

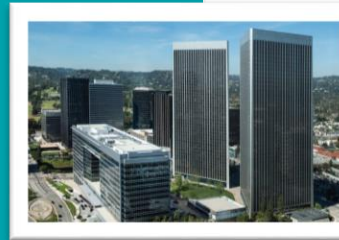


Title IX Appeals

Thompson Coburn LLP
Title IX Training Series | July 2020

Thompson Coburn LLP

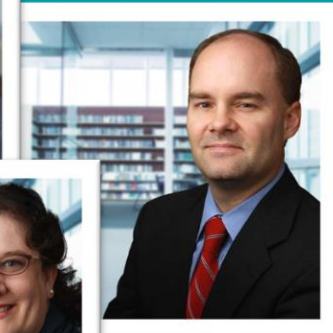
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- Offices in Chicago, Los Angeles, St. Louis, Dallas, and Washington, D.C.
- Higher education practice provides legal counsel, compliance, and training services to colleges and universities.



Higher Education Practice



Aaron D. Lacey
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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

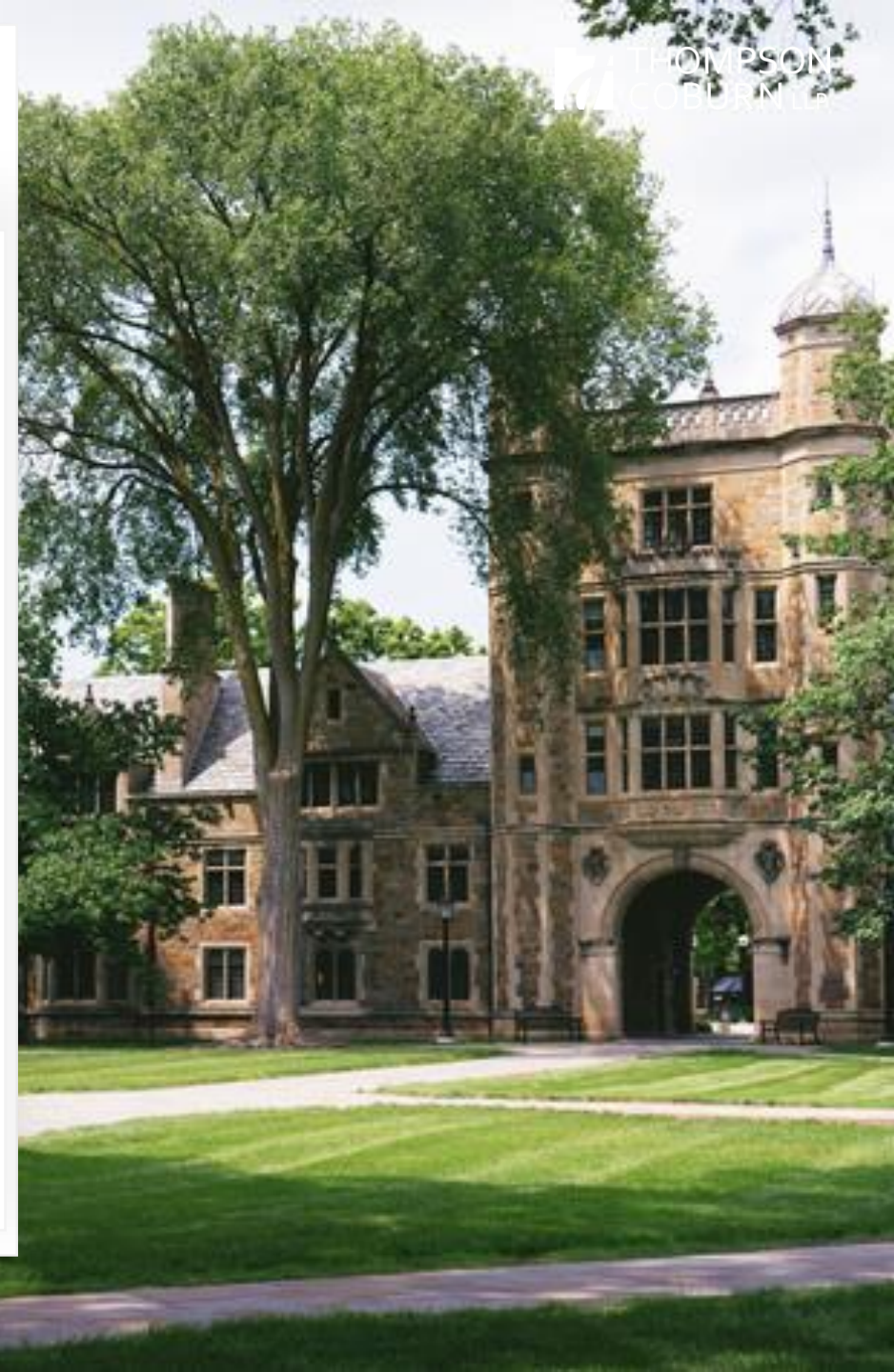
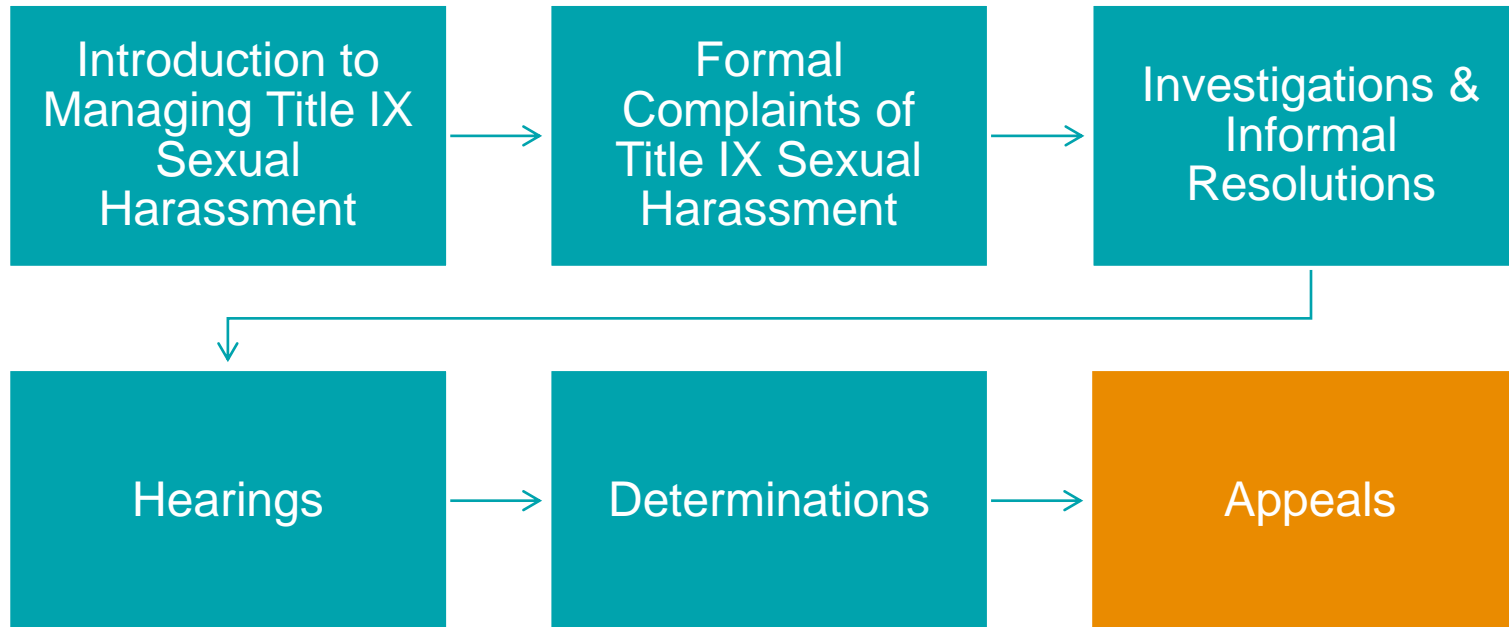
Institutions of higher education are **welcome** to use this foundational training series at their discretion, and to post the series to their websites as part of their Title IX training materials (a requirement under the new rule).

