

**Title IX Coordinator and Investigator Training**



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# Agenda

- Introduction and Definitions
  - Grievance Procedures
  - Conflicts of Interest, Bias, and Considering Trauma
  - Initial Implementation Requirements
  - Process and Implementation
- Other Title IX Coordinator Responsibilities
  - Consent
  - Role of the Investigator
  - Investigative Techniques



## Introduction

## Sex Discrimination and Harassment

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

## Sex Discrimination under Title IX (1 of 2)

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

## **Sex Discrimination under Title IX (2 of 2)**

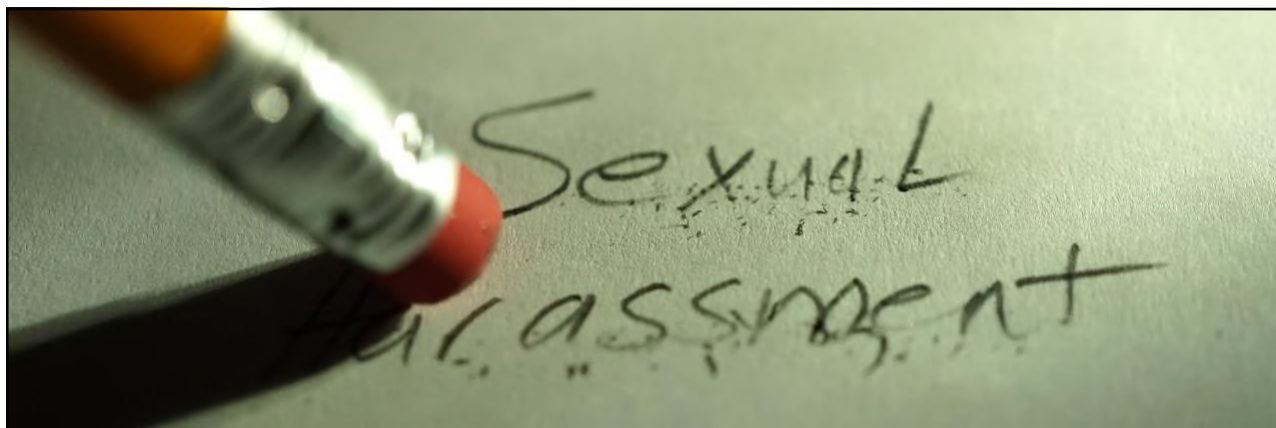
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- Apply any rule concerning the domicile or residence of a student or applicant;
- Aid or perpetuate discrimination against any person by **providing significant assistance to any agency, organization, or person which discriminates on the basis of sex** in providing any benefit or service to students or employees; or
- Otherwise limit any person in the enjoyment of any right, privilege, advantage, or opportunity. 34 C.F.R. § 106.31(b).

## **What Does “Sex” Mean?**

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- Biological Sex
- Gender
- Sex Stereotyping
- Sexual Orientation and Gender Identity\*\*
- “Sex” as a verb



## Sexual Harassment Definitions under the Title IX Regulations

### Definition of Sexual Harassment under Title IX

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

## **Jurisdiction**

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- Under the new regulations, if the District does not have jurisdiction to process the complaint under Title IX, the Title IX Coordinator must dismiss the complaint
- This does not preclude supportive measures or addressing other Code of Conduct violations

## **No Jurisdiction If:**

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- Alleged conduct would not be sexual harassment if proved
- Occurred outside of the US or
- Occurred outside of the District's education program or activity

## Definition of “Educational Program or Activity”

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“Educational program or activity” 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...

## Retaliation (1 of 2)

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- Title IX regs at 34 C.F.R § 106.71:
- Retaliation defined in part: “No recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by title IX or this part, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under this part”...

## Retaliation (2 of 2)

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

## District Obligations

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- Address complainant and provide supportive measures
- Mandatory reporting
- Informal Resolution
- Investigation
- Formal grievance process: notice, report, decision, appeal





## Process and Implementation Considerations

### “Actual Notice”

#### § 106.30(a)

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- 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)**

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- **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)**

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- 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)**

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- 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
- **May not** be used to resolve student-student sexual assault allegations (per GCCC Policy)
- Could include mediation, restorative justice practices

## **Jurisdictional Determinations (1 of 3)**

### **§ 106.45(b)(3)**

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

## **Jurisdictional Determinations (2 of 3)**

### **§ 106.45(b)(3)**

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- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

## **Jurisdictional Determinations (3 of 3)**

### **§ 106.45(b)(3)**

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- 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

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- 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

