

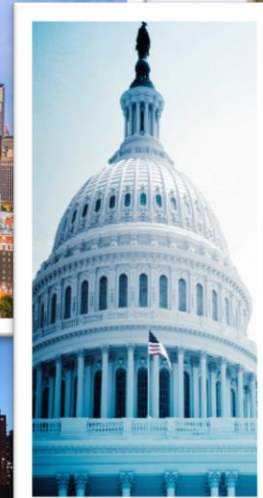
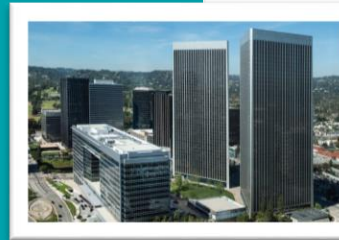


Title IX Investigations & Informal Resolutions

Thompson Coburn LLP
Title IX Training Series | July 2020

Thompson Coburn LLP

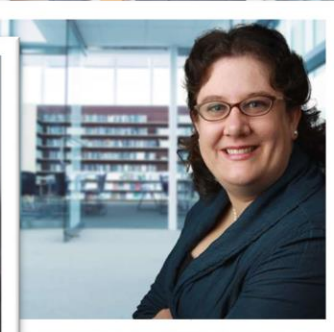
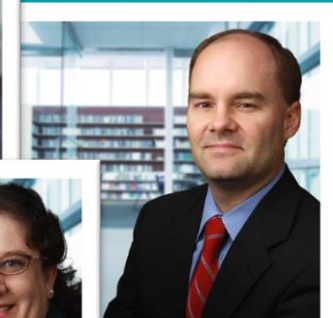
- Full-service law firm with over 380 attorneys.
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- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Higher Education Practice



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Practice Chair
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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

