

KNOW YOUR IX

Empowering students to stop sexual violence

February 25, 2016

Via electronic mail to peter_oppenheim@help.senate.gov; sarah_bolton@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:

For too long, gender-based violence in our nation's schools has been swept under the rug, impeding victims' access to their civil right to education under Title IX of the 1972 Education Amendments.¹ As young people whose educations have been imperiled by gender violence in school, we know firsthand that the clarifying guidance issued by the Department of Education's Office for Civil Rights (OCR) has proved pivotal in protecting student survivors' access to educational opportunities. Before OCR issued its 2011 Dear Colleague Letter, schools routinely allowed hostile environments to persist on campus, instituted disciplinary processes that were neither equitable nor fair, and denied survivors the resources they needed to continue their educations. We write to commend OCR for its steadfast commitment to addressing the issue.

I. Gender-based harassment and violence is pervasive in elementary, secondary, and postsecondary schools across the country, jeopardizing students' ability to access education.

One in five women, as well as many men and gender nonconforming students, will experience sexual violence during their time in college.² This violence often limits, or outright precludes, victims' ability to learn: Many survivors go to great lengths to avoid their perpetrators on campus, skipping shared classes,³ avoiding shared spaces, or hiding in their dormitory rooms. Others

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)).

² See DAVID CANTOR, ET AL., REPORT ON THE AAU CAMPUS CLIMATE SURVEY ON SEXUAL ASSAULT AND SEXUAL MISCONDUCT, Westat 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); Christopher P. Krebs et al., *The Campus Sexual Assault (CSA) Study*, NAT'L INST. JUST. 5- 3 (2007), <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/W6MP-X7VE>].

³ 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) ("Probably like 95% of the time, students will skip class for one reason or another. And, I mean, the reasons are because

struggle with post-traumatic stress disorder (PTSD), depression, eating disorders, anxiety, flashbacks, and nightmares,⁴ even attempting suicide or engaging in self-harm.⁵ Without support and accommodation, formerly successful students watch their grades drop as they struggle to participate in, or even attend, their classes.⁶

Courts have long recognized that sexual violence threatens students' ability to learn and that, under Title IX, schools receiving federal funding must take action to address violence and remedy its effects.⁷ Unfortunately, as students have made clear time and time again, too few schools live up to their legal (and moral) obligations to do so.⁸

As current college students and recent graduates, we have witnessed our peers suffer gender violence, only then to be discouraged by campus administrators from reporting, denied counseling and academic accommodations, and pressured to take time off—or withdraw—from school. As a result, victims and their families have incurred steep financial costs, some suffering hundreds of thousands of dollars in lost tuition, lost scholarships, counseling and medical expenses, or accumulated student debt. As one survivor reports:

I took a year off from classes following the assault and the Title IX investigation at the school I was not reimbursed for any costs, although we did request partial reimbursement for tuition and housing costs I lost a scholarship when I transferred schools, and had to take an entire extra semester of courses at my new institution It has easily cost me and my family an additional \$100,000 at least.⁹

the perp's in the class, because the perp's friends are in the class, because, sometimes schoolwork just gets to be too much, again in the aftermath of the assault. Sometimes, they've come out to the professor as a survivor, and the professor hasn't . . . been particularly supportive, so they won't go back to the class. Sometimes it's because they know that on their way to the class, they'll see the perp because of their schedules or whatever. Sometimes they might be in different majors with different course studies, but they'll have like a 101 class together, so that something will intersect, so they'll stop going to the 101 class. So they won't stop their studies on their own plane, but they'll stop the ones that intersect with the perp." (quoting a legal services provider).

⁴ *Id.* at 25-28.

⁵ See NAT'L CTR. FOR INJURY PREVENTION & CONTROL, CTRS. FOR DISEASE CONTROL & PREVENTION, THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2010 SUMMARY REPORT 1 (2011), http://www.cdc.gov/violenceprevention/pdf/nisvs_report2010-a.pdf [<http://perma.cc/FM4N-UPZW>]; see also Loya, *supra* note 3, at 25-28.

⁶ See Loya, *supra* note 3, at 94; 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> [<https://perma.cc/2VXN-BE75>].

