

Betsy DeVos  
Secretary Designate – US Department of Education  
Trump Transition Team  
1717 Pennsylvania Avenue,  
Washington, D.C., 20006

Dear Secretary-Designee DeVos:

I am writing to express concerns regarding the millions of college students affected by the seeming over-reach of the DOE's Office of Civil Rights (OCR) when it comes to the implementation of Title IX and the subject of sexual assault.

By way of brief introduction, I run a non-profit group called Empowering Victims focused on assisting victims of bullying, sexual assault, and domestic violence (<http://EmpoweringVictims.org>).

OCR, through its 2011 "Dear Colleague" letter to the schools, has put our colleges into the inappropriate and unwelcome position of investigating and labeling incidents as sexual assaults. As a result, Title IX's stated emphasis on preventing "hostile environments" has taken a back seat. Worse, the Dear Colleague letter starts with the implicit assumption that all sexual activity is an assault. It is no wonder students and college officials are confused.

The Dear Colleague letter has had two principal negative effects:

- 1) It mandated a standard of "affirmative consent" – which tells students they need explicit permission for each and every sexual activity, and that the absence of such explicit permission implies that an assault occurred. The present definition of this standard creates confusion, inconsistencies, and concerns over due process.
- 2) It suggested that hostile environments were incident based rather than context based. As a result, when schools attempt to comply with mandates regarding their investigations of allegations of sexual violence, they mostly fail to focus on the existence of a hostile environment, but get bogged down in determining whether an incident should be labeled as an assault. In the effort to label what occurred, normal due process safeguards quite often get overlooked while schools focus on punitive actions rather than remedial programs. The educational thrust of Title IX got lost.

The federal government has become deeply involved in the sex lives of college students in all the wrong ways as a direct consequence of this letter and its implementation. The letter itself has not been subject to the Administrative Procedure Act notice and comment period, nor has there been an opportunity for court challenges. Under the Obama Administration, our students are being told that sexual activity is a presumptive assault on their partner rather than a joint activity engaged in with respect for one another (a standard called respectful mutuality).

The new Administration has an opportunity to correct the Dear Colleague Letter's implication that any sexual activity is a presumptive assault. It can clarify "affirmative consent" to remove the implied conflation between assault and the absence of explicit permission for a sexual activity. The Department could more clearly focus college efforts on elimination of hostile environments to education, the core Title IX requirement. It could focus on colleges teaching students life lessons about respectful mutuality in their conduct, on communication, and about inebriation and responsible behavior.

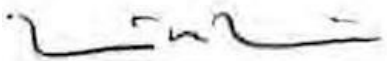
I have drafted and attached a four-page suggested supplement to the Dear Colleague letter that offers positive re-interpretations to reverse the overreach of the Obama administration's Title IX efforts regarding sexual activity. It restores the focus to the correction of hostile environments. It revises the standard to acknowledge that activity borne of "respectful mutuality," by definition, implies affirmative consent. It also clarifies that schools need to focus on how hostile environments can be remedied and prevented -- rather than attempting to label specific incidents as "violence" for the purpose of ordering punitive actions. It thus removes both the Federal Government and the schools from an inappropriate role supervising the sexual activities of college students.

I hope you will consider issuing the attached. I and my colleagues are available at your convenience to discuss this further.

I will be reaching out to the Transition Office next week.

Many thanks.

With respect,



Michael Lissack  
Executive Director

Enclosures:     Draft Dear Colleague Letter  
                      Case Study Examples

Dear Colleague:

We are writing you today to address problems that have arisen regarding the implementation of requirements stemming from Title IX of the Education Amendments of 1972 (Title IX), 20 U.S.C. §§ 1681 *et seq.* concerning the prevention of sexual harassment and specifically including sexual violence and the amelioration of the same should it exist. Sexual violence is a form of sexual harassment prohibited by Title IX. If a school knows or reasonably should know about harassment (including violence) that creates a hostile environment, Title IX requires the school to take immediate action to eliminate the harassment, prevent its recurrence, and address its effects. Schools have mostly focused on the elimination of harassment and have failed to carry out their obligations to both prevent its recurrence and address its effects.

