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
- We will send a copy of the slides after this presentation to all who registered their email address when signing in

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?

- 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
- We know this and will make this packet available to your institution to post
  - Watch for the “Thank you for attending” email and look for a link to download the slides

Additional information available at:

Title IX Resource Center
at www.bricker.com/titleix

Find us on **Twitter** at
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TIXC: Agenda (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: Agenda (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

9:00 – 10:30	Introduction and Discussion of TIXC Expectations
10:30 – 10:45	Break
10:45 - 12:00	TIXC Expectations Upon Receipt of a Report and Jurisdiction/Dismissal Issues
12:00 – 12:30	Lunch Break
12:30 – 2:00	Supportive Measures and Notice to Respondent
2:00 – 2:15	Break
2:15 – 3:30	Grievance Process and Serving Impartially and Without Bias
3:30 – 3:45	Break
3:45 – 5:00	Serving Impartially and Without Bias, Title VII, and Checklist for the Title IX Coordinator

What do Title IX Coordinators need to do to Implement New 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

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

TIXC: Initial Steps (1 of 5)

Initial Compliance Steps

- Implementation Date – August 14, 2020
- Engage relevant parties
  - 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

TIXC: Initial Steps (4 of 5)

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
  - 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?

TIXC: Initial Steps
Training (2 of 4)

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

TIXC: Initial Steps
Training (3 of 4)

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)

TIXC: Initial Steps
Training (4 of 4)

All TIX Investigators must be trained on:

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

TIXC: Initial Steps
Training Materials

Required to Post Training Materials

(34 C.F.R § 106.45(b)(1)(iii))

(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 but are not covered by the new Title IX regulations?
- What about conduct that *was* covered by your policy but may not be included in the new definition of Sexual Harassment?
  - Sexual Exploitation
  - Stalking that is NOT based on sex
- Use of your Student/Employee Code of Conduct in cases outside of Title IX jurisdiction?

TIXC: Process and Implementation Considerations (2 of 5)

Review your Title IX Policy for compliance

- New 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 new policy…

- Train your TIX Team on how to explain your process
  - This is new and confusing for everyone
  - 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?

TIXC: Process and Implementation Considerations (4 of 5)

Under your new 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. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. "Notice" as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

TIXC: “Actual Knowledge”

34 C.F.R § 106.30(a)

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)

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 (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 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 Intake (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 the complainant 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 (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 (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

Jurisdiction
(Review from Level One) (1 of 2)

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- 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.

Jurisdiction
(Review from Level One) (2 of 2)

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"Education program or activity"

"includes **<u>locations, events, or circumstances</u>** over which the recipient exercised **<u>substantial control</u>** 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)

Education Program or Activity

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

- Residence halls
- Classrooms
- Dining halls

Off Campus? (1 of 2)

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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)

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- (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)

Education Program or Activity

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Depends on fact-analysis under “substantial control”:

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

Jurisdiction and Mandatory Dismissal (1 of 3)

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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, …

Jurisdiction and Mandatory Dismissal (2 of 3)

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or **did not occur against a person in the United States**, ….

Jurisdiction and Mandatory Dismissal (3 of 3)

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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.

Online Study

- "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…

TIXC: Mandatory Dismissal

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

TIXC: Discretionary Dismissals

- **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

Dismissal/Exit Ramp Hypotheticals

Each of the hypothetical facts below will build upon one another. Consider the following questions for each new fact:

- 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?

Dismissal/Exit Ramp Hypothetical 1

Joe and Sally are dating. Sally suspects Joe is cheating on her and calls the Title IX office to report him.

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?

Dismissal/Exit Ramp Hypothetical 2

Sally logs on to Joe's email account and finds an email from Becky that sets up a rendezvous in Joe's room.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 3

Sally grabs her best friend, Angela, to go confront Joe.

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?

Dismissal/Exit Ramp Hypothetical 4

Sally is mad and busts the lock on Joe's door to get into his room.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 5

Angela (Sally's friend) turns on her Go Pro to record the encounter.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 6

Joe and Becky are in bed having sex.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 7

Sally and Angela enter Joe's room.

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?

