



Level 1

Civil Rights and Title IX Training

with Melissa Martinez Bondy and Kate Davis



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
- Yes, we will provide all attendees a copy of the slides

Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 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 electronically for your district to post

Agenda

- Level 1: Required Title IX training for all staff
- Level 2: Title IX Coordinator training
- Level 2: Informal Resolution Facilitator training



Additional information
available at:

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

Find us on **Twitter** at
@BrickerEdLaw



**Civil Rights Laws: Key Laws, Regulations, and
Guidance**

Discrimination = Treating people differently

Discrimination is the act of treating people **differently** based on a protected characteristic (or stereotypes based on that characteristic)

- Focus on access to education opportunities, resources, programs
- Disparate treatment in the workplace/school
- Disparate impact claims (neutral policies that have discriminatory impacts)

Common Types of Protected Traits

- | | |
|--|--|
| <ul style="list-style-type: none">• Race• Color• Religion• Sex (gender)• Military status• National origin | <ul style="list-style-type: none">• Disability• Age• Ancestry• Marital status• Pregnancy• Genetic information |
|--|--|

Title VI and Title VII (1 of 2)

- Title VI – “Any program, activity receiving Federal financial assistance”
- Race, color, or national origin
- Contracts, grants, educational activities



Title VI and Title VII (2 of 2)

- Title VII – “An unlawful employment practice for any employer...”
- Fail or refuse to hire, or discriminate, on the basis of race, color, religion, sex**, or national origin
- Limit, segregate, or classify employees that would deprive or limit employment opportunities based on...

Sex Discrimination and Harassment

Title VII and Title IX

“No person in the United States shall, **on the basis of sex**, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance...”

Sex Discrimination under Title IX (1 of 2)

34 C.F.R. § 106.31(b)

- Treat one person **differently** from another in determining whether such person satisfies any requirement or condition for the provision of such aid, benefit, or service
- Provide **different** aid, benefits, or services, or provide aid, benefits, or services in a different manner
- Deny any person such aid, benefit, or service
- Subject any person to separate or **different** rules of behavior, sanctions, or other treatment

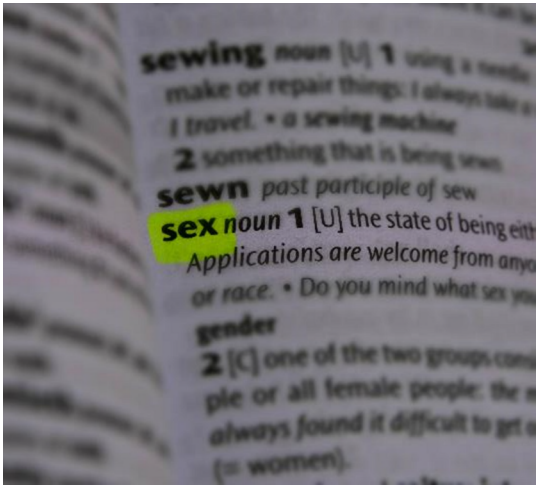
Sex Discrimination under Title IX (2 of 2)

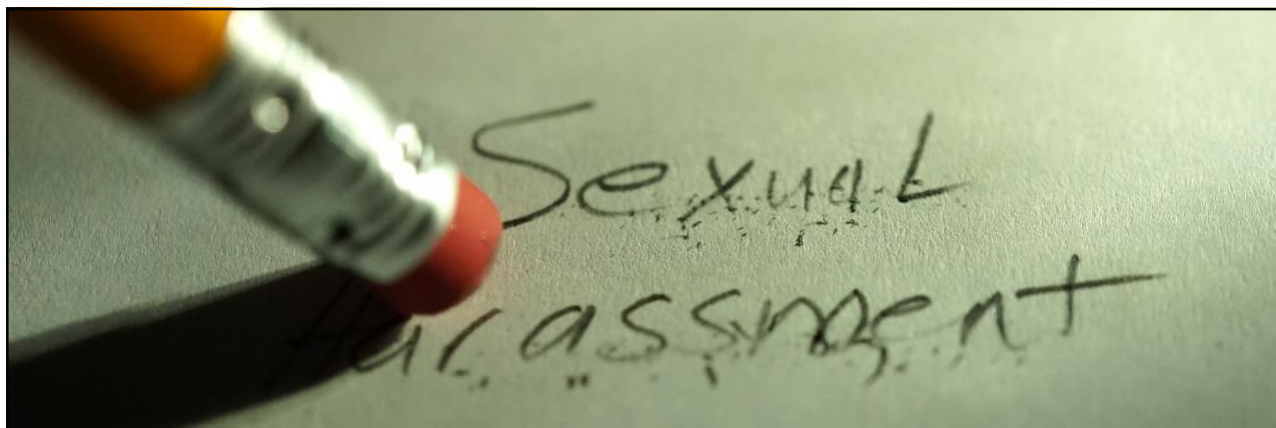
34 C.F.R. § 106.31(b)

- Apply any rule concerning the domicile or residence of a student or applicant
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity

What does “sex” mean?