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

Bases for Appeal

Drafting Appeal Decisions

Requirements for Appeal Officers



Session Presenters



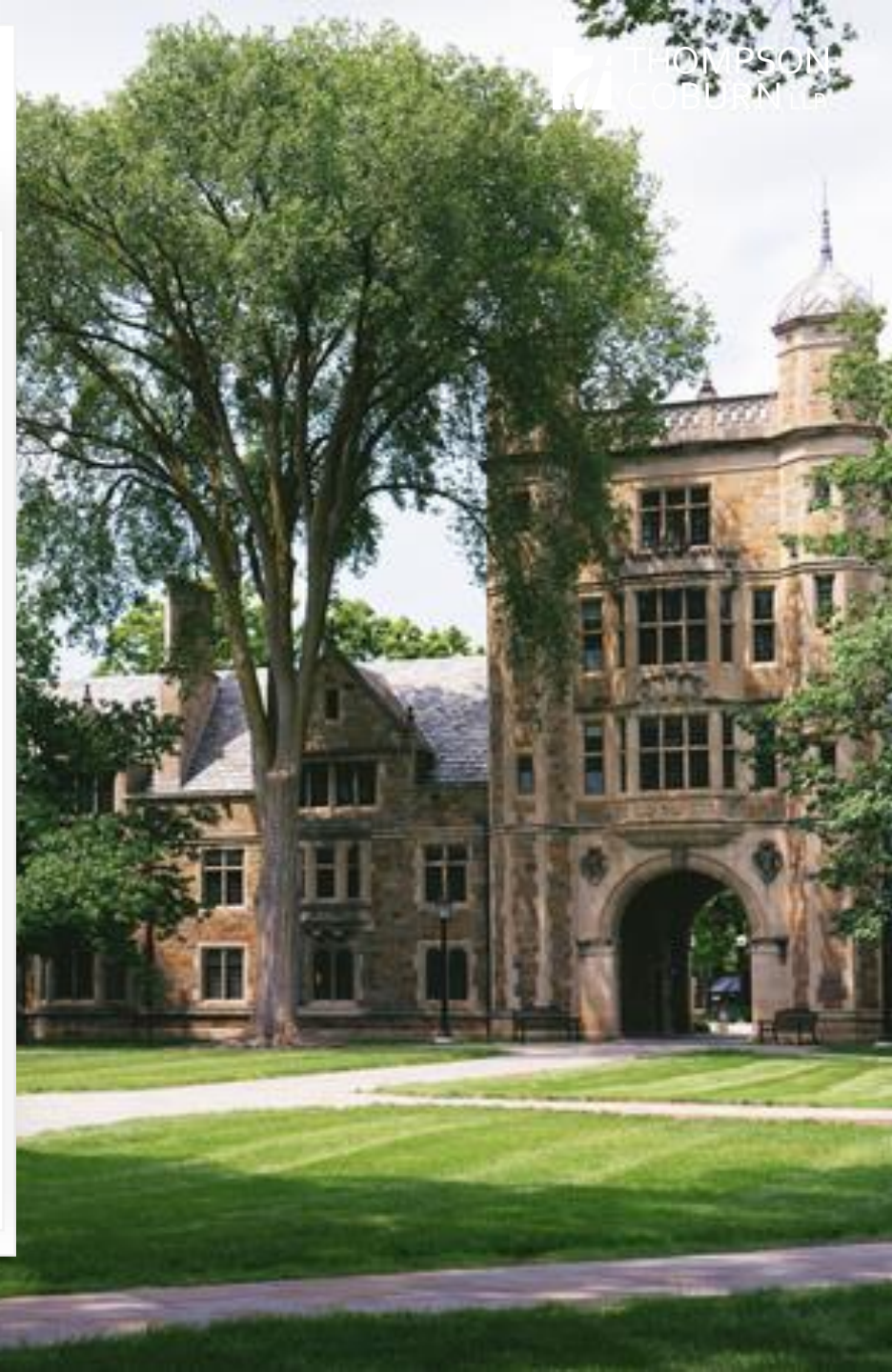
Ret. Judge Booker Shaw

Partner, Litigation &
Appellate Practice



Scott Goldschmidt

Counsel, Higher Education
Practice



The Formal Complaint Framework



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.

