

# Webinar

## Title IX Final Rule Released: What You Need to Know Now

Sponsored by



May 20, 2020

*Presented in cooperation with*



**NADOHE**  
National Association of Diversity Officers in Higher Education

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# Webinar

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# Webinar

## Q & A

Don't forget to submit your questions to our presenters.

**How?** Click on the Chat box at the bottom left of your screen and be sure to click "send."

A screenshot of a web-based chat interface. The chat window has a light blue background and a title bar that says "Chat" with a downward-pointing triangle on the right. Inside the chat window, there is a message from "Jennifer" welcoming users to the webinar and providing instructions on how to submit questions. Below the message is a dashed line. At the bottom of the chat window, there is a white input field with the placeholder text "Enter your message" and a "Send" button to its right. An orange oval is drawn around the input field and the "Send" button.



# Webinar

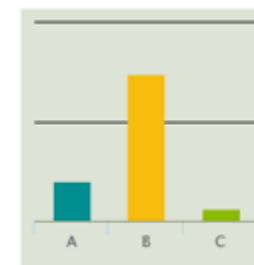
## Poll Questions

Click on your screen in the box next to your answer choice.

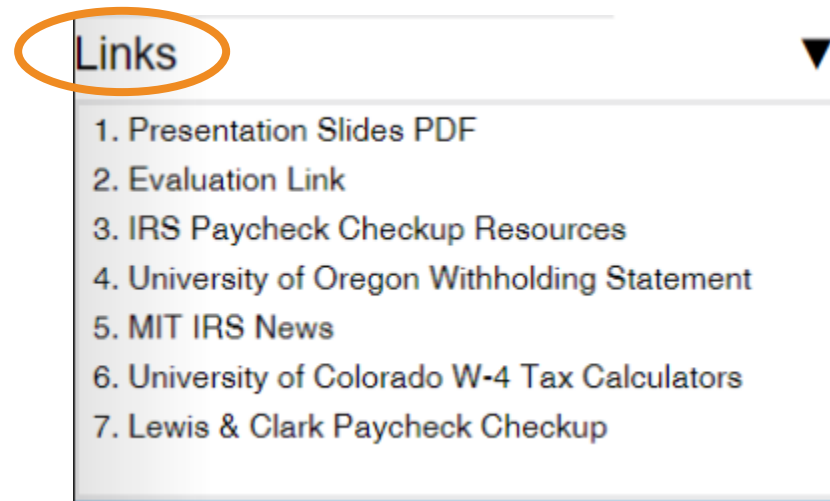
### Poll Question

At which stage would you currently place your institution overall when it comes to most strategic decision-making?

- 20% - 1 A ☐ Reliant on gut, intuition, experience  
74% - 19 B ☐ Data-informed  
6% - 2 C ☐ Data-driven



## Handouts



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# Webinar

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# cupa·hr™ Webinar

## Presenters



**Adrienne Meador Murray**  
Executive Director, Equity Compliance and  
Civil Rights Services  
D. Stafford & Associates and NACCOP



**William E. Hannum III**  
Partner  
Schwartz Hannum PC



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# Poll Question



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Of The 2033 Pages Of The New Title IX Regulations, How Many Pages Have You Read?

- A. All Of Them!
- B. About Half Of Them.
- C. Not Very Many.
- D. None.



# Agenda: Our Goals Today

1. Top 10 Key Changes Brought About By ED's New Title IX Regulations
2. Address Key Ways That Your Institution Will Need To Change Current Policies And Procedures
3. Prioritize Compliance Action Items  
... Your "To Do" List

YOUR DEADLINE

(IN CASE YOU DIDN'T KNOW):



## Because You Didn't Have Anything Else To Do Over The Next Three Months?



- Worrying About The Global Pandemic?
- Trying To Keep Up With New Pandemic-Related Orders & Guidance From Federal, State And Local Governments?
- Learning The Joys Of Working From Home?
- Worried About Your Own Children?
- Working With Students Suffering From Stress Of Online Learning, Loss Of In-Person Experience At College, Etc.?
- Trying To Decide If Your Institution Will Be Open This Fall?

