NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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U.S. Department of Education
400 Maryland Avenue SW, Room 6E231
Washington, DC 20202

Submitted Electronically

RE: Evaluation of Existing Regulations (Docket No. ED-2017-OS-0074-0001, at 82 Fed. Reg. 28431)

Dear Ms. Malawer:

The National Women's Law Center appreciates the opportunity to comment on the Department of Education's request for comments for regulations that may be appropriate for repeal, replacement or modification, in accordance with Executive Order 13777. The National Women's Law Center is a nonprofit organization that has worked since 1972 to combat sex discrimination and expand opportunities for women and girls in every facet of their lives, including education. Founded the same year as Title IX of the Education Amendments of 1972, the Center has participated in all major Title IX cases before the Supreme Court as counsel[1] and amici. As such, the Law Center is dedicated to eradicating all facets of sex discrimination in school, including unequal access to athletic opportunities, discrimination against pregnant and parenting students, sexual harassment (which includes sexual violence) that creates a hostile learning environment, and discrimination against LGBTQ students and students who are vulnerable to multiple forms of discrimination, such as girls of color and girls with disabilities.

The Law Center urges you not to repeal, replace or modify regulations that outline civil rights law[2] or significant guidance documents that clarify civil rights obligations to federal funding recipients. For one, the factors outlined in Executive Order 13777 to help identify burdensome regulations do not apply to civil rights regulations.[3] In fact, by ensuring equal educational opportunities for historically disadvantaged groups, these regulations promote educational pathways that lead to job creation and create benefits for our nation's workforce and economy that far exceed any costs. Indeed, the number of women, girls, students of color, and students with disabilities enrolled in school at all educational levels today compared to before these laws were passed indicates the effectiveness of laws like Title IX, Title VI, and the Rehabilitation Act. Furthermore, it is unclear how replacing or modifying a regulation under Executive Order 13777 interacts with agency requirements under Executive Order 13771,[4] (the so-called "one-in, two out" Executive Order), which is currently being challenged in

[1] *Jackson v. Birmingham Bd. of Educ.*, 544 U.S. 167 (2005); *Davis v. Monroe Cnty Bd. of Educ.*, 526 U.S. 629 (1999).
[2] 34 C.F.R. §§ 100.1 – 106.71.
[3] Exec. Order No. 13777, 82 Fed Reg. 12285, 12286 (2017) (instructing agencies to identify regulations that "(i) Eliminate jobs, or inhibit job creation; (ii) Are outdated, unnecessary, or ineffective; (iii) Impose costs that exceed benefits; (iv) Create a serious inconsistency or otherwise interfere with regulatory reform initiatives and policies; (v) Are inconsistent with the requirements of section 515 of the Treasury and General Government Appropriations Act, 2001 (44 U.S.C. 3516 note), or the guidance issued pursuant to that provision, in particular those regulations that rely in whole or in part on data, information, or methods that are not publicly available or that are insufficiently transparent to meet the standard for reproducibility; or (vi) Derive from or implement Executive Orders or other Presidential directives that have been subsequently rescinded or substantially modified.").
[4] Exec. Order 13771, 82 Fed. Reg. 9339 (2017).

court.[5] Thus, repealing, replacing or modifying any regulations would upend a system that students and families have relied on for to access basic educational rights. Because of the uncertainty that results from the current litigation, the very real educational risks such uncertainty poses to students and parents, the longstanding nature of civil rights regulations, and the important role guidance serves in informing schools of how courts interpret their obligations, the Law Center urges the Department to not rescind, replace or modify any current regulations or significant guidance documents.

The Department has the responsibility to ensure that students can attend school, free from discrimination. Key to that work is the preservation of our landmark civil rights laws that ban discrimination in education programs and activities that receive federal funds and enforcement of those laws consistent with longstanding legal precedent. For decades, students and parents have relied on these regulations to access educational opportunities, and this consistency has benefited schools as well by providing an unchanging set of obligations to comply with civil rights law. By way of example, this letter will highlight Title VI regulations on differential treatment and disparate impact, guidance on the nondiscriminatory use of school discipline, and guidance on protections for LGBTQ students under Title IX as interpreted by the courts. Lastly, the remainder of these comments will focus on countering unwarranted attacks to guidance issued under Title IX to address sexual violence in K-12 schools and institutions of higher education.

