



# The Implications of the *Proposed* Title IX Regulations on Your Clergy Compliance Efforts

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# Title IX

## 20 USCA § 1681 Sex (a) Prohibition against discrimination

No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . .

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# 1. *Sex Discrimination* versus *Sex-based Harassment*



*Sex-based harassment* means sexual harassment and harassment on the basis described in 106.10.

***Sex discrimination*** means discrimination based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, or gender identity. (41392: *Background*)

# *Sex-based Harassment versus Sex Discrimination*



## Sex-based Harassment

- Sexual harassment;
  - Quid pro quo
  - Hostile environment
  - Sexual assault, dating violence, domestic violence and stalking
- Harassment based on sex discrimination

## Sex Discrimination

- Sex stereotypes
- Sex characteristics
- Pregnancy or related conditions
- Sexual orientation
- Gender identity



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## Definitions of Sex-Based Harassment

- (1) Quid pro quo harassment. An employee, agent, or other person authorized by the recipient to provide an aid, benefit, or service under the recipient's education program or activity explicitly or impliedly conditioning the provision of such an aid, benefit, or service on a person's participation in unwelcome sexual conduct;
- (2) Hostile environment harassment. 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 (i.e., creates a hostile environment).

# Definitions of Sex-Based Harassment



- (i) Sexual assault meaning an offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the Federal Bureau of Investigation;
- (ii) Dating violence meaning violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the victim;
- (iii) Domestic violence meaning felony or misdemeanor crimes of violence committed by a person who: (A) Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim; (B) Is cohabitating, or has cohabitated, with the victim as a spouse or intimate partner; (C) Shares a child in common with the victim; or (D) Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction; 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.
- (iv) 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.

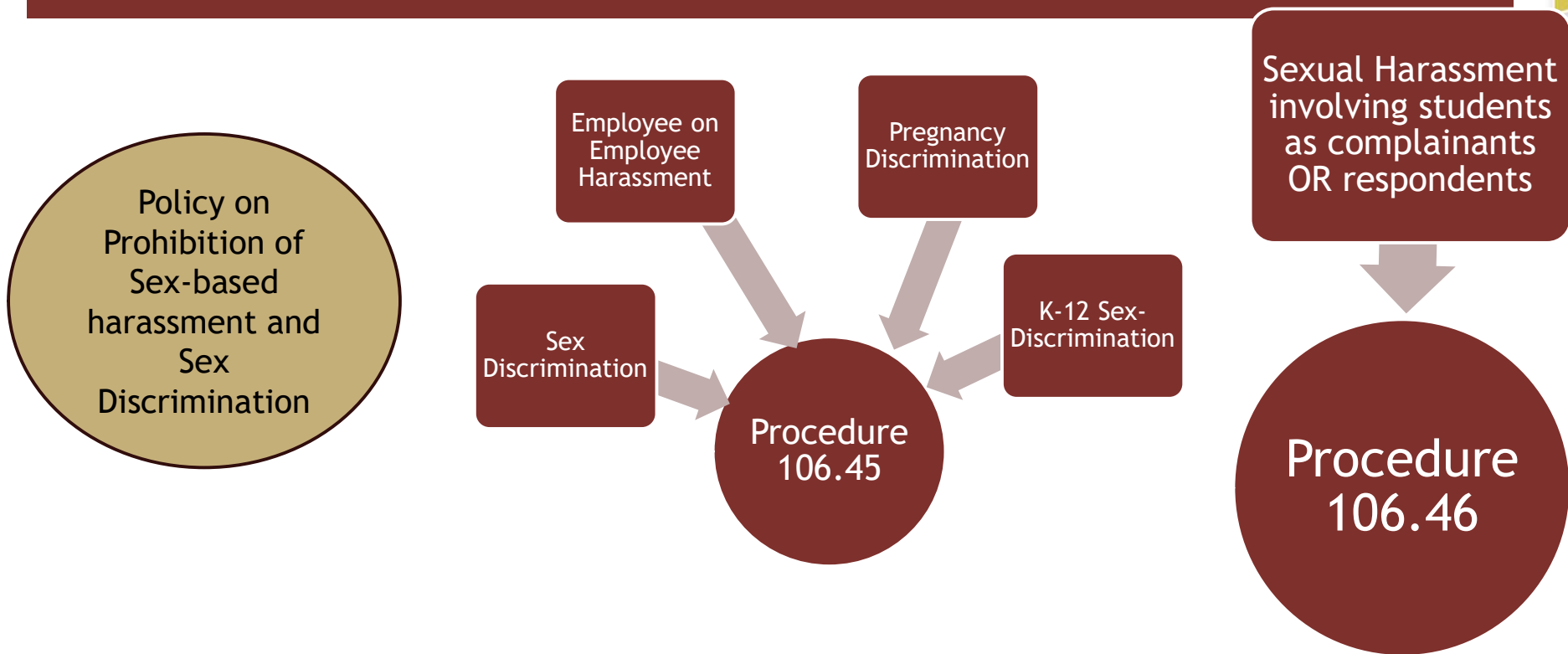
# Nondiscrimination Policy and Grievance Procedures



