

September 20, 2017

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

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

Dear Ms. Malawer and Dept. of Education personnel:

This comment supplements my original submission in support of a strong Title IX, including strong support for existing regulations and guidance on addressing campus sexual assault.

I was compelled to file this supplement to correct mis-representations made by Secretary DeVos in her September 7, 2017, statement about the position of the American Bar Association regarding Title IX. Her statement incorrectly implies that the ABA supports the efforts of the Department of Education (“DOE”) to weaken Title IX, including Title IX guidance on campus sexual assault.

I am a longtime member of the ABA and the leadership of the ABA Section of Civil Rights and Social Justice. As a CRSJ leader, I have fought for ABA policy, educational programs, and amicus briefs in support of Title IX enforcement. 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. I urge DOE and readers of this comment to review the materials associated with that series.¹ Those materials show why currently Title IX policies must be vigorously enforced - not weakened. While I file this comment on behalf of myself and not on behalf of the ABA, I am familiar with ABA policy on the issue and I believe that Secretary DeVos’ characterization of that policy is incorrect.

Secretary DeVos’s September 7, 2017, statement on the DOE website states that “The American Bar Association established a task force comprised of lawyers and advocates from diverse backgrounds and varying perspectives. They found consensus and offered substantive ideas on how we can do better.” <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>. This statement inaccurately characterizes the task force and the report. The inaccuracy was compounded by press reports that cited it, asserting that the report and its recommendations constitute the position and policy of the ABA.¹

¹ https://www.americanbar.org/groups/crsj/events_cle/campus-sexual-assault-teleconference-series--a-civil-rights-pers.html

First, the task force was not an ABA task force. It was a Criminal Justice Section task force established by and for members of that Section – criminal lawyers. The ABA Criminal Justice Section does not and cannot speak for the ABA. It is a small part of a very large organization. Only policy adopted by the ABA House of Delegates can be cited as the policy and position of the ABA itself. The CJS report and recommendations were NOT adopted by the ABA House of Delegates and thus cannot be represented as the position of the ABA.

Other groups within the ABA with expertise in Title IX and campus sexual assault — including the ABA Section of Civil Rights and Social Justice (“CRSJ”), the ABA Commission on Domestic and Sexual Violence (“CDSV”), and the ABA Commission on Women in the Profession — strongly objected to the composition of the Criminal Justice Section task force, its hastily convened and closed meetings, the limited nature of the materials provided to its members, and some of the substance of the report and recommendations. These groups support strong, vigorous enforcement of existing DOE guidance and were concerned that the CJS work could be wrongly used to weaken it. As a result of this opposition, CJS withdrew its resolution from consideration by the ABA House of Delegates. Accordingly, the report and recommendations were not approved by the ABA House of Delegates and thus are not the policy of the ABA.

Second, the Criminal Justice Section did not establish a task force of lawyers from “diverse background and varying perspectives.” It set up a task force to look at the issue from a criminal justice standpoint. When the Section of Civil Rights and Social Justice and the Commission on Domestic and Sexual Violence learned about the task force, they asked to participate so that the task force could hear views from a civil rights perspective. After all, Title IX is a civil rights statute – not a criminal statute. CJS allowed one liaison from each group to participate. Those liaisons were not allowed to share the workings of the task force with the groups who sent them until CJS had finished its work. Thus, the entities had no opportunity to provide input or feedback during the process.

After seeing and objecting to multiple parts of the task force’s final report and recommendations, CRSJ and CDSV asked the Criminal Justice Section to start over with a new, longer-term, ABA-wide task force with more people with more civil rights and Title IX expertise who would also receive and review materials supportive of Title IX. They suggested public hearings (instead of the closed meetings held for task force members only) so that the task force could hear testimony from Title IX lawyers, sexual assault victims, sexual violence experts, feminist law professors, school Title IX coordinators, and others. CJS chose not to do this. CJS instead chose to publish them solely under its own name.

The Criminal Justice Section and its members are entitled to their own views, but those views are not the policy of the ABA. The ABA has strong policy in support of Title IX enforcement. Enclosed herewith is a copy of the ABA’s 1975 policy, which “urges the prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments of 1972, which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute.”

