



5/18/2020 Ten Things to Know About the New Title IX Regulations Webinar Follow-Up Questions and Answers

1. Is the Title IX Coordinator still expected to oversee the prevention work? **The regs do not mention prevention as a Coordinator function, but yes, this is still an appropriate role for the TIXC.**
2. Can a Title IX Coordinator's supervisor be a decision-maker? **Yes, if trained. But it may depend on their other responsibilities and ability to act independently.**
3. Can a Title IX Coordinator serve as the "clerk" in the hearing process - managing documents, ensuring the recording, getting water for participants, ushering witnesses in and out? **Yes.**
4. When will ATIXA have their model policy updated? **Mid-to-late June. ATIXA just released an Interim Model Policy Guidance to our R³ site. You can view that here: <https://atixa.org/r3/#interim>**
5. It seems that we need lawyers to serve as decision-makers and possibly hearing officers, is that correct? **You need WELL-trained people! Smart and experienced is best for complex or high-level cases. Outsourcing is OK, but vet them to firms who know education and T9, like ours.**
6. The question re: allowing sexual penetration cases to use alternative resolutions - does this go against or conflict with anything within VAWA's encouragement to not use informal resolutions for sexual assault and/or DV cases? **I don't recall anything in VAWA to that effect.**
7. Does ATIXA still permit the use of the word "interim"? Are Interim measures now referred to as supportive measure? **Use the OCR term supportive measures.**
8. Under the new regulations, can you speak to the role of the Title IX Coordinator also serving as the director of civil rights investigations? Any conflicts (actual or perceived)? Thank you. **Generally, this should be acceptable. Just avoid specific conflicts.**
9. Wouldn't a TIXC be considered an "Official of Authority?" **Yes.**
10. What if respondent refuses to testify, but gave a recorded statement to investigators in which he "confesses?" Can investigators get the recorded statement into evidence? **Not if he refuses to testify.**
11. Can we require parties to attend meetings with the investigator? **Possibly, it's unclear. I would not tend to require it, based on the tone of the regs.**
12. Can you please repost the GAS model? **The GAS document is available on the Regs Blog here: <https://atixa.org/regulations-blog/>**
13. Some colleges currently treat minors enrolled at the college setting as adults and would not notify their parent if a complaint was filed. What now? Required to notify parent? Similarly, if a conserved student want to start the formal process, but their guardian says no... what then? **There is no obligation to notify parents, only to accept notice from them if they want to provide it. If a guardian says no, offer supportive measures only, but not a formal response.**
14. What if the respondent was dismissed for another violation of the policy? (Perhaps they were dismissed for physical assault.) **Once the respondent is no longer a student, you are in the provisions that permit voluntary dismissal, I believe.**
15. We have a law school; do you think it would be a good or bad idea to utilize law students as advisors in a new process? **It could be OK but playing lawyer could also be a disaster. Sorry to hedge...They**

would need to be trained in your process, which is different than the purely legal process Law students are being trained in, so not necessarily just because they are law students.

