

2024 Title IX Regulations Webinar Q&A Session for Higher Education

1. I'm clear that ATIXA's forthcoming model policy 1P1P will provide an avenue for incorporating 106.45, 106.46 and all forms of discrimination, woo hoo. Will it also cover how to separate out and provide options for addressing behavior pre-August 1?
 - Daniel Swinton answered live.
2. Some schools within my institution have resistance to implementing retroactive supportive measures. A common example is when a student experiences an assault today, misses an exam scheduled for tomorrow, and then approaches our office three weeks later seeking assistance in making up the missed exam. Is there anything in the regulations that specifically states that we must provide this sort of retroactive support?
 - Kayleigh Baker: Page 483 of the PDF of the Regulations will likely be helpful for you. The Department clarifies that in some circumstances, retroactive supportive measures may be appropriate!
 - Mandy Hambleton: Supportive measures should be considered for appropriateness, reasonableness, and consistency with institutional practices. If you have a student who is in a car accident and doesn't notify the student of that until they are released from the hospital three weeks later, would you let the student retake the test?
3. Which set of rules / policy will apply to complaints that began before 8/1 and continued past 8/1?
 - Kayleigh Baker: You're going to focus on whether the conduct occurred before or after 8/1, David. It seems like before 8/1 uses 2020 regs, after will use the 2024.
 - Eric Kidwell: And what about conduct that occurred prior to the 2020 regs? We have been treating this under our 2020 procedures but under our prior-2020 policy.
4. Which states require live hearing?
 - Daniel Swinton: We are working on compiling this list. Stay tuned! For starters, the 6th Circuit: Michigan, Ohio, Kentucky, and Tennessee have to. There are others as well, but that is off the top of my head.
 - Emily Bell: Arkansas institutions likely will under Act 470 of 2023
5. In definitions, it states for definition of Complainant "(1) A student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part; or (2) A person other than a student or employee who is alleged to have been subjected to conduct that could constitute sex discrimination under Title IX or this part and who was participating or attempting to participate in the recipient's education program or activity at the time of the alleged sex discrimination. " Should this read sex discrimination and sex-based harassment? They are dividing them out and this jumped ut at me.
 - Kayleigh Baker: Sex-based harassment is a form of sex-discrimination.
 - Joe Vincent: In this case, they're using "sex-based discrimination" as encompassing sex-based harassment, also.
6. In a student complainant vs employee respondent TIX sexual harassment case, where the complainant doesn't wish to file a complaint, can a college/university use a Title VII employee process that does not completely follow 106.45 procedures?
 - Kayleigh Baker: That is not likely based on my read of the regulations.

- Daniel Swinton: From what I read this morning - No. The preamble clearly states that neither the parties nor the college may side-step Title IX's process. If the conduct may violate TIX, you must use the TIX process.
- 7.** Do I understand correctly that training is no longer required to be posted, but rather just must be made publicly available upon request?
- Daniel Swinton: Correct.
- 8.** Do we need to continue to have our list posted for pre-2024 regs trainings/materials?
- Kayleigh Baker: At this point, I think so.
- 9.** Please explain the location issue (i.e., sexual assault at an off-campus apartment involving 2 students where Complainant finds their education affected.)
- Kayleigh Baker: I suspect we might talk about this during the webinar, but it will depend on a couple of things. Do you take disciplinary authority for off-campus student assaults that aren't sex-based? If yes, then you likely have jurisdiction over the off-campus SA. If not, you will likely still have to address the "downstream effects."
 - Joe Vincent: You would have an obligation to address the impact to program participation. It might mean addressing the off-campus conduct, but it also might mean a remedial response is sufficient.
- 10.** In reference to assisting students and employees, from the lenses of pregnancy et al., does the person involved in working through these accommodations with students and employees have to be a Title IX Coordinator or can this person be the ADA Coordinator, for example?
- Kayleigh Baker: We may get to this today, but if not, please come to our Pregnancy course. We talked about this a lot internally yesterday, but we believe that the TIXC is ultimately responsible rather than handing off the entire responsibility to the ADA office.
 - Joe Vincent: The Title IX Coordinator should oversee, regardless of delegation.
- 11.** So the Title IX Coordinator can have a Designee to lead the pregnancy accommodation charge, correct, as long as the Title IX Coordinator oversees this process?
- Kayleigh Baker: Yes, but this can also include the downstream effects Saunie is speaking to, now!
 - Joe Vincent: Yes, but that could include the "impact" of the out-of-program behavior. So if they have to sit next to each other in class, but nothing further happens in class, there still may be an obligation to address.
- 12.** What guidance exists for religious institutions (not asserting waiver) to balance religious liberty with Title IX (in a divided community, some conservative Catholic some progressive)?
- Daniel Swinton: The Regs permit religious institutions to maintain their policies consistent with closely held beliefs. Where you fall on that is going to be, as you noted, based on the campus culture.
- 13.** The regs talk about taking steps to prevent advisors from disclosing information they receive during the complaint process. If a party's advisor who is unaffiliated with the recipient (attorney, parent, etc.) discloses information, what steps can we take to address the behavior?