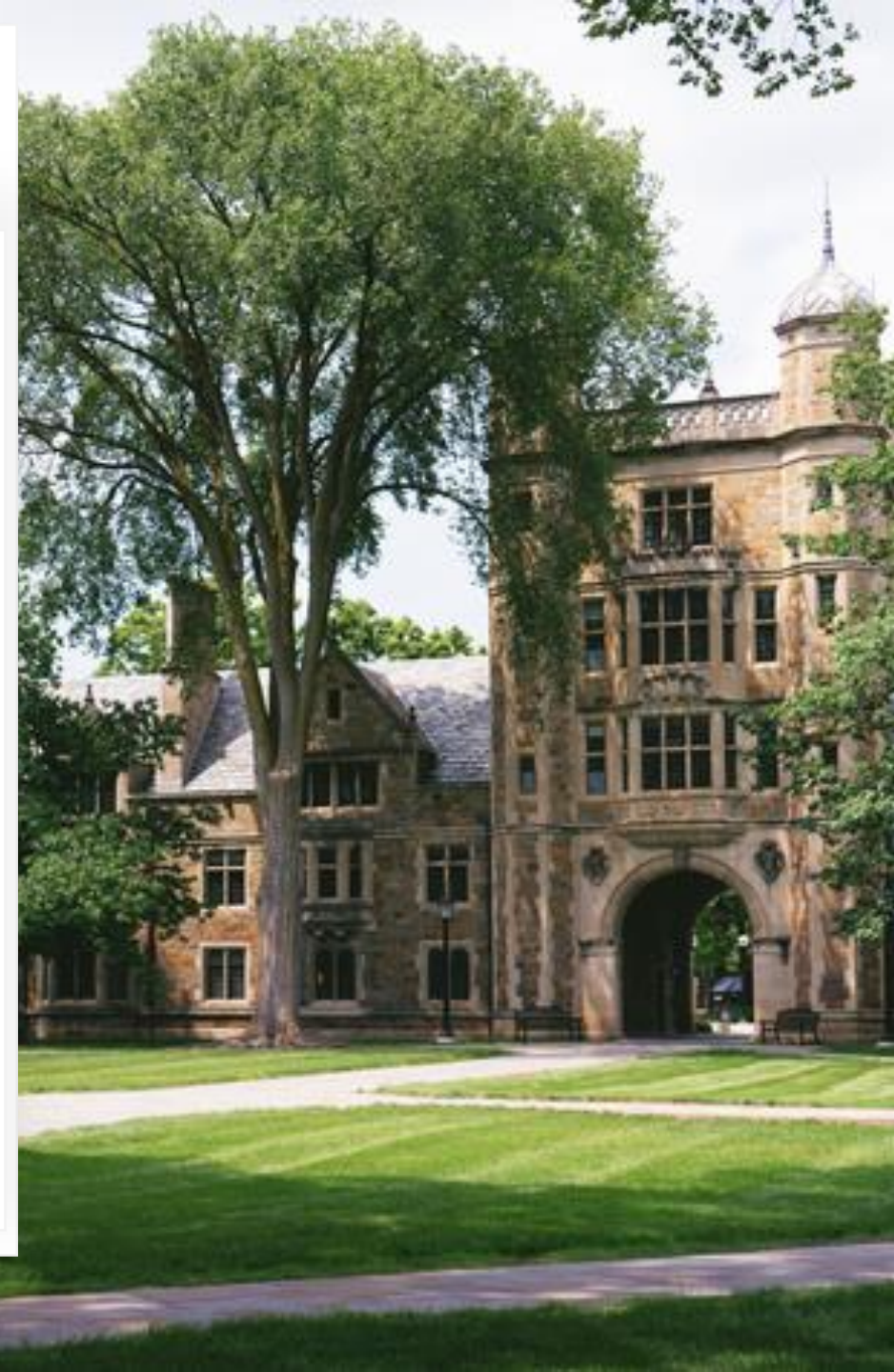
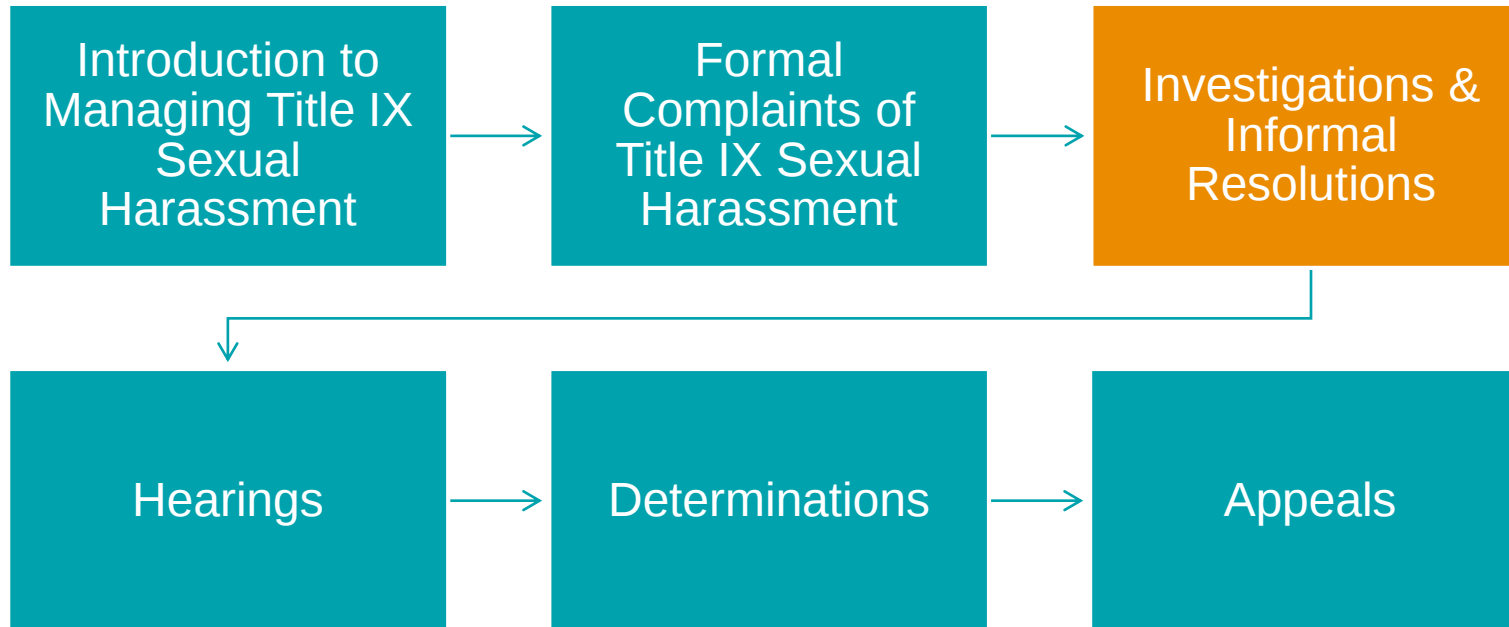
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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