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# How We Got Here

- Title IX Prohibits Discrimination On The Basis Of Sex
- ED And The Courts Have Interpreted Title IX To Prohibit Sexual Harassment (Including Sexual Assault)
  - Among Other Things, Colleges And University Must Investigate Allegations Of Sexual Harassment And Take Appropriate Disciplinary Action



# How We Got Here (Cont.)

- Obama-Era ED Guidance Focused On Protecting Victims
  - Including The 2011 “Dear Colleague” Letter, And
  - The Mandatory “Preponderance Of The Evidence” Standard
- Trump/DeVos-Era ED Has Focused On The Due Process Rights Of The Accused:
  - Rescinded Obama-Era Guidance
  - Issued Informal Guidance (Including 2017 Q&A)
  - Engaged In Formal Rulemaking Process

## What ED Is Saying:

“We can continue to combat sexual misconduct without abandoning our core values of fairness, presumption of innocence and due process.”

~ Secretary DeVos

May 6, 2020



# What One Opponent Is Saying:



- “Betsy DeVos has created a double standard that is devastating for survivors of sexual harassment and assault, who are overwhelmingly women and girls. We are suing to make sure this double standard never takes effect.”

~ Ria Tabacco Mar

Director Of The ACLU’s

Women’s Rights Project

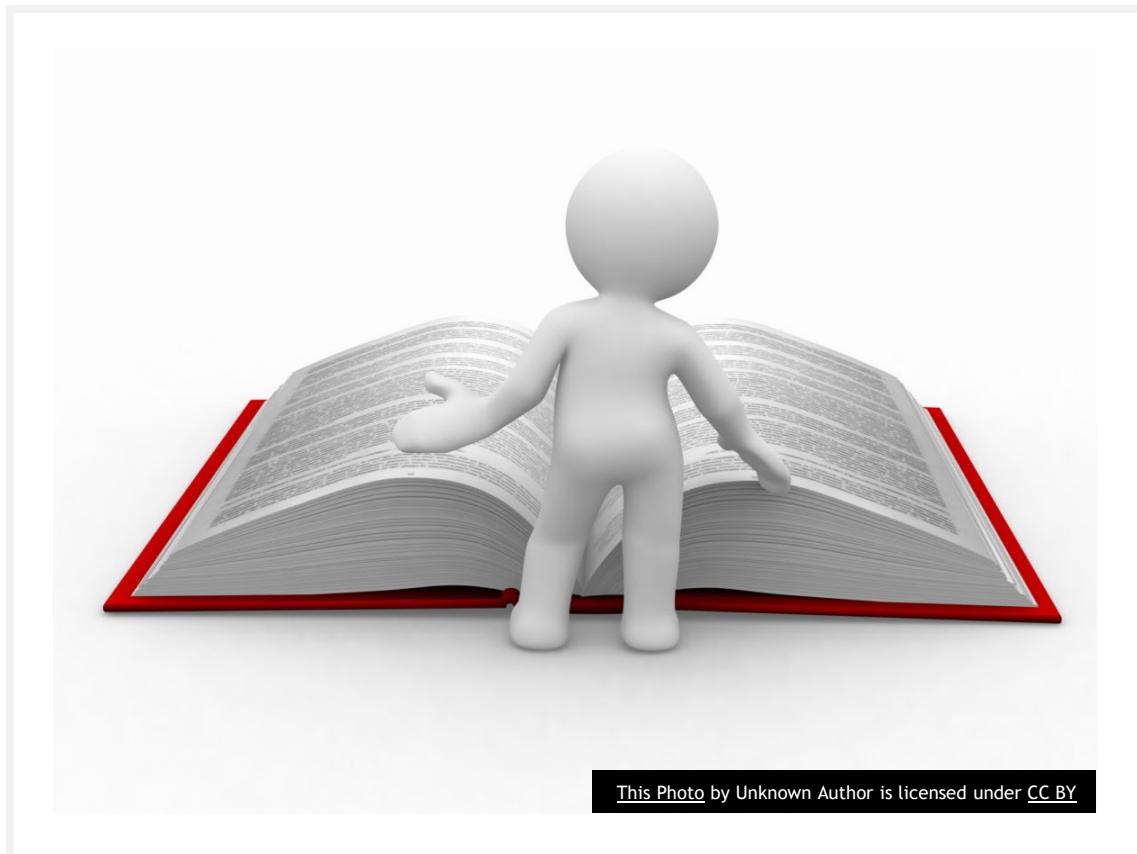
(Similar Litigation Is Expected To Follow)

