

## Updating Policies Mid-Year

### Pros and Cons and the Impact on Related Policies, Procedures and Publications

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PRESENTED JUNE 21, 2022

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Agenda

1: Fed Regulations

- 2020 Regs
- Proposed Regs

2: Fed Interpretations

- Court rulings
- Guidance
- OCR Audits

3: Other Considerations

- State laws
- Circuit rulings
- Private/Public

4: Lessons Learned

- General policy review
- Prep work

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1: Federal Regulations

Proposed Regulations are coming.

2020 Regulations are still in effect.

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Regulatory Process

Notice of Proposed Rulemaking

- OIRA
- Dept of Justice

Published in Federal Register

Notice and Comment period

Finalization

Post-finalization

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Changing Policy Based on Proposed Regulations?

Pros

- Prepared for changes
- Enhancements

Cons

- Could be different
- Will be time to implement

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2: Federal Interpretations

Court Rulings

Federal Guidance

Audits

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Really, you should go ahead and change...

- “If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility”
- Victims Rights Law Center et al. v. Cardona, WL 3185743 (D. Mass. July 28, 2021)

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On the basis of sex...



“Consistent with the Supreme Court’s ruling and analysis in *Bostock*, the Department interprets Title IX’s prohibition on discrimination “on the basis of sex” to encompass discrimination on the basis of sexual orientation and gender identity.”

- Enforcement of Title IX of the Education Amendments of 1972 With Respect to Discrimination Based on Sexual Orientation and Gender Identity in Light of *Bostock v. Clayton County*, Fed. Reg. 32637 (June 22, 2021).
- *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020)

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The “other” Title IX stuff--Pregnancy



▪ § 106.40(b) *Pregnancy and related conditions*.

- (1) A recipient shall not discriminate against any student. . . on the basis of such student’s pregnancy, childbirth, false pregnancy, termination of pregnancy or recovery therefrom. . .
- (4) A recipient shall treat pregnancy. . . in the same manner and under the same policies as any other temporary disability with respect to any medical or hospital benefit, service, plan or policy which such recipient administers, operates, offers, or participates in with respect to students admitted to the recipient’s educational program or activity.
- (5) . . . a recipient shall treat pregnancy, childbirth, false pregnancy, termination of pregnancy and recovery therefrom as a justification for a leave of absence for so long a period of time as is deemed medically necessary by the student’s physician, at the conclusion of which the student shall be reinstated to the status which she held when the leave began.

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Pregnancy Findings by OCR



“Although the College has a Nondiscrimination Policy and a Title IX website, neither of these resources explains the College’s policies and procedures for addressing pregnant students’ requests for leaves of absence related to pregnancy or need for academic adjustments or related aids and services. The College’s Code of Student Rights and Responsibilities (Code) also does not provide information about the rights of pregnant students. Finally, the College’s ADA Access and Reasonable Accommodations Policy and Disability Resource Center’s website do not refer to pregnant students and do not describe the process the College uses to approve or deny academic adjustments, including any appeal rights for students or the process the College uses to determine when a requested academic adjustment constitutes a fundamental alteration.”

Salt Lake Community College Resolution Letter, OCR 2022

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## Pregnancy Findings by OCR



- Failure to Respond Promptly or Equitably**
  - Title IX Coordinator concluded accommodation would be a “fundamental alteration of the Program”
  - OCR found: “no investigative file, no written statements, no notes, no notice of outcome”
- Failure to Engage in Interactive Process**
  - No discussion of alternatives
  - Nothing in writing (and no appeals right)
- Failure to Excuse Pregnancy-Related Absences**

Salt Lake Community College Resolution Letter, OCR 2022

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## Pregnancy in our policies



- Nondiscrimination Statement**
  - Website, Student Code of Conduct, Student Handbook
  - Discoverable if search “nondiscrimination statement”
- Grievance Procedures (and means to file)**
  - Different treatment
  - Exclusion from programs or activities based on pregnancy
  - Failure to excuse pregnancy-related absences or provide adjustments *similar to students with temporary disabilities*

