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.
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).
The foundational training series includes the following six sessions:

1. Introduction to Managing Title IX Sexual Harassment
2. Formal Complaints of Title IX Sexual Harassment
3. Investigations & Informal Resolutions
4. Hearings
5. Determinations
6. Appeals
## 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.

20 U.S.C. §1681 et seq.
The Title IX Regulations

Amplify the statute considerably, requiring institutions to:

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

34 CFR 106.8.
The New Title IX Rule

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

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

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

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34 CFR 106.45(b)(1)-(10) (August 14, 2020).
Key Concepts

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

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

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

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

What does it mean to objectively evaluate evidence?

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

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

• Legal privileges protect communications and documents from disclosure. Examples are:
  • Attorney – Client
  • Priest – Penitent
  • Doctor – Patient
  • Spousal
34 CFR 106.45(b)(5) (August 14, 2020).

**Key Concepts**

**Burden of Proof**
- Ensure burden of proof and burden of gathering evidence rests on the school not on the parties.

**Equal Opportunity**
- Provide equal opportunity for the parties to present fact and expert witnesses, and other inculpatory and exculpatory evidence.

**Restrictions**
- Refrain from restricting the parties’ ability to discuss the allegations or to gather and present relevant evidence.
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.
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.

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

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

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

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

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

34 CFR 106.71(a) (August 14, 2020).
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.
## Access to Evidence

<table>
<thead>
<tr>
<th>Generally</th>
<th>Prior to issuing investigative report</th>
<th>10 days prior to hearing or other determination</th>
<th>At and during any hearing</th>
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</thead>
<tbody>
<tr>
<td>• Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.</td>
<td>• Must send parties all evidence subject to inspection and review and afford at least 10 days to submit a written response.</td>
<td>• Must send investigative report to parties for review and written response.</td>
<td>• Must make all evidence available to parties’ and afford equal opportunity to review, including for purposes of cross-ex.</td>
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</tbody>
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### Formal Complaint Framework
- Notice of Allegations
- Confidentiality
- Access to Evidence
- Serving Impartially
- Issues of Relevance
- Interviews
- Credibility Determinations
- Collection & Review of Docs
- Writing Investigative Reports
- Informal Resolution

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

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

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

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

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.”

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.

<table>
<thead>
<tr>
<th>Formal Complaint Framework</th>
</tr>
</thead>
<tbody>
<tr>
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</tr>
<tr>
<td>Notice of Allegations</td>
</tr>
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</tr>
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</tr>
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</tr>
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</tr>
<tr>
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</tr>
<tr>
<td>Credibility Determinations</td>
</tr>
<tr>
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</tr>
<tr>
<td>Writing Investigative Reports</td>
</tr>
<tr>
<td>Informal Resolution</td>
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Collection & Review of Documentation

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

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

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

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

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

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

• Shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020.
## Higher Ed Webinar Series

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

If you would like to register for our webinars, email 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**<br>April 28, 2020 | **Better Together? Competition, Price Gouging and Other Antitrust Issues Raised by the COVID-19 Pandemic**<br>April 21, 2020 | **The CARES Act for Higher Education: Strategy and Implementation**<br>April 20, 2020 |
| **Law and Order in the Time of COVID-19: Does EPA’s Temporary Enforcement Policy Apply to Me?**<br>April 17, 2020 | **State and Federal Implementation of Industrial Hemp Laws**<br>April 16, 2020 | **Navigating HR Issues during the COVID-19 Emergency**<br>April 15, 2020 |
| **Contingency Planning for Distressed Institutions of Higher Education**<br>April 8, 2020 | **Higher Education & Immigration: Five Evolving Areas to Watch**<br>March 12, 2020 | **Using GDPR to Prepare for CCPA, and Vice-Versa**<br>March 11, 2020 |
The CARES Act: More options for higher education

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

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
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 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.
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 | 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 | 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 | 314-552-6405
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