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Kenneth Marcus, Assistant Secretary for the Office of Civil Rights
CC: Brittany Bull
U.S. Department of Education
400 Maryland Avenue S.W.
Room 6E310
Washington, D.C. 20202

Re. NPRM on Title IX

Dear Assistant Secretary Marcus:

I am a Lecturer on Law and the founding Director of the Gender Violence Program at Harvard Law School. I created the first and only seminar on Title IX in the country in 2007 and have taught it every year since. I have represented students and worked with schools on Title IX compliance for over a decade. I have served as a consultant for the Department of Justice Office on Violence Against Women providing legal policy guidance on how schools can prevent and address campus sexual assault. Previously, I served as the first Senior Counsel in the Office of Violence Against Women at the Justice Department.

To be sure, the problem of effectively preventing and addressing campus sexual assault as required by Title IX is a complex one. Schools are working on getting this right. No college president wants rape to happen on their campus. No parent wants to send their child to a school that tolerates sexual assault. Yet we know that sexual assault is a pervasive problem on campus.

Schools have been working hard to implement the Dear Colleague Letter ("DCL") of 2011. While the current system is not perfect, it is noteworthy that each and every case cited by Secretary DeVos to justify these new regulations represented a *violation* of the DCL, not an instance of compliance with a defective regime. Thus, the correct course of action is to clarify and build upon the DCL to assist schools in their efforts to comply with Title IX. The proposed regulations fail to do that. Instead, the regulations represent an illegal attempt to abdicate the responsibilities of the Department to enforce Title IX.

The proposed regulations will be subject to extensive legal challenges on several grounds, thus adding chaos, rather than clarity, to your regulatory scheme.

Unlike regular commercial businesses who might have economic incentives not to be regulated, schools are not simply commercial enterprises, and deregulation is not an option. Title IX is an important civil rights statute guaranteeing equal access to educational opportunities. Schools are beginning to understand their responsibilities. To so dramatically change course from holding schools responsible for

enforcing Title IX to complete impunity leaves them vulnerable to lawsuits from both the reporting student and the accused. Schools want guidance and assistance, not this type of regulatory morass.

Your regulations are proposed in light of the increased enforcement efforts of the Obama Administration. We agree that the Obama administration's guidelines can be improved and that there are gray areas in enforcement. However, it is illogical to say schools have faced too much liability for student to student conduct that may be out of their control, when the focus of Title IX is on access to education. Schools have not proven that less regulations would provide more equal access to education, and have not fulfilled any burden of showing that they have provided equal, and thus inherently non-hostile, educational environments to men and women. Title IX guidance must primarily require schools to step in, promptly investigate, and discipline where student-on-student violence has deprived one party of the ability to attend class or work productively due to pervasive rape trauma and re-victimization.

Rather than depart entirely from its past practices, OCR should build upon the Obama Administration's guidelines to make enforcement efforts more effective and efficient. Because these proposed regulations would eviscerate the Department's previous efforts to bring schools into compliance with Title IX, they will not survive legal challenge as an administrative agency cannot by regulation nullify a federal civil rights statute. The Department of Education has an opportunity to fix, not exacerbate issues with Title IX enforcement and focus guidelines in ways that decrease occurrence and cultures of campus sexual assault and gender inequality.

A better approach would be to clarify particular aspects of the schools' obligations to increase fairness protections for both the accuser and the accused. This can be achieved by provisions that equalize rights of representation and appeal to both sides and provide greater notice of the status of complaints to the students involved.

But critical to keep in mind here is that the position of the accuser and the accused is not the same. Equity and equality are not the same concept. To achieve equal access to educational opportunity, the Department must allow for some procedural differences to accommodate the reality of the situation. The trauma suffered by students who are sexually assaulted by others is not comparable to potential trauma of being found responsible for that assault, and the trauma and backlash that students face as a result of reporting is equated to experiencing a second rape.

Your proposed regulations imagine that the accused is falsely accused and unfairly held responsible. This rests on assumptions not supported by the overwhelming data and research on the topic.

Less than 10% of rape accusations are unfounded, meaning that over 90% of them are true. When you consider what it takes for a victim to overcome existing social, practical and psychological barriers to even report a sexual assault—a condition supported by the extensive research that schools have conducted into their own campus climates—it argues in favor of according more, not less, weight to a reported incident.

The proposed regulations conflict with the Campus SaVE Act and will sow great confusion

The proposed regulations conflict with the federal law known as Campus SaVE Act. Thus, if adopted, they would cause irreconcilable confusion to the regulatory community to the detriment of all parties involved.