- Biological sex
- Gender
- Sex stereotyping
- Sexual orientation**
- “Sex” as a verb





Sexual Harassment Definitions under the New Title IX Regulations

When does a school have notice of a complaint?

Actual knowledge = 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 or secondary school**

34 C.F.R. § 106.30(a)

The School’s Obligation

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.

New Definitions of Sexual Harassment under Title IX

Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:

- **Quid pro quo** – An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct
- **Hostile environment** – Unwelcome conduct determined by a reasonable person to be so severe, pervasive, **and** objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
- **Clery crimes** – Sexual assault, dating violence, domestic violence, or stalking [Clery regulatory definition cites omitted]

Final Regulations Apply to Employees

- Recipients that are subject to both Title VII and Title IX must comply with both
- “Deliberate indifference” standard applies
 - Because Title IX recipients are “in the business of education”
 - “Marketplace of ideas”

Quid Pro Quo Examples

- They do/won’t do this, so...
- They will/won’t put up with this, so...
- If you do/don’t... I will/won’t...



Quid Pro Quo

- May involve a power differential
- “Everyone knows that so-and-so...”
- Voluntary conduct between some may put observers in the position of believing that something sexual is necessary to get something favorable

Hostile Environment – What does this look like?

Be aware of things that are **not** elements:

- “Happened more than once”**
- “Parties weren’t dating at the time”
- “Must involve two people of compatible sexual orientations”
- “Must occur on school property” ** (but remember state law restrictions)
- “Must have bad intent”

Jurisdictionally Important

From 34 C.F.R. § 106.44:

“If the conduct alleged in the formal complaint would not constitute sexual harassment... 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.”

Hypothetical #1 (1 of 4)

- Chuck and Mary Sue are bus drivers
- Chuck asks Mary Sue out on a date
- Mary Sue says no

Hypothetical #1 (2 of 4)

- Chuck brings flowers and asks again
- Mary Sue says no again

Hypothetical #1 (3 of 4)

- Chuck asks Mary Sue out over the radio, and Mary Sue says no again
- The transportation supervisor warns them both informally not to discuss personal matters on the radio

Hypothetical #1 (4 of 4)

- Chuck corners Mary Sue in the break room before the morning route to ask her why she won't date him and won't let her leave until she says yes
- The transportation supervisor writes both of them up for starting their routes late

Hypothetical #2

- Mr. Smith is a well-loved teacher
- He is always commenting on how pretty his female students look
- Josie, a student, is his helper and comes to his room during fourth period class to grade papers
- Josie's mother brings you text messages that Mr. Smith has been sending to Josie (not sexual in nature)

Hypothetical #3

- A student approaches a trusted teacher after class and mentions that she was at a party last Friday night
- The student tells the teacher she was kissing another student at the party and then he reached down her pants and touched her in a way that made her uncomfortable after she told him to stop
- The student asks the teacher not to tell anyone, saying she “doesn’t want to make a big deal out of it”

Hypothetical #4

- You’re a custodian in the school district
- While working in the boys’ locker room one evening, you overhear a student complaining to his friend about the annual “hazing ritual” that happens in the locker room
- The student tells his friends that he’s “dreading the towel on his privates...”

Mandatory Reporting

- Child Abuse
- Felonies
- If a school employee engages in sexual conduct with a student, it must be reported
 - Even if the student is 18
- ODE Conduct Reporting



Retaliation (1 of 2)

Section added to new Title IX regs

Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part...”

34 C.F.R. § 106.71

Retaliation (2 of 2)

- Report this **immediately** to the Title IX Coordinator
- Is there already a no-contact order and, if not, do you want one?
- Adverse action against an individual
- Abuse, violence, threats, and intimidation
- More than just someone expressing their opinion

District Obligations

- | | |
|--|--|
| <ul style="list-style-type: none">• Update district policies• Address complainant and provide supportive measures• Mandatory reporting• Informal resolution | <ul style="list-style-type: none">• Investigation• Formal grievance process:<ul style="list-style-type: none">- Notice- Report- Decision- Appeal |
|--|--|

Employee Obligations

- Know who the District Title IX Coordinator is (their information will be posted on the school’s website)
- Recognize a potential Title IX violation
- Report any potential Title IX violation to the Title IX Coordinator **the same day** you receive notice of it
- Review your district’s anti-discrimination and anti-harassment policies as soon as they are updated

How do you make a report on your own behalf?

(1 of 2)

- Promptly report incidents of unlawful discrimination and/or retaliation to your District’s Title IX Coordinator so that the Board may address the conduct
- Remember – retaliation is prohibited



How do you make a report on your own behalf?

