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February 7, 2012

Russlynn Ali
Assistant Secretary for Civil Rights
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Sent by E-mail, U.S. Mail and Facsimile (202-453-6012)

Re: **WE SUPPORT THE TITLE IX DEAR COLLEAGUE LETTER ON CAMPUS SEXUAL VIOLENCE**

Dear Assistant Secretary Ali:

On April 4th, 2011, the US Department of Education's Office for Civil Rights (OCR) issued a "Dear Colleague Letter," (DCL) which explained schools' responsibilities for addressing campus sexual violence under Title IX.[1] While the letter does not amend Title IX or depart from previously issued regulatory guidelines, it provides depth and explanatory content on compliance standards. Announced jointly by Vice President Joe Biden and Secretary of Education Arne Duncan, the DCL signals the OCR's strong commitment to increased enforcement of Title IX as a prohibition against discrimination based on sex, including sexual harassment and sexual assault. Overall, the DCL addresses needed improvements in the promptness of administrative responses and resolutions of complaints, and enhanced equity in policies, investigations and procedures. The DCL also notes in particular that complaints against athletes must be subjected to the same rigorous standard as when the accused individual is a non-athlete.

Certain provisions in the DCL have been the subject of public controversy. This statement is intended as a response to that controversy and as a declaration of support for the DCL as a whole.

The two main provisions of the DCL that have generated the most debate are:

1. A provision recognizing that schools must apply a preponderance of evidence standard of proof when assessing the merits of a complaint of sex-based discrimination, harassment and/or violence;

2. A provision requiring equitable treatment of victims and accused students.[2]

[1] Throughout this document, the word "school" means K-12 school, district, college or university.

[2] In this context, "equitable" means fairness under the circumstances, rather than an assurance of precisely similar policies and procedures for all purposes.

Each of these will be addressed in turn and considered through the lens of Title IX's mandate requiring prompt, equitable and effective redress and remedies.[3]

THE PREPONDERANCE STANDARD

Proof by a "preponderance of the evidence" means the evidence is sufficient to persuade the finder of fact that the proposition is "more likely true than not."[4] Contrary to a few highly publicized claims, the DCL's requirement of a preponderance of evidence standard is neither new nor controversial. Indeed, according to Russlynn Ali, Assistant Secretary for Civil Rights at the Department of Education, approximately 80% of colleges and universities were already using the standard prior to the issuance of the DCL.[5] This reflects, in part, the OCR's consistent message to school over many years and administrations that they must apply a preponderance of evidence standard.[6] Prior to the issuance of the DCL, a minority of schools applied a "clear and convincing" or "clear and persuasive"[7] evidence standard. This much higher level of proof[8] had already been rejected by the OCR long before publication of the DCL.[9]

The preponderance standard is the only equitable choice under Title IX as it avoids the presumption, inherent in a higher standard of proof, that the word of a victim is less weighty than the word of an accused individual's denial. It also enables school officials to render more decisive findings with greater confidence, given that a determination that one individual is more credible than another will support a finding. This is important given widespread criticism of school policies that enable decision-makers to

[3] Title IX is codified in the Education Amendments of 1972, 20 U.S.C. §§ 1681-1688, and 28 C.F.R. § 54.135(b) (requiring schools to "adopt and publish" policies and procedures "providing for prompt and equitable resolution" of student complaints).

[4] See, e.g., *In re Winship, 397 U.S. 358, 371, 90 S.Ct. 1068, 1076, 25 L.Ed.2d 368 (1970);* Black's Law Dictionary 1182 (6th ed. 1990) ("[An] accurate notion of the preponderance-of-the-evidence standard is "evidence which as a whole shows that the fact sought to be proved is more probable than not.")

[5] See, e.g., http://www.msnbc.msn.com/id/44376767/ns/us_news-christian_science_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly/

[6] See e.g., October 16, 2003 letter from DC Office for Civil Rights enforcement officer Howard Kallem to Georgetown University noting that "federal courts, and therefore OCR, use a preponderance of the evidence standard in resolving allegations of discrimination under all of our statutes, including Title IX." See also, notification letter from the Washington Regional Office for Civil Rights, (OCR case No. 10922064, 1995) to Evergreen State College noting that the college had violated Title IX by, inter alia, applying a "clear and convincing," rather than "preponderance of evidence" standard. See also, OCR Complaint No. 11-03-2017, Opinion Letter of the Chief Attorney for the D.C. Enforcement Office of the Office for Civil Rights at the U.S. Department of Education, 2003 ("… federal courts, and therefore OCR, use a preponderance of the evidence standard in resolving allegations of discrimination under all of out statutes, including Title IX. Thus, in order for ... sexual harassment grievance procedures to be consistent with Title IX standards ... a preponderance of the evidence standard [must be applied]..."; OCR Complaint No. 15-06-2082 against Ohio State University (responding to a complaint regarding its "clear and convincing evidence" standard, OSU entered into an Early Complaint Resolution Agreement in 2007 and revised its standard to "preponderance of evidence").

