



Title IX Determinations

Thompson Coburn LLP
Title IX Training Series | July 2020



Thompson Coburn LLP

- Full-service law firm with over 380 attorneys.
- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Higher Education Practice



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Purpose of Training Series

The Title IX rule effective **August 14, 2020**, creates a new and specific process by which postsecondary institutions must manage complaints of **covered sexual harassment** on campus.

The TC Title IX Training Series is designed to provide **foundational training** to those individuals who will help to administer this required process, including **Title IX coordinators, investigators, adjudicators, advisors, appeal officers**, and individuals responsible for managing informal resolutions.



Use of Training Series

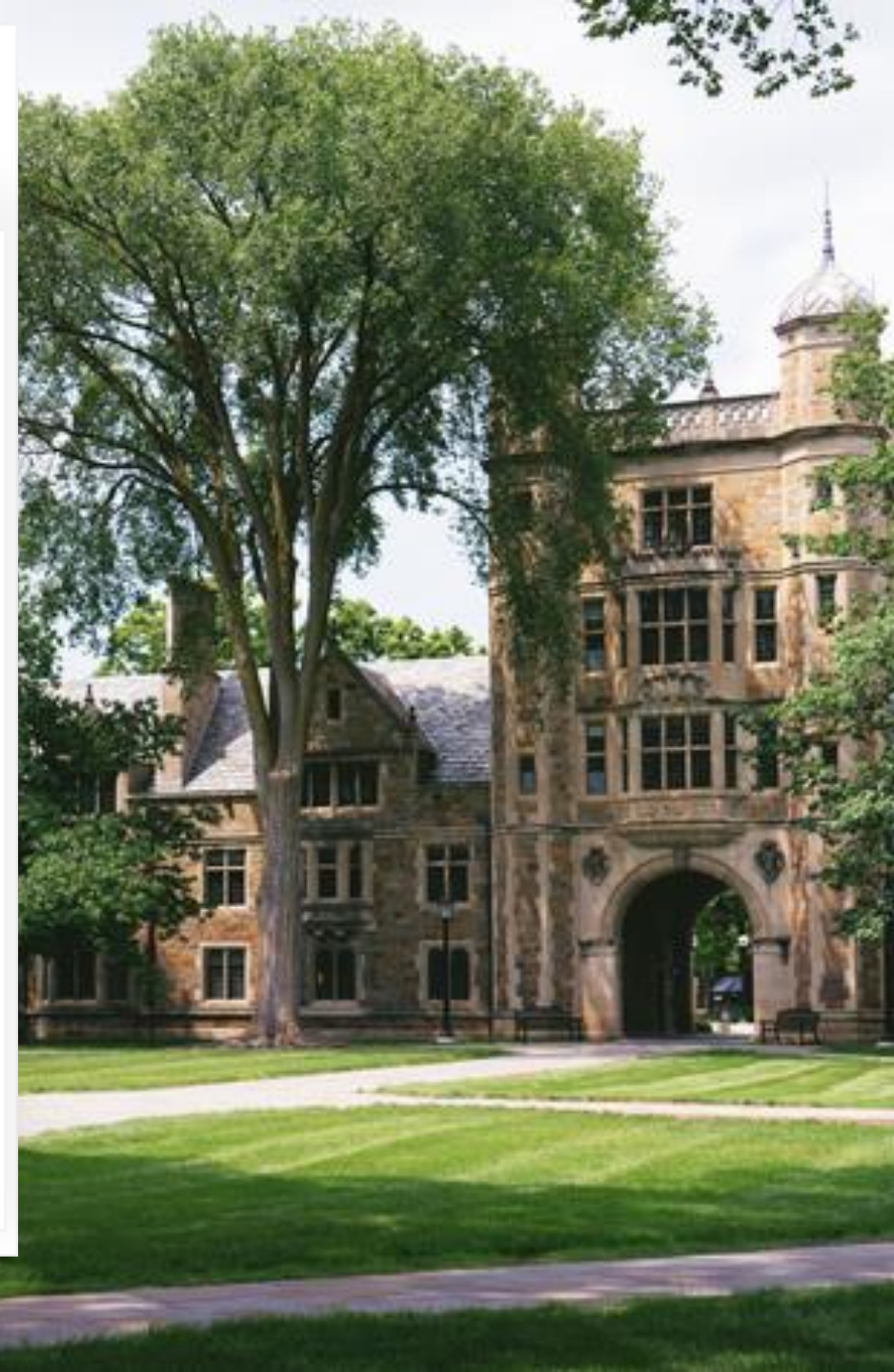
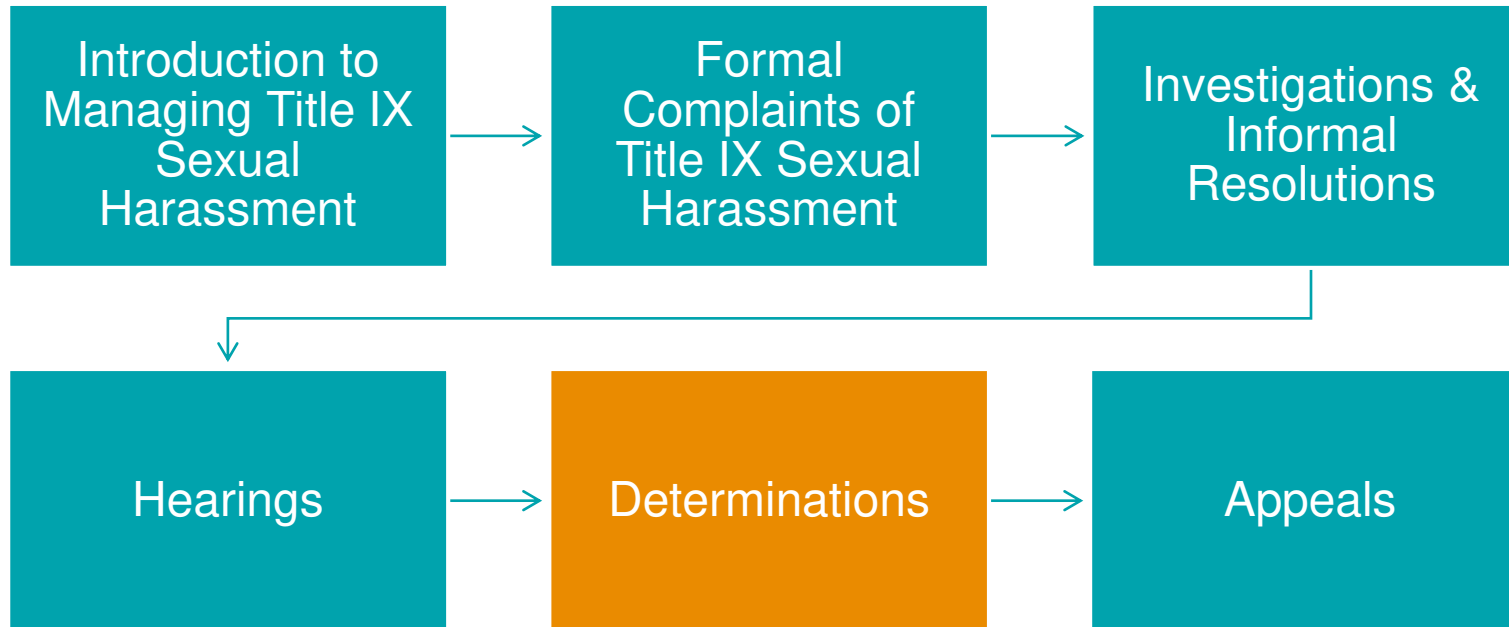
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