(2 of 2)

- The Title IX Coordinator can describe for you the difference between formal and informal complaints, discuss the criminal reporting process, determine appropriate supportive measures, and identify other available resources
- You can then choose how you wish to proceed (i.e., a formal or informal resolution process)
- If you make a report, the Title IX Coordinator should discuss **supportive measures** with you

Key Takeaways for Staff

- Understand the definition of sexual harassment
- Know to whom you should report any complaints of sexual harassment (whether witnessed yourself, or reported to you by someone else)
- Recognize or know responsibility to report any acts of retaliation
- Understand supportive measures you may need to help implement

Key Takeaways for Administrators

- Everything listed in the previous slide for staff
- Follow notice and posting requirements for anti-discrimination, Title IX policies, and training materials
- Schedule Training

Training Requirements for Your Title IX Team

- The definition of sexual harassment as defined in 34 C.F.R. § 106.30
- The scope of the district's education program or activities
- How to conduct an investigation
- How to consistently apply definitions used by the district with respect to consent (or the absence/negation of consent)
- The grievance process, including hearings, appeals, and informal resolution processes, as applicable
- How to serve impartially and avoid prejudgment of facts at issue, conflicts of interest, and bias



Level 2:
Title IX Coordinator Training & Responsibilities



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Initial Implementation Requirements

Designate Title IX Coordinator
§106.8(a)



- Designate at least one employee – Title IX Coordinator – to coordinate compliance
- Inform the following persons of the identity of the Title IX Coordinator:
 - Applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding CBAs or professional agreements with the recipient (i.e., the District)

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

Revise/Adopt TIX Grievance Procedures (1 of 2) §106.8(c)



- Implementation Date – August 14, 2020 (so in theory, these steps should already be complete!)
- Engage relevant parties
 - HR, unions, key administrators (e.g., principals, SPED director)
- Identify the TIX Team
 - Investigators, decision-makers, appeal entities, informal resolution facilitators

Revise/Adopt TIX Grievance Procedures (2 of 2) §106.8(c)



- Make grievance procedure “elections”:
 - Standard of evidence election – preponderance of the evidence or clear and convincing?
 - Standard must be consistent across CBAs and/or Employee Handbooks that address sexual harassment
 - Incorporating a live hearing?

Revise/Adopt TIX Grievance Procedures §106.8(c)



- Ensure that the Code of Conduct and Handbooks are reconciled with the new procedure
 - How will the District address conflicts arising between the grievance procedure and established staff/student disciplinary frameworks?
 - Does the Code of Conduct require an update?

Additional Steps



- Disseminate the policy, grievance procedure, and contact information for the TIX Coordinator (§106.8(b))
- May want to facilitate and/or schedule training for **all** District employees
- Will need to facilitate and/or schedule specific and targeted training for the TIX Team Members (§ 106.45(b)(1)(iii))

Training Requirements – All TIX Team Members (1 of 2)



- Definition of sexual harassment
- Scope of District’s education program or activity
- How to conduct investigation and grievance process, including hearings, appeals, and informal resolution processes

Training Requirements – All TIX Team Members (2 of 2)



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

Training Requirements – Decision-Makers



- Technology to be used at a live hearing
- If live hearings provided for as part of the grievance procedure:
 - Issues of relevance of questions and evidence
 - Including applicability of rape shield laws

Training Requirements – Investigators



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

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, appeals officers, and informal resolution officers)

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

(85 Fed. Reg. 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 judging is contrary to your neutral role] (85 Fed. Reg. 30323)

Bias: Concerns raised in comments in preamble



- Neutrality of paid staff in Title IX positions
- Tweets and public comments
- Identifying as a feminist

How the Department Tried to Prevent Bias



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

- Decision-maker must not have been the same person who served as the Title IX Coordinator or investigator (85 Fed. Reg. 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 (85 Fed. Reg. 30370)
- The institution may consider external or internal investigator or decision-maker (85 Fed. Reg. 30370)

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

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

(85 Fed. Reg. 30252)

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



Process and Implementation Considerations

“Actual Notice” § 106.30(a)



- TIX Coordinator responsible for receiving reports of conduct that **could** constitute sex discrimination or harassment
- Also responsible for receiving **formal** complaints that are signed by complainant
- Actual notice imputed not just when TIX Coordinator is notified, **but also** when someone with authority to correct the harassment is notified, **or** when **any** elementary/secondary school employee has knowledge

District's Response to Sexual Harassment § 106.44(a) and (b)



- **District must respond promptly in a manner that is not deliberately indifferent**
- District must treat complainants and respondents equitably by offering supportive measures
- In response to formal complaint, District must follow a grievance process

Specific Required Responses § 106.44(a)



- The TIX Coordinator has certain **specific required responses** to sexual harassment
 - Promptly contact complainant to discuss availability of supportive measures
 - Consider complainant's wishes with respect to supportive measures
 - Inform complainant of availability of supportive measures with or without the filing of a formal complaint
 - Explain to complainant the process for filing formal complaint

