ATIXA Position Statement

How to Fix Title IX

*Founded in 2011, ATIXA is the nation’s only membership association dedicated solely to Title IX compliance and supports our over 7,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 37,000 Title IX Coordinators and Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.*
Introduction

ATIXA is the leading professional industry association for 7,200 Title IX administrators at schools and colleges. ATIXA’s members have been working to implement the new Title IX regulations since they first took effect in August of 2020 and have seen their impact first-hand: how they have changed the way that sexual harassment is defined; how survivors have experienced barriers to accessing resolution processes; how protections for those accused have complicated procedures; how informal resolutions (including restorative justice principles) have been encouraged in appropriate circumstances; and how live hearings requiring party and witness participation with cross-examination have been implemented.

Though new regulations will undoubtedly require more changes and new compliance challenges for ATIXA’s members, colleges and schools generally have observed the negative impact of some parts of these new regulations on the community members they serve. As a result, they welcome the possibility of changes contemplated by the Biden administration to ensure fairness for all parties and a restoration of Title IX’s promise that access to education will not be denied on the basis of sex.

The process of resolving complaints of sexual and gender-based harassment and sexual and gender-based violence for schools and colleges has become slow, cumbersome, bureaucratic, laden with paperwork, and a significant drain on already limited available resources. The lived experience of college and school Title IX administrators is that the costs predicted by the Department of Education (ED) in implementing the regulations grossly underestimated the actual burden on schools. The highly prescriptive 2020 regulations have failed to serve institutions well and, most importantly, they also fail to meaningfully protect the parties involved. In summary, the experience these past ten months has been a lose-lose situation for all.

As predicted by many experts, the regulations also fail to achieve a fair balance between the rights of complainants and respondents. If the Obama administration’s approach favored complainants, the Trump administration’s approach favors respondents. ATIXA’s practitioner members aspire to provide a neutral, equitable Title IX approach that balances the rights of all parties – while favoring none.

After nearly one year of interacting with the new regulations and seeing their practical application, ATIXA’s members are well-positioned to share some critical insights into how the Biden administration might best address the negative impact of the August 2020 Title IX regulations as it seeks to issue new interim guidance and regulations. While this position statement may not be a point-by-point critique of the current regulations, it will outline what ATIXA’s membership views as the most important themes to address.
Simplify: With One Resolution Process for All Sexual Misconduct Complaints

The current regulations have encouraged schools and colleges to create confusing dual-track systems for complaint resolution. One process complies with the regulations and covers the behaviors defined within the regulations. Another process addresses complaints that fall outside the scope of the Title IX regulatory definitions and geographic limitations. ATIXA hopes that revised regulations will encourage schools and colleges to subject all forms of sexual misconduct, as well as other forms of discrimination and harassment based on other protected characteristics, to a greatly simplified single process that protects the rights of all parties involved and does not provide different rights for certain acts of sex/gender-based discrimination and harassment than for others, depending on where the alleged acts occurred or other factors.

Revise: A New Definition of Sexual Harassment

The definitions set by the regulations are too technical (because they are based on criminal standards) and too narrow. ED can best serve institutions with a two-pronged approach:

1. A broader sexual harassment standard (“unwelcome conduct of a sexual nature, or that is sex-based”) that requires the provision of supportive measures and remedies to the parties.
2. A hostile environment standard that guides the circumstances when discipline is appropriate, but which also respects the protections on speech established by the First Amendment, academic freedom, and state free speech laws.
   - The Supreme Court’s formulation (now adopted within the Title IX regulation) assesses severity, pervasiveness, and objective offense, but it was elaborated by the Court as a legal standard, not as policy language.
   - That legalistic language can be very confusing and difficult for ATIXA’s members to apply, because those terms are not defined and the reasonable person construct is amorphous. How does a college or K-12 administrator know what is objectively offensive to a sixth grader or second-year college student?
   - Whether ED takes a totality of the circumstances approach, moves to restore the previous “severe, persistent, or pervasive” standard, or provides other guidelines, the field needs a workable and understandable standard that is less restrictive than the definition adopted by the 2020 regulations.
   - ATIXA strongly encourages ED to give consideration to the fact that many laws – including Titles VI, VII, and IX – all operationalize the concept of a hostile environment. Recipients must comply with all of these statutes, yet variability of what creates a hostile environment across Titles VI, VII, and IX adds
complexity that ED can help the field to avoid by taking a uniform approach in new guidance. This would be especially helpful in relation to mixed-motive or intersectional complaints that invoke the protections of more than one of these laws at the same time.

This approach may also better respect the distinctions between private institutions and public institutions, differences that the current regulations do not acknowledge.