TC also is available to prepare **custom Title IX training** sessions, hearing simulations, and other assistance with Title IX matters (contact [Aaron Lacey](#) or [Scott Goldschmidt](#)).



Curriculum for Training Series

The foundational training series includes the following six sessions:



Syllabus for this Session

The Formal Complaint Framework

Key Concepts

Format & Content

Logistics

Excluding Facts in Evidence

Weighing Facts Under Applicable Evidentiary Standards

Effective Deliberations

Writing a Defensible Determination



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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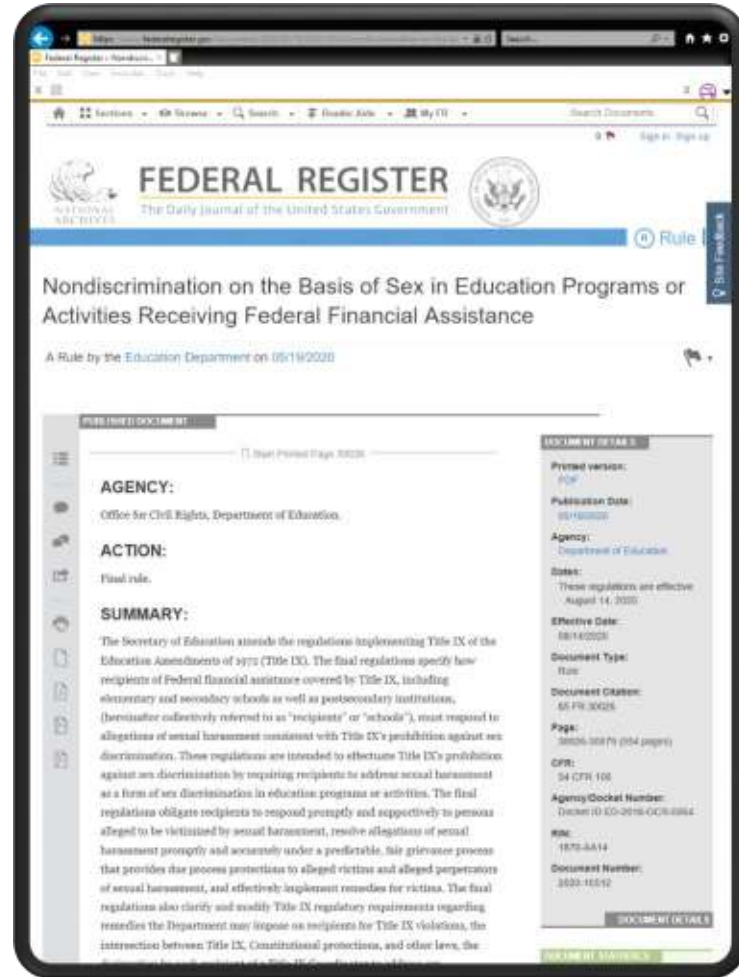
Effective Deliberations

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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.

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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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Format & Content

Allegations

- Identification of the allegations of sexual harassment.

Procedural Recitation

- A recitation of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held.

Findings of Fact

- Findings of fact supporting the determination.

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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.

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How can knowledge of the format of the written determination inform the hearing itself?

- Use the format of a written determination as a checklist and be able to answer each element before concluding the hearing.

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Does “all evidence” need to be addressed in the written determination?

- The preamble explains: “We decline to expressly require the written determination to address evaluation of contradictory facts, exculpatory evidence, “all evidence” presented at a hearing, or how credibility assessments were reached, because the decision-maker is obligated to objectively evaluate all relevant evidence, including inculpatory and exculpatory evidence (and to avoid credibility inferences based on a person’s status as a complainant, respondent, or witness), under § 106.45(b)(1)(ii).”

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Distribution of the 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.

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Excluding Facts in Evidence



Excluding Facts in Evidence

How should a decision-maker address a situation in which a party or witness inappropriately discloses privileged information, treatment records, or irrelevant information?

- Decision-makers may not consider this information.
- In a hearing, decision-makers should consider stating for the record that such information was inappropriately disclosed but will not be part of evidence or considered.
- If the decision-maker(s) cannot ignore such information, they should recuse themselves.

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Weighing Facts Under Applicable Evidentiary Standards



Applicable Standards of Evidence

What is the preponderance of the evidence standard?

- Proof that a particular fact or event was more likely than not to have occurred.

How should facts be evaluated under this standard?

- Does the decision-maker believe there is a greater than 50% chance that a fact or claim is true?

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Applicable Standards of Evidence

What is the clear and convincing evidence standard?

- Proof that a particular fact or event was highly and substantially more likely to be true than untrue.

How should facts be evaluated under this standard?

- Does the decision-maker believe the fact or claim is highly probable to be true?

