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**Cc:** Megan Calel  
**Subject:** Written Submissions on Behalf of ATIXA  
**Attachments:** Combined Document-ATIXA Submission to the Department of Education, Office for Civil Rights- How to Fix Title IX and ATIXA Comments on the 2020 Regulations.pdf

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Please accept the attached written submissions on behalf of ATIXA and its members. Thank you.



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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.



Association of  
Title IX Administrators

# ATIXA Comments on the 2020 Title IX Regulations

*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.*

To support the Department of Education's (ED) efforts to reform Title IX through new and/or revised regulations, ATIXA has compiled a set of comments on the existing 2020 regulations that reflect the experiences and sentiments of ATIXA's 7,000+ members. To facilitate this process, ATIXA has separated the major provisions of the regulations into bulleted points, followed immediately by ATIXA's commentary (*italicized*) on those points.

ATIXA is also submitting to ED a set of broad-brush recommendations for reform. ATIXA thanks ED for this opportunity to submit on behalf of its members.

### 2020 Regulatory Provisions:

□ Within Title IX-related policies and procedures, do not restrict any rights guaranteed against government action by the First Amendment of the U.S. Constitution.

***ATIXA Comments:*** *This provision is required as to state actors. ATIXA objects to ED's application of the First Amendment to recipients who are not state actors.*

□ Within Title IX-related policies and procedures, do not restrict any rights guaranteed against government action by the Due Process Clauses of the Fifth and Fourteenth Amendments to the U.S. Constitution.

***ATIXA Comments:*** *The preamble states that ED is not creating rights that are co-extensive with constitutional due process, but by this provision, it is.*

□ Within Title IX-related policies and procedures, do not restrict any rights guaranteed against government action by the Fourth Amendment.

***ATIXA Comments:*** *This provision is required as to state actors. ATIXA objects to ED's application of the Fourth Amendment to recipients who are not state actors.*

□ Comply with these regulations irrespective of FERPA provisions to the contrary.

***ATIXA Comments:*** *This leaves a lack of clarity around a number of privacy issues, and calls attention to the need to update the FERPA regulations/guidance accordingly.*

□ Nothing in these regulations should be used to deny any individual's rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e et seq., or any regulations promulgated thereunder.

***ATIXA Comments:*** *This provision highlights confusing complexity that results for recipients from the overlap between Titles VII and IX that could be addressed by reform to the Title IX definition of sexual harassment.*

Nothing in these regulations should deny any legal right of a parent or guardian to act on behalf of a “complainant,” “respondent,” “party,” or other individual, including the ability to file a formal complaint.

**ATIXA Comments:** *This provision can create a challenge for recipients when a minor complainant does not want action, but their parents/guardians do. Forcing a minor to participate in a formal process could be very damaging to their mental health/well-being, and if they don’t participate, or only participate half-heartedly (because they’re being forced), the formal process is unlikely to result in a finding of responsibility. Similarly, ATIXA would be concerned that a parent/guardian could shut down a complaint that a student feels strongly they want to pursue. ATIXA supports subjecting each of these situations to a requirement that the Title IX Coordinator has discretion to initiate or stop the process, if the actual victim or a parent/guardian refuses to do so, but is not obligated to do so just because parents/guardians demand either a dismissal or to proceed.*

If these regulations conflict with a state or local law applicable to your recipient, Title IX preempts that law to the extent of the conflict, and you should follow Title IX.

**ATIXA Comments:** *This provision is more vexing than it may seem. It places many K-12 schools in the position of choosing between their own state ED codes and Title IX compliance.*

Designate a Title IX Coordinator. Each recipient must designate and authorize at least one employee to coordinate its efforts to comply with its responsibilities under this part, which employee must be referred to as the “Title IX Coordinator.”

**ATIXA Comments:** *ATIXA supports this provision, but notes that in K-12 or multi-campus colleges, in many cases a Title IX Coordinator or deputy per building/site/campus is necessary to adequately carry out Title IX compliance (not necessarily a full-time position, but as an administrator with authority and responsibility). A district central office coordinator can be very distant in many ways from what is happening in individual schools/sites.*

Notify applicants for admission and employment, students, parents or legal guardians of elementary and secondary school students, employees, and all unions or professional organizations holding collective bargaining or professional agreements with the recipient, including:

- of the name or title
- office address
- electronic mail address
- and telephone number

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ Any person may report sex discrimination, including sexual harassment (whether or not the person reporting is the person alleged to be the victim of conduct that could constitute sex discrimination or sexual harassment), in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by any other means that results in the Title IX Coordinator receiving the person’s verbal or written report. Such a report may be made at any time (including during non-business hours) by using the telephone number or electronic mail address, or by mail to the office address, listed for the Title IX Coordinator.

***ATIXA Comments:*** *ATIXA is supportive of this provision.*

- Notify persons entitled to a notification as noted above that the recipient does not discriminate on the basis of sex in the education program or activity that it operates, and that it is required by Title IX and this part not to discriminate in such a manner.
- Such notification must state that the requirement not to discriminate in the education program or activity extends to admission (unless a regulatory exception applies) and employment.
  - Inquiries about the application of Title IX and this part to such recipient may be referred to the recipient’s Title IX Coordinator, to the Assistant Secretary, or both.

***ATIXA Comments:*** *ATIXA is supportive of this provision.*

□ Each recipient must prominently display the contact information required to be listed for the Title IX Coordinator on its website, if any, and in each handbook or catalog that it makes available to persons entitled to a notification as noted above.

***ATIXA Comments:*** *ATIXA is supportive of this provision, assuming the content is provided in accessible form.*

□ A recipient must not use or distribute a publication stating that the recipient treats applicants, students, or employees differently on the basis of sex except as such treatment is permitted by Title IX.

***ATIXA Comments:*** *ATIXA is supportive of this provision, though it may be somewhat simplistic.*

□ Adopt a grievance process that complies with § 106.45 for formal complaints as defined in § 106.30.