The Formal Complaint Framework

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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 Title IX complaint process must comply with a **wide range** of specific requirements set out in the new rule, including specific requirements concerning **appeals**.

The Formal Complaint Framework

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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

The Formal Complaint Framework

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Key Concepts



Key Concepts

- ❖ School must offer both parties an appeal from (1) a determination regarding responsibility, or (2) a school's dismissal of a formal complaint or any allegations therein.
- ❖ Schools generally must implement appeal procedures equally for both parties.
- ❖ Schools must notify the other party in writing when an appeal is filed.
- ❖ Schools must ensure that the appeal officer is not the hearing adjudicator, investigator, or Title IX Coordinator.

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Key Concepts

- ❖ Schools must ensure that the appeal officer has received required training.
- ❖ They must give both parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.
- ❖ Schools must issue a written decision describing the result.
- ❖ They must provide the written decision simultaneously to both parties.

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Bases for Appeal



Bases for Appeal

Appeals may be granted on the following bases:

- a procedural irregularity that affected the outcome;
- new evidence that was not reasonably available at the time the determination or dismissal was made and could affect the outcome; and
- the Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.

A school also may offer an appeal equally to both parties on additional bases.

The Formal Complaint Framework

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Bases for Appeal

Is the severity or proportionality of sanctions an appropriate basis for an appeal?

- “...the final regulations leave to a recipient’s discretion whether severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by a recipient must be offered equally to both parties.”

Can a party request an appeal because of dissatisfaction with the result?

- Ground for appeal are defined by the bound of an institution’s policy.

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Bases for Appeal

Is there a way to appeal an appeal?

- No. If an appeal is filed, the determination regarding responsibility becomes final on the date the parties are provided the written determination of the result of the appeal.
- But note that party can file a lawsuit or complaint with the Office of Civil Rights.

The Formal Complaint Framework

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Drafting Appeal Decisions



Drafting Appeal Decisions

What should appeal officers be considering when reviewing appeals?

- Understand applicable grounds for appeal.
- Have an open mind.
- Be guided by applicable policy and facts.

What are best practices to make written appeal outcomes as defensible as possible?

- Address, in some fashion, all claims raised.
- Ensure no bias or conflict of interest.
- Keep an eye toward litigation.

The Formal Complaint Framework

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Requirements for Appeal Officers



Requirements for Appeal Officers

What are a few characteristics and qualities of the best appeal officers?

- Thoroughness and attention to detail.
- Understanding of Title IX process.
- Not afraid to find appeal has merit.

What positions at an institution should be considered to serve as the appeal officer?

- High ranking employee of institution.
- Legal background may be helpful but not necessary.
- Understanding of Title IX or student conduct process.

The Formal Complaint Framework

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Requirements for Appeal Officers

What are the training requirements for appeal officers?

- As a decision-maker, the appeal officer must receive training on:
 - The definition of sexual harassment in § 106.30.
 - The scope of the recipient's education program or activity.
 - How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes, as applicable.
 - How to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
 - Any technology to be used at a live hearing and on issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant.

