

Title IX Training Materials

Section 106.45(b) of the 2020 Final Title IX Rules requires sharing “all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process in the Title IX Compliance and practices as of August 14, 2020. A recipient must make these training materials publicly available on its website.”

Thompson Coburn Title IX Training Series Materials (2020)

- [Module 1 – An Introduction to Managing Title IX Sexual Harassment on Campus](#)
- [Module 2 – Formal Complaints of Title IX Sexual Harassment](#)
- [Module 3 – Title IX Investigations & Informal Resolutions](#)
- [Module 4 – Title IX Hearings](#)
- [Module 5 – Title IX Determinations](#)
- [Module 6 – Title IX Appeals](#)

Additional Resources from the U.S. Department of Education’s Office of Civil Rights (OCR) Webinars:

- [OCR Webinar: Title IX Regulations Addressing Sexual Harassment \(YouTube\)](#)
- [The First Amendment and Title IX: An OCR Short Webinar \(YouTube\)](#)
- [OCR Webinar on Due Process Protections under the New Title IX Regulations \(YouTube\)](#)
- [OCR Short Webinar on How to Report Sexual Harassment under Title IX \(YouTube\)](#)
- [Conducting and Adjudicating Title IX Hearings: An OCR Training Webinar \(YouTube\)](#)
- [OCR Title IX Webinar: Bias and Conflicts of Interest \(YouTube\)](#)



An Introduction to Managing Title IX Sexual Harassment on Campus



Thompson Coburn LLP
Title IX Training Series | July 2020



Purpose of Training Series

The Title IX rule effective **August 14, 2020**, creates a new and specific process by which postsecondary institutions must manage complaints of **covered sexual harassment** on campus.

The TC Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including **Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.**






Syllabus for this Session

Title IX Fundamentals
The New Rule & Sexual Harassment
Key Definitions
Responding to Title IX Sexual Harassment
Elements of a Sufficient Response
Interim & Supportive Measures
Formal Complaints of Title IX Sexual Harassment
Recordkeeping
Additional Considerations

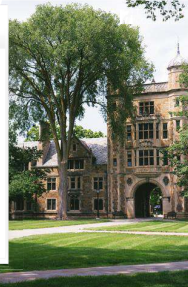




Thompson Coburn LLP

- Full-service law firm with over 380 attorneys.
 - Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
 - Higher education practice provides legal counsel, compliance, and training services to colleges and universities.
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Use of Training Series

Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule). TC also is available to prepare **custom Title IX training sessions, hearing simulations, and other assistance with Title IX matters** (contact [Aaron Lacey](#) or [Scott Goldschmidt](#)).

Session Presenters



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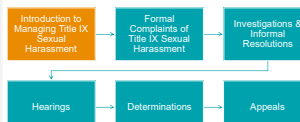


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Curriculum for Training Series

The foundational training series includes the following six sessions:



Title IX Fundamentals




The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination **on the basis of sex** in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students **and** employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.

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20 U.S.C. §1681 et seq.

The Title IX Regulations

With regard to **students**, specifically prohibit discrimination in:

Admission and recruitment	Education programs or activities	Housing
Facilities	Counseling	Financial and employment assistance
Health insurance and benefits	Marital or parental status	Athletics

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34 CFR Part 106.

Title IX Timeline

DATE	EVENT
June 23, 1972	Title IX of the Education Amendments of 1972
July 21, 1975	ED publishes 34 CFR Part 106 , which implements Title IX.
March 13, 1997	ED publishes Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties .
June 22, 1998	Gebser v. Lago Vista Ind. Sch. Dist. , 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it).
May 24, 1999	Davis v. Monroe City Bd. of Educ. , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is deliberately indifferent to known sexual harassment; the respondent is under the school's disciplinary authority, and the behavior is so severe, pervasive, and objectively offensive that it denies access to the school's program and activities).

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Sex-Based Discrimination

What is sex-based discrimination?

- The term is not defined in Title IX.
- "The Department follows the Supreme Court's approach in interpreting conduct "on the basis of sex" to include conduct of a sexual nature or conduct referencing or aimed at a particular sex."
- Includes sexual harassment (e.g., unwelcome sexual advances, requests for sexual favors), and **sexual violence**, which is a subset of sexual harassment (e.g., dating violence, domestic violence, sexual assault, or stalking)

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85 Fed. Reg. 30149-7 (May 19, 2020).

The Title IX Regulations

With regard to **employment**, specifically prohibit discrimination in:

Employment	Recruitment	Compensation
Job classification	Fringe benefits	Marital or parental status
Advertising	Pre-employment inquiries	Employment criteria

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34 CFR Part 106.

Title IX Timeline

DATE	EVENT
Jan. 2001	Following significant judicial activity, ED publishes Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties . ED draws distinction between standards for administrative enforcement and standards for private litigation.
Nov. 13, 2000	ED updates Title IX rules to incorporate the Civil Rights Restoration Act's broadened definitions of "program or activity" and "program."
Oct. 25, 2006	ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.
April 2011	ED publishes DCL with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes Questions and Answers on Title IX and Sexual Violence , further clarifying guidance articulated in 2011 Guidance and 2011 DCL.
May 2016	ED and DOJ issue joint DCL regarding treatment of transgender students, accompanied by Examples of Policies and Emerging Practices for Supporting Transgender Students .

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The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

- Disseminate a policy which includes a **non-discrimination statement**.
- Designate a Title IX Coordinator.
- Adopt and publish **grievance procedures** that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- Take action** to address and prevent sex-based discrimination.

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34 CFR 106.8.

The New Rule & Sexual Harassment

Title IX Timeline

DATE	EVENT
Feb. 2017	ED publishes DCL rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes DCL rescinding April 2011 DCL, as well as 2014 DCL on Campus Sexual Misconduct.
Nov. 2018	On November 29, 2018, ED publishes the official version of its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.
May 2020	On May 19, 2020, ED publishes the official version of its final Title IX rule in the Federal Register.
August 14, 2020	Effective Date of new Title IX Rule.

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The New Title IX Rule

Controversial, and already challenged, ED's new rule is its first regulation addressing **sexual harassment** since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.



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New Definitions of Key Terms

Sexual Harassment
Complainant
Respondent
Consent
Actual Knowledge
Supportive Measures
Formal Complaint

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Sexual Harassment

Does this definition prohibit all harassing or offensive remarks?

- No. Unwelcome conduct must be severe, pervasive, and objectively offensive. But schools can still address such remarks in a variety of ways.

Does quid pro quo harassment need to be severe, pervasive, and objectively offensive? How about Clery/VAWA offenses?

- No. Only the "unwelcome conduct" prong of the sexual harassment definition must be severe, pervasive, and objectively offensive. A victim of quid pro quo sexual harassment or Clery/VAWA sex offenses, has been effectively denied equal access to education.

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The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)(4).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX grievance process that complies with the new standards set forth in 34 CFR 106.45.

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Sexual Harassment

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- 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 school's education program or activity;
- an employee of the school conditioning the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; or
- sexual assault, as defined in the Clery Act, or dating violence, domestic violence, or stalking as defined in VAWA.

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Complainant, Respondent, Consent

Complainant. An individual who is alleged to be the victim of conduct that could constitute sexual harassment.

Respondent. An individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

Consent. The Assistant Secretary will not require schools to adopt a particular definition of consent with respect to sexual assault.

- Some schools are under state law requirements to apply a particular definition of consent for purposes of campus sexual misconduct policies.

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Key Definitions

Sexual Harassment

What is the basis for the new definition of sexual harassment?

- From one administration to the next, the Department has consistently maintained that the standards the agency uses to determine Title IX compliance do not need to align with those established by the Supreme Court in *Gebser and Davis*.
- Without surrendering this discretion, this Department has chosen to build these final regulations upon the foundation established by the Supreme Court.
- This Department "believes it would be beneficial for recipients and students alike if the administrative standards governing recipients' responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions..."

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Responding to Title IX Sexual Harassment

Responding to Title IX Sexual Harassment

An institution **must** respond to sexual harassment, **with or without** a formal complaint, when:

- the school has **actual knowledge** of the alleged sexual harassment;
- the alleged sexual harassment occurred in an **education program or activity** of the school; **and**
- the alleged sexual harassment was against a person **physically located in the United States**.

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34 CFR 106.44(a) (August 14, 2020).

Program or Activity

An **education program or activity** of the school includes "locations, events, or circumstances over which the school exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution."

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34 CFR 106.44(a) (August 14, 2020).

Elements of a Sufficient Response

Actual Knowledge

Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any official of the school who has **authority to institute corrective measures on behalf of the institution**.

- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does **not** qualify an individual as one who has authority to institute corrective measures on behalf of the institution.

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34 CFR 106.30(a) (August 14, 2020).

Program or Activity

How does an institution determine what constitutes a program or activity?

- It's a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred.

What if a student is sexually assaulted outside of an education program or activity but later suffers Title IX sexual harassment in an education program or activity?

- Title IX would only cover the act of sexual harassment in an institution's education program or activity, but the institution may still choose address the prior assault through its own process or code of conduct.

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85 Fed. Reg. 30204 (May 19, 2020).

Elements of a Sufficient Response

Institutions must respond "promptly" and "in a manner that is not **deliberately indifferent**."

A school is **deliberately indifferent** "only if its response to sexual harassment is clearly unreasonable in light of the known circumstances."

In the proposed rule, the Department offered additional detail regarding conduct that would, or would not, constitute deliberate indifference. The final rule does **not** include this language.

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34 CFR 106.44(a) (August 14, 2020).

Actual Knowledge

Who can make a report?

- Any person (including bystanders or anonymous reports).

Who is an official with authority to institute corrective measures on behalf of the institution?

- This is a fact-specific determination. Per the Preamble, possibly supervisors and deans. Schools can identify such individuals in a list.

Which employees must report sexual harassment to the Title IX Coordinator?

- As to employees who are not the Title IX Coordinator or Officials with Authority, schools have wide discretion to craft and implement their own employee reporting policy.

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34 CFR 106.30(a) (August 14, 2020).

Physical Location

The complainant must be a person physically located in the United States.

- The Department acknowledges that individuals experiencing sexual harassment while outside of the country (*i.e.*, studying abroad) would not be covered.

- However, it would appear that sexual harassment perpetrated online against an individual physically located in the United States could be covered, even if the perpetrator were located outside of the country.

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34 CFR 106.44(a) (August 14, 2020).

Elements of a Sufficient Response

However, the final rule **does** specify that a Title IX Coordinator must promptly contact the complainant to:

- discuss the availability of supportive measures;
- consider the complainant's wishes with respect to supportive measures;
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint; **and**
- explain to the complainant the process for filing a formal complaint.

A failure to satisfy these specific requirements could be characterized as deliberate indifference.

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34 CFR 106.44(a) (August 14, 2020).

Elements of a Sufficient Response

Further, the final rule specifies that a school's response must treat complainants and respondents equitably by offering **supportive measures** to a complainant, and by following a **compliant grievance process** before the imposition of any disciplinary sanctions against a respondent.

Once again, a failure to satisfy these requirements could be deemed deliberate indifference.

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Interim Measures: Removal / Leave

An institution would be permitted to remove a respondent from campus on an emergency basis, provided:

- that the school undertakes an individualized safety and risk analysis;
- determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; and
- provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.

An institution also would be permitted to place a "non-student employee respondent" on administrative leave during the pendency of [its] grievance process.

