



# CURRENT LEGAL ISSUES – WHERE WE ARE AND WHERE WE ARE HEADED

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CSPEN ANNUAL CONFERENCE  
CHICAGO, ILLINOIS  
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**MAYNARD**  
COOPER GALE

# ABOUT THE **PRESENTERS**

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# TWELVE OFFICES **COAST TO COAST**



**6**

NEW MAJOR MARKETS  
LAST FIVE YEARS

# HIGHER EDUCATION PRACTICE

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The Higher Education Practice Group is deeply experienced in all manner of regulatory issues that are important to institutions, investors, third-party servicers and accrediting agencies.

<b>Title IV</b>	<b>Accreditation</b>	<b>State Licensure</b>
Cybersecurity	False Claims Act	Title IX
Transactions	Government Relations	Government Investigations

# LEGAL **DISCLAIMER**

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- The purpose of this presentation is to provide news and information on legal and regulatory issues and that all content provided is for informational purposes only. It should not be considered legal advice.
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- If you desire legal advice for a particular situation, you should consult an attorney.

# CURRENT STATUS OF KEY REGULATORY TOPICS

- **Borrower Defense to Repayment (2016)** – Final Rule published November 1, 2016, and effective July 1, 2017. Continues to apply to loans first disbursed on or after July 1, 2017, and before July 1, 2020.
- **Borrower Defense to Repayment (2019)** – Final Rule published September 23, 2019, and effective July 1, 2020. Applies to loans first disbursed on or after July 1, 2020.
- **Title IX** – Final Rule published May 19, 2020. Effective August 14, 2020.
- **Distance Education** – Final Rule published September 2, 2020. Effective July 1, 2021, or earlier at institution's discretion.



# BORROWER DEFENSE TO REPAYMENT

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# BORROWER **DEFENSE TO** **REPAYMENT**

- **Trump Administration Actions and Current Status:**
  - November 2017-February 2018 – ED conducted negotiated rulemaking sessions to craft new BDR regulations, with no consensus.
  - February 14, 2018 – ED issued final rule delaying the 2016 BDR regulations effective date to July 1, 2019.
  - July 31, 2018 – ED issued proposed rule outlining new BDR regulations.
  - September-October 2018 – Court determined that the Department’s delay on implementation of 2016 BDR regulations was improper and could no longer continue.



# BORROWER **DEFENSE TO** **REPAYMENT**

- **Trump Administration Actions and Current Status (cont.):**
  - March 15, 2019 – ED issued guidance regarding effective date and implementation requirements for 2016 BDR regulations.
  - August 30, 2019 – ED published unofficial Final Rule for 2019 BDR, to be effective July 1, 2020.
  - September 23, 2019 – ED published official 2019 BDR regulations.
  - We issued a Client Alert on September 9, 2019, on the 2019 BDR regulations, which is publicly available on our website at <https://www.maynardcooper.com/blog-post/client-alert-2019-borrower-defense-to-repayment/>.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Trump Administration Actions and Current Status (cont.):**
  - 2019 BDR regulations lifted prohibition on use of mandatory arbitration agreements and class action waivers as of July 1, 2020.
  - These agreements and waivers must be disclosed to students and applicants.
  - The disclosures must be written in plain, straightforward language and explain clearly the conditions for enrollment.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Trump Administration Actions and Current Status (cont.):**
  - The disclosures must state that the institution cannot require a borrower (i) to participate in arbitration or any other internal dispute resolution process prior to filing a BDR claim, or (ii) in any way to waive or limit his or her ability to file a BDR claim.
  - The disclosures also must state that any mandatory arbitration proceeding tolls the three-year limitation period for a borrower to file a BDR claim.
  - All disclosures must be in 12-point font and be provided, at a minimum, on the institution's admissions information webpage and in the admissions section of the catalog.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Trump Administration Actions and Current Status (cont.):**
  - Legal aid group sued Department over 2019 BDR regulations (*New York Legal Assistance Group v. DeVos and U.S. Department of Education*)
  - U.S. District Court for the Southern District of New York on March 17, 2021, granted summary judgment in favor of Department in all but one of the claims, upholding nearly all of the DeVos 2019 BDR regulations.
  - Court granted summary judgment in favor of Plaintiff regarding the provision adding a three-year statute of limitations on some claims, remanding that issue back to the Department for further consideration.
  - Plaintiff appealed to the Second Circuit on April 7, 2021.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Financial Responsibility and Reporting Requirements:**
  - The 2019 BDR regulations revised the financial responsibility and triggering events introduced in the 2016 regulations.
  - The Secretary will determine that an institution cannot meet its financial or administrative obligations if one of the following mandatory triggering events occurs after the Secretary calculates a composite score:
    - Either (i) the institution incurs a liability from a settlement, final judgment or final determination arising from any administrative or judicial action, or (ii) there is a withdrawal of owner's equity from a proprietary institution with a composite score less than 1.5 by any means, including the payment of a dividend, and, as a result, the recalculated composite score is less than 1.0.

