



Level 3 Title IX Coordinator Training



Bricker & Eckler
ATTORNEYS AT LAW

Presenters - Jessica



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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.
- This training does not cover all of the basic subjects required for TIX Coordinators, institution-specific grievance procedures, policies, or technology.
- Use the chat function to ask general questions and hypotheticals.
- This training is not being recorded, however 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



Training Requirements for All Title IX Team Members



Remember, this is an advanced training...

- 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

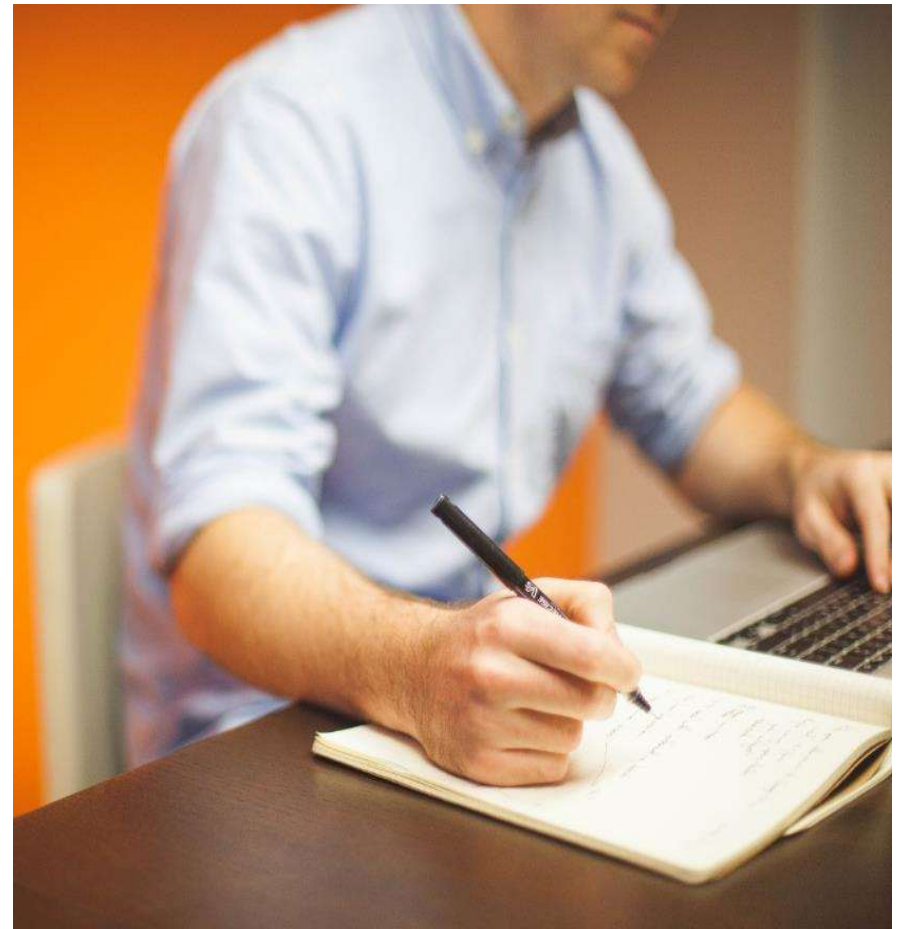
Additional Training Requirements for Decision-Makers



- 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



Aspirational Agenda



- | | |
|-----------|--|
| 1:00-1:45 | Top Ten Issues for TIXCs that <u>aren't</u> the “new” regs |
| 1:45-2:45 | Title IX updates and process potpourri |
| 2:45-3:15 | Preparation for Practice Session |
| 3:15-3:30 | Break |
| 3:30-4:15 | Practice session |
| 4:15-5:00 | Debrief and Q&A |

Expectations of the TIXC



Primary responsibility:

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

Specific expectations during the process:

- 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

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

Top Ten Issues for TIXCs



That *AREN'T* the New Title IX Regulations

- Prevention Programming
 - Clery/VAWA
 - Staffing
 - Office Structure
 - Mandatory report v. mandatory support
- Working to correct known misperceptions about Title IX
 - Policy review and updates
 - Anticipating and addressing secondary effects on your campus
 - Crisis management practices
 - Working with stakeholders on your campus

Prevention Programming



Prevention Education

- Electronic versus in person
 - Electronic
 - SUNY Spark, <https://system.suny.edu/sparc/>
 - ODHE resources, <https://www.ohiohighered.org/ccs>
 - In Person - Staffing model, connection points

Education as outcome of informal resolution

Use Clery/VAWA education language as a core, but consider expanding

Where is conduct that now falls outside of Title IX sexual harassment going?

