

A close-up photograph of several hands of different skin tones reaching towards the center, each holding a white puzzle piece. The pieces are being brought together to form a larger shape, symbolizing teamwork and collaboration.

Title IX Coordinator Training

ODHE Basic Title IX Coordinator Training
May 4 and 5, 2021



Bricker & Eckler
ATTORNEYS AT LAW

Presenters - Jessica

Jessica L. Galanos

- Bricker & Eckler, Attorneys at Law, Columbus, Ohio
- Former Deputy Title IX Coordinator and litigator
- Contact:

Bricker & Eckler
100 South Third Street
Columbus, OH 43215 -4291
614.227.2341
jgalanos@bricker.com



Presenters - Rob

Robert T. Kent

- Bricker & Eckler, Attorneys at Law, Cleveland, Ohio
- Former General Counsel and Title IX Coordinator
- Contact:

Bricker & Eckler

Cleveland, OH

517.208.1460

rkent@bricker.com



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
- This training does not cover institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals
- This training is not being recorded, but we will provide you with a packet of the training materials to post on your websites for Title IX compliance

Presentation Rules



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

Posting These Training Materials?

- **YES** – Post away!
- The “recipient” is required by §106.45(b)(10)(i)(D) to post materials used to train Title IX personnel on its website
- We know this and will make this packet available to you electronically to post
- Watch for the “Thank you for attending” email and look for a link to download the slides



Aspirational Agenda – Day 1



- 1:00-2:30** Introduction, Title IX Overview, and Discussion of Title IX Coordinator Role
- 2:30-2:40** Break
- 2:40-3:45** Continued Discussion of Title IX Coordinator Role, including Expectations Upon Receipt of a Report and Jurisdiction/Dismissal Issues
- 3:45-5:00** Supportive Measures and Notice to Respondent

Aspirational Agenda – Day 2



- 1:00-2:00** Explaining Your Grievance Process
- 2:00-3:00** Live Presentation and Discussion with Bricker Attorneys
- 3:00-3:45** Serving Impartially and Without Bias
- 3:45-4:00** Break/Q&A
- 4:00-5:00** Templates, Recordkeeping, and Checklists

Title IX Overview



New Title IX Regulations

- “Non-negotiable principles”
- Formal Rulemaking
 - Preamble and guidance versus the regulations
- New Definitions
- New Required Processes
- New Training Requirements
- Changes to Jurisdiction
 - “Education Program or Activity”
 - Complainant must be in the United States
 - Mandatory Dismissal from the Title IX process
- Live hearings req’d before Title IX discipline

Non-Negotiable Principles

Preamble, p. 30059



- The right of every survivor to be taken seriously, and
- The right of every person accused to know that guilt is not predetermined

Formal Rulemaking



Preamble/Guidance and the Regulations

Preamble/Guidance:

- Dept. of Ed. Interpretation
- May rely on legal precedent
- Entitled to deference
- Potential for change based on Dept. of Ed. leadership
 - Ex: 2011 Dear Colleague Letter

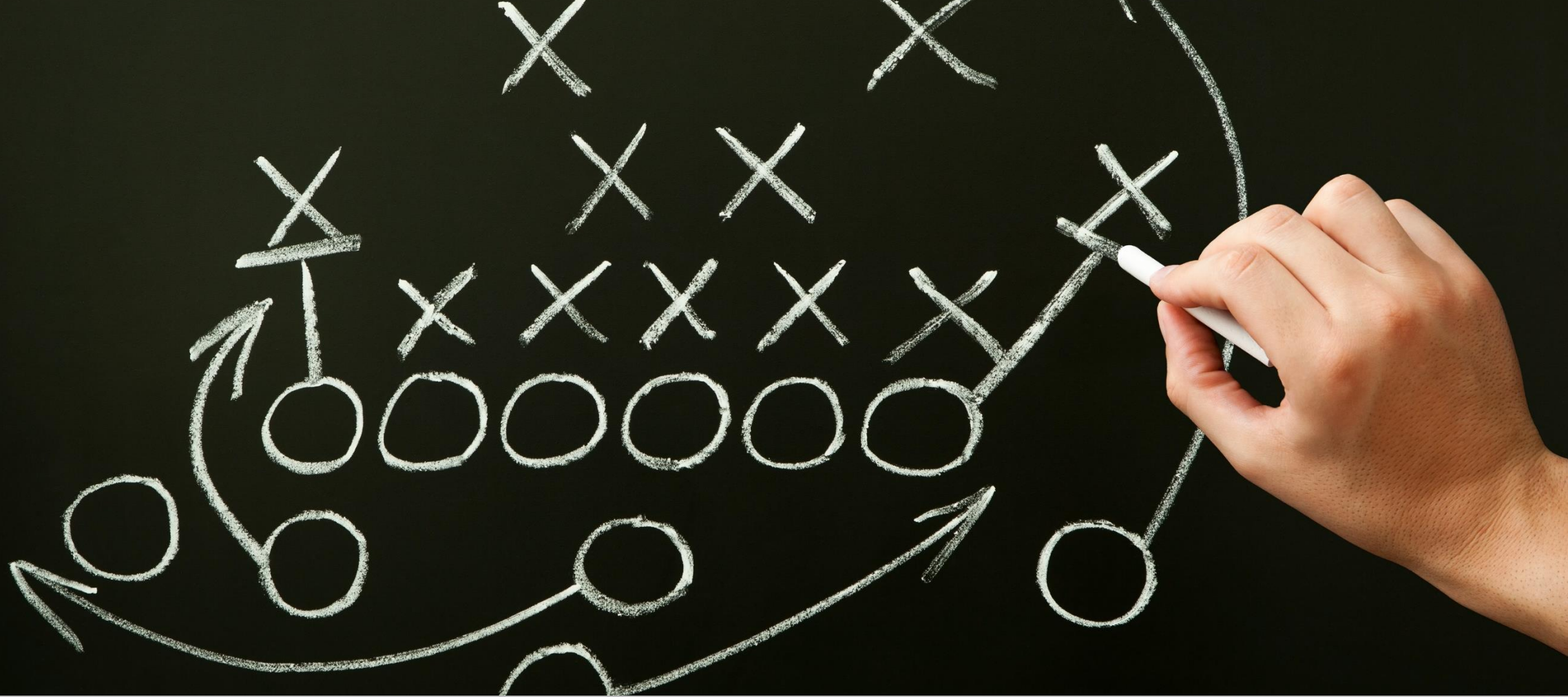
The Regulations:

- 34 C.F.R. § 106
- Force and effect of law
- Will require notice and comment rulemaking in order to amend

PART 106—NONDISCRIMINATION ON THE BASIS OF SEX IN EDUCATION PROGRAMS OR ACTIVITIES RECEIVING FEDERAL FINANCIAL ASSISTANCE

■ 1. The authority citation for part 106 continues to read as follows:

Authority: 20 U.S.C. 1681 *et seq.*, unless otherwise noted.



The Title IX Coordinator Role



Bricker & Eckler
ATTORNEYS AT LAW

Expectations of the TIXC



Primary Responsibility

- Coordinate the recipient's efforts to comply with Title IX responsibilities

Specific Expectations

- Implement a compliant process
- Respond when there's actual knowledge
- Contact the Complainant re: supportive measures
- Understand the entire process in order to shepherd the process and coordinate efforts
- Serve impartially and without bias

Areas of Expertise of the TIXC



New definitions, new processes, new responsibilities

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

Notice of Designation

34 C.F.R. §106.8(a)

- Designate at least one employee to coordinate compliance – “Title IX Coordinator”
 - Consider designating deputies



Who are you required to inform of the TIXC's identity?



- Applicants for admission and employment
- Students
- Employees
- All unions or professional orgs holding CBAs or professional agreements with the recipient

What must be included in the notice of the TIXC's identity?

- Name or title
- Office address
- Electronic mail address
- Telephone number





Title IX Coordinator: Initial Steps



Bricker & Eckler
ATTORNEYS AT LAW

Engage Relevant Parties



- Human Resources
- Unions
- Key administrators (Student Conduct)

Identify the TIX Team



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

Standards of Evidence

- Preponderance of the evidence **or** clear and convincing
- Must be consistent across CBAs or employee procedures addressing sexual harassment



Hearing Procedures



- Investigators, decision-makers, appeal entities, informal resolution facilitators
- Define roles and identify the required separation between them
- TIXC can serve as an investigator, but cannot serve as the initial decision-maker or the decision-maker for the appeal
- Create templates/scripts for consistency

Informal Resolution



- Room for flexibility, but notice of certain consequences must be given ahead of time
- Create templates for consistency

Exit Ramps for Non-TIX Conduct



- Code of Conduct, Employee Handbook, Staff Policies, etc.
- Identify officials who have “authority to institute corrective measures on behalf of the recipient”
 - Trigger for “actual knowledge”
 - Formerly “Responsible Employee”

Training



- Title IX Team
- Students and employees
- Counselors, athletics, Greek organizations, housing
 - Room for flexibility, but notice of certain consequences must be given ahead of time
 - Create templates for consistency

Technology

- Delivery of evidence and investigation reports
- Hearings



Training Requirements for All TIX Team Members



- Definition of sexual harassment
 - Scope of the institution's program or activity
 - How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
- How to serve impartially
 - Avoiding prejudgment of the facts
 - Conflicts of interest
 - Bias (use reasonable person/ "common sense" approach)
 - Not relying on sex stereotypes

Additional Training Requirements for Decision-Makers



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

Additional Training Requirements for Investigators

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



Training Materials Must Be Posted

34 C.F.R. §106.45(b)(1)(iii) and (b)(10)(i)(D)

- All materials used to train members of the TIX Team
- A recipient must make these training materials publicly available on its website, or if it doesn't maintain a website, it must make them available upon request for inspection by members of the public



Other Training Requirements?



