



Title IX Higher Ed Level 2

Title IX Coordinator Training

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Disclaimers

We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- You will receive a copy of the slides to post on your website!

Presentation Rules

- Questions are encouraged!
- “For the sake of argument...”
- Be aware of your own responses and experiences
- Follow-up with someone if you have questions and concerns
- Take breaks as needed

Posting These Training Materials?

Bricker Graydon

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website

TIXC: Topics 1 of 2

- Expectations of the Title IX Coordinator:
 - Preparing to implement the process
 - Upon receipt of a report or complaint
 - Understand the process from report through resolution in order to shepherd the process and coordinate efforts
- Serving Impartially and without Bias
- Checklist and Resources for additional information

TIXC: Topics 2 of 2

Additional Topics:

- Training
- Actual Notice
- Jurisdiction
- Mandatory and Discretionary Dismissal
- Supportive Measures
- Emergency Removal
- Formal Complaints
- Informal Resolution
- Advisors
- Recordkeeping
- Title VII

Aspirational Agenda Day 1



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- 2:00 – 2:10 EST Introduction
 - 2:10 – 3:15 EST Discussion of Title IX
Coordinator Expectations
Overview
 - 3:15 – 3:30 EST Break
 - 3:30 – 5:00 EST Title IX Expectations Upon
Receipt of a Report and
Jurisdiction/Dismissal Issues

Aspirational Agenda Day 2

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- 2:00 – 3:15 EST Supportive Measures and Notice to Respondent, and the Grievance Process
 - 3:15 – 3:30 EST Break
 - 3:30 – 5:00 EST Serving Impartially and without Bias, Title VII, and Checklist for TIXCs

2024 Regulations Update

- *Tennessee v. Cardona* – Vacated 2024 Title IX Regs. January 9, 2025.
- February 4, 2025 DCL
 - Supersedes Jan. 31 Guidance
- OCR will enforce the 2020 Title IX Regulations – NOT the 2024 regs
 - Definition of SH
 - Procedural protections
 - "... no portion of the 2024 Title IX Rule is now in effect in any jurisdiction."

Impact on Pending Title IX SH Investigations



- Cases initiated under the 2024 regs "should be immediately reevaluated to ensure consistency with the requirements of the 2020 Title IX Rule and the preexisting regulations at 34 C.F.R. 106 et seq."
- Things to think about:
 - Which cases need to go to a **hearing** now?
 - Remember the 2020 definition of **retaliation** when considering process
 - Do you need a signed **Formal Complaint**?
 - Do your **Notices of Investigation** require additional detail?
 - **Informal Resolution** – remember the limitation imposed by the 2020 regs
 - **Appeals for supportive measures** – Keep?
 - Remember to post your **training materials** if you stopped

- Work with legal counsel to address pending cases
 - Consider issuing interim guidance or talking points to assist with party meetings
- Evaluate your Title IX Policy – can you go back to your 2020 Policy?
 - What didn't work under your 2020 Policy?
 - Consider P&P provisions – not explicitly struck down by the TN decision or DCL
- Communicate with your campus/stakeholders

- "Defending Women from Gender Ideology Extremism and Restoring Biological Truth to the Federal Government," Jan. 20, 2025
 - Declares that gender identity is not implicated in Title IX's "on the basis of sex" language
 - Lawsuits pending on this EO already
- 2020 regs note explicitly "Anyone may experience sexual harassment, irrespective of gender identity or sexual orientation." (30178)

Sex must be the “But-for” cause

- In *United States v. Skrametti* (2025), the Supreme Court’s majority declined to apply *Bostock* reasoning to gender affirming treatment.
 - No assessment if *Bostock* rationale is Title VII specific (i.e. whether it applies in Title IX)
 - In *Skrametti*, unlike *Bostock*, sex or transgender status are not a “But-for” cause as the diagnosis may not automatically change with one’s sex
 - Thus, the Court applied a rational-basis review (rather than heightened scrutiny)
- As always, a fact-specific analysis

Further developments anticipated

- Supreme Court granted cert in July 2025 on two petitions, one from Idaho and one from Virginia.
 - Hecox v. Little (9th Cir., 2024)
 - B.P.J. v. West Virginia (4th Cir., 2024)
- Both states hope to uphold state laws barring transgender students from participating on women's sports teams.
- Arguments likely to be in the fall, a decision not likely until 2026

Gender Identity

Questions to Consider



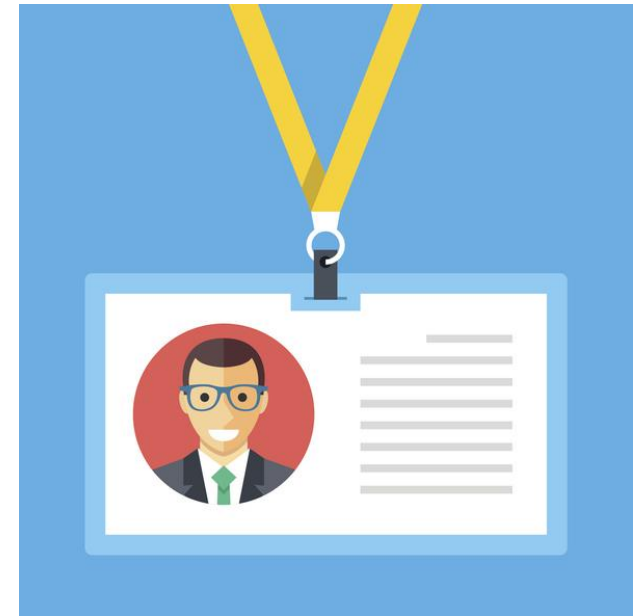
- If discrimination/harassment on the basis of gender identity is no longer protected by Title IX, will you modify other policies to provide those protections?
- How do your state laws on bathroom use, locker room use, athletic participation (see next slides), etc. affect what you can choose to protect and prohibit?



