



Online Course

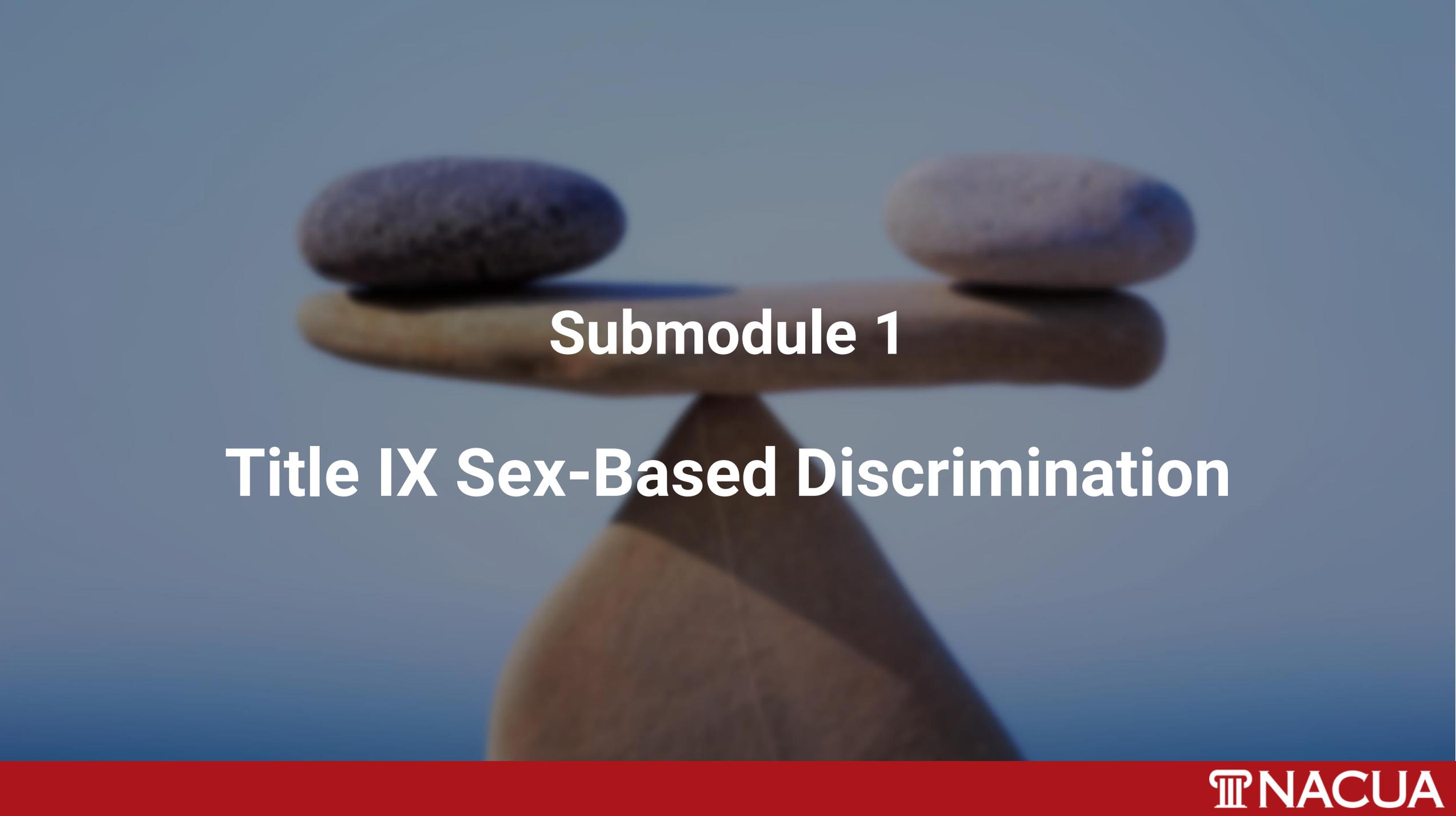
Title IX Coordinator Training

Module 2: Prohibited Conduct

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Submodule 1

Title IX Sex-Based Discrimination

Legislation: Title IX

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.