- Annual Clergy training
- Trauma-informed training
 - Required by some states, but not the TIX regulations
 - Does your policy require this? Stakeholders?
- Mediation/Restorative Justice training
 - What does your Informal Resolution process require?
 - State law considerations

Remember the Role - Compliance



- **Implement a compliant process**
- Respond when there's actual knowledge
- Contact the Complainant re: supportive measures
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts
- Serve impartially and without bias

Review your TIX Policy for Compliance



- New definitions
- New Grievance Policy requirements
- Where do your exit ramps take you and when are they available with regard to:
 - Cases that *were* covered by your policy but are not covered by the new TIX regs? (e.g., off campus sexual assault)
 - Conduct that *was* covered by your policy but isn't included in the new definition of Sexual Harassment? (e.g., sexual exploitation, stalking that is *not* based on sex)

New Definitions

34 C.F.R. §106.30(a)



- Actual knowledge
- Complainant
- Consent**
- Formal complaint

- Respondent
- Sexual harassment
(see next slide)
- Supportive measures

New Definition of Sexual Harassment

34 C.F.R. §106.30(a)

(1) 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;

(2) 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

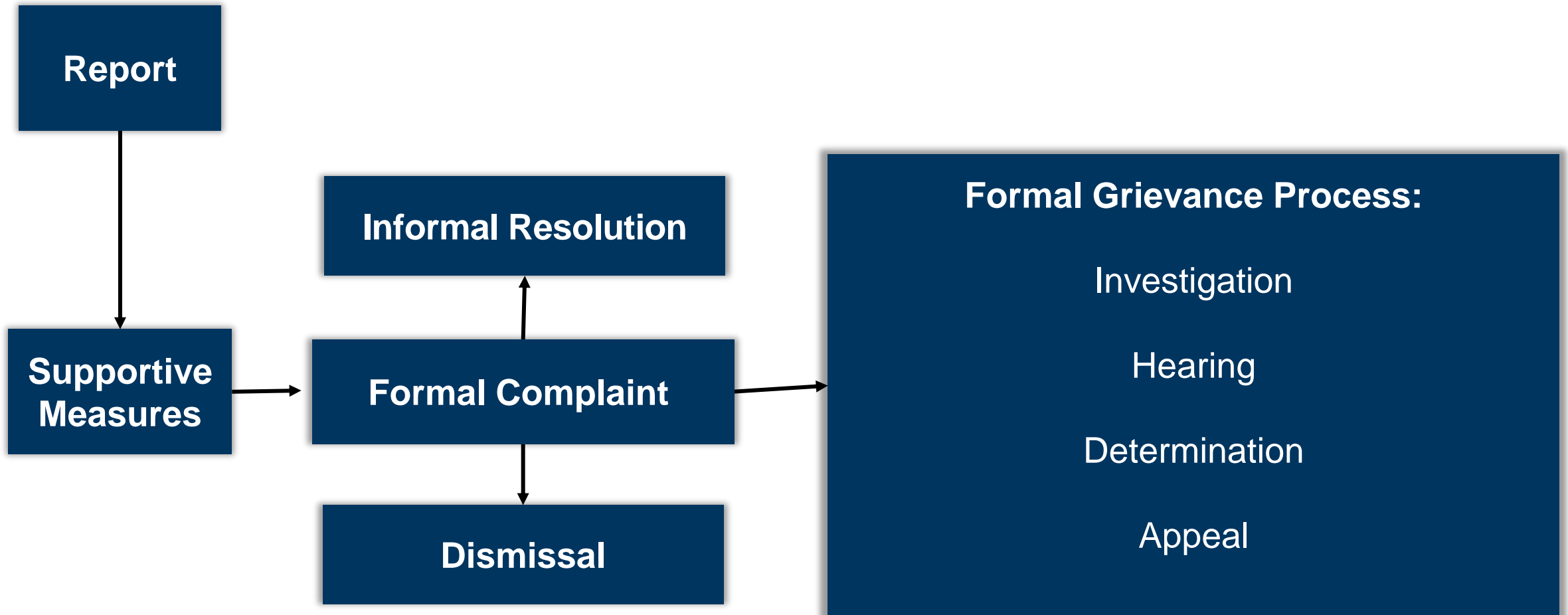
(3) "Sexual assault" as defined in 20 U.S.C. 1092(f)(6)(A)(v), "dating violence" as defined in 34 U.S.C. 12291(a)(10), "domestic violence" as

Sexual Harassment



- **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

Overview of New Required Processes



New Grievance Policy Requirements

34 C.F.R. §106.45(b)(5)(vi) and (vii)



- Time for parties/advisors to **review evidence (10 days)** to submit a written response, “which the investigator will consider prior to completion of the investigative report”)
 - Time for parties/advisors to **review the investigative report** and respond in writing (at least **10 days** prior to hearing)
- A hearing process with:
 - Advisors
 - Trained decision-maker(s)
 - Cross-examination

Know Your Ramps



- **Where and When do cases “exit” your process?**
- Where do your exit ramps take you and when are they available with regard to:
 - Cases that *were* covered by your policy but are not covered by the new TIX regs? (e.g., off campus sexual assault)
 - Conduct that *was* covered by your policy but isn't included in the new definition of Sexual Harassment? (e.g., sexual exploitation, stalking that is *not* based on sex)

Changes to Jurisdiction

34 C.F.R. §106.44(a)



Actual knowledge of SH → Educational program or activity → Against a person in the United States

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

Mandatory Dismissal



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

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

- **(BUT)** If the conduct alleged in the formal complaint
 - **would not constitute** sexual harassment as defined in §106.30 even if proved,
 - did not occur in the recipient's **education program or activity**, ...
 - or **did not occur against a person in the United States**,
- then the recipient **must** dismiss the formal complaint with regard to that conduct for purposes of sexual harassment under title IX or this part; **such a dismissal does not preclude action under another provision of the recipient's code of conduct.**

