

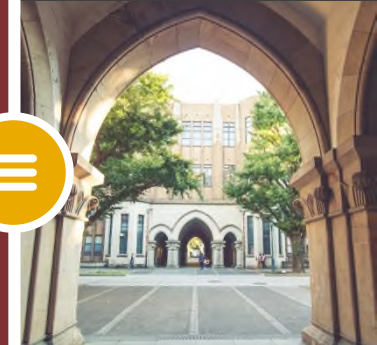
# ED's New Title IX Rule: A Detailed Examination

 THOMPSON  
COBURN LLP



May 20, 2020  
Higher Education Webinar

# Housekeeping



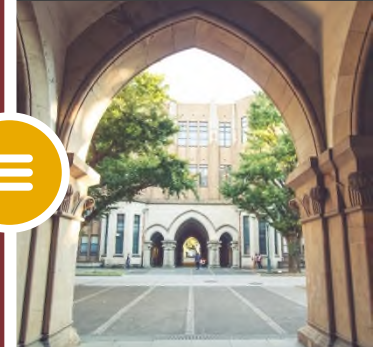
● The Q&A Widget

● The Resource Widget

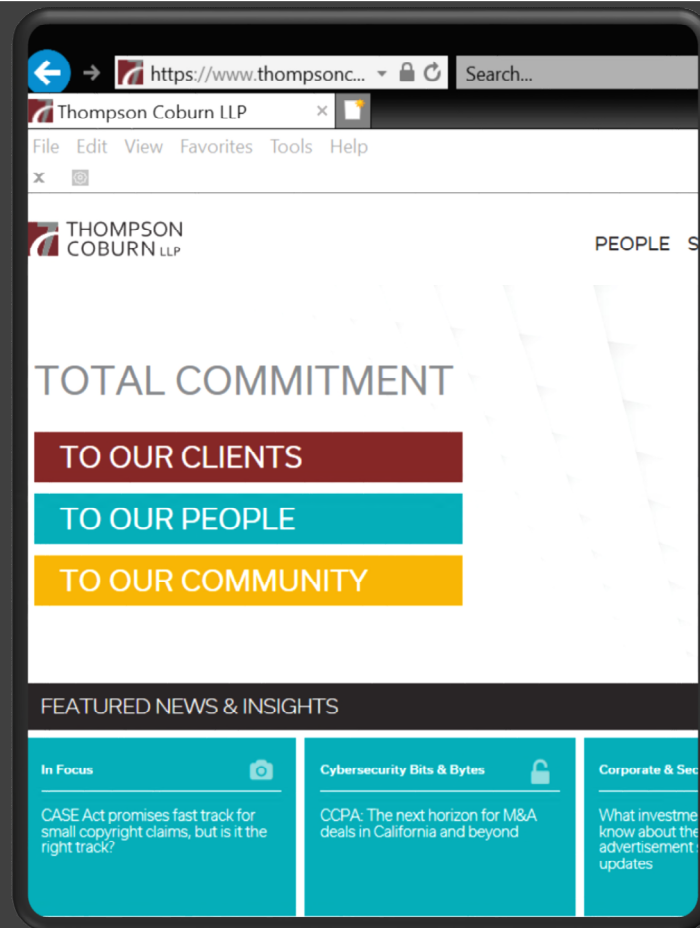
● The Help Widget

● Post-Webinar Survey

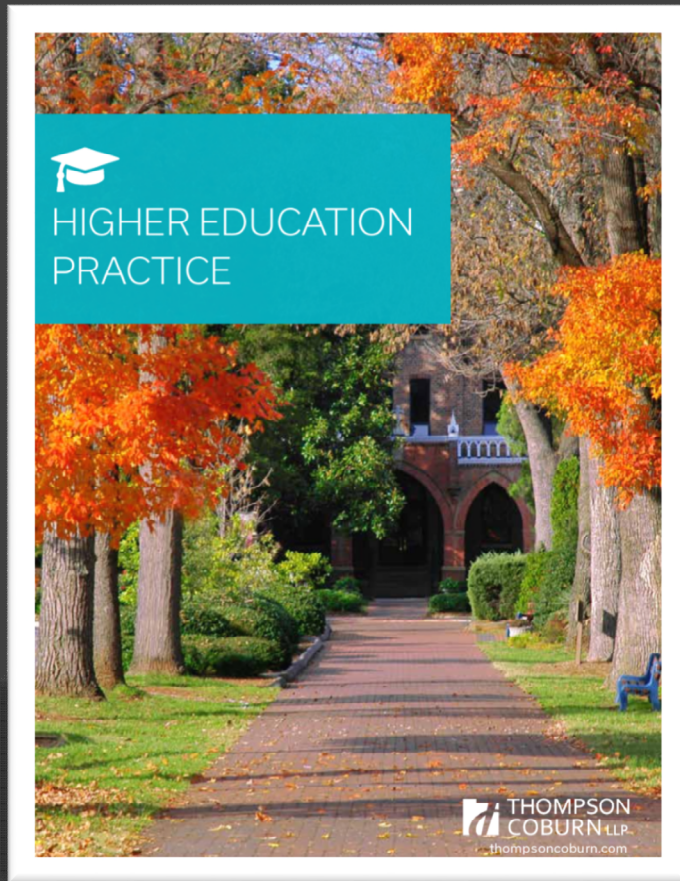
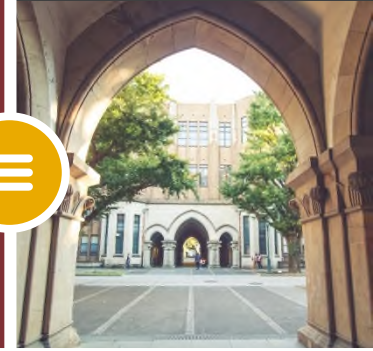
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# Higher Education Practice



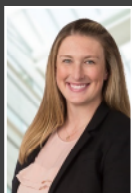
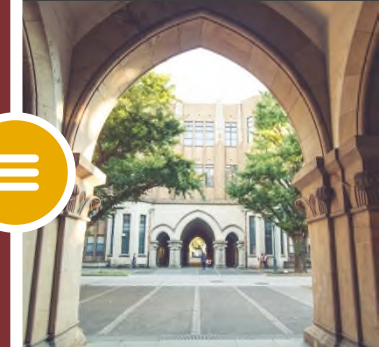
Aaron D. Lacey

Practice Leader

Host, Higher Ed Webinar Series

[alacey@thompsoncoburn.com](mailto:alacey@thompsoncoburn.com) | 314-552-6405

# Higher Education Practice



**Katie Wendel**  
Higher Education  
Regulation & Policy



**Scott Goldschmidt**  
Higher Education  
Regulation & Policy



**Emily Murphy**  
Postsecondary Mergers &  
Acquisitions



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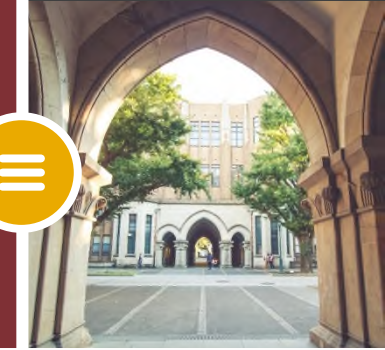


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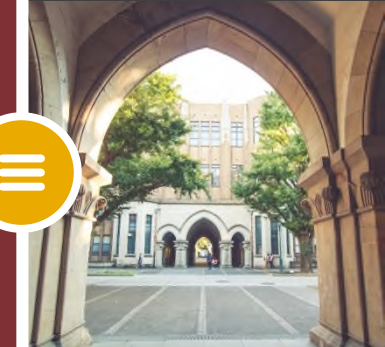
## 2019 | 2020 Series Calendar

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



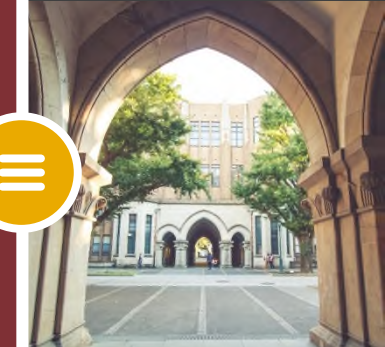
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# Speaker Introduction



- Aaron Lacey
  - Partner and Practice Leader, 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**.
  - Graduate of Duke University and the Vanderbilt University School of Law.

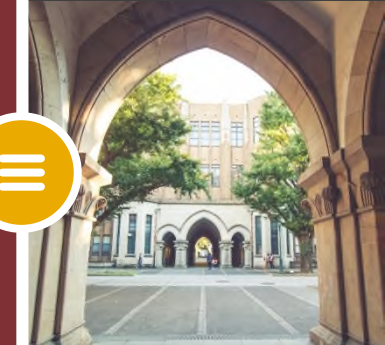
# Speaker Introduction



- 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.
  - Graduate of George Washington University and of the Catholic University of America Columbus School of Law.

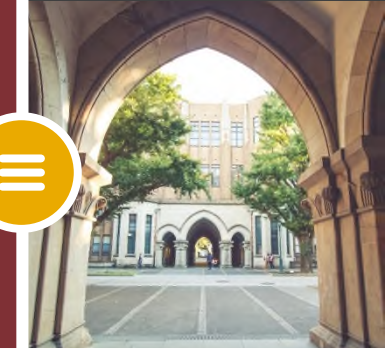


# Speaker Introduction

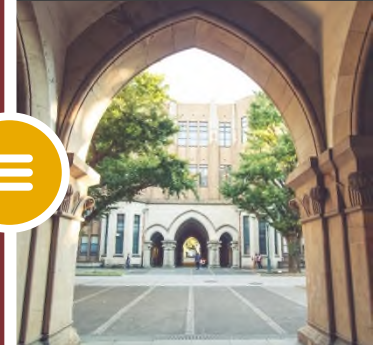


- Lesley Wynes
  - Director of Partner Recruiting and Integration
- Practice and Experience
  - Over a decade, served in senior leadership roles at Northwestern University's Kellogg School of Management and Pritzker School of Law.
  - While at Northwestern, served as Panelist and Advisor for the University's Hearing and Appeals System, in which capacity she routinely **adjudicated** matters involving allegations of **sexual misconduct**.
  - Graduate of University of Michigan and Harvard Law School.

