

July 11, 2017

Secretary Betsy DeVos
The U.S. Department of Education
400 Maryland Avenue
Washington, DC 20202

Sent via U.S. Mail

Dear Secretary DeVos:

The National Women's Law Center is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives. Founded the same year as Title IX of the Education Amendments of 1972, the Center has participated in all major Title IX cases before the Supreme Court as counsel¹ and amici. We write as Title IX celebrates its 45th anniversary to urge you to commit to preserving critical guidance that clarifies schools' obligations to address sexual harassment and violence.

The Department of Education has the enormous responsibility to ensure that students can attend school, free of discrimination. Key to that work is the enforcement of our landmark civil rights that ban discrimination in education programs and activities that receive federal funds. We are deeply concerned that the steps taken by the Department have undermined that obligation and made many of our most vulnerable students less safe. Rescinding the guidance that clarifies schools' obligations to transgender and gender nonconforming students, issuing an internal Office for Civil Rights ("OCR") memo that seemed to limit the Department's jurisdictional scope over complaints alleging transgender discrimination,² and advising OCR staff to employ a narrower approach when deciding the scope of investigations into sexual violence and discriminatory discipline complaints³ were each directives that would allow discrimination to persist, systemic problems to thrive undetected and student safety to be threatened.

These actions also have sent an unfortunate signal to stakeholders that the Department is retreating from holding schools to their Title IX obligation to address sex discrimination—especially the effects of sexual violence. The refusal to commit to preserving the 2011 Dear Colleague Letter on Sexual Violence, in particular, has caused survivors to worry that their schools will fail to address sexually hostile environments.⁴ That concern only deepened following the much publicized meeting with Georgia Representative Earl Ehrhart—a legislator

¹ *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).

² Rebecca Klein, *After Rolling Back Transgender Student Protections, Here's What Trump Is Doing Next*, HUFFINGTON POST (June 16, 2017; 12:32 P.M.) http://www.huffingtonpost.com/entry/transgender-students-civil-rights-rules_us_5943f1a3e4b06bb7d272a1ca?za.

³ Jessica Huseman & Annie Waldman, *Trump Administration Quietly Rolls Back Civil Rights Efforts Across Federal Government*, PROPUBLICA (June 15, 2017; 8:00 A.M.) <https://www.propublica.org/article/trump-administration-rolls-back-civil-rights-efforts-federal-government>.

⁴ Molly Redden & Sabrina Siddiqui, *Betsy DeVos hearing prompts fears for campus sexual assault protections*, GUARDIAN (Jan. 17, 2017; 5:17 P.M.) <https://www.theguardian.com/us-news/2017/jan/17/betsy-devos-hearing-prompts-fears-for-campus-sexual-assault-protections>; Tyler Kingkade, *Trump's Education Secretary Nominee Won't Commit To Keeping Campus Rape Rules*, BUZZFEED NEWS (Jan. 17, 2017; 6:58 P.M.) https://www.buzzfeed.com/tylerkingkade/betsy-devos-title-ix?utm_term=.of2oo8JJdq#.muL557MM2X.

committed to disempowering survivors and undermining the Department's efforts to protect their educational rights.

The appointment of officials within and outside of the Department with records hostile to Title IX has only compounded the concerns among students. For example, Adam Kissel,⁵ now in a high-ranking post with the Department,⁶ has put forward dangerous and inaccurate theories about how Title IX's requirement to have equitable grievance procedures somehow violates due process rights of students accused of sexual assault.⁷ Outside the Department, President Trump's appointment of Jerry Falwell, Jr.—who has characterized efforts to respond to gender-based violence in school as “federal overreach” and who promotes an honor code that prohibits premarital, extramarital and non-heterosexual sex—to head a White House task force on higher education⁸ sends a clear message that survivors of sexual assault, LGBTQ students and unmarried pregnant and parenting students are at risk of having their Title IX rights infringed.

