

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



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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

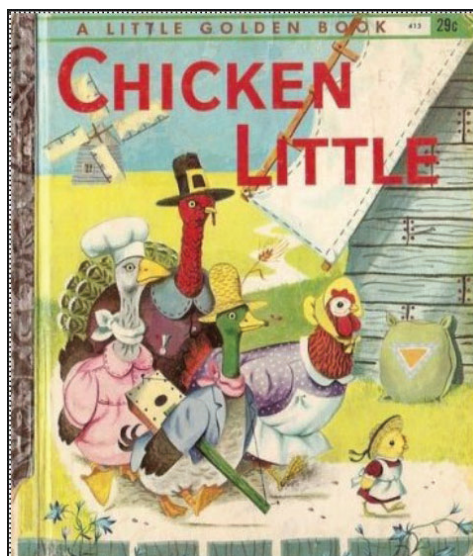
- Released on June 23, 2022, the 50th anniversary of Title IX
- 50 pages of proposed regulations, coupled with 650 pages of comments and discussion
- 60-day public comment period commences when the NPRM is published in the Federal Register
- OCR has reflected some openness to feedback and comments

“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

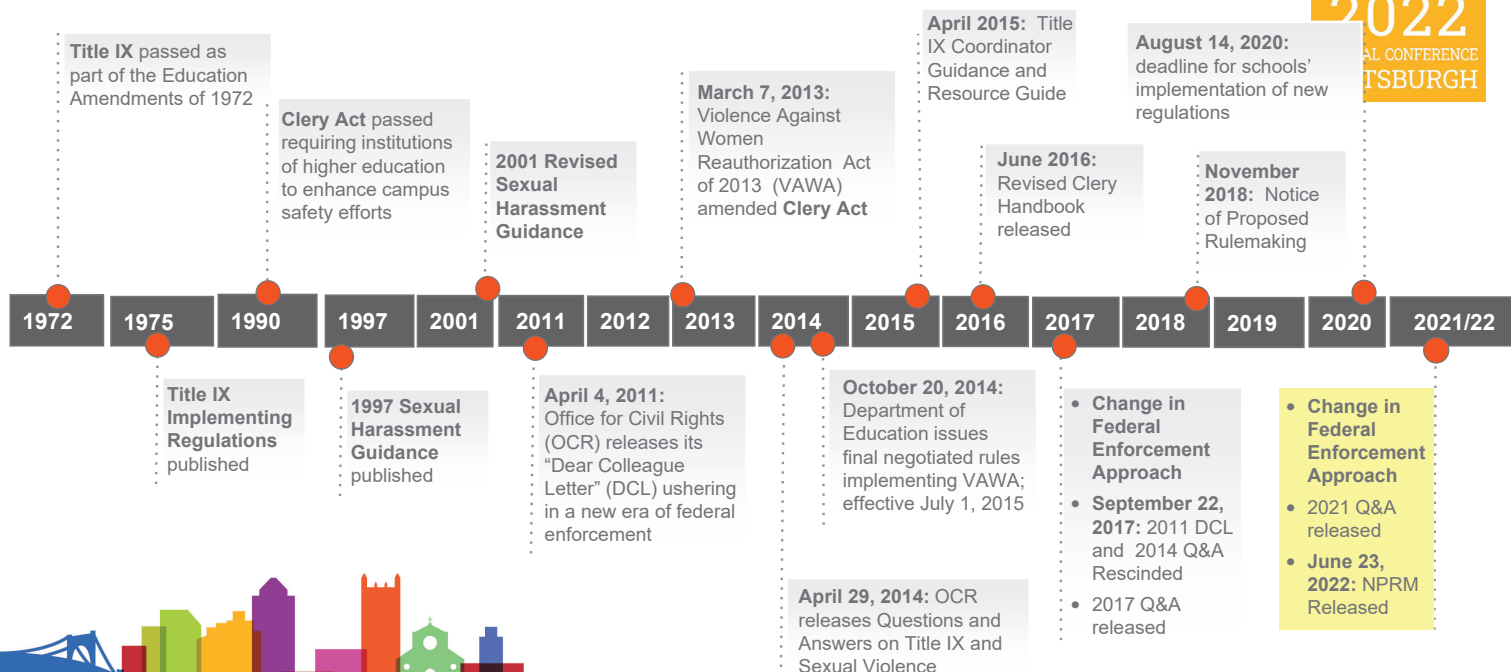