# Presentation Overview



# Critical Resources



- OCR Title IX Blog
  - Will include new guidance on a rolling basis.
- OCR Email Address
  - [OPEN@ed.gov](mailto:OPEN@ed.gov)
  - May be used for submitting inquiries regarding the new Title IX rule.


**OCR**  
Office for Civil Rights

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Office for Civil Rights Blog

**SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE**

May 18, 2020

 As schools plan and prepare for implementation of the new Title IX Rule, which becomes effective on August 14, 2020, schools may find it necessary to post new information on their websites. OCR will not enforce the new Title IX Rule until the new Rule has become effective, and provides this information to assist schools in preparing to comply with the new Title IX Rule.

The new Title IX Rule specifically requires schools to post on their websites:

1. The *contact information* for the school's Title IX Coordinator(s);
2. The school's *non-discrimination policy*; and
3. *Training materials* used to train the school's Title IX personnel.

Information about each of these requirements can be found in the unofficial version of the Title IX Rule posted by the Department, and the Department's commentary about the Rule, which can be viewed [here](#).

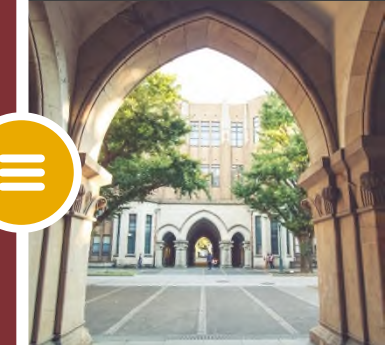
**Title IX Coordinator Contact Information / Non-discrimination Policy**

- Section 106.8(a) requires schools to designate and authorize at least one employee as a Title IX Coordinator and to notify students, employees, applicants, parents and guardians, and others of the Title IX Coordinator's contact information. That

[Previous Blogs](#)

- [20180726](#)
- [20200109](#)
- [20200515](#)

# Helpful Resource



- 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](mailto: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:

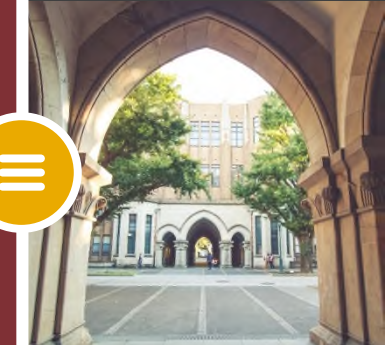
- Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.
- Department* means the Department of Education.
- Secretary* means the Secretary of Education.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

# Title IX Timeline

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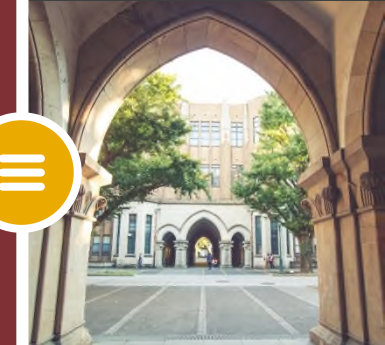


# Title IX Timeline



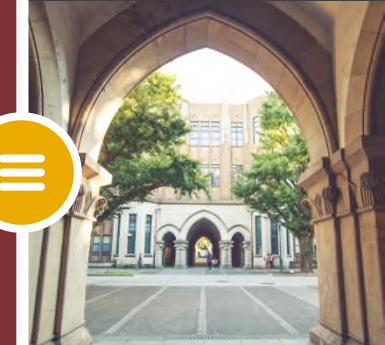
DATE	EVENT
June 23, 1972	<a href="#"><u>Title IX of the Education Amendments of 1972</u></a>
July 21, 1975	ED publishes <a href="#"><u>34 CFR Part 106</u></a> , which implements Title IX.
March 13, 1997	ED publishes <a href="#"><u>Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</u></a> .
June 22, 1998	<a href="#"><u>Gebser v. Lago Vista Ind. Sch. Dist.</u></a> , 524 U.S. 274 (1998) (holding that an individual may only recover monetary damages under Title IX when a school official with authority to institute corrective measures has actual notice of the harassment but is deliberately indifferent to it).
May 24, 1999	<a href="#"><u>Davis v. Monroe Cty. Bd. of Educ.</u></a> , 526 U.S. 629 (1999) (holding that a school can be liable under Title IX for student-on-student sexual harassment, but only if the school is <b>deliberately indifferent</b> to known sexual harassment, the respondent is under the school's disciplinary authority, and the behavior is so <b>severe, pervasive, and objectively offensive</b> that it denies access to the schools program and activities).

# Title IX Timeline



DATE	EVENT
Jan. 2001	Following significant judicial activity, ED publishes <a href="#">Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties</a> . ED draws <b>distinction</b> between standards for administrative enforcement and standards for private litigation for monetary damages.
Nov. 13, 2000	ED updates Title IX rules to incorporate the Civil Rights Restoration Act's broadened definitions of "program or activity" and "program."
Oct. 25, 2006	ED updates Title IX rules to clarify and modify requirements regarding single-sex schools, classes, and extracurricular activities in elementary and secondary schools.
April 2011	ED publishes <a href="#">DCL</a> with extensive guidance concerning school responsibilities for preventing and addressing sexual harassment and sexual violence.
April 2014	ED publishes <a href="#">Questions and Answers</a> on Title IX and Sexual Violence, further clarifying guidance articulated in 2001 Guidance and 2011 DCL.
May 2016	ED and DOJ issue joint <a href="#">DCL</a> regarding treatment of transgender students, accompanied by Examples of Policies and Emerging Practices for Supporting Transgender Students.

# Title IX Timeline



DATE	EVENT
Feb. 2017	ED publishes <a href="#">DCL</a> rescinding May 2016 DCL regarding treatment of transgender students.
Sept. 2017	ED publishes <a href="#">DCL</a> rescinding April 2011 DCL as well 2014 <a href="#">Q&amp;A</a> on Campus Sexual Misconduct.
Nov. 2018	On November 29, 2018, ED publishes the <a href="#">official version</a> of its proposed Title IX rule in the Federal Register. The first significant rule concerning sexual misconduct since 1975.
May 2020	On May 19, 2020, ED publishes the official version of its <a href="#">final Title IX rule</a> in the Federal Register.
August 14, 2020	<b>Effective Date</b> of new Title IX Rule.

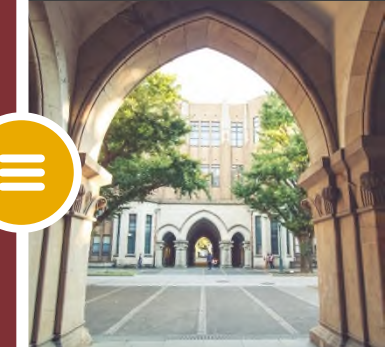


# Challenges & Delays

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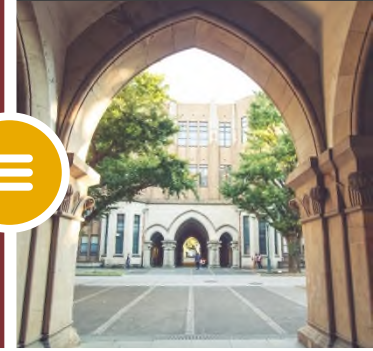


# Federal Legislative Activity



- Removal through federal legislative action
  - Stand-alone legislation
  - HEA Reauthorization
  - Congressional Review Act
    - Permits Congress to enact a “resolution of disapproval,” which if passed by both houses of Congress and signed by the President overturns any rule promulgated by a federal administrative agency, even in **already effective**.
    - Congress must act within **60 legislative days** of a final rule being reported to Congress (In 2017, a July 2016 rule was overturned using the CRA).
    - A new rule may not be issued in “substantially the same form” as the disapproved rule unless it is **specifically authorized by a subsequent law**.

# CRA Resource



- CRA: Frequently Asked Questions
  - Superb resource published by the **Congressional Review Service**
- Last updated January 2020



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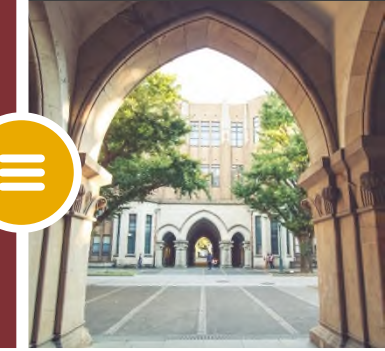
## The Congressional Review Act (CRA): Frequently Asked Questions

Updated January 14, 2020

Congressional Research Service  
<https://crsreports.congress.gov>  
R43992

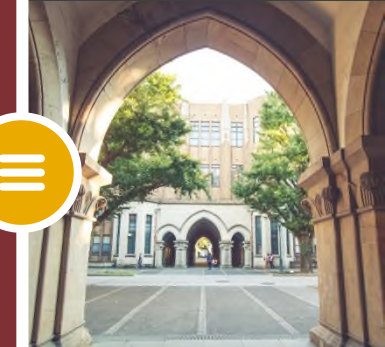
CRS REPORT  
Prepared for Members and  
Committees of Congress

# Regulatory & Judicial Activity



- Regulatory delays
  - Future administration could attempt to augment the impact of the rule through guidance, selective enforcement, or unofficial delay.
- Removal through subsequent rulemaking
  - Future administration also could modify or remove the rule through the rulemaking process.
- Legal challenge
  - Multiple legal challenges are highly likely, and possible ED would not defend all or some portion of the rule.