Students deserve better. As Secretary of Education, we are counting on you to lead the way in ensuring sexual violence does not deprive students of educational opportunities. To do so, it is essential that OCR preserve guidance that clarifies schools' obligations to address sexual harassment. This letter provides both an explanation of the importance of upholding the guidance and also counters arguments from individuals and organizations without a record of promoting civil rights that may be advising your administration on Title IX enforcement.⁹

How your administration enforces Title IX in schools is an important issue that should be informed by careful and deliberate consideration of and input from those the law is intended to protect. Thus, to properly execute the duties of your position and achieve a real understanding of the issues impacting survivors, we urge you to meet directly with survivors, their loved ones and allies across the country in a nationwide series of listening sessions. To ensure a diversity of voices and gain an understanding of how different campuses address sexual assault, such a listening tour must include visits to schools that vary in size, geographic location (i.e., rural, suburban and urban), regional location, student body, and institutional type (including community colleges, historically Black colleges and universities, minority-serving institutions, public schools and private institutions) at the secondary and post-secondary level.

I. Too many schools are failing to live up to their legal obligations to address sexual harassment and violence, with severe consequences for students.

Sexual harassment and violence plagues schools and colleges across the country. In a national survey of nearly 2,000 seventh- through twelfth-graders conducted in 2011, nearly half of all students surveyed reported

⁵ Adam Kissel, *Standing Up for Due Process on Campus = “Sticking Up for Penises Everywhere?”* HUFFINGTON POST (Oct. 30, 2011) http://www.huffingtonpost.com/adam-kissel/standing-up-for-due-proce_b_940352.html.

⁶ Alyson Klein, *Trump and DeVos Announce New Hires at Education Department*, EDUC. WEEK (June 6, 2017; 9:29 AM) http://blogs.edweek.org/edweek/campaign-k-12/2017/06/trump_devos_announce_new_ed_de.html?r=1510012309.

⁷ Letter from Nat'l Women's Law Ctr. & 85 Undersigned Organizations, to John B. King, Secretary, U.S. Dep't of Educ. (July 13, 2016), available at <https://nwlc.org/resources/sign-on-letter-supporting-title-ix-guidance-enforcement/>.

⁸ Goldie Blumenstyk, *A Task Force With Falwell Is Happening, White House Says*, CHRON. OF HIGHER EDUC. (June 11, 2017) <http://www.chronicle.com/article/A-Task-Force-With-Falwell-Is/240315>.

⁹ Letter from Greg Lukianoff, President & Chief Exec. Officer, Found. for Individual Rights in Educ., to Donald Trump, President, United States of America (Jan. 20, 2017) [hereinafter FIRE letter] available at <https://www.thefire.org/fire-letter-to-president-donald-trump-1-20-2017/>; Dan Merica, *Evangelical leader Jerry Falwell Jr. to lead education task force for Trump*, CNN.com (Feb. 2, 2017, 3:22 PM) <http://www.cnn.com/2017/02/02/politics/jerry-falwell-jr-donald-trump-education-task-force/>.

experiencing some form of sexual harassment in the 2010-11 school year.¹⁰ And a 2017 NWLC survey of 14- to 18-year-old girls found that more than one in five has been kissed or touched without their consent.¹¹ To the detriment of these students though, schools have failed to address sexual harassment and violence for far too long.

The facts of Title IX lawsuits resolved over the last few years provide a window into some of the harassment that schools have failed to address. In 2013, a Michigan high school student represented by NWLC filed a Title IX complaint in federal court alleging that her school was deliberately indifferent when she informed school officials of an on-campus sexual assault and subsequent cyber-bullying and harassment.¹² As a result, the student lost class time, suffered academically, quit the soccer team and cheerleading squad, and eventually transferred to a new school to escape her attacker.¹³ In 2014, the Law Center represented an Alabama middle school student who was raped due to a failed “sting operation” school administrators organized.¹⁴ After the assault and the school’s mishandling of the investigation, the student said she preferred to be alone, no longer trusted anyone, and no longer felt safe. She transferred to another school, stopped playing basketball, and went from making As, Bs, and Cs to sometimes getting all Fs.¹⁵ Tragically, some other students have even committed suicide in the face of sexual harassment and violence. One example is Audrie Pott, a 15 year old who took her own life in 2012 after an alleged sexual assault and sexual bullying.¹⁶ In 2016, Megan Rondini, a 20-year-old University of Alabama student transferred schools and hanged herself after the university denied her counseling services in the wake of an alleged sexual assault.¹⁷

As has been widely reported, colleges and universities across the country are also failing to prevent and address sexual harassment and assault. Study after study shows that one in five college women and one in twenty college men are sexually assaulted each year.¹⁸ Examples abound of complaints that schools failed to properly respond to reports of sexual violence:

¹⁰ AMERICAN ASSOC. OF UNIV. WOMEN, *CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL* (2011), Executive Summary at 2, available at <http://www.aauw.org/files/2013/02/crossing-the-line-sexual-harassment-at-school-executive-summary.pdf>.

