



*The Commission on*  
**INDEPENDENT**  
*Colleges & Universities*  
*in New York*

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## **2024 SUMMER WEBINAR SERIES**

# **Understanding the New Title IX Regulations**

**JUNE 11, 2024**

# MEET YOUR FACILITATOR

Joseph Storch



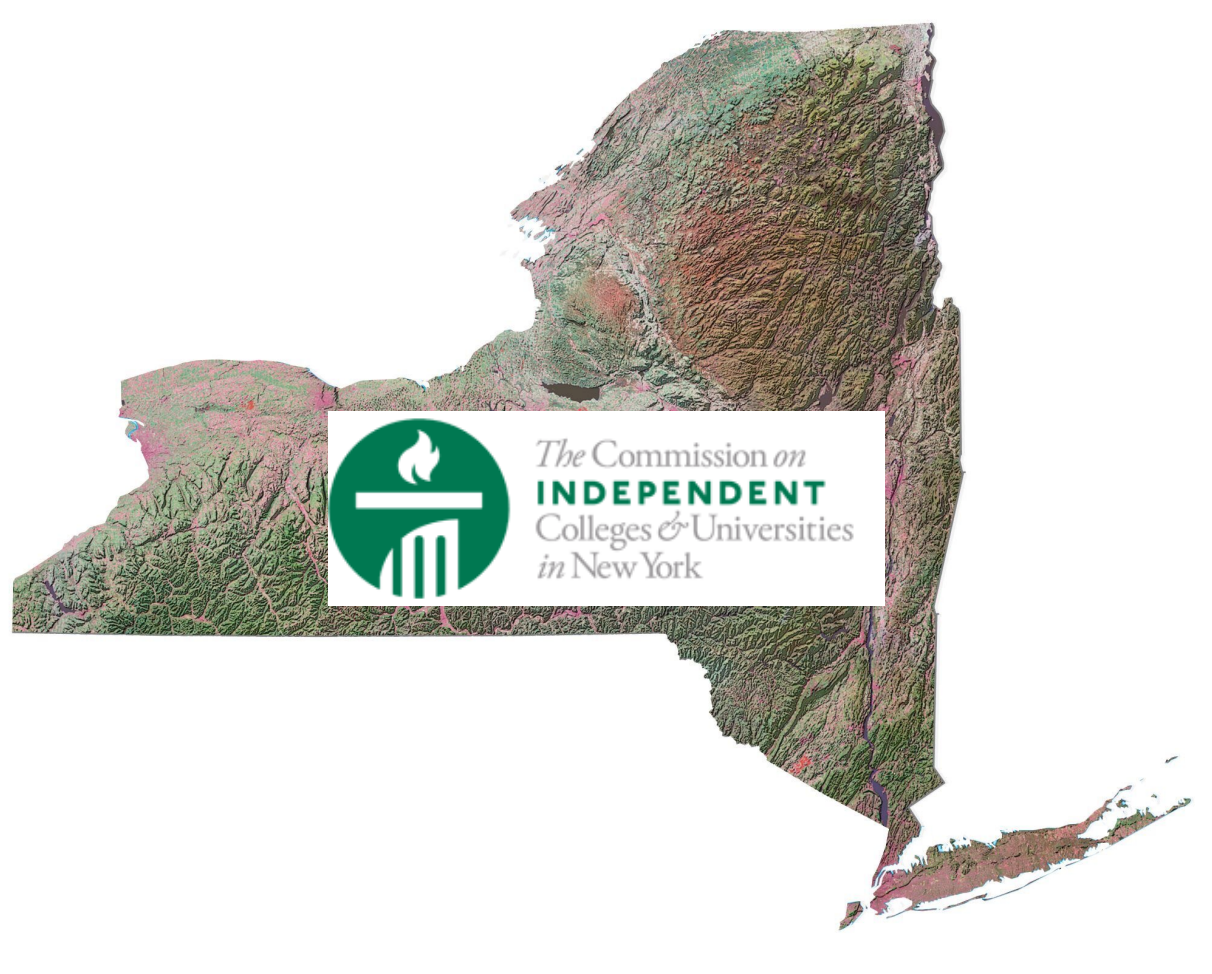
**Senior Director of Compliance  
& Innovation Solutions**

*he/him/his*

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Joseph Storch is the Senior Director of Compliance and Innovation Solutions for Grand River Solutions where he concentrates on developing new solutions for safety and equity challenges. He previously served as Associate Counsel at SUNY where, in addition to his legal work, he raised more than \$20 million in external funding for legal and compliance innovations. Joe twice served as an expert witness before the United States Senate, drafted bipartisan federal and state campus safety legislation, received the NACUA First Decade and City & State 40 Under 40 awards, and is the author of more than 75 articles and book chapters, most centering around campus safety and copyright law.