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Access to Evidence

Serving Impartially

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Interviews

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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.

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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**.

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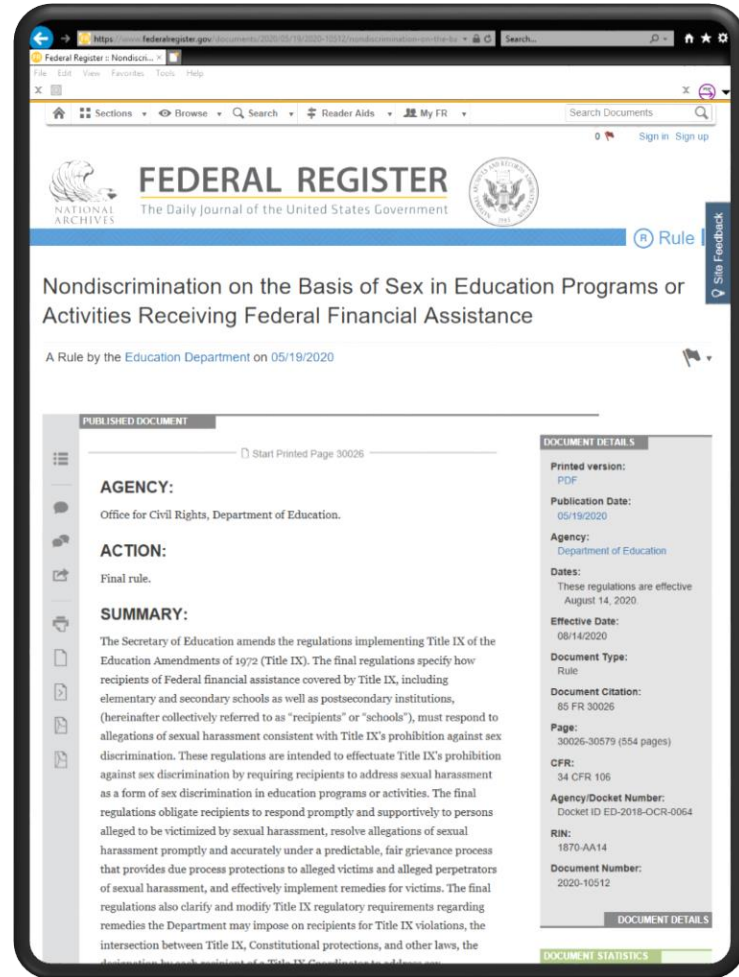
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The New Title IX Rule

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.



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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.

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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

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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.

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- ❖ 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.

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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

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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.

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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.

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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.

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- 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.

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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.

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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.

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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.

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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.

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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.