# State Legislative Activity



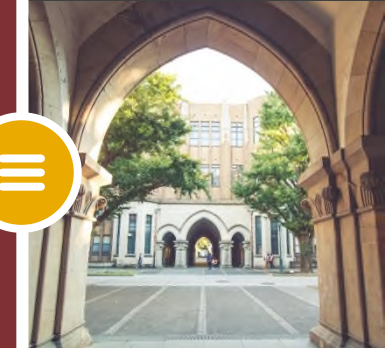
- State rulemakings
  - Highly likely that blue states will continue to enact statutes intended to advance Title IX policy introduced by Obama administration.
  - Institutions must comply with state requirements, in addition to the new Title IX rule.

# The New Compliance Framework

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# Compliance 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.

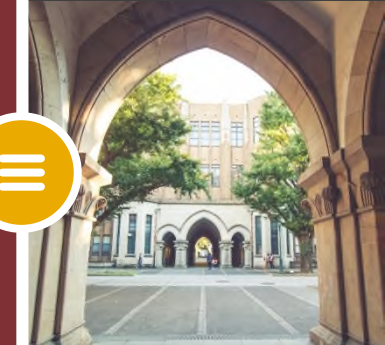
# New Definitions

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# Key Terms Defined



Sexual Harassment

Complainant

Respondent

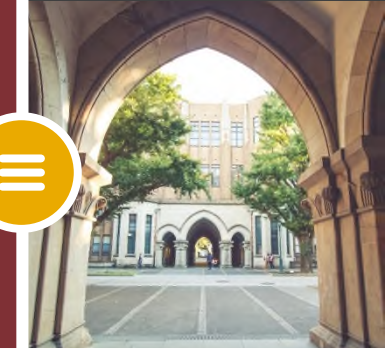
Consent

Actual Knowledge

Supportive Measures

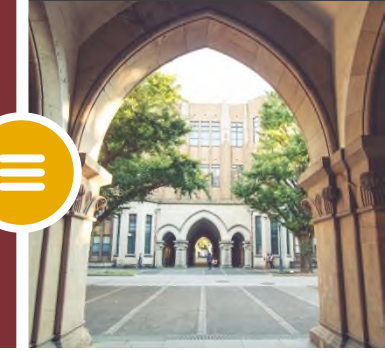
Formal Complaint

# Sexual Harassment



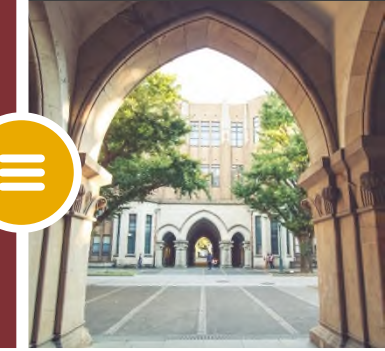
- **Sexual harassment** means conduct **on the basis of sex** that satisfies one or more of the following:
  - unwelcome conduct determined by a reasonable person to be so **severe, pervasive, and objectively offensive** that it effectively denies a person equal access to the school's **education program or activity**;
  - an employee of the school **conditioning** the provision of an aid, benefit, or service of the school on an individual's participation in unwelcome sexual conduct; **or**
  - sexual assault, dating violence, domestic violence, or stalking as those terms are defined in VAWA.

# Sexual Harassment: Commentary



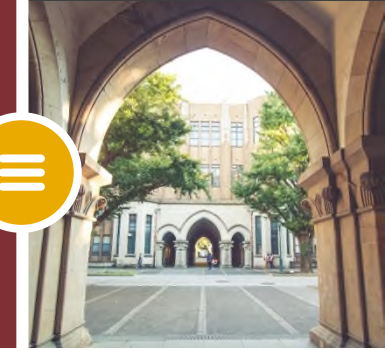
- “The Department has regulatory authority to select conditions and a liability standard different from those used in the Gebser/Davis framework.”
- “The Department **chooses** to build these final regulations upon the foundation established by the Supreme Court, to provide consistency between the rubrics for judicial and administrative enforcement of Title IX.”
- “The Department believes it would be beneficial for recipients and students alike if the administrative standards governing recipients’ responses to sexual harassment were aligned with the standards developed by the Supreme Court in private actions...”

# Sexual Harassment: Additional Questions



- What does “on the basis of sex” require?
- Does *quid pro quo* harassment need to be severe, pervasive, and objectively offensive? What about the Clery/VAWA offenses?

# Complainant, Respondent & Consent



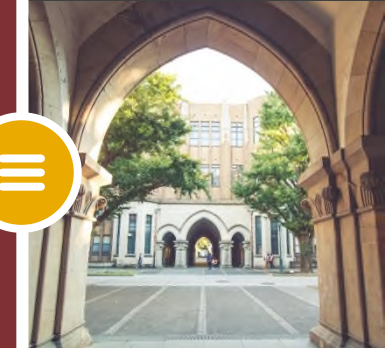
- **Complainant** means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
- **Respondent** means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- **Consent.** The Assistant Secretary will not require schools to adopt a particular definition of consent with respect to sexual assault, as referenced in this section.\*

# Responding to Sexual Harassment

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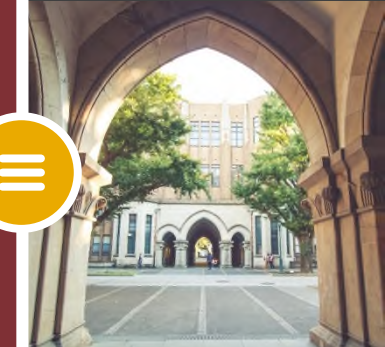


# Responding to Sexual Harassment



- An institution **must** respond to **sexual harassment** when:
  - the school has **actual knowledge** of the alleged sexual harassment;
  - the alleged sexual harassment occurred **in an education program or activity** of the school; **and**
  - the alleged sexual harassment was against a person located **in the United States**.

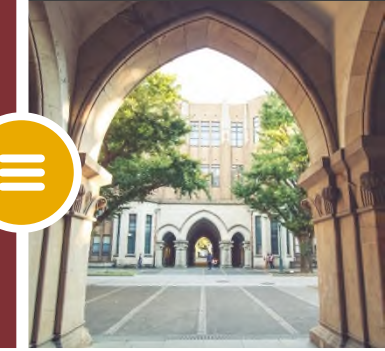
# Actual Knowledge



- **Actual knowledge** means notice of sexual harassment or allegations of sexual harassment to a school's Title IX Coordinator or any **official of the school who has authority to institute corrective measures** on behalf of the institution, or to any employee of an elementary and secondary school.
- The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does **not** qualify an individual as one who has authority to institute corrective measures on behalf of the institution.

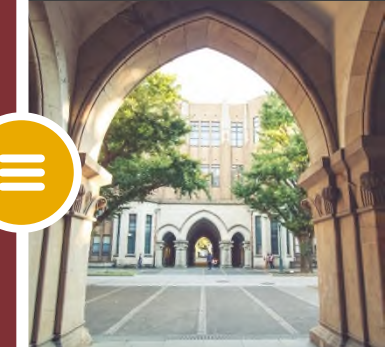


# Actual Knowledge: Additional Questions



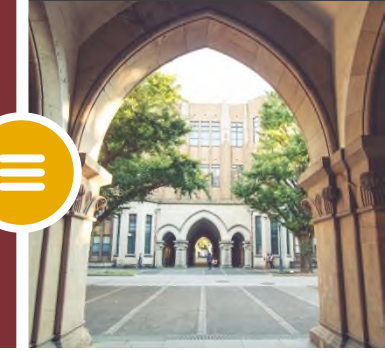
- Who can make a report?
- Who is an official with authority to institute corrective measures on behalf of the institution?
- Which employees must report sexual harassment to the Title IX Coordinator?

# Program or Activity



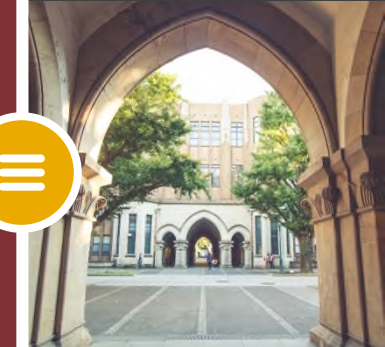
- An education program or activity of the school includes “locations, events, or circumstances over which the school exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.”

# Program or Activity: Additional Questions



- How does an institution determine what constitutes a program or activity?
- What if a student is sexually assaulted outside of an education program or activity but subsequently suffers Title IX sexual harassment in an education program or activity?

