



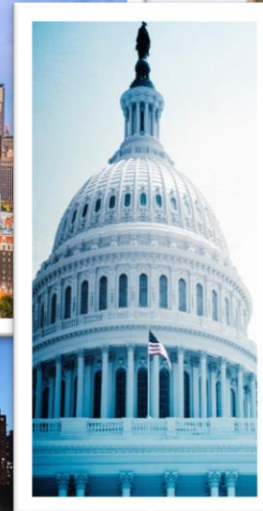
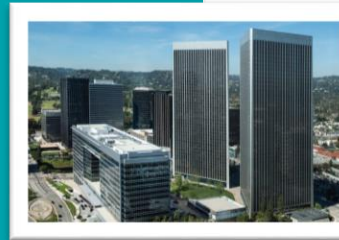
# An Introduction to Managing Title IX Sexual Harassment on Campus

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

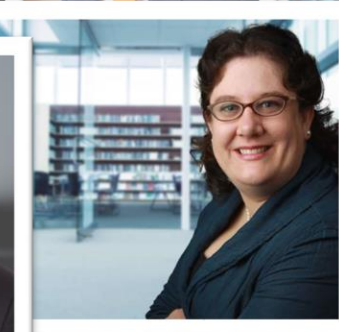
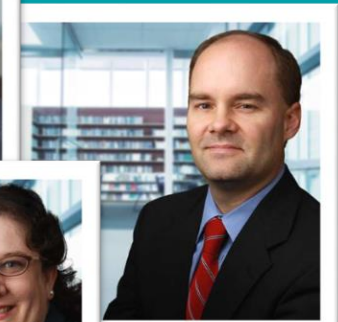
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# 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



# Session Presenters



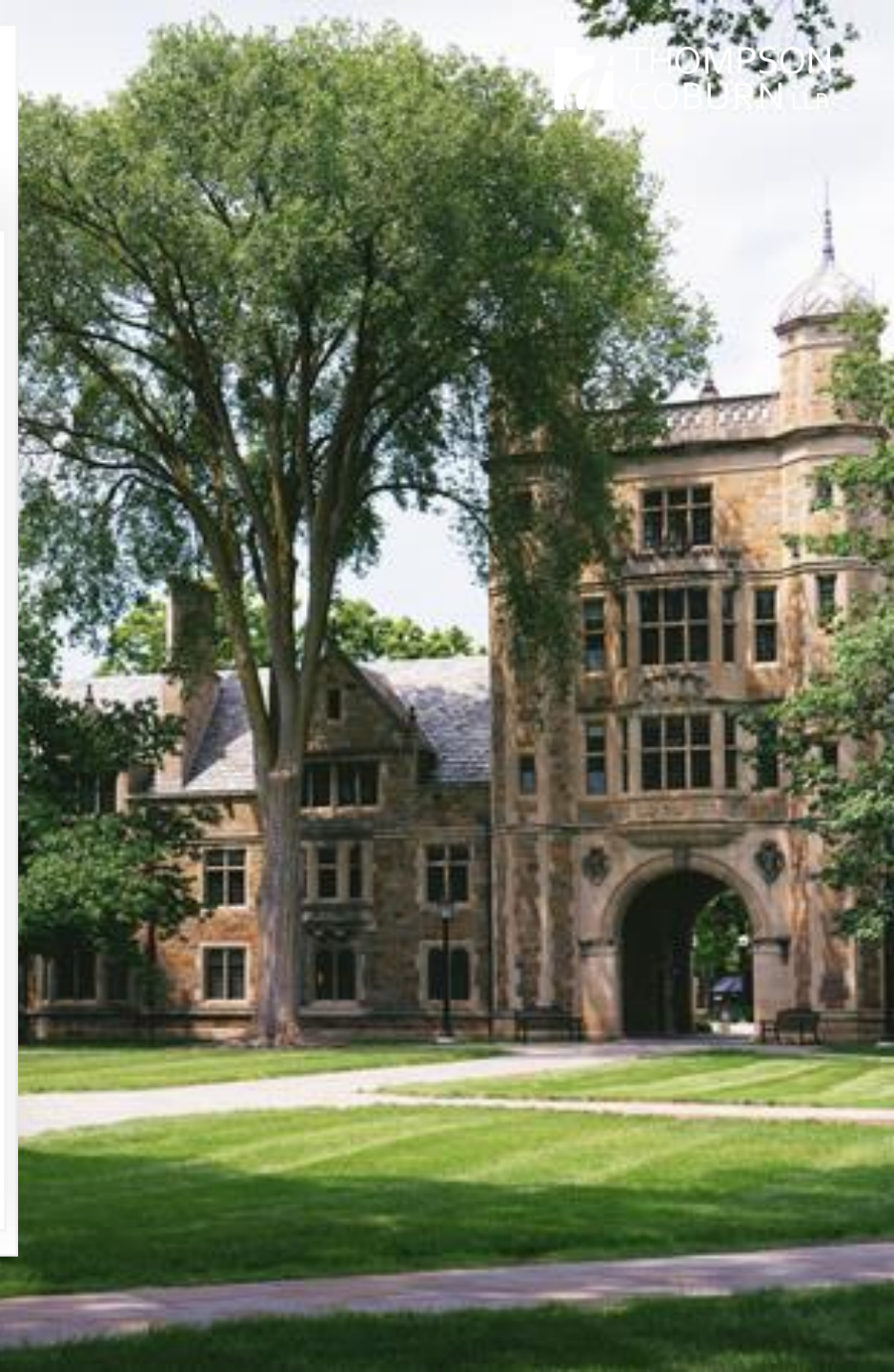
Scott Goldschmidt

Counsel, Higher Education  
Practice



Aaron Lacey

Partner & Chair, Higher  
Education Practice



# 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.

## Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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)

### Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

## Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

## Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# The New Rule & Sexual Harassment



# Title IX Timeline

DATE	EVENT
June 23, 1972	<a href="#">Title IX of the Education Amendments of 1972</a>
July 21, 1975	ED publishes <a href="#">34 CFR Part 106</a> , which implements Title IX.
March 13, 1997	ED publishes <a href="#">Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</a> .
June 22, 1998	<a href="#">Gebser v. Lago Vista Ind. Sch. Dist.</a> , 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	<a href="#">Davis v. Monroe Cty. Bd. of Educ.</a> , 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).

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Title IX Timeline

DATE	EVENT
Jan. 2001	Following significant judicial activity, ED publishes <a href="#">Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</a> . 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 <a href="#">DCL</a> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes <a href="#">Questions and Answers</a> on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.
May 2016	ED and DOJ issue joint <a href="#">DCL</a> regarding treatment of transgender students, accompanied by Examples of Policies and Emerging Practices for Supporting Transgender Students.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Title IX Timeline

DATE	EVENT
Feb. 2017	ED publishes <a href="#">DCL</a> rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes <a href="#">DCL</a> rescinding April 2011 DCL as well 2014 <a href="#">Q&amp;A</a> on Campus Sexual Misconduct.
Nov. 2018	On November 29, 2018, ED publishes the <a href="#">official version</a> 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 <a href="#">final Title IX rule</a> in the Federal Register.
August 14, 2020	Effective Date of new Title IX Rule.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

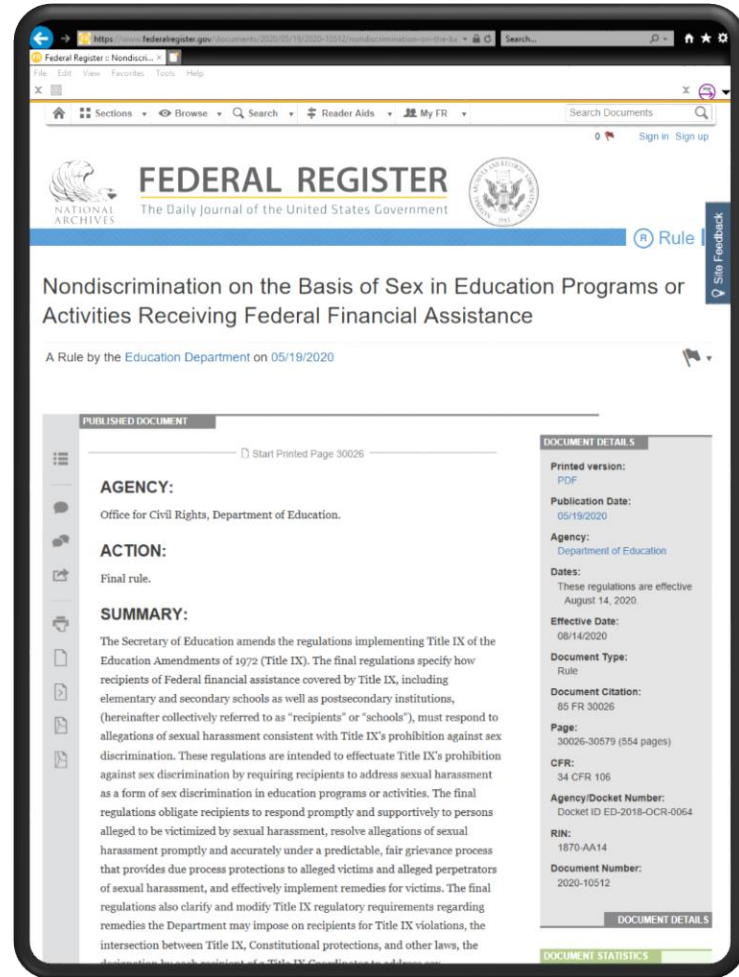
Recordkeeping

Additional Considerations

# 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.



Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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)-(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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Key Definitions



# New Definitions of Key Terms

Sexual Harassment

Complainant

Respondent

Consent

Actual Knowledge

Supportive Measures

Formal Complaint

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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...”

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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**.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.”

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Elements of a Sufficient Response



# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

**Elements of a Sufficient Response**

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Interim & Supportive Measures



# 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.”

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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 institution's 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Formal Complaints of Title IX Sexual Harassment



# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX 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
- The New Rule & Sexual Harassment
- Key Definitions
- Responding to TIX Sexual Harassment
- Elements of a Sufficient Response
- Interim & Supportive Measures
- Formal Complaints**
- Recordkeeping
- Additional Considerations

# 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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

**Formal Complaints**

Recordkeeping

Additional Considerations

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

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

# Recordkeeping



# Recordkeeping

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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Recordkeeping

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.

Title IX Fundamentals

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Additional Considerations



# 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

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# 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

The New Rule & Sexual Harassment

Key Definitions

Responding to TIX Sexual Harassment

Elements of a Sufficient Response

Interim & Supportive Measures

Formal Complaints

Recordkeeping

Additional Considerations

# Resources



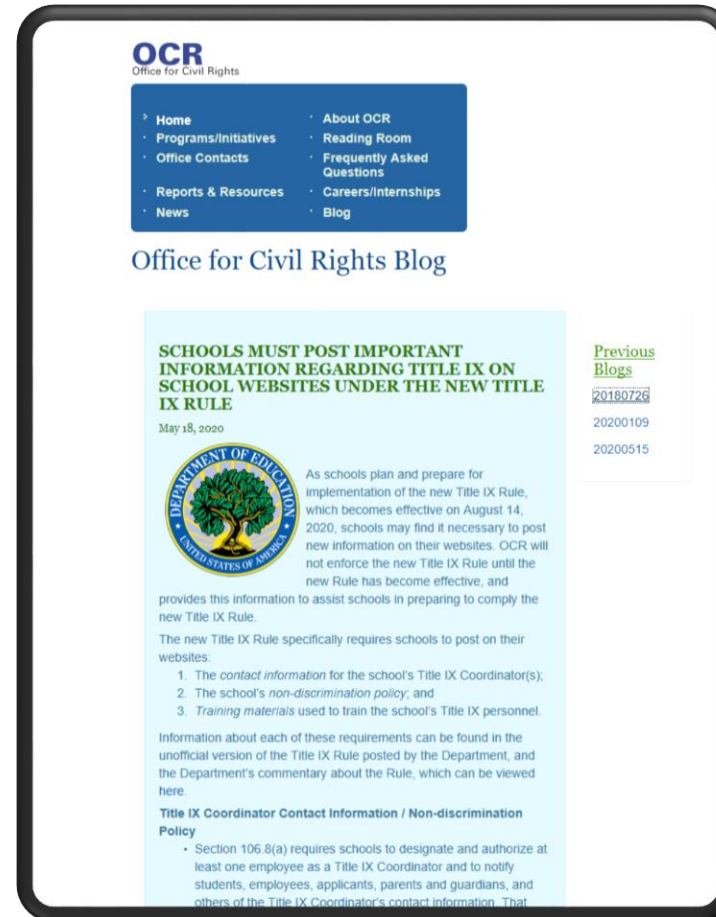
# Office of Civil Rights

## OCR Title IX Blog

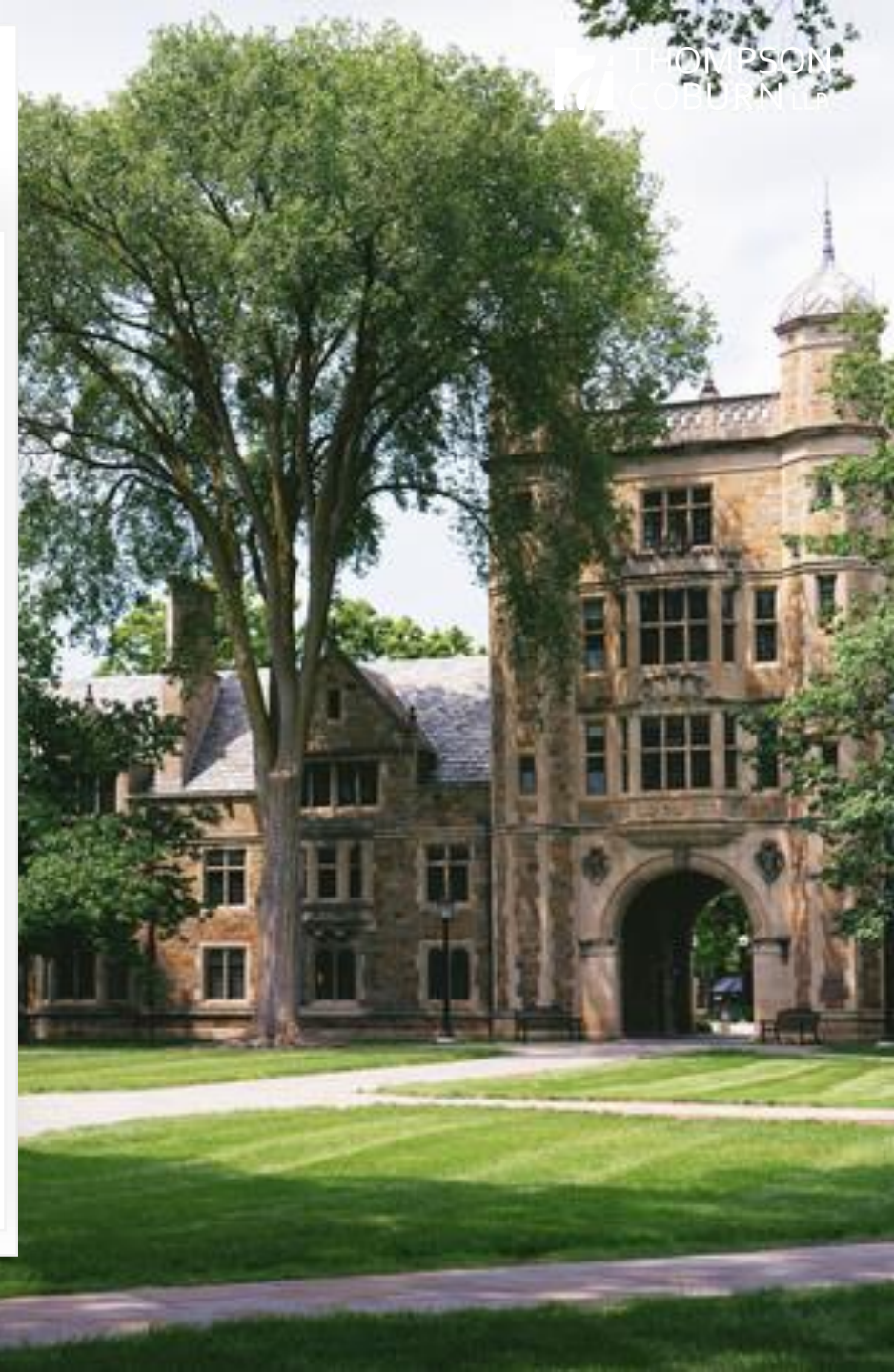
- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. A blue navigation menu contains links for Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. Below the menu is the title 'Office for Civil Rights Blog'. The main content area features a light blue header for a blog post titled 'SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE' dated May 18, 2020. The post includes the Department of Education logo and text explaining that schools must post information to assist with the new Title IX Rule, effective August 14, 2020. A list of requirements is provided: 1. Contact information for the school's Title IX Coordinator(s); 2. The school's non-discrimination policy; and 3. Training materials used to train the school's Title IX personnel. A 'Previous Blogs' sidebar on the right lists two entries: '20180726' dated 20200109 and '20200515' dated 20200515.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

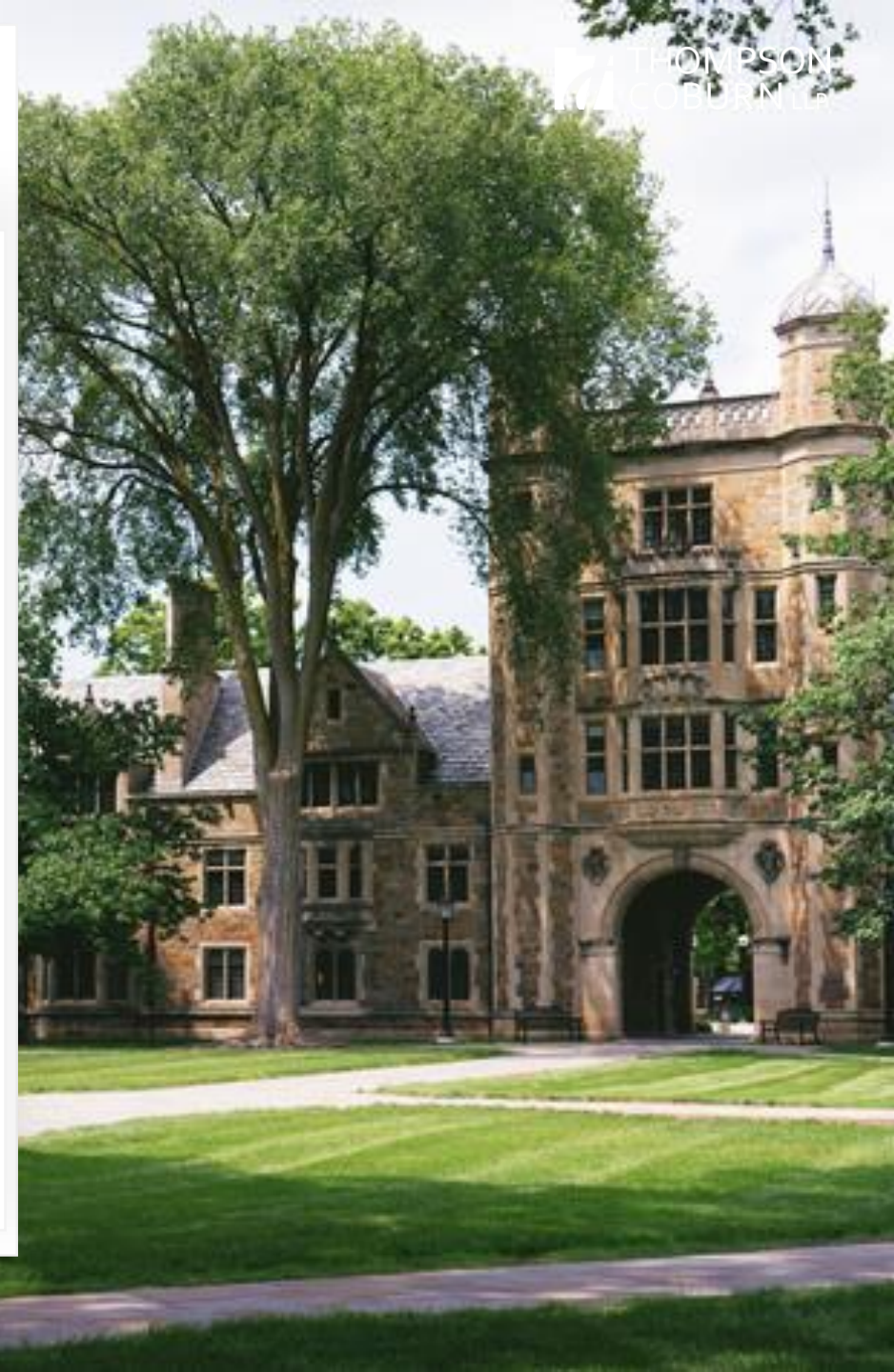
April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- [About](#)
- [Conditions of Use/Disclaimers](#)
- [REGucation RSS](#)
- [Student Litigation](#)
- [Higher Education](#)
- [Follow on Twitter](#)

