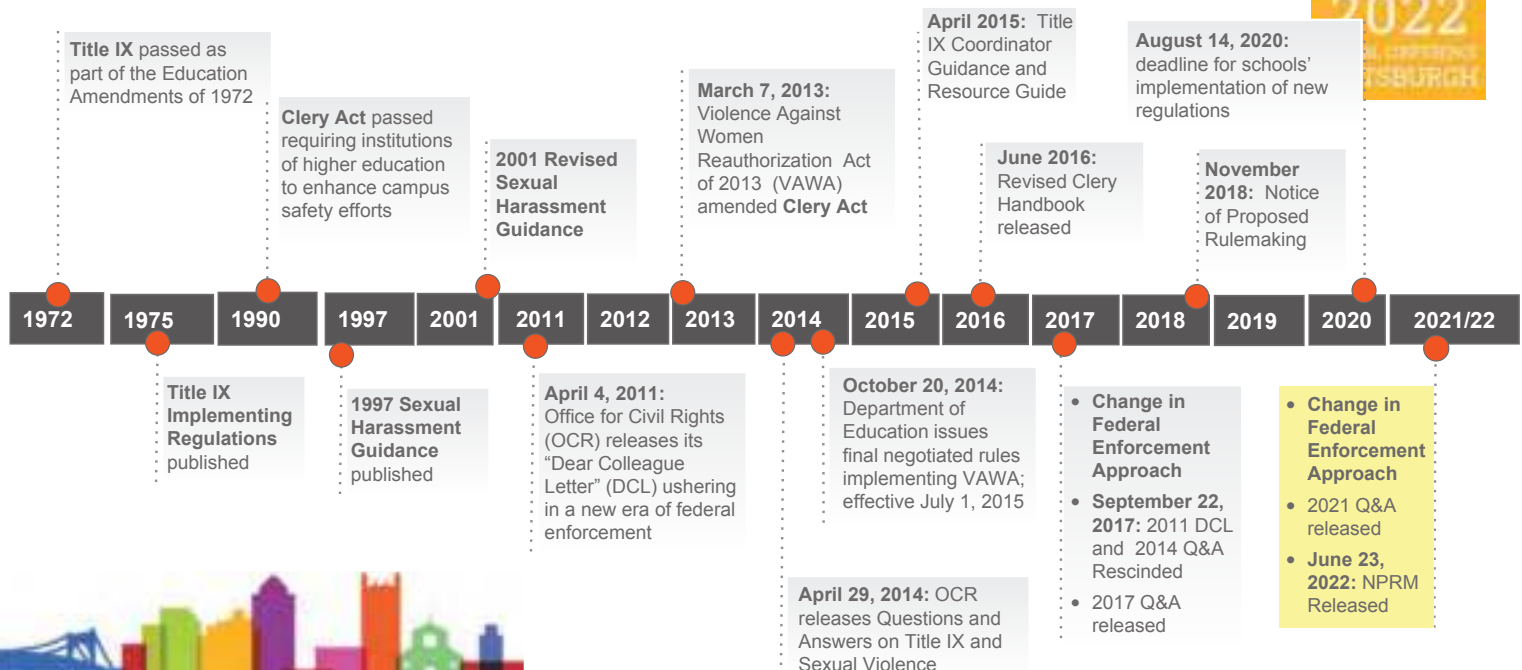
- Actual knowledge
- Deliberate indifference
- Narrow definitions and scope
- Formal complaint to trigger action
- Rigid application at every level