Remember the Role – Respond & Contact



- Implement a compliant process
- **Respond when there's actual knowledge**
- **Contact the Complainant re: supportive measures**
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts
- Serve impartially and without bias



Responding to “Actual Knowledge” of Sexual Harassment



Bricker & Eckler
ATTORNEYS AT LAW

“Actual knowledge”

(a) As used in this part:
Actual knowledge means notice of sexual harassment or allegations of sexual harassment to a recipient’s Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient, or to any employee of an elementary and secondary school. Imputation of knowledge based solely on vicarious liability or constructive notice is insufficient to constitute actual knowledge. This standard is not met when the only official of the recipient with actual knowledge is the respondent. The mere ability or obligation to report sexual harassment or to inform a student about how to report sexual harassment, or having been trained to do so, does not qualify an individual as one who has authority to institute corrective measures on behalf of the recipient. “Notice” as used in this paragraph includes, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

“Actual Knowledge”

34 C.F.R. §106.30(a)

- Notice of sexual harassment or allegations of sexual harassment
- 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

Imputation of Knowledge



- Notice is imputed **not just** when the TIXC is notified, **but also** when someone with authority to correct the harassment is put on notice
 - Mere ability or obligation of an employee to report sexual harassment isn't enough
 - Fact-sensitive analysis
- Work with legal counsel to determine who falls into this category
 - What is your institutional ethic of care?

TIXC Response to “Actual Knowledge”

34 C.F.R. §106.44(a)



TIXC has certain **specific required responses** to “actual knowledge” of sexual harassment in an education program or activity of the recipient against a person in the US:

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

- 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.

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

When you Receive a Report...



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

When you Receive a Report...

(cont.)



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

Determine which Policy Applies



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

Jurisdiction



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

“Education Program or Activity”

34 C.F.R. §106.30(a)

- Includes **locations, events, or circumstances**
- Over which the recipient exercised **substantial control** over both the respondent and the context in which the sexual harassment occurs
- And also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution

Locations, Events, or Circumstances with Substantial Control



- Residence halls
- Classrooms
- Dining halls

Off Campus?

(1 of 2)



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

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

Off Campus?

(2 of 2)



- (3) Incident occurred in an **off-campus building owned or controlled by a student organization** officially recognized by a post secondary institution
- Preamble specifically addresses off-campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
 - Must investigate in these locations (Preamble, p. 30196-97)

Not an Education Program or Activity



Locations, events, or circumstances **without** substantial control:

- **Anything** outside of the US
- Privately-owned off campus apartments and residences that don't otherwise fall under the control of the postsecondary institution
 - E.g., privately owned apartment complex not run by a student org

Education Program or Activity Analysis



Depends on a fact-specific analysis under “substantial control”:

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

Study Abroad Programs

- Draws a bright line – not outside of the US
 - Plain text of TIX – “no person in the US” means no extraterritorial application – **must dismiss** (Preamble, pp. 30205-06)
- Programs of college based in other countries?
 - No jurisdiction and **must dismiss**
- Foreign nationals in the US covered

Online Study

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

Mandatory Dismissals



- Would not constitute sexual harassment even if proved
 - New definitions for *quid pro quo*, unwelcome conduct, Clery crimes
- Did not occur in the recipient's education program or activity
- Did not occur against a person in the US

Discretionary Dismissals



- Complainant notifies TIXC 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