Dismissal/Exit Ramp Hypothetical 8

Sally screams at Joe and slaps him across the face.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 9

Sally pulls Becky out of bed, naked, and kicks her while she is on the floor.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 10

When Becky tries to leave the room, Sally grabs her breast and twists it, then threatens to kill her if she comes anywhere near Joe again.

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?

Dismissal/Exit Ramp Hypothetical 11

Becky leaves and runs out the door naked to her room down the hall.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 12

Joe shoves Sally and Angela out of his room so he can get dressed.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 13

Angela uploads the video onto YouTube, then tweets the link and tags Joe and Becky. She titles the video, “Little Dick and the Skank.”

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 14

Within minutes, Joe and Becky have hundreds of comments directed towards them on social media. Some are negative and some are threatening.

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?

Dismissal/Exit Ramp Hypothetical 15

When Becky reads the messages, she begins to send texts to Sally: “I’m coming after you.” “I see you across the Quad.” “Don’t go into that room alone or I’ll get you.” Becky sends approximately fifty similar messages over the course of the next two hours.

<u>Questions</u>

- 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?

Dismissal/Exit Ramp Hypothetical 16

Joe opens his closet to get dressed and lets his friend, Jim, out from where he was watching it all.

<u>Questions</u>

- 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?

TIXC: Supportive Measures

34 C.F.R § 106.30(a)

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.

TIXC: Supportive Measures

34 C.F.R § 106.30(a) (1 of 3)

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)

TIXC: Supportive Measures

34 C.F.R § 106.30(a) (2 of 3)

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 <u>and</u> the recipient's educational environment; and
- deter sexual harassment

TIXC: Supportive Measures

34 C.F.R § 106.30(a) (3 of 3)

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)

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)

(ii) For each response required under § 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. 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.

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?

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) – (1 of 3)

- 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
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) – (2 of 3)

- Needs to be supplemented if new allegations are to be included
- 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

Notice of Allegations to Respondent

34 C.F.R § 106.45(b)(2) – (3 of 3)

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TIXC: Keys to Respondent Contact

“What we do for one, we do for the other” (1 of 6)

TIXC: Keys to Respondent Contact

"What we do for one, we do for the other" (2 of 6)

- 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" (3 of 6)

- 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" (4 of 6)

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" (5 of 6)

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" (6 of 6)

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):

(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. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

TIXC: Emergency Removal
34. C.F.R § 106.44(c):

Does this decision fall to the TIXC at your institution?

- Current policy and practice

New 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)

Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase "document filed by a complainant" means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. 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 § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

TIXC: Signing a Formal Complaint
Role of the TIXC (1 of 2)

Considerations:

- NPRM § 106.44(b)(2) – 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."

TIXC: Signing a Formal Complaint Role of the TIXC (2 of 2)

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…"

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) – (2 of 8)

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?

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) – (5 of 8)

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

TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9) – (8 of 8)

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 District'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)

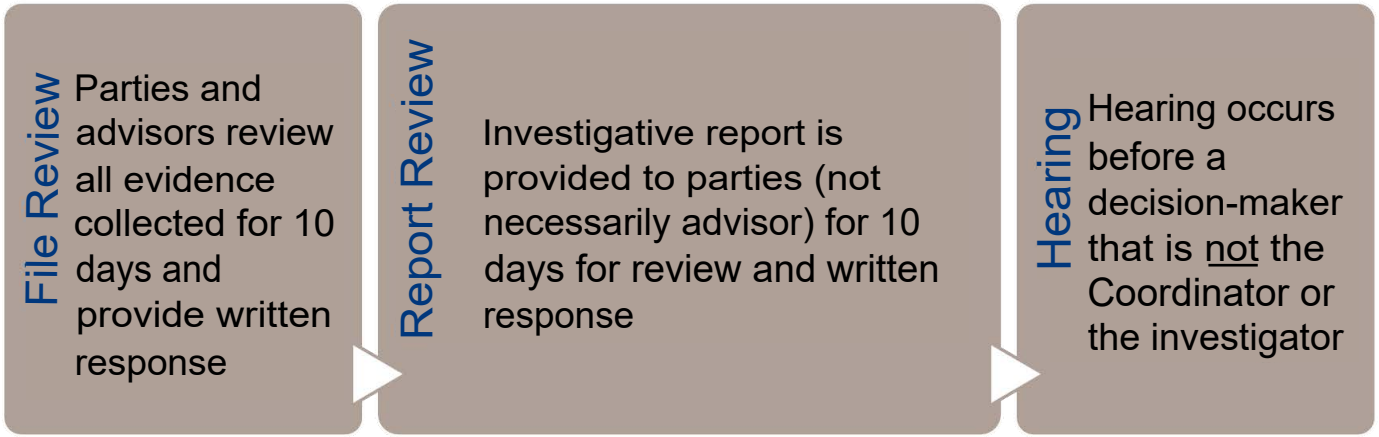
- Reasonably prompt timeframes for filing and resolving appeals and informal resolution processes
- Providing a list, or describing a range, of possible disciplinary sanctions and remedies
- Describing standard of evidence to be used to determine responsibility
- Describing procedures and permissible 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) may 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 before completion of report
- Review process may be managed by TIX Coordinator