***ATIXA Comments:*** *Please see ATIXA’s additional comments on offense definitions and formal proceedings, attached.*

- Provide to persons noted above who are entitled to a notification of this section notice of the recipient's grievance procedures and grievance process, including how to report or file a complaint of sex discrimination, how to report or file a formal complaint of sexual harassment, and how the recipient will respond.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

- Do not apply these rules to a person outside the United States. Dismiss a "Title IX" complaint from anyone outside the United States. Otherwise reinstate under alternative policies/procedures if you wish.

**ATIXA Comments:** *ATIXA believes this position requires reform. For example, if a student studying abroad in a recipient's program complains of sex discrimination, the resolution and remedy of that complaint by a recipient may occur within the United States, and thus can be subject to ED jurisdiction. This provision convolutes the conduct that forms the basis of the incident with the conduct of the recipient, which itself may be discriminatory and could occur within the United States. ED may also want to consider a more nuanced rule that reflects the federal funding of programs abroad. Also, a person who leaves the United States and later complains to a recipient about conduct that occurred while they were in the United States may well be deserving of Title IX protections.*

- Seek assurance of a religious exemption by submitting in writing to the Assistant Secretary a statement by the highest-ranking official of the institution, identifying the provisions of this part that conflict with a specific tenet of the religious organization.

**ATIXA Comments:** *ATIXA is supportive of this provision as it is consistent with existing law.*

OR

- If the recipient is under investigation for noncompliance with this part and the institution wishes to assert an exemption, the institution can raise the exemption then by submitting in writing to the Assistant Secretary a statement by the highest-ranking official of the institution, identifying the provisions of this part which conflict with a specific tenet of the religious organization, whether or not the institution had previously sought assurance of an exemption from the Assistant Secretary.

**ATIXA Comments:** *ATIXA is not supportive of this provision. If a recipient wants an exemption, it should timely apply for one before a person's rights are potentially violated. Potential students and employees have a right to choose their place of study or work with a transparent understanding of how or if their school/employer will act on their behaviors, orientation,*

and/or identity. ATIXA also supports a requirement that ED and the recipient must disclose all exemptions publicly, whether exercised by a recipient or not.

### § 106.30 Definitions.

□ Define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to a recipient's Title IX Coordinator or any official of the recipient who has authority to institute corrective measures on behalf of the recipient (can include anonymous reports).

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ Also define actual knowledge to mean notice of sexual harassment or allegations of sexual harassment to any employee of an elementary and secondary school, regardless of confidentiality.

**ATIXA Comments:** *ATIXA supports an exception for confidential employees within the K-12 setting.*

□ Notice would also include personal observation of sexual harassing conduct by any employee.

**ATIXA Comments:** *ATIXA is supportive of this provision and hopes ED will tie it more clearly to an obligation to address and remedy the conduct, and to provide supportive measures.*

□ This standard is not met when the only official of the recipient with actual knowledge is the respondent.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ Define notice as, but is not limited to, a report of sexual harassment to the Title IX Coordinator as described in § 106.8(a).

**ATIXA Comments:** *ATIXA supports a "knew or should have known" standard for agency enforcement.*

□ Define complainant as an individual who is alleged to be the victim of conduct that could constitute sexual harassment.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ Define consent per state law or best practices.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

A formal complaint means a document filed by a complainant or signed by the Title IX Coordinator alleging sexual harassment against a respondent and requesting that the recipient investigate the allegation of sexual harassment.

**ATIXA Comments:** *ATIXA is supportive of this provision, but not of a rule that conditions recipient action on the filing of a formal complaint. Action should be triggered by notice, actual or constructive.*

- If there is any other way to file a formal complaint with the Title IX Coordinator in addition to doing so in person, by mail, or by electronic mail, or by using the contact information required to be listed for the Title IX Coordinator above, indicate any additional method of doing so.
- Accept a document or electronic submission (such as by electronic mail or through an online portal provided for this purpose by the recipient) that contains the complainant's physical or digital signature, or otherwise indicates that the complainant is the person filing the formal complaint.
  - Indicate that where the Title IX Coordinator signs a formal complaint, the Title IX Coordinator is not a complainant or otherwise a party and must otherwise comply with their regulatory duties.

**ATIXA Comments:** *ATIXA is supportive of these provisions.*

Define respondent as an individual who has been reported to be the perpetrator of conduct that could constitute sexual harassment.

**ATIXA Comments:** *ATIXA is supportive of this provision but would clarify that an organization/group/department could be a respondent as well.*

Create an umbrella sexual harassment policy and define sexual harassment as conduct on the basis of sex that satisfies one or more of the following:

**ATIXA Comments:** *ATIXA would codify that "on the basis of sex" includes conduct that is sexual in nature. ATIXA understands "sex" to include sexual orientation and gender identity/expression, and encourages ED to clarify its understanding.*

An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual's participation in unwelcome sexual conduct.

**ATIXA Comments:** ATIXA believes that “quid pro quo” harassment can occur between students, that conditioning can be explicit or implicit, that a threatened detriment should also trigger this provision, and asks ED to reframe this text accordingly.

- Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity.

**ATIXA Comments:** ATIXA encourages ED to adopt a revised definition as described in our other submission.

- Define sexual assault as:

Sex Offenses, Forcible—Any sexual act directed against another person, without the consent of the Complainant, including instances where the Complainant is incapable of giving consent.

**ATIXA Comments:** ATIXA recommends that ED redraft this definition for clarity and simplicity as follows: Any sexual act involving the Complainant that occurs by force, without their consent, and/or where the Respondent knows or should have known of their incapacity. ATIXA then recommends that ED strike all (six) other sex offense definitions below as confusing, overlapping, antiquated, and/or unnecessary.