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Supportive Measures

Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

Such measures are designed to restore or preserve equal access to the school's education program or activity without **unreasonably** burdening the other party, including measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment.

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Elements of a Sufficient Response

Does the deliberate indifference standard relieve recipients of their obligation to respond to every known allegation of sexual harassment?

- No.

In the absence of a formal complaint, are there circumstances where an institution would initiate a grievance process against the respondent to avoid being deliberately indifferent?

- Yes. The Title IX Coordinator may sign a formal complaint to initiate a grievance process. Examples noted in the Preamble are threat, serial predation, violence, or weapons.

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Interim Measures: Removal / Leave

What does the "individualized safety or risk analysis" require?

- "...more than a generalized, hypothetical, or speculative belief that the respondent may pose a risk to someone's physical health or safety."

What does it mean that an individual can challenge their removal "immediately" after removal?

- This is fact-specific, but is generally understood as occurring without delay, as soon as possible, given the circumstances.

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Examples of Supportive Measures

Counseling	Extensions of deadlines or other course-related adjustments	Modifications of work or class schedules
Campus escort services	Mutual restrictions on contact between the parties	Changes in work locations
Changes in housing locations	Leaves of absence	Increased security and monitoring of certain areas of the campus

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Interim & Supportive Measures

Interim Measures: Removal / Leave

Is self-harm grounds for emergency removal?

- Yes, when the threat arises from allegations of sexual harassment. But it is important for institutions to consider and comply with the ADA.

Do respondents who are employees receive the same due process protections with respect to emergency removals (i.e., post-removal notice and opportunity to challenge the removal)?

- Yes.

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Supportive Measures

The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.

The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

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Formal Complaints of Title IX Sexual Harassment



Formal Complaint Process

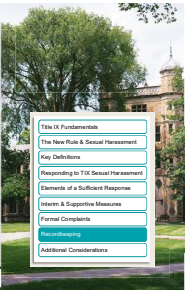
- ❖ Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is **not a complainant** or otherwise a party, and must comply with applicable Title IX requirements.
- ❖ For the purpose of addressing formal complaints of sexual harassment, a school's formal complaint policy and process must comply with a **wide range** of specific requirements set out in the new rule, including those on the following slide.



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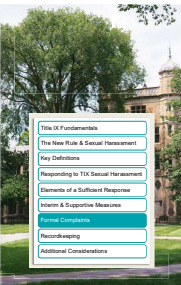
- For each formal complaint of Title IX sexual harassment, the institution must maintain records for **7 years** that include:
- records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment;
 - the basis for the school's conclusion that its response was not deliberately indifferent;
 - documentation that the school took measures designed to restore or preserve equal access; **and**
 - if the school did not provide supportive measures, the reasons why such a response was not clearly unreasonable in light of the known circumstances.



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Formal Complaint

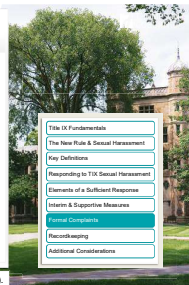
- ❖ A **formal complaint** of Title IX sexual harassment means a document filed by a complainant **or** signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- ❖ The phrase **"document filed by a complainant"** means a document or electronic submission that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.



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Formal Complaint Process

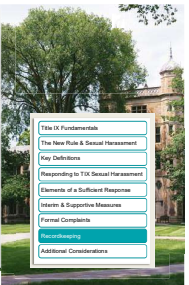
- Core Requirements
 - Details 10 core requirements of formal complaint process
- Complaint Dismissal
 - Grounds for dismissal and procedural requirements
- Consolidation
 - Complaint consolidation in specific circumstances
- Notice of Allegations
 - Requirements for initial and ongoing notice to parties
- Investigations
 - 7 required elements of formal investigation
- Informal Resolutions
 - Permits informal resolution where appropriate
- Heardings
 - Hearing requirements, including cross-ex and advisors
- Determinations
 - Requirements for adjudicators and determinations
- Appeals
 - Grounds and procedures for appeals
- Recordkeeping
 - Record maintenance requirements for specified periods



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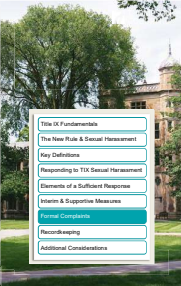
- If there was an adjudication, the records also **must** contain:
- any determination regarding responsibility;
 - any audio or audiovisual recording or transcript;
 - any disciplinary sanctions imposed on the respondent;
 - any remedies provided to the complainant;
 - any appeal and the result; **and**
 - any informal resolution and the result.



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- Responding to Title IX Sexual Harassment
- Elements of a Sufficient Response
- Interim & Supportive Measures
- Formal Complaints
- Recordkeeping
- Additional Considerations

Formal Complaint

- ❖ A formal complaint **may be filed** with the Title IX Coordinator in person, by mail, or by electronic mail . . . and by any additional method designated by the school.
- ❖ At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the **education program or activity** of the school with which the formal complaint is filed.



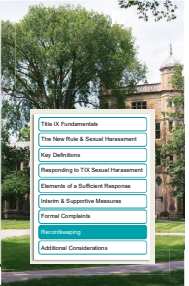
- Title IX Fundamentals
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Recordkeeping



Recordkeeping

- Apart from any specific proceeding, institutions also must keep for 7 years, all materials used to **train** Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process. Further, schools must make these training materials **publicly available on their websites**.



- Title IX Fundamentals
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Additional Considerations



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Relationship to Title VII

This having been acknowledged, the Department concludes that "nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX."

- Title IX Fundamentals
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85 Fed. Reg. 30440 (May 19, 2020).

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Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



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Retaliation

The new rule specifically prohibits retaliation, providing that no school "or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, 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 under this part."

- Title IX Fundamentals
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34 CFR 106.71(a) (August 14, 2020).

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Resources



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Higher Ed Webinar Series

2019 2020 Series Calendar	
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Relationship to Title VII

Title VII of the Civil Rights Act of 1964 generally prohibits discrimination in the workplace, and has been interpreted by the Supreme Court to prohibit sexual harassment.

In the Preamble to the new rule, the Department observes that it "is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations."

- Title IX Fundamentals
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85 Fed. Reg. 30440 (May 19, 2020).

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Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



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Webinars on Demand

TCE #1229		
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REGulation (our blog)

REGULATION

The CARES Act: More options for higher education

The CARES Act: Summary of provisions impacting higher education institutions and learners

CONTRIBUTORS

Aaron Lacey
Chris Taylor & Lacey

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Professional Profile

Scott Goldschmidt

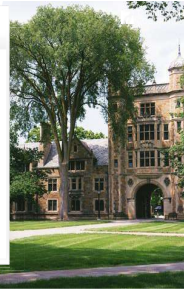
- Counsel, Higher Education Practice

Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

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TC Extra Credit

REGULATION

ED issues: Implications to Higher Ed to CARES Act

BORROWER DEFENSE RULE: Reporting Guide

CONTRIBUTORS

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Professional Profile

Aaron Lacey

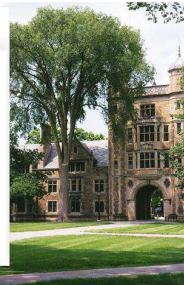
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Formal Complaints of Title IX Sexual Harassment

Thompson Coburn LLP
Title IX Training Series | July 2020

Presenters



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- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Higher Education Practice

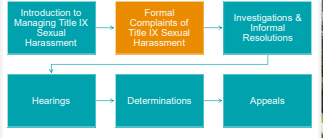


Aaron D. Lacey
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Curriculum for Training Series

The foundational training series includes the following six sessions:



The Formal Complaint Framework



Purpose of Training Series

The Title IX rule effective **August 14, 2020**, creates a new and specific process by which postsecondary institutions must manage complaints of **covered sexual harassment** on campus.

The TC Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including **Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.**



Syllabus for this Session

- The Formal Complaint Framework
- 10 Core Requirements
- Dismissal of Formal Complaints
- Consolidation of Formal Complaints



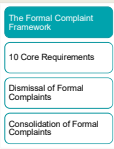
The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination **on the basis of sex** in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students **and** employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.



20 U.S.C. §1681 et seq.



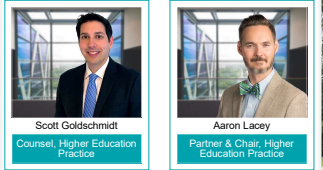
Use of Training Series

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TC also is available to prepare **custom Title IX training** sessions, hearing simulations, and other assistance with Title IX matters (contact [Aaron Lacey](#) or [Scott Goldschmidt](#)).



Session Presenters



Scott Goldschmidt
Counsel, Higher Education Practice

Aaron Lacey
Partner & Chair, Higher Education Practice



The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

- Disseminate a policy which includes a **non-discrimination statement**.
- Designate a Title IX Coordinator.
- Adopt and publish **grievance procedures** that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- **Take action** to address and prevent sex-based discrimination **in all forms**.



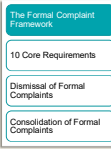
34 CFR 106.8.



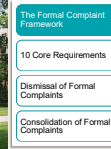
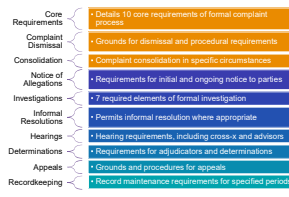
The New Title IX Rule

Controversial, and already challenged, ED's new rule is its first regulation addressing sexual harassment since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.



Formal Complaint Process

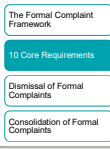


2. Objective Evaluation

A school's formal complaint process must require an objective evaluation of all evidence and provide that **credibility determinations** may not be based on a person's status as a complainant, respondent, or witness.

An **objective evaluation** is one that involves:

- Impartial consideration of available evidence.
- No prejudgment of parties, witnesses, facts at issue, or how facts at issue are presented.
- No deference to recommendations of an investigator.

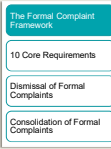


The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging all acts of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)-(d).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(g).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.



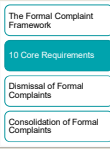
10 Core Requirements

2. Objective Evaluation

A **credibility** determination involves determining what statements to believe and what statements not to believe, based on the "credibility" of the individual making the statement.

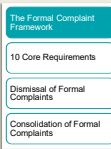
- Adjudicators may believe everything a party or witness says, part of it, or none or it.

In some situations, there may be little to no evidence other than the statements of the parties themselves.



Formal Complaints

- ❖ A **formal complaint** of Title IX sexual harassment means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- ❖ For the purpose of addressing formal complaints of sexual harassment, a school's formal Title IX complaint policy and process must comply with **specific requirements** set out in the new rule.



1. Equitable Treatment

A formal complaint process must treat complainants and respondents **equitably** by:

- providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent; **and**
- by following a complaint process that complies with the new Title IX rule.

Remedies must be designed to restore or preserve equal access to the school's education program or activity.



3. Training of Key Participants

A school's process must include training for coordinators, investigators, and adjudicators and require that they be free of conflict of interest.

- Materials used to train Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process, **must not rely on sex stereotypes** and must promote impartial investigations and adjudications of formal complaints of sexual harassment.



3. Training of Key Participants

Title IX Coordinators, investigators, adjudicators, and any person who facilitates informal resolutions

- Definition of sexual harassment and scope of the school's education program or activity.
- Conducting an investigation and grievance process including hearings, appeals, and informal resolutions.
- Serving impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.

Investigators

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Adjudicators

- Using technology at live hearings.
- Relevance of questions and evidence, including when questions and evidence about complainant's sexual history are not relevant.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(ii) (August 14, 2020).

