

# The Federal Approach May Change; Our Commitment Always Remains The Same

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## Joseph Storch (He/Him)

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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.

# REMINDER

Continue to follow current policies and procedures consistent with the 2020 Final Rule and state law



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# Title IX



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# How it started; how it's going (re: Study abroad)

## Clery Act:

- Statute and Regulations
- 2005 Handbook; 2011 Handbook; 2016 Handbook
- Letters from the Department

## Title IX:

- 2011 Dear Colleague Letter; 2014 Q&A
- Court cases (split)

## 2020:

August 2020: ~~Title IX obligations outside the United States~~

October 2020: ~~Clery Act obligations outside the United States~~

## 2024:

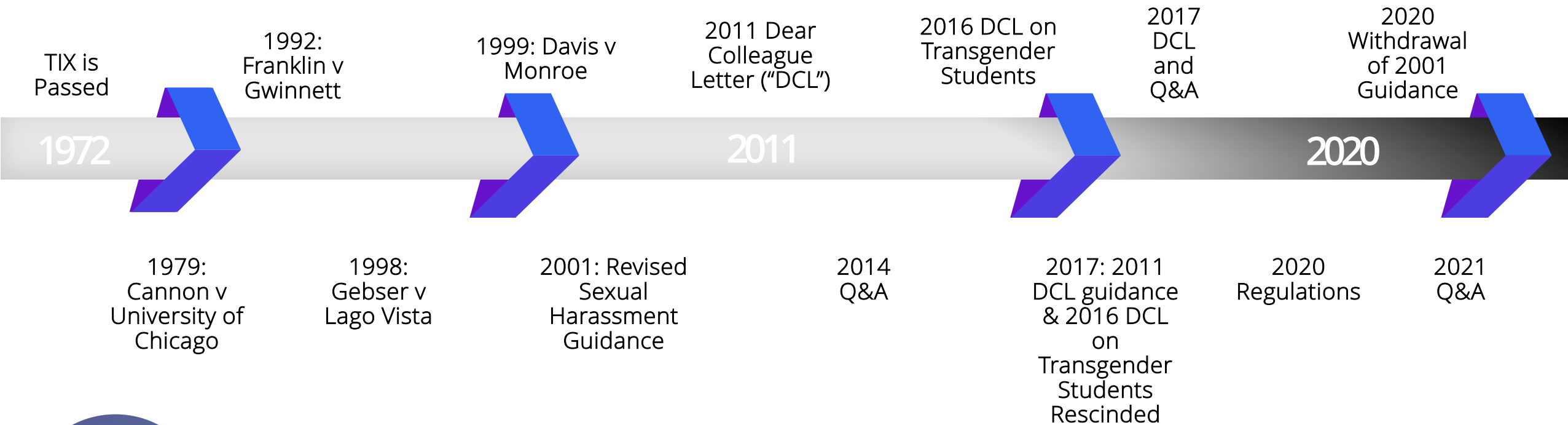
TBD: Partial Title IX return

ED interpretation of Clery Act and Title IV



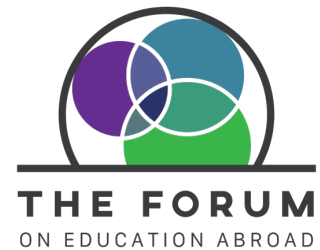
# The History of Title IX

A TIMELINE



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# Background

## 2020 Title IX Final Rule (effective now)

- Narrow geographic scope
- Narrow set of violations
- Narrow concentration (sexual harassment/violence)
- Narrow required reporting and formal process
- More significant process



30026

Federal Register / Vol. 85, No. 97 / Tuesday, May 19, 2020 / Rules and Regulations

### DEPARTMENT OF EDUCATION

#### 34 CFR Part 106

[Docket ID ED-2018-OCR-0064]

RIN 1870-AA14

#### Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

**AGENCY:** Office for Civil Rights, Department of Education.

**ACTION:** Final rule.

**SUMMARY:** The Secretary of Education amends the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The final regulations specify how recipients of Federal financial assistance covered by Title IX, including elementary and secondary schools as well as postsecondary institutions, (hereinafter collectively referred to as “recipients” or “schools”), must respond to allegations of sexual harassment consistent with Title IX’s prohibition against sex discrimination. These regulations are intended to effectuate Title IX’s prohibition against sex discrimination by requiring recipients to address sexual harassment as a form of sex discrimination in

Room 4E308, Washington, DC 20202. Telephone: (202) 453-6639. Email: [Alejandro.Reyes@ed.gov](mailto:Alejandro.Reyes@ed.gov).