16. As an FYI, Maryland state law prohibits Maryland colleges from having an informal resolution for sexual assault cases, so we have to deal with that. **Yes, it seems OCR would want you to try to comply with state law if possible, and informal resolutions are allowed by the regs, but not required.**
17. I'm sensing a lot of interest from our Office of General Counsel to be more involved in formal grievance processes than they have been (historically). I've seen several comments on the Listserv advising against that practice due to "conflict." Can someone briefly speak to this? **Advising, rather than controlling, directing, or re-writing. I would not have them provide training.**
18. If we have screenshots of or are allowed to view text messages on a party's phone, do we still need each involved individual to be cross-examined regarding their texts in order to use it for a decision? **Yes.**
19. Can we not address ANY other policy violations? What if it is related? For example, could we not charge for illegal possession of weapons if a respondent brandished an illegal firearm in a dating violence situation but didn't actually use it physically in the violence (just brandished it to incite fear)? **Yes, you can address collateral misconduct, unless doing so for the purpose of interfering with any right or privilege secured by Title IX or this part.**
20. Can schools create a separate employee policy stating that all employees must report any Title IX or gender-based violence to the Title IX Coordinator? **Yes, but why would you?** Or will this conflict with the new employee with authority piece from the regulations? **The new regs set a floor. Why shoot that low? See below.** Will we still have CSAs? **Yes.** We're curious about how to move forward with Resident Assistants. **I'm having PTSD from my 2011-2014 flashbacks where so many in the field seemed to pay attention to OCR and no other sources of law. That was 850 lawsuits ago. Please don't make the same mistakes again. I don't want to be here in 2030 with you, talking about the 1,000 lawsuits since 2020 that we could have avoided.**
 - a. **If your current approach is working, and OCR does not require a change, don't change.**
 - b. **OCR doesn't give a crap about your legal liability. It's not their job. They are ruling on T9 only, but you are responsible for a much broader range of legal liability issues.**
 - c. **Thus, it may seem like you can now remove RAs (or coaches, or faculty, etc.) from the Official with Authority (old RE) list, but before you do, please ask your T9 team and your general counsel this simple question: Does a jury expect a school/college to know and act upon what its RAs (coaches, faculty, etc.) know? If the answer is yes in your jurisdiction (and all the jury data presented at the last ATIXA conference by the jury research expert featured session points to an absolute, resounding, yes), then you need to define your practice beyond the floor OCR is setting, and realize that negligence-based duties must also be considered, as well as state law, not just T9.**
21. Should the university choose to move forward on a sexual misconduct complaint under its own code and policies that would not fall under Title IX now (e.g. occurred off-campus outside our control) what level of investigation and process is due? Are we back to pre-2011 days? **Not clear. If VAWA Section 304 applies, then we must comply with that set of requirements. If not, then maybe something like post-2011 if you're private or not subject to full due process requirements by courts? We're not sure whether it is best to track non T9 sexual misconduct through the Part 106.45 compliant process, or some sort of alternate track.**
22. What if you cannot or are unable to form a coalition? What is the minimum staffing you'll need to cover these regulations and new process? Speaking for a smaller school. **Bare minimum is 5, but we'd**

never recommend anything this lean. One Coordinator/Investigator, one hearing officer, two advisors (if there are no more than two parties in a case), one appeal officer.

- 23.** I work for a system office over our state's community colleges. Student may appeal complaints to our office once exhausting the college's grievance process. Could members of our system office staff who are not directly involved in reviewing complaints be part of an investigator pool or consortium? **Yes.**
- 24.** Can the decision-maker (Hearing Officer) be a member of the University's Title IX Office? **Yes, as long as they can act independently and free of conflicts.**
- 25.** That was my question, Joe, should our Deputy Title IX Coordinators who also serve other roles (i.e. Director of Student Conduct) lose their Deputy Title IX Coordinator title so that they are able to serve as decision-makers... or is that not necessary? **It's unclear. If they can step out of the deputy role for the hearing, I don't see a need to lose the title. Again, the key is being able to act independently and free of conflicts. I'd prefer more separation but know for some recipients, that will not be possible.**
- 26.** I understand that ATIXA will provide guidance that will help districts update their policy/procedure to include the new Title IX regs in Sept. However, the changes with the new regs are due in August. Any suggestions about where we would find sample p/p's with new regs? FYI: I work in K-12. **We will look to have this out in late June, early July for K-12. We're cranking!**
- 27.** Will ATIXA be providing a standardized language notification for the groups we are required to give notice to under 106.8 (a)? **We will incorporate it into our policy templates, yes.**
- 28.** How does "due process before restricting a respondent's educational access" translate for employees? **It doesn't under the regs (but pay attention to whether the employee has contractual/property rights by state law)**
- 29.** When ED uses the word "parties" is it inclusive of witnesses? **No.** Do witnesses get advisors of choice at investigation? **No.** at hearing? **No.** Language says, "provide to a party...". **Parties are the complainant, and the respondent (maybe the recipient, as well?)**
- 30.** Have we received a definition of "sexual assault"? Is it the Clery handbook definition? **Yes.**
- 31.** For supportive measures, it states TIXC is responsible for coordinating. Can that be delegated, **Yes.** and can it be delegated to the victim advocate? **That would not be my choice, as they must be equitable.** Then we also need to provide a separate person to provide supportive measures to respondents. **I suppose, again not a great idea. This is a better role for a case manager.**
- 32.** How do you believe the new federal regulations will impact states with required sexual harassment training for employees? **They won't change the state mandate but may impact on the definition of sexual harassment applicable. This is a question too deep for a webinar. Call us for a consult.**
- 33.** "recipients can and will....be held accountable for responding to sexual harassment in ways designed to ensure complainants' equal access to education without depriving any party of educational access without due process or fundamental fairness." p.74 - How can there ALWAYS be equal access without deprivation? Any suggestions on how to navigate this? **You get as close as you can come.**
- 34.** Are employees subject to the same hearing expectations as students? What about employee on employee cases? **Yes, and yes.**
- 35.** We can't wait until the hearing begins to provide the report and the evidence to the hearing panel. How are we supposed to "redact" information that they have already seen if a party or witness backs out last minute? I know they can just not include it in making their decision, but we can't turn back time and have them unsee it. Any recommendations? **Nope, you correctly assess the problem. Just get it on the record to disregard the evidence.**
- 36.** Can we still assist parties with "informal" processes absent a formal complaint? **If you dismiss under T9, then yes.** For example, if a student wants the responding party to know what they did was 'wrong' and wants an apology, can we assist with that without requiring a formal complaint to be filed?