# Physical Location



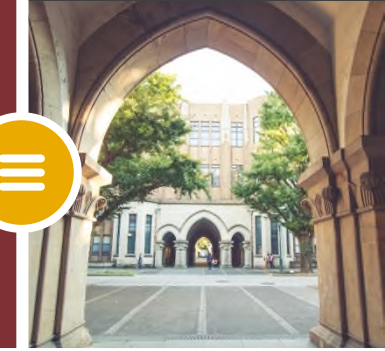
- The complainant must be a person located **in the United States**.
  - ED acknowledges that individuals experiencing sexual harassment while out of the country (*i.e.*, studying abroad) would **not** be covered.
  - However, it would appear that sexual harassment perpetrated online against an individual in the United States could be covered, even if the perpetrator were located outside of the country.\*

# Elements of a Sufficient Response

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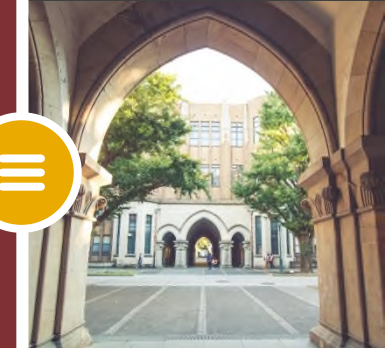


# Elements of a Sufficient Response



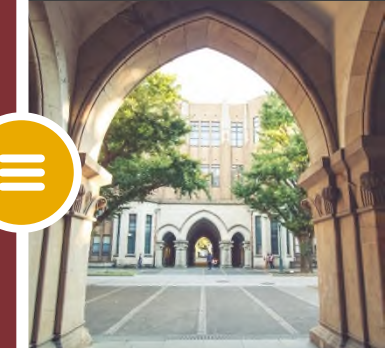
- Institutions must respond “promptly” and “in a manner that is **not deliberately indifferent.**”
- A school is deliberately indifferent “only if its response to sexual harassment is **clearly unreasonable in light of the known circumstances.**”
  - In the proposed rule, ED offered additional detail regarding conduct that would, or would not, constitute deliberate indifference. The final rule does not include this language.

# Elements of a Sufficient Response



- A school's response must treat complainants and respondents equitably by **offering supportive measures** to a complainant, and by following a compliant **grievance process** before the imposition of any disciplinary sanctions against a respondent.

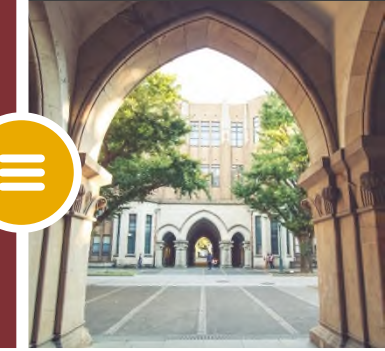
# Elements of a Sufficient Response



- The Title IX Coordinator must promptly contact the complainant to discuss the availability of **supportive measures**, consider the complainant's wishes with respect to supportive measures, inform the complainant of the availability of supportive measures **with or without** the filing of a formal complaint, and explain to the complainant the process for filing a formal complaint.



# Deliberate Indifference: Additional Questions



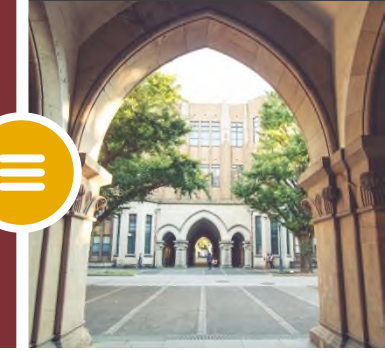
- Does the deliberate indifference standard relieve recipients of their obligation to respond to every known allegation of sexual harassment?
- In the absence of a formal complaint, are there circumstances where an institution would initiate a grievance process against the respondent to avoid being deliberately indifferent?

# Interim and Supportive Measures

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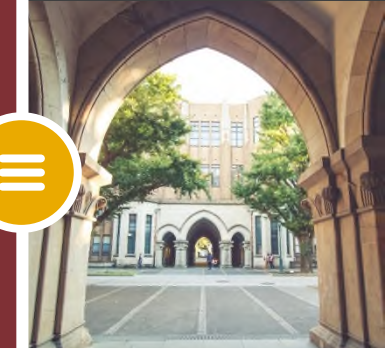


# Emergency Removal and Administrative Leave



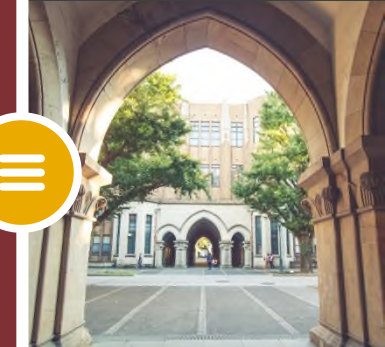
- An institution would be permitted to remove a respondent from campus on an emergency basis, **provided**:
  - that the school undertakes an **individualized safety and risk analysis**;
  - determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal; **and**
  - provides the respondent with notice and an opportunity to challenge the decision **immediately** following the removal.
- An institution also would be permitted to place a “non-student employee respondent” on administrative leave during the “pendency of [its] grievance process.”

# Removal and Leave: Additional Questions



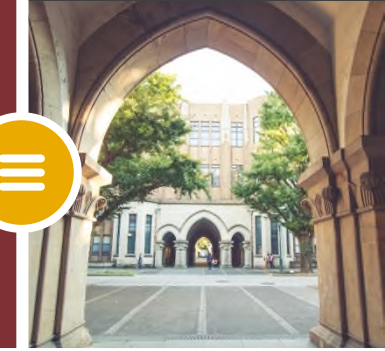
- What does the “individualized safety or risk analysis” require?
- What does it mean that an individual can challenge their removal “immediately” after removal?
- Is self-harm grounds for emergency removal?
- Do respondents who are employees receive the same due process protections with respect to emergency removals (*i.e.*, post-removal notice and opportunity to challenge the removal) as respondents who are students?

# Supportive Measures



- Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.
- Such measures are designed to restore or preserve equal access to the school's education program or activity without **unreasonably burdening** the other party, including measures designed to protect the safety of all parties or the school's educational environment, or deter sexual harassment.

# Examples of 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

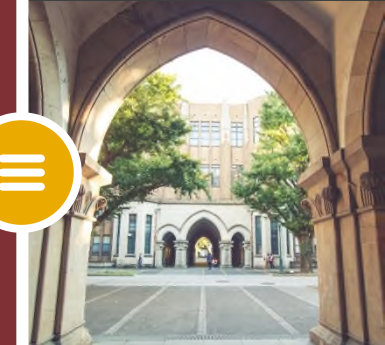
Changes in work locations

Changes in housing locations

Leaves of absence

Increased security and monitoring of certain areas of the campus

# Supportive Measures



- The school must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the school to provide the supportive measures.
- The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.\*

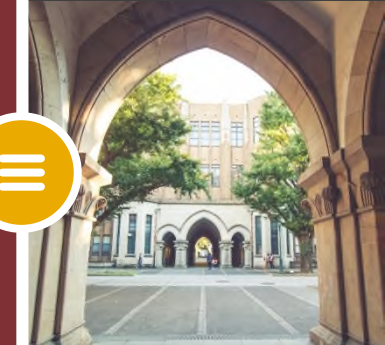
# Managing **Formal** **Complaints** of Sexual Harassment

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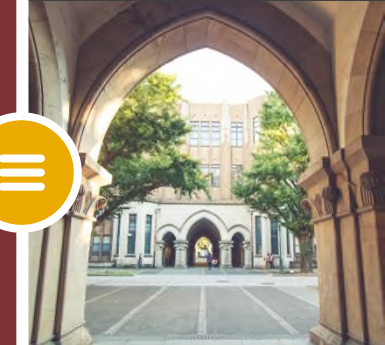


# Formal Complaint



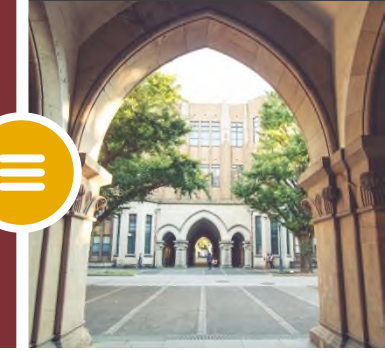
- Formal complaint means **a document filed by a complainant or signed by the Title IX Coordinator** alleging sexual harassment against a respondent and requesting that the school investigate the allegation of sexual harassment.
  - The phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the school) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
- Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party, and must comply with applicable Title IX requirements.\*

# Formal Complaint



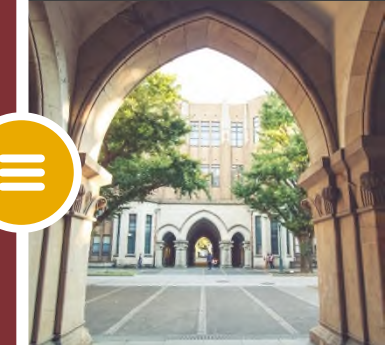
- **At the time of filing a formal complaint**, a complainant must be participating in or attempting to participate in the education program or activity of the school with which the formal complaint is filed.
- A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail... and by any additional method designated by the school.

# Framework for Managing Formal Complaints



- For the purpose of addressing formal complaints of sexual harassment, a school's grievance process must comply with the requirements of 34 CFR 106.45.
- Any provisions, rules, or practices other than those required by this section that a school adopts must apply equally to both parties.

