



KEEPING UP WITH THE REGULATORS:

A Training for Illinois College and University Colleagues

June 27, 2023

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PRESENTATION AGENDA

- Title IX Sexual Misconduct Regulations
- Title IX Athletics Regulations
- Title IX Expected Litigation Challenges
- VAWA Climate Survey Requirements
- Illinois Survey Requirements
- CHIPS and Science Reporting Requirements
- Pregnancy and parenting in light of Dobbs

**WHEN DO WE
EXPECT FINAL
REGULATIONS?**

**IT'S GONNA BE
MAY??**

NARRATOR: It would in fact, not come out in May...

SEE YOU IN...OCTOBER?

Released
unofficially
June 23, 2022 –
Happy
Anniversary!

July 12 official
publication

October 00, 2023
Final Rule
released?

Published in
the Federal
Register July
12th.

Sept 12 –
over 240,000
comments
submitted!

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MAJOR CHANGES



Scope Expansion



Obligation/reporting expansion



Adjudication options & more



What to do now, and next

Continue to follow current policies and procedures consistent with the 2020 final rule and state law until implementation



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SCOPE EXPANSION



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

Room 4E308, Washington, DC 20202. Telephone: (202) 453-6639. Email: *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
Executive Summary
Purpose of This Regulatory Action
Summary of the Major Provisions of This Regulatory Action
Timing, Comments, and Changes
Adoption and Adaption of the Supreme Court’s Framework To Address Sexual Harassment
Differences Between Standards in Department Guidance and These Final Regulations
Definition of Sexual Harassment
Actual Knowledge
Deliberate Indifference
Role of Due Process in the Grievance Process
Due Process Principles
Summary of § 106.45
Similarities and Differences Between the § 106.45 Grievance Process and Department Guidance
Public Comment
Analysis of Comments and Changes

Element
Formal (Support
No Formal
Sexual
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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

SCOPE EXPANSION: COVERED CONDUCT

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.

SCOPE EXPANSION: 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)

SCOPE EXPANSION: GEOGRAPHY AND JURISDICTION

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

**LONG TERM
CONCEPT**

“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)

(PROPOSED) EXPANDED RESPONSIBILITY



EXPANDED STANDARD OF
RESPONSIBILITY
“act promptly and
effectively” versus deliberate
indifference standard



Retaliation And Peer
Retaliation




Pregnancy and related
conditions




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

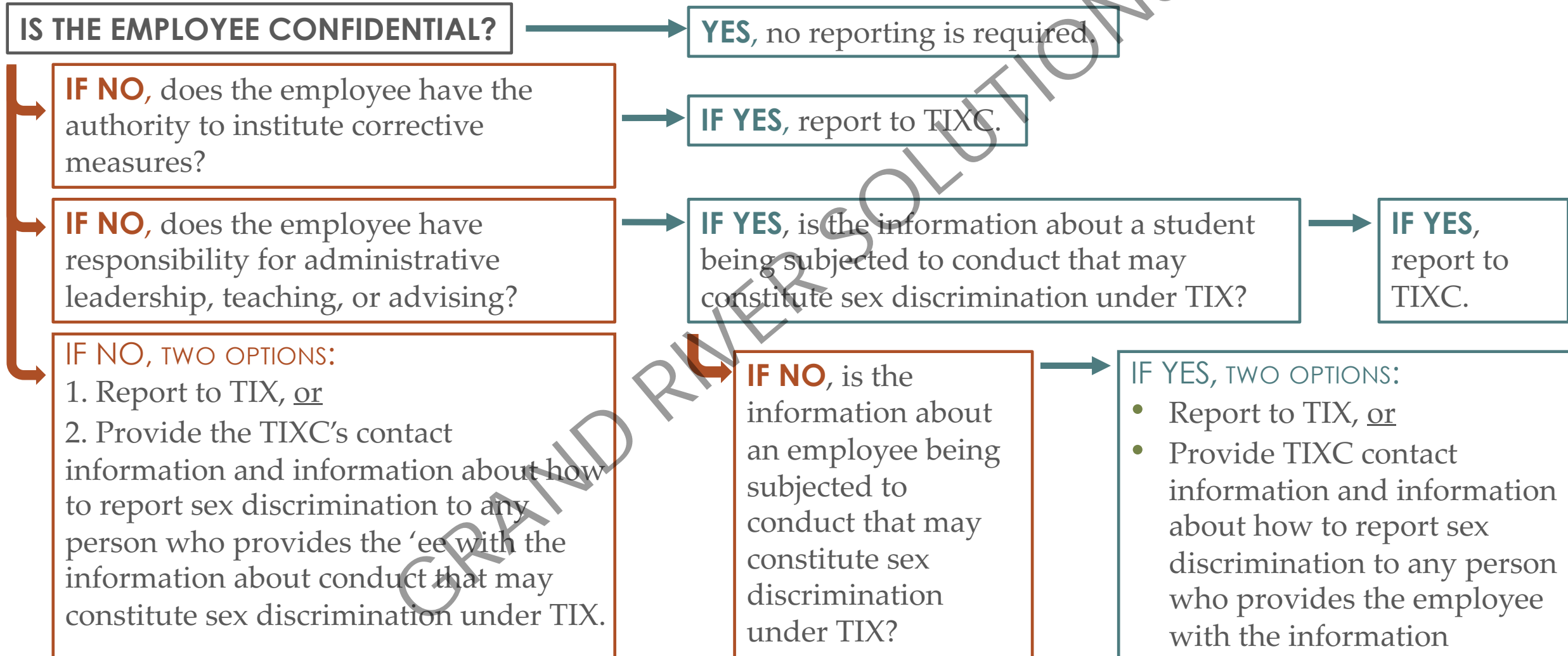
Employees required
to notify the TIXC
(proposed § 106.44)
are those who are
not confidential, and:



- 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?



ADJUDICATION CHANGES

- Informal resolution available without a formal complaint
- Live hearings optional*
- Advisor cross NOT required*
- Can use a different standard of evidence for students than employees
- Access to relevant evidence OR an investigative report accurately summarizing the evidence

LGBTQI+

- “sex stereotypes, sex characteristics... sexual orientation, and gender identity.”
- separate rule making for athletic eligibility standards

DISABILITY INTERSECTION



A new paragraph to address intersection of Federal disability laws, including Individuals with Disabilities Education Act (IDEA) and Section 504 of the Rehabilitation Act of 1973 (Section 504).

DEFINITIONS

Student



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graph TD; A[Student] --> B[Complainant (includes 3rd Party Complainants)]; B --> C[Retaliation and Peer Retaliation]; C --> D[Pregnancy or related conditions]; D --> E[Confidential Employee];
```

Complainant (includes 3rd Party Complainants)

Retaliation and Peer Retaliation

Pregnancy or related conditions

Confidential Employee

SUPPORTIVE MEASURES

- Definition expanded from the 2020 Final Rule
- “Upon being notified of conduct that **may** constitute sex discrimination under Title IX, a Title IX Coordinator must offer supportive measures, as appropriate, to the complainant or respondent to the extent necessary to restore or preserve that party’s access to the recipient’s education program or activity” (Proposed § 106.44(g))
- Supportive measures may include but are not limited to:

Increased security and monitoring of certain areas of the campus

Extensions of deadlines and other course-related adjustments;

Campus Escort Services

Counseling

Training and education programs related to sex-based harassment

Voluntary or involuntary changes in class, work, housing, or extracurricular or any other activity, regardless of whether there is or is not a comparable alternative

Leaves Of Absence

Restrictions on contact between the parties

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

WHAT TO DO NOW...

- Identify stakeholders
- Create a Title IX implementation team
- Identify policies, procedures, trainings that may be impacted (not just Title IX policy...)
- Create a timeline – consider the potential implementation timeline, and who needs to approve (Board?) and how long that review and approval process will take

