



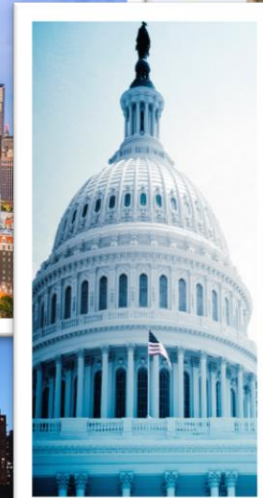
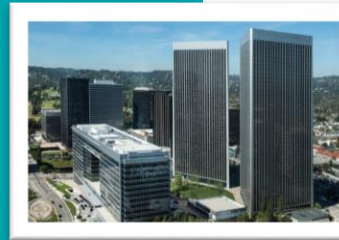
Formal Complaints of Title IX Sexual Harassment

Thompson Coburn LLP
Title IX Training Series | July 2020



Thompson Coburn LLP

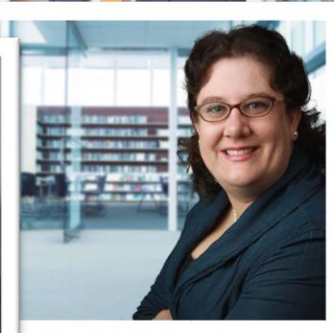
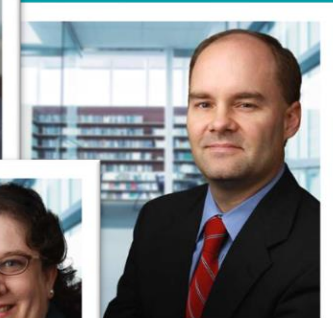
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- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Higher Education Practice