Title VI of the Civil Rights Act prohibits individuals from being excluded from participation in, being denied the benefits of, or being subjected to discrimination on the basis of race, color, or national origin under any program or activity receiving federal financial assistance.[6] Over two dozen agencies, including the U.S. Department of Education, have longstanding regulations effectuating Title VI that prohibit both actions and policies that intentionally treat individuals differently because of their race, color or national origin, and those that have an unjustified discriminatory impact.[7] Protecting this nation's residents from all forms of discrimination, intentional and unintentional, is a legal obligation of federal agencies that has been acknowledged by both Republican and Democratic Administrations for more than 50 years.[8] Similarly, the Individuals with Disabilities Education Act (IDEA) and the related regulation address disproportionality based on race and ethnicity in the areas of identification, placement in restrictive settings, and discipline. The Department of Education should not repeal, replace, or modify any of these or other related or similar regulations and guidances.

One area in which regulations and guidance on differential treatment and disparate impact has been particularly effective is in examining how discriminatory school discipline pushes Black students out of school. For example, Black girls are 5.5 times more likely to be suspended than white girls. They are also more likely to receive multiple suspensions than any other gender or race of students.[9] Data also shows that this disproportionate discipline starts as early as preschool, with Black girls making up 20 percent of girls enrolled, but 54 percent of girls suspended from preschool.[10] These uneven rates of discipline are not because of more frequent or serious

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[5] Josh Gerstein, *Trump faces suit over 2-for-1 executive order on regulations*, POLITICO (Feb. 8, 2017), http://www.politico.com/story/2017/02/trump-sued-2-for-1-regulations-234788.

[6] 42 U.S.C. § 2000d.

[7] *See, e.g.*, 34 C.F.R. §100.3(b)(2).

[8] U.S. DEP'T OF JUSTICE, MEMORANDUM FOR HEADS OF DEPARTMENTS AND AGENCIES, GENERAL COUNSELS, AND CIVIL RIGHTS DIRECTORS (Oct. 26, 2001), https://www.justice.gov/crt/federal-coordination-and-compliance-section-201; and The U.S. Department of Education, Dear Colleague Letter: Resource Comparability (Oct. 1, 2014), https://www2.ed.gov/about/offices/list/ocr/letters/colleague-resourcecomp-201410.pdf.

[9] National Women's Law Center Calculations from U.S. Department of Education, Office for Civil Rights, Civil Rights Data Collection, 2013-14.

[10] *Id*.

misbehavior. Rather, evidence shows that Black girls are often disciplined for minor or subjective offenses, which may be informed by implicit biases and race- and sex-based stereotypes.[11] Exclusionary discipline deprives Black girls of classroom learning, contributes to school pushout,[12] deprives students of an educational opportunity and may be discriminatory under Title VI. The availability of discipline rates as well as 2014 guidance on nondiscriminatory discipline has urged many schools to examine their school discipline policies and practices to ensure that they do not treat students differently or have a disparate impact on students based on race, ethnicity or national origin. As a result, many schools have introduced alternative forms of discipline that develop positive socio-emotional skills and positive behavior while keeping students in the classroom—with promising results that make all students feel welcome in school regardless of their race or ethnic background.[13] For these reasons, the Department should not rescind, replace or modify the 2014 guidance on nondiscriminatory discipline.