**SOME  
GRATITUDE...**



# SUMMARY SESSION

- This is 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
- Effective August 1, 2024; Not retroactive (shoulder season)
  
- Opportunities...

# BIG PICTURE

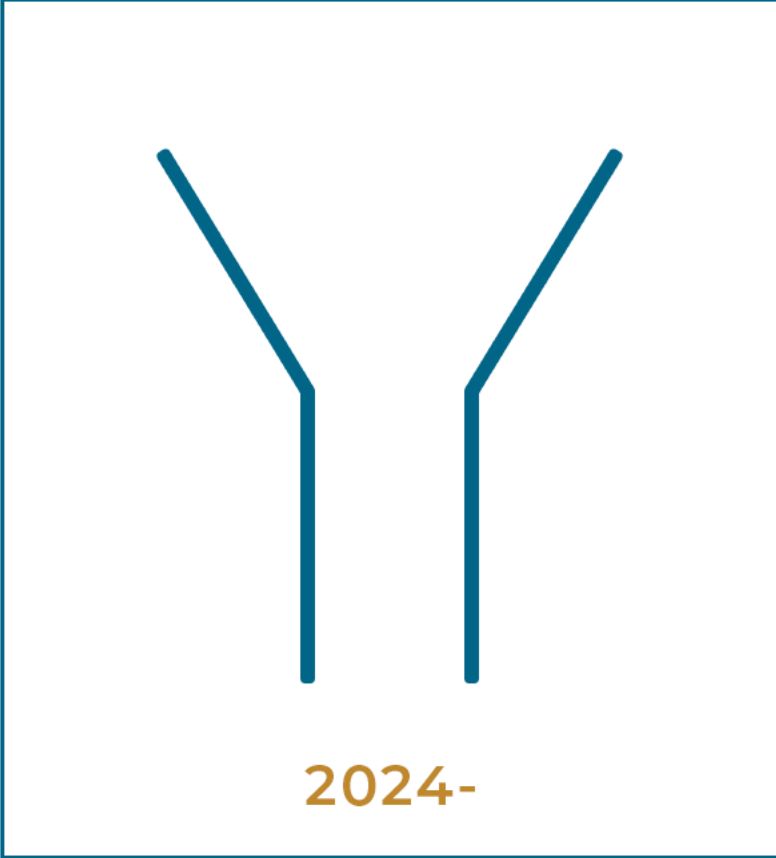
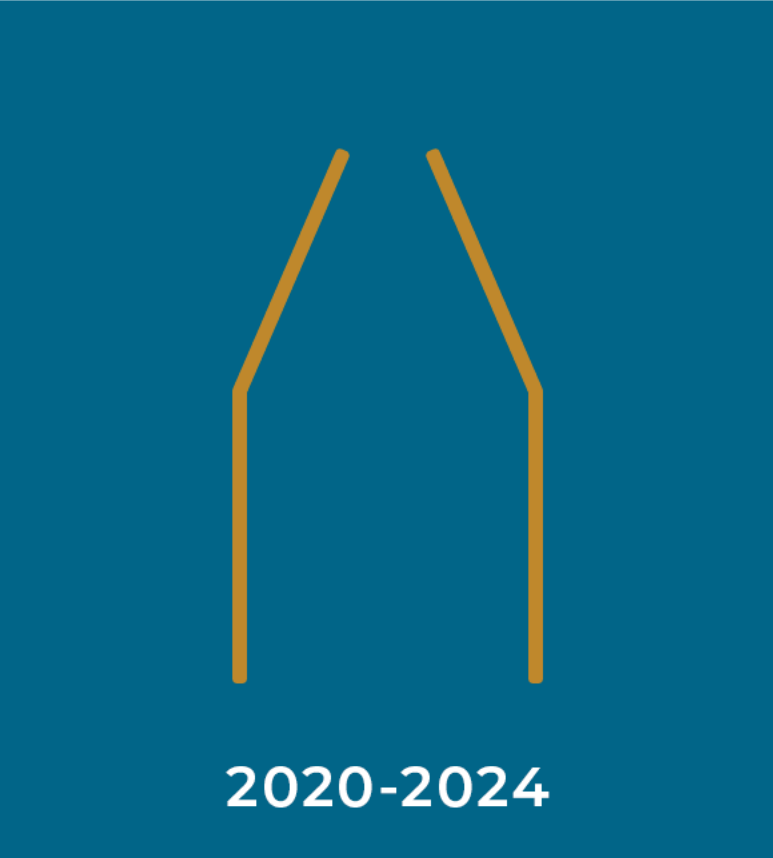
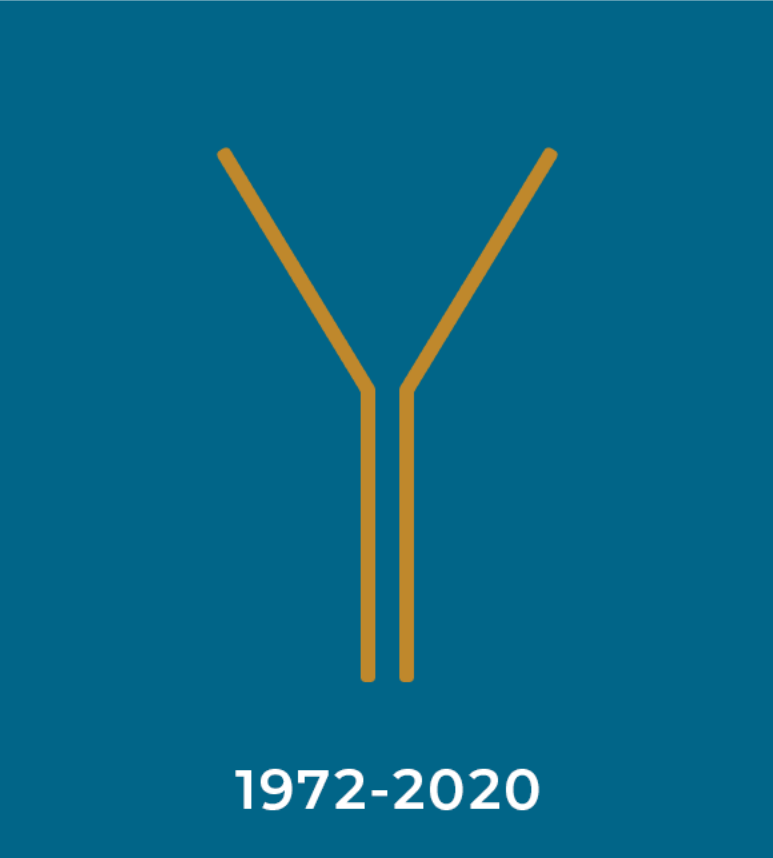


