

September 18, 2017

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Sec. Betsy DeVos  
c/o Hilary Malawer  
400 Maryland Ave. SW.,  
Room 6E231  
Washington, DC 20202

Re: ED-2017-OS-0074

Dear Sec. Betsy DeVos:

As the Legal Director of The Capital District Women's Bar Association Legal Project (The Legal Project) and the staff attorney for The Legal Project's, Campus Violence Legal Connection, we write this letter in support of the 2011 Dear Colleague Letter addressing sexual harassment and sexual violence on college campuses, the VAWA Reauthorization ACT of 2013 Final Regulations implementing the Clery Act and the 2014 Dear Colleague Letter.

The Legal Project is a non-profit, civil legal services organization that provides legal representation and advice to individuals without access to legal assistance. Since the founding of our program in 1995, a great deal of our work has involved representing victims of domestic violence and sexual assault. Last year alone we assisted nearly 1600 victims in the Capital Region by providing advice, consultations and representation in court. Recognizing the serious problem of sexual violence on college campuses, for the last ten years we have hosted monthly meetings of the *Campus Violence Prevention Consortium*, a group of over a dozen colleges and universities, mental health professionals, rape crises professions, law enforcement, crime victim advocacy organizations and others to share resources and best practices for addressing sexual harassment and sexual assault. We have recently been awarded a three-year Office of Violence Against Women Grant to Reduce Sexual Assault, Domestic Violence, Dating Violence, and Stalking on Campus Program by providing holistic legal services to victims.

Based upon our considerable experience in administrative and judicial proceedings addressing sexual violence and our work with educational institutions, we are in support of the 2011 and 2014 Dear Colleague letters and the Regulations implementing the Clery Act. While we acknowledge that the regulatory oversight could be improved upon, we disagree with Sec. Betsy DeVos' speech on September 7, 2017 in which she characterized the current system as a "failed system." The system is imperfect, however, to completely rescind it, with no clearly articulated plan for replacement, would lead to serious confusion in a system that is critical to keeping college campuses safe and free of discrimination on the basis of sex. Furthermore, we disagree that the current system fails to provide due process to both the victim and the accused.

The current system has called much needed attention to the horrifying prevalence of campus sexual violence and harassment. The extent of incidence and harm to individual victims as well as the campus community has been made clear by two studies: **The Campus Climate Survey on Sexual Assault and Sexual Misconduct** Published in September 2015 by the Association of American Universities (AAU) and **The Campus Climate Survey Validation Study** by the Bureau of Justice Statistics, published in January 2016. Combined these two surveys received nearly 200,000 responses and demonstrate that as many as one in four women experience sexual assault or misconduct while enrolled in college. The AAU survey found that among female college students, 23% said they experienced some form of unwanted sexual contact -- ranging from kissing to touching to rape, carried out by force or threat of force, or while they were incapacitated because of alcohol and drugs. Nearly 11% said the unwanted contact included penetration or oral sex.

The current system imposes several obligations on colleges and universities that receive federal funds to fulfill their Title IX obligations including requiring:

- Providing all members of the campus community with notice that the school does not discriminate on the basis of sex and that Title IX requires that it not discriminate,
- Adopting and publishing grievance procedures providing for the prompt and equitable resolution of sexual discrimination complaints with notice regarding the outcome of the complaint,
- Gathering and publishing statistics on incidents of domestic violence, dating violence, sexual assault, and stalking,
- Publishing an annual security report containing the statistics and the campuses relevant policies and procedures.

In addition to the obligations imposed on colleges and universities, guidance has also been provided that best practice would include:

- Implementing preventive educational programs and trainings and
- Adopting comprehensive victim services

With respect to the grievance procedures campuses are required to adopt and implement, under the current system may include formal and informal procedures and a combined investigation/adjudication model or an investigation and adjudication by two separate and independent entities. In resolving a complaint, schools are required to use the same standard adopted by the Supreme Court in Title VII cases and which has historically been used by the Office of Civil Rights in Title IX cases and state courts for civil orders of protection— preponderance of evidence. If there is a hearing, the parties must have an equal opportunity to present evidence, review information, be represented by counsel and offer questions or make statements before the adjudicator. Finally, while if the victim chooses mediation may be used in some instances of sexual harassment, it is not permissible in instances of sexual assault.

The utilization of the preponderance of evidence standard is appropriate because the nature of the proceeding and the potential remedial action upon a sustained complaint are very different than the possible outcome of a conviction in a criminal proceeding. It is common in states, including New York, for the courts and the legislature to determine that there is a societal benefit to providing a civil proceeding whereby a victim can seek a protective order against a perpetrator. Unlike a criminal

proceeding the role of a civil or administrative proceeding is not to punish but rather to provide the tools necessary to end violence (see BATTERED NON-WIVES AND UNEQUAL PROTECTION-ORDER COVERAGE: A CALL FOR REFORM, 23 Yale L. & Pol'y Rev. 93, 2005). Rather than the potential for incarceration, a Title IX proceeding has relatively minor consequences when a complaint is sustained such as counseling, services for the victim or the potential for a protective order on campus or expulsion in the most serious cases of sexual abuse.

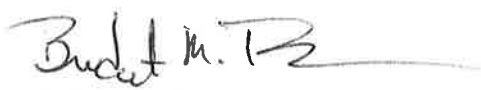
These procedures, when followed by an institution, prevent the unlawful discrimination on the basis of sex. However, there have been instances where the law has not been followed in an appropriate manner and students have continued to be victimized or not received the due process that is required. Further, there may well be instances where the investigator/adjudicator model has led decision makers to make judgements or reach conclusions before they have been given the opportunity to hear all the facts. There is a danger that an individual who leads an investigation will develop an opinion as to the veracity of the witnesses and the appropriate outcome and then will experience a hearing through the filter of confirmation bias. This necessitates separating the roles of investigator and adjudicator. Additionally, there have been instances where one party is able to hire an attorney and the other has not and, therefore, the relative preparation for each party to respond to the complexities of the system is terribly uneven. We would therefore, welcome additional resources being made available to campuses and students to address these issues.

We would support the following:

- (1) While we believe that it is important to maintain and even expand upon some of the informal procedures utilized for some of the complaints, where the victims do not choose to avail themselves of these informal procedures there should be separate investigation and adjudication departments and procedures,
- (2) Hearings should be conducted in a manner consistent with the Administrative Procedure Act (5 U.S.C.A. § 554),
- (3) The establishment of federally funded regional adjudication panels would address the issue of confirmation bias,
- (4) Federally funded regional attorney panels available to students in an administrative hearing who do not have private representation would even the playing field for the parties, and
- (5) Restorative justice training provided to colleges and universities to improve the informal procedures used when neither the victim nor the school wish to pursue a hearing.

With the availability of these additional resources, it is our belief that a sound system will become even more productive.

Sincerely,



Bridgit M. Burke, Esq.  
Legal Director



Sommer-Lynn Cross, Esq.  
Staff Attorney