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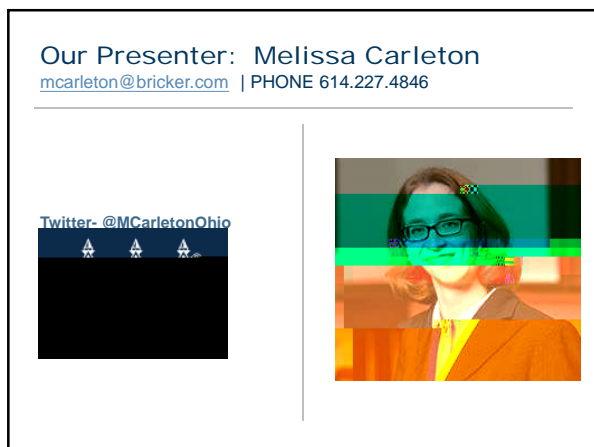
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## Disclaimers

We can't help ourselves. We're lawyers.

- We are not giving you legal advice
- Consult with your legal counsel regarding how best to address a specific situation
- We will send a copy of the slides after this presentation to all who registered their email address when signing in
- We will take questions at the end as time permits

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## 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

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## Posting These Training Materials?

- Yes!
- Your Title IX Coordinator is required by 34 C.F.R. §106.45(b)(10)(i)(D) to post materials to train Title IX personnel on its website
- We know this and will make this packet available to your institution to post
  - Watch for the "Thank you for attending" email and look for a link to download the slides

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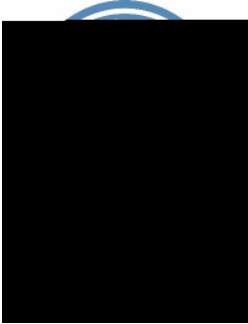
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Additional information available at:

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

Find us on **Twitter** at  
**@BrickerHigherEd**




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**TIXC: Agenda**

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Expectations of the Title IX Coordinator:

- Between now and August 14, 2020
- Upon receipt of a report or complaint
- Understand the process from report through resolution in order to shepherd the process and coordinate efforts

Serving Impartially and without Bias  
Checklist and Resources for additional information

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**TIXC: Agenda**

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Additional Topics:

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

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## Aspirational Agenda

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9:00 – 10:30	Introduction and Discussion of TIXC Expectations between Now and August 14, 2020
10:30 – 10:45	Break
10:45 - 12:00	TIXC Expectations Upon Receipt of a Report and Jurisdiction/Dismissal Issues
12:00 – 12:30	Lunch Break
12:30 – 2:00	Supportive Measures and Notice to Respondent
2:00 – 2:15	Break
2:15 – 3:30	Grievance Process and Serving Impartially and Without Bias
3:30 – 3:45	Break
3:45 – 5:00	Serving Impartially and Without Bias, Title VII, and Checklist for the Title IX Coordinator

**What do Title IX Coordinators need to do before August 14, 2020?**

What must notice include?  
§106.8(a)

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

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TIXC: Initial Steps

Initial Compliance Steps

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

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TIXC: Initial Steps

Initial Compliance Steps (Continued)

- 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

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### TIXC: Initial Steps

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- Consider your policy and procedure options
  - Standard of evidence
    - Preponderance of the evidence, or
    - Clear and convincing
      - Must be consistent across CBAs and/or Employee procedures that address sexual harassment
  - Hearing Procedures

### TIXC: Initial Steps

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#### Initial Compliance Steps (Continued)

- Consider your policy and procedure options
  - Informal Resolution
  - Use of your Code of Conduct in cases outside of Title IX jurisdiction
  - Officials who have “authority to institute corrective measures on behalf of the recipient”
    - Formerly “Responsible Employees”

## TIXC: Initial Steps Training

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All TIX Team Members must be trained on:

- Definition of Sexual Harassment (Level 1)
- Scope of the institution's program or activity (Level 1)
- How to conduct an investigation and grievance process, including hearings, appeals, and informal resolution processes, as applicable, under YOUR policy
  - How does the TIXC fit into these roles?

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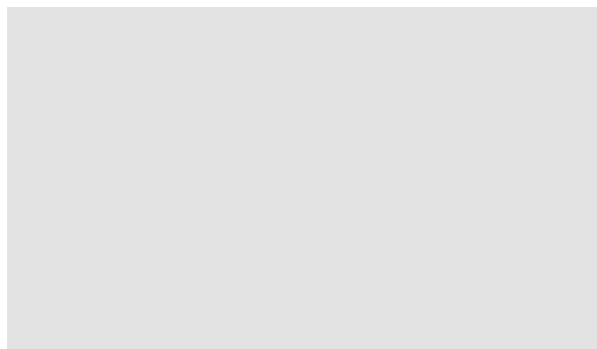
## TIXC: Process and Implementation Considerations

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Review your Title IX Policy for compliance

- o New Grievance Policy Requirements

Time for parties and their advisors to review evidence (10 days to submit a written response,



**TIXC: "Actual Knowledge"**

34 C.F.R § 106.30(a)

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Actual Knowledge definition:

- (1) Notice of sexual harassment or allegations of sexual harassment
- (2) To one of the following:
  - Title IX Coordinator, or
  - Any official of the recipient who has authority to institute corrective measures on behalf of the recipient

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## TIXC: Keys to Intake (continued)

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What to do when you or someone in your office receives a report of misconduct?