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Purpose of Training Series

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

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



Use of Training Series

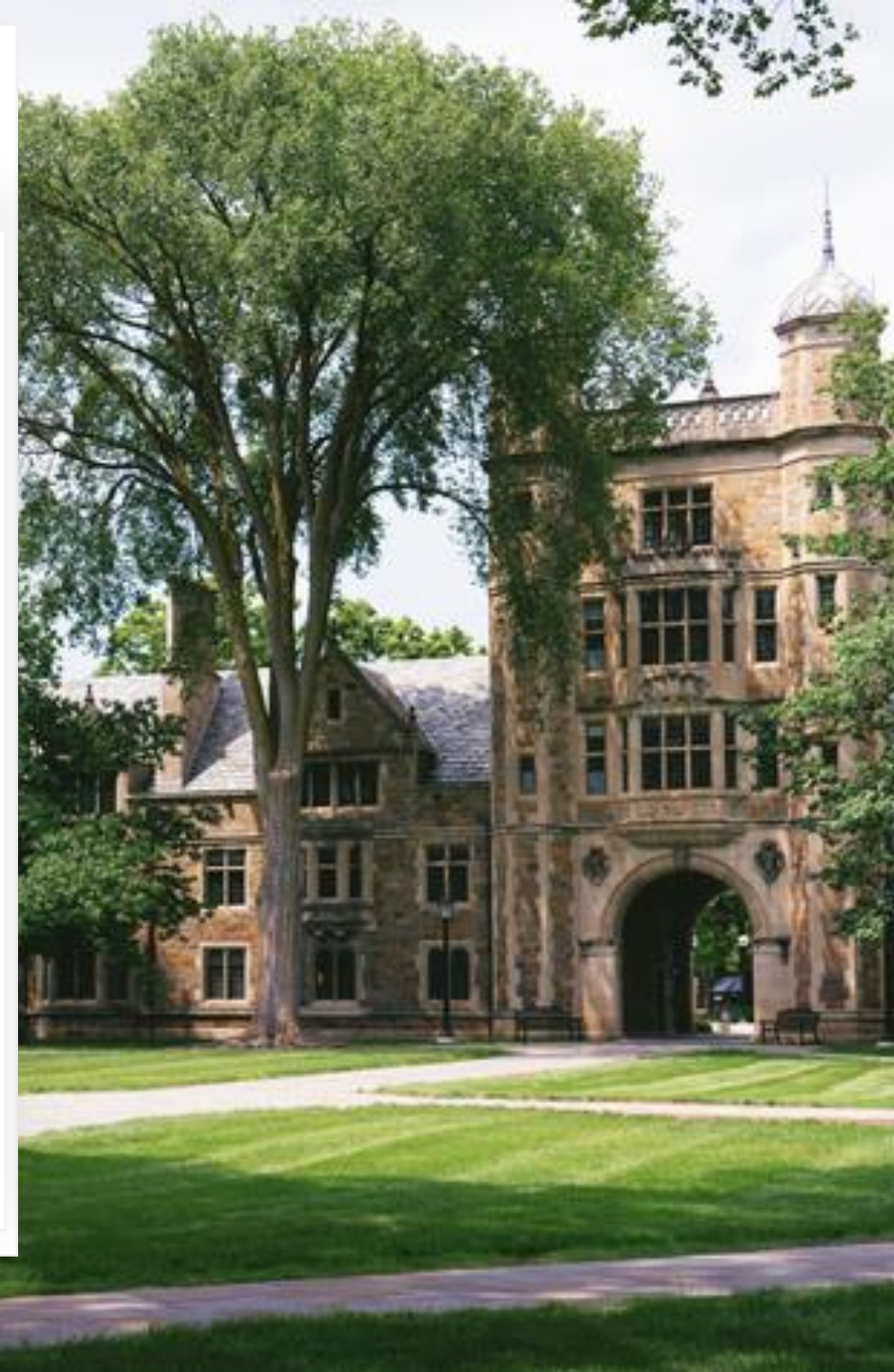
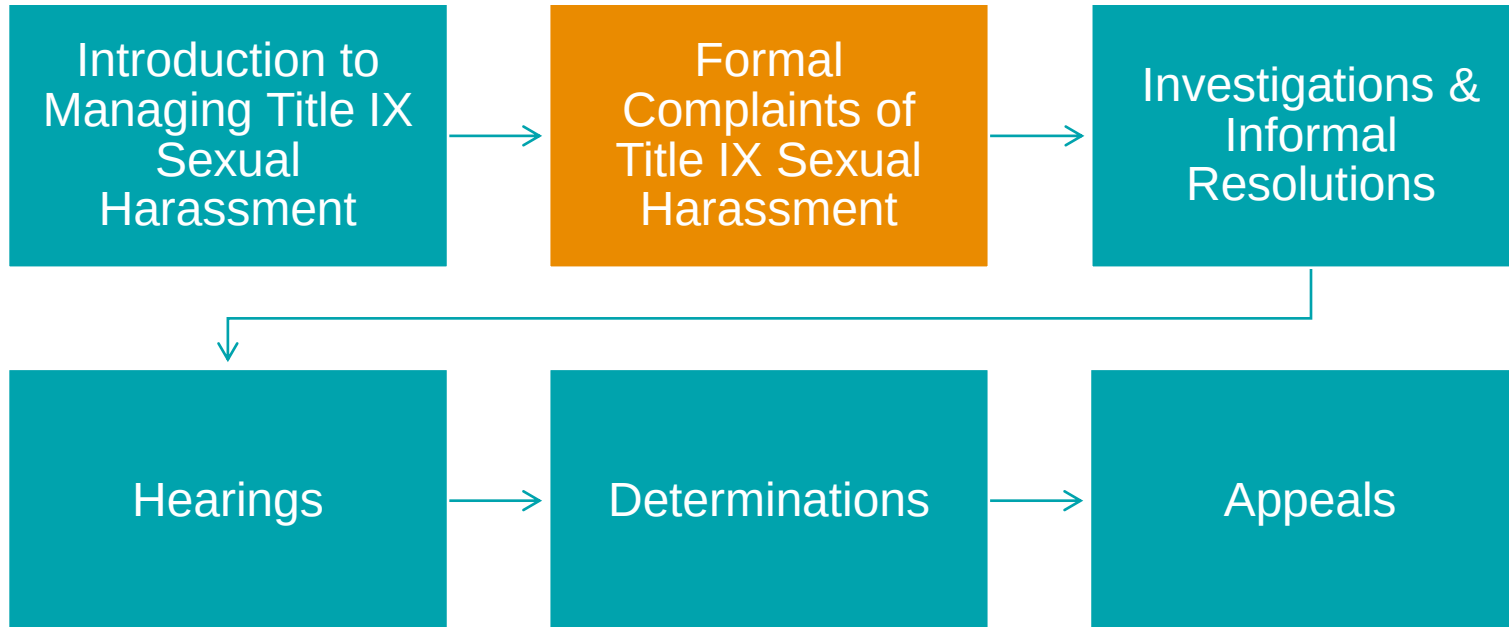
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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.

