



# R<sup>3</sup> Resources: ATIXA Summary of 2020 Title IX Regulations and Quick Tips

This checklist offers quick tips and our summary  
of the New 2020 Title IX Regulations

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# Summary of 2020 Title IX Regulations and Quick Tips

## Introduction

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The 2020 Title IX Regulations are here, and no matter how much time you may have spent reading, writing, discussing, and parsing the new rules, you may still find yourself wondering, “so what do we have to do?” This quick and handy checklist will help you get up to speed on what’s new, what’s changed, and what’s required. It will also help you to identify areas in need of attention related to the new rules. For ATIXA’s thorough review and critique of the new regulations, check out our comprehensive implementation guide that will be available on our [Regs Rapid Response](#) site the week of May 11th.

The new regulations are principally concerned with improving transparency, enhancing due process, and bolstering communication to individuals under the jurisdiction of a recipient’s sexual misconduct (which OCR now frames broadly as sexual harassment) policy developed in compliance with Title IX.

The majority of the regulations focus on three areas: changes or additions that are required to a recipient’s sexual misconduct policy; new or updated mandatory or OCR-preferred practices when the recipient conducts an investigation/resolution into alleged sexual misconduct, and new or updated procedures for resolution of allegations. There are other updates that include changes to OCR’s jurisdiction standard, training requirements, and expectations for separation of roles in the resolution process.

Mainly OCR’s new rules set the floor for minimum acceptable practices. Regulations are part of what constitute industry standards, though they’re not the entire source for such standards; you also have to look to caselaw, state statutes, etc. Knowing where the floor is can be helpful, but most of us look down on the floor. ATIXA is all about aiming for the ceiling of best practices, and we will be offering many guidance documents in the weeks and months ahead for those of you who -- like us -- believe that aiming for the floor is not an acceptable target, a viable way to ensure equal dignity, or a solid way to manage institutional risk.

The purpose of the checklist below is to get you started. Some of these items detail compliance mandates, and some provide ATIXA’s tips on how to implement the new requirements. This is just preliminary, as we’re still combing the regs, and intend to evolve and expand this document over time.

# Summary of 2020 Title IX Regulations and Quick Tips

## Policy

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- ☐ Specifically designate the “Title IX Coordinator” using the exact term. This can easily occupy a full-time, dedicated position. However, you may now need more than one, or at least a well-staffed Title IX Team, as the regs will be a heavy lift to implement and administer.
- ☐ Provide notice of your policy to applicants (admission and employment), students, employees, contractors, all unions with CBAs, for K-12, and parents/guardians.
- ☐ Prominently display your non-discrimination statement on your website and in each handbook or catalog.
- ☐ Define “Sexual Harassment” as OCR now does, below (private recipients may wish to incorporate a broader standard and should consult legal counsel accordingly):
- ☐ Sexual harassment means conduct on the basis of sex that satisfies one or more of the following:
  - (1) An employee of the recipient conditioning the provision of an aid, benefit, or service of the recipient on an individual’s participation in unwelcome sexual conduct<sup>1</sup>;
  - (2) Unwelcome conduct determined by a reasonable person to be so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or
  - (3) “Sexual assault” as defined in 20 U.S.C. § 1092(f)(6)(A)(v), “dating violence” as defined in 34 U.S.C. § 12291(a)(10), “domestic violence” as defined in 34 U.S.C. § 12291(a)(8), or “stalking” as defined in 34 U.S.C. § 12291(a)(30).
- ☐ Provide means for individuals to report sexual misconduct, including during non-business hours, in person, by mail, by telephone, or by electronic mail, using the contact information listed for the Title IX Coordinator, or by other means that results in the Title IX Coordinator receiving the person’s verbal or written report.
- ☐ Describe the process for submitting a “formal written complaint” signed by the complainant.
  - o Note that there is no time limit by which a complainant must file a formal complaint.

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<sup>1</sup> Note that quid pro quo sexual harassment can only be committed by an employee.