Must publish policy on nondiscrimination on the basis of sex and prohibition on sex discrimination

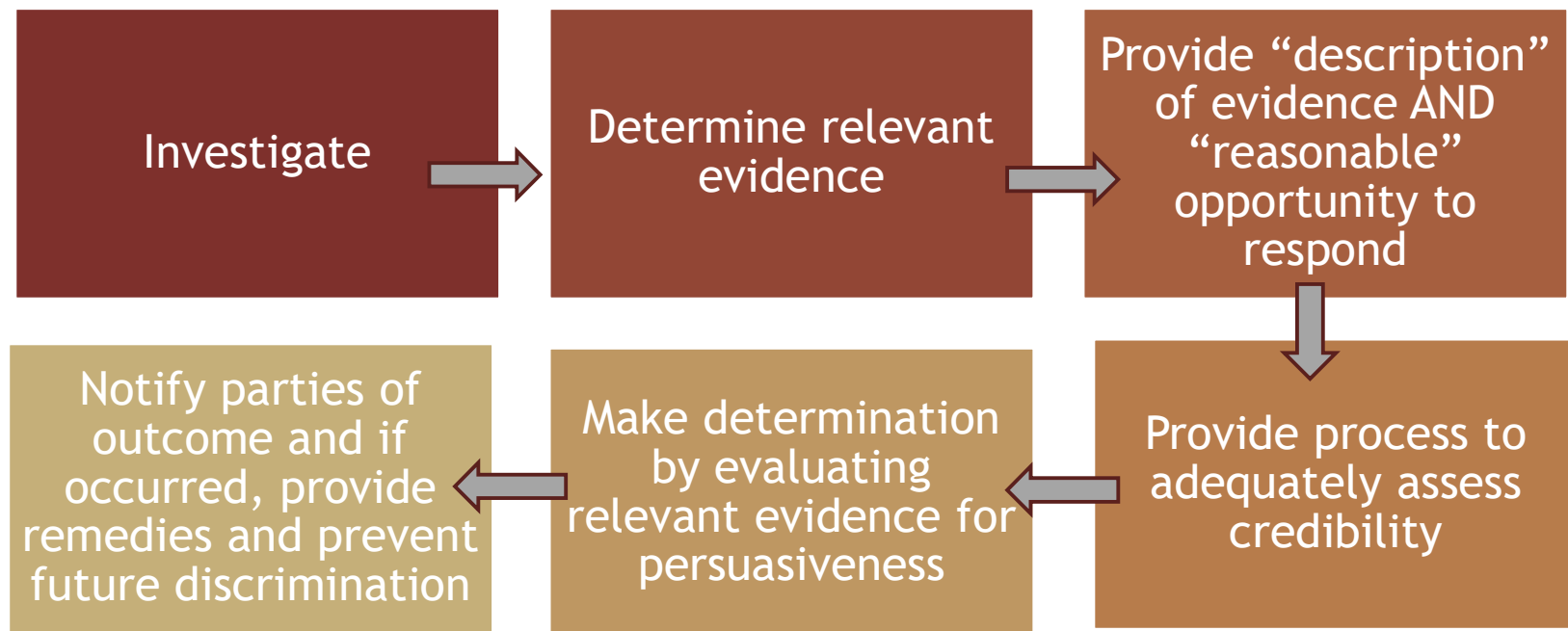
Must publish grievance procedures consistent with the requirements of 106.45 and 106.46.