5. Prompt Timeframes

A school's process must include reasonably prompt timeframes for resolution and allow for temporary delay or limited extension for good cause.

- "Any time frame included by the recipient must be 'reasonably prompt,' where the reasonableness of the time frame is evaluated in the context of the recipient's operation of an education program or activity."
- "The Department believes that each recipient is in the best position to balance promptness with fairness and accuracy based on the recipient's unique attributes and the recipient's experience with its own student disciplinary proceedings..."

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(iv)-(vi) (August 14, 2020); 85 Fed. Reg. 30269 (May 19, 2020)

8. Appeal Processes & Standards

A school's formal complaint process must describe the appeal process and standards.

- Appeals may be granted on the following bases:
 - a procedural irregularity that affected the outcome;
 - new evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome; and
 - the Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.
- A school also may offer an appeal equally to both parties on additional bases.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1) and (8) (August 14, 2020).

3. Training of Key Participants

What are best training practices?

- Develop a training plan and consider combining different types of training (live, remote, asynchronous).
- Encourage and ensure time for questions when possible.
- Consider simulations, which can introduce participants to policies and procedures, force them to grapple with difficult aspects of the process, provide an opportunity for questions to be answered in real-time, and allow for suggestions or corrections.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



6. Sanctions and Remedies

A school's formal complaint process must describe the range of possible sanctions and remedies.

- "Whether and what type of sanctions are imposed is a decision left to the sound discretion of recipients."
- "The new regulations 'permit recipients to evaluate such considerations and make disciplinary decisions that each recipient believes are in the best interest of the recipient's educational environment.'"

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(iv)-(vi) (August 14, 2020); 85 Fed. Reg. 30274 (May 19, 2020)

9. Supportive Measures

A school's process must describe the range of available supportive measures.

Counseling	Extensions of deadlines or other course-related adjustments	Modifications of work or class schedules
Campus escort services	Mutual restrictions on contact between the parties	Changes in work locations
Changes in housing locations	Leaves of absence	Increased security and monitoring of certain areas of the campus

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(viii)-(x) (August 14, 2020).

4. Presumption of Innocence

A school's formal complaint process must include a presumption of innocence for the respondent.

- "The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent as though the harassment occurred prior to the allegations being proved, and the final regulations require a recipient's Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudgment of the facts at issue, and without drawing inferences about credibility based on a party's status as a complainant or respondent."

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(v)-(vi) (August 14, 2020); 85 Fed. Reg. 30259 (May 19, 2020)

7. Standard of Evidence

A school's process must detail the standard of evidence that will be used and provide for consistent use in all formal complaints.

- Schools may use either preponderance of the evidence or clear and convincing.
- **Preponderance of the evidence** means a particular fact or event was more likely than not to have occurred.
- **Clear and convincing** means a particular fact or event was highly and substantially more likely than not to have occurred.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(iv)-(vii) (August 14, 2020).

10. Legal Privilege

A school's formal complaint process must not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

- Legal privileges protect communications and documents from disclosure. Examples include: Attorney – Client; Priest – Penitent; Doctor – Patient; Spousal.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



34 CFR 106.45(b)(1)(viii)-(x) (August 14, 2020).

Dismissal of Formal Complaints



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Dismissal of Complaints

"The § 106.45 grievance process obligates recipients to investigate and adjudicate allegations of sexual harassment for Title IX purposes: the Department does not have authority to require recipients to investigate and adjudicate misconduct that is not covered under Title IX, nor to preclude a recipient from handling misconduct that does not implicate Title IX in the manner the recipient deems fit. In response to commenters' concerns, the final regulations clarify that dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions..."

85 Fed. Reg. 300289 (May 19, 2020).

- The Formal Complaint Framework
- 10 Core Requirements
- Dismissal of Formal Complaints
- Consolidation of Formal Complaints

Consolidation of Formal Complaints



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Required Dismissal

Schools **must** dismiss a formal complaint of sexual harassment "for purposes of sexual harassment under title IX" if the alleged conduct:

- would not constitute sexual harassment even if proved;
- did not occur in the school's education program or activity; or
- did not occur against a person in the United States.

Such a dismissal does not preclude action under another provision of the school's code of conduct.

34 CFR 106.45(b)(3)(i) (August 14, 2020).

- The Formal Complaint Framework
- 10 Core Requirements
- Dismissal of Formal Complaints
- Consolidation of Formal Complaints

Dismissal of Complaints

Must schools always investigate a formal complaint of sexual harassment?

- Yes.

Under what circumstances is a mandatory dismissal applied?

- A formal complaint of sexual harassment "for purposes of sexual harassment under Title IX" must be dismissed if the alleged conduct:
 - would not constitute sexual harassment even if proved;
 - did not occur in the school's education program or activity; or
 - did not occur against a person in the United States.

- The Formal Complaint Framework
- 10 Core Requirements
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Consolidation of Formal Complaints

Provided the allegations of sexual harassment arise out of the same facts or circumstances, schools are permitted to consolidate formal complaints that are:

- Against more than one respondent
- By more than one complainant against one or more respondents
- By one party against the other party

34 CFR 106.45(b)(4) (August 14, 2020).

Optional Dismissal

Schools **may** dismiss a formal complaint of sexual harassment if, at any time:

- a complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw;
- the respondent is no longer enrolled or employed by the school; or
- specific circumstances prevent the school from gathering sufficient evidence to reach a determination.

Upon a required or optional dismissal, schools must promptly and simultaneously send written notice to the parties.

34 CFR 106.45(b)(3)(ii)-(iii) (August 14, 2020).

- The Formal Complaint Framework
- 10 Core Requirements
- Dismissal of Formal Complaints
- Consolidation of Formal Complaints

Dismissal of Complaints

If a school is required to dismiss a complaint, can it still investigate and adjudicate the complaint under alternative procedures?

- Yes. Such a dismissal does not preclude action under another provision of the school's code of conduct.

- The Formal Complaint Framework
- 10 Core Requirements
- Dismissal of Formal Complaints
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Resources



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Presenters

Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



REGucation (our blog)



Professional Profile

Scott Goldschmidt

- Counsel, Higher Education Practice

Practice and Experience

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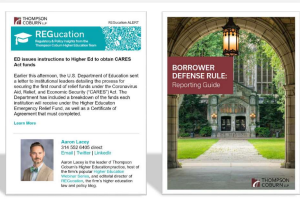
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
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Higher Education Practice

Aaron D. Lacey
Practice Chair
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    graph TD
      A[Introduction to Managing Title IX Sexual Harassment] --> B[Formal Complaints of Title IX Sexual Harassment]
      B --> C[Investigations & Informal Resolutions]
      C --> D[Hearings]
      D --> E[Determinations]
      E --> F[Appeals]
  
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Title IX Investigations & Informal Resolutions

Thompson Coburn LLP
Title IX Training Series | July 2020



Purpose of Training Series


The Title IX rule effective **August 14, 2020**, creates a new and specific process by which postsecondary institutions must manage complaints of **covered sexual harassment** on campus.

The TC Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including **Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.**

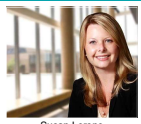


Syllabus for this Session

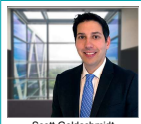
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Collection & Review of Documentation
Writing Investigative Reports
Informal Resolution



Session Presenters



Susan Lorenc
Partner, Employment Practice



Scott Goldschmidt
Counsel, Higher Education Practice

The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

- Disseminate a policy which includes a **non-discrimination statement**.
- Designate a Title IX Coordinator.
- Adopt and publish **grievance procedures** that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- Take **action** to address and prevent sex-based discrimination in all forms.

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Formal Complaints

- A **formal complaint** of Title IX sexual harassment means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- For the purpose of addressing formal complaints of sexual harassment, a school's formal Title IX complaint policy and process must comply with **specific requirements** set out in the new rule.

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The Formal Complaint Framework

The New Title IX Rule

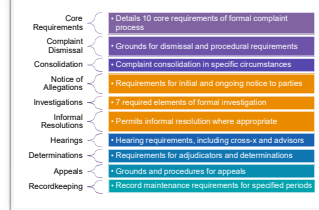
Controversial, and already challenged, ED's new rule is its first regulation addressing **sexual harassment** since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.



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Formal Complaint Process



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The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination **on the basis of sex** in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students **and** employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.

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The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)(1)

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX complaint process that complies with the new standards set forth in 34 CFR 106.45.

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Key Concepts

Key Concepts

- ❖ Treat complainants and respondents equitably.
- ❖ Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- ❖ Ensure investigators do not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

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34 CFR 106.45(b) (August 14, 2020).

Key Concepts

- Burden of Proof** • Ensure burden of proof and burden of gathering evidence rests on the school not on the parties.
- Equal Opportunity** • Provide equal opportunity for the parties to present fact and expert witnesses, and other inculpatory and exculpatory evidence.
- Restrictions** • Refrain from restricting the parties' ability to discuss the allegations or to gather and present relevant evidence.

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34 CFR 106.45(b)(5) (August 14, 2020).

Notice of Allegations

Upon receipt of a formal complaint, schools must provide written notice to parties that includes:

- Discussion of the formal complaint process, including any informal resolution option.
- Sufficiently detailed statement of allegations.
 - Sufficient detail includes the identities of the parties, if known, the conduct allegedly constituting sexual harassment, and the date and location of the alleged incident, if known.
- Statement that the respondent is presumed innocent and that a determination of responsibility is made at the conclusion of the process.

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34 CFR 106.45(b)(2) (August 14, 2020).

Key Concepts

- ❖ Understand the presumption that the respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process
- ❖ Understand the standard of evidence – either the preponderance of the evidence or clear and convincing evidence standard
- ❖ Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

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34 CFR 106.45(b) (August 14, 2020).

Key Concepts

- Notice Content and Timing** • Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.
- Investigative Report** • Include the issuance of an investigative report that fairly summarizes the evidence.

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34 CFR 106.45(b)(5) (August 14, 2020).

Notice of Allegations

- Statement regarding right to an advisor and to review and inspect evidence.
- Reminder that school prohibits knowingly making false statements or knowingly submitting false information.

Parties must be provided sufficient time to prepare a response before any initial interview.

Schools also must provide **updated** notice if the school decides to investigate allegations about the respondent or complainant that are not included in the initial notice.

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34 CFR 106.45(b)(2) (August 14, 2020).

Key Concepts

What does it mean to objectively evaluate evidence?

- Impartial consideration of available evidence
- No prejudgment of parties, witnesses, facts at issue, or how facts at issue are presented
- No deference to recommendations of an investigator

What is a legal privilege and how would this arise in an investigation?

- Legal privileges protect communications and documents from disclosure. Examples are:
 - Attorney – Client
 - Priest – Penitent
 - Doctor – Patient
 - Spousal

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34 CFR 106.45(b) (August 14, 2020).

Notice of Allegations

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Confidentiality

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Confidentiality

Schools must keep confidential the identity of any individual who has made a report or complaint of any form of prohibited sex discrimination, including any reporter, complainant, respondent, or witness, except:

- as may be permitted by FERPA;
- as required by law; or
- to carry out the Title IX regulations, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

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34 CFR 106.71(a) (August 14, 2020).