# Framework for Managing Formal Complaints



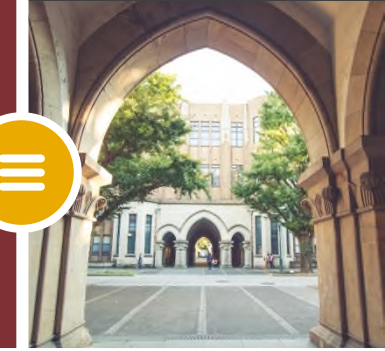
Basic Requirements	• Details 10 basic elements of formal complaint framework
Notice of Allegations	• Specifies requirements for initial and ongoing notice to parties
Complaint Dismissal	• Sets out grounds for dismissal and procedural requirements
Consolidation	• Allows for complaint consolidation in specific circumstances
Investigations	• Details 7 required elements of formal investigation
Hearings	• Discusses hearing requirements, including cross-x and advisors
Determinations	• Sets out requirements for adjudicators and determinations
Appeals	• Details grounds and procedures for appeals
Informal Resolution	• Permits schools to offer informal resolution where appropriate
Recordkeeping	• Requires schools to maintain records for specified periods

# Basic Requirements

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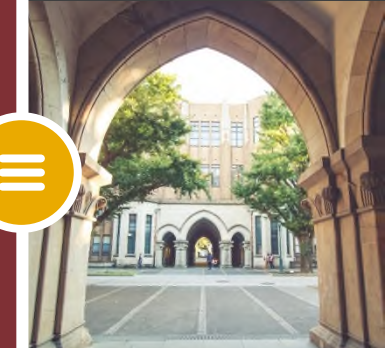


# 10 Basic Requirements



1. **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 grievance process that complies with 34 CFR 106.45.
  - Remedies must be designed to restore or preserve equal access to the school's education program or activity.
2. **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.

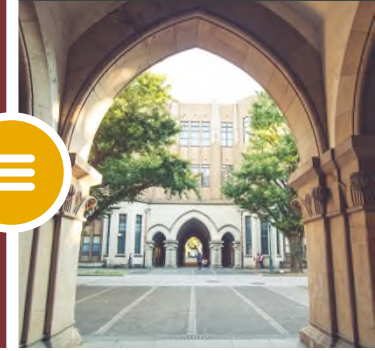
# 10 Basic Requirements



## 3. Train coordinators, investigators, and adjudicators and require that they be free of conflict of interest.

- Any 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.
- See Required Training Topics on next slide.\*

# Required Training Topics



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

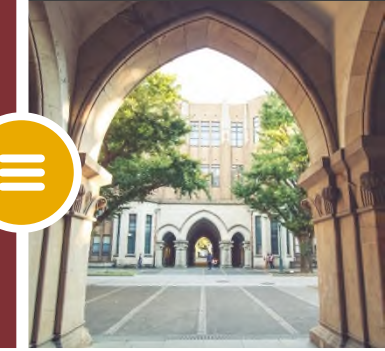
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Adjudicators

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

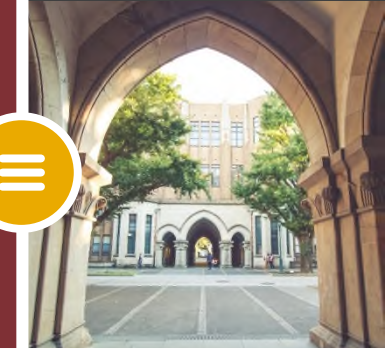


# Required Training: Additional Questions



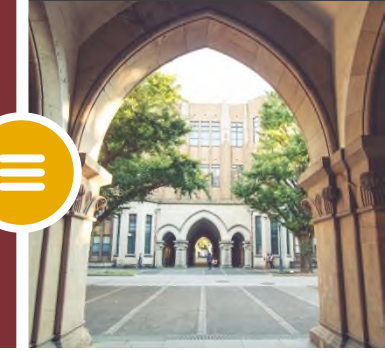
- What are best training practices?
- How can board members be trained on difficult (legal) concepts?
- How to select board members, especially the presiding officer?
- What about student and employee training?

# 10 Basic Requirements



4. Include presumption of innocence for respondent.
5. Include reasonably prompt timeframes for resolution and allow for temporary delay or limited extension for good cause.
6. Describe range of sanctions and remedies.
7. Detail standard of evidence and provide for **consistent use** in all formal complaints.
  - Schools may use either preponderance of the evidence **or** clear and convincing.\*

# 10 Basic Requirements



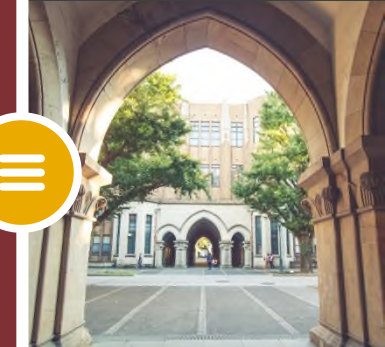
8. Describe appeal processes and standards.
9. Describe range of available supportive measures.
10. Do not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

# Notice of Allegations

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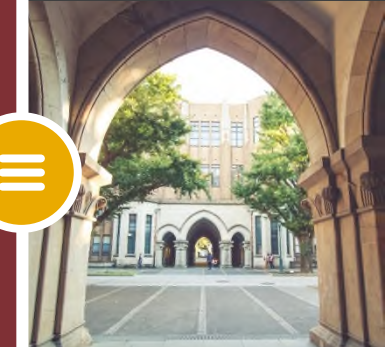


# Initial Notice Requirements



- 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.

# Initial Notice Requirements



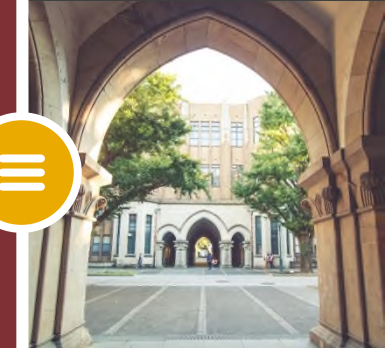
- Statement regarding right to an advisor and to review and inspect evidence.
- Reminder that school prohibits knowingly making false statements or knowingly submitting false information.
- Parties must be provided **sufficient time** to prepare a response **before** any initial interview.
- Schools 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.

# Complaint Dismissal

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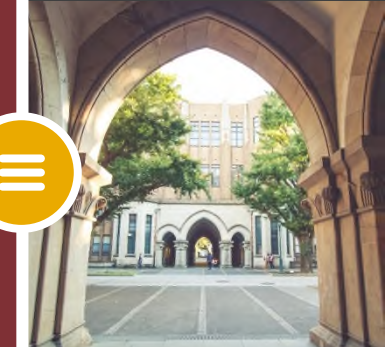
# Required Dismissal



- 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.

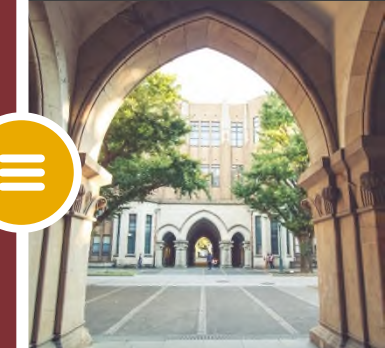


# Optional Dismissal



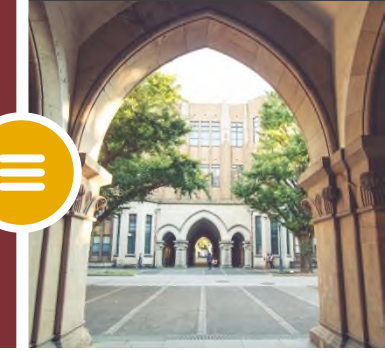
- Schools **may** dismiss a **formal complaint** of sexual harassment if, at any time:
  - a complainant notifies the Title IX Coordinator in writing that he or she would like to withdraw;
  - the respondent is no longer enrolled or employed by the school; **or**
  - specific circumstances prevent the 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.

# Dismissal of Complaints: Commentary



- “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...”

# Dismissal of Complaints: Additional Questions



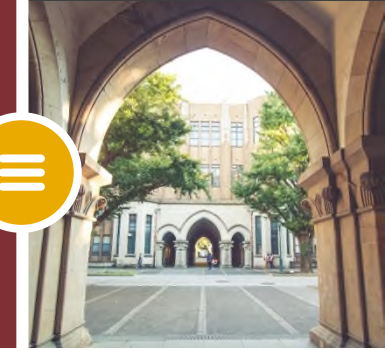
- Must schools always investigate a formal complaint of sexual harassment?
- Under what circumstances is a mandatory dismissal applied?
- If a school is required to dismiss a complaint, can it still investigate and adjudicate the complaint under alternative procedures?

# Complaint Consolidation

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# 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

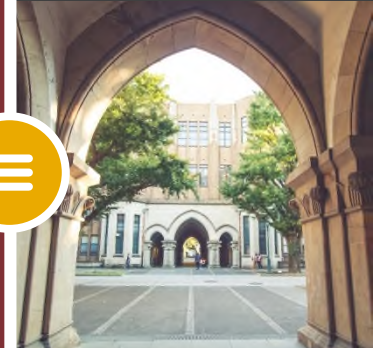
By one party against the other party

# Investigations

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# Requirements for Investigations of Formal Complaints



## Burden of Proof

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

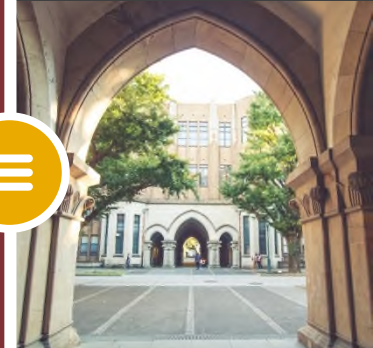
## Equal Opportunity

- 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.

# Requirements for Investigations of Formal Complaints



## Notice Content and Timing

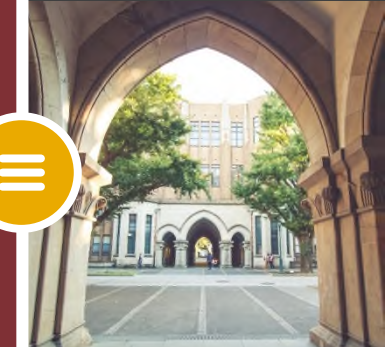
- Provide, to a party whose participation is invited or expected, written notice of the date, time, location, participants, and purpose of all hearings, investigative interviews, or other meetings, with sufficient time for the party to prepare to participate.