Importing a private law standard into a civil rights regulatory framework is illegal and illogical.

The illegality of importing a private law standard into a regulatory framework will be the basis of strong legal challenges to these proposed regulations. The Davis and Gebser standards are specifically applicable to private cases concerning Title IX enforcement. The high liability standard of deliberate indifference is to add some protection for public schools so that their funding is not jeopardized unfairly in private litigation. The attempt to equate your regulatory agency role with private litigation in federal court is a derogation of your official duties.

In Gebser v. Lago Vista Ind. School Dist., 524 U.S. 274 (1998) the Supreme Court stated:
"The statute entitles agencies who disburse education funding to enforce their rules implementing the nondiscrimination mandate through proceedings to suspend or terminate funding or through "other means authorized by law." 20 U.S.C. § 1682. *Significantly, however, an agency may not initiate enforcement proceedings until it "has advised the appropriate person or persons of the failure to comply with the requirement and has determined that compliance cannot be secured by voluntary means." Ibid*. The administrative regulations implement that obligation, requiring resolution of compliance issues "by informal means whenever possible," 34 CFR § 100.7(d) (1997), and prohibiting commencement of enforcement proceedings until the agency has determined that voluntary compliance is unobtainable and "the recipient ... has been notified of its failure to comply and of the action to be taken to effect compliance," § 100.8(d); see § 100.8(c)." Gebser, (emphasis added.)

The role of the OCR is completely different from, but complimentary to, the Davis/Gebser standard. As you are aware, the role of OCR is to enforce Title IX by working with schools to achieve Title IX compliance. Punishing schools through revoking funding, or effecting the school's funding stream at all, happens only in the most egregious of cases. OCR has never actually taken away a school's federal funding, although it has the power to do so. If OCR is concerned that schools will lose their funding arbitrarily, it has only to alter its internal guidance to protect against this outcome.

As the OCR 2001 Guidance clearly states:

> "The Court was explicit in Gebser and Davis that the liability standards established in these cases <u>are limited to private actions for monetary damages</u>. See, e.g., Gebser, 524 U.S. at 283, and Davis, 526 U.S. at 639. The Gebser Court recognized and contrasted lawsuits for money damages with the incremental nature of administrative enforcement of Title IX. In Gebser, the Court was concerned with the possibility of a money damages award against a school for harassment about which it had not known. In contrast, the process of administrative enforcement requires enforcement agencies such as OCR to make schools aware of potential Title IX violations and to seek voluntary corrective action before pursuing fund termination or other enforcement mechanisms."

Importing criminal law standards into a civil rights context is illegal.

The NPRM illegally imports criminal justice standards into a civil rights context contrary to the purpose of Title IX. Title IX is simply a civil rights statute to protect students from illegal sex discrimination.

The attempt to apply criminal justice standards for due process and cross-examination of witnesses into a civil rights administrative hearing on sex discrimination is sex discrimination and of itself in that it applies to sexual violence cases that are overwhelmingly committed by men against women. The higher criminal law standards regarding the burden of proof and related rights are for sexual assault cases

where the defendant stands to lose his liberty if convicted. But in a Title IX context, adherence to these elevated standards, especially when we recognize that the preponderance of the evidence is appropriate in other civil rights areas, such as race discrimination, is sex discrimination in itself.

Preponderance of the evidence is the correct standard for civil rights cases.

As a civil rights statute, Title IX jurisprudence has borrowed from Title VII, the civil rights statute that protects employees from sex discrimination. As a civil rights statute, the correct evidentiary standard for determining responsibility for illegal discrimination is the preponderance of the evidence. Any deviation from this standard is contrary to well-established civil rights jurisprudence. Moreover, any other standard presumes that the accuser is lying and that the accused is innocent.