Voluntary Informal Resolution

§ 106.45(b)(9)



- TIX Coordinator may need to facilitate scheduling and participation, if elected by complainant
- Informal resolution may occur, provided the district gives written notice to the parties of the allegations, and that they can withdraw at any time and resume formal grievance process
- **May not** be used to resolve employee-student harassment allegations
- Could include mediation, restorative justice practices

Jurisdictional Determinations (1 of 3)

§ 106.45(b)(3)



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

Jurisdictional Determinations (2 of 3)

§ 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 (3 of 3)

§ 106.45(b)(3)



- Preamble: Permitting district 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

Hypothetical – Jurisdictional Issues



- Student trip to France
- French teacher and parents chaperone
- Students leave hotel and go to a bar near the Moulin Rouge
- Allegation of forced sexual contact between students
- Respondent transfers to another school after the trip

Which of the following is true?

Notice of Allegations to Parties (1 of 2) § 106.45(b)(2)



- 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 Parties (2 of 2)

§ 106.45(b)(2)



- 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

Implement Supportive Measures


§ 106.30(a)



- TIX Coordinator “is responsible for coordinating effective implementation of supportive measures” to the parties
- **Preamble:** TIXC “must serve as the point of contact for the affected student to ensure that the supportive measures are effectively implemented so that the burden of navigating paperwork or other administrative requirements does not fall on the student receiving the supportive measures.”


Supportive Measures

§ 106.30(a)



- **Elements:** Non-disciplinary, non-punitive individualized services offered as appropriate, as reasonable available, without fee or charge to the parties
- **Availability?** Before or after filing formal complaint, or where no formal complaint is filed
- **Purpose:**
 - Designed to restore or preserve equal access to recipient’s program/activity
 - Protect safety of all parties or recipient’s educational environment, or deter sexual harassment

Supportive Measures Defined within Regulation



<ul style="list-style-type: none">• Counseling• Extensions of deadlines or other course-related adjustments• Modifications of work or class schedules• Campus escort services	<ul style="list-style-type: none">• Mutual restrictions on contact between the parties• Changes in work/housing locations• Leaves of absence• Increased security/monitoring of certain areas on campus
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Hypothetical – Supportive Measures



- 12yo student allegedly commits multiple off-campus sexual assaults against classmates over the summer
- Criminal investigation ongoing; court issued protective order requiring student to stay at least 15 feet away from complaining students at all times
- Complainants scared to be around respondent
- Respondent maintains innocence; fears harassment or retaliation

Thoughts on Hypothetical



- Raises the issue of off-campus conduct and on-campus climate.
- Under R.C. §3313.66, you must have a connection to campus to discipline under your student code of conduct (Extracurricular codes of conduct can generally be broader than this)
- Need to evaluate whether the off-campus misconduct has created hostile environment on campus is affecting access to your program.

Supportive Measures – More Requirements and Some Best Practices



- 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
- If OCR doesn't discuss supportive measures in non-TIX guidance, should we provide them for non-TIX cases?

Supportive Measures – Confidentiality & Recordkeeping



- Requirement to maintain as confidential any supportive measures provided §106.30
- Requirement to create and maintain records, for period of seven years, regarding any actions taken in response to report or formal complaint of sexual harassment **includes supportive measures** §106.45(b)(10)(ii)
- If recipient does not provide complainant with supportive measures, it must document the reasons why this was not clearly unreasonable in light of known circumstances

Emergency Removal (1 of 3)

§ 106.44(c)



- District can issue emergency removals, provided that it:
 - Undertakes **individualized** safety and risk analysis
 - Determines that an **immediate threat** to **physical** health or safety of **any student/individual** arising from the allegations justifies removal
 - Provides respondent with **notice and opportunity to challenge decision immediately**
- Does not modify IDEA, Section 504, or ADA rights

Emergency Removal (2 of 3)

§ 106.44(c)



- When available?
 - During an investigation or when no grievance is pending
 - Not limited to violent offenses
- Safety and risk analysis
 - More than a generalized or speculative belief of threat
 - Based on facts, not assumptions
 - Threat must be immediate and one that justifies removal
 - Conducted by someone impartial – may need training

Emergency Removal (3 of 3)

§ 106.44(c)



- Notice and opportunity to challenge determination after removal
 - No requirement of written notice, but recommended
 - Notice must describe reasons for finding a threat
 - District has discretion to
 - Determine who conducts hearing
 - Establish hearing procedures
- Timeline for challenge
 - Immediately after removal (without delay / as soon as possible given the circumstances)

Considerations – Emergency Removal



- Risk can be to anyone
- Alignment with general emergency removal/discipline procedures
- Implications for reassignment to alternative programs
- Considerations for students with disabilities

Emergency Removal – Employees

§ 106.44(d)