Also enclosed is ABA policy adopted in 2015 — policy adopted with the full support of the Criminal Justice Section. This policy shows resounding support for Title IX. It in no way criticizes DOE policy on campus sexual assault and in no way requests changes or withdrawal of DOE's 2001, 2008, 2011, or 2014 guidance on sexual harassment and/or campus sexual assault. These 1975 and 2015 policies – and not the CJS report – are the policy of the ABA.

Any statements or implications that the ABA supports DOE efforts to weaken or otherwise change Title IX guidance on campus sexual assault is inaccurate. The ABA has never taken such a position.

Sincerely,

Kristen Galles

ENDNOTE

Press reports that compounded Secretary DeVos' mischaracterization of the Criminal Justice Section report as the policy or proposal of the ABA itself (instead of just one of its sections).

1. See New York Times article:

<https://www.nytimes.com/2017/09/07/us/devos-campus-rape.html>

"Although her speech was short on details of what the administration's new rules might look like, Ms. DeVos mentioned a proposal by the American Bar Association that entails independent three-person panels to adjudicate complaints, and a requirement that campuses provide advisers to both sides; and another proposal by the American College of Trial Lawyers that would shift to the "clear and convincing" standard of proof."

See Inside Higher Ed article:

<https://www.insidehighered.com/news/2017/09/08/devos-says-federal-title-ix-guidelines-have-e2%80%98failed-e2%80%99-will-seek-public-input-new>

"DeVos specifically cites recommendations from an American Bar Association task force as well as an American College of Trial Lawyers task force among "important perspectives" that would "be helpful as we pursue a better way." The ABA report had encouraged campuses, where appropriate, to examine alternative models to traditional adjudication, including restorative justice, among other recommendations. The trial lawyers, meanwhile, called for raising the standard of proof for campus-based proceedings."

See New York Daily News article:

<http://www.nydailynews.com/opinion/justice-campus-article-1.3481364>:

"Citing fresh ideas from the American Bar Association, trial lawyers and Harvard Law faculty, DeVos has done her homework and will have to produce rules strong and fair enough to withstand the inevitable Title IX court challenges to come."

See Forbes article:

<https://www.forbes.com/sites/realspin/2017/09/11/betsy-devos-has-a-radical-idea-hear-both-sides-of-a-story/#11a805574f4d>:

"Numerous groups of legal experts and scholars, among others, think changes are necessary, too. In her speech, DeVos highlighted several supporters of a more balanced system, including the American Bar Association, the American College of Trial Lawyers and Harvard's law faculty."

See Washington Post Op-ed:

https://www.washingtonpost.com/news/grade-point/wp/2017/09/08/lawyers-devos-is-bringing-due-process-to-campus-sexual-assault-cases-finally/?utm_term=.2e854e6a4c19:

"DeVos praised recent proposals issued by the American Bar Association, the American College of Trial Lawyers and by two private lawyers who often represent schools, but she didn't say which options they would pick and what the rules might look like."

See Politico article:

<http://www.politico.com/tipsheets/morning-education/2017/09/08/secretary-betsy-devos-offers-clues-on-campus-sexual-assault-policies-she-might-back-222181>:

"— DeVos said schools could find recommendations from an American Bar Association task force helpful. The task force recommended that both parties in such cases have "robust procedural protections." It also says that "where appropriate" schools should consider "non-mediation alternatives," such as a restorative justice approach, if both sides agree."

See Bustle article:

<https://www.bustle.com/p/these-facts-about-title-ix-betsy-devos-explain-why-survivors-are-so-outraged-81548>:

"Jackson has primarily been looking at two different reports: one from an American Bar Association committee that examined the effectiveness of various policies on the handling of sexual assault cases, and one from civil rights attorney Alexandra Brodsky, which focused on finding common ground between advocates for survivors and students who are accused of assault."

See East Bay Times article:

<http://www.eastbaytimes.com/2017/09/07/devos-says-obama-era-approach-to-campus-sexual-assault-failed/>:

"Without specifying how her department plans to move forward, she cited several groups, including the American Bar Association and a collection of Harvard law professors, who have offered ideas for improving campus sexual assault procedures, including forming regional centers that investigate cases instead of individual schools handling cases internally."

