



September 5, 2017

The Honorable Betsy DeVos  
Secretary of Education  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, DC 20202

Dear Secretary DeVos:

Thank you for your recent, and diligent interest in Title IX's impact on how colleges and universities address the very serious issue of campus sexual violence. Thank you also for recently making a point of stressing the importance of enforcing the federal Jeanne Clery Act, which also contains provisions dealing with this issue. I'm hopeful that the outcome of this attention will be to arrive at a balanced approach that leads to safer campuses.

I'm aware that there has been specific interest in the Office for Civil Rights (OCR) April 4, 2011 Dear Colleague Letter (DCL) on Title IX's application to "Sexual Violence" cases. While this letter is noteworthy for focusing much needed attention to these matters, the essence of it reflects longstanding law, guidance, and practice as was intended by those of us who requested it. The DCL has made significant progress in combatting long documented discrimination against survivors of campus sexual violence. Please do not rescind or weaken this important guidance.

The essence of Title IX is of course equality and fairness. Accordingly, should you feel it is necessary to take any further steps to make sure that no individuals in our nation's educational communities face discrimination, whether they be survivors or individuals accused of sexual violence please do so in a way that does not roll back the clock on the progress survivors, and the institutions that work to meet their needs have made over the last six years. Additionally, any sudden changes now at the beginning of the academic year could be significantly disruptive to schools, so a long-term process is more sound.

Should additional guidance be forthcoming, I would respectfully suggest an update to OCR's "Sexual Harassment Guidance", last promulgated in 2001. With a public notice and comment period this would enable all stakeholders – survivors, accused, and schools – and their advocates to provide substantive policy and legal input to the Department towards a goal of a thoroughly balanced framework.

Please let us know if we can be of any assistance to you during this process.

Sincerely,

A handwritten signature in black ink that reads "S. Daniel Carter". The signature is written in a cursive, flowing style.

S. Daniel Carter, President



**S. Daniel Carter, Contributor**  
Campus Security Consultant

## In Defense of the Title IX Dear Colleague Letter

09/16/2017 10:45 pm ET

When U.S. Secretary of Education Betsy DeVos earlier this month announced her intention to change Title IX enforcement she decried a “failed system” established by the Obama administration in 2011 for dealing with campus sexual violence. She got it half right. The current system for handling campus sexual violence has failed too many students, both survivors and the accused. But it wasn’t established by the Obama administration, it existed long before their efforts to support survivors. She also criticized the “notion that a school must diminish due process rights to better serve the ‘victim’”, but this is not a notion found in the guidelines issued by the Obama administration which specifically called for institutions to uphold due process.

As the Kansas City Star editorial board recently put it this is not an indication of the pendulum swinging too far back and forth, but rather of that “failed system”. “Instead, it’s evidence of the same old problem of not taking sexual assault seriously enough to fully and aggressively investigate every case without assuming anything or protecting anyone, following the facts wherever they lead and then responding accordingly,” they wrote.

In 2009 and 2010 an extensive investigation by the Center for Public Integrity found that this system had been failing for at least a decade, despite action by Congress (which had passed the Campus Sexual Assault Victims’ Bill of Rights in 1992) and federal courts (Title IX has been applied to campus sexual assault cases through decades of court rulings) in this time to make campuses safer. “Students found ‘responsible’ for sexual assaults on campus often face little or no punishment from school judicial systems, while their victims’ lives are frequently turned upside down,” said CPI summarizing their reporting. First as a student activist, and later a victims’ rights advocate I’d seen this re-victimization firsthand for nearly two decades when the Obama administration acted on calls from victims’ rights advocates, survivors, and practitioners, including myself, to provide consistent Title IX guidelines for educational institutions to respond to sexual violence.

Those of us who sought this guidance were led by attorney Wendy Murphy, and included the National Center for Higher Education Risk Management (now the NCHERM Group), and Security On Campus, Inc. (now the Clery Center) where I served as Director of Public Policy at the time. By then I was also working directly with institutions, and saw that they had a need for a consistent framework to build their responses around. We’d all seen inconsistent Title IX enforcement by the U.S. Department of Education’s Office for Civil Rights (OCR), and the “global guidance” proposed by Murphy was a much needed first step towards better solutions.