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

[▲ Aaron Lacey](#) [▲ Christopher Murray](#) [▲ Scott Goldschmidt](#) [📅 April 3, 2020](#)



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

[▲ Scott Goldschmidt](#) [▲ Aaron Lacey](#) [▲ Christopher Murray](#) [📅 March 27, 2020](#)



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



## REGucation

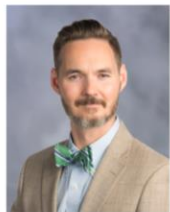
Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



### ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

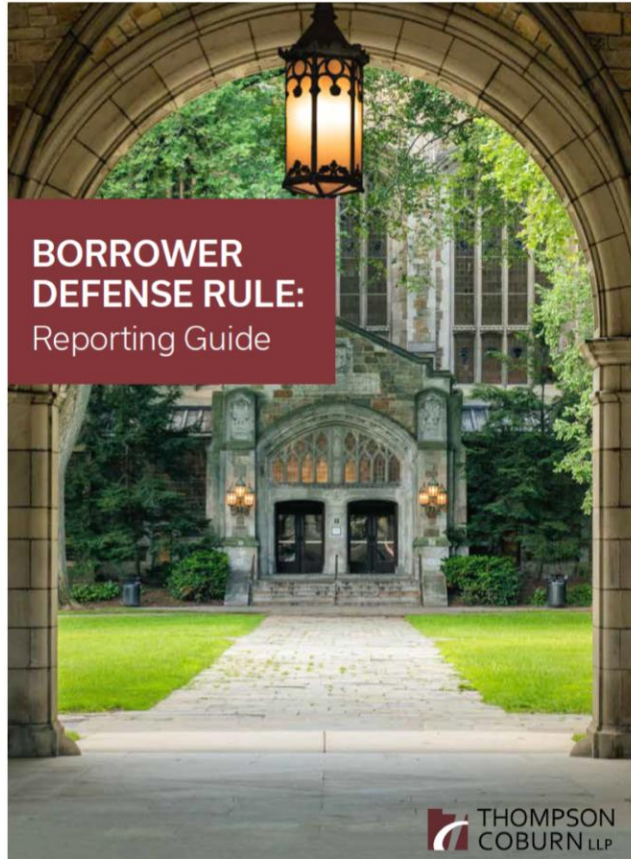


#### Aaron Lacey

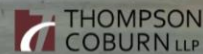
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# Presenters



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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





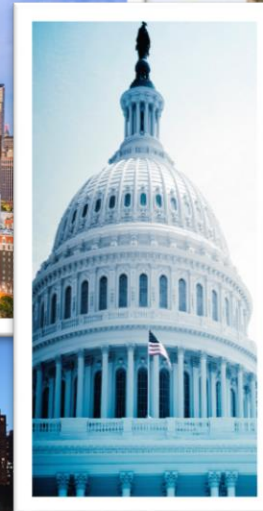
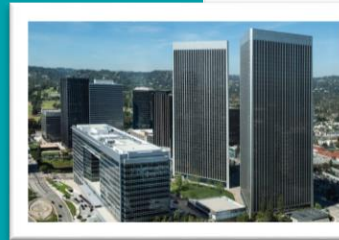
# Formal Complaints of Title IX Sexual Harassment

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

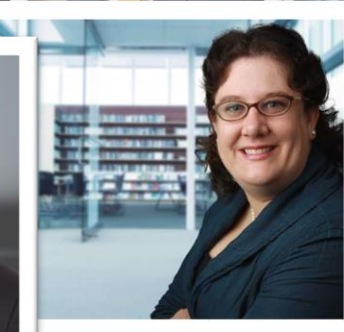
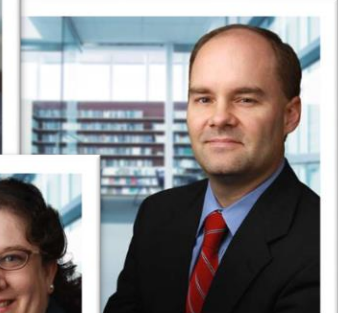
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

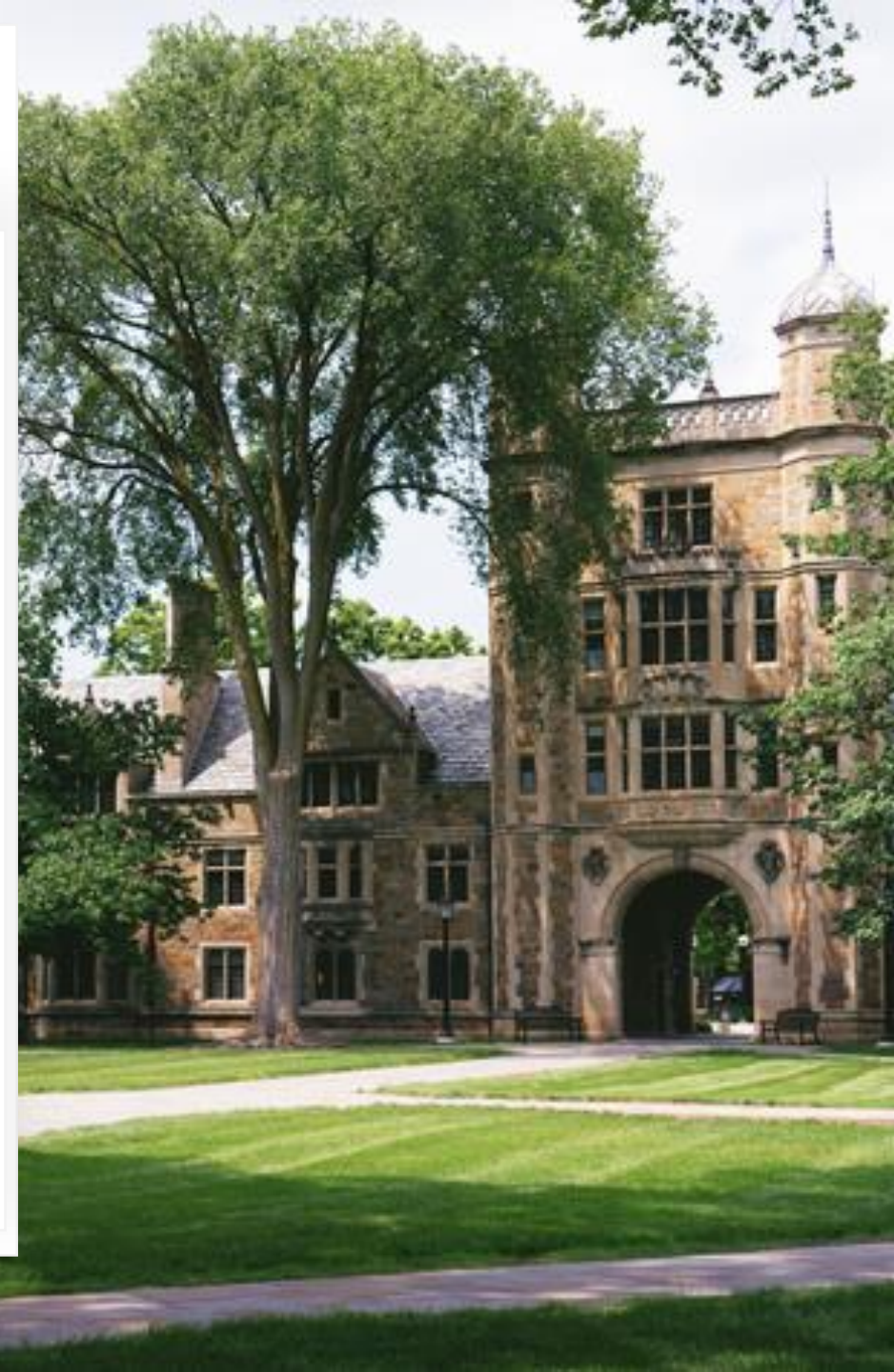
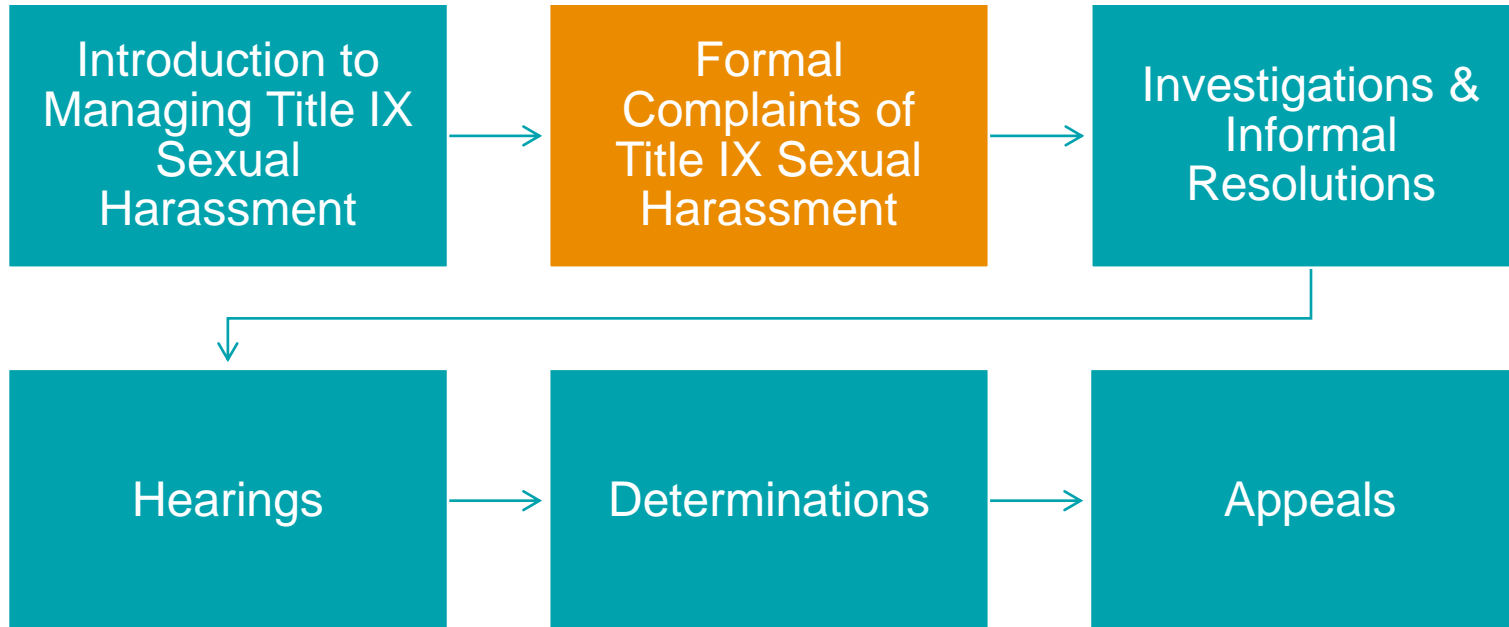
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# Syllabus for this Session

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints



# Session Presenters



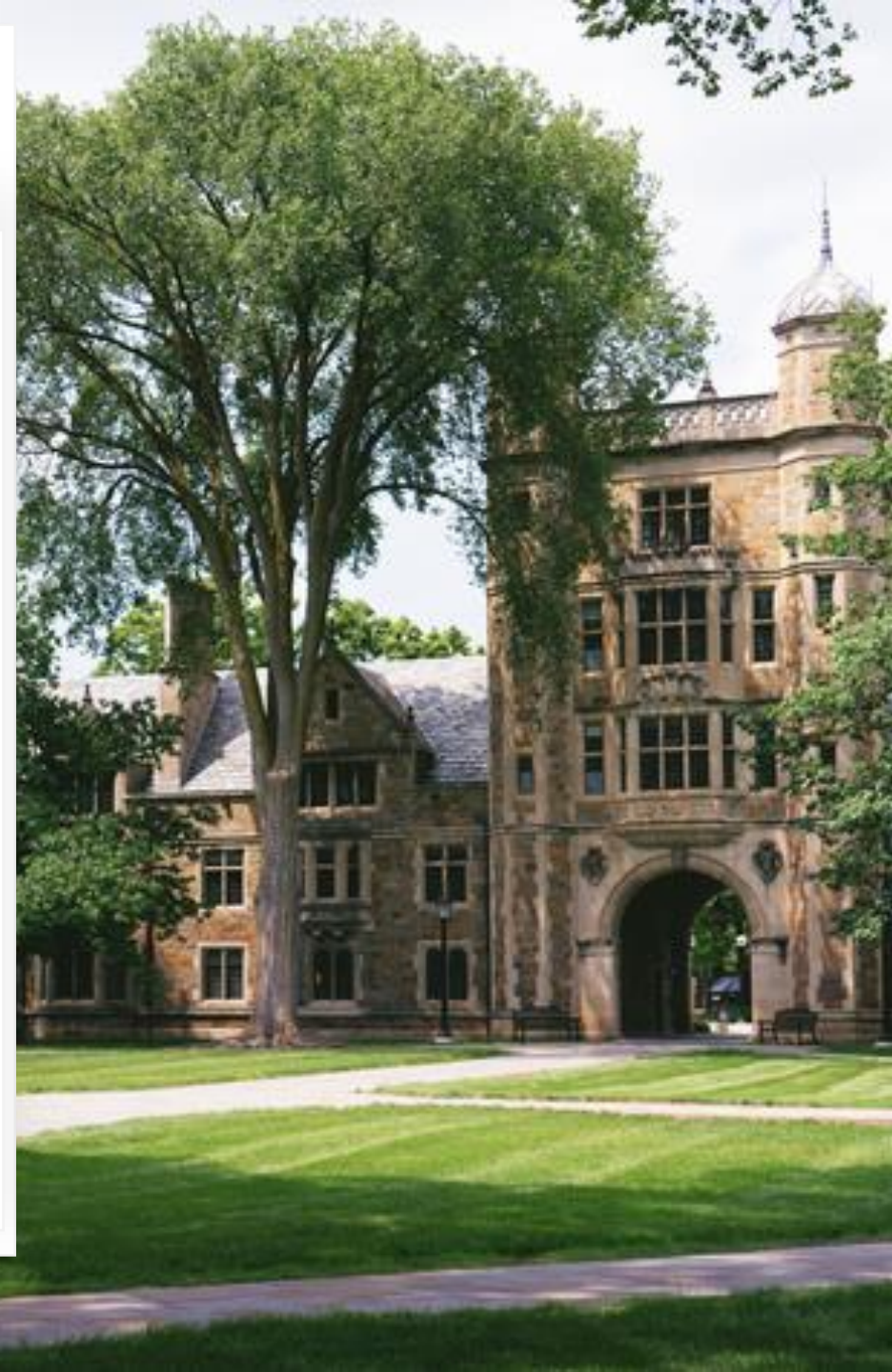
Scott Goldschmidt

Counsel, Higher Education  
Practice



Aaron Lacey

Partner & Chair, Higher  
Education Practice



# The Formal Complaint Framework



# 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.

## The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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**.

## The Formal Complaint Framework

10 Core Requirements

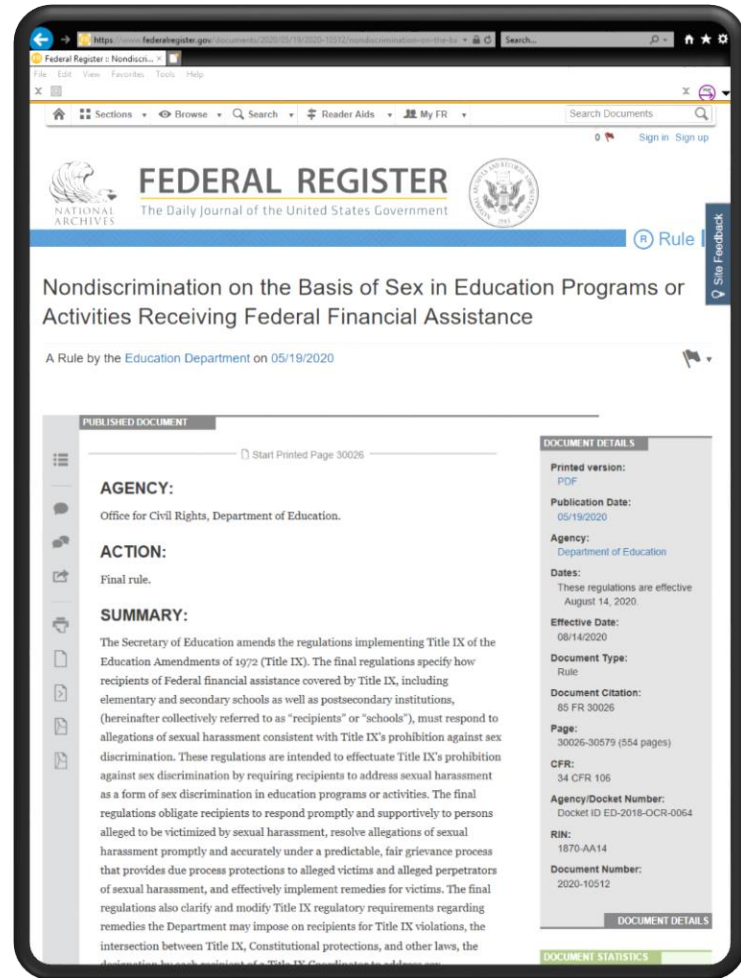
Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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.



The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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)-(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.

## The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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.

## The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 10 Core Requirements



# 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.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

## 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 Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

## 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 of it.

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

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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 prejudice 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

# 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

# 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

# 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

# 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

# 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

# 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

# 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

# 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

# Dismissal of Formal Complaints



# 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.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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.

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# 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...”