# BORROWER **DEFENSE TO** **REPAYMENT**

- Financial Responsibility and Reporting Requirements (cont.):
  - For a publicly traded institution, the SEC suspends or revokes the registration of the institution's securities or suspends trading of the institution's securities, the exchange on which the institution's securities are traded delists the securities because the institution is not in compliance with listing requirements, or the SEC does not receive required reports timely and has not granted an extension.
  - In the most recent fiscal year on which the Secretary has calculated a composite score, if the institution is subject to two or more discretionary triggering events described below, those events will be considered mandatory triggering events unless a triggering event is resolved before a subsequent event occurs.

# BORROWER **DEFENSE TO** **REPAYMENT**

- Financial Responsibility and Reporting Requirements (cont.):
  - The Secretary may determine that an institution cannot meet its financial or administrative obligations if one of the following discretionary triggering events occurs:
    - The institution's accrediting agency issues a show-cause order or similar action that could result in the loss of the institution's accreditation if not resolved.
    - The institution violates a provision or requirement in a security or loan agreement with a creditor that leads to a default, delinquency or other event that causes or enables the creditor to require or impose an increase in collateral, a change in contractual obligations, an increase in interest rates or payments, or other sanctions or penalties.

# BORROWER **DEFENSE TO** **REPAYMENT**

- Financial Responsibility and Reporting Requirements (cont.):
  - The institution's state licensing or authorizing agency determines that the institution has violated an applicable state agency requirement, and the state agency intends to withdraw or terminate the institution's license or authorization if the institution does not take steps to come into compliance.
  - A proprietary institution fails the 90/10 rule for one year.



# BORROWER **DEFENSE TO** **REPAYMENT**

- **Financial Responsibility and Reporting Requirements (cont.):**
  - The institution has high dropout rates as calculated by the Secretary. This provision was introduced in the 2016 Regulations, but the Department has not yet developed a specific threshold or methodology for this calculation.
  - The institution's two most recent official cohort default rates are 30% or greater, unless one or both rates have been appealed or challenged and (i) the appeal or challenge is still pending, (ii) the appeal or challenge reduces one or both rates below 30%, or (iii) the appeal or challenge precludes the rates from resulting in a loss of eligibility or provisional certification.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Biden Administration Actions:**
  - The Department held virtual public hearings in June 2021 to receive feedback on potential issues for future negotiated rulemaking sessions.
  - On August 6, the Department announced the topics and schedule for the next negotiated rulemaking session.
  - The Affordability and Student Loans Committee will meet for three sessions:
    - Session 1: October 4-8, 2021
    - Session 2: November 1-5, 2021
    - Session 3: December 6-10, 2021

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Biden Administration Actions (cont.):**
  - Topics for the Affordability and Student Loans Committee are:
    - Borrower defense to repayment;
    - Closed school discharges;
    - Discharges for borrowers with a total and permanent disability;
    - Discharges for false certification of student eligibility;
    - Loan repayment plans;
    - Interest capitalization on Federal student loans;
    - Mandatory pre-dispute arbitration and prohibition of class action lawsuits provisions in institutions' enrollment agreements;
    - Pell Grant eligibility for prison education programs; and
    - The Public Service Loan Forgiveness program.

# BORROWER **DEFENSE TO** **REPAYMENT**

- **Biden Administration Actions (cont.):**
  - The Department also announced the formation of a subcommittee called the Prison Education Program Subcommittee.
  - This subcommittee will be charged with making recommendations to the full committee regarding expansion of the Pell Grant program to incarcerated persons.
  - The subcommittee will meet for two sessions in October and November, with more details to be announced at a later date.