We sought common sense solutions, including the basic fairness of informing institutions of consistent standards they would be expected to apply in these cases. We asked OCR to articulate a uniform standard of proof – they were

already applying preponderance of the evidence in individual cases, to offer better guidance on expected timeframes to meet the “promptness” requirement, and to guarantee that institutions would not force survivors to choose between the criminal justice system and campus discipline. While critics have challenged the preponderance standard, it was already in use by OCR and had long been upheld by courts in these types of cases (campus discipline which at most can expel a student is not held to the same standards of a criminal court which can imprison someone). In no way did we ask OCR to deny the accused their due process, and given the assurances in the letter we certainly didn’t see the guidance as doing so.



S. DANIEL CARTER

U.S. Vice President Joe Biden, flanked by U.S. Secretary of Education Arne Duncan, announces the Title IX “Dear Colleague Letter”. The University of New Hampshire, Durham, NH, April 4, 2011.



Vice President Joe Biden, a longtime champion of victims’ rights and eliminating sexual violence even when this agenda wasn’t necessarily popular with either major party in Congress, announced the “Dear Colleague Letter” (DCL) at the University of New Hampshire on April 4, 2011. It rearticulated longstanding Title IX requirements such as having a Title IX coordinator, and adopting grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints. It also articulated longstanding practices such as requiring use of the preponderance of the evidence standard, and recommended certain procedural steps including that investigations be resolved within 60 days. What has not been mentioned much in the recent dialogue about the DCL is that it also called for upholding due process, and enumerated certain procedural safeguards for both the accused and accuser required to meet Title IX standards, including the following:

- **Public and state-supported schools must provide due process to the alleged perpetrator.**

- Throughout a school's Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence.
- The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.
- OCR also recommends that schools provide an appeals process.
- A school's investigation and hearing processes cannot be equitable unless they are impartial.

If an institution has deprived an accused student or employee of due process, has denied them timely access to evidence, and or subjected them to a biased proceeding then they have ignored fundamental tenants of the DCL that are intended to ensure a fair process for everyone involved. In 2016 for example OCR determined that students at Wesley College in Dover, Delaware accused of sexual misconduct had their Title IX rights violated by the college.



Jonathan Kassa, Executive Director, Security On Campus, Inc. (SOC); Melissa Lucchesi, SOC's Outreach Education Coordinator; Laura Dunn; Assistant Secretary Russlynn Ali; S. Daniel Carter, SOC's Director of Public Policy; and Angela Rose, Executive Director of PAVE. U.S. Department of Education Headquarters, Washington, DC, December 22, 2010.

The DCL was always one step on the road to improving how educational institutions better respond to sexual violence, and moving forward with a notice and comment period for new formal guidance as Secretary DeVos has proposed should reflect another step forward. Rescinding the DCL while that process is completed, however, would be a step backwards, and is not necessary. The DCL contains quite explicit protections for not only survivors but the accused, and the Secretary's statements have certainly put schools on notice that they need to take protections for the accused seriously.

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## The Federal Jeanne Clery Act Already Addresses Many Concerns About Campus Sexual Assault Cases

09/14/2017 08:00 pm ET | Updated 4 days ago

In the week since U.S. Education Secretary Betsy DeVos announced impending changes to Title IX campus sexual violence guidelines there has been a lot of concern and speculation about what comes next. While these concerns are very important, there, however, has been virtually no discussion about similar requirements found in the federal Jeanne Clery Act that should provide more stability. They address prevention, assistance for survivors of sexual violence, and most pertinent to the current discussion procedures for institutional conduct proceedings.



S. DANIEL CARTER

Colin Goddard, a survivor of the April 16, 2007 Virginia Tech shooting and member of the VTV Family Outreach Foundation, speaks in favor of campus sexual assault provisions at the Violence Against Women Act National Rally, on June 26, 2012. United States Capitol, Washington, DC.