37. Would testimony be admissible if a person cannot participate due to death? (We had a key witness die mid-case.) **Inadmissible.**
38. I am thinking of a situation where we had a reporting party provided a witness who the reporting party believed would be an essential witness for her. The witnesses statement favored the respondent. The reporting party reviewed the report. Witness heard from a third party that reporting party was upset with witness and witness no longer wanted to participate in hearing. We are no longer able to require witness participation. So, in this case the Univ would know about exculpatory evidence, can't force the witness to participate, can no longer use witnesses' statement, and have no evidence that reporting party pressured witness not to participate. What should we do? (When this happened prior to regs we required the witness to participate). **Ask the complainant if they pressured the witness and then accept that there is no way to consider this evidence. Sorry.**
39. If an investigator is questioned in cross-examination about a party's statement, should we not answer those questions since we can testify to their statement? Does that leave us to only answer questions regarding any summary/analysis and credibility assessment? **You can testify to what you know, assuming the witness/party about who you are testifying will also be testifying and subject to cross.**
40. Did you say that Deputy TIXCs also cannot be decision makers (hearing panelist, appeals, etc.)? **They can, as long as they are not in the deputy role at the time. Take off one hat, wear another.**
41. I'm confused by some of the terminology. Is the Hearing Chair the same person as the Decision-Maker, or are those separate roles? **Up to you. If you have only one person, they are both. If you have a panel, make one a voting chair.**
42. If the decision-maker has to decide sanctions as well, how do you suggest we deal with tenure of faculty, which is typically not a decision made by a hearing panel, but rather through a lengthy review process with layers of faculty involvement? **We suggest you make non-binding sanction recommendations and write a very clear credibility section of the determination letter.**
43. Will the chair of the hearing panel also be a decision-maker and partake in the responsibility and sanction findings **Yes, voting chair implied in regs.** or only the determined hearing panel members? (x amount of hearing panel members and 1 chair vs. all being panel members).
44. If a group of colleges form a consortium to outsource a decision-maker, could juries also see that decision-maker as possibly biased for the colleges that have hired the decision-maker? **Not really.** Is there a way to mitigate that? **Choose a decision-maker whose record is balanced, and whose integrity is beyond reproach. Like us!**
45. Can the Title IX Coordinator have designees as they did in the past? **Yes.** Some of the requirements around providing interim measures. It specifically directs certain roles to a Title IX coordinator and does not use the designee language. **TIXCs can delegate. You can even have more than one TIXC.**
46. Are we able to "compel" a witness (not complainant or respondent) to attend an interview or hearing? **We don't recommend it anymore.** In the past, we have told witnesses that they had to attend, but didn't have to answer questions. If they didn't show up for the interview or hearing, an incident report was sent to the conduct office and they could be referred for failure to comply. We can't compel them to provide information, but we wanted them to at least attend the interview to hear about the need for them to participate and to attend the hearing to be asked the questions, even if they refuse to answer. Can we do this with witnesses? **Maybe, but we don't think the regs favor it, reading between the lines.**
47. Can Title IX Coordinators be the Directors of Student Conduct and or Chairs of the BIT/CARE Teams? **No, we don't think this is unconflicted.** What about Deputy TIXCs? **Yes.**
48. Just to clarify-we have to offer a hearing option. But if a respondent accepts responsibility for the conduct, we don't have to have a hearing. Please correct me if I am wrong. **Right, if you can resolve**

findings and sanctions to the satisfaction of the parties, you can resolve informally (but doesn't function as a waiver of the hearing).