**What do Title IX Coordinators need to do to
Implement Title IX Policies?**

TIXC: Notice of Designation §106.8(a)

- Designate at least one employee to coordinate compliance – “Title IX Coordinator”
- Inform the following persons of the identity of the Title IX Coordinator(s):
 - Applicants for admission and employment
 - Students
 - Employees
 - All unions or professional organizations holding CBAs or professional agreements with the recipient
- Prominently display on website & each handbook, catalog



What must notice include?

§106.8(a)

- Notice of the TIXC **must** include, for the employee or employees designated as the Title IX Coordinator:
 - The name or title
 - Office address
 - Electronic mail address
 - Telephone number
- Acknowledge that “reports may be made at any time (including during non-business hours)”
(30069)

TIXC: Initial Steps 1 of 5

Compliance with Current Regulations

- Implementation Date – August 14, 2020
- Engage relevant parties to ensure policy language is compliant and considers campus community expectations
 - Human Resources
 - Unions
 - Key Administrators (Student Conduct)

TIXC: Initial Steps 2 of 5

Initial Compliance Steps (Continued)

- Identify the TIX Team
 - Investigators, decision-makers, appeal entities, informal resolution facilitators
 - Define roles and identify the required separation between them
 - TIXC can serve as an investigator, but cannot serve as the initial decision-maker or the decision-maker for the appeal



TIXC: Initial Steps 3 of 5

- Consider your policy and procedure options
 - Standard of evidence
 - Preponderance of the evidence, or
 - Clear and convincing
 - Must be consistent across CBAs and/or Employee procedures that address sexual harassment
 - Hearing Procedures

Initial Compliance Steps (Continued)

- Consider your policy and procedure options
 - Informal Resolution
 - Use of your Code of Conduct in cases outside of Title IX jurisdiction? Keep in the Title IX Office?
 - Officials who have “authority to institute corrective measures on behalf of the recipient”
 - Formerly “Responsible Employees”

TIXC: Initial Steps 5 of 5

Initial Compliance Steps (Continued)

- Consider your policy and procedure options
 - Training
 - Title IX Team
 - Students and Employees
 - Counselors, Athletics, Greek organizations
 - Technology



TIXC: Initial Steps Training 1 of 4

All TIX Team Members must be trained on:

- Definition of Sexual Harassment (Level 1)
- Scope of the institution's program or activity (Level 1)
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
 - How does the TIXC fit into these roles?
 - Investigator?
 - Supervisor?



All TIX Team Members must be trained on:

- How to serve impartially
 - Avoiding prejudgment of the facts
 - Conflicts of interest
 - Bias (use reasonable person/"common sense" approach)
 - Not relying on sex stereotypes

All TIX **Decision-Makers** must be trained on:

- Technology to be used at a live hearing
- Issues of relevance of questions and evidence
 - Including rape shield provisions in 34 C.F.R. §106.45(b)(6)

All TIX **Investigators** must be trained on:

- Issues of relevance to create an investigative report that fairly summarizes relevant evidence

Required to Post Training Materials

(34 C.F.R § 106.45(b)(1)(iii))

Section D. All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process. 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.

TIXC: Process and Implementation

Considerations 1 of 5

Review your Title IX Policy for compliance

- What about cases that *were* covered by your policy in previous years but are not covered by the current Title IX regulations?
- What about conduct that *was* covered by your policy in previous years but may not be included in the new definition of Sexual Harassment?
 - Sexual Exploitation
 - Stalking that is NOT based on sex
 - Title VII sexual harassment – still protects employee complainants
- Use of your Student/Employee Code of Conduct in cases outside of Title IX jurisdiction? Or keep it in your office?

TIXC: Process and Implementation

Considerations 2 of 5

Review your Title IX Policy for compliance

- Grievance Policy Requirements
 - Time for parties and their advisors to review evidence (10 days to submit a written response, “which the investigator will consider prior to completion of the investigative report”)
 - 34 C.F.R. §106.45(b)(5)(vi)
 - Time for parties and their advisors to review the investigative report and respond in writing (at least 10 days prior to the hearing)
 - 34 C.F.R. §106.45(b)(5)(vii)

TIXC: Process and Implementation

Considerations 3 of 5

Under your policy...

- Train your TIX Team on how to explain your process
 - The process required by the regulations can be confusing
 - Have your team members, particularly investigators, explain the new process to YOU
 - How did they do?
 - Would you understand if you were a participant?
 - Can they answer questions? Admit they need to get more information?

Under your policy...

- Make sure your TIX Team is trained on YOUR institution's policies and procedures
- Make sure you TIX Team is trained on any technology YOUR institution will be using
 - Not covered here and may not be covered by other trainings
 - Required by 34 C.F.R § 106.45(b)(1)(iii)
 - Example: break-out rooms, waiting rooms, muting attendees

TIXC: Process and Implementation

Considerations 5 of 5

- Other practical tips or considerations?