As part of a civil statute, Title IX's substantive standard of proof for violations is whether a preponderance of the evidence indicates a discriminatory act occurred.[1] As Baine Kerr, a nationally prominent Title IX attorney, states:

> "A preponderance of the evidence standard] is the only standard that complies with Title IX because it does not favor one student over another and asks only, in the context of a rape allegation, which student's account is more likely. In weighing which account is more likely, customary evidentiary principles apply, including credibility, bias, consistency and inconsistency, adverse inferences from refusals to answer questions, corroboration by physical evidence and other witnesses, post-incident behavior and demeanor, and whether the student had a motive not to tell the truth."[2]

Of course, while rape is an act of sex discrimination that violates one's rights on campus, it is also a criminal act. But even though there is overlap between the responsibilities of schools and those of law enforcement, it is crucial to remember that the civil rights/criminal justice system distinction creates a different legal standard for school adjudications as compared to criminal cases.[3]

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[1] Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 144. Title IX jurisprudence and interpretation has developed to be consistent with Title VII, which prevents sex discrimination in employment. See REVISED SEXUAL HARASSMENT GUIDANCE, supra note 12, at v–vi (citing Davis v. Monroe Cnty. Bd. of Educ., 526 U.S. 629 (1999); Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274 (1998)). Further, preponderance of the evidence was always the standard in Title IX sexual assault cases and was not challenged or questioned until recently, when schools were re- quired to take seriously their obligations to prevent and address campus rape. See, e.g., Brzonkala v. Va. Polytechnic & State Univ., 935 F. Supp. 779, 785 (W.D. Va. 1996) ("Whether Brzonkala can prove the allegations in her complaint by a preponderance of the evidence is not currently an issue before the Court.")

[2] Complainant's Post-Hearing Memorandum in Support of Proposed Order at 2, Florida State University Investigative Hearing in the Matter of Erica Kinsman and Jameis Winston (Dec. 12, 2014) (on file with author and Harvard Law Review) [hereinafter Post-Hearing Memorandum] (citation omitted).

[3] Given the increased capacity and commitment of schools to effectively prevent rape, I ex- pect to see a correlative improvement in the criminal justice system's efforts to address the problem. The White House Task Force to Protect Students from Sexual Assault is currently developing models for memoranda of understanding between schools and law enforcement agencies to promote coordination in rape prevention and prosecution. See generally WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT, BUILDING PARTNERSHIPS AMONG LAW ENFORCEMENT AGENCIES, COLLEGES AND UNIVERSITIES: DEVELOPING A MEMORANDUM OF UNDERSTANDING TO PREVENT AND RESPOND EFFECTIVELY TO SEXUAL ASSAULTS AT COLLEGES AND UNIVERSITIES (2015), http://www.whitehouse.gov/sites/default/files/docs/white_house_task_force_law_enforcement_mou.pdf [http://perma.cc/A4TL

Critics fear that, under a preponderance of the evidence standard, students accused of sexual assault can be easily expelled from school. Critics of the standard assert that (a) the relevant evidence will be murky because the key question in determining responsibility will likely be the presence or absence of consent or coercion; (b) school adjudicators will favor the victim to avoid possible consequences from OCR; and (c) false conclusions that the accused did indeed commit sexual assault under the standard will result in terrible injuries to him. Critics are correct that we must not take lightly the significance of the potential harms to a student found responsible for sexual misconduct — harms that may include having to transfer to another school; having the finding on his transcript and having to explain it for the rest of his life; having problems gaining employment; and experiencing reputational harm.

But these potential harms are overblown: despite the fact that campus sexual assaults almost always impair the victims' educational experience, often severely, the vast majority of perpetrators receive no disciplinary action whatsoever from their university.[4] Of the small minority of assailants who are found to have committed sexual assaults, less than one-third are expelled from their universities.[5] By contrast, the costs to the community of not effectively addressing sexual assault include all the harms associated with a hostile environment. These include loss of life through suicide and lifetime negative impacts on performance and mental health. Females might forego an academic opportunity because they fear being raped and not having any recourse if they are. Considered in this light, if the private and public costs of false negatives are at least as high as the private and public costs of false positives, then a set of procedures that is at least as protective of the complainant as it is of the accused is justified.

The proposed regulations slam the doors of access to educational opportunities in the faces of survivors and will work to the detriment of schools.

1. The regulations will chill reporting

Roughly one-third of students who experience unwanted sex do not report the incident to anyone, including friends or family. No more than 10% report their experiences to a school official. Many reasons are offered for the failure to report sexual assault, including fear of not being believed or taken seriously, not knowing it was sexual assault, not wanting others to know about the experience, belief that nothing will be done, insufficient proof, and fear of retaliation from the offender or his friends.[6]

[4] *See* CSA STUDY, supra note 1, at 5-26, 5-27 ex. 5-9

[5] Tyler Kingkade, Fewer than One-Third of Campus Sexual Assault Cases Result in Expul- sion, HUFFINGTON POST (Sept. 29, 2014, 8:59 PM), http://www.huffingtonpost.com/2014/09/29/campus-sexual-assault_n_5888742.html [http://perma.cc/92FX-X8JQ].