Streamline: Provide More Flexibility With Pre-Hearing Resolutions and the Automatic Hearing Requirement

The current regulations beneficially allow for a spectrum of informal resolution approaches but are not flexible enough in practice, requiring process for the sake of process. Currently, unless a dismissal occurs, an investigation is conducted and then a live hearing is held at postsecondary institutions. However, if a respondent indicates they want to accept responsibility for a policy violation after the investigation and avoid the hearing, the current rules require a complex shift into an informal resolution process that must be agreed to by the complainant. Instead, regulations should permit the parties to accept the recommended findings of the investigation without additional procedural complexity. Further, a hearing should only occur when the parties contest the findings of the investigation, or a limited-scope hearing on the proposed sanction when necessary. These minor changes would greatly streamline the resolution process.

Shorten: Abbreviate the Resolution Process

The current regulations provide for what can be an almost month-long review process between the time that the investigation is finalized and a hearing is scheduled. Revised regulations should shorten this process to approximately ten business days, which is sufficient time for the parties to review the evidence and prepare for the hearing or decision-making phase of the resolution process.

- The resolution process laid out by the regulations is so long and complex that the field is regularly seeing the parties voluntarily waive the review periods to allow more expeditious resolution.
- K-12 ATIXA members are reporting that a complaint that used to take 3-5 days to resolve through a traditional student discipline process for a K-12 school could now take 2-3 months. Although 3-5 days often isn’t long enough to be thorough, 2-3 months is far too long at the K-12 level.
- Higher education ATIXA members are reporting that the overall process for some colleges has extended from 2-3 months to 3-6 months, creating a similar issue that the parties are having to wait far too long for final resolution, with the added concern that
many complaints are not able to be resolved before the parties graduate or that during the pendency of the resolution, they are adversely impacting a work unit.

**Flexibility: Step Back Away from Prescriptive Procedural Requirements**

The current regulations are incredibly prescriptive and have abolished much of the administrative discretion necessary to achieve a fair result for all parties. Complex rules regarding complaints, notice, and dismissals are confusing to everyone involved and are not reflected in other campus disciplinary or civil rights resolution processes. The current regulations have effectively turned college and school disciplinary systems into miniature criminal courts, with rules that do not even exist in actual criminal courts.

ATIXA encourages ED to offer revised regulations that set out broad themes, but that return to schools the discretion to exercise sound judgment to determine specific procedures that should be applicable to the resolution of sexual and gender-based reports and complaints. The current regulations, layers of state standards, case law, and federal obligations have created a tangle that makes it challenging for colleges – and nearly impossible for many K-12 schools – to comply with all the various applicable standards. Adding substantial complexity does nothing to serve a seventh grader who is being sexually harassed in gym class, nor to encourage a student who was sexually assaulted in college to come forward. As new regulations are written, it’s essential to keep the focus on those whom Title IX was intended to protect in the first place – people who experience sex-based discrimination in educational programs.

**Revisit: Reconsider the Value of Live Hearings in Every Case in Postsecondary Institutions**

ATIXA generally disfavors the live hearing format with cross-examination prescribed for postsecondary institutions for many reasons, including the fact that it is cumbersome without evidence that it is necessary and effective in eliciting clarifying information or amplifying fairness. Rather, it is observed to be a blunt tool within a one-size-fits-all approach. Yet, while this formal approach is required by the courts for some schools, for others it is not. ATIXA hopes that ED will adopt a new regulation that flexibly allows schools to comply with court-made standards when they have to but also allows schools to adopt different approaches that still ensure a fair and equitable process when law permits.

Given their extensive and long-term involvement in thousands of college and school resolutions of sexual misconduct complaints, ATIXA members know there is no perfect system of resolution, but there is a better system than what is required by current regulations.
As ED revisits how it guides recipients, ATIXA asks ED to please ensure that any approach it recommends or requires is not one that has a likelihood of creating a disproportionate impact on students and employees of color.

We set forth below an outline of how a new and improved approach could work:

**A More Equitable System**

Colleges and schools should conduct a robust investigation when they have notice of sexual and gender-based offenses. That investigation should result in a dismissal of the complaint if there is insufficient evidence to sustain the complaint, or in recommended findings. If that outcome is accepted by the parties, the process should end. If the outcome is rejected, the report (without the recommendations) goes to an independent decision-maker who conducts as much additional process as the facts of the complaint (or the law of the jurisdiction) require. That could include meeting with the parties, calling witnesses, instructing investigators to gather additional evidence, etc., or it could entail a full, live hearing.

Schools have long-recognized three tiers of response within best practices – informal resolution, administrative resolution, and formal resolution. The prescriptive approach to the regulations taken in 2020 inhibits schools from achieving the best practice of tailoring the response to the nature of the complaint. Regardless of approach, each party would have the right to have all relevant questions they (or their advisors) suggest posed by the decision-maker to the other parties or witnesses. This would be less adversarial than the current approach for postsecondary institutions, and no less effective. It doesn’t matter who asks the questions, just that they are asked.

**No Evidence That Cross-Examination Improves Outcomes**

Where credibility must be assessed, the decision-maker would ask the parties and witnesses to appear in person (or by technology). Having collectively conducted dozens of hearings under the 2020 regulations, no ATIXA members report that the opportunity for the parties’ advisors to cross-examine the other party or witnesses has improved the quality of evidence or procured answers that were different from those that would come from the decision-maker posing the same questions when suggested by the parties. Cross-examination is already indirect under the current regulations because the decision-maker must rule on the relevance of all questions before they are answered by a party or witness.