The Department of Education also should maintain all guidance that clarifies that Title IX of the Education Amendments and other federal statutes prohibiting discrimination on the basis of sex include protection on the basis of sexual orientation and gender identity. This interpretation is consistent with that of many other federal agencies, including the Equal Employment Opportunity Commission (EEOC). Guidance documents do not create new obligations upon recipients. Rather, these interpretations provide schools information on the compounding trend in federal courts, which have consistently held in recent cases that discrimination on the basis of sexual orientation or gender identity is prohibited under existing civil rights laws that prohibit sex discrimination including Title VII of the Civil rights Act of 1964, Title IX of the Education Amendments of 1972, and the Fair Housing Act. Courts have interpreted sex discrimination to include discrimination based on actual or perceived sexual orientation since the Supreme Court's 1998 decision in *Oncale v. Sundowner Offshore Services*.[14] This interpretation has naturally extended to the Title IX context. For example, a federal judge held in *Videckis v. Pepperdine University* that two female students had an actionable sex discrimination claim under Title IX against Pepperdine University for alleged discrimination on the basis of sexual orientation.[15] The court reasoned "[a] plaintiff's 'actual' sexual orientation is irrelevant to a Title IX or Title VII claim because it is the biased mind of the alleged discriminator that is the focus of the analysis."[16] Most recently in *Whitaker v. Kenosha Unified School District*, the U.S. Court of Appeals for the Seventh Circuit affirmed that a school's denial of a transgender boy's access to the boy's restroom was a violation of both Title IX and the Equal Protection Clause.[17] Because guidances reflect how courts interpret civil rights obligations and provide a guide for how recipients can

[11] For example, Black girls who are outspoken in class, who use profanity or who confront people in positions of authority—as well as Black girls who are perceived as dressing provocatively—are disproportionately disciplined using exclusionary methods. *See* Monique W. Morris, African American Policy Forum, *Race, Gender, and the School-to-Prison Pipeline: Expanding Our Discussion to Include Black Girls* (2012), 6, *available at* http://www.otlcampaign.org/sites/default/files/resources/Morris-Race-Gender-and-the-School-to-Prison-Pipeline.pdf.

[12] National Women's Law Center calculations using data from U.S. Department of Education Office for Civil Rights, Civil Rights Data Collection, 2013-14 Retention Estimations by Gender and Race/Ethnicity.

[13] *E.g.*, Cindy Long, *Restorative Discipline Makes Huge Impact in Texas Elementary and Middle Schools*, NEA TODAY (Aug. 25, 2016), http://neatoday.org/2016/08/25/restorative-discipline/; Emily Richmond, *When Restorative Justice in Schools Works*, THE ATLANTIC (Dec. 29, 2015), https://www.theatlantic.com/education/archive/2015/12/when-restorative-justice-works/422088/; Stacy Teicher Khadaroo, *Restorative justice: One high school's path to reducing suspensions by half*, CHRISTIAN SCIENCE MONITOR (March 31, 2013), https://www.csmonitor.com/USA/Education/2013/0331/Restorative-justice-One-high-school-s-path-to-reducing-suspensions-by-half.

[14] 523 U.S. 75 (1998).

[15] 2015 WL 8916764 (C.D. Cal. Dec. 15, 2015).

[16] Id.

[17] *Whitaker v. Kenosha Unified School District*, 858 F.3d 1034 (7th Cir. 2017).

avoid liability, repealing, replacing or modifying such guidance in a way that is inconsistent with judicial interpretation would confuse schools and students alike, while leaving recipients liable to litigation.

I. Rescinding Title IX guidance documents on sexual violence would make schools less safe and cause confusion about how to comply with the law.

Over the last few years, the Department's Office for Civil Rights (OCR) released a series of guidance documents in response to schools' requests to help them better understand their legal obligations. The 2011 Dear Colleague Letter on Sexual Violence and the 2014 Questions and Answers document on Title IX and Sexual Violence have provided much needed clarification of what Title IX requires schools to do to prevent and address sex discrimination in educational programs. These guidance documents and increased enforcement of Title IX by OCR have spurred schools to address cultures that for too long contributed to hostile environments, which deprive many students of equal educational opportunities. Unsurprisingly, the 2011 guidance is popular, with 87 percent of voters voicing support for the document in a May 2017 poll.[18] Unfortunately, some are urging the Department to rescind these important guidance documents.[19]