- Mandy: You can consider whether they can be an Advisor again and if they are an attorney, you can report them for an ethics violation.
 - Joe Vincent: Typically, the consequences are imparted to the party, but it could also result in the advisor's removal from the process or even future processes.
- 14.** For those in states that have declared these new regs should not be followed by school districts, what does this mean to higher education? How are we to handle the issues of sex discrimination based on sexual orientation and gender identity?
- Mandy: You will want to consult with your legal counsel and whether they would rather defend you being in compliance with federal law or state mandates.
- 15.** How long do you anticipate it would take for the regulations to be turned over if Trump or someone of the like wins the presidency and wants to go back to the 2020 Title IX regulations..?
- Daniel Swinton: Because they are regulations, the most a new administration could do is say they will not enforce the regulations but would need to go through another rulemaking process to supplant them.
- 16.** I'm hoping to hear more discussion on the restrictions regarding documentation and supportive measures/accommodations for pregnancy. Sometimes documentation is needed to determine what is reasonable and appropriate.....especially when in states with restrictive abortion laws.
- Kayleigh Baker: Fantastic question! We're discussing this a lot internally, too!
- 17.** Can you walk us through a process that would involve eliminating hearings but having a separate decisionmaker (not the investigator as we are hesitant to return to the single investigator model)?
- Joe Vincent: Our models will address this efficiently in a way that complies but also incorporates our experiences as practitioners for some best practice approaches.
- 18.** The regs mention that a recipient must not require supporting documentation from a student unless doing so is necessary and reasonable or when modifications are available to students for non-pregnancy related reasons without submitting documentation. Our accessibility office requires documentation for all accommodation requests. Does this mean that they can no longer require it? Do the regs clarify when it would and would not be appropriate to ask for documentation? I know they mention lactation but what about other requests? What's the threshold for asking for documentation/doctor's notes?
- Kayleigh Baker: Important to note that pregnancy-related supports are going to be considered "reasonable modifications" and are not the same as accommodations under ADA. The TIXC is responsible for ultimately overseeing and coordinating these modifications, so it may or may not align with your ADA practices. The regs do give some examples in the pregnancy for things that should not require documentation as a general rule (water breaks and larger desks are examples if my memory serves me!)
- 19.** Can we hold a Respondent's degree under the new regs if we have an investigation in progress?
- Daniel Swinton: This specific question has not yet been answered from what I have read. I think holding a diploma could be viewed as a discipline without due process, so I would disfavor holding diplomas.

- 20.** Can a Complainant decline to participate in a TIX process in favor of having the matter go through student conduct instead, or is this still considered circumventing the regs and thus not allowed?
- Daniel Swinton: If TIX could apply, you have to use TIX-compliant procedures. You can't sidestep them.
- 21.** When is 106.45 used vs 106.46?
- Answered live by Daniel Swinton
- 22.** How are we defining attempting to participate in the recipient's education program or activity? Would this include a visitor; if so what type of visitor? A person who has only applied?
- Kim Pacelli: In the preamble, OCR makes clear it is a pretty broad standard that includes visitors if that person was participating or attempting to in the education program and activity. I don't have the preamble language in front of me, but one example I remember from the preamble was a guest speaker who is visiting the campus.
- 23.** I was just thinking of a student friend visiting for a party on campus that is not authorized is that they are trying to engage in a program or activity etc.
- Kayleigh Baker: I think it will depend on Simone. Likely the factors you described could be involved in the determination.
- 24.** The regs say that when providing support measures for pregnant students we cannot ask for documentation. Does this apply when a student has a medical condition related to pregnancy such as preeclampsia? Our professors tell us that it is their policy that if someone has a medical condition, the process is the student first provides the professor a letter from the doctor and then the professor will give the student support measures but they will not do anything until they get that note from the doctor. The note doesn't have to have their diagnosis or other private info, only that the doctor is treating them and due to their condition, they need adjustments. For example, if a student misses class due to the flu, the student must provide the professor a doctor's note that said the doctor treated the student and recommended the student not attend class. Only then will the professor give them an excused medical absence. Do we need to change this process for pregnant students with pregnancy-medical conditions?
- Kayleigh Baker: I gave an answer above that might address some of this. Ultimately, the TIXC needs to be making these determinations rather than the individual faculty members due to the overall institution's obligations not to discriminate. Check out my answer to Anonymous above, though!
- 25.** In the webinar on Wednesday, it said confidential employees cannot serve as advisors. Does that mean that students who are working with a university victim advocate can't have that advocate as their advisor in the hearing even if the advocate and student have signed a waiver? My understanding was that students may choose whomever they want to be their advisor and we really can't impede that.
- Lauren Starnes: A confidential employee serving as an advisor would likely pose a conflict for that advisor. If your university victim advocates are designated (and trained) as confidential employees in accordance with these regulations, then they likely should not be an advisor.

- 26.** In a situation with an employee complainant where alleged conduct could violate both Title IX and Title VII, which process takes precedence? Or does the complainant choose?
- Kim Pacelli: Ideally your process would satisfy the elements under both laws. One of the nice features of the change to the hostile environment standard (severe or pervasive) is the synergy with Title VII. If an incident falls within Title IX, the process needs to meet the procedural requirements of Title IX, just as with the 2020 regulations.
- 27.** Will ATIXA provide guidance on how to "monitor barriers to reporting"?
- Kim Pacelli: You bet! We are already working on this and are also considering whether folks would find some specific training on this, too!
 - A good place to start is with these two Blog posts:
 - i. <https://www.atixa.org/blog/dont-let-the-title-ix-regs-release-date-be-a-barrier-to-your-barrier-analysis-part-one/>
 - ii. <https://www.atixa.org/blog/dont-let-the-title-ix-regs-release-date-be-a-barrier-to-your-barrier-analysis-part-two-enhancing-reporting-processes-without-fostering-a-perception-of-escalating-incidents/>
- 28.** Does California have to have hearings? Can you also clarify SB 493 in relation to the 2024 Regulations?
- Kayleigh Baker: We're working on this list, Anonymous! However, it is likely that it may depend on whether you're public or private in CA.
 - Kim Pacelli: I'll add that I haven't yet wrapped my head around all of the various SB 493 facets relative to these regulations, but my general sense is that most of the CA requirements will be consistent with, and additive to the TIX regulations. But we will be looking at this further in the coming weeks.
- 29.** Can someone give a high level about the changes? Some of us were not in the overview from Wednesday.
- Sharon Perry Fantini: Yes, <https://www2.ed.gov/about/offices/list/ocr/docs/t9-final-rule-summary.pdf>
- 30.** What if an incident is reported after 8/1/2024 but occurred prior to 8/14/2020- policy at the time and Trump era process or the even older one at the time?
- Kim Pacelli: We have asked this question of OCR's program legal office! We had it, too!
- 31.** Is this 8/1 date referring to the actual incident or when it was report to the Title IX Office?
- Daniel Swinton: Actual incident. So conduct that occurred pre-8/1 would have to be addressed using 2020 Regs, regardless of when the report is made.
- 32.** For those institutions that are not going the live hearing route, what is the most efficient way to implement the strange provision about sharing the audio or transcript to solicit questions/feedback?
- Kayleigh Baker: I think that a written transcript of Q&A is likely to be a relatively straight forward approach.
- 33.** What is required in terms of lactation spaces? Do all buildings need one?
- Daniel Swinton: The Regs do not specify how many you need to have, rather that lactation spaces be available. I tend to recommend folks should not have to walk more than 3-5 minutes to get to one.