Access to Evidence

- | | | | |
|---------------------------------------------------------------------------------------------------------------------------------------|-----------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------------------------|---------------------------------------------------------------------------------------------------------------------------|
| Generally | Prior to issuing investigative report | 10 days prior to hearing or other determination | At and during any hearing |
| • Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation. | • Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response. | • Must send investigative report to parties for review and written response. | • Must make all evidence available to parties and afford equal opportunity to review, including for purposes of cross-ex. |

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34 CFR 106.45(b)(5) (August 14, 2020).

Serving Impartially

What does it mean for an investigator to have bias or a conflict of interest?

- Avoid prejudgment of facts at issue.
- Avoid inferences based on party status.
- Avoid sex stereotypes.

How can an institution ensure that its investigator remains free of bias and conflict of interest?

- Ensure adequate training and understanding of bias and conflict of interest.
- Encourage/do not penalize investigator for disclosing bias or conflict of interest.

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Access to Evidence

Serving Impartially

Serving Impartially

What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.

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Access to Evidence

Throughout the investigation, institutions must afford both parties equal opportunity to review and inspect any evidence that:

- was obtained as part of the investigation; and
- is directly related to the allegations.

This includes evidence upon which the school does not intend to rely in reaching a determination, and inculpatory or exculpatory evidence, whether obtained from a party or other source.

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Serving Impartially

Investigators must not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

Investigators must objectively evaluate all relevant evidence—including both inculpatory and exculpatory evidence.

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Issues of Relevance

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Issues of Relevance

Investigators must create an investigative report that fairly summarizes relevant evidence.

- Evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless:
- such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant;
 - if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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Interviews

Interviews

How to handle concurrent law enforcement investigations?

- Concurrent law enforcement activity may constitute good cause for short-term delays or extensions.
- For example, "if a concurrent law enforcement investigation uncovers evidence that the police plan to release on a specific time frame and that evidence would likely be material to the recipient's determination regarding responsibility,"

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Issues of Relevance

What is "relevance" and "relevant evidence"?

- Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- Repetition of the same question is irrelevant.

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How does an investigator determine which individuals to interview?

- Start with witnesses named by complainant or respondent that may have relevant evidence.

How does an investigator determine which questions to ask?

- Come prepared.
- FUNNEL METHOD!
 - General questions: based on the elements of the offense.
 - Specific questions: based on known facts, documentary evidence, and other interviews.

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Credibility Determinations

Issues of Relevance

How does an investigator summarize relevant evidence?

- Have a clear record of steps taken during the investigation.
- Consider summarizing:
 - The alleged incident
 - Parties involved and witnesses identified
 - Key factual findings
 - Relevant evidence
 - Specific policy alleged to be violated

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How to keep order with advisors?

- Implement rules about appropriate conduct at an interview that require all participants to behave in an orderly manner.
 - Clearly explain those rule and expectations at the outset of each hearing.
 - Enforce rules equally.
- Keep control of the interview.
- Consider terminating an interview if an advisor or participant is not acting appropriately.

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Credibility Determinations

In light of Title IX's requirement prohibiting the investigator from being the decision-maker, should the investigator make credibility determinations?

- This is up to the institution. But note that:
 - Credibility determinations cannot be based on party status.
 - An investigator's determination regarding credibility cannot actually be a determination regarding responsibility.
 - the decision-maker is under an obligation to objectively evaluate all relevant evidence both inculpatory and exculpatory, and must therefore independently reach a determination regarding responsibility without giving deference to the investigative report.

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Collection & Review of Documentation



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Writing Investigative Reports

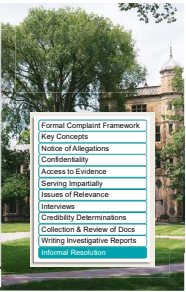


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Informal Resolution

A school may not, under any circumstance, require a student or employee to waive the right to an investigation and adjudication of formal complaints under Title IX.

Similarly, a school may not require the parties to participate in the informal resolution of a formal complaint or even offer an informal resolution process unless a formal complaint is filed.




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34 CFR 106.45(b)(9) (August 14, 2020).

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Collection & Review of Documentation

Records of each sexual harassment investigation must be kept for seven years. While investigators may not be responsible for maintaining records, their close cooperation with Title IX coordinators and counsel will be critical to ensuring that complete and accurate records are collected and preserved.



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34 CFR 106.45(b)(10)(A) (August 14, 2020).

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Writing Investigative Reports

What are the main goals of an investigative report that fairly summarizes relevant evidence?

- Do not reach any conclusions.
- Put decision-makers in best position to understand relevant evidence.
- Demonstrate to parties that institution took the allegation seriously and responded appropriately.
- Be guided by the knowledge that the report may be "Exhibit 1."



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34 CFR 106.45(b)(5)(vii) (August 14, 2020).

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Informal Resolution

However, at any time prior to reaching a final determination, a school may facilitate an informal resolution that does not involve a full investigation and adjudication, provided that the school:

- provides the parties a written notice disclosing (1) the allegations, (2) the requirements of the informal resolution process (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts, and (3) any other consequences of participating in the informal resolution process, (4) the records that will be maintained or could be shared;
- obtains the parties' voluntary, written consent to the informal resolution.



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34 CFR 106.45(b)(9) (August 14, 2020).

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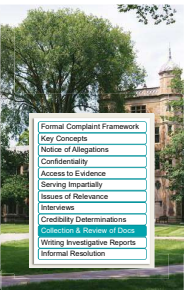
Collection & Review of Documentation

What are some best practices for the review and collection of written documentation?

- Transcript or audio recording for interviews, subject to state law.

What should an investigator know about potential future litigation or audit?

- Litigation and audit is a possibility of every Title IX investigation.
- Document retention requirements under Title IX are 7 years.



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34 CFR 106.45(b)(10)(A) (August 14, 2020).

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Informal Resolution




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Informal Resolution

Informal resolution is not available to resolve allegations that an employee sexually harassed a student.

At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and to resume the formal complaint process.



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34 CFR 106.45(b)(9) (August 14, 2020).

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What are the pros and cons of informal resolution?

- Pros: simplified process, finality for the parties, control of outcome.
- Cons: delays process if unsuccessful, less process and safeguards, avoidance of consequences.

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Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



Webinars on Demand

FCLE(123) Overview of Loss Limitations, Family Official Filing, and Other Antitrust Issues Raised by the COVID-19 Pandemic. April 20, 2020 (1:00pm)	Better Together? Connections, Price Grouping and Other Antitrust Issues Raised by the COVID-19 Pandemic. April 20, 2020 (1:00pm)	The CARES Act for Higher Education: Strategy and Implementation April 20, 2020 (1:00pm)
Law and Order in the Time of COVID-19: Does EPA's Temporary Enforcement Policy Apply to Me? April 13, 2020	State and Federal Implementation of Industrial Hygiene Laws April 14, 2020 (1:00pm)	New COVID-19 Issues during the COVID-19 Emergency April 24, 2020 (1:00pm)
Contingency Planning for Closed Institutions of Higher Education April 8, 2020 (1:00pm)	Higher Education & Immigration: Five Evolving Areas to Watch March 11, 2020 (1:00pm)	Using QDPR to Prepare for CCPA and Vice Versa March 11, 2020 (1:00pm)

Informal Resolution

What are best practices for facilitating informal resolution?

- Trained, neutral facilitator.
- Make parties aware of the benefits and limitations of informal resolution.
- Don't take sides or try to adjudicate the dispute.
- Be compassionate.
- Help parties reach a just settlement **on their terms**. Potential resolution terms include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and disciplinary measures.

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Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



REGUCation (our blog)



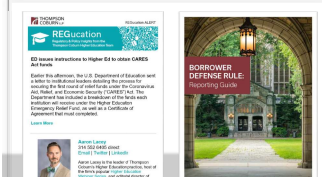
Resources

Higher Ed Webinar Series

2019 2020 Series Calendar	
August 2019	Examining the ED Approval Process for Higher Ed Mergers and Acquisitions
September 2019	Colleges Held for Ransom: Responding to a Ransomware Attack
October 2019	Merging Institutions of Higher Education: Corporate and Tax Considerations
December 2019	A Year-End Roundup of ED Rulemaking Activity
February 2020	Recent Court Decisions in Student Disputes That You Should Know About
March 2020	Higher Education & Immigration: Five Evolving Areas to Watch
April 2020	The CARES Act for Higher Education: Strategy and Implementation
May 2020	ED's New Title IX Rule: A Detailed Examination

If you would like to register for our webinars, email plott@thompsoncoburn.com and we will send you a link to the event each time for registration.

TC Extra Credit



Presenters



Professional Profile

Aaron Lacey

- Partner and Chair, Higher Education Practice

Practice and Experience

- Provide regulatory counsel on federal, state, and accrediting agency laws and standards governing higher education.
- Represent institutions in administrative proceedings before state licensing entities, accrediting agencies, and the U.S. Department of Education, including matters arising from audits and investigations of the Office for Civil Rights.

Contact Information

- alacey@thompsoncoburn.com | 314-552-6405



Professional Profile

Susan Lorenc

- Partner, Employment Practice

Practice and Experience

- Experienced and trusted employment law advisor who counsels employers at every stage of a personnel-related issue.
- Assists with hiring and firing, conducts workplace investigations, and provides day-to-day counseling on a wide variety of matters including discrimination and retaliation.

Contact Information

- slorenc@thompsoncoburn.com | 312-580-2324



Disclaimer



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- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Professional Profile

Scott Goldschmidt

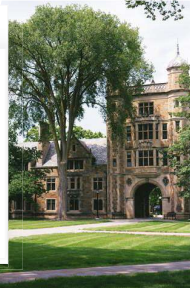
- Counsel, Higher Education Practice

Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

Contact Information

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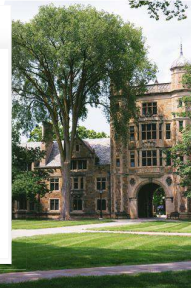


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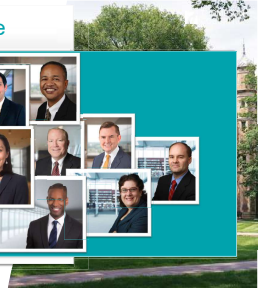
If you desire legal advice for a particular situation, you should consult an attorney.



Higher Education Practice



Aaron D. Lacey
Practice Chair
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Purpose of Training Series

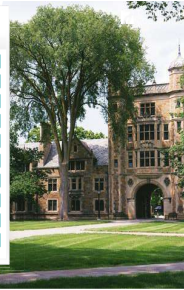
The Title IX rule effective August 14, 2020, creates a new and specific process by which postsecondary institutions must manage complaints of covered sexual harassment on campus.

The TC Title IX Training Series is designed to provide foundational training to those individuals who will help to administer this required process, including Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.



Syllabus for this Session

The Formal Complaint Framework
Key Concepts
Live Hearings
Advisors
Cross-Examination
Relevance
Credibility
Burden of Proof
Evidence
Legal Privileges

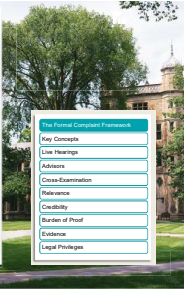


The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.80-1(d).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.

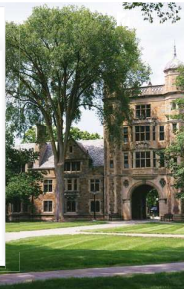


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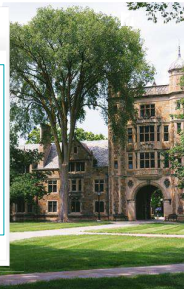
Use of Training Series

Institutions of higher education are welcome to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

TC also is available to prepare custom Title IX training sessions, hearing simulations, and other assistance with Title IX matters (contact Aaron Lacey or Scott Goldschmidt).