# One Policy-Two Grievance Procedures

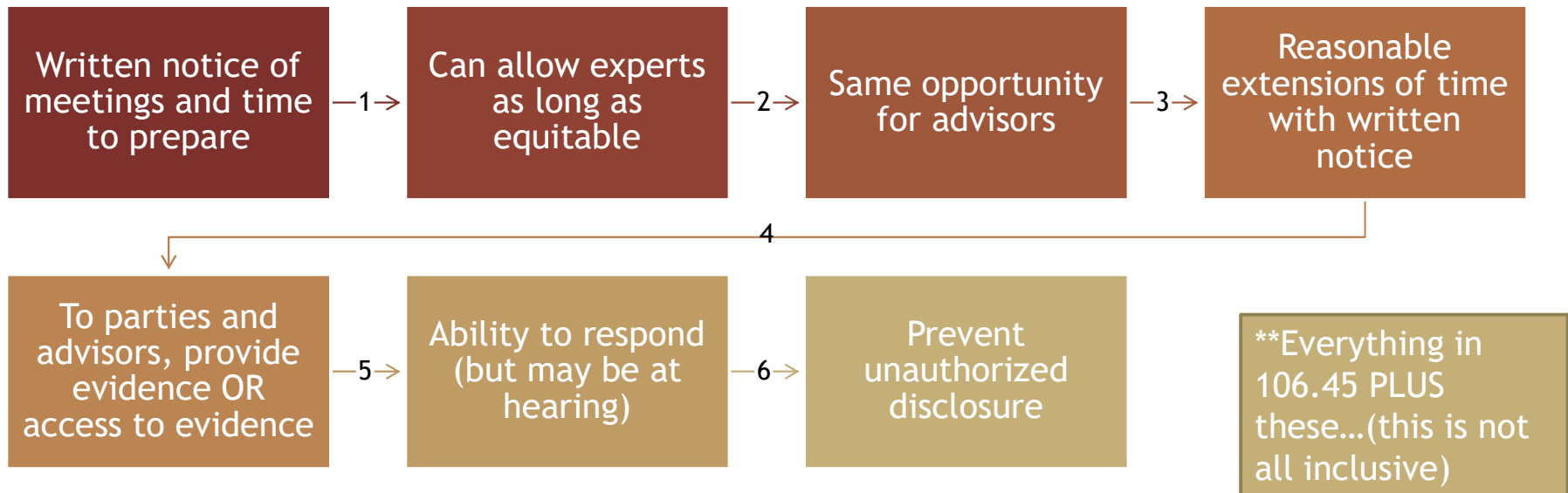




# New Proposed 106.45-Sex Discrimination Grievance Procedures



# New Proposed 106.46-Sex-based Harassment Grievance Procedures



# Jurisdiction of Title IX

- 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 United States.