If you use a telecommunications device for the deaf (TDD) or a text telephone (TTY), call the Federal Relay Service (FRS), toll free at 1-800-877-8339.

#### SUPPLEMENTARY INFORMATION:

##### Table of Contents

Effective Date	Elementary and Secondary Schools Formal Complaint
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	Effectively Denies Equal Access
	Prong (3) Sexual Assault, Dating Violence, Domestic Violence, Stalking
	Gender-Based Harassment
	Supportive Measures
	Overall Support and Opposition
	No-Contact Orders

# How it started; how it's going

The future...?



# Background



41390

Federal Register / Vol. 87, No. 132 / Tuesday, July 12, 2022 / Proposed Rules

## DEPARTMENT OF EDUCATION

### 34 CFR Part 106

[Docket ID ED–2021–OCR–0166]

RIN 1870–AA16

#### **Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance**

**AGENCY:** Office for Civil Rights, Department of Education.

**ACTION:** Notice of proposed rulemaking.

**SUMMARY:** The U.S. Department of Education (Department) proposes to amend the regulations implementing Title IX of the Education Amendments of 1972 (Title IX). The purpose of the proposed regulations is to better align the Title IX regulatory requirements with Title IX’s nondiscrimination mandate, and to clarify the scope and application of Title IX and the obligation of all schools, including elementary schools, secondary schools, postsecondary institutions, and other

convert the PDF to “print-to-PDF” format, or to use some other commonly used searchable text format. Please do not submit the PDF in a scanned format. Using a print-to-PDF format allows the Department to electronically search and copy certain portions of your submissions to assist in the rulemaking process.

- *Federal eRulemaking Portal:* Please go to <http://www.regulations.gov> to submit your comments electronically. Information on using <http://www.regulations.gov>, including instructions for finding a rule on the site and submitting comments, is available on the site under “FAQ.”

**Note:** The Department’s policy is to generally make comments received from members of the public available for public viewing on the Federal eRulemaking Portal at <http://www.regulations.gov>. Therefore, commenters should include in their comments only information about themselves that they wish to make publicly available. Commenters should not include in their comments any information that identifies other individuals or that permits readers to

#### **Executive Summary**

##### *Purpose of This Regulatory Action*

The Department’s review of the current regulations and of information received during and pursuant to a week-long public hearing as well as stakeholder listening sessions and meetings suggest that the current regulations do not best fulfill the requirement of Title IX of the Education Amendments of 1972 (Title IX) that schools and institutions that receive Federal financial assistance eliminate discrimination on the basis of sex in their education programs or activities. The Department therefore proposes that the current regulations should be amended to provide greater clarity regarding the scope of sex discrimination, including recipients’ obligations not to discriminate based on sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity. Further, the Department proposes that the current regulations could better account for the variety of education

## 2022 Proposed Title IX Rule

- Significant changes
- Some significant things not changed
- If application off school grounds comes back, it will come back wider

# 2022 NPRM

Widely addressing sex discrimination

1. Defines sex-based harassment;
2. Addresses pregnancy and parenting;
- 3. Expands geographic scope for prohibited conduct;**
4. Expands obligation to take prompt and effective action to end any prohibited sex discrimination;
5. Develops procedural requirements for all complaints of sex discrimination



# (Proposed) Expanded Scope

- Sex-Based Harassment (Proposed § 106.2) includes Discrimination on the Basis of Sex (Proposed § 106.10)

## SEX-BASED HARASSMENT

- Quid pro quo
- Hostile environment: “Severe *or* pervasive”
- Specific Offenses, including sexual assault, dating violence, domestic violence, and stalking

## DISCRIMINATION ON THE BASIS OF SEX

- Discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

# (Proposed) Expanded Responsibility



# LGBTQI+

- “sex stereotypes, sex characteristics,... sexual orientation, and gender identity.”