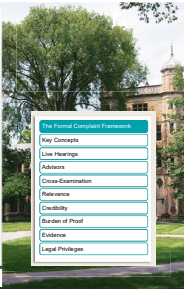
Session Presenters



Formal Complaints

A formal complaint of Title IX sexual harassment means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.

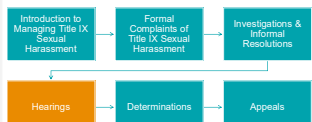
For the purpose of addressing formal complaints of sexual harassment, a school's Title IX complaint process must comply with a wide range of specific requirements set out in the new rule, including specific requirements concerning hearings.



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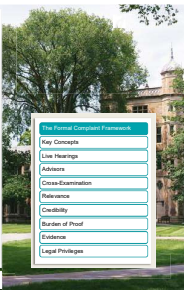
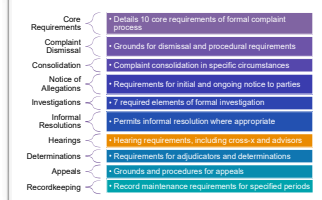
Curriculum for Training Series

The foundational training series includes the following six sessions:

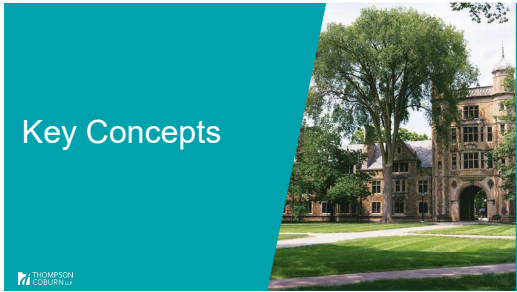


The Formal Complaint Framework

Formal Complaint Process



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Key Concepts

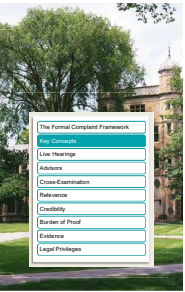
What does it mean to objectively evaluate relevant evidence?

- Impartial consideration of available evidence.
- No prejudice of parties, witnesses, facts at issue, or how facts at issue are presented.
- No deference to recommendations of an investigator.

What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.

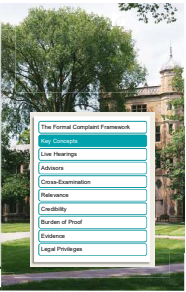
THOMPSON COBURN LLP



Key Concepts

- ❖ Ensure decision-makers do not have a **conflict of interest** or bias for or against complainants or respondents generally or an individual complainant or respondent.
- ❖ Understand the **standard of evidence** – either the preponderance of the evidence or clear and convincing evidence standard.
- ❖ Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a **legally recognized privilege**, unless the person holding such privilege has waived the privilege.

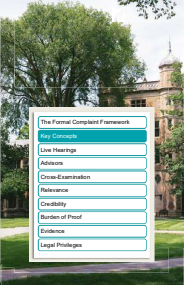
THOMPSON COBURN LLP 34 CFR 106.45(b) (August 14, 2020).



Key Concepts

- ❖ Treat complainants and respondents equitably.
- ❖ Objectively evaluate all relevant evidence – including both **inculpatory** and **exculpatory** evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.
- ❖ Understand the **presumption** that the respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process.

THOMPSON COBURN LLP 34 CFR 106.45(b) (August 14, 2020).

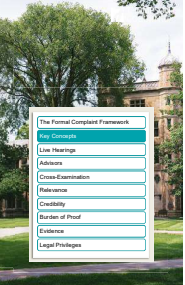


Key Concepts

What are credibility determinations and why are they significant?

- A determination by adjudicators of what statements to believe and what statements not to believe.
 - Adjudicators may believe everything a party or witness says, part of it, or none of it.
- In some situations, there may be little to no evidence other than the statements of the parties themselves.

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Key Concepts

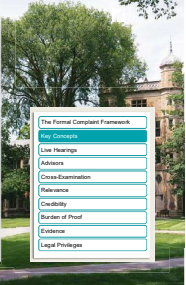
What is the preponderance of the evidence standard mean?

- Proof that a particular fact or event was more likely than not to have occurred.

What does the clear and convincing standard mean?

- Proof that a particular fact or event was highly and substantially more likely to be true than untrue.

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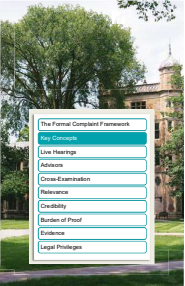


Key Concepts

What is "relevance" and "relevant evidence"?

- Evidence pertinent to proving whether facts material to the allegations under investigation are more or less likely to be true.
- Repetition of the same question or duplicative evidence may be deemed irrelevant.

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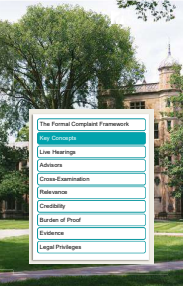


Key Concepts

What does the presumption of innocence mean for the respondent?

- "The presumption does not imply that the alleged harassment did not occur; the presumption ensures that recipients do not take action against a respondent as though the harassment occurred **prior to the allegations being proved**, and the final regulations require a recipient's Title IX personnel to interact with both the complainant and respondent in an impartial manner throughout the grievance process without prejudice of the facts at issue, and without drawing inferences about credibility based on a party's status as a complainant or respondent."

THOMPSON COBURN LLP 85 Fed. Reg. 30259 (May 19, 2020).



Live Hearings Required

Institutions are **required** to include a **live hearing** in their formal complaint process.

- The adjudicator cannot be the same person as the Title IX Coordinator or the investigator.

Absent any request from the parties, live hearings **may** be conducted either with all parties physically present or with participants appearing virtually, with technology enabling them to see and hear each other.

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34 CFR 106.45(b)(6) (August 14, 2020).

Advisors

Cross-Examination Required

- ❖ Adjudicators **must** permit each party's advisor to cross-examine the other party and any witnesses.
- ❖ Cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's advisor and **never** by a party personally.
- ❖ If a party does not have an advisor, the school must provide an advisor of **its** choice, free of charge, to conduct cross-examination. The advisor may be, but is not required to be, an attorney.

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34 CFR 106.45(b)(6) (August 14, 2020).

Keep 'Em Separated

At the **request** of either party, schools must provide for the live hearing to occur with the parties located in **separate** rooms, with technology enabling the adjudicator and parties to **simultaneously** see and hear the party or the witness answering questions.

Schools must create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

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34 CFR 106.45(b)(6) (August 14, 2020).

Advisors

Schools must afford the parties equal opportunity to have an advisor during any aspect of the formal complaint process.

Advisors may be an attorney.

Schools may **not** restrict the choice of advisor or the advisor's presence.

Schools may **not** restrict advisor participation in the proceedings, as long as the restrictions apply equally.

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34 CFR 106.45(b)(5) (August 14, 2020).

Why Advisors?

"...the Department does not believe that the **benefits of adversarial cross-examination** can be achieved when conducted by a person ostensibly designated as a "neutral" official. This is because the function of cross-examination is precisely **not** to be neutral but rather to point out in front of the neutral decision-maker each party's unique perspective about relevant evidence and desire regarding the outcome of the case."

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85 Fed. Reg. 30335 (May 19, 2020).

Rules for Hearings

What rules can institutions adopt regarding the **conduct of hearings**?

- So long as **all rules** comply with the final regulations and apply equally to both parties, schools can adopt rules concerning:
 - Rules of decorum.
 - Timing and length of breaks.
 - Prohibition on disturbing the hearings.
 - Prohibition on badgering witnesses.
- **Make sure to review your school's policies thoroughly.**

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34 CFR 106.45(b)(6) (August 14, 2020).

Cross-Examination

Adversarial Advisors

If a party's advisor of choice refuses to comply with a school's rules of decorum (for example, by insisting on yelling at the other party), can the school require the party to use a different advisor?

- Yes. Similarly, if the advisor refuses to comply with a school's rules of decorum, the school may provide that party with a different advisor to conduct cross-examination on behalf of that party.

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34 CFR 106.45(b)(6) (August 14, 2020).

Adversarial Advisors

Assuming one or both advisors are attorneys, how should decision-makers and presiding officers maintain order?

- Clearly explain the order of proceeding, as well as any other requirements and expectations of each party at the outset of each hearing.
- Enforce rules of order or decorum equally and compassionately.
- Take breaks and ask for help if needed.
- Do not be afraid to adjourn or postpone.

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Examining Cross-Examination

What does "statements" mean?

- "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination.
- "The prohibition on reliance on 'statements' applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination."

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Examining Cross-Examination

Can a party's advisor appear and conduct cross-examination even when the party whom they are advising does not appear?

- Yes.

What happens where a party does not appear but the party's advisor of choice does?

- " . . . a recipient-provided advisor must still cross-examine the other, appearing party on behalf of the non-appearing party, resulting in consideration of the appearing party's statements but not the non-appearing party's statements (without any inference being drawn based on the non-appearance). Because the statements of the appearing party were tested via cross-examination, a fair, reliable outcome can result in such a situation."

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Refusing Cross-Examination

If a party or witness does not submit to cross-examination at the live hearing, the adjudicator must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

- However, the adjudicator cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

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Examining Cross-Examination

If a party or witness does not appear live at a hearing or refuses to answer cross-examination questions, what evidence can be considered?

- "Statements" may not be considered.
- Other evidence that does not consist of statements, such as video evidence, may be used to reach a determination.
- Decision-maker must not draw any inference about the party's or witness's absence from the hearing or refusal to answer cross-examination questions.

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Managing a Live Hearing

If a party does not appear or submit to cross-examination, can the party's family member's or friend's recount the statement of the party?

- No. "Even if the family member or friend did appear and submit to cross-examination, where the family member's or friend's testimony consists of recounting the statement of the party, and where the party does not submit to cross-examination, it would be unfair and potentially lead to an erroneous outcome to rely on statements untested via cross-examination."

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Examining Cross-Examination

What does "submit to cross-examination" mean?

- Answering cross-examination questions that are relevant.

Does the same "exclusion of statement" rule apply to a party or witness's refusal to answer questions posed by the adjudicator?

- No, because questions posed by a neutral fact finder is not cross-examination.
- "If a party or witness refuses to respond to a decision-maker's questions, the decision-maker is not precluded from relying on that party or witness's statements."

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Examining Cross-Examination

Can a decision-maker ask questions of the parties and witnesses?

- Yes.

When is an advisor's cross-examination "on behalf of that party" satisfied?

- "An advisor's cross-examination 'on behalf of that party' is satisfied where the advisor poses questions on a party's behalf, which means that an assigned advisor could relay a party's own questions to the other party or witness, and no particular skill or qualification is needed to perform that role."

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Relevance

Relevance

Only **relevant** cross-examination and other questions, including those challenging credibility, may be asked of a party or witness.

Before a party or witness answers a cross-examination or other question, the adjudicator must **determine** whether the question is relevant, and **explain** any decision to exclude a question as not relevant.

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34 CFR 106.45(b)(6) (August 14, 2020).

Relevance

Can a school adopt a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss relevance determinations with the decision-maker during the hearing?

• "If a recipient believes that arguments about a relevance determination during a hearing would unnecessarily protract the hearing or become uncomfortable for parties, the recipient may adopt a rule that prevents parties and advisors from challenging the relevance determination (after receiving the decision-maker's explanation) during the hearing."