The Formal Complaint Framework

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Requirements for Appeal Officers

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

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

The Formal Complaint Framework

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Resources



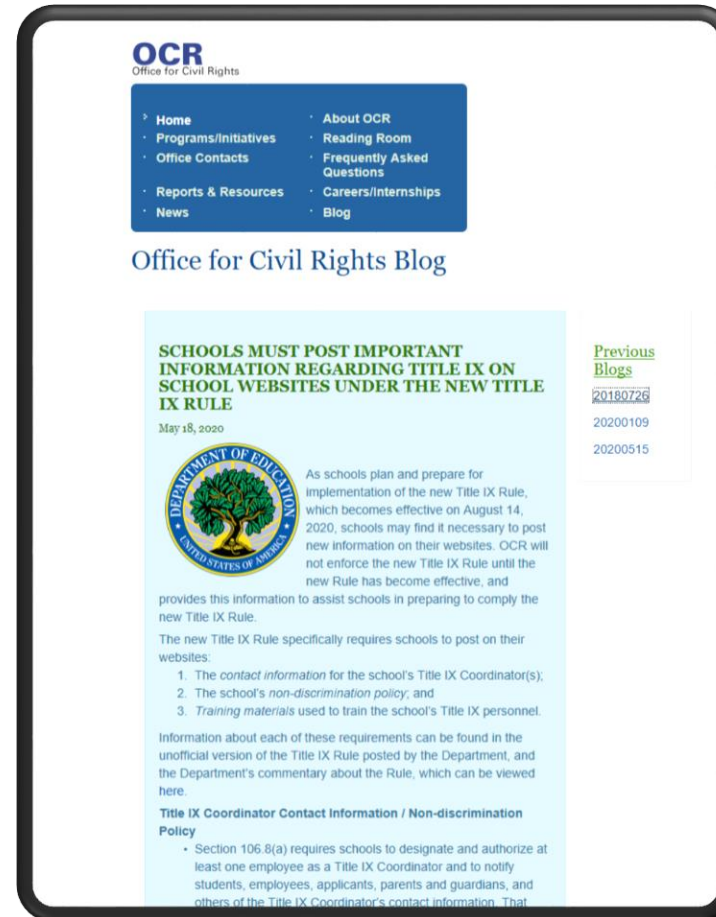
Office of Civil Rights

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.



The screenshot shows the OCR Office for Civil Rights website. At the top left is the OCR logo. A blue navigation menu contains links for Home, Programs/initiatives, Office Contacts, Reports & Resources, News, About OCR, Reading Room, Frequently Asked Questions, Careers/Internships, and Blog. Below the menu is the title 'Office for Civil Rights Blog'. The main content area features a light blue box with the heading 'SCHOOLS MUST POST IMPORTANT INFORMATION REGARDING TITLE IX ON SCHOOL WEBSITES UNDER THE NEW TITLE IX RULE' dated May 18, 2020. To the right of this box is a 'Previous Blogs' section with links for 20180726 and 20200515. The main text explains that schools must post information to assist with the new Title IX Rule, effective August 14, 2020. It lists three requirements: 1. 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. It also mentions that information about these requirements can be found in the unofficial version of the Title IX Rule and the Department's commentary.



Title IX Rule Comparison

Title IX Rule Comparison

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



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

Last Updated: May 20, 2020

On May 19, 2020, the U.S. Department of Education published the official version of its [new Title IX regulation](#) in the Federal Register. This new rule constitutes the first significant revision of the Department's Title IX regulations concerning sexual harassment in over 40 years. Among other things, the new rule revises the scope of a school's responsibility for managing incidents of sex discrimination, codifies procedural requirements for the resolution of Title IX complaints, and defines key concepts in the law. The effective date of the new rule is August 14, 2020. Below, we provide a comparison that shows the changes the new rule will make to 34 C.F.R. Part 106 as of August 14, 2020. We have created this document by comparing the existing rule to the changes set forth in the Federal Register, noted above.

Institutions with questions regarding the new Title IX rule are welcome to contact Aaron Lacey at (314) 552-6405 or alacey@thompsoncoburn.com. Aaron Lacey is the leader of Thompson Coburn's Higher Education practice, host of the firm's popular [Higher Education Webinar Series](#), and editorial director of [REGucation](#), the firm's higher education law and policy blog.

Disclaimer

Please note that the purpose of this document is to provide information on a regulatory matter and all content provided is for informational purposes only and should not be considered legal advice. The transmission of information from this document does not establish an attorney-client relationship with the reader. If you desire legal advice for a particular situation, you should consult an attorney.