- Administrative leave for employees remains available
- Nothing in the regulations dictate whether such leave is paid or unpaid

Basic Requirements for Formal Grievance Process

§ 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

§ 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

Investigation Process



- Burden of proof and burden of gathering evidence is on recipient
- Equal opportunity to present witnesses
- May not prohibit parties from discussing allegations or gathering/presenting evidence
- Provide same opportunity to have others present including advisor of choice
- Written notice of any hearings/interviews/meetings

Facilitate Inspection/Review of Evidence § 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

Providing Written Investigative Report § 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

Submission of Written Questions

§ 106.45(b)(6)(ii)



However, **the decision-maker must** afford each party “the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party” and also to **explain any decision to “exclude a question as not relevant.”**

Live Hearing

§ 106.45(b)(6)(ii)



- **If provided**, TIX Coordinator will need to facilitate scheduling and completion of a live hearing

Determination and Remedies

§ 106.45(b)(7)(iii), (b)(7)(iv)



- TIX Coordinator (or possibly the decision-maker) will need to disseminate the written determination to the parties simultaneously
- TIX Coordinator is responsible for effective implementation of any remedies
- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein

Offer Opportunity to Appeal

§ 106.45(b)(8)



- TIX Coordinator will want to offer both parties an equal opportunity to appeal determination regarding responsibility, or dismissal of formal complaint or any allegations therein
 - Procedural irregularity that would affect the outcome
 - New evidence that was not available at the time of the determination that would affect the determination
 - Member of TIX Team had conflict of interest or bias that affected the outcome



Other Title IX Coordinator Responsibilities

TIXC May File Formal Complaint
§ 106.30(a)



- After receiving multiple reports about same respondent
- Must remain free from conflicts of interest and bias, and must serve impartially
- Is not acting as complainant
 - Not participating in the investigation
 - Not submitting questions or cross examining on behalf of the complainant

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

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

Hypothetical – Employee-Student Allegations

(1 of 2)



- Teacher's suggestive statements make student so uncomfortable she wants to drop the class
- Her parent complains to the superintendent
- Student is insistent that she wants nothing more than to drop the class

Time for another poll question!

Hypothetical – Employee-Student Allegations (2 of 2)



- If TIX issue, informal resolutions not available
- **Make sure the student is safe** – remedy any effects – remove teacher, possibly run TIX investigation **and** parallel conduct investigation (unprofessional behavior, boundary violations)
- Professional misconduct report?

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

Checklist for the Title IX Coordinator



- | | |
|--|---|
| <ul style="list-style-type: none">• 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 | <ul style="list-style-type: none">• Determine process for emergency removals• Coordinate discipline and special ed procedures• Address retaliation• Develop record keeping protocols• Post training materials |
|--|---|



Questions?



Level 2:
Informal Resolution Officer Training



Grievance Process and Investigations

Basic Requirements for Formal Grievance Process § 106.45(b)(1) (1 of 2)



- Treating complainants and respondents equitably
- No conflict of interest or bias; trained staff
- 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; no sanctions until process is complete

Basic Requirements for Formal Grievance Process § 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

Grievance Procedure Initial Steps: How did we get here?



- Formal Complaint: Triggers Grievance Process
- Written Notice to Parties
 - Summary of allegations/time to prepare response
 - Parties' right to advisor
 - Parties' right to inspect/review evidence
 - Advise of code of conduct prohibiting false statements
 - Presumption that Respondent is not responsible
 - Must be supplemented if additional allegations arise

Grievance Procedures: Informal Resolution



- Optional (if your policy allows and if appropriate)
- Written notice
- Only after Formal Complaint
- Must have consent; may not be mandatory
- Consent may be withdrawn prior to reaching agreement
- Cannot be used for Student-C v. Employee-R
- Stops Grievance Process
- If agreement reached, cannot return to Grievance Process



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 **informal resolution** officers (and Title IX Coordinators, investigators, decision-makers, and appeals officer)

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

(85 Fed. Reg. 30053)

Being Impartial



- Be neutral
- Do not be partial to a complainant or a respondent, or complainants and respondents generally
- Do not judge: memory is fallible [and judging is contrary to your neutral role] (85 Fed. Reg. 30323)

Concerns raised in comments in preamble about bias



- Neutrality of paid staff in Title IX positions
- Tweets and public comments
- Identifying as a feminist

Bias: Objective Rules and Discretion



- **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).

Examples of Bias



- An informal resolution officer has a relationship with one party but not the other (for example, the resolution officer also serves as a Coach for one party and they have a close relationship);
- Information “gleaned” by the investigator is shared with the informal resolution officer outside the investigation report (in a meeting to discuss student discipline data, or in passing while at work, etc.)