# DISTANCE EDUCATION

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# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status:**
  - The Final Rule addressing distance education and related topics was published on September 2, 2020.
  - We issued a Client Alert on September 4, 2020, that is available at <https://www.maynardcooper.com/u-s-department-of-education-issues-new-distance-education-and-related-regulations>.
  - The Final Rule was effective on July 1, 2021.
  - The new regulations include a host of changes, including much-needed definitions, and provide some additional flexibilities.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- Trump Administration Actions and Current Status (cont.):
  - The new regulations clarify the distinction between distance education and correspondence courses:
    - Distance Education - A distance education course is one in which instruction is delivered by one or more types of technology, including the internet, various wired and wireless media, or audio conference to students who are separated from the instructor(s). These technologies “support regular and substantive interaction between the students and the instructor or instructors, either synchronously or asynchronously.” (Emphasis added.)

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - The new regulations clarify the distinction between distance education and correspondence courses:
    - Correspondence - A correspondence course is one in which “the institution provides instructional materials, by mail or electronic transmission, including examinations on the materials, to students who are separated from the instructors.” A key feature that distinguishes a correspondence course from a distance education course is that “[i]nteraction between instructors and students in a correspondence course is limited, is not regular and substantive, and is primarily initiated by the student.”



# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - Section 600.7(b)(2) provides that a student is considered to be enrolled in correspondence courses if more than 50% of the student's courses in an award year are correspondence courses.
  - A course that combines correspondence and residential training is considered a correspondence course.
  - If a course combines correspondence study and distance education, the institution must determine the predominate method of instruction and apply the appropriate rules.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - A correspondence program is considered an eligible FSA program if it has been accredited by an accrediting agency recognized by the Department for accreditation of correspondence education.
  - An institution is not eligible to participate in Title IV if in an academic year:
    - More than 50% of its courses are delivered by correspondence; or
    - 50% or more of its students are enrolled in correspondence courses.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- Trump Administration Actions and Current Status (cont.):
  - A key element of a distance education course is that there must be regular and substantive interaction between the students and the instructor.
  - This is not a new requirement, but there has been considerable uncertainty regarding the meaning and extent of this ambiguous term that the new definition seeks to address.

# DISTANCE **EDUCATION AND RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - “Substantive interaction” means “engaging students in teaching, learning, and assessment, consistent with the content under discussion” and must include at least two of five components:
    - Providing direct instruction;
    - Assessing or providing feedback on a student’s coursework;
    - Providing information or responding to questions about the content of a course or competency;
    - Facilitating a group discussion regarding the content of a course or competency; and/or
    - Other instructional activities approved by the institution’s or program’s accrediting agency.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- Trump Administration Actions and Current Status (cont.):
  - “Regular interaction” requires an institution to ensure, “prior to the student’s completion of a course or competency,” that there is “the opportunity for substantive interactions with the student on a predictable and scheduled basis commensurate with the length of time and the amount of content in the course or competency.”
  - The institution also is responsible for “[m]onitoring the student’s academic engagement and success and ensuring that an instructor is responsible for promptly and proactively engaging in substantive interaction with the student when needed on the basis of such monitoring, or upon request by the student.”

# DISTANCE **EDUCATION AND RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - “Academic engagement” requires “[a]ctive participation by a student in an instructional activity related to the student’s course of study” as defined by the institution consistent with any requirements imposed by its state or accrediting agency.
  - It can include attending a class where the students and instructor can interact, turning in an academic assignment or taking a test, participating in an interactive computer-assisted instruction, participating in an institutional-directed group activity or online discussion, or interacting with the instructor regarding academic matters.
  - It excludes use of an institution’s housing or meal plan, logging into an online class without further participation, and participating in academic counseling or advising.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - The Final Rule also revised the definitions of “clock hour” and “credit hour” and modified the requirements for program lengths.
  - “Clock hour” is 50-60 minutes of instruction or other specified academic activity in a 60-minute period.
  - Institutions can calculate clock hours both for synchronous instruction where there is direct interaction between the students and the instructor and for an asynchronous academic engagement activity where the student interacts with technology that has the capability to monitor and document the amount of time the student participates in that activity.

# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Trump Administration Actions and Current Status (cont.):**
  - Section 668.14(b)(26) previously limited the eligibility of programs that prepare graduates for gainful employment in a recognized occupation to those programs comprising no more than 150% of the minimum number of clock hours for training in the recognized occupation as established by the state in which the institution is located, if any, or by any federal agency.
  - The Final Rule modifies this limitation by retaining the 150% maximum in the institution's home state and by adding a limitation of 100% of the minimum number of hours of training as established by a state adjacent to the state where the institution is located, whichever is greater.