- What happens when jurisdiction-based TIX dismissals occur for conduct that could constitute a Clery Crime (domestic violence, dating violence, sexual assault, or stalking)?
- Moving to separate office?
 - Make sure they have required Clery/VAWA training

Are you a Campus Security Authority under Clery? How is mandatory reporting handled?

Staffing



Do you have the people you need?

- Volunteers and voluntolds
- Consider grant opportunities for special projects (<https://www.justice.gov/ovw/grant-programs>)
- Internal versus external
- Qualifications

Are you taking care of your people?

TIX Office Structure



Reporting and organization structure

- Who should the TIXC report to? (authority, knowledge)
- Should prevention education be part of the TIX office? (continuity, independence)
- Deputy TIXCs

Mandatory Reporting/Supporting



Mandatory Reporting versus Mandatory Supporting

- Mandatory reporting (NOTE: OH Felony reporting requirement)
 - Risks of not doing it (liability, enforcement actions)
 - Risks of doing it (loss of trust, re-traumatization)
- Mandatory supporting
 - Risks of not doing it (cold hand, re-traumatization)
 - Risks of doing it (training, discretion)

Do both

Correcting Misperceptions



- Perception that because students know what is going on, all administrators know what is going on
- Perception that the administration is using the TIX process to target/protect faculty and staff
- How do you dispel myths about TIX?
 - Not covering up complaints
 - If we don't have information, we can't use it
 - We listen, we care – Just because we don't talk about it, doesn't mean we are not doing anything
 - You don't have to participate in an investigation

Policy Review and Updates



When and how do I update our policy?

- Wait for new regs?
- Breaks/Summer
- Before our BOT meeting?

What do I need to know in order to update?

- Surveys
- Stakeholder meetings
- Legal Advice

Update committee

Secondary Impact



- Support for those who are supporting
- Support for witnesses - not getting direct supportive measures that parties are entitled to receive
- Support for reporters/employees
- Supporting change:
 - Ally with advocates

Crisis Management



Who will you go to first?

- Police, president, PR/spokesperson, counsel, clergy...?

Next?

- Department, development...?

Talk to the Media?

- Media training
- Protecting the institution/yourself

Weathering the storm

De-briefing and preparing for the next storm

Identifying Stakeholders – Obvious



Identifying Stakeholders

- Obvious
 - Police, public safety, etc.
 - Human resources
 - Mandatory reporters
 - Student affairs/conduct
 - Residence hall staff

Identifying Stakeholders – Not-so-obvious



Identifying Stakeholders

- Not-so-obvious
 - Student/faculty govt.
 - Deans/chairs/directors
 - Advocacy/support services
 - Institution's health services
 - Greek councils
 - Local attorneys/Institution's counsel
 - Athletics

Stakeholders – Police, public safety, etc.



Police, public safety, etc.

- How and when will you share information?
- Mode of communication, notice
- Warrants/subpoenas
- Timely warnings
- How/when matters move to prosecutor
- Collaboration on interviews?
- Enforcement of no contact

Stakeholders – Human Resources



Human resources

- How and when will you share information?
- Mode of communication, notice
- Administrative leave decisions
- Sanctioning decisions
- Non-TIX problem conduct

Stakeholders – Mandatory Reporters



Mandatory reporters

- How and when will you share information?
- Mode of communication, notice
- Training
- Compliant humanity – report AND support

Stakeholders – Student affairs/conduct



Student affairs/conduct

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Clery training
- No contact orders

Stakeholders – Residence hall staff



Residence hall staff

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Supportive measures implementation, including no contact and student moves

Stakeholders – Student/faculty govt.



Student/faculty govt.

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency

Stakeholders – Deans/chairs/directors



Deans/chairs/directors

- How and when will you share information?
- Mode of communication, notice
- Hand-off procedure
- Defining retaliation/interference
- Assistance with supportive measures

Stakeholders – Advocacy/support services



Advocacy/support services

- Opportunities for collaboration during investigation
- Limits and boundaries
- Referral process
- Process feedback

Stakeholders – Health services



Health services

- Coordination and consistency of messaging
- Coordination of campus/community services
- Process feedback

Stakeholders – Greek councils



Greek councils

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency
- Process feedback

Stakeholders – Local attorneys/School Counsel



Local attorneys

- Instruction on processes
- Process feedback

Institution's Counsel

- Instruction on processes
- Support re “what ifs”
- Process feedback

Stakeholders – Athletics



Athletics

- TIX initiatives
- Opportunities for partnership
- Familiarity and trust
- Transparency
- Process feedback
- Handling supportive/interim measures



**What's
new?**

Recent Title IX Updates

Summer 2021 Title IX Updates



- July 20, 2021 Q & A on the Title IX Regulations on Sexual Harassment
 - <https://www2.ed.gov/about/offices/list/ocr/docs/202107-qa-titleix.pdf>
- *VRLC v. Cardona*
 - Decisions issued on July 28, 2021 and Aug. 10, 2021
- August 24, 2021 Letter to Students, Educators, and other Stakeholders re: VLRC v. Cardona
 - www2.ed.gov/about/offices/list/ocr/docs/202108-titleix-VRLC.pdf

Q&A #13 – Appropriate Standard



Question 13:

What is the appropriate standard for evaluating alleged sexual harassment that occurred before the 2020 amendments took effect?

