



June 2, 2014

The Honorable Claire McCaskill
Chairman, Financial & Contracting Oversight Subcommittee
Homeland Security & Governmental Affairs Committee
U.S. Senate
Washington, D.C. 20510

The Honorable Ron Johnson
Ranking Member, Financial & Contracting Oversight Subcommittee
Homeland Security & Governmental Affairs Committee
U.S. Senate

Washington, D.C. 20510

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Re: Campus Sexual Assault: The Role of Title IX (Roundtable)

Dear Chairman McCaskill and Ranking Member Johnson:

On behalf of the American Civil Liberties Union (ACLU), a non-partisan organization with more than a half million members, countless additional activists and supporters, and fifty-three affiliates nationwide, we write to offer recommendations regarding Title IX and sexual violence, specifically to propose a number of improvements to ensure that the civil rights of all students are protected. This is an important and timely discussion, and one in which we are pleased to participate.

The Work of the Department of Education's Office for Civil Rights (OCR) on Sexual Violence and Harassment in Schools

OCR is to be commended for its attention to and impactful enforcement of Title IX¹ against schools in cases involving sexual violence and harassment. The ACLU's Women's Rights Project has filed complaints with OCR using the administrative process, challenging how a Texas school district² responded to a high school student who reported sexual assault and another involving a student at Carnegie Mellon University.³ The OCR process is an important avenue for relief and has helped bring about comprehensive changes

¹ 20 U.S.C. §§ 1681–1688 (2012).

² See Sandra Park, *Title IX Victory: Civil Rights Office Condemns School's Actions in Sexual Assault Case*, ACLU BLOG OF RIGHTS (June 20, 2012, 5:16 PM), <https://www.aclu.org/blog/womens-rights/title-ix-victory-civil-rights-office-condemns-schools-actions-sexual-assault-case>.

³ See Complaint, available at https://www.aclu.org/sites/default/files/assets/2013_12_18_-_carnegie_mellon_complaint_-_redacted_and_sanitized.pdf.

at some schools. We urge continued support for OCR’s critically important work on these issues.

Dating Violence, Domestic Violence, Stalking, and Title IX

In its April 2011 “Dear Colleague Letter,” OCR discussed how Title IX’s protections apply to actions such as rape, sexual assault, sexual battery, and sexual coercion.⁴ Yet OCR did not address how other forms of gender-based violence, such as domestic violence, dating violence, and stalking, fall within Title IX’s reach. In contrast, other federal agencies have recognized that discrimination against victims of domestic violence can constitute sex discrimination.⁵

Moreover, the Clery Act now requires schools to incorporate domestic violence, dating violence,⁶ and stalking into their policies and procedures, and thus the need to explain how Title IX applies in those situations is even more pressing.

OCR should address this oversight as soon as possible. It should acknowledge that dating violence, domestic violence, and stalking are encompassed by Title IX and provide guidance on the issue so as to ensure that survivors of stalking, domestic violence, and dating violence on college campuses have access to the protections of Title IX to which they are entitled.

Need for Greater Guidance on the Due Process Rights of the Accused

OCR has made great progress in providing guidance to schools on the rights of students who report experiencing sexual harassment and sexual violence. In guaranteeing those rights, OCR should also give clear guidance on the due process rights and other rights of the accused. OCR acknowledged the rights of the accused in its 2001 Guidance by referring to confidentiality concerns of the accused, due process rights of the accused, and First Amendment issues when “speech or expression are involved.”⁷ Additional guidance issued by OCR has briefly mentioned the rights of the accused as well.⁸ However, OCR guidance does not describe such rights with the

⁴ See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. to Colleagues, 1–2 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁵ See, e.g., Memorandum from Sara K. Pratt, Deputy Sec’y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (Feb. 9, 2011) (“[S]tatistics show that discrimination against victims of domestic violence is almost always discrimination against women. . . . domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act.”); *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic Violence, Sexual Assault or Stalking*, EEOC, http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm (last visited May 29, 2014) (citations omitted) (“Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on . . . sex . . . and the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. . . . Title VII and the ADA may apply to employment situations involving applicants and employees who experience domestic or dating violence, sexual assault, or stalking.”).

⁶ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 89 (2013).

⁷ See U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 16, 22 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

⁸ See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 13, 26, 43–44 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (addressing due process, First Amendment, and other rights of the accused); Letter from Assistant Sec’y for Civil

level of detail that would inform students and institutions about the rights to which the accused is entitled.⁹ Guidance from OCR regarding guaranteeing the accused’s rights, in a manner that preserves the protections afforded to the complainant, would ensure that all parties involved have access to justice.

Need for an Increased K-12 Focus

Due to impressive student activism, the issue of campus sexual assault has begun to receive the attention it deserves. School districts’ responses to sexual harassment similarly require increased focus, as sexual harassment and assault occur at significant rates in the K-12 grades.¹⁰ Compared to colleges and universities, school districts are less likely to have formal policies, procedures, and trainings on the proper response to allegations of sexual violence. In addition, K-12 students are rarely educated about their rights under Title IX. All of these problems were evident in an OCR complaint brought by the ACLU on behalf of Rachel Bradshaw-Bean, a high school student who was accused of “lewdness” after she reported being sexually assaulted at school and was sent to the same disciplinary program as her attacker.¹¹ Ultimately, OCR found that the school district violated Title IX by failing to conduct its own investigation and retaliating against Rachel after she made the report.¹² To avoid additional cases like this one, greater awareness about sexual violence and increased enforcement of Title IX at the K-12 level is vitally important.