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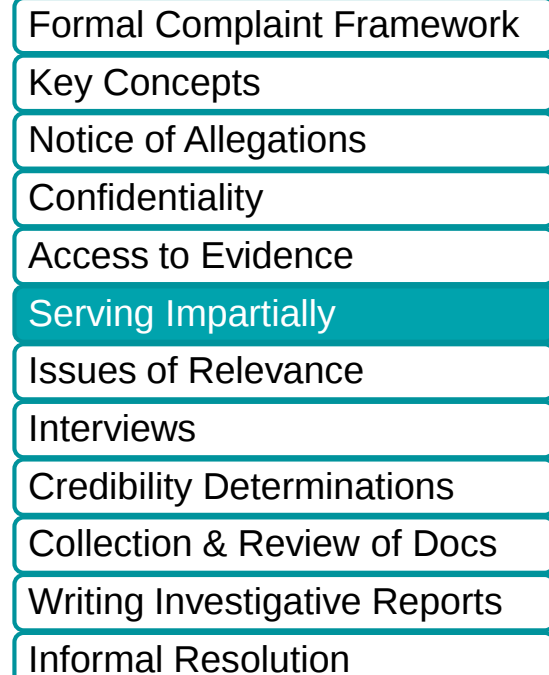
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What is inculpatory and exculpatory evidence?

- **Inculpatory evidence** shows or tends to show respondent's responsibility.
- **Exculpatory evidence** shows or tends to show the respondent is not responsible.



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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.

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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.

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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

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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.

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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.

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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.”

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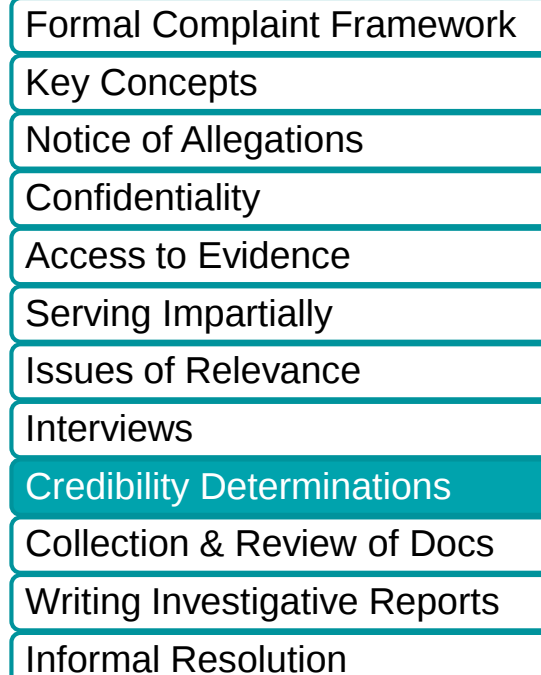
Credibility Determinations



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."



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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.

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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.

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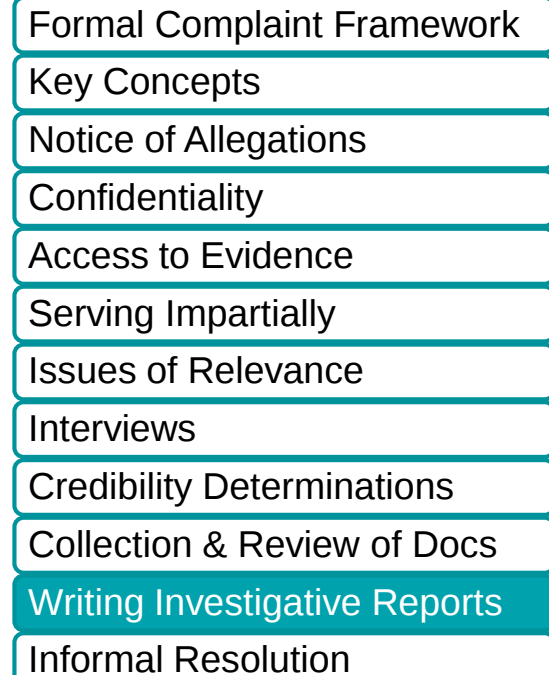
Writing Investigative Reports



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.”