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The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

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

The Formal Complaint Framework

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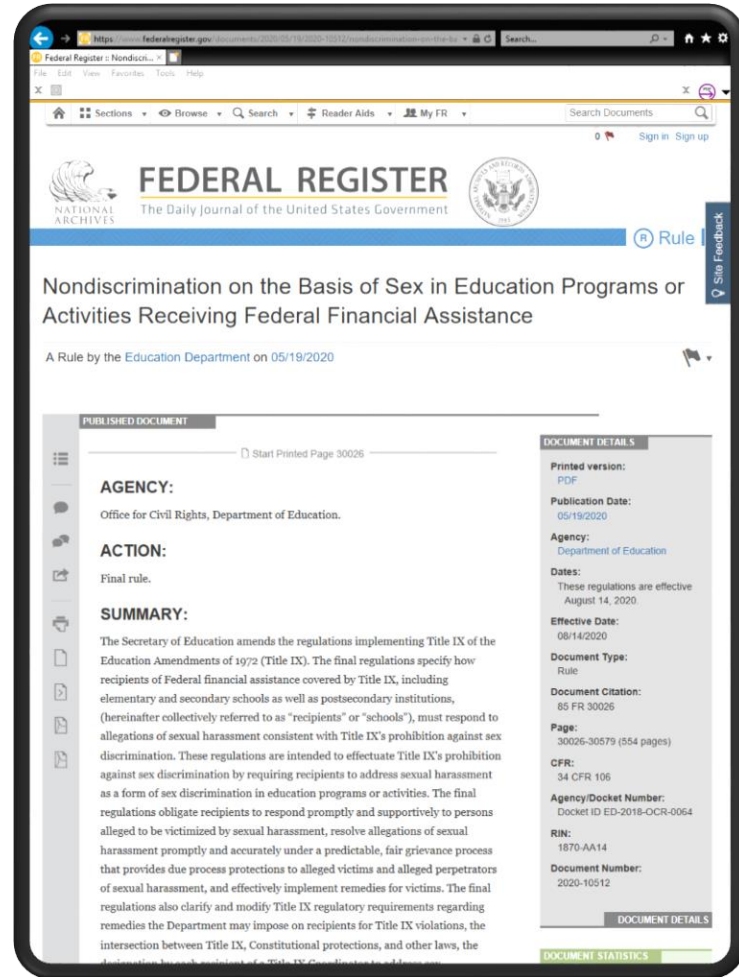
Dismissal of Formal Complaints

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

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The Big Picture

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

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

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

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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

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Formal Complaint Process

Core Requirements	• Details 10 core requirements of formal complaint process
Complaint Dismissal	• Grounds for dismissal and procedural requirements
Consolidation	• Complaint consolidation in specific circumstances
Notice of Allegations	• Requirements for initial and ongoing notice to parties
Investigations	• 7 required elements of formal investigation
Informal Resolutions	• Permits informal resolution where appropriate
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

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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

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Dismissal of Formal Complaints

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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

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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

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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

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3. Training of Key Participants

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

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

Investigators

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

Adjudicators

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

The Formal Complaint Framework

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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

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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

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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...”

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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.”

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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.

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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.