Sex-Based Discrimination

Disparate Treatment

Sexual Harassment



Disparate Treatment

Examples

- Excluding from a program
- Paying less
- Grading more harshly
- Not promoting
- Not hiring
- Firing

Proving Disparate Treatment

- Direct Evidence
 - Emails
 - Witness Statements
- Circumstantial Evidence
 - Creates an inference of a discriminatory motive
 - Comparative evidence

Disparate Treatment in Admissions 2024 Regulations

- § 106.21 expressly prohibits discrimination in admissions based on sex.
- § 106.2 defines admission: “selection for part-time, full-time, special, associate, transfer, exchange, or any other enrollment, membership, or matriculation in or at any education program or activity...”
- Expressly includes “parental, family, or marital status; pregnancy and related conditions”
- Prohibits: inquiry about marital status (“Miss or Mrs.”)
- May ask applicant to self-identify their sex, but only if asked of all applicants and if response is not used as a basis for prohibited discrimination.

Direct Evidence

- Evidence that if believed would prove the existence of the fact without inferences or presumptions
- Example: Evidence that hiring manager told someone in the context of hiring that he “did not want a woman for the job.”
 - This is direct evidence that employee was not hired for job because she was a woman
 - Fact finder does not need to draw any inferences regarding the motive for not hiring the female employee
 - The statement is direct evidence that establishes that the female was disfavored when compared to a man.

Circumstantial Evidence

- Unlike direct evidence, circumstantial evidence does not directly prove that the motive for the disparate treatment was protected class discrimination.
 - Comparative evidence
 - Statistical evidence
- The circumstantial evidence creates only an inference or presumption of unlawful motive.
- The inference or presumption of unlawful motive may be rebutted.

Circumstantial Evidence

Example:

- (1) Female applies for a job;
 - (2) Female is qualified for the job;
 - (3) Despite qualifications, female was rejected;
 - (4) After rejection, male hired for the job who had fewer qualifications
- * Still need to dig in to determine if there was a legitimate, non-discriminatory reason for hiring the male

On The Basis of Sex

2020 Regulations

Silent on definition of “on the basis of sex.”

2024 Regulations

§ 106.10: “Discrimination on the basis of sex includes discrimination on the basis of sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity.

§ 106.31: In the limited circumstances in which TIX permits different treatment or separation on the basis of sex, recipient must not carry it out in a manner that discriminates on the basis of sex by subjecting a person to more than *de minimis* harm.

A policy or practice that prevents a person from participating in a program or activity consistent with the person’s gender identity subjects a person to more than *de minimis* harm on the basis of sex.

Disparate Treatment in Employment

“...in Title VII, Congress outlawed discrimination in the workplace on the basis of race, color, religion, sex, or national origin. Today, we must decide whether an employer can fire someone simply for being homosexual or transgender. The answer is clear. An employer who fires an individual for being homosexual or transgender fires that person for traits or actions it would not have questions in members of a different sex. Sex plays a necessary and undistinguishable role in the decision, exactly what Title VII forbids.”

Bostock v. Clayton County (US. S. Ct. 2020)

Disparate Treatment of Students

- Check with your legal counsel
 - Pending injunctions
 - State Laws

Sex-Based Harassment

- 2020 commentary to regs acknowledged that sexual harassment impacted many demographic groups “based on sex, race and the intersection of sex and race (as well as other characteristics such as disability status, sexual orientation, and gender identity).”
- Sexual harassment not tolerated against LGBTQ students.

Sex-Based Harassment

Quid Pro Quo

Hostile Environment



Quid Pro Quo Harassment

2020 Regs

§106.3

An employee conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

2024 Regs

§106.2

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.

Hostile Environment Harassment

2020 Regs

Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity.