## Implement Supportive Measures

### § 106.30(a)

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- 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)

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- **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

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

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- 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**

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- 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

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- 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

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



## **Emergency Removal (1 of 4)**

### **§ 106.44(c)**

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

## **Emergency Removal (2 of 4)**

### **§ 106.44(c)**

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

## **Emergency Removal (3 of 4)**

### **§ 106.44(c)**

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

## **Emergency Removal (4 of 4)**

### **§ 106.44(c)**

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- 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**

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- 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)**

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

## Formal Complaint

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- **Formal Complaint** – “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”
- **Complainant** – “an individual who is alleged to be the victim of conduct that could constitute sexual harassment”

## Notice of Allegations to Parties (1 of 2)

### § 106.45(b)(2)

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- Must include sufficient details known at the time, and with sufficient time to prepare a response before any initial interview
- Sufficient details include:
  - Identities of the parties
  - Conduct allegedly constituting sexual harassment
  - Date/location of alleged incident

## **Notice of Allegations to Parties (2 of 2)**

### **§ 106.45(b)(2)**

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- 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

## **Basic Requirements for Formal Grievance Process (1 of 2)**

### **§ 106.45(b)(1)**

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- 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 (2 of 2)**

### **§ 106.45(b)(1)**

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- 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**

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- 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)**

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- **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)**

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- 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)**

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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)**

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- **If provided**, TIX Coordinator will need to facilitate scheduling and completion of a live hearing
- **Required** for Complaints arising in post-secondary program



## **Determination and Remedies**

### **§ 106.45(b)(7)(iii), (b)(7)(iv)**

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- 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)**

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- 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



## **Make No Assumptions: Being Impartial, Avoiding Conflicts of Interest, and Bias**

### **Being Impartial, Unbiased, without Conflict of Interest, and Avoiding Pre-Judgment of Facts**

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- 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.
- Discussed in preamble on pp. 821-843; 1720-1726

## **Being Impartial**

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- The preamble discussion (pp. 828-829) appears to indicate that being impartial means being free from bias
- “The Department believes that keeping this provision focused on ‘bias’ paired with an expectation of impartiality helps appropriately focus on bias that impedes impartiality.” (p. 829)

## **Bias: Concerns Raised in Comments in Preamble**

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- Preamble concerns about all paid staff members being biased in favor of institution
- Institutional bias: cover-ups
- Past tweets that appear to support complainants or respondents
- Being a feminist
- “Appearance of bias” v. actual bias

## **Conflict of Interest: Concerns Raised in Comments in Preamble**

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- Decision-maker and financial and reputational interest aligned with institution (or to protect institution)
- Co-mingling of administrative and adjudicative roles
- Title IX Coordinator supervisor of decision-maker
- Past advocacy for victim's or respondents' rights (example also for bias)
- "Perceived conflict of interest" v. actual conflict of interest

## **Preamble Discussion: Bias and Conflict of Interest**

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- Final regulations "leave recipients flexibility to use their own employees, or to outsource Title IX investigation and adjudication functions, and the Department encourages recipients to pursue alternatives to the inherent difficulties that arise when a recipient's own employees are expected to perform functions free from conflicts of interest and bias."
- No *per se* prohibited conflicts of interest under 106.45(b)(1)(iii) in using employees or administrative staff. (p. 826)
- No *per se* violations of 106.45(b)(1)(iii) for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process. (p. 827)

## Avoiding Pre-Judgment of Facts at Issue

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- A good way to avoid bias and ensure impartiality: avoiding prejudgment of facts
- Keep an open mind as a decision-maker and actively listen to all the facts presented as subjected to cross-examination\*
- Each case is unique and different

## Avoiding Sex Stereotypes

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- “Must” not rely on sex stereotypes: Preamble pages 831-837
- Comments include examples of sex stereotypes (e.g., women have regret about sex and lie about sexual assaults, men are sexually aggressive or likely to perpetrate sexual assault)
- Stereotype considerations:
  - Different from evidence-based information or peer-reviewed scientific research, including impact of trauma
  - Cautions against an approach of “believing” one party over the other and notes 106.45(b)(1)(ii) precludes credibility determinations based on a party’s status as a complainant or respondent
  - Consideration of marginalized groups: People with disabilities, people of color, people who identify in the “LGBTQ” community (pp. 1723-25; 1732-1737)

## Considerations: Potential Responses to Trauma

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- Delayed reporting
- Difficulty remembering specifics (could also be due to drugs/alcohol)
- Reluctant reporting
- Remaining in a relationship or living arrangement with the respondent
- Being calm and composed after an assault
- Failing to identify the accused

