September 20, 2017

Hilary Malawer
U.S. Department of Education
400 Maryland Avenue SW, Room 6E231
Washington, DC 20202

Submitted Electronically

Attention: ED-2017-OS-0074-0001

Dear Ms. Malawer:

The undersigned appreciate the opportunity to comment on the Department of Education's (the Department) request for comments on regulations that may be appropriate for repeal, replacement or modification, in accordance with Executive Order 13777. The undersigned are attorneys, law professors, and organizations that advocate on behalf of student survivors of sexual harassment. Many have significant experience representing these students in direct negotiations with schools and at all levels of our federal judiciary, including in landmark Title IX litigation before the Supreme Court. We write to correct some common misconceptions about Title IX, sexual assault, and fairness in student discipline. A number of commenters have raised questions about the procedures colleges and universities use to investigate reports of sexual assault. As advocates for students' civil rights, we share a deep investment in protecting the opportunity to learn, whether it is threatened by sexual harassment or, less frequently, false accusations. Fair disciplinary procedures are crucial to ensure justice, combat discrimination, and establish the legitimacy of school adjudications, whether the conduct in question is sexual assault, simple assault, or plagiarism. We urge the Department of Education, though, to recognize existing Title IX regulations and guidance as a tool for fair process, despite some commenters' claims to the contrary, and to avoid imposing uniquely onerous burdens on students who report sexual violence.

I. Existing Title IX regulations and guidance require fair process.

A number of commenters, including the Foundation for Individual Rights in Education and a group of Harvard Law School professors, suggest that Title IX regulations and guidance—particularly the 2011 Dear Colleague Letter[1]—promote unfair disciplinary procedures and threaten accused students' due process rights. To the contrary, these regulations and guidance require greater procedural protections than the due process protections required by the U.S. Constitution in public schools' disciplinary proceedings.[2]

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[1] U.S. Dep't of Educ., Dear Colleague Letter (Apr. 4, 2011) [hereinafter Dear Colleague Letter], https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[2] *See* Alexandra Brodsky, *A Rising Tide: Learning About Fair Disciplinary Process from Title IX*, 66 J. LEGAL EDUC. 822, 832-38 (2017).

The required constitutional protections for students involved in disciplinary proceedings are minimal. In 1975, the Supreme Court held that public school students are guaranteed only "*some* kind of notice and *some* kind of hearing."[3] Private school students are entitled to even less since their colleges and universities are not state actors: as a general matter, disciplinarians need only follow the college or university's written policies.[4] In contrast, Title IX's mandate of an equitable complaint process provides far greater protections than the Constitution, and extends those rights to public and most private school students.

For example, four Harvard Law professors complain, in their comment, of accused students' insufficient notice and access to the record. But their complaints are neither grounded in what is required by the 2011 Dear Colleague Letter nor the Constitution. According to the Supreme Court, "[t]here need be no delay between the time 'notice' is given and the time of the hearing."[5] As the Sixth Circuit has noted, the Court did not guarantee the parties access to "evidence against the accused [or] a transcript of the proceedings."[6] Some lower courts have been more generous, but barely.[7] And these protections, of course, would be of little help to a student at Harvard, a private university. Yet Title IX, as interpreted in the 2011 Dear Colleague Letter and enforced by the Office for Civil Rights in recent years, requires more than a week of notice to the accused[8] and "timely access [by both parties] to any information that will be used at the hearing."[9] Indeed, in 2016, the Office for Civil Rights found a private college out of compliance with Title IX for failing to do so in suspending a student accused of taping a woman having sex without her consent.[10]

By way of another example, the Dear Colleague Letter recommends a right to appeal beyond what is constitutionally required. The Harvard Law professors and other commenters are correct that opportunities to appeal disciplinary decisions, when structured thoughtfully, promote fairness. Yet no such right is guaranteed by the U.S. Constitution.[11] Nonetheless, the Dear Colleague Letter encourages schools to adopt appellate procedures.[12] So too does the Department's 2014 "Questions and Answers" document, which urges colleges and universities to allow appeal of both findings and