# Responding and Notification

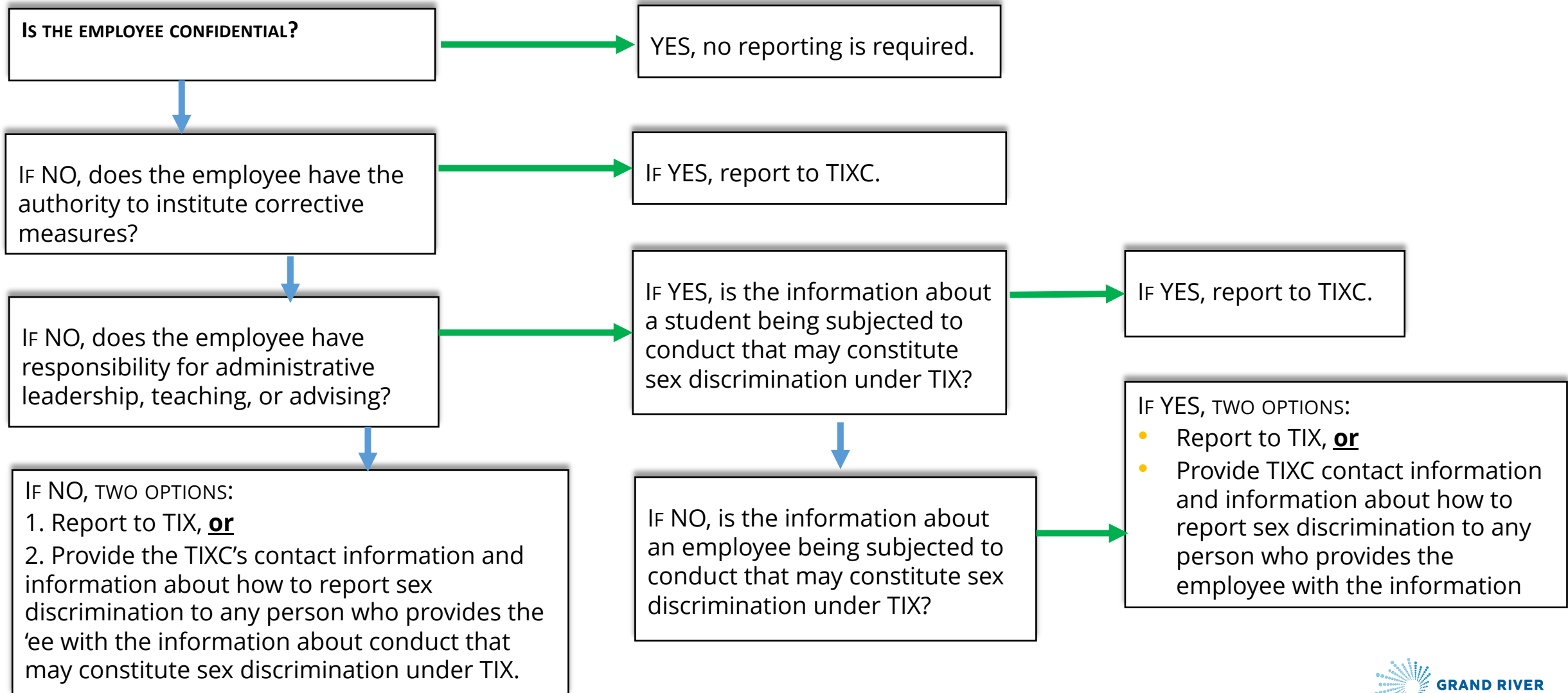
## “actual knowledge”

- “[R]equire a recipient to take a prompt and effective action to end any prohibited sex discrimination that has occurred in its education program or activity, to prevent its recurrence, and remedy its effects.” (Proposed § 106.44(a))
- Supportive measures