[6] BONNIE S. FISHER ET AL., BUREAU OF JUSTICE STATISTICS, NCJ NO. 182369, THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN 15 (2000), https://www.ncjrs.gov/pdffiles1/nij/182369.pdf [https://perma.cc/6BVR-CW89] ("15.5percent of the college women [surveyed] were sexually victimized during the current academic year."). In a 2007 survey conducted for the National Institute of Justice (a part of the U.S. Department of Justice), 28.5% of the 5446 undergraduate women surveyed reported that they had experienced attempted or completed sexual assault either before or since entering college. CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL RE- PORT, at xii (2007), https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf [https://perma.cc /ABJ5-R949] [hereinafter CSA STUDY]. Moreover, 19% percent of the women surveyed reported experiencing completed or attempted sexual assault since starting college. Id. at 5-3

Additional motivations discourage reporting by racial and sexual minority survivors, such as fear of betraying the minority community[7] or, in the case of LGBTQ survivors, fear of being outed.[8] Last but not least, school administrators concerned about the reputation of their institutions are often disinclined to encourage victims to come forward. If the victim does decide to report, she faces possible retaliation from her social group, especially, it seems, if she is a member of an athletic team or a sorority where a reported sexual assault might damage the group's social currency. The reaction of one's school, too, can be re-traumatizing. In fact, Dr. Jennifer Freyd, a researcher at University of Oregon, has developed the term "**institutional betrayal trauma"** to describe frequently reported effects experienced by victims who report sexual assault to their schools.[9]

2. The proposed regulations would drastically increase the incidence of a "Second Rape" for survivors by disincentivizing schools to fulfill their Title IX responsibilities.

In regard to a school's response to a report of sexual misconduct, the most critical point is that schools must prevent a "second rape" through an informed response that does not cause additional trauma to the affected student.[10] Schools can play the crucial role in setting the trajectory for a student's possible recovery through a coordinated and intelligent response. On the other hand, they can — and often do — exacerbate a victim's trauma by making her fend for herself, not investigating properly, saying victim-blaming things or asking victim-blaming questions, or just overall not taking the assault seriously.

The proposed regulations create insurmountable barriers to reporting by severely narrowing the definitions of sexual assault; artificially attempting to narrow the cases over which the Department has jurisdiction by excluding off-campus rapes that clearly can create hostile environments on campus; instituting live hearings and cross examination practices designed to intimidate, rather than accommodate, a survivor coming forward. Moreover, limiting what a school need do to avoid liability in terms of interim measures to help a survivor stay in school will actually work to the disadvantage of the school.

The PTSD and emotional fallout after a sexual assault should not be minimized by critics afraid that women will "cry rape" and men will be unfairly punished. Lizzy Seeberg from St. Mary's College and Trey Malone from Amherst each committed suicide in the wake of their sexual assaults. Lizzy was

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[7] See, e.g., Shaquita Tillman et al., Shattering Silence: Exploring Barriers to Disclosure for African American Sexual Assault Survivors, 11 TRAUMA VIOLENCE & ABUSE 59, 66 (2010) (de- scribing "culture-specific barriers to disclosure" such as a "potential cultural mandate to protect African American male offenders").

[8] *See* Nat'l Ctr for Victims of Crime and Nat'l Coal of Anti Violence, Why it Matters: Rethinking Victim Assistance for Lesbian, Gay, Bisexual, Trans-Gender and Queer Victims of Hate Violence & Intimate Partner Violence 7 (2010), http://www.victimsofcrime.org/docs/Reports%20and%20Studies/WhyItMatters_LGBTQreport_press.pdf [http://perma.cc/4W3Q-BKGD].

[9] See Jennifer J. Freyd, Institutional Betrayal and Betrayal Blindness, UNIV. OR., http://dynamic.uoregon.edu/jjf/institutionalbetrayal (last updated Mar. 18, 2015) [http://perma.cc/M3TF-FAFT].