See Buzzfeed article:

https://www.buzzfeed.com/tylerkingkade/betsy-devos-reveals-plan-to-overhaul-obama-era-campus-rape?utm_term=.irLKAQ7Wb#.xkXGr62Vg:

"Candice Jackson, a deputy of DeVos who was put in charge of the department's Office for Civil Rights, said she's taken an interest in a report from an American Bar Association committee that examined what are some of the best policies for campus sexual assault cases, sources who met with her told BuzzFeed News. The ABA committee included law professors, victims rights' advocates, defenders of accused students, university administrators, and attorneys."

of all American troops from Vietnamese soil.

The United States, by a change in official policy, withdrew its forces from Viet Nam more than two years ago and the armed conflict in that country ended this Spring. President Ford has recently made several appeals for reconciliation over the Viet Nam issue. Virtually all national leaders have responded favorably. As the *Washington Star* stated in an editorial on May 9, 1975:

"With the war in Vietnam ended and the United States opening its arms and offering opportunity for a new life to some 100,000 refugees from that unhappy land, the time seems appropriate to take the final step in reclaiming the lives of a nearly equal number of young Americans who, as an act of conscience chose to evade the draft or desert the armed forces rather than serve in a way they felt strongly against.

"The granting of unconditional amnesty would not mean an admission that those who refused to serve were right or that they acted honorably. Rather it would be a compassionate act by a nation that recognizes human susceptibility to error and the need for forgiveness when the circumstances warrant.

"Who has been without mistake in this tragic and divisive episode in American history? Nearly everyone now realizes that it was a cause we either should not have become concerned with or one we should have handled differently once we became involved. Is it right now, when there is so much blame to be shared, that retribution should fall heaviest on a single segment of society? We think not.

"Some argue that granting unconditional amnesty would be unfair to those who fought and died and to those who refused to serve but stayed in this country and accepted the legal consequences of their actions. Perhaps it is unfair. But nearly everything about the war was unfair, and one of the unfairness of all was the draft system itself, which allowed so many to escape military service legally in one way or another while others were required to serve.

"Certainly there will be uneven applications or miscarriages of justice in proclaiming an unconditional amnesty. There will be some evaders and deserters who will claim their actions flowed from moral opposition to the war when in truth they acted out of cowardice, or because they wanted to buck the system; or for other reasons unrelated to the rightness or wrongness of the war. But better to blanket in a few liars than to com-

mit to exile forever the thousands of others who believed, erroneously or not, that what they were doing was morally right.

"One of the ironies is that Americans who refused to fight in Vietnam are forced to remain in exile while some Vietnamese who evaded service in their own military forces are reported among the refugees being brought to this country by the United States government.

"It is time, as President Ford has stated frequently, to end recrimination over Vietnam and look to the future. What better time than now for the President or the Congress, or both, to extend to those huddled masses of American exiles living in Canada and elsewhere the right to breathe free in their native land?"

Furthermore, it is highly appropriate that all Americans be brought together for the 200th Anniversary of our Nation's founding. It is important that the American Bar Association now take a step forward to support this recommendation and carry through on the action undertaken by the House of Delegates at its last Annual Meeting. Now that the Viet Nam War has ended there is a distinct possibility that the persons who could benefit by amnesty may be forgotten by the American public and that no further official action will be taken to relieve their plight. This would be a national tragedy. Regardless of the other tragedies resulting from American military involvement in Viet Nam, no further public purpose will be served by the continued separation of war resisters from their families and from the mainstream of American society.

Accordingly, on the basis of the foregoing report, it is respectfully recommended that the American Bar Association adopt the foregoing resolution.

In conformance with Association policy, copies of this report and recommendation have been sent to the following Association entities for their review and comment: Administrative Law Section; Criminal Justice Section; General Practice Section; Young Lawyers Section; the Law Student Division; Standing Committee on Lawyers in the Armed Forces; Standing Committee on Military Law; and the Special Committee on the Administration of Criminal Justice.

The report and recommendation were approved by a majority of the Council of the Section of Individual Rights and Responsibilities on May 3, 1975.

ROBERT J. KUTAK

Chairman

REPORT NO. 4 OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION*

Be It Resolved, That the American Bar Association urges the prompt, vigorous, and effective implementation and enforcement of Title IX of the Education Amendments Act of 1972, which promotes equal educational opportunity without regard to sex, to the full extent of the powers granted in the statute.