Avoiding Prejudgment of Facts



A good way to ensure impartiality and avoid bias:

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



Informal Resolution: The Theory and Practice

Informal Resolution: Reasons Parties May Prefer It to Formal Resolution



- Parties to disputes may be more satisfied with outcomes they reach themselves
- They can control the outcome
- They have the ability to tailor solutions to their needs

Less Adversarial Resolution



“Informal resolution may present a way to resolve sexual harassment allegations **in a less adversarial manner** than the investigation and adjudication procedures that comprise the 106.45 grievance process.”

(85 Fed. Reg. 30098 FN 463)

When: Threshold



- **Only** available to the parties **if** a ***formal complaint*** is filed
- **Never** available to resolve allegations that an employee sexual harassed a student

When: Termination



Available at ***any time prior to*** reaching a **determination**

Caution in Approach (1 of 3)



A school district may **NOT** require:

- As a condition of enrollment or continuing enrollment
- As a condition of employment or continuing employment

Caution in Approach (2 of 3)



A school district may **NOT** require:

- As a condition of enjoyment of *any other right*
- The waiver of the right to an investigation and adjudication of formal complaints of sexual harassment

Caution in Approach (3 of 3)



A school district may **NOT** require:

- The parties to participate in an informal resolution process
- Pressure either or any party to participate
- **This is a voluntary process for both (or all) parties!**

What Can Be Offered?



An “informal resolution process, such as mediation, that does not involve a full investigation and adjudication”

What Does This Mean?



The regulations don't provide more detail on what this means, but the preamble gives examples of the processes, such as:

- Mediation
- Restorative justice (85 Fed. Reg. 30098 FN. 463)

Mediation (1 of 2)



The regulations don't provide more detail on what this means

- “Mediation” may have legal meaning in your jurisdiction that invokes certain requirements
 - Ohio does

Mediation (2 of 2)



- In Ohio, the Supreme Court and state law have provisions governing mediation and a Uniform Mediation Act
- See, ORC 2710.01 through 2710.10

Ohio Law – Uniform Mediation Act (ORC §2710.01-.10)



- **Defines “Mediation”** – “any process in which a **mediator** facilitates communication and negotiation between parties to assist them in reaching a voluntary agreement regarding their dispute”
- **Defines “Mediator”** – an “individual who conducts a mediation”
- **Defines “Mediation Party”** – a person “whose agreement is necessary to resolve the dispute”
- The Act provides that if the mediation is conducted by a primary or secondary school **and** the all of the parties are students (i.e., peer mediations) the Act does **not** apply
- As long as a parent is involved in the process, or the mediation is between adult District employees, the Act does apply

Mediation or, Perhaps Better–Facilitated Resolution



- There are many definitions of mediation out there, but the TIX Regulations anticipate a **third-party** (the informal resolution officer) **facilitated resolution** of a dispute between parties
- Facilitated Resolution is what you will be doing

Facilitated Resolution (1 of 2)



Written agreement required?

- Regulations are silent about whether required.
- But – other provisions require **documentation** of the grievance process from formal complaint to resolution

Facilitated Resolution (2 of 2)



What is a resolution of the dispute?

- Do parties need to reach an agreement about what occurred between them?
- Is it sufficient to find a way to move forward so both parties can have equal access to educational opportunities?

Restorative Justice (1 of 3)



- The Regulations do not define “restorative justice.”
- Usually aims to repair harm done to victims or relationships through facilitation, but will vary from program to program.

Restorative Justice Example



A system of school-based, non-punitive interventions, in which students are brought together with staff to discuss differences and conflicts, often in a group setting

Restorative Justice (2 of 3)



Remember:

- 1) What we do for one we do for the other
- 2) Recipient cannot make *a finding of responsibility* without completing the formal grievance procedure

Restorative Justice (3 of 3)



The goal must be to ensure that the process preserves (equal) access for both parties to educational opportunities.



**Informal Resolution:
How to Facilitate a Resolution with Basic Principles**

Initial Consideration: Separation of the Parties



- When issues are very emotional, as they often are in Title IX disputes, keeping parties separate during the facilitating may be the best way for the parties to move forward.
- “Shuttle Diplomacy”

Overview of the Process with the Parties



Whether beginning together or separately, the facilitator should begin by providing an overview with the parties of the expectations and process for the resolution

Provide Opportunity for Each Party to Tell Their Story



- Whether beginning together or separately, the facilitator should provide space for each party to tell their “story” and present their perspective on the underlying dispute
- If haven’t separated at this point, separate parties after this point

Determine What Each Party Wants



- Often referred to as the “WIFM” – what’s in it for me?
- Ask each party what they want out of the process
- Ask each party what they want from the other party
- Make a list of each WIFM and try to identify the top three for each party
- Go through the list with the party
- Be clear with each party what you can share from the list with the other party

Questions Facilitator May Ask of a Party



- What would make you feel safe?
- What do you want your day at school to look like after this?
- What could the school do to make you feel safer?
- What could the other party do to make you feel safer?
- What do you need and what do you want, and are those different?
- What could you live with?

