NPRiMer: Preparing for the 2023 Title IX Regulations
Training & Certification Course for Higher Education
Any advice or opinion provided during this webinar, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.
CONTENT ADVISORY

The content and discussion in this course will necessarily engage with sex- and gender-based harassment, discrimination, and violence and associated sensitive topics that can evoke strong emotional responses.

ATIXA faculty members may offer examples that emulate the language and vocabulary that Title IX practitioners may encounter in their roles including slang, profanity, and other graphic or offensive language.
AGENDA

1. 2022 NPRM
2. Scope & Applicability
3. Reporting & Response
4. Intake & Evaluation
5. Grievance Procedures
6. Pregnancy & Related Conditions
7. What’s Next?
8. Questions?
LEARNING OUTCOMES

After completing this course, participants will be able to:

- Explain the NPRM rulemaking process and anticipated timeline for next steps
- Identify specific policy and process changes anticipated for compliance with the new regulations
- Evaluate current staffing and team structure and determine recommended changes
- Develop a training plan for all stakeholder groups
- Assess current pregnancy and related conditions services and support and recommend necessary changes
- Distinguish between sex discrimination and sex-based harassment
2022 NPRM
The Department of Education (ED) released a 701-page Notice of Proposed Rulemaking (NPRM) on June 23, 2022 – the 50th Anniversary of Title IX

Published in the Federal Register on July 12
- 60-day comment period ran until September 12
- ED received over 210,000 comments
- ED must now respond to all comments as part of the rulemaking process

Final version likely will differ from NPRM
- Less deviation expected than in the 2018 NPRM versus 2020 Regulations
NPRM, GENERALLY

- Broader than the 2020 Regulations
  - Includes the behavior covered by the 2020 Regulations
  - Expands to provide procedures to respond to other forms of sex discrimination
- Elements of both Obama-era and Trump-era guidance/regulations
- Adds in greater flexibility
- Return to Stop, Prevent, Remedy,
THE FINAL RULE

- ED expects to release a Final Rule in 2023
  - 2020 Regulations took approximately 18 months from NPRM to release
    - Anticipated implementation by August 2023
  - 2020 Regulations had approximately 100-day implementation period
SCOPE & APPLICABILITY
SCOPE (§ 106.10)

- NPRM is broader than the 2020 Regulations
- Discrimination on the basis of sex includes
  - Sex stereotypes, sex characteristics, pregnancy or related conditions, sexual orientation, and gender identity
- Sex discrimination includes **sex-based harassment**
  - Replaces “sexual harassment” and includes
    - Quid pro quo, Hostile Environment, Sexual Assault, Dating Violence, Domestic Violence, and Stalking
- ED has announced a proposed rule regarding athletic eligibility based on gender may come later

NPRM pg. 666
HOSTILE ENVIRONMENT

- Hostile Environment Harassment (pg. 657-58)
  - Unwelcome sex-based conduct that is
  - Sufficiently severe OR pervasive, that, based on the totality of the circumstances AND
  - Evaluated subjectively and objectively
  - Denies or limits a person’s ability to participate in or benefit from the recipient’s education program or activity

§ 106.2
SPOO VS. SORP

**SPOO (2020 Regulations)**

Severe **AND** Pervasive **AND** Objectively Offensive

**SORP (2022 NPRM)**

Sufficiently Severe **OR** Pervasive **AND** Evaluated Objectively **AND** Subjectively
HOSTILE ENVIRONMENT (CONT.)

- OCR’s proposed definition also provides factors for evaluating whether a hostile environment exists including:
  - Complainant’s ability to access the education program or activity
  - The type, frequency, and duration of the conduct
  - The parties’ ages, roles, and previous interaction(s)
  - The location and context of the conduct
  - The control the Recipient has over the Respondent
- Potential intersection with First Amendment

§ 106.2
APPLICABILITY

- **Education program or activity**
  - Broadly interpreted to include:
    - Academic, extracurricular, and athletic programs
    - Activities on school network, bus, class, or facilities

- **De Minimis Harm**
  - Policy or practice preventing participation in a program or activity consistent with gender identity “subjects a person to more than de minimis harm on the basis of sex”

§ 106.31; NPRM pg. 668
APPLICABILITY (CONT.)