## Investigative Report

- Include the issuance of an investigative report that fairly summarizes the evidence.



# 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.

# Advisors



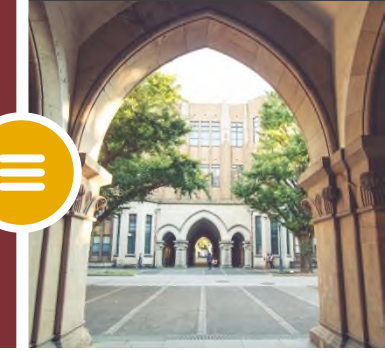
Schools must afford the parties equal opportunity to have an advisor during any aspect of the formal complaint process.

Advisors may be an attorney.

Schools are not permitted to limit the choice of advisor or the advisor's presence.

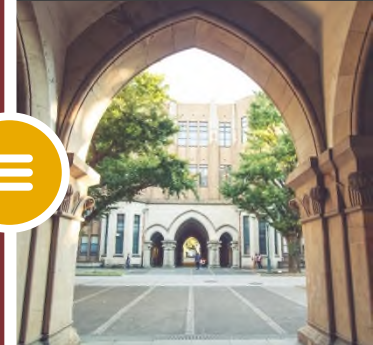
Schools may restrict advisor participation in the proceedings, as long as the restrictions apply equally.\*

# 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.

# Timing of Access



## Generally

- Must provide access early enough that each party can meaningfully respond to the evidence prior to conclusion of the investigation.

## Prior to issuance of 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

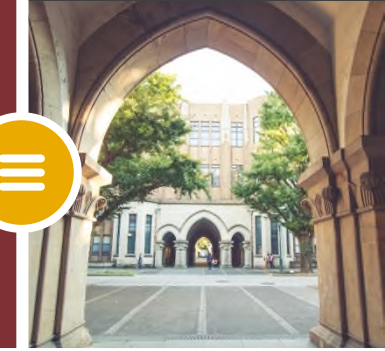
- Must make all evidence available to parties' and afford equal opportunity to review, including for purposes of cross-ex.

# Hearings

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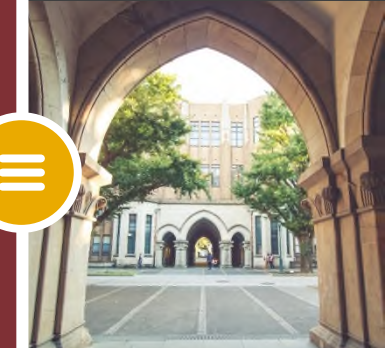


# Hearings



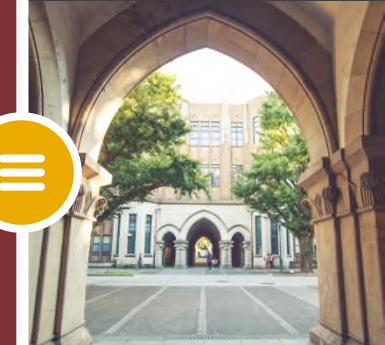
- Institutions are **required** to include a **live hearing** in their formal complaint process.
  - The adjudicator cannot be the same person as the Title IX Coordinator or the investigator.
- Live hearings **may** be conducted with all parties physically present or, at the school's discretion, participants may appear virtually, with technology enabling them to see and hear each other.
- Schools **must** create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

# Cross-Examination



- Adjudicators must permit each party's advisor to cross-examine the other party and any witnesses.
- Cross-examination at the live hearing must be conducted **directly, orally, and in real time** by the party's **advisor** and never by a party personally.
- If a party does not have an advisor, the school must **provide** an advisor of its choice, free of charge, to conduct cross-examination. The advisor may be, but is not required to be, an attorney.

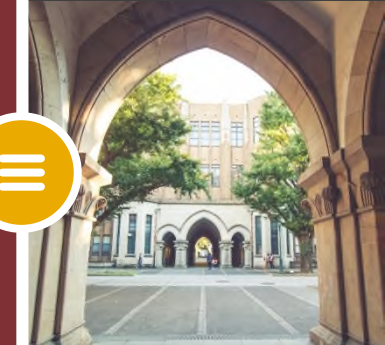
# Cross-Examination



- At the request of either party, schools **must** provide for the live hearing to occur with the parties located in separate rooms, with technology enabling the adjudicator and parties to simultaneously see and hear the party or the witness answering questions.

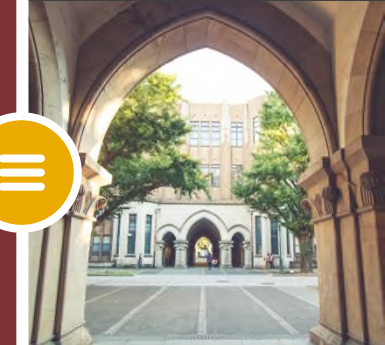


# Cross-Examination



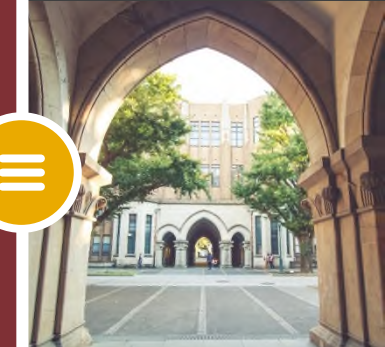
- Only **relevant** cross-examination and other questions, including those challenging credibility, may be asked of a party or witness.
- **Before** a party or witness answers a cross-examination or **other** question, the adjudicator must determine whether the question is relevant, and **explain** any decision to exclude a question as **not** relevant.

# Cross-Examination



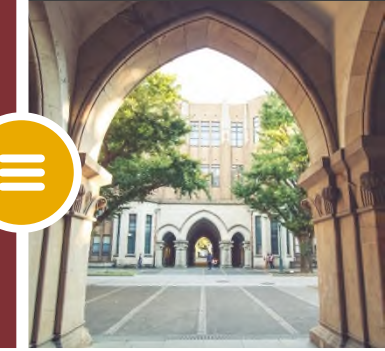
- Questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, **unless** such questions and evidence:
  - are offered to prove that someone other than the respondent committed the alleged conduct; **or**
  - concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

# Cross-Examination



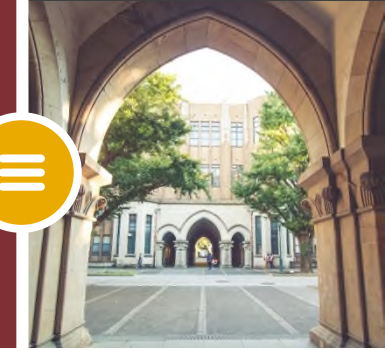
- If a party or witness does not submit to cross-examination at the live hearing, the adjudicator must **not** rely on **any statement** of that party or witness in reaching a determination regarding responsibility.
  - However, the adjudicator cannot draw an inference about the determination regarding responsibility based **solely** on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

# Cross-Examination: Commentary



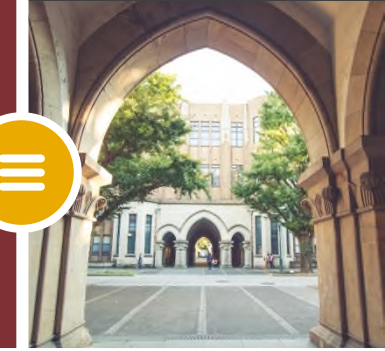
- “...the Department does not believe that the benefits of adversarial cross-examination can be achieved when conducted by a person ostensibly designated as a “neutral” official. This is because the function of cross-examination is precisely *not* to be neutral but rather to point out in front of the neutral decision-maker each party’s unique perspective about relevant evidence and desire regarding the outcome of the case.”

# Cross-Examination: Additional Questions



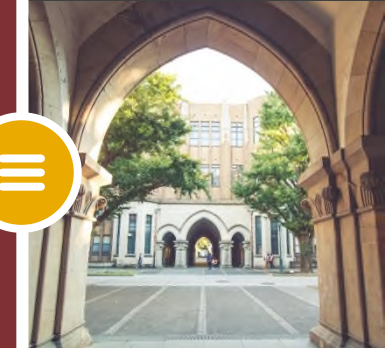
- Can a school adopt rules that govern the conduct and decorum of participants at live hearings?
- If a party's advisor of choice refuses to comply with a recipient's rules of decorum (for example, by insisting on yelling at the other party), can the school require the party to use a different advisor?
- Can trauma-informed approaches be used for questioning and cross-examination?

# Cross-Examination: Additional Questions



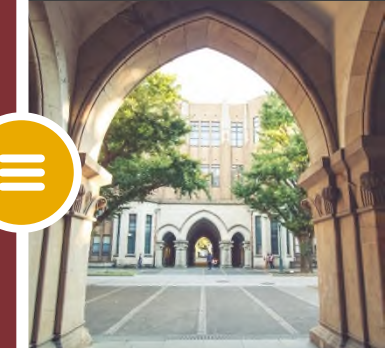
- If a party or witness does not appear live at a hearing or refuses to answer cross-examination questions, what evidence can be considered?
- What if an advisor asks a question in a harassing, intimidating, or abusive manner?
- What happens when the Title IX Coordinator is called as a witness?
- Can relevant character evidence or evidence of prior bad acts on cross-examination be excluded?