Have Ready a List of Supportive Measures That Can Be Easily Offered



- Adjusting course schedules
- Online alternatives for courses
- Increased adult supervision
- Counseling
- Training
- Apology letters (not necessarily admitting wrongdoing, but acknowledging feelings)

Review the WIFMs for Each Party and Look for Overlap



- Sometimes the parties want a lot of the same things
- Sometimes the parties do not have any overlap
- Identify with each party what they may be willing to share with the other party and that sharing may help resolve

Go Back and Forth Until a Resolution Agreement Can Be Reached



- This may not happen. Not everyone can reach a resolution agreement in every case
- Make sure you can get both parties to agree to the same terms and then make sure you have their agreement

If Agreement Reached...



- Document it in some fashion
- Have the parties sign that the documentation accurately reflects their understanding
- Try to finish it before the parties leave so it doesn't fall apart

If No Agreement Reached...



- Parties may want time to think about the resolution – this will be up to the school on how to proceed
- May provide a certain deadline by which to have signed
- May provide certain provision that it will go back to formal process by deadline
- May choose to offer further facilitated resolution on the dispute of it the parties think it would be helpful



Informal Resolution: Best Practices

Informal Resolution Officer Goals



Help parties find ways to **move forward** (for as long as their time together is before they graduate) with **equal access to educational opportunities**

What Should Our Process Look Like? Requires a Prompt Timeframe



The recipient (the school) should decide what “prompt” timeframe to set to resolve the informal resolution

Prompt Timeframe Considerations



- Stop the clock for exams or breaks so that students are not required to participate during exams or breaks or have that time count against resolving
- Have the ability to extend timeframe if close to resolving but need a few extra days

Contact the Parties



The informal resolution officer should contact each party individually to initiate and explain the process.

A written notice shall be provided disclosing:

- The allegations
- The informal resolution process requirements
- Any consequences

Determine Setup



- In person in same room?
- In person but in separate rooms with informal resolution officer going between (sometimes called shuttle mediation)?

Setup Considerations



- Each matter is different, so providing multiple methods for conducting a resolution may be helpful
- Should the parties communicate directly with each other?
- Are there attorneys or parents involved?

Assess Needs & Wants



- Meet with each party individually to find out:
 - What they **want**
 - What they **need**
- What are they willing to accept as a resolution?
- What are they not willing to accept?

Finding Out What the Parties Want



Example:

- A complainant may tell you they want the respondent to admit wrongdoing
- However, the complainant may be willing to accept that respondent sees the underlying interaction differently but apologizes for the resulting harm to the complainant

Identify Overlap



Identify any overlap between what the parties:

- Want
- Need
- Are willing to accept

Support to Parties



Identify supportive measures you could propose to the parties individually that also protect their individual access to educational activities

Work the Process



Identify how to get the parties to work towards a solution:

- May require back and forth by the informal resolution officer
- May require reality checking: the alternative to resolution will be the formal process

Reality Checking



A helpful tool, but be cautious

- It may be helpful to remind one or both parties the limitation of informal resolution requires agreement to complete
- It may be helpful to remind one or both parties that the alternative may be a return to the formal process
- It may be helpful to remind one or both parties that they can control the outcome in the informal process, but not the formal process

Reality Checking – Caution



BUT...

Be careful to remain neutral and not push a party to do something the party does not really want to do

Reality Checking – Neutral



Example of a neutral reality check:

“If this goes back to the formal process, you will not have control over the outcome, and there is a possibility that a decision-maker could find you in violation of policy”

Reality Checking – Bias?



Example of a biased/pushy reality check:

“I’ve seen cases like yours and it’s not looking good for you. You should take the informal resolution option offered by the other party.”

Resolution Documentation



- If the parties reach a resolution, memorialize the terms
- Have both parties review the terms
- Have both parties acknowledge the terms of the resolution document
- If it involves minor students, have the parents sign document

Resolution Documentation Considerations



- Include any confidentiality provisions for the informal resolution process and agreement in the text of the agreement (and any consequences for violating those provisions)
- Provide each party with a copy of the agreement

