

Title IX Corner – February 2019

The United States Department of Education published new (proposed) Title IX regulations

On November 29, 2018, the U.S. Department of Education's Office for Civil Rights (OCR) [published proposed regulations](#) governing Title IX of the Education Amendments of 1972. The current Title IX regulations were issued in 1975. Since then, OCR has issued a series of guidance documents, most notably the 2011 Dear Colleague Letter (withdrawn in September 2017). These guidance documents have instructed institutions such as ours on how to address sexual harassment and sexual violence.

In the four decades since OCR promulgated its original regulations, there have been many other chefs in the Title IX kitchen. The Department of Education is not the only federal agency tasked with enforcing Title IX. Many other federal agencies, including the Department of Health and Human Services and the Department of Justice also have a hand in regulating Title IX. Other federal laws, such as the Clery Act, Campus SaVE Act, and the Violence Against Women Act, play a direct or indirect role in how sexual violence is addressed on college campuses. Both state and federal courts across the country, including the Supreme Court, have issued rulings on the Title IX obligations of institutions of higher education. Likewise, several states have passed laws that create additional requirements for universities. For example, in New York, all universities are required to conduct campus climate surveys at least every other year with questions covering the Title IX Coordinator's role, campus policies and procedures, bystander attitudes, awareness of affirmative consent, etc. At times, the incongruity between agency guidance documents, state law, and court decisions has created uncertainty and confusion among universities about their Title IX obligations.

The current proposed regulations do three broad things. First, they establish a "deliberate indifference" standard for when OCR can find a university in violation of Title IX for failing to properly respond to a report of sexual harassment or sexual assault. In plain terms, this means that to the extent a university has established and uses a compliant grievance procedure, OCR will not find the university in violation of Title IX even if it disagrees with the university's findings. In a similar vein, the regulations have removed the bite underlying former OCR guidance by eliminating the threat of monetary damages.

Second, the proposed regulations contain numerous due process requirements for individuals accused of sexual harassment or sexual assault. While there is little controversy surrounding the heightened standard for OCR's investigations, the due process requirements, including language regarding live hearings, cross examination, providing advisors, and appeals procedures, are the source of heated debate on campuses across the country.

Third, the proposed regulations have narrowed the definition of sexual harassment. Under the previous administration, sexual harassment was defined as “unwelcome conduct of a sexual nature” that is “sufficiently severe *or* pervasive” to alter the conditions of one’s education or employment.” This definition was in line with [the Supreme Court’s Title VII definition of a hostile environment](#). The proposed regulations have redefined this standard such that sexual harassment must be “severe, pervasive, *and* objectively offensive” to constitute a hostile environment.

Pursuant to the notice-and-comment procedures under the Administrative Procedure Act, OCR is currently accepting comments on the proposed regulations until February 15, 2019. All submitted comments will be made publicly available. To date, the Department of Education has received 124,196 comments. Since the close of the notice-and-comment period, OCR is reviewing all the comments and will issue final regulations at an undisclosed date. The Department of Diversity, Equity, and Inclusion will continue to provide the MUSC community with legislative updates on Title IX.