After a Report or Complaint of Title IX Sexual Harassment



TIXC: “Actual knowledge”

“(a) As used in this part:

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.

TIXC: “Actual Knowledge”

34 C.F.R § 106.30(a) (1 of 2)

Actual Knowledge definition:

- (1) Notice of sexual harassment or allegations of sexual harassment
- (2) To one of the following:
 - Title IX Coordinator, or
 - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

TIXC: “Actual Knowledge”

34 C.F.R § 106.30(a) (2 of 2)

Notice is imputed not just when the TIXC is notified, but also when someone with authority to correct the harassment is put on notice

- Mere ability or obligation of an employee to report sexual harassment isn't enough
- Fact-sensitive analysis
- Work with legal counsel to determine who falls into this category
 - What is your institutional ethic of care?

TIXC: Response to “Actual Knowledge”

34 C.F.R § 106.44(a)

The TIX Coordinator has certain **specific required responses** to “actual knowledge” sexual harassment in an education program or activity of the recipient against a person in the United States:

- Promptly contact complainant to discuss availability of supportive measures
- Consider complainant’s wishes with respect to supportive measures
- Follow a grievance process that complies with 34 C.F.R. § 106.45(b)

TIXC: Keys to Intake 1 of 5

- Both parties may be emotional and may need access to supportive measures and resources.
 - **“What we do for one, we do for the other”**
- Be sensitive to the person making the report and refrain from comments that blame the victim, suggest disbelief, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.



TIXC: Keys to Intake (continued) 2 of 5

- Document the supportive measures, accommodations, and resources that are provided
 - Also document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
 - Also document supportive measures that are *offered* but *rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.

TIXC: Keys to Intake (continued) 3 of 5

What to do when you or someone in your office receives a report of misconduct?

- Offer a meeting and discuss the process first
 - Form letters – updated in light of your new process?
 - Right to bring an advisor
 - Availability of resources and accommodations
 - Reminder that retaliation is prohibited
- At the meeting – give a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain what a “Formal Complaint” means under the new Title IX regulations – Give the complainant time to decide

TIXC: Keys to Intake (continued) 4 of 5

What to do when you or someone in your office receives a report of misconduct?

- Explain the Informal Resolution Process, if it's available
 - Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. § 106.45(b)(9))
 - Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of responsibility is made
- Explain the Hearing Process
 - Go step-by-step through your policy
 - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions about it

TIXC: Keys to Intake (continued) 5 of 5

What to do when you or someone in your office receives a report of misconduct?

- Determine which policy and procedure applies
 - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
 - May change over time as more information comes in
 - Consider Jurisdiction and the definition of Sexual Harassment
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
 - “Exit Ramps”
 - Document, Document, Document

- A recipient with actual knowledge of sexual harassment in an educational program or activity of the recipient against a **person in the United States**, **must respond promptly in a manner that is not deliberately indifferent.**
- A recipient is only deliberately indifferent if its response to sexual harassment is unreasonable in light of known circumstances.

“Education program or activity”

“includes locations, events, or circumstances over which the recipient exercised substantial control over both the respondent and the context in which the sexual harassment occurs, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution. “ §106.30(a)

Locations, events, or circumstances with substantial control – the easy ones:

- Residence halls
- Classrooms
- Dining halls



Off Campus? 1 of 2

Any of the three conditions must apply to extend Title IX jurisdiction off campus:

- (1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 106.2(h));
- (2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus; and

Off Campus? 2 of 2

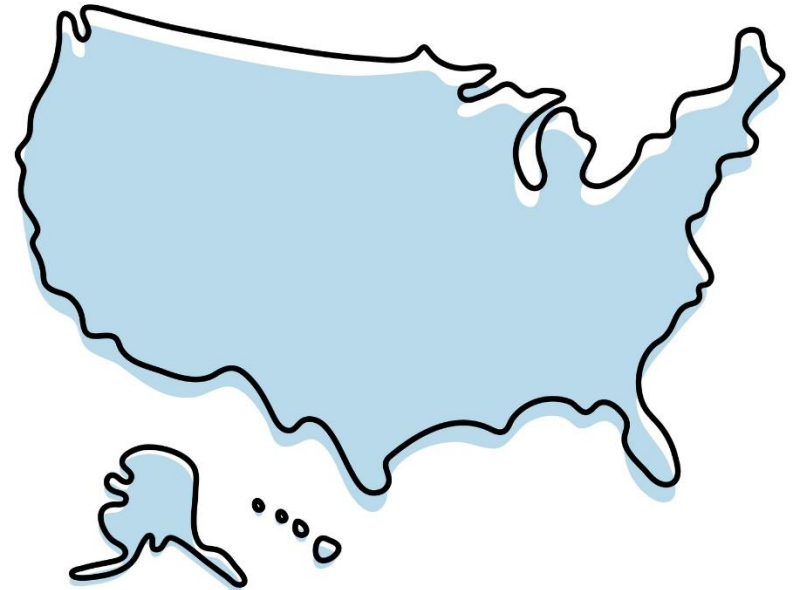
(3) Incident occurred in an off-campus building owned or controlled by a student organization officially recognized by a post secondary institution

- Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- Must investigate in these locations (30196-97)

Not an Education Program or Activity

Locations, events, or circumstances without substantial control:

- **Anything** outside of the United States;
- Privately-owned off campus apartments and residences that do not otherwise fall under the control of the postsecondary institution (example: privately owned apartment complex not run by a student organization)



Depends on fact-analysis under “substantial control”:

- Conventions in the United States
- Holiday party for an academic department
- Professor has students over to house

Dismissal of a formal complaint— §106.45(b)(3)(i)

The recipient **must** investigate the allegations in a formal complaint.

