



June 26, 2014

The Honorable Tom Harkin  
Chairman  
Health, Education, Labor and Pensions (HELP) Committee  
U.S. Senate  
Washington, D.C. 20510

The Honorable Lamar Alexander  
Ranking Member  
Health, Education, Labor and Pensions (HELP) Committee  
U.S. Senate  
Washington, D.C. 20510

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TREASURER

**Re: Hearing on Sexual Assault on Campus – Working to Ensure Student Safety**

Dear Chairman Harkin and Ranking Member Alexander:

For nearly 100 years, the American Civil Liberties Union (ACLU) has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and the laws of the United States guarantee everyone in this country. The ACLU takes up the toughest civil liberties cases and issues to defend all people from government abuse and overreach. With more than a million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C., for the principle that every individual's rights must be protected equally under the law.

On behalf of the ACLU, we thank the Committee for convening this hearing on campus sexual assault and efforts to ensure student safety. This is an important and timely discussion, and one in which we are pleased to participate. We very much hope the committee will consider the recommendation offered below as it grapples with these issues.

**The Work of the Department of Education's Office for Civil Rights (OCR) on Sexual Violence and Harassment in Schools**

OCR is to be commended for its attention to and impactful enforcement of Title IX<sup>1</sup> against schools in cases involving sexual violence and harassment. The ACLU's Women's Rights Project has filed complaints with OCR using the administrative process, challenging how a Texas school district<sup>2</sup> responded to a high school student who reported sexual assault and another involving a student at Carnegie Mellon University.<sup>3</sup> The OCR process is an important avenue for relief and has helped bring

<sup>1</sup> 20 U.S.C. §§ 1681–1688 (2012).

<sup>2</sup> See Sandra Park, *Title IX Victory: Civil Rights Office Condemns School's Actions in Sexual Assault Case*, ACLU BLOG OF RIGHTS (June 20, 2012, 5:16 PM), <https://www.aclu.org/blog/womens-rights/title-ix-victory-civil-rights-office-condemns-schools-actions-sexual-assault-case>.

<sup>3</sup> See Complaint, available at [https://www.aclu.org/sites/default/files/assets/2013\\_12\\_18\\_-\\_carnegie\\_mellon\\_complaint\\_-\\_redacted\\_and\\_sanitized.pdf](https://www.aclu.org/sites/default/files/assets/2013_12_18_-_carnegie_mellon_complaint_-_redacted_and_sanitized.pdf).

about comprehensive changes at some schools. We urge continued support for OCR’s critically important work on these issues.

### **Dating Violence, Domestic Violence, Stalking, and Title IX**

In its April 2011 “Dear Colleague Letter,” OCR discussed how Title IX’s protections apply to actions such as rape, sexual assault, sexual battery, and sexual coercion.<sup>4</sup> Yet OCR did not address how other forms of gender-based violence, such as domestic violence, dating violence, and stalking, fall within Title IX’s reach. In contrast, other federal agencies have recognized that discrimination against victims of domestic violence can constitute sex discrimination.<sup>5</sup> Moreover, the Clery Act now requires schools to incorporate domestic violence, dating violence,<sup>6</sup> and stalking into their policies and procedures, and thus the need to explain how Title IX applies in those situations is even more pressing.

Congress should urge OCR to address this oversight as soon as possible. OCR should acknowledge that dating violence, domestic violence, and stalking are encompassed by Title IX and provide guidance on the issue so as to ensure that survivors of stalking, domestic violence, and dating violence on college campuses have access to the protections of Title IX to which they are entitled.