## Employees required to notify the TIXC (proposed § 106.44) are those who are **not confidential**, and:

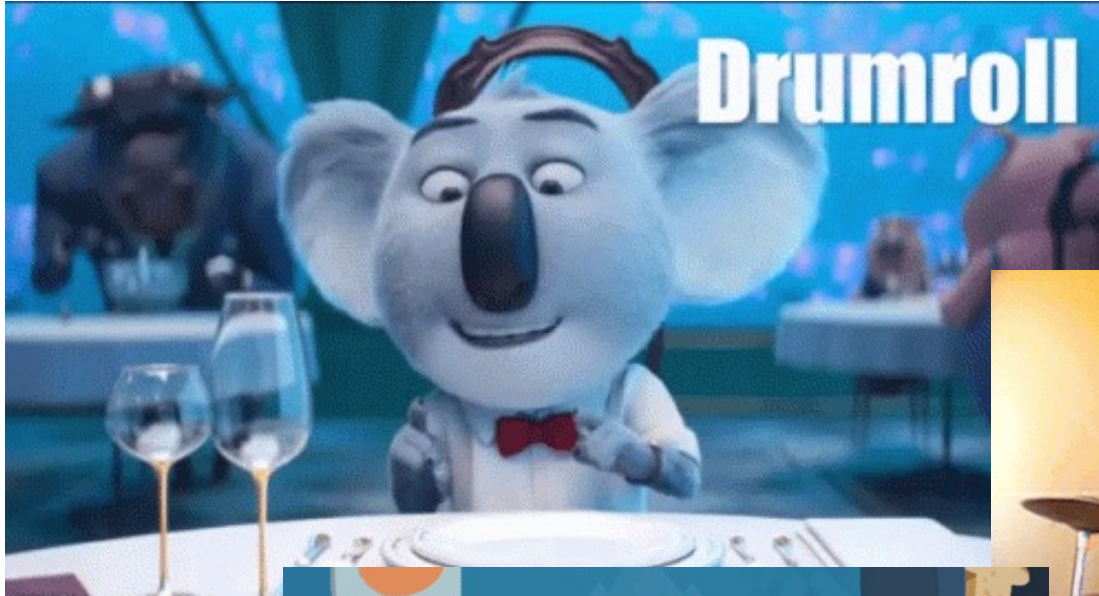
- have responsibility for administrative leadership, teaching, or advising
- have authority to institute corrective measures
- All other employees who are not confidential employees\*

# 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?





# But the Biggest Relevant Change...



# Geography and Jurisdiction

- Expanded scope (Proposed § 106.11)
- ~~“in the United States”~~ (Current § 106.44(a))

“It also requires a recipient to respond to a hostile environment based on sex within its education program or activity in the United States, **even if sex-based conduct contributing to the hostile environment occurred outside the recipient’s education program or activity or outside the United States.**” (Proposed § 106.11)





# Geography and Jurisdiction

## Long Term Concept

Which matters more:

- Where the incident happened?
- Where (and whether) the person is excluded/limited from their education program or activity?

G  
E  
O  
G  
R  
A  
P  
H  
Y

# Study Abroad Examples from the NPRM

"[A]student in a recipient's study abroad program complains that he was subjected to different treatment in grading based on sex by a professor and, as a result, the student lost his scholarship. Under proposed § 106.11, the recipient would be required to address the complaint because, although the different treatment in grading occurred outside of the United States, **that conduct caused discrimination based on sex in the recipient's education program in the United States.**"

# Study Abroad Examples from the NPRM

"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."

# Forum Letter

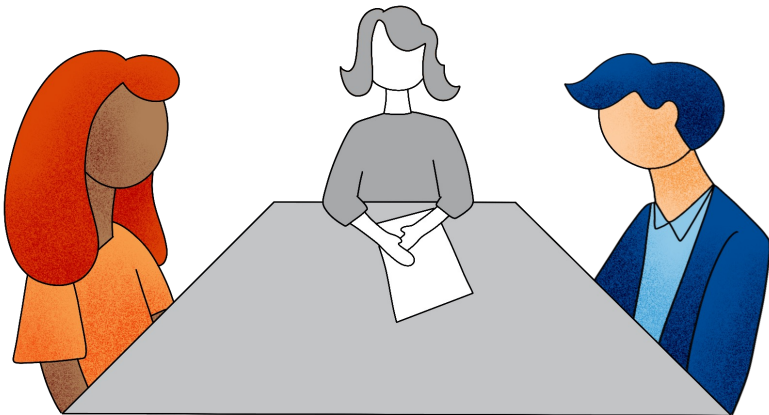
1. Lack of clarity around when misconduct abroad triggers a required prompt and effective response from the institution
2. Conflict with privacy laws, like GDPR, and resulting required reporting issues
3. Responsibility of contractors/partners to provide required information about the applicable Coordinator to any student who discloses?