Title IX and its implementing regulations, 34 C.F.R. Part 106, prohibit discrimination based on sex or gender in education programs or activities operated by recipients of Federal financial assistance. This letter is a supplement to our *Dear Colleague* letter of April 4, 2011 by providing additional guidance regarding the Title IX requirements as they relate to sexual harassment including violence. Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature. Sexual harassment which creates a hostile environment is prohibited under Title IX.

In the five and one half years since the issuance of our April 2011 letter, recipients have tended to focus on their procedures regarding investigations and hearings to determine whether sexual harassment or violence occurred. They have mostly failed to determine whether or not a hostile environment exists, who may be effected thereby, and how those effects can be ameliorated. We believe the current emphasis on investigations has led to confusion on the part of students, and in the process, the requirement for each school to take steps to prevent recurrence of harassment has seldom been met. This letter provides guidance to help schools implement Title IX regarding sexual harassment (including violence) by emphasizing a school's responsibility to prevent the creation, maintenance, or recurrence of hostile environments.

Nothing in Title IX requires that a school produce a finding that an act of sexual violence did or did not occur. Instead, Title IX requires that a school produce a finding as to whether or not, to the extent that harassment (including potential or actual violence) did occur, such harassment rose to the level where a hostile environment has been created. Hostile environments may affect just one student, a group of students, or the entire student body. As explained in OCR's 2001 Guidance, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or

benefit from the school's programs. Students' conduct must be viewed in context, meaning that the conduct to be examined includes the history of the relationship between a complainant and any accused, and the interactions the complainant has with the educational offerings of the school. A three-pronged inquiry is required.

The primary responsibility for every school under Title IX is to prevent the creation of, maintenance of, and recurrence of hostile environments. Individual incidents of harassment, no matter how severe, do not in and of themselves create a hostile environment. Interactions between the accused and the complainant before, during, and after the incidents which trigger a complaint determine the context to be examined regarding any reported incident. The complainant's access to educational programs also must be examined. The only relevant questions are those that seek to establish (1) if there was harassment, (2) if that harassment created or led to a hostile environment, and (3) if a hostile environment does exist, how it impacts both the complainant and other students.

Once a school has reached a finding that a hostile environment has been created, it must take immediate steps to address that hostile environment for the sake not only of the directly affected student (most likely the complainant) but also for the student body as a whole. Schools must provide an assurance that specific steps will be taken to prevent recurrence of any harassment, and to correct its discriminatory effects on the complainant and others, and then if appropriate, to provide a non-hostile environment.

The school's inquiry must in all cases be prompt, thorough, and impartial. It is the school's responsibility to determine if harassment occurred **and** a hostile environment has been created, **not** to determine if an incident of sexual violence occurred. This "labeling" of specific incidents as an occurrence of sexual violence is a direct violation of the requirement for impartiality in that the label has the potential to prejudice other related and potentially parallel proceedings.

Accusations that involve sexual violence require potentially two separate investigations. By definition, sexual violence is potentially criminal conduct; when a complaint of harassment includes a description of potential sexual violence, school personnel must determine, consistent with State and local law, whether, how, and by whom appropriate law enforcement or other authorities should be notified. Such notification does not fulfill a school's Title IX responsibility to investigate potential hostile environments. Because the standards for criminal investigations are different from that required under Title IX, police investigations or reports are not determinative of whether harassment violates Title IX. Conduct may constitute "harassment" under Title IX even if the police do not have sufficient evidence of a criminal violation. Unlike the school, the police are not expected to make a finding regarding the existence of hostile environments.

It is important as well to underscore that under the 2001 Guidance, a recipient's general policy prohibiting sex discrimination will not be considered effective and would violate Title IX if students are unaware of what kind of conduct constitutes sexual harassment, including sexual violence, or that such conduct is prohibited sex discrimination. Through this letter, we are urging you further to revise the language you use to explain to students what kind of behavior constitutes sexual harassment.