Be It Further Resolved, That the President or his designee is authorized to present the substance of the foregoing resolution to appropriate committees of Congress and appropriate offices of the Executive Branch.

REPORT

Title IX of the Education Amendments Act of 1972 provides, with limited exceptions:¹

"No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance. . . ." 20 U.S.C. § 1681(a).

The purpose of this broad remedial law is to provide to students and employees of educational institutions the benefits of equal educational and employment opportunity without regard to sex in schools at every academic level by conditioning receipt of federal funds on non-discrimination. Statutory sanctions against institutions which

discriminate on the basis of sex include termination of federal financial assistance or other appropriate actions. 20 U.S.C. § 1682. All of the nation's law schools, as well as other institutions, are covered by the legislation.²

Title IX is to be enforced primarily by the Department of Health, Education and Welfare (DHEW).³ DHEW has been slow in implementing Title IX. It waited almost two years after the effective date of the statute in July 1972 to publish proposed implementing regulations in the Federal Register.

On June 20, 1974, DHEW published pro-

²A number of law review articles have discussed the effects enforcement of Title IX will have on educational institutions. See, e.g., Buck and Orleans, *Sex Discrimination—A Bar to a Democratic Education: Overview of Title IX of the Education Amendments of 1972*, 6 Conn. L. Rev. 1 (1973); Shelton and Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 Calif. L. Rev. 1121 (1974).

³The statute provides that each federal agency which is empowered to extend federal financial assistance to any educational program or activity must effectuate the law. As a practical matter, DHEW extends more money to educational institutions than other agencies, and enforcement responsibility has been delegated to it.

¹The recommendation was approved. See page 710.

²With regard to admissions, the statute covers "institutions of vocational education, professional education; and graduate higher education, and to public institutions of undergraduate education." 20 U.S.C. § 1681(a)(1). Certain educational institutions controlled by religious organizations, military academies and traditionally single-sex public undergraduate schools are also exempted. 20 U.S.C. § 1681(a)(3)-(5). By legislative amendments, the Boy Scouts, the Girl Scouts, and social sororities and fraternities are also exempted. P.L. 93-568, 88 Stat. 1855 (1974).

posed regulations.⁴ Extensive comments were filed. Pursuant to express statutory procedure, regulations promulgated by DHEW under Title IX must be approved by the President⁵ and subsequently by Congress.⁶ In March, 1975 the Secretary of DHEW transmitted proposed regulations to the White House; on June 3, 1975 after making certain modifications in those regulations, the President sent the draft regulations to Congress.⁷

⁴39 Fed. Reg. 22228 *et seq.* (June 20, 1974), 45 C.F.R. Part 86.
⁵20 U.S.C. § 1682.
⁶Part 431(d), Education Amendments Act of 1974, P.L. 93-380, 88 Stat. 484.
⁷40 Fed. Reg. 24127 (June 4, 1975).

The regulations were adopted on June 21, 1975, because Congress did not act to disprove them.
Prompt, vigorous, and effective enforcement of Title IX through regulation and other means must be instituted to insure that girls and women are not denied equal educational opportunity because of traditional institutional practices and arrangements.
This resolution is consistent with, and is necessary to further implement, the resolution passed by the House of Delegates in 1972, which urged the extension of legal rights privileges and responsibilities to persons, regardless of sex.

ROBERT J. KUTAK
Chairman

REPORT NO. 5 OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION*

Be It Resolved, That the immigration laws should be amended to eliminate the present provisions requiring exclusion from the United States and deportation of aliens convicted for possession of marihuana; and

Be It Further Resolved, That the President or his designee is authorized to present the substance of the foregoing resolution and the attached report to appropriate committees of Congress.

REPORT

Since 1922 the immigration laws have included increasingly severe provisions for the exclusion and deportation of aliens convicted of narcotic violations. In their original form these statutes were found inapplicable to the possession of marihuana. *Hoy v. Mendoza-Rivera*, 267 F.2d 451 (9th Cir. 1959); *Hoy v. Rojas-Gutierrez*, 267 F.2d 490 (9th Cir. 1959). However in 1960 Congress amended the statute to make it specifically applicable to marihuana violations. Sec. 9, Act of July 14, 1960, 74 Stat 504. Under the present statutory provisions, an alien who is convicted of possessing even a single marihuana cigarette is subject to perpetual exclusion from the United States, and to deportation if he is already a resident of this country. See Secs. 212 (a) (23) and 241 (a) (11), Immigration and Nationality Act, 8 U.S.C. 1182 (a) (23) and 1251 (a) (11).

