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.
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.
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:

- Introduction to Managing Title IX Sexual Harassment
- Formal Complaints of Title IX Sexual Harassment
- Investigations & Informal Resolutions
- Hearings
- Determinations
- Appeals
**Syllabus for this Session**

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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
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.

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).
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.

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

Procedures and permissible bases for appeal.

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

Logistics
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.
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.
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% change that a fact or claim is true?
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?
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?
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.
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.
Writing a Defensible Determination
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.
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

2019 | 2020 Series Calendar

**August 2019**  
Examining the ED Approval Process for Higher Ed Mergers and Acquisitions

**September 2019**  
Colleges Held for Ransom: Responding to a Ransomware Attack

**October 2019**  
Merging Institutions of Higher Education: Corporate and Tax Considerations

**December 2019**  
A Year-End Roundup of ED Rulemaking Activity

**February 2020**  
Recent Court Decisions in Student Disputes That You Should Know About

**March 2020**  
Higher Education & Immigration: Five Evolving Areas to Watch

**April 2020**  
The CARES Act for Higher Education: Strategy and Implementation

**May 2020**  
ED’s New Title IX Rule: A Detailed Examination

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

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| Overview of Loss Limitations; Family Office Partnership; Sale to Spousal Grantor Trust | April 28, 2020 | Register |

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THOMPSON COBURN LLP
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

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• Experienced and trusted employment law advisor who counsels employers at every stage of a personnel-related issue.  
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Professional Profile

Scott Goldschmidt
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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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Professional Profile

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

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