¹¹ NAT’L WOMEN’S LAW CTR., *LET HER LEARN: STOPPING SCHOOL PUSHOUT* (2017), Overview and Key Findings at 1, available at <https://nwlc.org/resources/stopping-school-pushout-overview-and-key-findings/>.

¹² *Doe v. Forest Hills School District*, No. 1:13-CV-428, 2015 WL 9906260 (W.D. Mich. Mar. 31, 2015).

¹³ Press Release, National Women’s Law Center, NWLC Joins Title IX Lawsuit Against Michigan Public School for Failing To Address Student’s Sexual Assault, (Apr. 18, 2013), available at <http://www.nwlc.org/press-release/nwlc-joins-title-ix-lawsuit-against-michigan-public-school-failing-address-students-se>.

¹⁴ *Hill v. Cundiff*, 797 F.3d 948 (11th Cir. 2015).

¹⁵ Press Release, National Women’s Law Center, NWLC Files Eleventh Circuit Court Brief in Case Against Alabama Middle School for Subjecting Eighth-Grade Girl to Sexual Harassment and Assault by Male Student, (Sept. 18, 2014), available at <https://nwlc.org/press-releases/nwlc-files-eleventh-circuit-court-brief-case-against-alabama-middle-school-subjecting-eighth-grade-girl-sexual-harassment-and-assault-male-student/>.

¹⁶ Christina Sterbenz, *Heartbreaking Details Revealed About 15-Year-Old Who Killed Herself After Alleged Sexual Assault*, BUS. INSIDER (Sept. 20, 2013, 2:30 PM) <http://www.businessinsider.com/details-on-audrie-potts-suicide-2013-9>.

¹⁷ Katie J.M. Baker, *How Accusing A Powerful Man of Rape Drove A College Student To Suicide*, BUZZFEED NEWS (June 22, 2017, 7:40 A.M.) https://www.buzzfeed.com/katiejmbaker/how-accusing-a-powerful-man-of-rape-drove-a-college-student?utm_term=.vmavvPrN4#.atQooVZZjg.

¹⁸ C.P. Krebs et al., *College Women’s Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639 (2009).

- In 2013, Occidental College settled a lawsuit with at least 37 students who claimed it failed to handle their complaints of sexual violence properly, discouraged reporting, and intimidated faculty who criticized the college.¹⁹
- A University of Southern California student complained that she reported a rape to her university and played authorities a tape of her rapist admitting to the assault, but the school dismissed her case for lack of evidence.²⁰
- An Amherst College student published an article about her sexual assault and the school's sexual assault counselor, who advised her to “forgive and forget” instead of filing a report.²¹
- Swarthmore students charged that the college violated the Clery Act by failing to report sexual assaults on campus, and they filed a Title IX complaint alleging that the school's apathy created a hostile environment.²²

The growing concern about institutions' failure to appropriately address sexual violence cases led groups of sexual assault survivors to form student-led organizations, such as Know Your IX²³ and End Rape on Campus,²⁴ to educate students about Title IX and help them learn about ways to enforce their rights.

II. Rescinding Title IX guidance documents would make schools less safe and cause confusion about how to comply with the law.

OCR released a series of guidance documents in response to schools' requests to help them better understand their legal obligations. The 2010 Dear Colleague Letter on Bullying and Harassment, the 2011 Dear Colleague Letter on Sexual Violence, the 2014 Questions and Answers document on Title IX and Sexual Violence, and the 2016 Dear Colleague Letter on Transgender Students have provided much needed clarification of what Title IX requires schools to do to prevent and address sex discrimination in educational programs. These guidance documents and increased enforcement of Title IX by OCR have spurred schools to address cultures that for too long contributed to hostile environments which deprive many students of equal educational opportunities. Moreover, the 2011 guidance is popular, with 87 percent of voters voicing support for the document in a May 2017 poll.²⁵ Unfortunately, some are urging the Department to rescind these important guidance documents.²⁶

To be clear, these guidance documents merely clarify the law and do not establish new law. Apart from them, schools are still required to address sex discrimination related to sexual harassment and violence and

¹⁹ Tyler Kingkade, *Occidental College Settles Lawsuit with Sexual Assault Victims*, HUFFINGTON POST (Sept. 19, 2013, 2:18 PM) http://www.huffingtonpost.com/2013/09/19/occidental-lawsuit-sexual-assault_n_3950830.html.