# HERE WE GO AGAIN? NOT QUITE.

- 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
  
- Consistency with Article 129-B

# BIG PICTURE: SHIFTING THE TIX FUNNEL SHAPE

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



# 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

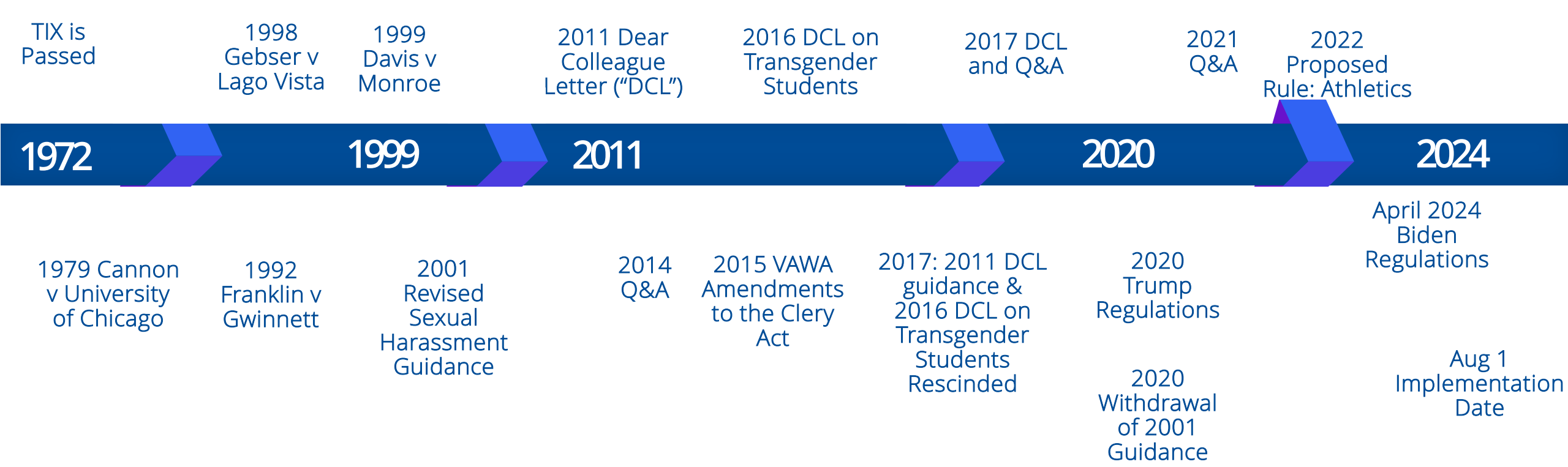
Expands employee reporting obligations

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



# The History of Title IX

## A Timeline



# 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!**



# 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

# 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.

# 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.”
- New York State law overlap

# PREGNANCY





# 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 (higher ed)
- Examples in the Preamble
- Fewer footnotes
- Making the language and information more accessible
- K-12 v. Post-secondary and dual enrolment



# 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

# 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)

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## NY Law

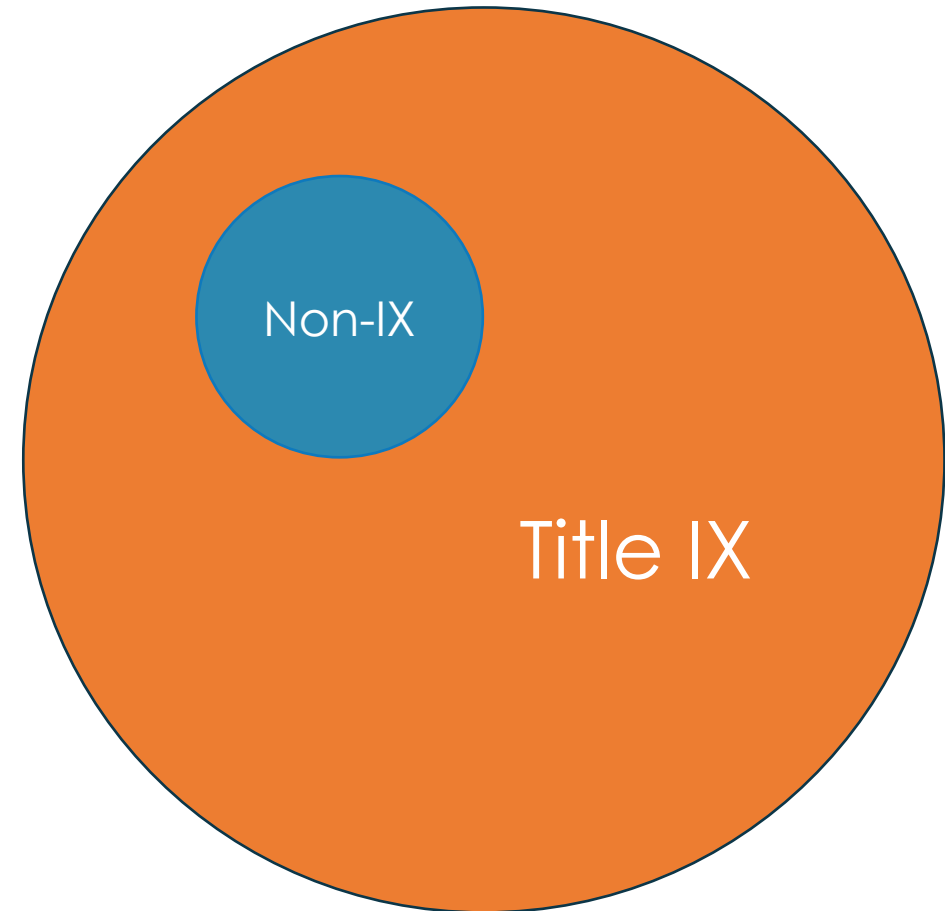
“...6. The provisions of this article shall apply regardless of whether the violation occurs on campus, off campus, or while studying abroad...”