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Effective Deliberations

- ❖ **Inherent plausibility**: Is the testimony believable on its face? Does it make sense?
- ❖ **Demeanor**: Did the person seem to be telling the truth or lying?
- ❖ **Corroboration**: Is there witness testimony (such as testimony by eye-witnesses, people who saw the person soon after the alleged incidents, or people who discussed the incidents with him or her at around the time that they occurred) or physical evidence (such as written documentation) that corroborates the party's testimony?

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- ❖ **Motive to falsify**: Did the person have a reason to lie?
- ❖ **Past record**: Did the alleged harasser have a history of similar behavior in the past?

None of these factors is determinative as to credibility. For example, the fact that there are no eye-witnesses to the alleged harassment by no means necessarily defeats the complainant's credibility, since harassment often occurs behind closed doors. Furthermore, the fact that the alleged harasser engaged in similar behavior in the past does not necessarily mean that he or she did so again.

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How can a decision-maker evaluate expert witness testimony and medical records?

- Ask as many clarifying questions as necessary.
- Remember, juries evaluate expert testimony and reports without training either.

How can decision-makers effectively evaluate facts and reaching consensus?

- Objectively evaluate all facts and do not jump to a conclusion before all facts are available.
- Recess prior to closing statements to make sure all decision-makers have asked all necessary questions.
- Be collegial and use the record to bolster your position; remain rooted in facts, not opinions.

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Writing a Defensible Determination



Writing Defensible Determinations

What should decision-makers be considering when writing determinations?

- Requirements under institutional policy.
- Gravity of the outcome for the parties involved.
- Demonstrate decision-makers took the matter seriously and came to a thoughtful outcome.

What are best practices to make written determinations as defensible as possible?

- Assume the determination could be “Exhibit 1.”
- Include all elements necessary under policy and justify your conclusions with the record.
- Ask for legal help when appropriate.

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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 [EDucation](#), 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. 1853 (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:

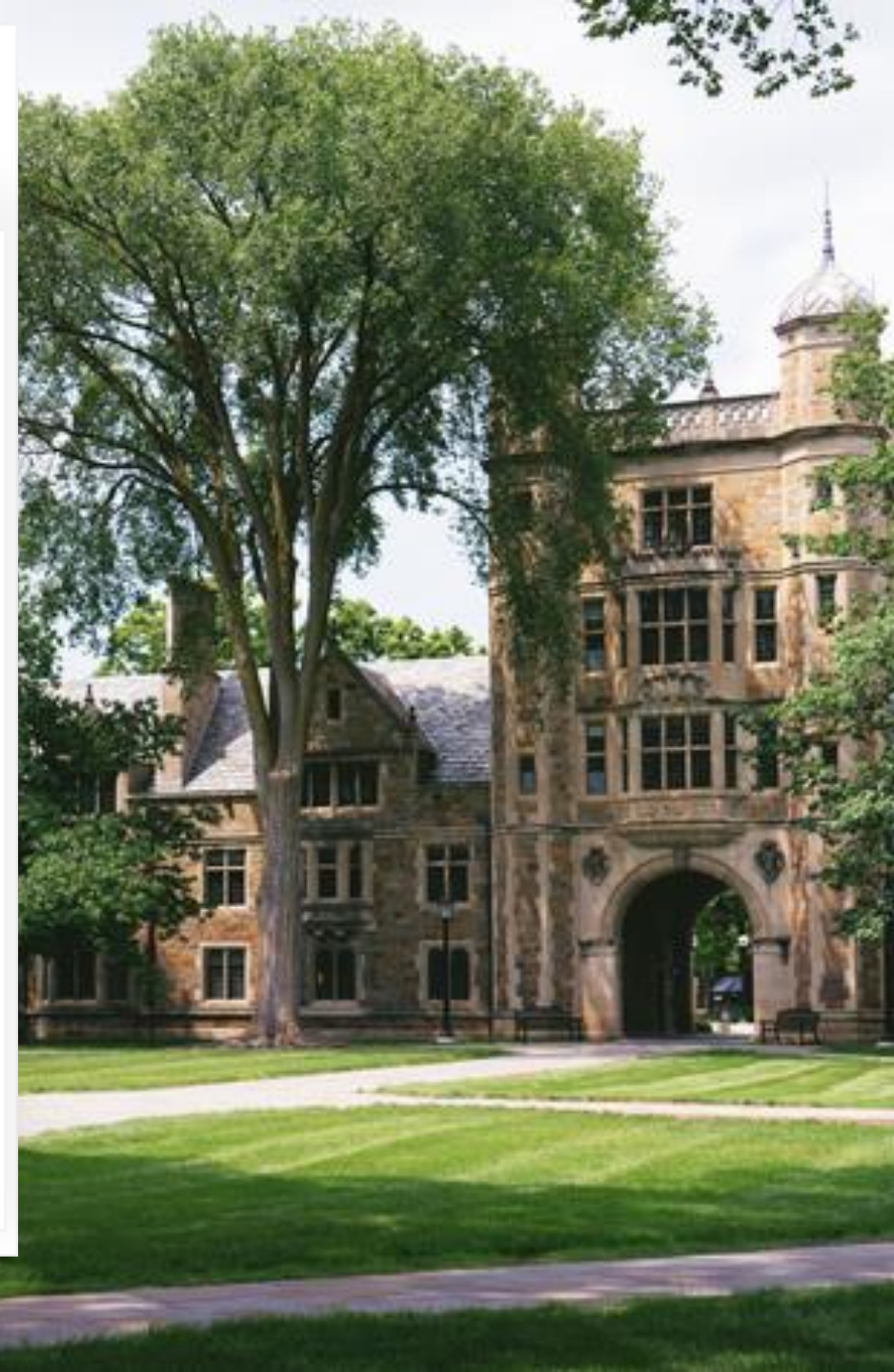
(a) Title IX means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(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