- 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))
  -

## Jurisdiction

(Review from Level One)



**“Education program or activity”**



“includes **locations, events, or circumstances** over which the recipient exercised **substantial control**”

## Off Campus?



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

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## Not an Education



Locations, events, or circumstances without substantial control:

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

### Jurisdiction and 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**, ...

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### Jurisdiction and Mandatory Dismissal



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



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### Jurisdiction and Mandatory Dismissal



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

*When and Where are your extrajurisdictional?*

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## Study Abroad Programs



- Draws a bright line-not outside of the United States: plain text of Title IX “no person in the United States,” means no extraterritorial application. Must dismiss. (30205-06) 
- Programs of college based in other countries? No jurisdiction and must dismiss.
- Foreign nationals in the United States covered.

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## 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.” (30202) 
- Still has to occur in educational program or activity
- And in United States...

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## TIXC: Mandatory Dismissal

### Mandatory Dismissals

- Would not constitute sexual harassment even if proved
  - 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 United States

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### TIXC: Discretionary Dismissals

- **Jurisdictional Determination** § 106.45(b)(3)
- **Discretionary Dismissals**
  - Complainant notifies TIX Coordinator in writing they would like to withdraw the formal complaint
  - Respondent is no longer enrolled or employed by the recipient
  - Specific circumstances prevent the recipient from gathering sufficient evidence

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### Jurisdictional Determinations

34 C.F.R § 106.45(b)(3)

- Preamble: Permitting recipient to dismiss because they deem allegation meritless or frivolous without following grievance procedure would defeat the purpose of the regulations
- Must promptly send written notice of dismissal/reasons simultaneously to the parties
- Jurisdictional issues can arise at any time, even during the investigation

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### Dismissal/Exit Ramp Hypotheticals

Each of the hypothetical facts below 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 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?

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## Dismissal/Exit Ramp Hypothetical 1

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Joe and Sally are dating. Sally suspects Joe is cheating on her 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?
  -

### Dismissal/Exit Ramp Hypothetical 4

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

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 5

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Angela (Sally's friend) turns on her Go Pro to record the encounter.

#### 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

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Joe and Becky are in bed having sex.

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 7

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Sally and Angela enter Joe's room.

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 8

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Sally screams at Joe and slaps him across the face.

#### Questions

### Dismissal/Exit Ramp Hypothetical 10

When Becky tries to leave the room, Sally grabs her breast and twists it, then threatens to kill her if she comes anywhere near Joe again.

Questions

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

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### Dismissal/Exit Ramp Hypothetical 11

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

Questions

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

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### Dismissal/Exit Ramp Hypothetical 12

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

Questions

- What do I do with this if it comes to the TIX Office?
- 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?

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Dismissal/Exit Ramp Hypothetical 16

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## TIXC: Supportive Measures

34 C.F.R § 106.30(a)

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Designed to:

- **restore or preserve access** to the recipient's

## TIXC: Supportive Measures

Role of the TIXC (34. C.F.R § 106.44(a))

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Role of the TIXC:

- Must maintain confidentiality to the greatest extent possible

But, shouldn't impai

## TIXC: Supportive Measures

Role of the TIXC

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### Further Considerations:

- Must consider the complainant's wishes

**Notice of Allegations to Respondent**  
**34 C.F.R § 106.45(b)(2)**

- Needs to be supplemented if new allegations are to be included
- Must include statement that respondent is presumed not responsible for alleged conduct and that determination regarding responsibility is made at the conclusion of the grievance process
- Must inform the parties that they may have advisor of their choice who may be an attorney and who may inspect and review evidence

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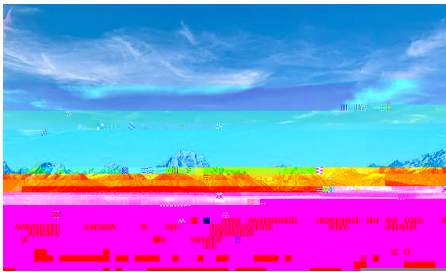
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**TIXC: Keys to Respondent Contact**  
*"What we do for one, we do for the other"*




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**TIXC: Keys to Respondent Contact**  
*"What we do for one, we do for the other"*

- Both parties may be emotional and may need access to supportive measures and resources.
  - "What we do for one, we do for the other"
- Be sensitive to both parties and refrain from comments that blame either party, suggest disbelief/prejudgment, or discourage participation in the process.
- Document your interactions with each party **in writing** after you speak with them.