2022: Holistic & Aspirational

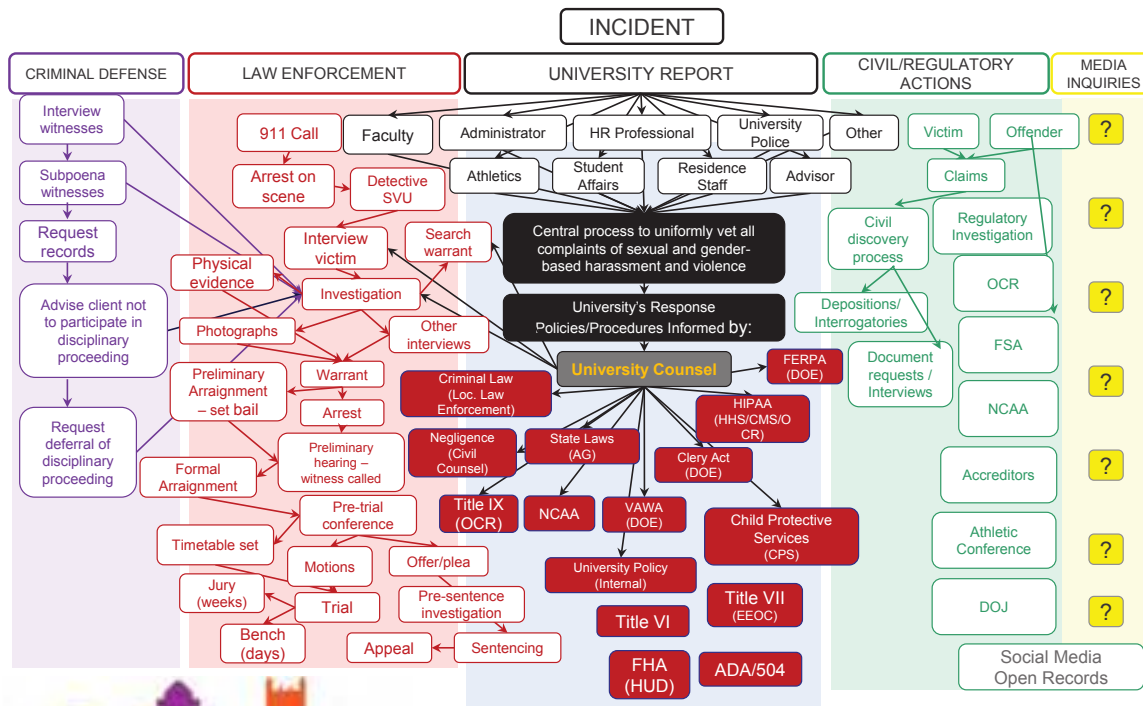
- “[M]ust take prompt and effective action to **end** any sex discrimination that has occurred in its education program or activity, **prevent** its recurrence, and **remedy** its effects”
- Maintains and expands core requirements re: notice and opportunity to be heard
- Builds in flexibility at many stages of the grievance procedures

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Evolution of Federal Legislation and Guidance



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Note: Lists of report recipients and relevant laws not exhaustive.

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The Title IX NPRM

KEY PROVISIONS:

The Title IX Notice of Proposed Rule Making (NPRM)

June 23, 2022

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Expansion of Scope and Jurisdiction



- Under §106.10, sex discrimination includes
 - Sex stereotypes
 - Sex characteristics
 - Pregnancy or related conditions
 - Sexual orientation
 - Gender identity
- Current, potential, or past parental, family, or marital status
[§ 106.21, § 106.40, § 106.57]



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Expansion of Scope and Jurisdiction



- Sex-based harassment means:
 - *Sexual harassment
 - Harassment on the bases described in §106.10
 - Other conduct on the basis of sex
- (1) Quid pro quo harassment
 - (2) Hostile environment harassment
 - (3) Specific offenses
 - Sexual Assault
 - Dating Violence
 - Domestic Violence
 - Stalking



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Expansion of Scope and Jurisdiction



- Shift in hostile environment definition
 - Unwelcome sex-based conduct that is sufficiently severe **or** pervasive, that based on the totality of the circumstances and evaluated subjectively and objectively, denies or limits a person's ability to participate in or benefit from the recipient's education program or activity



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Expansion of Scope and Jurisdiction



- Standing – who are the categories of individuals who can trigger a response obligation
 - A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX
 - 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 when the alleged sex discrimination occurred.
 - Student includes admitted students



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Expansion of Scope and Jurisdiction



- Education program or activity
 - Conduct that occurs under a recipient's education program or activity includes but is not limited to:
 - Conduct that occurs in a building owned or controlled by a student organization that is officially recognized by a postsecondary institution, and
 - Conduct that is subject to the recipient's disciplinary authority
 - A recipient has an obligation to address a sex-based hostile environment under its education program or activity, even if sex-based harassment contributing to the hostile environment occurred outside the recipient's education program or activity or outside the U.S.



