

NEW TITLE IX REGULATIONS: A SEISMIC SHIFT DURING A PANDEMIC

Michael Baughman, Esquire
Amy Foerster, Esquire

Pepper Hamilton LLP
Attorneys at Law

May 20, 2020

Troutman Sanders and Pepper Hamilton Announce Plans to Combine

Troutman Sanders and Pepper Hamilton LLP have agreed to merge effective July 1, 2020. Troutman Pepper will offer expanded capabilities and practice strengths, with a hallmark focus on client care.



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 feed of a webinar slide titled "Pepper Hamilton Webinar". The slide features the text "Audio should stream automatically on entry through your computer speakers" in red, with an arrow pointing to a "Pepper Hamilton LLP Attorneys at Law" logo. A "Pepper Hamilton Webinar" banner is also visible. In the bottom right corner, there is a "Q&A" section.

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Pause Stop

Participants

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

Q&A

Audio

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File Edit View Communicate Participant Event Help

Cisco Webex Events

Connected

BD

Brian Dolan (Host)

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Q&A

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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.

Amy C. Foerster

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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.



Michael E. Baughman

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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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Agenda

- ▶ Threshold / Jurisdictional Issues
- ▶ Supportive Measures
- ▶ Grievance Procedures
- ▶ Training
- ▶ Implementation

Background

- ▶ Sept. 2017 DCL
- ▶ Nov. 2018 NPRM
- ▶ Feb. 2019 Public Comment Closes
- ▶ March 13, 2020 COVID-19 Pandemic Declared a National Emergency
- ▶ May 6, 2020 Draft Final Rulemaking Released
- ▶ May 19, 2020 Final Rulemaking Published
- ▶ August 14, 2020 Effective Date

Jurisdictional and Preliminary Matters

The Framework

- ▶ Purports to generally adopt the *Gebser / Davis* Standard for Civil Lawsuits
- ▶ “A recipient with ***actual knowledge*** of ***sexual harassment*** in an ***education program or activity of the recipient*** against a person in the United States, must respond promptly in a manner that is ***not deliberately indifferent.***”
 - Section 106.44(a)
- ▶ Key definitions will trigger when school must respond, what conduct is covered, and what the school must do in response

The Framework

- ▶ To avoid “Deliberate Indifference” must offer supportive measures and the option for a Formal Complaint
- ▶ For complaint process, school **must** dismiss complaint:
 - if the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved,
 - did not occur in the recipient’s education program or activity,
 - or did not occur against a person in the United States
- ▶ **May** dismiss if:
 - written request from Complaint seeking withdrawal;
 - respondent is no longer enrolled or employed;
 - specific circumstance prevent gathering of evidence necessary to reach a determination.

Scope: Employees

- ▶ “Complainants” and “Respondents” includes both students and employees
 - Complainant means an individual who is alleged to be the victim of conduct that could constitute sexual harassment.
 - Respondent means an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.
- ▶ Rationale for Including Employees; *See Preamble at 1508*
- ▶ Same procedures for resolution of formal complaints apply to employees, including faculty
- ▶ IHEs must use the same standard of evidence in cases involving students as employees
 - Section 106.45(b)(1)(vii)

Action Items: Employees

- ▶ Identify all policies for handling sexual harassment claims against faculty and staff
- ▶ Determine procedures for amendments
- ▶ Begin dialogue with relevant constituents
- ▶ Consider standard of proof

Critical Definitions: Sexual Harassment

- ▶ Three Types:
 - Quid Pro Quo
 - Unwelcomed sexual conduct that is so severe, pervasive and objectively offensive that it effectively denies equal access to the institution's programs or activities
 - Sexual assault, dating and domestic violence, stalking
- ▶ Sexual Violence
 - Schools Maintain Flexibility to Define "Consent"
- ▶ Severe Pervasive AND Objectively Offensive / Denies Equal Access to Programs or Activity
 - Jurisdictional – Must dismiss if doesn't meet this standard

Action Items: Sexual Harassment

- ▶ Review definitions in policy
- ▶ Develop standards for “threshold” question of jurisdiction
- ▶ Consider alternative policies and procedures to address harassment that does not meet the definitions proscribed by the regulations

Critical Definitions: Educational Program or Activity

- ▶ Regulations permit resolution of formal complaints only for conduct occurring in the IHE's "educational program or activity."
 - Schools may address such conduct under other policies
- ▶ What is an educational program of activity
 - locations, events, or circumstances over which the recipient exercised substantial control over **both** the respondent **and** the context in which the sexual harassment occurs,
 - any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

Section 106.44(a)

Critical Definitions: Educational Program or Activity

“Whether sexual harassment occurs in a recipient’s education program or activity is a fact specific inquiry. The key questions are whether the recipient exercised substantial control over the respondent and the context in which the incident occurred. ***There is no bright-line geographic test, and off-campus sexual misconduct is not categorically excluded from Title IX protection under the final regulations.*** Recognizing that recipients need to carefully consider this matter, the Department revised § 106.45(b)(1)(iii) to require training for Title IX Coordinators, investigators, decision-makers, and persons who facilitate informal resolution processes on “the scope of the recipient’s education program or activity.”