Recordkeeping



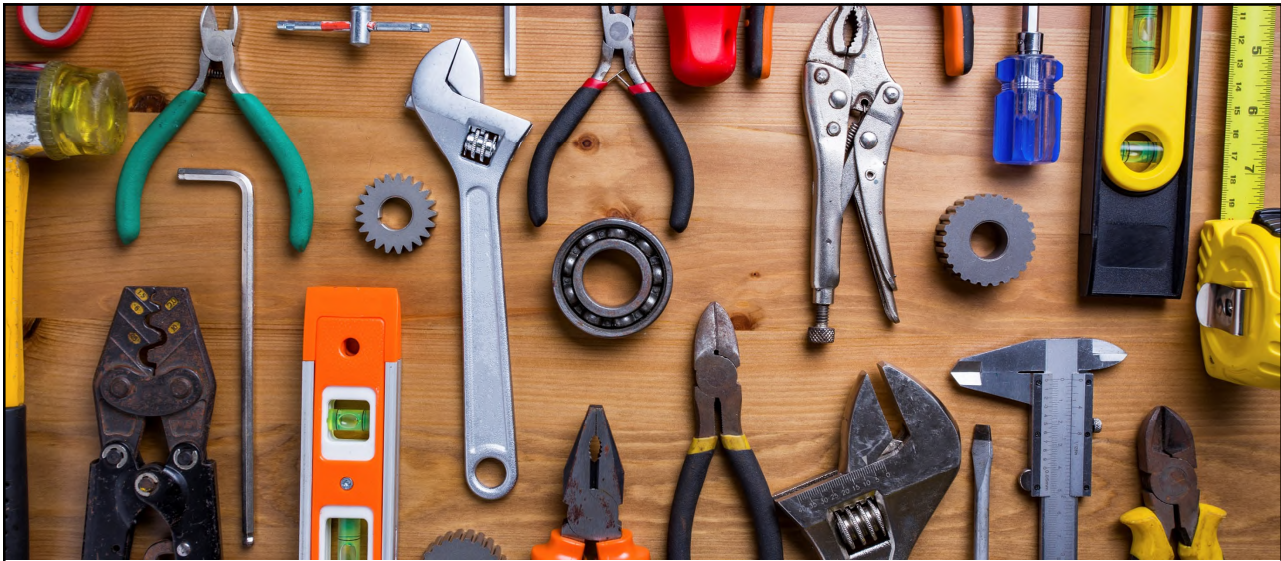
- Maintain a copy of documentation in the Title IX office for seven years
- If the resolution is not successful, maintain any records of the process and its result for seven years



Informal Resolution: Scenario Review



Informal Resolution: Live Example



Informal Resolution: Toolbox/Checklist

Script of Overview of Process



As you saw in our live scenario, a script is helpful to ensure:

- You approach each facilitation consistently
- Overview of your process
- Don't forget anything you needed to say

Make Sure Each Party Feels Heard



Not only a step of the process, but a tool to empower the parties to:

- Identify what is important to them
- Identify what they may be able to be flexible on
- Feel like they are engaging in and trusting the process

Identify What Each Party Wants



Regardless of the type of resolution process, ensure that you identify with each party:

- What they want
- What they can live with

Have a List of Supportive Measures Available



Be ready to easily provide each party with a list of supportive measures and other ideas that may help them think about moving forward

Have a Form/Template for Documenting the Resolution Agreed Upon



- If the parties agree, you will want to be able to quickly pull together a document detailing the terms of resolution
- Having a form or template easily accessible that you can add the provisions to is more likely to allow you to have the parties agree that day – you don't want your delay to be the reason an agreement falls apart



Documenting Agreement

Why Document Agreement in Writing?



While some jurisdictions will not allow discussions or documents from mediation to be relied upon outside of mediation, many do allow a carve out for a written agreement (signed by the parties) as final memorialization of an agreement

Why Document The Resolution In Writing?



- Important to have the terms of any resolution agreed upon in writing, in case of later disagreements
- Documentation is important if DOE reviews the informal resolutions

What About Confidentiality? (1 of 2)



- The terms of the resolution should be on a need-to-know basis
- The resolution may include penalties for a party or recipient for publishing or sharing the agreement
- Resolutions relating to students are student records protected by FERPA; kept in student file

What About Confidentiality? (2 of 2)



- For employees, these may have different considerations and more than likely are a public record
- May be contained in a separate file from the employee's personnel file

The Problem with “Gag” Orders or Non-Disparagement Agreements (1 of 2)



- Could be contrary to the First Amendment
- Could be contrary to academic freedom if it involves teaching staff
- Could be contrary to public records laws

The Problem with “Gag” Orders or Non-Disparagement Agreements (2 of 2)



What happens if a party breaks the order?

- How will you enforce it?
- What if it's years later?
- What if it's a conversation with a family member vs. journalist?
- What if it seems like the school is trying to bury information?

What Resolution Documentation Should Include



- Names of any parties, representatives, and informal resolution officer
- The specific terms of agreement, with as much specificity as possible
- Acknowledgement of all the terms by signature of the parties (parents) and the consequences of signing

What Any Resolution Documentation Should Include



- How to resolve any future disputes arising out of the underlying facts or the resolution itself
- Who to contact with questions or concerns about the terms

Final Thoughts



- Share with parties that the TIX Coordinator will check in on how the resolution is going
- **Pros:** Helps the school monitor the effectiveness of the solution
- **Cons:** Might poke a sleeping bear

Bricker Graydon’s Title IX Toolkit
Available for download: k12tixtoolkit.bricker.com



Thank you for attending!

Remember – additional
information available at:

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

Find us on **Twitter** at
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