Pinnacle Career Institute Title IX Training
Presented by Thomas Coburn LLP
Title IX Training Series

Presentation Materials for Title IX Training
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THOMPSON COBURN LLP

Title IX Compliance Checklist

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On August 14, 2020, the U.S. Department of Education's new and controversial Title IX Rule takes effect. The new rule requires institutions to put into a place a complex policy framework for resolving reports of sexual harassment on campus. In particular, the new rule details requirements that institutions must follow when they receive a "formal complaint" of sexual harassment, as that term is defined in the law.

To assist institutions in their efforts to comply with the new rule's requirements, Thompson Coburn's Higher Education Practice created this compliance checklist. This self-audit tool is designed to assist institutions as they review their policies for compliance with the new Title IX rule's most significant requirements concerning the formal complaint process, and includes select quotations from the agency commentary that accompanied the new rule when it was published. Please note that this checklist is not a comprehensive review of every requirement found in the new rule. The regulation is complex, and institutions are strongly encouraged to review it directly, and to consult counsel as they work towards compliance.

Finally, we note that this checklist can be used in conjunction with Thompson Coburn's free Title IX Training Series, which assists institutions to comply with the significant training requirements in the new rule. This six-part, online lecture series provides foundational training for those individuals who will be administering the new Title IX process this fall, including Title IX coordinators, investigators, advisors, hearing officers, and appeal officers.[1]

1. Thompson Coburn welcomes institutions to use the Title IX Training Series at their discretion, and to include the lectures on their external websites, as required by the new rule.

	Required Elements of an Institution's Process for Resolving Formal Complaints of Title IX Sexual Harassment	Citation[2]
	Basic Procedural Requirements	
➤	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 • Following a formal complaint process that complies with 106.45 before the imposition of any disciplinary sanctions or other actions that are not supportive measures as defined in 106.30, against a respondent.	106.45(b)(1)(i)
	Related Guidance: "Being sensitive to the trauma a complainant may have experienced does not violate § 106.45(b)(1)(i) or any other provision of the grievance process, so long as... ''being sensitive'' does not lead a Title IX Coordinator, investigator, or decision-maker to lose impartiality, prejudge the facts at issue, or demonstrate bias for or against any party." 85 Fed. Reg. 30245.	
➤	Ensure remedies provided to a complainant are designed to restore or preserve equal access to the institution's education program or activity. Such remedies may include the same individualized services defined in 106.30 as "supportive measures"; however, remedies may be disciplinary or punitive and may burden the respondent, where supportive measures should not.	106.45(b)(1)(i)
	Related Guidance: "The unreasonableness of a burden on a party must take into account the nature of the educational programs, activities, opportunities, and benefits in which the party is participating, not solely those educational programs that are "academic" in nature. On the other hand, the Department appreciates the opportunity to clarify that, contrary to some commenters' concerns, schedule and housing adjustments do not necessarily constitute an "unreasonable" burden on a respondent, and thus the § 106.30 definition of supportive measures continues to require that [institutions] consider each set of unique circumstances to determine what individualized services will meet the purposes, and conditions, set forth in the definition of supportive measures. Removal from sports teams (and similar exclusions from school related activities) also require a fact-specific analysis, but whether the burden is "unreasonable" does not depend on whether the respondent still has access to academic programs; whether a supportive measure meets the § 106.30 definition also includes analyzing whether a respondent's access to the array of educational opportunities and benefits offered by the [institution] is unreasonably burdened. Changing a class schedule, for example, may more often be deemed an acceptable, reasonable burden than restricting a respondent from participating on a sports team, holding a student government position, participating in an extracurricular activity, and so forth." 85 Fed. Reg. 30182.	
➤	Require an objective evaluation of 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.	106.45(b)(1)(ii)
➤	Require that the Title IX Coordinator, investigator, decision-maker, or any person designated to facilitate an informal resolution process be free of bias and conflict of interest and trained on the following: • **Title IX Coordinators, investigators, adjudicators, and any person who facilitates informal resolutions:** The 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; and serving impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias. • **Adjudicators:** Using technology at live hearings; relevance of questions and evidence, including when questions and evidence about complainant's sexual history are not relevant. • **Investigators:** Issues of relevance to create an investigative report that fairly summarizes relevant evidence. Any materials used to train Title IX Coordinators, investigators, decision-makers, 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.	106.45(b)(1)(iii)

