



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
- Feel free to submit questions – we will answer them at the end as time permits

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 to your district electronically to post

Agenda

- Expectations of the Title IX Coordinator
 - Initial Implementation Actions
 - When There Has Been a Report or Complaint
 - Overview of Grievance Procedure Requirements
 - Other Responsibilities for Title IX Coordinator
- Checklist and Resources for Additional Information

Additional information
available at:

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

Find us on **Twitter** at
@BrickerEdLaw





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

§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 §106.8(c)

- Make grievance procedure “elections”:
 - All protected classes anti-discrimination policy vs. separate sex discrimination policy?
 - 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

- 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

- 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

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

- 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

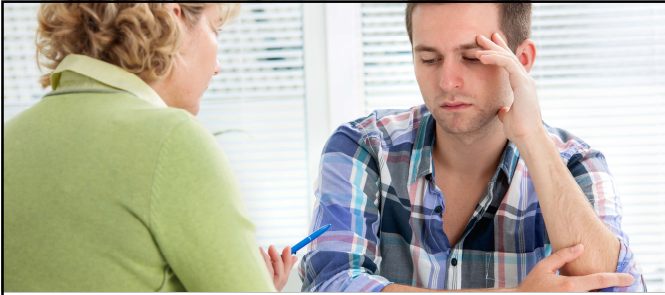
Training, Bias, and Past Professional Experience

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

§ 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

§ 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

§ 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**§ 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**§ 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



Let's take a break!

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 |
|---|--|

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

§ 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

§ 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**§ 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
 - o Determine who conducts hearing
 - o Establish hearing procedures
- Timeline for challenge
 - Immediately after removal (without delay / as soon as possible given the circumstances)

Emergency Removal**§ 106.44(c)**

- Removal v. Supportive Measure
 - Consider if it the action is disciplinary or punitive
 - Would it cause an unreasonable burden on the respondent?
 - Fact specific analysis
- Consider scope of removal (all or part of program)

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)**

- 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)**

- 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

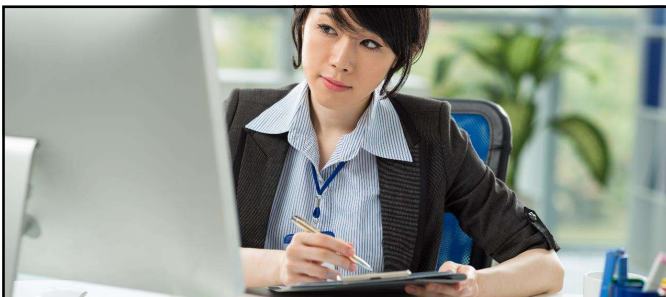
§ 106.45(b)(7)(iii), (b)(7)(iv)

- 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

- 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

- 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

- 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

- 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 |
|---|---|



Bricker's Title IX Toolkit

Available for download: k12tixtoolkit.bricker.com

VEED.IO

Bricker's Title IX for K-12 Training Series

Level 1

- General training for all K-12 staff

Level 2

- Title IX Coordinator/Administrator
- Investigator
- Report Writing for investigators and decision-makers
- Decision-Maker and Appeals Officer
- Informal Resolution Facilitator

Now Added: **Level 3** advanced training for your K-12 Title IX Team!

- Title IX Coordinator
- Investigator
- Report Writing
- Informal Resolution Facilitator

View dates and register at www.bricker.com/titleix

Thank you for attending!

Remember – additional information available at:

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

Find us on **Twitter** at
@BrickerEdLaw