Preamble 654

Critical Definitions: Educational Program or Activity

“While it may be helpful or useful for recipients to consider factors applied by Federal courts to determine the scope of a recipient’s program or activity, ***no single factor is determinative to conclude whether a recipient exercised substantial control over the respondent and the context in which the harassment occurred,*** or whether an incident occurred as part of “all of the operations of” a school, college, or university.”

Preamble page 625.

Did the school promote or sponsor the event

Preamble at 625

Action Items: Educational Program or Activity

- ▶ Identify property that is owned or controlled by officially recognized organization
- ▶ Consider how to reduce “educational program or activity” to policy – General or Specific
- ▶ Consider whether to allow other policies to “gap fill” for off-campus conduct that has an effect on campus.
- ▶ Consider Litigation Risk in Crafting Definitions

Critical Definitions: Actual Knowledge

- ▶ “*Actual knowledge* means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge.”
 - Section 106.30(a)
- ▶ Official With Authority Not the Same as “Responsible Employee”

Critical Definitions: Actual Knowledge

- ▶ Who are “Officials with Authority?”
 - “Lower Federal courts applying the Gebser/Davis actual knowledge condition have reached various results with respect to whether certain employees . . . in a postsecondary institution, are officials with authority to whom notice conveys actual knowledge to the recipient.” Preamble at 51.
 - “in postsecondary institutions, for reasons discussed below, the Department believes that complainants will be better served by allowing the postsecondary institution recipient to craft and apply the recipient’s own policy with respect to which employees must, may, or must only with a complainant’s consent, report sexual harassment and sexual harassment allegations to the Title IX Coordinator.” Preamble page 58.

Action Items: Actual Knowledge

- ▶ Determine who will be your officials “with authority”
- ▶ Permitted to still include everyone
- ▶ Distinguish in policy reporting obligation versus legal term of “actual knowledge” to the institution.
- ▶ Guidance suggests department unlikely to second guess your designations if within realm of reason

Supportive Measures

- ▶ *Supportive measures* means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services, mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Initial Response

- ▶ Must contact complainant about supportive measures.
- ▶ Must consider complainant's wishes
- ▶ Must explain they are available whether a formal complaint is filed or not.
- ▶ Must explain the options and process for filing a formal complaint.
- ▶ Document that all of this was done

Section 106.44(a)

Grievance Process

Formal Complaint – Notice of Allegations

- ▶ May consolidate formal complaints arising out of the same facts and circumstances, including “counter-complaints.”
 - ▶ Notice of allegations
 - Notice of grievance process
 - Notice of the allegations, with sufficient details (parties, conduct, date and location) to respond
 - Presumption of respondent not responsible
 - May have advisor of choice
 - May inspect and review evidence
 - Policy regarding false statements
- §106.45(b)(4) and (b)(2)(A)

Emergency Removal

May remove respondent from *education program or activity* if:

- ▶ Conduct individualized safety and risk analysis,
- ▶ Determine that respondent poses an immediate [imminent] threat to the *physical* health or safety of *anyone* justifying removal,
- ▶ The threat arises from the allegations of sexual harassment, and
- ▶ Provide opportunity for respondent to challenge removal immediately thereafter.

§106.44(c)

Emergency Removal

- ▶ Not limited to sexual assault.
- ▶ Who will conduct the assessment and make the decision?
- ▶ What information will be considered?
- ▶ Recipient can determine the scope of removal.
 - Only certain aspects of the institution's programs or activities?
 - To suspend or not?
- ▶ No specific timeframes – may (not must) reassess.
- ▶ What will respondent's ability to challenge look like?

Informal Resolution

The recipient may facilitate an informal resolution process that does not involve a full investigation and adjudication.

- ▶ Only if there is a formal complaint.
- ▶ Discretionary when appropriate, not mandatory.
 - Decide ^{I.}_{W.} when it will be appropriate.
- ▶ Informal resolution can take many forms.
 - What will it look like?
- ▶ Not permitted when an employee is alleged to have sexually harassed a student.

§106.45 (b)(9)

Investigation

Prior to completion of the investigative report, the recipient must send each party *and the party's advisor*, if any, the evidence subject to inspection and review *in an electronic format or a hard copy*. 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.

