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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

DAVID P. CLEARY, STAFF DIRECTOR
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<http://help.senate.gov>

October 12, 2017

The Honorable Betsy DeVos
Secretary of Education
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Ms. Candice Jackson
Acting Assistant Secretary
Office for Civil Rights
U.S. Department of Education
400 Maryland Avenue, S.W.
Washington, D.C. 20202

Dear Secretary DeVos and Acting Assistant Secretary Jackson:

We write today to follow up on the September 27, 2017 letter sent by thirty-two Senators about your decision to rescind the 2011 and 2014 guidance ("2011 guidance") on sexual violence and sex-based discrimination. To replace the 2011 guidance, you issued a Dear Colleague Letter and Questions & Answers document ("interim guidance"). The interim guidance is vague and often contradictory, and has caused confusion among college administrators, teachers, and students across the country. To provide some measure of clarity and to better understand the current thinking at the U.S. Department of Education ("Department"), we have a number of questions about how you intend to enforce the interim guidance and about the process you used to develop these new policies.

No student should have to worry about their safety or about being harassed because of their sex, yet numerous studies have demonstrated that far too many of our students experience sexual assault and sexual violence in school. One in five women experience sexual assault or sexual violence while on campus,¹ more than 20 percent of female high school students who dated experience dating violence,² and 12 percent have been forced to have sex.³ Unacceptably, these incidents of sexual violence in schools have been frequently swept under the rug, and too often

¹ Nick Anderson & Scott Clement, *1 in 5 College Women Say They Were Violated*, WASH. POST (Jun. 12, 2015) http://www.washingtonpost.com/sf/local/2015/06/12/1-in-5-women-say-they-were-violated/?utm_term=.f474ffc31b04; See also Christopher P. Krebs, Christine H. Lindquist, Tara D. Warner, Bonnie S. Fisher & Sandra L. Martin, *The Campus Sexual Assault (CSA) Study: Final Report*, at xiii (2007), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

² *Understanding Teen Dating Violence: Fact Sheet*, CDC, <https://www.cdc.gov/violenceprevention/pdf/teen-dating-violence-factsheet-a.pdf>.

³ *Sexual Violence: Facts at a Glance*, CDC, <https://www.cdc.gov/violenceprevention/pdf/sv-datasheet-a.pdf>.

schools do not live up to their obligation to ensure students have access to education in safe environments free from sex-based discrimination.

In order to address the epidemic of sexual assault on campuses, in 2011 the Obama Administration clarified schools' obligation to address sexual assault and sexual violence under Title IX of the Education Amendments of 1972 ("Title IX"). This guidance unquestionably helped to ensure that survivors across the country were able to come forward to report incidents of harassment, discrimination, assault, and violence and that schools understood their obligations to address those reports. With clearer protections in place, the number of complaints made to the Department's Office for Civil Rights alleging sexual violence at postsecondary institutions increased from less than 15 in 2009 to more than 160 in 2015.⁴

On September 22, 2017, you revoked the 2011 guidance, suggesting that it required schools to adopt procedures that "lack the most basic elements of fairness and due process, [and] are overwhelmingly stacked against the accused."⁵ Yet the new interim guidance promulgated by the Department raises serious concerns about fairness to survivors and student safety, and threatens to derail the tremendous progress we have made in recent years to ensure schools take seriously their responsibilities under Title IX to effectively respond to complaints of sexual assault.

The interim guidance allows schools to make the appeals process available only to the alleged perpetrator but not the student who brings a complaint. The interim guidance provides schools with no helpful instructions about how quickly complaints must be resolved. The interim guidance suggests that interim measures may be optional rather than mandatory, and provides no information about what types of interim measures are appropriate in either institutions of higher education or in our elementary and secondary schools. And the interim guidance allows schools to offer mediation as an informal method of resolving a sexual assault complaint made by a student, despite the fact that the 2001 guidance issued by the Department, which the interim guidance claims to rely on, states that mediation is inappropriate for incidents of sexual assault.⁶

Moreover, the Department has been extremely unclear with schools, the public, and this Committee about its intentions regarding Title IX guidance and rulemaking. On September 7, 2017, Secretary DeVos declared, "the era of the rule by letter is over," presumably referring to the use of sub-regulatory guidance to clarify schools' obligations under Title IX.⁷ However, just a few weeks after Secretary DeVos announced the Department was planning to no longer use guidance, Acting Assistant Secretary Jackson issued new substantive guidance. At the same

⁴ *Report: Complaints to OCR Have Doubled Since 2005*, CAMPUS SAFETY MAGAZINE (May 5, 2016), http://www.campusafetymagazine.com/clery/report_complaints_to_ocr_have_doubled_since_2005/.

⁵ See Dear Colleague Letter: Office for Civil Rights Withdraws Guidance on Sexual Violence and Issues Q&A on Campus Sexual Misconduct 1 (Sept. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [hereinafter "2017 Dear Colleague Letter"].

