June 9, 2014

The Honorable Senator Claire McCaskill
506 Hart Senate Office Building
Washington D.C. 20510

The Honorable Senator Richard Blumenthal
724 Hart Senate Office Building
Washington D.C. 20510

Dear Senator McCaskill & Senator Blumenthal,

On behalf of SurvJustice, thank you for last week's campus sexual assault roundtable focusing on Title IX. This letter contains some additional thoughts on that discussion, as well as an additional recommendation from the first roundtable on the Clery Act.

(1) Improved Enforcement of Title IX

As one of the few survivors who filed a Title IX complaint before the U.S. Department of Education's 2011 Dear Colleague Letter, I have seen administrative enforcement of the law progress in many ways while still falling short of what is needed to end the epidemic of sexual violence. What is truly needed, and has still not been done to date by the U.S. Department of Education or even the White House Task Force to Protect Students Against Sexual Assault, is to ensure meaningful enforcement of Title IX.

(A) Administrative Enforcement

20 U.S.C. § 1682 authorizes federal agencies to enforce Title IX in two ways: (1) "termination of or refusal to grant or to continue [financial] assistance," or (2) "by any other means authorized by law." As was the consensus at the table, the former sanction is too severe and harms students, thus it is undesirable as an enforcement mechanism. While the latter means is promising, it is impeded by the condition that "no such action shall be taken until the department or agency . . . has determined that compliance cannot be secured by voluntary means." The U.S. Department of Education has interpreted this as requiring voluntary resolution agreements to be the primary enforcement mechanism for Title IX complaints. While appropriate in some cases, there is overreliance on these agreements, which are proving ineffective at addressing repeat offender schools, such as Tufts University.[1] Additionally, these agreements simply fail survivors.

[1] Tufts University has had a minimum of two Title IX complaints filed against it in the last decade involving the same administrators. It was recently found out of compliance with one of the resulting voluntary resolution agreements. *See*

The current waive of Title IX complaints is the result of many fearless survivors shattering the silence of sexual violence.[2] However, after asserting their federally protected civil rights through the U.S. Department of Education's complaint process, survivors are cut out of the process. The resulting voluntary resolution agreements do not include a remedy for the injustice suffered by an individual survivor. Additionally, the U.S. Department of Education often authors these voluntary resolution agreements without including findings of noncompliance (though they are obviously entered into for a reason). This prevents survivors from relying on the findings in private lawsuits that seek to recovery damages for educational institutions for the harm done to their education.

Simply put, voluntary resolution agreements are not an effective remedy, and the U.S. Department of Education should not be required to seek voluntary compliance in the face of an epidemic of campus sexual violence. Therefore legislation is needed to remove the requirement for an agency to seek voluntary compliance under 20 U.S.C. § 1682(2). This would allow further legislation to create a fine to serve as a "means authorized by law" for sanctioning Title IX violations. Such fines should exist on a sliding scale to ensure they meaningfully sanction the spectrum of educational institution under 20 U.S.C. § 1681(c) (preschools, elementary schools, secondary schools, vocational schools, professional schools, or institutions of higher education).[3]

(B) Judicial Enforcement

During the Title IX roundtable, the issue of the U.S. Supreme Court decision in *Gebser* arose. While the standards of "actual knowledge" and "deliberate indifference" are assuredly too high to allow sufficient private enforcement of Title IX, caution is urged in crafting any legislative change. Any change must anticipate later interpretation by the U.S. Supreme Court, which may result in the curtailing of current rights enjoyed under Title IX.[4] Setting that concern aside, "actual knowledge" should be expanded to include "constructive knowledge," with the aim of avoiding the all–too–common circumstance of a faculty member sexually abusing a student while the institution turns a blind eye. This expansion also accounts for the reality of underreporting given historical social stigma, prevalent victim blaming, and real fear of retaliation within our society. Legislation could also address the current court practice of finding evidence of a school violating its own Title IX policies insufficient to establish "deliberate indifference." While this later suggestion may seem minor, such violations are commonplace and victims could more readily meet the current standard if such violations were sufficient proof, thus allowing an increase in private Title IX enforcement.

Sara Lipka, *Tufts U. Disputes Finding That It Failed to Comply With Civil-Rights Law*, CHRONICLE OF HIGHER EDUC. (Apr. 29,2014), *available at* http://chronicle.com/article/Tufts-U-Disputes-Finding-That/146253/. Despite this, the U.S. Department of Education still did not levy a sanction. Michael Stratford, *OCR Stays Busy on Sexual Assault*, INSIDE HIGHER ED (May 12, 2014), *available at* http://www.insidehighered.com/news/2014/05/12/us-civil-rights-office-finds-title-ix-violations-vmi-and-settles-tufts#sthash.YOfjhfkM.dpbs.

[2] As a side note related to the roundtable discussion, SurvJustice agrees that the current 180-day window is too limited for many students to adequately assert their rights. Enrolled students should be able to assert their civil rights at any point during their education. In addition, there should be a sufficient window of time after graduation (or unenrollment) to allow a student to bring a Title IX claim.

[3] In addition to these categories, an higher education may further be divided into two-year and four-year institutions.

[4] *See Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999) (Kennedy, J., dissenting).

(2) Improvements to the Clery Act

Regarding improvements to the Clery Act, 20 U.S.C. 1092(f)(14)(ii) currently prevents the Act from being used as a standard of care in *per se* negligence state tort claims. This should be removed because the Clery Act includes important provisions, such as the requirement for timely warnings to the community. This provision and others should create a legal duty for colleges given the intended effect of keeping campus communities safe. This allows some private enforcement of the Clery Act to compliment the U.S. Department of Education's current administrative enforcement.

(3) Improved State Criminal Justice Systems

At both roundtables, the issue of mandatory reporting has been raised and met with consistent concerns from survivors. SurvJustice believes that reporting to law enforcement will naturally increase overtime without such legislation if State laws uniformly acknowledge incapacitation due to intoxication, the need for ongoing affirmative consent throughout the duration of sexual activity, and victimization outside of a heterosexual normative context. Given Congress' own findings for the 1994 Violence Against Women Act, there is no debate that State criminal justice systems have historically and systematically failed survivors of sexual violence.[5] As a result, survivors often conduct a cost–benefit analysis about whether to report to police while considering the safety of themselves and others, the risks of retaliation, and their personal mental wellbeing. We should not take that choice away from adult survivors. Instead the federal government should create incentives for States to improve their laws on sexual violence, which will naturally encourage reporting. Furthermore, the U.S. Department of Justice's Office on Violence Against Women could increase grants regarding the prosecution of sexual violence that specifically encourage prosecution of alcohol-facilitated sexual violence. Increased prosecution of this common form of campus sexual violence will promote victims' faith in the criminal justice system.

In conclusion, the roundtable discussions have begun a fruitful dialogue. We look forward to the final roundtable on reforming the criminal justice system as well as the resulting legislation aimed at decreasing the prevalence of sexual violence and increasing the prospect of justice for survivors.

Sincerely,

Laura L. Dunn
Founder of SurvJustice

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[5] *See U.S. v. Morrison*, 529 U.S. 598, 632 (2000) (Thomas, J., concurring) (noting the extensive findings on rape, such as that a perpetrator has "about 4 chances in 100 of being arrested, prosecuted, and found guilty.").