Dismissal/Referral ≠ Merit

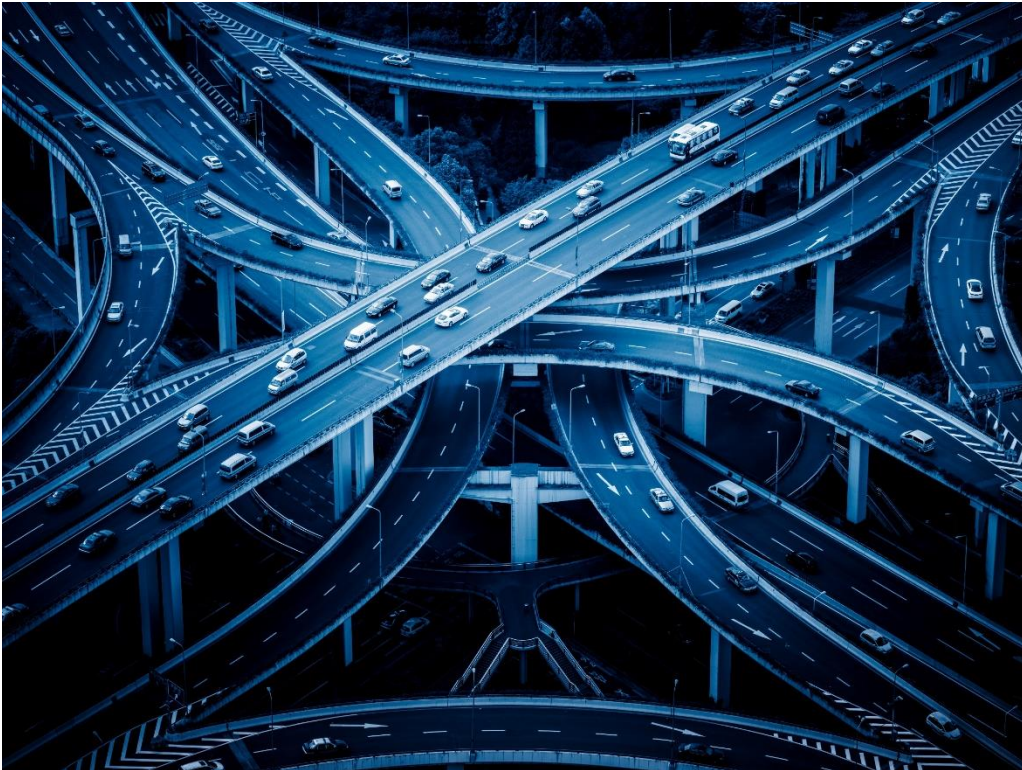
Preamble, p. 30214

- Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Don't base this decision on your opinion of the merits



Notice & Timing

34 C.F.R § 106.45(b)(3)



- Must promptly send written **notice** of dismissal/**reasons** simultaneously to the parties
- Jurisdictional issues can arise **at any time**, even during the investigation

Dismissal/Exit Ramp Hypotheticals



Each of the hypotheticals' facts will build upon one another – consider the following questions for each new fact:

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under the TIX definition of sexual harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX jurisdiction?
 - If not, does it need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 1



Wendy and Cody are dating. Wendy believes that Cody is emotionally manipulative and calls the Title IX office to report him.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 2



During her initial Title IX meeting, Wendy reports that Cody often yells at her and gets very jealous when she talks to other guys.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 3



Wendy also reports that Cody can sometimes be “controlling” and “clingy.” She explained that Cody recently begged her to stay in one night and watch movies with him instead of going out with friends.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 4



Wendy said that during a recent fight, which was one of the their worst fights ever, Cody called her “psychotic,” accused *her* of being jealous and controlling, told her she was “worthless,” referred to her as a “bitch,” and said that he never really loved her.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 5



Wendy tells her best friend and roommate, Rachel Rex, that she feels Cody is abusive. Rachel feels compelled to tell the other women in their residence hall to stay away from Cody because of his “abusive tendencies.”

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 6



Rachel sees Cody at a local off-campus liquor store buying a lot of alcohol. She remembers Wendy telling her that Cody is particularly mean and abusive when he drinks. Rachel decides to follow Cody to see where he is going with all that booze.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 7



Rachel follows Cody back to his fraternity house and believes that he has bought alcohol for a party that night. She pulls her car in behind Cody in the parking lot and then leans out of her car window and yells, “Be careful with the booze, man. I’ve heard how violent you get when you drink!”

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 8



Rachel feels that it is her duty to protect others on campus from potential abuse by Cody. For this reason, she attends the ABC fraternity party to “keep an eye” on Cody.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX’s definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX’s jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 9



At the party, Rachel stands near to Cody (to keep an eye on him) and sees him talking to a young woman she doesn't recognize. In an effort to get the young woman's attention over the loud music, Rachel yells, "I feel sorry for the person who dates Cody next since he's known to be an abusive boyfriend!" There are at least 10 people standing nearby who hear Rachel's comment.

Questions

- What do I do with this if it comes to the TIX Office?
- Does the conduct at issue, if true, fall under TIX's definition of Sexual Harassment?
 - If not, does it need to go somewhere else?
- Does the conduct at issue, if true, fall under TIX's jurisdiction?
 - If not, does not need to go somewhere else?

Dismissal/Exit Ramp Hypothetical 10



A few days after the party, Cody comes to the Title IX office and reports Rachel's conduct. He also explains that he's been avoiding people the last few days and hiding out in his room because he's worried that people think he abused Wendy. He's been skipping classes because he feels like people are talking about him every time he enters a room. He also hasn't been sleeping well and is angry that Rachel can go around saying these things when they aren't true.

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?

TIXC: Supportive Measures

34 C.F.R § 106.30(a)



Supportive measures means non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed. Such measures are designed to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment. Supportive measures may include counseling, extensions of deadlines or other course-related adjustments, modifications of work or class schedules, campus escort services,

mutual restrictions on contact between the parties, changes in work or housing locations, leaves of absence, increased security and monitoring of certain areas of the campus, and other similar measures. The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures. The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

Supportive Measures Elements



Elements of the definition

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

Purposes of Supportive Measures



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

Supportive Measures



Examples from the Regulations

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

TIXC & Supportive Measures



When a report comes in...

- Promptly contact the complainant to discuss the availability of supportive measures as defined in §106.30
- Consider the complainant's wishes with respect to supportive measures
- Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint

Supportive Measures and Confidentiality



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

Supportive Measures Documentation

34 C.F.R § 106.45(b)(10)(ii)

(ii) For each response required under § 106.44, a recipient must create, and maintain for a period of seven years, records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment. In each instance, the recipient must document the basis for its conclusion that its response was not deliberately indifferent, and document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity. If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

- Maintain documentation for seven years
- Your office must document the **absence of deliberate indifference**
 - In other words, your office's (TIX compliant) response to a TIX report

Non-Provision of Supportive Measures

- See 34 C.F.R. § 106.45(b)(10)(ii)
- “If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances...
- The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.”