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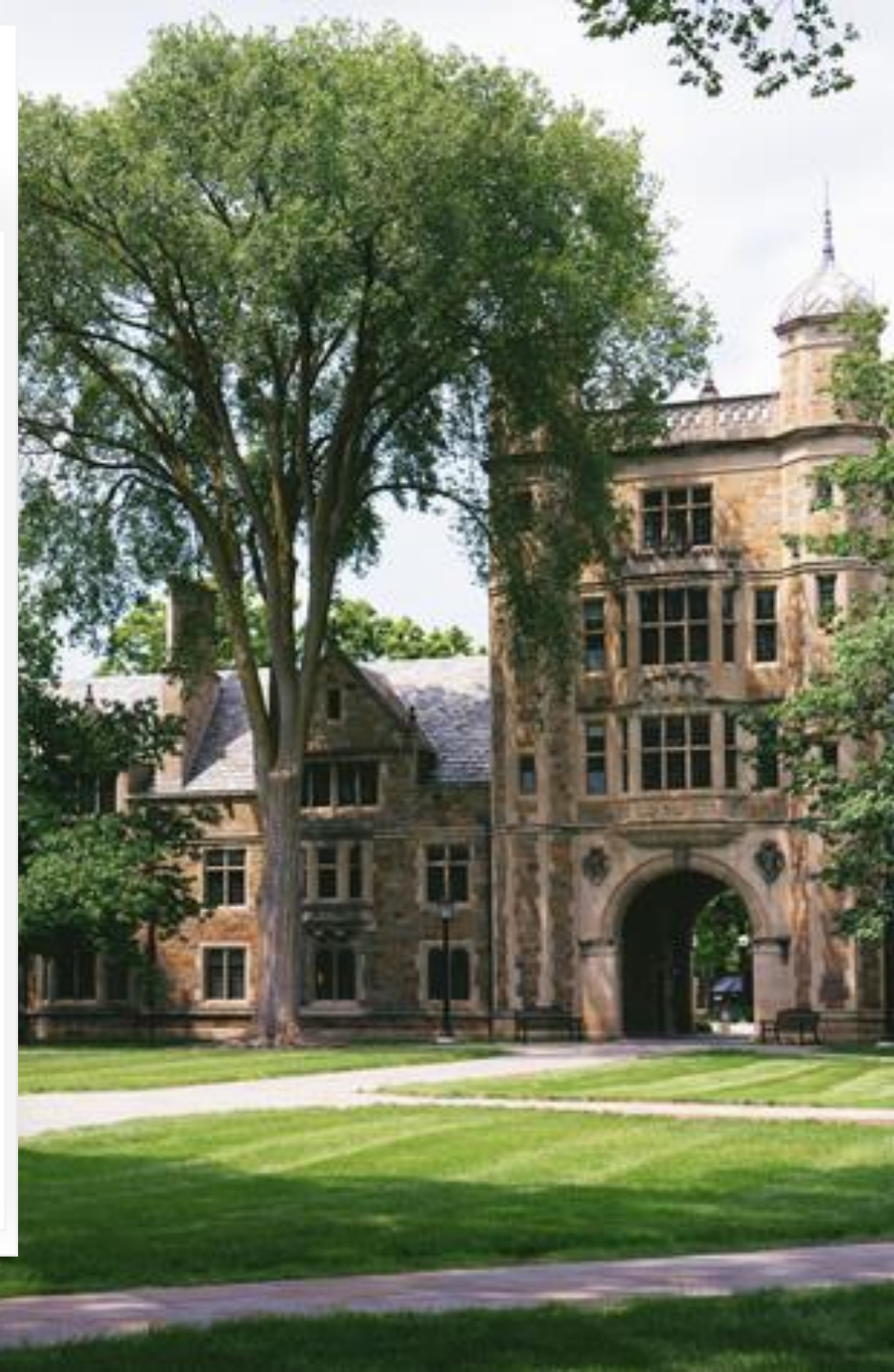
Higher Ed Webinar Series