2022: Holistic & Aspirational

- “[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

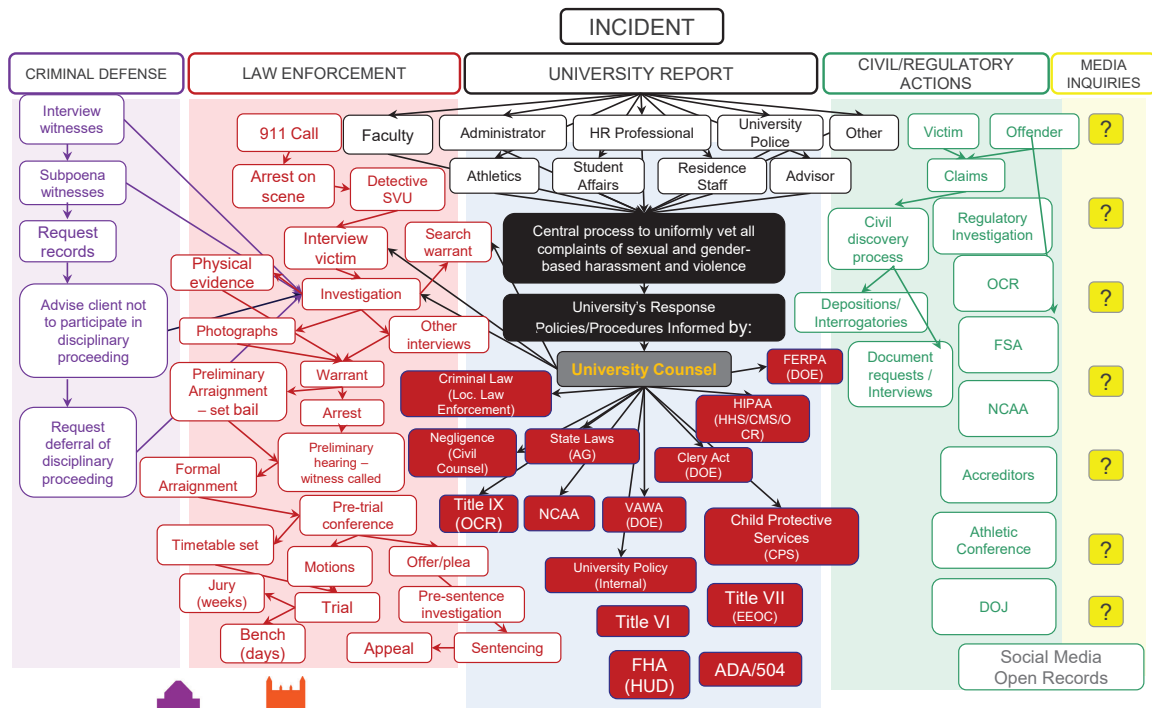


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Evolution of Federal Legislation and Guidance



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

The Title IX NPRM

KEY PROVISIONS:
The Title IX Notice of Proposed Rule Making (NPRM)
June 23, 2022

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*



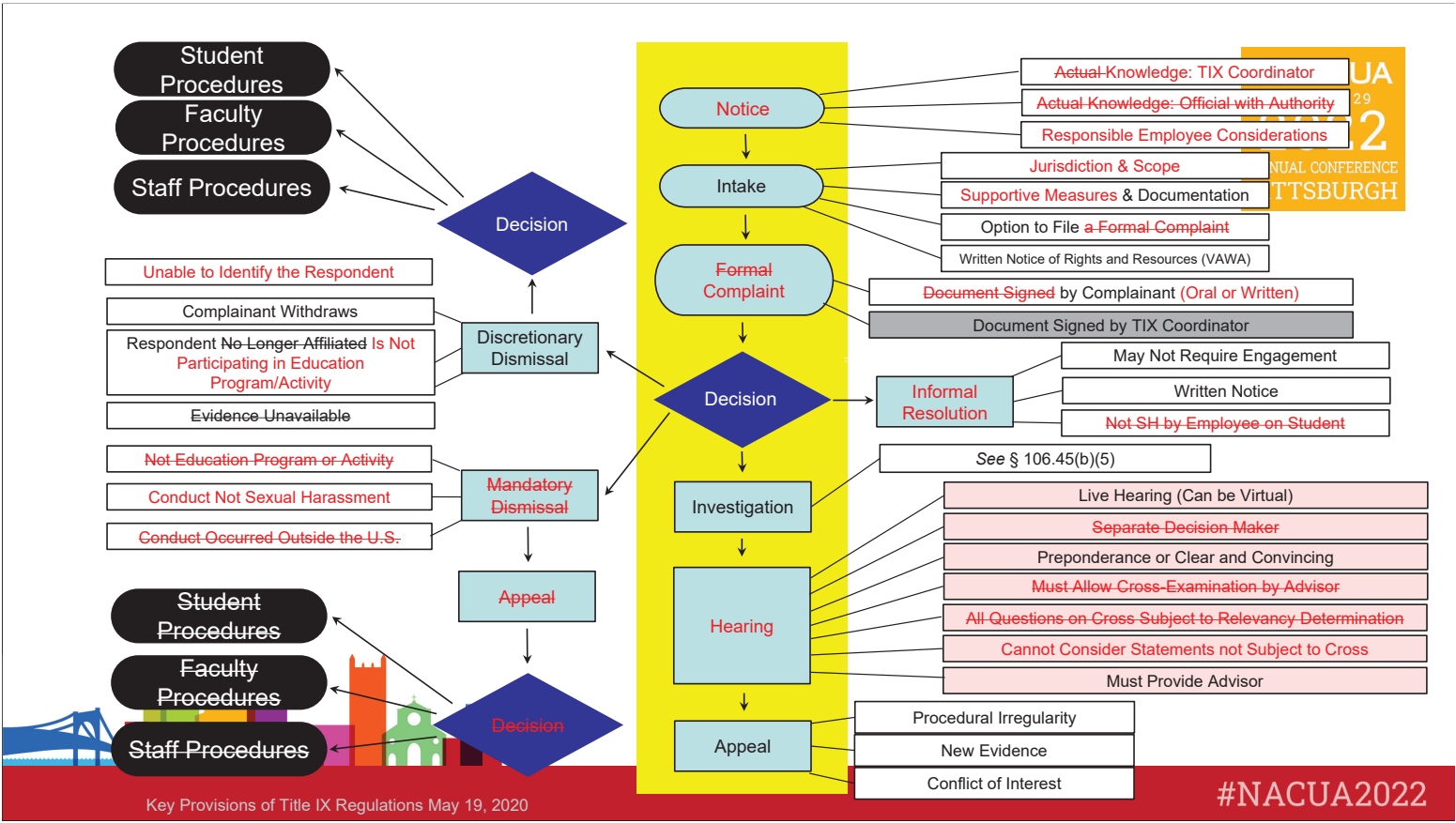
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Grievance Procedures