(BUT) 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,

then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

- When and Where are your exit ramps?

Study Abroad Programs

- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06)
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

- “Operations” of the recipient may include computer and online programs and platforms “owned and operated by, or used in the operation of, the recipient.” (30202)
- Still has to occur in educational program or activity
- And in United States...

Mandatory Dismissals

- Would not constitute sexual harassment even if proved
 - Quid pro quo, unwelcome conduct, Clery crimes
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the United States

- **Jurisdictional Determination § 106.45(b)(3)**
- **Discretionary Dismissals**
 - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
 - Respondent is no longer enrolled or employed by the recipient
 - Specific circumstances prevent the recipient from gathering sufficient evidence

Jurisdictional Determinations

34 C.F.R § 106.45(b)(3)

- Preamble: Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation



Practice, practice, practice

Dismissal/Exit Ramp Hypotheticals

For each of the following hypothetical situations, consider the following questions:

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
 - If not, does not need to go somewhere else?
- Does this situation include one of the discretionary dismissal factors?
 - If so, *should* you use your discretion to dismiss it?

Dismissal/ Exit Ramp Hypothetical 1

Marion is a first-year student at your institution. In the first few weeks of the semester Marion attended a party at an off-campus apartment complex with another first-year student, Jasmine. Upon returning to campus for the Spring semester, Marion reached out to her RA about an interaction between her and Jasmine at that party. The RA has called your office and stated unequivocally that he believes Jasmine violated Title IX.

What do you do?

Dismissal/ Exit Ramp Hypothetical 2

Joni, a graduate student, was in Dr. Murray's class when another student, James, made an offensive comment about Joni's appearance and explicitly referenced her gender.

Dr. Murray has submitted a report to your office and states that she believes James' statement violated a law in your state.

What do you do?

Dismissal/ Exit Ramp Hypothetical 3

Hubert signed a formal complaint against his ex-girlfriend Guadalupe. The conduct he described, if true, would constitute sexual harassment as defined in § 106.30. However, you believe the allegations to be frivolous and without merit.

What do you do?

Dismissal/ Exit Ramp Hypothetical 4

Prof. Lin submitted a report to your office last month. You evaluated the report and the events, if true, would meet the appropriate definition(s). Prof. Lin signed a formal complaint, and your team initiated an investigation.

This morning, Prof. Lin has emailed you to withdraw the formal complaint.

What do you do?

Dismissal/ Exit Ramp Hypothetical 5

Erma and Malik were walking home through campus one night. A third person walked up to them and Malik thinks that they slapped Erma's buttock. Malik just learned from his daughter (a new first year student at your institution) that this situation may be prohibited conduct. This event occurred over 15 years ago, and you are unable to gather additional evidence. Erma has refused to participate with your process.

What do you do?

Dismissal/ Exit Ramp Hypothetical 6

Wade signed a formal complaint with your office last semester. In his complaint, Wade alleges that Garry engaged in conduct that, if true, would meet the § 106.30 definition of sexual harassment. Aurelio is a witness, and his statements led your investigator to believe that Garry may pose a risk to the campus community. Since the initial report, Garry has withdrawn from the institution and his attorney has asked you to dismiss the complaint.

What do you do?

TIXC: Supportive Measures

34 C.F.R § 106.30(a) 1 of 5



The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

TIXC: Supportive Measures

34 C.F.R § 106.30(a) 2 of 5

Elements of the Definition:

- Non-disciplinary and non-punitive
- Individualized
- “as reasonably available”
- Without fee or charge to either party
- Available at any time (regardless of formal complaint)

Designed to:

- ***restore or preserve access*** to the recipient's education program or activity, *without* unreasonably burdening the other party;
- protect the safety of all parties and the recipient's educational environment; and
- deter sexual harassment

TIXC: Supportive Measures

34 C.F.R § 106.30(a) 4 of 5

Examples from the Regulations:

- Counseling
 - Extensions of deadlines (course-related adjustments)
 - Modifications of work/class schedules
 - Campus escort services
 - Mutual contact restrictions
- Changes in work or housing locations
 - Leaves of absence
 - Increased security and monitoring of certain areas of the campus
 - “and other similar measures”

TIXC: Supportive Measures

34. C.F.R § 106.44(a) 5 of 5

Role of the TIXC upon receiving a report:

- promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30,
- consider the complainant's wishes with respect to supportive measures,
- inform the complainant of the availability of supportive measures with or without the filing of a formal complaint,

TIXC: Supportive Measures

Role of the TIXC (34. C.F.R § 106.44(a))



Role of the TIXC:

- Must maintain confidentiality to the greatest extent possible
 - But, shouldn't impair the ability to provide the measures at issue (may have to tell campus PD, faculty, etc. *some* information)

TIXC: Supportive Measures

Documentation per 34. C.F.R § 106.45(b)(10)(ii) 1 of 2



Section (ii) states “ (ii) For each response required under section 106.44, a recipient must create, and maintain for a period of **seven years**, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must **document the basis for its conclusion** that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient’s education program or activity.