# 1. Definition Of Sexual Harassment

Must Be Severe, Pervasive,  
and Objectively Offensive

- Conduct Must Occur Within The Context Of An “Education Program Or Activity” and the institution must have control over the Respondent
- Conduct Must Occur In The U.S.

# 1. Definition Of Sexual Harassment (Cont.)



- Sexual Harassment Will Also Expressly Include The Following (As Of August 14, 2020) (AND—these definitions use the Clery Act & VAWA definitions):
  - Sexual Assault
  - Dating Violence
  - Domestic Violence
  - Stalking

## 2. Mandatory Dismissal

- Recipient Must Dismiss Complaint If Allegations Do Not Meet Title IX Definition Of Sexual Harassment
- Dismissal Does Not Preclude Action Under The College's Or University's Code Of Conduct



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### 3. Emergency Removal

- Colleges And Universities May Remove A Student From An Education Program Or Activity If The Institution:
  - Conducts An Individualized Safety And Risk Analysis;
  - Determines There Is An Immediate Threat; And
  - Provides Respondent With Notice And An Opportunity To Challenge Decision Immediately Following Removal.

## 4. Notice Requirement

- Respondent Must Receive Written Notice (With Sufficient Time To Prepare Before Initial Interview), Including:
  - Identities Of The Parties Involved
  - Conduct Allegedly Constituting Sexual Harassment
  - Date Of Alleged Incident
- Continuing Obligation To Update Written Notice
- Written Notice Must Also State That Respondent:
  - Is Presumed Not Responsible
  - May Have An Advisor (Attorney?)
  - May Inspect And Review Evidence

# Poll Question:

- In Your Opinion, How Many Respondents Will Choose To Get An Attorney Involved In The Disciplinary Process Under This New Rule?
  - A. All
  - B. More Than 50%
  - C. Maybe 25%
  - D. None



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## 5. Evidence Gathering



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- Institution May Not Restrict Either Party From Either Discussing The Allegations Under Investigation Or Gathering And Presenting Relevant Evidence
  - ED: Restricting Respondent From Discussing Allegations May Limit Ability To Effectively Present Evidence

# Poll Question

Given This Change In Rules, Are You Concerned About An Increased (1) Risk Of Retaliation Or (2) Need For Additional Supportive Measures On Your Campus?

- A. Increased Risk Of Retaliation
- B. Increased Need For Additional Supportive Measures
- C. Both
- D. Neither