⁷ *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 292 (1998) (tasking the Department of Education with "administering and enforcing Title IX, see 20 U.S.C. § 1682").

⁸ See U.S. Department of Education Releases List of Higher Education Institutions with Open Title IX Sexual Violence Investigations, U.S. DEP'T EDUC., (May 1, 2014), <http://perma.cc/LH9D-Q8FA>; see also Tyler Kingkade, *Harvard Forced Sexual Assault Victim to Live By Abuser, Lawsuit Claims*, HUFFINGTON POST (Feb. 17, 2016), <http://huff.to/1oqH9is>; W. Bogdanich, *A Star Player Accused, and a Flawed Rape Investigation*, N.Y. TIMES (Apr. 16, 2014), <http://www.nytimes.com/interactive/2014/04/16/sports/errors-in-inquiry-on-rape-allegations-against-fsu-jameis-winston.html>.

⁹ See Dana Bolger, 125 YALE L.J. *Gender Violence Costs: Schools' Financial Obligations Under Title IX* (forthcoming May 2016) (on file with Know Your IX).

Still other survivors—particularly those who lack the resources to obtain mental health services or to transfer schools—report withdrawing from their classes or universities as a result.¹⁰ Others remain in school, earning poorer grades, and in some cases, facing consequent academic probation, suspension, or expulsion. When students are forced to drop out of school in the wake of gender violence and institutional neglect, they report suffering long-term penalties to their earning potential well into the future.¹¹ One survivor reports that they dropped out of college and, nearly three years later, have yet to return. They describe the impact:

I lost two years of income that I would've been in the job market. I was planning to work in politics, earning \$30-40,000 per year before going to get my PhD I have been chronically homeless and housing unstable for two years now.¹²

A crushing debt burden, coupled with lost earning potential, can make it impossible for survivors who leave school to return.

This intolerable status quo—in which victims of gender violence are *still* unable to access their right to education—demands a strong federal response, one that the Education Department—after decades of administrative under-enforcement—has only just begun to take on.

II. Thanks to the important work of the Office for Civil Rights, schools are finally beginning to take seriously their responsibilities to students.

Courts have long affirmed the Department's authority—and responsibility—to issue and enforce requirements that effectuate Title IX's nondiscrimination mandate.¹³ In accordance with this authority, the Department published guidance in 1997 and 2001 that underwent notice-and-comment. These guidance documents explained that a school is liable under Title IX if it fails to take “immediate and appropriate corrective action” for sexually harassing conduct about which it knows or should have known and which is “sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from an education program or activity.”¹⁴ OCR named several kinds of corrective action schools might employ in order to satisfy their legal obligations under the statute: place the victim and accused student in separate classes, alter housing arrangements, provide tutoring, offer reimbursement for counseling, or make tuition adjustments.

Over the last five years, OCR has helpfully continued its efforts to advise schools and students alike of institutions' specific responsibilities under Title IX to eliminate a hostile environment, prevent its recurrence, and remedy its effects. The 2011 Dear Colleague Letter, as well as the 2014 “Questions

¹⁰ *Id.*

¹¹ According to the U.S. Census Bureau, students who leave college before graduation can lose up to 30 percent of their future earnings as year-round, full-time workers. See generally J.C. Day & E.C. Newburger, *The Big Payoff: Educational Attainment and Synthetic Estimates of Work-Life Earnings*, U.S. CENSUS BUREAU (2002).

¹² See Bolger, *supra* note 9.

¹³ *Gebser v. Lago Vista Indep. Sch. Dist.* 524 U.S. 274, 292 (1998) (tasking the Department of Education with “administering and enforcing Title IX, see 20 U.S.C. § 1682”).

¹⁴ Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,038-39 (Mar. 13, 1997), <http://www.gpo.gov/fdsys/pkg/FR-1997-03-13/pdf/97-6373.pdf> [<http://perma.cc/DP2Z-CC43>].

and Answers,” echoed OCR’s earlier guidance,¹⁵ providing clarification to students on just what kinds of services and accommodations they might access in the wake of violence, and to schools on the kinds of circumstances in which they should take action to remedy violence’s impacts. This collection of guidance documents, coupled with student activism, has proven widely transformative in allowing survivors en masse to learn their rights and begin, at long last, to enjoy the educational benefits of the law’s enforcement. The guidance has similarly provided helpful clarity to schools on OCR’s construction of the law that it administers.

