



University of Colorado

Boulder | Colorado Springs | Denver | Anschutz Medical Campus

To: Secretary Betsy DeVos  
United States Department of Education

From: Patrick O'Rourke, Vice President, University Counsel and Secretary of the Board of Regents on behalf of University of Colorado President Bruce Benson

Re: Questions on Proposed Rule - Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance

Date: January 30, 2019

The University of Colorado submitted a comment on the proposed rule. Separately, the University of Colorado respectfully submits a series of higher priority questions related to the U.S. Department of Education Office for Civil Rights' Proposed Rulemaking on Title IX of the Education Amendments of 1972, as published in the Notice of Proposed Rulemaking ("NRPM") in the Federal Register on November 28, 2018 ("proposed rules"). The University of Colorado would benefit from clarification from the Office for Civil Rights ("OCR") on these questions in order to help determine how to interpret and implement these key points if the proposed rules were to be adopted in their existing form.

1. The proposed rules state that recipients are free to respond to sexual harassment that did not occur within the recipients program or activity "through the recipient's student conduct code, but such decisions are left to the recipient's discretion in situations that do not involve conduct falling under Title IX's purview" (NPRM, Federal Register Page 61475). To what extent is OCR suggesting or requiring differences between the procedural treatment of Title IX complaints, as defined by the proposed rules, and other complaints of misconduct that the university would like to also address?
2. The proposed rules note that "Like the existing regulations, the proposed regulations would apply to sexual harassment by students, employees, and third parties" (NPRM, Federal Register Page 61483); yet, they also note that nothing in the regulations shall be read "in derogation of an employee's rights" under Title VII and its regulations (NPRM, Federal Register Page 61495). Will universities maintain discretion on how to adjudicate/address sexual harassment allegations against employees under the framework of Title VII? Would the adjudication process set forth in these proposed rules interfere with universities' ability to set forth behavioral standards and impose disciplinary action for its employees through existing procedures that comply with state and university rules and regulations?

3. The proposed rules require the Title IX Coordinator to initiate a formal complaint if there is actual knowledge of multiple reports of alleged sexual harassment by one respondent (NPRM Federal Register Page 61497). To what extent, if any, does such a formal complaint impact the inability to rely on any statement of a party in reaching a determination (NPRM Federal Register Page 61498)? In other words, in this context of Title IX Coordinator initiated formal complaints, if one or more complainants do not participate in the grievance process, including cross-examination, does the Title IX Coordinator have an obligation or the discretion to continue a process?
4. The proposed rules are silent on how to proceed if additional, substantive responses are submitted by one or both parties during the investigative stage, namely if universities should allow for another 10 days for the parties to re-inspect the supplemented investigative file and/or respond to an amended investigative report containing newly provided information. Allowing on-going supplemental file inspections and amended investigative reports is ideal from a thoroughness perspective, but may result in a significantly prolonged investigative stage. What if any guidelines should be put in place regarding supplementing the record at this stage of the process?
5. For the purposes of the cross-examination stage, is it recommended that universities craft rules of evidence in order to consistently and fairly apply rules of admissibility? How can decision-makers ensure that evidentiary decisions during the cross-examination phase are applied consistently and equitably?
6. The proposed rules indicate that “if a party or witness does not submit to cross-examination at the hearing, the decision-maker must not rely on any statement of that party or witness in reaching a determination regarding responsibility” (NPRM, Federal Register Page 61498). Are decision-makers able to consider information provided in documents during the investigation stage (e.g. phone records, email correspondence, text messages, police reports, SANE reports etc.) if certain witnesses referenced in those documents (e.g. police officers and SANE nurses) do not submit to cross-examination or refuse to answer a specific question during cross-examination?
7. When a criminal or civil protective order is in place, how should universities facilitate a live cross-examination process without effectuating a violation of the order? Particularly if there is a requirement in place that prohibits one party from contacting the other (either directly or through third party), how does OCR recommend the live cross-examination take place?