Most schools have adopted, and some states have further required the adoption of, a standard of "affirmative consent" – which is commonly defined as "only yes means yes," and that the absence of a "no" does not imply "yes" – to determine if sexual harassment occurred. Consequently, students are being taught – as part of a school's Title IX (and possibly state law) compliance – that they need explicit permission for each and every particular sexual activity, and that the absence of such explicit permission creates a presumption that an assault occurred. For Title IX purposes, schools have treated any finding that an assault occurred as per se sexual harassment and violence. This standard has become widespread since the issuance of the 2011 Dear Colleague Letter, yet has led to much confusion among students. Confusion about what constitutes sexual harassment (including violence) is not conducive to the prevention of hostile environments. By this letter, we state the relationship of the requirements of Title IX to "affirmative consent."

"Affirmative consent" is confusing to many students primarily because of the emphasis on the word "consent." Consent is about giving another individual permission to do something to you or on your behalf. Affirmative Consent to sexual activity in the context of Title IX is not based initially in the concept of permission but in the concept of mutual agreement and mutual respect. Sexual activity is done with one another – not done by one party to the other. Permission is generally not a prerequisite to affirmative consent – a context of respectful mutuality is. Respectful mutuality as the initial basis for affirmative consent should be the standard used to educate students about acceptable behavior. The requirement for explicit permission only arises when respectful mutuality is lacking. The articulated language your school uses in defining sexual harassment needs to reflect this distinction.

As part of the proactive measures to prevent sexual harassment and violence, OCR recommends expanding preventive education programs incorporating the above definition of "affirmative consent" outlined above. A school might communicate to their students that the goals regarding preconditions to sexual activity are mutuality, respect for one another, and a commitment to respect whatever boundaries the other person may assert as the activity occurs. When either respectful mutuality is missing or those asserted boundaries are perceived to be violated, and then explicit permission was not obtained, an encounter can become harassment and can form the basis for a Title IX complaint. The absence of explicit permission for an individual activity that occurs within

a context of respectful mutuality is unlikely, in and of itself, to create a hostile environment and therefore would not form the basis for a Title IX complaint.

Schools need to design and implement appropriate educational efforts that make clear what does and what does not constitute sexual harassment (including violence) under Title IX. Respectful mutuality as the initial basis for affirmative consent should be the standard used to educate students about acceptable behavior. Explicit permission for individual acts is only a requirement when the context for the encounter has ceased to be based on mutuality. Explicit permission is then the only acceptable means of demonstrating respect and avoiding harassment.

By acknowledging that the affirmative consent standard begins with respectful mutuality (and not with explicit expressions of permission), and by removing from schools responsibility for labelling specific incidents as acts of sexual violence, we believe that the focus of Title IX efforts on your campus can be redirected to where it belongs: the prevention and remediation of hostile environments. Eliminating confusion amongst students regarding the role of explicit permission in the concept of “affirmative consent,” and reminding them that the concept itself begins with respectful mutuality, will go a long way to preventing hostile environments from arising.

Title IX was not intended by Congress to cause schools to create a separate investigatory system regarding acts of sexual violence apart from law enforcement. Findings that there exists sexual harassment sufficient to create a hostile environment do not require any explicit determination of violence nor any labelling of a specific incident as an act of sexual violence. Addressing and remedying a hostile environment does not in and of itself require that punitive action be taken against anyone; remedial actions may suffice. Congress’s primary intent was to eliminate and prevent the creation of hostile environments. Any inference to the contrary that you derived from our April 2011 letter should be revisited. Your focus should be on the prevention and remediation of hostile environments, not on characterizing any specific incident(s) that led to a complaint.

To the extent that this letter conflicts with the guidance in our April 4, 2011 letter, this letter shall prevail. Nothing in either letter should be viewed as being inconsistent with our formal 2001 Guidance document.

Thank you for your attention to this matter.