# Example from Draft Title IX Regulations



“For example, Student A reports that Student B sexually assaulted her while participating in the recipient’s study abroad program and both students have now returned to campus in the United States. Student A reports that Student B has been taunting her with sexually suggestive comments about the prior assault since their return to campus. Because of the sexual assault and Student B’s continuing conduct, Student A is unable to concentrate or participate fully in her classes and activities where Student B is present. In this scenario, because Student A has alleged a hostile environment based on sex within the recipient’s education program or activity within the United States, the recipient would have an obligation to take action to address those allegations. The proposed regulations would require the recipient to provide Student A with appropriate supportive measures and, if the recipient’s investigation finds that a hostile environment exists within its education program or activity, take action against Student B after following all applicable grievance procedures.” (Unofficial Version, Page 50).

## “Complaint” versus “Signed Formal Complaint”

- A complaint means an oral or written request to the institution to initiate the school’s grievance procedures under 106.45 and/or 106.46.

## No More “Actual Knowledge”

- Title IX requires all recipients to operate their education programs or activities free from prohibited sex discrimination at all times.
- To fulfill this requirement, the proposed regulations would require a recipient to take prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, prevent its recurrence, and remedy its effects. (Proposed § 106.44(a))

# Who is a Complainant?



A “complainant” means a student or employee who is alleged to have been subjected to sex discrimination under Title IX; or

A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination AND who was participating in or attempting to participate in the educational program or activity when the alleged sex discrimination occurred.

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# Employee Training: All Employees

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- All employees must be trained on: obligation of institution to address sex discrimination; and what constitutes sex discrimination, including sex harassment; and all applicable notification requirements, including how to contact the Title IX Coordinator; and information on the institution's policy and applicable grievance procedures.



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# Employee Training: Investigators, Decisionmakers, and others in process

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- Investigators, Decisionmakers, and other persons who are responsible for implementing the grievance procedure OR has the authority to modify or terminate supportive measures: obligation of institution to address sex discrimination; and the institution's obligations pursuant to their (compliant) institutional policy; how to serve impartially, including prejudgment of facts; avoiding conflict and bias; the meaning and application of the term "relevant" in relation to questions and evidence; the type of evidence that are impermissible.

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## Employee Training: Informal Resolution Facilitators

- **Informal Resolution Facilitators**: in addition to receiving the “all employee” training, those employees who facilitate informal resolution must be trained on the rules and practices associated with the institution’s informal resolution process and how to serve impartially, including avoiding conflicts of interest and bias.

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# Employee Training

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- Title IX Coordinator and Designees: everything all prior groups must be trained on as well as all responsibilities outlined in the law, including how to discharge the policy and grievance procedures appropriately and retain records in accordance with the law.

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# EMPLOYEE REPORTING



# Employee Reporting-Notification Requirement



- Must notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

# Confidential Employees DEFINED



PRIVILEGED (IN ROLE)

DESIGNATED (WHEN PROVIDING SERVICES)

HUMAN-SUBJECTS RESEARCH ON SEX DISCRIMINATION

# Reporting Requirements (Post-Secondary)



Employee Role	Involving	Notify T9	Provide T9 info*	
Confidential Employee	Student or Employee	No	Yes	
Employee with <b>ability to institute corrective measures</b>	Student or Employee	Yes		
Employee responsible for <b>administrative leadership, teaching, or advising</b>	Student	Yes		
Employee responsible for <b>administrative leadership, teaching, or advising</b>	Employee	Yes	OR	Yes
All other employees	Student or Employee	Yes	OR	Yes

# Appeals-Sex-Based Harassment Procedures ONLY



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Procedural irregularity that would change the determination of whether sex-based harassment occurred

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New evidence that would change the outcome of the matter and that was not reasonably available at the time the determination of whether sex-based harassment occurred, or dismissal was made