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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

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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

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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

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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

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Dismissal of Complaints

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

The Formal Complaint Framework

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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

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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

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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
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Resources



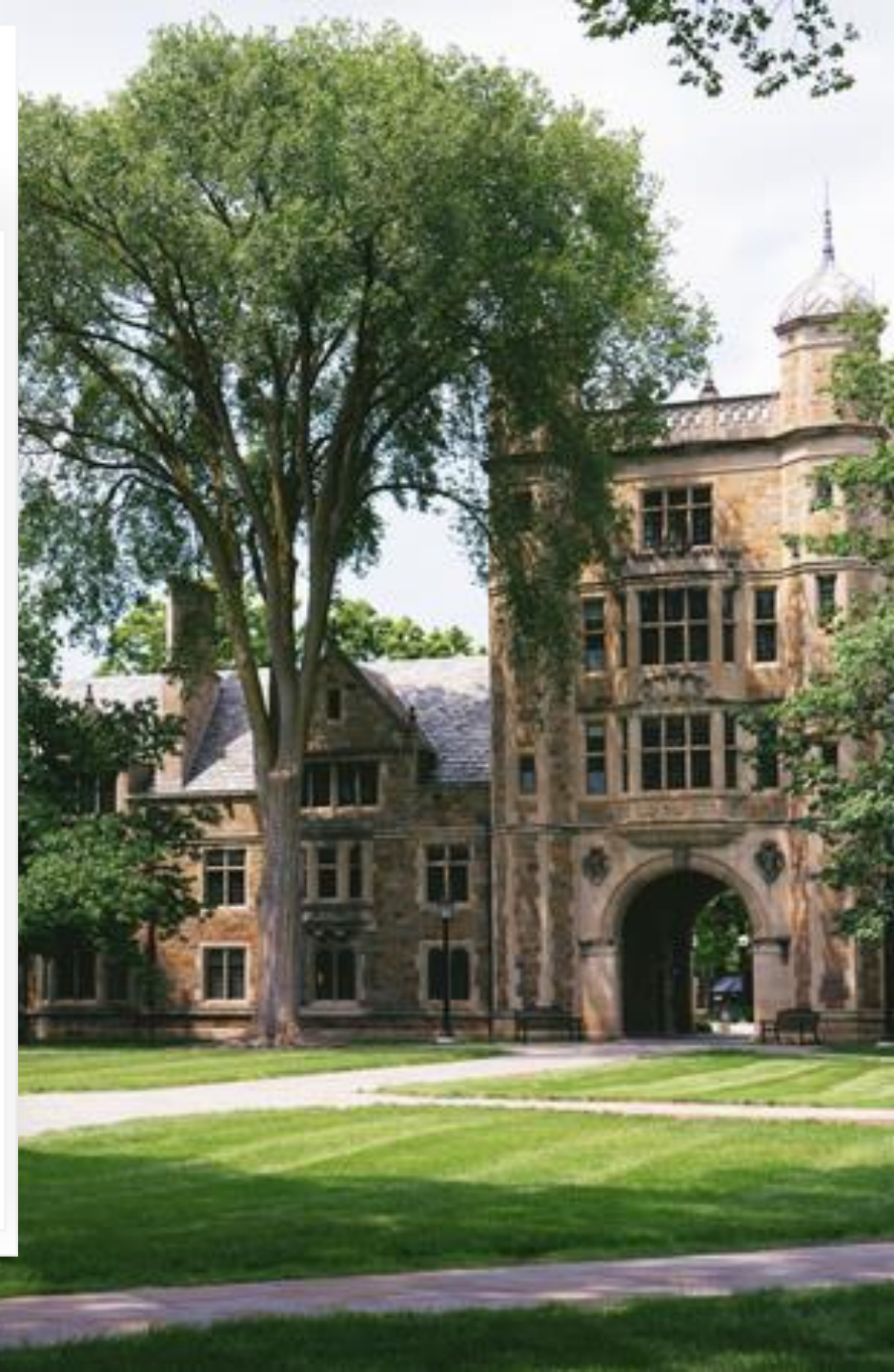
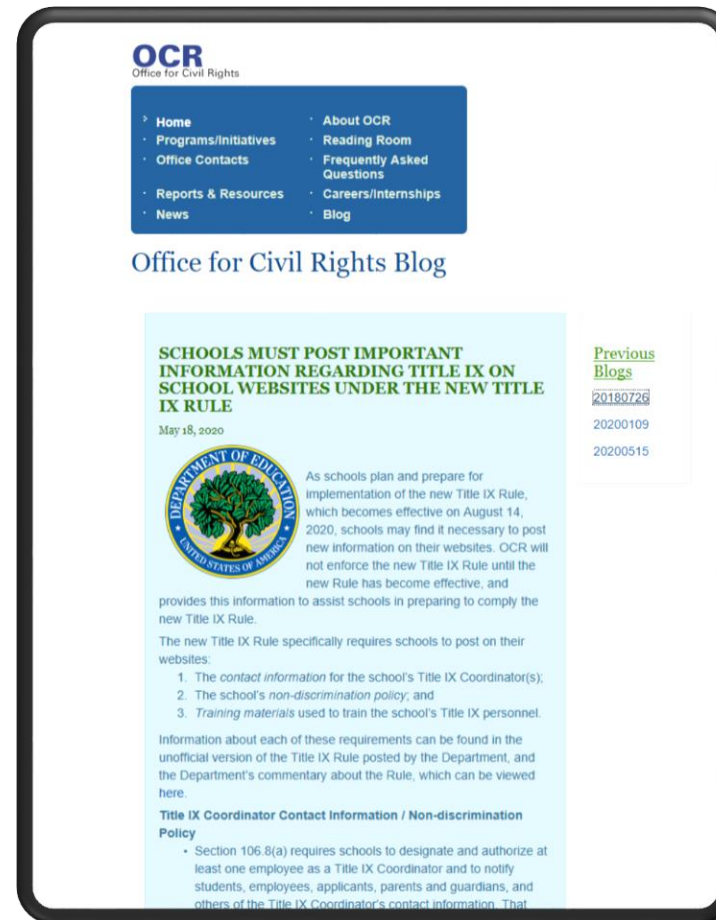
Office of Civil Rights