Grievance Process Must Include



Providing Written Investigative Report

34. C.F.R § 106.45(b)(5)(vii)

- After **completion** of investigation, TIX Coordinator (or Investigator) **may** be responsible for providing the parties a copy of the written investigative report
- Parties are to be sent the report **at least 10 days** in advance of reaching a determination of responsibility
- Review process and exchange of written questions may also be coordinated by TIX Coordinator

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

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (1 of 2)

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)

Impartiality and Avoiding Bias, Conflict of Interest and Prejudgment of Facts (2 of 2)

- 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)

Impartiality

- 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)

Bias: Objective Rules and Discretion (1 of 2)

"[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)

Bias: Objective Rules and Discretion (2 of 2)

- **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

Preamble Discussion on Bias and Conflict of Interest (1 of 3)

- 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)

Preamble Discussion on Bias and Conflict of Interest (3 of 3)

- 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)

Training, Bias, and Past Professional Experience

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).

Conflict of Interest and Bias Hypotheticals

Scenario for the next several hypotheticals:

You are the Title IX Coordinator and have just received a complaint. An initial review did not identify you or anyone else on your team as having any conflicts of interest. Assess the following situations based on additional information you receive.

Hypothetical 1

You review the report and realize that the name of the Complainant seems familiar to you from a past and unrelated investigation. You don’t have any real memory of the case, but the Complainant has requested a meeting with you to discuss supportive measures.

What should you do?

Hypothetical 2

You have three Investigators in your office that have worked together for years and often “vent” to one another about the pressures of working in Title IX and the things that frustrate them about their cases. They also encourage one another and help troubleshoot best practices for particular cases.

Your institution does not have the budget to hire additional staff or outsource the new Title IX roles required by the final Title IX regulations. You want to use your current staff of investigators on a rotating basis, in which they sometimes serve as an informal resolution facilitator or decision-maker for cases they don’t directly investigate.

Is this allowed?

Hypothetical 3

After an initial review of a formal complaint, you assigned Sarah, one of your investigators to the case. You are familiar with Sarah's background as a prosecutor, but she has attended all required TIX and Clery trainings and has served as an impartial investigator for years. After you assign the case, the Respondent's representative contacts you and asks that another investigator be assigned because Sarah's background as a prosecutor makes her biased against Respondents.

What should you do?

Hypothetical 4

Your institution's student conduct office, Title IX office, and Greek life office meet weekly to discuss student issues and potential issues. In these meetings, you discuss specific students' names for continuity of care and to ensure everyone is on the same page. As a result, you have heard other employees discuss the parties in the case handed to you and some of it seemed to indicate that the Complainant may be dramatic.

What should you do?

Hypothetical 5

You assign Jessica to serve as a Decision-Maker for a particular case. Jessica has served in this role before and has issued five decisions in other cases. A few days later, Jessica contacts you to let you know that one of the witnesses in the *current* case testified in a *prior* case. In the prior case, this witness gave inconsistent statements and was often refuted by contradictory documentary evidence. While the prior decision was polite about it, Jessica ultimately found that this person's testimony was not credible. Jessica believes she can set that aside and be impartial in the new case, but wanted to alert you to the issue.

What should you do?

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

Questions?