Q.13 Background



- August 5, 2020 Blog Post – “The Rule does not apply to schools’ responses to sexual harassment that allegedly occurred prior to August 14, 2020. The Department will only enforce the Rule as to sexual harassment that allegedly occurred on or after August 14, 2020. With respect to sexual harassment that allegedly occurred prior to August 14, 2020, OCR will judge the school’s Title IX compliance against the Title IX statute and the Title IX regulations in place at the time that the alleged sexual harassment occurred.”

Doe v. Rensselaer Polytechnic



- 2020 WL 6118492 (Oct. 16, 2020)
- Not retroactive enforcement to require regs to be used for hearings occurring after August 14, 2020
- Blog post is not an “authoritative statement” entitled to deference
- Court not willing to let disciplinary proceedings continue unless parties agree to use new procedure

Back to Q.13 (9 mos. after *RPA*)



- “[A] school must follow the requirements of the Title IX statute and the regulations that were in place at the time of the alleged incident.”
- 2020 amendments do not apply to SH occurring before August 14, 2020, even where the complaint is filed after that date
- Our question: is this meant to include *procedures* as well as *substance*?

Q&A #24 – Formal Complaints



Question 24:

If a complainant has not filed a formal complaint and is not participating in or attempting to participate in the school's education program or activity, may the school's Title IX Coordinator file a formal complaint?

- YES – it may be a violation if the Title IX Coordinator *does not do so*
- Example in the Answer:
 - Actual knowledge of a pattern of alleged SH by a perpetrator in a position of authority

Q&A – “Put simply...”



Per the most recent guidance:

“Put simply, there are circumstances when a Title IX Coordinator may need to sign a formal complaint that obligates the school to initiate an investigation regardless of the complainant’s relationship with the school or interest in participating in the Title IX grievance process.”

Q&A – Support Persons? (1 of 2)



In previous trainings...

- Advised that support persons were not permitted in hearings based on Preamble
- “The sensitivity and high stakes of a Title IX sexual harassment grievance process weigh in favor of protecting the confidentiality of the identity and parties to the extent feasible (unless otherwise required by law), and the Department thus declines to authorize that parties may be accompanied to a live hearing by persons other than the parties’ advisors, or other persons for reasons ‘required by law’...” (Preamble, p. 30339)

Q&A – Support Persons? (2 of 2)



Example Language in July 20, 221 Q&A (p. 46)

- Example Policy 2: The decision-maker will discuss measures available to protect the well-being of parties and witnesses at the hearing. These may include, for example, use of lived names and pronouns during the hearing, including names appearing on a screen; **a party's right to have their support person available to them at all times during the hearing (in addition to their advisor)**; and a hearing participant's ability to request a break during the hearing, except when a question is pending. (Emphasis added).

Submission to Cross-Examination

- Aug. 2020 regs prohibited consideration of statements from parties/witnesses if not subjected to cross-examination (34 CFR 106.45(b)(6)(i))
- Sept. 4, 2020 Q&A clarified that failure to answer one question was a failure to submit to cross-examination

Arbitrary & Capricious

- Mass. Federal decision vacated regulation requiring submission to cross-examination for consideration of statements (*VRLC v. Cardona*, June 28, 2021)
- August 24, 2021 letter providing guidance that, pursuant to *VRLC* decision, OCR will “immediately cease enforcement” of this specific provision in 34 CFR 106.45(b)(b)(i)
 - ***Work with legal counsel to assess risk***
 - Pending cases
 - Breach of contract concerns
- Texas has been permitted to appeal this decision, along with several individuals who have an interest in the outcome



Process Potpourri for Title IX Coordinators

Jurisdiction & Mandatory Dismissal

(1 of 2)



Dismissal of a formal complaint per §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, ...**

Jurisdiction & Mandatory Dismissal

(2 of 2)



(Cont.)... 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 exit ramps?**

Discretionary Dismissal



Dismissal of a formal complaint per §106.45(b)(3)(ii)

- “The recipient **may** dismiss the formal complaint or any allegations therein, if at the time during the investigation or hearing:
 - A complainant notifies the TIXC in writing that **the complainant would like to withdraw the formal complaint** or any allegations therein;
 - The **respondent is no longer enrolled or employed** by the recipient; or
 - **Specific circumstances** prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

Dismissal Considerations

(1 of 2)



- Procedural posture
 - Has a formal complaint been filed?
 - If not, how will you document the dismissal and/or referral?
- Reaction of the parties
 - Has the issue of dismissal been previewed?
 - Do you need to meet to explain the decision?