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

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

Consolidation of Formal Complaints

# Consolidation of Formal Complaints



# 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

The Formal Complaint Framework

10 Core Requirements

Dismissal of Formal Complaints

Consolidation of Formal Complaints

# Resources



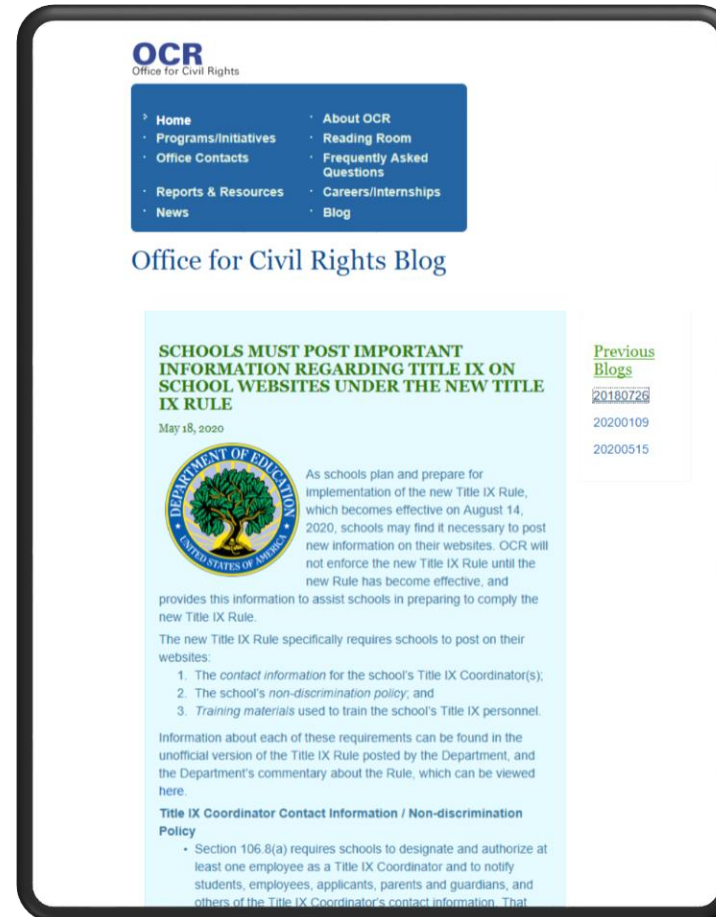
# Office of Civil Rights

## OCR Title IX Blog

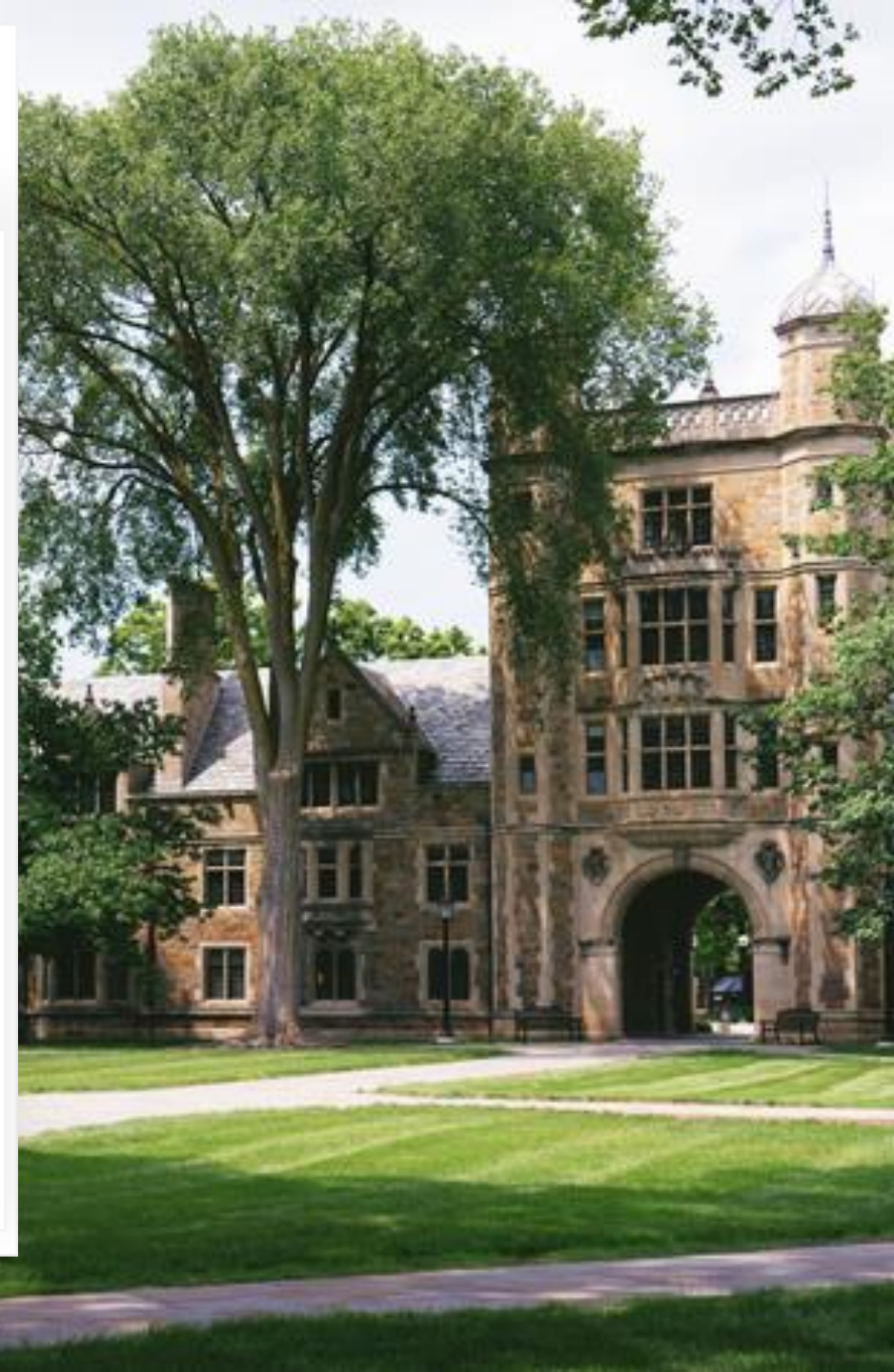
- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR website's navigation menu with links for Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. Below the menu is the title 'Office for Civil Rights Blog' and a featured article titled 'SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE' dated May 18, 2020. The article includes the Department of Education logo and text explaining that schools must post contact information for their Title IX Coordinator, non-discrimination policy, and training materials. A 'Previous Blogs' sidebar lists two other posts: '20180726' and '20200515'.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

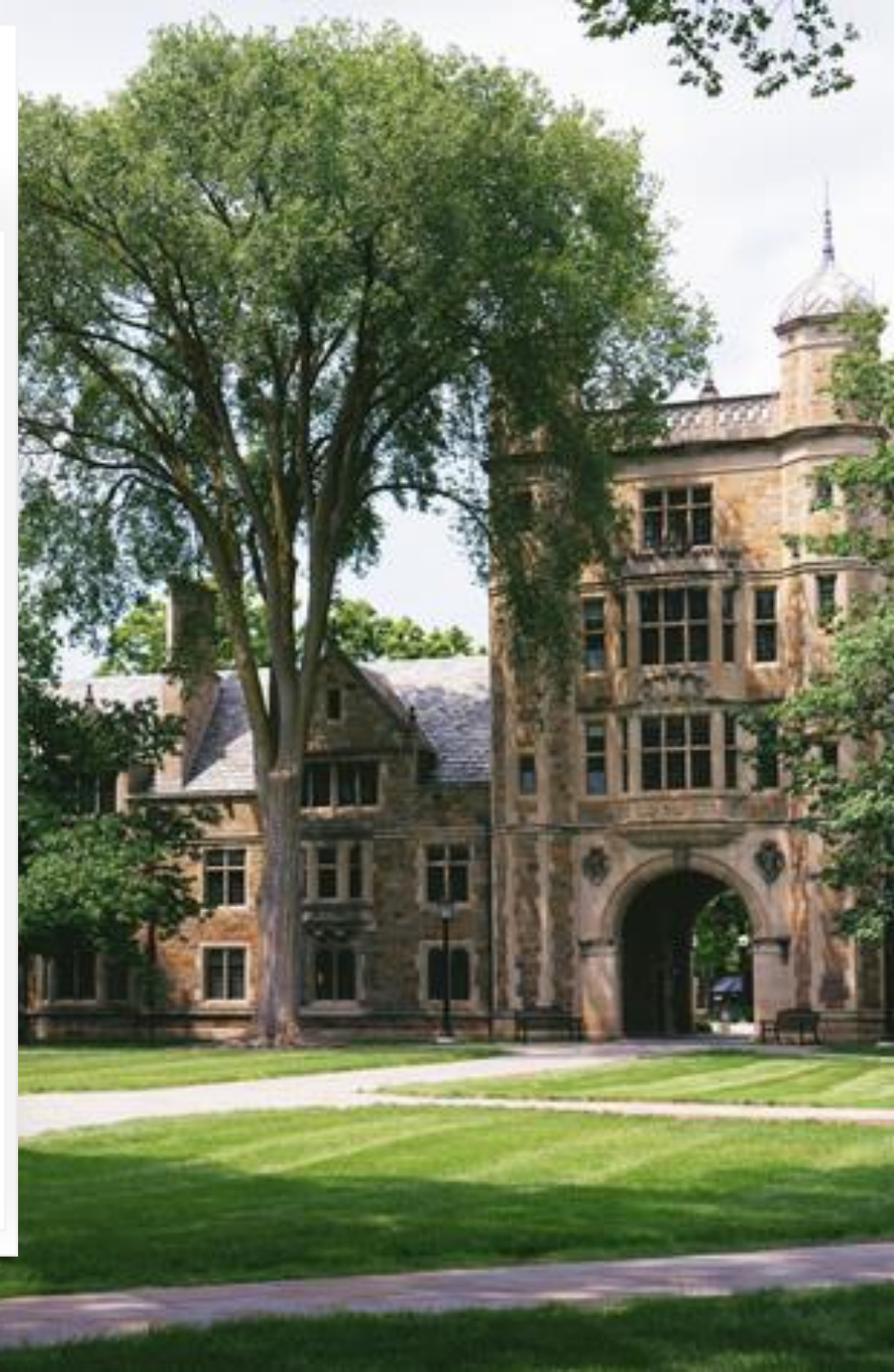
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

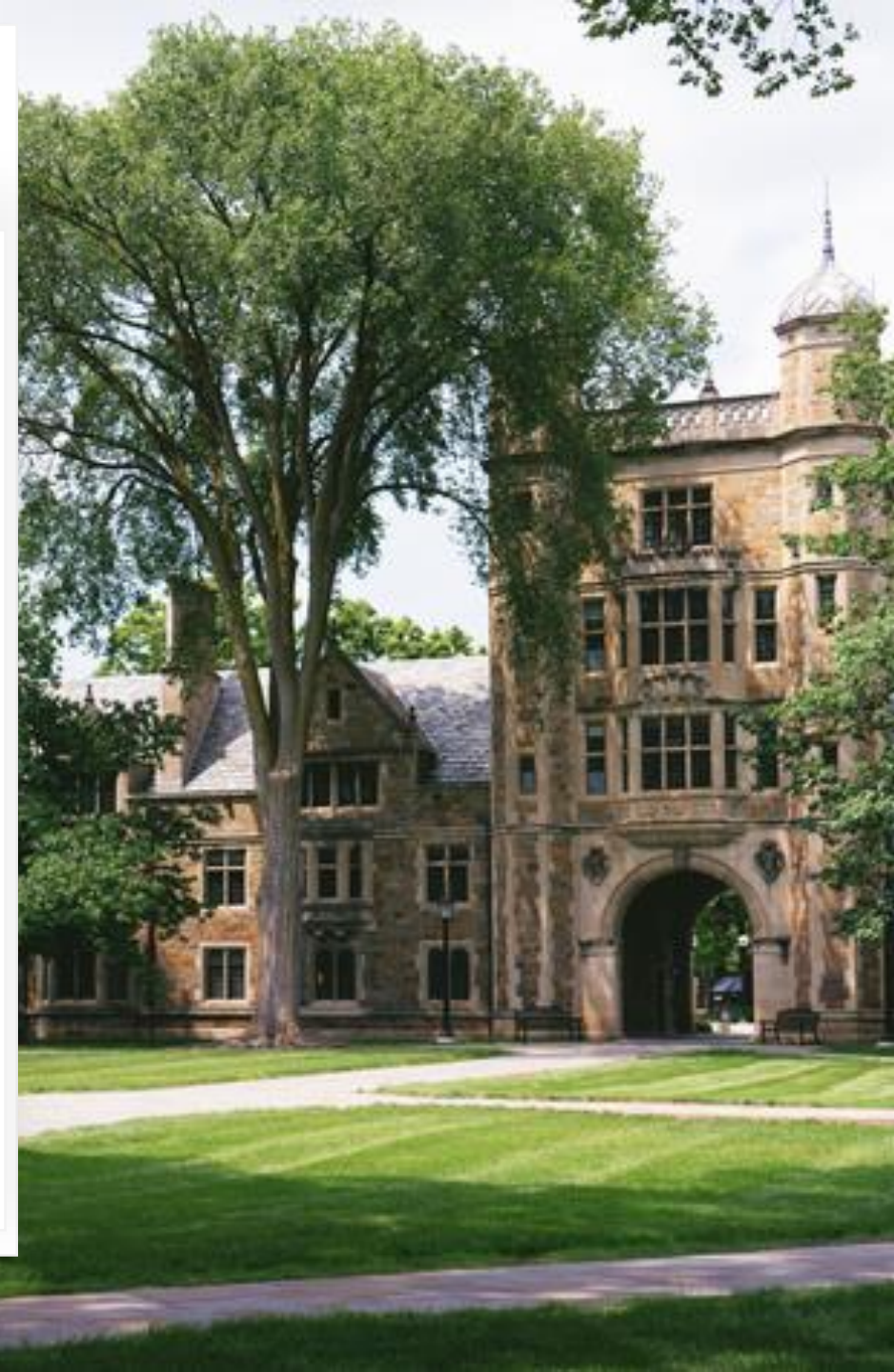
April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- [About](#)
- [Conditions of Use/Disclaimers](#)
- [REGucation RSS](#)
- [Student Litigation](#)
- [Higher Education](#)
- [Follow on Twitter](#)

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

[▲ Aaron Lacey](#) [▲ Christopher Murray](#) [▲ Scott Goldschmidt](#) [📅 April 3, 2020](#)



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

[▲ Scott Goldschmidt](#) [▲ Aaron Lacey](#) [▲ Christopher Murray](#) [📅 March 27, 2020](#)



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



**REGucation**

Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



## ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

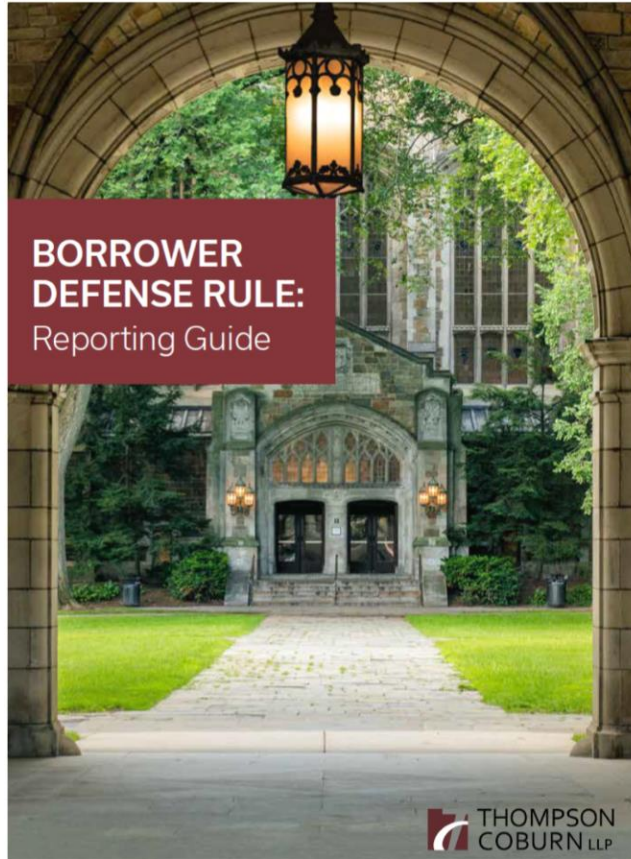


### Aaron Lacey

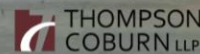
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# Presenters



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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





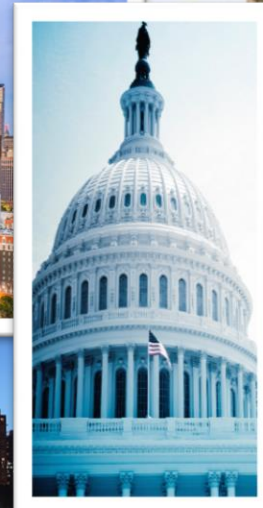
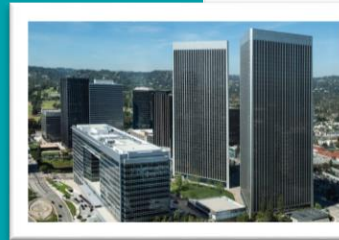
# Title IX Investigations & Informal Resolutions

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

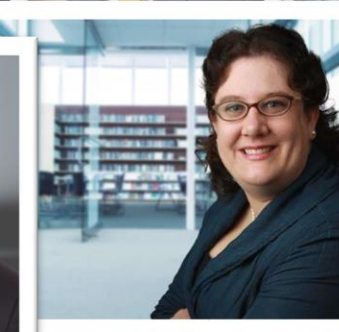
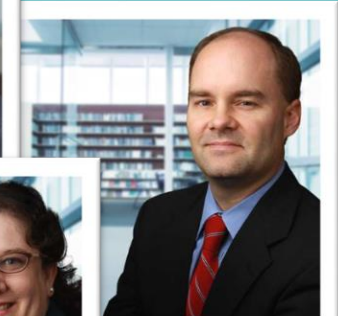
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

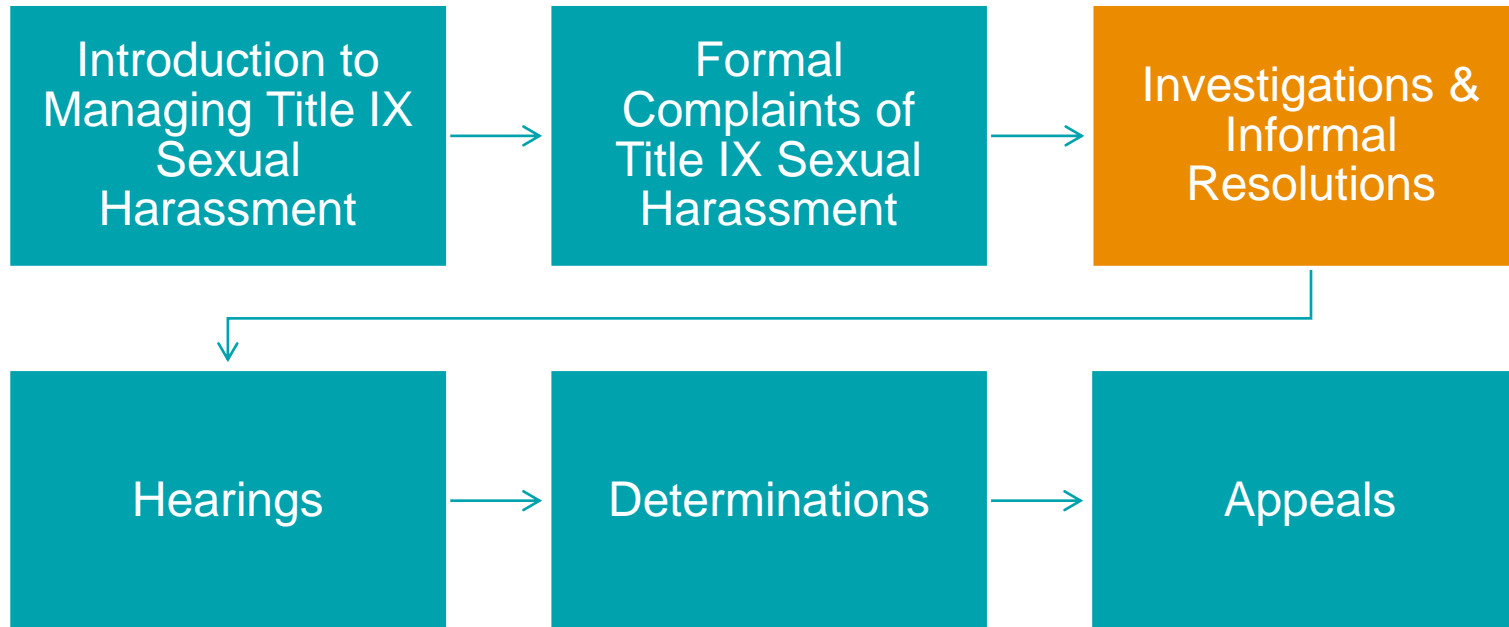
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# Syllabus for this Session