2024 Regs

Unwelcome sex-based conduct that based on the totality of the circumstances, is subjectively and objectively offensive and is so severe or pervasive that it limits or denies a person's ability to participate in or benefit from the recipient's education program or activity.

Analysis of Hostile Environment Harassment under 2024 Regs

- The degree to which the conduct affected the complainant's ability to access the program or activity;
- The type, frequency, and duration of the conduct;
- The parties' ages, roles within the education program or activity, previous interactions, and other factors about each party that may be relevant to evaluating the effects of the conduct;
- The location of the conduct and the context in which the conduct occurred; and
- Other sex-based harassment in the recipient's education program or activity.

Hostile Environment: Subjective & Objective Analysis



Hostile Environment Sexual Harassment

Not Harassment

- One stray remark
- One offensive particular expression, perceived by some persons, standing alone
- Statement of one's point of view on an issue of debate, even if other person disagrees strongly

Possible Harassment

- Sex-based conduct, occurring on multiple occasions & so persistent that it limits another student's ability to complete assigned coursework at the student's typical level of performance
- Look at Title VII court cases and EEOC guidance
- Harassment can be pervasive if it is widespread, openly practiced or well-known to students and staff
- Look for patterns or practice of harassment, non-trivial, continuous series of events

Specific Offenses Prohibited

2020 Regs

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

2024 Regs

- Sexual Assault
- Dating Violence
- Domestic Violence
- Stalking

Sexual Assault

2020 Regs

- Clery Definition

2024 Regs

An offense classified as a forcible or nonforcible sex offense under the uniform crime reporting system of the FBI

Dating Violence

2020 Regs

- Clery Definition

2024 Regs

Violence committed by a person:

Who is or has been in a social relationship of a romantic or intimate nature with the victim; and

Where the existence of such a relationship shall be determined based on a consideration of the following factors:

1. Length of the relationship;
2. Type of relationship;
3. Frequency of interaction between the persons involved in the relationship.

Domestic Violence

2020 Regs

- Clery Definition

2024 Regs

Felony or misdemeanor crimes committed by a person who:

1. 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;
2. Is cohabitating, or has cohabitated with the victim as a spouse or intimate partner;
3. Shares a child in common with the victim; or
4. Commits acts against a youth or adult victim who is protected from those acts under the family or domestic violence laws of the jurisdiction.

Stalking

2020 Regs

- Clery Definition

2024 Regs

- Engaging in a course of conduct directed at a specific person that would cause a reasonable person to:
 - Fear for the person's safety or the safety of others; or
 - Suffer substantial emotional distress.