Dismissal Considerations

(2 of 2)



- Documentation of the dismissal
 - Internal or shared with the parties?
 - Depends on FC and your process
 - Meeting with the parties to explain the dismissal
- Consistency with prior dismissals
 - Substantively and Procedurally
 - Watch for this with discretionary dismissal

Dismissal Notice & Timing



34 CFR § 106.45(b)(3)(iii)

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

“Show Your Work”

(1 of 2)



- Will talk more about this during the Writing Workshop
- Places in the new regs that require a written rationale:
 - Supportive measures
 - Dismissal of a Formal Complaint
 - Determination regarding responsibility
 - Appeal decision

Additional provisions that require documentation of decision-making:

- Demonstrating a lack of deliberate indifference generally
 - 34 CFR 106.44(a) *General response to sexual harassment*
- The “result” of an institutional disciplinary proceeding under Clery
 - 34 CFR § 668.46(k)(2)(v) and (k)(3)(iii)
 - “Result means any initial, interim, and final decision by any official or entity authorized to resolve disciplinary matters within the institution... the result must include the rationale for the result and the sanctions.”

“Show Your Work” – Supportive Measures



Must show the basis for *not* providing certain supportive measures

- 34 CFR § 106.45(b)(10)(D)(ii))
- “must document the reasons why such a response was not clearly unreasonable in light of known circumstances”

“Show Your Work” – Dismissal



Dismissal of a Formal Complaint

- 34 CFR § 106.45(b)(3)(iii)
- “must promptly send written notice of the dismissal and reason(s) therefore simultaneously to the parties”

“Show Your Work” – Decision



Determination Regarding Responsibility

- 34 CFR § 106.45(b)(7)(ii)(A)-(E)
- 5 topics required in order to explain the decision, including:
 - Findings of facts
 - “A statement of, and rationale for, the result as to each allegation...”

“Show Your Work” – Appeal



Determination Regarding Responsibility

- 34 CFR § 106.45(b)(8)(iii)(E)
- “Issue a written decision describing the result of the appeal and the rationale for the result...”

“Show Your Work” – Informal Resolution



No “result” or “finding” to be explained, but...

- Best practice to document the resolution reached
- And the steps that got you there
 - Adequate notice
 - Voluntary written consent
 - Does not involve allegations that an employee sexually harassed a student

Other requirements to “Show Your Work”



- Additional provisions that require documentation of decision-making:
 - Demonstrating a lack of deliberate indifference generally
 - 34 CFR 106.44(a) *General response to sexual harassment*
 - The “result” of an institutional disciplinary proceeding under Clery

Disclaimer: This is not a discussion of record-keeping, which is much broader; this discussion is focused on documenting a thought process for a particular decision

practice...
practice...
practice...

Preparation for Practice Session



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Tessa and Michael



- You've received an email from Tessa
 - Formal Complaint?
 - See July 20, 2021 Q&A #22
- You schedule an intake meeting and pull out your trusty intake checklist and process flowchart

Tessa Intake Interview



- Goals for your intake interview?
 - Supportive Measures
 - **Explanation of the Process (including jurisdiction/referral)
 - **Details about the assault?
- Anyone want to practice?
 - I will play the role of Tessa

LET'S
DO THIS

Practice Session



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Debrief and Q&A



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Supportive Measures



- What did Tessa tell us?
 - Counseling
 - Housing
 - Academics
 - Work

Process Discussion



- What does this look like for you?
 - Taking points/checklist
 - Flowchart
 - Discussion re: dismissal (**if applicable**)
 - Determine whether this belongs in another process or office
 - If so, meet with Tessa again to discuss the referral
 - Remember, if there's a formal complaint, there must be notice of dismissal and the reason

What Happened?



Some details are needed to determine jurisdiction:

- Who
- What
- Where
- When
- Why
- Same level of detail as an investigative interview?
 - What if you are the TIXC *and* the investigator
 - If not, is it better to get fewer details?
 - Meet the person where they are

Where to Find Additional Information

Bricker's Title IX Resource Center Website:
[**www.bricker.com/titleix**](http://www.bricker.com/titleix)

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



Questions?