### **Need for Greater Guidance on the Due Process Rights of the Accused**

OCR has made great progress in providing guidance to schools on the rights of students who report experiencing sexual harassment and sexual violence. In guaranteeing those rights, OCR should also give clear guidance on the due process rights and other rights of the accused. OCR acknowledged the rights of the accused in its 2001 Guidance by referring to confidentiality concerns of the accused, due process rights of the accused, and First Amendment issues when “speech or expression are involved.”<sup>7</sup> Additional guidance issued by OCR has briefly mentioned the rights of the accused as well.<sup>8</sup> However, OCR guidance does not describe such rights with the level of detail that would inform students and institutions about the rights to which the accused is entitled.<sup>9</sup> Guidance from OCR regarding guaranteeing the

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<sup>4</sup> See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. to Colleagues, 1–2 (Apr. 4, 2011), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

<sup>5</sup> See, e.g., Memorandum from Sara K. Pratt, Deputy Sec’y for Enforcement and Programs, Office of Fair Hous. & Equal Opportunity, U.S. Dep’t of Hous. & Urban Dev. to FHEO Office Directors and FHEO Regional Directors: Assessing Claims of Housing Discrimination against Victims of Domestic Violence under the Fair Housing Act and the Violence Against Women Act (Feb. 9, 2011) (“[S]tatistics show that discrimination against victims of domestic violence is almost always discrimination against women. . . . domestic violence survivors who are denied housing, evicted, or deprived of assistance based on the violence in their homes may have a cause of action for sex discrimination under the Fair Housing Act.”); *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic Violence, Sexual Assault or Stalking*, EEOC, [http://www.eeoc.gov/eeoc/publications/qa\\_domestic\\_violence.cfm](http://www.eeoc.gov/eeoc/publications/qa_domestic_violence.cfm) (last visited May 29, 2014) (citations omitted) (“Title VII of the Civil Rights Act of 1964 (Title VII) prohibits discrimination based on . . . sex . . . and the Americans with Disabilities Act (ADA) prohibits discrimination on the basis of disability. . . . Title VII and the ADA may apply to employment situations involving applicants and employees who experience domestic or dating violence, sexual assault, or stalking.”).

<sup>6</sup> Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, § 304(a)(1)(B)(iii), 127 Stat. 89 (2013).

<sup>7</sup> See U.S. DEP’T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENT BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 16, 22 (2001), available at <http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.

<sup>8</sup> See U.S. DEP’T OF EDUC., OFFICE FOR CIVIL RIGHTS, QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 13, 26, 43–44 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf> (addressing due process, First Amendment, and other rights of the accused); Letter from Assistant Sec’y for Civil Rights, Office for Civil Rights, U.S. Dep’t of Educ. to Colleagues (July 28, 2003), available at <http://www2.ed.gov/about/offices/list/ocr/firstamend.html> (addressing First Amendment rights of the accused); Ali, *supra* note 4, at 12 (addressing due process rights of the accused).

<sup>9</sup> For example, the 2001 Guidance refers to due process rights in a general sense by stating “A public school’s employees have certain due process rights under the United States Constitution. The Constitution also guarantees due process to students in public and State-supported schools who are accused of certain types of infractions. The rights established under Title IX must be interpreted consistent with any federally guaranteed due process rights involved in a complaint proceeding . . . . Procedures that ensure the Title IX rights of the complainant, while at the same time according due process to both parties involved, will lead to

accused's rights, in a manner that preserves the protections afforded to the complainant, would ensure that all parties involved have access to justice.

### **Need for an Increased K-12 Focus**

Due to impressive student activism, the issue of campus sexual assault has begun to receive the attention it deserves. School districts' responses to sexual harassment similarly require increased focus, as sexual harassment and assault occur at significant rates in the K-12 grades.<sup>10</sup> Compared to colleges and universities, school districts are less likely to have formal policies, procedures, and trainings on the proper response to allegations of sexual violence. In addition, K-12 students are rarely educated about their rights under Title IX. All of these problems were evident in an OCR complaint brought by the ACLU on behalf of Rachel Bradshaw-Bean, a high school student who was accused of "lewdness" after she reported being sexually assaulted at school and was sent to the same disciplinary program as her attacker.<sup>11</sup> Ultimately, OCR found that the school district violated Title IX by failing to conduct its own investigation and retaliating against Rachel after she made the report.<sup>12</sup> To avoid additional cases like this one, greater awareness about sexual violence and increased enforcement of Title IX at the K-12 level is vitally important.

### **Civil Rights Obligations of Law Enforcement**

Much of the discussion about sexual violence in schools has rightly focused on the schools' responses and compliance with Title IX. It is important to recognize, however, that the criminal justice system is another key player and is also governed by civil rights laws. In some cases, student survivors will report the violence to law enforcement authorities only to have their complaints treated with hostility and dismissal. Moreover, some survivors will be deterred from filing complaints because of this expectation and experience.