Subpart A—Introduction

§106.1 Purpose and effective date.

The purpose of this part is to effectuate title IX of the Education Amendments of 1972, as amended by Pub. L. 93-568, 88 Stat. 1855 (except sections 904 and 906 of those Amendments) which is designed to eliminate (with certain exceptions) discrimination on the basis of sex in any education program or activity receiving Federal financial assistance, whether or not such program or activity is offered or sponsored by an educational institution as defined in this part. This part is also intended to effectuate section 844 of the Education Amendments of 1974, Pub. L. 93-380, 88 Stat. 484. The effective date of this part shall be July 21, 1975.

§106.2 Definitions.

As used in this part, the term:

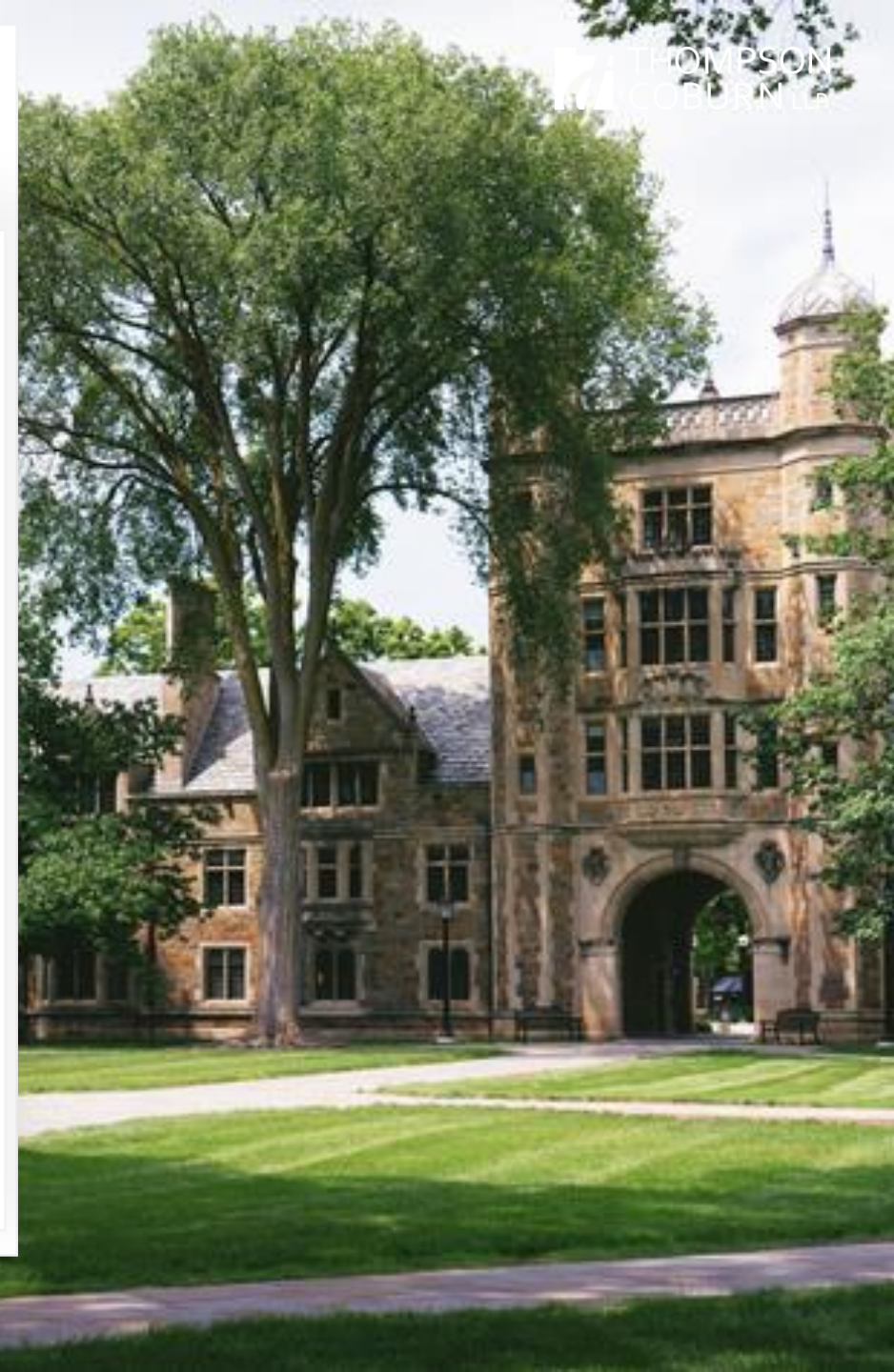
(a) *Title IX* means title IX of the Education Amendments of 1972, Pub. L. 92-318, as amended by section 3 of Pub. L. 93-568, 88 Stat. 1855, except sections 904 and 906 thereof; 20 U.S.C. 1681, 1682, 1683, 1685, 1686.

