

# Title IX Update: Where Are We Now, What Have We Learned, and Where Are We Going?

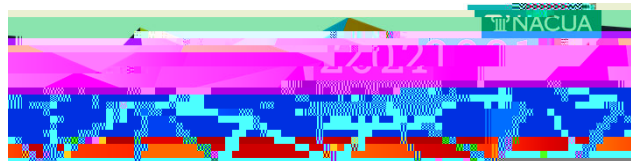
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## Presenters

- **Carol Ashley** is Of Counsel at Jackson Lewis, PC. Prior to joining Jackson



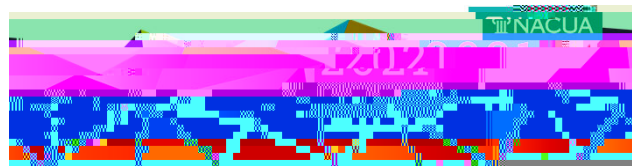
# Agenda

- Understanding the Title IX regulatory requirements and communicating them effectively to the campus community
- Practical Considerations in Staffing and Conducting Title IX Hearings
- Current Litigation and Case Law Update
- Questions and Answers

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## Communicating Title IX Regulatory Requirements to the Campus Community

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# Understanding the changes in the 2020 Title IX Regulations

- Terms defined by the Title IX regulations
    - **Complainant** = individual who is alleged to be the victim of conduct that could constitute sexual harassment
    - **Respondent** = individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment
    - **Formal Complaint** = document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting the recipient investigate the allegation of sexual harassment.
    - **Supportive Measures** = non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available and without fee or charge to both complainants and respondents.
- 34 C.F.R. § 106.30(a)

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## What have we learned?

- While the Title IX regulation definition of sexual harassment is narrow...
  - Community expectations may be broader
  - State laws may be more expansive
  - Other federal laws define similar conduct
- Communication is key

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## Explaining differences in policies and procedures

- Title IX Preamble:

[N]othing in the final regulations prevents recipients from initiating a student conduct proceeding or offering supportive measures to students affected by sexual harassment that occurs outside the recipient's education program or activity.

- Options:

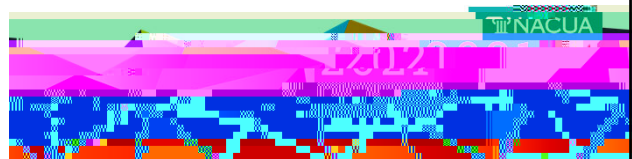
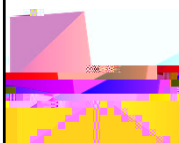
- One Policy/Procedure for all conduct
- Multiple Procedures



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## Explaining differences in policies and procedures

- Make sure your policy/procedure is clear as to the conduct each addresses
- Publish policies and procedures in a prominent/accessible location *and* translate key documents into other languages
- Document decision and rationale in determining jurisdiction
- Document decision and rationale for Title IX Coordinator filing a Formal Complaint



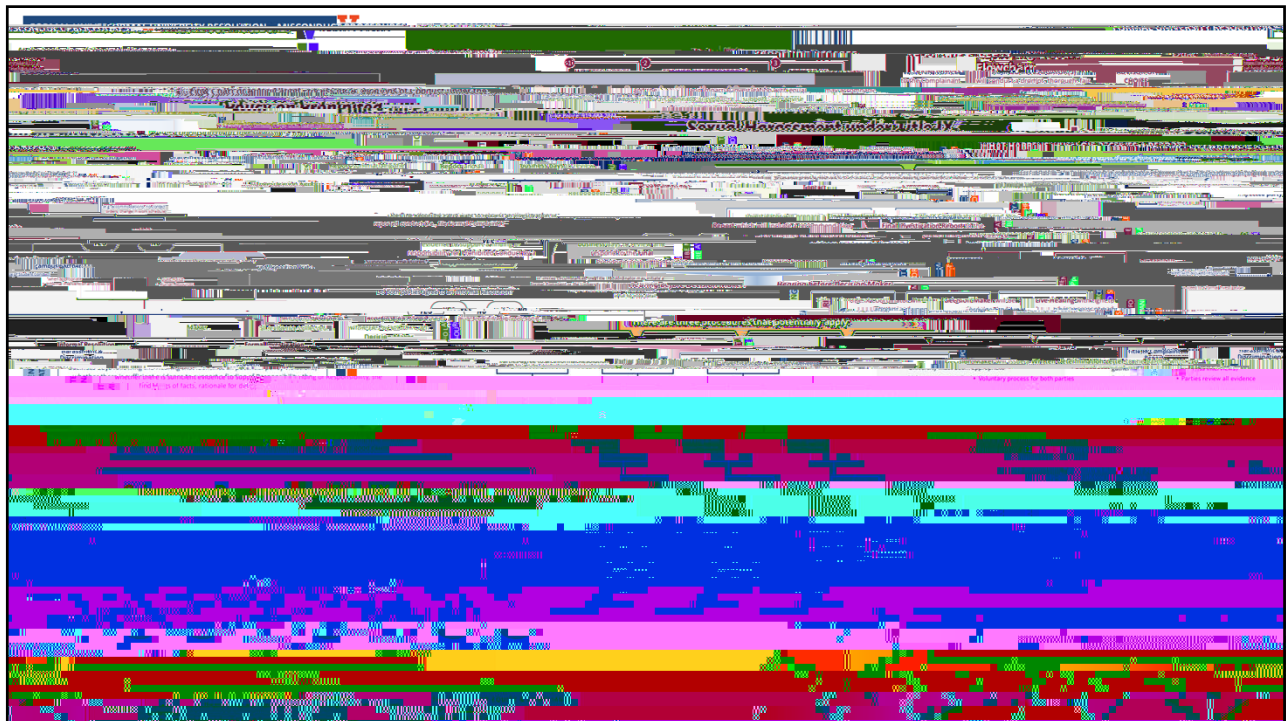
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# Explaining differences in policies and procedures