TIXC: Supportive Measures

Documentation per 34. C.F.R § 106.45(b)(10)(ii) 2 of 2

Role of the TIXC:

- Your office must document the absence of deliberate indifference →→ In other words, your office's (Title IX compliant) response to a Title IX report
- Non-Provision of Supportive Measures
 - “If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.”
- Maintain documentation for 7 years

TIXC: Supportive Measures

Role of the TIXC

Further Considerations:

- Must consider the complainant's wishes
- The school should follow up with both parties regarding the efficacy of the supportive measures
- Supportive measures may be appropriate to offer regardless of whether the allegation has been substantiated or fully investigated because it preserves access and deters harassment

Should supportive measures be provided in non-TIX cases?

- Are they provided for in your student code, employment policies?

TIXC: Keys to Supportive Measures

- Offer promptly regardless of formal complaint
- Document response regarding their wishes
- Assess if measures are
 - Restoring/ preserving access to education program or activity
 - non-punitive
 - individualized
 - “reasonably available”
 - unreasonably burdensome
- Explicitly document rationale if denied



Supportive Measures Hypothetical 1

Alex is a respondent who recently participated in a Title IX hearing through your office. For two days after the hearing, Alex experienced significant anxiety and missed all of their classes. They are requesting those absences be excused.

Questions:

- Does this supportive measure restore or preserve access to an education program or activity?
- Is the measure non-punitive?
- Is this “reasonably available”?
- Would it unreasonably burden the respondent?
- **Do you provide the requested measure? If not, why & how do you document it?**

Supportive Measures Hypothetical 2

Jammal, has signed a formal complaint with your office. He and Effron, the respondent, live in the same residence hall. Jammal has requested that Effron move out.

Questions:

- Does this supportive measure restore or preserve access to an education program or activity?
- Is the measure non-punitive?
- Is this “reasonably available”?
- Would it unreasonably burden the respondent?
- **Do you provide the requested measure? If not, why & how do you document it?**

Supportive Measures Hypothetical 3

Ross was a complainant 3 years ago. As he prepares for graduation, Ross has noticed his grades from that semester are significantly and adversely impacting his overall GPA. Ross reached out to your office to request that he be retroactively dropped from all of the classes he was enrolled in at the time of the incident.

Questions:

- Does this supportive measure restore or preserve access to an education program or activity?
- Is the measure non-punitive?
- Is this “reasonably available”?
- Would it unreasonably burden the respondent?
- **Do you provide the requested measure? If not, why & how do you document it?**

Notice of Allegations

34 C.F.R § 106.45(b)(2) 1 of 2

- Sent in writing “upon receipt of a formal complaint” (30138)
- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
 - Identities of the parties (if known)
 - Conduct allegedly constituting sexual harassment
 - Date, time, and location of alleged incident
- Notifies about the process and any informal resolutions processes available

Notice of Allegations

34 C.F.R § 106.45(b)(2) 2 of 2

- Needs to be supplemented if new allegations
- Must include statement that respondent is **presumed not responsible** for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence
- Must warn about the prohibition of false statements (if applicable in your code of conduct)
- May include prohibition of retaliation information

Notice Checklist

- “Sufficient details”
 - Identities of the parties (if known)
 - Conduct
 - Date, time, and /location of alleged incident
- Process & any informal resolutions processes available
- Respondent is presumed not responsible
- Advisor of choice
- False statements prohibited (if applicable)
- prohibition of retaliation information [permissive]
- Does it need to be updated as the investigation advances?



TIXC: Keys to Respondent Contact
“What we do for one, we do for the other”

TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 1 of 5



- Both parties may be emotional and may need access to supportive measures and resources.
 - “What we do for one, we do for the other”
- Be sensitive to both parties and refrain from comments that blame either party, suggest disbelief/prejudgment, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.

TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 2 of 5



- Document the supportive measures, accommodations, and resources that are provided
 - YES! Discuss Supportive Measures with Respondent, too!
 - Document supportive measures that *are requested but not provided* and the rationale (e.g., changes to housing or class schedule)
 - Document supportive measures that are *offered by rejected* and the rationale given
- The more options you can offer the parties, the more in control they will feel about the situation.

TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 3 of 5



First steps after providing notice to the Respondent?

- Offer a meeting and discuss the process first
 - Form letters – updated in light of your new process?
 - Right to bring an advisor
 - Availability of resources and accommodations
 - Reminder that retaliation is prohibited
- At the meeting – give the respondent a copy of the Title IX Policy
- Explain the difference between privacy and confidentiality
- Discuss Supportive Measures
- Explain the procedure the complainant has elected to pursue (if you know)
 - Formal Complaint, Informal Resolution, Hearing, etc.

TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 4 of 5



Make sure Respondent understands the process before the meeting ends:

- Explain the Informal Resolution Process, if it's available
 - Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. § 106.45(b)(9))
 - Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of responsibility is made
- Explain the Hearing Process
 - Go step-by-step through your policy
 - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions about it

TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” 5 of 5



You’ve talked to Complainant and Respondent. Now what?