# Informal Resolution

# INFORMAL RESOLUTION

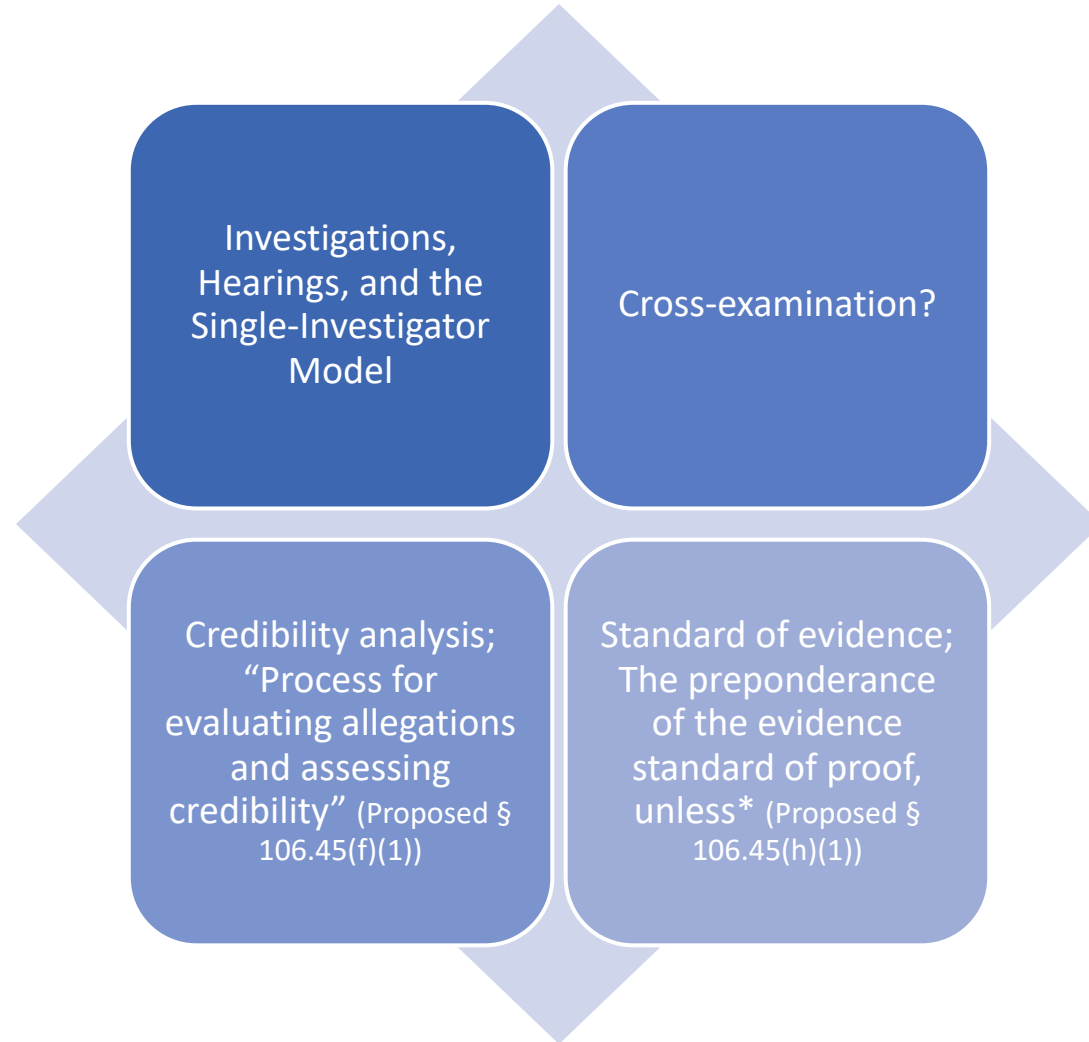
When may  
informal  
resolution begin?

Other changes?