## Disclaimer

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- This section is about rape myths and trauma as **context for what may or may not be someone's internal dialogue**, to help you ask sensitive questions
- Both parties may be traumatized – and the trauma may be **completely unrelated** to the incident you're investigating
- Do **not** assume that because there are signs of trauma, the trauma was caused by the respondent and therefore the respondent violated the policy
- Do **not** assume that because there are no signs of trauma, nothing happened

## Stories We Tell Ourselves

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## Know the Facts (1 of 2)

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- Most rapes are committed by those who know each other
- Rapes can happen in a committed relationship
- Rapes can happen between individuals of any gender
- Victims of intimate partner violence may return to the violent partner for a variety of reasons that may not seem rational to outsiders looking in

## Know the Facts (2 of 2)

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- Drug-facilitated sexual assault is common, and the most common drug used is alcohol
- Being drunk doesn't excuse behavior
- A wide variety of responses are normal for those who experience trauma (e.g., calm, hysterical, angry, in denial, detached, withdrawn, or in shock) – don't make assumptions about how they "should act"

## Trauma and the Brain

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- Trauma affects the way the brain **encodes and decodes memories** of what occurred
- Fight, flight, or freeze



## Why Don't People Tell Right Away?

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- Fear of retaliation
- Fear of not being believed

## Why Is Being Trauma Informed Important?

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How you handle a person in your first meeting can make the difference between:

- Cooperation in the investigation **vs.** refusal to cooperate
- Retraumatization **vs.** supportive environment
- Putting off other potential complainants or witnesses from coming forward **vs.** encouraging future reports
- Lawsuit or OCR complaint (or both) **vs.** supportive and cooperative relationship

## Words Have Power

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- Victim vs. Survivor vs. Complainant
- Perpetrator, accused vs. Respondent
- Alleged Behavior vs. Reported Conduct
- **Stick with policy language** to the extent possible

## Culture Affects Response (1 of 2)

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| <ul style="list-style-type: none"><li>• Age of consent</li><li>• Dating vs. arranged marriages</li><li>• Attitudes towards homosexuality</li><li>• Attitudes towards intimate partner violence</li></ul> | <ul style="list-style-type: none"><li>• Cooperating with investigations</li><li>• Sharing personal information</li><li>• Reactions toward authority figures</li><li>• Reactions toward male vs. female</li></ul> |
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## Culture Affects Response (2 of 2)

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- 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



### Initial Implementation Requirements

## **Designate Title IX Coordinator**

### **§106.8(a)**

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- 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)**

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

## **Revise/Adopt TIX Grievance Procedures (1 of 3)**

### **§106.8(c)**

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

## **Revise/Adopt TIX Grievance Procedures (2 of 3)**

### **§106.8(c)**

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- 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 (3 of 3)**

### **§106.8(c)**

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- 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**

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

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

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

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

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- 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**

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- 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**

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





## Other Title IX Coordinator Responsibilities

### **TIXC May File Formal Complaint** **§ 106.30(a)**

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- 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)**

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

## **Intersection of Employee Issues with Title VII (1 of 2)**

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- USDOE states Title IX and Title VII have “no inherent conflict” (i.e., employees have same rights as students), **but...**
- Title VII “severe **or** pervasive” vs. Title IX “severe, pervasive, **and** objectively offensive”
- Title VII doesn’t require 10 days to review evidence and 10 days to respond to report
- And what about student employees?

## **Intersection of Employee Issues with Title VII (2 of 2)**

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- USDOE states that complaint and/or disciplinary measures in CBAs or employee handbooks may need to be revisited/renegotiated to comply with Title IX
- Board Policy may also need to be revisited

## **Hypothetical – Employee-Student Allegations (1 of 2)**

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- 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

## **Hypothetical – Employee-Student Allegations (2 of 2)**

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- 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**

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- 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

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- Update policies/handbooks/etc.
- Distribute contact info
- Revise/adopt grievance process
- Identify team & provide training
- Coordinate response to reports and formal complaints
- Establish/facilitate informal resolution process
- Determine process for emergency removals
- Coordinate discipline and special ed procedures
- Address retaliation
- Develop record keeping protocols
- Post training materials

## Consent: Left to Schools to Define

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- No required definition in law, regs, or guidance
- Policy language is going to be critical to your analysis
- *GCCC Policy*: “*Consent* refers to words or actions that a reasonable person would understand as agreement to engage in the sexual conduct at issue. A person may be incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity. A person who is incapacitated is not capable of giving consent.”

