



Association of
Title IX Administrators

ATIXA Submission to the Department of Education's Office for Civil Rights How to Fix Title IX – June 11, 2021

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance. ATIXA supports over 7,200 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 nearly 40,000 Title IX professionals since 2011

June 11, 2021

Suzanne B. Goldberg
Acting Assistant Secretary, Office for Civil Rights
Deputy Assistant Secretary for Strategic Operations and Outreach
U.S. Department of Education

Dear Secretary Goldberg,

Thank you for opportunity to provide comments as you embark on this difficult task to evaluate existing and issue new guidance and regulations on Title IX. ATIXA greatly appreciates your work in this area and looks forward to being a partner with you and the Department in the process.

Introduction

As you may know, the Association of Title IX Administrators (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 have also failed to meaningfully protect the parties involved. On the whole, the experience these past ten months has been a lose-lose situation for all involved.

The current regulations 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 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. This document outlines what ATIXA's membership views as the most important themes to address.

The supplement to this submission provides a point-by-point critique of the current regulations from the perspective of ATIXA's members, should ED decide to work from the current regulations as the basis for future revisions.

Simplify: One Resolution Process for All Sexual Misconduct Complaints

ATIXA hopes that revised regulations will encourage schools and colleges to subject all forms of sexual misconduct, and other forms of discrimination as well, to a greatly simplified single process that protects the rights of all parties involved and does not provide different rights for certain types of sexual and gender-based harassment and violence than for others.

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 sexual and gender-based harassment and violence than for others, depending on where the alleged acts occurred or other factors.

This level of simplification will be of great benefit to administrators who are struggling to manage multiple processes. It will also benefit students/employees, who are finding the multiplicity of processes, dismissals, and reinstatements to be confusing at best, demoralizing

at worst, and generally too complex to navigate. This unnecessary complexity is reported by ATIXA members to potentially be causing impediments to the reporting of sexual harassment, and/or an uncertainty or unwillingness to pursue formal complaints.

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. ATIXA recommends that ED revise the definition of sexual harassment to include a two-pronged approach as outlined below:

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 consider 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 will make it easier for decision-makers to apply clear standards, will help students/employees to assess whether to report harassment, will assist recipients’ understanding of what to do with reports of low-level or more minor harassing conduct, and

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

We ask ED to revise regulations to simplify and facilitate greater flexibility for recipients with respect to the range of resolution options they can deploy.

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(s) is necessary.

These minor changes would greatly streamline the resolution process, making it shorter, more efficient, more user-friendly, more intuitive, and more responsive to the needs of participants.

Shorten: Abbreviate the Resolution Process

ATIXA asks ED to restore an equitable emphasis on promptness that has been sacrificed in the current 2020 regulations in favor of dense layers of procedural complexity.

The current regulations provide for what can be an almost month-long review process between the time that the investigation is finalized and the time 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 asking to 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.

The Supreme Court has identified promptness as a hallmark of an effective recipient response to actual knowledge of sexual harassment. Justice delayed can be justice denied when a hostile environment is allowed to persist. The reforms suggested above can help to mandate clear and reasonable timelines for addressing complaints that can restore confidence in the ability of recipient response processes to achieve equitable remedies.

Flexibility: Please Step Back Away from Prescriptive Procedural Requirements

ATIXA asks ED to reconsider the entire tone of the 2020 regulations. Until 2017, ED's approach to Title IX was to offer the field guidance, principles, and guardrails that informed best practices. This approach was practical, workable, and effective. Now, ED has dispensed with nearly 50 years of consistent approaches to Title IX in favor of dictating every step of a recipient's response to a complaint of sexual harassment. The net result is that recipients can no longer aim for the ceiling of best practices, even if they want to, because regulations obligate them to aim for the floor of industry standards.

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 harassment and violence. 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 7th 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 is 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 asks ED to recognize the principle elaborated by the Supreme Court in *Mathews v. Eldridge* that due process is not a fixed concept, but one that varies and should vary based on a set of criteria that balance protections and burdens.

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 generally seen by those in the field as 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 more 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 harassment and violence. 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.

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 be removed. Decision-makers should be trained 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, when they may no longer be available or not understand 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 Guidance

ATIXA asks ED to place as much emphasis on training and prevention as it does on providing guidelines for response.

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 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 essential (and worth expanding), 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 to reduce the incidence of sexual harassment, sexual violence, dating/domestic violence, stalking, and related forms of sex discrimination within education programs and activities.

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 recipient 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 will help recipients to best achieve the balanced procedures and protections that are necessary to fulfill Title IX's nearly 50-year mandate for educational equity.