

Title IX Higher Ed Level 2

Title IX Coordinator Training

With Melissa Carleton and Rob Kent

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Disclaimers

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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

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

Additional Topics:

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| <ul style="list-style-type: none"><li>• Training</li><li>• Actual Notice</li><li>• Jurisdiction</li><li>• Mandatory and Discretionary Dismissal</li><li>• Supportive Measures</li></ul> | <ul style="list-style-type: none"><li>• Emergency Removal</li><li>• Formal Complaints</li><li>• Informal Resolution</li><li>• Advisors</li><li>• Recordkeeping</li><li>• Title VII</li></ul> |
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## Aspirational Agenda

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

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

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## TIXC: Notice of Designation §106.8(a)

- Designate at least one employee to coordinate compliance – “Title IX Coordinator”
- Inform the following persons of the identity of the Title IX Coordinator(s):
  - Applicants for admission and employment
  - Students
  - Employees
  - All unions or professional organizations holding CBAs or professional agreements with the recipient

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What must notice include?

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TIXC: Initial Steps

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

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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”

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TIXC: Initial Steps

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Initial Compliance Steps (Continued)

- Consider your policy and procedure options
  - Training
  
- Technology

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## TIXC: Initial Steps Training

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All TIX Team Members must be trained on:

## TIXC: Initial Steps Training

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All TIX **Investigators** must be trained on:

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

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## TIXC: Initial Steps Training Materials

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Required to Post Training Materials  
(34 C.F.R § 106.45(b)(1)(iii))

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## TIXC: Process and Implementation Considerations

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Review your Title IX Policy for compliance

- What about cases that *were* covered by your policy but are not covered by the new Title IX regulations?
- What about conduct that *was* covered by your policy but may not be included in the new definition of Sexual Harassment?
  
- Use of your Student/Employee Code of Conduct in cases outside of Title IX jurisdiction?

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## TIXC: Process and Implementation

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**TIXC: "Actual Knowledge"**

34 C.F.R § 106.30(a)

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: "Actual Knowledge"**

34 C.F.R § 106.30(a)

Notice is imputed not just when the TIXC is notified, but also when someone with authority to correct the harassment is put on notice

sexual harassment isn't enough

- Work with legal counsel to determine who falls into this category

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**TIXC: Response to "Actual Knowledge"**

34 C.F.R § 106.44(a)

The TIX Coordinator has certain **specific required responses** to "actual knowledge" sexual harassment in an education program or activity of the recipient against a person in the United States:

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

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TIXC: Keys to Intake

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## Jurisdiction

(Review from Level One)

### “Education 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, and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.” §106.30(a)

## Education Program or Activity

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

- Residence halls
- Classrooms
- Dining halls

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

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

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

- o Discussion specifically addresses off campus sorority and fraternity housing and, as long as **owned by or under control of organization that is recognized by the postsecondary institution**, it falls within Title IX jurisdiction
- o Must investigate in these locations (30196-97)

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**Dismissal of a formal complaint**



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- Draws a bright line-not outside of the United

States: plain text of Title IX "no e eun( )1.9(U)23.i(n)29.9(i)23.5(t)26.9(e223)heT

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## TIXC: Discretionary Dismissals

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- **Jurisdictional Determination** § 106.45(b)(3)

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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?
  - 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 2

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

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 3

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Sally grabs her best friend, Angela, to go confront Joe.

#### Questions

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

## Dismissal/Exit Ramp Hypothetical 4

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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?

### 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?

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### Dismissal/Exit Ramp Hypothetical 8

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Sally screams at Joe and slaps him across the face.

Questions

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

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### Dismissal/Exit Ramp Hypothetical 9

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

Questions

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

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## Dismissal/Exit Ramp Hypothetical 10

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When Becky tries to leave the room, Sally grabs

### Dismissal/Exit Ramp Hypothetical 13

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

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 14

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Within minutes, Joe and Becky have hundreds of comments directed towards them on social media. Some are negative and some are threatening.

#### Questions

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

### Dismissal/Exit Ramp Hypothetical 15

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When Becky reads the messages, she begins to send texts to Sally: "I'm coming after you." "I see you across the Quad." "Don't go into that room alone or I'll get you." Becky sends approximately fifty similar messages over the course of the next two hours.

#### Questions

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

## Dismissal/Exit Ramp Hypothetical 16

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

### Questions

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

## TIXC: Supportive Measures

34 C.F.R § 106.30(a)

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## 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

measures at issue (may have to tell campus PD, faculty, etc. *some* information)

## TIXC: Supportive Measures

Documentation per 34. C.F.R § 106.45(b)(10)(ii)

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



## Notice of Allegations to Respondent

**34 C.F.R § 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

TIXC: Keys to Respondent Contact

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## TIXC: Keys to Respondent Contact

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

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You've talked to Complainant and Respondent. Now what?