## **Who Can *Never* Give Consent?**

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- Under age 13 (varies by state)
- Between the ages of 13 and 16, if the other person is over 18 (varies by state)
- A student if the offender is a teacher, administrator, coach, or other person in authority employed by or serving in their school
- Severely cognitively disabled persons
- Those who are incapacitated
- Those who are by law unable to give consent

## **Consent**

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- May be withdrawn with clear communication
- Consent for one activity is not consent for everything
- Silence or failure to resist does not constitute consent
- Previous consent does not constitute consent for future activities

## **When Does Consent *Not* Exist?**

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- Use of physical force, threats of physical force, physically intimidating behavior, or coercion
- Individual from whom consent is required is incapacitated

## **Evidence of Consent? (1 of 3)**

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- What words or actions did complainant use to convey consent/non-consent?
  - Must examine sexual contacts, acts in detail
- Was complainant capable of consenting? (Asleep? Passed out? Not understanding what was happening?)

## **Evidence of Consent? (2 of 3)**

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- Who took off what clothes?
- Who provided the condom?
- Who initiated physical contact?
- Who touched who where?
- “They gave consent” = What did you say to them, and what did they say to you?

## **Evidence of Consent? (3 of 3)**

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- [Ask the respondent] What did complainant say to you and/or what actions did they take to show consent?
  - “How did you know they wanted to have sex?”
- If applicable, what role, if any, did respondent play in complainant’s intoxication/incapacitation?



## What is your role as investigator?

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As you write a report keep in mind that you are **NOT** the decision-maker

## Report Process and Timelines

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- Provide both parties an equal opportunity to inspect and review any evidence obtained as part of the investigation that is directly related to the allegations raised in a formal complaint
  - **Include the evidence you don't intend to rely on**
  - **Include inculpatory or exculpatory evidence whether obtained from a party or other source**
  - Purpose: allow each party to meaningfully respond to the evidence prior to conclusion of the investigation.

## **Report Process and Timelines (1 of 4)**

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- **Prior to completion of the investigative report**, you must send the evidence subject to inspection and review **to each party and the party's advisor**
- You must give the parties at least **10 days to submit a written response**
- **You must consider the responses prior to completion of the investigative report**

## **Report Process and Timelines (2 of 4)**

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- You must make all of the evidence subject to the parties' inspection and review available at any hearing

## Report Process and Timelines (3 of 4)

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- Create an investigative report that fairly summarizes relevant evidence
- Send it to each party and the party's advisor for review and a written response **at least 10 days prior to a hearing** (if there is one) **or other time of determination regarding responsibility**

## Report Process and Timelines (4 of 4)

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- Before reaching a determination regarding responsibility, the decision-maker(s) **must afford each party**:
  - The opportunity to submit written, relevant questions that a party wants asked of any party or witness
  - The answers to those questions
  - Additional, limited follow-up questions



## Introduction to Investigative Techniques

### Initial Review

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- Review notes and information collected by the Title IX Coordinator
- Review Notices to Complainant and Respondent
- Review Policy/Code of Conduct
- Define Scope of Investigation
  - What elements do you think will be disputed?
  - Agreed upon?

## Begin Evidence List

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- If there is a criminal investigation, work with law enforcement to collect and preserve evidence

### Types of evidence

- Electronic communications
- Security information

- Pictures, videos, audio
- Police reports
- Personnel files
- Prior complaints against respondent

## Begin Witness List

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- If there is a criminal investigation, work with law enforcement to ensure permission to question witnesses
- Who should be included?
- Who should NOT be included?
- In what order should the witnesses be interviewed?
- Be flexible

## **Craft Questions for Each Witness**

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- Refer to the policy
- Consider what information they are likely to have related to each element
- Consider what information they are likely to have that may assist the decision-maker in determining credibility
- Be flexible

## **Organizing for the Interview**

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- What should you have with you?
  - Allegations
  - Investigation log
  - Investigation notes cover sheet
  - Pre-prepared questions
  - Evidence you may need to reference or show witness
  - Policy or Handbook

## Note-taking Tips

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- Use predictable symbols in the margin to easily skim during the interview:
  - ? ← Follow-up questions
  - \* ← Potential evidence
  - W ← Potential witness
- Try to record exact quotes when possible

## Setting Up the Interview

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- Identify yourself, your role, and a general outline of what you're investigating
- Consider requesting the TIX Coordinator check in with those who fail to respond or refuse to participate
- Don't give up on the interview till you've tried at least 3 times, in at least 2 different methods

## **Set the Stage**

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- Make introductions
- Be hospitable
- Give overview of why they are being interviewed
- Explain retaliation policy
- Invite questions

## **Begin Broadly**

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- Elicit a monologue about the incident
  - What happened earlier that day before the incident?
  - What happened with regard to the incident?
  - What happened next?