# Formal Resolution

# PROCEDURES



# Training

- SPECIFIC OBLIGATIONS TO TRAIN

Employees: Scope and obligations; responsible employee duties; pregnant/parenting

Investigators, decisionmakers, and other persons who are responsible for implementing the recipient's grievance procedures or have the authority to modify or terminate supportive measures

Facilitators of informal resolutions

TIXC and designees





# The Clery Act and Violence Against Women Act

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# Non Campus- International (Counting)

## Examples of Non Campus buildings:

2005 Handbook- essentially silent

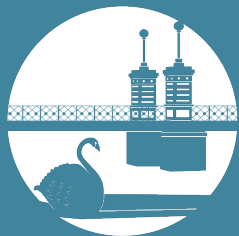
2011 Handbook- Hotels

2016 Handbook- Expanded

October 2020- disclaimed (some relevant Court cases)

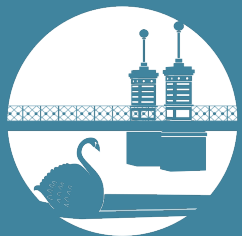
Not in Regs or Statute

But...what ED currently says...



# Non Campus- International (Responding)

Under the Clery Act, response is not the same as counting





# VAWA AND CLERY REPORTING

stalking, as required by paragraph (k) of this section; and

(vii) A statement that, when a student or employee reports to the institution that the student or employee has been a victim of dating violence, domestic violence, sexual assault, or stalking, whether the offense occurred on or off campus, the institution will provide the student or employee a written explanation of the student's or employee's rights and options, as described in paragraphs (b)(11)(ii) through (vi) of this section.

(12) A statement advising the campus community where law enforcement

- Title IX (historically) and VAWA response are not based on geography, they are based on identity (usually).
- Title IX (current) response and Clery counting are based on geography

# VAWA Reportable Incidents

## Dating Violence

The term dating violence means “violence committed by a person—

- A. who is or has been in a social relationship of a romantic or intimate nature with the victim;
- B. the existence of such a relationship shall be determined based on the reporting party's statement and with consideration of:
  - I. The length of the relationship;
  - II. The type of relationship; and
  - III. The frequency of interaction between the persons involved in the relationship”

# VAWA Reportable Incidents

## Domestic Violence (Regulations, Appendix A)

The term domestic violence is a “felony or misdemeanor crimes of violence committed

- A. by a current or former spouse 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 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.



# Sexual Assault

“An offense that meets the definition of rape, fondling, incest, or statutory rape as used in the FBI’s UCR program and included in Appendix A of this subpart.”



# VAWA Reportable Incidents

## Stalking

- The term 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.

# VAWA disciplinary procedures must:

- Produce a fair, prompt, and impartial investigation and resolution;
- Be conducted by “officials” who receive “annual training.”



# Access to an advisor of choice, who may be an attorney

- Only required to allow the advisor to be an attorney in cases of
  - Sexual assault
  - Dating violence
  - Domestic violence
  - Stalking
- Consider and implement permitted restrictions
  - “Potted plant” (\*But see Title IX Final Rule)
  - Scheduling conflicts/extensions



# Providing Written Notice

- Institutions must provide written information to all students and employees;
  - Certain information must be provided in writing to victims\*; and
  - Certain information must be provided in writing to both the accused and the victim.
- 
- \*Regulatory language



# Equitable Opportunities

*Written policy provided to all students and employees must include everything in Victim Notification (forthcoming slides), and also information regarding:*

- **Equitable opportunities for victim and accused**
  - Accused and victim are entitled to the same opportunities to have others present during the institutional disciplinary process (hearing and other meetings).
  - Regulations make clear that all parties must have the right to have any advisor, including an attorney, present at the hearing and related meetings.

# Providing Written Notice

Must notify victim in writing about:

Sanctions, protective measures;

Evidence preservation;

How to report the offense, on and off campus, and assistance with reporting;

Availability of orders of protection, no contact orders, etc.;

Interim remedies, including options for and assistance with changing academic, living, transportation, and working situations, if requested and reasonably available;

Procedures for institutional disciplinary proceedings.

# Providing Written Notice

Notify the parties simultaneously and in writing about:

- The outcome of an institutional disciplinary proceeding;
- Procedures for appealing the results, if any;
- Any interim results (pre-appeal);
- When the results become final.