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[3] Goss v. Lopez, 419 U.S. 565, 579 (1975) (emphasis added).
[4] Dixon v. Alabama State Bd. of Ed., 294 F.2d 150, 157 (5th Cir. 1961) (following "the well-settled rule that the relations between a student and a private university are a matter of contract").
[5] *Goss*, 419 U.S. at 582.
[6] Flaim v. Med. Coll. of Ohio, 418 F.3d 629, 634 (6th Cir. 2005).
[7] *E.g.* Vail v. Bd. of Ed. of Portsmouth Sch. Dist., 354 F. Supp. 592, 603 (D.N.H.), *vacated and remanded*, 502 F.2d 1159 (1st Cir. 1973) (requiring that a public school student facing a suspension longer than five days be provided "sufficient time to prepare a defense or reply" between notice and a hearing").
[8] *Letter to Robert E. Clark II, President of Wesley College from Beth Gellman-Beer*, U.S. Dep't of Educ. (Oct. 12, 2016) [hereinafter *Letter to Robert E. Clark II*], https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/03152329-a.pdf.
[9] Dear Colleague Letter, *supra* note 1, at 11.
[10] *Letter to Robert E. Clark II*, *supra* note 8.
[11] *E.g. Flaim*, 418 F.3d at 636; Brewer by Dreyfus v. Austin Indep. Sch. Dist., 779 F.2d 260, 263 (5th Cir. 1985).
[12] Dear Colleague Letter, *supra* note 1.

sanctions,[13] which offers students more protection than the narrow grounds identified by the four Harvard Law professors in their comment.[14]

Though some schools mistreat students in disciplinary proceedings, the fault does not lie with Title IX, its regulations, or its accompanying guidance. Many of us have represented student sexual assault survivors, students who face unfair discipline, and sometimes students who fit both categories. We know colleges and universities sometimes make grave mistakes. But a recent review of lawsuits brought by students sanctioned for sexual assault found that none of the defendant-schools' offenses were attributable to Title IX.[15] Rather, the offenses stemmed from the schools' failure to comply with Title IX. The solution is to enforce Title IX, not undermine it.

II. Student survivors of sexual violence should not face unique procedural burdens.

Campus sexual assault has raised critics' concerns about fair discipline in an unprecedented manner. Professors, lawyers, and writers who were silent when students were suspended for plagiarism, dress code violations, or simple assault are deeply engaged now that the topic is rape.[16] We welcome the opportunity to discuss what equitable and smart student discipline looks like. We worry, though, that this special concern for process in sexual assault cases will result in heightened procedural burdens for sexual assault complainants compared to their peers who allege other wrongdoings. Indeed, some critics now demand that students accused of rape should have greater rights than students accused of other weighty harms and that survivors should meet a uniquely high evidentiary standard.[17] As law professors and attorneys have pointed out in numerous publications, the preponderance of the evidence was the standard favored by schools for all disciplinary matters well before the Dear Colleague Letter.[18] It is only now

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[13] U.S. Dep't of Educ., Questions and Answers on Title IX and Sexual Violence 44 (Apr. 29, 2014), http://www2.ed.gov/about/ offices/list/ocr/docs/qa-201404-title-ix.pdf.

[14] While not the focus on this comment, those same professors criticize schools for implementing overly broad definitions of sexual misconduct. Similar to their criticisms of fair process, these concerns are valid but not attributable to the Dear Colleague Letter. Under long-standing Department policy, reaffirmed in the 2011 Letter, student expression must rise to the level of unwelcome sexual conduct that is "severe" or "pervasive" in order to constitute a hostile environment. *See* Office for Civil Rights, Revised Sexual Harassment Guidance, Dept. of Educ. 6 (Jan. 19, 2001), https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf. That high standard excludes the free exchange of ideas so important to campus communities—and simple off-color jokes. Accordingly, federal courts have held that policies narrowly tailored to address harassment or prevent similar disruptions in the classroom are consistent with the First Amendment in both secondary and post-secondary institutions. *E.g.*, 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); Koeppel 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).

[15] *See generally* Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 MONT. L. REV. 71 (2017).

[16] *See generally* Katharine K. Baker, *Campus Misconduct, Sexual Harm and Appropriate Process: The Essential Sexuality of it All*, 66 J. LEGAL EDUC. 777 (2017).