# Cross-Examination: Additional Questions



- Can a school adopt rules about the timing and lengths of break requested by the parties?
- When is an advisor's cross-examination "on behalf of that party" satisfied?
- If a party or advisor break a school's rule during the hearing, can the school enforce its own code of conduct?
- Can a school adopt a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss relevance determinations with the adjudicator during the hearing?

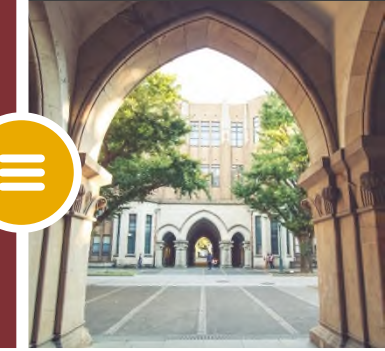
# Cross-Examination: Additional Questions



- What is required of the adjudicator during a relevance determination?
- Can a party's advisor appear and conduct cross-examination even when the party whom they are advising does not appear?
- What happens where one party does not appear and that party's advisor of choice does not appear?
- If a party does not appear or submit to cross-examination, can the party's family member's or friend's recount the statement of the party?



# Cross-Examination: Additional Questions



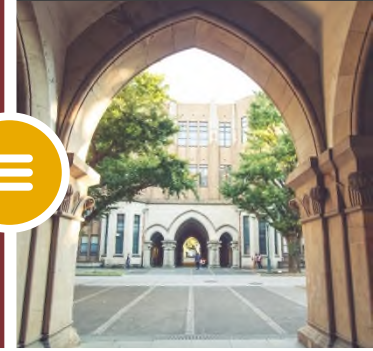
- What does “submit to cross-examination” mean?
- What does “statements” mean?
- Does the same exclusion of statement rule apply to a party or witness’s refusal to answer questions posed by the adjudicator?

# Determinations

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# Requirements for Written Determination



## Allegations

- Identification of the allegations of sexual harassment.

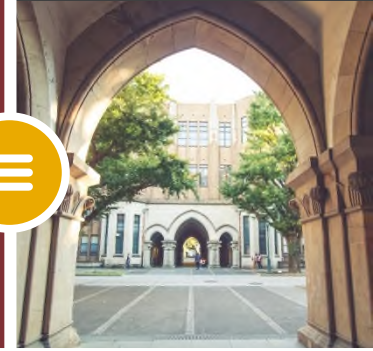
## Procedural Recitation

- 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.

# Requirements for Written Determination



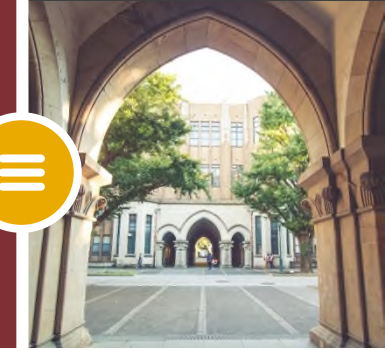
## Conclusions\*

- 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.

## Appeal

- Procedures and permissible bases for appeal.

# Written Determination



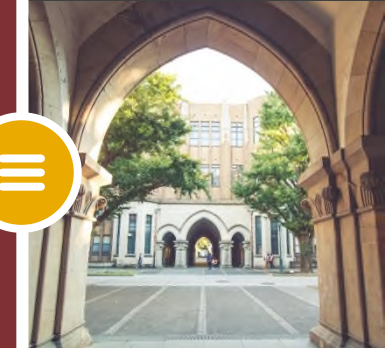
- The school **must** provide the determination to the parties simultaneously.
- The determination becomes final either:
  - on the date on which an appeal would no longer be considered timely; **or**
  - if an appeal is filed, on the date that the school provides the parties with the written appeal determination.

# Appeals

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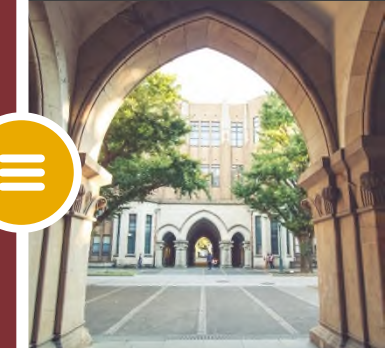


# Appeals Required



- School **must** offer **both** parties an appeal from:
  - a determination regarding responsibility;
  - a school's dismissal of a formal complaint or any allegations therein.
- 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.

# Appeal Procedures



- Schools generally must implement appeal procedures equally for both parties. In addition, they must:
  - notify the other party in writing when an appeal is filed;
  - ensure that the appeal officer is not the hearing adjudicator, investigator, or Title IX Coordinator;
  - ensure that the appeal officer has received required training;
  - give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome;
  - issue a written decision describing the result; **and**
  - provide the written decision simultaneously to both parties.

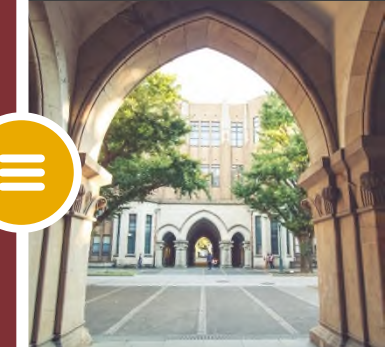


# Informal Resolution

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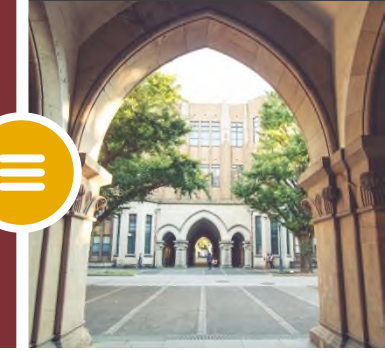


# Informal Resolution



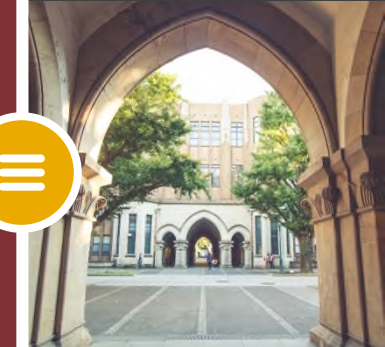
- A school may not, under any circumstance, **require** a student or employee to waive the right to an investigation and adjudication of formal complaints under Title IX.
- Similarly, a school may not **require** the parties to participate in the informal resolution of a formal complaint **or** even **offer** an informal resolution process unless a formal complaint is filed.

# 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



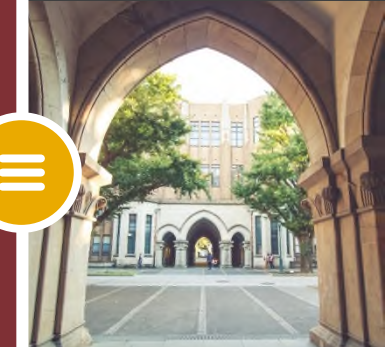
- Informal resolution is not available to resolve allegations that an employee sexually harassed a student.
- At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution and to resume the formal complaint process.\*

# Recordkeeping

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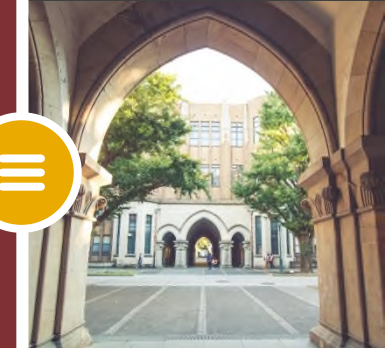


# Recordkeeping



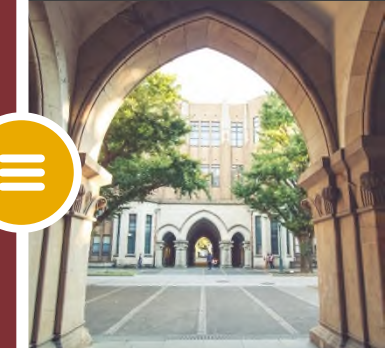
- For each sexual harassment complaint, the institution must maintain records for **7 years** that include:
  - records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment;
  - the basis for the school's conclusion that its response was not deliberately indifferent;
  - documentation that the school took measures designed to restore or preserve equal access; **and**
  - if the school did **not** provide supportive measures, the reasons why such a response was not clearly unreasonable in light of the known circumstances.

# Recordkeeping



- If there was an adjudication, the records also must contain:
  - any determination regarding responsibility;
  - any audio or audiovisual recording or transcript;
  - any disciplinary sanctions imposed on the respondent;
  - any remedies provided to the complainant;
  - any appeal and the result; **and**
  - any informal resolution and the result.

# Recordkeeping



- Apart from any specific proceeding, institutions also must keep for **7 years**, all materials used to train Title IX Coordinators, investigators, adjudicators, and any person who facilitates an informal resolution process.
- Further, schools must make these training materials **publicly available** on their websites.

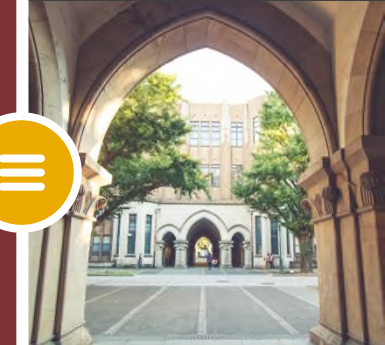


# Retaliation

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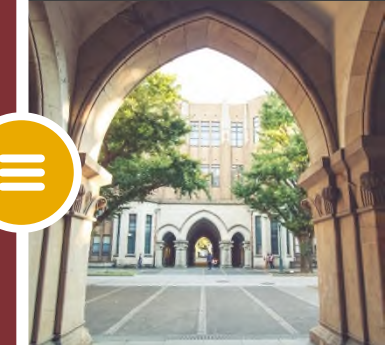


# Retaliation



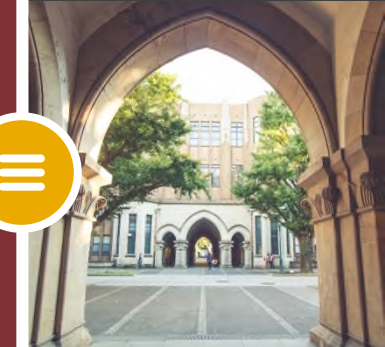
- The new rule specifically prohibits retaliation, providing that no school “or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part.”