Supportive Measures: Further Considerations

- Must consider complainant's wishes
- 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 of conduct?
- In your employment policies?



Notice of Allegations to Respondent

34 C.F.R. §106.45(b)(2)



- Must include **sufficient details** known at the time
- Must include **sufficient time** to prepare a response before any initial interview

Sufficient details include:

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

Notice of Allegations to Respondent (Cont.)



- 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 an advisor of their choice who may be an attorney and who may inspect and review evidence



**Keys to Respondent Contact –
“What we do for one, we do for
the other”**



Bricker & Eckler
ATTORNEYS AT LAW

Keys to Respondent Contact

- 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

Documenting Supportive Measures Offered to Respondent



- **YES** – discuss supportive measures with the respondent too!
- Document supportive measures that **are requested but not provided** and the rationale (e.g., changes to housing or class schedule)
- Document supportive measures that are **offered but rejected** and the rationale
- The more options you can offer the parties, the more in control they'll feel about the situation

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 respondent copy of TIX policy

Initial Meeting with Respondent



- At the meeting, give respondent copy of TIX 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.

Explain Informal Resolution



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

Explain the Hearing



- Explain the **Hearing** Process
 - Go step-by-step through your policy
 - Make sure that you and/or the investigators describing this process understands what the hearing will look like and can answer questions

Steps After Speaking to the Complainant and the Respondent



- Determine which policy and procedure applies
 - Will depend on your TIX Policy, student/employee codes of conduct
 - May change over time as more information comes in
 - Consider jurisdiction and the definition of sexual harassment

More Steps After Speaking to the Complainant and the Respondent

- Does the TIXC make jurisdiction/definition decisions? What does that process look like?
 - “Exit Ramps”
 - Document, document, document

TIXC: Emergency Removal

34. C.F.R § 106.44(c):

(c) *Emergency removal.* Nothing in this part precludes a recipient from removing a respondent from the recipient's education program or activity on an emergency basis, provided that the recipient undertakes an individualized safety and risk analysis, determines that an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and provides the respondent with notice and an opportunity to challenge the decision immediately following the removal. This provision may not be construed to modify any rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act.

Emergency Removal Requirements



Requires that the institution:

- Undertakes an **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**

Emergency Removal – Who Decides?



- Does this decision fall to the TIXC at your institution?
 - Current policy and practice
 - Work with your legal counsel
 - Consistency with past removal decisions

More on Emergency Removal

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

Complainant Signing a Formal Complaint

34. C.F.R § 106.30(a)



Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint

Complainant Signing a Formal Complaint



- Triggers the need for a recipient to respond by following a grievance process
- Title IX Coordinator must offer the Complainant supportive measures **regardless** of whether a formal complaint is filed
- Required for both a formal grievance process (investigation and hearing) as well as an informal resolution process

TIXC: Signing a Formal Complaint

34. C.F.R § 106.30(a)



Formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment. At the time of filing a formal complaint, a complainant must be participating in or attempting to participate in the education program or activity of the recipient with which the formal complaint is filed. A formal complaint

may be filed with the Title IX Coordinator in person, by mail, or by electronic mail, by using the contact information required to be listed for the Title IX Coordinator under § 106.8(a), and by any additional method designated by the recipient. As used in this paragraph, the phrase “document filed by a complainant” means a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant’s physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint. Where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party under this part or under § 106.45, and must comply with the requirements of this part, including § 106.45(b)(1)(iii).

When a TIXC Signs a Formal Complaint



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

Considerations for TIXC Signing a Formal Complaint



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

Consolidation of Formal Complaints

34 C.F.R. §106.45(b)(4)

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

Informal Resolution

34 C.F.R. §106.45(b)(9)

- “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...”

Informal Resolution

- No definition
 - “unnecessary”
 - “Informal resolution may encompass a broad range of conflict resolution strategies, including, but not limited to, arbitration, mediation, or restorative justice.” Preamble, p. 30401

Informal Resolution according to the Preamble



Preamble, pp. 30404-30406

- Final regs don't require any recipient to offer IR and preclude a party from being required to participate
- “Recipients remain free to craft or not craft an informal resolution process to address sexual misconduct incidents.”
- “Nothing in 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents”

Considerations for Informal Resolution



- How will this affect reporting?
- Is IR 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 IR?
- What if a complainant wants an admission of responsibility but doesn't want the respondent to be punished?

Prohibition on Informal Resolution

34 C.F.R. §106.45(b)(9)(iii)



Recipients are categorically prohibited from offering or facilitating an IR process to resolve allegations than an employee sexually harassed a student.