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Documentation

Writing Investigative Reports

Informal Resolution



# Session Presenters



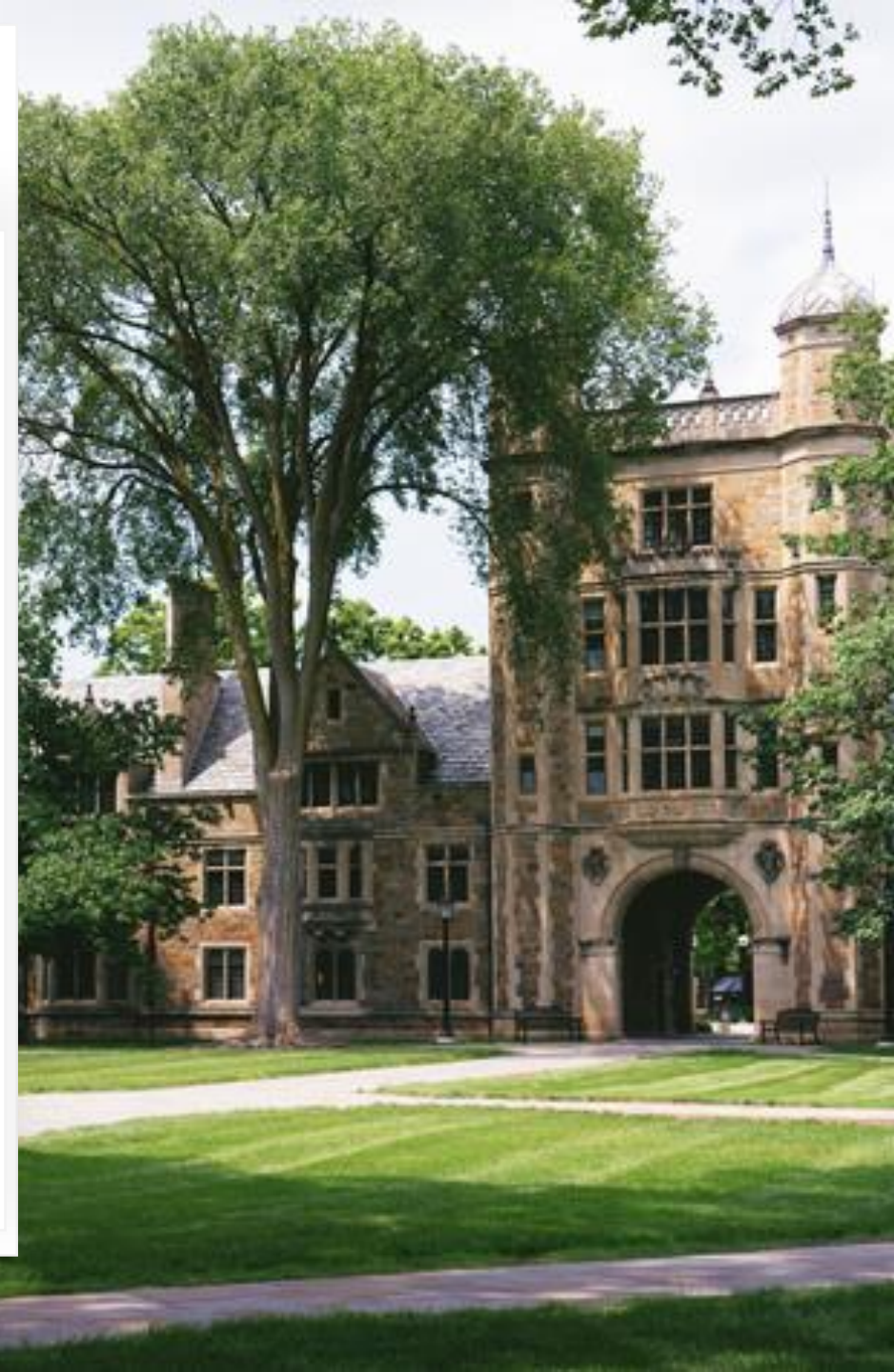
Susan Lorenc

Partner, Employment  
Practice



Scott Goldschmidt

Counsel, Higher Education  
Practice



# The Formal Complaint Framework



# 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.

## Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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**.

## Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

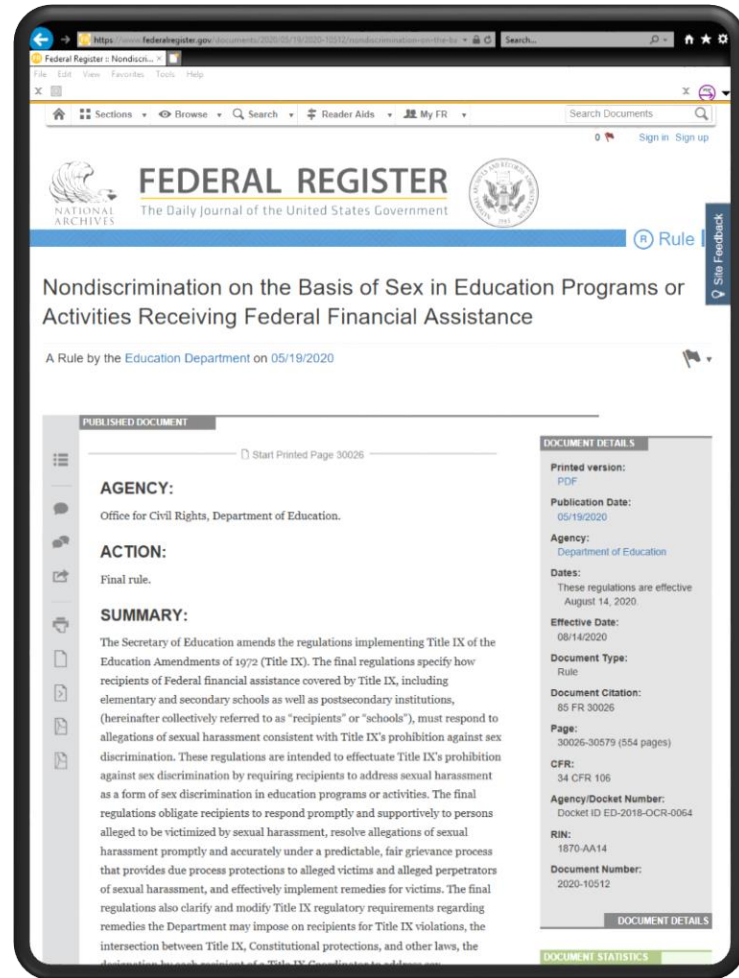
Writing Investigative Reports

Informal Resolution

# 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 Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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)-(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.

## Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

## Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

**Key Concepts**

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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**

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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

Formal Complaint Framework

**Key Concepts**

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

**Key Concepts**

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

**Key Concepts**

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Notice of Allegations



# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Confidentiality



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

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Access to Evidence



# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Access to Evidence

## Generally

- Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

## Prior to issuing investigative report

- Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.

## 10 days prior to hearing or other determination

- Must send investigative report to parties for review and written response.

## At and during any hearing

- Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Serving Impartially



# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

**Serving Impartially**

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Issues of Relevance



# 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;
- or
- 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Interviews



# Interviews

## 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

**Interviews**

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Interviews

## 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.”

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

**Interviews**

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Credibility Determinations



# 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."

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

**Credibility Determinations**

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Collection & Review of Documentation



# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Writing Investigative Reports



# 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.”

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Informal Resolution



# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Informal Resolution

## 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# 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.

Formal Complaint Framework

Key Concepts

Notice of Allegations

Confidentiality

Access to Evidence

Serving Impartially

Issues of Relevance

Interviews

Credibility Determinations

Collection & Review of Docs

Writing Investigative Reports

Informal Resolution

# Resources



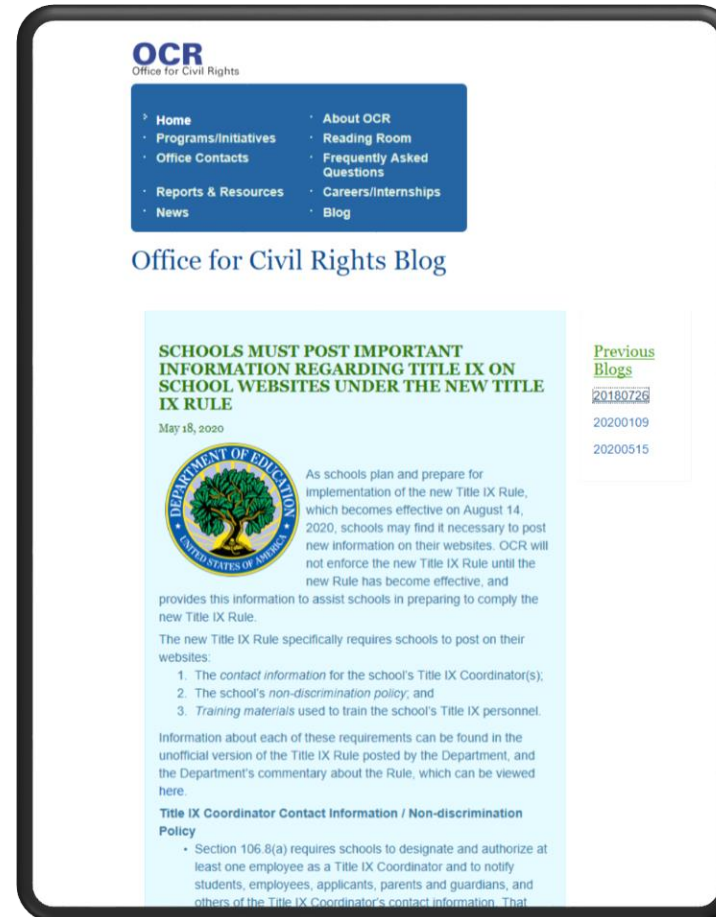
# Office of Civil Rights

## OCR Title IX Blog

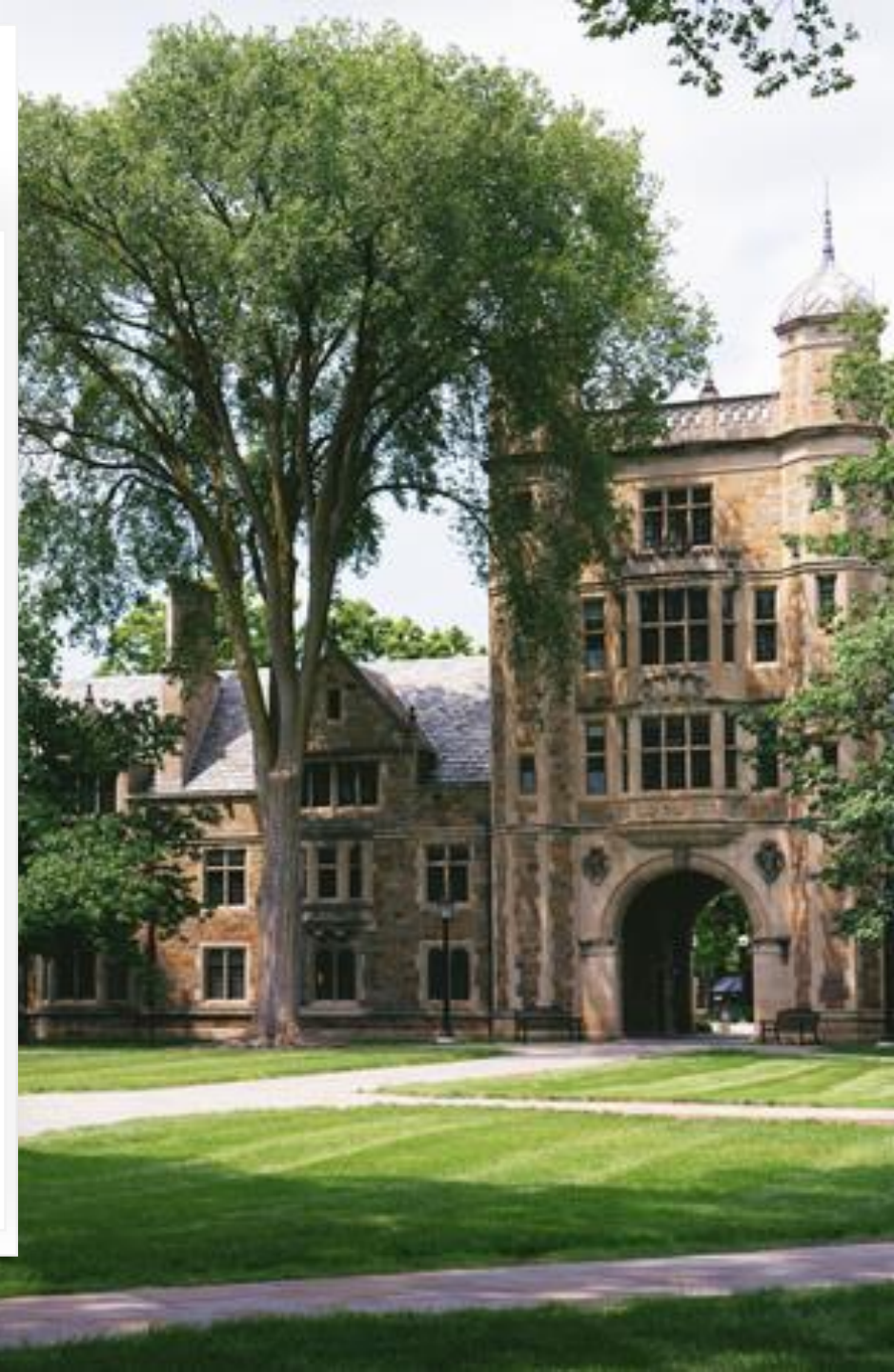
- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. Below it is a blue navigation menu with links: Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. The main heading is "Office for Civil Rights Blog". The featured article is titled "SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE" dated May 18, 2020. The article includes the Department of Education logo and text explaining that schools must post information on their websites to assist with the new Title IX Rule. A list of requirements is provided: 1. Contact information for the school's Title IX Coordinator(s); 2. The school's non-discrimination policy; and 3. Training materials used to train the school's Title IX personnel. A "Previous Blogs" sidebar on the right lists two entries: "20180726" dated 20200109 and "20200515" dated 20200515.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

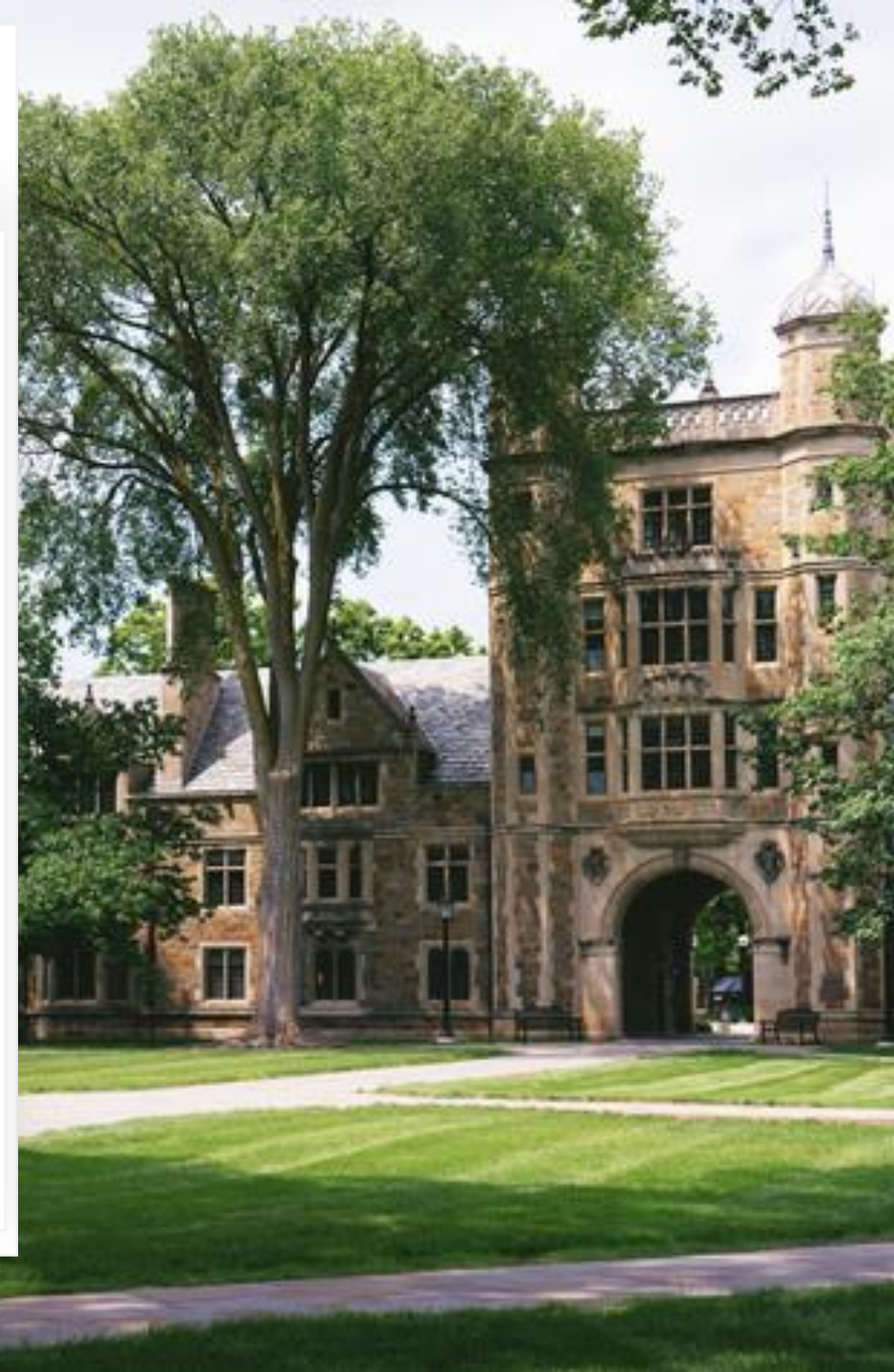
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