~~□ Forcible Rape—Penetration, no matter how slight, of the vagina or anus with any body part or object, or oral penetration by a sex organ of another person, without the consent of the Complainant.~~

~~□ Forcible Sodomy—Oral or anal sexual intercourse with another person, forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.~~

~~□ Sexual Assault With An Object—To use an object or instrument to penetrate, however slightly, the genital or anal opening of the body of another person, forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.~~

~~□ Forcible Fondling—The touching of the private body parts of another person (buttocks, groin, breasts) for the purpose of sexual gratification, forcibly and/or against that person’s will (non-consensually) or not forcibly or against the person’s will in instances where the Complainant is incapable of giving consent because of age or because of temporary or permanent mental or physical incapacity.~~ Sex Offenses, Nonforcible—Nonforcible sexual intercourse.

~~□ Incest—Nonforcible sexual intercourse between persons who are related to each other within the degrees wherein marriage is prohibited by [insert state] law.~~

- ~~Statutory Rape— Nonforcible sexual intercourse with a person who is under the statutory age of consent of [insert age in your state].~~
  
- Dating Violence, defined as: violence committed by a person who is or has been in a social relationship of a romantic or intimate nature with the Complainant. The existence of such a relationship shall be determined based on the Complainant’s statement and with consideration of the length of the relationship, the type of relationship, and the frequency of interaction between the persons involved in the relationship. For the purposes of this definition—
  - ~~Dating violence includes, but is not limited to, sexual or physical abuse or the threat of such abuse.~~
  - ~~Dating violence does not include acts covered under the definition of domestic violence.~~

***ATIXA Comments:*** *ATIXA is supportive of this provision, but would combine both offenses of dating and domestic violence into an umbrella of Intimate Partner Violence largely defined as above, with the clarification that:*

*Violence includes, but is not limited to, behavior for the purpose of threatening or causing physical, psychological, mental, and/or emotional injury or harm to another.*

- ~~Domestic Violence, defined as: a felony or misdemeanor crime of violence committed—~~
  - ~~By a current or former spouse or intimate partner of the Complainant;~~
  - ~~By a person with whom the Complainant shares a child in common;~~
  - ~~By a person who is cohabitating with, or has cohabitated with, the Complainant as a spouse or intimate partner;~~
  - ~~By a person similarly situated to a spouse of the Complainant under the domestic or family violence laws [insert your state here];~~
  - ~~By any other person against an adult or youth Complainant who is protected from that person’s acts under the domestic or family violence laws of [insert your state here].~~

*\*To categorize an incident as Domestic Violence, the relationship between the Respondent and the Complainant must be more than just two people living together as roommates. The people cohabitating must be current or former spouses or have an intimate relationship.*

- Stalking, defined as: engaging in a course of conduct directed at a specific person that would cause a reasonable person to—
  - Fear for the person’s safety or the safety of others; or
  - Suffer substantial emotional distress.

For the purposes of this definition—

- (i) Course of conduct means two or more acts, including, but not limited to, acts in which the stalker directly, indirectly, or through third parties, by any action, method, device, or means, follows, monitors, observes, surveils, threatens, or communicates to or about a person, or interferes with a person's property.
  - (ii) Reasonable person means a reasonable person under similar circumstances and with similar identities to the Complainant.
  - (iii) Substantial emotional distress means significant mental suffering or anguish that may but does not necessarily require medical or other professional treatment or counseling.
- Nothing in these definitions will be interpreted in a way that violates the First Amendment rights of any individual.

**ATIXA Comments:** *This definition lacks a mens rea, thereby potentially applying it to individuals with disabilities (e.g. autism spectrum disorder) who mean no harm, but who are not adept at reading social cues. ATIXA encourages ED to re-write this definition, to eliminate the potential for disability discrimination, as:*

*Stalking, defined as: engaging in a menacing and/or invasive and/or threatening course of conduct directed at a specific person that would cause a reasonable person to—*

- *Fear for the person's safety or the safety of others; or*
- *Suffer substantial emotional distress.*

□ Define supportive measures as non-disciplinary, non-punitive individualized services offered as appropriate, as reasonably available, and without fee or charge to the complainant or the respondent before or after the filing of a formal complaint or where no formal complaint has been filed.

**ATIXA Comments:** *ATIXA is supportive of this provision but would clarify that supportive measures typically come before a finding, whereas remedies are implemented after a finding (but may include the same measures) or could occur in lieu of any formal process. The duty to stop, prevent, and remedy should be reiterated by ED. It may be helpful to clarify that supportive measures can be punitive if voluntarily accepted by a Respondent.*

□ Design such measures to restore or preserve equal access to the recipient's education program or activity without unreasonably burdening the other party, including measures designed to protect the safety of all parties or the recipient's educational environment, or deter sexual harassment.

□ Supportive measures may include:

- counseling
- extensions of deadlines or other course-related adjustments
- modifications of work or class schedules
- campus escort services

- mutual restrictions on contact between the parties
- changes in work or housing locations
- leaves of absence
- increased security and monitoring of certain areas of the campus
- and other similar measures (See VAWA Section 304 for additional measures that may be required)

**ATIXA Comments:** *ATIXA is supportive of this provision but would substitute “equitable” in place of “equal” and “mutual.”*

□ The recipient must maintain as confidential any supportive measures provided to the complainant or respondent, to the extent that maintaining such confidentiality would not impair the ability of the recipient to provide the supportive measures.

**ATIXA Comments:** *ATIXA is supportive of this provision, except to the extent that confidentiality deprives a respondent of the ability to prove a defense that a complaint has been falsified as a means to leverage supportive measures. ATIXA asks ED to please clarify once and for all whether it intends to create a legally protected status of confidentiality, or whether this is merely a privacy provision co-extensive with FERPA.*

□ The Title IX Coordinator is responsible for coordinating the effective implementation of supportive measures.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

## § 106.44 Recipient’s response to sexual harassment.

□ Respond promptly in a manner that is not deliberately indifferent to actual knowledge of sexual harassment in an education program or activity of the recipient against a person in the United States.