(b) *Department* means the Department of Education.

(c) *Secretary* means the Secretary of Education.

(d) *Assistant Secretary* means the Assistant Secretary for Civil Rights of the Department.

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Higher Ed Webinar Series

2019 | 2020 Series Calendar

August 2019	<u>Examining the ED Approval Process for Higher Ed Mergers and Acquisitions</u>
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

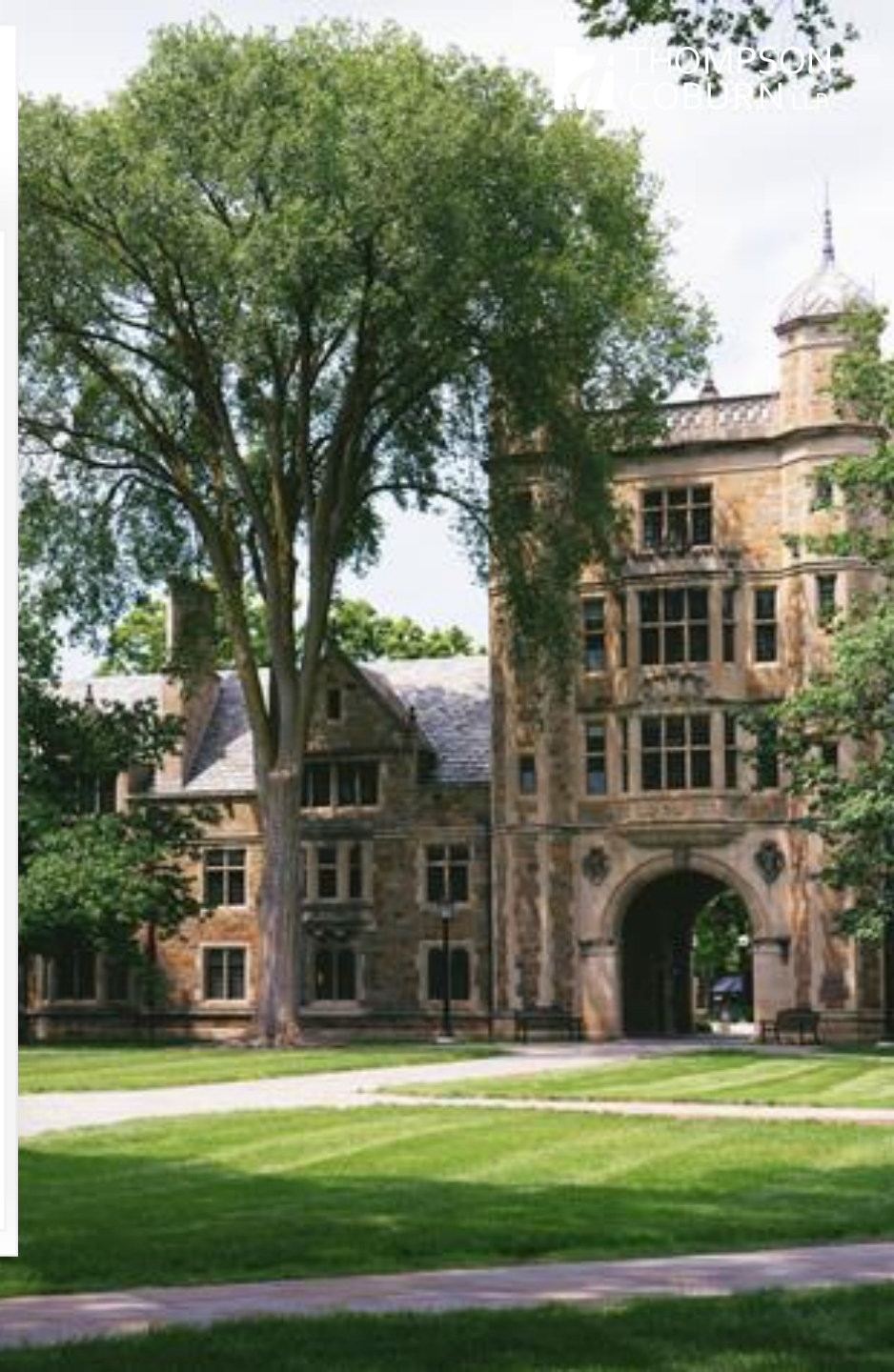
April 8, 2020 | [View Recording](#)