Salt Lake Community College Resolution Agreement, OCR 2022

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## Pregnancy in our policies



- Disability Webpages**
  - (a) the rights of pregnant students under Title IX;
  - (b) how to request academic adjustments, special services, excused absences, or leaves of absence;
  - (c) the process the College follows to determine appropriate academic adjustments and special services;
  - (d) the process available to students if the College denies requested academic adjustments or special services; and
  - (e) the process the College uses to determine when a requested academic adjustment constitutes a fundamental alteration of a program or activity

Salt Lake Community College Resolution Agreement, OCR 2022

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Title IX/Section 504



- To ensure a pregnant student's access to its educational program, when necessary, a school must make adjustments to the regular program that are reasonable and responsive to the student's temporary pregnancy status.
- A recipient may offer the student alternatives to making up missed work, such as retaking a semester, taking part in an online course credit recovery program, or allowing the student additional time in a program to continue at the same pace and finish at a later date, especially after longer periods of leave. The student should be allowed to choose how to make up the work.
- Section 504 envisions a meaningful and informed process with respect to the provision of modifications, e.g., through an interactive and collaborative process between a post-secondary institution and the student. . . This evaluation process should be interactive, with information exchanged between the student and the postsecondary institution to arrive at a conclusion about the academic adjustment requested.

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Other Considerations



State Laws

Circuit Rulings

Public vs. Private

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Other Considerations for Review/Update



State Laws

Federal Circuit

Public / Private

- NY: Annually reviewing MOUs?
- IL: Who are your confidential options?
- TX: How investigate "failure to report"?
- 6<sup>th</sup>: "Opportunity to cross examine"
- 3<sup>rd</sup>: "Some method of cross examination"
- 1<sup>st</sup>: "Cross-examination, even if only through a hearing panel"

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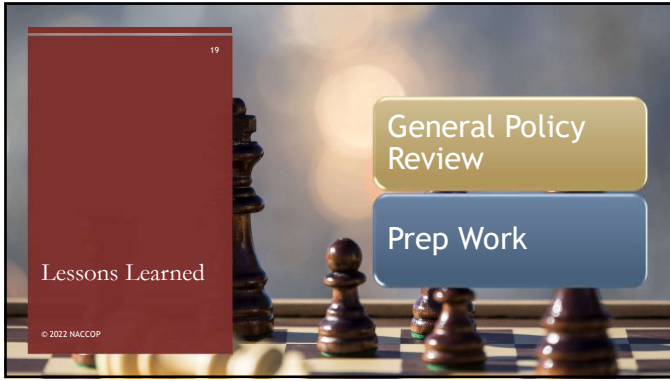
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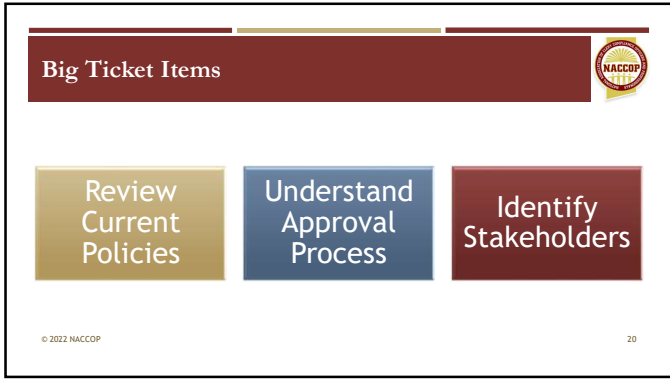
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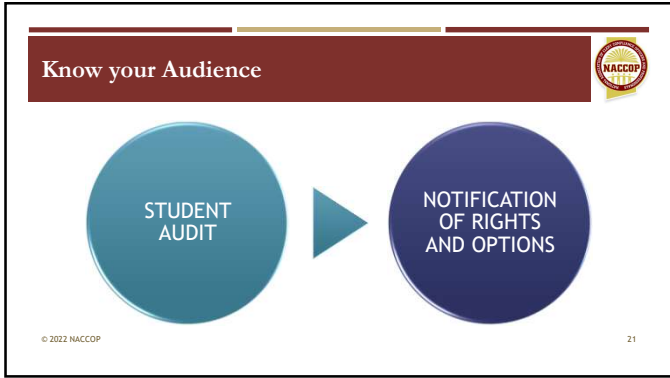
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Ann's policy pork and other policy issues...