In recent years there has been extensive discussion regarding the excessive severity of federal and state laws mandating criminal punishment of persons found guilty of possessing marihuana. Substantial amelioration of federal criminal law was accomplished with enactment of the Comprehensive Drug Abuse Prevention and Control Act of 1970, 84 Stat. 1236. More recently, the National Commission on Marihuana and Drug Abuse—after concluding that “the possession offense is of little functional benefit to the discouragement [of use] policy and carries heavy social costs, not the least of

which is disrespect and cynicism among some of the young”—recommended repeal of all criminal provisions for possession of marihuana. Similar recommendations have issued from, among others, the National Conference of Commissioners on Uniform State Laws, the National Council of Churches and the National Education Association. This Association placed itself firmly in support of the elimination of criminal penalties for possession of small amounts of marihuana by resolution enacted at the August 1973 Annual Meeting.

On May 25, 1975, the Supreme Court of Alaska held that the right of privacy guaranteed by the federal and Alaskan Constitutions prohibits the criminal prosecution of adults who privately use or possess, within their homes, quantities of marihuana that are not indicative of an intent to sell. *Ravin v. State*, 43 LW 2502 (1975).

As of June 15, 1975, two states—Oregon and Alaska—have enacted legislation reducing marihuana possession to the status of a non-criminal violation with offenders subject to a maximum civil fine of \$100. Similar legislation is pending in more than twenty states and has been passed by either the Senate or House in six states (Arizona, California, Colorado, Minnesota, New Hampshire, and Ohio). Without doubt the public's attitude toward the possession and use of marihuana is undergoing a dramatic and significant modification.

Unfortunately, this enlightened attitude in regard to the possession of marihuana has not yet been reflected in the immigration statutes. The inflexible provisions of those

*The recommendation was withdrawn. See page 710.

AMERICAN BAR ASSOCIATION
ADOPTED BY THE HOUSE OF DELEGATES
AUGUST 3-4, 2015

RESOLUTION

RESOLVED, That the American Bar Association urges colleges and universities:

- (1) To recognize the right of students to receive an education free from sexual harassment, sexual assault, stalking, gender-based violence, and intimate partner violence;
- (2) To adopt and enforce policies and procedures that protect and respond to the needs of students and employees who allege that they are victims of sexual harassment, sexual assault, stalking, gender-based violence, or intimate partner violence;
- (3) To train students and employees about the harms caused by sexual harassment, sexual assault, stalking, gender-based violence, and intimate partner violence, and about the schools' policies and procedures to address them;
- (4) To develop and maintain collaborative relationships with community-based victim resources (such as rape crisis centers, domestic violence support groups, crime victim services, independent counseling services, or others), so that they can be readily accessed by the victims who choose to use them;
- (5) To develop and maintain collaborative relationships with state and local civil and criminal justice systems, to assist in creating a prompt and appropriate response to the complaints of victims who choose to file them; and
- (6) To maintain the privacy, confidentiality, and autonomy of victims and those accused to the fullest extent allowed by law, and to reject the designation of all students or campus employees as mandated reporters;

FURTHER RESOLVED, That the American Bar Association urges Congress to increase funding for the Office for Civil Rights of the United States Department of Education and the Office on Violence Against Women of the Department of Justice so that they can effectively educate schools about their obligations to keep campuses safe from sexual harassment, sexual assault, stalking, gender-based violence, and intimate partner violence; investigate complaints; and vigorously enforce Title IX, the Clery Act, the Violence Against Women Act, and other relevant laws, and assure that fair procedures are utilized in the hearing and disposition of complaints; and

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FURTHER RESOLVED, That the American Bar Association urges federal, state, local, tribal, and territorial governments to adopt meaningful remedies and vigorous enforcement mechanisms, including civil remedies, for sexual harassment, sexual assault, stalking, gender-based violence, and intimate partner violence, while assuring that the rights of those accused of such acts are recognized, respected and protected; and to fully fund implementation of such remedies and enforcement.