[10] See Diane L. Rosenfeld, Schools Must Prevent the "Second Rape," HARVARD CRIMSON (Apr. 4, 2014), http://www.thecrimson.com/article/2014/4/4/Harvard-sexual-assault [http://perma.cc/AT9Q-KZSF]. I wrote this piece in the Harvard Crimson in response to a heartwrenching editorial by a student, entitled Dear Harvard: You Win, HARVARD CRIMSON (Mar. 31, 2014), http://www.thecrimson.com/article/2014/3/31/Harvard-sexual-assault [http://perma.cc/QL5K-3J3G].See also Thomas G. Fiffer, Dear John Harvard: A Plea to Stop the "Second Rape" that Follows Campus Sexual Assaults, GOOD MEN PROJECT (Apr. 10, 2014), http://goodmenproject.com/ethics-values/call-stop-second-rape-follows-campus-sexual-assaults-fiff [http://perma.cc/TPQ3-359R] (arguing, because of the trauma caused by "second rape," in favor of an affirmative consent standard that shifts the presumption of consent such that the initiator must show that any sexual contact was affirmatively wanted, rather than assuming it was if the victim did not demonstrably resist).

threatened with retaliation by members of the Notre Dame football team for accusing one of their fellow players.[11] Trey cited Amherst's callous reaction to his reported assault in his suicide note.[12]

It is not hyperbole to say that treating campus sexual assault seriously is a life or death matter. The proposed regulations could contribute to a hostile environment at schools through its attempt to protect the accused from consequences and the schools from responsibility. I sincerely hope it does not come to this level of dangerousness, and that the Department reconsider the proposals in light of the comments it receives from survivors and schools.

[11] *See* Todd Lighty & Rich Campbell, Ex-Notre Dame Player's Remarks Reopen Wound, CHI. TRIB. (Feb. 26, 2014), http://articles.chicagotribune.com/2014-02-26/news/ct-seeberg-interview-met-20140226_1_lizzy-seeberg-tom-seeberg-seeberg-case [http://perma.cc/MB6U-JPZP].

[12] *See* Lead a Good Life, Everyone: Trey Malone's Suicide Note, GOOD MEN PROJECT (Nov. 5, 2012), http://goodmenproject.com/ethics-values/lead-a-good-life-everyone-trey-malones-suicide-note [http://perma.cc/U2FY-A3ZR].

3. ***The proposed regulations would create "Constructive Expulsion" for rape victims and survivors.***

The proposed regulations would exacerbate rape trauma syndrome in an academic setting, thus causing constructive expulsion for victims. When a victim is not responded to appropriately by her or his school, she will often be forced to drop out, forfeiting all educational opportunities at the chosen institution. This amounts to a **constructive expulsion** of rape victims. I use this term to highlight the reality of the severe consequences suffered by a victim. If the Department is concerned with the expulsion only of the accused, I urge them to consider the constructive expulsion of the reporting student.

4. ***The regulations are bad for schools.***

Schools are ill-advised to try to sweep campus rape under the rug after so much national progress has been made identifying the issue. Ignoring it will not make it go away. Instead, traumatic impact will increase exponentially, and there will be an explosion of high-profile cases that will reflect poorly on the school's reputation. The school will likely see decreased applications and will suffer lower rankings. The Department is required to help schools, not to provide advice likely to get the schools into legal trouble and reputational downfall.

The requirement of "prompt and equitable" cannot be discarded and ignored.

Since OCR started regulating sexual harassment, the guiding principle has been that the remediation of a hostile environment must be prompt and equitable. There is no precedent for discontinuing administrative guidelines that assist schools in providing educational environments free from sex discrimination.

The reason for prompt resolution of cases is to effectuate the purpose of Title IX: to eliminate a hostile environment. Cases should be investigated and resolved in the same semester in which they are brought, if possible, to minimize academic disruption. The 60 day limit is entirely reasonable to conduct a competent and fair investigation by an investigator trained to work on cases of sexual misconduct.

I urge you to reconsider this proposal in light of the reality of students' lives on both sides of the case. The academic calendar intensifies the need for promptness in these cases.

Conclusion

In conclusion, the unintended consequences of the proposed regulations demand that the Department reconsider them in total. I cannot fathom that the Department would intentionally create hostile environments for half the student population in attempt to correct some procedural deficiencies in current processes. Nor do I imagine that the Department intends to shirk its responsibilities to prevent sex discrimination in educational institutions by adopting inappropriate and inapplicable standards to its regulatory regime.

Overall, the proposed regulations would increase the prevalence of campus sexual assault. These regulations would chill reporting, making schools less safe. The rules would limit the liability of schools without making the process more fair. Importantly it would exacerbate the extreme trauma of those who suffer these assaults.

It is my sincere hope that the Department consider seriously the potential harms it would cause in the lives of students across the country through the proposed regulations. I stand ready to assist the Department in its reconsideration.

Thank you for your consideration of my comments.

Sincerely,

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