Because Clery's provisions are enumerated in statute and regulation they are much less subject to change by the Secretary. Every interested constituency group – including survivors, the accused, and institutions of higher education – and their advocates would be well served by taking note of Clery's longstanding requirements. Looking to these provisions, and making sure they are followed would go a long way to addressing all of the concerns raised by survivor and accused constituency groups in the last week.

Secretary DeVos herself has made note of them signaling that they would be taking on a more prominent role. In a statement on August 31st about a stronger approach to enforcing compliance she singled out "institutions willfully ignoring their Clery Act responsibilities." The U.S. Department of Education increased fines for violating the Clery Act to \$54,789 in April.

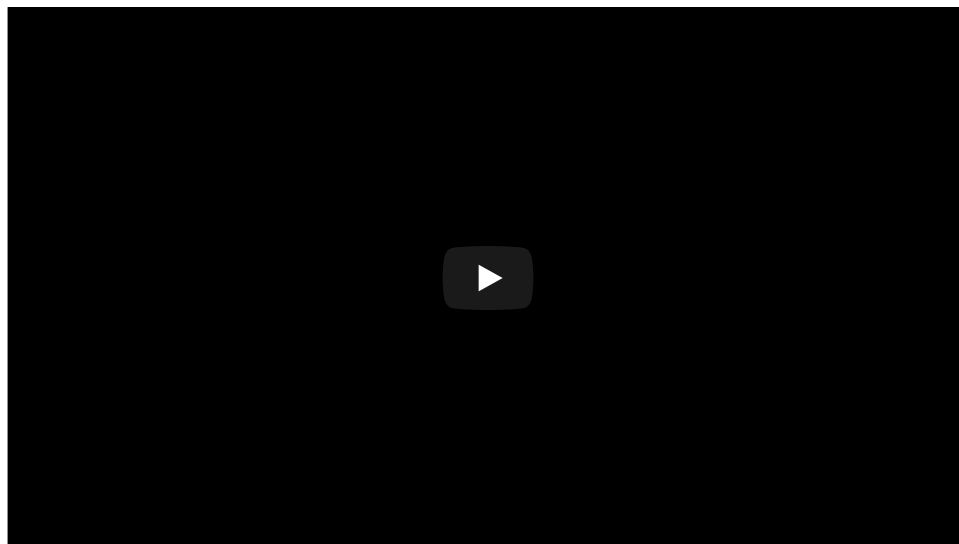
In the interests of providing a safe learning environment, and protecting tax payer investments, the Clery Act requires institutions of higher education participating in student aid programs to adopt policies prohibiting sexual assault, dating violence, domestic violence, and stalking. These policies must be made available to prospective students, and shared annually with current students by October 1st. Each type of disciplinary procedure used must be disclosed in detail including the burden of proof used.

The law already mandates much of what is being asked for by civil liberties advocates including explicit procedural safeguards. Proceedings must afford a “prompt, fair, and impartial process from the initial investigation to the final result”. They must be conducted “by officials who, at a minimum, receive annual training on the issues related to dating violence, domestic violence, sexual assault, and stalking and on how to conduct an investigation and hearing process”. Officials must “not have a conflict of interest or bias for or against the accuser or the accused”.



Clery in seeking a balanced approach also enumerates specific rights for both “the accuser and the accused” including:

- **The same opportunities to have others present.**
- **The opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice who may be an attorney.**
- **Simultaneous notification, in writing of the result of the proceeding; options, if any, to appeal; any changes to the result; and when such results become final.**
- **Timely and equal access to any information that will be used during informal and formal disciplinary meetings and hearings.**



The federal government’s interest in this issue is hardly new or partisan. Congress first passed the Clery Act’s sexual assault provisions, originally known as the “Campus Sexual Assault Victims’ Bill of Rights”, with strong bi-partisan support in 1992 and Republican President George H.W. Bush signed them into law.

