



R³ Resources: Top Ten Myths of the New OCR Title IX Regs

A comprehensive assessment of common myths
that surround the New OCR Title IX Regs



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Introduction

In the coming three months, the education field will undertake in earnest the hard work of moving toward compliance with the most comprehensive re-imagining of Title IX in a generation. The 2020 OCR Title IX Regulations contain both blessings and curses, for sure, but they also pose hidden compliance challenges because some of the provisions are unclear or vague. ATIXA, the professional association for 3,500 Title IX administrators, offers this brief discussion of some key provisions of the Regs to help the field separate regulatory myths from Title IX facts.

When the 2011 DCL was released, many practitioners confined themselves to the four corners of that document. The mindset of many was, “If OCR didn’t say it, we couldn’t do it.” The rote or literal adherence to the DCL was paralyzing for many recipients. OCR is a primary source for compliance requirements, but not the only source. Indeed, courts, state laws and regulations, and industry standards are also primary sources in terms of compliance. Now, with these new Regs more than ever, it’s going to be critical to understand the limits of OCR’s rulemaking as defining compliance, not excellence.

It is not the job of funding recipients (e.g. schools, school districts, colleges, and universities) to become merely adherents to OCR’s rules, but to ask in a more heavily regulated environment how we can evolve our programs toward the excellence of best practices. Where OCR merely describes a floor (or digs a hole to set the floor even lower), none of us should accept that merely meeting the floor is the best we can do. Our communities expect us to innovate, research, and find new and better ways to achieve equitable resolutions.

The OCR perspective is one view of how to do that, but let’s not allow it to be the only view. The courts may have separate expectations they elaborate through negligence and due process claims. State legislatures may have higher expectations and some already do. And lastly, Congress may well take on the OCR sub-basement and raise the floor. In all of these cases, we at ATIXA will keep our members at the forefront of the field. Here are 10 myths that we see from a first review of the new regs:

Myth One: You can maintain your current definitions of offenses including sexual harassment, sexual assault, etc.

Fact One:

While OCR doesn't say it explicitly, the regs make it clear by inference that notice and training are expected to be given on the offense definitions that OCR offers in the Regs. Thus, it appears that OCR intends recipients to adopt its definitions as policy. However, it is also clear (as in OCR's discussion of consent) that OCR does expect, and will permit, recipients to add/embellish policy beyond what it offers in §106.30 (such as a recipient's ability to create its own definition of consent), as long as the basic definitions of offenses OCR has provided are incorporated. It will also make sense to incorporate as policy OCR's definition of what constitutes retaliation, as it will likely differ from a recipient's existing policy

Myth Two: You have to change your policy on receiving notice and can only accept written notice submitted to the Title IX Coordinator.

Fact Two:

OCR is only changing the notice standard OCR will use for enforcement purposes, not the standard recipient's need to adopt as policy. You can still accept notice in any form you want, from anyone you want. You can act on constructive notice (just as you always have), but now OCR isn't requiring you to. You still should.

Myth Three: You need to change your mandated reporting policy.

Fact Three:

OCR is changing the standard for those whom OCR considers to be responsible employees (now only the TIXC, officials with authority to implement corrective measures, and all K-12 employees), but not telling recipients whom they must designate as such. Obviously in K-12, it's everyone. Institutions of higher education (IHEs) can keep mandated reporting policies just as they are. No change is required. OCR is setting the floor (and setting it lower than it was), but you can still aim for the ceiling of best practices. This will be important as faculty and others may push to be excluded from institutional reporting obligations.

Myth Four: You can't take off-campus jurisdiction anymore.

Fact Four:

Sure you can. The courts will still expect you to address the in-program effects (also called the "downstream effects of the harassment") of out-of-school sex discrimination, even if it's unclear whether OCR now expects you to do so. OCR is again setting a floor, but also telling you that you can take jurisdiction over the misconduct through an alternate process (something other than a "Title IX" policy, though ATIXA doesn't think it has to be the student conduct process, explicitly). If you don't consider the misconduct covered by Title IX, it can still be addressed by your sexual misconduct policies, your comprehensive harassment and discrimination policy, or your codes of conduct in exactly the same way that you'd address the misconduct if it occurred within your program. This is really just an issue of how you classify the misconduct, and whether you consider it to fall within Title IX. Procedurally, nothing all that different needs to occur except for you to clarify which process applies during the preliminary inquiry, and jump through OCR's "dismissal" hurdle, which you ought to be doing anyway, as a matter of appropriate documentation.

Myth Five: You have to have a hearing panel.

Fact Five:

Fact Five: IHE's need to hold a live hearing before an independent decision-maker. That decision-maker can be a single administrator or a panel. There is no panel requirement, just a hearing requirement. Within a few years (if these Regs survive that long), we expect many schools to move to adopt a model which employs a full-time professional hearing officer for "Title IX" cases, though we prefer the checks and balances of a small, three-member panel if we have to use the formal hearing model. You'll probably also see more recipients move to third-party-neutral external hearing officers, [like those provided by TNG](#).

