



ATIXA POSITION STATEMENT

ATIXA POSITION STATEMENT ON EQUITABLE APPEALS BEST PRACTICES

ABOUT ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance and supports our over 3,000 administrator 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 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.

October 5th, 2018

In light of the Office for Civil Rights' 2017 interim guidance document and the leaked draft Title IX regulations, ATIXA issues this position statement supporting equitable appeal¹ rights for the parties to campus and school sexual misconduct resolutions and other allegations of discrimination.

Despite indications that OCR will propose regulations that permit inequitable appeals, ATIXA believes that equitable appeals are both an industry standard² and best practice that should be preserved by schools and colleges, irrespective of the floor set by OCR.

This position statement differentiates between equity of appeal opportunity and equity of appeal participation; ATIXA supports equity of both. Language proposed at this point suggests that OCR will permit recipients to deny equity of appeal opportunity, meaning that only the responding party will have the ability to appeal an adverse finding, and a reporting party will not. Whether a reporting party will have the equitable right to participate in that appeal once an appeal is requested by the responding party is unclear from current OCR publications.

Arguably, Title IX does not *require* equity of appeal opportunity. There is nothing in the statute that requires providing all parties the right to request an appeal, so long as a recipient provides all parties the opportunity to participate equitably in the process once the responding party requests an appeal.

¹ While this position statement uses the term "appeal," what the appeal process may look like or be labelled can take differing forms at institutions. The primary focus of this statement is on equity of opportunity or equity of participation at a minimum in whatever challenge/error correction process an institution elects to use.

² ATIXA utilizes the term industry standard as a legal term-of-art to denote the commonly accepted practices within the field, not to suggest that resolution of sexual misconduct on college campuses is an "industry" in the lay sense of the word.

It is ATIXA's position that equity of participation in an appeal, if not equity of opportunity to request an appeal, is in fact required by Title IX. However, what is legally required does not translate into what is most equitable nor what constitutes a best practice. ATIXA encourages the field and all of its members to continue the practice of full equity of appeal opportunity and participation. All parties should be able to request an appeal on the same, articulated grounds. Once an appeal request is granted, all parties should have the same opportunity to fully participate in the appeal and be informed of its outcome in writing.

ATIXA takes this position for several reasons. First, the current practice has been common and widespread since at least 2012, and it has been fair, functional, and without significant problems or legal challenge. As this practice has no noteworthy flaws, the rationale behind the proposed change is unclear. If it isn't broken, why attempt to fix it?

Second, procedural errors during the resolution process do occur. These errors can be fatal to the fairness of the process, and these errors can be made to the disadvantage of any party. Any party should have the opportunity to elect for the corrective opportunity that an appeal can afford.

Third, equitable appeals are solid risk management. If there is a fatal flaw in the process, smart administrators prefer to discover the problem internally, raised on appeal, rather than later, as the basis of a lawsuit. Internal appeals provide one last chance to head off unnecessary litigation.

Fourth, the resolution process itself will likely feel more inhospitable to reporting parties under the new Title IX regulations. Maintaining the status quo in the area of appeals serves as a reminder to reporting parties that the process is fair, regardless of the political inclination of OCR toward responding parties.

Fifth and finally, there must be balance in the process. After the Dear Colleague Letter in 2011, the pendulum swung too far, with some recipients unfairly favoring reporting parties. If the draft regulations do not change significantly from what was leaked, OCR will swing the pendulum too far the other direction, as a result of its over-correction. It is up to ATIXA's members to strive for a golden mean in their practices, promoting fairness for all parties without favoritism to any.

To further elaborate on best practices in the appeal context, ATIXA supports the following additional elements as industry standards for proficient appeals:

- An appeal window of at least 7 business days to request an appeal, once a decision is rendered and communicated to the parties;
- Clear grounds for appeal, including:
 - New evidence, unavailable previously, that could be outcome determinative;
 - Demonstrated bias of any official involved in the resolution process;
 - Material deviation from (substantive or procedural) policy or procedures that could impact the outcome; and

- Sanction(s) that fall substantially outside the range of sanction designated for this offense, when also considering the cumulative conduct record of the responding party.
- Trained appeals officers, free of conflict-of-interest, who have had no conflicting involvement with earlier stages of the resolution process;
- Use of remand to return a flawed result to an appropriate prior stage of the process for revision or reconsideration;
- Deference to the original determination unless there is clear error;
- Deference to the original sanction unless there is a compelling justification to make a change;
- One level of appeal, consolidated to address all grounds raised by all parties;
- Limited use of appeals that involve a new panel rehearing the matter, and instead typically confining appeal scope to a review of the record of the investigation and/or hearing;
- Referral to a new panel to rehear the matter only if no other resolution will satisfy procedural fairness or due process; and
- The rationale for an appeal result should mirror the extent and detail of the written rationale issued in the original determination.

This position statement has been ratified by the ATIXA Board of Advisors, October 4th, 2018