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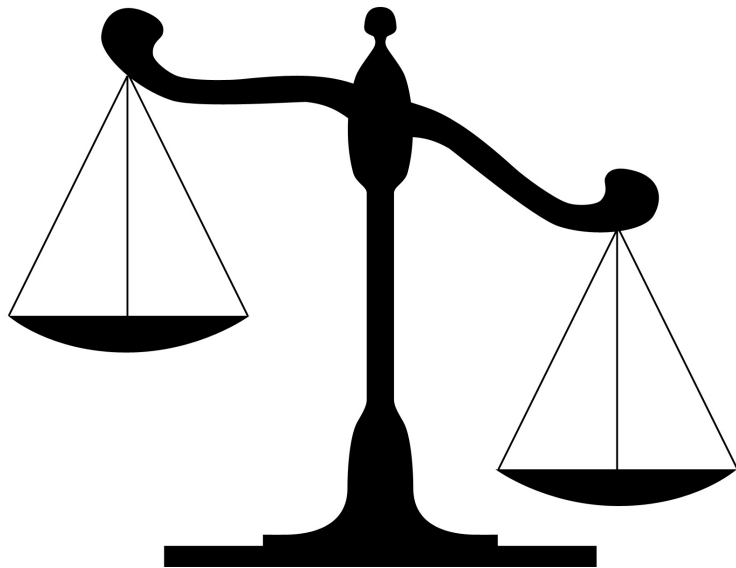
## 6. Informal Resolution



- Informal Resolution Process Allowed (Except For Allegations That An Employee Harassed A Student)
- Both Parties Must Agree To Informal Resolution
- Either Party May Withdraw From Informal Process And Resume Grievance Process