- Determine which policy and procedure applies
 - Will depend on your Title IX Policy, Student/Employee Codes of Conduct
 - May change over time as more information comes in
 - Consider Jurisdiction and the definition of Sexual Harassment
- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
 - “Exit Ramps”
 - Document, Document, Document

TIXC: Emergency Removal

34. C.F.R § 106.44(c) (1 of 2) :

It states “(c) *Emergency Removal*. Nothing in this part precludes a recipient from removing a respondent from the recipient’s education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal.”

TIXC: Emergency Removal

34. C.F.R § 106.44(c) (2 of 2) :

Does this decision fall to the TIXC at your institution?

- Current policy and practice

Regs require:

- Individualized safety and risk analysis
- The existence of an immediate threat to the physical health or safety of any student/individual arising from the allegations

Respondent is entitled to:

- Notice, and
- Opportunity to be heard
- Does not modify Section 504 or ADA rights
- Can place a non-student respondent on administrative leave

TIXC: Signing a Formal Complaint

34. C.F.R § 106.30(a)

“...Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under section 106.45, and must comply with the requirements of this part, including section 106.45(b)(1)(iii).”

TIXC: Signing a Formal Complaint

Role of the TIXC 1 of 2

Considerations:

- 2018 NPRM § 106.44(b)(2) – previously required Title IX Coordinators to file a formal complaint after receiving multiple reports about the same respondent.
- This provision has been removed in the final regs – Preamble, p. 30216
- “Removing this proposed revision means that Title IX Coordinators retain discretion, but are not required, to sign formal complaints after receiving multiple reports of potential sexual harassment against the same respondent.”

When a Title IX Coordinator does sign a formal complaint

- Doesn't act as a complainant under § 106.45 (during the grievance process)
 - Not participating in the investigation
 - Not cross-examining witnesses on behalf of the Claimant at the hearing
 - Must remain free from conflicts of interest and bias, and must serve impartially
 - Complainant is not obligated to participate in the ensuing grievance process

TIXC: Consolidation of Formal Complaints 34. C.F.R § 106.45(b)(4)

- “A recipient may consolidate formal complaints as to allegations of sexual harassment...by more than one complainant against one or more respondents... where the allegations of sexual harassment arise **out of the same facts or circumstances.**”
 - “May” = permissive, not required
 - What about similar conduct but different facts/circumstances?

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) 1 of 8

- “I don’t want the respondent to be punished; I just want them to realize how bad this event was for me.”
Preamble, p. 30399 (Official)
- Informal Resolution is permitted but not required
 - “... at any time prior to reaching a determination regarding responsibility the recipient may facilitate an informal resolution process, such as mediation, that does not involve a full investigation and adjudication...”

No definition

- “unnecessary”
- “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.” p. 1370 (Unofficial)

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) 3 of 8

According to the Preamble,

- The final regs do not require any recipient to offer informal resolution and preclude a party from being required to participate. Preamble, p. 30404 (Official)
- “Recipients remain free to craft or not craft an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30404 (Official)
- “Nothing in 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.” Preamble, p. 30406 (Official)

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) 4 of 8

Considerations:

- How will this affect reporting?
- Is Informal Resolution appropriate for some, all, or none of the reports at your institution?
- What role will the institution play in imposing sanctions as a result of an informal resolution?
- What if a complainant wants an admission of responsibility but doesn't want the respondent to be punished?

Prohibition on Informal Resolution

- Recipients are categorically prohibited from offering or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student 106.45(b)(9)(iii)

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) 6 of 8

Requirements:

- Formal Complaint - § 106.45(b)(9)
- Facilitators must be free from conflicts of interest and bias
- Facilitators must be trained in accordance with 106.45(b)(1)(iii)
- Reasonably prompt time frames in accordance with 106.45(b)(1)(v)

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) 7 of 8

Requirements (continued):

- The initial written notice of allegations sent to both parties must include information about any informal resolution processes the recipient has chosen to make available – 106.45(b)(2)(i)
- Either party has the right to withdraw from informal resolution and resume a 106.45 grievance process at any time before agreeing to a resolution

Different from Supportive Measures

- Supportive Measures ≠ punishment
- Informal resolution may result in disciplinary or punitive measures
 - What role will a complainant have in disciplinary or punitive measures?

TIXC: Advisors

During the Investigation or Informal Resolution



- Role may be limited
 - “... the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties.” 34 C.F.R § 106.45(b)(5)(iv)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding
 - Witnesses may serve as advisors for interviews and the hearing
 - How should investigators CAREFULLY address that situation in real time?

TIXC: Advisors

During the Hearing

- Role includes questioning the other party and any witnesses
 - Includes challenges to credibility
 - “Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice...” 34 C.F.R. § 106.45(b)(6)(i)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party
 - Witnesses may serve as advisors for the hearing
 - How should decision-makers address this situation during the hearing? During deliberation?

