

September 23, 2022

# Time with IX: ATIXA's Activism

Explaining our Comments on the 2022 Title IX NPRM

# Today's Presenters

Sept. 23, 2022



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  - If you would like to ask a question anonymously, you can send that to the moderator in a private chat.



## September

28-29 | Informal Resolution One: Foundations

## October

4-5 | Title IX for Healthcare Educators and Providers

6 | Consent Workshop

11 | Rationale Writing Workshop for Decision-makers and Investigators

13 | What the Title IX Team Needs to Know About Stalking Allegations Workshop

14 | K-12 Institute: Defining Title IX

16 | NPRiMer: Preparing for the 2023 Title IX Regulations: Training and Certification Course for Higher Education\*

16 | NPRiMer: Preparing Your K-12 School or District for the 2023 Title IX Regulations: Training and Certification Course\*

17 | K-12 Coordinator One: Foundations\*

17 | Single-Sex Programs and Disparate Treatment in Title IX\*

\*In-Person Training

**View the full schedule and register at  
[www.atixa.org/training](http://www.atixa.org/training).**



# Upcoming Trainings and Events

# ATIXA's Activism – Explaining our Comments on the 2022 Title IX NPRM

This members-only event will discuss ATIXA's comment on the proposed Title IX regulations, including the provisions we support, those we recommend modifying, and those we would like to see eliminated.

Lending our 9,700-member-strong voice to the comments provides a strong influence along with the depth of knowledge of ATIXA's experts to enact change on the federal level.



[www.atixa.org/regs](http://www.atixa.org/regs)

# AGENDA

1 General Comments

2 Definitions

3 Application

4 Section 106.44: Reporting, Supportive Measures, Removal, Informal Resolution

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Directed Questions & Regulatory Impact Analysis

# GENERAL COMMENTS

# GENERAL COMMENTS

ATIXA's comment on the NPRM **does not** necessarily represent ATIXA's best practices or recommendations. The commentary ATIXA provided responds directly to the proposed rules and framework.

ATIXA's goals:

- Represent the interests of its members,
- Help ED develop rules appropriate to a variety of organizational structures, financial and personnel resources, and unique limitations,
- Advocate for flexible and practical rules that balance the rights of parties and permit Recipients to implement best practices within their individual circumstances.

# GENERAL COMMENTS

TOPIC	ATIXA'S RECOMMENDATIONS
<b>Effective Date</b>	All complaints received after the effective date, regardless of when the alleged conduct occurred
<b>Privacy &amp; Pregnancy</b>	Robust privacy protections for pregnant students, especially regarding termination of pregnancy
<b>Religious Exemptions</b>	Recipient must publish exemption and rationale
<b>Union/Collective Bargaining Agreement Grievance Processes</b>	Clarify interaction with Title IX rights

# DEFINITIONS

# DEFINITIONS – SECTION 106.2

- **Federal Financial Assistance:**
  - ATIXA requested clarification from ED whether tax-exempt status requires a private school to comply with Title IX.
- **Pregnancy:**
  - ATIXA questioned ED’s decision to omit “loss of pregnancy” from definition.
  - ATIXA asked for clarification regarding lactation spaces, how long protections are available after pregnancy ends, and non-birthing parent protections.
- **Respondent:**
  - ATIXA inquired whether a student organization could be a Respondent and, if so, asked for guidance managing organizational complaints.

# DEFINITIONS – SECTION 106.2 (CONT.)

- **Retaliation:**
  - ATIXA requested clarification on:
    - Retaliatory harassment
    - Improper disclosure of information
  - ATIXA asked for confirmation that information sharing during employee reference checks does not constitute retaliation
- **Quid Pro Quo:**
  - ATIXA recommended including students as Respondents

# DEFINITIONS – SECTION 106.2 (CONT.)

- **Hostile Environment:** ATIXA proposed changing the definition to:
  - “Unwelcome sex-based conduct that is sufficiently severe or pervasive that it could or does deny or limit a person’s ability to participate in or benefit from the Recipient’s education program or activity.
  - “For purposes of this definition:
    - Hostile environment harassment requires consideration of the totality of the circumstances, analyzing the conduct from both objective and subjective perspectives.
    - Such a fact-specific inquiry could include consideration of the following...[include list of factors in proposed definition].”