Following an investigation by the Center for Public Integrity documenting systemic gaps in how both Title IX and these original provisions were being implemented, Congress began consideration of an update, known as the “Campus Sexual Violence Elimination Act”, in 2010. Congress subsequently included the updated provisions in the bi-partisan Violence Against Women Reauthorization Act of 2013 which Democratic President Barack Obama signed into law. These most recent amendments went through a thorough regulatory process in 2014, which included a public notice and comment period like that now proposed for the Title IX guidelines.

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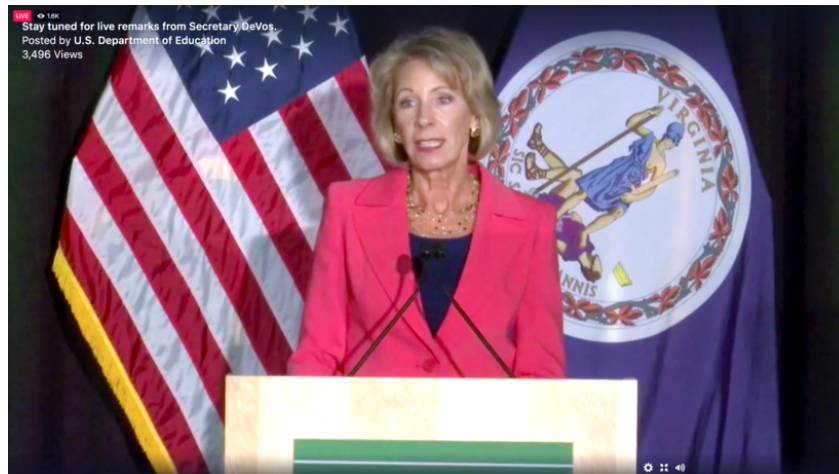


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## Now Is The Time To Move Title IX's Sexual Violence Protections Forward Not Backward

09/08/2017 05:00 pm ET

On Thursday, September 7, 2017 U.S. Secretary of Education Betsy DeVos stood at George Mason University's Antonin Scalia Law School and declared that the "era of 'rule by letter' is over." She was referring to the landmark "Dear Colleague Letter" (DCL) sent by the U.S. Department of Education on April 4, 2011 to educational institutions across the country explaining their obligations to combat sexual violence under the federal gender equity law Title IX. A great many of my colleagues in higher education, advocates, and most significantly sexual violence survivors are understandably concerned about the uncertainty of what comes next. This is a challenging time, but we have come too far to turn back the clock now, and working together we can hold our ground and even move things forward.



U.S. DEPARTMENT OF EDUCATION

Secretary of Education Betsy DeVos at George Mason University's Antonin Scalia Law School, Arlington, VA, September 7, 2017.

In today's environment it may be too easy to forget why the DCL was needed. While the federal Jeanne Clery Act and Title IX had afforded rights to both the accuser and the accused in campus sexual assault disciplinary proceedings for years, there was a history of decades of discrimination against survivors. The Center for Public Integrity led an extensive investigation and expose from 2008 to 2010 that brought this to light, notably a bleak history of lack of enforcement of Title IX requirements which were often unrecognized at the time. Brave survivors like Laura Dunn, now the founder and Executive Director of the not-for-profit SurvJustice, told their stories in great detail putting this issue at the forefront of a national dialogue. Congress enacted the Campus Sexual Violence Elimination Act, an update to Clery, and the Obama administration released the DCL because of this.



S. DANIEL CARTER

U.S. Vice President Joe Biden, flanked by U.S. Secretary of Education Arne Duncan, announces the Title IX "Dear Colleague Letter". The University of New Hampshire, Durham, NH, April 4, 2011.

The DCL profoundly improved response and awareness to campus sexual violence firmly putting it in the public consciousness in large part thanks to the work of then Vice President Joe Biden (whose words on a recent group call inspired me to write this), but it also drew scrutiny from critics who said it had deprived the accused of “due process” and hadn’t gone through necessary regulatory procedure for approval of guidance. It was this scrutiny that led to the Trump administration reevaluating the DCL, and deciding to conduct what is known as a “notice and comment” process where more formal guidance will be proposed in the Federal Register and formally promulgated. For now the DCL remains in place, with the Education Department (ED) saying some type of interim guidance will be forthcoming until the new guidelines are in place.



