

Protecting Students From Sexual Violence and Harassment
Submitted to the Committee on Health, Education, Labor, and Pensions
By: End Rape on Campus and Know Your IX
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Via electronic mail to Melanie_Rainer@help.senate.gov and Manuel_Contreras@help.senate.gov

Chairman Lamar Alexander
Committee on Health, Education,
Labor and Pensions
455 Dirksen Senate Office Building
Washington, DC 20510

Ranking Member Patty Murray
Committee on Health, Education,
Labor and Pensions
154 Russell Senate Office Building
Washington, DC 20510

Dear Chairman Alexander and Ranking Member Murray:

Sexual violence is a pervasive problem in schools and colleges across the country, denying too many students the opportunity to learn and impeding their civil right to receive an education free from discrimination under Title IX of the 1972 Education Amendments.¹ We, the undersigned organizations, work directly with victims of sexual harassment and violence in our nation's schools. We have seen firsthand that the safety and equity of our schools depend on the U.S. Department of Education's critical civil rights work. As you consider Ms. Betsy DeVos' nomination for Secretary of Education, we urge you to evaluate her positions on, understanding of, and plans to address sex discrimination and sexual harassment in schools. Safe and equitable education depends upon a Secretary of Education who is firmly committed to upholding Title IX and reducing gender violence.

Campus climate surveys and research from the Bureau of Justice Statistics reveal that one in five college women have experienced sexual assault.² These rates are often higher for people with disabilities, LGBT youth, and women of color, who also face unique challenges in reporting.³

¹ Title IX of the Education Amendments of 1972, Pub. L. No 92-318 § 901(a), 86 Stat. 235, 373 (codified at 20 U.S.C. § 1681(a) (2012)). (“No person in the United States shall, on the basis of sex, be . . . subjected to discrimination under any education program or activity receiving Federal financial assistance . . .”).

² See CHRISTOPHER P. KREBS ET AL., THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT at 6-3 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>; DAVID CANTOR ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT 13-14 (2015), <http://ow.ly/XOL15>; see generally B.S. FISHER, L.E. DAIGLE, & F.T. CULLEN, UNSAFE IN THE IVORY TOWER: THE SEXUAL VICTIMIZATION OF COLLEGE WOMEN (2010).

³ See ERIKA HARRELL, BUREAU OF JUSTICE STATISTICS, CRIMES AGAINST PERSONS WITH DISABILITIES, 2009-2012 – STATISTICAL TABLES (2014), <https://www.bjs.gov/content/pub/pdf/capd0912st.pdf>; BLACK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 SUMMARY REPORT (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf; BLACK ET AL., CENTERS FOR DISEASE CONTROL AND PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY (NISVS): 2010 FINDINGS ON VICTIMIZATION BY SEXUAL ORIENTATION (2011), https://www.cdc.gov/violenceprevention/pdf/nisvs_sofindings.pdf.

Pervasive gender violence jeopardizes young people’s ability to succeed in school. Victims go to great lengths to avoid their perpetrators: skipping shared classes,⁴ avoiding libraries or dining halls, or withdrawing from campus life. Others struggle with post-traumatic stress disorder (PTSD), depression, eating disorders or anxiety.⁵ These effects are magnified when a perpetrator remains on campus with a survivor, and are further exacerbated when schools ignore their legal responsibility to protect students.⁶ Without support and accommodations, many survivors see their grades drop as they struggle to participate in, or even attend, their classes;⁷ others are forced to leave school temporarily, transfer, or drop out entirely. As a result, survivors are forced to take out additional student loans—often for hundreds of thousands of dollars⁸—to pay for services their schools should have provided or for lost tuition.

For many student survivors, gender-based violence impedes, or even outright precludes, their continued access to education. These are harms to which schools are uniquely positioned—and required by law—to respond. While the purpose of the criminal system is to incarcerate perpetrators, schools’ Title IX processes serve to directly provide survivors with the support they need to stay in school, by providing free counseling services, an extension on a paper, or moving a survivor out of a class shared with a rapist.

As victims advocates and young people whose educations have been imperiled by gender violence in school, we know just how critical the Department’s Office for Civil Rights’ (OCR) work has proven for students. OCR has helped ensure that schools live up to their legal responsibilities to prevent sexual harassment and violence on campus and promptly and equitably address it when it occurs.

No student should be denied the opportunity to succeed in the classroom by sexual harassment or assault. We strongly urge you to prioritize OCR’s work in protecting that opportunity to learn and to make sure the next Secretary commits to upholding the following principles:

⁴ See Rebecca Marie Loya, *Economic Consequences of Sexual Violence for Survivors: Implications for Social Policy and Social Change* 96 (June 2012) (unpublished Ph.D. dissertation, Brandeis University) (on file with Know Your IX).