# DEFINITIONS – SECTION 106.2

- **Stalking:**
  - ATIXA asked ED to provide clarification to differentiate stalking from lurking, to guard against discrimination of individuals with disabilities or individuals from different cultural backgrounds
  - ATIXA proposed changes to definition to avoid any First Amendment concerns
- **“Forcible” & “Nonforcible”:**
  - ATIXA recommended deletion
- **Student:**
  - ATIXA advised narrowing the definition significantly because the current version could include individuals who never participated in a Recipient’s program or activity beyond applying or completing an application for admission

# APPLICATION

# APPLICATION – SECTIONS 106.11

## **In a Recipient’s education program or activity in the United States.**

- ATIXA counseled that this entire provision is ambiguous.
- Jurisdiction now includes conduct subject to the Recipient’s disciplinary authority.
  - ATIXA noted that Recipients may refuse to take any off-campus/out-of-school jurisdiction, asked for clarification and examples of “similar context” concept.
- Jurisdiction also includes responsibility to “address” hostile environment, even if underlying harassment was outside the program/activity/United States.
  - ATIXA requested ED clarify the meaning of “address.”

# DE MINIMIS EXCEPTION – SECTION 106.31

- Provision permits different treatment or separation on the basis of sex, but **not** in a way that subjects a person to more than *de minimis* harm.
  - Preventing a person from participating in an education program or activity consistent with a person's gender identity subjects them to more than *de minimis* harm.
  - ATIXA asked for additional clarification around *de minimis* harm, including whether it extends to misgendering, deadnaming, or participation in athletics.



**SECTION 106.44: REPORTING,  
SUPPORTIVE MEASURES, REMOVAL,  
INFORMAL RESOLUTION**

# REPORTING – SECTION 106.44(C)

PROPOSED REGULATIONS	ATIXA'S RECOMMENDATIONS
Dependent on the role of the person <b>making</b> the disclosure	Dependent on the individual <b>receiving</b> the disclosure only
Dependent on the role of the person <b>receiving</b> the disclosure	“Who can I <b>reasonably expect</b> would be able to help?”
Complex and confusing	Communicate duty to report

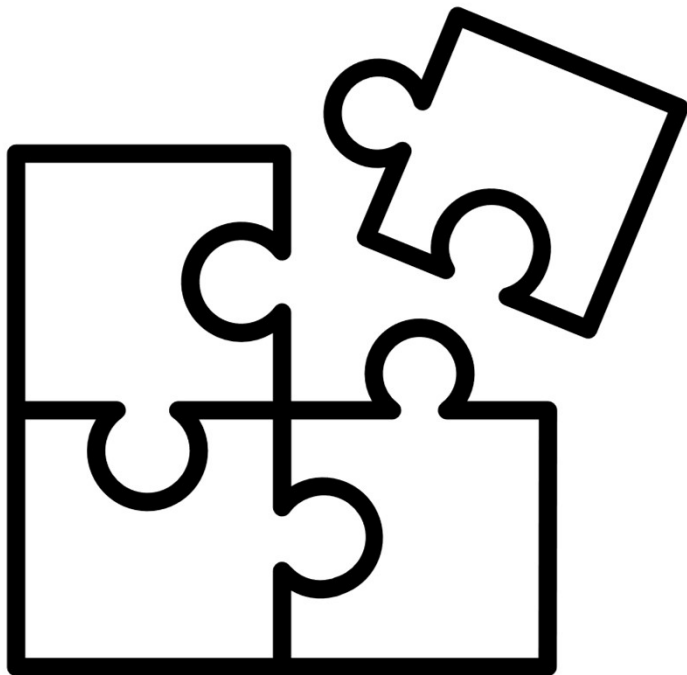
# SUPPORTIVE MEASURES V. REMOVALS

TOPIC	ATIXA'S RECOMMENDATIONS
<b>Supportive Measures and Removals</b>	<p>Given the new availability of supportive measures that burden the Respondent, ATIXA recommended ED permit partial removals and limit emergency removal requirements to complete removals that disrupt academic progress.</p>