## Potential Effects of the Proposed Dear Colleague Letter

### Case Study Examples

- 1) Stanford football player who was twice determined to have committed a sexual assault – but no corrective action was taken. See <http://www.nytimes.com/2016/12/29/sports/football/stanford-football-rape-accusation.html>

Current situation: Stanford's process is designed to investigate single incidents and the assumed punishment for a finding of "assault" is expulsion. No procedure is in place to address hostile environments. Because the investigating panels' findings were not at least 4-1 (now changed to a unanimous requirement among a panel of three), the player was allowed to remain on the team and was not disciplined. The victim withdrew from school in order to avoid the player.

Proposed situation: The panels both times found that a hostile environment had been created. At minimum, the player would have been removed from the team, and the victim would have been issued an order of protection (keeping the player away from her). Both students would have been referred to counseling. The football team would be required to undergo Title IX training. If the player and others then continued to harass the victim, removals from campus would be ordered.

- 2) Yale University suspends Delta Kappa Epsilon fraternity for five years for having its pledges march through campus in 2010 chanting, "No means yes, yes means anal" and for carrying a sign that read "We love Yale sluts." See <http://www.nytimes.com/2011/05/18/education/18yale.html>

Current situation: As described above. Not clear whether the school would address the campus wide impacts of the hostile environment so created.

Proposed situation: Clearly a hostile environment had been created. Punishment for the fraternity would be similar but all fraternity members at all fraternities would be required to undergo additional Title IX training. A campus wide forum would be held to promote open discussion of the issues raised by the incident.

- 3) Florida State student Erica Kinsman accuses the football team's quarterback, Jameis Winston, of rape. Winston is barely investigated and is declared innocent by the school. See <http://www.wsj.com/articles/jameis-winston-accuser-my-life-was-turned-upside-down-1419290782>

Current situation: As described above. No effort is made to restrain the college community in general nor the football team, in particular, from harassing Ms. Kinsman. The hostile environment created by the team (and then fueled by the community reaction when Ms. Kinsman went public) was never addressed.

Proposed situation: Winston's semi-public (and then public) insistence that Kinsman was a willing participant served to create a hostile environment for Kinsman. The football team's harassment of

Kinsman compounded the hostile environment. While the matter remained private, the football team and Winston would be required to undergo additional Title IX training. Once the matter became public, Winston would have been suspended from representing the school while the criminal investigation took place, and a campus wide forum would be held to promote open discussion of the issues raised by the incident. The incident could have served as an important lesson for the whole campus regarding “hooking up” with near strangers and not “taking advantage” of those who are inebriated. Nothing in the proposed Dear Colleague Letter would have affected how law enforcement handled the matter.

- 4) University of Tennessee at Chattanooga student Corey Mock is expelled despite having been found “not responsible” for sexual misconduct during the first hearing on his case. See <http://www.thecollegefix.com/post/24688/>

Current situation: As described above. No evidence of a hostile environment was ever presented. The complainant was never given counseling regarding inebriation.

Proposed situation: Because no hostile environment had been created, Mock should have suffered no penalties. The complainant should have been given counseling regarding inebriation.

- 5) Michigan student Drew Sterrett is expelled for “rape” despite evidence that the encounter was consensual. See <http://www.thecollegefix.com/post/24328/> and <http://www.thecollegefix.com/post/17398/>

Current situation: As described above. No evidence of a hostile environment was ever presented.

Proposed situation: Because no hostile environment had been created, Sterrett should have suffered no penalties.

- 6) Columbia student Paul Nungesser is publicly harassed by another student Emma Sulkowicz for “rape” despite two hearings which found Nungesser innocent and evidence that their encounters were consensual. See <https://heatst.com/culture-wars/columbia-student-the-damage-done-by-mattress-girl/>

Current situation: As described above. No evidence of a hostile environment regarding Sulkowicz was ever presented. The university refused to deal with the ample evidence that a hostile environment had been created for Nungesser.

Proposed situation: Because no hostile environment had been created by him, Nungesser should have suffered no penalties. By contrast, Sulkowicz actively worked to create a hostile environment and should have been counseled and disciplined. Continuation of the behavior should have resulted in expulsion.