⁵ See THE WHITE HOUSE COUNCIL ON WOMEN AND GIRLS, *RAPE AND SEXUAL ASSAULT: A RENEWED CALL TO ACTION 2* (2014), https://www.whitehouse.gov/sites/default/files/docs/sexual_assault_report_1-21-14.pdf.

⁶ See Carly Parnitzke Smith and Jennifer J. Freyd, *Institutional Betrayal*, 69 AM. PSYCHOL. 575, 587-582 (2014).

⁷ See Cari Simon, *On Top of Everything Else, Sexual Assault Hurts the Survivors’ Grades*, WASH. POST: POST EVERYTHING (Aug. 6, 2014), <https://www.washingtonpost.com/posteverything/wp/2014/08/06/after-a-sexual-assault-survivors-gpas-plummet-this-is-a-bigger-problem-than-you-think>.

⁸ See Laura Hilgers, *What One Rape Cost Our Family*, N.Y. TIMES (Jun. 24, 2016), http://www.nytimes.com/2016/06/24/opinion/what-one-rape-cost-our-family.html?_r=0.

I. Maintaining the Department’s 2011 and 2014 Guidance Documents Clarifying Schools’ Legal Responsibilities to Prevent and Address Sexual Harassment Under Title IX

Courts have long recognized that sexual violence and other forms of sexual harassment threaten students’ ability to learn and that, accordingly, schools receiving federal funding are required under Title IX to prevent harassment and remedy its effects.⁹ To assist schools in fulfilling these longstanding legal obligations, OCR issued its 2011 Dear Colleague Letter on Sexual Violence (DCL)¹⁰ and accompanying 2014 Questions and Answers on Title IX and Sexual Violence,¹¹ helpfully clarifying schools’ responsibilities under Title IX, including their obligation to:

- Provide survivors the accommodations they need—at no cost—in order to access education after suffering gender violence;
- Designate Title IX coordinators who do not have job responsibilities that might create a conflict of interest;
- Provide a fair and equitable process for complainants and respondents in school grievance procedures (*e.g.*, if a school affords the respondent the right to present witnesses, review evidence, or access counsel, the complainant must have the same rights, and vice versa);
- Prevent, respond to, and address the effects of sexual harassment within all of the recipient’s educational programs and activities.

The 2011 DCL further clarified for schools that a single instance of rape is such a severe act of gender-based harassment that it creates a hostile environment that impedes a survivor’s civil right to equal educational access, and to which schools must promptly respond.¹² This principle was affirmed by courts more than a decade before the 2011 DCL was issued and has consistently been reaffirmed in case law.¹³ Yet before OCR’s guidance was issued, many schools ignored their obligations under the law, both because colleges and universities failed to understand them, and because schools knew few students understood the law well enough to assert their rights.

While the Department’s 2011 Dear Colleague Letter provided schools with a valuable framework for fulfilling their legal obligations, the 2011 DCL did not “create” these obligations, as some

⁹ See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998).

¹⁰ See Office for Civil Rights, *Dear Colleague Letter from Assistant Secretary for Civil Rights Russlyn Ali*, U.S. DEP’T EDUC. 1-3 (Apr. 4, 2011), <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [hereinafter DCL 2011].

¹¹ See Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, U.S. DEP’T OF EDUC. (2014), <https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> [hereinafter FAQ 2014].

¹² See DCL 2011, *supra* note 10, at 9.

¹³ See, *e.g.*, *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 n.4 (6th Cir. 2000) (“[w]ithin the context of Title IX, a student’s claim of hostile environment can arise from a single incident” (quoting *Doe v. Sch. Admin. Dist. No. 19*, 66 F. Supp. 2d 57, 62 (D. Me. 1999))); *Soper v. Hoben*, 195 F.3d 845, 855 (6th Cir. 1999) (explaining that rape and sexual abuse “obviously qualify[ed] as...severe, pervasive, and objectively offensive sexual harassment”).

critics have misleadingly claimed. Schools’ obligations stem from federal statutes, including Title IX and the Clery Act, as interpreted by courts for decades.¹⁴ The 2011 DCL and 2014 FAQ helpfully clarified existing requirements, ensuring that schools have the tools to comply with the law—and that students have the information to vindicate their rights. Altering guidance would do little to change schools’ underlying obligations. Instead, it would create needless confusion for schools, which rely on the guidance to understand their responsibilities under Title IX; would undermine public understanding of the law; and would obscure the rights of student survivors seeking to understand what protections the law affords them when they face violence in school.