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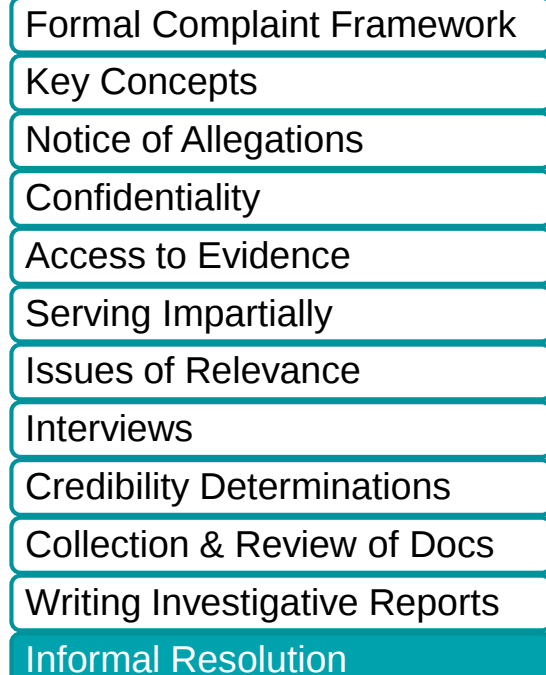
Informal Resolution



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.



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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:

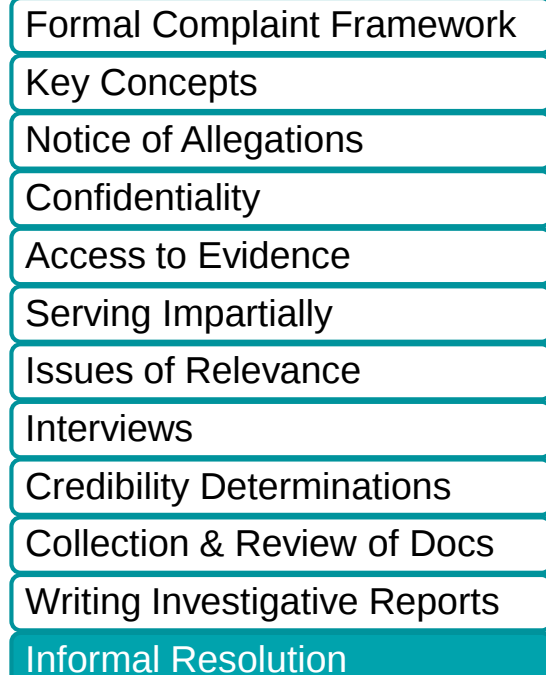
- provides the parties a written notice disclosing (1) the allegations, (2) the requirements of the informal resolution process (3) the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts, and (3) any other consequences of participating in the informal resolution process, (4) the records that will be maintained or could be shared;
- obtains the parties' voluntary, written consent to the informal resolution.

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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.



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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.

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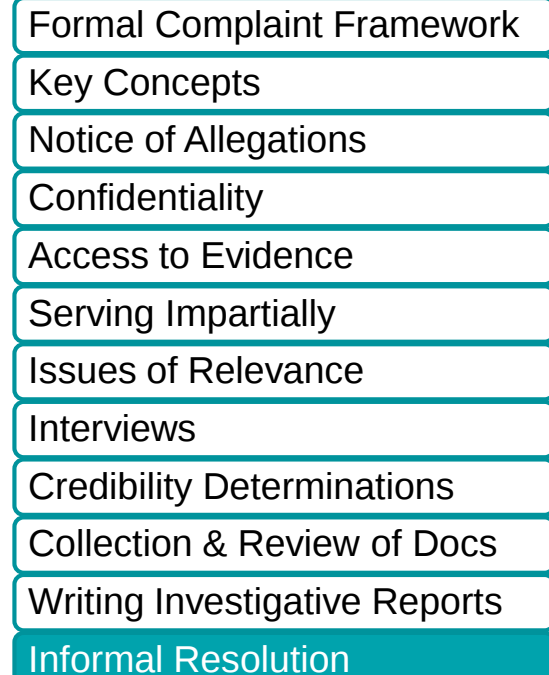
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What are best practices for facilitating informal resolution?

- 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.



