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

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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).
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

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
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.
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.
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

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

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

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.

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.
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.
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.
Requirements for Appeal Officers

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

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

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

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

Last Updated: May 30, 2020

On May 15, 2019, 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 preventing incidents of sex discrimination, sets new 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 showing changes to USD Title IX Rule Effective August 14, 2020. We have created this document by comparing the existing rules to the changes as set forth in the Federal Register, regulations.

Institutions with questions regarding the new Title IX rule are welcome to contact Karen Casey at (314) 924-0485 or kcasey@thompsoncoburn.com. Jamie Lauer is the leader of Thompson Coburn’s Higher Education Practice, head of the firm’s Private Higher Education Webinar Series and editorial director of CollegeNotes, the firm’s higher education law and policy blog.

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Please note that the purpose of this document is to provide information on a regulatory matter and is not intended to provide a non-technical, non-legal analysis or advice. The information contained herein is not intended to be a comprehensive, authoritative or legal analysis of the document. 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 reflect Title IX of the Education Amendments of 1972, as amended by Pub. L. 95-558, 90 Stat. 1973 (except sections 904 and 908 of those Amendments which is designed to eliminate both sex's concern discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is afforded or sponsored by an educational institution as defined in this part. This part is also intended to reflect section 504 of the Rehabilitation Amendments of 1974, Pub. L. 93-172, 88 Stat. 484. The effective date of this part shall be July 23, 1979.

§106.2 Definitions

As used in this part, the term—


(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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# Webinars on Demand

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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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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

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.

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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

Aaron Lacey
• Partner and Chair, Higher Education Practice

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

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