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**Education.**

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# Welcome to The 30<sup>th</sup> Anniversary Legal Issues in Higher Education Conference

Title IX New Regulations and Implementation:  
Lessons Learned So Far

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Jeffrey J. Nolan, J.D.



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# TRAINING

Schools “must ensure that Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, receive training”



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## TRAINING SHOULD INCLUDE:

- Definitions of sexual harassment
- Scope of “education program or activity”
- How to conduct formal and informal processes



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## TRAINING SHOULD INCLUDE:

- How to determine what is/isn't "relevant"
  - Including how to apply "rape shield" concepts
- How to serve impartially, by avoiding prejudice, conflicts of interest and bias



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# TRAINING

“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 sexual harassment.”



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# TRAUMA-INFORMED TRAINING APPROACH VALIDATED IN REGULATION PREAMBLE

**J. Nolan, “Promoting Fairness in Trauma-Informed Investigation Training”, National Association of College and University Attorneys (“NACUA”) NACUANOTE, February 8, 2018, Vol. 16 No. 5**

Updated H&K white paper version available at:

<https://www.hklaw.com/en/insights/publications/2019/07/fair-equitable-trauma-informed-investigation-training>  
(cited 8 times in regulation Preamble)





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# MANDATORY REPORTING ISSUES

- “Responsible employee” concept is not in regulations
- “Actual knowledge” means notice to TIXC or “official . . . who has authority to institute corrective measures”
- Pros and cons of different “mandatory reporter” approaches





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# WHAT PROCEDURES TO APPLY?

- New regulations effective 8/14/20
- Schools may choose in Title IX-covered cases to:
  - Apply new procedures only to conduct that occurred on or after 8/14/20
  - Apply new procedures to all cases pending on or initiated after 8/14/20
- Pros and cons of different approaches



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# INTAKE ISSUES

- Is reporting being affected by new regulations?
- Triage issues
- Formal vs. informal resolution experience preferences to date?



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# INVESTIGATION ISSUES

- “Directly related evidence” issues
- Investigation reports summarizing relevant evidence
- Confidentiality agreements re evidence and reports?
- Other investigation issues



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# ADVISOR ISSUES

- Schools must provide advisors to perform cross-examination at hearings if party does not have one
- How are schools building that capacity?
- When involving them in process?
- Training for advisors?
- Conflict of interest issues?
- Pros and cons of different approaches



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# PRE-HEARING MEETINGS

- Opportunities and challenges with pre-hearing meetings
- “Must submit to all relevant cross-examination” challenges
  - Addressing challenges through pre-hearing procedures
- What to cover and how?



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# HEARING ISSUES

- Cross-examination and on-the-fly relevancy rulings
- Counsel for hearing officers/panels?
- Hearing logistics
- Permitting objections to questions and/or relevancy determinations
  - Pros and cons of different approaches



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# SANCTIONING ISSUES

- “One written determination” challenges
- How orienting sanctioning officer optimally to matter?
- Relationship between Title IX process determinations, sanctions and post-determination procedures such as:
  - Staff sanctioning/grievance processes
  - Faculty grievance/tenure revocation processes





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# OTHER CHALLENGES AND OPPORTUNITIES?



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