



Association of
Title IX Administrators

January 9, 2024

OCR's 2023 Higher Education Resolution Agreements: Session 2

An ATIXA Webinar

Not for Distribution

TODAY'S PRESENTERS



Brett Sokolow, J.D.
Chair, TNG Board of Directors;
TNG Management Committee;
ATIXA Advisory Board



Lauren Starnes, J.D.
Consultant, TNG



Daniel Swinton, J.D., Ed.D.
Partner, TNG Consulting
President, ATIXA



Strategic Risk
Management Solutions



Any advice or opinion provided during this training, either privately or to the entire group, is never to be construed as legal advice. Always consult with your legal counsel to ensure you are receiving advice that considers existing case law, any applicable state or local laws, and evolving federal guidance.

CALIFORNIA POLYTECHNIC UNIVERSITY - POMONA

- Discrimination allegations arose from a student who disputed her treatment in a business incubator program; akin to a “grade dispute”
- Student was the only female on a team of students for an experiential learning course involving the creation of a business “Start-Up” that was graded, could lead to University employment, and resulted in ownership shares of the business upon launch
- Student was awarded a 6% equity shares whereas the other non-lead students (all male) received 14-17%
 - Student and the University disputed her performance on the project, including her contribution of a data set she contributed
 - After Student complained about the proportion of her share, the male students met and removed Student from the program and attempted to lower her shares to 1%
 - After removal, Student was told she could not use the same title (“co-founder”) as her male peers

FRAMEWORK



Was there an adverse action against a member of a protected class because of their actual or perceived membership of said class?



Is there an offered legitimate, non-discriminatory reason for the adverse action?



Is there evidence that the offered reason is a pretext for retaliation?

TAKEAWAYS

OCR will look at both the action taken, and the process applied

Broad training across the institution is important

Even unofficial actions can constitute disparate treatment

SOUTHEASTERN COMMUNITY COLLEGE

- Female students reported feeling unwelcome in STEM programs
 - School had received reports of sexual harassment within program
 - Students in program did not know how to report
- Recruitment showed little female participation
- Surveys showed that female students felt isolated
- OCR's compliance review included:
 - A review of Southeastern's previous investigations
 - An evaluation of Southeastern's culture and climate
 - An on-site visit, interviews, surveys, and documentation review

TAKEAWAYS

Regular reviews of recruitment and other promotional materials campus-wide

Publicize reporting options and grievance processes

Conduct climate assessments before OCR intervenes

Track aggregate reports and complaints to identify potential climate issues

NORTHWOOD

- Complaint alleged that Northwood discriminated against men on the basis of sex in their award/scholarship eligibility practices
- Distinguished Women Award (DWA)
 - Created by the University's Board of Trustees
 - Awarded to members of the local community, not students
 - OCR determined DWA was part of "education program and activity"
- Distinguished Women Endowed Scholarship (DWES)
 - Students "opt-in" to private donor scholarship pool then a committee selected the recipients among eligible students
 - Some scholarships had eligibility criteria related to gender

AKRON

- Complaint alleged that Akron restricted eligibility for a memorial scholarship to women only
 - The donors wanted to encourage women to overcome barriers to entering the computer science field
 - Eligibility criteria:
 - Female junior or senior, full-time student majoring in Computer Science
 - Financial Aid, Computer Science Department, and the family selected recipients
 - No specific application for this scholarship
- University worked with donors to remove the sex restriction on eligibility on all sex restricted scholarships

UNIVERSITY OF MINNESOTA-TWIN CITIES

- Complaint alleged sex discrimination because the University only nominated female medical school students for the Alpha Epsilon Iota Foundation Award (AEI)
- University agreed to revise eligibility criteria and remove the sex-based nomination requirement of the AEI

Not for Distribution

AWARDS AND SCHOLARSHIPS TAKEAWAYS

Audit award and scholarship opportunities

Modify award and scholarship descriptions

Work with donors to modify eligibility criteria

Audit webpages, nomination forms, promotional materials

NORTHEASTERN STATE UNIVERSITY

- Compliance review examined whether NE State:
 - Discriminated against female students by denying them an equal opportunity to participate in intercollegiate athletics
 - Discriminated against male or female students by not awarding athletic scholarships in proportion to the numbers of students of each sex participating in intercollegiate athletics