- Develop reporting process flow chart with key elements
  - What happens when you receive a report?
  - What procedure applies?
  - What is the process for each procedure?
  - What is the outcome for each procedure?
- Develop a Q&A or FAQ
- Prepare template communications



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## Explaining differences in policies and procedures

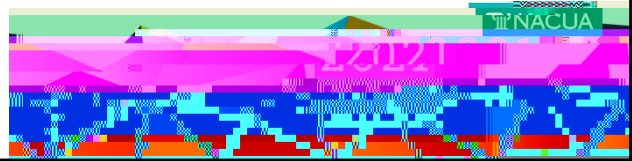
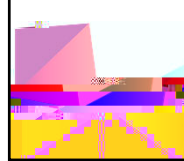
- Conduct in-person/virtual informational meetings with the parties
- Train employees and students who interact with potential complainants and respondents
  - RAs, TAs, Student Affairs, HR, PHEs, student orgs
- Develop Resource Guides and Training materials for students and employees
  - Highlight changes to the procedures
  - Quick Guide for Responsible Employees
  - Infographic/Resource Guide on Supportive Measures



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## Explaining differences in terminology

- Title IX has a specific definition for “complainant” and “respondent”
  - Does your institution use these terms?
  - If not, make clear how your definitions align with Title IX
- If investigating a consolidated Formal Complaint (e.g., with multiple complainants/respondents or cross-claims), consider language and how you refer to parties

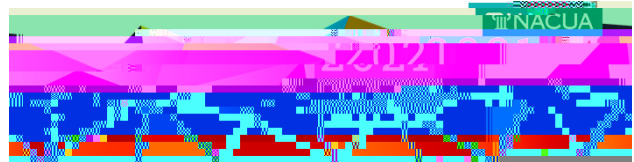


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# Explaining appeals and dismissals

- Develop FAQ or Flowchart that explains process for appeals and dismissals
- Highlight when **must** dismiss and when **may** dismiss
  - Be sure to explain what happens next – process ends OR process continues under another procedure
- Carefully map your appeal process
  - When can an appeal be filed?
  - What are the timelines?
  - Do you permit time extensions?



# Practical Considerations in Staffing and Conducting Title IX Hearings

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## Why is a Title IX hearing needed?

Every institution must provide live hearings for Title IX grievance proceedings where findings of fact are at issue.

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## Who comprises a hearing board?

- Single Hearing Officer
- Board Chair (non voting) + Panelists
- Board Chair as voting member

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## What is the role of advisors?

- (1) provide private advice to the party he/she is supporting and;
- (2) cross examine the opposing party and other witnesses.

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Who should serve as an advisor?

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How should we conduct the cross examination?

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## *Doe v. Rensselaer Polytechnic Institute* – Court’s Concerns

- Preamble discussion regarding retroactive application is unclear
- Department blog post is not an “authoritative statement”
- Under the Department blog post, schools would have to maintain two policies with no end in sight.
- RPI’s new Title IX Policy conflicted with the OCR blog post
- RPI could have easily applied its new Title IX Policy at the respondent’s hearing

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## Additional Cases

### *Doe v. Princeton University*

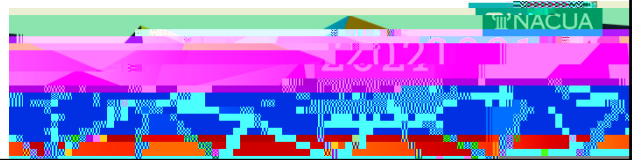
- Decided December 31, 2020
- United States District Court for the District of New Jersey
- The Court rejected Plaintiff’s argument that Princeton improperly used a single-investigator model
  - The new Title IX regulations were not in effect until August 14, 2020
  - According to the Preamble and Department blog, the Department will not enforce the new Title IX regulations retroactively
  - The new Title IX regulations were not effective at any time during the Plaintiff’s proceeding

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## Additional Cases

### ***Doe v. Stonehill College***

- Decided February 23, 2021
- United States District Court for the District of Massachusetts
- The court rejected the Plaintiff's arguments regarding live hearings
  - The text of the former implementing regulation does not require a live hearing with cross-examination or any other particular procedure.
  - The Title IX statute imposes no requirement of a live hearing with cross-examination.
  - The respondent's due process arguments failed because the College is not a public university

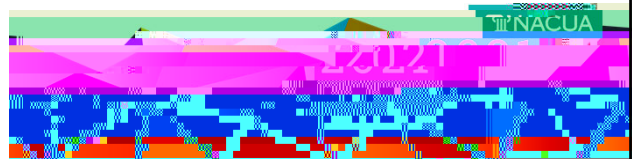


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## Additional Cases

### ***Roe v. St. John University***

- Decided March 31, 2021
- United States District Court for the Eastern District of New York
- The Court addresses the case under the Title IX regulations in effect at the time of the underlying incidents.



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## Key takeaways

- Courts may not give deference to the Department's statements about the effective date of the new Title IX regulations
- Consider the individual facts of the underlying case
- Consider state and federal case law

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## Questions and Answers

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Join us June 22, 2021 at 2:00 pm  
ET for the “Meet the Experts”  
Networking Lounge to continue  
the conversation