- **Jurisdiction** includes:
  - Conduct subject to Recipient’s disciplinary authority,
  - Conduct in a building owned or controlled by a student organization officially recognized by a postsecondary institution

- Removes geographical restrictions
  - Conduct outside the United States may need to be addressed under Title IX
    - Downstream (in-program) effects
    - Charging decisions may become more complicated

§ 106.11; NPRM pg. 666
§ 106.31; NPRM pg. 668
IF THE CONDUCT...

Occurred in your program or activity

AND/OR

Is subject to your disciplinary authority

AND/OR

Has led to a hostile environment within your program or activity

AND would meet Title IX, if proven...

YOU LIKELY HAVE JURISDICTION
OTHER POLICIES & LAWS

- The proposed regulations will likely overlap with existing policies and laws
  - Title VII
  - Fair Housing Act
  - Violence Against Women Act Amendments to the Clery Act
  - State statutory definitions of sexual harassment applicable to students and/or employees
  - State or jurisdiction requirements for sexual harassment investigations and/or reporting requirements

- Work with your legal counsel to figure out the best way to ensure all institutional policies co-exist cohesively

Decision Point: What other laws and policies does your institution need to consider?
REPORTING & RESPONSE REQUIREMENTS

- Reporting & Response Requirements
- Reporting Categories
- Exceptions
- Additional Requirements
## REPORTING & RESPONSE TO DISCLOSURES REQUIREMENTS (§ 106.44)

<table>
<thead>
<tr>
<th>EMPLOYEE ROLE</th>
<th>DISCLOSURE FROM</th>
<th>NOTIFY TITLE IX COORDINATOR</th>
<th>PROVIDE TIXC INFO</th>
</tr>
</thead>
<tbody>
<tr>
<td>Confidential Employees</td>
<td>• Student</td>
<td>NO</td>
<td>YES</td>
</tr>
<tr>
<td>• Employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees with the authority to institute corrective measures</td>
<td>• Student</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>• Employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Employees with responsibility for administrative leadership, teaching, and advising</td>
<td>• Student</td>
<td>YES</td>
<td>YES</td>
</tr>
<tr>
<td>• Employee</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>All other employees who are not confidential employees</td>
<td>• Student</td>
<td></td>
<td>CHOOSE ONE OR THE OTHER</td>
</tr>
<tr>
<td>• Employee</td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

Confidential Employees: Employee NO YES
Employees with the authority to institute corrective measures: Employee YES YES
Employees with responsibility for administrative leadership, teaching, and advising: Employee CHOOSE ONE OR THE OTHER
All other employees who are not confidential employees: CHOOSE ONE OR THE OTHER

© 2022 Association of Title IX Administrators

NPRM pg. 672-75
REPORTING CATEGORIES

- Four Types of Employee Roles (pg. 674-75)
  - Does not replace Title VII, Clery Act, or state law reporting obligations

- **Confidential Employees** (pg. 651)
  - Can be designated by the Recipient
  - Institution must notify all employees and students of the identity of confidential employees
  - Confidential employees must explain confidential status and provide Title IX Coordinator (TIXC) information

§ 106.44

Decision Point:
Who will be designated as a confidential employee?
Designate all non-confidential employees mandated reporters.

Require all employees, regardless of confidential status, to provide contact information for the Title IX Coordinator to any person making a disclosure of conduct that may implicated Title IX.
REPORTING EXCEPTIONS

- No self-reporting requirement for employee Complainants
- Postsecondary public awareness events (§ 106.44(e))
  - Institution not obligated to respond to information provided during public event, including on online platforms
    - Unless information reveals an immediate and serious threat to the health or safety of students or other persons in the postsecondary institution’s community, institution must respond
- Must incorporate information/trends revealed at public awareness events into prevention education

§ 106.44; NPRM pg. 674-675
TRAINING REQUIREMENTS (§ 106.8)

- Various training requirements for:
  - All employees
  - Investigators, Decision-makers, and others responsible for implementing grievance procedures or modifying/terminating supportive measures
  - Informal Resolution Facilitators
  - Title IX Coordinator
  - No training requirement for students under NPRM

- All training materials must be made available on institution’s website

Decision Point: Training frequency and modalities

NPRM pg. 662-665
Provide process, policy, and reporting training on a recurring basis.

Train Title IX team members on supportive measures.

Offer training to Recipient-provided Advisors, if any.

Offer prevention education for employees and students.