# 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).



# Prevention: Study Abroad!

## In short:

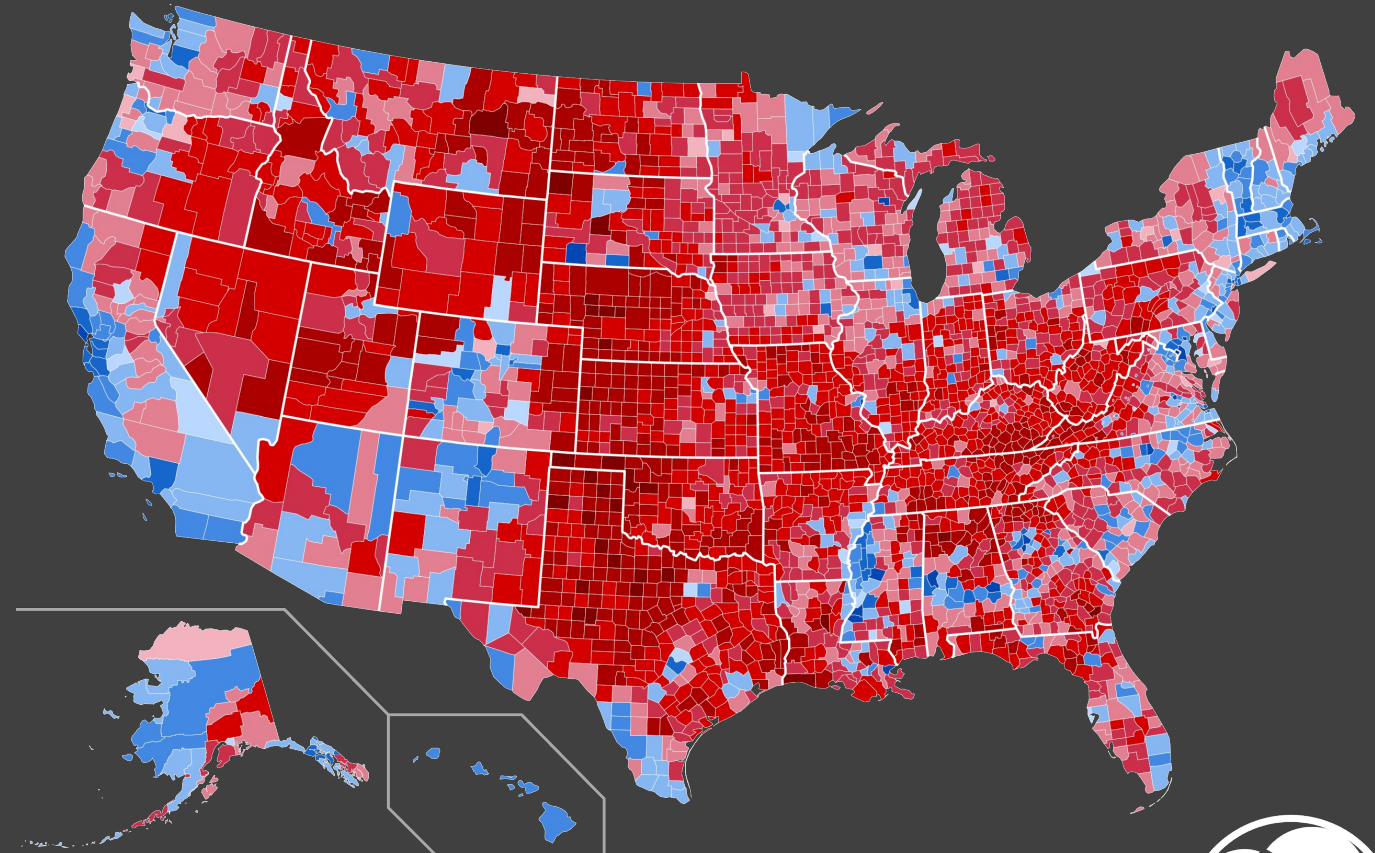
- Training, training, training...
- Awareness programs
- Bystander intervention training
- Ongoing prevention and awareness campaigns
- Primary prevention programs
- Risk reduction training



# Prevention: Study Abroad!

- **Can use programs “informed by research”**
- **Can meet more than one requirement in a single training.**
- **Note:**
  - There is no requirement that you use or buy any specific program, software, or “solution.”
  - There is no requirement that you spend at least \$X.
  - More expensive ≠ better for students.
  - Proven or promising. There is really good work being done by great, deeply dedicated organizations.

# State Law Approaches



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A stylized illustration in shades of blue and teal. On the left, a swan is shown in profile, facing right. In the background, two towers with domes and spires stand on a platform with a decorative railing. The scene is set against a circular backdrop.