II. Continuing to Recognize Preponderance of Evidence As the Appropriate Standard of Proof in Campus Sexual Harassment Investigations

Title IX requires that schools use a preponderance of the evidence standard of proof in sexual harassment cases (*i.e.*, it is “more likely than not” that the respondent committed sexual harassment or violence).¹⁵

While the Department explicitly clarified that preponderance was the appropriate standard for Title IX procedures in 2011,¹⁶ courts have long affirmed that it is the appropriate standard for adjudication of violations for civil rights laws, including Title IX,¹⁷ Title VI of the Civil Rights Act, and Title VII of the Civil Rights Act of 1964.¹⁸ As the Supreme Court recognized in *Cannon v. University of Chicago*, the drafters of Title IX modeled the statute after Title VI and “explicitly assumed that [Title IX] would be interpreted and applied as Title VI had been.”¹⁹ As claims of discrimination and racially-motivated harassment under Title VI are adjudicated using the

¹⁴ Recipient obligations articulated by the DCL—providing accommodations, appointing Title IX coordinators, creating fair and equitable procedures, and responding to harassment within all of its educational programs—are derived from the Title IX statute, regulations, and case law. Recipients may be required to take remedial or affirmative action to overcome the effects of discrimination, which can include providing accommodations. *See* 34 CFR §106.3 (1997); *Gebser*, 524 U.S. at 288. Recipients are also required to “designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under [Title IX]” and to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints [under Title IX].” 34 CFR § 106.8 (1997). In addition, following the Supreme Court’s decision in *Grove City v. Bell*, 465 U.S. 555 (1984) which limited the scope of Title IX’s coverage at the time, Congress clarified that Title IX covers all of a recipient’s educational programs and activities. *See* 20 U.S.C. §1687.

¹⁵ *See* DCL 2011, *supra* note 10, at 10.

¹⁶ *Id.*

¹⁷ *See e.g., Williams ex. rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (stating school district “may be liable for the sexual abuse of a student if the [p]laintiff demonstrates by a preponderance of the evidence each of the [necessary] elements”).

¹⁸ *See Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986) (noting that “a plaintiff in a Title VII suit need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . [A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail”); NANCY CHI CANTALUPO ET AL., TITLE IX AND PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 4 (2016), <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-10.3.16.pdf>.

¹⁹ *Cannon v. Univ. of Chicago*, 441 U.S. 677, 696 (1979).

preponderance standard, so too are claims of discrimination and sexual harassment (including sexual violence) made under Title IX. Beyond civil rights litigation, preponderance of the evidence is the standard employed in most civil actions. If the Department indicated its tolerance for other standards of proof, it would create a system where victims of gender-based harassment face uniquely high barriers while victims of harassment on the basis of all other protected characteristic do not. Such a system would be grossly inconsistent with case law as well as Title IX's purpose of eliminating discrimination on the basis of sex.

III. Maintaining Transparency in Title IX Enforcement

In 2014, the Department began regularly publishing a list of higher education institutions under federal investigation for mishandling gender violence complaints,²⁰ to the great relief of prospective students and their families.

The Department built on this progress in 2016 by publicly releasing a list of schools that had requested and received religious exemptions, exempting them from legal requirements not to discriminate against students on the basis of pregnancy, reproductive health decisions, sexual orientation, or gender identity.²¹ When a school receives a religious exemption, it can punish, refuse to admit, or even expel pregnant students or students who identify as LGBT. Without public disclosure of the names of schools that are seeking or have received Title IX exemptions, pregnant or LGBT students may unknowingly enroll in schools where discrimination against them is permitted.

Today, more than 297 institutions of higher education are under investigation for violating Title IX,²² and more than 245 schools have received religious exemptions from Title IX's nondiscrimination mandate.²³ By publicly releasing lists of these schools, the Department brings transparency to its enforcement actions, helps thousands of prospective students and parents make informed decisions about enrollment, and enables campus communities to take action against hostile environments in their school communities. These commonsense measures are vital resources for the public, and we urge the nominee to commit to sustaining them.

²⁰See *U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations*, U.S. DEP'T OF EDUC. (May 1, 2014), <https://www.ed.gov/news/press-releases/us-department-education-releases-list-higher-education-institutions-open-title-i>.

²¹ See Scott Jaschik, *Education Dept. Releases Title IX Exemptions, Requests*, INSIDE HIGHER ED (May 2, 2016), <https://www.insidehighered.com/quicktakes/2016/05/02/education-dept-releases-title-ix-exemptions-requests>.

²²See *Title IX: Tracking Sexual Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION, <http://projects.chronicle.com/titleix/> (last visited Jan. 6, 2017).

²³See *Institutions Currently Holding Religious Exemption*, U.S. DEP'T OF EDUC., <https://www2.ed.gov/about/offices/list/ocr/docs/t9-rel-exempt/rel-exempt-approved-and-pending.xlsx> (last updated Sept. 15, 2016).