Ensure training and prevention education programs meet all federal and state audience and content requirements.
ADDITIONAL REQUIREMENTS (§ 106.44)

- Monitoring
  - TIXC must monitor education program or activity for barriers to reporting information and take reasonable steps to address such barriers
    - Identity-based barriers
    - Perceived delays in responding to reports
    - Infrequent communication/updates
    - Fears of retaliation
    - Collateral conduct charges/lack of amnesty policies
    - Limited supportive measures offered
    - Lack of awareness of Title IX Office/TIXC
    - Perceived inadequate response

NPRM pg. 672
GROUP BRAINSTORM

How can you collect and analyze barrier information?
INTAKE & EVALUATION

- Notice & Complaints
- Intake & Initial Evaluation
- Dismissals
- Supportive Measures
- Removals
- Informal Resolution
NOTICE & COMPLAINTS

- “Complaint” replaces “Formal Complaint”

- Notice (and complaints) can be verbal or written
  - Complaints do not have to be submitted to Title IX Coordinator/Title IX Team Member

- Complaints can be made by a Complainant or the TIXC
  - If a parent, guardian, or other authorized legal representation has the authority to act on behalf of a person, then that person can also file a complaint

- For allegations of sex discrimination, other than sex-based harassment, any student, employee, or third party may make a complaint

§ 106.2; NPRM pg. 651
§ 106.6; NPRM pg. 665
§ 106.45; NPRM pg. 682
INTAKE & INITIAL EVALUATION

Upon notification of sex discrimination allegations, TIXC must:

- Treat parties equitably
- Notify Complainant of procedures and, in the event of a complaint, prepare to notify the Respondent
- Offer and coordinate supportive measures
- Initiate grievance procedures or informal resolution as requested

Initial Evaluation

Provides TIXC with greater latitude to collect information before formal grievance process begins

§ 106.44(f); NPRM pg. 675-76
DISMISSALS (§ 106.45)

All dismissals are discretionary, but can occur when:

- The Respondent is unable to be identified after reasonable steps to do so
- The Respondent is no longer participating in the educational program or employed by the Recipient
- The Complainant withdraws all or a portion of the complaint and any remaining conduct ≠ discrimination under Title IX
- It is determined that the conduct, even if proven, would ≠ discrimination under Title IX
  - Prior to dismissing the complaint, the Recipient must take reasonable efforts to clarify the allegations with Complainant

NPRM pg. 685-86
DISMISSEALS (§ 106.45) (CONT.)

Upon dismissing a complaint:

- A Recipient must notify the Complainant of the basis for the dismissal
- Supportive measures should still be offered to the Complainant
- Must notify the Respondent of the dismissal and offer supportive measures if the Respondent has already been notified of the complaint
- All parties have a right to appeal the dismissal
  - What’s Unclear?
    - Whether an unaware Respondent has this right

Decision Point: Who will hear dismissal appeals?

NPRM pg. 686-87
Encourage use of a centralized reporting process to ensure that information gets to those who are trained to respond in a timely and efficient manner.

Provide written notice of any determination, including a notice of dismissal.
SUPPORTIVE MEASURES (§ 106.44)

- Should restore or preserve the party’s access
  - May not impose burdensome measures for punitive or disciplinary reasons, but permits burdening respondent for other reasons during the grievance process
- Supportive measures may be continued, modified, or terminated at the end of the grievance process or IR
- Must provide an opportunity to seek modification or reversal of supportive measure (or lack thereof)
  - An impartial employee, not involved with the initial decision, must have authority to modify or reverse
REMOVALS (§ 106.44)

- **Administrative Leave**
  - Institutions may place *employee* Respondents on administrative leave during grievance process.

- **Emergency Removal**
  - Institutions may remove *student* Respondents, on an emergency basis, if an individualized safety and risk analysis determines:
    - An immediate and serious threat exists and arises from the allegations.
  - Removes the “physical” threat requirement from the 2020 Regulations.

**Decision Point:** Who will conduct the safety and risk analysis?

NPRM pg. 679
Following an emergency removal

- A Recipient must provide the Respondent notice and an opportunity to challenge the removal

What’s Unclear?

- Whether supportive measures that burden a student Respondent constitute a “partial removal” that can only be implemented after an individualize safety and risk analysis

- Whether a “partial removal” can be implemented as a supportive measure to preserve Complainant’s access without an individualized safety and risk analysis

Decision Point: Who will hear Emergency Removal challenges?