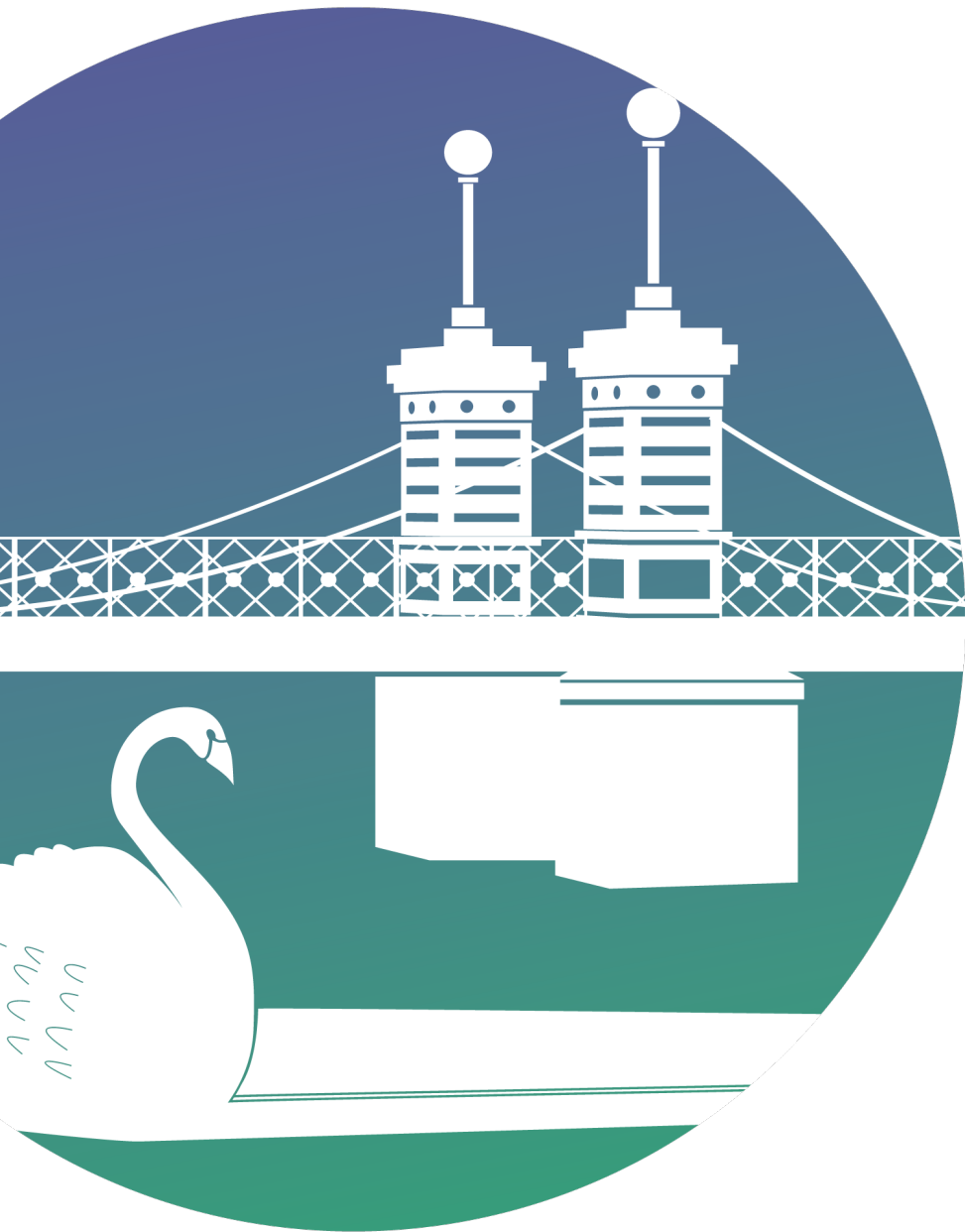
# But here are my bigger questions...

1. Are we checking a box or are we driving change?
2. Who dictates our moral approach?

A stylized illustration in shades of blue and teal. On the left, a swan is shown in profile, swimming. In the center, two identical towers with tiered tops and spherical finials stand on a platform with a decorative railing. The background is a light blue circular shape.

# But here are my bigger questions...

- Checking “their” box?
- Leading!



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