To be clear, these guidance documents merely clarify the law and do not establish new law. Apart from them, schools are still required to address sex discrimination, and students are still afforded these protections under the law. However, rescinding the guidances would cause confusion and deprive schools of resources that clarify the law in advance of an investigation or lawsuit. As a result of institutions being unclear about their obligations, rescinding the guidance will also likely result in increased discrimination against women, girls and other LGBTQ individuals, which in turn will create more litigation from students seeking to vindicate their civil rights—litigation which is likely to be successful given Title IX jurisprudence. Thus, by issuing and preserving these documents, the Department plays a key role in guiding schools to fulfill their Title IX obligations, avoid litigation, and ensure students' civil rights are not violated.

II. Detractors' calls for rescinding Title IX guidance documents are not based in fact or in law.

Since the Title IX regulations were issued in 1975, educational programs have been required to create "grievance procedures providing for prompt and *equitable* resolution" of complaints (emphasis added).[20] The 2011 guidance merely clarified what constitutes an *equitable* grievance procedure. Namely, the Department reminded schools that both the complainant and the respondent in any sexual violence grievance proceeding must have the same rights—e.g., the same right to review documents, the same right to counsel, the same right to present witnesses and evidence, and the same right to an appeal.

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[18] Memorandum from Public Policy Polling to Interested Parties 1 (May 16, 2017) *available at* https://nwlc.org/resources/voters-nationwide-overwhelmingly-support-title-ix-other-protections-for-survivors-of-college-and-k-12-sexual-assault/.

[19] Letter from Greg Lukianoff, President & Chief Exec. Officer, Found. for Individual Rights in Educ., to Donald Trump, President, United States of America (Jan. 20, 2017) [hereinafter FIRE letter] *available at* https://www.thefire.org/fire-letter-to-president-donald-trump-1-20-2017/.

[20] 34 C.F.R. §106.8(b).

Moreover, the guidance clarified that an equitable grievance procedure means that both the complainant and respondent bear the same burden of proof—i.e., that schools should use the preponderance of the evidence standard. This standard is used in cases alleging discrimination under other civil rights laws,[21] in civil lawsuits between two private parties (including suits related to possibly criminal conduct such as tort actions for battery or murder/wrongful death), and in 80 percent of schools according to a 2002 report issued well before the 2011 guidance.[22] Contrary to what detractors claim, the 2011 sexual violence guidance does not deprive accused students of due process. In fact, by demanding equitable treatment of both the respondent and complainant, the Department's interpretation of Title IX provides students accused of sexual assault with procedural protections beyond those due process guarantees outlined by the Supreme Court.[23]

What detractors actually propose is that students accused of rape and sexual assault deserve special treatment and are entitled to *greater* due process protections than survivors or students charged with other student code infractions, such as assault or academic dishonesty. This essentially creates special rights for accused rapists, which would directly violate Title IX's goal of promoting equity in education by disadvantaging those who complain about sex discrimination in favor of those alleged to have perpetuated it.

III. Title IX's requirements regarding the standard for sexual harassment and assault are supported by case law and detractors' proposal for a narrower definition of harassment[24] would make students and campuses less safe and encourage more litigation.

In *Davis v. Monroe County Board of Education*,[25] the Supreme Court established that a school is liable for student-on-student harassment if it had "actual knowledge" of and was deliberately indifferent to peer harassment so "severe, pervasive and objectively offensive" that it deprived the student of the educational opportunities or benefits provided by the school. However, the Court limited this standard to claims for money damages. The Department of Education has employed a less stringent standard[26] to withdraw funding from schools who fail to address sexual harassment and the Supreme Court has stated that doing so is appropriate.[27] The Department of Education has used this standard since 1997, when OCR stated schools must take "prompt and equitable" action

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[21] *See, e.g., Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989); 42 U.S.C. § 20001 (2006).

[22] Heather Karjane, et al., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 122 (Nat'l Criminal Justice Reference Serv., Oct. 2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

[23] *See Goss v. Lopez*, 419 U.S. 565, 579 & 583 (1975) ("[S]tudents facing suspension [in public educational institutions] must be given some kind of notice and afforded some kind of hearing. . . . We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident.").