- Mikiba Morehead: The regs do not provide a quantified number of spaces. Instead, it seems OCR is allowing campuses to make the decision on how many are reasonable based on the population size, campus size, and demand over time. They do not require us to build new spaces and encourage the use of existing space to meet the regulator requirement that lactation spaces not be a bathroom, is clean, is shielded from view, and free from the intrusion of others.
- 34.** Does the 'no man's land' still exist under 2024 regs where the 'complainant' doesn't want to proceed and the TIXC doesn't initiate the complaint process due to one of the permitted reasons? Is the concept of risking deliberate indifference still applicable?
- Kayleigh Baker: Filing a Formal Complaint as a TIXC will continue to be a rare occurrence and the regs give a lot of factors a TIXC should consider in making that determination.
- 35.** Can you explain the differences in the 2020 and 2024 regs in regards to the grievance procedure, specifically employee rights in the grievance procedure when employees participate (as Respondents and Complainants) in the grievance procedure?
- Daniel Swinton: If employee-employee, you can use .45, which has far fewer requirements, but maintains fairness, but any time a student is involved, you must use .46.
- 36.** If an institution chooses to offer a live hearing, and if the institution chooses to have questions be asked by the hearing officer/decision-maker (rather than by a hearing advisor), does the institution then have to provide a hearing advisor to each party (assuming they do not have one)?
- Kayleigh Baker: An advisor has to be provided if you allow advisor-based questioning at the hearing.
- 37.** What does "advisor-based questioning" mean or entail? Would it include a process where a party provides their question in writing to the Hearing Officer who when asks the witness the question out loud?
- Kayleigh Baker: You've got a couple of options. Either the option you've described OR one that is more similar to what we're accustomed to under 2020
- 38.** I'm at a community college. We have dual-credit students on campus. Do we use the K-12 regs or the Higher Ed regs?
- Kayleigh Baker: You'll use the Higher Ed regs; however, there may also be jurisdiction at their home institution that would fall under the other regs.
- 39.** Can you clarify the regulations around behavior that occurs out of the country? Title IX doesn't apply outside the US but we do need to address on-campus impacts. If a student sexually assaults another student out of the country but the victim is reporting that they now feel afraid on campus (but no further behavior or harassment has occurred from the respondent) are we adjudicating that under TIX?
- Kayleigh Baker: You'll be addressing the downstream effects like Brett was discussing a few moments ago!
- 40.** Training Requirements: Training must be completed, not just made available. Would you please elaborate what is best practice on this?
- Daniel Swinton: Best practice is yet to be determined, but the Regs and the preamble imply that we should be tracking completion.

- 41.** Going to the next step—what are the best practices for enforcing the training? Can we sanction individuals who do not complete the training?
- Lauren Starnes: I always find the carrot works better than the stick. We had a lot of internal discussion about giving employees big gold stars they could print and place in their workspaces to show they have completed this training.
- 42.** Since employee Title IX Training is mandated now, does that mean all employees have to be trained by August 1, 2024, or after? If it is the former, then it seems like institutions must have updated policies ready by June or July to ensure everyone is trained on new policies by August 1. That is a big undertaking when you have 2-3K employees.
- Answered live.
- 43.** Can informal resolution be utilized for sexual assault cases?
- Kayleigh Baker: Yes, it could be. Informal Resolution is permitted except in cases of K12 students alleging sex-based harassment from an employee.
- 44.** Under the new definition of a complaint, is the university put on notice at the first instance a student talks to a mandatory reporter now that a complaint can be made orally?
- Daniel Swinton: Yes, and the TIXC will need to reach out to the person who allegedly experienced the behavior to offer supportive measures.
- 45.** I'm also hoping for more discussion around that notion that we can restrict or separate by gender only where there is no injury or harm to a party.....sports?Dorms?Bathrooms?
- Answered live.
- 46.** For conduct overlapping August 1, I wonder if the parties would be able to waive the 2020 regs procedure if they both agree to have it resolved under 2024.
- Lauren Starnes: There has been discussion on this in the chat as well. Generally, you want to use the more protective, due process heavy process. Parties cannot waive the hearing requirement under the 2020 regs unless they agree to informal resolution. Ultimately, this is a question that TIXC's can take to their legal counsel in the coming months and years.
- 47.** Do you see a legal risk to not using a live hearing at all after 8/1, or is it safer to use it at least for potential suspension/expulsion cases?
- Kayleigh Baker: Really going to depend a lot on your jurisdiction. You'll want to implement a robust procedure with many due process protections either way.
- 48.** Should a credibility assessment be included in the investigation report now?
- Daniel Swinton: That is what we are thinking of recommending moving forward since we are probably recommending the investigator recommend findings as well.
- 49.** Do HE employees (not involved in TIX process) need to be trained by 5/1/24?
- Daniel Swinton: You need to have the training in place by 8/1. Having everyone trained by then is unrealistic for those with 10-month contracts, etc., so you will need to have a plan to train everyone promptly after 8/1. You can, of course, train before then on the 2024 requirements if you wish.
- 50.** Under the new rule, if the Hearing Officer/Decision Maker has questions for the Investigators do we have to record that and allow the parties to review and comment?
- Joe Vincent: I've not read anything that necessitates making that conversation available for party review. However, if it results in additional relevant evidence being incorporated for consideration, the parties have a right to know that.