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Intake and Outreach



- Supportive measures
 - Can include involuntary changes in class, work, housing, or extracurricular or any other activity
 - Can include temporary measures that burden a respondent imposed for non-punitive and non-disciplinary reasons and that are designed to protect the safety of the complainant or the recipient's educational environment, or deter the respondent from engaging in sex-based harassment
 - Supportive measures that burden a respondent may be imposed only during the pendency of the grievance procedures and must be terminated at the conclusion of those grievance procedures.
 - Measures must be no more restrictive of the respondent than is necessary to restore or preserve the complainant's access to the recipient's education program or activity
 - No involuntary measures that burden the respondent during informal resolution
 - Right to seek modification or reversal of the supportive measures



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Intake and Outreach



- Emergency removal
 - An immediate and serious threat to the health or safety of students, employees, or other persons arising from the allegations of sex discrimination that justifies removal



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Intake and Outreach



- Title IX Coordinator required to monitor the recipient's education program or activity for barriers to reporting information about conduct that may constitute sex discrimination under Title IX
- Shift in the "formal complaint" approach
 - Allows for oral and written complaints
 - To the recipient, not to the Title IX Coordinator
 - Title IX Coordinator must determine whether to initiate a complaint of sex discrimination . . . if necessary to address conduct that may constitute sex discrimination



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Notice and Reporting Responsibilities



- Responsibility to respond arises when recipient is on notice of conduct that MAY be sex discrimination
- Reporting obligations for employees
 - Obligations differ based on whether the conduct involves a student or employee complainant
 - Adds obligations to all employees, including confidential employees, to provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - Explicitly incorporates faculty as employees with the responsibility to report sex discrimination



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Notice and Reporting Responsibilities



- Categories of employees
 - Confidential employees
 - Any employee who has authority to institute corrective measures on behalf of the recipient
 - Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity
 - Student complainant: notify the Title IX Coordinator
 - Employee complainant: notify the Title IX Coordinator OR provide the contact information of the Title IX Coordinator and information about how to report sex discrimination
 - All other employees



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Reporting Obligations



Provide Info to Complainant

- Confidential employees
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is an *employee*
- All other employees

Report to Title IX Coordinator

- Any employee who has authority to institute corrective measures on behalf of the recipient
- Any employee who has responsibility for administrative leadership, teaching, or advising in the recipient's education program or activity when the complainant is a *student*



