



mcadsv

Missouri Coalition Against
Domestic and Sexual Violence

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Missourians with
a shared value that
rape and abuse
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JANUARY 30, 2019

Docket ID: ED-2018-OCR-0064-7922

Brittany Bull

Office of Civil Rights, U.S. Department of Education

400 Maryland Avenue SW., Room 6E310

Washington, DC 20202

**Re: U.S. Department of Education Public Comment Period: (83 FR 61462)
on Nondiscrimination on the Basis of Sex in Education Programs or
Activities Receiving Federal Financial Assistance**

This letter is written to provide public comment to the U.S. Department of Education regarding its current guidance for Title IX.

The Missouri Coalition Against Domestic and Sexual Violence (MCADSV) unites Missourians with a shared value that rape and abuse must end, and advances this through education, alliance, research and public policy. MCADSV is a statewide membership association comprised of 124 domestic and sexual violence agencies and organizations such as shelters and rape crisis centers, including campus-based programs. Additionally, MCADSV works alongside our statewide partners in elementary, secondary, and higher education to create spaces where students are safe from intimate partner violence and sexual harassment or assault.

MCADSV gathered feedback from our membership and allied partners in regard to the [Proposed Rules](#) with specific reference to Title IX enforcement

The 2011 Dear Colleague Letter provides guidance on the unique concerns that arise in sexual violence cases, such as the role of criminal investigations and a school's independent responsibility to investigate and address sexual violence. A Title IX investigation, which is based on an educational institution's code of conduct policies, should not be compared to criminal justice investigations of sexual assault. Universities are not investigating criminal statutes, and do not have the resources for criminal investigations or access to crime labs. The proposed rulemaking would increase the financial and administrative costs to both universities and students involved in the grievance process by requiring institutions to permit cross-examination of witnesses and parties by advisors, including attorneys, and provide advisors "aligned with the interests" of the parties if they do not have an advisor. This requirement, perhaps more than any other within the proposed rulemaking, would unnecessarily and significantly change the fundamental nature the Title IX grievance process from one which is educational and administrative to one which is purely legal in nature.

Institutions' student conduct processes are not intended to be legal in nature, nor should they be, in that the stakes involved in a student conduct process are

much different (and lesser) than they are in the criminal justice process. Universities have developed thorough investigation procedures that have retired the “he said, she said” standard assumption that sexual violence is a miscommunication. As such, and college students now expect protections under Title IX; reversing current guidance will create additional inconsistency and confusion.

The proposed definition of sexual harassment would force students to endure more severe harassment before receiving help. Schools must intervene in sexual harassment and assault before it causes irreparable harm in order to protect equal educational access. More than one third of students experiencing sexual assault in college drop out of school. By severely narrowing the definition of sexual harassment in which schools must intervene, the proposed rule would force students to endure more severe harassment for longer periods of time before getting help undoubtedly resulting in greater deprivations of educational access, especially burdening women, girls, gender nonconforming students, and students with disabilities. Since 2001, the Department has defined sexual harassment as “unwelcome conduct of a sexual nature” for purposes of Title IX enforcement. In contrast to previous guidance, the proposed rule defines sexual harassment as “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 [school’s] education program or activity.” By including only the most severe instances of sexual harassment, which have already caused a material deprivation of educational access, the proposed rule would dramatically limit the circumstances in which schools have a duty to intervene forcing students to endure more severe harassment, and the concomitant interference with their educational access, before their schools respond.

The proposed rule would prohibit schools from responding to sexual harassment and assault perpetrated outside of a school activity, even when it creates a hostile environment at school. Proposed rule § 160.45(b)(3) provides that schools “must dismiss” any complaint of sexual harassment that does not rise to the level described by the new harassment definition at § 160.30, or which occurred outside a school activity. Therefore, the proposed rule expressly prohibits schools from taking action to remedy harassment or assault that was perpetrated off campus or via electronic communication, even if that harassment creates a hostile environment on campus or results in additional harassment or retaliation on campus. This provision would pose especially harmful consequences for K-12 students and for postsecondary students who live off-campus. The proposed rulemaking disregards both the underlying purpose of Title IX, as well as the factual settings and circumstances in which most sexual assaults of students occur.

The Proposed Rules are Inconsistent with the Clery Act. A number of the Department’s proposed rules are inconsistent with the Clery Act, which the Department also enforces, and which also addresses the obligation of colleges and universities to respond to sexual assault and other behaviors that may constitute sexual harassment, including dating violence, domestic violence, and stalking. For example, the proposed rules prohibiting schools from investigating off-campus and online sexual harassment conflict with Clery’s reporting requirements. The Clery Act requires colleges and universities to notify all students who report sexual assault, stalking, dating violence, and domestic violence of their rights, regardless of “whether the offense occurred on or off campus.” The Clery Act also requires colleges and universities to report all sexual assault, stalking, dating violence, and domestic violence that occur on “Clery geography,” which includes all property controlled by a school-recognized student organization (such as an off-campus fraternity); nearby “public property”; and “areas within the patrol jurisdiction of the campus police or the campus security department.”

Every survivor of sexual violence must be taken seriously, and every accused should know guilt is not predetermined, yet the experience of survivors and accused cannot be conflated. The proposed rules would require schools to give unequal appeal rights. Although Secretary DeVos claims that the proposed rules make “[a]ppel rights equally available to both parties,” they do not in fact provide equal grounds for appeal to both

parties, as complainants are barred from appealing a school's resolution of a harassment complaint based on inadequate sanctions imposed on a respondent. Allowing only the respondent the right to appeal a sanction decision is both unfair and a violation of the requirement of "equitable" procedures, because survivors are also impacted by sanction decisions. Perpetrators of sexual violence silence victims through intimidation and coercion, resulting in many survivors not coming forward to report their assault. This creates an environment where access to education is not equitable, the basis for Title IX. Failures of due process are not the result of erroneous OCR guidance, but rather misapplication of such guidance. Rolling back current protections will place additional burden on students who have experienced sexual violence, and how their campus is able to respond.

In conclusion, MCADSV appreciates having these comments taken into consideration.

Sincerely,

A handwritten signature in black ink that reads "Jennifer Carter Dochler". The signature is written in a cursive, flowing style.

Jennifer Carter Dochler
Public Policy Director
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