September 20, 2017

Hilary Malawer
U.S. Dept. of Education
400 Maryland Ave. SW
Room 6E231
Washington, DC 20202

Re: Comments in response to 82 Fed. Reg. 28431 (June 22, 2017)
ED-2017-OS-0074-0001

Dear Ms. Malawer and Dept. of Education personnel:

I write you to express my strong support for Title IX and its existing regulations and guidance.

I have litigated Title IX cases, worked on Title IX policy, and conducted Title IX education programs for well over 20 years. I have represented students and employees (both male and female) who have endured sex discrimination by their educational institutions. I have worked with women's groups, student groups, civil rights groups, and legal groups to advance equal access to education. I have organized and participated in countless educational programs relating to sex discrimination in education. During the 2015-2016 academic year I organized and moderated a free 6-part educational series on *Title IX and Campus Sexual Assault: A Civil Rights Perspective* for the American Bar Association.[1]

Based upon my years of experience and expertise, I strongly oppose any attempt to weaken Title IX's regulations or guidance. I particularly oppose any attempt to weaken or alter Title IX's regulations, Dear Colleague Letters, and other guidance relating to campus sexual assault, including DOE's 2001 guidance on sexual harassment, its 2008 guidance on *Sexual Harassment: It's Not Academic*, its 2011 Dear Colleague Letter on sexual violence, and its 2014 Question & Answer guidance on the same (published after the 2013 amendments to the Violence Against Women Act and the Campus Sexual Violence Elimination Act).

Title IX's regulations, 34 C.F.R. Part 106, have been in place since 1975. They were adopted by a Republican President after submission by a Republican led Department of Health Education & Welfare. Those regulations were submitted to a democratically controlled Congress for review and debate. After hearings and debate, Congress chose not to reject them and to allow them to go into effect in July, 1975.. Since that time, every court that has encountered arguments regarding the

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[1] I strongly urge you to carefully review the audio from those ABA programs, as well as the educational materials provided to attendees from actual experts in the field. https://www.americanbar.org/groups/crsj/events_cle/campus-sexual-assault-teleconference-series--a-civil-rights-pers.html (audio & descriptions)
https://www.americanbar.org/content/dam/aba/administrative/crsj/csawebpage_programmaterials.authcheckdam.pdf (list of and links to materials)

constitutionality of Title IX regulations and guidance has upheld them.

Thus, the existing Title IX regulations went into effect based upon the considered debate and reflection by Democrats and Republicans in both Congress and the Executive Branch. Those regulations have been upheld time and time and time again by the Judicial Branch. All three branches of government and all political parties were part of this effort. Given this history, it makes no sense to re-open them now, especially to weaken them when sex discrimination remains a compelling problem in the nation's schools.

Students, parents, and educational institutions have relied on these regulations and the guidance arising from them for more than 42 years. Forty-two years. That is a long time. Decades of legal jurisprudence interpreting and applying these regulations has developed and been relied upon by schools and the legal system. Indeed, the guidance that the Department of Education ("DOE") has issued from time to time has been based upon that legal jurisprudence.[2]

The statements by Secretary DeVos and Title IX opponents that DOE's 2011 Dear Colleague Letter guidance on sexual assault some how changed the law, shocked schools, or came out of no where are absolutely FALSE. The guidance was based upon already existing law and already existing legal interpretations of the law. The guidance summarized existing law and existing best practices. It did NOT make new law or establish new standards.

The most notable falsehood is that the 2011 Dear Colleague Letter established "preponderance of the evidence" as a new standard for Title IX school disciplinary proceedings. Preponderance of the evidence has been the standard of proof for ALL civil rights matters and ALL civil legal matters since the beginning of our legal system. It was and is not new to anyone – not to schools, not to lawyers, and not to anyone who knows anything about the legal system or school disciplinary systems. Indeed, it is supported by people who actually work in the field, including the Association of Title IX Administrators, which represents and trains the nations Title IX coordinators and investigators.[3]

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[2] The Title IX regulations mandated that educational institutions inform students about their rights, establish grievance procedures to investigate and resolve complaints about discrimination, and designate and train a Title IX coordinator to ensure equal opportunity/ nondiscrimination. 34 C.F.R. §106.8 & §106.9. Schools have been required to follow these regulations for 42 years. DOE has issued guidance on grievance procedures since the 1970s, including periodic updates that have incorporated developing legal precedent. Any school that has paid attention during this time knows its legal obligations. Any school that does not (or professes to not understand when it gets caught for violations), merely confirms its deliberate indifference to those well-established obligations.