[24] FIRE Letter *supra* note 19 at 2-3.

[25] 526 U.S. 629, 633, 650 (1999).

[26] That is, whether harassment is "severe, persistent, *or* pervasive" enough to limit a student's ability to participate in or benefit from an education program or activity, or to create a hostile or abusive educational environment. U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, SEXUAL HARASSMENT GUIDANCE 1997: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES (1997) [hereinafter 1997 Guidance], *available at* https://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html.

[27] See *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 292 (1998) ("Of course, the Department of Education could enforce the requirement [to have a grievance procedure] administratively: Agencies generally have authority to promulgate and enforce requirements that effectuate the statute's nondiscrimination mandate.").

"to remedy [a] hostile environment and prevent future harassment."[28] This standard was reaffirmed in 2001 after the Supreme Court's decision in *Davis*,[29] again in 2006 under the Bush administration,[30] and in 2010,[31] 2011[32] and 2014[33] in guidance documents issued by the Obama administration. This standard is also well-established in employment discrimination cases[34] and other civil rights contexts.[35]

OCR examines a range of factors to determine whether sexual harassment has risen to the level of a hostile environment—in other words, whether the conduct is "sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment."[36] It further advises educational institutions to use these same factors when "draw[ing] commonsense distinctions between conduct that constitutes sexual harassment and conduct that does not rise to that level."[37] As OCR and courts have long stated, one sufficiently serious isolated event—such as a sexual assault—can rise to the level of actionable sexual harassment.[38]

Detractors would prefer OCR to adopt a definition that departs from twenty years of OCR guidance and is more stringent than the standard applied for damages—specifically, "*targeted*, discriminatory *conduct* that is so severe, pervasive *and* objectively offensive" that it effectively denies equal access to educational opportunities.[39] (emphasis added) In addition to running counter to decades of precedence, adopting a standard that is higher than or even one equal to the standard to recover money damages would place an unfortunate burden on student survivors and make campuses less safe. It also could motivate plaintiffs to opt for litigation instead of an OCR investigation—an expensive result for both students and institutions. In many instances, an OCR investigation notifies institutions of a possible violation *before* the need for litigation arises—allowing students and institutions

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[28] 1997 Guidance *supra* note 26.
[29] U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, at 12 (2001) [hereinafter 2001 Guidance], *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.
[30] Letter from Stephanie Monroe, Assistant Secretary for Civil Rights, U.S. Dep't of Educ., to Colleagues (Jan. 25, 2006) *available at* https://www2.ed.gov/about/offices/list/ocr/letters/sexhar-2006.html.
[31] Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. to Colleagues, at 2-3 & 6 (Oct. 26, 2010) *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201010.pdf.
[32] Letter from Russlynn Ali, Assistant Secretary for Civil Rights, U.S. Dep't of Educ. to Colleagues, at 4, 6, 9 & 16 (Apr. 4, 2011) *available at* https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.
[33] U.S. DEP'T OF EDUC. OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 1-2 (2014) *available at* https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.
[34] *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993) (defining a hostile environment as one in which harassment is severe or pervasive) ; *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (same); *see also* U.S. EQUAL EMP'T OPPORTUNITY COMM'N, POLICY GUIDANCE ON CURRENT ISSUES OF SEXUAL HARASSMENT (1990) ("When an employer receives a complaint or otherwise learns of alleged sexual harassment in the workplace, the employer should investigate promptly and thoroughly. The employer should take immediate and appropriate corrective action by doing whatever is necessary to end the harassment, make the victim whole by restoring lost employment benefits or opportunities, and prevent the misconduct from recurring") *available at* https://www.eeoc.gov/policy/docs/currentissues.html.
[35] *E.g.* Racial Incidents and Harassment Against Students at Educational Institutions; Investigative Guidance, 59 Fed. Reg. 11448, 11450 (Mar. 10, 2017) ("A violation of Title VI may be found if racial harassment is severe, pervasive, or persistent so as to constitute a hostile or abusive educational environment.").
[36] 2001 Guidance *supra* note 29 at vi.
[37] *Id.* at 5-6.
[38] *See id.* at 6; *see also T.Z.*, 634 F. Supp. 2d at 271 (holding that a "sufficiently serious one-time sexual assault" can even satisfy *Davis*'s pervasiveness standard).
[39] FIRE Letter *supra* note **Error! Bookmark not defined.** at 3.

