



ATIXA POSITION STATEMENT

ATIXA REISSUES POSITION STATEMENT ON TITLE IX, GENDER EQUITY AND GENDER EXPRESSION

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to compliance with Title IX and the support of our more than 3,000 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification, having certified more than 3,000 Title IX coordinators and more than 8,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.

February 23, 2017

Recent developments have prompted ATIXA to revise and reissue its position statement on the protections of transgender and transitioning people under Title IX. The arguments for inclusion remain largely unchanged, however the history of the issue has been edited to reflect changes in the current political winds.

This ATIXA position statement reflects the importance of protections for gender nonconformity, gender identity, gender expression, transitioning and transgender status conferred by Title IX of the Education Amendments of 1972. Allegations of such discrimination should be subject to a civil rights, equity-based response from any educational program or activity receiving federal financial assistance. ATIXA strongly endorses and supports these protections and encourages their full implementation within all schools, colleges and universities subject to Title IX.

Because the verbiage of Title IX itself is broad in its protections, the Department of Education's Office for Civil Rights' (OCR) interpretation of the law has evolved over time, progressively focusing on employment discrimination, equity in athletics, sexual harassment and sexual violence. We now see OCR and the courts debating whether the Title IX lens should focus on the rights of gender-nonconforming and transgender individuals to ensure their access to the full benefits of federally funded educational programs.¹

As early as 2001, OCR recognized that bullying and harassment of LGBT or gender-nonconforming students which is gender-based harassment—meaning harassment or bullying because a student does not conform to stereotyped notions of masculinity or femininity—is

¹ Simply speaking, *transgender* is an umbrella term for persons whose gender identity, gender expression or behavior does not conform to that typically associated with the sex to which they were assigned at birth. *Gender identity* refers to a person's internal sense of being male, female or something else; *gender expression* refers to the way a person communicates gender identity to others through behavior, clothing, hairstyles, voice or body characteristics. An individual who is transgender may exhibit behavior ranging from a boy wearing fingernail polish to someone having surgery to change their sex, although not everyone whose appearance or behavior is gender-nonconforming will identify as a transgender person.

covered by Title IX. In fact, [OCR's October 26th, 2010 Dear Colleague Letter](#) spoke specifically to the protections Title IX affords regarding harassment of LGBT individuals.

In 2015, the OCR had not yet clarified whether Title IX covers discrimination on the basis of actual or perceived gender identity. This is an important distinction. ATIXA posits that intentional discrimination against a transgender individual because that person is transgender is, by definition, discrimination “based on sex.” In that case, evidence of gender stereotyping would not be necessary in order to establish that sex discrimination occurred against a transgender person. This is a position that the Equal Employment Opportunity Commission had started to take at the end of the last administration, and which some courts are now starting to subscribe to.

In 2016, the Department of Education issued new guidance in a [Dear Colleague Letter on Transgender Students](#). The guidance was challenged and under legal review. The Obama Administration moved to have the injunction limited, which it was.

However, the current administration appears unwilling to continue down this path, according to [OCR's February 22, 2017 Dear Colleague Letter](#). The Attorney General has withdrawn from the injunction challenge, and the administration has now forced the rescission of the 2016 Dear Colleague Letter. Yet, other legal challenges still remain. The EEOC still appears to support Title IX as covering transgender individuals, at least for now. The [G.G. v. Gloucester School Board](#) case will be before the Supreme Court this spring, though legal scholars are debating whether the rescission will have the effect of mooted that litigation.

The Secretary of Education in the letter announcing the rescission made the following comment on the issue of protecting transgender students:

“Schools, communities, and families can find – and in many cases have found – solutions that protect all students.

I have dedicated my career to advocating for and fighting on behalf of students, and as Secretary of Education, I consider protecting all students, including LGBTQ students, not only a key priority for the Department, but for every school in America.

We owe all students a commitment to ensure they have access to a learning environment that is free of discrimination, bullying and harassment.”

As schools establish new policy and turn toward [best practices now in the absence of federal guidance](#), ATIXA encourages broad consideration of the very real barriers to education faced by students identifying as transgender. To be clear, schools are now free to protect transgender and transitioning students as much as they want, unless there is state law to the contrary, and many state laws explicitly include gender identity and expression as protected classes.

Statistics published by the [Transgender Law Center](#) indicate that an estimated 2 to 5% of the population is transgender, meaning they experience some degree of gender fluidity. Recent

research from the Human Rights Campaign, published as a study entitled *Growing up LGBT in America*, reflects a growing acceptance of LGBT youth by their peers, while simultaneously showing that LGBT youth are more likely than their peers to experience verbal harassment, exclusion and physical attacks at school. In addition, 78% of transgender Americans say they have experienced workplace discrimination at some time. A recent study² of 150,000 college students by the Association of American Universities (AAU) found:

- Rates of sexual assault and misconduct were highest among undergraduate females and those identifying as transgender, genderqueer, questioning, nonconforming, and as something not listed on the survey (TGQN).
- Those identifying as TGQN have rates comparable, or in many cases slightly higher, than females, confirming prior research that has found these groups to be at high risk of sexual assault and misconduct.
- Acts involving penetration by force or incapacitation are considered the most serious types of sexual assault and misconduct. Undergraduates identifying as TGQN had the highest rates (12.4%), followed by undergraduate females (10.8%) and graduate TGQN students (8.3%).

ATIXA supports gender nonconforming and transgender individuals enrolled and/or employed by schools and colleges and welcomes the diversity they bring. ATIXA hopes that our members will endeavor to assure that school and college communities will be safe, hospitable and supportive for those gender nonconforming and transgender individuals within our communities. Here are several starting steps ATIXA encourages its members to take:

- Show flexibility in housing assignments to reflect gender identity-based preferences
- Retrofit and design new facilities to create gender-inclusive restroom access without stigmatizing or identifying users
- Create work-arounds that allow for locker room access without stigma
- Include briefings on and protections for gender nonconforming and transgender individuals in school and college Title IX trainings and prevention programs
- Cultivate a culture of understanding about individuals' name and pronoun choices, including proactively requesting information on health and academic records rather than placing the onus on trans individuals to self-disclose repeatedly

We hope that in the near future, the courts will provide clear guidance that discrimination based on gender nonconformity, gender identity, gender expression and transgender status constitutes sex or gender discrimination under Title IX requiring a civil rights, equity-based response from any educational program or activity receiving federal financial assistance.

This statement has been ratified by the ATIXA Advisory Board on October 8th, 2015 and reissued on February 23rd, 2017.

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²https://www.aau.edu/uploadedFiles/AAU_Publications/AAU_Reports/Sexual_Assault_Campus_Survey/Report%20on%20the%20AAU%20Campus%20Climate%20Survey%20on%20Sexual%20Assault%20and%20Sexual%20Misconduct.pdf