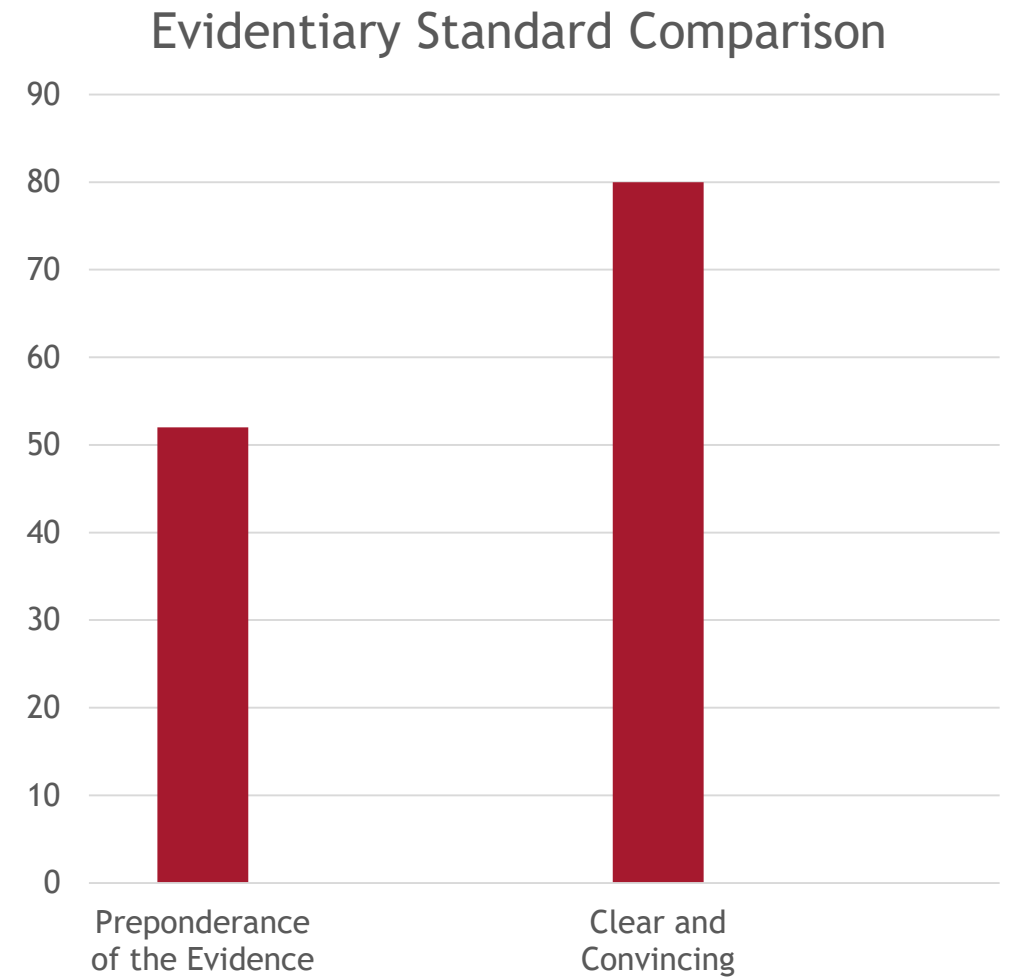
## 7. Evidentiary Standard



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- Consistent With Interim Guidance, Colleges And Universities May Use Either The “Preponderance” Standard Or The “Clear and Convincing” Standard
- Must Apply The Same Standard of Evidence To:
  - All Title IX And All Non-Title IX Cases
  - All Title IX Complaints Against Employees And Against Students

# Preponderance Of The Evidence



# Clear And Convincing Evidence



- This standard requires a finding in favor of the complainant if the evidence shows that a particular violation was substantially more likely than not to have occurred.
- Some courts have described this standard as requiring a high probability that a particular fact is true. This standard sets a higher threshold than the preponderance of the evidence standard but does not rise to the widely recognized standard in criminal cases of “beyond a reasonable doubt.”

# Considerations When Choosing Standard



- How Will Community React To Changes:
  - Students?
  - Faculty?
  - Employees?
  - Alumni?
- Possible Impact Of Union-Represented Employees?
- Who Should Be Involved In Choice?

# Poll Question

Which Evidentiary Standard Will Your Institution Use When The New Regulations Become Effective?

- A. We Will Use The “Preponderance” Standard
- B. We Will Use The “Clear And Convincing” Standard
- C. We Are Still Undecided, But We Will Decide Soon
- D. We Will Be Agonizing About This Until August 14

## 8. Inspection Of Evidence

- Both Parties Must Be Given An Equal Opportunity To Inspect Evidence Directly Related To The Allegations
  - At Least 10 Days Before Completion Of Investigative Report
  - At Any Hearing

Must Include Any Inculpatory And Exculpatory Evidence Whether Obtained From A Party Or Another Source





## 9. Live Hearing



- Required Element For All Post-Secondary Grievance Procedures
- “Single Investigator” Now Prohibited
- Hearing May Be Held In One Location
- May Be Held Virtually, In Real Time
  - At The Request Of A Party; Or
  - At The Institution’s Discretion
- Must Be Recorded Or Transcribed, With Recording Or Transcript Available To Parties For Inspection And Review

# Cross-Examination

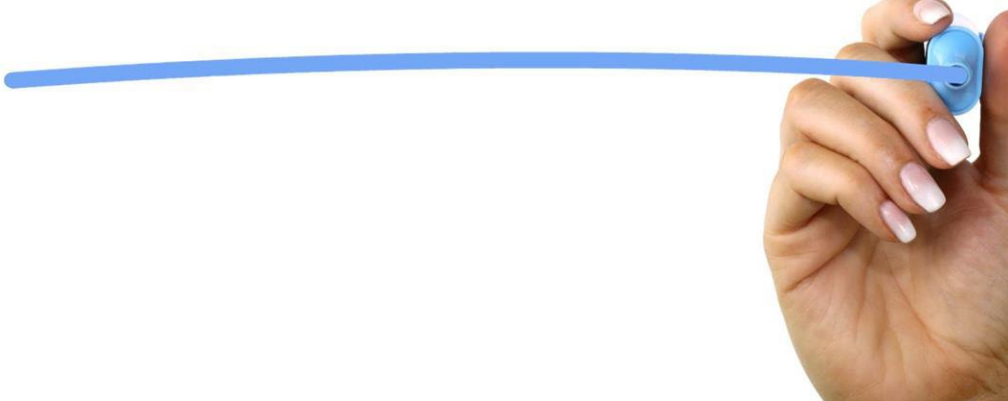
- Must Be Conducted By Advisor (Or Attorney)
  - Never By Party
  - If Any Party Has No Advisor, Institution Must Provide One Free Of Charge
- Questions Challenging Credibility Are Allowed
  - Decision-Maker May Preclude Irrelevant Questions
  - Questions About Complainant's Prior Sexual Behavior Or Sexual Predisposition Generally Not Allowed
- If An Individual Refuses To Submit To Cross-Examination, Decision-Maker May Not Rely On Any Statement Of That Individual To Determine Responsibility