2. All citations refer to 34 C.F.R. Part 106.

	Related Guidance: "Whether bias exists requires examination of the particular facts of a situation and the Department encourages [institutions] to apply an objective (whether a reasonable person would believe bias exists), common sense approach to evaluating whether a particular person serving in a Title IX role is biased, exercising caution not to apply generalizations that might unreasonably conclude that bias exists (for example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents)..." 85 Fed. Reg. 20252.	
➤	Include a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process.	106.45(b)(1)(iv)
	Related Guidance: "The Department acknowledges that these final regulations apply only to allegations of Title IX sexual harassment, and as such these final regulations do not impose a presumption of non-responsibility in other types of student misconduct proceedings." 85 Fed. Reg. 30258.	
➤	Include reasonably prompt timeframes for conclusion of the grievance process, including reasonably prompt timeframes for filing and resolving appeals and informal resolution processes, and allow for temporary delay or limited extension with written notice for good cause. • Good cause may include considerations such as the absence of a party, a party's advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.	106.45(b)(1)(v)
	Related Guidance: "...even where good cause exists, the final regulations make clear that [institutions] may only delay the grievance process on a temporary basis for a limited time. A respondent (or other party, advisor, or witness) would not be able to indefinitely delay a Title IX proceeding by refusing to cooperate. While [institutions] must attempt to accommodate the schedules of parties and witnesses throughout the grievance process in order to provide parties with a meaningful opportunity to exercise the rights granted to parties under these final regulations, it is the [institution's] obligation to meet its own designated time frames, and the final regulations provide that a grievance process can proceed to conclusion even in the absence of a party or witness." 85 Fed. Reg. 30270-1.	
➤	Describe the possible range of sanctions and remedies, or list the possible disciplinary sanctions and remedies that the institution may implement following any determination of responsibility.	106.45(b)(1)(vi)
➤	State the standard of evidence to be used, whether that standard is the preponderance of the evidence or clear and convincing standard, and apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.	106.45(b)(1)(vii)
	Related Guidance: "The Department declines to provide definitions of the "preponderance of the evidence" standard and the "clear and convincing evidence" standard. The Department believes that each standard of evidence referenced in the final regulations has a commonly understood meaning in other legal contexts and intends the "preponderance of the evidence" standard to have its traditional meaning in the civil litigation context and the "clear and convincing evidence" standard to have its traditional meaning in the subset of civil litigation and administrative proceedings where that standard is used." 85 Fed. Reg. 30388 (May 19, 2020). But see footnote 1480, which contains sample definitions used in the Preamble.	
➤	Include the procedures and permissible bases for the complainant and respondent to appeal.	106.45(b)(1)(viii)
➤	Describe the range of available supportive measures available to complainants and respondents.	106.45(b)(1)(ix)
	Related Guidance: The "plain language of the § 106.30 definition does not state that a supportive measure provided to one party cannot impose any burden on the other party; rather, this provision specifies that the supportive measures cannot impose an unreasonable burden on the other party," 85 Fed. Reg. 30181, and there may be specific instances where it is impossible or impracticable to offer supportive measures, 85 Fed. Reg. 30209.	