OCR Title IX Blog

- Will include new guidance on a rolling basis.

OCR Email Address

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



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. 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.

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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.

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Higher Ed Webinar Series

2019 | 2020 Series Calendar

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



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

Contingency Planning for
Distressed Institutions of
Higher Education

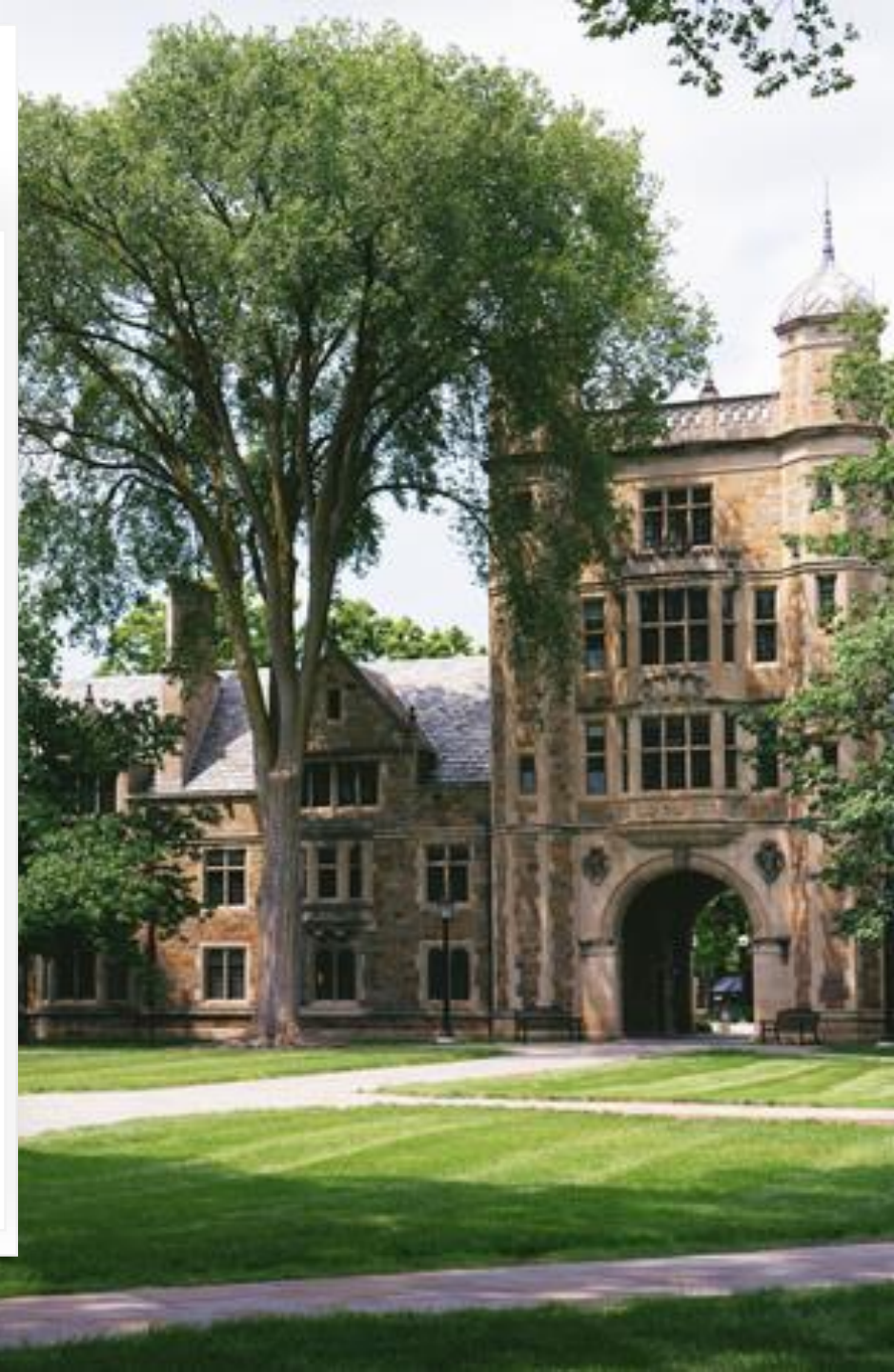
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Higher Education &
Immigration: Five Evolving
Areas to Watch

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

Using GDPR to Prepare for
CCPA, and Vice-Versa

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



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CONTRIBUTORS



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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](#)

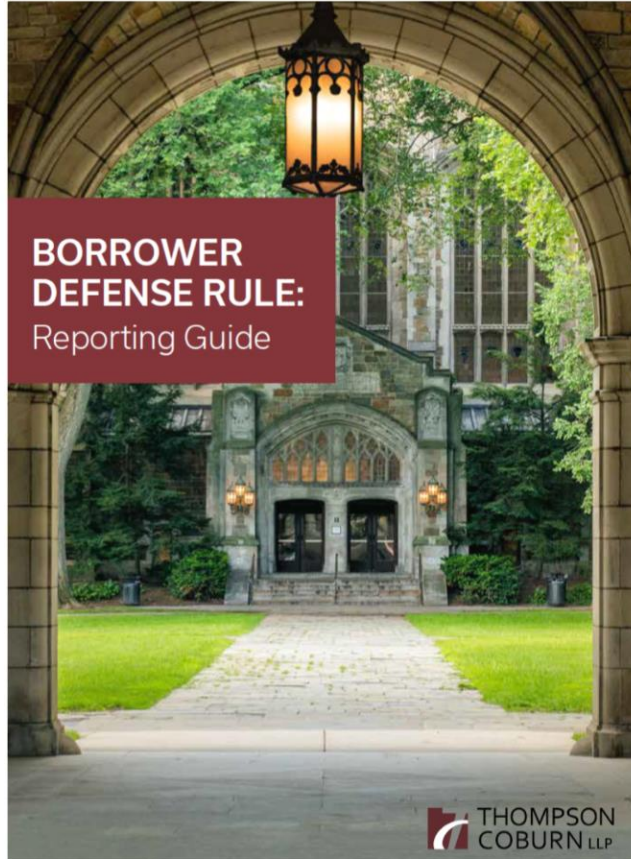


Aaron Lacey

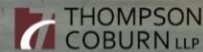
314 552 6405 direct

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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



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Practice and Experience

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

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

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