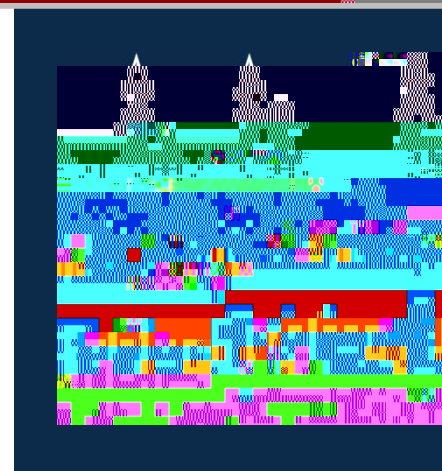


Title IX Coordinator Training



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**

-
- **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**

Bricker's Title IX Resource Center Website:
www.bricker.com/titleix

You can also find us on Twitter at
[@BrickerHigherEd](https://twitter.com/BrickerHigherEd)



Additional Topics:

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

Two-Day Agenda

Day 1

900 1030 Introduction and Discussion of TIXC Expectations

1030 1045 Break

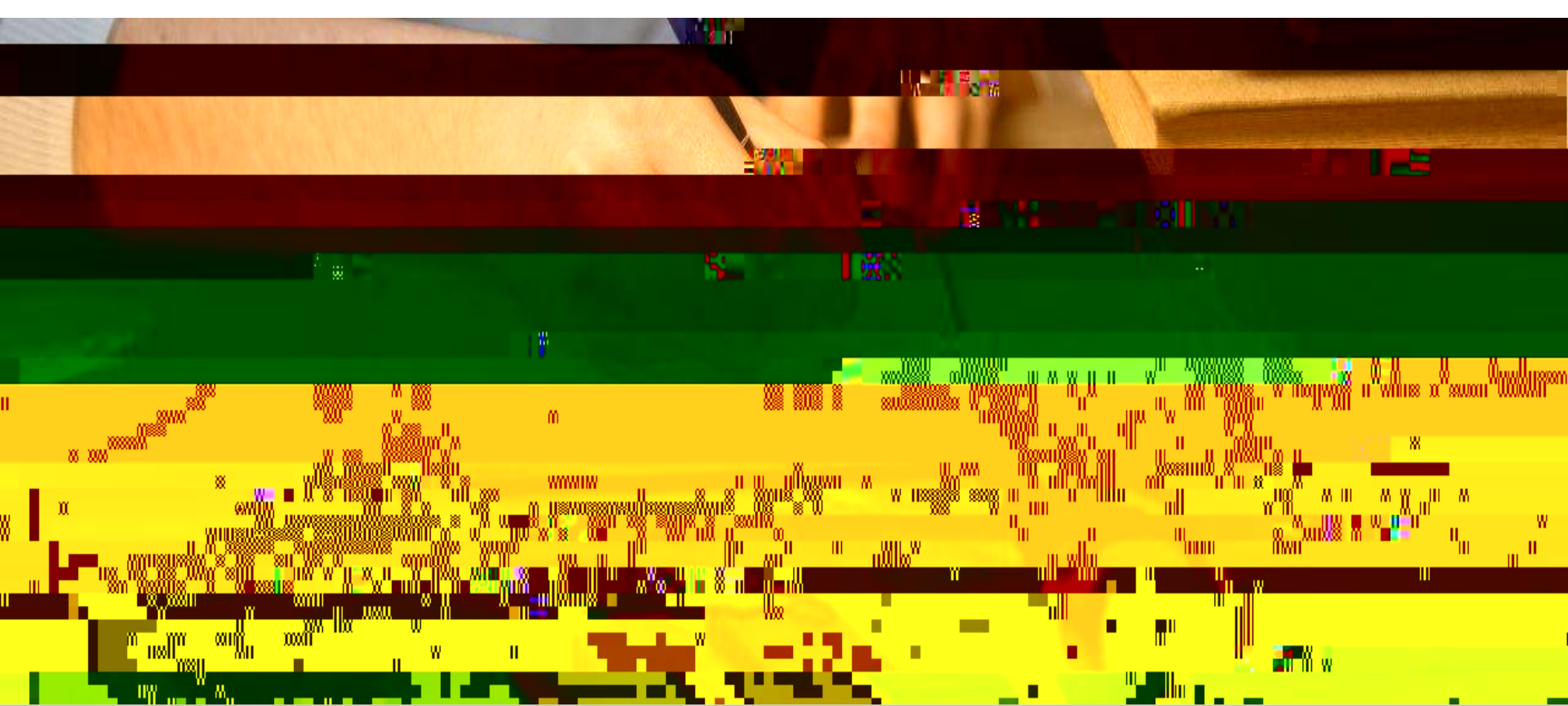
1045 1200 TIXC Expectations Upon Receipt of a Report and Jurisdiction/Dismissal Issues

Day 2

900 1030 Grievance Process and Serving Impartially and Without Bias

1030 1045 Break

1045 1200 Serving Impartially and Without Bias, Title VII, and Checklist for the TIX



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

1068(a)