➤	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.	106.45(b)(1)(x)
	Initial Notice of Formal Complaint	
➤	Upon receipt of a formal complaint, schools must provide a written notice to the parties that includes: • Discussion of the formal complaint process, including any informal resolution option; • The allegations of sexual harassment, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview (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); • A statement that the respondent is presumed innocent and that a determination of responsibility is made at the conclusion of the process; • A statement regarding right to an advisor and to review and inspect evidence; and • A statement informing the parties of any provision in the school's code of conduct that prohibits knowingly making false statements or knowingly submitting false information.	106.45(b)(2)(i)
➤	If, in the course of an investigation, an institution decides to investigate allegations about the complainant or respondent not included in the initial written notice, the institution must provide an updated written notice to the parties detailing the new allegations.	106.45(b)(2)(ii)
	Dismissal of a Formal Complaint	
➤	Schools **must** investigate the allegations in a formal complaint. Schools also **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.	106.45(b) (3)(i)
	Related Guidance: "...dismissal is mandatory where the allegations, if true, would not meet the Title IX jurisdictional conditions..." 85 Fed. Reg. 30289.	
➤	Schools **may** dismiss a formal complaint of sexual harassment under Title IX 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.	106.45(b)(3)(ii)
	Related Guidance: "The Department wishes to emphasize that this provision is not the equivalent of an [institution] deciding that the evidence gathered has not met a probable or reasonable cause threshold or other measure of the quality or weight of the evidence, but rather is intended to apply narrowly to situations where specific circumstances prevent the [institution] from meeting its burden in § 106.45(b)(5)(i) to gather sufficient evidence to reach a determination. Accordingly, an [institution] should not apply a discretionary dismissal in situations where the [institution] does not know whether it can meet the burden of proof under § 106.45(b)(5)(i)." 85 Fed. Reg. 30290.	
➤	Upon a required or optional dismissal, schools must promptly and simultaneously send written notice to the parties.	106.45(b)(3)(iii)

	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 complaint against one or more respondents; or • By one party against the other party.	106.45(b)(4)

	Investigation of a Formal Complaint	
➤	Ensure the burden of proof and burden of gathering evidence rests on the school not the parties.	106.45(b)(5)(i)
➤	Avoid the use of legally privileged documentation. An institution cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the institution obtains that party's voluntary, written consent to do so for a grievance process under this section.	106.45(b)(5)(i)
➤	Provide equal opportunity for the parties to present fact and expert witnesses, and other inculpatory and exculpatory evidence.	106.45(b)(5)(ii)
➤	Refrain from restricting the parties' ability to discuss the allegations or to gather and present relevant evidence.	106.45(b)(5)(iii)
	Related Guidance: "...the Department believes that generally, a party's communication with a witness or potential witness must be considered part of a party's right to meaningfully participate in furthering the party's interests in the case, and not an 'interference' with the investigation. However, where a party's conduct toward a witness might constitute 'tampering' (for instance, by attempting to alter or prevent a witness's testimony), such conduct also is prohibited under § 106.71(a)." 85 Fed. Reg. 30296.	
➤	Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding; however, the institution may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.	106.45(b)(5)(iv)
	Related Guidance: "[Institutions] may require parties and advisors to refrain from disseminating the evidence (for instance, by requiring parties and advisors to sign a non-disclosure agreement that permits review and use of the evidence only for purposes of the Title IX grievance process), thus providing [institutions] with discretion as to how to provide evidence to the parties that directly relates to the allegations raised in the formal complaint." 85 Fed. Ref. 30304. "We further note that live hearings with cross-examination conducted by party advisors is required only for postsecondary institutions, and the requirement for a party's advisor to conduct cross-examination on a party's behalf need not be more extensive than simply relaying the party's desired questions to be asked of other parties and witnesses. 85 Fed. Ref. 30299.	
➤	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.	106.45(b)(5)(v)
➤	Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is **directly related** to the allegations raised in a formal complaint, including the evidence upon which the institution does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source, so that each party can meaningfully respond to the evidence prior to conclusion of the investigation. • Prior to completion of the investigative report, the institution must send to each party and the party's advisor, if any, the evidence subject to inspection and review in an electronic format or a hard copy, and the parties must have at least 10 days to submit a written response, which the investigator will consider prior to completion of the investigative report. • The institution must make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.	106.45(b)(5)(vi)