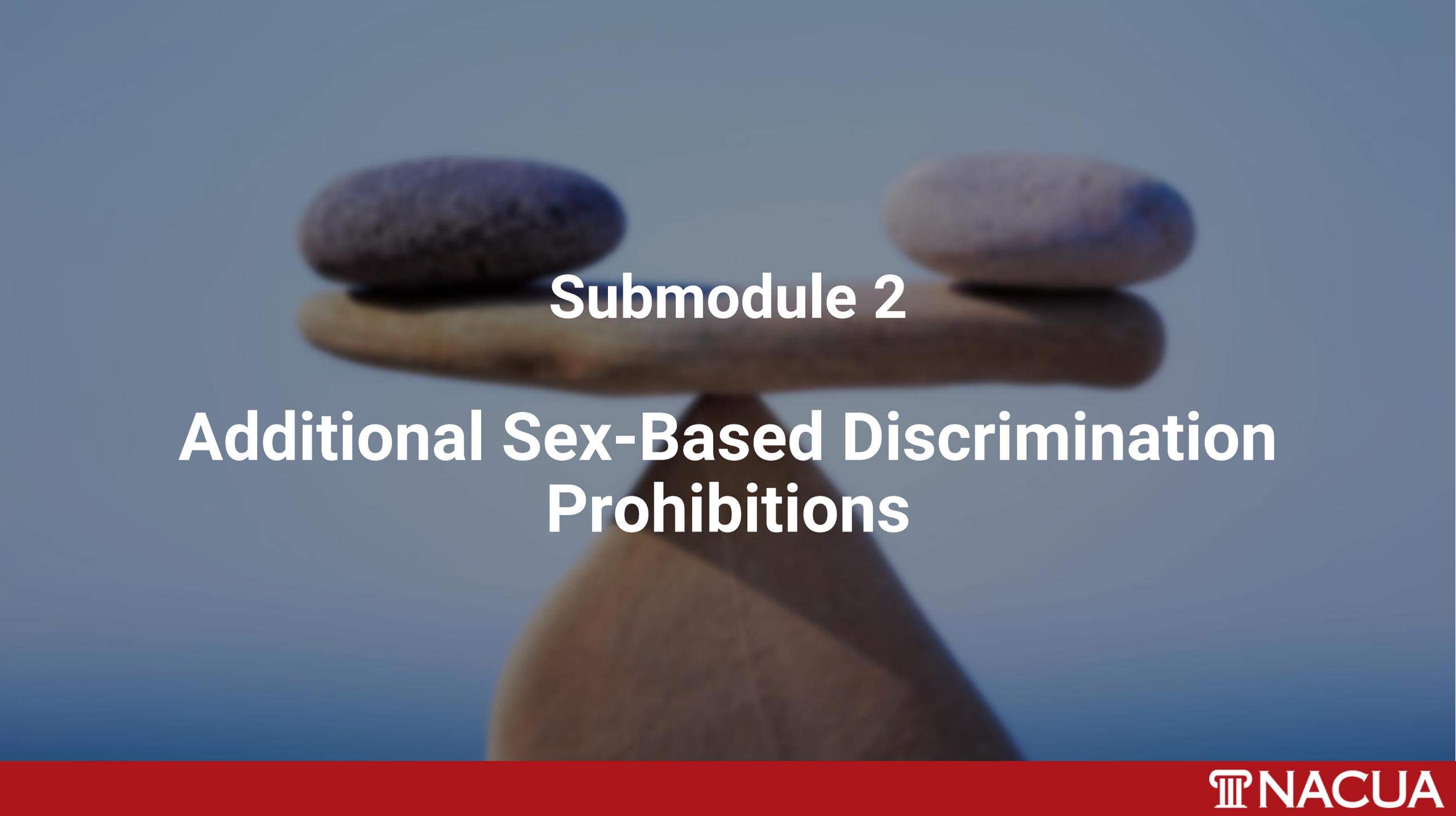
Retaliation

2020 Regs

- Recipient or other person
- Intimidations, threats, coercion, or discrimination
- Against any individual
- For the purpose of interfering with any right or privilege secured by TIX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing.
- May not discipline an individual for conduct that does not involve sex discrimination or sexual harassment for the purpose of interfering with any right or privilege secured by TIX or these regulations.

2024 Regs

- Recipient, a student, or an employee or other person authorized by the recipient to provide aid, benefit, or service under the recipient's education program or activity
- Intimidations, threats, coercion, or discrimination
- Against any person
- For the purpose of interfering with any right or privilege secured by TIX, or because the person has reported information, made a complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing, including an informal resolution...
- May not discipline for making a false statement or for engaging in consensual sexual conduct based solely on determination of whether sex discrimination occurred.
- Institution may still require employees and other authorized persons to participate as a witness in, or otherwise assist with an investigation, proceeding, or hearing.