## Freeze Frames

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- Ask the witness to “freeze” on the moment and describe details
  - What could they see? Feel? Smell? Taste? Hear?
  - Where was the other person? How were they positioned?
  - Where were you? How positioned?
  - What did you say to the other person? Them to you?
  - Describe other person’s tone, demeanor, body language

## Ask Follow-Up Questions

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- Re-review your notes
- Re-review the elements of each charge
  - Have you elicited all of the information this witness might have about each element?
  - Do you have an understanding of how the witness obtained the information they shared?

## Credibility

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- Gather facts to assist **decision-maker**
- Ask questions to test memory
- Identify where the witness may corroborate or contradict their testimony, or other witnesses, and physical evidence
- Be sensitive to potential trauma experienced by witnesses

## When Consent is at Issue

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- Consider the wording and tone of your questions
- Utilize “freeze frame” strategy
- Ask questions about what happened to determine whether there was unspoken consent
- Ask questions to identify whether alcohol/drugs may have played a role regarding consent
- Apply definition of consent consistently and impartially

## **Closing the Interview**

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- Closing questions
- Request copies of all evidence potentially available to the witness
- Discuss confidentiality - but do not prohibit a party from discussing allegations
- Inform the witness of next steps and how to reach you

## **After the Witness Leaves**

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- Update investigation log
- Review notes, make corrections/clarifications
- Update witness list
- Update list of evidence to be obtained
- Write down questions to ask other witnesses
- Consider whether appropriate to send email

## **Physical Evidence**

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- Follow up on anything identified during interviews
- Is law enforcement involved? Could they be?
- Ensure physical evidence is in a secure location and documented in the investigation log

## **Inspection and Review of Evidence**

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### **Provide ALL Evidence to both parties and advisors**

- Include everything directly related to allegations, even if you don't expect decision-maker to rely on it
- Allow 10 days to review
- Allow written response
- Follow up where necessary
- Consider responses when preparing report

## **Key Takeaways (1 of 2)**

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- Study your updated grievance procedures
- Know the definition of sexual harassment and keep the policy language in mind as you interview parties and witnesses
- Identify when/if another policy such as anti-bullying is in play

## **Key Takeaways (2 of 2)**

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- Make sure you understand potential biases (actual or perceived)
- Trauma may affect how someone responds to an incident
- Prepare for your interview with questions and statements
- Start with open-ended questions
- Obtain any documentary evidence that you can



## Title IX Discipline – Not What You're Used To

### **Title IX Implications for Student Discipline**

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Title IX Regs impose an intensive and lengthy process for intake, investigation, and determination of conduct involving sexual harassment or assault

**This entire process must be completed BEFORE any discipline is imposed**

If the conduct does (or seems like it might) implicate Title IX, **STOP** and call the Title IX Coordinator **BEFORE** investigating and **BEFORE** imposing any discipline

## Discipline of Students – §106.30(a)

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Building leaders may be comfortable investigating claims of student misconduct and issuing discipline, but when that misconduct involves sexual harassment under TIX, the regulations **require leaders to respond in a very different way than they are used to**, including **holding off on imposing any discipline** until a determination is made through the Title IX process.

(please read that again)

## Discipline Lesson 1 – Question

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**Question:** Can the district go ahead and discipline a student or employee for other misconduct instead of following the TIX process?

## Discipline Lesson 1 – Answer

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**Answer:** No, not if the conduct is related to TIX misconduct  
If the alleged misconduct could constitute TIX sexual harassment, the formal grievance process must be followed  
This makes the jurisdictional determination at the beginning of the process all the more important

## Discipline Lesson 2 – Question

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**Question:** What if the principal has already investigated the matter and issued discipline to the student before it ever gets to the TIXC? Should the district redo the investigation and follow the TIX process?





## Discipline Lesson 2 – Answer

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**Answer:** The district **cannot** issue new or different discipline if it has already been served

If discipline hasn't occurred yet, could be held in abeyance

Consider

- Is an investigation necessary to identify underlying issues
- Provision of supportive measures
- Consult Title IX Coordinator



## Thank you for attending!

Remember – additional  
information available at:

**Title IX Resource Center**  
at [www.bricker.com/titleix](http://www.bricker.com/titleix)

Find us on **Twitter** at  
**@BrickerEdLaw**