# DISTANCE **EDUCATION AND** **RELATED TOPICS**

- **Biden Administration Actions:**
  - The Administration's announcement of new negotiated rulemaking activities did not mention distance education as a topic for review.
  - The Department issued an Electronic Announcement on May 25, 2021, regarding implementation of the clock-to-credit conversions provided in the Final Rule.
  - The Final Rule changes the clock-credit formula that applies to nondegree programs unless all of the credits transfer to an eligible degree program at the same institution that enrolls and graduates students.

# TITLE IX

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# TITLE IX

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- **Title IX Legal Foundation:**
  - Title IX of the Education Amendments of 1972 (“Title IX”) prohibits discrimination based on sex in education programs and activities that receive Federal financial assistance.
  - Title IX is enforced by the U.S. Department of Education’s Office for Civil Rights (“OCR”).

# TITLE IX

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- 2020 Title IX Final Rule:
  - On May 19, 2020, the Department published a Final Rule amending Title IX regulations (85 FR 30026).
  - We published a Client Alert regarding the Final Rule on June 9, 2020, that is available at <https://www.maynardcooper.com/u-s-department-of-education-issues-final-title-ix-regulations>.

## TITLE IX

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- 2020 Title IX Final Rule (cont.):
  - The Final Rule obligates institutions to:
    - Respond promptly and supportively to persons alleged to be victimized by sexual harassment;
    - Resolve allegations of sexual harassment promptly;
    - Establish and implement fair grievance processes that provides due process protections for alleged victims and alleged perpetrators of sexual harassment; and
    - Effectively implement remedies for victims.

# TITLE IX

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- 2020 Title IX Final Rule (cont.):
  - The Final Rule provide a new definition of “Sexual Harassment” in Section 106.30(a):
    - Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
      - (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct;
      - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or

# TITLE IX

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- 2020 Title IX Final Rule (cont.):
  - The Final Rule provide a new definition of “Sexual Harassment” in Section 106.30(a):
    - Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
      - (1) ...;
      - (2) ...; or
      - (3) “Sexual assault” as defined in 20 U.S.C. 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. 12291(a)(10), ‘domestic violence” as defined in 34 U.S.C. 12291(a)(8), or “stalking” as defined in 34 U.S.C. 12291(a)(30).

## TITLE IX

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- **Education Program or Activity:**
  - Title IX applies to all institutional education program or activities, whether such programs or activities are on or off campus.
  - Education programs or activities include locations, events, or circumstances over which the institution exercises substantial control.
  - For a Title IX allegation, the institution must have substantial control over both the person accused and the context in which the sexual harassment occurs.
  - With regard to clinical clerkships or with preceptors located at a separate facility, the institution “must consider whether the [institution] exercised substantial control over both the [accused student] and the hospital or medical clinic where the clinical clerkship is held.”



## TITLE IX

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- **Mandatory Response Obligations:**
  - An institution must respond promptly to Title IX sexual harassment in a manner that is not deliberately indifferent when:
    - The institution has actual knowledge of sexual harassment;
      - An institution has actual knowledge of sexual harassment when an institution has notice that a person may have been victimized by sexual harassment.
    - That occurred within the institution's education program or activity; and
    - Against a person in the United States.

# TITLE IX

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- **Supportive Measures:**
  - Supportive measures are free, individualized services designed to restore or preserve equal access to education, protect safety, or deter sexual harassment.
  - Supportive measures support a student, and they are not disciplinary or punitive with respect to another student.
  - There does not need to be a formal complaint for the person alleged to be the victim to receive supportive measures.
  - Examples of supportive measures include counseling, extension of deadlines, modifications of class schedules, leaves of absence, and mutual restrictions on contact between individuals.

## TITLE IX

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- **General Procedures:**
  - Institutions must send written notice of any investigations, interviews, or hearings.
  - The respondent must be presumed not responsible, so that any finding of responsibility only comes after the conclusion of the grievance process.
  - The burden of gathering evidence and the burden of proof must remain on the institution.
  - Institutions must provide an equal opportunity to select an advisor of the party's choice.
  - Institutions must provide equal opportunity for the parties to present fact and expert witnesses and other inculpatory and exculpatory evidence.

# TITLE IX

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- **Investigations:**
  - Institutions must investigate every formal complaint (which may be filed by a complainant or by an institution's Title IX Coordinator).
  - Formal complaint: A document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the institution investigate the allegation of sexual harassment.

## TITLE IX

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- Investigations (cont.):
  - Institutions must send the parties, and their advisors, evidence directly related to the allegations, with at least 10 days for the parties to inspect, review, and respond to the evidence.
  - Institutions must dismiss allegations of conduct that do not meet the definition of sexual harassment (under Title IX) or did not occur in an institution's education program or activity against a person in the U.S.