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- ☐ Describe the process for filing a formal report by the Title IX Coordinator, despite a reluctant or unwilling complainant
  - o Note that in such situations, the Title IX Coordinator does not become a party.
- ☐ Identify individuals who have “authority to institute corrective measures” and would therefore have “actual notice” when made aware of potential policy violations.
  - o For K-12, this includes all employees.
  - o RECOMMENDATION: Institutions of higher education (IHEs) can continue to use existing “responsible employee” reporting systems and training programs on your campus unless they are not working.
- ☐ Describe the range of supportive/interim measures available to all parties without expense even if no formal complaint has been filed.
- ☐ Outline the process for emergency removal (interim suspension) including 1) written notice, 2) an individualized safety and risk analysis to determine whether an immediate threat to the physical health or safety of a student or other individual is present, and 3) the opportunity to challenge the decision.
  - o This does not preclude a recipient from placing a non-student employee on administrative leave pending the outcome of the grievance process.
- ☐ Articulate a written policy presumption that the responding party is not responsible for the alleged conduct until a determination is made.
- ☐ Articulate that the burden of collecting evidence and proving a violation of policy is on the recipient, not the parties.
- ☐ Articulate that there are no restrictions on the ability of any party to discuss the allegations or gather and present relevant evidence, including presentation of expert witnesses.
- ☐ Determine whether to use the preponderance of the evidence or clear and convincing evidence as the Standard of Evidence used to determine all violations of the policy, based on OCR’s stated criteria.

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- ☐ Identify and articulate “reasonably prompt” timeframes for investigation, adjudication, and appeal.
  - o Identify a mechanism for temporary delays or limited extensions of your process for good cause with written notice to the parties, including articulated rationale.
- ☐ Describe, with specificity, the possible range of sanctions and remedies that could apply for policy violations.
- ☐ Describe appeal rights as required by OCR, including the process for appealing and the available appeal grounds, including those specified by OCR and any additional grounds that are provided by the recipient.

## Investigation

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- ☐ Conduct a brief preliminary inquiry to determine reasonable cause, whether any of OCR's three requirements for dismissal are present, suitability for informal resolution, and supportive/interim measures. If dismissal is required, possibly refer for resolution to student conduct or other non-Title IX process.
  - o Take careful note of the notice requirements. The regulations require proper notice to parties before any investigative interview takes place.
- ☐ If an informal resolution is selected and appropriate, ensure that:
  - o The process may be used at any point prior to reaching a determination of responsibility as long as a formal complaint has been filed and an employee is not the respondent.
  - o The facilitator is adequately trained.
  - o All parties provide voluntary, written consent to use the informal process.
  - o All parties are provided with a written notice that includes:
    - The allegations.
    - The requirements of the informal resolution process including the circumstances under which it precludes the parties from resuming a formal complaint arising from the same allegations.
    - At any time prior to agreeing to a resolution, the right of any party to withdraw from the informal resolution process and resume the grievance process with respect to the formal complaint.
    - Any consequences resulting from participating in the informal resolution process, including the records that will be maintained or could be shared.

## Investigation

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- ☐ Upon receipt of a formal report, provide written notice of the allegations to the parties, including:
  - o Notice of the applicable policies and procedures.
  - o Notice of the details of the allegations, including:
    - The identities of the parties involved (if known).
    - The specific section(s) of the policy alleged to have been violated.
    - The conduct that would be considered sexual harassment, etc.
    - The date of the incident.
    - The location of the incident.
  - o A statement in the written notice that the responding party is presumed to be “not responsible” for the alleged conduct until a determination is made according to your process.
  - o A statement that parties may request to see and review evidence collected in an investigation.
  - o A reminder of the expectation of truthfulness in your process (assuming your policy requires this), including consequences for providing knowingly false statements or submitting false information.
- ☐ Provide clear written notice before each and every interview or other meeting they are invited or expected to attend, including:
  - o Date
  - o Time
  - o Location
  - o Participants
  - o Purpose of the investigative interview or meeting

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## Investigation

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- ☐ Ensure all parties are aware of their right to an advisor of their choice, who may be present at all meetings, interviews, and proceedings. Any restrictions to advisor participation must be applied equally to all parties.
  - ☐ IHEs should identify any party proceeding without an advisor and provide one at no cost to the party. During the live hearing mandated for IHEs this advisor will conduct cross-examination of opposing parties.
- ☐ Ensure that coordinators, investigators, decision-makers, individuals who conduct informal resolutions, and appeals officers do not have a conflict of interest or bias for or against reporting and responding parties generally, or against an individual party.
  - ☐ Vet and select carefully all Title IX team members.
  - ☐ Provide a process for self-recusal as well as a challenge mechanism for the parties.
- ☐ Appoint different officials to serve as investigator, decision-maker, appeals officers, coordinator, and advisors, in any given case.
- ☐ Ensure that the investigator does not access, consider, disclose, or otherwise use a party's records that are made or maintained by a health or mental health professional unless the investigator obtains the party's voluntary, written consent to do so.
- ☐ Provide all parties an equal opportunity to inspect and review evidence obtained during the investigation that is "directly related" to the allegations, including any evidence that the investigator does not intend to rely on in the written investigation report prior to finalizing the report.
- ☐ Provide all parties at least 10 days to review and submit a written response to the evidence, which must be considered by the investigator(s) before finalizing the report.
- ☐ Provide the final investigation report to the parties at least 10 days before any hearing to decide whether the respondent is ultimately responsible for the alleged policy violations.