[3] See Letter from ATIXA and numerous other groups to Russlyn Ali dated February 7, 2012, which defends the preponderance of the evidence standard, stating (on p. 2) "Contrary to a few highly publicized claims, the DCL's requirement of a preponderance of the evidence standard is neither new nor controversial."
https://www.atixa.org/documents/Organizational%20Sign-on%20for%20DCL%20re%20Sexual

If a student sues her school for responding to her complaints of sex discrimination with deliberate indifference, she must prove her case by a preponderance of the evidence. If a student sues a school for discriminating against him in its handling of sexual assault claims, he must prove his case by a preponderance of the evidence. If a female student sues an attacker for tortious battery after a sexual assault, she must prove her case by a preponderance of the evidence. If an accused student believes his accuser defamed him through false accusations of sexual assault, he must prove his claim by a preponderance of the evidence. Preponderance of the evidence merely means that the jury or disciplinary board or other finder of fact must start the case with no biases and no assumptions about the stories of either party in the matter. It is the foundation of voir dire and our civil legal system. Any other standard would start the proceeding with the appalling, false, and inequitable position that the woman must be lying and thus must do more to hold the assaulter (usually male) responsible. That different treatment of the testimony of men and women violates Title IX.

Preponderance of the evidence has always been the standard and DOE has always applied it in its work, including its technical assistance letters, letters of finding, and guidance. DOE has used this standard under presidential administrations from both parties for over 40 years.[4] The 2011 DCL was merely a reminder to schools of this already existing, long-standing standard.

Criminal defense lawyers and groups that insist on bringing criminal law standard into civil rights proceedings simply don't know what they are talking about. They do not know or understand civil rights law any more than I understand patent law. They are not accustomed to civil trials, civil rights hearings, or even the EEOC and other administrative hearings held within the federal government for discrimination claims under other federal statutes. All such hearings for all other federal civil rights statutes use preponderance of the evidence. Merely teaching at Harvard does not make criminal lawyers experts in areas of law in which they have never practiced. They completely ignore that campus sexual assault constitutions sex discrimination under civil rights laws and a tort under civil common law. Criminal standards simply do not apply in these circumstances any more

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%20Violence%202012%20FINAL%20Sign%20on.pdf
See also ATIXA Position Statement on Why Colleges Are in the Business of Addressing Sexual Violence.
https://atixa.org/wordpress/wp-content/uploads/2017/02/2017February-Final-ATIXA-Position-Statement-on-Colleges-Addressing-Sexual-Violence.pdf

[4] See DOE Office for Civil Rights Letter to Evergreen College (April 4, 1995), and DOE OCR letters to Georgetown University during the Bush Administration (October 16, 2003 and May 5, 2004), explaining how/why Title IX requires that institutional grievance procedures use a preponderance of the evidence standard to resolve allegations of sex discrimination. Available at available at www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf and https://www.ncherm.org/documents/199-GeorgetownUniversity--11032017.pdf. See also collection of NCHERM OCR letters on this topic at https://www.ncherm.org/resources/legal-resources/ocr-database/#SPF

See also Katharine K. Baker et al., Title IX and the Preponderance of the Evidence: A White Paper. Available at https:/perma.cc/3VS4-CHK4

than they apply to wrongful death actions filed against accused murderers.[5]

Criminal proof standards only apply - and have always only applied - to criminal proceedings in which the state prosecutes an individual for violation of a criminal law and the individual's freedom is at state. If criminal standards applied to school discipline, no school would ever be able to discipline students who misbehave and school learning environments would deteriorate into chaos. Criminal standards of proof and criminal standards of due process simply do not apply in civil law settings.

Applying such standards to private schools is even more outrageous. If a private religious school wants to expel a student because he disrespected a class mate – whether through foul language or sexual assault – that private religious school has every right to do so, whether or not the accused student's behavior was a crime. As decades of courts have held, private schools only owe students the due process provided them in their own policies and manuals.

Men's rights groups who demand higher standards of proof for accused rapists are merely seeking *special rights for rapists.* Men's rights groups that want to take discipline for sex discrimination out of the hands of schools (sexual assault is merely one form of sex discrimination) are merely seeking *special rights for rapists.* [6]

Schools have long disciplined students for violating school codes of conduct. They discipline students when they talk out of turn or disrespect teachers. They discipline students for fighting on the playground or on the ball field. They discipline students for all kinds of behavior that may even qualify as criminal, including underage drinking, drug possession, drug sales, theft, vandalism, and assault. If a student assaults another student by punching him in the face, a school is going to discipline that student – and will use the preponderance of the evidence standard to assess responsibility. It is beyond appalling for anyone to suggest that schools should not have the power or the right to discipline a student who assaults another student by raping her (or should apply a higher standard only to rapists). Is a male student with a broken nose more valuable than an 18 year old freshman woman who had no sexual experience before being drugged and sexually assaulted by a class mate? The whole point of Title IX is to make sure that schools not discriminate in this way.