2019 | 2020 Series Calendar

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



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



Webinars on Demand

TCLE(123)

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

April 28, 2020 | [Register](#)

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?

April 17, 2020

State and Federal
Implementation of Industrial
Hemp Laws

April 16, 2020 | [View Recording](#)

Navigating HR Issues during
the COVID-19 Emergency

April 16, 2020 | [View Recording](#)

Contingency Planning for
Distressed Institutions of
Higher Education

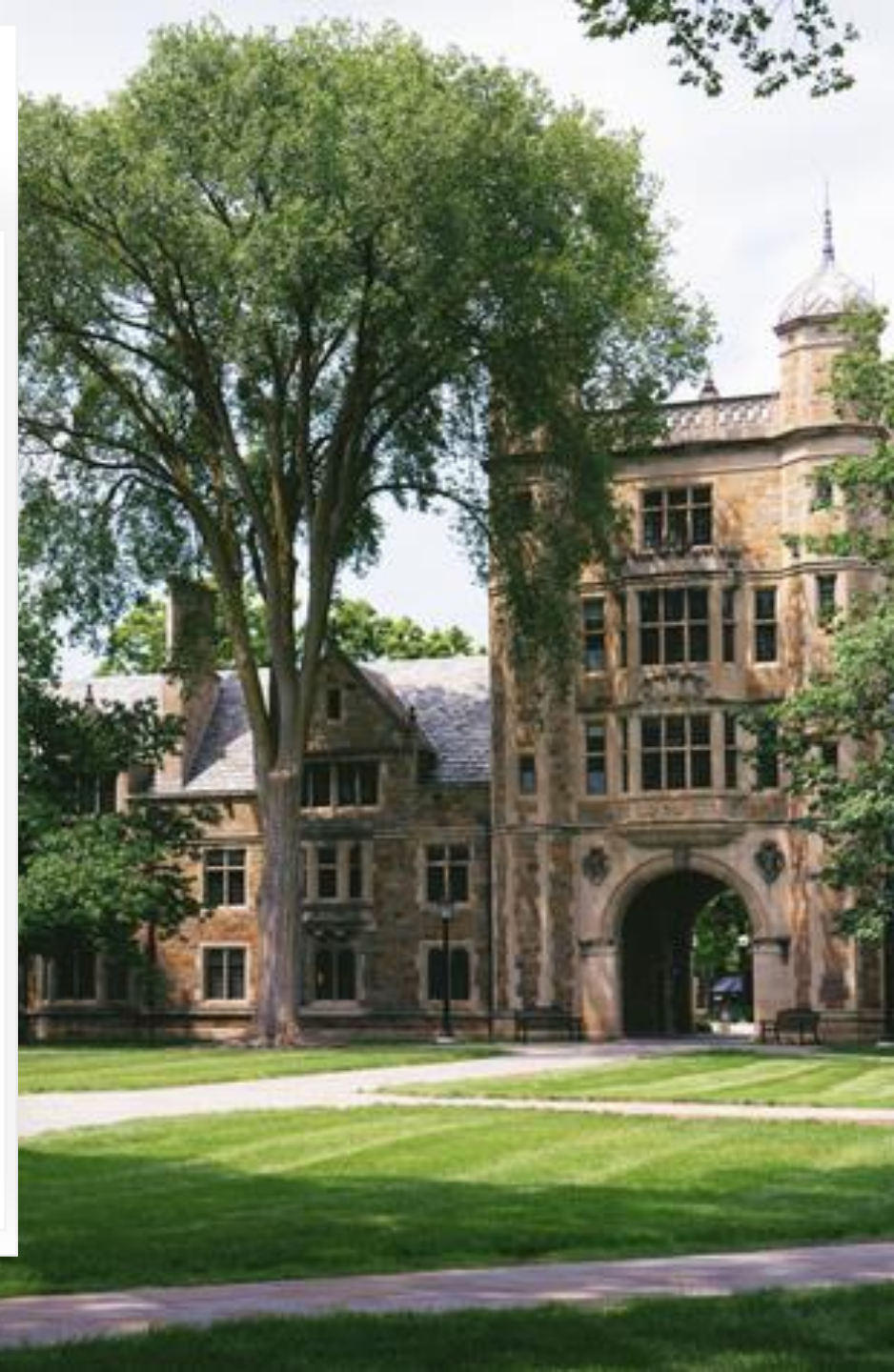
April 8, 2020 | [View Recording](#)