**ATIXA Comments:** *ATIXA asks ED to please define “promptly” and to consider whether a reasonable response standard is more appropriate than a deliberate indifference standard.*

□ Education program or activity means locations, events, or circumstances over which the recipient exercises substantial control over both the respondent and the context in which the sexual harassment occurs and also includes any building owned or controlled by a student organization that is officially recognized by a postsecondary institution.

**ATIXA Comments:** *ATIXA is supportive of this provision and would ask ED to please define “substantial control.” ATIXA also believes ED could set this standard as a floor rather than as a ceiling (“Educational program or activity means, at a minimum, ...”). Doing so would*

*distinguish the standard by which OCR determines whether Title IX applies versus how a recipient defines the jurisdiction of its policies and procedures, a distinction blurred (unhelpfully) by the 2020 regulations.*

- Treat complainants and respondents equitably by offering supportive measures as defined in § 106.30 to a complainant.

**ATIXA Comments:** *Since this is meaningless as it relates to a respondent, and not required by Title IX, why is it needed?*

- The Title IX Coordinator will promptly contact the complainant to discuss the availability of supportive measures as defined in § 106.30.
  - Consider the complainant’s wishes with respect to supportive measures
  - Inform the complainant of the availability of supportive measures with or without the filing of a formal complaint
  - Explain to the complainant the process for filing a formal complaint.

**ATIXA Comments:** *ATIXA is supportive of this provision. Define “promptly.”*

- Remove a student respondent from the recipient’s education program or activity on an emergency basis, only after:
  - Undertaking an individualized safety and risk analysis, and
  - Determining if an immediate threat to the physical health or safety of any student or other individual arising from the allegations of sexual harassment justifies removal, and
  - Providing the respondent with notice and an opportunity to challenge the decision immediately following the removal while respecting all rights under the Individuals with Disabilities Education Act, Section 504 of the Rehabilitation Act of 1973, or the Americans with Disabilities Act, as applicable.

**ATIXA Comments:** *Please see ATIXA’s comments attached on this overly restrictive and unduly limiting language.*

- Place a non-student employee respondent on administrative leave during the pendency of a grievance process under existing procedures, without modifying any rights provided under Section 504 of the Rehabilitation Act of 1973 or the Americans with Disabilities Act.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

## § 106.45 Grievance process for formal complaints of sexual harassment.

Apply any provisions, rules, or practices other than those required by this section equally to all parties.

**ATIXA Comments:** *ATIXA is supportive of this provision but would substitute “equitably” for “equally.”*

Treat complainants and respondents equitably by providing remedies to a complainant where a determination of responsibility for sexual harassment has been made against the respondent.

Remedies must be designed to restore or preserve equal access to the recipient’s education program or activity.

Such post-determination remedies may include the same individualized services described in § 106.30 as “supportive measures” and can be disciplinary or punitive and need not avoid burdening the respondent.

**ATIXA Comments:** *ATIXA is supportive of this provision but would ask ED to reassert the appropriateness of community remedies, as well.*

Objectively evaluate all relevant evidence – including both inculpatory and exculpatory evidence – and determine credibility without respect to a person’s status as a complainant, respondent, or witness.

**ATIXA Comments:** *ATIXA is supportive of this provision but asks ED to define “relevant.”*

Implement an evaluative/vetting process to ensure that the Title IX Coordinator, investigator, decision-maker, or any person designated by a recipient to facilitate an informal resolution process does not have a conflict of interest or bias for or against complainants or respondents generally or an individual complainant or respondent.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

Train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, as applicable, on:

The definition of sexual harassment in § 106.30

- How to apply definitions used by the recipient with respect to consent (or the absence or negation of consent) consistently, impartially, and in accordance with the other provisions of § 106.45.

The scope of the recipient's education program or activity

- How to conduct an investigation and grievance process including hearings, appeals, and informal resolution processes
- How to serve impartially, by avoiding prejudgment of the facts at issue, conflicts of interest, and bias
- Any technology to be used at a live hearing
- Issues of relevance of questions and evidence
- Issues of relevance to create an investigative report that fairly summarizes relevant evidence.

***ATIXA Comments:*** *ATIXA is supportive of this provision but encourages ED to clarify this cannot be a “one-and-done” obligation. Given how central training is to competence, ATIXA strongly recommends that ED offer expanded requirements on training content, topics, frequency, and competencies (e.g. how to write a report and rationale, how to apply a standard of proof).*

- Ensure that any materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process, must not rely on sex stereotypes and must promote impartial investigations and adjudications of formal complaints of sexual harassment.

***ATIXA Comments:*** *ATIXA is supportive of this provision.*

- Include in the grievance process a presumption that the respondent is not responsible for the alleged conduct until a determination regarding responsibility is made at the conclusion of the grievance process by the applicable standard of proof.

***ATIXA Comments:*** *ATIXA is supportive of this provision but worries that it may be inequitable unless accompanied by, “Include in the grievance process a presumption that the complaint is made in good faith unless and until evidence proves that it was not.”*

- Include reasonably prompt time frames for conclusion of the grievance process, including:
  - Reasonably prompt time frames for filing and resolving appeals and informal resolution processes if the recipient offers informal resolution processes, and
  - Implement a process that allows for the temporary delay of the grievance process or the limited extension of time frames for good cause with written notice to the complainant and the respondent of the delay or extension and the reasons for the action.

- Good cause may include considerations such as the absence of a party, a party’s advisor, or a witness; concurrent law enforcement activity; or the need for language assistance or accommodation of disabilities.

**ATIXA Comments:** *This is all fine, content-wise, but please see ATIXA’s attached comments raising concerns with how long and complex the resolution process has become. ATIXA also asks ED to offer more clarity on the intersection/timing of Title IX and criminal processes, which is not addressed with much detail in the 2020 regulations.*

Describe the range of possible disciplinary sanctions and remedies or list the possible disciplinary sanctions and remedies that the recipient may implement following any determination of responsibility.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

Choose either the preponderance of the evidence standard or the clear and convincing evidence standard and apply it uniformly for all formal complaints of sexual harassment against students and employees, including faculty.