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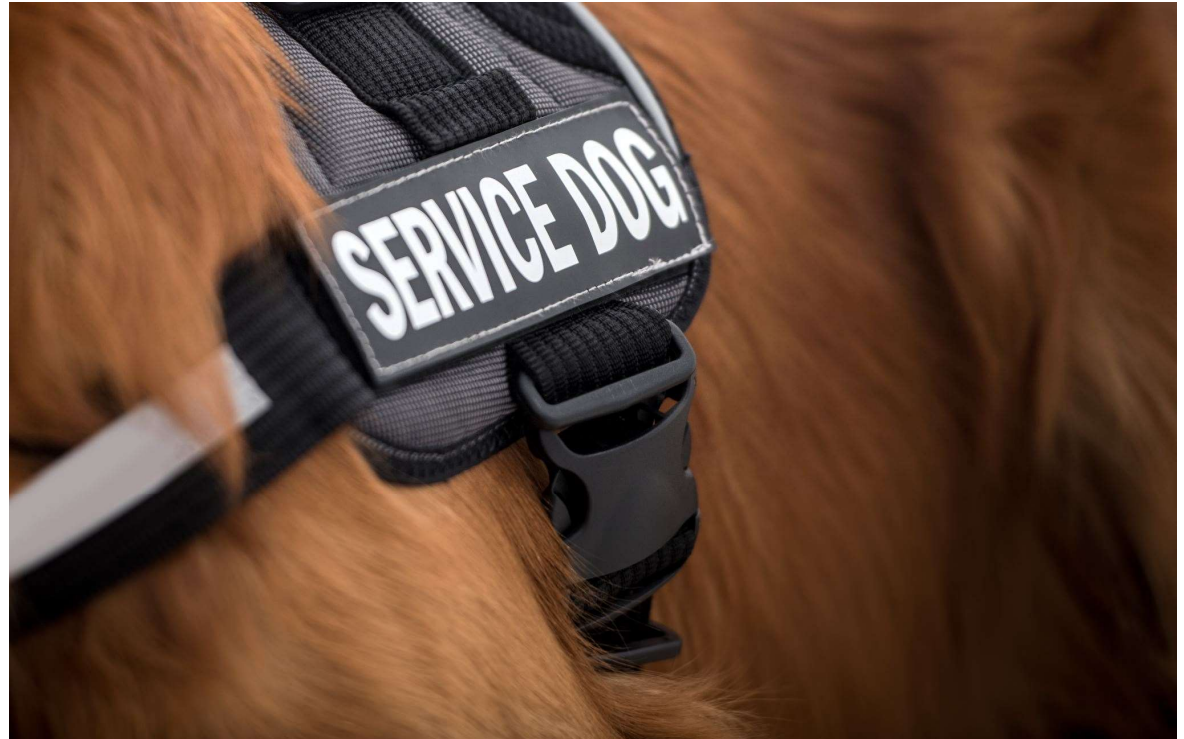
Title IX Coordinator, investigator or decision-maker had conflict of interest of bias that would change the outcome



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## Other Miscellaneous Items

- Emergency Removal
- Supportive Measures
- Informal Resolution
- Exercise by Rights of Parents of Minors
- 504 and ADA Implications



# Pregnancy and Parental Status Discrimination: Intent



“The Department describes its proposed revisions to the Title IX regulations related to pregnancy or related conditions as well as sex discrimination related to marital, parental, and family status, to provide clarity to recipients about their obligation not to discriminate against students or employees who are pregnant or experiencing pregnancy-related conditions.

# Parental Status

- “Parental status, as used in §§ 106.21(c)(2)(i), 106.37(a)(3), 106.40(a), and 106.57(a)(1), means the status of a person who, with respect to another person who is under the age of 18 or who is 18 or older but is incapable of self-care because of a physical or mental disability, is:
  - (1) A biological parent;
  - (2) An adoptive parent;
  - (3) A foster parent;
  - (4) A stepparent;
  - (5) A legal custodian or guardian;
  - (6) In loco parentis with respect to such a person; or
  - (7) Actively seeking legal custody, guardianship, visitation, or adoption of such a person.”

## Parental, family, or marital status; pregnancy or related conditions means...

- Pregnancy or related conditions means:
  - (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 their related medical conditions.