- ▶ All evidence directly related to the allegations – not a test as to relevance.

§106.45 (b)(3)(vi)

Hearing: Cross-Examination

Cross-examination must be conducted by each party's advisor – directly, orally and in real time.

Allow all relevant questions and follow-up questions, including those challenging credibility.

If the party does not have an advisor, recipient must provide one at no cost.

§106.45(b)(6)(i)

Hearing: Cross-Examination

- ▶ May require parties to provide advance notice of their advisor's attendance.
 - What if they are a no-show?
- ▶ Advisor provided by institution need not be an attorney.
 - Need not be of "equal competency."
 - Who will they be and how will they be trained?
- ▶ May remove disruptive advisors ... *carefully*.
- ▶ To what extent should the recipients "prepare" parties for cross-examination?

Hearing: Relevancy Determinations

Decision-maker must determine whether questions are relevant and explain any decision to exclude.

- ▶ Questions and evidence about complainant's sexual history are not relevant, unless to prove that someone other than respondent committed the conduct alleged or, if concerning specific incidents of complainant's conduct with respondent, offered to prove consent.
- ▶ Decision-makers [and investigators] must be trained on relevance.

§106.45(b)(6)(i)

Hearing: Relevancy Determinations

- ▶ May not require questions in advance in writing.
- ▶ May only exclude questions based on relevance.
 - Not because unduly prejudicial, concerning prior bad acts, or constituting character evidence.
 - May be deemed not relevant when duplicative of other evidence.
- ▶ May train as to how to assign weight to a given type of relevant evidence.

Hearing: Relevancy Determinations

- ▶ Enough to say the question is not probative of any material fact.
- ▶ May have rules:
 - Precluding parties from challenging decision during the hearing or setting forth a process to do so.
 - Allowing decision-maker to revise explanation post-hearing.
- ▶ Who will be (and advise) the decision-maker?
- ▶ How will the decision-maker be trained to navigate relevancy issues?

Hearing: Excluding Statements

If a party is not subject to cross-examination, then:

- ▶ No reliance on their statement in determining responsibility.
- ▶ No inference as to responsibility.

§106.45(b)(6)(i)

Hearing: Excluding Statements

- ▶ Doesn't matter if:
 - It's a statement against interest.
 - The witness is unavailable due to death or disability.
 - The witness told their friend or parent right away.
 - The statement is in a police or SANE report.

- ▶ How can you work with a witness to get them there?

- ▶ How will you train decision-makers to deal with developments concerning statements?

Hearing: Rules of Decorum

May have rules that:

- ▶ Require advisors be respectful and prohibit abusive/intimidating questioning.
 - Deem repetition of the same question irrelevant.
 - Allow for removal of advisors.
- ▶ Govern the timing and length of breaks to confer and prohibit disruptive consultation.
- ▶ Require that *parties* make any openings and closings.
- ▶ Who will enforce the rules of decorum?
 - How will you train decision-makers?

Hearing: Standard of Evidence

May use preponderance of the evidence or clear and convincing standard, **but** must use the same standard for formal complaints of sexual harassment against students as for formal complaints against employees, including faculty.

- ▶ Assess current standards in policies and CBAs.

§106.45(b)(1)(vii)

Appeals

Must provide an appeal process, equally available to both parties, on ***at least*** the following grounds:

- ▶ Procedural irregularities that affected the outcome.
- ▶ New evidence not reasonably available at the time of determination that could affect the outcome.
- ▶ Bias of the Title IX Coordinator, investigator or decision-maker.
- ▶ Don't forgot the appeals decision-makers when identifying roles and developing training.

§106.45(b)(8)

Recordkeeping

7 years!

- ▶ See laundry list of documents to be maintained.
- ▶ Update retention schedules.

§106.45 (b)(10)

Training

Training

- ▶ Annual Training Already Required by VAWA
- ▶ The Regulations Specify Training of Particular People and Particular Topics
- ▶ Post All Training Material to Website
 - “A recipient must make these training materials publicly available on its website, or if the recipient does not maintain a website the recipient must make these materials available upon request for inspection by members of the public.” Section 106.45(b)(10)(D)

Training: Who Must Be Trained

- ▶ Per Regulations
 - Title IX Coordinators,
 - Investigators,
 - Decision-makers,
 - Any person who facilitates an informal resolution process

- ▶ Consider Additional Training For Advisors Assigned to Cross Examine

Training: On What?