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## TIXC: Keys to Respondent Contact

*"What we do for one, we do for the other"*

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- Document the supportive measures, accommodations, and resources that are provided
  - YES! Discuss Supportive Measures with Respondent, too!
  - Document supportive measures that *are requested but not provided* and the rationale (e.g., changes to





## TIXC: 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?](#)

## TIXC: 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



TIXC: Informal Resolution

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**TIXC: Informal Resolution**

34. C.F.R § 106.45(b)(9)

Requirements:

- Formal Complaint - § 106.45(b)(9)
- Facilitators must be free from conflicts of interest and bias
- Facilitators must be trained in accordance with 106.45(b)(1)(iii)
- Reasonably prompt time frames in accordance with 106.45(b)(1)(v)

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**TIXC: Informal Resolution**

34. C.F.R § 106.45(b)(9)

Requirements (continued):

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

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**TIXC: Informal Resolution**

34. C.F.R § 106.45(b)(9)

Different from Supportive Measures

- Supportive Measures punishment
- Informal resolution *may* result in disciplinary or punitive measures
  - What role will a complainant have in disciplinary or punitive measures?

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**TIXC: Advisors**  
During the Investigation or Informal Resolution

- Role may be limited



### Providing Written Investigative Report 34. C.F.R § 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 34. C.F.R § 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.”**

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

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Section 106.45 **requires** that Title IX (and investigators, decision-makers, informal resolution officers and appeals officers)

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

(30053)

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

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- We will discuss each of these individually and provide examples, but some of the factors for each overlap.

Bias: Concerns raised in comments in  
preamble

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Preamble Discussion on 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.” (30251)

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Preamble Discussion on Bias and Conflict of Interest

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- No *per se* prohibited conflicts of interest in using employees or administrative staff
  - including supervisory hierarchies (but see portion about decision-makers and Title IX Coordinator as supervisor)
- No *per se* violations for conflict of interest or bias for professional experiences or affiliations of decision-makers and other roles in the grievance process (30352-30353)

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Preamble Discussion on Bias and Conflict of Interest

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- Example: it is **not** a *per se* bias or conflict of interest to hire professionals with histories of working in the field of sexual violence (30252)
- Cautions against using generalizations to identify bias and conflict of interest and instead recommends using a reasonable-person test to determine whether bias exists.

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### Example of Unreasonable Conclusion that Bias Exists

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- “[F]or example, **assuming** that all self-professed **feminists**, or self-described **survivors**, are biased against men, or that a **male** is incapable of being sensitive to women, or that prior work as a **victim advocate**, or as a **defense attorney**, renders the person biased for or against complainants or respondents” is **unreasonable** (30252)

### Training, Bias, and Past Professional Experience

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This required training (that you are sitting in right

### Examples of Bias

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- An investigator used to supervise one of the parties;
- Information "gleaned" by the investigator is shared with the decision-maker outside the investigation report (in meetings to discuss pending cases, in passing while at work, etc.)

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### Avoiding Prejudgment of Facts at Issue

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A good way to ensure impartiality and avoid bias:

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

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### Hypotheticals

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

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## Conflict of Interest and Bias Hypotheticals

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Scenario for the next several hypotheticals:

You are the Title IX Coordinator and have just received a complaint. An initial review did not identify you or anyone else on your team as having any conflicts of interest. Assess the following situations based on additional information you receive.

### Hypothetical 1

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You review the report and realize that the name of the

### Hypothetical 3

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After an initial review of a formal complaint, you assigned Sarah, one of your investigators to the case. You are familiar with Sarah's background as a prosecutor, but she has attended all required TIX and Clery trainings and has served as an impartial investigator for years. After you assign the case, the Respondent's representative contacts you and asks that another investigator be assigned because Sarah's background as a prosecutor makes her biased against Respondents.

What should you do?

Hypothetical 4-286.4(o)7.7(n)7.7(e)-282.5(o)7.7(f)-270.2(y)32.3(o)7.7(u)7.7(r)-312.0(i)-3. 0.25 O.

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### Intersection of Employee Issues with Title VII

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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

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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

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- |  |  |
|--|--|
| <ul style="list-style-type: none"><li>• Update policies/handbooks/etc.</li><li>• Distribute contact info</li><li>• Revise/adopt grievance process</li><li>• Identify team &amp; provide training</li><li>• Coordinate response to reports and formal complaints</li><li>• Establish/facilitate informal resolution process</li></ul> | <ul style="list-style-type: none"><li>• Determine process pro33(X)]1cproceiDetøprocess</li></ul> |
|--|--|