REPORT VS COMPLAINT



CLERY LANGUAGE



TRAINING

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How many policies?



Employees



T9 vs. Non-T9



Harassment vs Discrimination



Gender vs. Other Protected classes

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Institutional Mission




Mandatory Reporting




Definitions




Jurisdiction



Informal Resolution



Cross-examination



Non-Student Complainant

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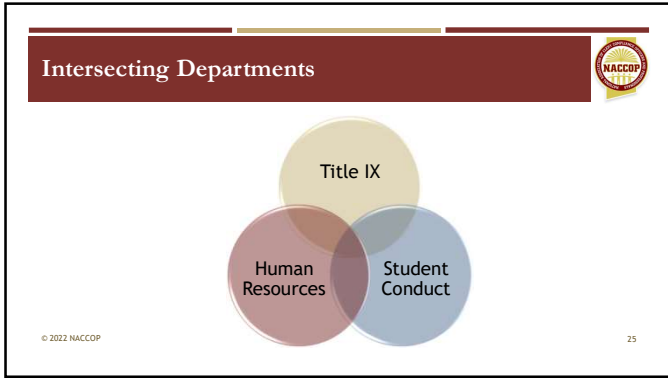
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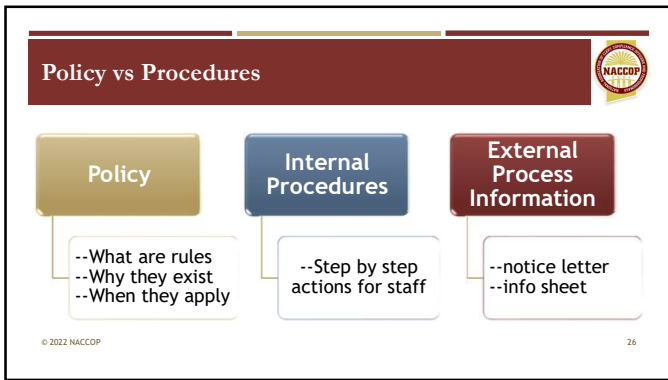
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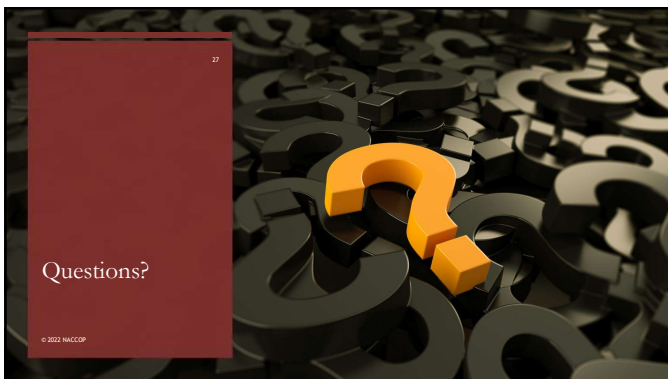
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Thanks to our sponsor!



For more information:  
[dstaffordandassociates.com](http://dstaffordandassociates.com)

Upcoming D. Stafford Classes

Title IX Coordinator Training-VIRTUAL

Class (Virtual) to be held:  
October 10-14, 2022

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