to reach an agreement that focuses on revising institutional policies and practices for little or no cost to either party. Such a change could be costly to schools and is entirely unnecessary.

IV. The definition of harassment under Title IX is consistent with the First Amendment.

Although proponents of a more stringent definition of harassment have cloaked some of their arguments in claims of promoting free speech, institutional adoption of this standard could result in the proliferation of perverse and dangerous policies that require any conduct to be targeted, severe, *and* pervasive before the school addresses it. Again, such a policy would make students less safe and schools ripe for litigation.[40]

In addition, Title IX's prohibitions on harassment are consistent with Supreme Court precedent on speech protected by the First Amendment. In *Tinker v. Des Moines Independent Community School District*,[41] the Supreme Court held that student speech is protected by the First Amendment unless "conduct by the student, in class or out of it . . . materially disrupts classwork or involves substantial disorder or invasion of the rights of others."[42] The speech does not actually need to have created a substantial disruption for the school to intervene; the question is whether the facts "might reasonably have led school authorities to forecast substantial disruption of or material interference with school activities."[43] The Court determined that the students' black armbands, worn in silent protest of the Vietnam War, did not forecast such a disruption.

Of course, in many cases of sexual harassment, First Amendment concerns may not even be implicated. First, the First Amendment applies only to state actors, which for educational institutions means public school districts or state universities.[44] Private colleges and universities that receive federal funding, in the form of student loans for example, must comply with the requirements of Title IX, but are not covered by the First Amendment.[45]

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[40] *See Hill v. Cundiff*, 797 F.3d 948, 971-76 (11th Cir. 2015) (reversing the district court's grant of summary judgment on Title IX claim stemming from a student's sexual assault in a school-arranged "sting operation" ostensibly meant to address the student's complaints of sexual harassment).

[41] 393 U.S. 503 (1969).

[42] *Id.* at 513. The "rights of others" language from *Tinker* has not been developed by the courts.

[43] *Id.* at 514.

[44] *See Tinker*, 393 U.S. 503 (applying the First Amendment to a public school district); *Christian Legal Soc. Chapter of the Univ. of Cal., Hastings Coll. of Law v. Martinez*, 130 S. Ct. 2981, 3011 (2010) ("The First Amendment rights of speech and association extend to the campuses of state universities." (alteration and quotation marks omitted")). In addition, there is a question as to whether and how the test in *Tinker*, along with other Supreme Court precedent regarding student speech in public elementary and secondary schools—applies to public colleges and universities. *See Tatro v. Univ. of Minn.*, 816 N.W. 2d 509, 519 & n.5 (Minn. 2012) (recognizing unsettled case law, citing to examples from the Third, Sixth, and Ninth Circuits, and declining to consider the issue); Kelly Sarabyn, *The Twenty-Sixth Amendment: Resolving the Federal Circuit Split over College Students' First Amendment Rights*, 14 Tex. J. C.L. & C.R. 27, 28-49 (2008) (discussing the unresolved question); *see also Hazelwood Sch. Dist. v. Kuhlmeier*, 484 U.S. 260, 273 n.7 (1988) ("We need not now decide whether the same degree of deference [given to high school restrictions on school newspaper] is appropriate with respect to school-sponsored expressive activities at the college and university level.").

[45] State law may provide that private universities may not restrict student speech more than as if the First Amendment applies; California has done so with its "Leonard Law." Cal. Educ. Code § 94367(a) ("No private postsecondary educational institution shall make or enforce a rule subjecting a student to disciplinary sanctions . . . when engaged in outside the campus or facility of a private postsecondary institution, is protected from governmental restriction by the First Amendment.").

