



CAMPUS COUNSEL

A legal blog written for administrators, HR professionals, in-house counsel, and deans at colleges and universities

Affirmative Consent Standards Under FIRE

JANUARY 6, 2016

The key factor in many Title IX complaints is whether or not consent was given to engage in sexual activity. As Title IX does not provide a definition of consent, colleges and universities are tasked with defining this term for themselves. Over the last couple of years, many schools have changed the definition of “consent” in their Title IX policies to an “affirmative consent” (or “yes means yes”) standard. In response to this growing trend, the Foundation for Individual Rights in Education (FIRE) sent a [letter](#) to the U.S. Department of Education Office for Civil Rights (OCR) last month, demanding that the agency “clearly and publicly censure” affirmative consent standards that require “students engaging in sexual activity to be able to prove unambiguous and demonstrable expressions of consent for any sexual act performed.” Read a copy of FIRE’s letter [HERE](#). According to FIRE, affirmative consent standards clearly violate the due process and fundamental fairness requirements of Title IX by failing to give students notice of what is required of them, and placing “the burden of proof on accused students to demonstrate their innocence.”

Client Tip: *FIRE raises legitimate concerns about the legality and morality of affirmative consent standards. While it is questionable that OCR will renounce affirmative consent standards at this time, colleges should be cautious about implementing such policies as they are often overly broad, vague, and place unrealistic expectations on students engaging in sexual activity.*