WHAT WE'RE DOING . . .

- Updating our trainings
- Creating template language, model forms
- Developing checklists
- Training our GRS investigators, hearing officers, coordinators, advisors, etc
- Planning free and more intensive live events, open and in River Connect



WHEN THE REGS DROP, GET STARTED

- First thing's first:
 - Message your community about your plans
 - Engage your stakeholders
 - Update your timeline
- Implement your plan!
 - Revise policies and procedures (and get the necessary approvals), templates, forms, letters, notices
 - Update your trainings
 - Draft updates for your website
 - Ensure the Title IX personnel receive updated training

WHEN THE REGS DROP, JOIN US!

Join GRS:

- Come to our free fast-turnaround summary session
- Visit River Connect for our forums, live events, and resources (with updated forms, templates)
- Attend training and send other folks to training pursuant to the new final rule and to understand the differences
- Engage experts to work with you on revisions

PROPOSED TITLE IX ATHLETICS REGULATIONS

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance: Sex-Related Eligibility Criteria for Male and Female Athletic Teams

A Proposed Rule by the [Education Department](#) on 04/13/2023

This document has a comment period that ends in 32 days. (05/15/2023)

[SUBMIT A FORMAL COMMENT](#)

PUBLISHED DOCUMENT

Start Printed Page 22860

AGENCY:

Office for Civil Rights, Department of Education.

ACTION:

Notice of proposed rulemaking (NPRM).

DOCUMENT DETAILS

Printed version:

[PDF](#)

Publication Date:

04/13/2023

Agency:

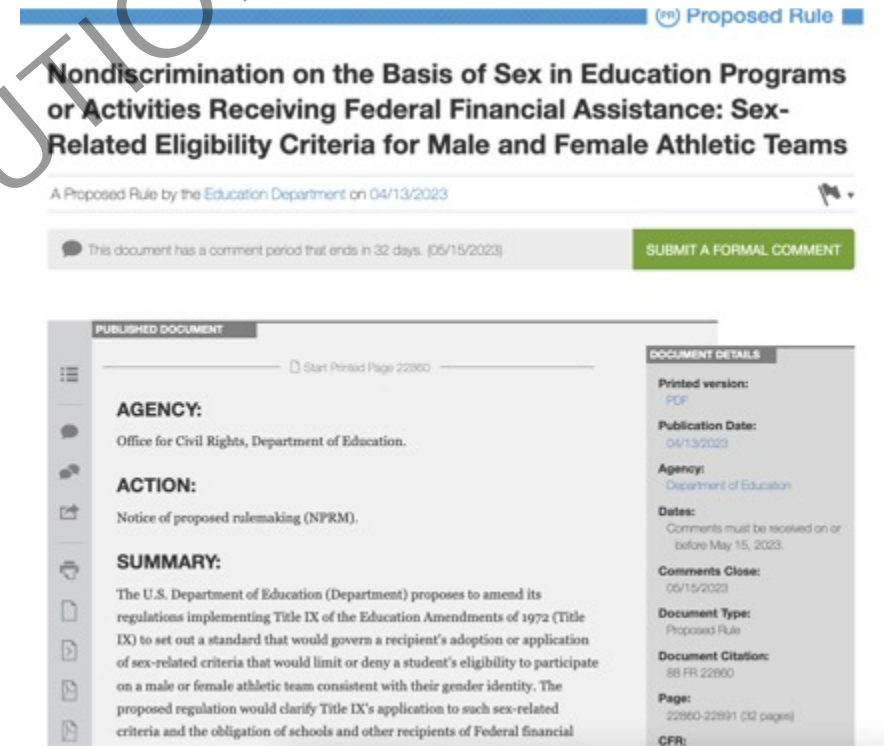
[Department of Education](#)

Dates:

Comments must be received on or before May 15, 2023.

TL;DR

- Published in April 2023
- Date finalized TBD (October?)
- Received a lot of comments (156,000+)
- We expect litigation (and it is starting)
- What it says:
 - No blanket bans
 - Rebuttable Presumption



WHAT THE PROPOSED RULE CHANGES (ADDS)

(b) *Separate teams.*

(1) Notwithstanding the requirements of paragraph (a) of this section, a recipient may operate or sponsor separate teams for members of each sex where selection for such teams is based upon competitive skill or the activity involved is a contact sport. However, where a recipient operates or sponsors a team in a particular sport for members of one sex but operates or sponsors no such team for members of the other sex, and athletic opportunities for members of that sex have previously been limited, members of the excluded sex must be allowed to try-out for the team offered unless the sport involved is a contact sport. For the purposes of this part, contact sports include boxing, wrestling, rugby, ice hockey, football, basketball and other sports the purpose or major activity of which involves bodily contact.