**ATIXA Comments:** *ATIXA is supportive of a requirement to use only the preponderance of the evidence standard.*

Implement a procedure that does not require, allow, rely upon, or otherwise use questions or evidence that constitute, or seek disclosure of, information protected under a legally recognized privilege, unless the person holding such privilege has waived the privilege.

**ATIXA Comments:** *ATIXA is supportive of this provision, though notes that it may sometimes be difficult to avoid asking questions about information that may be privileged without first knowing that such information or privilege exists.*

Upon receipt of a formal complaint indicating that the complainant wants a formal investigation, provide the following written notice to the parties who are known:

**ATIXA Comments:** *ATIXA strongly recommends a return to its industry standard concept of a “preliminary inquiry” before issuing notice. A preliminary inquiry can be triggered by notice or a formal complaint.*

Notice of the recipient’s grievance process that complies with this section, including any informal resolution process.

- Notice of the allegations of sexual harassment potentially constituting sexual harassment as defined in § 106.30, including sufficient details known at the time and with sufficient time to prepare a response before any initial interview, including.
  - The identities of the parties involved in the incident, if known
  - The conduct allegedly constituting sexual harassment under § 106.30
  - The date and location of the alleged incident, if known
  - A statement that the respondent is presumed not responsible for the alleged conduct and that a determination regarding responsibility is made at the conclusion of the grievance process
  - Informing the parties that they may have an advisor of their choice, who may be, but is not required to be, an attorney, under paragraph (b)(5)(iv) of this section, and may inspect and review evidence under paragraph (b)(5)(vi) of this section
  - Inform the parties of any provision in the recipient’s code of conduct that prohibits knowingly making false statements or knowingly submitting false information during the grievance process
  - Provide notice of any additional allegations added after the initial notice to the parties whose identities are known.

**ATIXA Comments:** *ATIXA is supportive of these provisions.*

- Dismiss a formal complaint:
  - If the conduct alleged in the formal complaint would not constitute sexual harassment as defined in § 106.30 even if proved, and/or
  - If the conduct did not occur in the recipient’s education program or activity, or
  - If the conduct did not occur against a person in the United States, or
  - If at the time of filing a formal complaint, a complainant is not participating in or attempting to participate in the education program or activity of the recipient.

**ATIXA Comments:** *ATIXA’s members find these dismissal provisions to be cumbersome, conflicting (i.e. the preamble says both that recipients cannot vet complaints for sufficiency and that they must dismiss complaints that could not meet the sexual harassment standard), and challenging to operationalize. ED has conceptualized a process for “the gate to come down,” whereas recipients would be better-served by a preliminary inquiry that determines first “if the gate should come up,” thereby making the dismissal unnecessary. Dismissal can be both confusing and traumatizing to the parties, unnecessarily. ATIXA encourages a much more expansive definition of “participating in or attempting to participate in” and hopes that ED will consider the rights of a person enrolled in or employed by one recipient to file a grievance with a different recipient who has control over a respondent and on whose property an incident occurred.*

- Consider reinstating the complaint under another provision of the recipient’s code of conduct or other applicable resolution procedures.

**ATIXA Comments:** Please see ATIXA's attached comments about the value of moving to a system where there is only one resolution process for all complaints/notice of sex-based or sexual misconduct.

- Consider dismissing a complaint (may, not must) if at any time during the investigation or hearing:
  - A complainant notifies the Title IX Coordinator in writing that the complainant would like to withdraw the formal complaint or any allegations therein; and/or
  - The respondent is no longer enrolled or employed by the recipient; and/or
  - Specific circumstances prevent the recipient from gathering evidence sufficient to reach a determination as to the formal complaint or allegations therein.

**ATIXA Comments:** ATIXA is supportive of this provision, as it reflects the gatekeeping approach that ATIXA has long recommended. However, the third provision could benefit from some greater definition and/or clarity as to what types of circumstances are contemplated by ED, and why preventing a determination is a logical threshold, when a dismissal is in fact a determination.

- Upon a required or permitted dismissal, promptly send written notice of the dismissal and reason(s) therefor simultaneously to the parties.

**ATIXA Comments:** ATIXA is supportive of this provision.

- Treat the complainant as a party even if the complainant chooses not to participate in the grievance process.

**ATIXA Comments:** ATIXA is supportive of this provision.

- Decide whether to consolidate formal complaints as to allegations of sexual harassment against more than one respondent, or by more than one complainant against one or more respondents, or by one party against the other party, where the allegations of sexual harassment arise out of the same facts or circumstances.

**ATIXA Comments:** ATIXA is supportive of this provision, though members might benefit from greater clarity from ED on the criteria which could inform such practitioner judgments. ATIXA has long taught our members that investigations can be placed on one (or more) of three footings: incident(s) and/or pattern and/or climate/culture. This delineation can help to inform the question of consolidation, especially as it relates to investigation of pattern.

- Investigate the allegations in a formal complaint, and when doing so:

- Ensure that the burden of proof and the burden of gathering evidence sufficient to reach a determination regarding responsibility rest on the recipient and not on the parties.

***ATIXA Comments:*** *ATIXA is supportive of this provision.*

- Provide that the recipient cannot access, consider, disclose, or otherwise use a party's records that are made or maintained by a physician, psychiatrist, psychologist, or other recognized professional or paraprofessional acting in the professional's or paraprofessional's capacity, or assisting in that capacity, and which are made and maintained in connection with the provision of treatment to the party, unless the recipient obtains that party's voluntary, written consent to do so for a grievance process.
  - If a party is not an "eligible student," as defined in 34 CFR 99.3, then the recipient must obtain the voluntary, written consent of a "parent," as defined in 34 CFR 99.3.

***ATIXA Comments:*** *ATIXA is supportive of this provision.*

- Provide an equal opportunity for the parties to present witnesses, including fact and expert witnesses, and other inculpatory and exculpatory evidence.

