

Interim Policy Guidance

Dear Members,

Like you, ATIXA's panel of experts has been reading the new regulations and contemplating their implications. We're thinking about you, the effect these new rules will have on you, how best to help you manage them, and how to move forward. There are at least 50 substantive changes, large and small, between the draft and final rules. We will be publishing a comprehensive summary of those changes for members soon. Every school and college in the country will have to change its policies and procedures, substantially.

The purpose of this communication is to ensure that ATIXA's members are aware of the political and litigation environments surrounding these rules and carefully consider their implications. In that vein, we have several messages to share:

1. Don't rush new policies into place too soon. Although recipients have until mid-August, ATIXA's revised model policy based on the new regulations will be available in early June. You may want to wait to review it and benchmark against it, if not adopt some version of it directly. The days of custom policies that vary greatly from recipient to recipient are likely over. These regulations require a high level of homogenization of policy and process. Our models - with the regulations as a base - build in as much best practice as the regulations permit. This will result in a blend of old and new that is likely about as close to best practices as we can come given that the law as currently framed by OCR may not permit a recipient to achieve true programmatic excellence, though that should always be our goal.

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2. Recipients will need to develop a consistent approach to cases that are currently underway or arise between now and mid-August, when the regulations take effect. We see three options:
 - a. Proceed using your current policies and procedures (risky, but you may have no other choice due to political variables, COVID-19 impacts, or the tight timeframe for updates);
 - b. Pause findings, recommended findings, and/or adjudications (not investigations) until new policies and procedures are put in place, but ensure that recipients implement the full measure of supportive actions and remedies in the meantime (a potentially workable compromise, but one with a few-month shelf life at most);
 - c. Implement a set of procedures that moves toward compliance with the regulations but does not fully embrace them until you've had the chance to fully build new procedures, staff up accordingly, and train everyone.

If you proceed under your current policies and procedures, please anticipate that you will be facing requests to delay your process until the regulations take effect. Respondents (and their attorneys) will argue that the process will be inherently more fair to them after August 14, 2020, and that proceeding now deprives them of rights to which the Department of Education has indicated they are entitled. Technically, they are not entitled to those rights until August 14, 2020, but that won't stop them from seeking judicial injunctions or other temporary stay orders to stop recipients from proceeding. Thus, options b. or c. above may be a stopgap worth considering, not on a case-by-case basis, but as a blanket approach during this interim period.

3. Because we are in an unprecedented time, the status of the regulations is extremely fragile. The ATIXA panel of experts has consulted internally and with external attorneys far and wide. We all share a consensus view that the Department of Education is out on a limb with some elements of the new regulations, and that the final rule is susceptible to litigation. It's doubtful the regulations in their entirety will be struck down, but some portions or sections may be. We may face a patchwork of different rulings, or some federal judge may enjoin a portion of the final rule nationally. If so, recipients will be in limbo with policies and procedures that align with the regulations that have now been enjoined.

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Thus, we advise that all recipients be prepared to contend with that eventuality and write new policies and procedures that allow you to quickly reinstate or revise your previous policies and procedures in the event that any portion of the regulations is struck down. The world has changed, and we must be in a position to be nimble, able to pivot, and adjust policies and procedures much more quickly than we have in the past.

For that reason, and because of the impending 2020 election, ATIXA advises all recipients to issue their new policies and procedures (on or before August 14, 2020) as INTERIM policies and procedures. If Biden is elected president, he already has publicly announced that he will withdraw the regulations and re-implement some form of the 2011 OCR guidance. Our guess is that it won't be as simple as "out with the new and in with the old," given that the new regulations went through the required regulatory public comment and review process.

We also expect Congress to act if the election provides a majority to Democrats in both houses. Although it may take a while to fully withdraw the regulations (as it appears that doing so would require the Department of Education to undertake another notice and comment rulemaking process under the federal Administrative Procedure Act), we have researched the question, and we believe that upon taking office, there is nothing that would stop a President Biden from issuing an executive order that directs all agencies not to enforce the 2020 Title IX regulations. This would immediately put all recipients into limbo until new rules are issued (again, through an APA rulemaking process, which, as we have seen, could take months or years).

Consider further that if both houses of Congress wind up with Democrat majorities, even if the current president is re-elected, they may be able to replace these regulations by statute, though that would likely be some years away, and could be subject to presidential veto.

Thus, our advice is that because the courts and the election will likely put the future of the Title IX regulations into serious question, it would be imprudent for any recipient to issue new policies and procedures that supersede previous policies and procedures on anything but an interim basis. ATIXA intends to write language to this effect into our models as follows:

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These policies and procedures are implemented on an interim basis for renewable six-month intervals. Should a court strike down, either temporarily or permanently, any terms or provisions of these policies and procedures, the [recipient] reserves the right to make immediate modifications to the policies and procedures that take effect upon publication on our website. Further, should any court strike any portion of the 2020 Title IX Regulations (34 C.F.R. Part 106), or should an administration order them suspended or withdrawn, the [recipient] reserves the right to withdraw these interim policies and procedures and immediately reinstate previous policies and/or procedures or revise them accordingly.

We are in uncharted territory. Let's proceed slowly and carefully, with much forethought and anticipation that the status and validity of these regulations may not be finally determined for quite some time.

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*This ATIXA Interim Policy Guidance has been unanimously approved by the ATIXA Board of Advisors
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CONTACT INFORMATION

Brett A. Sokolow, Esq.
President, ATIXA
610-644-7858

Brett.Sokolow@atixa.org
www.atixa.org
www.tngconsulting.com