- ▶ the definition of sexual harassment;
- ▶ the scope of the recipient's education program or activity,
- ▶ how to conduct an investigation and grievance process . . . and how to serve impartially, including by avoiding prejudgment of the facts at issue, conflicts of interest, and bias.
- ▶ any technology to be used at a live hearing
- ▶ issues of relevance of questions and evidence, including when questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant
- ▶ investigators receive training on issues of relevance to create an investigative report that fairly summarizes relevant evidence.

Training: Sex Stereotypes

- ▶ “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.” Section 1065.45(b)(1)(iii).

Trauma Informed Training

- ▶ “The Department notes that although there is no fixed definition of “trauma-informed” practices with respect to all the contexts to which such practices may apply in an educational setting, practitioners and experts believe that application of such practices is possible – albeit challenging – to apply in a truly impartial, nonbiased manner.” Preamble at 842.
- ▶ Trauma informed practices can be implemented as part of an impartial, unbiased system that does not rely on sex stereotypes, but doing so requires taking care not to permit general information about the neurobiology of trauma to lead Title IX personnel to apply generalizations to allegations in specific cases.” Preamble at 1088.

Consideration with Posting Training to Website

- ▶ Use in Appeals and Litigation
- ▶ Posting Training Material for Training Conducted by Outside Professionals
 - See ED Blog Post of 5/18
- ▶ Use of External Investigators and Adjudicators Who Receive Training Separate From School

Implementation

Implementation

- ▶ Communicate with constituents.
- ▶ Develop an implementation plan.
 - Identify policies and contracts that must be revised, reimagined and/or renegotiated.
 - Determine who has to be at the table.
 - Develop a timeline.
 - Identify the roles to be filled.
 - Title IX Coordinator
 - Investigators
 - Advisors
 - Decision-makers (initial responsibility and appeal)
 - Informal resolution
 - Catalog training requirements and develop a schedule.

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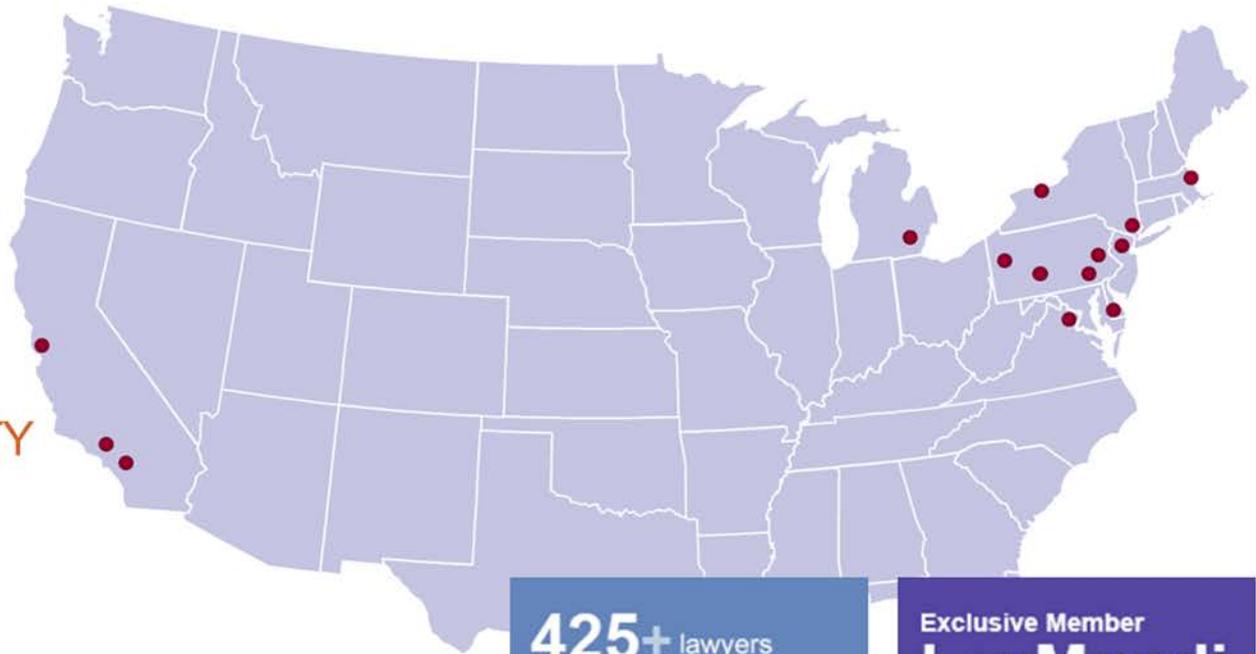
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Troutman Sanders and Pepper Hamilton Announce Plans to Combine

Troutman Sanders and Pepper Hamilton LLP have agreed to merge effective July 1, 2020. Troutman Pepper will offer expanded capabilities and practice strengths, with a hallmark focus on client care.



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