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85 Fed. Reg. 30343 (May 19, 2020).

Burden of Proof

Relevance

Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are **not relevant**, unless such questions and evidence:

- are offered to prove that someone other than the respondent committed the alleged conduct, **or**
- concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

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34 CFR 106.45(b)(6) (August 14, 2020).

Credibility

Burden of Proof

The burden of proof and burden of gathering evidence sufficient to reach a determination is on **the institution**.

- The institution may **not** access, consider, disclose, or otherwise use a party's medical records without written consent.

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Relevance

What is required of the decision-maker during a relevance determination?

- Lengthy or complicated explanation not required. "[I]t is sufficient, for example, for a decision-maker to explain that a question is irrelevant because the question calls for prior sexual behavior information without meeting one of the two exceptions, or because the question asks about a detail that is not probative of any material fact concerning the allegations."

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85 Fed. Reg. 30343 (May 19, 2020).

Managing a Live Hearing

Can relevant character evidence or evidence of prior bad acts on cross-examination be excluded?

- No, ... where a cross-examination question or piece of evidence is relevant, but concerns a party's character or prior bad acts, under the final regulations the decision-maker **cannot exclude or refuse to consider the relevant evidence**, but may proceed to objectively evaluate that relevant evidence by analyzing whether that evidence warrants a high or low level of weight or credibility, so long as the decision maker's evaluation treats both parties equally by not, for instance, automatically assigning higher weight to exculpatory character evidence than to inculpatory character evidence.

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85 Fed. Reg. 303337 (May 19, 2020).

Burden of Proof

What does the burden of proof mean in terms of reaching a determination?

- Complainants are not required to prove responsibility.
- Respondents are not required to prove non-responsibility.
- The institution is required to draw accurate conclusions about whether sexual harassment occurred in an educational program or activity.

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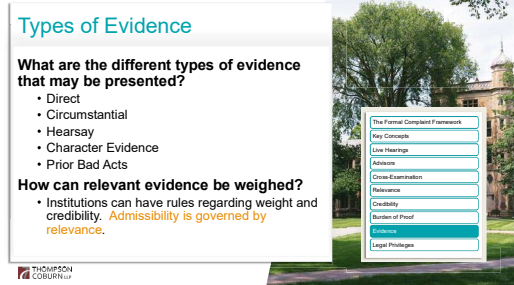
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Timing of Access

Generally	Prior to issuing investigative report	10 days prior to hearing or other determination	At and during any hearing
<ul style="list-style-type: none"> Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation. 	<ul style="list-style-type: none"> Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response. 	<ul style="list-style-type: none"> Must send investigative report to parties for review and written response. 	<ul style="list-style-type: none"> Must make all evidence available to parties and afford equal opportunity to review, including for purposes of cross-ex.

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Types of Evidence

What are the different types of evidence that may be presented?

- Direct
- Circumstantial
- Hearsay
- Character Evidence
- Prior Bad Acts

How can relevant evidence be weighed?

- Institutions can have rules regarding weight and credibility. **Admissibility is governed by relevance.**

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Legal Privileges



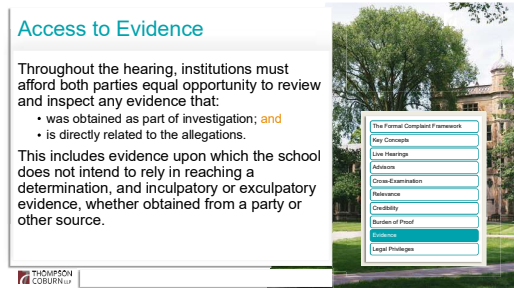
Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



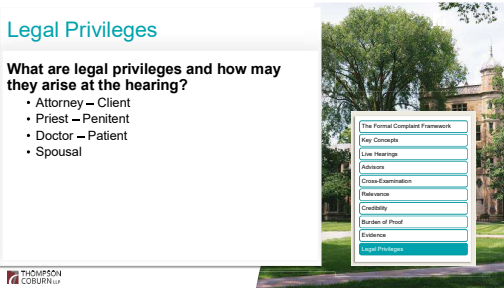
Access to Evidence

Throughout the hearing, institutions must afford both parties equal opportunity to review and inspect any evidence that:

- was obtained as part of investigation; **and**
- is directly related to the allegations.

This includes evidence upon which the school does not intend to rely in reaching a determination, and inculpatory or exculpatory evidence, whether obtained from a party or other source.

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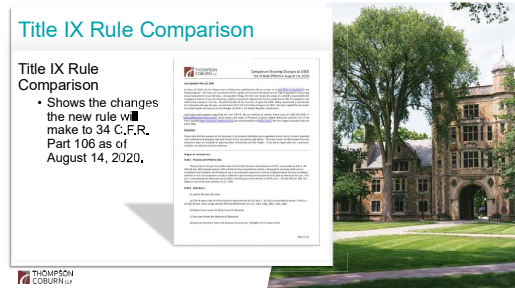


Legal Privileges

What are legal privileges and how may they arise at the hearing?

- Attorney – Client
- Priest – Penitent
- Doctor – Patient
- Spousal

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Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



Higher Ed Webinar Series

2019-2020 Series Calendar	
August 2019	Examining the ED Approval Process for Higher Ed Mergers and Acquisitions
September 2019	Colleges Held for Ransom: Responding to a Ransomware Attack
October 2019	Merging Institutions of Higher Education: Corporate and Tax Considerations
December 2019	A Year-End Roundup of ED Rulemaking Activity
February 2020	Student Court Decisions in Student Disputes That You Should Know About
March 2020	Higher Education & Immigration: Five Evolving Areas to Watch
April 2020	The CARES Act for Higher Education: Strategy and Implementation
May 2020	ED's New Title IX Rule: A Detailed Examination

If you would like to register for our webinars, email ed@thompsoncoburn.com and we will send you a link to our registration page.



TC Extra Credit

REGucation

ED Issues Involving Higher Ed Mergers and Acquisitions

ED Issues Involving Higher Ed Mergers and Acquisitions

ED Issues Involving Higher Ed Mergers and Acquisitions

BORROWER DEFENSE RULE: SECURITY GUIDE

Borrower Defense Rule: Security Guide

Borrower Defense Rule: Security Guide

Borrower Defense Rule: Security Guide



Professional Profile

Scott Goldschmidt

- Counsel, Higher Education Practice

Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

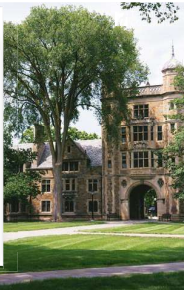
Contact Information

- sgoldschmidt@thompsoncoburn.com | 314-552-6405



Webinars on Demand

TCLE 123		
Overview of Loss Limitations, Family Credit, Partnership, Sale to Spousal Grantor Trust View On Demand	Better Together? Corporate, Price Gouging and Other Inflation Issues Raised by the COVID-19 Pandemic View On Demand	The CARES Act for Higher Education: Strategy and Implementation View On Demand
Law and Order in the Time of COVID-19: Does EPA's Temporary Enforcement Policy Apply to ME? View On Demand	State and Federal Implementation of Industrial Hemp Laws View On Demand	Navigating HR Issues during the COVID-19 Emergency View On Demand
Contingency Planning for Distressed Institutions of Higher Education View On Demand	Higher Education & Immigration: Five Evolving Areas to Watch View On Demand	Using GDPR to Prepare for CCPA, and Vice-Versa View On Demand



Presenters



Professional Profile

Aaron Lacey

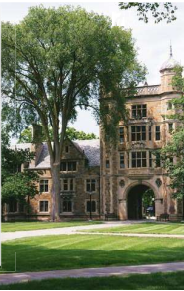
- Partner and Chair, Higher Education Practice

Practice and Experience

- Provide regulatory counsel on federal, state, and accrediting agency laws and standards governing higher education.
- Represent institutions in administrative proceedings before state licensing entities, accrediting agencies, and the U.S. Department of Education, including matters arising from audits and investigations of the Office for Civil Rights.

Contact Information

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REGucation (our blog)

REGucation

ED Issues Involving Higher Ed Mergers and Acquisitions

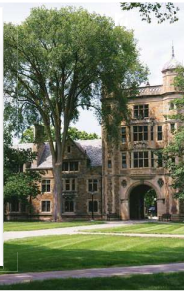
ED Issues Involving Higher Ed Mergers and Acquisitions

ED Issues Involving Higher Ed Mergers and Acquisitions

The CARES Act: Summary of provisions impacting higher education institutions and borrowers

The CARES Act: Summary of provisions impacting higher education institutions and borrowers

The CARES Act: Summary of provisions impacting higher education institutions and borrowers



Professional Profile

Retired Judge Booker T. Shaw

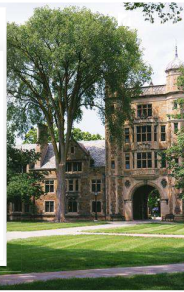
- Partner, Litigation & Appellate Practice

Practice and Experience

- A skilled litigator and appellate advocate who brings valuable insight and perspective gained from more than 25 years on the bench.
- While serving on the Missouri Court of Appeals, Eastern District, participated in more than 1,000 cases and authored 141 appellate opinions. As a trial judge in the 22nd Judicial Circuit, from 1983 until 2002, presided over more than 500 trials.

Contact Information

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Higher Education Practice

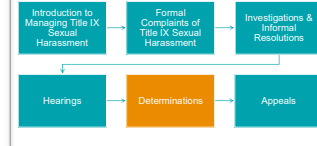


Aaron D. Lacey
Practice Chair
alacey@thompsoncoburn.com
314.292.4410



Curriculum for Training Series

The foundational training series includes the following six sessions:



Title IX Determinations

Thompson Coburn LLP
Title IX Training Series | July 2020

Purpose of Training Series

The Title IX rule effective **August 14, 2020**, creates a new and specific process by which postsecondary institutions must manage complaints of **covered sexual harassment** on campus.

The TC Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including **Title IX coordinators, investigators, adjudicators, advisors, appeal officers**, and individuals responsible for managing informal resolutions.



Syllabus for this Session

The Formal Complaint Framework
Key Concepts
Format & Content
Logistics
Excluding Facts in Evidence
Weighing Facts Under Applicable Evidentiary Standards
Effective Deliberations
Writing a Defensible Determination



Thompson Coburn LLP

- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



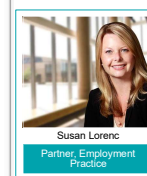
Use of Training Series

Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

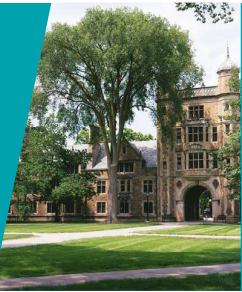
TC also is available to prepare **custom Title IX training sessions**, hearing simulations, and other assistance with Title IX matters (contact **Aaron Lacey** or **Scott Goldschmidt**).



Session Presenters



The Formal Complaint Framework


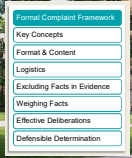


THOMPSON COBURN LLP

The New Title IX Rule

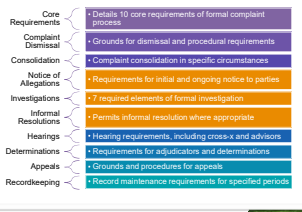

Controversial, and already challenged, ED's new rule is its first regulation addressing **sexual harassment** since 1975.