49. If a Complainant wants to dismiss a complaint, but the respondent demands a conclusion to the investigation because they want an official finding of Not responsible, will the investigation continue? **That's discretionary in the regs. TIXC gets to decide whether to proceed, but if the complainant won't participate, why would you continue?**
50. Given that advisers are now mandated. How should we address advisers who may be using schedule changes to continue to push processes from going forward? **Give them a week or so delay but refuse to allow more unless all parties consent.**
51. Wish another word can be used than confidentiality due to that we can't ensure it. **OCR means privacy when they say confidentiality, that much is clear.**
52. Can the recipient give a deadline on when parties should indicate if they will not be attending a live hearing? **Yes, you can, but it's not really enforceable, just maybe procedurally helpful.**
53. How does online activity fit into jurisdiction given there's no way to know where either party was when it was sent/posted. **If it uses your equipment or network, or if it causes a substantial disruption or discriminatory effect within the program, you can address it or its effects.**
54. Would it be available to develop a template for the written formal complaint? **We will be offering one in our policy models.**
55. If the respondent decides not to participate, do we still have to allow their representative to cross-examine the complainant? **Yes. They must, it's not just allowed. Otherwise, you can't consider the complainant's evidence.**
56. If you have a youth program, like a summer camp or 4-H, which has primary or secondary school students, any ideas on how the notice to parents of policy would apply there? **If you provide substantial assistance, notify the parents through the camp. They will have contact information.**
57. If one party has a lawyer as their advisor; does the college need to ensure both parties have equal representation? **No. There really is no such thing.** If one of the parties cannot afford legal representation does the college need to supply legal representation? **No, but you will face pressure to do so.** Mainly my question is on ensuring equivalent advising/support for each party and any potential financial planning that is needed? **If you can afford it, we provide outsourced advising that is very equitable.**
58. Can a College's risk management director and/or college attorney review the investigative report before the parties? **Yes, we think so, but with a light touch.**
59. If a student submits a report that could fall under the jurisdiction of Title IX, but the complainant requests it be investigated via the conduct system, does the TIXC maintain authority to make the decision as to which process will investigate the case? **No, Part 106.45 applies if 106.30 applies.**
60. Higher Ed union environment: would it be advisable to ask the union reps to act in the advisor roles for employees who are either complainants or respondents? Assuming they have sufficient training, of course. **Maybe, sometimes parties will not want that, or want someone else in addition. We recommend you facilitate that.**
61. What do you perceive to be the average amount of time for an investigation now? **20-30 hours.**
62. What are your thoughts about a policy that does not allow advisors to speak at all during the investigation? In my experience, students are often traumatized and/or do not understand the process. PLEASE advise publicly. **You have to at least let them take breaks to consult with their advisee. I tend to be pretty flexible on this.**
63. Who should hear an appeal of the panel's decision, particularly for those of us considering outsourcing the decision maker role? **Outsource the appeal? Or find someone unconflicted, of good judgment.**

64. Can an institution typically use a three-person panel, but add the option as an alternate process to have a 1-person panel as needed? **Yes, that would be permissible, as long as equitable.**
65. The document says that we are not required to train advisors. There is no way that this would be acceptable - lack of training would not be helpful to anyone. Why didn't US Dept of Ed require training for advisors? **Ask the OPEN Center, we could only guess they didn't want to add burden to recipients.** When will there be training available? **We are working on it for fall.**
66. Weaponizing the policy may also be threats to file a report if another person doesn't do what the person making the threat wants. How would you recommend addressing that situation? **That's retaliation.**
67. How do you train someone to mediate sexual assault? That seems risky. **We agree, and do not recommend. This is rarely a conflict to manage to a compromise**
68. You all keep emphasizing 'training' could you please be specific what good 'training' looks like? **Sure. Everything we offer, here: <https://atixa.org/events/training-certification/>** Simply being a 'Student Affairs' or faculty member does not equip folks to conduct these processes. **Agreed.** What type of training do you suggest for those who will be responsible for ADR processes? **We're not willing to recommend such processes or training at this time. Just because OCR says you can do something doesn't mean that you should.** The concern is the presence of bias / lack of neutrality / lack of formal training in regard to RJ and or ADR methods. **Us, too.** Presently, my experience is that those who are overseeing these processes have not received the necessary training. You all keep emphasizing 'training' could you please be specific what good 'training' looks like? Simply being a 'Student Affairs' or faculty member does not equip folks to conduct these processes. **Let's get good at the basic processes first before we move into deeper ADR. There's time on this. August 14th is not a required ADR deadline. There isn't one. Triage and prioritize.**
69. How do you handle it if a respondent takes the 5th while a criminal prosecution is pending? Can you stay the Title IX hearing? **Yes.** If not, can you draw an inference from the fact that the person took the 5th? **No.** Are you running into a constitutional problem if you force the person to proceed to hearing in this situation? **No, they can choose not to attend, or not to answer. You must proceed according to the regs unless the respondent withdraws.**
70. What about rebuttal witnesses? **Witnesses are witnesses and should be handled like any other witness by your protocol.**