Basic Requirements for Formal Grievance Process 34. C.F.R § 106.45(b)(1) 1 of 2

- Treating complainants and respondents equitably
- Remedies designed to restore or preserve equal access to the institution's education program or activity
- Objective evaluation of all relevant evidence and credibility determinations
- Presumption that respondent is not responsible for alleged conduct

Basic Requirements for Formal Grievance Process 34. C.F.R § 106.45(b)(1) 2 of 2

- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible bases for appeal
- Describing range of available supportive measures

Facilitate Inspection/Review of Evidence 34. C.F.R § 106.45(b)(5)(vi)

- **During** investigation, TIX Coordinator (or Investigator) will need to facilitate parties' opportunity to inspect and review any evidence obtained as part of the investigation
- Parties are to be provided **at least 10 days** to submit a written response to the evidence.

Grievance Process Must Include



File Review

Parties and advisors review all evidence collected for 10 days and provide written response



Report Review

Investigative report is provided to parties and their advisor for review and written response. This must be sent at least 10 days before the hearing.



Hearing

Hearing occurs before a decision-maker that is not the Coordinator or the investigator.

Providing Written Investigative Report 34. C.F.R § 106.45(b)(5)(vii)

- After **completion** of investigation, TIX Coordinator (or Investigator) are responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** before the hearing.
- Parties can provide a written response.



Live Hearing

34. C.F.R § 106.45(b)(6)(ii)

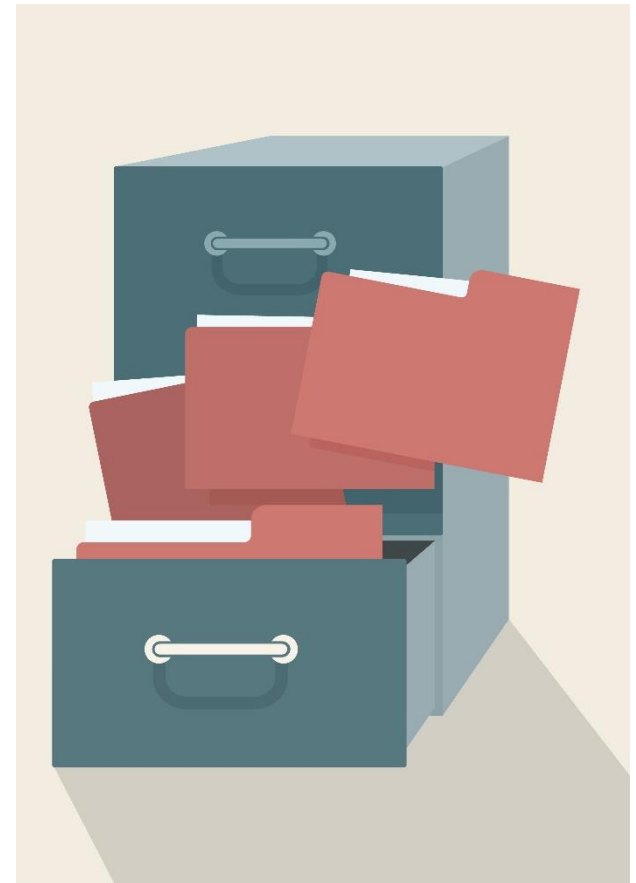
- **Again, TIXC cannot be the Decision-Maker in case where they have previously served as TIXC**
- TIXC will need to facilitate scheduling and completion of a live hearing



Recordkeeping

§ 106.45(b)(10)(i)(A), (B), (D)

- TIX Coordinator will want to develop a process for required recordkeeping, including:
 - Maintaining all investigatory and appeal records for a period of seven years
 - Collecting and publicly posting on its website **all** materials used to train TIX Team



Prohibition Against Retaliation

§ 106.71

- Retaliation prohibited, including intimidation, threatening, coercion, or discrimination against any individual:
 - For purpose of interfering with any right or privilege secured by Title IX
 - Because an individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing
 - Includes charges for code of conduct violations that do not involve sex discrimination/harassment but arise out of the same facts/circumstances



**Being Impartial and Avoiding Bias, Conflict of Interest,
and Prejudgment of Facts**

Section 106.45 **requires** that Title IX Coordinators (and investigators, decision-makers, informal resolution officers and appeals officers)

- be free from **conflict of interest, bias, and**
- be trained **to serve impartially and without prejudging facts.**

(30053)

- We will discuss each of these individually and provide examples, but some of the factors for each overlap.
- For example, being impartial is greatly aided by not pre-judging facts.

(30249-30257; 30496)

- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and it's contrary to your neutral role] (30323)

Bias: Concerns raised in comments in preamble

- Neutrality of paid staff in Title IX positions
- Institutional history and “cover ups”
- Tweets and public comments
- Identifying as a feminist

Perceived v. Actual Bias

- Both can lead to the same perception (30252)
- On appeal of decisions, the Department requires the bias “that could affect the outcome of the matter”

How the Department tried to prevent bias

No single-investigator model (34 C.F.R. 106.45(b)(7)(i)):

- Decision-maker (or makers if a panel) must not have been the same person who served as the Title IX Coordinator or investigator (30367)
- Separating the roles protects both parties because the decision-maker may not have improperly gleaned information from the investigation that isn't relevant that an investigator might (30370)
- The institution may consider external or internal investigator or decision-maker (30370)

“[R]ecipients ***should*** have **objective rules** for determining when an adjudicator (or Title IX Coordinator, investigator, or person who facilitates an informal resolution) is biased, and the **Department leaves recipients discretion to decide how best to implement the prohibition on conflicts of interest and bias...**” (30250)

- **Discretionary:** Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory:** Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

Conflict of Interest: Concerns raised in comments in preamble

- Financial and reputational interests of Title IX employee aligns with institution
- Past advocacy for a survivor's group
- Past advocacy for a respondent's group

- Final regulations “leave recipients **flexibility to use their own employees, or to outsource** Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient’s own employees are expected to perform functions free from conflicts of interest and bias.” (30251)

Preamble Discussion on Bias and Conflict of Interest 2 of 3

- No *per se* prohibited conflicts of interest in using employees or administrative staff
 - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process

(30352-30353)

- Example: it is not a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead **recommends** using a **reasonable-person test** to determine whether bias exists.