THREE-PART TEST (1979)

Effective accommodation of interests and abilities

1

Opportunities for males and females substantially proportionate to their respective enrollments; **OR**

2

Where one sex has been underrepresented, a history and continuing practice of program expansion responsive to the developing interests and abilities of that sex; **OR**

3

Where one sex is underrepresented and cannot show a continuing practice of program expansion, whether it can be demonstrated that the interests and abilities of that sex have been fully and effectively accommodated by that present program

NORTHEASTERN STATE UNIVERSITY

- Prong 1
 - Enrollment was 40% male, 60% female
 - Athletics participation was 70% male, 30% female
 - Five teams for each sex
- Prong 2
 - Requests handled on ad hoc basis
 - Had not added women's sport in 21 years
 - Participation numbers had not meaningfully increased
- Prong 3
 - Comparisons to other conference schools
 - No formal actions to assess interests and abilities

NORTHEASTERN STATE UNIVERSITY

- Athletic Financial Assistance
 - Should be “substantially equal amounts”
 - Generally, one percent or less
 - Here, 70% of athletes were male but received 62% of scholarships
 - OCR typically considers whether there is any legitimate, nondiscriminatory reason behind the discrepancy
 - University preempted this step by offering to complete a compliance review and agreement

TAKEAWAYS

Institutions have options to reach compliance

Regular audits of athletics equity are beneficial

Create athletics equity plans to reach compliance

Ensure existing systems and structures can provide the type of data needed to assess compliance and equity

OVERALL TAKEAWAYS FROM 2023

- Complaint Duration
 - Many of these resolution agreements began as OCR complaints many years ago
 - Resolving these complaints costs time, money, and personnel resources
- Breakdown of Resolution Agreements
 - Sex: 67 (53 at K-12 level)
 - Disability: 56
 - Race and National Origin: 5
- Providing support does not alleviate obligation to offer or initiate grievance process

OVERALL TAKEAWAYS FROM 2023

- For sexual harassment claims:
 - Hodgepodge of standards based on OCR guidance at various times
 - 2001 Revised Sexual Harassment Guidance or 2020 Regulations
 - Return to emphasis on “sufficiently serious” as OCR’s evaluative standard for sex-based harassment
- Policies and Procedures
 - Ensure that policies and procedures address sex discrimination in addition to sexual harassment
 - Do not ignore websites
 - TIXC name and contact info
 - More than sexual misconduct info

OVERALL TAKEAWAYS FROM 2023

- Scrutiny on single-sex and identity-based affinity groups or programs
- Consider preemptive auditing and training for staff
 - Scholarships
 - Awards
 - Athletics
 - STEM programs
 - Academic programs
 - Enrichment programs for youth
 - Affinity groups and programming
 - Employees, too



Association of
Title IX Administrators

Questions?

Not for Distribution



Association of
Title IX Administrators

LIMITED LICENSE AND COPYRIGHT. By purchasing, and/or receiving, and/or using ATIXA materials, you agree to accept this limited license and become a licensee of proprietary and copyrighted ATIXA-owned materials. The licensee accepts all terms and conditions of this license and agrees to abide by all provisions. No other rights are provided, and all other rights are reserved. These materials are proprietary and are licensed to the licensee only, for its use. This license permits the licensee to use the materials personally and/or internally to the licensee's organization for training purposes, only. These materials may be used to train Title IX personnel, and thus are subject to 34 CFR Part 106.45(b)(10), requiring all training materials to be posted publicly on a website. No public display, sharing, or publication of these materials by a licensee/purchaser is permitted by ATIXA. You are not authorized to copy or adapt these materials without explicit written permission from ATIXA. No one may remove this license language from any version of ATIXA materials. Licensees will receive a link to their materials from ATIXA. That link, and that link only, may be posted to the licensee's website for purposes of permitting public access of the materials for review/inspection, only. Should any licensee post or permit someone to post these materials to a public website outside of the authorized materials link, ATIXA will send a letter instructing the licensee to immediately remove the content from the public website upon penalty of copyright violation. These materials may not be used for any commercial purpose except by ATIXA.