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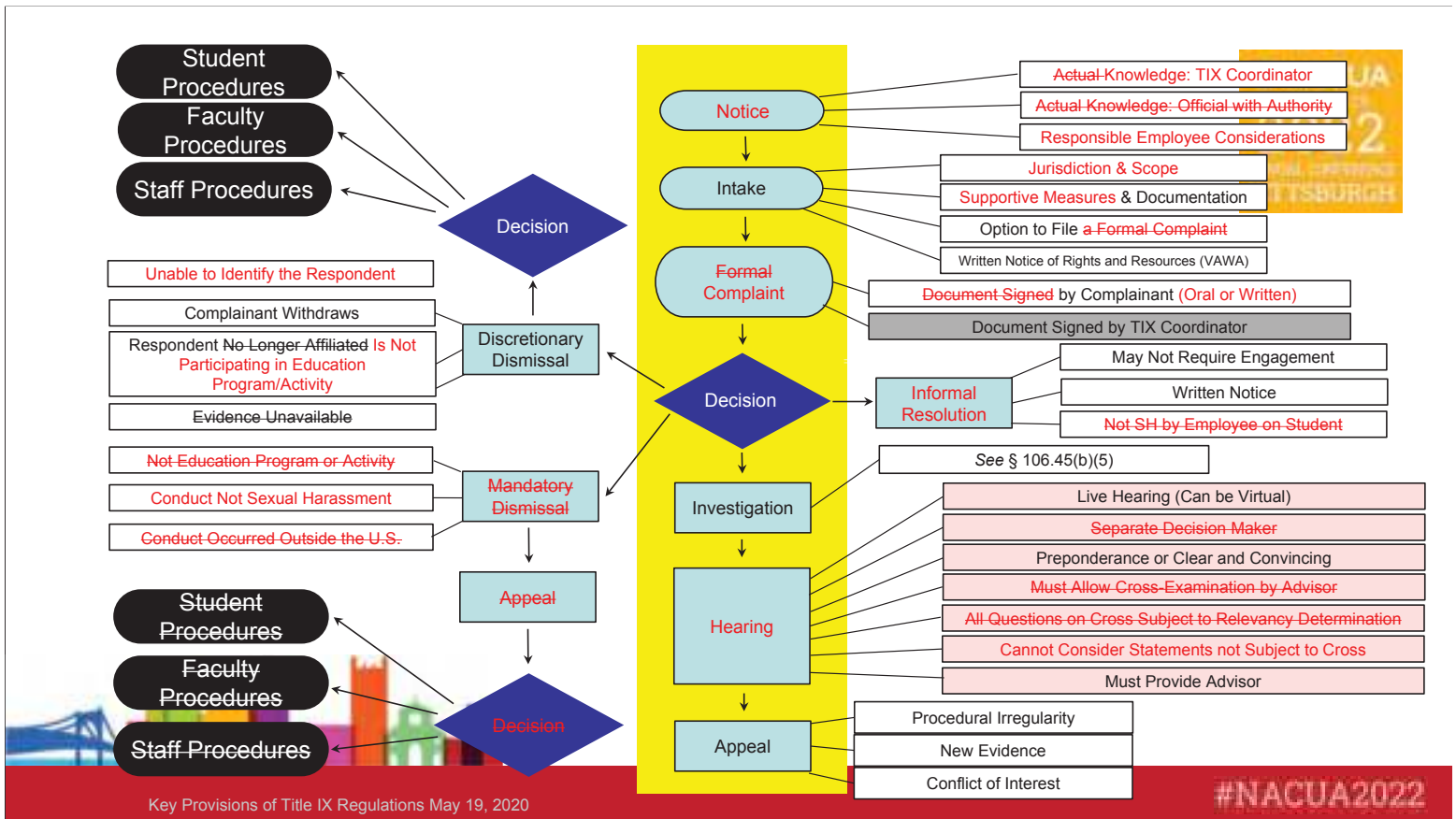
Grievance Procedures



- Provides two sets of grievance procedures:
 - § 106.45: prompt and equitable resolution of complaints of sex discrimination
 - § 106.46: resolution of complaints of sex-based harassment involving a student party
- Note:
 - Explicit requirement for written grievance procedures for responding to complaints of sex discrimination related to a person's actions
 - For complaints alleging that a policy/practice discriminates on the basis of sex, the recipient is not considered a respondent



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§ 106.45 (Prompt and equitable resolution of complaints of sex discrimination)

- Treat complainants and respondents equitably
- No have a conflict of bias or interest
- Presumption of not responsible
- Reasonably prompt timeframes for the major stages of the grievance process
- Reasonable steps to protect the privacy of the parties and witnesses
- Objective evaluation of all relevant evidence
- Exclude certain classes of evidence
- Notice of allegations
- Adequate, reliable, and impartial investigation
- Burden on recipient to gather evidence
- Provide *description* of evidence relevant to allegations and reasonable opportunity to respond.
- Notify the parties of the outcome
- Appeal optional
- Complete process before imposing sanctions

