



R³ Resources: ATIXA Position Statement on Adopting the Preponderance of the Evidence Standard of Proof

The ATIXA Advisory Board's statement regarding the Preponderance of the Evidence Standard of Proof present in the New Title IX Regulations



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ATIXA Position Statement

About ATIXA

Founded in 2011, ATIXA is the nation's only membership association dedicated solely to Title IX compliance and supports our over 3,700 administrator members who hold Title IX responsibilities in schools and colleges. ATIXA is the leading provider of Title IX training and certification in the U.S., having certified more than 4,500 Title IX Coordinators and more than 12,000 Title IX investigators since 2011. ATIXA releases position statements on matters of import to our members and the field, as authorized by the ATIXA Board of Advisors. For more information, visit www.atixa.org.

Introduction

The debate continues to rage on about which standard of proof federal funding recipients (including schools and colleges) should apply to determine whether a violation of sexual harassment policy has occurred. The Office for Civil Rights (OCR) has long contended, and courts have consistently affirmed, that the appropriate standard is preponderance of the evidence (POTE). Most funding recipients adopted POTE in their sexual harassment policies to remain consistent with OCR and the courts.

OCR recently reversed 20 years of previous guidance by issuing new regulations that permit recipients to choose between POTE and a more stringent standard – clear and convincing evidence (C&C). A recipient's choice, though, comes with strings – the recipient must consistently apply the chosen standard in all grievance processes addressing sexual harassment that involve students and/or employees (including faculty). Whether a college or school may continue to use POTE or must raise the standard to C&C may be dictated by its faculty processes. If an institution relies on the C&C standard in any process (e.g. in a faculty grievance process), then it will have to choose which standard to implement in all processes to satisfy OCR's new consistency requirement.

ATIXA issues this position statement to reiterate our consistent position that the POTE standard is the only equitable standard under Title IX, and to encourage our members to uniformly adopt POTE for all sexual harassment allegations involving all students and employees, including faculty.

Preponderance of the Evidence (POTE)

ATIXA agrees that recipients are best served by the application of a consistent standard. The POTE standard is not just the only equitable standard of proof (and Title IX mandates equity), POTE is also the legal standard consistently used in adjudicating civil rights claims in the U.S.¹ Title IX's equity mandate means that recipients must have a level playing field for students and employees who become involved in Title IX grievance processes. There is no reason to skew the playing field toward one party or the other in a sexual harassment claim. C&C would enhance protection for respondents at the expense of complainants and, therefore, is not the standard that ensures equity.

A Level Playing Field is Always a Good Idea

Moving the standard to C&C is a zero-sum game, where one party benefits at the other's expense, which is contrary to the equity mandate of Title IX. The data consistently show that the vast majority of complaints are brought by individuals who identify as female regarding alleged misconduct by individuals who identify as male. That reality makes it fair and appropriate to ask why it should be harder for a recipient to determine a woman (or any person) was sexually harassed than for a recipient to determine that a man (or any person) did not engage in sexual harassment.

That disparity on the basis of sex is the practical effect that adopting C&C would have. How will recipients explain making such a value judgment to the members of their communities who expect to be treated equitably? In an equitable setting, the standard should be balanced between the parties. POTE does that. C&C does not.

¹ See, e.g. *Bazemore v. Friday*, 478 U.S. 385, 400 (1986).

A Level Playing Field is Always a Good Idea - cont.

It is also worth noting that POTE is the accepted standard (and has been for over 40 years) for disciplinary decisions involving employment discrimination for all employers.² In addition, no court has ever ruled definitively that applying POTE to a campus sexual misconduct decision (barring a state Administrative Procedures Act mandate to the contrary) was unfair or violated due process. Even the American Association of University Professors (AAUP), which insists its members apply the C&C standard to faculty discipline, has been unsuccessful in convincing a court to agree that a higher standard than POTE must be applied.

To be clear, C&C may better insulate faculty from student allegations, but if recipients make that choice, they will also have to accept the ripple effect of imposing C&C on student-on-student allegations. If a recipient chooses C&C now, it is probably because the faculty discipline process requires C&C under AAUP standards. But how will students feel if their institution sacrifices the safety that POTE offers them in exchange for the higher levels of faculty insulation from allegations of misconduct that C&C represents? Will faculty rights prevail when pitted against the rights of students?

While many recipients might assume that faculty members or unions will contest an effort to adopt the POTE standard, it's worth noting that a recipient's employees, including faculty members, are just as likely to experience sexual harassment as to perpetrate sexual harassment. Thus, a recipient's employees may more broadly support a change to POTE than anticipated. At the very least, recipients may want to solicit feedback from a cross-section of stakeholders before a final decision on the standard of proof is made.