# 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) including all K-12
- 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

## 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

- **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.

# 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.

# 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 and NY state law!

# 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

# 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

NY Law  
training  
obligations

- 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*



# 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).

# GOODBYE CERTAIN TITLE IX OBLIGATIONS

- 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

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF TEXAS  
AMARILLO DIVISION

# LITIGATION

STATE OF TEXAS,

*Plaintiff,*

v.

THE UNITED STATES OF AMERICA;  
MIGUEL CARDONA, in his official  
capacity as Secretary of Education;  
UNITED STATES DEPARTMENT OF  
EDUCATION; CATHERINE LHAMON, in  
her official capacity as Assistant Secretary  
for Civil Rights, Department of Education;  
RANDOLPH WILLS, in his official capacity  
as Deputy Assistant Secretary for  
Enforcement, Department of Education,

*Defendants.*

No. \_\_\_\_\_

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**State of Texas's Original Complaint**

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1. Through an exercise in notice-and-comment rulemaking ordered by President Biden, the U.S. Department of Education has attempted to effect radical social

April 29, 2024

Lawsuits filed by a number of states and organizations, mostly centered around coverage of sexual orientation and gender identity

# 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.
- Remember what ED says about plain language...

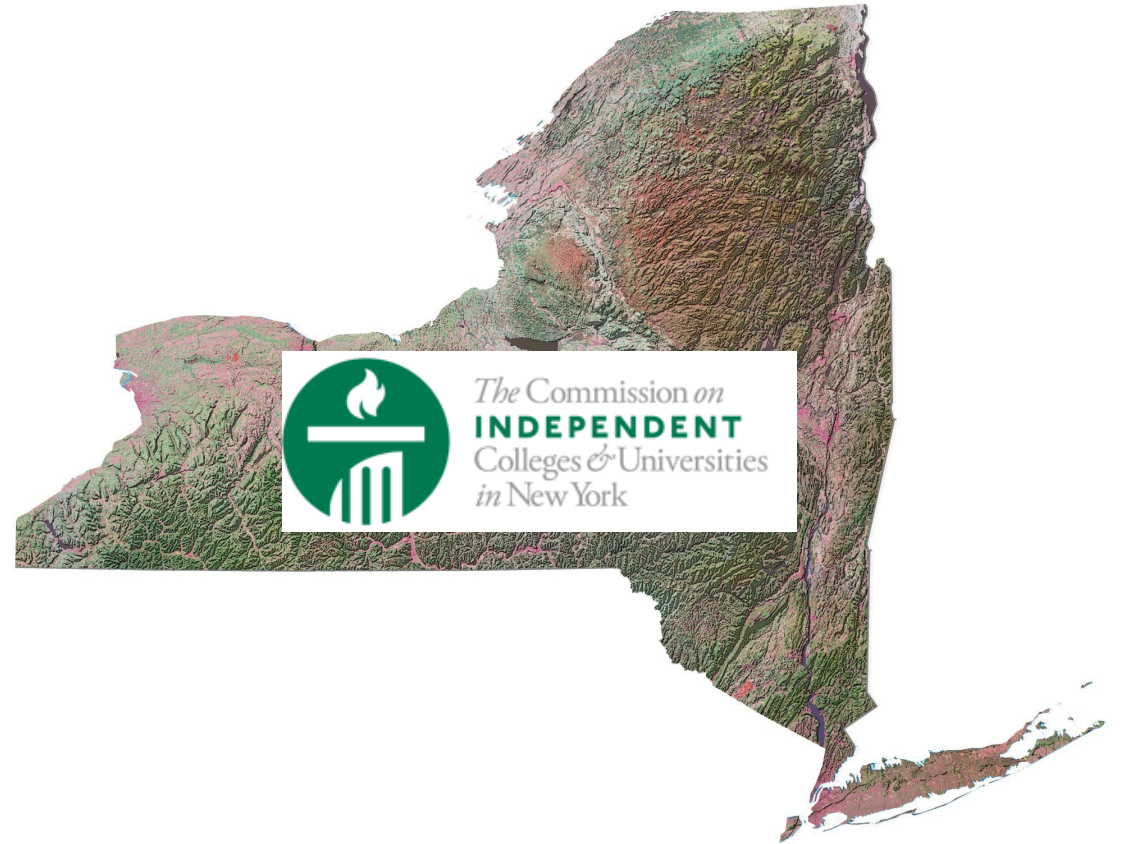
# NEW YORK STATE LAW AND VAWA

- Substantive consistency of Clery, Title IX (2024) & Education Law Article 129-B
- Prior sexual activity Title IX v. 129-B
- Training and Prevention
- MOU's
- Website and notices (to all and to parties)
- Climate Surveys
- Amnesty
