ATIXA POSITION STATEMENT

WHEN SEXUAL HARASSMENT DEFINITIONS ARE IN LIMBO, GO BACK TO THE STATUTE ITSELF.

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.

Screen out the noise. Ignore the fact that the federal courts can't agree or provide a cogent explanation. Sidestep the efforts by OCR to change the very definition of sexual harassment within the Title IX regulations. Just focus on the statute. In a time of change and lack of clarity, first principles are our best guides.

It's About…Discrimination

Title IX is a statute prohibiting only one thing--discrimination on the basis of sex[1] in federally-funded educational programs.

It doesn't prohibit sexual harassment, or sexual violence, or athletics inequity, or stalking, or intimate partner violence, or even bullying, *unless* those actions deny access to or participation in a federally-funded educational program on the basis of sex, at which point they become conduct prohibited by the statute.

Considered conversely, Title IX guarantees access to federally-funded educational programs on the basis of sex. If a person within a federally-funded educational program is *not* experiencing a limitation in participation or denial of access, benefits, or opportunities on the basis of sex, Title IX does not apply. Your conduct policies might apply. Your sexual misconduct policy might apply. But Title IX does not.

Start with the Question of Discriminatory Effect

To determine if Title IX is applicable, your first inquiry should always be the discriminatory effect question. Is there *evidence* that shows the alleged misconduct has caused a

[1] And gender, if you believe – as ATIXA does – that sex and gender are indivisible constructs.

discriminatory effect on the basis of sex in the context of your federally-funded educational program? If so, proceed as if Title IX governs the resolution.[2] If not, Title IX does not govern the resolution.

The question is not whether the alleged misconduct resulted in a report or a complaint, or caused offense, or caused someone to be shocked, horrified, or mortified. The question is whether the alleged misconduct caused an unreasonable interference with someone's engagement in an educational program or activity, such as causing someone to miss classes, drop classes, fail classes, receive lower grades, change a major, go out of their way to avoid a faculty member, drop out of a student organization, move off-campus, avoid the library (cafeteria, computer lab, and so on), quit a team, lose a scholarship, etc. The discriminatory effect cannot be speculative, theoretical, supposed, or merely possible. There must be tangible evidence that it happened. The person impacted by discrimination may be traumatized, may be having panic attacks, flashbacks, loss of trust, or any number of other effects, but the threshold question is whether those negative impacts limit or deny access or participation in an educational program that the individual had, enjoyed, or had the potential right to enjoy, prior to the alleged misconduct.

Consider the Context

The "educational program or activity" component is broad. It doesn't just mean academics. It means any programmatic element of your institution, such as athletics, housing, extra-curricular activities, and employment. If your institution provides the program or activity and your institution receives federal funds, you must ensure equitable access to the program or activity.

Discriminatory Effect

Where a deprivation occurs, the obligation of the funding recipient is to make the victim whole again, by restoring the access that was lost to the fullest extent possible. But allegation supporting the assertion of deprivation of access must also be objectively reasonable. In assessing what is objectively reasonable, consider whether another individual, in the same set of circumstances, would be deprived access to or participation in the educational program.

In a recent situation, a female student experienced some leering and one comment about her appearance by a faculty member on two occssions during first month of class. She felt unable to continue school and dropped out as a result of the faculty member's conduct. Now, her parents are demanding a return of their tuition, citing Title IX. They are not going to – nor should they – get it. The faculty member engaged in inappropriate conduct within an educational setting, but didn't discriminate against her. Her response of dropping out of school was not **reasonable** in light of the inappropriate conduct.

[2] To discipline, you also have to have control over the responding party, but this is not necessary for the purpose of remedial protections or actions.

In another scenario, two students reported objections to seeing a student who exposed themself in the library. After the incident, the two students went on their way, experiencing no barriers to access within their educational program. They experienced inappropriate conduct, but nothing that would rise to the level of being discriminatory. How do we know?

