



Written Testimony Presented to the Committee on Home Land Security and Governmental Affairs Subcommittee on Financial and Contracting Oversight roundtable on “Campus Sexual Assault: the Role of Title IX”

Submitted by: The Victim Rights Law Center

May 29, 2014

Office of U.S. Senator Claire McCaskill
United States Senate
Hart Senate Office Building, Ste. 506
Washington, D.C. 20510

RE: Campus sexual violence, Title IX, and law enforcement

Dear Senator McCaskill and subcommittee members:

The Victim Rights Law Center (VRLC) is submitting this written testimony to the roundtable discussion on “Campus Sexual Assault: The Role of Title IX” to share our expertise in Title IX and the interplay of Title IX and law enforcement. As victims’ attorneys and experts on Title IX, the VRLC strongly believes Title IX is a mechanism to enforce a victim’s civil rights and not a tool of the criminal justice system. As such, schools and victims should never be required to report to law enforcement, unless specified by state law.

For over a decade, VRLC has provided civil legal services to victims of sexual violence in Massachusetts, and more recently in Oregon. This work has expanded nationally to include trainings and technical assistance to other organizations serving victims of sexual assault. The attorneys at VRLC address a comprehensive range of civil legal needs for victims in the areas of housing, privacy, immigration, employment, financial security, safety, and education.

VRLC is home to national leading experts and attorneys on Title IX and campus sexual violence. The VRLC has represented over 100 campus sexual assault victims across Massachusetts and has conducted conferences on campus sexual violence and Title IX compliance for many of the state’s higher educational institutions. Our work on campuses has given us practice-based insights and knowledge on campus disciplinary processes and their impact on victims of sexual violence. VRLC has been a Resource Team member and trainer for the OVW Campus Program Training and Technical Assistance Institute since 2010 and a recent presenter for the Project STOP NOW! conference for campus administrators from historically black colleges and universities. VRLC serves as trainers on the VRLC's Office on Violence Against Women Technical Assistance grant, where they train throughout the country on a number of topics, including Title IX and Campus Sexual Assault Policies and Response.

Notably, VRLC's work with victims of sexual violence on college campuses has transformed the organization into a national leader on campus sexual assault. As a result, the VRLC served as a resource and provided expert opinion to the White House Task Force to Address Campus Sexual Assault.

I. Campus Sexual Violence Must Be Viewed Through a Civil Rights Lens, Not As a Criminal Justice or Law Enforcement Issue

Because Title IX is a civil rights statute focused on gender equality, it shifts the focus of sexual violence to one of equal rights to a victim versus only the accountability of the assailant. Alternatively, sexual violence victims in the criminal justice system get minimal, if any, rights. They are not parties to a criminal case, but are merely a "complaining witness." Prosecutors are not the victims' lawyers and the victims have no control over the presentation or decisions made in those cases. Rules such as the *Brady* rule regarding exculpatory evidence can also make it impossible for victims to protect their private information in criminal proceedings.

Schools often misunderstand the underlying purpose of Title IX because they continue to view sexual violence only as a criminal violation and not a violation of a victim's civil rights. A solely law enforcement approach to addressing campus sexual violence rightfully turns the focus on perpetrators, and replaces the needs of the individual victim with the safety needs of the community. However, this focus on the safety needs of the community is often in opposition to the victims' actual needs, especially when the victim does not wish to cooperate with a criminal investigation. The criminal system is focused on the alleged perpetrator, represented by defense counsel, and the abstract community as a whole, represented by the state and its prosecutor. As noted, the victim is neither a party to the criminal case, nor are her/his interests represented in it.

Viewing sexual assault through a criminal justice or law enforcement lens presents a barrier not only to protecting the civil rights of individual victims but also to recognizing the cultural and environmental aspects of the sexual violence problem. Simply investigating and prosecuting alleged perpetrators—even if sexual assault prosecution rates for conviction and incarceration were higher, which we know they are not—would only partially address this

violence. True elimination of sexual violence will require prevention strategies, cultural change, and strong campus based support systems for victims.