# Summary of 2020 Title IX Regulations and Quick Tips

## Adjudication

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- ☐ IHEs - Provide a live hearing to determine responsibility for policy violations.
  - o K-12 schools may choose not to use live hearings (unless state, district, or board policy so requires) but must allow the parties (at a minimum) to respond to the report in writing and pose questions and share responses through the decision-maker.
- ☐ Provide notice of the hearing, including date, time, location, participants, and purpose, with sufficient time for the parties to prepare.
- ☐ Record or transcribe the live hearing and make that recording or transcript available to the parties for inspection and review.
- ☐ Appoint a trained decision-maker or panel.
- ☐ IHEs provide an opportunity for cross-examination to permit all parties to ask the other parties and all witnesses “all relevant questions and follow-up questions” including challenging the party’s or witness’s credibility.
  - o Cross-examination must be performed by the party’s advisor.
  - o If a party does not have an advisor, the IHE must provide an advisor of the recipient’s choice for that party to conduct the cross-examination at no cost.
  - o Questions must be first be evaluated by the decision-maker for relevance before being permitted, and any questions rejected will be explained on the record.
- ☐ Ensure the decision-maker(s) are prepared to understand relevance, including how to provide a sound and defensible rationale for excluding unapproved questions, as such decisions will be frequently challenged.
- ☐ Exclude all prior statements made by any party or witness who does not attend the hearing and/or chooses not to submit to cross-examination, but do not draw negative inferences from the failure to participate, only from the evidence that is or is not available.

## Adjudication

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- ☐ Ensure that decision-maker(s) do not pose questions and/or consider evidence about the complainant's prior sexual predisposition or sexual behavior unless such evidence is being offered to prove someone other than the respondent committed the alleged conduct or the evidence relates to the complainant's prior sexual behavior with respect to the respondent and is being offered to prove consent.
  - o Do not allow similar questions on cross-examination of the complainant that do not meet these criteria.
- ☐ Issue a written determination simultaneously to all parties for each alleged policy violation, including:
  - o The specific section(s) of the code alleged to have been violated.
  - o A description of all the steps taken from the receipt of the formal report through the hearing.
  - o Specific descriptions of all "findings of fact" that support the determination.
  - o Conclusions regarding the application of the "findings of fact" to the alleged violations.
  - o A statement and rationale with respect to each allegation, including determination, sanctions, and remedial measures.
  - o Procedures for appeal, including the bases upon which the parties may appeal.
- ☐ Extend any appeal rights equally to all parties, including rights to appeal an initial dismissal of the matter as not falling within Title IX jurisdiction. The following grounds for appeal must be included:
  - o Procedural irregularity that affected the outcome of the matter.
  - o New evidence that was not reasonably available at the time the determination regarding responsibility or dismissal was made, that could affect the outcome of the matter.
  - o The Title IX Coordinator, investigator, or decision-maker had a conflict of interest or bias that affected the outcome of the matter.
  - o Additional grounds for appeal may be added provided they are available to all parties.

## Record Keeping

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- ☐ Maintain all records (available for request by the reporting and responding party) for a period of seven years.
  - o RECOMMENDATION: Maintain all records of investigations, hearings, informal resolutions, and other processes for as long as the existing retention period that you use for other student records, but at least seven years. Maintain records of all training done to comply with these regulations, including attendance records and training materials, for the same record retention period.
- ☐ Make all training materials used to train the Title IX Coordinator, investigators, decision-makers, and any person who facilitates an informal resolution process available on the recipient's public website. If those materials are copyrighted or proprietary and cannot be posted publicly, make a list of them available by title and source on your website, but do not include the contents. Make only those training materials that are proprietary available for inspection only (viewing, not copying) in the Title IX office upon request.

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