Myth Six: If you are a Title IX Coordinator, you cannot also do investigations.

Fact Six:

OCR accepts and understands that smaller schools with limited resources must use their Coordinators to investigate. This is not ideal, but OCR will not prohibit this approach. There must be a distinction between the investigator and an independent decision-maker (hearing officer) who is not the Coordinator, and again between the decision-makers and appeals officer(s), but you are still permitted to use the Coordinator as an investigator, if options are limited. Of note, the Regs explicitly prohibited the Title IX Coordinator from being the decision-maker. If the Title IX Coordinator is serving as the investigator, then the Coordinator should not then play subsequent roles in the process. The Title IX Coordinator may also need to designate someone to oversee the quality of the investigation. At smaller campuses and in high profile cases, schools may start to outsource this function. The General Counsel cannot do it, as they are conflicted.

Myth Seven: You can't funnel questions through the hearing decision-maker.

Fact Seven:

Well, it's true that live cross examination is now the requirement for IHE's (and is already required of many K-12s by state law or district policy in cases of longer term removals for students), with questions posed by the advisors to the parties. All advisor-posed questions must be funneled through the decision-maker first. However, there is no restriction on hearing officers or panels having the right to ask their questions before cross-examination takes place. The Chair has the right to limit unduly repetitious or irrelevant questions. If the hearing officer or panel then asks all its questions first, and is thorough in its questioning, there may only be few and/or likely repetitious questions left for the advisors to ask, which may be disallowed by the Chair. Also note, the Chair must provide an on-the-record rationale for disallowing any questions.

Myth Eight: One Coordinator is going to be enough to achieve compliance.

Fact Eight:

Nope. While there is still a need to have one lead Coordinator, schools are going to need multiple Coordinators ("Deputies" in common parlance). We have studied these regulations in great detail, and the new requirements are extraordinary and onerous. There are more than 50 substantive changes alone between the 2018 draft and the 2020 final rule. You're facing making at least 150 changes to policy, process, and practices. Training obligations are broad. The heavy lift ahead of you may be impossible to meet by August 14th for some recipients, but it's definitely impossible if you can't resource the compliance program adequately.

Myth Eight: One Coordinator is going to be enough to achieve compliance. - cont.

Fact Eight: - cont.

Presidents, boards, and superintendents: we know that right now many of your budgets are frozen or at risk, and your ability to expand programs is limited by a health crisis and an economic downturn, but compliance isn't an option. You'll be sued the minute you fail to accord someone the rights these regulations guarantee. And, your insurer isn't going to accept that you just couldn't afford to comply. While historically, recipients have functioned with a single Coordinator model, this looks to be enough ongoing work for 2-3 full-time Coordinators, or at least a well-staffed team, at each recipient.

Coordinators need to make it clear to their governing officials what it will take to make the needed changes, and governing officials, please work with your Coordinators to assess the task ahead (including preparing for the attack on single-sex programming that is being waged through OCR right now), and ensure that resources are prioritized accordingly. You will lose far more financially defending lawsuits and OCR complaints than you will spend to implement a compliant program for sex/gender equity.

Myth Nine: VAWA §304 applies only to colleges and universities, not K-12.

Fact Nine:

With these new Regs, OCR has effectively used the regulatory process to repackage and retroactively extend most of the procedural rights provisions of VAWA §304 to K-12 schools and districts, despite Congress' original intent to only bind Title IV funding recipients to VAWA Section 304 compliance. While VAWA doesn't literally apply to K-12, most of it does apply functionally, now. K-12 administrators and legal advisors would benefit from studying the [relevant sections of the VAWA Regs](#), not just the 2020 Title IX Regulations.

Myth Ten: Live hearings can be managed well by amateurs, volunteers, and those with occasional hearing panel experience.

Fact Ten:

OCR just effectively turned grievance processes into mini criminal courts. The sooner we acknowledge and accept this new reality, the sooner we can prepare to staff it professionally and competently. Many recipients think they'll be able to use their existing student conduct processes for this purpose. We doubt it. There are so many required changes that your student conduct process will already wind up as a different process than it currently is, when used for Title IX cases. And, don't forget, a mirror process for employees will also be required. Do you really want to create two new processes? It may make more sense to adapt existing sexual misconduct grievance and resolution processes. Of course, ATIXA believes these regulations make our [One Policy, One Process model](#) more salient than ever, especially as OCR is requiring identical procedures regardless of the constituency of the parties involved (students, faculty, administrators, staff). Regardless of what process is used, the decision-makers will need to be vetted carefully, assessed for bias and conflict of interest, and trained comprehensively. ATIXA has resources available for [you to train](#) your decision-makers, or [we can certify them](#). Nothing beats an ATIXA training for preparing administrators or panels to deliver professionalism and expertise on rigorous decision-making, analysis, due process, and procedure safeguards.

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