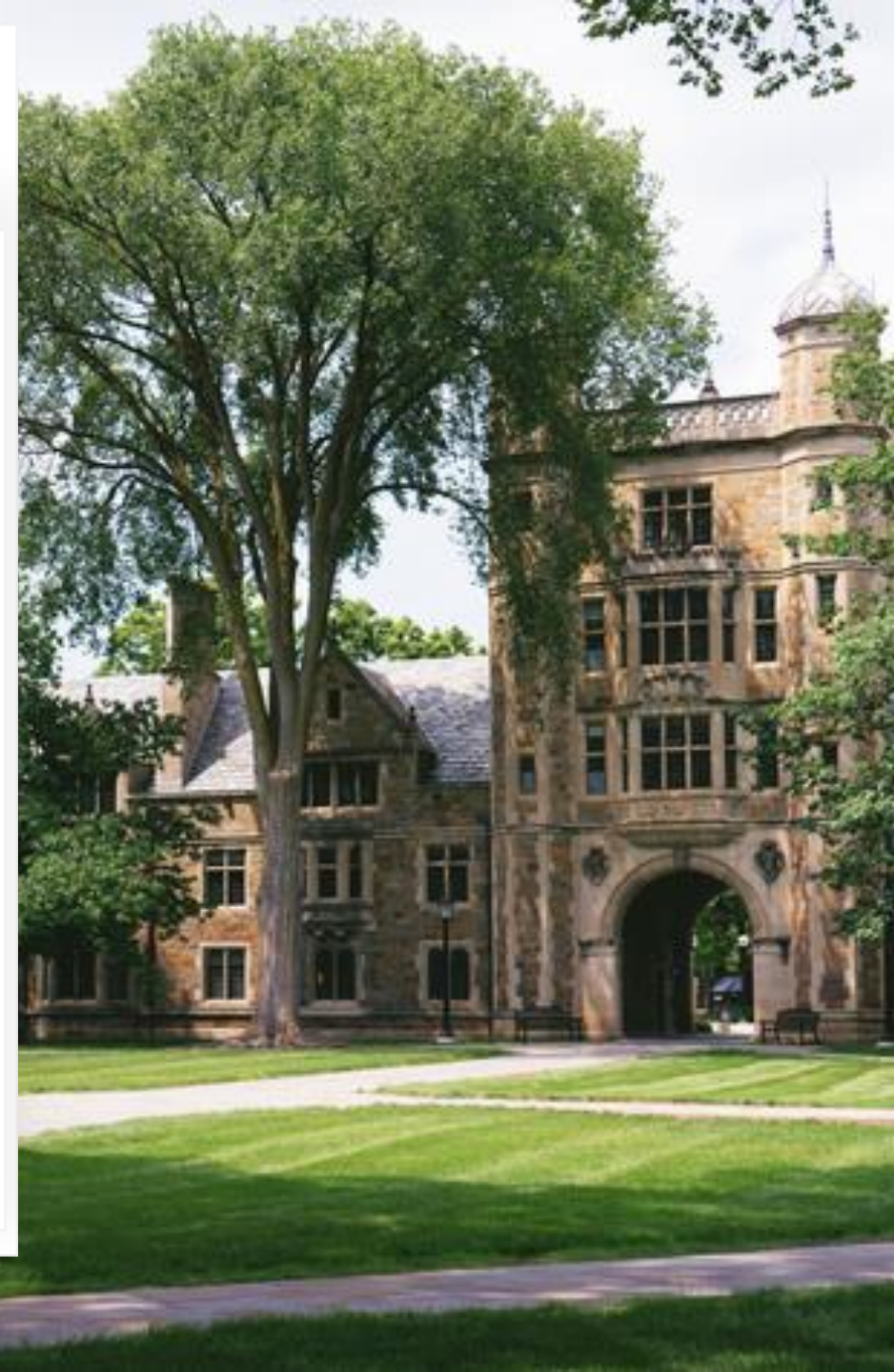
# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

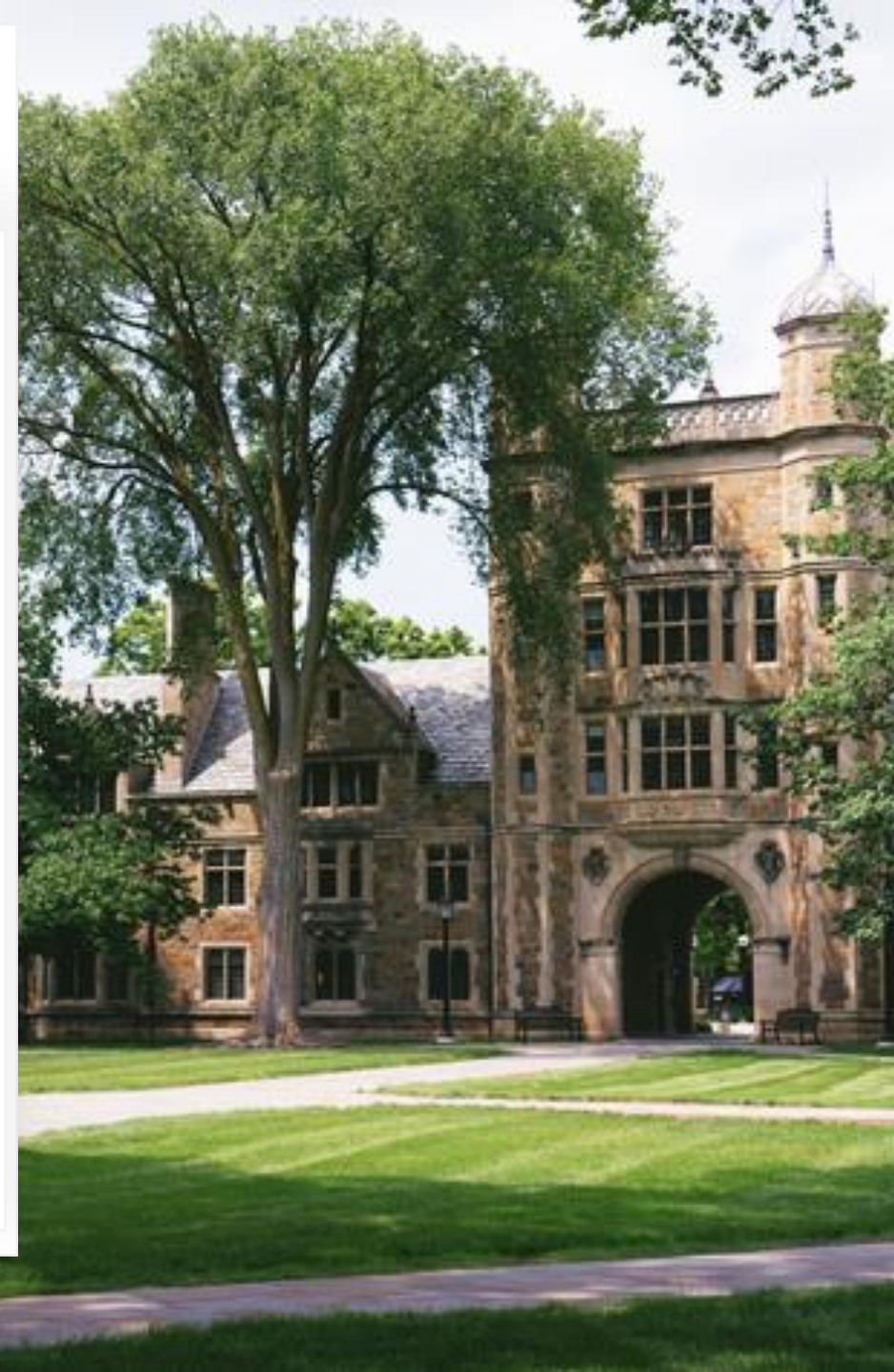
April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- [About](#)
- [Conditions of Use/Disclaimers](#)
- [REGucation RSS](#)
- [Student Litigation](#)
- [Higher Education](#)
- [Follow on Twitter](#)

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

[▲ Aaron Lacey](#) [▲ Christopher Murray](#) [▲ Scott Goldschmidt](#) [📅 April 3, 2020](#)



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

[▲ Scott Goldschmidt](#) [▲ Aaron Lacey](#) [▲ Christopher Murray](#) [📅 March 27, 2020](#)



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



## REGucation

Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



### ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

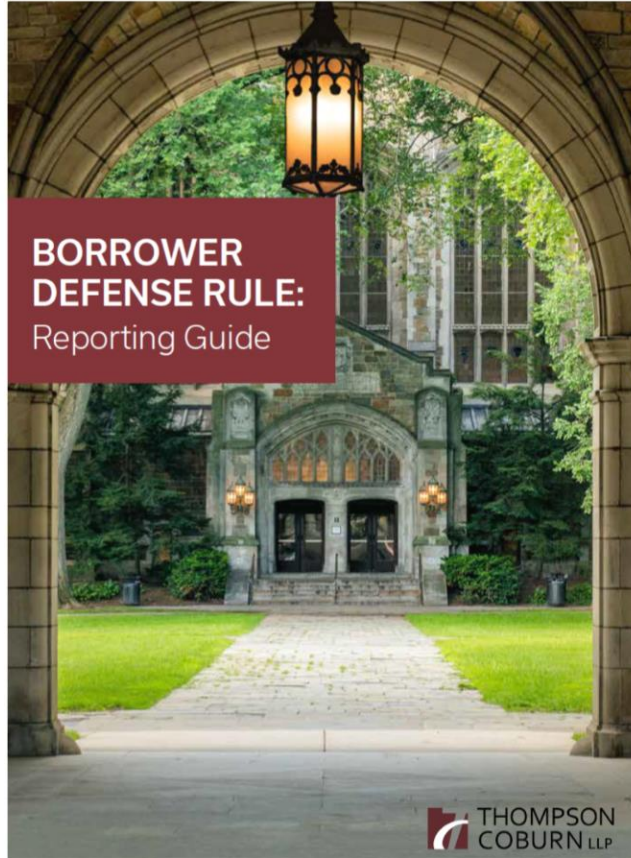


#### Aaron Lacey

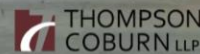
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# 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

- [slorenc@thompsoncoburn.com](mailto:slorenc@thompsoncoburn.com) | 312-580-2324



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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





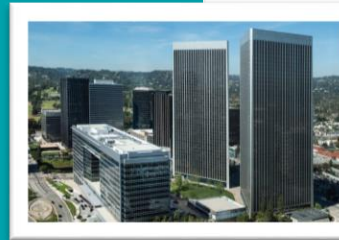
# Title IX Hearings

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

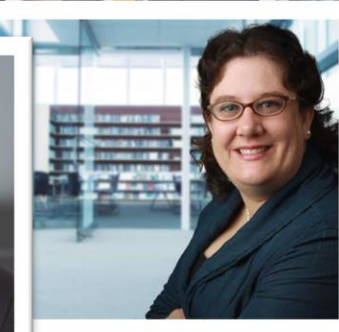
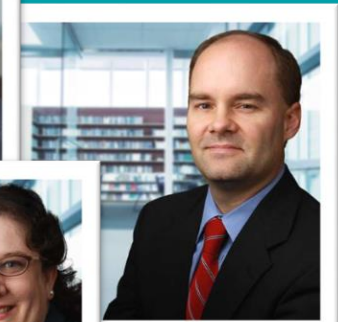
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

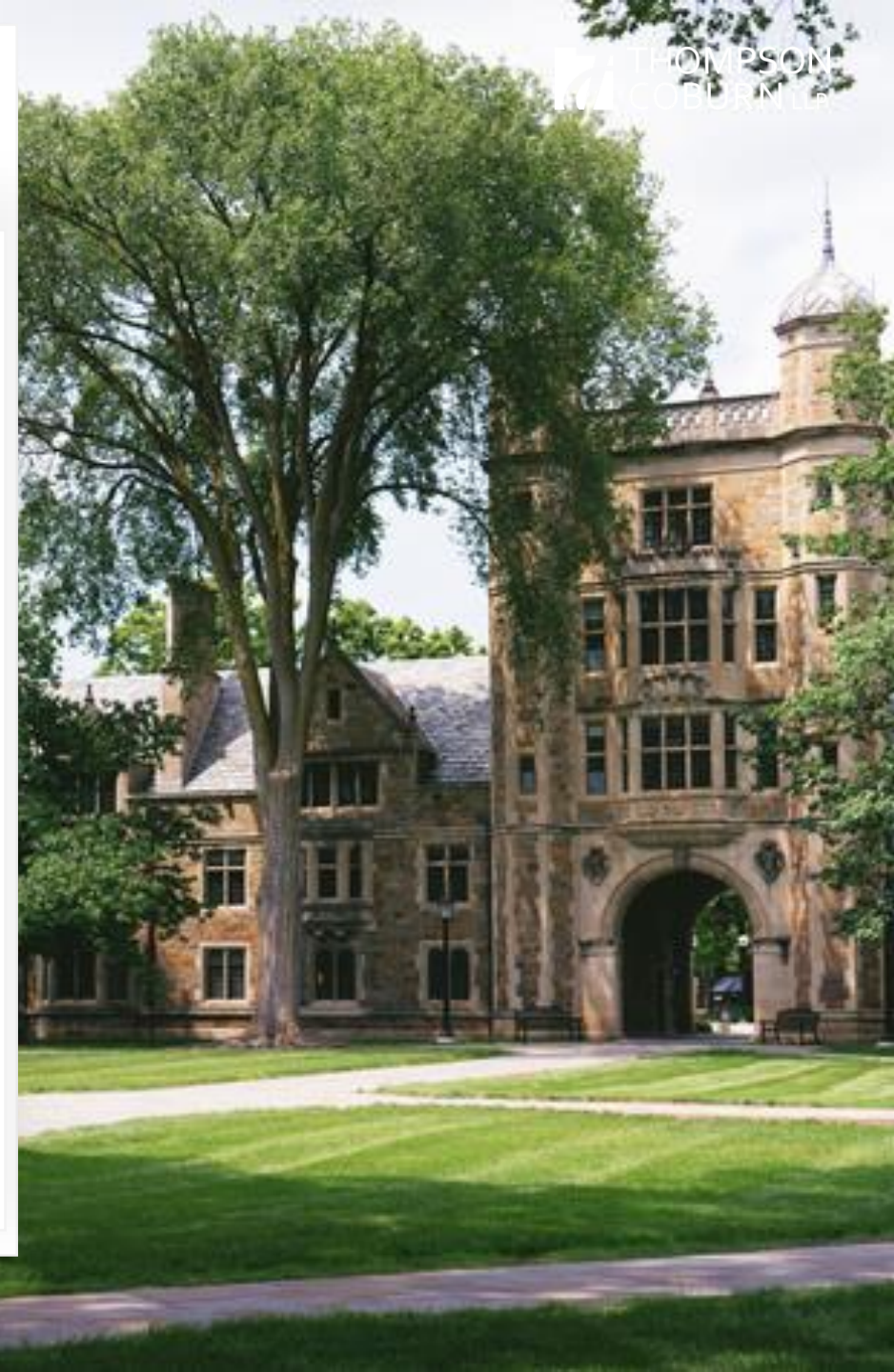
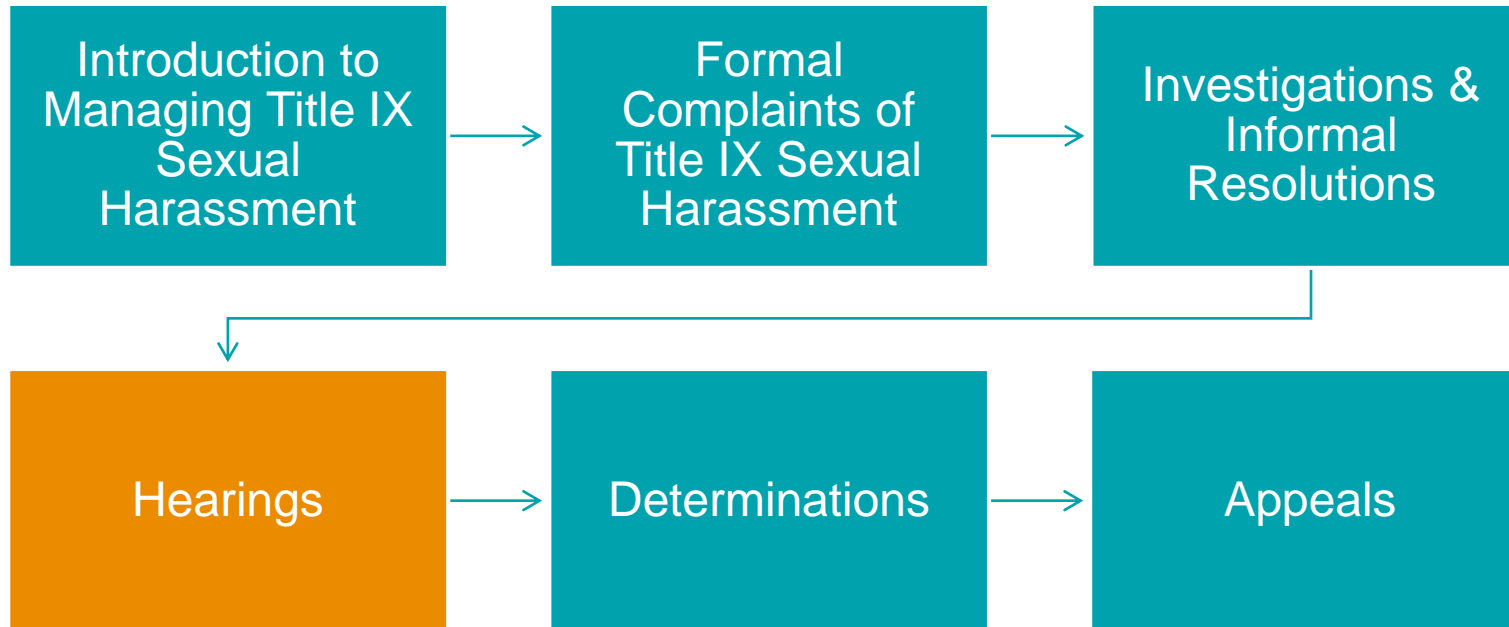
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# Syllabus for this Session

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges



# Session Presenters



Ret. Judge Booker Shaw

Partner, Litigation &  
Appellate Practice



Scott Goldschmidt

Counsel, Higher Education  
Practice



# The Formal Complaint Framework



# 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)-(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.

## The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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**.

## The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.
- ❖ 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Key Concepts

## What does it mean to objectively evaluate relevant 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 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

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

The Formal Complaint Framework

**Key Concepts**

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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 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

**Key Concepts**

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

**Key Concepts**

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Live Hearings



# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Advisors



# 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 restrict advisor participation in the proceedings, as long as the restrictions apply equally.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Cross- Examination



# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.”

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.”

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.”

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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."

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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."

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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."

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.”

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.”

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Credibility



# 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."

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Burden of Proof



# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

**Burden of Proof**

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

**Burden of Proof**

Evidence

Legal Privileges

# Evidence



# 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.**

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# 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.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

**Evidence**

Legal Privileges

# Timing of Access

## Generally

- Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

## Prior to issuing investigative report

- Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.

## 10 days prior to hearing or other determination

- Must send investigative report to parties for review and written response.

