

June 11, 2021

From: Association for the Treatment of Sexual Abusers

To: Office for Civil Rights, U.S. Department of Education



Subject: Written Comment: Title IX Public Hearing Comments on 2020 Title IX Rule Changes

## **INTRODUCTION**

The Association for the Treatment of Sexual Abusers (ATSA) appreciates the opportunity to comment on the proposed changes to the Title IX rules governing the handling of sexual harassment in educational institutions. ATSA is a multi-disciplinary professional organization that comprises over 3,000 members dedicated to making society safer by preventing sexual abuse. We support sound research, effective practice, informed public policy, and collaborative community approaches that lead to comprehensive prevention strategies and promote the effective assessment, treatment, and management of individuals who have sexually abused or are at risk to abuse. It is within this framework that we make the following comments.

## **DEFINITION OF SEXUAL HARASSMENT**

ATSA supports a comprehensive definition of “sexual harassment” that is inclusive of the range of behaviors that can interfere with a person’s equal access to an educational program or activity.

The 2020 Title IX rule change defined sexual harassment to mean “*either 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; or unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient’s education program or activity; or sexual assault as defined in 34 CFR 668.46(a), implementing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act (Clery Act).*” This portion of the definition and the definition overall effectively narrowed the range of reportable behaviors in such a way that it now requires virtually a worst-case scenario for a student to be able to report an incident of sexual harassment under the revised Title IX. Narrowing the definition of sexual harassment has already had the unintended consequence of further reducing the reporting of concerning behaviors, resulting in neither the person harmed or the person who caused the harm engaging in counseling or other services they may need. Equally problematic is that the new regulations lift the *obligation* on

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schools and effectively eliminate their responsibility to connect students with those interventions to which they are entitled/could benefit from.

The previous Title IX rules were appropriately inclusive of the range of behaviors that can interfere with a person's equal access to an educational program or activity. By including a range of behaviors that varies in severity, this definition facilitated public safety by allowing educational institutions to become aware of all types of situations that impact students. Even when the alleged conduct did not rise to a level that merited a response under Title IX, knowledge of the inappropriate behavior enabled institutions to intervene early when sexual harassment had been reported. This empowered institutions to offer the necessary support and services to all involved persons and assisted them in identifying problem areas that allow effective design and implementation of prevention programs. Promoting early intervention not only supports victims and future student safety, it also provides the opportunity to offer the student engaging in sexual harassment individualized risk-based interventions to address the concerning behavior with the goal of helping him/her/them receive the necessary supports to avoid a potential trajectory of repeated sexual harassment or violence. The new definition effectively restricts students' access to Title IX services by strictly limiting the behaviors that can be identified as sexual harassment. Ultimately, this change curtails efforts to promote student safety and reduces the ability to prevent future sexually inappropriate behavior.

## **DEFINING EQUITABLE SERVICES**

With the release of these new regulations, then assistant secretary of the Office of Civil Rights, Kenneth Marcus, said that the rule is focused on protecting students on both sides of Title IX complaints. ATSA supports the concept that services should be offered to anyone needing services, whether they choose to report or not, and whether they have been reported or choose to ask for help with concerns about their own behaviors. This empowers institutions to offer the necessary support and services to all involved persons, and it assists in identifying problem areas. Promoting early intervention not only supports victims/survivors and future student safety, it provides the opportunity to offer the respondent individualized risk-based interventions to address the concerning behavior with the goal of helping him/her/them receive the necessary supports to avoid a potential trajectory of repeated sexual harassment or violence.

Under the current rule, there is, however, no clarity about whether services need to be equal or equitable. Initial studies have shown that although campuses offer a range of services for victims/survivors, many campuses do not offer many needed services for respondents or students concerned about their own behaviors (e.g., counseling, psychoeducational services, etc.). Indeed, in some cases, institutions are not renewing their Memorandum of Understanding with local rape crisis centers because there are not equal services or an available equal supportive relationship for students accused of sexual misconduct. Clearly what is needed for victims/survivors will be very different from

what will benefit students accused of or found responsible for sexual harassment or sexual assault. A clear definition of equitable services would encourage colleges and universities to establish the appropriate services for all parties involved.

## **SUPPORTIVE MEASURES**

ATSA supports implementing individualized supportive measures that are tailored to each situation. The concept of safety planning for complainants, the use of supportive measures to offer a change of housing, school schedules, etc. has been a tool used by colleges and universities. In the past, this has provided a sense of safety for the complainant and allows the campus to address the potential risks of a particular situation. This approach is now, however, limited by the Final Rule that defines “supportive measures” as individualized services reasonably available that are nonpunitive, non-disciplinary, and not unreasonably burdensome to the other party while at the same time designed to ensure equal educational access, protect safety, or deter sexual harassment.

Although a supportive measure may at times be a temporary inconvenience to the responding party, it does offer a campus the opportunity to evaluate risk and to engage the campus in supporting safety. Rather than use the term of “unreasonably burdensome to the other party” as the standard, the concept of safety for all students, including the respondent could be introduced. After an allegation of sexual harassment or sexual assault has been made, supportive measures for the respondent could be viewed as a way to prevent any further accusation or provide additional pro-social engagement to ensure further safety for all individuals.

## **SUMMARY**

Everyone deserves to live free from sexual harassment, the threat of sexual harm, and sexual assault in educational, workplace, and all other environments. To that aim, ATSA works actively at preventing and responding most effectively to all forms of sexual violence. Although the changes to Title IX’s rules within educational institutions were established to create a balance between all parties involved, they have fallen short of this goal. The new rules have created an environment that limits what can be reported and prevents students who have been harmed or who have caused that harm from receiving the necessary interventions they need to enable them to move forward in a positive manner. ATSA appreciates this important dialogue that helps to examine the consequences and efficacy of proposed changes to Title IX. Within the framework of well-considered policies and regulations, the interests of all parties as well as the surrounding student environment can focus on safety and ultimately make the prevention of sexual harassment and sexual assault a reality.