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](#)



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CONTRIBUTORS



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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](#)

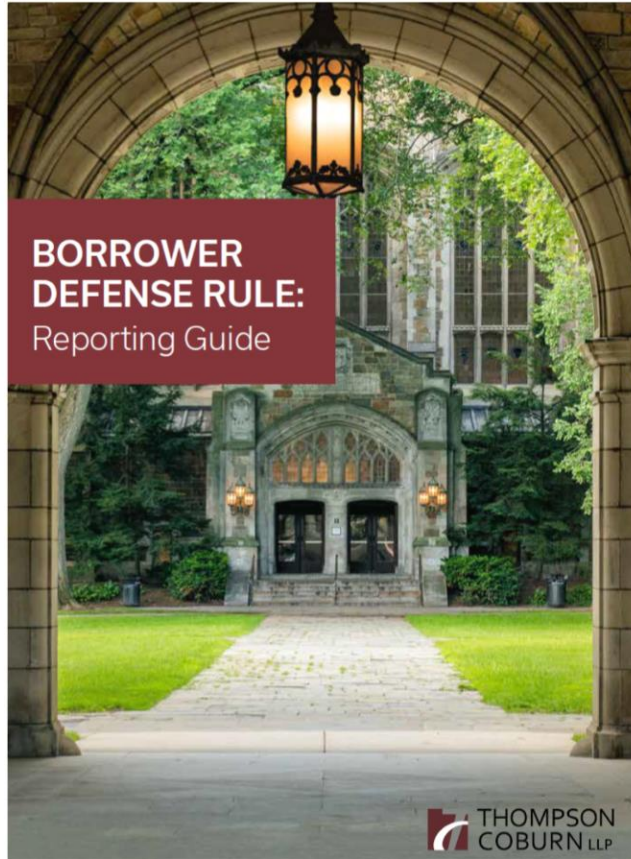


Aaron Lacey

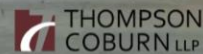
314 552 6405 direct

[Email](#) | [Twitter](#) | [LinkedIn](#)

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



Presenters



Professional Profile

Retired Judge Booker T. Shaw

- Partner, Litigation & Appellate Practice

Practice and Experience

- A skilled litigator and appellate advocate who brings valuable insight and perspective gained from more than 25 years on the bench.
- While serving on the Missouri Court of Appeals, Eastern District, participated in more than 1,000 cases and authored 141 appellate opinions. As a trial judge in the 22nd Judicial Circuit, from 1983 until 2002, presided over more than 500 trials.

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Professional Profile

Scott Goldschmidt

- 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.

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Professional Profile

Aaron Lacey

- Partner and Chair, Higher Education Practice

Practice and Experience

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

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