- 51.** Will ATIXA still provide specific guidance for academic health centers that have a hospital and university like in the past?
- Kim Pacelli: We actually have as a feature of our new ATIXA curriculum that we've been unveiling all year that there is an opportunity to take it coming up in June, I believe. You can find that information on our Schedule at a Glance: <https://www.atixa.org/training-and-events-schedule-at-a-glance/>
- 52.** Would you please elaborate on the decision-maker change. From the previous session, I believe it was said that the Title IX Coordinator and/or Investigators are becoming decision-makers? If so, is that not a conflict of interest. Thank you
- Kayleigh: There COULD be a conflict; however, as a general rule it may not be. We like having multiple people involved in the process, but there's going to be a number of ways that can work in practice depending on your resources/size/volume.
- 53.** Our director of security asked me to bring this up. If a male identifies as a female and uses a female restroom, and a female is in the restroom as well and is upset about it. It seems as both students have rights. How do we address this. We do have gender neutral restrooms in each building that are single use and can be locked, but this scenario could occur.
- what is the behavior they are alleging? That their presence alone was causing a hostile environment? I would focus on behavior, not identities.
 - This is a hypothetical at this point, but I do appreciate the info. Let's assume the female in the restroom is not comfortable with the transgender individual in the restroom and claims as such? I'm assuming we would proceed to see if the behavior meets any sort of harassment? I am thinking this through a bit as I type but if the student is simply uncomfortable, that doesn't constitute harassment.
 - Kayleigh: this is going to be a little complicated for those of you in certain states. However, the regulations seem to indicate that refusing to permit a person to use the bathroom that matches their gender identity, it would be a "more than" minimize harm and could therefore be a type of sex discrimination.
- 54.** There seemed to be some reference to having to communicate the interim measures for the victim/impacted party/complainant to the responding party. Can you help us identify some strategies for keeping the victim/impacted party safe especially when the matter involves stalking or domestic/relationship violence? Interim measures likely would include room or building assignment changes and classroom changes which would unnecessarily expose victim/impacted party/complainant.
- Kim Pacelli: The preamble makes clear that safety considerations factor into communication, and that you can communicate about SM necessary to implement them. I think this answers your question, but please let us know if it does not!
- 55.** Could Employee jurisdiction be different than student jurisdiction?
- Daniel Swinton: Yes.
- 56.** What are Climate Survey Requirements in the new regulations?
- Daniel Swinton: There are no specific climate survey requirements, but climate survey is one way to monitor discrimination and harassment at the school (which is required).

- 57.** Our student code of conduct includes jurisdiction over international travel, it is my understanding that because we include that we would be responsible for TIX violations that occur during international travel. Is that correct?
- Joe Vincent: I believe that is correct.
- 58.** Can you share more about Title IX requiring accommodations be made to assist with restoring access to education when an incident of sexual misconduct occurs? Will institutions be required to provide accommodation for individuals when the incident does not occur on campus?
- Kayleigh Baker: Title IX does not necessarily require accommodations, but does require supportive measures and, in the event of sex discrimination, remedies. If you have disciplinary jurisdiction for off-campus incidents and/or there are on-campus effects, it is possible that SM or Remedies will be required.
- 59.** I am concerned about portions of the regs that overstep & disregard religious liberty and freedom of speech. This is addressed on pgs 100-102 I think; however, I am not confident that the rule protects these. Has/Will OCR provide clarification and guidance on this aspect of the final rule?
- Daniel Swinton: We expect they will need to, yes. The new definition of sex-based harassment is much broader than 2020 and, if misapplied, could really create some first amendment problems.
- 60.** Do the new regs state that training for all employees must be every year? We currently require RE training within 30 days of hire and then every other year.
- Kayleigh Baker: Yes. Annual training requirement.
- 61.** What about electronic/social media? on or off campus?
- If you take disciplinary jurisdiction over those in any way, then you have to take TIX jurisdiction. We do recommend you have the ability to address social media.
- 62.** Can you speak to the effect of the new regs on employee-on-employee sex discrimination or sex based harassment? How might this interact with tenure protection, CBA, etc.?
- Kayleigh Baker: The preamble talks about this quite a bit. If the CBA requires things that go above and beyond the regs, it is likely that the regs do not prevent following your CBA. However, if the CBA conflicts, talk to legal counsel because you may need to renegotiate it at the earliest opportunity (and there may be a provision that allows you to comply in the interim because it's federal law)
- 63.** Regarding mandating training for all employees, I get that it's different from offering under VAWA, but are they expecting us to demonstrate a 100% compliance rate? Or just that it's distributed to everyone and we tell them it's mandatory?
- Kim Pacelli: The preamble does indicate that there is an obligation to enforce the requirement. Not just make it available.
- 64.** Can you provide clarification on the ability to challenge supportive measures? Currently, supportive measures are supposed to be kept confidential and the Respondent is not aware of them. Is that changing at all?
- Kim Pacelli: We've been chewing on this internally. Generally speaking, parties can only challenge those SM that relate to them. If a Respondent knows about a complainant's SM it would be because the information relates to the Respondent,

too. And our read on things is that in those cases the Respondent could seek to challenge/modify in that case.

- 65.** I wonder how the "gaggish" rule will impact folks who have retained attorneys and there is a corresponding criminal case.
- Kayleigh Baker: Not entirely sure what you mean here, Anonymous. I think there will continue to be Respondents who are less likely to participate if they have a pending criminal case.
- 66.** But we can't limit the attendance of family or friends to all meetings, right? Can we ask them to sign a participation agreement asking them to respect privacy?
- Kim Pacelli: The preamble states that there is no requirement for a privacy/confidentiality agreement, but also no prohibition on using them either.
- 67.** Do the new regs speak specifically regarding a college with male and female dorms?
- Daniel Swinton: Yes. You can maintain separate residential facilities, as long as they are equitable.
- 68.** How should parties who are Residents and Fellows in med school programs and teaching hospitals should be identified- as students or employees? They get paid to work at the hospital, but residency and fellowship are the last parts of their education program.
- Kim Pacelli: Regs direct that you need to do a case-by-case analysis and probably land on what is the primary relationship that the person has with the institution in the context that the h/d arose.
- 69.** If the complainant does not wish to file a Title IX complaint, then it seems to me the regulations would say that unless the TIXC files a "commissioner's charge," then there will be no complaint. So why would the recipient be barred from using an alternative process like Title VII?
- This was supposed to be a follow-up to the question on a student claim against an employee, if the student did not want to file a Title IX complaint.
 - Kayleigh Baker: The regulations envision conduct that falls under the regulations to be governed under either 106.45 or .46. There doesn't appear to be an option to "opt out" to another process to determine whether conduct constitutes sex discrimination.
- 70.** There appears to be a difference in the content of the investigation report under 103.45 and 106.46. Please explain.
- Kayleigh Baker: An investigation report is not necessarily required under 106.45; however, parties will need to be able to review a description of the evidence and have access to the evidence for review upon request.
- 71.** With sex-based cases that involve employees as the complainant and respondent, under the 2024 regs, does the complaint need to be handled under Title IX or can it be handled under Title VII?
- Joe Vincent: They would need to be handled using a procedure consistent with 106.45 of the regulations.
- 72.** The regs have very broad TIX application to sex discrimination and then have .45 and .46 processes for sex-based harassment with a narrower definition. For sex discrimination that falls outside of sex-based harassment, are the policy and process options open as long as they are consistent with other policies and practices and equitable?