***ATIXA Comments:*** *ATIXA is supportive of this provision but recommends that ED substitute "equitable" for "equal."*

- Implement a policy that does not restrict the ability of either party to discuss the allegations under investigation or to gather and present relevant evidence.

***ATIXA Comments:*** *ATIXA is supportive of this provision and asks ED to clarify whether this extends to the actions of the parties' advisors?*

- Provide the parties with the same opportunities to have others present during any grievance proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice, who may be, but is not required to be, an attorney, and not limit the choice or presence of advisor for either the complainant or respondent in any meeting or grievance proceeding.

***ATIXA Comments:*** *ATIXA is supportive of this provision and encourages ED to take notice of the trend toward permitting more than one advisor. ED is encouraged to set a floor here, rather than a ceiling.*

- Establish policy regarding the extent to which the advisor may participate in the proceedings, as long as the restrictions apply equally to all parties.

**ATIXA Comments:** *ATIXA continues to be concerned with advisor limitations that are being implemented by some recipients, which impede the ability of advisors to advise.*

□ Write an investigation report appropriately summarizing the investigation and all relevant evidence obtained.

**ATIXA Comments:** *ATIXA's members struggle to understand what ED means by "appropriately summarizing" and hope that concepts from the 2001 Guidance, such as thoroughness, adequacy, and reliability will re-surface. It is entirely clear to ATIXA members that an appropriate summary has incredibly different meanings in higher education than in K-12. Are recipients to summarize the relevant evidence, or include all the relevant evidence? Perhaps we're reading too much into the language used, but it seems to be susceptible to more than one interpretation. Perhaps a summary is the floor ED expects?*

□ Prior to completion of the investigative report, send to each party and the party's advisor, if any, all evidence obtained that is directly related to the complaint, to review in an electronic format or a hard copy, including the evidence upon which the recipient does not intend to rely in reaching a determination regarding responsibility and inculpatory or exculpatory evidence whether obtained from a party or other source.

□ Give the parties at least 10 days to submit a meaningful written response, which the investigator will consider prior to completion of the investigative report.

□ Whether included as relevant in the investigation report or not, make all such evidence subject to the parties' inspection and review available at any hearing to give each party equal opportunity to refer to such evidence during the hearing, including for purposes of cross-examination.

□ Finalize an investigative report that fairly summarizes relevant evidence and, at least 10 days prior to a hearing (if a hearing is required under this section or otherwise provided) or other time of determination regarding responsibility, send to each party and the party's advisor, if any, the investigative report in an electronic format or a hard copy, for their review and written response.

**ATIXA Comments:** *This provision is at the root of some of the challenges ATIXA members are facing. It is also part of why the process is taking too long. Two 10-day review periods, especially when those periods are based on business days, can mean almost a month between the close of interviews and the start of the hearing. ATIXA suggests reform to simplify and streamline this process. The process ATIXA taught before the 2020 regulations took effect worked quite well and was broadly adopted by the field. The investigator(s) would complete a draft report and share it with the parties (and their advisors) for their review and feedback. The report would then be updated/revised by the investigator(s) and finalized. From there, the parties would have sufficient time (approximately 10 days) to prepare for the hearing. Any further review and comment by the parties would be raised during pre-hearing meetings with*

*the decision-maker or at the hearing. This saves time for everyone involved by avoiding the step in the current regulations where evidence is shared with the parties in raw form, without any organization, culling, or synthesis. Commenting on evidence in raw form is much more difficult for the parties, and organization by the investigators into a report of relevant evidence and a file for any other evidence excluded from the report makes review more efficient for everyone involved.*

- Postsecondary institutions (IHEs) must provide for a live hearing:
- At the live hearing, the decision-maker(s) must permit each party's advisor to ask the other party and any witnesses all relevant questions and follow-up questions, including those challenging credibility.

**ATIXA Comments:** *Please see ATIXA's attached comments on live hearings.*

- Only relevant cross-examination and other questions may be asked of a party or witness.

**ATIXA Comments:** *While this provision sounds reasonable on paper, in practice, it is sometimes difficult for decision-makers to distinguish a relevant question from a question likely to produce relevant evidence/testimony.*

- Before a complainant, respondent, or witness answers a cross-examination or other question, the decision-maker(s) must first determine whether the question is relevant and explain any decision to exclude a question as not relevant.

**ATIXA Comments:** *Lawyers argue over relevance in every courtroom in America. The idea that lay administrators can assess this without legal training is unrealistic, and just invites the lawyer advisors in the process to dissect every decision a decision-maker makes.*

- If a party does not have an advisor present at the live hearing, the recipient must provide without fee or charge to that party, an advisor of the recipient's choice, who may be, but is not required to be, an attorney, to conduct cross-examination on behalf of that party.

**ATIXA Comments:** *ATIXA is supportive of this provision but believes that advisors should be provided for the entire resolution process, not just the hearing. Also, ED should clarify that a party can waive an advisor at the hearing if they do not intend to conduct cross-examination.*

- Implement a policy that questions and evidence about the complainant's sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant's prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant's prior sexual behavior with respect to the respondent and are offered to prove consent.

**ATIXA Comments:** *ATIXA thinks this provision is poorly conceived, unrealistic, and blocks consideration of relevant evidence. If a complainant wants to testify that they were a virgin and that they did not consent because they did not want to have sex before marriage, this evidence is barred. If a complainant wants to testify that they did not consent because they don't have sex with men, this evidence is barred. A party should always be able to introduce their own history/character.*

□ If a party or witness does not submit to cross-examination at the live hearing, policy must clarify that the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility.

**ATIXA Comments:** *This rule makes no sense and has no parallel in the courts. If a party or witness does not testify, a decision-maker should make a decision based on the evidence that is available.*

□ Policy should clarify that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.

**ATIXA Comments:** *The word "solely" here is a puzzle. What does this mean?*

□ Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally.