Informal Resolution Requirements



- Formal Complaint - §106.45(b)(9)
- Facilitators must be:
 - Free from conflicts of interest and bias
 - Trained in accordance with §106.45(b)(1)(iii)
- Reasonably prompt timeframes in accordance with §106.45(b)(1)(v)

More Informal Resolution Requirements



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

Informal Resolution – Different from Supportive Measures



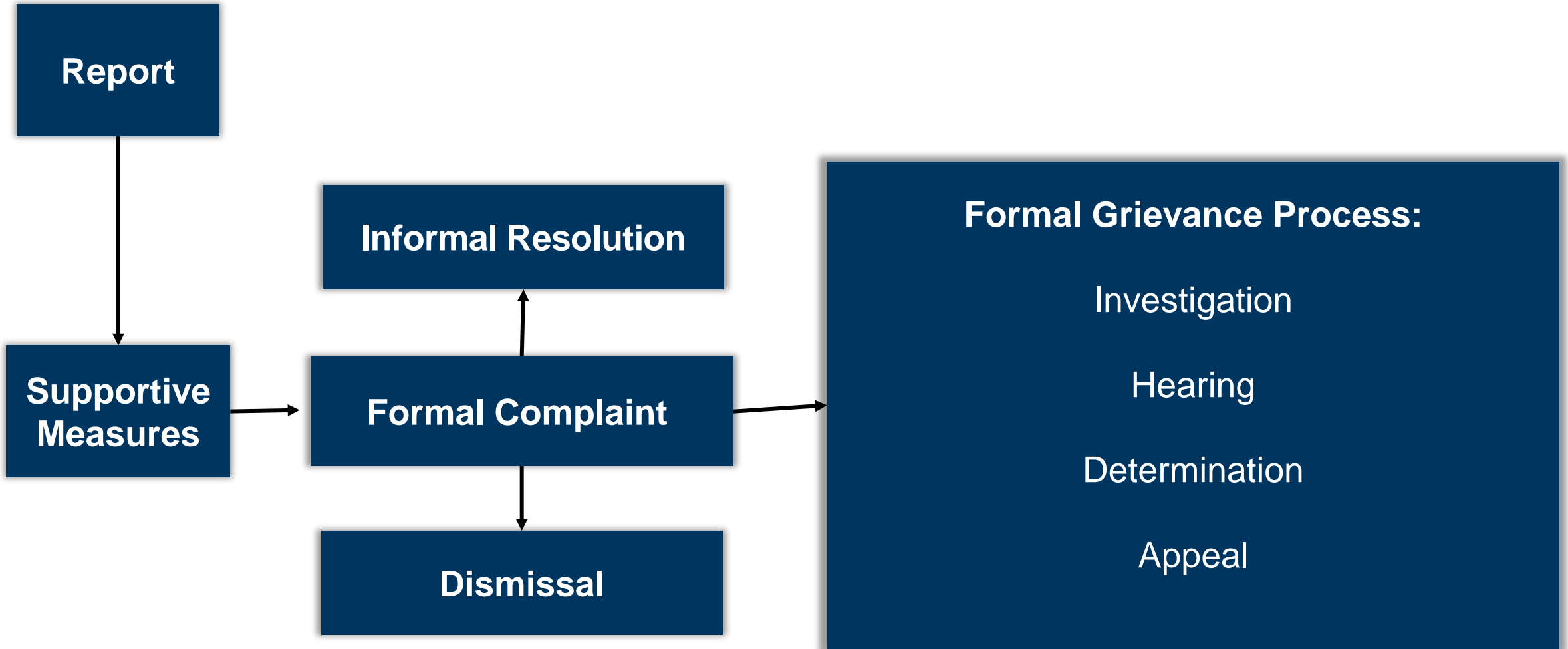
- Supportive measures **≠** punishment
- IR **may** result in disciplinary or punitive measures if agreed upon by the parties
 - What role will a complainant have in disciplinary or punitive measures?

Remember the Role – Understand & Explain



- Implement a compliant process
- Respond when there's actual knowledge
- Contact the Complainant re: supportive measures
- **Understand the process from report through resolution in order to shepherd the process and coordinate efforts**
- Serve impartially and without bias

Do You Understand? Can you Explain?





Live Performance and Discussion



Bricker & Eckler
ATTORNEYS AT LAW

Returning to Wendy and Cody...



- You've received an email from Cody in which he's reported harassment and stalking
- You schedule an intake meeting and pull out your trusty process flowchart
- This live presentation includes some suggestions for an intake meeting – it is NOT intended to be used as a script and is does NOT include all of the topics that should be discussed at an intake meeting (see previous slides on this subject)
- The following presentation (and fact pattern materials) are not based on any actual cases we have handled or of which we are aware. Any similarities to actual cases are coincidental.



Advisors



Bricker & Eckler
ATTORNEYS AT LAW

Advisors in General



- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding
 - Witnesses may serve as advisors for interviews and the hearing
 - How should investigators CAREFULLY address that situation in real time?

Role of Advisors



- Role may change over time
- Role may be limited depending on the step in the process
 - “... 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)
 - May require a passive role during the investigation and IR

Advisors – Role During the Hearing



- Role includes questioning the other party and any witnesses
 - Includes challenges to credibility
 - “Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party’s advisor of choice...” - §106.45(b)(6)(i)

Basic Requirements for Formal Grievance Process

(1 of 2)



34 C.F.R. §106.45(b)(1)

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

Basic Requirements for Formal Grievance Process

(2 of 2)



34 C.F.R. §106.45(b)(1)

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

Facilitate Inspection/Review of Evidence



34 C.F.R. §106.45(b)(5)(vi)

- **During investigation**, TIXC (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 the report
- Review process may be managed by TIXC

Grievance Process Must Include



File Review

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

Report Review

Investigative report is provided to parties (not necessarily advisor) for 10 days for review and written response