- Joe Vincent: 106.45 is the prescribed grievance process for sex-based discrimination.
- 73.** Can you speak about the audio recording or transcript requirement?
- Kayleigh Baker: I think this has possibly been discussed aloud, but there are still robust documentation requirements under 106.45 and more so under 106.46.
- 74.** In order to provide consistent information about rights, do you recommend that all employees now also be mandatory reporters of pregnancy/related condition disclosures?
- Joe Vincent: At the very least, all employees should be able to refer the discloser to the Title IX Coordinator.
- 75.** Within health care residents and fellows are a hybrid of employee and student. How do I determine which to apply 45 or 46?
- Joe Vincent: Residents are typically considered students engaged in an education program for the purposes of Title IX.
- 76.** What about a confidentiality rule for witnesses?
- Kayleigh Baker: Are you meaning confidentiality as it relates to identity? Witnesses still seemingly need to be ID'd in the process. However, we can instruct witnesses not to share information as we have to protect the privacy of the parties and process.
- 77.** Can you speak to the broadened definition of complainants in the regs? Who is a person with legal authority to a college student?
- Kim Pacelli: The intent here is to include adult individuals who are in some sort of relationship with a parent/guardian who retains decision-making authority over the person, such as someone with disabilities such that the guardianship arrangement extends into adulthood. We also have been noodling on whether OCR intended to give parent/guardians authority over college students under the age of 18. I actually read something different this morning on this that made me keep thinking on it and haven't yet had a chance to loop back to these three fine folks (and my other ATIXA colleagues!)
- 78.** Can you speak to training requirements? I'm thinking about how we are going to be in compliance with this by August 1 when a good portion of our faculty and coaches are not on contract until after that date.
- Answered live.
- 79.** Please share best practices, when supportive measures are challenged.
- Kayleigh Baker: We're still working on best practices, but it will have to be an impartial person to make those determinations (likely whether they're overly burdensome or designed to be punitive)
- 80.** My university has 7 international campuses. If the conduct happens solely at one of the international campuses, is this under my jurisdiction? If so, would it be best to have deputy title ix coordinators at the international campuses to deal with these cases?
- Joe Vincent: It would depend on whether you take jurisdiction on other types of conduct and behavioral issues at the international campuses. If so, you arguably have Title IX jurisdiction as well.
- 81.** Does the model 1 policy 1 process consider state requirements such as SB 493 in CA, such that 1 policy and 1 process would also meet SB 493 requirement?

- Kayleigh Baker: We're working on a widely applicable 1P1P first and then will attempt to get some state-specific resources out throughout the summer.
- 82.** Once an agreement is reached as part of an informal resolution process, do parties have the right to appeal, or is that at the discretion of institutions? What do you all recommend if it is discretionary?
- Joe Vincent: There is no obligation to offer an appeal upon voluntary, mutual agreement to an informal resolution.
- 83.** Our institution employs adjuncts and 3rd party vendors who have consistent contact with staff and students. Are they required to have the mandatory training?
- Kayleigh Baker: If they are employees. While I don't know your set up, I suspect the answer will be yes.
 - Joe Vincent: your use of the word “employs” may be indicative.
- 84.** When a complainant stops participating/is not responsive after initial participation, does the institution have the option of resolving the matter through an informal resolution?
- Kayleigh Baker: Informal Resolution requires the agreement of the parties.
- 85.** Can there be a separate process for unionized faculty versus staff and students? In other words can you use an investigation model for faculty and live hearing for students? For all other matters at our institution, that's the model. Faculty use an investigation model and we have live hearings for all formal student matters.
- Kayleigh Baker: This seems like it would be permissible.
- 86.** OCR goes out of their way to not provide definitions regarding prohibited conduct, but we have to provide sufficient definition for students and employees to know what is prohibited (and expected). Any suggestions?
- Kim Pacelli: OCR does provide prohibited conduct in both the definition of sex-based harassment and also the bases of sex discrimination. There is a definition of student in the definitions section. On employees, they do defer to us to define who are our employees are.
- 87.** will you also be updating ATIXA’s pregnant and parenting students model policy? Will there be anything released related to employees with the new Pregnant workers fairness act?
- Kayleigh Baker: You can expect many, many updates this summer!!
- 88.** Please can you speak to the roll out of TIX training across campus, particularly for faculty / contract start dates?
- Answered live.
- 89.** Also for pregnancy, is there a distinction regarding the pregnant student vs. non-pregnant parent, when it comes to academic modifications? While discrimination of all parenting students is prohibited, do the modifications apply only to the pregnant student?
- Kayleigh Baker: The regulations seem to prevent discrimination against parent students due to the relationship to pregnancy/childbirth.
- 90.** If we go back to having a single investigator is it right that interviews have to be recorded under the new regs's requirement that the party is entitled to have a recording of the investigator asking questions re: credibility in order to follow up?
- Answered live.
- 91.** Does termination of pregnancy include loss (ie. miscarriage) of pregnancy?