When police officers rely on gender stereotypes and bias in addressing sexual violence complaints, they deny victims equal protection under the law. The Department of Justice has exercised its authority under 42 U.S.C. § 14141 and § 3789d to reform how police departments in New Orleans, Puerto Rico, and Missoula, MT respond to complaints of sexual violence,<sup>13</sup> and in the case of Missoula, coordinated its

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sound and supportable decisions. . . . Schools should be aware of these rights and their legal responsibilities to individuals accused of harassment." U.S. DEP'T OF EDUC., *supra* note 8, at 22.

<sup>10</sup> A report by the American Association of University Women found that nearly half of middle and high school students experienced some form of sexual harassment in the 2010-11 school year, that 13% of girls reported being touched in an unwelcome sexual way, and that 4% of girls reported being forced to do something sexual. CATHERINE HILL AND HOLLY KEARL, AMERICAN ASSOCIATION OF UNIVERSITY WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL 2, 12 (2011), available at <http://www.aauw.org/files/2013/02/Crossing-the-Line-Sexual-Harassment-at-School.pdf>. Another study by researchers at the University of Illinois at Urbana-Champaign found that 21% of middle school students surveyed in 2008 experienced a form of physical sexual violence. SARAH RINEHART, NAMRATA DOSHI, & DOROTHY ESPELAGE, SEXUAL HARASSMENT AND SEXUAL VIOLENCE EXPERIENCES AMONG MIDDLE SCHOOL YOUTH 4 (2014), available at <http://www.aera.net/Portals/38/Newsroom%20-%20Recent%20Research/Sexual%20Harassment%20and%20Sexual%20Violence%20Experiences%20Among%20Middle%20School%20Youth.pdf>.

<sup>11</sup> See Abigail Pesta, *Kicked out of high school for 'public lewdness' after reporting rape*, NBC NEWS (Dec. 23, 2013, 9:41 AM), <http://www.nbcnews.com/news/other/kicked-out-high-school-public-lewdness-after-reporting-rape-f2D11794148>.

<sup>12</sup> See Park, *supra* note 2.

<sup>13</sup> See U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE PUERTO RICO POLICE DEPARTMENT (2011), available at [http://www.justice.gov/crt/about/spl/documents/prpd\\_letter.pdf](http://www.justice.gov/crt/about/spl/documents/prpd_letter.pdf); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE NEW ORLEANS POLICE DEPARTMENT (2011), available at [http://www.justice.gov/crt/about/spl/nopd\\_report.pdf](http://www.justice.gov/crt/about/spl/nopd_report.pdf); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE MISSOULA POLICE DEP'T (2013), available at [http://www.justice.gov/crt/about/spl/documents/missoulapdfind\\_5-15-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulapdfind_5-15-13.pdf); U.S. DEP'T OF JUSTICE, CIVIL RIGHTS DIV., INVESTIGATION OF THE UNIV. OF MONTANA'S OFFICE OF PUBLIC SAFETY (2013), available at [http://www.justice.gov/crt/about/spl/documents/missoulafind\\_5-9-13.pdf](http://www.justice.gov/crt/about/spl/documents/missoulafind_5-9-13.pdf).

investigation with the Department of Education to also examine the University of Montana's practices.<sup>14</sup> This work highlights that any examination of a school's response to sexual violence should also include the relevant law enforcement agencies, as all are important components to whether a student has equal access both to educational opportunity and the justice system.

### **DOJ Guidance Would Improve Law Enforcement Engagement**

DOJ's work in this area would be amplified by issuing guidance that addresses the civil rights obligations of law enforcement agencies, including those responding to sexual assault on campus and at schools. Such guidance would address how sexual violence investigations should be conducted, supervision and oversight, classifying and tracking of complaints, and the training provided to officers. The guidance should also tackle issues that commonly arise when sexual violence occurs at school. For example, it should be clear that law enforcement should not dissuade victims from pursuing criminal justice charges by encouraging them to file complaints through school grievance or disciplinary procedures. Additionally, law enforcement should be aware that schools have independent legal obligations to respond to sexual assault and harassment, and thus schools are not bound by the findings of any criminal justice investigation. We urge members of the Committee to encourage DOJ to continue its work on these critical issues.