- Determine which policy and procedure applies

Codes of Conduct

TIXC: Signing a Formal Complaint  
34. C.F.R § 106.30(a)

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## TIXC: Consolidation of Formal Complaints

34. C.F.R § 106.45(b)(4)

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- "A recipient may consolidate formal complaints as to allegations of sexual harassment...by more than one complainant against one or more respondents... where



### TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9)

According to the Preamble,

- The final regs do not require any recipient to offer informal resolution and preclude a party from being required to participate. Preamble, p. 30404 (Official)
- "Recipients remain free to craft or not craft an informal resolution process to address sexual misconduct incidents." Preamble, p. 30404 (Official)
- "Nothing in 106.45(b)(9) prohibits recipients from using restorative justice as an informal resolution process to address sexual misconduct incidents." Preamble, p. 30406 (Official)

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### TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9)

Considerations:

none of the reports at your institution?

sanctions as a result of an informal resolution?

responsibility but doesn't want the respondent to be punished?

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### TIXC: Informal Resolution

34. C.F.R § 106.45(b)(9)

Prohibition on Informal Resolution

or facilitating an informal resolution process to resolve allegations that an employee sexually harassed a student 106.45(b)(9)(iii)

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**TIXC: Informal Resolution**

34. C.F.R § 106.45(b)(9)

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Requirements:

and bias

106.45(b)(1)(iii)

106.45(b)(1)(v)

**TIXC: Informal Resolution**

34. C.F.R § 106.45(b)(9)

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Requirements (continued):

### TIXC: Advisors

#### During the Investigation or Informal Resolution

- Role may be limited
  - "... the recipient may establish restrictions regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to both parties." 34 C.F.R § 106.45(b)(5)(iv)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party in any meeting or grievance proceeding
  - Witnesses may serve as advisors for interviews and the hearing
  - How should investigators CAREFULLY address that situation in real time?

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### TIXC: Advisors

#### During the Hearing

- Role includes questioning the other party and any witnesses
  - Includes challenges to credibility
  - "Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice..." 34 C.F.R. § 106.45(b)(6)(i)
- Advisor may be, but is not required to be, an attorney
- Cannot limit the choice or presence of advisor for either party
  - Witnesses may serve as advisors for the hearing
  - How should decision-makers address this situation during the hearing? During deliberation?

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### Basic Requirements for Formal Grievance Process

#### 34. C.F.R § 106.45(b)(1)

- 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

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Basic Requirements for Formal  
Grievance Process

34. C.F.R §

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Providing Written Investigative Report  
34. C.F.R. § 106.45(b)(5)(vii)

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- After

## 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

## 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,

## Impartiality and Avoiding Bias, Conflict

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Bias: Concerns raised in comments in

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## Bias: Objective Rules and Discretion

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

## Bias: Objective Rules and Discretion

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- **Discretionary:** Recipients have the discretion to have a process to raise bias during the investigation.
- **Mandatory:** Basis for appeal of decision-maker's determination per 34 C.F.R. 106.45(b)(8)(i)(C).

## Conflict of Interest: Concerns raised in comments in preamble

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- Financial and reputational interests of Title IX employee aligns with institution

## 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

### 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

Experiences of Survivors of Sexual Assault and Stalking

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## 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.)

## 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

## Hypotheticals

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

## 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.

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## Hypothetical 1

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You review the report and realize that the name of the Complainant seems familiar to you from a past and unrelated investigation. You don't have any real memory of the case, but the Complainant has requested a meeting with you to discuss supportive measures.

What should you do?

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## Hypothetical 2

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You have three Investigators in your office that have worked together for years and often "vent" to one another about the pressures of working in Title IX and the things that frustrate them about their cases. They also encourage one another and help troubleshoot best practices for particular cases.

Your institution does not have the budget to hire additional staff or outsource the new Title IX roles required by the final Title IX regulations. You want to use your current staff of investigators on a rotating basis, in which they sometimes serve as an informal resolution facilitator or decision-maker for cases they don't directly investigate.

Is this allowed?

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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 disc-3.8(scTm [(pd)850V.251 g C vo-12.2(s3-7(e)m9 .20.8(e)9(s)-1.3( )3.7(T)30.4A)5.1( )-44(4(4 1 e)m9

Questions?

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