[17] *See* Brodsky, *supra* note 2, at 841-42.

[18] Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 YALE L.J. 1940, 198688 (2016); FIRE: Foundation for Individual Rights in Education, APPENDIX, available at

in the context of sexual assault that the common standard is considered controversially low.[19]

Demands for uniquely onerous procedures in sexual assault investigations are rooted in inaccurate, sexist myths. The trope of the scorned woman who cries rape is at least as old as the Bible. Shamefully, it was long enshrined in our states' laws, jury instructions, and the Model Penal Code.[20] Many schools replicated these injustices. Harvard, for example, previously required uniquely prompt reports and corroborating witnesses from sexual assault victims alone.[21] Only in recent decades have we begun the hard work of eradicating rape myths from our courts and schools.[22] To reverse course now and impose unique burdens on sexual assault survivors would be a terrible regression, one that would cost many students their education.

III. Moving forward the Department should not repeal, replace, or modify current Title IX regulations and guidance, but should instead focus on providing technical assistance to educational institutions.

Over the past decade, colleges and universities have made enormous strides in their handling of campus sexual assault, thanks in large part to survivors courageously coming forward to demand justice from their schools and their government. Yet schools undoubtedly still make mistakes that hurt both complainants and accused students. The Department of Education's job is to enforce Title IX, and it should do so by providing schools the technical support they need to follow the law instead of undermining existing rules that require a fair process and making it harder for survivors of sexual violence to continue their education. Schools that use unfair disciplinary processes should be assisted and, if necessary, investigated pursuant to the Office for Civil Rights' authority. Survivors should not be punished in their stead.

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http://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf; Angela F. Amar, et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 (4) VIOLENCE AND VICTIMS 579, 584-85 (2014); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002), *available at* http://www.hhd.org/sites/hhd.org/ files/mso44.pdf; Nancy Chi Cantalupo, et al., *Title IX & the preponderance of the evidence: a white paper* 7-8 (Aug. 7, 2016), available at http://www.feministlawprofessors. com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf.

[19] *See* Brodsky, *supra* note 2, at 844-47; Anderson *Campus Sexual Assault Adjudication and Resistance to Reform*, *supra* note 18, at 1986-87 ("That opponents have asserted an enthusiasm for a robust standard of proof only in cases of campus sexual assault is troubling. Again, it bespeaks a concern, not for due process on campus, but for those accused of sexual assault over those accused of other misconduct."). For a full discussion of the preponderance of the evidence standard, see generally Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standar*d, 78 MONT. L. REV. 109 (2017); Cantalupo, *supra* note 18.

[20] *E.g.* Model Penal Code § 213 (Proposed Official Draft 1962); *see also* Morrison Torrey, *When Will We Be Believed? Rape Myths and the Idea of A Fair Trial in Rape Prosecutions*, 24 U.C. DAVIS L. REV. 1013, 1027 (1991); Susan Estrich, *Rape*, 95 YALE L.J. 1087, 1139-40 (1986).

[21] Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 989-992 (2004).

[22] Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform,* supra note 18 at 1943.

We appreciate your consideration of our comments. If you have any questions, please contact Neena Chaudhry (nchaudhry@nwlc.org) or Alexandra Brodsky (abrodsky@nwlc.org) at the National Women's Law Center or Adele Kimmel (akimmel@publicjustice.net) at Public Justice.

Sincerely,

National Women's Law Center
Public Justice

Joined by:

American Association of University Women (AAUW)
Atlanta Women for Equality
Black Women's Blueprint
Break the Cycle
California Women's Law Center
Casa de Esperanza: National Latin@ Network for Healthy Families and Communities
Champion Women
Clery Center
Equal Rights Advocates
Futures Without Violence
Girls, Inc.
Human Rights Campaign
Illinois Accountability Initiative
Know Your IX
Kristen Galles
Lisalyn R. Jacobs
Maryland Coalition Against Sexual Assault, Sexual Assault Legal Institute
Michele Dauber, Frederick I. Richman Professor of Law, Stanford Law School
Nancy Chi Cantalupo, Co-Author, Title IX & the Preponderance of the Evidence: A White Paper, https://papers.ssrn.com/sol3/cf_dev/AbsByAuth.cfm?per_id=884485
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