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Second, the First Amendment applies only to *speech*. While some expressive conduct, like the black armbands worn in *Tinker*, may be constitutionally protected,[46] "[t]here is of course no question that non-expressive, physically harassing *conduct* is entirely outside the ambit of the free speech clause."[47] The First Amendment does not protect "true threats."[48] Thus, school intervention in response to physical harassment or "true threats" does not raise First Amendment concerns. Lastly, harassment often does not fall neatly into a single category. Where conduct involves both "speech" and "nonspeech" elements, "a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms."[49] As courts have emphasized, there is a compelling government interest in preventing discrimination and harassment.[50] Schools "have a duty to protect their students from harassment and bullying in the school environment" and "school administrators must be able to prevent and punish harassment and bullying in order to provide a safe school environment conducive to learning."[51]

Even where free speech rights are implicated, Title IX remains consistent with the First Amendment. For example, in *Saxe v. State College Area School District*, then-Judge Alito addressed a First Amendment challenge to the constitutionality of a school district's anti-harassment policy.[52] The court struck the policy because it was both broader than harassment prohibited by Title IX and "appear[ed] to cover substantially more speech than could be prohibited under *Tinker*'s substantial disruption test."[53] Similarly, in *DeJohn v. Temple University*, the Third Circuit equated the hostile environment test in *Davis* with *Tinker*'s substantial disruption inquiry.[54] In other words, the court assumed that *Davis* and *Tinker* were consistent and that a "hostile environment" and "substantial disruption" were synonymous. Indeed, federal district and circuit courts have held that policies narrowly tailored

[46] *See Texas v. Johnson*, 491 U.S. 397, 404 (1989) (holding flag burning was speech protected by the First Amendment because the actor intended to "convey a particularized message" and it was likely that those who view the conduct would understand that message).
[47] *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001); *see also Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").
[48] *See generally Watts v. United States*, 394 U.S. 705 (1969); *see also Keefe v. Adams*, 840 F.3d 523, 531-33 (8th Cir. 2016) (holding that college did not violate the First Amendment when it disciplined a student who threatened violence that implicated other students on his Facebook page); *Koeppel v. Romano*, --F. Supp. 3d --, 2017 WL 2226681, *9 (M.D. Fla. May 11, 2017) (finding "intimidating, hostile, offensive and threatening" speech, whether on-campus or off-campus "is simply outside the protections of the First Amendment because it disrupts another student's ability to pursue her education in a safe environment"); *J.S. v. Bethlehem Area School District*, 807 A.2d 847, 856 (Pa. 2002) (inquiring whether student off-campus internet speech constituted a true threat before determining that it did not and therefore applying *Tinker*).
[49] *Texas*, 491 U.S. at 407.
[50] *See DeJohn v. Temple Univ.*, 537 F.3d 301, 319-20 (3d Cir. 2008) ("[We] do believe that a school has a compelling interest in preventing harassment"); *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 209 (3d Cir. 2001) ("Certainly, preventing discrimination . . . in the schools [] is not only a legitimate, but a compelling, government interest."); *see also Harper v. Poway Unified Sch. Dist.*, 445 F.3d 1166, 1178 (9th Cir. 2006) (holding removing student from classroom for wearing T-shirt was acceptable under *Tinker*'s because the "wearing of his T-shirt collides with the rights of other students in the most fundamental way").
[51] *See Kowalski v. Berkeley County Sch.*, 652 F.3d 565, 572 (4th Cir. 2011); *see also* U.S. Department of Education, Office for Civil Rights, Revised Sexual Harassment Guidance: Harassment of Students by School Employees, other Students, or Third Parties, at 12 (2001), *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.
[52] 240 F.3d 200 (3d Cir. 2001).
[53] *Id.*; *see also Sypniewski v. Warren Hills Regional Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002) ("[A] particular form of harassment or intimidation can be regulated by defendants only if it meets the requirements of *Tinker*; that is, if the speech at issue gives rise to a well-founded fear of disruption or interference with the rights of others.")
[54] 537 F.3d 301, 317 (3d Cir. 2008).