NPRM pg. 679
**INFORMAL RESOLUTION (§ 106.44)**

- Informal Resolution Requirements:
  - Voluntary by parties
  - TIXC must agree
  - Provide notice to parties in advance (detailed requirements)
  - Facilitator may not be Investigator or Decision-maker
  - Not permitted in complaints with a student Complainant and an employee Respondent

- Informal Resolution can occur **without** a formal complaint
  - Can look like a supportive measures only response

- Information and records from the Informal Resolution cannot be used in the grievance process if the Informal Resolution is unsuccessful

**Decision Point:** Who will facilitate Informal Resolutions?

NPRM pg. 680-82
BEST PRACTICES

Implement informal resolution methods to allow for an alternative to the formal grievance process.

Consider offering multiple types of informal resolution that are consistent with the institutional culture and needs and are supported by necessary training and resources.
GRIEVANCE PROCEDURES

- Investigating
- Decision-making
- Appeals
- Advisors
- Evidence
## WHICH GRIEVANCE PROCEDURES TO USE?

<table>
<thead>
<tr>
<th></th>
<th>§ 106.45</th>
<th>§ 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>K-12</strong></td>
<td>Everything</td>
<td>N/A</td>
</tr>
</tbody>
</table>
| **Higher**     | Sex-based harassment complaints that are **NOT** sex-based harassment | All sex-based harassment complaints involving a student Complainant or Respondent, including:  
- Student-on-student  
- Student-on-employee  
- Employee-on-student |
| **Education**  | Sex-based harassment complaints that do not involve a student               |                                               |

NPRM pg. 682-697
§ 106.45 VS. § 106.46

- Section 106.45 is a bare-bones civil rights process
  - Section 106.46 is a more robust process that incorporates all of the elements of § 106.45 and retains many features from the 2020 regulations
- Two separate policies are permitted, but not required

Decision Point:
How many policies and procedures will your institution adopt?

NPRM pg. 682-697
Offer a streamlined, § 106.46-compliant, process to provide for a consistent response to stop, prevent, and remedy all forms of discrimination, including:

- Written Notice
- Right to an Advisor of choice
- Comprehensive, written investigation report
- Opportunity for report review and response
- Separation between investigator and decision-maker
- Cross examination
- Written determination
- One level of appeal
GRIEVANCE PROCEDURES

- Section 106.45 outlines a list of requirements for written grievance procedures that generally apply to both § 106.45 and § 106.46.
- Prohibits conflicts of interest or bias
- Allows for single-investigator model
  - No requirement for a separate Decision-maker
  - Permissible for the Investigator to serve as the Decision-maker
  - Permissible for the TIXC to serve as the Investigator (and/or DM)

Decision Point: Who will serve as an investigator? As Decision-maker?

NPRM pg. 682-90
Provide a process that includes a separation between investigation and decision-making responsibilities.
GRIEVANCE PROCEDURES (CONT.)

- Reasonably prompt timeframe for major process stages
  - Evaluation, Investigation, Determination, Appeal
- Reasonable steps to protect privacy without restricting a party’s ability to obtain and present evidence
  - Section 106.46 specifies that expert witnesses may be allowed if the right is offered to all parties
- Objective evaluation of permissible relevant evidence
- Allows for additional provisions, so long as they are applied equally to the parties

Decision Point:
Will expert witnesses be permitted? Will you add other provisions?

NPRM pg. 682-690
### GRIEVANCE PROCEDURES (CONT.)

- Notice must be provided to parties at the beginning of an investigation

<table>
<thead>
<tr>
<th>§ 106.45</th>
<th>§ 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td>• Notice does not have to be written</td>
<td>• Written notice required</td>
</tr>
<tr>
<td>• No waiting period between notice and interview</td>
<td>• Sufficient time to prepare before an interview required</td>
</tr>
</tbody>
</table>

**Decision Point:**
Do you have policies prohibiting false statements? If not, will you add them?

- Presumption of non-responsibility
- Prohibition against false statements, if any

NPRM pg. 682-92
Complaints can be consolidated in some situations

The burden to conduct an investigation and gather sufficient information to make a determination is on the Recipient

For sex-based harassment complaints only, the grievance procedures must:
- Describe the range of supportive measures available
- Describe the range of possible disciplinary sanctions and remedies that could be imposed

Decision Point: What are the range of sanctions and remedies for students? For Employees?