Under Title IX, three things can result in a discriminatory effect on the basis of sex: (1) disparate treatment; (2) a disparate impact; and (3) a hostile environment.[3] That's it. Nothing else can. Let's address each in turn using a hypothetical.

Disparate Treatment

The president of the university chess club decides that the chess club will not admit women as members because they are a distraction to the ability of men members to focus on the game. When women attempt to join, the president refuses them. They file a complaint. The Title IX office can find by a preponderance of the evidence that the women were intentionally excluded because they were women, and that the exclusion caused them a deprivation of access in a federally-funded educational program (the school's chess club). As a result, the president – and the organization itself – should be subject to sanctions for their misconduct in excluding the women from the club, and the women should be ensured access to the club from which they were discriminatorily excluded. The president treated the women differently – and *worse* – because they are women. This disparate treatment resulted in a discriminatory effect of exclusion from the chess club.

Disparate Impact

The president of the chess club, decides that the club will only admit chess players who have been playing for at least ten years. This results in an all-male club. Women who wish to join the club challenge the admission requirement, and the Title IX office finds that the admission rule has a disparate impact on women. The rule does not result in the best players being in the club (which could be a legitimate justification for what would otherwise be a discriminatory impact), but instead only results in members who are older, and thus more senior, or those with greater play longevity. The Title IX office moves to remedy the situation by requiring a change in the rules that allows women and non-binary individuals to compete on an equal footing with all members of the club. There is no need to impose discipline on Armando as there is not a preponderance of evidence that his admission rule was intentionally discriminatory, although it still had the effect of excluding people from the club on the basis of sex.

Hostile Environment

The president of the chess club, is pretty pissed. His clever ten-year rule, intended to keep women out of his club, has been shot down by the Title IX office. Now he has to allow women

[3] Federally, courts no longer make a significant distinction between *quid pro quo* claims and hostile environment claims.

to join the club. Unable to exclude women from the club by rule, the president vows to drive them out. At each practice, he berates the women members – and only the women members – of the club. He calls them vile and gendered names, demeans their chess skills, and tells them they will never be as good as his hero, Kasparov. At tournaments, he only lets them play against other women, and he never misses a chance to dismiss their chess talents and make them feel inferior to the men players in the club. Two of the three women in the club quit as a result. All three women club members allege to the Title IX office that the president has created a hostile environment for them on the basis of sex. The Title IX office is able to corroborate the alleged misconduct by a preponderance of the evidence and determines that the president has engaged in conduct that has deprived the women of access to or full participation in the chess club on the basis of sex. The Title IX office removes the president from the chess club and works to restore the women to their rightful membership and participation. There may also be a need for broader remedial or educational measures to be taken with the chess club to ensure the hostile environment does not continue.

In all three cases, there is a tangible, measurable discriminatory effect.

Severe, Pervasive and Objectively Offensive

As you have by now surely noted, it is entirely possible to make a finding of discrimination without resorting to an analysis of whether the conduct was severe/pervasive/objectively offensive. This three-part standard for determining a hostile environment, elaborated by the Supreme Court in the *Davis*[4] case, isn't entirely essential to understanding and assessing whether discrimination exists, but it is considered the litmus test for the hostile environment form of discrimination. Perhaps this standard overcomplicates the analysis, because the hostile environment standard set forth in *Davis* is confusing, and subsequent decisions by the Supreme Court and other courts have failed to provide greater clarity. Now, OCR aims to incorporate this standard into its administrative enforcement of Title IX, a move which only exacerbates the lack of clarity.

Much of what is reported to Title IX offices requires application of a hostile environment analysis, so it warrants additional attention. The most problematic element of the hostile environment analysis isn't the objectively offensive component. As discussed above in the example of the student who dropped out of school after being leered at, whether conduct is objectively offensive is essential to any analysis; many people may be offended when a reasonable person would not be. But in addition to assessing whether a reasonable person, similarly situated, would find the underlying conduct offensive, don't we also need to know if the conduct is severe enough to create a discriminatory effect? Under the *Davis* standard, we do, but we then enter the territory of the "infamous comma."