to address harassment or prevent disruptions in the classroom are consistent with the First Amendment as it applies to both secondary[55] and post-secondary institutions.[56]

Thus, *Tinker* and *Davis* are consistent in that they allow (*Tinker*) and require (*Davis*) a school to intervene in response to conduct, including speech that simultaneously creates a hostile environment and a foreseeable risk of substantial disruption of the school environment. While the Supreme Court famously observed in *Tinker* that "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," it also noted that those rights must be "applied in light of the special characteristics of the school environment," and therefore the Court "has repeatedly emphasized the need for affirming the comprehensive safeguards, to prescribe and control conduct in the schools."[57] As the Third Circuit has stated: "Intimidation of one student by another, including intimidation by name calling, is the kind of behavior school authorities are expected to control or prevent. *There is no constitutional right to be a bully*."[58] (emphasis added). And schools have an additional obligation under Title IX to promptly remedy gender-based harassment and prevent its recurrence.[59]

Thus, OCR's longstanding definition of sexual harassment should not be altered. Title IX has been critical to removing gender-based barriers to educational opportunities. The longstanding Title IX legal standards governing sexual harassment claims do not infringe on students' constitutionally protected speech or due process rights, and backing down from these standards would leave many students vulnerable to more sexual harassment and violence. We urge the Secretary to gain a better understanding of these issues by touring the country to listen to survivors and advocates in a variety of school settings and continuing to enforce Title IX consistent with the law's goals of ensuring equal educational opportunities free from sex and gender-based discrimination.

* * *

In conclusion, the Law Center urges the Department not to repeal, replace or modify any regulations or guidances related to civil rights or expanding equal educational opportunities. Our comments regarding the sexual violence guidance are particularly urgent, as the Department has already indicated an intent to enter into a formal rulemaking process to modify current obligations. The Law Center believes this announcement is premature given the hundreds of thousands of comments submitted by the public urging the Department not to rescind, modify or replace these rules in this very comment period. As such, the Law Center expects that the Department will consider fully and respond thoroughly and meaningfully to this comment letter and other significant comments[60] submitted by the close of the comment period as required under the Administrative Procedure Act *before*

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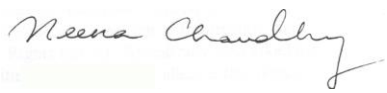
[55] *Barr v. Lafon*, 538 F.3d 554, 569 (6th Cir. 2008); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000).
[56] *Koeppel v. Romano*, No. 6:15-cv-1800-Orl-40KRS, 2017 WL 2226681, *9 (M.D. Fla. May 11, 2017); *Marshall v. Ohio University*, No. 2:15-cv-775, 2015 WL 1179955, *5-*7 (S.D. Ohio 2015).
[57] *Tinker*, 393 U.S. at 506-07.
[58] *Sypniewski v. Warren Hills Reg'l Bd. of Educ.*, 307 F.3d 243, 264 (3d Cir. 2002); *see also id.* at 259 ("In the public school setting, the First Amendment protects the nondisruptive expression of ideas. It does not erect a shield that handicaps the proper functioning of the public schools.").
[59] *See* 2001 Guidance *supra* note 29, at 3.
[60] See Perez v. Mortg. Bankers Ass'n, 575 U.S. __, 135 S. Ct. 1199, 1203 (2015) ("An agency must consider and respond to significant comments received during the period for public comment."). At least one court has described "significant comments" as "those which raise relevant points and which, if adopted, would require a change in the agency's proposed rule." Am. Mining Cong. v. EPA, 965 F.2d 759, 771 (9th Cir. 1992).

commencing any rulemaking process regarding the sexual violence guidance or any other regulation or significant guidance document that advocates urged against rescission, replacement or modification.

If you have any questions, please feel free to contact us at (202) 588-5180.

Sincerely,



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