The opponents of Title IX who oppose applying the preponderance of the evidence standard to students accused of sexual assault are merely demanding special rights for rapists — special rights that will force schools to coddle students who engage in the worst kind of behavior and that will prevent schools from protecting the 1 in 5 women who experience sexual assault at some point

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[5] Sarah L. Swan, Between Title IX and the Criminal Law: Bringing Tort Law to the Campus Sexual Assault Debate, 64 Kansas Law Review 961 (2016).

[6] See Michelle Anderson, Campus Sexual Assault Adjudication and Resistance to Reform, 125 Yale Law Journal 1940 (2016); Nancy Cantalupo, Address: The Civil Rights Approach to Campus Sexual Violence, 28 Regent U. Law Review 185 (2016); Annaleigh E. Curtis, Due Process Demands as Propaganda: The Rhetoric of Title IX Opposition, 29:2 Yale Journal of Law & the Humanities, 101 (2017).

during their college years. The few miscreants who engage in sexual assault will be emboldened by their special rights, subjecting more women to more danger of sexual assault and denying more women equal educational opportunity. That is the antithesis of Title IX and its purpose.

When I was a college freshman, male classmates threatened to jump me and rape me in the college library if I did not bomb the next chemistry test. Chemistry was the gateway class for future doctors. It was graded on a curve, and my high scores were setting the curve too high for my mostly male class mates. These male students threatened rape as their tool to deny me an education and to enhance their own chances of getting into medical school over mine. When I did not bomb the next test, they threatened me again, but this time they vandalized my dorm room and car to show they were serious, again stating that if I did not bomb the next step, they would jump me and rape me when I least expected it. When I reported all this to university administrators, their response was, "Good Catholic boys don't do things like that." The implication was that my room mate and I were lying about the phone call threats and the vandalism. Good Catholic boys apparently don't threaten to rape women, but good Catholic girls apparently lie about what those Catholic boys actually do when the priest isn't looking. It was more important to protect the reputation of the Catholic boys and the Catholic university then the virtue, personal security, and educational access of Catholic girls. That is the exact same attitude that Secretary DeVos and Assistant Secretary Candace Jackson have exhibited in their shameful comments about women accusers — implying that they are the liars and not the men who assaulted them and implying that the reputations and once promising futures of the alleged assaulters is more important than those of the victims they chose to assault.

The best available data and studies show that rape reports are no more likely to be false than reports of other crimes. Thousands of women are sexually assaulted on campus each year. Because people like Ms. DeVos and Ms. Jackson presume they are liars, the vast majority of rape victims never report their rapes. Of the few who do, studies estimate that at most 2-8% are false reports. If 5% of women on a campus falsely report an assault, that means 95% of the men who are accused but claim they are innocent are lying. Think about that. Despite Ms. Jackson's outrageous comments that 90% of women who complain about sexual assault are lying after regretting sex, the reality is, based upon academic studies and government stats, that it's the approximately 95% of accused (mostly men) who are lying. Some of these accused are lying to avoid discipline. Others refuse to admit that their behavior was sexual assault. As studies show, some men say they have never raped anyone but when asked more specific questions about their behavior, it becomes clear that they actually have raped — they just don't think they did. It is important that schools discipline – not coddle – such delusional students not only to punish them for their misbehavior and to protect other students from that behavior but also to send the message to other students on campus that such thinking and behavior does in deed violate the code of conduct.[7] It is not 90% of women who lie

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[7] See Edwards, Sarah R., Kathryn A. Bradshaw, and Verlin B. Hinsz, *Denying Rape but Endorsing Forceful Intercourse: Exploring Difference Among Responders,* Violence and Gender. December 20 14, 1(4): 188-193, available at http://online.liebertpub.com/doi/pdf/10.1089/vio.2014.0022

See Sarah J. Harsey, et al., *Perpetrator Responses to Victim Confrontation: DARVO and Victim Self-Blame*; Journal of Aggression, Maltreatment, and Trauma, available at

because they regretted sex. It is 95% of the accused who lie about their actions. If decent men had merely asked those 90% of women whom Ms. Jackson accused by Ms. Jackson have regretting drunk sex

Think about who really has the motive to lie in this situation. Most women are so horrified by what happened to them and so demoralized by sexist disciplinary systems that they never report. They suffer in silence. The few who do face intense scrutiny. They are called liars. They are harassed by the friends of the accused. They are forced to relive their rapes during the disciplinary proceedings. They lose their privacy. Their lives are ruined. What is the motive to lie? Now, look at the accused's motive to lie. If he doesn't lie, he will face discipline (maybe even expulsion) and he will shame his family. What rapist is willing to admit to his mother that he committed rape by taking advantage of a drunk, passed out class mate at a party?