(2) If a recipient adopts or applies sex-related criteria that would limit or deny a student's eligibility to participate on a male or female team consistent with their gender identity, such criteria must, for each sport, level of competition, and grade or education level: (i) be substantially related to the achievement of an important educational objective, and (ii) minimize harms to students whose opportunity to participate on a male or female team consistent with their gender identity would be limited or denied.

THE CURRENT ATHLETICS REGULATIONS

106.41 is the section of the regulations regarding athletics

- (a) General
- (b) Separate teams
- (c) Equal opportunity
- (d) Adjustment period

[important: these apply to any any interscholastic, intercollegiate, club, or intramural athletics of a recipient, k12 and higher ed]

WHY NOW?



- Different approaches among athletic organizations in the U.S. and internationally
- Varying state laws
- Litigation
- Inconsistency is harmful and unhelpful

IF YOU'RE APPLYING “SEX-RELATED” ELIGIBILITY CRITERIA...

- Do you have an important educational objective in separating athletic teams?
- Are the criteria substantially related to those identified important educational objectives?
- Are you minimizing harm to students whose opportunities will be limited or denied?



WHAT IS AN IMPORTANT EDUCATIONAL OBJECTIVE?

- Preventing injury
- Promoting fairness in competition
- And (*the Department would love to know*)?
- Still requires an analysis that's specific to the sport and level of competition
- “Communicating or codifying disapproval of a student or student’s gender identity” is not an important educational objective



HOW DO YOU MINIMIZE HARM?

- Department has identified some harms.
- The Department is asking us to tell them how a school can minimize harms.

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WHAT ELIGIBILITY CRITERIA ARE NOT SEX-RELATED?

- Attendance
- Academic standing
- Conduct/behavior



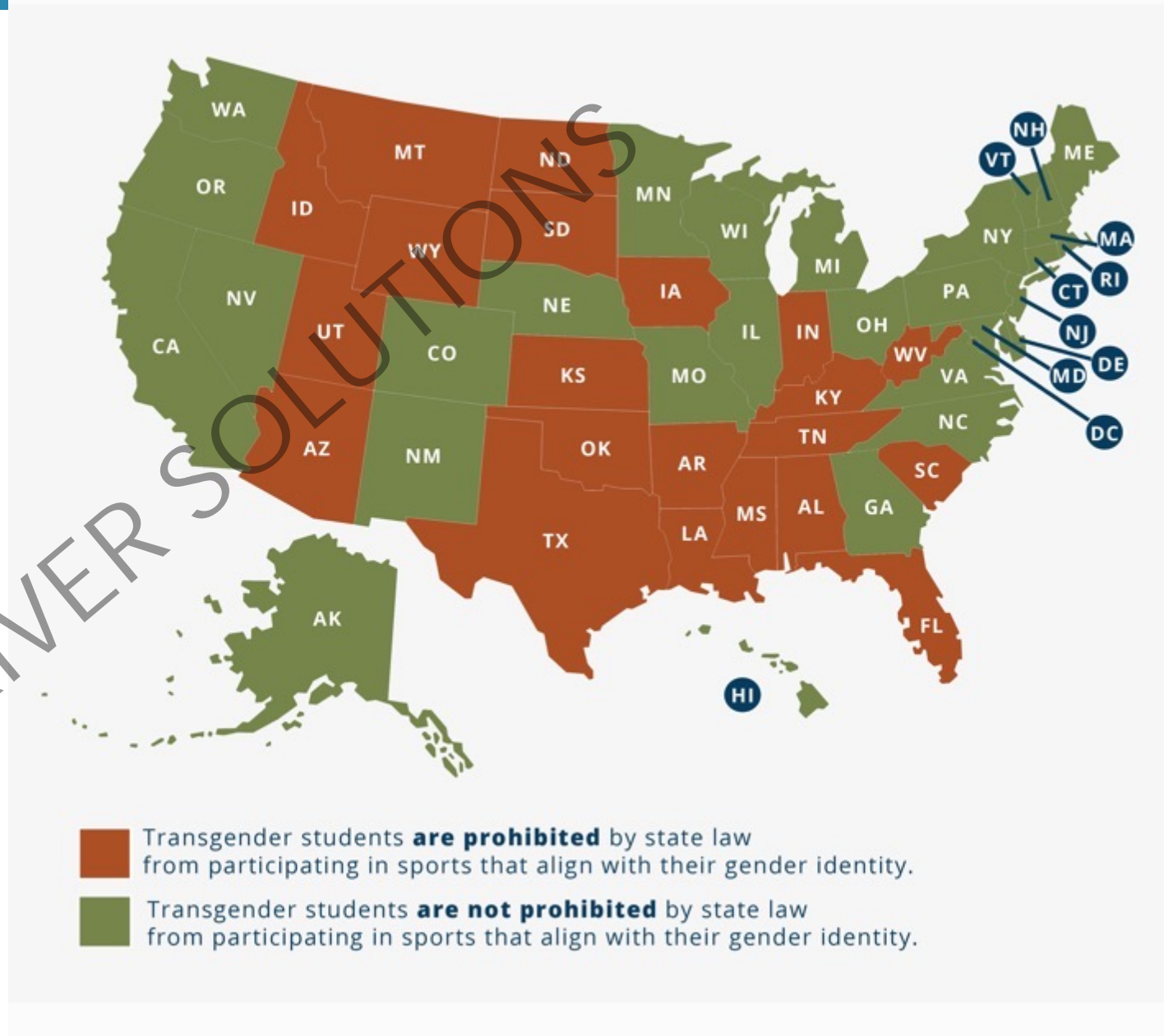
INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

- Supreme Court uses intermediate scrutiny in sex discrimination cases