[4]Davis v. Monroe County Bd. of Ed., 526 U.S. 629 (1999).

"The Infamous Comma"

Endless debate in the courts and in the field surrounds the question of whether the hostile environment standard set forth by *Davis* (1999) is "severe and pervasive" or "severe or pervasive," to the point where clarity does not exist. Nor does it make any sense that different standards would define what constitutes a hostile environment under Title IX versus Title VII (which uses the "or"). The Supreme Court in *Davis* implied an "and" when it wrote "severe, pervasive and objectively offensive," but other courts have held consistently (with the exception of the 8th Circuit) that one instance of sufficiently severe conduct may constitute a hostile environment. OCR said the same in its 2001 Guidance. Some courts contend that severity can stand alone, while others argue that severe conduct, by its very nature, has a pervasive effect, thus satisfying both elements. This assertion begs the question of whether the requirement is that the *conduct* be pervasive, or whether it is enough for the *effect* to be pervasive?

Offensive misconduct that is severe can cause a hostile environment, even without being pervasive (though it may be pervasive in effect).[5] Thus, the "and" isn't required, right? Conversely, offensive misconduct may be pervasive but not severe. In that sense, "and" makes sense, though conceptually, severity may be able to stand alone (assuming objective offense, of course), even if pervasiveness cannot. Pervasive harassing speech, for example, could be protected by the First Amendment if it fails to be objectively offensive (merely offensive, not severely offensive). Logically, therefore, the more severe the conduct, the more likely it is to be objectively offensive. While this debate over the comma is more than academic, it is also impossible to reconcile until the Supreme Court speaks to it again.[6] Until then, most schools will do well to look to the discriminatory effect as the yardstick, with a secondary inquiry as to

[5]Some courts further confuse the matter by conflating the terms pervasive and persistent. Persistence is the quality of repetition or continuation, whereas the concept of pervasiveness means that it pollutes the environment by being widespread. Persistence can create pervasiveness, but something can be pervasive without being persistent.

[6] When the Supreme Court elaborated this standard in *Davis* in 1999, it had already decided both *Meritor* and *Harris*, which together established the Title VII standard as "severe **or** pervasive and objectively offensive." [emphasis added]. The Supreme Court expounded at length in *Davis* on the distinctions between Titles VII and IX, never once mentioning an intentional distinction in the definition of what constitutes a hostile environment. If it had meant to create such a meaningful distinction, it is logical the Court would have drawn attention to it with at least a mention in *Davis* holding. Thus, it is possible that this entire kerfuffle is the result of poor editing by Justice O'Connor's law clerk, and that the infamous comma was really meant to be an "or", and that there are no real distinctions between the hostile environment definitions applicable to Title VII and Title IX. After all, hostile environment is hostile environment, right? There is no logical reason why it would be harder to prove a hostile environment under Title VII than under Title IX, and if there was, the Court should have spoken to that specifically. The Obama-era OCR stated as much when asked, but that, of course, is not the current OCR.

whether the conduct was severe and/or pervasive (or persistent) enough to have caused that effect.