Decision Point: What supportive measures are available?
INVESTIGATING

- Adequate, reliable, and impartial investigations of complaints
- Equal opportunity for parties to present inculpatory and exculpatory evidence
- Investigators must collect evidence and determine relevance

<table>
<thead>
<tr>
<th>§ 106.45</th>
<th>§ 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td>- Written or verbal description of relevant evidence</td>
<td>- Equitable access to all relevant evidence or to an investigation report that summarizes the evidence</td>
</tr>
<tr>
<td>- Reasonable opportunity for parties to respond</td>
<td>- Reasonable opportunity to review and respond</td>
</tr>
<tr>
<td></td>
<td>- Review must take place before the hearing, if any</td>
</tr>
</tbody>
</table>

NPRM pg. 682-90
Allow parties to offer expert witnesses.

Provide a comprehensive investigation report to all parties and their Advisors.

Provide all relevant evidence to parties prior to the completion of the investigation report and offer an opportunity to respond to the evidence.
## DECISION-MAKING

<table>
<thead>
<tr>
<th></th>
<th>§ 106.45</th>
<th>§ 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Second 10-day period</strong></td>
<td>Not required</td>
<td>Not required</td>
</tr>
<tr>
<td><strong>Credibility Assessment</strong></td>
<td>Decision-maker is required to assess credibility</td>
<td>Decision-maker(s) required to assess credibility through live questioning during a live hearing or through individual meetings</td>
</tr>
<tr>
<td></td>
<td>Does not have to occur during a hearing or live questioning</td>
<td>Permissible</td>
</tr>
<tr>
<td><strong>Live Hearing</strong></td>
<td>Not required</td>
<td>Required in some jurisdictions</td>
</tr>
</tbody>
</table>

NPRM pg. 682-90
## DECISION-MAKING (CONT.)

<table>
<thead>
<tr>
<th></th>
<th>§ 106.45</th>
<th>§ 106.46</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Cross-examination</strong></td>
<td>• Not required</td>
<td>• Required</td>
</tr>
<tr>
<td></td>
<td></td>
<td>• Can occur through the Decision-maker or</td>
</tr>
<tr>
<td></td>
<td></td>
<td>through party Advisors (during a live hearing)</td>
</tr>
<tr>
<td><strong>Written Outcome</strong></td>
<td>• Permitted but not required</td>
<td>• Required</td>
</tr>
<tr>
<td><strong>Appeal</strong></td>
<td>• Permitted but not required</td>
<td>• Required</td>
</tr>
<tr>
<td></td>
<td>• May be otherwise required</td>
<td></td>
</tr>
</tbody>
</table>
INDIVIDUAL MEETINGS

- Under § 106.46 if a Recipient chooses to conduct individual meetings, Decision-makers must be permitted to pose their own relevant questions and relevant questions from the parties
  - Parties may provide questions directly to Decision-maker or, if separate, to the Investigator

- What’s Unclear?
  - If an institution utilizes the same administrator for investigating and decision-making, can cross-examination take place during the investigation?
  - Does cross-examination have to occur after the investigation has concluded?

§ 106.46(f); NPRM pg. 694
LIVE HEARINGS

- Under § 106.46 if a Recipient conducts live hearings:
  - Decision-makers must be allowed to pose their own relevant questions and relevant questions from the parties, **OR**
  - Each party’s Advisor must be allowed to ask **any party** and any witnesses all relevant questions
- Can include questions going to credibility
- Parties can never ask questions directly

Decision Point: Will you offer a live hearing?

§ 106.46(f); NPRM pg. 694
SUPPRESSION RULE

- Section 106.46 includes a “suppression rule”
  - If a party does not respond to questions related to their credibility, the Decision-maker(s) must not rely on any statement of that party that supports that party’s position
  - Decision-maker(s) must not draw an inference on whether the harassment occurred based solely on a refusal to respond to questions about credibility

§ 106.46(f)(4), NPRM pg. 695
OUTCOME DETERMINATION

- After making a determination as to whether the sex-based harassment occurred, the Recipient must provide that determination to the parties
  - Under § 106.45
    - Does not have to be in writing
  - Under § 106.46
    - **Written** determination must include:
      - Description of alleged sex-based harassment
      - Information about policies and procedures
      - Decision-maker’s evaluation of credible evidence and determination
      - Disciplinary sanctions and/or remedies, as appropriate
      - Appeal procedures

NPRM pg. 696
APPEALS

- Under § 106.46 institutions are required to offer an opportunity to request an appeal after a final determination
  - Outcome becomes final on the date the Recipient provides a written determination of an appeal, or if an appeal is not filed, the date on which appeal would no longer be timely
- Appeal Decision-maker(s) cannot be the Investigator or Decision-Maker

Decision Point: Who will serve as the Appeal Decision-maker(s)?