# REPORTING – SECTION 106.44(G)

PROPOSED REGULATIONS	ATIXA RECOMMENDATIONS
Parties may appeal for modification or reversal of adverse decision	Limit formal appeals to SMs that burden a Respondent and result in partial removal
	All other SMs, parties should make request to the Title IX Coordinator

# EMERGENCY REMOVAL – SECTION 106.44(H)



## ATIXA'S RECOMMENDATIONS

- Reconsider immediacy standard, as it is inconsistent with law or the threat assessment field
- Remove the “arising from the allegations of sex discrimination” requirement
- Use this provision only for complete removals

# INFORMAL RESOLUTION – SECTION 106.44(K)

- ATIXA inquired about whether Informal Resolution may apply to structural complaints where the Recipient is the Respondent (e.g., the institution's *practice* is discriminatory).
- ATIXA recommended additional clarification about:
  - Whether a Recipient can participate in an IR when not a party
  - Whether IR may result in a Respondent accepting responsibility and sanctions
  - Whether there is no right to appeal an IR agreement

# INFORMAL RESOLUTION – SECTION 106.44(K) (CONT.)

- ATIXA recommended:
  - Removing the mandate for absolute confidentiality during an IR process
  - Permitting a facilitator to stop the IR if the process becomes harmful to a party or new information comes to light that renders IR inappropriate or prohibited
  - Specifying that potential terms of an agreement may not include terms restricting or obligating actions by an individual or group who is not a party to the IR
  - Considering whether more leeway was needed than the blanket prohibition on IR for complaints involving a student and employee, including whether to allow a TIXC to determine the propriety of Informal Resolution in such circumstances

# SECTION 106.45 GRIEVANCE PROCESS



# WHICH GRIEVANCE PROCEDURES TO USE?

	§ 106.45	§ 106.46
K-12	Everything	N/A
Higher Education	<ul style="list-style-type: none"><li>• All sex-based discrimination</li><li>• All sex-based harassment complaints involving:<ul style="list-style-type: none"><li>• Employee-on-employee</li></ul></li></ul>	<ul style="list-style-type: none"><li>• All sex-based harassment complaints involving:<ul style="list-style-type: none"><li>• Student-on-student</li><li>• Student-on-employee</li><li>• Employee-on-student</li></ul></li></ul>

# SECTION 106.45 GRIEVANCE PROCESS

## **No Advisor Requirement:**

- Section (b) does not require Recipients to permit Advisors.
  - ATIXA recommended permitting Advisors, especially since VAWA requires the right to Advisors.

## **Rape Shield Protection:**

- Subsection (b)(7)(iii) retains the prohibition about the Complainant's sexual interests or history, with the two exceptions.
  - ATIXA strongly recommended changing this subsection to permit the Complainant to introduce this evidence and maintain the prohibition on the Respondent doing so.

# SECTION 106.45 GRIEVANCE PROCESS (CONT.)

- **Section (f) Investigation:**
  - ATIXA recommended ED explicitly permit expert witnesses.
  - ATIXA strongly advised that any description or report of relevant evidence be in writing in order to safeguard the parties' due process.
  - ATIXA commented that ED should require some kind of written report, even a summary report, rather than permitting a “description” of the relevant evidence.
- **Section (h) Determination of Outcome:**
  - ATIXA recommended ED require a written determination but slim down requirements.