Example of Unreasonable Conclusion that Bias Exists

- “[F]or example, assuming that all self-professed feminists, or self-described survivors, are biased against men, or that a male is incapable of being sensitive to women, or that prior work as a victim advocate, or as a defense attorney, renders the person biased for or against complainants or respondents” is unreasonable (30252)

This required training (that you are sitting in right now) can help protect against disqualifying someone with prior professional experience
(30252)

Department: Review of Outcomes Alone Does Not Show Bias

- Cautioned parties and recipients from concluding bias or possible bias “based solely on the outcomes of grievance processes decided under the final regulations.”
- Explained: the “mere fact that a certain number of outcomes result in determinations of responsibility, or non-responsibility, does not necessarily indicate bias.” (30252)

Examples of Bias

- An investigator used to supervise one of the parties;
- Information “gleaned” by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

Avoiding Prejudgment of Facts at Issue

A good way to ensure impartiality and avoid bias:

- Keep an open mind and actively listen
- Each case is unique and different

Hypotheticals

Thinking about how to move forward with some issues of impartiality, conflict of interest and bias (perceived or actual).

Impartiality, conflict of interest & bias Hypo 1

You've been at your institution for just over a year and just last week completed your first annual review with your supervisor. In that conversation you looked at your case statistics and learned that you found the respondent responsible 87% of the time.

Today you're making a decision in a new case and the respondent has already expressed concern that you are generally biased against respondents.

What should you do to mitigate concerns in today's case?

Impartiality, conflict of interest & bias Hypo 2

You are a Title IX decision-maker at a small school where you are expected to wear multiple hats.

Last week, you authorized the emergency removal of a respondent in the Title IX process.

This week in the standing “CARE Team” meeting (where colleagues from Student Affairs and Public Safety gather to discuss recent issues and particular students of concern), you learned information about this same respondent.

Are you automatically disqualified from being the decision maker in this case?

Impartiality, conflict of interest & bias Hypo 3

You administer the Title IX appeals process and have just received word that a student intends to appeal their outcome on the grounds that one of your investigators is generally biased against respondents. This investigator, Tatum, is a self-proclaimed feminist, and previously worked in a survivor advocacy center.

Is this sufficient grounds for an appeal?

How/ would this be different if it were the outset of the process the respondent requested another investigator?

Impartiality, conflict of interest & bias Hypo 4

You're a Title IX investigator who's recently completed a semester long professional development certificate in trauma informed care. You believe strongly that a trauma-informed approach makes you a better professional- and person. You are also concerned about allegations of biased in favor complainants.

How do you balance these considerations?

You recently signed a formal complaint on behalf of a complainant. Does that change your approach to the rest of the case?

Intersection of Employee Issues with Title VII 1 of 2

- USDOE states Title IX and Title VII have “no inherent conflict” (i.e., employees have same rights as students), **but**...
- Title VII “severe **or** pervasive” vs. Title IX “severe, pervasive, **and** objectively offensive”
- Title VII doesn’t require 10 days to review evidence and 10 days to respond to report
- And what about student employees?

Intersection of Employee Issues with Title VII 2 of 2

- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

Checklist for the Title IX Coordinator

- Update policies/handbooks/etc.
- Distribute contact info
- Revise/adopt grievance process
- Identify team & provide training
- Coordinate response to reports and formal complaints
- Establish/facilitate informal resolution process
- Determine process for emergency removals
- Address retaliation
- Develop record-keeping protocols
- Post training materials

Investigation documentation check list

- Report received [date & copy]
- Intake meeting with complainant [date, details, & rationale- note supportive measures]
- Receive signed formal complaint [date & copy]
- Assess for administrative leave or emergency removal [Yes/ no evaluation, date, & rationale]
- Notices of investigation [date & copy- initial & amended, if applicable]
- Informational meeting with respondent [date offered, accepted/ rejected, meeting date & details, if applicable]
- Interviews [dates & details- complainant, respondent, and witnesses, as applicable]
- Evidence collection [dates & details]
- Witness outreach [dates & details]
- Summary review/ approvals [dates, copies, & details]
- Evidence packet and responses [dates, copies, & details]
- Investigative report draft, feedback, finalized [dates, copies, & details]
- Hearing [date referred]

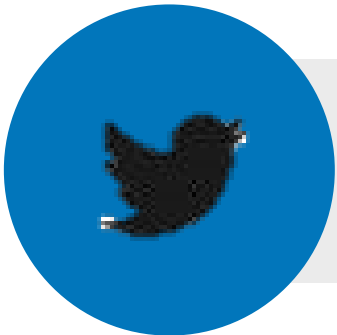


Questions?

Thank you for attending!



Title IX Resource Center at
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