II. Title IX Does Not Require that Schools Report to Law Enforcement

Title IX and all guidance from the U.S. Department of Education Office for Civil Rights (OCR) clearly establishes Title IX procedures, investigations, hearings, and sanctions to be entirely separate and apart from the criminal justice process. Just over a month ago, OCR released additional guidance on Title IX which further articulates schools' obligations. The new questions and answers published by OCR clearly explains the important differences between the criminal process and Title IX. The guidance explains that Title IX is different in the following ways:

By contrast, a Title IX investigation will never result in incarceration of an individual and, therefore, the same procedural protections and legal standards are not required. Further, while a criminal investigation is initiated at the discretion of law enforcement authorities, a Title IX investigation is not discretionary; a school has a duty under Title IX to resolve complaints promptly and equitably and to provide a safe and nondiscriminatory environment for all students, free from sexual harassment and sexual violence. Because the standards for pursuing and completing criminal investigations are different from those used for Title IX investigations, the termination of a criminal investigation without an arrest or conviction does not affect the school's Title IX obligations.¹

As is illustrated, Title IX has entirely different standards, sanctions, and obligations for schools than the criminal justice process.

Throughout the April 2014 Title IX guidance, schools are encouraged to notify students about their "options for reporting an incident of sexual violence to campus or local law enforcement."² This is to inform students of their Title IX right to report to police, not to force students to report to law enforcement. Though schools may have a reporting obligation under specific state law, the recent OCR guidance explains that "Title IX does not require a school to report alleged incidents of sexual violence to law

¹ Office for Civil Rights (April, 2014). "Questions and Answers on Title IX and Sexual Violence." U.S. Dept. of Education. Available from: <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>. Page 27.

² Ibid. at 24.

enforcement.”³ To mandate that campuses refer all sexual violence reports to law enforcement negates the spirit of Title IX, which focuses on empowering the victim to seek equal rights towards his/her continued access to education and provide safety, housing and academic accommodations that can attempt to make the victim whole, a focus that the criminal justice system cannot provide.

III. Driving Down Reporting

VRLC is concerned that a required criminal justice and law enforcement response to campus sexual violence will drive down victim reporting rates. Reporting rates are already extremely low and victims typically do not disclose sexual assault to formal support providers (law enforcement, campus administrators, and crisis centers). Campus estimates suggest 2-6% disclose to law enforcement and 4% to campus authorities.⁴ There are many reasons why survivors do not disclose to professionals, including fear of others knowing about the assault and wanting to keep it private.⁵ This suggests that confidentiality is a priority for many survivors to disclose. As a result, support services that are not confidential may not be used.⁶ Victims cannot be guaranteed confidentiality if they report to law enforcement.

Forcing or mandating law enforcement involvement in campus sexual violence cases only takes the control and decision-making power away from the victim, just as the perpetrator did. Title IX frames notifying victims of their right to report to the police as an option. Victims must be given choices so they can reclaim their lives and continue on their educational trajectory. Title IX does not require schools to report to the police and VRLC strongly supports keeping reporting to the police as an available option after an assault.

IV. Conclusion

Title IX requires a civil rights approach to addressing campus sexual violence. Best practices for working with sexual violence victims ensures that victims are in control, can make

³ *Ibid.* at 27.

⁴ Fisher, B., Daigle, L., Cullen, F., & Turner, M. (2003). Reporting sexual victimization to the police and others: Results from a national-level study of college women. *Criminal Justice and Behavior*, 30, 6–38.

⁵ Walsh et al (2010). Disclosure and service use on a college campus after an unwanted sexual experience. *Journal of Trauma & Dissociation*, 11:134–151.

⁶ Walsh et al (2010). Disclosure and service use on a college campus after an unwanted sexual experience. *Journal of Trauma & Dissociation*, 11:134–151.

their own decisions, and have options. Title IX embodies the spirit of victim choice and equal treatment and does not mandate law enforcement involvement in campus cases.

We thank the Subcommittee for its time and consideration,

Stacy Malone, Esq.
Executive Director
Victim Rights Law Center