- The Proposed is *not* a bright line rule
- Schools (and associations [and states]) cannot use blanket bans or one-size-fits-all tests



THE CURRENT LANDSCAPE

- Title IX 1972 and 1975
- Non-Athletics Cases Start to Bubble Up
- Dueling DCL's
- *Bostock v. Clayton County* (2020)
- ED Notice of Interpretation, July 2021 (Enjoined)
- 2022 Proposed TIX Regulations
- 2023 Proposed TIX Athletics Regulations



INTERMEDIATE SCRUTINY OR THE REBUTTABLE PRESUMPTION

- Difference between elementary (and immediately following) and secondary/post-secondary
- Intramural and Club Sports
- A presumption of inclusivity, to be (potentially) rebutted if meets both tests



IN THE COURTS

- Sexual Misconduct and Athletics Rule Litigation
- States are very divided on these issues
- *West Virginia et al. v. Environmental Protection Agency* (2022)
- Red Title IX and Blue Title IX
- Some thoughts...



**EXPERIENCE
DRIVES US**

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DATA DRIVES DECISIONS

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**THE ENVIRONMENT
OUR STUDENTS
DESERVE**

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THE PROBLEM

Climate Surveys Are:

- Lengthy
- Expensive
- Complex
- Challenging for Participants to Complete
- Lacking Practical Insights and Recommendations

Climate Surveys Should Be:

- High-Quality
- Affordable
- Accessible
- Actionable

A NATIONAL SURVEY?

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Institutions can customize
- Created with input from experts
- National and institution-specific reports

10 is authorized to be appropriated to carry out this section
11 \$10,000,000 for fiscal years 2023 through 2027.”.

12 **SEC. 1507. ONLINE SURVEY TOOL FOR CAMPUS SAFETY.**

13 (a) IN GENERAL.—The Secretary of Education, in
14 consultation with the Attorney General, the Director of
15 the Centers for Disease Control and Prevention, the Sec-
16 retary of Health and Human Services, and experts in do-
17 mestic violence, dating violence, sexual assault, sexual har-
18 assment, and stalking, shall develop, design, and make
19 available through a secure and accessible online portal, a
20 standardized online survey tool regarding postsecondary
21 student experiences with domestic violence, dating vio-

BUT THERE'S A PROBLEM

As part of the **2022 Omnibus bill**, Congress will require the Department of Education to create and administer a survey of all students at all colleges and universities receiving federal funds.