Rights, Office for Civil Rights, U.S. Dep’t of Educ. to Colleagues (July 28, 2003), *available at* <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (addressing First Amendment rights of the accused); Ali, *supra* note 4, at 12 (addressing due process rights of the accused).

⁹ For example, the 2001 Guidance refers to due process rights in a general sense by stating “A public school’s employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding . . . Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to sound and supportable decisions. . . . Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment.” U.S. DEP’T OF EDUC., *supra* note 8, at 22.

¹⁰ A report by the American Association of University Women found that nearly half of middle and high school students experienced some form of sexual harassment in the 2010-11 school year, that 13% of girls reported being touched in an unwelcome sexual way, and that 4% of girls reported being forced to do something sexual. CATHERINE HILL AND HOLLY KEARL, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2, 12 (2011), *available at* <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. Another study by researchers at the University of Illinois at Urbana-Champaign found that 21% of middle school students surveyed in 2008 experienced a form of physical sexual violence. SARAH RINEHART, NAMRATA DOSHI, & DOROTHY ESPELAGE, SEXUAL HARASSMENT AND SEXUAL VIOLENCE EXPERIENCES AMONG MIDDLE SCHOOL YOUTH 4 (2014), *available at* <http://www.aera.net/Portals/38/Newsroom%20-%20Recent%20Research/Sexual%20Harassment%20and%20Sexual%20Violence%20Experiences%20Among%20Middle%20School%20Youth.pdf>.

¹¹ See Abigail Pesta, *Kicked out of high school for ‘public lewdness’ after reporting rape*, NBC NEWS (Dec. 23, 2013, 9:41 AM), <http://www.nbcnews.com/news/other/kicked-out-high-school-public-lewdness-after-reporting-rape-f2D11794148>.

¹² See Park, *supra* note 2.

Need for Explicit Protections for LGBT Students

We know that students who are, or perceived to be, lesbian, gay, bisexual, or transgender (LGBT), are especially vulnerable to discrimination, harassment, and violence, including sexual violence, in our nation's schools. A nationwide 2011 survey of more than 8,500 students between the ages of 13-20 found that eight out of ten LGBT students reported experiencing harassment at their school within the past year based on their sexual orientation.¹³ Six in ten LGBT students reported feeling unsafe at school because of their sexual orientation.¹⁴ Transgender students experienced more hostile climates than their non-transgender peers, with eight in ten reporting feeling unsafe at school because of their gender expression.¹⁵ The effect of a hostile school climate on LGBT students has a direct and negative impact on the student's education. Nearly a third of LGBT students reported skipping at least once, and three in ten reported missing at least one entire day of school in the past month because of safety concerns.¹⁶

Despite these sobering statistics and the clear need for action, there is no federal law that explicitly protects LGBT students from discrimination. There is legislation modeled on Title IX currently pending in the Senate, the Student Non-Discrimination Act (S. 1088), which would establish a comprehensive, explicit prohibition against discrimination and harassment in all public elementary and secondary schools across the country based on a student's actual or perceived sexual orientation or gender identity. Congress should make passage of this civil rights measure a priority.

In the absence of a law like the Student Non-Discrimination Act, guidance like the recent Q&A on Title IX and sexual violence from OCR within the Department of Education is even more important. OCR made clear in that guidance that a school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved, and that Title IX's sex discrimination prohibition extends to claims of discrimination based on gender identity or a failure to conform to stereotypical notions of masculinity or femininity.¹⁷ The guidance further stated that schools should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.¹⁸ This clarity from OCR on the scope of the protections of Title IX is very important to LGBT students; however, it should not be read as an excuse for inaction on the part of Congress. The need for an explicit sexual orientation and gender identity non-discrimination prohibition in federal law remains as vital as ever. This gap in our civil rights laws has left LGBT students uniquely vulnerable to discrimination, harassment, and violence for far too long.

¹³ JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 23 (2012), available at <http://glsen.org/nscls>.

¹⁴ *Id.* at 20.

¹⁵ *Id.* at 89.

¹⁶ *Id.* at 21.

¹⁷ OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

¹⁸ *Id.* at 5-6.

Fifty years of civil rights history demonstrate that laws similar to the Student Non-Discrimination Act are effective in preventing discrimination and harassment from occurring in the first place by prompting schools to take proactive steps to ensure a safe and supportive learning environment for all students who are in their care.

Conclusion

We believe these recommendations on Title IX and sexual violence would help to ensure that the civil rights of all students are properly safeguarded. Thank you for affording us the opportunity to offer this statement. We would be happy to answer any follow-up questions you may have. Please feel free to contact Vania Leveille at (202) 715-0806 or vleveille@aclu.org or Ian Thompson at (202) 715-0837 or ithompson@aclu.org.

Sincerely,



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Cc: Members of the Financial & Contracting Oversight Subcommittee