### **Need for Explicit Protections for LGBT Students**

We know that students who are, or perceived to be, lesbian, gay, bisexual, or transgender (LGBT), are especially vulnerable to discrimination, harassment, and violence, including sexual violence, in our nation's schools. A nationwide 2011 survey of more than 8,500 students between the ages of 13-20 found that eight out of ten LGBT students reported experiencing harassment at their school within the past year based on their sexual orientation.<sup>15</sup> Six in ten LGBT students reported feeling unsafe at school because of their sexual orientation.<sup>16</sup> Transgender students experienced more hostile climates than their non-transgender peers, with eight in ten reporting feeling unsafe at school because of their gender expression.<sup>17</sup> The effect of a hostile school climate on LGBT students has a direct and negative impact on the student's education. Nearly a third of LGBT students reported skipping at least once, and three in ten reported missing at least one entire day of school in the past month because of safety concerns.<sup>18</sup>

Despite these sobering statistics and the clear need for action, there is no federal law that explicitly protects LGBT students from discrimination. There is legislation modeled on Title IX currently pending in the Senate, the Student Non-Discrimination Act (S. 1088), which would establish a comprehensive, explicit prohibition against discrimination and harassment in all public elementary and secondary schools across the country based on a student's actual or perceived sexual orientation or gender identity. Congress should make passage of this civil rights measure a priority.

In the absence of a law like the Student Non-Discrimination Act, guidance like the recent Q&A on Title IX and sexual violence from OCR within the Department of Education is even more important. OCR made clear in that guidance that a school's obligation to respond appropriately to sexual violence complaints is the same irrespective of the sex or sexes of the parties involved, and that Title IX's sex

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<sup>14</sup> U.S. DEP'T OF JUSTICE ET AL., INVESTIGATION OF THE UNIV. OF MONTANA (2013), *available at* <http://www.justice.gov/opa/documents/um-ltr-findings.pdf>.

<sup>15</sup> JOSEPH G. KOSCIW ET AL., GAY, LESBIAN & STRAIGHT EDUCATION NETWORK, THE 2011 NATIONAL SCHOOL CLIMATE SURVEY: THE EXPERIENCES OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER YOUTH IN OUR NATION'S SCHOOLS 23 (2012), *available at* <http://glsen.org/nscs>.

<sup>16</sup> *Id.* at 20.

<sup>17</sup> *Id.* at 89.

<sup>18</sup> *Id.* at 21.

discrimination prohibition extends to claims of discrimination based on gender identity or a failure to conform to stereotypical notions of masculinity or femininity.<sup>19</sup> The guidance further stated that schools should investigate and resolve allegations of sexual violence regarding LGBT students using the same procedures and standards that it uses in all complaints involving sexual violence.<sup>20</sup> This clarity from OCR on the scope of the protections of Title IX is very important to LGBT students; however, it should not be read as an excuse for inaction on the part of Congress. The need for an explicit sexual orientation and gender identity non-discrimination prohibition in federal law remains as vital as ever. This gap in our civil rights laws has left LGBT students uniquely vulnerable to discrimination, harassment, and violence for far too long.

Fifty years of civil rights history demonstrate that laws similar to the Student Non-Discrimination Act are effective in preventing discrimination and harassment from occurring in the first place by prompting schools to take proactive steps to ensure a safe and supportive learning environment for all students who are in their care.

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Thank you for the opportunity to offer our views. Please do not hesitate to call Vania Leveille at (202) 715-0806 should you have any questions or need additional information.

Sincerely,



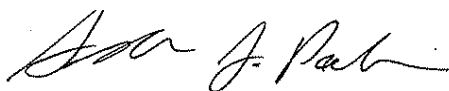
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CC: Members of the Health, Education, Labor and Pensions (HELP) Committee

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<sup>19</sup> OFFICE OF CIVIL RIGHTS, U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE 5 (2014), available at <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

<sup>20</sup> *Id.* at 5-6.