⁶ OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 21 (Jan. 19, 2001) <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf> [hereinafter "2001 Guidance"].

⁷ See Betsy DeVos, Sec'y, Dep't of Educ. Address at George Mason University (Sept. 7, 2017), <https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement>.

time, the Department announced that it intends to undergo rulemaking on Title IX, but has not provided any timeline for when that will begin.

All of these actions raise serious concerns about how the Department and OCR intend to enforce Title IX and ensure students' rights and safety are protected. To clarify a number of procedural and substantive issues related to the interim guidance and potential rulemaking, please answer the following questions no later than October 26, 2017:

1. Who did senior Department officials meet with when developing the interim guidance? Please provide a complete list of all individuals and groups who met with Secretary DeVos, Acting Assistant Secretary Jackson, or any other senior official when issues (other than party matters) related to sexual assault and sexual violence, sexual harassment, the 2011 guidance, or Title IX were discussed, or who provided any written input on these issues.
2. How many investigations involving sexual violence has OCR opened since January 1, 2017, and how many investigations involving sexual violence has OCR closed during that same period? Please provide a complete list of all ongoing OCR investigations into complaints involving sexual violence including in those in public elementary and secondary schools.
3. In the Department's view, are schools bound by the interim guidance?
4. How will OCR handle ongoing cases that were opened prior to the revocation of the 2011 guidance? Will those cases be evaluated against the 2011 guidance or the interim guidance?
5. When does the Department intend to begin a rulemaking process on schools' Title IX responsibilities?
6. One justification presented for revoking the 2011 guidance is that it did not undergo notice and the opportunity for public comment.⁸ This critique is difficult to understand, given that the interim guidance you promulgated is itself significant guidance that did not undergo a public notice and comment period. Please clarify why issuing significant guidance without notice and comment was inappropriate in 2011 but appropriate now.
7. The Dear Colleague letter suggests that the 2011 guidance was inappropriate because it recommended certain policies that were different from the procedures schools had previously used.⁹ Is it the Department's position that sub-regulatory guidance should never include procedures that are different from those in use by schools at the time?
8. The Dear Colleague letter implies that the 2011 guidance was inappropriate because it suggested that a right to personally cross-examine the opposing party might violate Title

⁸ See 2017 Dear Colleague Letter, at 2.

⁹ *Id.*, at 1.

IX.¹⁰ Is it the Department's position that there is no circumstance in which a respondent personally cross-examining the complainant could violate Title IX?

9. The interim guidance does not include any guidance to schools about whether to restrict questions about the complainant's sexual history. Will OCR consider a school in compliance with Title IX if it permits complainants to be questioned about their sexual history with third parties?
10. The Dear Colleague letter implies that the 2011 guidance was inappropriate because it forbade schools from relying on criminal investigations to resolve Title IX complaints.¹¹ However, the 2001 *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001) states "police investigations or reports may not be determinative of whether harassment occurred under Title IX and do not relieve the school of its duty to respond promptly and effectively." This position is consistent with that taken by courts and in OCR enforcement.¹² Does the interim guidance overrule the 2001 *Revised Sexual Harassment Guidance*? Will OCR consider schools in compliance with Title IX if they rely on police investigations or reports to determine whether a Title IX violation has occurred?
11. The Dear Colleague letter implies the 2011 guidance was inappropriate because it suggests there should not be "unnecessary delay" in resolving charges.¹³ In the Department's view, what specific circumstances would justify unnecessary delays?
12. The interim guidance says schools must conduct a prompt resolution of complaints of sex discrimination. The interim guidance gives no clarification or explanation about what timeframes are "prompt," saying only that it will evaluate schools' good-faith efforts to be timely.¹⁴ Please explain how OCR will analyze whether schools are making a "good faith effort." What evidence will schools need to show to demonstrate their effort is sufficient?
13. Will the evaluation of good-faith efforts include a review of the school's policy, or will those efforts be evaluated on a case-by-case basis? Does OCR expect schools to have a policy for promptly resolving complaints of sex discrimination?
14. Please provide a citation to the specific phrase or section of text of Title IX that the Department interprets to allow a waiver or compliance exception for a good-faith effort.

¹⁰ *Id.*

¹¹ *Id.*

¹² Forest Hills, No. 1:13-CV-428, 2015 WL 9906260, at 10; McGrath v. Dominican Coll. of Blauvelt, N.Y., 672 F. Supp. 2d 477, 488 (S.D.N.Y. 2009); Dawn L., 586 F. Supp. 2d at 370; Mills Pub. Sch. Dist., OCR Case No. 01-93-1123 (Dep't. of Educ. May 19, 1994); Acad. Sch. Dist. No. 20, OCR Case No. 8-93-1023 (Dep't. of Educ. April 16, 1993).