²⁰ Claire Groden, *Campus Rape Victims Find a Voice*, TIME (Aug. 08, 2013) available at <http://nation.time.com/2013/08/08/campus-rape-victims-find-a-voice/?iid=tsmodule>.

²¹ Angie Epifano, *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 17, 2012) <http://amherststudent.amherst.edu/?q=article%2F2012%2F10%2F17%2Faccount-sexual-assault-amherst-college>.

²² Emma Jacobs, *Swarthmore Students File Title IX Complaint over Alleged Inaction on Sexual Assault*, NEWSWORKS (Apr. 26, 2013) <http://www.newsworks.org/index.php/local/item/54084>.

²³ KNOW YOUR IX, <http://knowyourix.org/> (last visited July 5, 2017).

²⁴ END RAPE ON CAMPUS, <http://endrapeoncampus.org/> (last visited July 5, 2017).

²⁵ Memorandum from Public Policy Polling to Interested Parties 1 (May 16, 2017) available at <https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/>.

²⁶ FIRE Letter *supra* note 9 at 5.

LGBTQ rights under Title IX, and students are still afforded these protections under the law. However, rescinding the guidances would cause confusion and deprive schools of a resource that clarifies the law in advance of an investigation or lawsuit. As a result of institutions being unclear about their obligations, rescinding the guidance will also likely result in increased discrimination against women, girls and other LGBTQ individuals, which in turn will create more litigation from students seeking to vindicate their civil rights—litigation which is likely to be successful given Title IX jurisprudence. Thus, by issuing and preserving these documents, the Department plays a key role in guiding schools to fulfill their Title IX obligations, avoid litigation, and ensure students' civil rights are not violated.

III. Detractors' calls for rescinding Title IX guidance documents are not based in fact or in law.

Since the Title IX regulations were issued in 1975, educational programs have been required to create “grievance procedures providing for prompt and *equitable* resolution” of complaints (emphasis added).²⁷ The 2011 guidance merely clarified what constitutes an *equitable* grievance procedure. Namely, the Department reminded schools that both the complainant and the respondent in any sexual violence grievance proceeding must have the same rights—e.g., the same right to review documents, the same right to counsel, the same right to present witnesses and evidence, and the same right to an appeal.

Moreover, the guidance clarified that an equitable grievance procedure means that both the complainant and respondent bear the same burden of proof—i.e., that schools should use the preponderance of the evidence standard. This standard is used in cases alleging discrimination under other civil rights laws,²⁸ in civil lawsuits between two private parties (including suits related to possibly criminal conduct such as tort actions for battery or murder/wrongful death), and in 80 percent of schools according to a 2002 report issued well before the 2011 guidance.²⁹ Contrary to what detractors claim, the 2011 sexual violence guidance does not deprive accused students of due process. In fact, by demanding equitable treatment of both the respondent and complainant, the Department's interpretation of Title IX provides students accused of sexual assault with procedural protections beyond those due process guarantees outlined by the Supreme Court.³⁰

What detractors actually propose is that students accused of rape and sexual assault deserve special treatment and are entitled to *greater* due process protections than survivors or students charged with other student code infractions, such as assault or academic dishonesty. This is a dangerous slippery slope towards enshrining what may essentially be “right-to-rape” policies, which would directly violate Title IX's goal of promoting equity

²⁷ 34 C.F.R. §106.8(b).

²⁸ See, e.g., *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989); 42 U.S.C. § 20001 (2006).

²⁹ Heather Karjane, et al., *CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND* 122 (Nat'l Criminal Justice Reference Serv., Oct. 2002), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

³⁰ See *Goss v. Lopez*, 419 U.S. 565, 579 & 583 (1975) (“[S]tudents facing suspension [in public educational institutions] must be given some kind of notice and afforded some kind of hearing. . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.”).

in education by disadvantaging those who complain about sex discrimination in favor of those alleged to have perpetuated it.