- Sexual and interpersonal violence and harassment cannot be measured in “restaurant sanitation grades” comparative safety

Learn More: <https://grandriversolutions.com/wp-content/uploads/2022/05/Taking-Stock-of-the-Survey-Advantages-and-Challenges-of-a-National-Climate-Survey1.pdf>



ILLINOIS STATE REQUIREMENTS

- **IL Senate Bill 1610 (2021-22)**
- No required survey; Specific topics to be covered; Topics to be developed by a Task Force
 - *Task force actually developing model questions (91 questions in 13 sections)*
- Must be able to respond "prefer not to answer"
- Maintain privacy of responses
- Grand River Solutions Survey can include IL Panel or offer IL survey

THE ROAD TO CHANGE

What We
Want

To help create
safe and
equitable work
and educational
environments

What We
Need to Get
There

Accessible, proven,
and promising
programs and
approaches to create
change

First We Need

High-Quality Data
A Community of
Change Makers

WHAT'S INCLUDED?



Survey Instrument

The survey is created using standardized and custom questions



Survey Admin

Data is collected by anonymous links emailed via Qualtrics



Marketing Materials

Generate awareness through print and social media graphics



Report

Data is analyzed and translated into concise findings with actionable insights



Briefing

A presentation of the findings and Q&A is facilitated live

WHY GRAND RIVER SOLUTIONS?



Privacy & Security

We are committed to ethics, data security, and privacy



Purposeful

Our survey only asks questions that yield meaningful data



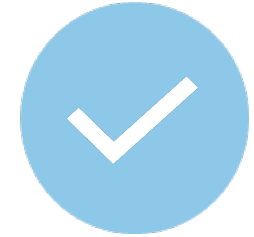
Clarity

Our report clearly summarizes the most important findings and provides practical insights



Mission-Driven

We are committed to helping institutions create meaningful change that improves safety and equity of communities nationwide



Accessible

Affordable and tailored to the specific needs and budgets of the institution

CHIPS AND SCIENCE ACT

- Current patchwork of reporting harassment to grantors
 - Consolidates and conforms
 - Surveys and Data
 - Funding??
-
- Learn more: <https://grandriversolutions.com/wp-content/uploads/2022/08/CHIPS-and-Science-Act-Includes-Efforts-to-STEM-Sexual-Harassment.pdf>

CURRENT REGULATIONS

DISCRIMINATION PROHIBITED

Do not exclude or treat differently students, employees, or applicants based on pregnancy

"PREGNANCY OR RELATED CONDITIONS"

"Childbirth, false pregnancy, termination of pregnancy, or recovery therefrom"