In her remarks, Secretary DeVos promised to uphold Title IX’s requirements. “We will continue to enforce it and vigorously address all instances where people fall short,” she said. “Sadly, too many fall short when it comes to their responsibility under Title IX to protect students from sexual misconduct, acts of which are perpetrated on campuses across our nation.”

While many of her comments did focus on the rights of the accused, she also made extensive comments about protecting survivors. “Any failure to address sexual misconduct on campus fails all students,” she said. “This is not about letting institutions off the hook. They still have important work to do.” The blank slate that existed at the time of her confirmation hearing is no longer an empty one, she has accepted ownership of and responsibility for this work like no Secretary of Education before her. She will be held to her word.

While the process she outlined will phase out the DCL, there are important reasons it was not eliminated earlier as some other Obama administration era guidance was. The bulk of it reasserted long established guidance from prior court rulings or previous rulemaking proceedings. These requirements include establishing grievance procedures. Addressing sexual violence as an extreme



form of hostile environment sexual harassment. And requiring prompt and equitable resolutions to complaints of sexual harassment. These principals are unassailable, and must continue to be part of guidance going forward.

Other, more seemingly controversial provisions of the DCL such as requiring use the “preponderance of the evidence” burden to prove responsibility under Title IX complaints were decades long practice by ED’s Office for Civil Rights. By its nature, a finding by more than 50% of the evidence, this is the standard that is the closest possible to treating the accuser and accused equally, and has long been upheld by courts that have evaluated the due process protections of educational conduct proceedings which aren’t criminal proceedings. It has also long been the industry standard for student conduct cases. Coupled with procedural safeguards for both the accused and accuser, such as adequate access to inculpatory and exculpatory evidence prior to any hearing, this standard is eminently defensible for continued inclusion in the forthcoming Title IX guidance as are others.

While there are certainly still challenges, some of them significant, the culture of higher education has dramatically changed for the better over the last six years, continuing a trend that was actually already underway. “No school is going to go back to doing what they were doing before the 2011 guidance,” Terry Hartle, senior vice president at the American Council on Education told Politico. Hartle, who has worked on campus safety policy since his time on staff in Congress during consideration of the original Campus Security Act (now the Jeanne Clery Act) in 1990, understands fundamentally how far higher education has come, perhaps better than anyone else.


“It’s more important than ever for people involved in this work to do things, not because they’re legally required to do it, and not do things that are illegal, but what I’m saying is — to do things that on a very basic human level are the right thing. Go for it,” Taylor Parker, a compliance officer and deputy Title IX coordinator at Ringling College of Art and Design, in Florida told Inside Higher Ed.

OCR’s formal Title IX guidance know as “Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties” was last updated in January of 2001 after a notice and comment period. It is certainly not lost on me that a lot has happened in the intervening 16 years making a formal update more than warranted. This in and of itself is not a bad thing, and all stakeholders will have an opportunity to influence the update. Addressing concerns to ensure that those accused too are treated fairly and equitably, which is what both Title IX and the Clery Act require, need not come at the expense of much needed protections for survivors of sexual violence or turning back the clock on them. These are not mutually exclusive options in any way.

I know that many people I work with feel discouraged at this time, but it is each and every single one of them that give me hope. Even in the face of hardship and difficulty there are countless brave survivors speaking out in ways big and small, publicly and privately. There are allies and advocates who tirelessly fight for justice. Finally, there are so many higher education professionals who’ve dedicated their careers to getting these issues right, something I could have never conceived of 25 years ago when I first got involved as a student.

Once this guidance is formally updated everyone affected – survivors, accused, and schools – will have a much clearer and most importantly even stronger framework than we have now from which to work, and understand their rights and duties. It is our obligation to get this right to ensure that the rights of all are upheld, and I remain undeterred in my commitment and confidence that we can achieve this goal.

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