



# U.S. Senator Questions Whether U.S. Department of Education Has Overstepped Title IX Authority

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Last week, U.S. Senator James Lankford (R-Okla.), chairman of the Senate's Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management, sent a letter to John B. King, Jr., the Acting Secretary of the U.S. Education Department (the "Department") questioning whether the Department's Office of Civil Rights ("OCR") has exceeded its legal authority, through the issuance of its guidance documents, to push institutions to do more on campus sexual assault.

By way of brief background, regulatory guidance letters, like the ones recently issued by the Department in 2010 and 2011<sup>[1]</sup> are designed to simplify regulations that are already in place. Importantly, unlike regulations, guidance letters do not have binding power and regulatory agencies need not engage in formal processes in issuing guidance letters. To the contrary, the process of introducing new regulations is an arduous process that requires a regulatory agency to solicit public input and respond to those inputs.

Over the past few years, OCR has imposed a number of new requirements on institutions vis-à-vis the publication of "Dear Colleague" guidance letters that focus on campus sexual misconduct. Most notably, in 2011, OCR published the [Dear Colleague Letter](#) concerning sexual violence. In this letter, the Department addresses an institution's obligation, pursuant to Title IX, to adopt grievance procedures that promptly and equitably resolve complaints of sexual misconduct. In the Letter, the Department also states that schools should evaluate complaints under a "preponderance of evidence" standard, rather than a "beyond a reasonable doubt" standard.

The focus of Senator Lankford's letter is that the Department has unlawfully circumvented the regulatory process through the issuance of these guidance letters. "I don't have a sense that the Department of Education is mean or evil," said Senator Lankford. "My issue is you have to follow the rules and do this the right way." Specifically, Senator Lankford argues that unlike typical guidance letters, the guidance documents recently issued by the Department are, in essence, a binding authority on institutions. To that end, Senator Lankford argues that the guidance letters essentially amount to new regulations, as they set forth sweeping institutional changes. Indeed, many institutions across the country have been inclined to implement the policies and comply with the requirements set forth in the Dear Colleague letters out of fear that they will lose federal funding if they decline to do so. "I condemn all types of sex-based discrimination, including sexual violence and harassment, in the strongest possible terms, but believe that the 'Dear Colleague' letters advance substantive and binding regulatory policies that are effectively regulations," said Senator Lankford.

“Perhaps OCR sought to avoid notice and comment procedures, fearing that education officials and other interested groups would have voiced substantive objections to the letters’ policies if given an opportunity,” said Senator Lankford. “If so, this fear would have been well-placed: legal scholars and academics across the political spectrum have decried the ‘Dear Colleague’ letters as offensive to First and Fourth Amendment protections — protections that Title IX and its implementing regulations alone have never been said to imperil.”

Furthermore, Senator Lankford pointed out that current Title IX regulations do not contemplate any standard of proof to justify the imposition of a “preponderance of evidence” standard included in the 2011 letter. Senator Lankford emphasized that this sort of substantive rule must be implemented through the procedures of introducing new regulations. In addition to mandating that the Department cites legal support for all of the requirements set forth in the 2010 and 2011 “Dear Colleague” letters, Senator Lankford urged the Education Department to clarify that the letters do not amount to regulations, and that an institution’s failure to adhere to the letters would not result in an adverse finding or rescission of federal aid.

The Education Department declined to comment on Lankford’s letter. “We have received the letter and look forward to responding,” said spokesperson Dorie Nolt. However, this isn’t the first time the scope of the Department’s authority is being challenged. In previous cases, the Department has justified the broad scope of the Dear Colleague Letters by arguing that the guidance letters spell out regulations that stem from Title IX. “I do not make the law, but we explain it. It’s an explanation of what Title IX means,” Catherine E. Lhamon, former assistant secretary for civil rights, previously stated when questioned on this very issue.

Institutions should keep a close eye out for the Department’s formal response to Senator Lankford’s letter. However, in the meantime, in order to minimize potential liability, institutions are advised to implement procedures and policies that comply with Title IX (and the Dear Colleague letters) and train their employees regularly to minimize Title IX liability and fulfill their duties to its students.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

[1] Please note that OCR has published additional guidance documents since this time. For example, In 2014, OCR published “[Questions and Answers on Title IX and Sexual Violence](#).” In 2015, Assistant Secretary for Civil Rights Catherine E. Lhamon sent a [Dear Colleague Letter](#) to school districts, colleges, and universities reminding them of their obligation to designate a Title IX coordinator.