- Mikiba Morehead: The reg do not go into a deeper definition of what is meant by "termination". I recommend using an inclusive approach and contemplate this as termination for any reason.
- 92.** As someone in the sixth circuit - I'm curious as to recommendations for best practices on cross-examination under the new regulations?
- Kayleigh Baker: We are working on it!
 - Joe Vincent: Under the current precedent, you'll likely still be required to host a live hearing with advisor-led cross-examination.
- 93.** I don't believe the Regs addressed this directly, but do you have any insight on how to handle cross-complaints in bad faith, or rather the ability to sue the complainant directly for defamation? Thank you.
- Kayleigh Baker: This is discussed in the preamble, Anonymous. Cross-complaints and counter-complaints are discussed a little, if you use the search function on the PDF.
- 94.** Now that IR's do not require a formal complaint what do you suggest we do to be sure we know exactly what is being resolved?
- Kayleigh Baker: While there is no formal complaint requirement, there are some requirement in 34 CFR 106.44(k)(3)
- 95.** Has anyone started parsing how the pregnancy protections in the regs will intersect with the new EEOC PWFA regs?
- Kayleigh Baker: I think they will coordinate quite nicely, but we have not done a deep dive quite yet!
- 96.** If a complaint can be filed under title IX and state law, and state law provides greater protections for victims, must we use Title IX regs or can we use state procedures?
- Kayleigh Baker: States typically have the ability to add more protections, but not less.
- 97.** Is there an age limit for children of parents? Can they still receive reasonable modifications if the child is 17 years old? What if the child is 30 and mentally and physically disabled, would reasonable modifications under TIX still apply?
- Mandy Hambleton: Reasonable modifications are for pregnancy or related conditions, not general parenting.
- 98.** Since TIX covers pregnancy and parenting, is there an age limit then for the children of parents?
- Mikiba Morehead: The preamble seems to broaden the coverage in this area. First from the definition of Parental Status in 106.2 and a statement that the protections from discrimination extend throughout a student's participation in the education program or activity. The age limit is persons under the age of 18 or someone older than 18 but is incapable of self-care because of physical or mental disability. p.1509.
- 99.** At a faith-based institution, can a student file a TIX complaint against faculty or staff who refuse to respect their gender identity (e.g., refusing to address them by a chosen name or pronouns)?
- Answered live.
- 100.** Seems like a nightmare to have the Investigator investigate and then cross-examine!?

- Joe Vincent: Actually, investigative interviews could facilitate most of the cross-examination by virtue of the natural questioning approach of the investigator.
- 101.** Live hearings have been cumbersome. If an institution goes back to the investigator model, can we eliminate decision-makers from the TIX Team?
- Joe Vincent: Not necessarily. You'll still need a DM function, and likely some collaborative approach to facilitating decision-making with a measure of investigator involvement.
- 102.** Under the new regs is it correct that we get to choose if we want advisors in the hearings?
- Mandy Hambleton: Not under 106.46. You get to decide if you want them to conduct questioning, but you have to allow their presence even if they aren't doing the questioning.
- 103.** What if state laws require a two-party consent state to record an interview? In CA both parties have to consent to record.
- Mandy Hambleton: Those laws apply to situations in which someone has a reasonable expectation of privacy. An administrative process interview is not that, so you don't need their consent, though you do need to tell them you are recording.
- 104.** We have found that the power imbalance that exists when a student brings a complaint forward against an employee (especially since many of our employees are unionized) typically results in the student choosing not to file a formal complaint. Do the new regs offer options for addressing through other avenues? It seems like there is a risk to not addressing when there is no formal complaint but a challenge when there is a reluctant complainant.
- Mandy Hambleton: You can now consider using informal resolution for complaints involving students and employees in higher education. No complaint required.
- 105.** What if the allegations are more egregious sexual misconduct?
- Mandy Hambleton: Institutional decision whether you want to offer it in those circumstances. Some institutions will have facilitators that are equipped to handle that through IR, most won't.
- 106.** As it relates to the recordings.....are we required to give the opposite party a copy of the other party's recording as relevant evidence?
- Mandy Hambleton: You have to allow them to listen to it or provide them with a transcript, but not a copy.
- 107.** Can the investigator also serve as the decision maker? Can the investigator also serve as the hearing officer?
- Mandy Hambleton: Yes.
 - Joe Vincent: Technically, the investigator can be the decision-maker. As you're hearing discussed now, we don't think that's the best approach, however allowable the regs may make it.
- 108.** I believe I read that the Investigator or TIXC may act as the adjudicator. Although not ideal, the TIXC has in the past been allowed to act as the Investigator. How do the three positions correlate with 2024?
- Joe Vincent: The only required separation is for the appeal decision-maker, who can't be the TIXC, investigator, or DM.
- 109.** Are you interpreting this as requiring recording the entire interviews or just the portions of the interviews related to the parties suggested questions? parties?

- Daniel Swinton: Entire interview. Having it recorded will help prove you already asked certain questions that are later suggested by the Parties, and avoids the disruptive recording/non-recording in a single interview.
- 110.** If we have two students who live outside the US and are only in an online class with us. There is an allegation of sexual misconduct by a parent - not either student. There is no concern by either student that has an effect on their education. Do we have a TIX case? Let's say this happened in the 2020 regs and the new 2024 regs. I can't tell if I have a case.
- Kayleigh Baker: Do you have disciplinary authority over the parent? Likely not...
- 111.** Under the regs, in what circumstances would we not consider off-campus conduct to contribute to a hostile environment on-campus?
- Daniel Swinton: The key will be to determine whether there is a limitation or denial in programs or activities. That is a pretty broad brush.
- 112.** Do we then have to have transcribing services for the recording? That has been a push back point here.
- Mandy Hambleton: You would either provide access to listen to the recording or a transcript of it.
- 113.** Speaking of state law, how does the de minimis harm standard relate to single-sex bathrooms (i.e., Florida Safety in Private Spaces Law)?
- Answered live.
- 114.** A particularly troubling 2022 NPRM provision seems to have been removed! 106.46(f)(4)'s language ("If a party does not respond to questions related to their credibility, the presiding officer must not rely on any statement of that party that supports that party's position.") has become: (4) Refusal to respond to questions and inferences based on refusal to respond to questions. A decisionmaker may choose to place less or no weight upon statements by a party or witness who refuses to respond to questions deemed relevant and not impermissible...This seems good, but I also wonder if I'm missing a point here. This new language is so permissive that it seems to just state that a DM can decide how much weight to give the refusal. Which is already clear... right?
- Kayleigh Baker: I think you've got it!
- 115.** The regs are clear that the decision-maker can be the TIXC or the TIX Investigator. Is there any discussion of whether one person can be TIXC, Investigator, and Decisionmaker?
- Daniel Swinton: Yes. The regs say they can all be the same person in the same case.
- 116.** Also, along those lines, can the Title IX Coordinator act in the role of investigator while also remaining in the Title IX Coordinator role?
- Mandy Hambleton: We have always considered that a practice that should be avoided if possible. You can't ensure that your own work isn't biased.
- 117.** How are we going to ensure that training is completed by all employees?
- Mandy Hambleton: You will need to develop a system to do so by coordinating with your HR staff on hiring dates, etc. Many online training platforms track completion.
- 118.** what about religious-based institutions?
- Daniel Swinton: Religious institutions still have the ability to uphold their policies on issues such as gender identity and sexual orientation.
- 119.** If someone won't permit recording when the investigator asks questions of the parties and witnesses, do we need a stenographer to create a transcript?