## At and during any hearing

- Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Legal Privileges



# Legal Privileges

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

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

The Formal Complaint Framework

Key Concepts

Live Hearings

Advisors

Cross-Examination

Relevance

Credibility

Burden of Proof

Evidence

Legal Privileges

# Resources



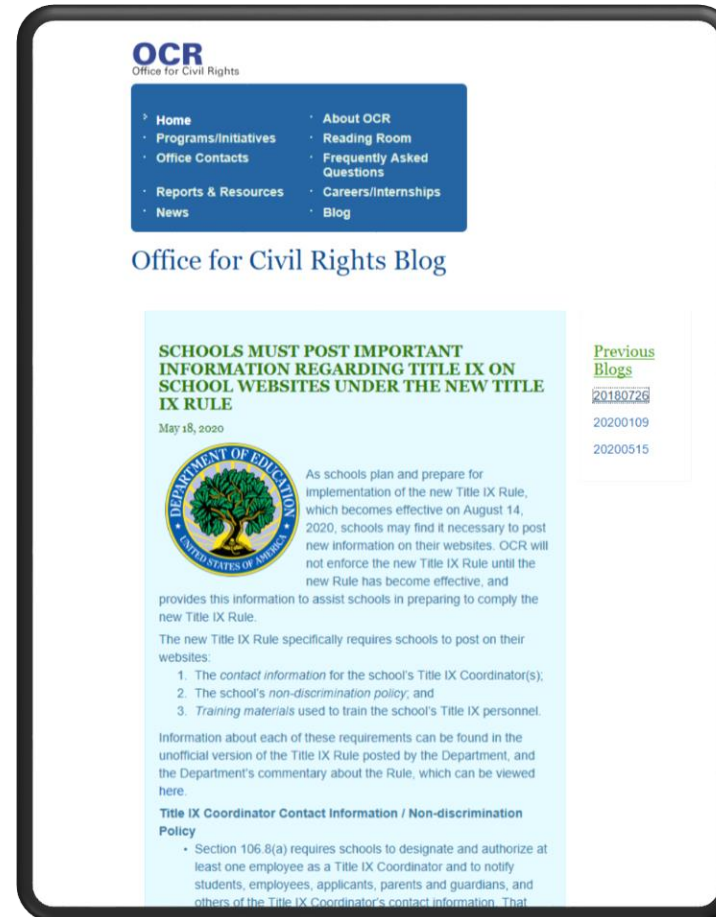
# Office of Civil Rights

## OCR Title IX Blog

- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. Below it is a blue navigation menu with links: Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. The main heading is "Office for Civil Rights Blog". The featured article is titled "SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE" dated May 18, 2020. The article includes the Department of Education logo and text explaining that schools must post information to assist with the new Title IX Rule, effective August 14, 2020. The required information includes: 1. Contact information for the school's Title IX Coordinator(s); 2. The school's non-discrimination policy; and 3. Training materials used to train the school's Title IX personnel. A "Previous Blogs" sidebar on the right lists two entries: "20180726" dated 20200109 and "20200515" dated 20200515.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

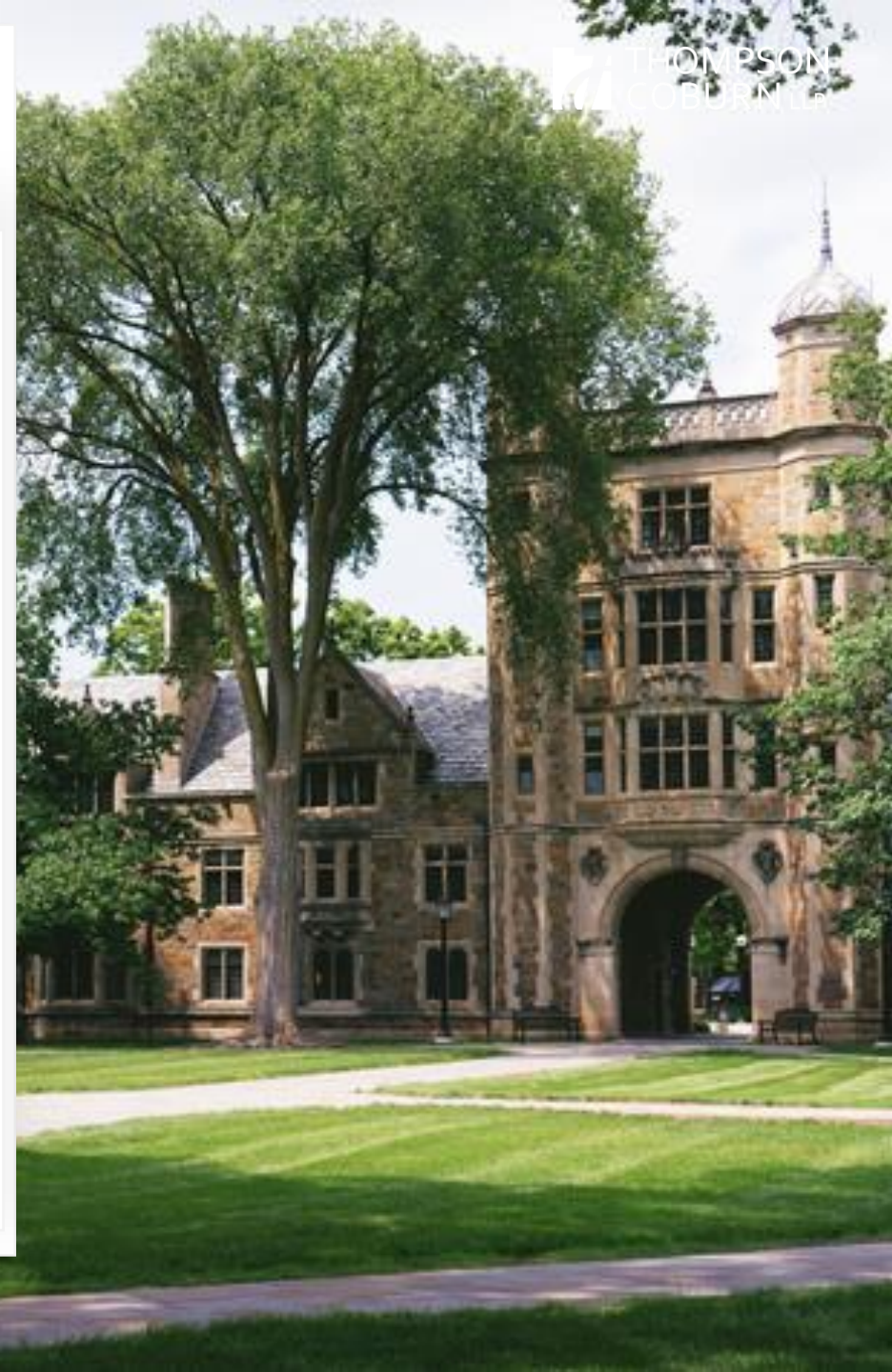
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- About
- Conditions of Use/Disclaimers
- REGucation RSS
- Student Litigation
- Higher Education
- Follow on Twitter

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

Aaron Lacey Christopher Murray Scott Goldschmidt April 3, 2020



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

Scott Goldschmidt Aaron Lacey Christopher Murray March 27, 2020



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



## REGucation

Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



### ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

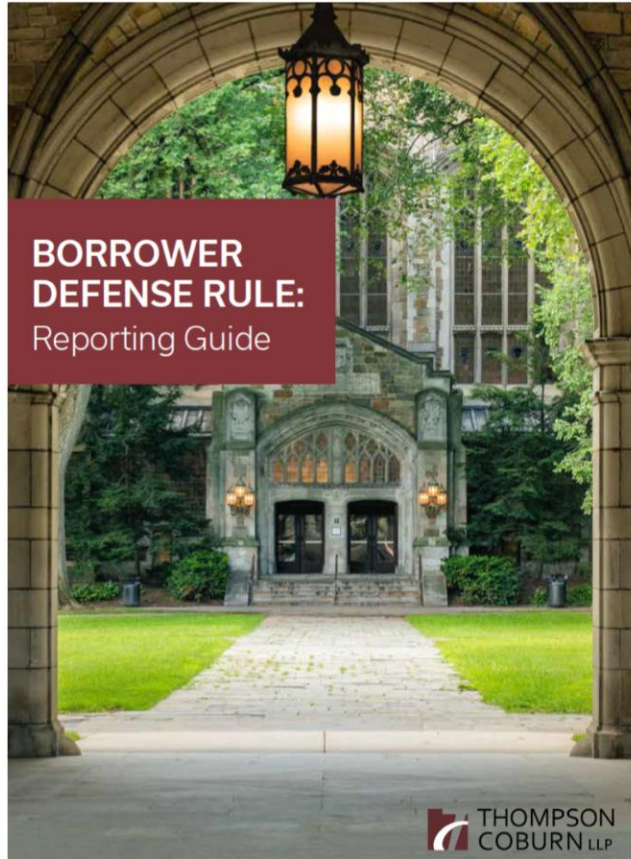


#### Aaron Lacey

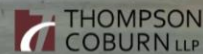
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# Presenters



# 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

- [bshaw@thompsoncoburn.com](mailto:bshaw@thompsoncoburn.com) | 314-552-6087



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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





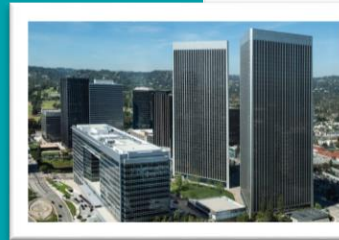
# Title IX Determinations

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

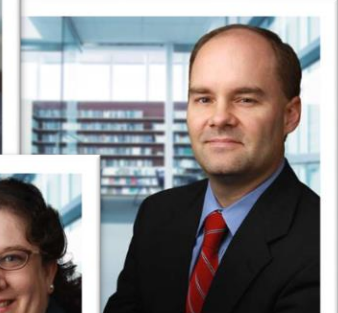
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

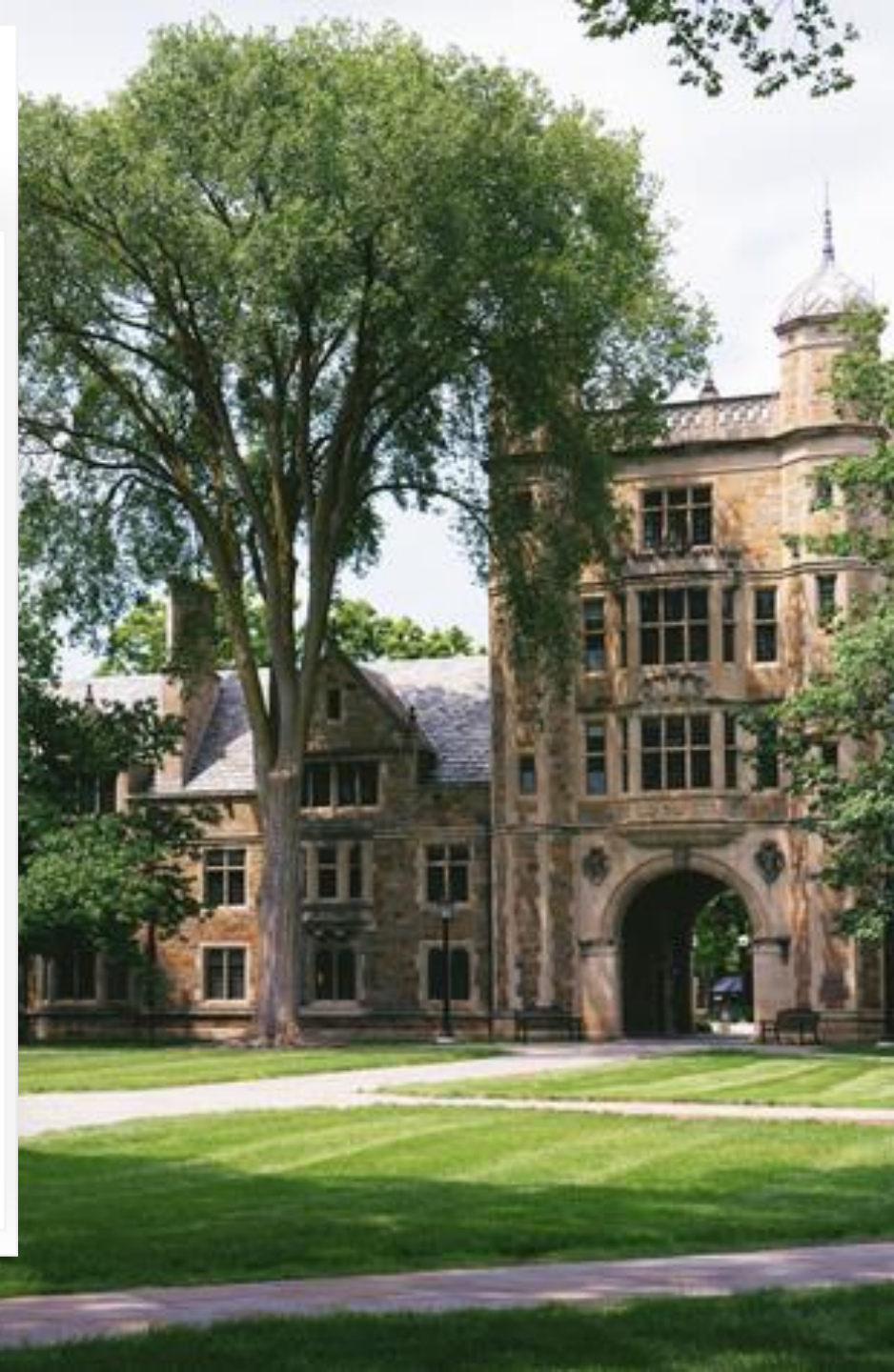
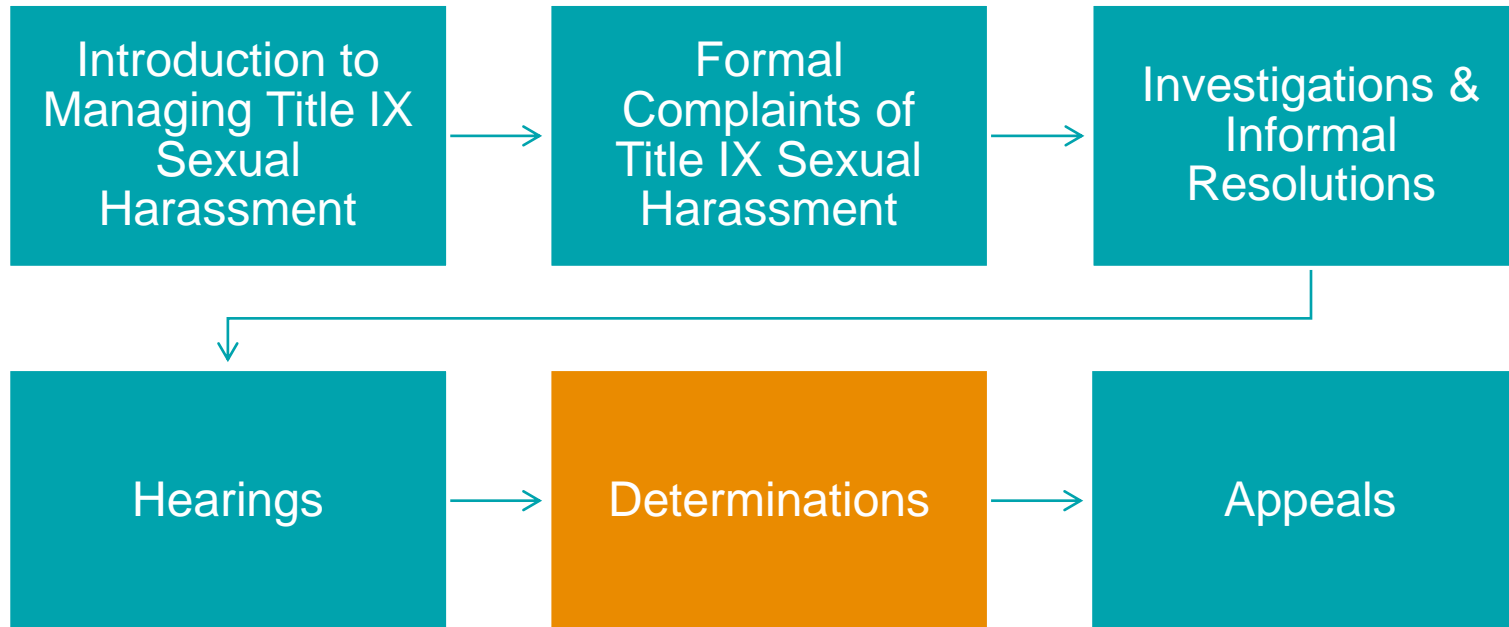
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# 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



# Session Presenters



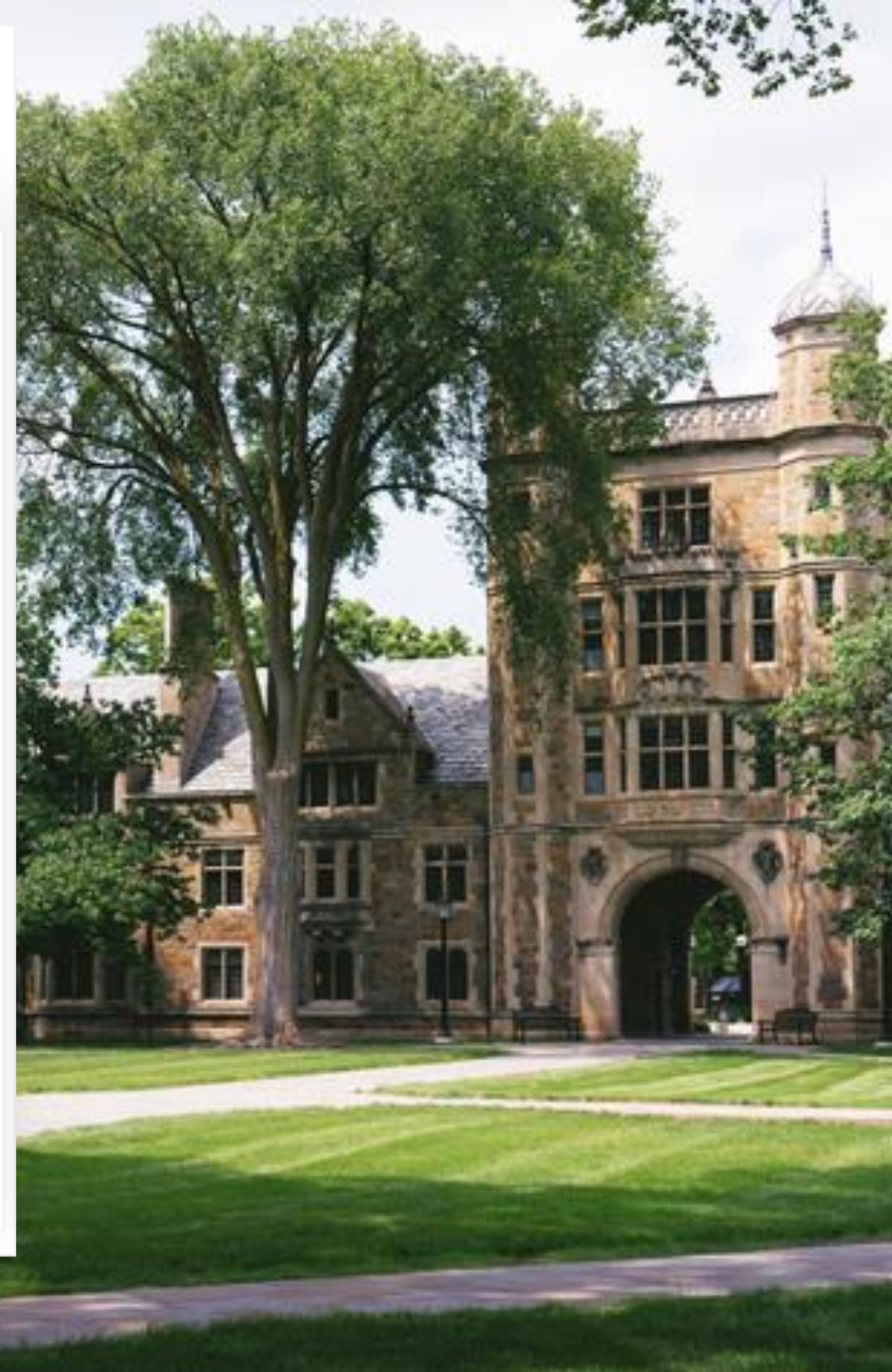
Susan Lorenc

Partner, Employment  
Practice



Scott Goldschmidt

Counsel, Higher Education  
Practice



# The Formal Complaint Framework



# 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.

## Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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**.

## Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination



# 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)-(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.

## Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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.

## Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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.

Formal Complaint Framework

**Key Concepts**

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Format & Content



# Format & Content

## 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

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Logistics



# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Excluding Facts in Evidence



# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Weighing Facts Under Applicable Evidentiary Standards



# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

**Weighing Facts**

Effective Deliberations

Defensible Determination

# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Effective Deliberations



# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# 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

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts

Effective Deliberations

Defensible Determination

# Resources



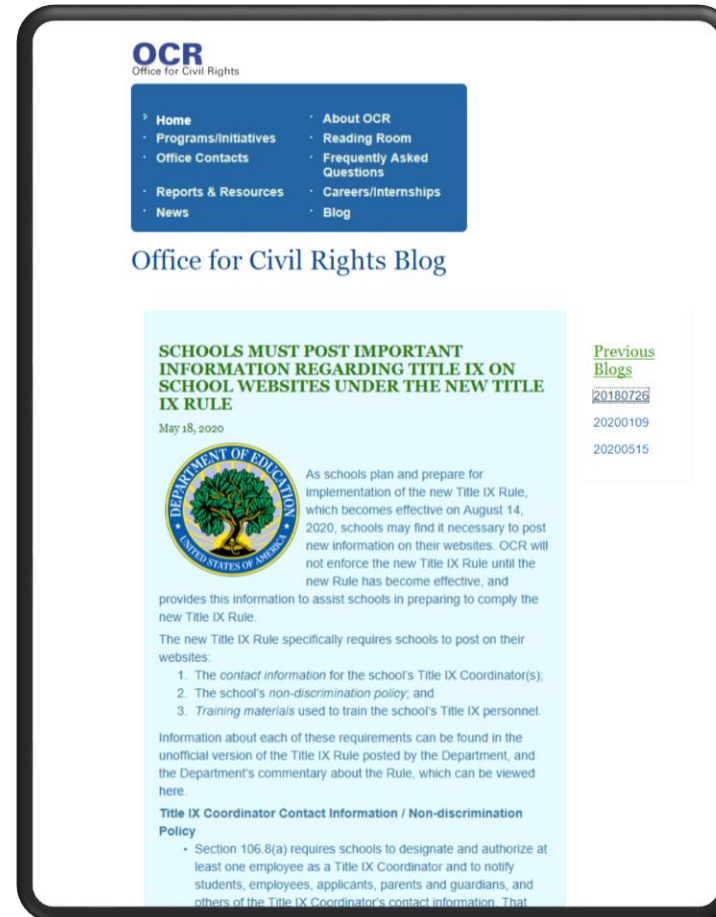
# Office of Civil Rights

## OCR Title IX Blog

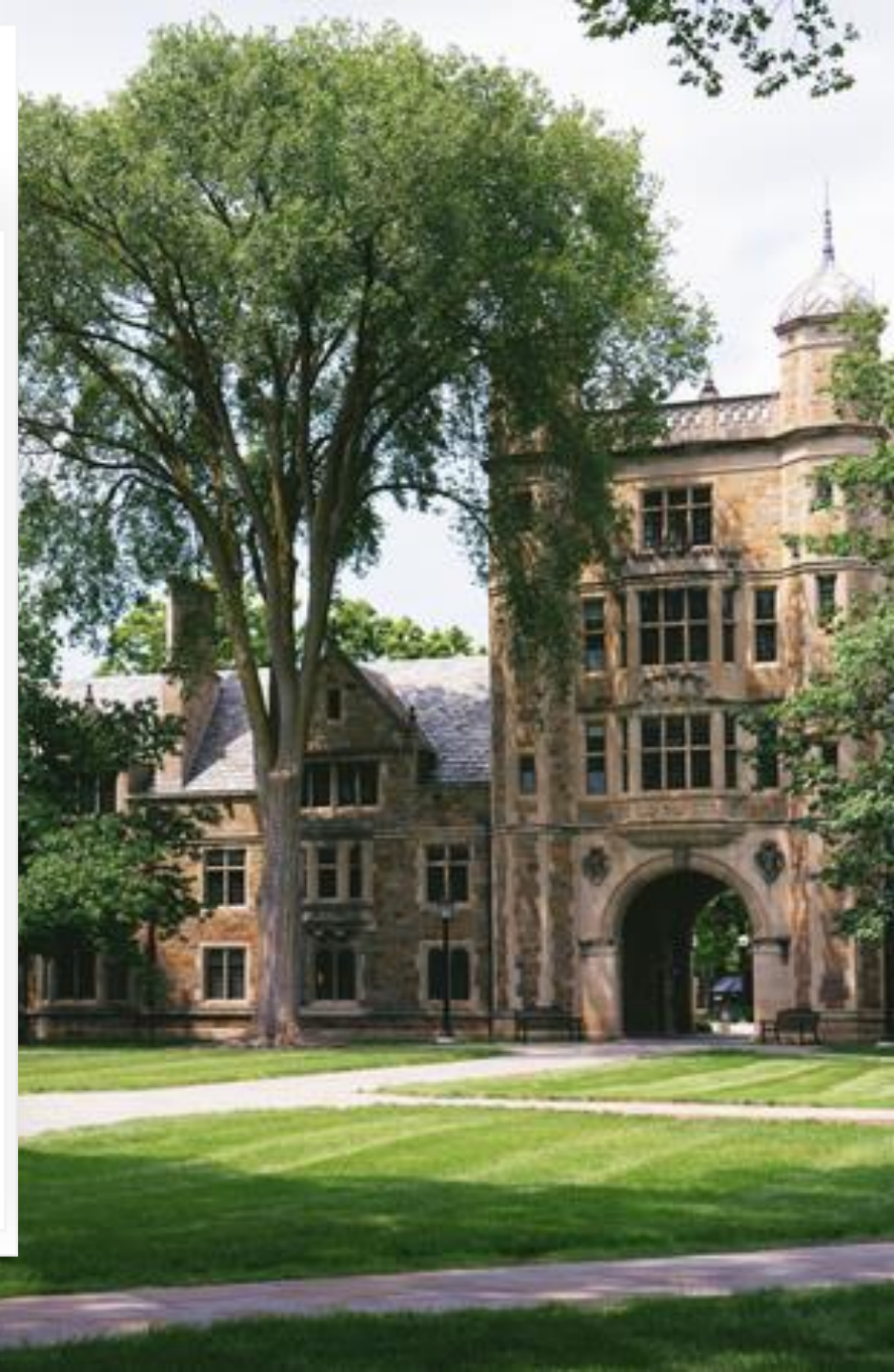
- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. A blue navigation menu contains links for Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. Below the menu is the title 'Office for Civil Rights Blog'. The main content area features a light blue box with the heading 'SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE' dated May 18, 2020. To the right of this box is a 'Previous Blogs' section with two entries: '20180726' dated 20200109 and '20200515' dated 20200515. The main article text includes the Department of Education logo and states that schools must post information to assist with the new Title IX Rule, which becomes effective on August 14, 2020. The required information includes contact information for the Title IX Coordinator, the school's non-discrimination policy, and training materials for Title IX personnel. A link is provided to view the unofficial version of the Title IX Rule and the Department's commentary.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

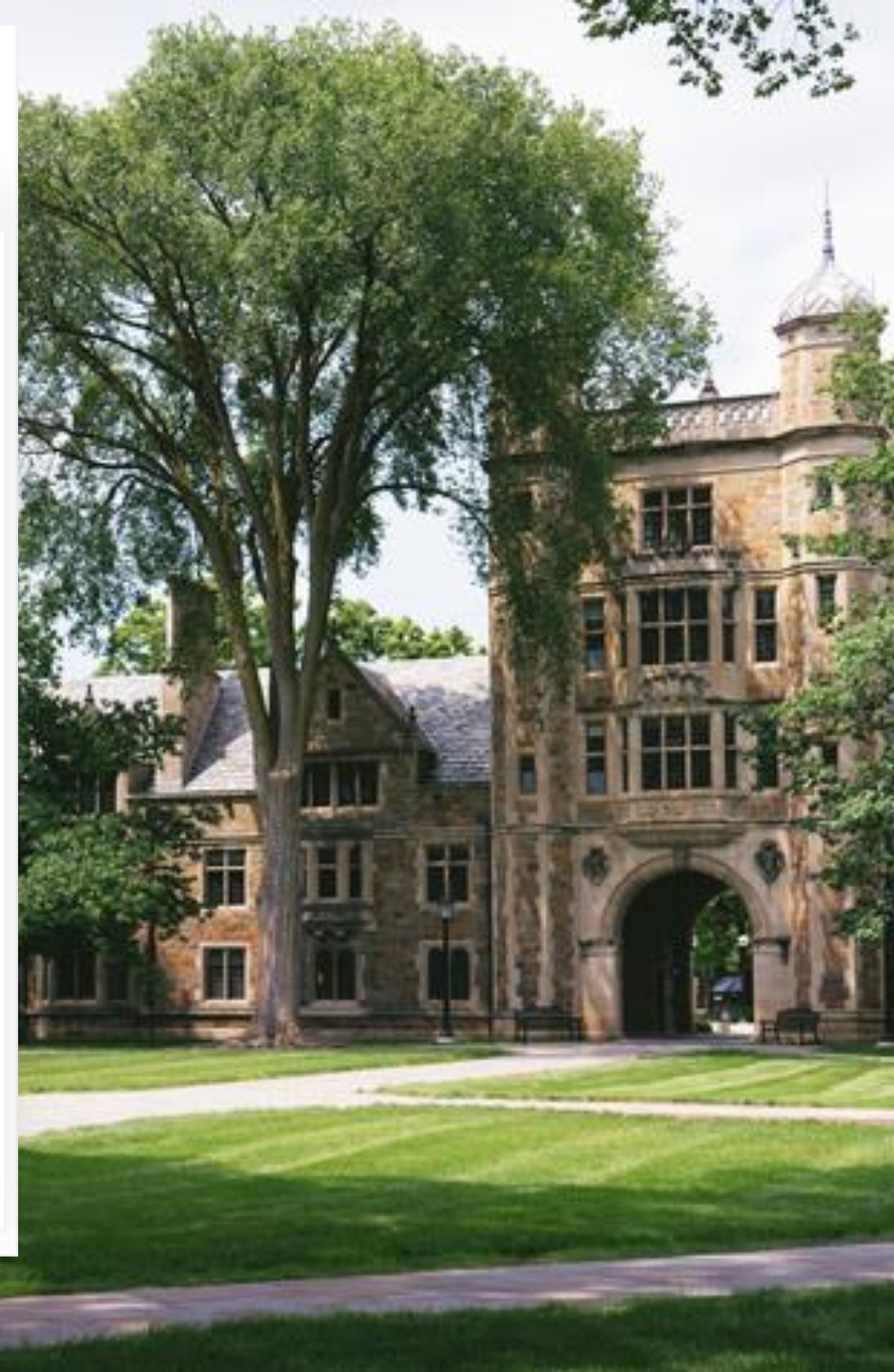
April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- [About](#)
- [Conditions of Use/Disclaimers](#)
- [REGucation RSS](#)
- [Student Litigation](#)
- [Higher Education](#)
- [Follow on Twitter](#)

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

[▲ Aaron Lacey](#) [▲ Christopher Murray](#) [▲ Scott Goldschmidt](#) April 3, 2020



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

[▲ Scott Goldschmidt](#) [▲ Aaron Lacey](#) [▲ Christopher Murray](#) March 27, 2020



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



## REGucation

Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



### ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

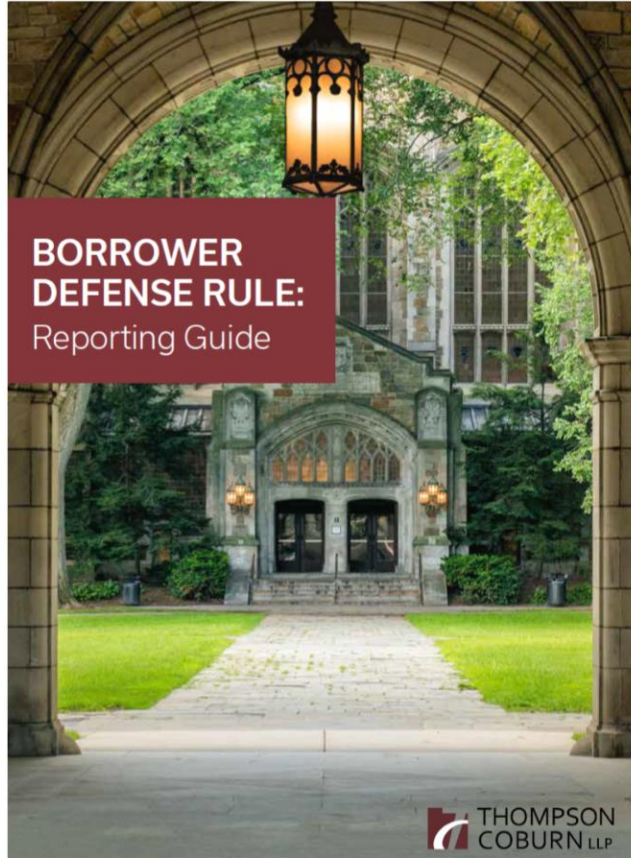


#### Aaron Lacey

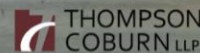
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# 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

- [slorenc@thompsoncoburn.com](mailto:slorenc@thompsoncoburn.com) | 312-580-2324



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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





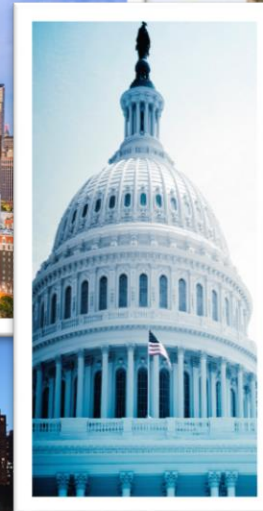
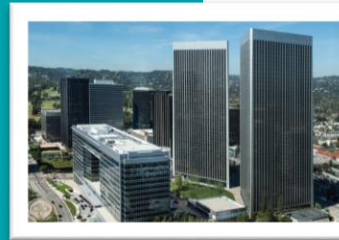
# Title IX Appeals

Thompson Coburn LLP  
Title IX Training Series | July 2020



# Thompson Coburn LLP

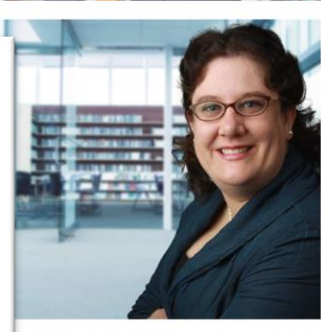
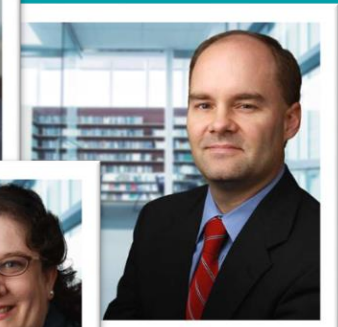
- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



# Higher Education Practice



Aaron D. Lacey  
Practice Chair  
alacey@thompsoncoburn.com  
314-552-6405



# 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

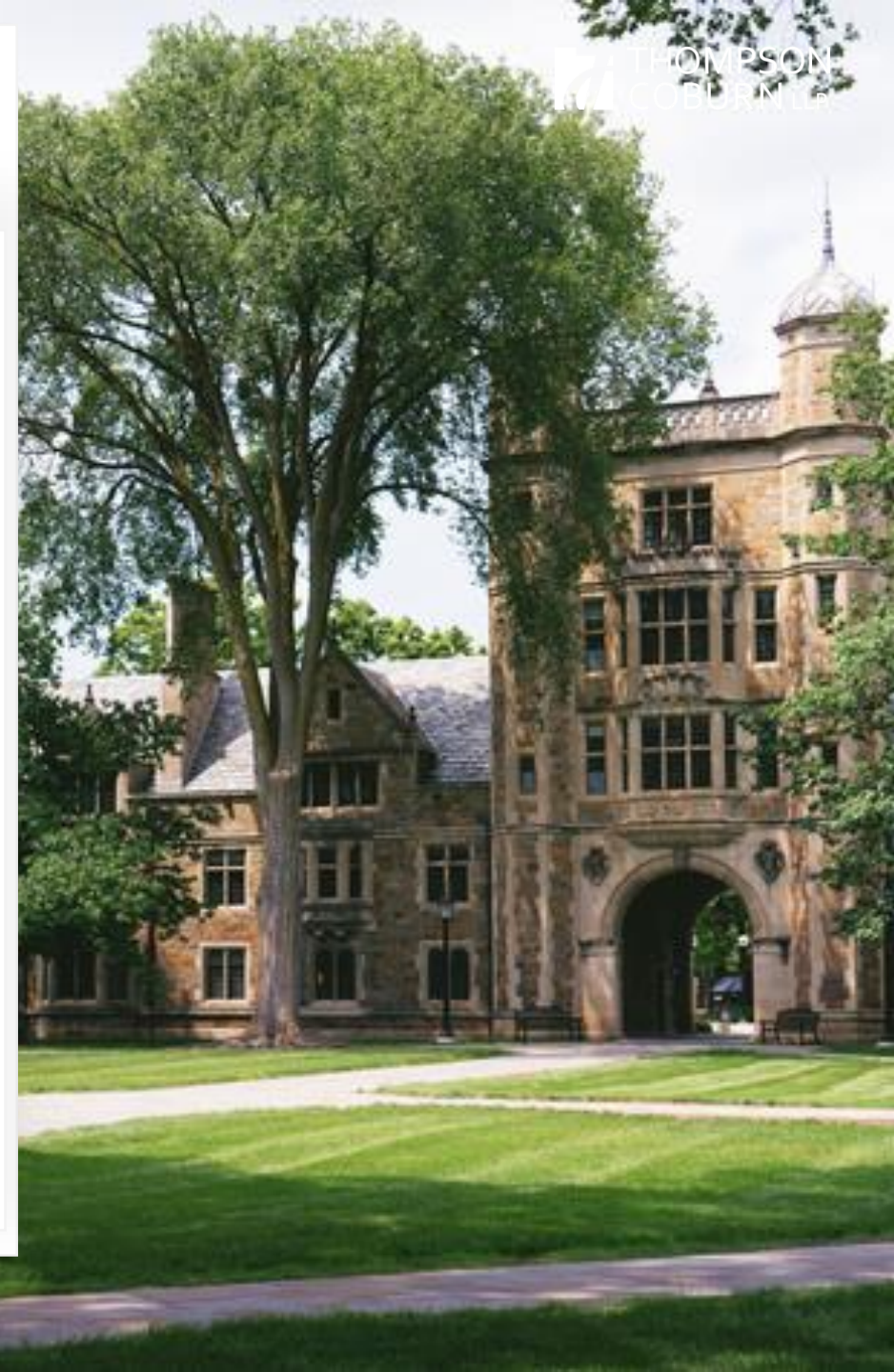
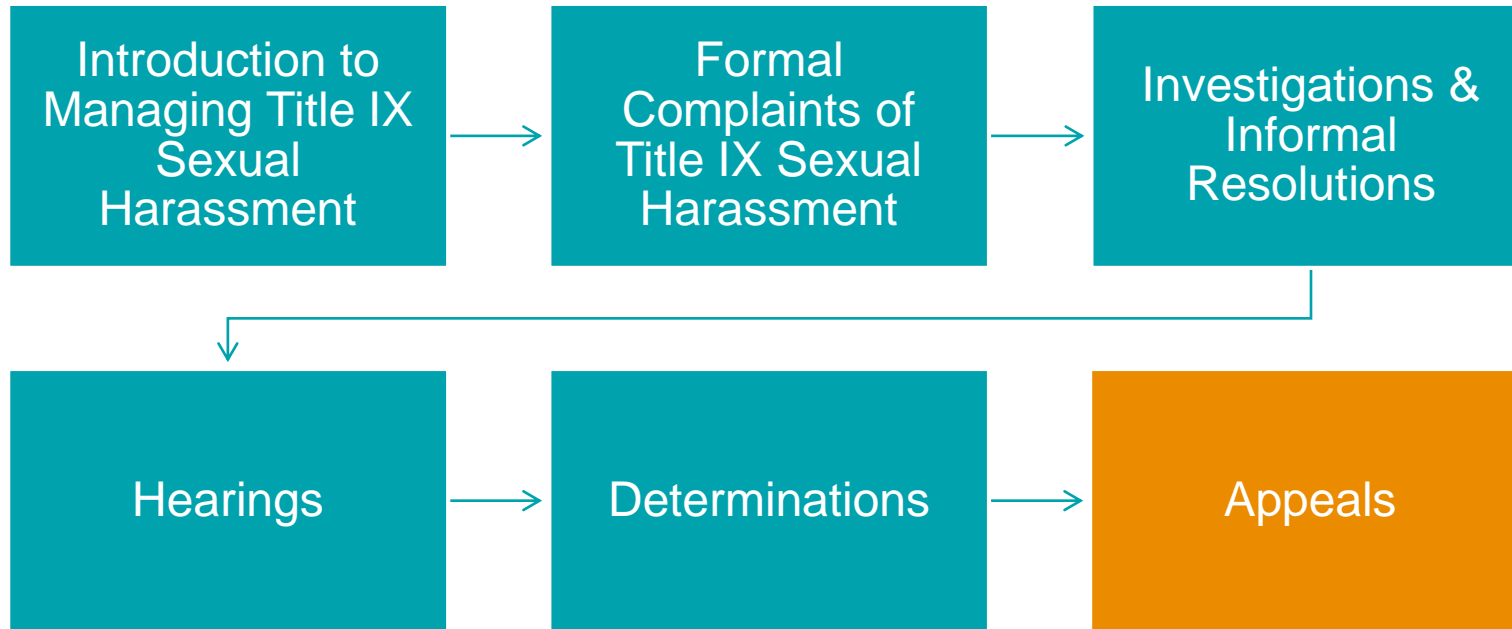
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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](#)).