NPRM pg. 696
Provide a written outcome notification including the determination, any sanctions or remedies, and any opportunities for appeal.

Offer one level of appeal and ensure comparable procedures for complaints other than sex discrimination also offer one level of appeal.
STANDARD OF PROOF

- Standard of Proof
  - Language shift from “burden of proof” or “standard of evidence”

- Must use preponderance of the evidence *unless*
  - Clear and convincing is used in all other comparable proceedings, including other discrimination complaints (Title VII, Title VI)
    - Employee Respondent vs. Student Respondent complaints are not comparable

Decision Point:
Which standard of proof will be used for employees? Students?

§ 106.6(g); NPRM pg. 688
Adopt the “preponderance of the evidence” standard in all complaints unless it conflicts with other contract rights.

Negotiate future contract rights to allow for the preponderance of the evidence to be used.
ADVISORS

- Under § 106.45, Recipients are not required to permit Advisors
  - Recipients are not prohibited from doing so, as long as all parties are treated equitably
  - Advisors may otherwise be required
    - VAWA
    - Union/CBA Agreements

- Under § 106.46, all parties have the right to be accompanied by an Advisor of choice
  - An Advisor is not required unless an institution has chosen to implement live hearings with Advisor-led cross-examination
    - If a party does not have an Advisor, the Recipient must provide an Advisor at no cost

§ 106.46(e)(2); NPRM pg. 692
Permit access to Advisors for all parties in all formal processes.

If an institution provides Advisors, provide them with adequate training on the institution’s policies and procedures.
TYPES OF EVIDENCE

- Relevant
- Impermissible (regardless of relevance)
- Not Relevant

§ 106.6; NPRM pg. 684
EVIDENCE

- Relevant
  - Includes inculpatory and exculpatory evidence
  - Initial determinations about relevance occur at the investigation stage
  - Decision-maker(s) must objectively evaluate all relevant evidence

- Impermissible
  - Must not be accessed, considered, disclosed, or otherwise used, regardless of relevance

- Not Relevant

Decision Point: How will parties receive the evidence? How long will the parties have to review?

§ 106.6; NPRM pg. 684
IMPERMISSIBLE EVIDENCE

- Evidence that is protected as privileged, unless the person holding the privilege has voluntarily waived it

- A party’s records maintained by a physician, psychologist, or other recognized professional/paraprofessional in connection with treatment, unless the Recipient obtains that party’s voluntary written consent

- Evidence that relates to the Complainant’s sexual interests or prior sexual conduct, unless:
  - Evidence is offered to prove someone other than Respondent committed the alleged conduct
  - Specific evidence of prior conduct with the Respondent is offered to prove consent

§ 106.6; NPRM pg. 684
GROUP BRAINSTORM

How does your institution intend to structure staffing for investigations and decision-making?
PREGNANCY & RELATED CONDITIONS

- Pregnancy Discrimination
- Reasonable Modifications
- Pregnancy Leave
- Lactation Space
PREGNANCY DISCRIMINATION

- Pregnancy or related conditions:
  1) Pregnancy, childbirth, termination of pregnancy, or lactation
  2) Medical conditions related to pregnancy, childbirth, termination of pregnancy, or lactation
  3) Recovery from pregnancy, childbirth, termination of pregnancy, lactation, or their related medical conditions

- Nondiscrimination
  - Cannot adopt policies, practices, or procedures
    - To treat a student OR employee differently based on current, potential, or past pregnancy related conditions
Admissions/Enrollment

- No pre-admission or enrollment inquiries regarding marital status
  - Including asking “Miss or Mrs.”
  - Self-identification of sex is permissible if required from all applicants

What’s Unclear?

