

## TITLE IX

### *Law Professors Sign Open Letter Protesting Title IX Guidance and Enforcement.*

A group of law professors from across the country released an [open letter](#) to state and federal lawmakers, college administrators, and officials at the U.S. Department of Education Office for Civil Rights (OCR) this month. The letter protests a series of OCR directives and enforcement actions issued pursuant to Title IX of the Education Amendments of 1972, which prohibits discrimination on the basis of sex in federally-funded educational institutions.

The letter argues that OCR has unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment. In particular, it argues that the majority of OCR's directives on the topic of campus sexual harassment have not undergone notice and comment procedures as the Administrative Procedure Act requires of all proposed regulations as part of the rule-making process. Instead, OCR's directives incorporate obligatory language such as "must" and "require" without citing any regulatory or statutory basis.

The open letter further argues that OCR's directives and enforcement actions have had a harmful effect on campus free speech and due process by dramatically expanding the U.S. Supreme Court's definition of "sexual harassment" under Title IX, which is limited to conduct that is "severe, pervasive, and objectively offensive." For example, OCR's directives indicate that "harassment does not have to . . . involve repeated incidents" to be actionable. The letter contends that this voids the Supreme Court's requirement that the conduct be "pervasive." Additionally, the open letter criticizes OCR's enforcement actions for indicating that sexual harassment includes "any unwelcome conduct of a sexual nature," which disregards the Supreme Court's requirement that the conduct be "objectively offensive." The open letter also criticizes OCR's requirement that educational institutions use a lower standard of proof, the preponderance of the evidence standard, as conflicting with prior case law.

The open letter ultimately asks OCR to clarify which directives it considers to be guidance rather than regulations, and to eliminate obligatory wording from the directives that merely serve as guidance unless they are supported by prior legislation or regulation. Further, it asks that the directives it deems to be regulations be brought into compliance with the Administrative Procedure Act, including its review and comment procedures.

#### **NOTE:**

*The argument that OCR's directives regarding sexual harassment were made without regard to the required notice and comment rule-making process has been previously raised. James Lankford, United States Senator for Oklahoma, has [previously written to the Department of Education](#) on this topic, eliciting a [response](#). Senator Lankford, in turn, wrote a [second letter](#), again asking the Department of Education to clarify that its policies are not required by Title IX, but reflect only one of various ways schools may choose to develop and implement policies for the prevention and remedy of sexual harassment and sexual violence. While there is great debate surrounding this issue, we recommend that institutions consult with legal counsel regarding their compliance with OCR's guidance.*