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# Pregnancy Leave

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- “In the case of a recipient that does not maintain a leave policy for its employees, or in the case of an employee with insufficient leave or accrued employment time to qualify for leave under such a policy, a recipient shall treat pregnancy or related conditions as a justification for a voluntary leave of absence without pay for a reasonable period of time, at the conclusion of which the employee shall be reinstated to the status held when the leave began or to a comparable position, without decrease in rate of compensation or loss of promotional opportunities, or any other right or privilege of employment.” (Proposed 106.57)

# Lactation

- Institutions must provide reasonable break time for an employee to express breast milk or breastfeed as needed.
- Institutions must ensure the availability of a lactation space, which must be a space other than a bathroom that is clean, shielded from view, free from intrusion from others, and may be used by an employee for expressing.



# Pregnancy and Parental Status Discrimination

Sections applying to Employees and Students

Lactation time and space

Comparable treatment to temporary disabilities or conditions

When employee informed of student pregnancy ...promptly informs that person of how to notify the Title IX Coordinator

When Title IX learns...must inform student

- Prohibit sex discrimination
- Reasonable modifications
- Allow access to separate and comparable program or activity
- Allow voluntary leave of absence
- Lactation space
- Grievance procedures

# CLERY ACT IMPLICATION OF THE DRAFT 2023 REGULATIONS

\*ANTICIPATED RELEASE DATE OF  
NEW REGS IS OCTOBER 2023

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# Definitions

## Draft Title IX Regs

*The Department proposes incorporating the portion of the definition of “domestic violence” that is relevant to Title IX.*

Domestic Violence:

A Felony or misdemeanor crime of violence committed by a person who—

- A. Is a current or former spouse or intimate partner of the victim under the family or domestic violence laws of the jurisdiction of the recipient, or a person similarly situated to a spouse of the victim;
- B. Is cohabitating, or has cohabitated with, the victim as a spouse or intimate partner;
- C. Shares a child in common with the victim;
- D. Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

## Clergy Act

Domestic Violence:

A Felony or misdemeanor crime of violence committed—

- A. By a current or former spouse or intimate partner 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 crime of 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.

# Training of “Officials” Who Discharge the Process



## Draft Title IX Regs

Title IX Coordinator, Designees

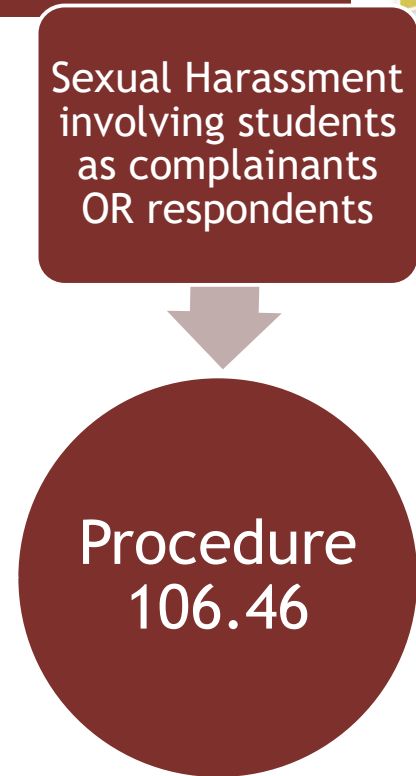
Obligation of institution to address sex discrimination; and the institution’s obligations pursuant to their (compliant) institutional policy; how to serve impartially, including prejudgment of facts; avoiding conflict and bias; the meaning and application of the term “relevant” in relation to questions and evidence; the type of evidence that are impermissible; how to discharge the policy and grievance procedures appropriately and retain records in accordance with the law.