	Related Guidance: "With regard to the sharing of confidential information, an [institution] may permit or require the investigator to redact information that is not directly related to the allegations (or that is otherwise barred from use under § 106.45, such as information protected by a legally recognized privilege, or a party's treatment records if the party has not given written consent) contained within documents or other evidence that are directly related to the allegations, before sending the evidence to the parties for inspection and review." 85 Fed. Reg. 30304.	
➤	Create an investigative report that fairly summarizes **relevant** evidence and, at least 10 days prior to a hearing, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.	106.45(b)(5)(vii)
	Hearings	
➤	An institution's hearing procedures must: • Require a live hearing in the formal adjudication process, which **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; • Permit each party's advisor to cross-examine the other party and any witnesses in the live hearing directly, orally, and in real time; • Require that cross-examination be conducted by the party's advisor and never by the party personally; • Require that the institution provide an advisor to a party, free of charge, if a party does not have an advisor to conduct cross-examination; • At the request of either party, require 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; • Describe that 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; • Require that only relevant cross-examination and other questions may be asked of a party or witness; and require the adjudicator to determine whether a question is relevant, and explain any decision to exclude a question as not relevant, before a party of witness answers a cross-examination or other question; • Explain that 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); and • Require an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.	106.45(b)(6)(i)
	Related Guidance: Institutions are not prohibited "from using a non-disclosure agreement that complies with these final regulations and other applicable laws." 85 Fed. Reg. 20298. Institutions also have "discretion to adopt rules governing the conduct of hearings that could, for example, include rules about the timing and length of breaks requested by parties or advisors and rules forbidding participants from disturbing the hearing by loudly conferring with each other," but may not forbid a party from conferring with the party's advisor. 85 Fed. Ref. 30339. "These final regulations require objective evaluation of relevant evidence, and contain several provisions specifying types of evidence deemed irrelevant or excluded from consideration in a grievance process; an [institution] may not adopt evidentiary rules of admissibility that contravene those evidentiary requirements prescribed under § 106.45. For example, an [institution] may not adopt a rule excluding relevant evidence whose probative value is substantially outweighed by the danger of unfair prejudice; evidence concerning a complainant's prior sexual history) or otherwise barred from use under § 106.45 (as is, for instance, information protected by a legally recognized privilege). However, the §	

	106.45 grievance process does not prescribe rules governing how admissible, relevant evidence must be evaluated for weight or credibility by an [institution's] decision-maker, and [institutions] thus have discretion to adopt and apply rules in that regard, so long as such rules do not conflict with § 106.45 and apply equally to both parties." 85 Fed. Ref. 30294. "[An institution] may adopt rules of order or decorum to forbid badgering a witness, and may fairly deem repetition of the same question to be irrelevant." 85 Fed. Ref. 30248. When "evidence is duplicative of other evidence, an [institution] may deem the evidence not relevant." 85 Fed. Ref. 30337. An institution may also adopt "a rule (applied equally to both parties) that does, or does not, give parties or advisors the right to discuss the relevance determination with the decision-maker during the hearing." 85 Fed. Ref. 30343. "The prohibition on reliance on "statements" applies not only to statements made during the hearing, but also to any statement of the party or witness who does not submit to cross-examination. "Statements" has its ordinary meaning, but would not include evidence (such as videos) that do not constitute a person's intent to make factual assertions, or to the extent that such evidence does not contain a person's statements. Thus, police reports, SANE reports, medical reports, and other documents and records may not be relied on to the extent that they contain the statements of a party or witness who has not submitted to cross-examination. While documentary evidence such as police reports or hospital records may have been gathered during investigation and, if directly related to the allegations inspected and reviewed by the parties, and to the extent they are relevant, summarized in the investigative report, the hearing is the parties' first opportunity to argue to the decision-maker about the credibility and implications of such evidence. Probing the credibility and reliability of statements asserted by witnesses contained in such evidence requires the parties to have the opportunity to cross-examine the witnesses making the statements." 85 Fed. Ref. 30349.	
	Determination Regarding Responsibility	
➤	The decision-maker(s), who cannot be the same person(s) as the Title IX Coordinator or the investigator(s), must issue a written determination regarding responsibility. To reach this determination, the institution must apply the standard of evidence specified in the institution's policy (i.e., "preponderance of the evidence" or "clear and convincing").	106.45(b)(7)(i)
➤	Require that the written determination, provided to the parties simultaneously, include: • An identification of the allegations of sexual harassment; • 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 supporting the determination; • Conclusions regarding the application of the school's sexual misconduct policy to the facts; • 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; and • Procedures and permissible bases for appeal.	106.45(b)(7)(ii)
	Appeals	