§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)



- Everything under § 106.45 *plus*
 - Expanded content for written notice of allegations
 - With sufficient time to prepare a response before any initial interview
 - Presumption of non-responsibility
 - Opportunity to present relevant evidence to a trained, impartial decisionmaker
 - Advisor of choice
 - Access to relevant evidence or investigative report that accurately summarizes evidence
 - Potential conduct violation for false statements
- May delay issuing notice to address safety concerns
- Expanded requirements re: dismissal
- Complaint investigation procedures
 - Timely notice of meetings
 - Right to advisor of choice
 - Equal opportunity to have other persons present, if permitted
 - Discretion to allow expert witnesses, if applied for all parties
 - Reasonable extensions of time for good cause
 - Equitable access to relevant evidence

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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)



- Process for evaluating allegations and assessing credibility
 - Enables decisionmaker to adequately assess the credibility of the parties and witnesses to the extent credibility is in dispute and relevant
 - Allow the decisionmaker to ask the parties and witnesses relevant and not otherwise impermissible questions and follow up questions
 - Individual meetings or live hearings
 - Decisionmaker must determine relevance and permissibility prior to the question being posed and explain any decision to exclude a question
 - Must not permit questions that are unclear or harassing
 - Cannot rely on a party's statements that support that party's position if the party refuses to answer credibility questions

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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)



Investigator Model

- Equitable access to the relevant evidence or to the same written investigation report
- If report, equitable access to the relevant evidence upon request
- Reasonable opportunity to review and respond prior to determination
- Individual meetings if credibility is an issue and relevant
- Decisionmaker poses questions raised by the parties

Live Hearing

- If live hearing, opportunity to review the evidence and/or investigation report before the live hearing
- Opportunity to respond before or during the hearing
- Physically present in same geographic location or through technology
- Allow each party's advisor to ask questions of any party and any witnesses
- No questioning by the party personally
- Must provide advisor without charge to the party for the purpose of advisor-conducting questioning



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§ 106.46 (Resolution of complaints of sex-based harassment involving a student party)



Outcome and Appeal

- Simultaneous written determination of whether sex-based harassment occurred
- Must offer the parties an appeal

Protections on Privacy

- Must take reasonable steps to prevent and address the parties' and their advisors' unauthorized disclosure of information and evidence obtained solely through the sex-based grievance procedures



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Title IX Coordinator Responsibilities



Title IX Coordinator MUST

- § 106.8 - Retain ultimate oversight over compliance responsibilities
- § 106.8(d) – Be trained
- § 106.8(f) - Maintain records
- § 106.40 – Take specified actions following notice of student's pregnancy or related condition
- § 106.44(b) - Monitor for barriers to reporting AND reasonably address
- § 106.44(f) – Take specified actions after notice of sex discrimination

Title IX Coordinator MAY

- § 106.8(e) - Consult with disability support
- § 106.44(e) - Public awareness events*
- § 106.45(b)(2) - Be the decision maker in grievance process



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Pregnancy or Related Conditions



- § 106.2 - Definition of pregnancy or related conditions:
 - Pregnancy, childbirth, termination of pregnancy, or lactation
 - Medical conditions related to [above]
 - Recovery from [above]
- § 106.40 - Notice requirement re: pregnancy or related conditions - when an employee learns of a student's pregnancy or related condition, the employee must inform them that they may inform the Title IX Coordinator and provide the Title IX Coordinator's contact info

Training!



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Pregnancy or Related Conditions



- § 106.40 – After receiving notice, a Title IX Coordinator must:
 - Notify the student of the school's obligations re: pregnancy and related conditions
 - Provide the student with voluntary reasonable accommodations to policies/practices/procedures
 - Allow leave of absence (and reinstate to same academic/extracurricular status as pre-leave)
 - Ensure availability of lactation space
- Admissions (§ 106.21) and employment (§ 106.57)



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What Next? What to Do Now?