## Clery Act

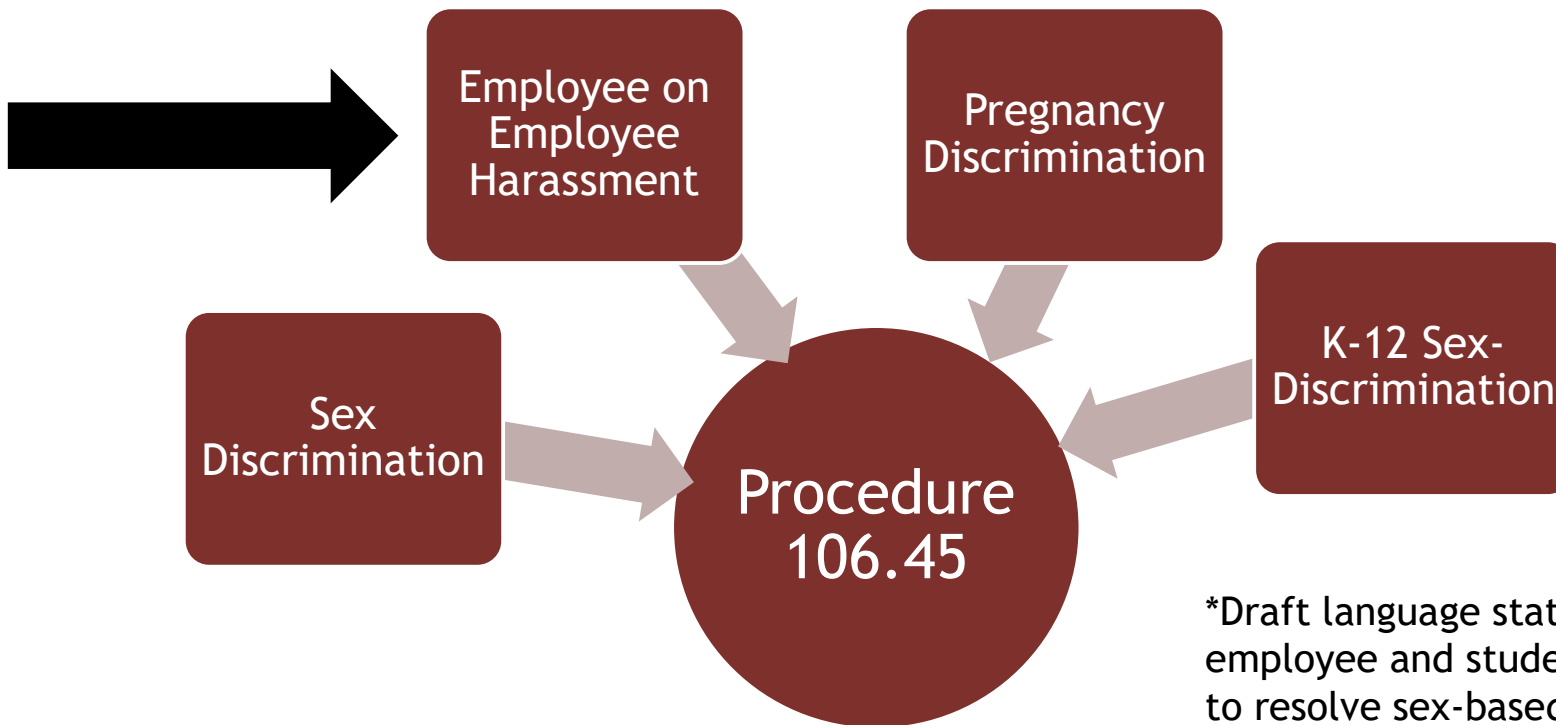
Procedures for institutional disciplinary action in cases of alleged dating violence, domestic violence, sexual assault, or stalking...that (2) Provides that the proceedings will—

Be conducted by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process that protects the safety of victims and promotes accountability;

# Policy and Procedure Construction



# 106.45 Employee on Employee Challenges



\*Draft language states that employee and student procedures to resolve sex-based harassment will no longer be the same

# Employee on Employee Harassment



## Draft Title IX Regs

- Silent

A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties. (Proposed § 106.45(i))

## Clery Act

- Provide the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice. (Advisor means any individual who provides the accuser or accused support, guidance, or advice.)