The decision-maker would then reach a determination by the preponderance of the evidence (the standard currently used by 98%+ of schools and colleges, and OCR) and
issue a written rationale. The decision could then be appealed, once, on limited grounds similar to those elaborated in the current regulations. This greatly simplified approach outlined by ATIXA would be faster, more efficient, fairer, more balanced, less bureaucratic, and more accessible than the process laid out in the current regulations. Where applicable law requires more formal hearings, schools would comply.

The decision-making approach that ATIXA has outlined above would allow K-12 and higher education institutions the flexibility to meet each complaint with the process it deserves, and which is legally mandated.

The Higher the Stakes, the More Process Should Be Due

One idea ATIXA urges ED to consider is to permit less formal resolution approaches for complaints that will not result in suspension or expulsion of a student or suspension or termination of an employee. The most formal process should be reserved for those offenses that could result in separation from the institution, school, or district. This is how due process is evaluated by courts, rather than the one-size-fits-all approach of the Title IX regulations.

Please Strike the Suppression Clause

ATIXA and its membership strongly recommend that the rule in the regulations that suppresses all statements from witnesses and parties if they are not willing to submit to cross-examination at the live hearing should be removed. Decision-makers should know how to weigh evidence, and if someone does not attend the hearing or answer questions, decision-makers can weigh that accordingly without a requirement to disregard evidence – a requirement that has no parallel to the rules of any criminal or civil court in the United States and is incredibly difficult to train practitioners to properly implement. Further, this is an area that has resulted in many challenges for schools and colleges. While witnesses are often willing to participate in an investigatory interview, they often are less inclined to participate in a live hearing that occurs two to three months later, not understanding why they have not already fulfilled their duty by participating in the investigation interview.

Allow Schools Broader Latitude to Make Safety Decisions About their Own Programs

Under the current regulations, it is almost impossible to suspend a student on an interim basis or restrict their campus/school activities for safety reasons. This extends to alternative placements, athletic participation, and extracurricular activities, as well.
Even more significantly, schools now have no viable mechanism to prevent respondents who are under investigation from graduating, or withdrawing after the semester with their credits, and thereby evading any consequences should they be found to have engaged in misconduct.

The regulations impose constraints that most courts have not required of schools when taking interim actions. While interim suspension from school during an investigation should require evidence of a clear safety risk, it does not automatically require separation from academic progress and should not impose limits on restrictions by other school programs (e.g. athletics, study abroad) that deprive administrators of the discretion necessary to run those programs in a manner that ensures appropriate access or participation.

The practical effect of this regulation is that a coach can suspend a student-athlete from practice or play for not attending class or a meeting, failing a drug test, being accused of cheating, or violating any of a myriad of student conduct or team rules, but not for being under investigation for sexual assault, stalking, or dating/domestic violence. To make matters even more absurd under the regulations, that same coach can suspend the player if the alleged behavior occurred off-campus, but not on campus. ATIXA recommends a new regulation with a reasonable, fair threshold for interim action, coupled with an informal way for the respondent to contest that action, along with a mandate for the school to minimize the disruption to the respondent’s academic progress as much as possible.

Restore Training and Prevention

The existing regulations are primarily focused on responding to complaints rather than on prevention of discrimination. While having effective response systems is necessary, ATIXA members know that in order truly to provide educational environments that are free of sex and gender-based discrimination, recipients must engage in robust prevention education and awareness efforts. The response-focused regulations have demanded resources that may have the unintended result of siphoning away recipient resources dedicated to providing prevention education efforts for students and employees. They may have also subtly or inadvertently signaled an ED preference for response over prevention. There is a distinct difference between prevention education and policy and the process training required by the regulations. Previous OCR guidance alluded to, suggested, and/or encouraged recipients to engage in broad training of students, faculty, and staff. Existing regulations only require training for Title IX team members, and while that is a good start, recipients would benefit from clearer expectations from ED with respect to prevention education and training. This could include requirements and/or encouragement to offer training to incoming and transfer students at orientation on Title IX resources and policies; training for employees who are
mandated reporters; employee sexual harassment training on Title IX resources, policies, and expectations; and age-appropriate prevention programming that will help recipients reduce the incidence of sexual harassment, sexual violence, intimate partner violence, stalking, and related forms of sex discrimination within academic programs.

Conclusion

ATIXA is confident that necessary reform for Title IX will occur during the Biden term. ATIXA welcomes the opportunity for change through a set of workable regulations that:

- require reasonable resources;
- balance expediency with protection from all forms of sexual and gender-based discrimination; and
- offer a fair resolution process.

ATIXA believes that the path outlined above is the one that will most likely achieve balanced procedures and protections to fulfill Title IX’s equity mandate.

This position statement was unanimously adopted by the ATIXA Advisory Board on June 10, 2021.