IV. Detractors' proposals for mandatory reporting are flawed and dangerous.

Leaving investigations of sexual assault solely to law enforcement, as detractors propose,³¹ would clearly violate Title IX. Schools have an independent duty to investigate known incidents of sexual harassment, including sexual violence, and ensure such incidents do not deprive victims of educational opportunities.³² Currently, survivors already have the option of reporting their assaults to law enforcement in addition to their schools. And according to the Rape, Abuse & Incest National Network, more than a third—34 percent—of sexual assaults are reported to law enforcement.³³ Yet, there are several valid reasons why the remainder of assaults goes unreported. For instance, many victims know their perpetrators and are reluctant to report their partners or friends to the police or fear retaliation from abusive partners. For other victims, it's a matter of educational focus; being involved in a criminal investigation and trial is a significant time and emotional commitment that can interfere with one's education. Additionally, within certain communities, such as some communities of color and LGBTQ communities, there is a deep mistrust of law enforcement stemming from a history of racial profiling and brutality, as well as stereotypes and criminalization of LGBTQ and gender-nonconforming victims.

Moreover, law enforcement has a poor record of prosecuting sexual assault—only 6 in 310 assaults (less than two percent) reported to police will result in jail time for the perpetrator.³⁴ And according to one study, sexual misconduct is the second highest complaint filed against police officers after excessive force.³⁵ Involving law enforcement also could open victims up to criminal charges themselves if, for example, the victim was engaged in underage drinking or consumption of an illegal substance. Furthermore, there is evidence that when a victim has engaged in alcohol or drug use or has a criminal record, police are unlikely to believe the victim or charge her alleged perpetrator—exposing the survivor to the threat of being charged for filing a false police report.³⁶

For these reasons, there is a real risk that mandatory reporting laws or having only law enforcement address sexual assault will result in fewer victims reporting their assaults to anyone at all—allowing perpetrators to go unpunished and causing survivors to drop out of school. For example, one study revealed that domestic violence victims who had turned to law enforcement in the past were less likely to do so again than victims who

³¹ FIRE Letter *supra* note 9 at 4-5.

³² *E.g.*, *Doe v. Forest Hills School District*, No. 1:13-CV-428, 2015 WL 9906260, *10 (W.D. Mich. Mar. 31, 2015).

³³ THE CRIMINAL JUSTICE SYSTEM: STATISTICS | RAINN, <https://www.rainn.org/statistics/criminal-justice-system> (last visited July 5, 2017).

³⁴ *Id.*

³⁵ Matt Sedensky & Nomaan Merchant, *AP: Hundreds of officers lose licenses over sex misconduct*, THE ASSOCIATED PRESS (Nov. 1, 2015), <http://bigstory.ap.org/article/fd1d4d05e561462a85abe50e7eae4ec/ap-hundreds-officers-lose-licenses-over-sex-misconduct>.

³⁶ *E.g.*, Katie J.M. Baker, “*They Told Me It Never Happened*”, BUZZFEED NEWS (Sept. 27, 2015), <http://www.buzzfeed.com/katiejmbaker/the-police-told-her-to-report-her-rape-then-arrested-her-for#.bk4zaNLkBr>.

had never contacted police.³⁷ Another study of victim assistance advocates found that 88 percent of respondents believed that fewer victims would report their assaults if all colleges were forced to report to the police against survivors' wishes.³⁸ Not surprisingly, 74 percent of voters support allowing survivors to choose whether they report their assaults to the police, their schools, neither or both.³⁹

V. Title IX's requirements regarding the standard for sexual harassment and assault are supported by case law and detractors' proposal for a narrower definition of harassment⁴⁰ would make students and campuses less safe and encourage more litigation.

In *Davis v. Monroe County Board of Education*,⁴¹ the Supreme Court established that a school is liable for student-on-student harassment if it had "actual knowledge" of and was deliberately indifferent to peer harassment so "severe, pervasive and objectively offensive" that it deprived the student of the educational opportunities or benefits provided by the school. However, the Court limited this standard to claims for money damages. The Department of Education has employed a less stringent standard⁴² to withdraw funding from schools who fail to address sexual harassment and the Supreme Court has stated that doing so is appropriate.⁴³ The Department of Education has used this standard since 1997, when OCR stated schools must take "prompt and equitable" action "to remedy [a] hostile environment and prevent future harassment."⁴⁴ This standard was reaffirmed in 2001 after the Supreme Court's decision in *Davis*;⁴⁵ again in 2006 under the Bush administration;⁴⁶ and in 2010,⁴⁷ 2011⁴⁸

³⁷ TK LOGAN & ROB (ROBERTA) VALENTE, NAT'L DOMESTIC VIOLENCE HOTLINE, WHO WILL HELP ME?: DOMESTIC VIOLENCE SURVIVORS SPEAK OUT ABOUT LAW ENFORCEMENT RESPONSES (2015), at 5 & 9 available at <http://www.thehotline.org/wp-content/uploads/2015/09/NDVH-2015-Law-Enforcement-Survey-Report.pdf>.

