

OCR is About to Rock Our Worlds

ATIXA, the association of Title IX administrators where I serve as president, anticipates publication of the final Title IX regulations in the [Federal Register](#) within the coming weeks. The federal government last issued Title IX regulations in 1975, so this is somewhat unprecedented. The proposed changes are far more sweeping than the [2011 Dear Colleague Letter](#) promulgated by the Office for Civil Rights (OCR). Most significantly, unlike in 2011, the changes are also pointed squarely at PreK-12, not just directed to colleges. In fact, OCR is applying most of the federal VAWA Section 304 to PreK-12, despite the fact that Congress aimed it at colleges when it was enacted in 2013. What's coming is revolutionary for schools, not evolutionary. The changes coincide with a [due process revolution](#) occurring in some federal courts as well, with respect to college and university disciplinary processes that may trickle down to elementary and secondary education.

What will these changes mean for schools?

Perhaps 75 to 80 percent of the proposed regulations mandate neutral or beneficial changes or clarifications. Many of the more controversial changes will probably be addressed by a [future Congress](#) or through litigation. Some of the proposed changes included in the [draft](#) that OCR shared publicly last November may not make it into the final rule. Most of the changes revolve around due process, which protects all of us regardless of our school role or status. Some of the less controversial changes include provisions requiring more substantive written notice to the respondent of the nature of sexual misconduct allegations, the right of the parties to review investigation materials prior to a final determination, and the right to a written rationale for the outcome and any sanctions assigned. For or the most part, these are rights you would want to protect you if you were accused -- rightfully or wrongfully -- of sexual misconduct.

What do we do now?

We at ATIXA suggest that schools continue to honor "best practices" commonly adopted by the education field, while moving gradually toward implementing the changes that the regulations will require. Some changes, like equitable interim resources and supports for responding parties, can be implemented now without radical alteration of programs. In its 2011 guidance, OCR was explicit about the need for schools to provide broad-based supports and resources to victims of sex discrimination, such as counseling services, academic accommodations, and housing changes. Now, OCR is making clear its expectation that those supports and resources also be offered to respondents.

Similarly, schools can act now to extend all [VAWA Section 304](#) rights to parties in sexual harassment cases. In 2014, Congress enacted amendments to the Violence Against Women Act. (VAWA). These changes codified as law some provisions of Title IX that were previously only proffered as regulatory agency guidance, and added many provisions requiring training and prevention by colleges. Oddly, the protections of VAWA Section 304 only extended to what have become known as the "Big Four" offenses of sexual violence, dating violence, domestic

violence, and stalking. This created an asymmetry because Title IX protections include these four offenses, but also include conduct like sexual harassment and disparate treatment sex discrimination that VAWA does not. And, Title IX applies to schools, whereas VAWA only applied to colleges. Schools were left with two competing laws that did not fully parallel each other. OCR's proposed regulation logically aligns VAWA and Title IX so that rights do not vary by the type of sex offense alleged, and notably extend the VAWA protections to PreK-12 schools, as well. Thus, recipients can take steps now to implement important VAWA rights, such as providing written notice of the outcome of an allegation to all parties, not just in the Big Four offenses, but for sexual harassment, too.

Additionally, schools can ensure equitable provision of advisers across all cases impacted by Title IX, not just for the Big Four offenses covered by existing law. Under current law, parties have the right to advisers in all steps of a sexual assault investigation and resolution, but not in sexual harassment cases. The proposed regulation fixes that, and applies it to PreK-12 for the first time. Schools don't have to wait for OCR's permission to make a beneficial and logical policy change like this to extend advisory rights to all behaviors covered by Title IX, irrespective of VAWA protections.

These kinds of changes will give administrators a head start on compliance before the regulations are even released. Once released, there will be an implementation grace period of perhaps 90 days to as much as 12 months from publication of the final rule to give schools time to move toward compliance. So we're still some months from an enforcement deadline, even if we are unsure what that deadline will be.

What do we do when the regulations are published?

Schools need to move toward compliance or to decide to litigate the validity of the regulations against the U.S. Department of Education -- or both. OCR is obligated to address, in aggregate, the nearly 130,000 comments it received during the public notice and comment period. The pressure is on for it to make it clear in its responses that its rules are rationally related to the statute, especially with a U.S. Supreme Court that appears [increasingly hostile](#) philosophically to agency rules.

Once OCR publishes the final rule, it will expect good faith efforts to comply. With respect to litigation, it's unlikely that a federal judge will enjoin the regulations fully, and if there is a partial injunction, schools will still need to comply with those elements of the regulations that are not enjoined. Unless and until a judge says that they don't have to comply, schools will need to become compliant.

It took the higher education field three to four years to fully implement the 2011 guidance, but that kind of lethargy won't be an option with these new regulations. They will have the force of law behind them, rather than simply serve as guidance. Drag your feet on implementation, and responding parties will sue the minute you are not according them the full panoply of rights OCR has promised them. Fail to provide the responding party with a copy of the investigation

report, or fail to provide sufficient time to prepare for a hearing, and you should expect a motion for a temporary restraining order from their attorney.