# Curriculum for Training Series

The foundational training series includes the following six sessions:



# Syllabus for this Session

The Formal Complaint Framework

Key Concepts

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers



# Session Presenters



Ret. Judge Booker Shaw

Partner, Litigation &  
Appellate Practice



Scott Goldschmidt

Counsel, Higher Education  
Practice



# The Formal Complaint Framework



# 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)-(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.

The Formal Complaint Framework

Key Concepts

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers

# 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

# 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
Hearings	• Hearing requirements, including cross-x and advisors
Determinations	• Requirements for adjudicators and determinations
Appeals	• Grounds and procedures for appeals
Recordkeeping	• Record maintenance requirements for specified periods

## 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

# 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

Requirements for Appeal Officers

# Bases for Appeal



# 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

# 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

# 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

# Drafting Appeal Decisions



# 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

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.

The Formal Complaint Framework

Key Concepts

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers

# 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 evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

The Formal Complaint Framework

Key Concepts

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers

# Requirements for Appeal Officers

## What happens if 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.

The Formal Complaint Framework

Key Concepts

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers

# Resources



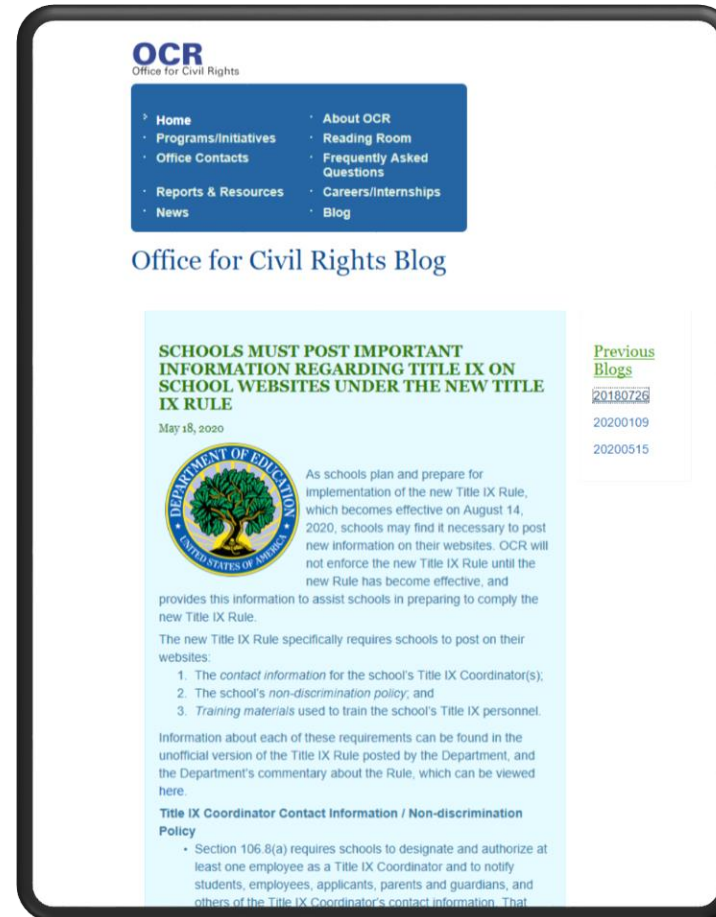
# Office of Civil Rights

## OCR Title IX Blog

- Will include new guidance on a rolling basis.

## OCR Email Address

- [OPEN@ed.gov](mailto:OPEN@ed.gov)
- May be used for submitting inquiries regarding the new Title IX rule.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. A blue navigation menu contains links for Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. Below the menu is the title 'Office for Civil Rights Blog'. The main content area features a light blue header for a blog post titled 'SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE' dated May 18, 2020. The post includes the Department of Education logo and text explaining that schools must post information to assist with the new Title IX Rule, effective August 14, 2020. A list of requirements is provided: 1. Contact information for the school's Title IX Coordinator(s); 2. The school's non-discrimination policy; and 3. Training materials used to train the school's Title IX personnel. A 'Previous Blogs' sidebar on the right lists two entries: '20180726' dated 20200109 and '20200515' dated 20200515.



# 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.



Comparison Showing Changes to USED  
Title IX Rule Effective August 14, 2020

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or [alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com). Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

#### Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

#### Subpart A—Introduction

##### §106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

##### §106.2 Definitions.

As used in this part, the term:

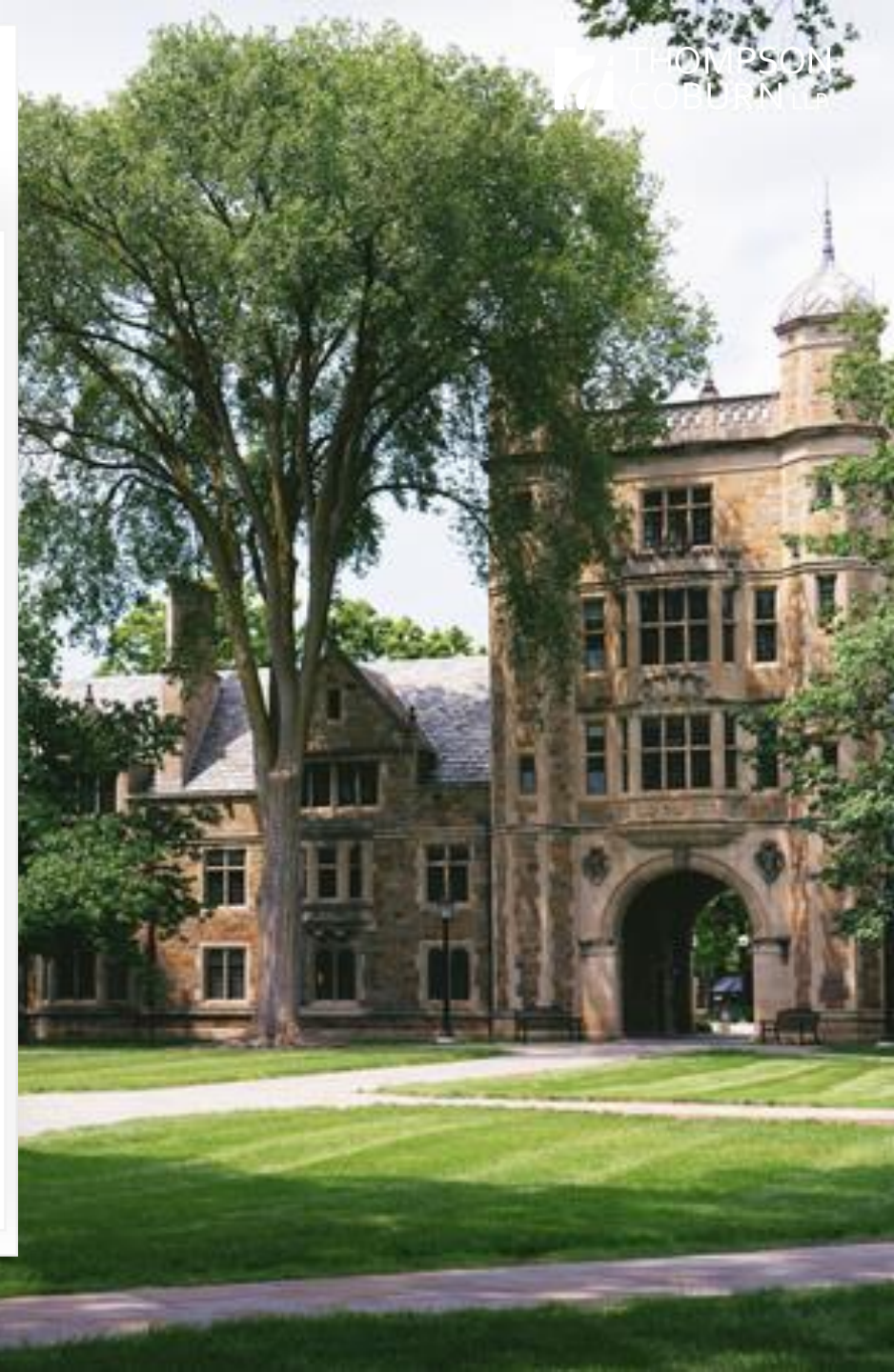
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

Page 1 of 32



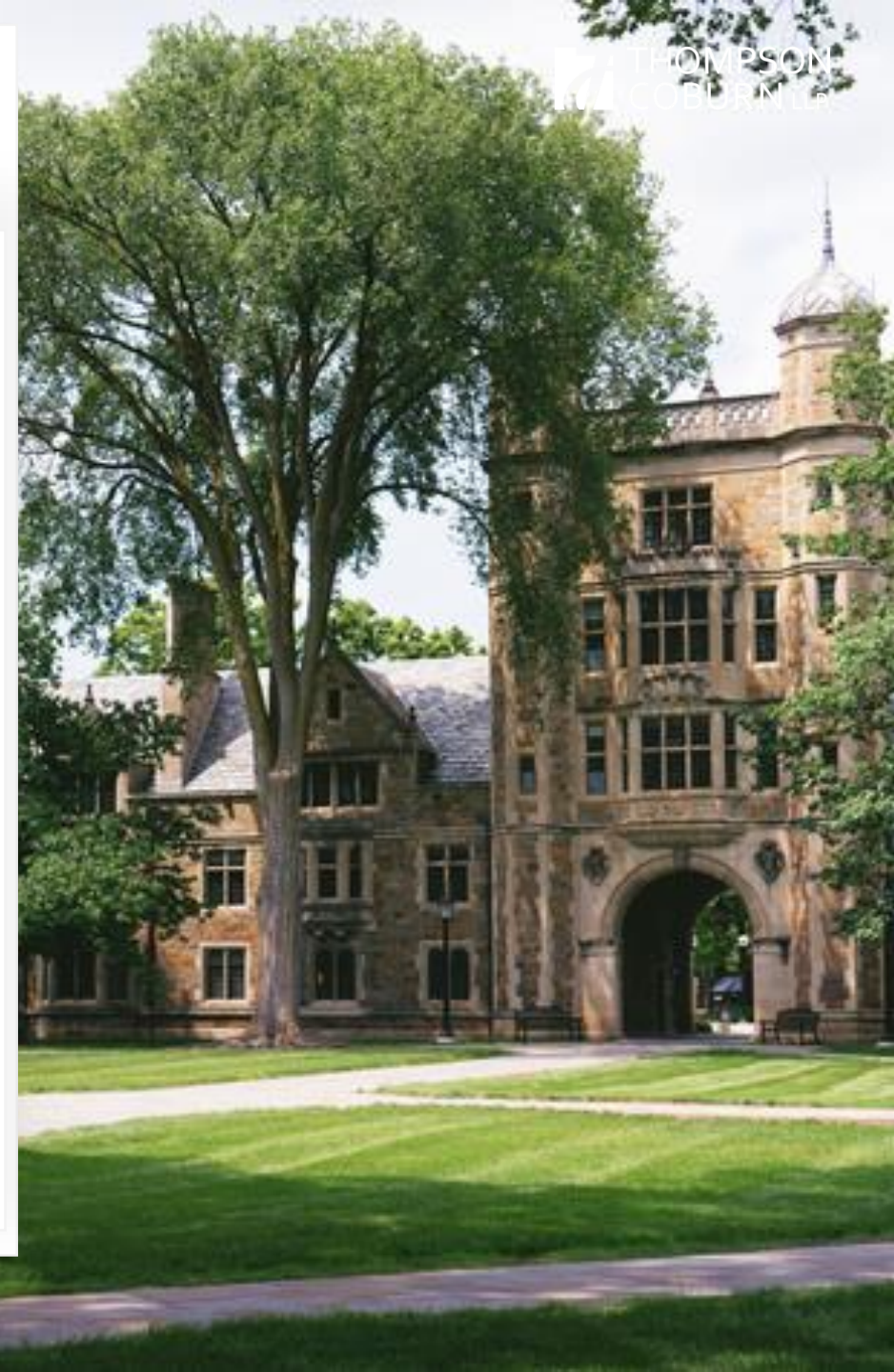
# Higher Ed Webinar Series

## 2019 | 2020 Series Calendar

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



If you would like to register for our webinars, email [srichter@thompsoncoburn.com](mailto:srichter@thompsoncoburn.com) and we will send you a link as we open each webinar for registration.



# Webinars on Demand

## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

April 28, 2020 | [Register](#)

Better Together?  
Competition, Price Gouging  
and Other Antitrust Issues  
Raised by the COVID-19  
Pandemic

April 21, 2020 | [Register](#)

The CARES Act for Higher  
Education: Strategy and  
Implementation

April 20, 2020 | [Register](#)

Law and Order in the Time of  
COVID-19: Does EPA's  
Temporary Enforcement  
Policy Apply to Me?

April 17, 2020

State and Federal  
Implementation of Industrial  
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during  
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for  
Distressed Institutions of  
Higher Education

April 8, 2020 | [View Recording](#)

Higher Education &  
Immigration: Five Evolving  
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for  
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



# REGucation (our blog)

## REGUCATION

(By accessing, browsing or using the pages below, you agree to the Blog Conditions of Use/Disclaimer available under "Links.")

SUBSCRIBE TO THIS BLOG

### LINKS

- [About](#)
- [Conditions of Use/Disclaimers](#)
- [REGucation RSS](#)
- [Student Litigation](#)
- [Higher Education](#)
- [Follow on Twitter](#)

### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### The CARES Act: More options for higher education

[▲ Aaron Lacey](#) [▲ Christopher Murray](#) [▲ Scott Goldschmidt](#) April 3, 2020



This is a brief overview of provisions of the CARES Act that, while not designed specifically for higher education, are nonetheless relevant to institutions in their roles as businesses and employers, and which may provide opportunities for economic relief. [READ MORE](#)

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

[▲ Scott Goldschmidt](#) [▲ Aaron Lacey](#) [▲ Christopher Murray](#) March 27, 2020



In this article, we provide a brief overview of the provisions of the CARES Act that most directly concern institutions of higher education and their borrowers. In some cases, the statutory language contemplates extraordinary waivers, assistance, and accommodations, with very little detail regarding when and how such relief will become



# TC Extra Credit



REGucation ALERT



## REGucation

Regulatory & Policy Insights from the  
Thompson Coburn Higher Education Team



### ED issues instructions to Higher Ed to obtain CARES Act funds

Earlier this afternoon, the U.S. Department of Education sent a letter to institutional leaders detailing the process for securing the first round of relief funds under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. The Department has included a breakdown of the funds each institution will receive under the Higher Education Emergency Relief Fund, as well as a Certificate of Agreement that must be completed.

[Learn More](#)

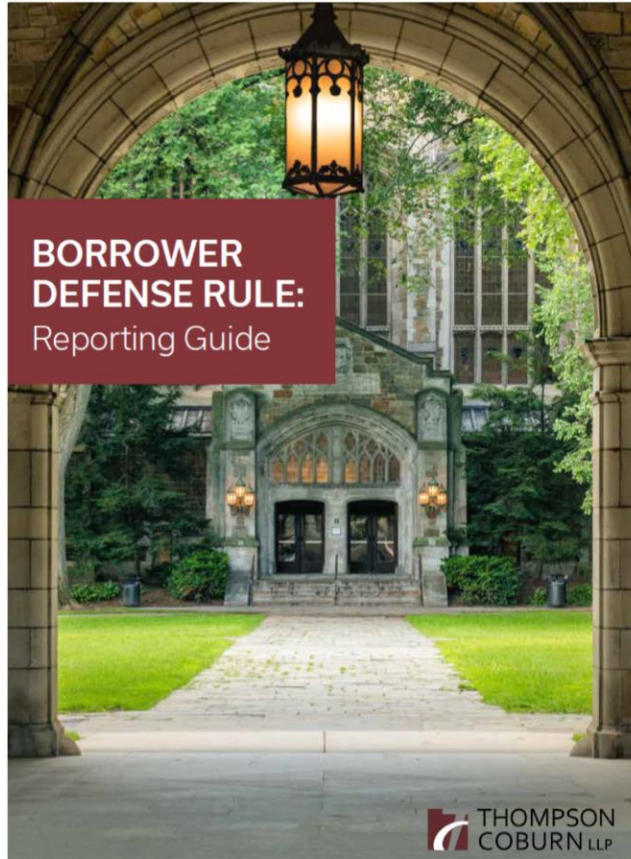


#### Aaron Lacey

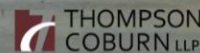
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



## BORROWER DEFENSE RULE: Reporting Guide



# Presenters



# 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

- [bshaw@thompsoncoburn.com](mailto:bshaw@thompsoncoburn.com) | 314-552-6087



# 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](mailto:sgoldschmidt@thompsoncoburn.com) | 314-552-6405



# 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](mailto:alacey@thompsoncoburn.com) | 314-552-6405



# Disclaimer



# Conditions of Use and Disclaimer

Please note that the purpose of this presentation is to provide news and information on legal issues and all content provided is for informational purposes only and should not be considered legal advice.

The transmission of information from this presentation does not establish an attorney-client relationship with the participant. The participant should not act on the information contained in this presentation or any accompanying materials without first consulting retained legal counsel.

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