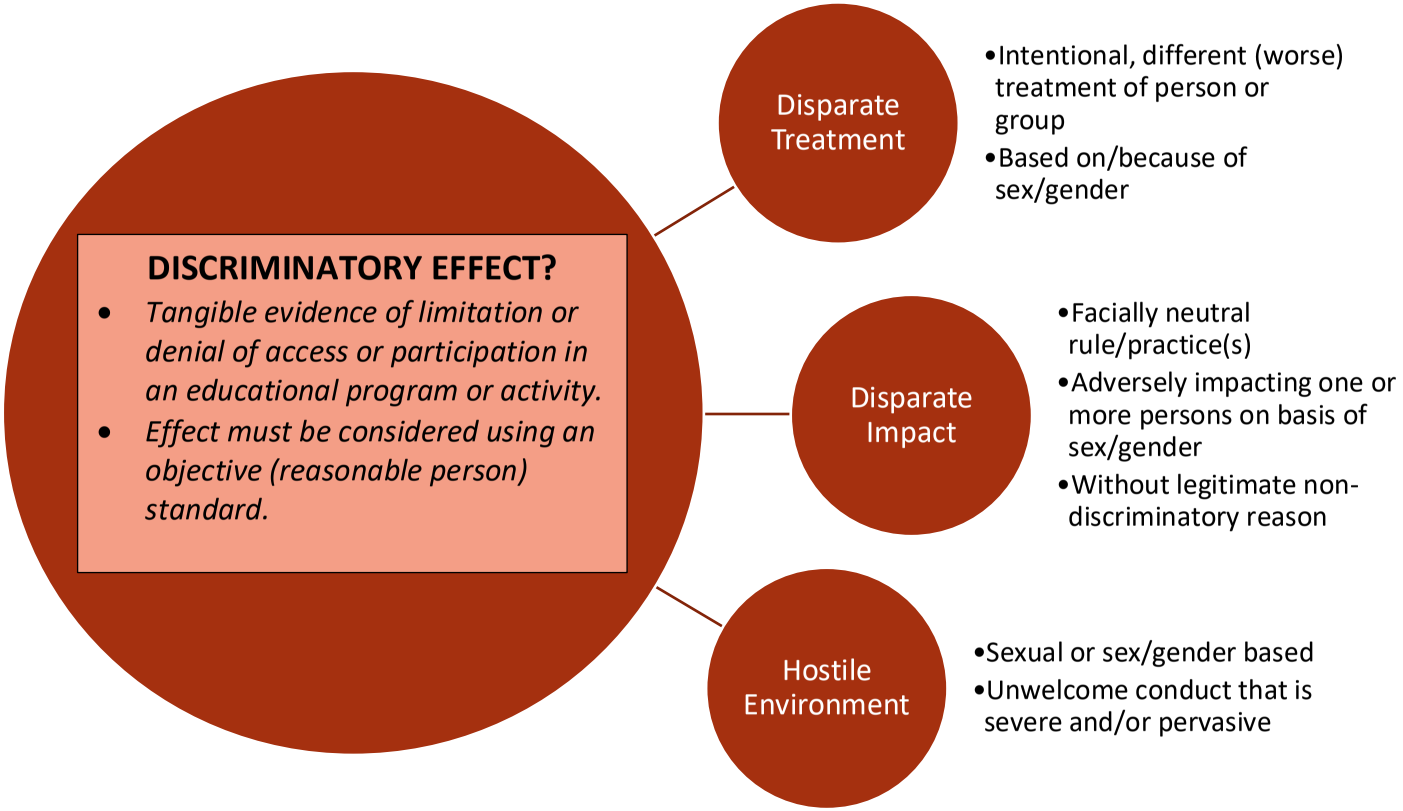
Conclusion

So, courts are split on when to use an "and" or an "or," and we don't know what the OCR regulatory changes will be, but do we really need either? No. The underlying principles derived from the statute itself provide us with the necessary tools to assess whether Title IX governs. We're looking for sufficiently egregious conduct that causes a reasonable person to experience a discriminatory effect on the basis of sex. We know what that is, and it's easier than trying to decipher a punctuation conundrum. This position statement is your roadmap to identifying it.

This position statement has been ratified by the ATIXA Board of Advisors, March 6, 2019

***Please see below for graphical representations of the key points of this position statement.**

ASSESSING POTENTIAL SEX DISCRIMINATION



ASSESSING POTENTIAL SEX DISCRIMINATION