## TITLE IX

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- **Informal Resolution:**
  - At its discretion, an institution may choose to offer and facilitate informal resolution options, such as mediation or restorative justice.
  - An institution, however, may not:
    - Require a student or employee to waive the right to an investigation and adjudication of a formal complaint;
    - Require the parties to participate in any informal resolution process; or
    - Offer an informal resolution process unless a formal complaint has been filed.

## TITLE IX

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- Hearings:
  - The institution's grievance process must provide for a live hearing:
    - If any party requests it, the institution must provide for the entire live hearing to occur with the parties located in separate rooms with technology enabling the parties to see and hear each other;
    - The decision-maker(s) must permit each party's advisor to ask witnesses all relevant questions and follow-up questions, including those challenging credibility; and
    - Cross-examination must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

# TITLE IX

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- **Standard of Evidence:**
  - The institution can choose between the preponderance of the evidence standard or the clear and convincing evidence standard.
  - Whichever standard the institution chooses, it must use the same standard for all formal complaints of harassment, whether the respondent is a student or faculty member.



## TITLE IX

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- **Written Determination:**
  - After the evidence has been weighed, the decision-maker(s) must issue a written determination regarding:
    - rationale for the result as to each allegation;
    - conclusions about whether the alleged conduct occurred;
    - any disciplinary sanctions imposed by the respondent; and
    - whether remedies will be provided to the complainant.
  - The written determination must be sent simultaneously to the parties along with information about how to file an appeal.

## TITLE IX

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- Appeals:
  - An institution must offer both parties an appeal from a determination regarding responsibility and from an institution's dismissal of a formal complaint or any allegations on the following basis:
    - Procedural irregularity that affected the outcome of the matter, newly discovered evidence that could affect the outcome of the matter, and/or Title IX personnel had a conflict of interest or bias, that affected the outcome of the matter.
  - An institution may offer an appeal equally to both parties on additional bases.

# TITLE IX

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- **Training and Conflicts of Interest:**
  - Title IX personnel (Title IX Coordinators, investigators, people who facilitate any informal resolution process) must be free from conflicts of interest or bias.
  - The decision-maker(s) cannot be the same person as the Title IX Coordinator or the investigator.
  - Title IX personnel must be trained. Training must include the definition of sexual harassment; scope of the institution's education program and activity; how to conduct an investigation and grievance process, including hearings and appeals; and how to serve impartially.

## TITLE IX

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- **Biden Administration Actions:**
  - The Department recently held a “virtual public hearing to gather information for the purpose of improving enforcement of Title IX.”
  - On July 20, 2021, the Department issued a new document entitled “Questions and Answers on the Title IX Regulations on Sexual Harassment,” available at <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>.
  - The Department is expected to undertake additional rulemaking to revise Title IX. Any such activity would not be subject to the negotiated rulemaking and master calendar provisions.

# DECISIONS TO MAKE

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- Who is the Title IX Coordinator?
  - What are his/her qualifications?
  - Where is contact information disclosed to students and employees?
  - Title IX Coordinator should not be general counsel or other school lawyer.
- Who will conduct investigations?
  - How is the investigator chosen?
  - What are his/her qualifications?

# DECISIONS TO MAKE

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- Who is/are the decision-maker(s)?
  - How are they chosen?
- What is the process for ensuring that the Title IX Coordinator, investigator(s) and decision-maker(s) do not have a conflict of interest or bias regarding a party?
- How are Title IX Coordinator, investigator(s) and decision-maker(s) trained?
  - How often are they trained?
  - How does the institution ensure that the training materials are free of sex stereotypes and promote impartial investigations and adjudications?

## DECISIONS TO MAKE

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- Where is the nondiscrimination policy published?
- Where are the Title IX grievance procedures published?
- How will the institution handle reports and grievances regarding alleged conduct that took place outside its education programs or activities?
- What standard of proof has the institution adopted?
- How will the institution handle a request by any party for any cross-examination to occur with the parties in separate rooms and with appropriate technological connections with each other and the decision-maker(s)?

# DECISIONS TO MAKE

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- Has the institution established its grounds for an appeal?
- Who will hear the appeal, what are his/her qualifications, and how is he/she trained?
- Does the institution offer an informal resolution process for handling Formal Complaints?
  - If yes, how are the requirements communicated to the parties?
  - What are the potential consequences to the parties, and what records will be maintained?
- What formal recordkeeping processes has the institution adopted, and who is responsible for maintaining the records?





# CONTACT

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