- 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

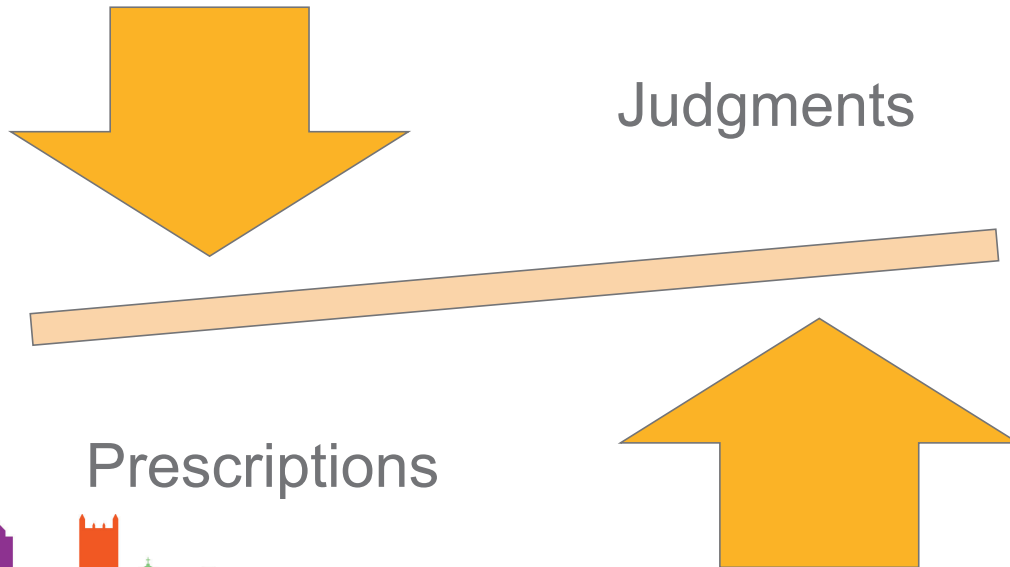


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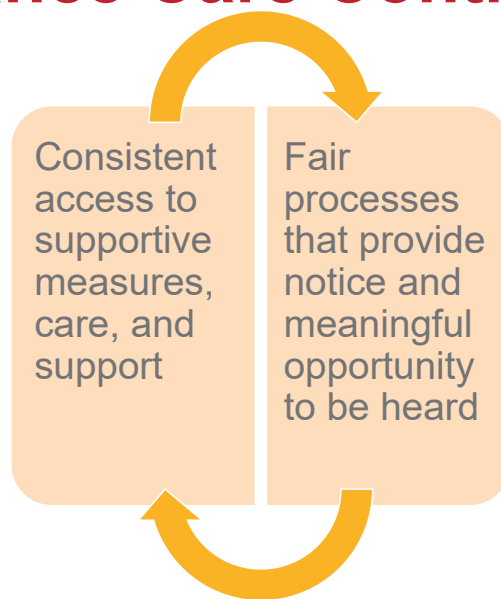
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Balancing



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The Compliance Care Continuum



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