Indeed, in accordance with its duty to administer and enforce the law, OCR has opened an unprecedented number of investigations into institutions of higher education that have denied students the accommodations they need, such as academic accommodations and mental health services. OCR has also investigated institutions that have placed uniquely onerous and inequitable challenges, like higher evidentiary burdens, in the way of rape victims who pursue disciplinary charges against their assailants (to which victims of other student conduct code violations, like theft and non-sexual physical assault, are not subject).¹⁶

Displeased with the results of OCR’s recent enforcement efforts, some have called into question OCR’s authority to issue clarifying guidance or interpretive rules like those contained in the 2011 Dear Colleague Letter. But the law is clear: Just last year in *Perez v. Mortgage Bankers Association*, the Supreme Court confirmed that interpretive rules—“issued by an agency to advise the public of the agency’s construction of the statutes and rules which it administers”¹⁷—do not require notice and comment.¹⁸ These are precisely the sort of interpretative rules OCR has set out in its recent guidance. Further, given that other agencies have issued interpretive rules and other guidance of this sort¹⁹ with relatively little objection, it is striking that critics have specially singled out OCR’s action on this particular issue for searching scrutiny.

* * *

Over four decades since the passage of Title IX—during which time inequality in education has remained firmly entrenched—we are finally beginning to see promising steps towards change. The Education Department has courageously led the charge, providing clarity and transparency to its construction of the law it is tasked with enforcing. It would be deeply inadvisable to condemn the

¹⁵ As the Supreme Court unanimously affirmed in March 2015, under the Administrative Procedure Act agencies may issue such guidance without notice-and-comment procedures—and frequently do. *See generally* *Perez v. Mortgage Bankers Ass’n*, 575 U.S. (2015).

¹⁶ 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 (2004).

¹⁷ *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995)

¹⁸ *See generally* *Perez v. Mortgage Bankers Ass’n*, 575 U.S. (2015) (“Because an agency is not required to use notice-and-comment procedures to issue an initial interpretive rule, it is also not required to use those procedures to amend or repeal that rule”); *see also* *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995).

¹⁹ *See* U.S. Government Accountability Office, *GAO-13-21, Federal Rulemaking: Agencies Could Take Additional Steps to Respond to Public Comments* 8 (2012), <http://www.gao.gov/assets/660/651052.pdf> (“Agencies did not publish a notice of proposed rulemaking (NPRM) [...] for about 35 percent of major rules and about 44 percent of nonmajor rules published during 2003 through 2010.”).

Department's work to clarify the law, when schools have abdicated their responsibility to ensure educational equity for so long, with such devastating consequences for student survivors.

In sum, without the federal government's engaged administration and enforcement of Title IX, gender violence will, without a doubt, continue to cost students their educations and their futures.

If you have any questions, please contact Dana Bolger, Executive Director of Know Your IX, at dana@knowyourIX.org.

Sincerely,

Better Sex Talk

Brandeis Students Against Sexual Violence

Bruin Consent Coalition, formerly known as 7000 in Solidarity: A Campaign Against Sexual Assault"

Coalition Against Sexual Violence (Columbia University)

Columbia Law Women's Association

The Feminist Society at NYU

Georgetown Take Back the Night

Harvard Law School HALT

Iowa Student Power Network

Know Your IX

NYU Law Women

Our Harvard Can Do Better

#PaceUEndRape

Rebels Against Sexual Assault (University of Mississippi)

Sexual Assault Network for Grads

Stand Up! (Brown University)

Student Association for Gender Equality (Morehead State University)

Student Government of Iowa State University

Students for Sexual Respect at NYU

Title IX at Northwestern

United States Student Association

Women for Change (University of Hartford)

Womyn's Awareness Center (Gustavus Adolphus College)

Yale Journal of Law & Feminism

Yale Law Students for Reproductive Justice

The 2015-2016 Board of Yale Law Women

The York College Women's Center