Hearing

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

Providing Written Investigative Report

34 C.F.R. §106.45(b)(5)(vii)

- After **completion** of investigation, TIXC (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 the hearing
- Review process and exchange of written questions may also be coordinated by TIXC

Live Hearing

34 C.F.R. §106.45(b)(6)(ii)

- Again, **TIXC cannot be the decision-maker** in case where they have previously served as TIXC
- TIXC will need to facilitate scheduling and completion of a live hearing
 - How many of you have been through hearings
 - Any logistical tips for the group

Recordkeeping



34 C.F.R. §106.45(b)(10)(A), (B), (D)

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

Prohibition Against Retaliation

34 C.F.R. §106.71

- Includes **intimidation, threats, coercion, or discrimination** against any individual:
 - To interfere with any right or privilege secured by TIX
 - 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

Remember the Role - Impartiality



- Implement a compliant process
- Respond when there's actual knowledge
- Contact the Complainant re: supportive measures
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts
- **Serve impartially and without bias**



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



Bricker & Eckler
ATTORNEYS AT LAW

Impartiality and Avoiding Bias, Conflict of Interest, and Prejudgment of Facts



- §106.45 **requires** that TIXCs (and investigators, decision-makers, IR officers, and appeals officers):
 - Be free from **conflict of interest, bias,** and
 - Be trained **to serve impartially** and **without prejudging facts**
 - Preamble, p. 30053

Impartiality



Preamble, p. 30323

- Be neutral
- Don't be partial to a complainant or a respondent individually, or complainants or respondents generally
- Don't judge – memory is fallible (and it's contrary to your neutral role)

Bias



Concerns raised in the Preamble:

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

No Single Investigator Model



34 C.F.R. §106.45(b)(7)(i)

- Decision-maker (or makers if a panel) must not have been the same person who served as the TIXC or investigator – Preamble, p. 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 – p. 30370
- The institution may consider external or internal investigator or decision-maker – p. 30370

Bias – Objective Rules and Discretion



Preamble, p. 30250

- Recipients **should** have **objective rules** for determining when an adjudicator (or TIXC, investigator, or person who facilitates an IR) is biased
- The Department leave recipients **discretion to decide** how best to implement the prohibition on conflict of interest and bias

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 - §106.45(b)(8)(i)(C)

Avoiding Prejudgment of Facts

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



**Why it is
Important to
NOT make
assumptions?**



Why Don't People Tell Right Away

- The Regulations tell us:
 - Fear of retaliation
 - Fear of not being believed



Why Don't People Always Remember

- Also need to recognize that a party should not be “unfairly judged due to inability to recount each specific detail of an incident in sequence, whether such inability is due to trauma, the effects of drugs or alcohol, or simple fallibility of human memory”
(Preamble, p. 30323)



A Note About Trauma



- Assume all parties and witnesses may be dealing with trauma – from this or other incidents
- Meet them where they are
- Help them tell their story as part of the process
- Signs of trauma ≠ policy violation
- No signs of trauma ≠ no policy violation

Avoiding Sex Stereotypes

- “Must” not rely on sex stereotypes: Also helpful to avoiding pre-judgment of facts, remaining unbiased and impartial
- Examples of sex stereotypes in comments (Preamble, p. 30253):
 - Women have regret sex and lie about sexual assaults
 - Men are sexually aggressive or likely to perpetrate sexual assault

Culture Affects Response

- I won't report it if it doesn't feel wrong.
- I'll admit it because I don't understand it's prohibited.
- I won't report it if I would be a snitch.
- It's impolite to look you in the eye, so I'll look down the whole time.
- I deserved it. It's normal.
- Reporting this would result in serious consequences at home.

Process YOUR Response

(1 of 2)



- Is your assessment based on your culture, or theirs, or both? (It shouldn't be.)
- Is your assessment based on stereotypes you hold based on sex? Race? Culture? Yours or theirs? (It shouldn't be.)
- Is your assessment based on their role (Complainant or Respondent)? (It shouldn't be.)

Process YOUR Response

(2 of 2)



- Is your assessment based on a person you like or someone you identify with? (It shouldn't be.)
- Is your assessment based on a person “acting guiltily” by not making eye contact or fidgeting? (It shouldn't be.)
- Would you have done things differently?
- If so, SO WHAT?

Counterintuitive Response



- If they didn't act they way you might have, that doesn't mean it isn't true.
- Stop and consider carefully before you decide someone is lying because they responded in a way different from how you would have responded.
- Counterintuitive response has to be measured to another's perspective. Be careful to use a valid measurement.

TIX Coordinator Checklist



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

Review TIX Policy for Compliance with New Requirements



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

Train TIX Team 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?
 - Can they admit they need to get more information?

More Process and Implementation Considerations Under Your New Policy



- Make sure your TIX Team is trained on **your** institution's policies and procedures
- Make sure your TIX Team is trained on any technology **your** institution will be using – required by §106.45(b)(1)(iii)
 - Not covered here and may not be covered in other trainings
 - E.g., break-out rooms, waiting rooms, muting attendees
- Other practical tips or considerations?



Questions?

Where to Find Additional Information



- Bricker's Title IX Resource Center:
www.bricker.com/titleix
- You can also find us on **Twitter** –
[@BrickerHigherEd](https://twitter.com/BrickerHigherEd)