# SECTION 106.45 GRIEVANCE PROCESS

## No Right to Appeal

- ATIXA recommended requiring Recipients offer an appeal if they offer an appeal for similar types of conduct outside of Title IX
  - Any appeal for Title IX complaints under Section 106.45 should mirror the Recipient's appeal process for similar conduct, and appeal rights should be equitable between all parties
- ATIXA asked ED to clarify when a decision becomes final

# **SECTION 106.46 GRIEVANCE PROCESS & RETALIATION**

# SECTION 106.46 GRIEVANCE PROCESS

<b>PROPOSED REGULATIONS</b>	<b>ATIXA'S RECOMMENDATIONS</b>
<p><b>Access to Evidence:</b></p> <ul style="list-style-type: none"><li>Parties entitled to relevant evidence <u>or</u> a report.</li></ul>	<ul style="list-style-type: none"><li>ED revise this subsection to require a report.</li></ul>
<p><b>Refusal to Respond:</b></p> <ul style="list-style-type: none"><li>DM cannot consider any statement supporting a party's position if the party fails to answer Qs about their own credibility.</li></ul>	<ul style="list-style-type: none"><li>DM be able to consider all relevant, permissible evidence.</li></ul>

# RETALIATION

# RETALIATION – SECTION 106.71

- Preamble language suggests that the purpose of subsection (a) is to ensure Recipients do not act against Complainants, via the disciplinary process, in ways that chill reporting
  - ATIXA recommended additional clarity regarding whether Recipients may enforce their student conduct codes, during the pendency of a Title IX process, for non-Title IX behaviors that arose from the same facts and circumstances
  - ATIXA asked for ED to further explain the distinction between retaliation and peer retaliation.

# K-12 CONSIDERATIONS

# K12 CONSIDERATIONS

TOPIC	ATIXA'S RECOMMENDATIONS
<b>Single Investigator Model</b>	ATIXA recommends limiting SIM to where it may be the only option in some K-12 or post-secondary environments
<b>Peer Retaliation</b>	ATIXA suggests that this definition could also extend to adult agents acting on behalf of the student
<b>Parent/Guardian Rights</b>	ATIXA recommends ED provide more information about parental rights to information about a student's gender identity, gender identity complaint, and name/pronoun change.

# **DIRECTED QUESTIONS & REGULATORY IMPACT ANALYSIS**

# DIRECTED QUESTIONS

TOPIC	ATIXA'S RECOMMENDATIONS
<b>Sections 106.45 &amp; 106.46 Bifurcation</b>	Base the applicability of Sections 106.45 and 106.46 on the identity of the Respondent
<b>Single Investigator Model</b>	ED limit the availability of the Single Investigator Model  Recipients using this model must offer a robust appeal
<b>Standard of Proof</b>	Reconsider “comparable proceedings” concept

# REGULATORY IMPACT ANALYSIS

- ED estimates a 10% increase in investigations
  - ATIXA counseled that ED's number is too low, and the real number could be higher than a 50% increase depending on Recipient type and the impact of Covid on reporting
  - ATIXA asserted that investigations are not the only significant cost, as Title IX professionals often spend significant time facilitating case management and supportive measures
- ED's policy updates and training estimate
  - ATIXA counseled that ED underestimated the amount of time Title IX professionals will invest in these tasks

# REGULATORY IMPACT ANALYSIS (CONT.)

- ED's request for comment on costs associated with the provision of supportive measures
  - ATIXA detailed the complexities and time-consuming nature of supportive measures.
  - ED estimated that individuals seeking supportive measures over initiating a formal process will be two or three to one. ATIXA countered that numbers of individuals choosing supportive measures, but no formal process are likely to be closer to ten to one, or more.

# REGULATORY IMPACT ANALYSIS (CONT.)

- ED's assumes that its current estimates may overestimate the appeal costs
  - ATIXA asserted there was likely to be an uptick in appeals as a natural extension of having more investigations and determinations – but also because ED created an appeal right for supportive measures
    - Although Recipients have the option to not offer an appeal in Section 106.45, ATIXA anticipated most will continue to do so, and therefore ED's estimate of the appeal numbers is likely low

# REGULATORY IMPACT ANALYSIS (CONT.)

- ED's recordkeeping estimates
  - ATIXA counseled that ED's estimates are likely far too low, as more reports lead to more outreach, more supportive measures, more investigations, more Informal Resolutions, and more determinations, all of which will necessitate more recordkeeping
- ED's requirement to monitor for barriers to reporting estimate
  - ATIXA asserted that ED's estimates are dramatically low, given the time it takes to design assessments, interpret results, and create and implement programs or training



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**Questions?**



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