CONSIDER EXISTING POLICIES...

For temporary disabilities
For leave

TITLE IX

Pregnancy and Post Pregnancy

Make up any missed work without penalty.

- *Assignments, exams, labs, attendance and participation points*
- *Clinical assignments*

When a student returns to school, they must be allowed to return to the same academic and extracurricular status as before their medical leave began.

Must provide reasonable adjustments, like a larger desk, elevator access, or allowing frequent trips to the restroom



"TEMPORARY DISABILITY?"

Treat disabilities related to pregnancy, etc, in the same manner and under the same policies as any other temporary disability or physical condition.

Applicants for admission, students, and employees.

Do you have a student leave policy?

RULES ON STATUS

WHAT IT SAYS

A recipient shall not apply any rule concerning a student's actual or potential parental, family, or marital status which treats students differently on the basis of sex.

34 CFR 106.40

WHAT IT MEANS

You can't require married women or mothers to drop out but allow married men or fathers to stay enrolled. That's different treatment on the basis of sex concerning parental, family, or marital status.

WHAT ABOUT "PARENTS" AND "PARENTING?"

Cannot apply a rule about the actual or potential parental or marital status of a student, applicant, or employee that treats people differently based on sex.

These are from 1975!



NEW TITLE IX RULES***

MODIFY

Reasonable
modifications to
policies, practices

SPACE

Lactation space,
adjustments to
physical space and
supplies

DEFINITIONS

New definition for
pregnancy and related
conditions; parental
status

NOTIFY

Employee obligations;
notice to pregnant
students about rights

PROPOSED REGULATIONS: DEFINITIONS

Discrimination on the basis of pregnancy and related conditions is prohibited

"Pregnancy and related conditions" =

- (1) Pregnancy, childbirth, termination of pregnancy, or lactation;
- (2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation;
- (3) Recovery from pregnancy, childbirth, termination of pregnancy, **lactation**, or their related medical conditions.

PARENTAL STATUS

Definition includes parents (bio, adoptive, step, foster), legal guardians, and those actively seeking such custody or guardianship.

Still is about sex discrimination based on parental status, not parental status generally.

PROPOSED REGULATIONS: NOTIFY

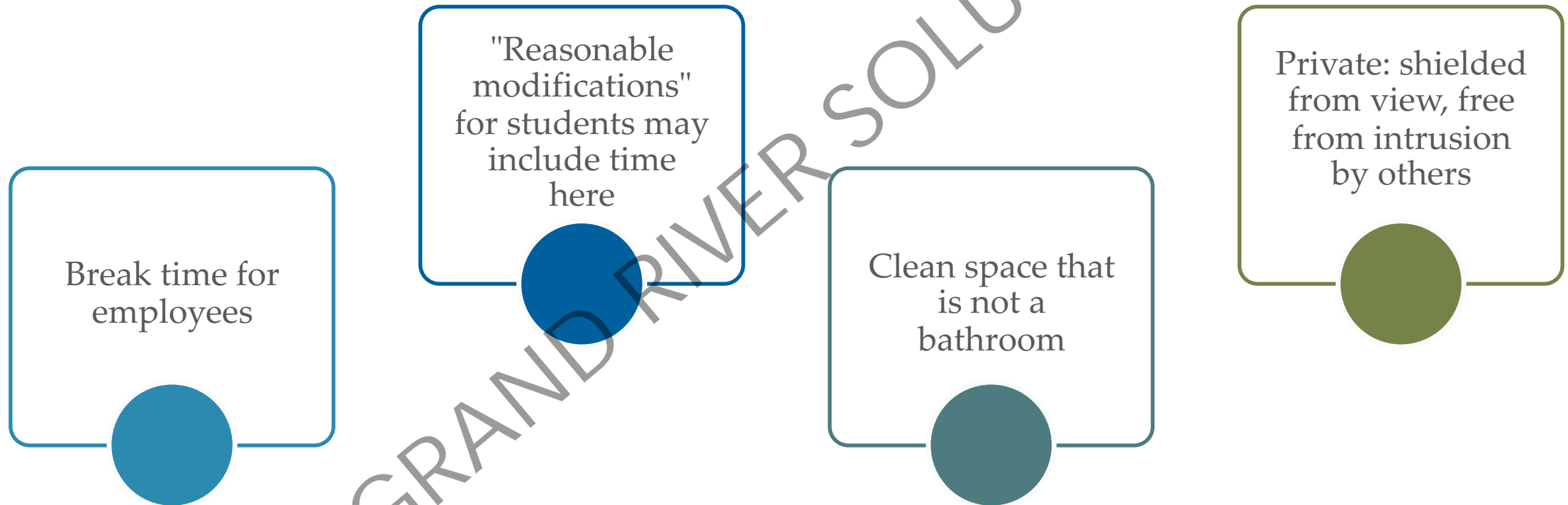