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Resources



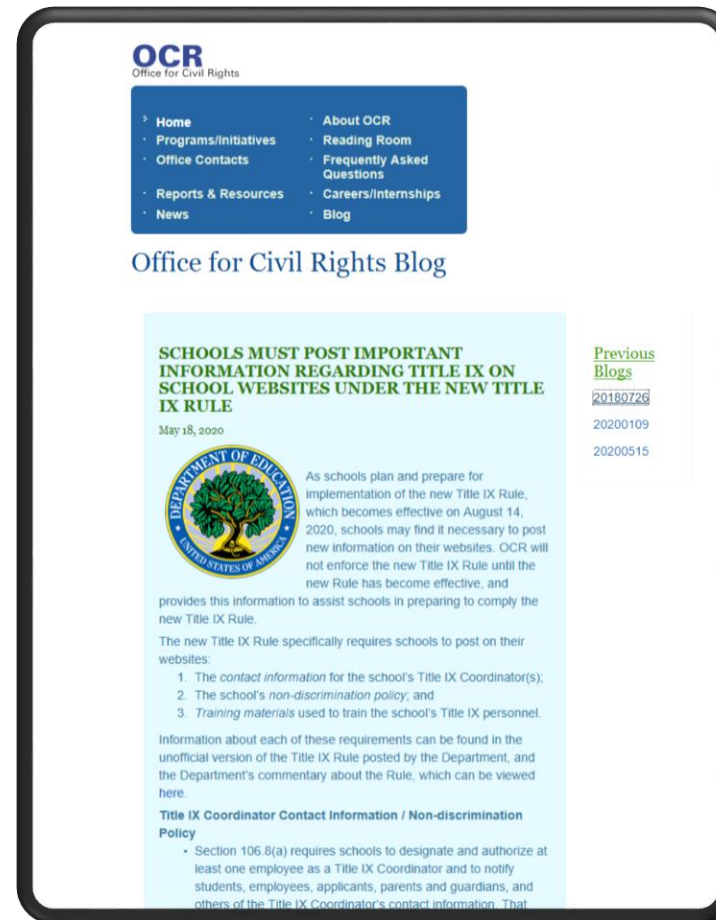
Office of Civil Rights

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.

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:

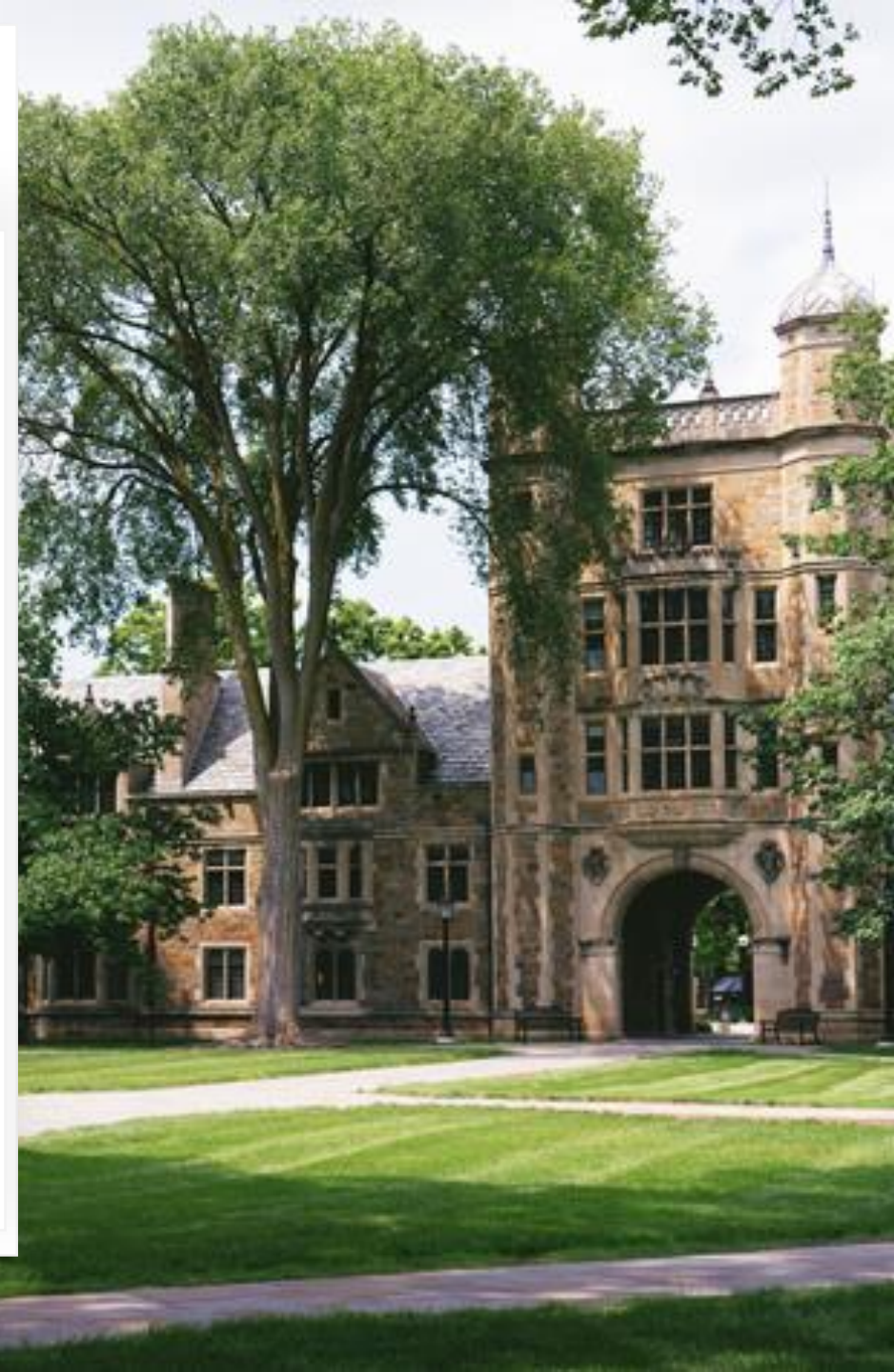
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(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.