**ATIXA Comments:** *Is the party's own advisor permitted to question the party? Please see ATIXA's attached submission addressing this provision.*

□ At the request of either party, the recipient must provide for the live hearing to occur with the parties located in separate rooms with technology enabling the decision-maker(s) and parties to simultaneously see and hear the party or the witness answering questions. Hearings may be conducted with all parties physically present in the same geographic location or, at the recipient's discretion, any or all parties, witnesses, and other participants may appear at the live hearing virtually, with technology enabling participants simultaneously to see and hear each other.

**ATIXA Comments:** *ATIXA is supportive of this provision, but the phrasing is ableist with respect to people who cannot see and/or hear.*

□ Create an audio or audiovisual recording, or transcript, of any live hearing and make it available to the parties for inspection and review.

**ATIXA Comments:** *ATIXA is supportive of this provision, and assumes that advisors may review with the parties?*

- Elementary and secondary schools, and other recipients that are not postsecondary institutions (e.g. scouting organizations), may, but need not, provide for a hearing (some already have to under state, board or, district rules, and will continue to do so).
- With or without a hearing, after the recipient has sent the investigative report to the parties pursuant to paragraph (b)(5)(vii) of this section and before reaching a determination regarding responsibility, the decision-maker(s) must afford each party the opportunity to submit written, relevant questions that a party wants asked of any party or witness, provide each party with the answers, and allow for additional, limited follow-up questions from each party.

**ATIXA Comments:** *Why are relevant questions being limited? By whom? Based on what criteria?*

- With or without a hearing, questions and evidence about the complainant’s sexual predisposition or prior sexual behavior are not relevant, unless such questions and evidence about the complainant’s prior sexual behavior are offered to prove that someone other than the respondent committed the conduct alleged by the complainant, or if the questions and evidence concern specific incidents of the complainant’s prior sexual behavior with respect to the respondent and are offered to prove consent.

**ATIXA Comments:** *Please see same comments on this same language, above.*

- The decision-maker(s) must explain to the party proposing the questions any decision to exclude a question as not relevant.

**ATIXA Comments:** *ATIXA is supportive of this provision, but again notes that determinations of relevance may be challenging for those without legal training.*

- Determine responsibility and issue a written determination applying the standard of evidence described in paragraph (b)(1)(vii) of this section.
- The decision-maker(s) cannot be the same person(s) as the Title IX Coordinator or the investigator(s)
- Provide the written determination to the parties simultaneously
- The determination regarding responsibility becomes final either on the date that the recipient provides the parties with the written determination of the result of the appeal, if an appeal is filed, or if an appeal is not filed, the date on which an appeal would no longer be considered timely.
- The written determination must include—

- Identification of the allegations potentially constituting sexual harassment as defined in § 106.30.
- A description of the procedural steps taken from the receipt of the formal complaint through the determination, including any notifications to the parties, interviews with parties and witnesses, site visits, methods used to gather other evidence, and hearings held
- Findings of fact supporting the determination
- Conclusions regarding the application of the recipient's code of conduct (policies) to the facts
- A statement of, and rationale for, the result as to each allegation, including:
  - any disciplinary sanctions the recipient imposes on the respondent
  - and whether remedies designed to restore or preserve equal access to the recipient's education program or activity will be provided by the recipient to the complainant
  - The Title IX Coordinator is responsible for effective implementation of any remedies.

***ATIXA Comments:*** *ATIXA is supportive of these provisions.*

- Offer all parties an appeal from a determination regarding responsibility, and from a recipient's dismissal of a formal complaint or any allegations therein, on the following bases:
  - Procedural irregularity that affected the outcome of the matter
  - New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter; and
  - The Title IX Coordinator, investigator(s), or decision-maker(s) had a conflict of interest or bias for or against complainants or respondents generally or the individual complainant or respondent that affected the outcome of the matter
  - Other additional bases, as long as applied to the parties, equitably.
- Notify the other party in writing when an appeal is filed and implement appeal procedures equally for all parties.
- Ensure that the decision-maker(s) for the appeal is not the same person as the decision-maker(s) that reached the determination regarding responsibility or dismissal, the investigator(s), or the Title IX Coordinator.
- Give the parties a reasonable, equal opportunity to submit a written statement in support of, or challenging, the outcome.

***ATIXA Comments:*** *ATIXA is supportive of these provisions.*

- A recipient may use the same procedures elaborated under Title IX for resolution of allegations arising under Title VI, especially when arising from the same course of conduct.

**ATIXA Comments:** *ATIXA is supportive of this provision, though it does not go far enough. Given the centrality of race in our society, it is a shame to see Title VI continuing to take a back seat in all respects to Title IX and the other laws ED regulates and enforces. Why should a recipient treat race discrimination any differently than sex discrimination?*

- Informal resolution, that does not involve a full investigation and adjudication, may be offered at any time prior to reaching a determination regarding responsibility, as long as:
  - Policy may not require informal resolution participation as a condition of enrollment or continuing enrollment, or employment or continuing employment, or enjoyment of any other right, waiver of the right to an investigation and adjudication of formal complaints of sexual harassment consistent with this section.
  - Policy may not require the parties to participate in an informal resolution process under this section and may not offer an informal resolution process unless a formal complaint is filed.
  - The parties receive a written notice disclosing:
    - The allegations
    - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations
    - At any time prior to agreeing to a resolution, any party has the right to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint
    - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.
  - Obtain the parties' voluntary, written consent to the informal resolution process; and
  - May not offer or facilitate an informal resolution process to resolve allegations that an employee sexually harassed a student.