Higher Education &
Immigration: Five Evolving
Areas to Watch

March 12, 2020 | [View Recording](#)

Using GDPR to Prepare for
CCPA, and Vice-Versa

March 11, 2020 | [View Recording](#)



REGucation (our blog)



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CONTRIBUTORS



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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](#)

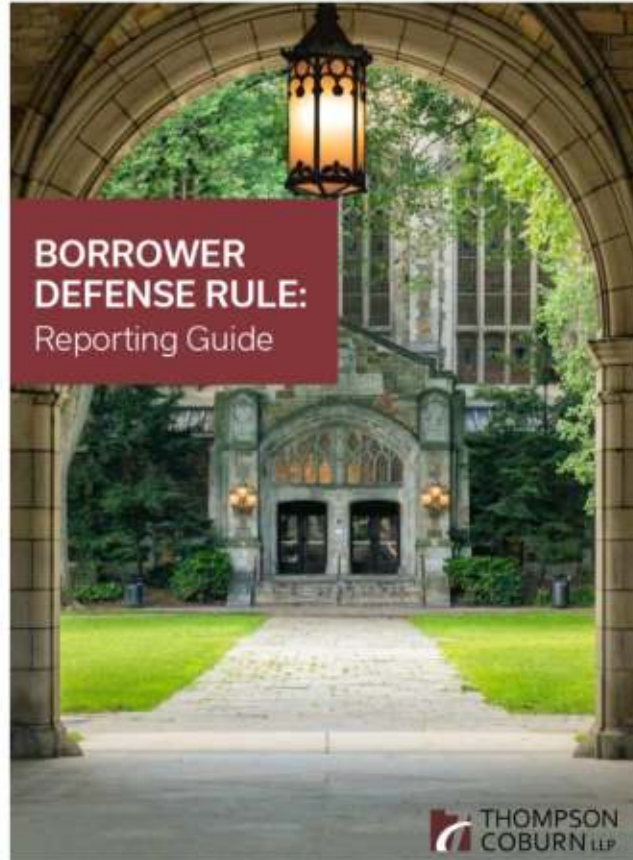


Aaron Lacey

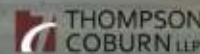
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Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.



BORROWER DEFENSE RULE: Reporting Guide



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Practice and Experience

- Experienced and trusted employment law advisor who counsels employers at every stage of a personnel-related issue.
- Assists with hiring and firing, conducts workplace investigations, and provides day-to-day counseling on a wide variety of matters including discrimination and retaliation.

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Professional Profile

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Practice and Experience

- Former Deputy General Counsel for Catholic University, brings in-house perspective to legal, regulatory, and compliance issues faced by institutions.
- Routinely assists with matters involving discrimination law, student affairs, contract drafting and review, and policy development.

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Professional Profile

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Practice and Experience

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

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