² See, e.g. Dori Meinert, How to Conduct a Workplace Investigation, Society for Human Resource Management (2014), available at <https://www.shrm.org/hr-today/news/hr-magazine/pages/1214-workplace-investigations.aspx>; David I. Weissman, Proper Workplace Investigations, Society for Human Resource Management (2011), available at <https://www.shrm.org/hr-today/news/hr-magazine/Pages/0511legal.aspx>.

If the Right Thing is Hard to Do – That’s Probably How You Know It’s the Right Thing to Do

Recipients will likely face resistance to uniform adoption of POTE from unions and faculty governance bodies. While ATIXA believes that a balanced approach to due process and fundamental fairness protections for respondents is important, the substantial due process protections OCR has included in the 2020 regulations – i.e. providing clear notice with sufficient time to respond; ensuring access to a useful advisor (who can be an attorney); affording the right to review and the opportunity to challenge all evidence prior to or during a hearing; affording the right to identify and question witnesses and other parties; providing a clear rationale for the outcome; and an appeal process – will be more effective than changing the standard of proof, and should reassure these groups that their rights are in fact now better protected.

Risk of Litigation

Recipients should also understand that moving away from POTE will provoke lawsuits. On almost all college campuses, the vast majority of those who will benefit from a shift to C&C will be individuals who identify as male. Lawyers planning to sue recipients because they raised the standard of proof to C&C will make substantive due process and equal protection claims as well as seek personal liability from public administrators under Section 1983. Would a constitutional Equal Protection argument have legs, at least against public universities, because of the systematic disadvantage based on sex that changing to C&C could cause? Could it result in a class action lawsuit brought by complainants at your institution?

A Retreat from Doing the Right Thing

Moving away from POTE will also likely result in activism and protests. Many recipients have activist students and faculty. National organizations are already working overtime to galvanize grassroots support. We expect to see public websites tracking which schools and colleges protect victims/survivors, and which have capitulated to faculty privilege – a C&C wall of shame, if you will.

A Retreat from Doing the Right Thing - cont.

A retreat from Title IX protections, which the regulations represent generally, and from POTE in particular, will inspire or increase such activism. Before implementing a change in the standard of proof, administrators should carefully consider the impact such a change may have on reporting sexual harassment and sexual assault (potential chilling effects), allegations of creating a hostile environment based on sex and/or toward complainants, the public relations impact on admissions and planned-giving, and the long-term wisdom of rolling back protections. A Democratic administration will take office in Washington again at some point. Democrats have stated public opposition to these regulations, and presidential candidate Joe Biden has committed to withdrawing them if he wins the election. Those with long-term perspectives know this and are preparing for that potential election outcome.

Empirical Research Must Also Be Considered

Colleague and ATIXA member Bill Kidder's important study for the [Journal of College and University Law](#) raises another important point for consideration. Bill compared the effect of various standards of proof on the issue of false positives and false negatives. A false positive occurs when a respondent who is truly not responsible for the allegations is wrongfully found to have violated policy. A false negative happens when a recipient determines that a respondent did not violate policy even though the complainant's allegations were true. Bill's research conclusion is summarized in his law review article (which we encourage you to read and circulate):

The executive summary to the DeVos/Trump proposed Title IX regulations states the overarching goal of "producing more reliable factual outcomes" in campus Title IX cases, a theme repeated throughout the document. Accuracy should be a paramount consideration in the Title IX context, just as it is more generally. However, the proposed standard of evidence regulation is pulling in the opposite direction and more likely than not it would result in a net loss in reliability of campus Title IX outcomes. For the reasons detailed below, the consensus view among evidence law scholars is that moving from the [POTE] standard to the C&C standard has the foreseeable effect, other things being equal, of increasing false negative errors to a greater extent than it reduces false positive errors, thus eroding overall accuracy in Title IX outcomes.

Empirical Research Must Also Be Considered - cont.

Given this reasoned conclusion, how can a recipient in good conscience impose a policy change likely to have this effect, which Bill aptly characterizes as a “Foolish Consistency”?

Conclusion

For all of the foregoing reasons, ATIXA recommends the POTE standard to its members and the field. Having said that, we need recipients to steadfastly respect POTE. If there is 49.9% evidence of a violation of policy, that is not enough to discipline the respondent. Even 50% is not enough. When the greater weight of the evidence shows a violation by at least 50.01%, then, and only then, is there sufficient evidence to impose discipline.

This position statement was unanimously adopted by the ATIXA Advisory Board on May 21st, 2020.

CONTACT INFORMATION

Brett A. Sokolow, Esq.
President, ATIXA
610-644-7858

Brett.Sokolow@atixa.org
www.atixa.org
www.tngconsulting.com