¹³ 2017 Dear Colleague Letter, at 1.

¹⁴ Q&A On Campus Sexual Misconduct 3 (Sept. 22, 2017), *available at* <https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf>.

15. Will OCR consider a school in compliance with Title IX if it makes a good-faith effort to conduct a prompt investigation, but fails, and a complaint is not resolved in a timely manner?
16. When addressing complaints of sexual assault or sexual violence, the interim guidance says that schools “may facilitate an informal resolution, including mediation.”¹⁵ This is in direct contradiction to the 2001 *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan 19 2001), which says mediation “will not be appropriate even on a voluntary basis”¹⁶ Does the interim guidance overrule the 2001 *Revised Sexual Harassment Guidance*? Will OCR consider schools in compliance with Title IX if they provide mediation for cases of alleged sexual assault?
17. The interim guidance states a school may utilize “informal resolution that does not involve a full investigation and adjudication” when the parties agree and when a school “determines that a particular Title IX complaint is appropriate for such a process.”¹⁷ What does the Department mean by informal resolution? How should schools determine when informal resolution is appropriate or inappropriate? During a Title IX investigation, how will OCR evaluate whether informal resolution was appropriate for a particular complaint?
18. The interim guidance says that it “may be appropriate” for a school to offer interim measures like counseling, modifications of course schedules, or leaves of absence to either or both of the reporting and responding parties.¹⁸ The Clery Act’s implementing regulations *require* institutions of higher education to offer victims protective measures if they are requested and reasonably available.¹⁹ Is it the Department’s view that a school may be in compliance with federal law if it does not offer interim or protective measures? Under what circumstances would it be inappropriate for a school to offer protective measures?
19. The interim guidance says that in “assessing the need for a party to receive interim measures, a school may not rely on fixed rules or operating assumptions that favor one party over another.”²⁰ How does this comport with the 2001 *Revised Sexual Harassment Guidance* (66 Fed. Reg. 5512, Jan. 19, 2001), which says that interim measures “should be designed to minimize, as much as possible, the burden on the student who was harassed”?²¹ Will OCR consider schools in compliance with Title IX if they provide interim measures that minimize the burden on the student who was harassed?
20. The interim guidance allows schools to use a clear and convincing standard of evidence rather than a preponderance of the evidence standard.²² The preponderance of the

¹⁵ See *id.*, at 4.

¹⁶ 2001 Guidance, at 21.

¹⁷ See Q&A On Campus Sexual Misconduct, at 4.

¹⁸ See *id.* at 2–3.

¹⁹ 34 C.F.R. § 668.46(b)(11)(v).

²⁰ Q&A On Campus Sexual Misconduct, at 3.

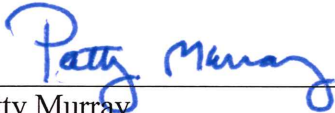
²¹ 2001 Guidance, at 16.

²² Q&A On Campus Sexual Misconduct, at 5.

evidence standard is used in many civil and civil rights cases.²³ Please explain why it would be appropriate for a school to adopt a higher standard of evidence in school disciplinary proceedings involving sexual harassment and sexual assault?

If you have any questions about this request, please contact Carly Rush or Laurel Sakai with the Health, Education, Labor, and Pensions Committee at 202-224-0767.

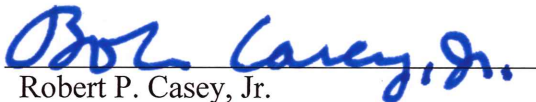
Sincerely,



Patty Murray
United States Senator



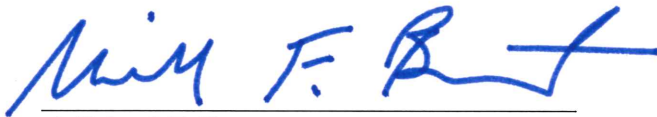
Bernard Sanders
United States Senator



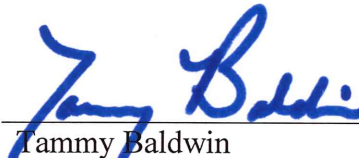
Robert P. Casey, Jr.
United States Senator



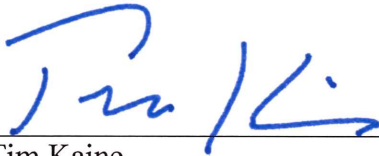
Al Franken
United States Senator



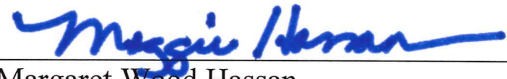
Michael F. Bennet
United States Senator



Tammy Baldwin
United States Senator



Tim Kaine
United States Senator



Margaret Wood Hassan
United States Senator

²³ See, e.g., *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) (noting that the preponderance of the evidence standard is the “conventional rule of civil litigation” under Title VII).