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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>
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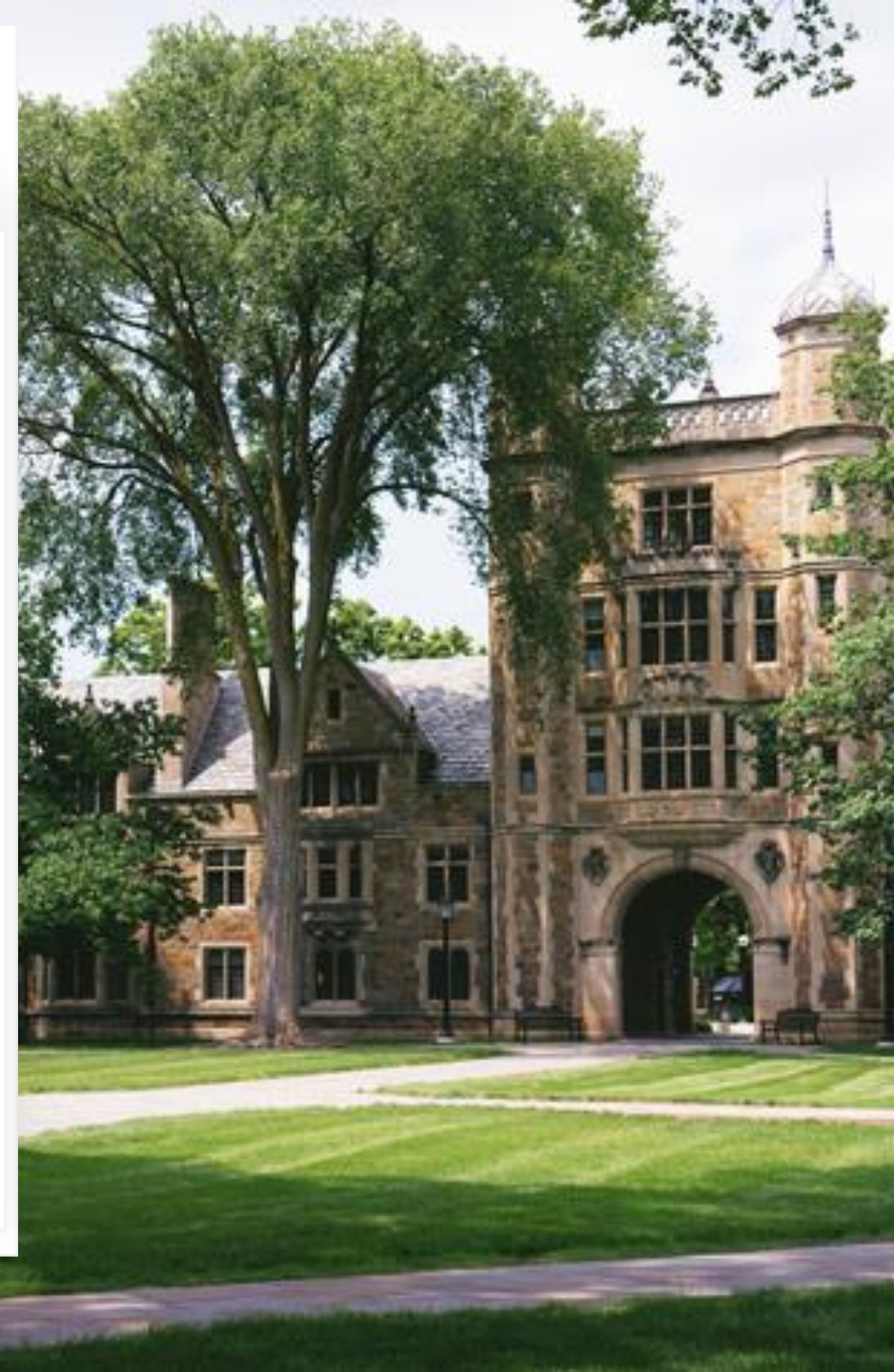
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The CARES Act: More options for higher education

 [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](#)

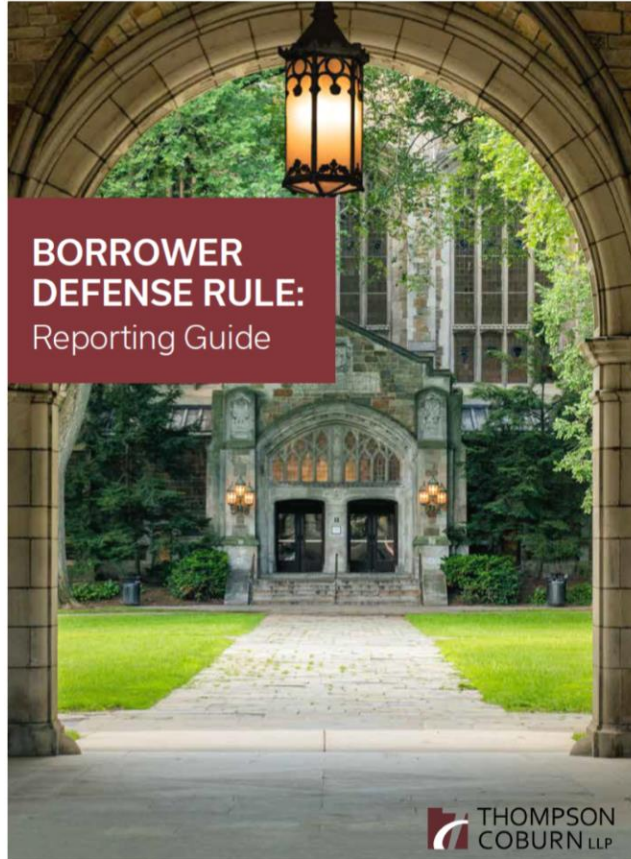


Aaron Lacey

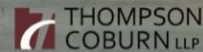
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Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



BORROWER DEFENSE RULE: Reporting Guide



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