- Affirmative Consent



# THE OPPORTUNITY

- Consider our New York State students and employees and consider what we know about sex discrimination, and about sexual harassment and violence.
- Consider who comes to seek help, who does not, and who cannot.
- Strategizing, creating efficiencies, and partnering to better meet the moment.
- ***Why comply when we can lead?***



# THE RIVER CONNECT

THE RIVER CONNECT is a virtual community of experts and colleagues gathered together to help each other process the complexities of the work.



A place to

*communicate*  
*share*  
*educate*  
*learn*


for HIGHER EDUCATION  
PROFESSIONALS working in  
**Title IX, Equity & Clery**





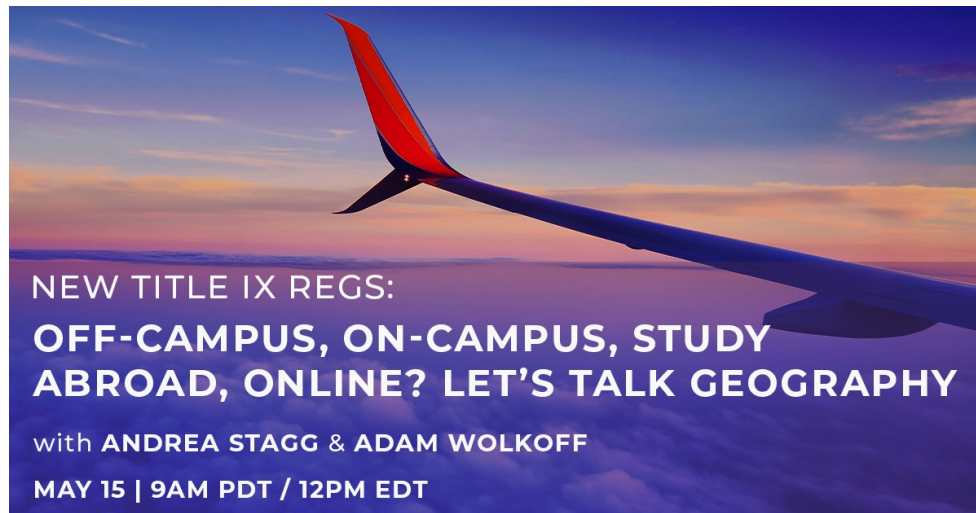
NEW TITLE IX REGS:  
**EMPLOYEE  
REPORTING  
OBLIGATIONS**  
with **ANDREA STAGG**

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





## Title IX and Clery Act News & Analysis



*The Commission on*  
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# TITLE IX SUMMARY SESSION FOR NEW YORK STATE INDEPENDENT COLLEGES AND UNIVERSITIES

A screenshot of a LinkedIn profile for Grand River Solutions. The profile includes a header with navigation icons for Articles, People, and Learnin. Below is a banner image with a logo on the left and three photos of people on the right. The profile name is "Grand River Solutions" with a "View all 96 employees" link. The description reads: "Education Administration Programs, Los Altos, CA · 4,738 followers, Title IX, equity, and Clery Act solutions for campuses and communities." A "Follow" button is at the bottom.

[linkedin.com/company/grand-river-solutions](https://www.linkedin.com/company/grand-river-solutions)

2024 Final Title IX Regulations

*June 11, 2024*

Joseph Storch, Senior Director of  
Compliance & Innovation

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**GRAND RIVER | SOLUTIONS**



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**PLEASE COMPLETE THE SURVEY:**  
**[HTTPS://FORMS.OFFICE.COM/R/DJ6XPQV5P7](https://forms.office.com/r/dj6xpqv5p7)**

**THANK YOU!**



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Lola W. Brabham  
*President*