- Mandy Hambleton: We would likely not continue the interview if they object to the recording.
- 120.** Lets say an investigator records all interviews and at the conclusion of their preliminary investigation issues a report that includes the interview transcripts. The parties are then given an opportunity to submit a response to the Preliminary investigation report, which can include proposed questions for the other party and witnesses. Then the investigator asks the relevant questions proposed by the parties (again recorded) which gets incorporated into a final report. Can a separate decision maker then simply review the final investigation report and make a determination? Or does the decision maker need to have an opportunity to be in front of the parties to be able to do a credibility assessment?
- Mandy Hambleton: They need to be able to speak with the parties or witnesses if necessary to assess credibility, but they don't have to if they have the information the need to do that from the investigation.
- 121.** How are we handling sex discrimination (gender identity, sex stereotypes, sexual orientation) as it relates to religious/faith-based institutions?
- Kim Pacelli: The preamble does state that the exemption would apply if it's connected to a tenet of the religion's faith/doctrine.
- 122.** Do Title IX training materials still need to be posted on our websites?
- Kim Pacelli: The posting requirement is modified to making training materials available upon request; however, we're anticipating that to the extent you're still running a 2020 process (for a case arising before 8/1, that you may need to have posted). We are still noodling on that!
- 123.** Can you please address religiously affiliated schools and if they still have protections for religious freedom?
- Answered live.
- 124.** Regarding gender identity, do Christian colleges still have ability to assign housing by biological sex?
- Answered live.
- 125.** I understand that we wouldn't record if they refuse to permit. My question is that we are required to provide a transcript and how do we do that if we can record other than to get a stenographer.
- Mandy Hambleton: I'm saying you stop the interview if it's not recorded. They are either recorded or they don't participate.
- 126.** Right after the regs were released on Friday, ESPN announced that student-athletes can play during investigations of sexual misconduct. The article referenced the Terrence - Illinois decision, but I think I'm confused because there is still the safety risk assessment requirement before you do an emergency removal. What am I missing here?
- Sharon Perry Fantini: Some folks have removed student-athletes upon the allegation. They have labeled it as "team rules".
- 127.** How much does an all-employee training need to be customized to share information about TIXC, the reporting process, and relevant policies? If ATIXA is going to develop a (brief) training, would there be a way to customize that?

- Mandy Hambleton: You need to ensure that the training appropriately provides institution-specific information. ATIXA is considering what options might exist for us to provide large-scale training and what that would look like.
- 128.** I see, so if they don't permit recording that is fine, but it means they can't participate and the interview is ended?
- Mandy Hambleton: Correct.
- 129.** re: supportive measures, the new regs allow for them to be appealed. If an incident occurred before Aug. 1, reported after Aug, is an appeal process required?
- Kayleigh Baker: I think we're going to contemplate allowing it in our models, but it isn't likely required.
- 130.** Can religious institutions maintain the religious exemptions they received under 2020 regs?
- Answered live.
- 131.** Will ATIX eventually generate a side-by-side comparison of attributes for each model? One pager? Flow charts?
- Kayleigh Baker: We'll be coming up with lots of great tools this summer!
- 132.** Can private school religious exemptions then be extended to punish or discriminate against students who become pregnant?
- Daniel Swinton: We are discussing this behind the scenes. Send me an email at daniel.swinton@tngconsulting.com so I can respond once we think it through.
- 133.** What about public institutions that have religious student groups who wish to hold events that are separated by sex? For example, reserving the rec pool for a women's only swim?
- Daniel Swinton: Typically, your own policies already restrict this. Though I note some religious groups do have stringent separation requirements in such circumstances, so you will need to analyze those on a case-by-case basis. That said, courts and OCR increasingly disfavor limitations on the basis of sex/gender.
- 134.** I'm a bit confused by the provision on live hearing procedures and what it means about holding hearings remotely (e.g., over Zoom). I get that if the hearing is going to be in-person the institution must offer the possibility of either/both parties being physically present in separate locations. That makes sense and seems to be good practice. But does the provision mean that the institution can decide to hold the live hearing under a remote approach for all participants? Or, if one or both parties ask that it be physically in-person - must the institution do so for one or both parties (recognizing the physically present but separate caveat)?
- Mandy Hambleton: Yes, the hearing can be held virtually. If one person wants in-person and the other wants virtual, I would weigh out what is the most equitable.
- 135.** Would you give an example of why a complainant/respondent would appeal supportive measures? The supportive measures are up to them to choose what would effectively support them, correct?
- Mandy Hambleton: If a party feels that a supportive measure is an unreasonable burden, that might be a reason they would appeal.
- 136.** Would the documentation of a Medical Withdrawal due to a sexual assault serve as documentation that the off-campus incident affected the on-campus education?

- Joe Vincent: I don't see why that couldn't be relevant evidence, if the complainant consents to its inclusion.
- 137.** Is it possible to obtain a list of points that we should be discussing with our university counsel? High risk decisions to be made?
- Mandy Hambleton: Yes, we will be offering a decision points document that will include our recommendations for each.
- 138.** How would an institution address sexual violence/stalking that happens off campus, does not involve a survivor who "qualifies" as a complainant, but the conduct or course of conduct is so severe that there are reasons to believe other students or employees could be at risk?
- Answered live.
- 139.** I still am wrapping my head around the "challenging" of a supportive measure. Would that not just be someone not accepting measures/requesting a measure or is it saying that the other party can challenge another parties supportive measures?
- Erin Agidius: I could envision a mutual No-Contact Directive/Order that is requested by one party would be something the other party might want to challenge.
- 140.** We're already seeing certain states direct schools to ignore the regs. What are the potential consequences of schools doing so? Are you anticipating future litigation or the regs potentially being overturned?
- Kayleigh Baker: I would bet that 64k that we will have litigation!
 - Daniel Swinton: Yeah - I would leave the answer to the question to your legal counsel since it will vary by location.
- 141.** Is there any guidance on how to define de minimus harm regarding student housing? Whether the resident has identified or not as LGBTQ+ to the public institution?
- Kayleigh Baker: There is language in the regulations and preamble that speaks to this
- 142.** The regs specifically say it must be subjectively and objectively offensive.
- Daniel Swinton: Yes. And we will keep learning about what that means.
- 143.** Has the definition of Domestic Violence been expanded to include economic, technological, etc.?
- Joe Vincent: I believe this occurred as a function of the VAWA reauthorization.
- 144.** Has the definition of Domestic Violence been expanded to include economic, technological, etc.?
- Mandy Hambleton: OCR codified the definition of domestic violence in the regulations rather than continuing to cite VAWA for the definition, and no economic and technological abuse are not included in that codified definition to the best of my recollection.
- 145.** Any advice for those of us who have faculty unions? Can the regs supersede?
- Joe Vincent: The regs would supersede to the extent that they add due process protection. They shouldn't be construed to diminish process rights otherwise owed.
- 146.** Reasonable time frames for each phase of the process? When does the clock start?
- Mandy Hambleton: The clock starts at the beginning of each phase. The phases are specified in the regulations.
 - Daniel Swinton: Upon receipt of notice of a mandatory reporter.

