



## ATIXA STATEMENT

### STATEMENT ON SEPTEMBER 22, 2017 DEAR COLLEAGUE LETTER RESCISSION AND INTERIM GUIDANCE

---

#### ABOUT ATIXA

*Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,500 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 3,000 Title IX coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases statements on matters of import to our members and the field. For more information, visit [www.atixa.org](http://www.atixa.org).*

September 22, 2017

Today, we learned that OCR has rescinded the April 4<sup>th</sup>, 2011 Dear Colleague Letter and the 2014 Q&A on Title IX and Sexual Violence. OCR guidance on Title IX to higher education and preK-12 since 2011 has been both a blessing and a curse, with many benefits, some confusion, and a few unintended consequences. Most importantly, OCR focused colleges' attention on the critical issue of sexual violence, and the importance of implementing clear and equitable policies and grievance procedures. Regardless of what happens with OCR guidance, it is clear that this focus is not going away. Advocacy groups, activists, and the media will keep the pressure on to ensure that there is no tolerance for mishandling allegations of sexual violence, and that colleges do not roll back protections. The pre-2011 days are, indeed, gone for good.

In the longer term, OCR intends to issue new guidance on Title IX, but the key question is what to do until then? For ATIXA, it is about commitment, not compliance. Gender equity remains an inherent good in education, and would be so even if Title IX had never been enacted. Yet, Title IX was enacted 45 years ago, and the trajectory of Title IX has never been defined – nor will it ever be – solely by the four-year term of any one administration.

Schools now have the opportunity to develop and enhance a commitment to Title IX from within and to envision what we should be doing, rather than what we must be doing. To take one example, working within a 60-day mandate for resolutions was untenable given the complexity of many cases and the limited resources available to address them. Perhaps that timeframe relaxes now, although the courts still require promptness, as does Title IX's 2001 Guidance. The expectation of, and need for promptness remains. There is only so much OCR can change with the rescission of guidance, when the underlying fundamentals are unchanged.

It is essential that schools realize that the 2011 Guidance was derivative of the 2001 Guidance as well as Title IX regulations, and case law like [Gebser](#) and [Davis](#). All of those sources of

guidance are still compulsory on colleges and schools. Further, ATIXA expects case law to fill any regulatory gap that may be left by OCR. Any school that de-prioritizes Title IX may quickly find itself on the wrong side of a federal judge, campus activists, or both – but certainly on the wrong side of history. This isn't a hard-reset to the pre-2011 Title IX era, and should not be viewed or treated that way. Schools must consider, for example, whether raising the standard of proof – if that is even permissible under law – would trigger lawsuits by every student disciplined under prior, lower standards? Plaintiff's lawyers are waiting with baited breath for any school to make that move. And, colleges and schools know that the courts are not going to change the civil standard of proof by which college and school liability is assessed in lawsuits. Schools would be wise to move slowly to make changes, given that anything in the interim guidance issued today could be changed in a year or so when new guidance is issued, making any actions in the interim potentially subject to challenge by those impacted.

Moreover, many of the sub-regulatory expectations issued by OCR under the Obama administration were codified by Congress in 2013 with VAWA Section 304. That section is now incorporated into the Clery Act, and fines for violations were just increased in April of 2017 to \$54,789 per violation.

In short, Title IX isn't the whole story. Schools' obligations to address sex- and gender-based harassment and discrimination, including sexual violence, stalking, and intimate partner violence, stem from a variety of sources, including Title IX, Clery/VAWA Section 304, the U.S. Supreme Court, Title VII, Title VI, OCR, state law, and institutional policies and procedures.

The commitment to address these issues is an ethical one; a human one. The sub-regulatory guidance for Title IX has shifted, but our legal and moral obligations to ensure that all members of our educational communities are free from discrimination and harassment on the basis of sex and gender remain.

Laws, regulations, guidance, and court decisions set the floor. We, as practitioners, set the industry standards. ATIXA calls on higher education and preK-12 to maintain and uphold those standards, despite the shifting winds of politics. If you think about it, our standards should never have been dictated by appointees in Washington, DC to begin with. They should be dictated by our dedication to the principles of fairness, equity, and equal dignity. The need for this work has never been greater. Students, parents, employees, and all other members of our communities need and expect us to remain committed to doing the right thing by protecting the rights of those involved in these processes, ensuring educational access, and demanding the highest behavioral expectations from our community members.

ATIXA is here for you and your communities. If you want to know what to do next, we have already provided all ATIXA members with access to [The ATIXA Playbook: Best Practices for the Post-Regulatory Era](#). It's your roadmap to where OCR will likely go next so that you can prepare now rather than waiting for the next round of regulatory guidance. Similarly, the ATIXA model policies and procedures are revised regularly to be responsive to federal changes and to ensure that you are prepared to meet the challenges coming next.

As always, ATIXA will update you with any changes as they occur, and offer our thoughts on developments in the field. As an association, ATIXA's view is long-term, and while we need to address changes being made now at the national level, we are already busy thinking about how to lead our members to be ready for the compliance challenges in 2020 and beyond.

Maintaining the commitment to sex and gender equity today is the first step.



Brett A. Sokolow, Esq.  
Executive Director, ATIXA