Submodule 2

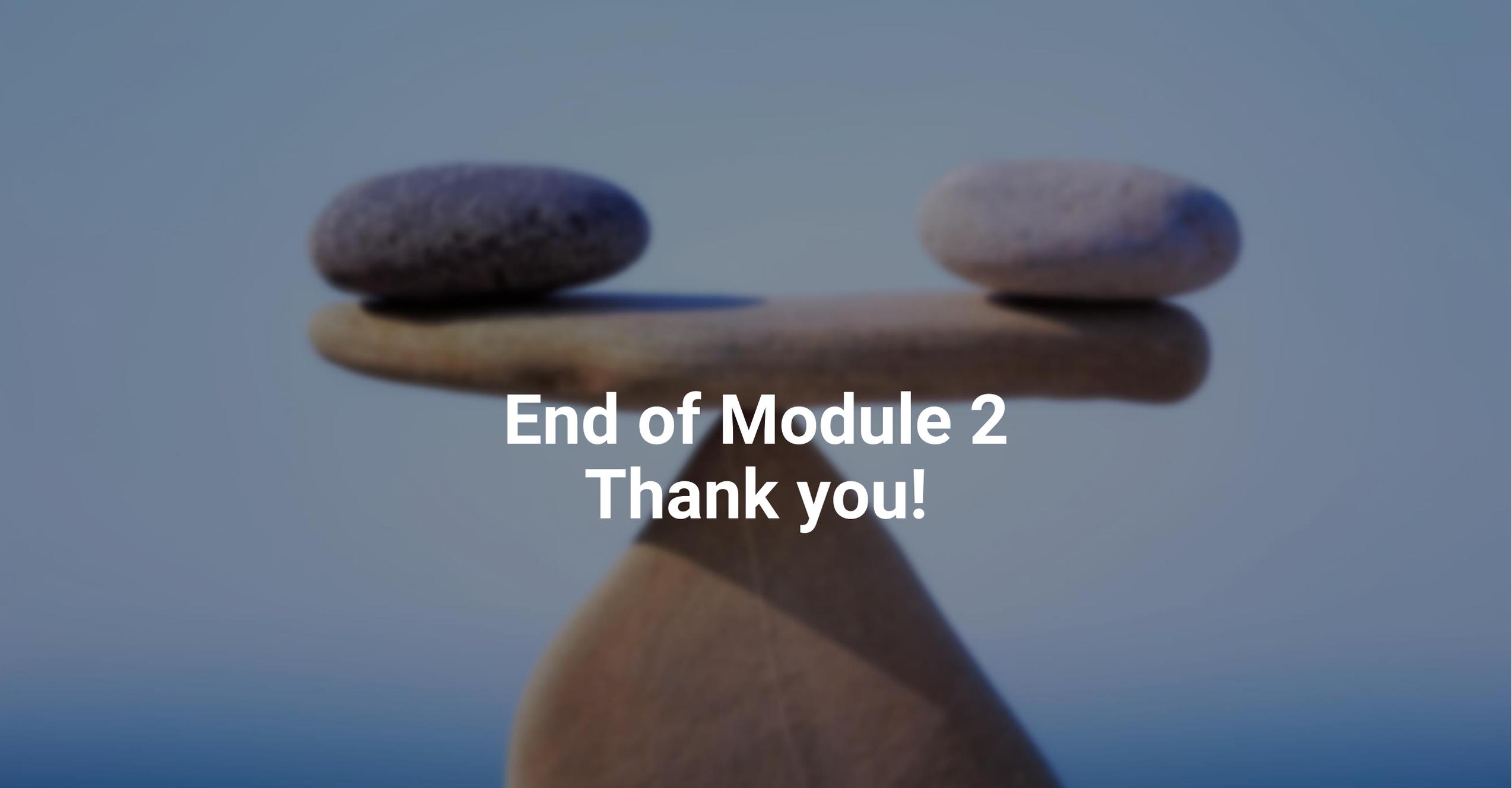
**Additional Sex-Based Discrimination
Prohibitions**

Other Laws

- State Laws
- Title VII
- FMLA
- Pregnant Workers Fairness Act
- Equal Pay Act

Other Examples of Sex Based Discrimination

- Pay inequity
- Sexual Exploitation
- Sexual violence/misconduct
- Treating a person inconsistent with their gender identity



**End of Module 2
Thank you!**

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