➤	Offer appeal from **at least** the following:
	• A determination regarding responsibility or school's dismissal of a formal complaint or any allegations therein. At a minimum, appeals may be made 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; or
	  ▸ The Title IX Coordinator, investigator, or adjudicator had a conflict of interest or bias that affected the outcome of the matter.
		106.45(b)(8)
		(i-ii)

	Related Guidance: "...the final regulations leave to an [institution's] discretion whether severity or proportionality of sanctions is an appropriate basis for appeal, but any such appeal offered by an [institution] must be offered equally to both parties." 85 Fed. Reg. 30396.	

➤	The appeal process must: • Notify the other party in writing when an appeal is filed and implement appeal procedures equally for both parties; • Ensure that the decision-maker for the appeal is not the same person as the hearing officer, the investigator, or the Title IX Coordinator; • Ensure that the decision-maker for the appeal is free of bias and conflict of interest and meets the training requirements in 106.45(b)(1)(iii); • 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 of the appeal and the rationale for the result; and • Provide the written decision simultaneously to both parties.	106.45(b)(8)(iii)
	Informal Resolution	
➤	After a formal complaint is filed and at any time prior to reaching a determination regarding responsibility, an institution may facilitate (but never require) an informal resolution process that does not require a full investigation and adjudication. The institution must provide the parties a written notice disclosing: the allegations; the requirements of the informal resolution process; the circumstances under which it precludes the parties from resuming a formal complaint arising from the same facts; any other consequences of participating in the informal resolution process; and the records that will be maintained or could be shared. The school also must obtain the parties' voluntary, written consent to an informal resolution.	106.45(b)(9)(i-ii)
	Related Guidance: "Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice. Defining this concept may have the unintended effect of limiting parties' freedom to choose the resolution option that is best for them, and [institutional] flexibility to craft resolution processes that serve the unique educational needs of their communities." 85 Fed. Reg. 30401.	
➤	The school must explain that at any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and to resume the formal complaint process. The institution also must explain that informal resolution is not available to resolve allegations that an employee sexually harassed a student.	106.45(b)(9)(iii)
	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.	106.45(b)(10)
➤	If there was an adjudication, the records also must contain any: determination regarding responsibility; audio or audiovisual recording or transcript; disciplinary sanctions imposed on the respondent; remedies provided to the complainant; appeal and the result; and informal resolution and the result.	106.45(b)(10)
➤	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.	106.45(b)(10)

Institutions with questions regarding this Title IX Compliance Checklist, the Title IX Training Series, or other matters relating to Title IX compliance are welcome to contact Aaron Lacey at alacey@thompsoncoburn.com or Scott Goldschmidt at sgoldschmidt@thompsoncoburn.com. Aaron is the Chair 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. Scott is the former Deputy General Counsel for Catholic University, and a member of the firm's Higher Education practice.

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