

Title IX in Limbo: Practical Steps for Summer 2019

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Pepper Hamilton Higher Education “In Brief” Series

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- ▶ Provides litigation, counseling and investigative services to colleges, universities and schools across the country, leveraging her broad higher education experience to provide practical advice in the myriad complex matters facing institutions of higher education
- ▶ Has provided extensive advice to colleges, universities and K-12 schools in areas such as Title IX and the Clery Act, employee and student misconduct, fundraising and major gift agreements, federal and state regulatory compliance, governing board activities and shared governance
- ▶ Before joining Pepper, Ms. Foerster was general counsel and chief of staff at Bucknell University.



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- ▶ Has extensive experience litigating complex commercial disputes in jurisdictions throughout the United States and his practice focuses on complex commercial litigation, newsroom law and higher education law
- ▶ Represents colleges, universities and other educational institutions in providing counseling, litigation and investigative services for the unique challenges that face institutions of higher learning
- ▶ Has provided extensive advice on compliance with the federal Clery Act, the Family Educational Rights and Privacy Act (FERPA) and other federal and state laws that apply to educational institutions.
- ▶ Has provided counseling and advice on drafting and complying with policies and procedures dealing with Title IX.

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Audio

The screenshot displays the Cisco Webex Events interface. At the top, the title bar reads "Cisco Webex Events" with standard window controls. Below the title bar is a menu with "File", "Edit", "View", "Communicate", "Participant", "Event", and "Help". The main content area shows a video player with a red text overlay: "Audio should stream automatically on entry through your computer speakers". Below this, a banner for "Pepper Hamilton Webinar" is visible. At the bottom of the video player, there is a logo for "Pepper Hamilton LLP Attorneys at Law". A small "Audio Broadcast" window is open, showing a rate of "24.7 Kbps" and buttons for "Pause" and "Stop". The bottom toolbar contains icons for mute, video, chat, and other functions. On the right side, a "Participants" panel is open, showing "Panelist 1" (Brian Dolan (Host)) and "Attendee" (Brian Dolan (me)).

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Audio Broadcast ×

24.7 Kbps

Pause Stop

Participants

Panelist 1

BD Brian Dol... (Host) 🔊

Attendee:

BD Brian Dolan (me)

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Q&A

Audio

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File Edit View Communicate Participant Event Help

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Brian Dol... (Host)

BD

Brian Dolan (me)

Q&A

Q&A

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Participants

- Panelist: 1
 - BD Brian Dol... (Host)
- Attendee:
 - BD Brian Dolan (me)

Q&A

**The webinar will be starting at approx. 12:00pm ET.
There is currently no audio until we start.**

We are on mute and will be starting in a few minutes.

Title IX: How did we get here?

- ▶ 1972 Title IX of the Education Amendments Act
- ▶ 1975 Title IX implementing regulations
- ▶ 1999 SCOTUS holds peer harassment actionable
- ▶ 2001 OCR's Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students or Third Parties
- ▶ 2011 OCR's Dear Colleague Letter: Sexual Violence
- ▶ 2014 OCR's Q&A on Title IX and Sexual Violence

Sept. 2017 DCL and Q&A

- ▶ “Significant guidance document”
- ▶ Withdrew the 2011 DCL and the 2014 Q&A
- ▶ Reaffirmed the regulations and the 2001 Revised Guidance on Sexual Harassment
- ▶ Stressed flexibility and fundamental fairness
- ▶ Signaled the rulemaking process

Nov. 2018 NPRM



FEDERAL REGISTER

The Daily Journal of the United States Government



 Proposed Rule

Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

A Proposed Rule by the [Education Department](#) on 11/29/2018



Live Hearing

NPRM 106.45(b)(3)

- ▶ Cross-examination must be conducted by the party's advisor of choice.
- ▶ If a party does not have an advisor present at the hearing, the institution must provide an advisor aligned with the party to conduct cross-examination.
- ▶ Decision-maker must explain to the party's advisor any decision to exclude questions as not relevant.

Sept. 2017 Q&A

- ▶ “The investigator(s), or separate decision-maker(s), ***with or without a hearing***, must make findings of fact and conclusions...”
- ▶ Citing 2001 Guidance, schools must ensure “an adequate, reliable, and impartial” investigation, “including the opportunity to present witnesses and other evidence.”
- ▶ “Any process made available to one party ... should be made equally available to the other party (for example, ... the right to cross-examine parties and witnesses or to submit questions to be asked of parties and witnesses).”
- ▶ Reaffirmed that institutions may limit the role of advisors.