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# Poll Question

POLL



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- In light of the new requirements regarding live hearings and cross examination, what percentage of complainants moving forward this fall would you expect NOT to participate in your process OR withdraw prior to the live hearing?
  - A. More than 80% of complainants will not participate
  - B. 50% to 80% of complainants will not participate
  - C. Less than 50% of complainants will not participate
  - D. I don't think the live hearing requirements will create any barriers to participation by complainants

## 10. Decision-Maker's Written Determination

- Decision-Maker(s) Must Issue Written Determination That
  - Identifies Allegations
  - Describes Procedural Steps
  - Includes Findings Of Fact
  - Includes Conclusions Applying Facts To Code of Conduct
  - Includes Rationale For Conclusion Regarding Each Allegation
  - Describes Appeal Procedures



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## Top 10 Continued ... Surprise!

### 11. Appeal

- Equal Access To Appeal For Complainant And Respondent
- Must Be Allowed For Any Material...
  - Procedural Irregularity
  - New Evidence
  - Conflict of Interest
- Institution Has Discretion To Offer Additional Grounds For Appeal



## One Last Surprise!?

### 12. Publication Of Training Materials

- Institutions Must\* Publish - On Their Website - All Materials Used To Train
  - Title IX Coordinators
  - Title IX Investigators
  - Title IX Decision-Makers
  - Any Person Who Facilitates Informal Resolutions



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## And then don't forget to add the Clery Requirements!

- As you redevelop your institutional policies and procedures related to Title IX, remember, half the Clery Act contains requirements related to institutional disclosures, training, and procedures you must have in place when responding to a report of sexual assault, dating violence, domestic violence and stalking.



# Poll Question

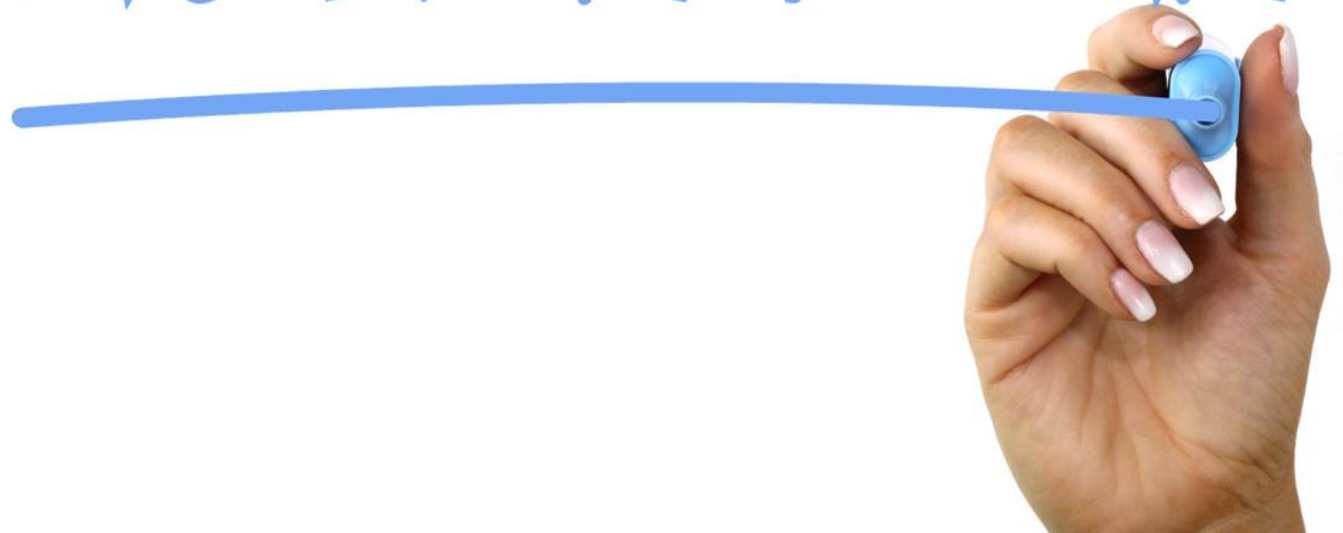
In Your View, Which Of The Following Tasks Will Present The Greatest Challenge For Your Institution During The Next Three Months?