- Collaborate with your Title IX Coordinator sooner rather than later
 - What changes will likely illicit a response from your community? Your current complainants/respondents?
 - Training takes time.
- Honor the Title IX 50th Anniversary
- Evaluate your institution's appetite for submitting a comment (or joining one)



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What Next? What to Do Now?



- Master the material
 - Don't underestimate the importance of the preamble, particularly the articulated reasons for the shift from the current regulations to the proposed regulations
- Map the delta between the current state and the new concepts in the NPRM to identify potential areas of change/voluntary enhancements
- Communicate with your campus about the impact of the NPRM
- Evaluate the potential impacts in your community

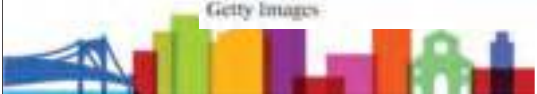


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Stable Moorings

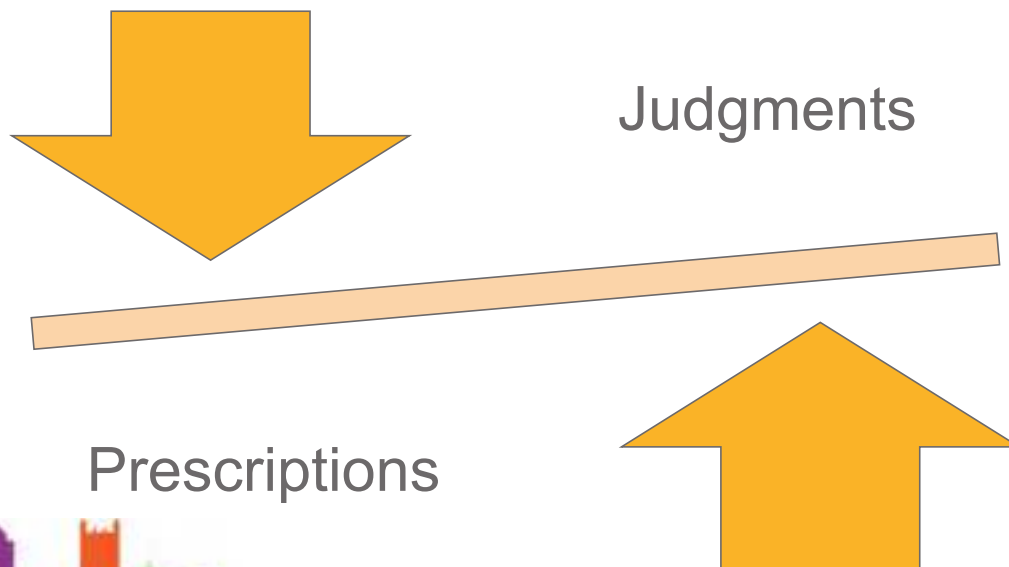


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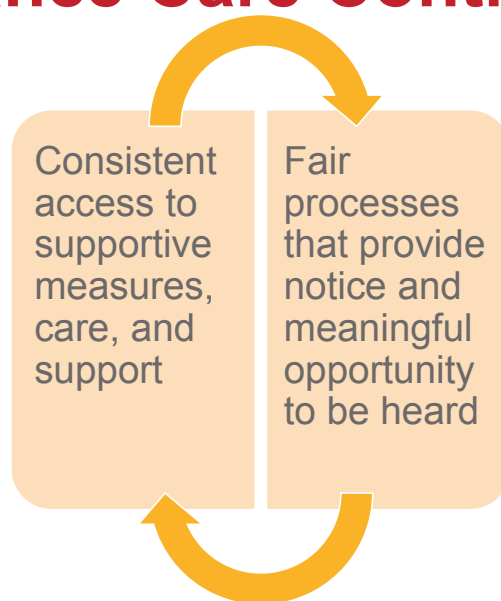
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Balancing



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The Compliance Care Continuum



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