The new rule articulates a complex framework for managing allegations of sexual harassment on campus.

THOMPSON COBURN LLP

Formal Complaint Process


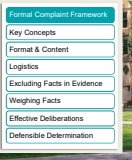



THOMPSON COBURN LLP 34 CFR 106.45(b)(1)-(10) (August 14, 2020).

The Title IX Statute

Title IX of the Education Amendments of 1972 prohibits discrimination **on the basis of sex** in education programs and activities and employment.

- Covers not only equity in athletic programming, but all forms of discrimination based on sex.
- Protects students **and** employees.
- Applies to all institutions that receive federal financial assistance, either directly or indirectly.
- Enforced by the Office of Civil Rights.


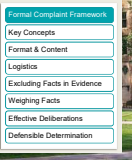
THOMPSON COBURN LLP 20 U.S.C. §1681 et seq.

The Big Picture

Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging all facts of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)(6).

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and comply with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.

THOMPSON COBURN LLP

Key Concepts

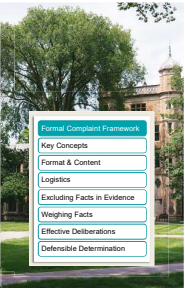
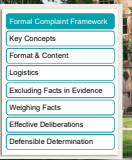


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The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

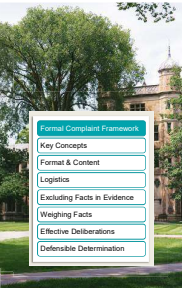
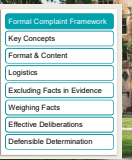
- Disseminate a policy which includes a **non-discrimination statement**.
- Designate a Title IX Coordinator.
- Adopt and publish **grievance procedures** that are prompt and equitable and allow for adequate, reliable, and impartial investigation of complaints.
- Take action** to address and prevent sex-based discrimination in all forms.

THOMPSON COBURN LLP 34 CFR 106.8.

Formal Complaints

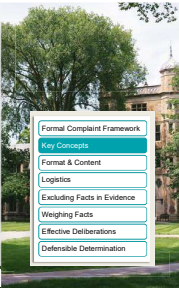
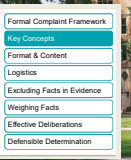
- A **formal complaint** of Title IX sexual harassment means a document filed by a complainant **or** signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
- For the purpose of addressing formal complaints of sexual harassment, a school's formal Title IX complaint policy and process must comply with **specific requirements** set out in the new rule.

THOMPSON COBURN LLP 34 CFR 106.30(a)-(b) (August 14, 2020).

Key Concepts

- Treat complainants and respondents equitably.
- Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and provide that credibility determinations may not be based on a person's status as a complainant, respondent, or witness.

THOMPSON COBURN LLP 34 CFR 106.45(b) (August 14, 2020).

Key Concepts

- ❖ Understand the presumption that the respondent is not responsible for the alleged conduct until a determination is made at the end of the grievance process.
- ❖ Understand the standard of evidence – either the preponderance of the evidence or clear and convincing evidence standard.
- ❖ Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

Formal Complaint Framework
Key Concepts
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Effective Deliberations
Defensible Determination

34 CFR 106.45(b) (August 14, 2020).

Format & Content

Conclusions

- Conclusions regarding the application of the school's sexual misconduct policy to the facts, including a statement of, and rationale for, the result as to each allegation, including a determination regarding responsibility, any disciplinary sanctions the school imposes on the respondent, and whether remedies designed to restore or preserve equal access to the school's education program or activity will be provided by the school to the complainant.

Appeal

- Procedures and permissible bases for appeal.

Formal Complaint Framework
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Defensible Determination

34 CFR 106.45(b)(7) (August 14, 2020).

Logistics

Format & Content

Format & Content

How can knowledge of the format of the written determination inform the hearing itself?

- Use the format of a written determination as a checklist and be able to answer each element before concluding the hearing.

Formal Complaint Framework
Key Concepts
Format & Content
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Effective Deliberations
Defensible Determination

THOMPSON COBURN LLP

Distribution of the Determination

The school must provide the determination to the parties simultaneously.

The determination becomes final either:

- on the date on which an appeal would no longer be considered timely; **or**
- if an appeal is filed, on the date that the school provides the parties with the written appeal determination.

Formal Complaint Framework
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34 CFR 106.45(b)(7) (August 14, 2020).

Format & Content

Format & Content

Does "all evidence" need to be addressed in the written determination?

- The preamble explains: "We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, "all evidence" presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person's status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii)."

Formal Complaint Framework
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85 Fed. Reg. 30389 (May 19, 2020).

Excluding Facts in Evidence

Allegations

- Identification of the allegations of sexual harassment.

Procedural Recitation

- A recitation of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.

Findings of Fact

- Findings of fact supporting the determination.

Formal Complaint Framework
Key Concepts
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34 CFR 106.45(b)(7) (August 14, 2020).

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Excluding Facts in Evidence

How should a decision-maker address a situation in which a party or witness inappropriately discloses privileged information, treatment records, or irrelevant information?

- Decision-makers may not consider this information.
- In a hearing, decision-makers should consider stating for the record that such information was inappropriately disclosed but will not be part of evidence or considered.
- If the decision-maker(s) cannot ignore such information, they should recuse themselves.

Formal Complaint Framework
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Applicable Standards of Evidence

What is the clear and convincing evidence standard?

- Proof that a particular fact or event was highly and substantially more likely to be true than untrue.

How should facts be evaluated under this standard?

- Does the decision-maker believe the fact or claim is highly probable to be true?

Formal Complaint Framework
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Defensible Determination

Effective Deliberations

- ❖ **Motive to falsify:** Did the person have a reason to lie?
- ❖ **Past record:** Did the alleged harasser have a history of similar behavior in the past?

None of these factors is determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

Formal Complaint Framework
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Defensible Determination

Weighing Facts Under Applicable Evidentiary Standards

Effective Deliberations

Effective Deliberations

How can a decision-maker evaluate expert witness testimony and medical records?

- Ask as many clarifying questions as necessary.
- Remember, juries evaluate expert testimony and reports without training either.

How can decision-makers effectively evaluate facts and reaching consensus?

- Objectively evaluate all facts and do not jump to a conclusion before all facts are available.
- Recess prior to closing statements to make sure all decision-makers have asked all necessary questions.
- Be collegial and use the record to bolster your position; remain rooted in facts, not opinions.

Formal Complaint Framework
Key Concepts
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Defensible Determination

Applicable Standards of Evidence

What is the preponderance of the evidence standard?

- Proof that a particular fact or event was more likely than not to have occurred.

How should facts be evaluated under this standard?

- Does the decision-maker believe there is a greater than 50% chance that a fact or claim is true?

Formal Complaint Framework
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Effective Deliberations

- ❖ **Inherent plausibility:** Is the testimony believable on its face? Does it make sense?
- ❖ **Demeanor:** Did the person seem to be telling the truth or lying?
- ❖ **Corroboration:** Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

Formal Complaint Framework
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Writing a Defensible Determination

Writing Defensible Determinations

What should decision-makers be considering when writing determinations?

- Requirements under institutional policy.
- Gravity of the outcome for the parties involved.
- Demonstrate decision-makers took the matter seriously and came to a thoughtful outcome.

What are best practices to make written determinations as defensible as possible?

- Assume the determination could be "Exhibit 1."
- Include all elements necessary under policy and justify your conclusions with the record.
- Ask for legal help when appropriate.

Formal Complaint Framework
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Title IX Rule Comparison

Title IX Rule Comparison

- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



REGucation (our blog)



Resources

Higher Ed Webinar Series

2019 2020 Series Calendar	
August 2019	Examining the ED Approval Process for Higher Ed Mergers and Acquisitions
September 2019	Colleges Held for Ransom: Responding to a Ransomware Attack
October 2019	Merging Institutions of Higher Education: Corporate and Tax Considerations
December 2019	A Year-End Roundup of ED Rulemaking Activity
February 2020	Recent Court Decisions in Student Disputes That You Should Know About
March 2020	Higher Education & Immigration: Five Evolving Areas to Watch
April 2020	The CARES Act for Higher Education: Strategy and Implementation
May 2020	ED's New Title IX Rule: A Detailed Examination

If you would like to register for our webinars, email sixtch@thompsoncoburn.com and we will send you a link as we open each webinar for registration.

TC Extra Credit

ED issues instructions to Higher Ed to enforce CARES Act rules.

Enter his address, the U.S. Department of Education and a link to the instructions to Higher Ed to enforce CARES Act rules. For more of our free legal guides to Coronavirus Response and Economic Security (CARES) Act, visit www.thompsoncoburn.com. You'll find a number of topics under the Higher Education Department's legal guide, as well as a list of all applicable federal laws.

Learn More

Anna L. Leland
2019-2020 Senior Counsel
David J. Tucker | Counsel
Senior Counsel of Higher Education
Senior Counsel of Higher Education
Senior Counsel of Higher Education
Senior Counsel of Higher Education
Senior Counsel of Higher Education

BORROWER DEFENSE RULE Reporting Guide

Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



Webinars on Demand

TCU(0129)	Better Together! Competition, Prior Gouging and Other Antitrust Issues Raised by the COVID-19 Pandemic	The CARES Act for Higher Education: Strategy and Implementation
Overview of Loss Limitations, Family Office Partnerships, Safe-to-Success Grantor Trusts April 20, 2020 Register	April 23, 2020 Register	April 23, 2020 Register
Law and Order in the Time of COVID-19: Does SVP's Temporary Enforcement Policy Apply to Me? April 17, 2020	State and Federal Implementation of Industrial Hemp Laws April 20, 2020 View Recording	Navigating HR Issues during the COVID-19 Pandemic April 23, 2020 View Recording
Contingency Planning for Distressed Institutions of Higher Education April 6, 2020 View Recording	Higher Education & Immigration: Five Evolving Areas to Watch March 31, 2020 View Recording	Using GDPR to Prepare for CCPA and Vice-Versa March 23, 2020 View Recording

Presenters

Professional Profile

Susan Lorenc

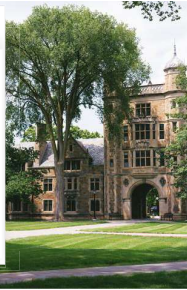
- Partner, Employment Practice

Practice and Experience

- Experienced and trusted employment law advisor who counsels employers at every stage of a personnel-related issue.
- Assists with hiring and firing, conducts workplace investigations, and provides day-to-day counseling on a wide variety of matters including discrimination and retaliation.

Contact Information

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- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Professional Profile

Scott Goldschmidt

- Counsel, Higher Education Practice

Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

Contact Information

- sgoldschmidt@thompsoncoburn.com | 314-552-6405

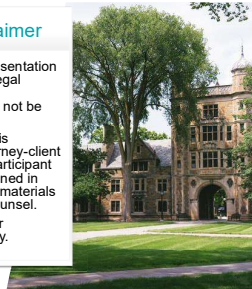


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Higher Education Practice



Professional Profile

Aaron Lacey

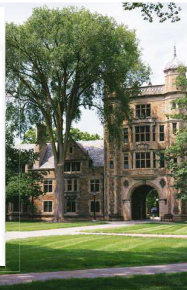
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Practice and Experience

- Provide regulatory counsel on federal, state, and accrediting agency laws and standards governing higher education.
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Contact Information

- alacey@thompsoncoburn.com | 314-552-6405



Title IX Appeals

Thompson Coburn LLP
Title IX Training Series | July 2020



Purpose of Training Series

The Title IX rule effective August 14, 2020, creates a new and specific process by which postsecondary institutions must manage complaints of covered sexual harassment on campus.