³⁸ RESISTING MANDATORY POLICE REFERRAL EFFORTS | KNOW YOUR IX, <https://www.knowyourix.org/issues/resisting-mandatory-police-referral-efforts/> (last visited July 5, 2017).

³⁹ Memorandum from Public Policy Polling to Interested Parties 1-2 (May 16, 2017) available at <https://nwl.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/>.

⁴⁰ FIRE Letter *supra* note 9 at 2-3.

⁴¹ 526 U.S. 629, 633, 650 (1999).

⁴² That is, whether harassment is "severe, persistent, or pervasive" enough to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE 1997: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997) [hereinafter 1997 Guidance], available at <https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>.

⁴³ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) ("Of course, the Department of Education could enforce the requirement [to have a grievance procedure] administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate.").

⁴⁴ 1997 Guidance *supra* note 42.

⁴⁵ U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at 12 (2001) [hereinafter 2001 Guidance], available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁴⁶ Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 25, 2006) available at <https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html>.

⁴⁷ Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. to Colleagues, at 2-3 & 6 (Oct. 26, 2010) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf>.

⁴⁸ Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. to Colleagues, at 4, 6, 9 & 16 (Apr. 4, 2011) available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

and 2014⁴⁹ in guidance documents issued by the Obama administration. This standard is also well-established in employment discrimination cases⁵⁰ and other civil rights contexts.⁵¹

OCR examines a range of factors to determine whether sexual harassment has risen to the level of a hostile environment—in other words, whether the conduct is “sufficiently severe, persistent, or pervasive to limit a student’s ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment.”⁵² It further advises educational institutions to use these same factors when “draw[ing] commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level.”⁵³ As OCR has long stated, one sufficiently serious isolated event—such as a sexual assault—can rise to the level of actionable sexual harassment.⁵⁴

Detractors would prefer OCR to adopt a definition that departs from twenty years of OCR guidance and is more stringent than the standard applied for damages—specifically, “*targeted, discriminatory conduct* that is so severe, pervasive *and* objectively offensive” that it effectively denies equal access to educational opportunities.⁵⁵ (emphasis added) In addition to running counter to decades of precedence, adopting a standard that is higher than or even one equal to the standard to recover money damages would place an unfortunate burden on student survivors and make campuses less safe. It also could motivate plaintiffs to opt for litigation instead of an OCR investigation—an expensive result for both students and institutions. In many instances, an OCR investigation notifies institutions of a possible violation *before* the need for litigation arises—allowing students and institutions to reach an agreement that focuses on revising institutional policies and practices for little or no cost to either party. Such a change could be costly to schools and is entirely unnecessary.

VI. The definition of harassment under Title IX is consistent with the First Amendment.

Although proponents of a more stringent definition of harassment have cloaked some of their arguments in claims of promoting free speech, institutional adoption of this standard could result in the proliferation of

⁴⁹ U.S. DEP’T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1-2 (2014) available at <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁵⁰ *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (defining a hostile environment as one in which harassment is severe or pervasive); *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (same); see also U.S. EQUAL EMP’T OPPORTUNITY COMM’N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990) (“When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring”) available at <https://www.eeoc.gov/policy/docs/currentissues.html>.

⁵¹ E.g. [Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance](#), 59 Fed. Reg. 11448, 11450 (Mar. 10, 2017) (“A violation of Title VI may be found if racial harassment is severe, pervasive, or persistent so as to constitute a hostile or abusive educational environment.”).

⁵² 2001 Guidance *supra* note 45 at vi.

⁵³ *Id.* at 5-6.

⁵⁴ See *id.* at 6; see also *T.Z.*, 634 F. Supp. 2d at 271 (holding that a “sufficiently serious one-time sexual assault” can even satisfy *Davis*’s pervasiveness standard).