IV. Maintaining the Department’s 2016 Dear Colleague Letter on Transgender Students

Transgender and gender non-conforming students experience alarmingly high rates of harassment, bullying, and violence. In 2016, the Department issued its Dear Colleague Letter on Transgender Students to guide schools in responding to this urgent problem. The Department’s guidance comes at a time when discrimination is costing too many transgender students their education: almost one in five K-12 students who are perceived as transgender have left a school as a result of severe mistreatment.²⁴ Both the Department of Education and the Department of Justice have recognized that gender identity discrimination does not have to be “sexual” in nature to constitute sex discrimination, and that harassing a student for not conforming to the sex they were assigned at birth is “unquestionably” discrimination on the basis of sex.²⁵

The Fourth Circuit Court of Appeals afforded *Auer* deference to the Department of Education’s interpretation of Title IX²⁶ and vacated a lower court’s denial of a preliminary injunction that would have ordered a school board to allow a transgender student to use the restroom facility consistent with his gender identity.²⁷ Furthermore, for more than 15 years, courts across the country, including federal appeals courts for the First, Sixth, Ninth, and Eleventh Circuits have held that federal laws prohibiting sex discrimination protect transgender people from discrimination on the basis of gender identity.²⁸

As organizations that serve survivors of gender-based violence, we reject the myth that addressing discrimination against transgender students, such as by allowing transgender students to use single-sex facilities consistent with their gender, would cause sexual assault or harassment. On the contrary, half of Americans today live under state and local laws protecting transgender people from discrimination in public places, with no evidence of any public safety threat. Meanwhile, students who are transgender or gender non-conforming are significantly more likely to experience sexual assault than those who are not.

²⁴ See NATIONAL CENTER FOR TRANSGENDER EQUALITY, 2015 U.S. TRANSGENDER SURVEY: EXECUTIVE SUMMARY 9 (2016), <http://www.transequality.org/sites/default/files/docs/USTS-Executive-Summary-FINAL.PDF>.

²⁵ See Brief for the United States as Amicus Curiae Supporting Plaintiff-Appellant and Urging Reversal at 10, *G.G. v. Gloucester County School Board*, 822 F.3d 709 (4th Cir. 2016) (No. 15-2056).

²⁶ See *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709, 723 (4th Cir. 2016).

²⁷ *Id.* at 715. The lower court subsequently granted plaintiff’s request for a preliminary injunction. See *G.G. v. Gloucester County School Board*, 2016 WL 3581852 (E.D. Va. 2016). The Supreme Court has granted a petition for writ of certiorari on this question. See *G. G. v. Gloucester Cnty. Sch. Bd.*, 822 F.3d 709 (4th Cir. 2016), *cert. granted in part*, 196 L. Ed. 2d 283 (Oct. 28, 2016).

²⁸ See Chase Strangio, *There is Only a Title IX Crisis if You Believe the Existence of Trans People Is up for Debate*, SLATE (May 27, 2016), http://www.slate.com/blogs/outward/2016/05/27/jeannie_suk_s_newyorker_com_article_was_sloppy_and_inaccurate.html (stating that courts spanning from Maine to California, including the federal courts of appeals for the 1st, 6th, 9th, and 11th circuits have specifically held that federal laws prohibiting sex discrimination also include sex discrimination against transgender people).

The Department's 2016 DCL builds upon this foundation of support for transgender students, and is imperative to ensuring their educational access.

As advocates for students whose education has been disrupted by sexual harassment and violence, we know the critical role that the Education Department, the 2011 DCL, 2014 FAQ on Title IX and Sexual Violence, and 2016 DCL on Transgender Students have played in promoting Title IX compliance, gender equity, and safe schools. Understanding the importance of the Department's key role in enforcing Title IX is an essential qualification for anyone who would lead it.

We urge you to assess Ms. DeVos' knowledge of and positions on Title IX and related guidance documents issued by the Department. Anything less than a firm commitment to maintaining the Department's Title IX guidance, enforcement work, and transparency procedures should be considered with utmost concern.

Thank you for your consideration and your commitment to building a future where students can learn and thrive free from violence.

Sincerely,

End Rape on Campus
Know Your IX
Advocates for Youth
American Association of University Women (AAUW)
American Federation of Teachers (AFT)
Arizona Coalition to End Sexual and Domestic Violence
Arte Sana and ALAS (the national Latinx alliance against sexual violence)
Connecticut Alliance to End Sexual Violence
Colorado Coalition Against Sexual Assault
Iowa Coalition Against Sexual assault
Jane Doe Inc (Massachusetts coalition)
Maryland Coalition Against Sexual Assault
Minnesota Coalition Against Sexual Assault
National Women's Law Center
National Alliance to End Sexual Violence
New York State Coalition Against Sexual Assault
North Carolina Coalition Against Sexual assault
Ohio Alliance Against Sexual Violence
Promoting Awareness Victim Empowerment (PAVE)
Victim Rights Law Center
West Virginia Foundation for Rape Information Services