- A. Revising Investigation Procedures
- B. Creating/Revising Procedures For Live Hearings
- C. Training Title IX Personnel
- D. Deciding On The Evidentiary Standard

## Key Action Items

- Assemble Your “Title IX Update Task Force”
  - Title IX Coordinator
  - Student Affairs
  - Human Resources
  - Communications/Public Relations
  - Campus Police/Public Safety
  - Senior Administrators?
  - Title IX Consultants?
  - Legal Counsel?
  - (Who Else?)

# ACTION PLAN



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# Key Action Items



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- Make A Plan
  - Review Current Policies And Practices
  - Compare Them With The New Regulations
  - Develop Your List Of What Needs To Be Updated, Your Top Compliance Priorities
  - Consider Amount Of Time Required For Each Task
  - Consider What Resources Are Available
- Choose A Philosophy
  - Make No Changes (Dare ED & Respondents To Sue)
  - Strict Compliance (Dare Victims To Sue)
  - Compliance Plus (Try To Thread The Needle; Get Sued By Someone Anyhow?)

# Key Action Items

- Suggested Priorities
  - Select Standard Of Evidence
    - (With Appropriate Input)
  - How To Handle Complaints Outside Scope Of Title IX
  - Update Title IX Policies & Grievance Procedures
  - Develop/Update Hearing Procedures
  - Update All Training Materials
  - Train All Title IX Trainers
    - Prepare To Train All Employees & Students
  - Hire/Train/Retain Title IX Investigators
  - Hire/Train/Retain Title IX Hearing Officers



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# 2020 Title IX Regulations: Policy Implications and Practical Application



- 12 hours of virtual, live instruction on new regs (“Zoom Ins”)
- Various options to accommodate different time zones, institutions, and people’s own schedules
- Will also explore Clery intersections of new regs (2.5 hours of training on intersections)
- Special Sessions for 2-Year Institutions (denoted by \*)

Class Dates	Class Time (EDT)
May 26 - 27	10:00 am - 5:00 pm
June 3 - 4	10:00 am - 5:00 pm
June 8 - 12	12:00 pm - 2:30 pm
June 8 - 9	10:00 am - 5:00 pm
June 11 - 12*	10:00 am - 5:00 pm
June 15 - 19	12:00 pm - 2:30 pm
June 22 - 26	11:00 am - 1:30 pm
June 22 - 26*	3:00 pm - 5:30 pm
June 22 - 26	3:00 pm - 5:30 pm

**REGISTER AT [HTTPS://WWW.NACCOP.ORG/TITLE-IX-REGS-CLASSES](https://www.naccop.org/title-ix-regs-classes)**

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## Q & A



**Adrienne Meador Murray**  
Executive Director, Equity Compliance and  
Civil Rights Services  
D. Stafford & Associates and NACCOP  
[www.dstaffordandassociates.com](http://www.dstaffordandassociates.com)



**William E. Hannum III**  
Partner, Schwartz Hannum PC  
[www.shpclaw.com](http://www.shpclaw.com)  
[whannum@shpclaw.com](mailto:whannum@shpclaw.com)  
(978) 623-0900

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