Let pregnant students know about the school's obligations:

- Prohibit sex discrimination, including sex-based harassment;
- Provide the student with the option of reasonable modifications;
- Allow access, on a voluntary basis, to any separate and comparable portion of the education program or activity;
- Allow a voluntary leave of absence;
- Ensure the availability of lactation space;
- Maintain grievance procedures that provide for the prompt and equitable resolution of complaints of sex discrimination.



PROPOSED REGULATIONS: SPACE (& TIME)

For expressing breastmilk or breastfeeding as needed



POST-DOBBS CONSIDERATIONS



In states that criminalize abortion, consider the risks of . . .

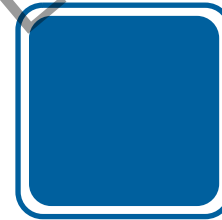
- Complying with Title IX obligation to report pregnancies to the Coordinator
- Providing students with information about options, including nearby abortion providers
- Supporting students financially to travel to a state that permits abortion
- Data privacy; records retention

RECENT ED RESOLUTIONS & GUIDANCE



JUNE 2022

Salt Lake Community College
Resolution Agreement



October 2022

Pregnancy and Parenting
Resource



January 2023

Troy University Resolution Agreement

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LESSONS LEARNED

Make reasonable responsive adjustments

Provide accessible information for pregnant students

Designate a central contact to centralize response

Respond promptly to pregnancy discrimination complaints

Engage in the interactive process

Consider whether there is a temporary disability

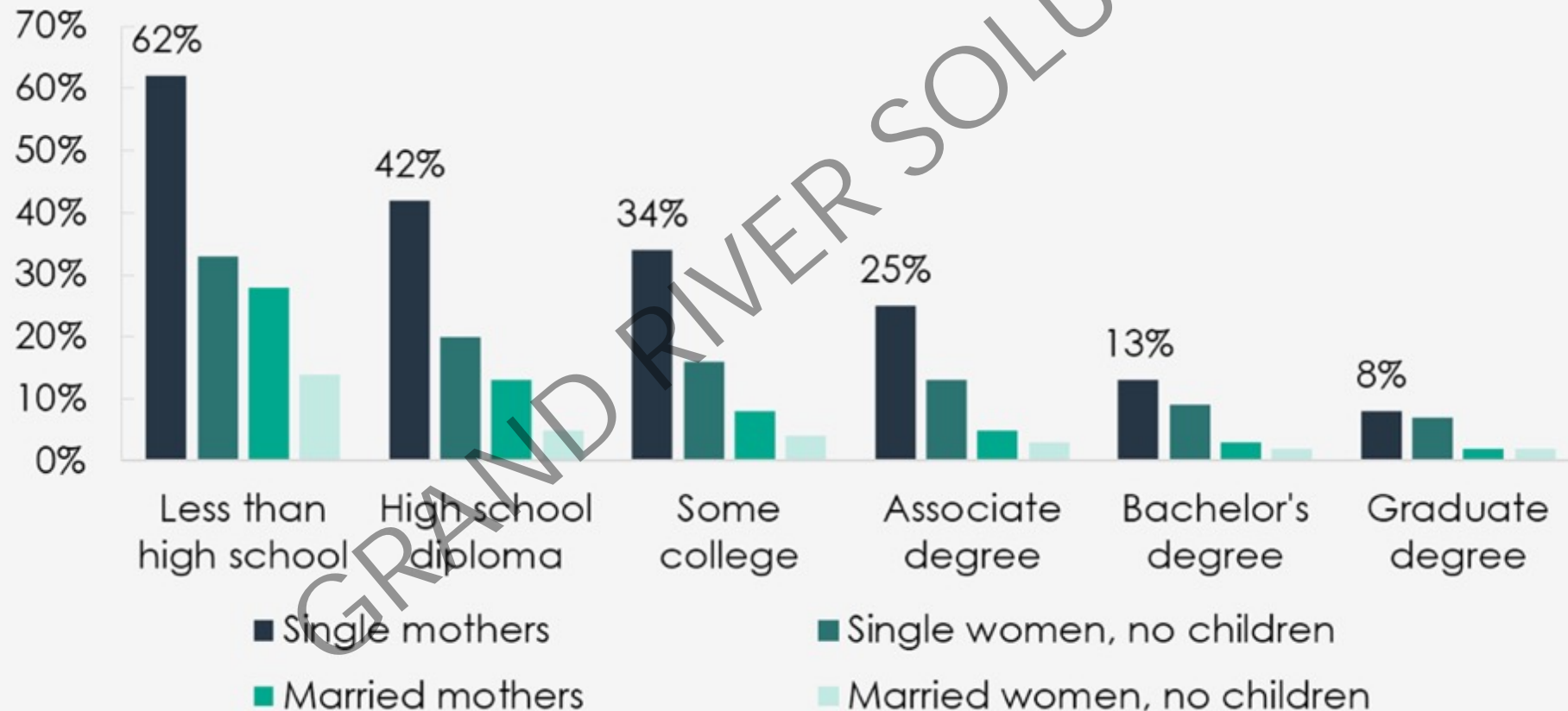
Train employees on your rules and process



WHY IS THIS
IMPORTANT?

POVERTY RATES BY EDUCATION LEVEL AND PARENT STATUS AMONG WOMEN

Poverty Rates by Education Level and Marital and Parent Status among Women Aged 25 and Older, 2015



IMPLEMENTATION

Review or create
leave policy

Update
community
trainings to
include
pregnancy+

Create resources
for pregnant
students for the
web, handbooks

Remember
student-
employees

Review
policies to
ensure
inclusion of
pregnancy+

Outreach
and
collaboration
with
stakeholders

Identify
lactation
space

Get
feedback
from
students
with
experience

Coordinate with
accessibility
office

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A place to

communicate
share
educate
learn

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



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