Evolving Case Law

- ▶ Sixth Circuit: Due Process requires a live hearing and cross-examination (*Doe v. Baum*, 903 F.3d 676 (6th Cir. 2018)).
- ▶ California: Fundamental fairness requires a live hearing and cross-examination (*Doe v. Allee*, 30 Cal. App. 5th 1036 (Cal. App. 2d App. Div. 2019)).

What should schools do now?

- ▶ Ensure policies include notice to the respondent before an interview.
- ▶ If still using a single investigator model, consider whether now is the time to move to a hearing model; alternatively, discuss what such a model would look like if required.
- ▶ Ensure policies afford both parties the same opportunity to challenge the other's narrative.
- ▶ Ensure policies provide the investigator and decision-maker the opportunity to assess credibility.
- ▶ Ensure training materials do not use stereotypes or fixed assumptions, and are articulated in neutral terms.
- ▶ Consider creating a stable of trained advisors.
- ▶ Discuss how the institution might handle a more active role for attorneys.

Terminating the Grievance Process

NPRM 106.45(b)(3)

- ▶ If the conduct would not constitute sexual harassment OR did not occur within the institution's program or activity, the institution "must terminate its grievance process."
- ▶ "This ensures that only conduct covered by Title IX is treated as a Title IX issue in a school's grievance process."
- ▶ Institution can investigate through the "student conduct code."

Sept. 2017 Q&A

- ▶ When the school knows or reasonably should know of an incident of “sexual misconduct,” it must respond appropriately; when it is so severe, persistent or pervasive as to deny or limit a student’s ability to participate in or benefit from the school’s programs or activities, the school must respond.
- ▶ “The investigator(s), or separate decision-maker(s), with or without a hearing, must make findings of fact and conclusions as to whether the facts support a finding of responsibility for violation of ***the school’s sexual misconduct policy.***”

What should schools do now?

- ▶ Ensure that sexual misconduct policies are clear as to how off-campus conduct will be addressed and under what circumstances.
 - Summers and academic year breaks
 - Abroad programs
 - Off-campus housing

Compelled Disposition

NPRM 106.44(b)(2)

- ▶ When an institution has actual knowledge of reports by multiple complainants of conduct by the same respondent, the Title IX Coordinator must file a formal complaint.
- ▶ If a party does not submit to cross-examination at a hearing, the decision-maker must not rely on any statement of that party or witness (106.45(b)(3)(vii)).

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- ▶ “Whether or not a student files a complaint of alleged sexual misconduct or otherwise asks the school to take action, where the school knows or reasonably should know of an incident of sexual misconduct, the school must take steps to understand what occurred and to respond appropriately.”

What should schools do now?

- ▶ Discuss and be able to articulate the circumstances under which the institution will investigate multiple reports concerning the same student, even where an alleged victim does not wish to go forward.
- ▶ Consider meeting with the student who has been named in multiple reports even absent a formal investigation.

Interim Measures

NPRM 106.44(e)(4)

- ▶ Supportive Measures: “Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent.”
- ▶ Designed to restore or preserve access to the institution’s education program or activity, without unreasonably burdening the other party.
- ▶ Title IX Coordinator is responsible for coordinating effective implementation.
- ▶ Maintain records for three years.

Sept. 2017 Q&A

- ▶ Interim measures
 - Focus on “individualized services”
 - Available to **both** students
 - “... mak[e] every effort to avoid depriving any student of his or her education.”

- ▶ Do not rely on “fixed rules or operating assumptions that favor one party over another”

What should schools do now?

- ▶ Review policies (and unwritten practices) to ensure there is no indication that fixed assumptions are in play.
- ▶ Ensure supportive measures really are available to both complainants and respondents.
- ▶ Brainstorm how measures can be implemented in an appropriately non-punitive way.

Informal Resolution

NPRM 106.45(b)(6)

- ▶ Permitted at any point prior to reaching a determination as to responsibility, but the institution must provide both parties with a written notice including:
 - the allegations,
 - the requirements of the informal resolution process, including the circumstances (if any) under which it precludes resuming the formal process, and
 - any consequences of participating, including whether records are maintained and shared for any purposes.
- ▶ Institutions must obtain the written consent of the parties to participate.

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- ▶ Informal resolution is permitted if parties voluntarily agree AND the institution determines that the particular Title IX complaint is appropriate for such a process, but...
 - 2001 Revised Guidance prohibits in instances of sexual assault.

What should schools do now?

- ▶ If permitting informal resolution, ensure policy describes the process and the limits of informal resolution.
- ▶ Discuss and be able to articulate the circumstances under which the institution would not permit the use of informal resolution.

Timeframes

NPRM 106.45(b)(1)(v)

- ▶ Still need designated and reasonably prompt timeframes for the conclusion of the grievance process, including appeals.
- ▶ Include allowance for the temporary delay of the grievance process or the limited extension of timeframes for good cause, with written notice to the parties of the delay or extension and the underlying reason.