The Catch-22 is that when you move to compliance, activists will sue to argue that the regulations are *ultra vires* and anti-victim expansions of agency authority. They will surely challenge provisions that require disclosure to responding parties all evidence provided by reporting parties, even when that evidence is not admissible or used to support a decision. This rule will create a chilling effect on reporting parties and it will be argued is beyond the scope of OCR's authority to enact under the statute.

Within this highly politicized crucible where any action or inaction will catalyze litigation, schools and districts need to form committees, task forces, and Title IX teams now, so that administrators can study the regulations and commentary when they are published and change what needs to be changed. Faculty grievance processes will be an issue that administrators will have to face and resolve now, if they didn't back in 2011. OCR is forcing the issue, and Title IX offices are probably going to be between a rock and a hard place -- with faculty members who advocate for additional protections, such as clear and convincing evidence as a standard of proof for those accused of sexual assault, while others strongly advocate for preponderance of the evidence.

What do we do if we don't agree with some provisions within the regulations?

About 20 to 25 percent of the regulations are potentially very detrimental to the cause of sex and gender equity in education, and we will need as a field to find ways to work within those requirements, challenge them in court, or find clever work-arounds. Proposed provisions on notice, mediation, and mandated reporting could create significant chilling effects on the willingness of those who experience discrimination, harassment, and sexual violence to report it to administrators and pursue formal resolution pathways.

Let's drill down on each of these proposed provisions a bit. OCR seeks to limit the ways that which recipients are legally put on notice of sex discrimination. Schools might see this as a welcome safe harbor, but why would schools want to make it harder to report and respond to incidents?

OCR now plans to remove the "soft ban" on mediation of sexual violence it implemented in 2011. Permitting mediation is likely a doubled-edged sword. 80-90% of all sexual harassment claims can and should be resolved informally, but we need to be sure that the parties are participating voluntarily in mediation, and aren't being coerced or pressured to minimize the severity of what has happened to them. And, many in the field are rightfully concerned about whether schools have access to mediators skilled enough to resolve allegations of violence. Lower-level sexual harassment is very amenable to resolution via mediation, but the data on whether the same is true for violent incidents is much less conclusive.

Live hearings and cross-examination are some of the most controversial provisions of the proposed regulations. They are not obligations on PreK-12, but optional, in the draft. However, the cross-examination requirement is going to apply to many secondary schools, which already provide live hearings for suspension and expulsion-level offenses. If you provide a live hearing, you're going to need to comply with OCR's mandates for cross-examination conducted by the parties' advisors. Of the nearly 130,000 comments submitted to OCR on the draft regulation, most were negative, with a particular targeting of OCR's desire to turn educational resolution processes into mini-courtrooms that mirror criminal trials. It will take a strong person to be willing to go through a process where they will be subject to cross-examination by the other party's lawyer. OCR seems to have forgotten that the essential purpose of Title IX to ensure educational access, not to dissuade people from availing themselves of the very resolution systems designed to restore access.

Importantly, there is no research to indicate that cross-examination creates more accurate results than other ways of allowing the parties in a sexual misconduct allegation a full and fair opportunity to review and contest all evidence prior to a final determination.¹ In fact, because cross-examination relies on talented questioning and sophisticated rules of evidence, it is susceptible to great variations in its effectiveness², and there is research to show that cross-examination is no more effective at discerning the truth than other methods of doing so.³ OCR is adding process for the sake of process and forgetting to balance rights. How are school administrators chairing hearings going to effectively control attorneys engaged in cross-examination and make rulings on admissibility of questions and evidence? That's hard enough for experienced judges, let alone those trained as lawyers. Even if cross-examination was a better method of discerning the truth, we'd still have to examine the effect on victims/survivors, and the burden of imposing this added protection on schools. OCR has grossly underestimated the costs and resources that will be needed, and the potential move toward outsourcing resolutions to third party neutrals that this change is likely to provoke.

In light of all of this tumult, perhaps the healthiest mindset is to view the regulations mostly as setting a floor for compliance and to commit to aim for the ceiling of best practices. Many organizations, including ATIXA, will continue to offer the field extensive guidance on how to evolve exemplary programs within the framework OCR is establishing, and outside of it, where we can.

What is clear is that the pendulum is about to swing too far, again. The regulations have the potential to create significant public backlash, especially if schools are seen as de-prioritizing Title IX compliance in the coming months and years. Potential victims need to see you strengthening your program, not backing down. They are likely to perceive barriers to coming

¹ https://papers.ssrn.com/sol3/papers.cfm?abstract_id=1100090. And see, the [Haidak](#) court, "We are aware of no data proving which form of inquiry produces the more accurate result in the school disciplinary setting."

² <https://heinonline.org/HOL/LandingPage?handle=hein.journals/uclalr25&div=33&id=&page=>

³ <https://onlinelibrary.wiley.com/doi/abs/10.1002/acp.1768>

forward in the new rules, and administrators need to do everything possible to reassure potential victims that the Title IX office is still here for them, and that you'll do everything not prohibited by the regulations to make reporting easier, offer services and resources, establish a process that is transparent and user-friendly, and avoid re-victimization.

One thing is for sure, defining and maintaining sex and gender equity programmatic excellence in an environment of regulatory change, unfunded mandates, politicization of Title IX, and fervent litigation will be amongst the most pressing challenges facing schools and districts in 2020 and for some time to come.

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