**ATIXA Comments:** *ATIXA is supportive of these provisions but asks ED to clarify that there are resolutions that fall outside of this informal/formal framework. What ever happened to confronting a harasser and telling them to cut it out or documenting a warning? Why is no attention paid in the final rule to pre-complaint intervention, conflict resolution, and problem-solving? This lack of attention from ED contributes to the tendency of complainants and recipients to escalate everything to formal processes long before such approaches are often truly needed.*

- Recordkeeping. Must maintain for a period of seven years records of –
  - Each sexual harassment investigation including any determination regarding responsibility.
  - Any audio or audiovisual recording or transcript required under paragraph (b)(6)(i) of this section
  - Any disciplinary sanctions imposed on the respondent

- Any remedies provided to the complainant designed to restore or preserve equal access to the recipient's education program or activity

**ATIXA Comments:** *ATIXA is supportive of this provision and notes that community remedies should be included and documented here, as well.*

- Any appeal and the result therefrom
- Any informal resolution and the result therefrom
- All materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process
- Records of any actions, including any supportive measures, taken in response to a report or formal complaint of sexual harassment.
  - In each instance, document the basis for the conclusion that its response was not deliberately indifferent
  - Document that it has taken measures designed to restore or preserve equal access to the recipient's education program or activity
  - If a recipient does not provide a complainant with supportive measures, then the recipient must document the reasons why such a response was not clearly unreasonable in light of the known circumstances. The documentation of certain bases or measures does not limit the recipient in the future from providing additional explanations or detailing additional measures taken.

**ATIXA Comments:** *ATIXA is supportive of these provisions.*

- Make all materials used to train Title IX Coordinators, investigators, decision-makers, and any person who facilitates an informal resolution process publicly available on its website, or if the recipient does not maintain a website, the recipient must make these materials available upon request for inspection by members of the public.

**ATIXA Comments:** *ATIXA is supportive of this provision, but questions the premise that training is the source of bias.*

### § 106.71 Retaliation.

- Implement policy that no recipient or other person may intimidate, threaten, coerce, or discriminate against any individual for the purpose of interfering with any right or privilege secured by Title IX, or because the individual has made a report or complaint, testified, assisted, or participated or refused to participate in any manner in an investigation, proceeding, or hearing under Title IX.

**ATIXA Comments:** *ATIXA hopes that ED will reconsider the idea that a respondent is engaged in protected activity such that they should be protected by retaliation standards.*

□ Intimidation, threats, coercion, or discrimination, including charges against an individual for code of conduct violations that do not involve sex discrimination or sexual harassment, but arise out of the same facts or circumstances as a report or complaint of sex discrimination, or a report or formal complaint of sexual harassment, for the purpose of interfering with any right or privilege secured by Title IX or this part, constitutes retaliation.

**ATIXA Comments:** *This provision will not be necessary (and a lot of potential future litigation against recipients will be avoided) if ED adopts ATIXA’s suggestion that all sexual misconduct/discrimination be resolved with a single process.*

□ Complaints alleging retaliation may be filed according to the grievance procedures for sex discrimination required to be adopted under § 106.8(c).

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ The exercise of rights protected under the First Amendment does not constitute retaliation.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

□ Charging an individual with a code of conduct violation for making a materially false statement in bad faith in the course of a grievance proceeding does not constitute retaliation as long as a policy recognizes that determination regarding responsibility, alone, is not sufficient to conclude that any party made a materially false statement in bad faith.

**ATIXA Comments:** *ATIXA is supportive of this provision.*

## Confidentiality

□ Maintain the confidentiality of the identity of any individual who has made a report or complaint of sex discrimination, including any individual who has made a report or filed a formal complaint of sexual harassment, any complainant, any individual who has been reported to be the perpetrator of sex discrimination, any respondent, and any witness, except as may be permitted by the FERPA statute, 20 U.S.C. 1232g, or FERPA regulations, 34 CFR part 99, or as required by law, or to carry out the purposes of 34 CFR part 106, including the conduct of any investigation, hearing, or judicial proceeding arising thereunder.

**ATIXA Comments:** *ATIXA is generally supportive of this provision but asks ED to clarify the meaning of and protections of “confidentiality.” ATIXA also asks ED to reconsider the OPEN Center response that takes the position that sharing an outcome of an employee complaint for purposes of a reference check could be seen as a form of retaliation.*

ATIXA also offers comments that are collateral to the regulations or address OPEN Center responses:

- *The regulations fail to specify the transmission of the investigation report to decision-makers. ATIXA asks ED to please do so.*
- *The regulations do not cogently address the issue of in-program effects of off-campus misconduct. ATIXA asks ED to please address this topic in more depth, to explain the scope of recipient duties to address the in-program effects, both when they constitute a potential offense under §106.30 and when they do not.*
- *The OPEN Center says to give plain meaning to the term simultaneous with respect to notifications to the parties, but in a one-person Title IX office, it may be challenging to send two emails at once or make two phone calls at the same time. ATIXA suggests that ED clarify that its expectation is that there will not be undue delay between notifications to each party.*
- *ATIXA requests that ED permit recipients to disallow any party or witness from introducing last-minute evidence at the hearing if that evidence was known and available to the party or witness such that it could have been provided during the investigation. The regulation currently incentivizes non-participation in the investigation, to have the element of surprise by introducing all evidence at the hearing without the guaranteed opportunity for pre-hearing review and comment specified in the final rule.*
- *The OPEN Center's position that sanctions imposed prior to appeal, and restrictions (holds) on graduation during a pending investigation are unduly burdensome or adverse to a respondent should be revisited. This interpretation incentivizes respondents and their advisors to run out the clock to graduation by delaying the process as much as they can. This also incentivizes perpetrators to time assaults close to graduation. As it stands, if any recipient's resolution process takes 90 days to complete, a respondent who commits any violation covered by §106.30 within 90 days to graduation knows that the recipient will lose jurisdiction over them during the pendency of the process. For postsecondary schools, their primary tool to address this pre-regulations was to place a hold on the conferral of the degree until the resolution of the Title IX grievance process, thereby retaining jurisdiction over the respondent as a student. Please restore the option for recipients to use that tool.*
- *Not requiring recipient-appointed advisors to be trained was an error in the 2020 regulations that ATIXA asks ED to please correct. Training should be required.*
- *Why is it possible that a single act of pinching or patting someone's buttocks is now tantamount to discrimination on the basis of sex? Isn't this regulatory overreach?*