⁵⁵ FIRE Letter *supra* note 9 at 3.

perverse and dangerous policies that require any conduct to be targeted, severe, *and* pervasive before the school addresses it. Again, such a policy would make students less safe and schools ripe for litigation.⁵⁶

In addition, Title IX's prohibitions on harassment are consistent with Supreme Court precedent on speech protected by the First Amendment. In *Tinker v. Des Moines Independent Community School District*,⁵⁷ the Supreme Court held that student speech is protected by the First Amendment unless "conduct by the student, in class or out of it . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others."⁵⁸ The speech does not actually need to have created a substantial disruption for the school to intervene; the question is whether the facts "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."⁵⁹ The Court determined that the students' black armbands, worn in silent protest of the Vietnam War, did not forecast such a disruption.

Of course, in many cases of sexual harassment, First Amendment concerns may not even be implicated. First, the First Amendment applies only to state actors, which for educational institutions means public school districts or state universities.⁶⁰ Private colleges and universities that receive federal funding, in the form of student loans for example, must comply with the requirements of Title IX, but are not covered by the First Amendment.⁶¹

Second, the First Amendment applies only to *speech*. While some expressive conduct, like the black armbands worn in *Tinker*, may be constitutionally protected,⁶² "[t]here is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause."⁶³ The First

⁵⁶ See *Hill v. Cundiff*, 797 F.3d 948, 971-76 (11th Cir. 2015) (reversing the district court's grant of summary judgment on Title IX claim stemming from a student's sexual assault in a school-arranged "sting operation" ostensibly meant to address the student's complaints of sexual harassment).

⁵⁷ 393 U.S. 503 (1969).

⁵⁸ *Id.* at 513. The "rights of others" language from *Tinker* has not been developed by the courts.

⁵⁹ *Id.* at 514.

⁶⁰ See *Tinker*, 393 U.S. 503 (applying the First Amendment to a public school district); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2981, 3011 (2010) ("The First Amendment rights of speech and association extend to the campuses of state universities." (alteration and quotation marks omitted)). In addition, there is a question as to whether and how the test in *Tinker*, along with other Supreme Court precedent regarding student speech in public elementary and secondary schools—applies to public colleges and universities. See *Tatro v. Univ. of Minn.*, 816 N.W. 2d 509, 519 & n.5 (Minn. 2012) (recognizing unsettled case law, citing to examples from the Third, Sixth, and Ninth Circuits, and declining to consider the issue); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 Tex. J. C.L. & C.R. 27, 28-49 (2008) (discussing the unresolved question); see also *Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference [given to high school restrictions on school newspaper] is appropriate with respect to school-sponsored expressive activities at the college and university level.").

⁶¹ State law may provide that private universities may not restrict student speech more than as if the First Amendment applies; California has done so with its "Leonard Law." Cal. Educ. Code § 94367(a) ("No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions . . . when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment.").

⁶² See *Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding flag burning was speech protected by the First Amendment because the actor intended to "convey a particularized message" and it was likely that those who view the conduct would understand that message).

⁶³ *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").

Amendment does not protect “true threats.”⁶⁴ Thus, school intervention in response to physical harassment or “true threats” does not raise First Amendment concerns. Lastly, harassment often does not fall neatly into a single category. Where conduct involves both “speech” and “nonspeech” elements, “a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms.”⁶⁵ As courts have emphasized, there is a compelling government interest in preventing discrimination and harassment.⁶⁶ Schools “have a duty to protect their students from harassment and bullying in the school environment” and “school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning.”⁶⁷

Even where free speech rights are implicated, Title IX remains consistent with the First Amendment. For example, in *Saxe v. State College Area School District*, then-Judge Alito addressed a First Amendment challenge to the constitutionality of a school district’s anti-harassment policy.⁶⁸ The court struck the policy because it was both broader than harassment prohibited by Title IX and “appear[ed] to cover substantially more speech than could be prohibited under *Tinker*’s substantial disruption test.”⁶⁹ Similarly, in *DeJohn v. Temple University*, the Third Circuit equated the hostile environment test in *Davis* with *Tinker*’s substantial disruption inquiry.⁷⁰ In other words, the court assumed that *Davis* and *Tinker* were consistent and that a “hostile environment” and “substantial disruption” were synonymous. Indeed, federal district and circuit courts have held that policies narrowly tailored to address harassment or prevent disruptions in the classroom are consistent with the First Amendment as it applies to both secondary⁷¹ and post-secondary institutions.⁷²

Thus, *Tinker* and *Davis* are consistent in that they allow (*Tinker*) and require (*Davis*) a school to intervene in response to conduct, including speech that simultaneously creates a hostile environment and a foreseeable risk