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- ▶ No 60-day requirement, but still need “designated and reasonably prompt time frames for the major stages of the complaint process.”

What should schools do now?

- ▶ Review the timeframes in your policy to ensure appropriate flexibility.
- ▶ Ensure policy specifically references possible need for delay.
- ▶ Ensure process is in place to communicate delays to the parties.

Access to Evidence

NPRM 106.45(b)(3)(viii)

- ▶ Both parties must have the opportunity to “inspect and review 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 recipient does not intend to rely in reaching a determination regarding responsibility”

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- ▶ Both parties must have timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.
- ▶ Institution must use trained, objective investigator(s) considering inculpatory and exculpatory evidence.

What should schools do now?

- ▶ Ensure institution is meeting the Sept. 2017 standard (i.e., both parties must have the opportunity to fully review all documents that are relied upon during the investigation and adjudication).
- ▶ Do not fall into the trap of withholding arguably exculpatory information because it doesn't seem directly relevant.

Standard of Evidence

NPRM 106.45(b)(4)(i)

- ▶ Must use preponderance of the evidence or clear and convincing.
- ▶ May only use POE if institution uses it in all other conduct proceedings, including against employees.

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- ▶ Should be consistent with other *student* misconduct cases.

What should schools do now?

- ▶ Consider ensuring the standard of evidence used in all student-related processes is consistent.
- ▶ Audit all student and employee processes to identify varying standards of evidence.

Appeals

NPRM 106.45(b)(5)

- ▶ Discretionary as to whether to offer an appeal, but must be available to both parties if offered.
- ▶ When a respondent is found responsible, the complainant may appeal on the ground that the remedies are not designed to restore or preserve the complainant's access to the institution's education program or activity, but may not demand a particular sanction.
- ▶ Institution must:
 - notify the other party in writing when an appeal is filed;
 - ensure that the appeal decision-maker is not the same person as the investigator;
 - give both parties a reasonable, equal opportunity to submit a written statement; and
 - issue a written decision to both parties describing the result of the appeal and the rationale.

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- ▶ Appeal rights can be unilateral

What should schools do now?

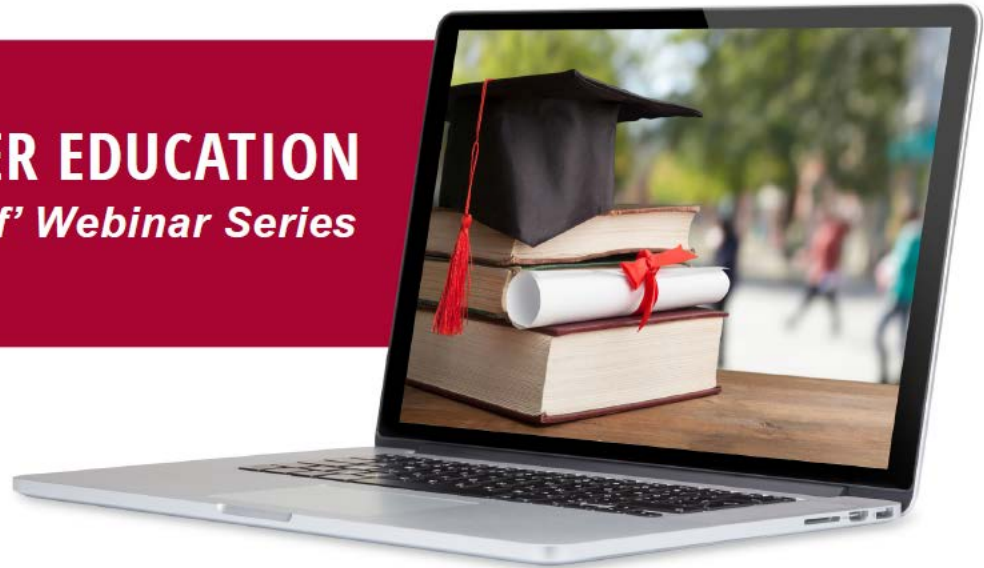
- ▶ Discuss whether to offer (continue offering) the opportunity for appeal.
- ▶ If offered, maintain as bilateral.
- ▶ Specifically articulate the basis for appeal in policy, as well as what the outcome might entail (e.g., new hearing, revised sanction, etc.).

Questions & Answers

Save the Dates!

- ▶ July 24
Evolving Labor & Employment Issues Impacting Campuses
- ▶ Sept. 5
Managing Risk on Campus Capital Projects
- ▶ Oct. 16
Renewable Energy Trends and Opportunities for Colleges and Universities

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