# Retaliation



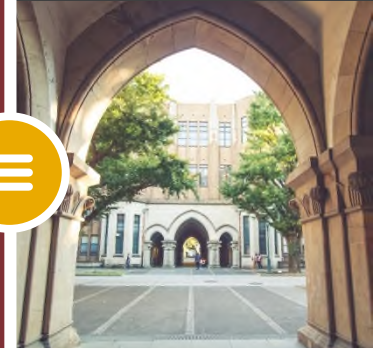
- Addressing certain, anticipated nuances, the new rule also provides:
  - The exercise of rights protected under the First Amendment does not constitute retaliation.
  - It is not retaliation if a school charges an individual with a code of conduct violation for making a materially false statement in bad faith during a Title IX proceeding.

# Title VII: Commentary



- “The Department is aware that Title VII imposes different obligations with respect to sexual harassment, including a different definition, and recipients that are subject to both Title VII and Title IX will need to comply with both sets of obligations. Nothing in these final regulations, however, shall be read in derogation of an individual’s rights, including an employee’s rights, under Title VII, as expressly stated in § 106.6(f). Similarly, nothing in these final regulations precludes an employer from complying with Title VII. The Department recognizes that employers must fulfill both their obligations under Title VII and Title IX, and there is no inherent conflict between Title VII and Title IX.”

# Implementation: Additional Questions



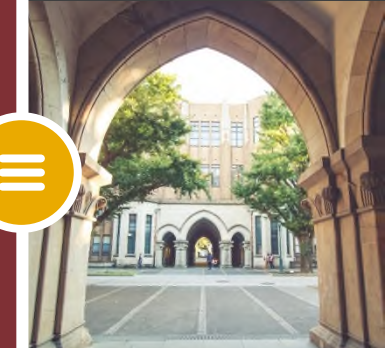
- How do you communicate urgency?
- Who needs to be involved in drafting?
- Who needs to provide review, provide input, approve?
- What needs to be considered?
- How to get started?

# Updates to Rights & Responsibilities

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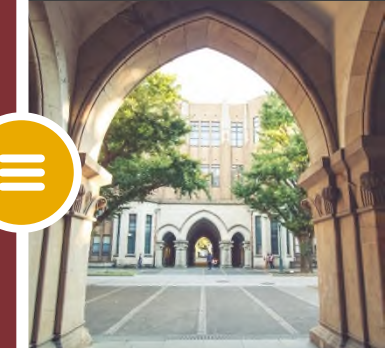


# Rights and Preemption



- New rule **clarifies** relationship between Title IX regulations and constitutional rights, FERPA, and Title VII.
- Also states that in the event of a conflict between state or local law and the new Title IX provisions concerning management of sexual harassment on campus, the obligation to comply with the new provisions “is not obviated or alleviated by any State or local law.”

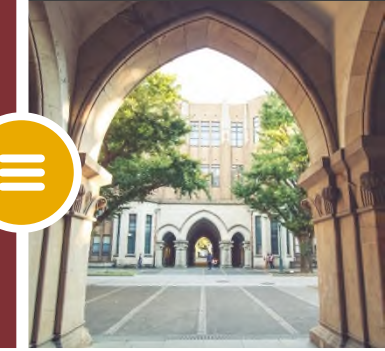
# Revisions to Core Title IX Responsibilities



- The new rule updates 106.8 to:
  - Eliminate inference that Title IX Coordinator should conduct investigations.
  - Update requirements concerning Coordinator contact information and availability.
  - Update notification, dissemination and publication requirements for statement of non-discrimination.
  - Require that grievance procedures conform to new requirements and be provided to students and employees.
- Also clarifies that grievance procedures only apply to students and employees located in the US.
  - ED observes that statute limits application to protecting “person[s] in the United States.” 20 U.S.C. 1681(a).

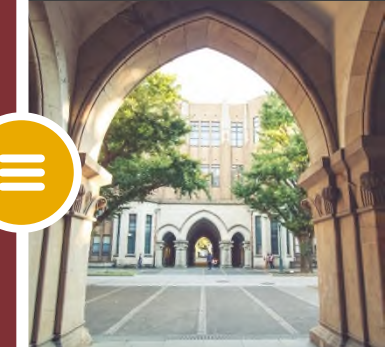


# Exemptions for Faith-Based Institutions



- The new rule dispenses with requirement that faith-based institutions must seek acknowledgement of Title IX exemption.
  - Faith-based institutions still may voluntarily seek assurance of exemption.
- Also clarifies that faith-based institutions **under investigation** can raise exemption “whether or not the institution had previously sought assurance of an exemption” from ED.

# Final Thoughts



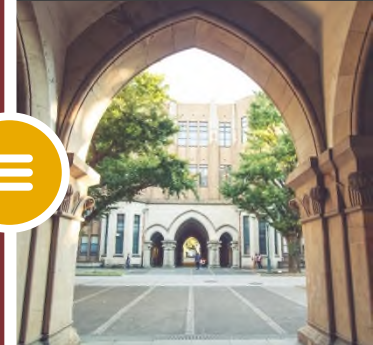
- Take advantage of whatever flexibility is provided to institutions.
- Assume the rule will be effective and you must be in compliance on August 14, 2020.
- Take advantage of ED's technical guidance and monitor the OCR blog.
- Think through hard questions likely to arise (e.g., difficult advisors or no shows).

# TC Resources

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# Webinars on Demand



## TCLE(123)

Overview of Loss Limitations;  
Family Office Partnership;  
Sale to Spousal Grantor Trust

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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?

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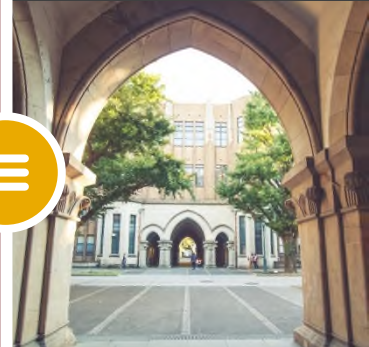
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# REGucation (our blog)









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### CONTRIBUTORS



Aaron Lacey



Emily Wang Murphy

### 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](#)

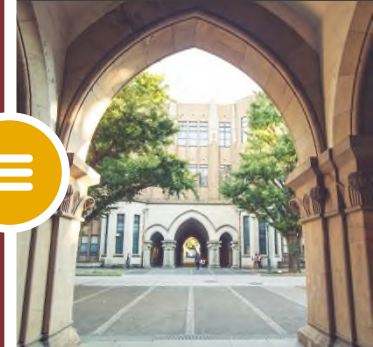
### The CARES Act: Summary of provisions impacting higher education institutions and borrowers

 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](#)



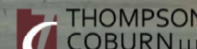
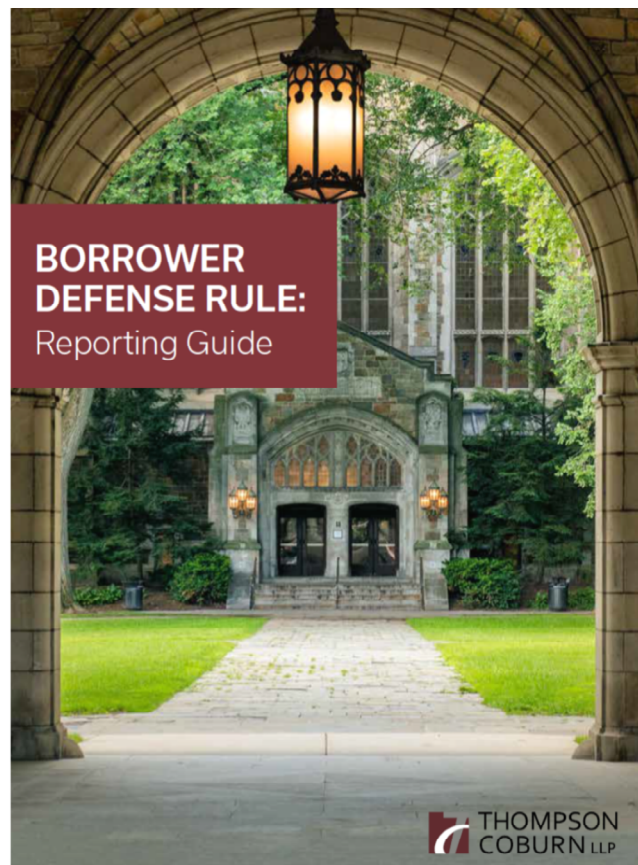
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Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

## BORROWER DEFENSE RULE: Reporting Guide

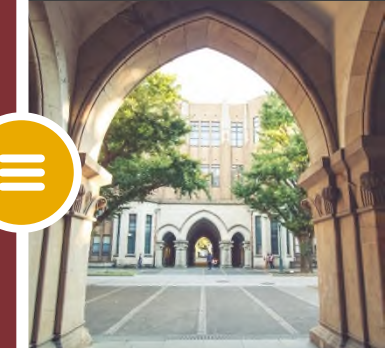


# Questions & Answers

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