- **Designate at least one employee to coordinate**

-
- **Notice of the Title IX Coordinator must include, for the employee or employees designated as the Title IX Coordinator:**
 - **The name or title**
 - **Office address**
 - **Electronic mail address**
 - **Telephone number**

Initial Compliance Steps

- **Implementation Date – August 14, 2020**
- **Engage relevant parties**
 - **Human Resources**
 - **Unions**
 - **Key Administrators (Student Conduct)**

Initial Compliance Steps (Continued)

Initial Compliance Steps (Continued)

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

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**
 - o **How does the TIXC fit into these roles?**
 - Investigator?**
 - Supervisor?**

All TIX Team Members must be trained on

- **How to serve impartially**

- **Avoiding prejudgment of the facts**

- **Conflicts of interest**

- **Bias (use reasonable person's common**



All TIX Investigators must be trained on

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

Required to Post Training Materials

(34 C.F.R § 106.45(b)(1)(ii))

Under your new policy...

- o Train your ITX 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?**



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**

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?

-
- **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**





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 Title IX make jurisdiction/definition decisions? What does that process look like?**

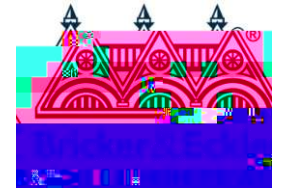
“Exit Ramps”

Document, Document, Document



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





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

- **Residence halls**
- **Classrooms**
- **Dining halls**



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

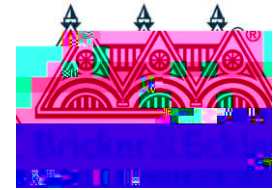
(1) Incident occurs as part of the recipient's "operations" (meaning as a "recipient" as defined in the Title IX statute or the Regs 1062(h));

(2) If the recipient exercised substantial control over the respondent and the context of alleged sexual harassment that occurred off campus;
and



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

- o 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**
- o Must investigate in these locations (3019697)**



Locations, events, or circumstances without substantial control:

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



Depends on fact analysis under “substantial control”:

- **Conventions in the United States**
- **Holiday party** **B**



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



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

When and Where are you required to stamp?

-
- **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. (3020506)**
 - **Programs of college based in other countries? No jurisdiction and must dismiss.**
 - **Foreign nationals in the United States covered**

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

-
- **Jurisdictional Determination 10645(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**

10645(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**

Joe and Sally are dating Sally suspects Joe is

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

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

Angela (Sally's friend) turns on her GoPro to record the encounter

Joe and Becky are in bed having sex

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?**

Sally screams at Joe and slaps him across the face.

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?**

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

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?**

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?**

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

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?**

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

Questions

- **What do I do with this if it comes to the TIX Office sth the time it**

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

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?**

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?**

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.

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?**

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

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?**

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

Designed to:

- o to the recipients education program or activity, without unreasonably burdening the other party;**
- o protect the safety of all parties and the**

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 others similar measures”**





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**
 - o **If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was**

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?



34 C.F.R. 10645(b)(2) (3 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**



TIXC: Keys to Respondent Contact
‘What we do for one, we do for the other’

-
- **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**

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.**

Make sure Respondent understands the process before the meeting ends:

- **Explain the Informal Resolution Process, if it's available**
 - o **Make sure to explain that this option is only available if a Formal Complaint is filed (34 C.F.R. 106.45(b)(9))**
 - o **Explain the option to end the Informal Resolution Process and proceed with a hearing at any point before a determination of**



It states “(c) Emergency Removal. Nothing in this part precludes a recipient from removing a respondent from the recipient’s e

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**

“..Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under section 10645, and must comply with the requirements of this part, including section 10645(b)(1)(iii).”



-
- **“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?

-
- **“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..”**

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 10645(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents.” Preamble, p 30406 (Official)**

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 wan

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 10645(b)(9)(iii)

Requirements:

Formal Complaint- 10645(b)(9)

Facilitators must be free from conflicts of interest and bias

Facilitators must be trained in accordance with 10645(b)(1)(iii)

Reasonably prompt time frames in accordance with 10645(b)(1)(v)

Different from Supportive Measures

- **Supportive Measures** **punishment**
- **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**
 - **Hbs soot in**



-
- **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**

34 C.F.R. 10645(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**

File Review

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

34 C.F.R. 10645(b)(6)(ii)



10645(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**

- **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 violde invold sex discrimination harassment but arise ou of the same facts/circumstances**



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

Section 10645 requires that Title IX Coordinators (and investigators, decision makers, informal resolution officers and appeals officers)

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

(30053)

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

(30249 30257, 30496)

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

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

-
- **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”**



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

-
- **Discretionary:** Recipients have the discretion to have a process to raise bias during the investigation
 - **Mandatory:** Basis for appeal of decision maker's determination per 34 C.F.R. 10645(b)(8)(i)(C).

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

-
- **Final regulations ‘leave recipients**



-
- **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.**

-
- “[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)

-
- **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)**

-
- **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.)**



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

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

**You review the report and realize that the name of the
Compañía zeenn tenio ey' e fiome namí**

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.

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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 Cery 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?

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?

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

incomp hnp o td d d

-
- **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?**

-
- **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**



Questions?