- 147.** Would it be wise for an investigator to recommend findings of fact and findings of credibility in a matter that may go to a hearing, where a decision maker may find differently?
- Answered live.
- 148.** If a victim of dating violence declines to submit a Title IX complaint and instead wishes to submit a report to the Conduct Office for assault, can the Respondent petition to have the matter taken under Title IX to ensure their rights under Title IX?
- Joe Vincent: If the conduct reasonably falls under Title IX, it should be handled under Title IX, regardless of where it's reported
- 149.** So if we take jurisdiction (per the question above re off campus conduct), the complainant who would normally not "qualify" as a complainant, becomes a complaint. Correct?
- Kayleigh Baker: It depends, Anonymous. The definition of Complainant is limited and defined in the regs.
 - Mandy Hambleton: Don't forget you also have rights to apply from VAWA. And that's regardless of whether the person is P/ATP
- 150.** will the new model also account for the requirements around sexual harassment from NSF and other grants?
- Joe Vincent: That would be our expectation, as historically grant funders align their expectations with prevailing civil rights laws.
- 151.** Sorry if this was covered already, but what is the estimated time ATIXA expects to release the models?
- Kayleigh Baker: Brett gave a timeline on the listserv earlier this week! Check it out if you haven't!
- 152.** I saw this mentioned earlier. Under the 2020 regs if we had a complaint of conduct that occurred prior to 2020 we were to use the 2020 processes but under our pre-2020 policy. Is this still the case?
- Kayleigh Baker: Great question for legal counsel because the 2024 regulations clearly do NOT adopt that rationale this time around.
- 153.** Are you going to create a waiting list for folks who'd like to consult with ATIXA to write new policy?
- Daniel Swinton: Yes - reach out to kate.halligan@tnconsulting.com
- 154.** Do the new regulations affect/have changes for Title IX in athletics?
- Answered live.
- 155.** What will be the line when dealing with complaints that happen off campus or overseas under the new regulations?
- Answered live.
- 156.** I wonder if the conduct overlaps 8/1, if the parties could waive the hearing process if it is not applicable in the 2024 regs.
- Kayleigh Baker: We've typically felt like the live hearing can't be "waived" unless the parties agree to an informal resolution. I'm not seeing anything that would change that if we're dealing with pre-8/1 conduct
 - Anonymous: Hi Kayleigh, I agree about the waiver, but given Brett's comment about resolving under a "collateral" theory, maybe we could also take into account the preference of the parties. If one of them insisted on 2020, then so be it.

- Kayleigh Baker: I think that this is ultimately a question that a lot of TIXCs will be taking to their legal counsel in the coming months and maybe years!
- 157.** Do you see a legal risk to not using a live hearing at all after 8/1, or is it safer to use it at least for potentially suspension/expulsion cases?
- Answered live.
- 158.** There seemed to be some reference to having to communicate the interim measures for the victim/impacted party to the responding party. Can you help us identify some strategies for keeping the victim/impacted party safe especially when the matter involves stalking or domestic/relationship violence?
- Answered live.
- 159.** Recording interviews even if there is a live hearing?
- Answered live.
- 160.** Do we then have to have transcribing services to go along with the recording? That has always been the push back here.
- Answered live.
- 161.** As it relates the recordings.....are we required to give the opposite party a copy of the other party's recording as relevant evidence?
- Answered live.
- 162.** We have not been recording or transcribing. Anyone have a good service that they recommend for transcription?
- Michelle Issadore: Rev.com is a common one
 - Alisha Carter Harris: Rev.com is what we use.
 - Anonymous: 3Play
 - Erin Agidius: I've also seen institutions use otter.ai
 - Anonymous: otter.ai is what we use
 - Anonymous: Microsoft Teams has a new built-in transcription service, that's what we've been using
 - Anonymous: We use rev.com. For those who use Teams-please check because it looked to us that anyone present in the meeting could download the transcript.
- 163.** If someone won't permit the investigator to record the asking of the questions do we need a stenographer so we can create a transcript?
- Answered live.
- 164.** Would it be an issue if anyone on the meeting could access the transcript because they will get the recording regardless now correct?
- Answered live.
- 165.** Since the training is necessarily institution-specific (contact information, institution reporting processes, policies), would it be advisable to develop some sort of in-house training (can it be just a video or does it need to have some kind of knowledge check) and put it on some platform, like Vector Solutions an ASCA colleague suggested, so that completion can be tracked and/or enforced?
- Answered live.
- 166.** Could you speak to some of the additional reporting requirements for employees that are made aware of a potential TIX complaint or a pregnant student, providing the TIX Coordinator information, how to report, etc. Is there a way that we could include this

information in training as meeting the requirement or is this needed as part of the conversation, regardless of it being placed in training or on our website? This is a huge lift and I am uncertain how we would be able to confirm that an employee actually met their obligation to notify in these cases.

➤ Answered live.

167. How would mandated recordings, and providing them to the parties, comport with privacy and confidentiality requirements? In CA, we also have to have consent of the recorded party, so they can decline. What do we do then?

➤ Answered live.

168. Regarding gender identity, do Christian colleges still have ability to assign housing by biological sex?

➤ Answered live.

169. Can private school religious exemptions then be extended to punish or discriminate against students who become pregnant?

➤ Answered live.