- Non-birthing parents
- Scope of parental protections

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 698-99
RESPONSE TO PREGNANCY

- Providing Information
  - When an employee acquires knowledge of a student’s pregnancy or related conditions by the student…the employee must inform that person of Title IX support

- TIXC required response:
  - Prohibit sex discrimination
  - Reasonable modifications (document it!)
  - Allow voluntary access to separate and comparable program, if desired
  - Voluntary leave of absence
  - Availability of lactation space
  - Grievance procedures for sex discrimination complaints

§ 106.40; NPRM pg. 669-72
Offer support to non-birthing parents in the event of a medical need for a birthing parent or newborn.

Provide information on institutional website including:

- The rights of pregnant students under Title IX
- How to request support for pregnancy or related conditions
- The processes available for requesting assistance and for challenging when a denial of assistance occurs.
Reasonable modifications may include:

- Breaks to attend health needs
- Breaks for breastfeeding or expressing breast milk
- Absences for medical appointments
- Access to online or homebound education
- Changes in sequence or schedule of courses
- Extensions or rescheduling examinations
- Counseling
- Elevator access

§ 106.40; NPRM pg. 669-72
PREGNANCY-RELATED LEAVE

- Pregnancy or related conditions serve as a justification for a reasonable, voluntary leave of absence
  - Can be unpaid
  - Applies to employees and students
    - Even if there is no policy or the person does not qualify under the policy
- Upon return, the person should be reinstated to their prior or a comparable status
  - For employees, there should be no decrease in compensation
  - For students, this includes academic and extracurricular status

§ 106.40; NPRM pg. 670
§ 106.57; NPRM pg. 699
LACTATION TIME & SPACE

- Employees and students must be provided reasonable break times for breastfeeding or expressing breast milk

- Lactation Space
  - Not a bathroom
  - Clean, shielded from intrusion
  - Can be used by a student or employee, as needed

Decision Point:
How many lactation spaces are needed to reasonably accommodate both student and employee populations?

§ 106.40; NPRM pg. 669-72
§ 106.57; NPRM pg. 699
Offer multiple spaces that include access to sinks, outlets, and refrigerators.

Provide access to the lactation room without having to request permission.

Add lactation spaces to cleaning schedules in that facility.

Ensure space is available during evening and weekend classes or programs.
WHAT’S NEXT?
POSSIBLE LEGAL CHALLENGES

- 2020 Regulations saw several legal challenges
  - *Cardona* decision ultimately struck the suppression clause
  - No challenges delayed or halted implementation
- The Final Rule will likely face many legal challenges
  - Tennessee + 19 other states have a current injunction
  - Regulatory overreach
    - *West Virginia v. EPA*, 597 U.S. ___ (2022)
  - Additional challenges likely
SPECIFIC CONSIDERATIONS

- State Laws & Case Law
  - Does your jurisdiction have requirements related to hearings or cross-examination?
  - Specific requirements for investigations or determinations?
  - Many states are continuing to introduce state laws related to Title IX

- Post-\textit{Dobbs}
  - High potential for impact in school settings
THINGS TO DO BEFORE IMPLEMENTATION

- Review today’s decision points
- Prepare to expedite policy revisions at your institution
- Educate community about future changes
  - The final changes may be different from the NPRM
- Review current policies, practices, publications, and websites
  - Create a checklist of changes that will need to be made to each
- Work with your legal counsel to determine how the proposed regulations intersect with other policies and governing laws
- KEEP FOLLOWING THE 2020 REGULATIONS!
Questions?
regs@atixa.org
www.atixa.org/regs
Thanks for joining us today.
LIMITED LICENSE AND COPYRIGHT. By purchasing, and/or receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensed to the licensee only, for its use. This license permits the licensee to use the materials personally and/or internally to the licensee’s organization for training purposes, only. These materials may be used to train Title IX personnel, and thus are subject to 34 CFR Part 106.45(b)(10), requiring all training materials to be posted publicly on a website. No public display, sharing, or publication of these materials by a licensee/purchaser is permitted by ATIXA. You are not authorized to copy or adapt these materials without explicit written permission from ATIXA. No one may remove this license language from any version of ATIXA materials. Licensees will receive a link to their materials from ATIXA. That link, and that link only, may be posted to the licensee’s website for purposes of permitting public access of the materials for review/inspection, only. Should any licensee post or permit someone to post these materials to a public website outside of the authorized materials link, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.