⁶⁴ See generally *Watts v. United States*, 394 U.S. 705 (1969); see also *Keefe v. Adams*, 840 F.3d 523, 531-33 (8th Cir. 2016) (holding that college did not violate the First Amendment when it disciplined a student who threatened violence that implicated other students on his Facebook page); *Koepfel v. Romano*, --F. Supp. 3d --, 2017 WL 2226681, *9 (M.D. Fla. May 11, 2017) (finding “intimidating, hostile, offensive and threatening” speech, whether on-campus or off-campus “is simply outside the protections of the First Amendment because it disrupts another student’s ability to pursue her education in a safe environment”); *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 856 (Pa. 2002) (inquiring whether student off-campus internet speech constituted a true threat before determining that it did not and therefore applying *Tinker*).

⁶⁵ *Texas*, 491 U.S. at 407.

⁶⁶ See *DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008) (“[We] do believe that a school has a compelling interest in preventing harassment”); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) (“Certainly, preventing discrimination . . . in the schools [] is not only a legitimate, but a compelling, government interest.”); see also *Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (holding removing student from classroom for wearing T-shirt was acceptable under *Tinker*’s because the “wearing of his T-shirt collides with the rights of other students in the most fundamental way”).

⁶⁷ See *Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 572 (4th Cir. 2011); see also U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties, at 12 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁶⁸ 240 F.3d 200 (3d Cir. 2001).

⁶⁹ *Id.*; see also *Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) (“[A] particular form of harassment or intimidation can be regulated by defendants only if it meets the requirements of *Tinker*; that is, if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.”)

⁷⁰ 537 F.3d 301, 317 (3d Cir. 2008).

⁷¹ *Barr v. Lafon*, 538 F.3d 554, 569 (6th Cir. 2008); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000).

⁷² *Koepfel v. Romano*, No. 6:15-cv-1800-Orl-40KRS, 2017 WL 2226681, *9 (M.D. Fla. May 11, 2017); *Marshall v. Ohio University*, No. 2:15-cv-775, 2015 WL 1179955, *5-*7 (S.D. Ohio 2015).

of substantial disruption of the school environment. While the Supreme Court famously observed in *Tinker* that “[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate,” it also noted that those rights must be “applied in light of the special characteristics of the school environment,” and therefore the Court “has repeatedly emphasized the need for affirming the comprehensive safeguards, to prescribe and control conduct in the schools.”⁷³ As the Third Circuit has stated: “Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. *There is no constitutional right to be a bully.*”⁷⁴ (emphasis added). And schools have an additional obligation under Title IX to promptly remedy gender-based harassment and prevent its recurrence.⁷⁵

Thus, OCR’s longstanding definition of sexual harassment should not be altered.

* * *

Title IX has been critical to removing gender-based barriers to educational opportunities. The longstanding Title IX legal standards governing sexual harassment claims do not infringe on students’ constitutionally protected speech or due process rights, and backing down from these standards would leave many students vulnerable to more sexual harassment and violence. We urge you to gain a better understanding of these issues by touring the country to listen to survivors and advocates in a variety of school settings and continuing to enforce Title IX consistent with the law’s goals of ensuring equal educational opportunities free from sex and gender-based discrimination.

If you have any questions, please feel free to contact us at (202) 588-5180.

Sincerely,



President & CEO
National Women’s Law Center

CC:

Donald Trump, President of the United States
Jeff Sessions, United States Attorney General
Candice Jackson, Acting Assistant Secretary, U.S. Department of Education, Office for Civil Rights
Andrew Bremberg, Director, White House Domestic Policy Council
Senator Lamar Alexander, Chair, U.S. Senate Committee on Health, Education, Labor and Pensions
Senator Patty Murray, Ranking Member, U.S. Senate Committee on Health, Education, Labor and Pensions
Representative Virginia Foxx, Chair, Committee on Education and the Workforce, U.S. House of Representatives
Representative Bobby Scott, Ranking Member, Committee on Education and the Workforce, U.S. House of Representatives

⁷³ *Tinker*, 393 U.S. at 506-07.

⁷⁴ *Sypniewski v. Warren Hills Reg’l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002); *see also id.* at 259 (“In the public school setting, the First Amendment protects the nondisruptive expression of ideas. It does not erect a shield that handicaps the proper functioning of the public schools.”).

⁷⁵ *See* 2001 Guidance *supra* note 45, at 3.