For decades, if not centuries, women have been blamed for their own rapes. What did you expect to happen when you wore that dress? What did you expect to happen when you drank alcohol (like everyone else at the party)? What did you expect to happen when you went to the fraternity party? These questions are based upon the blamers' belief that women should expect to get raped at such parties, because that is what men do at such parties. Women are blamed because men could not control their own behavior.

It is time to turn that narrative around. Why aren't the men held responsible for their own behavior? Where is their personal responsibility? Shouldn't men be held accountable for their own decisions to have sex with unconscious or incapacitated women? Why is it the woman's fault for being drunk instead of the man's fault for taking advantage of the drunk woman? Why aren't men asking permission before having sex – especially with women they don't even know?

Candace Jackson seems to think that 90% of campus sexual assault complaints are by women who got drunk, had sex, and later regretted it. This astoundingly false and biased view is driving DOE's recent attacks on Title IX. But the real question is, why did the accused men choose to have sex with such women? Why did they choose to take advantage of women in these situations? Why did such men choose to take advantage of the situation to have sex with women they knew or should have known could not consent — and did so without asking permission first. Men are not being "falsely" accused because women identify the wrong attacker. They are not being accused of having sex when they did not. Men are being accused because they admitted to having sex but insist that they thought the women consented ---- even though the men never bothered to actually ask.

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https://doi.org/10.1080/10926771.2017.1320777.

See Nicole Bedara, *Moaning and Eye Contact: College Men's Negotiation of Sexual Consent and Theory in Practice*, a study that showed some men who profess to support affirmative consent standards for sex do not actually follow them, instead believing that they can divine consent by looking at a women's eyes or the tone of her moan. See article about the study at https://www.insidehighered.com/news/2017/08/14/study-suggests-bigdifference-between-how-college-men-describe-affirmative-consent?width=775&height=500&iframe=true

Why didn't they ask permission before disrobing such women and having sex with them? Why didn't they wait for the woman to respond with a clear YES before doing so? If most cases were about drunk sex, the problem of campus sexual assault could be greatly alleviated merely by expecting men to ask for and obtain permission first and expecting men not to take advantage of women who are in compromised or incapacitated states. Those expectations are the basis of affirmative consent policies that are included in more and more codes of conduct. If assaulters ignore those policies, then they violate the code.

Men who engage in this kind of behavior should be held accountable if schools think such behavior violates their school codes of conduct – whether or not the behavior constitutes a crime. Schools rightly can and should expect better. It is time to stop blaming women for merely existing in the public space. It is time to hold the men accountable for putting themselves in these situations. They misbehaved. They could have avoided any chance of being accused if they had just taken the small step of asking for and obtaining permission before acting. Men accuse women of lying or regretting sex when, in fact, men could have avoided any misunderstandings by simply asking permission. When they choose not to do so or when they think they can divine the intent of an incapacitated woman, they are misbehaving. Schools should be able to decide that they don't want students with such poor judgment on campus. They are a danger to other students. It is time that more men learn this lesson and adjust their behavior accordingly.

When so much is at stake, when victims are denied equal access to education, when victim's lives can be destroyed forever, shouldn't we expect men to ask permission first? It is such a small, easy thing for them to do. When they don't do so, and when their victims later say they did not consent, parents and schools should not let them off the hook. The rapists put themselves in that position. They decided to disrespect and take advantage of class mates by choosing not to ask permission first. They should be disciplined. Men's rights groups, including those who have Secretary DeVos' ear, want to excuse these men. They want to protect the men from the consequences of their own actions. They want special rights for rapists. They want special standards of proof for rapists. It is time to call them out for what is really behind their movement. It is about excusing the "good Catholic boys" with promising futures while disregarding the lives, educations, and futures of victims. Again, this is the antithesis of Title IX and its purpose.

Title IX and its regulations have been in place for over 42 years. Forty-two years of legal precedent has evolved over that time.... precedent summarized in DOE guidance on campus sexual assault. Precedent schools have followed — or should have been following — during all this time.

During those years no political party and no presidential administration has made it a mission to attack or weaken Title IX the way this Administration, this Secretary of Education, and this OCR Secretary apparently seek to do.

It would be beyond shameful for the Department of Education to throw away this history and consensus by weakening Title IX regulations, protections, or guidance in order to advance the political goals of men's rights groups that essentially seek special rights for rapists. Their mission is not about due process or discrimination. It is about protecting rape culture, male power, and male

reputations — at the expense of victims.

When sexual assault remains so prevalent on school campuses (whether K-12 or college), now is the time to enhance education, technical assistance, and enforcement. It is not the time to weaken the law in ways that will make campuses across the country far more dangerous and far more discriminatory.

Sincerely,

Kristen Galles