# Employee on Employee Harassment



## Draft Title IX Regs

- Silent

A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties. (Proposed § 106.45(i))

## Clery Act

- Not limit the choice of advisor or presence for either the accuser or the accused in any meeting or institutional disciplinary proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties; and

# Employee on Employee Harassment



## Draft Title IX Regs

- Describe the range of, or list, the possible disciplinary sanctions and remedies that the recipient may impose following a determination the sex-based harassment occurred.

## Clery Act

- Lists all possible sanctions that the institution may impose following the results of an institutional disciplinary procedure for an allegation of dating violence, domestic violence, sexual assault, or stalking; and

A recipient may add provisions to its grievance procedures as long as the provisions apply equally to the parties. (Proposed § 106.45(i))

# Reporting



## Draft Title IX Regs

Must notify the Title IX Coordinator when the employee has information about conduct that may constitute sex discrimination under Title IX.

Notice to any employee required to report constitutes notice to the recipient.

## Clery Act Implication

- Since all employees less confidential employees (in their capacity as confidential) will be required to report sexual harassment to the Title IX Coordinator, we can expect an increase in CSA reports from Title IX to the reporting structure of the institution.
- This includes allegations of conduct that did not occur in the institution's Clery reportable geography and not within the institution's educational programs or associated activities as the jurisdiction for Title IX applicability is expected to greatly increase.
- Many schools came to rely on Title IX reports as clearly "in" as current threshold for Title IX does strongly rely on an incident occurring "on campus."



# Implementation Date and ASR Implications



\*\*If the regs drop in October and the implementation date is midcycle, you will need to republish and redistribute your ASR/ASF SR

Review

Revise

Republish

Redistribute

## What should I be thinking about now?

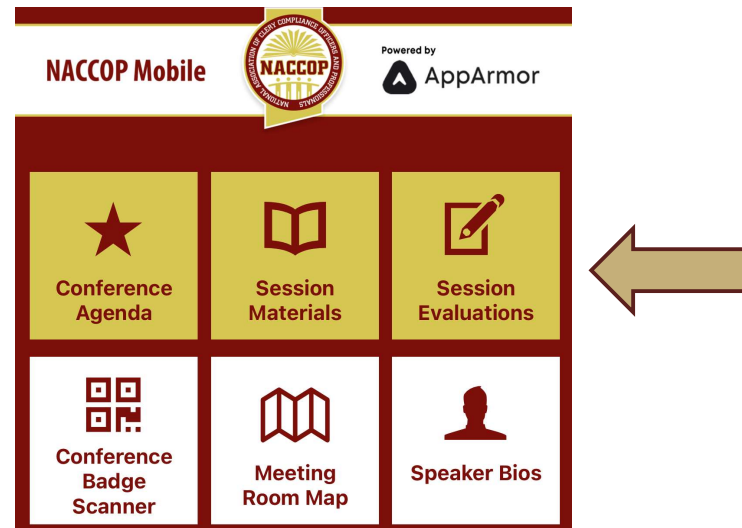
1. Stay tuned....we expect final regs on or about October 2023.
2. Be thinking about your current policy and procedure structure—who will need to be at the table to start amending documents when the regs drop? What role will you have as you work to ensure Clery Act requirements are considered in the amendment process?
3. Many schools are going to have to seriously up their game on pregnancy, parenting, and lactation requirements if these pass as is...this far exceeds what HR has previously been required to do under Federal law. While these areas do not have Clery Act implications, per se, it would be prudent to train staff as complaints of sex-discrimination (in addition to sex harassment) could come to public safety.
4. Get ready to amend ASR/ASF SR when new policies and procedures come to fruition.





# Session Evaluation

1. Select the “Session Evaluations” button in the NACCOP Mobile App



2. Or, visit <https://www.surveymonkey.com/r/NACCOP2023> to evaluate this session.