The TC Title IX Training Series is designed to provide foundational training to those individuals who will help to administer this required process, including Title IX coordinators, investigators, adjudicators, advisors, appeal officers, and individuals responsible for managing informal resolutions.

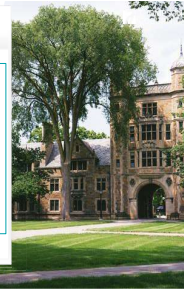


Use of Training Series

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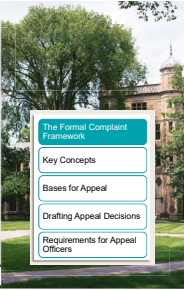
Session Presenters



Formal Complaints

A **formal complaint** of Title IX sexual harassment means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.

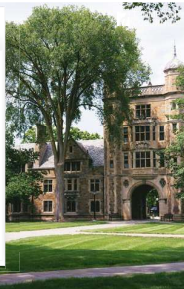
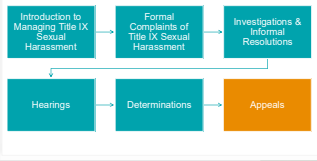
For the purpose of addressing formal complaints of sexual harassment, a school's Title IX complaint process must comply with a **wide range** of specific requirements set out in the new rule, including specific requirements concerning **appeals**.



- The Formal Complaint Framework
- Key Concepts
- Bases for Appeal
- Drafting Appeal Decisions
- Requirements for Appeal Officers

Curriculum for Training Series

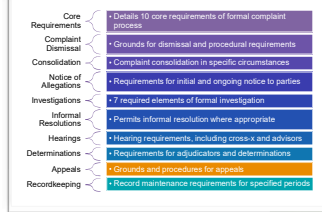
The foundational training series includes the following six sessions:



The Formal Complaint Framework



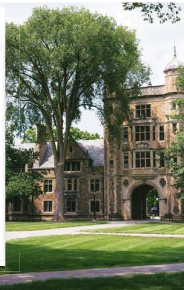
Formal Complaint Process



- The Formal Complaint Framework
- Key Concepts
- Bases for Appeal
- Drafting Appeal Decisions
- Requirements for Appeal Officers

Syllabus for this Session

- The Formal Complaint Framework
- Key Concepts
- Bases for Appeal
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The Big Picture

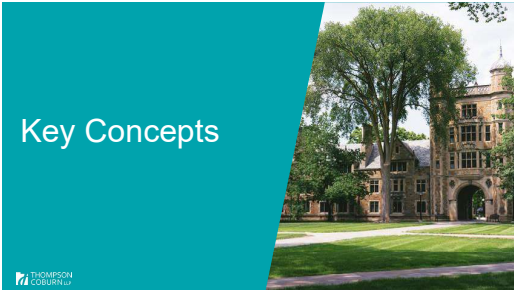
Discrimination Based on Sex: Institutions are obligated to adopt and publish grievance procedures that provide for the prompt and equitable resolution of student and employee complaints alleging any form of prohibited sex discrimination occurring against a person in the United States. 34 CFR 106.8(c)(1)(i)

Title IX Sexual Harassment: With or without a formal complaint, institutions with actual knowledge of Title IX sexual harassment occurring in an education program or activity of the school against a person in the United States must respond promptly in a manner that is not deliberately indifferent and complies with 34 CFR 106.44(a).

Formal Complaint of Title IX Sexual Harassment: In response to a formal complaint of sexual harassment, institutions must follow a Title IX formal complaint process that complies with the new standards set forth in 34 CFR 106.45.



- The Formal Complaint Framework
- Key Concepts
- Bases for Appeal
- Drafting Appeal Decisions
- Requirements for Appeal Officers



Key Concepts

Key Concepts

- ❖ School must offer both parties an appeal from (1) a determination regarding responsibility, or (2) a school's dismissal of a formal complaint or any allegations therein.
- ❖ Schools generally must implement appeal procedures equally for both parties.
- ❖ Schools must notify the other party in writing when an appeal is filed.
- ❖ Schools must ensure that the appeal officer is not the hearing adjudicator, investigator, or Title IX Coordinator.

The Formal Complaint Framework
Key Concepts
Bases for Appeal
Drafting Appeal Decisions
Requirements for Appeal Officers

Bases for Appeal

Appeals may be granted on the following bases:

- a procedural irregularity that affected the outcome;
- new evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome; and
- the Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.

A school also may offer an appeal equally to both parties on additional bases.

The Formal Complaint Framework
Key Concepts
Bases for Appeal
Drafting Appeal Decisions
Requirements for Appeal Officers

Drafting Appeal Decisions

Key Concepts

- ❖ Schools must ensure that the appeal officer has received required training.
- ❖ They must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- ❖ Schools must issue a written decision describing the result.
- ❖ They must provide the written decision simultaneously to both parties.

The Formal Complaint Framework
Key Concepts
Bases for Appeal
Drafting Appeal Decisions
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Bases for Appeal

Is the severity or proportionality of sanctions an appropriate basis for an appeal?

- "... the final regulations leave to a recipient's discretion whether severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by a recipient must be offered equally to both parties."

Can a party request an appeal because of dissatisfaction with the result?

- Ground for appeal are defined by the bound of an institution's policy.

The Formal Complaint Framework
Key Concepts
Bases for Appeal
Drafting Appeal Decisions
Requirements for Appeal Officers

Drafting Appeal Decisions

What should appeal officers be considering when reviewing appeals?

- Understand applicable grounds for appeal.
- Have an open mind.
- Be guided by applicable policy and facts.

What are best practices to make written appeal outcomes as defensible as possible?

- Address, in some fashion, all claims raised.
- Ensure no bias or conflict of interest.
- Keep an eye toward litigation.

The Formal Complaint Framework
Key Concepts
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Bases for Appeal

Bases for Appeal

Is there a way to appeal an appeal?

- No. If an appeal is filed, the determination regarding responsibility becomes final on the date the parties are provided the written determination of the result of the appeal.
- But note that party can file a lawsuit or complaint with the Office of Civil Rights.

The Formal Complaint Framework
Key Concepts
Bases for Appeal
Drafting Appeal Decisions
Requirements for Appeal Officers

Requirements for Appeal Officers

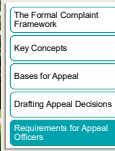
Requirements for Appeal Officers

What are a few characteristics and qualities of the best appeal officers?

- Thoroughness and attention to detail.
- Understanding of Title IX process.
- Not afraid to find appeal has merit.

What positions at an institution should be considered to serve as the appeal officer?

- High ranking employee of institution.
- Legal background may be helpful but not necessary.
- Understanding of Title IX or student conduct process.



Resources

Higher Ed Webinar Series

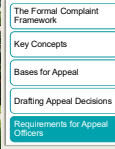
2019 2020 Series Calendar	
August 2019	Examining the ED Approval Process for Higher Ed Mergers and Acquisitions
September 2019	Colleges Held for Ransom: Responding to a Ransomware Attack
October 2019	Merging Institutions of Higher Education: Corporate and Tax Considerations
December 2019	A Year-End Roundup of ED Rulemaking Activity
February 2020	Recent Court Decisions in Student Discipline That You Should Know About
March 2020	Higher Education & Immigration: Five Evolving Areas to Watch
April 2020	The CARES Act for Higher Education: Strategy and Implementation
May 2020	ED's New Title IX Rule: A Detailed Examination

For more details register for our webinars: mlschlager@thompsoncoburn.com and we will send you a link as we open each webinar for registration.

Requirements for Appeal Officers

What are the training requirements for appeal officers?

- As a decision-maker, the appeal officer must receive training on:
 - The definition of sexual harassment in § 106.30.
 - The scope of the recipient's education program or activity.
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable.
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- Any technology to be used at a live hearing and on issues of relevance of questions and evidences, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.



Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

- OPEN@ed.gov
- May be used for submitting inquiries regarding the new Title IX rule.



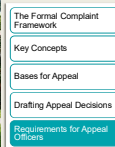
Webinars on Demand

TCU (1/2)		
Overview of Loss Limitations, Family Office Partnership, Sale to Spousal Grantor Trust April 1, 2020 (Recording)	Better Together? Contractivity, Price Gouging and Other Antitrust Issues Raised by the COVID-19 Pandemic April 23, 2020 (Recording)	The CARES Act for Higher Education: Strategy and Implementation April 14, 2020 (Recording)
Law and Order in the Time of COVID-19: Does DHS's Temporary Enforcement Policy Apply to Me? April 1, 2020	State and Federal Implementation of Industrial Hemp Laws April 16, 2020 (Live Recording)	Navigating HR Issues during the COVID-19 Emergency Act of 2020 April 14, 2020 (Recording)
Contingency Planning for Distressed Institutions of Higher Education March 26, 2020 (Recording)	Higher Education & Immigration: Five Evolving Areas to Watch March 11, 2020 (Live Recording)	Using GDPR to Prepare for CCPA, and Vice Versa March 11, 2020 (Recording)

Requirements for Appeal Officers

What happens of an appeal officer has a conflict of interest?

- An appeal officer with a conflict of interest should not hear the appeal.
- An institution's policy should allow for the designation of a substitute appeal officer in the case of a conflict or unavailability.



Title IX Rule Comparison

Title IX Rule Comparison

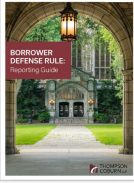
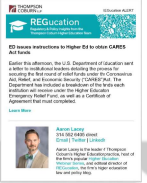
- Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.



REGucation (our blog)



TC Extra Credit



Professional Profile

Scott Goldschmidt

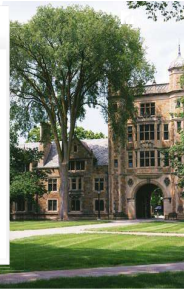
- Counsel, Higher Education Practice

Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

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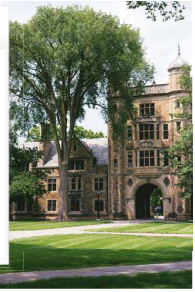


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If you desire legal advice for a particular situation, you should consult an attorney.



Presenters



Professional Profile

Aaron Lacey

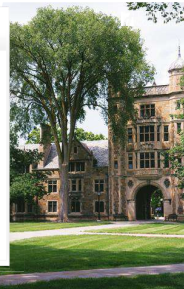
- Partner and Chair, Higher Education Practice

Practice and Experience

- Provide regulatory counsel on federal, state, and accrediting agency laws and standards governing higher education.
- Represent institutions in administrative proceedings before state licensing entities, accrediting agencies, and the U.S. Department of Education, including matters arising from audits and investigations of the Office for Civil Rights.

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Professional Profile

Retired Judge Booker T. Shaw

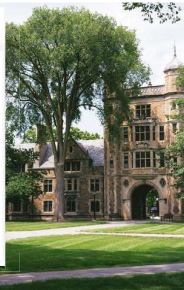
- Partner, Litigation & Appellate Practice

Practice and Experience

- A skilled litigator and appellate advocate who brings valuable insight and perspective gained from more than 25 years on the bench.
- While serving on the Missouri Court of Appeals, Eastern District, participated in more than 1,000 cases and authored 141 appellate opinions. As a trial judge in the 22nd Judicial Circuit, from 1983 until 2002, presided over more than 500 trials.

Contact Information

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