[7] *Ryan v. Ryan, 419 Mass. 86, 92-93 (1994)* ("clear and persuasive" proof is the same as "strong, clear and convincing evidence").

[8] See, e.g., *Colorado v. New Mexico, 467 U.S. 310, 316, 104 S.Ct. 2433, 2437-38, 81 L.Ed.2d 247 (1984); In re Arnold and Baker Farms 177 B.R. 648, 654 (9th Cir.BAP (Ariz.),1994); U.S. v. Montague 40 F.3d 1251, 1254-1255, 309 U.S.App.D.C. 220, 223-224 (C.A.D.C., 1994)* (clear-and-convincing standard generally requires the trier of fact, in viewing each party's pile of evidence, to reach a "firm conviction of the truth on the evidence about which he or she is certain.")

[9] Supra, note 6.

claim they "believed" the victim, thus offered her counseling services, etc., but did not believe her ***enough*** to justify a finding against the assailant.[10]

While Title IX's equity mandate does not require that similar violations receive the same punishment, it does require that discrimination based on sex be subjected to the same policies and procedures as other forms of discrimination. As institutions routinely apply a preponderance standard to allegations of harassment based on race, ethnicity, disability, etc.,[11] it would be inequitable in the extreme not to apply the same standard to matters involving discrimination based on sex.

Because the preponderance standard allows for high confidence in decision-making, it better enables schools to take effective steps to prevent the future recurrence of discriminatory behavior, and to repair harm done to the school community.

Finally, a preponderance standard is appropriate because it is the applicable standard of proof in civil litigation when issues of sexual harassment and assault are redressed. If civil courts must apply a preponderance of evidence standard when holding schools and/or individuals accountable for negligence and intentional tort claims and civil rights violations, then schools should be obligated and empowered to protect their communities under the same standard. To conclude otherwise would ironically render victims more vulnerable to violence and harassment on college campuses than in the relatively less regulated "real" world simply because a lower standard will be less effective in deterring and vetting out harmful behavior within the community. Furthermore, with the same standard in place for school-based proceedings and civil justice matters, students may be less likely to file lawsuits because they will no longer perceive the civil justice system as affording a more favorable venue for legal redress.

THE EQUITABLE TREATMENT OF VICTIMS AND ACCUSED STUDENTS

Fair treatment of victims and accused students is consistent with the explicit mandate that schools adopt policies providing for "equitable" redress.[12] The DCL is clear that the rights, benefits, privileges or opportunities typically extended to accused individuals should also be extended to victims. For example, if an accused individual is provided with a right to an advocate, the same benefit should be made available to the victim. Equity also requires that relevant investigative materials be provided by the school to the accused individual and to the victim, such that they have equal opportunities to prepare and respond. The victim should neither be burdened with the responsibility of serving as a kind of

[10] Use of the word "her" here is simply a convention reflecting that most victims of sexual violence are women. The authors acknowledge male victimization, and do not intend its exclusion simply by the choice of pronoun.

[11] See e.g., University of Michigan, Office of Institutional Equity, available at http://hr.umich.edu/oie/discrimination/harassresol.html (stating that all investigations relating to discrimination and harassment will be subject to the preponderance of the evidence.); Purdue University, Procedures for Resolving Complaints of Discrimination and Harassment; http://www.purdue.edu/ethics/resolvingcomplaints.html (applying the preponderance standard to all charges of discrimination.); Duke Law, Policy 7-1. Duke University Non-Discrimination Policy, available at http://www.law.duke.edu/about/community/rules/sec7 (applying the preponderance of the evidence standard to discrimination on the basis of race, color, religion, national origin, disability, veteran status, sexual orientation, gender identity, sex, genetic information, or age in the administration of its educational policies, admission policies, financial aid, employment, or any other university program or activity.)

[12] *Supra*, note 2, Title IX, 1972.

"prosecutor" during the process, nor be relegated to the role of mere witness with no individual rights at stake. Title IX obligates the school, not the victim, to take all responsibility for the remediation of harm by providing for the prompt, equitable and effective redress of complaints.

A minority of schools have adopted policies and procedures that mimic criminal justice proceedings. These school procedures afford greater rights to the accused student, with few if any substantive or enforceable rights for victims. Applying criminal justice rules to school-based proceedings is not appropriate because schools are not the government and are not vested with the power to deprive an individual of a liberty interest akin to the nature of liberty at stake in criminal courts. Moreover, unlike the criminal justice system, the primary purpose of schools under Title IX is to ensure equal access to education, not to deter, punish and provide rehabilitation for accused and convicted criminals.[13]

This does not mean schools should be unfair to accused students or that the interests at stake for accused students are not important. Indeed, the U.S. Supreme Court has held that public schools must provide some degree of due process to students prior to the imposition of punishment that rises to a level of suspension or dismissal.[14] The Court has cautioned, however, that the student's interest is much less weighty than that which is at stake for criminal defendants. Thus, far less "process" is required in school-based proceedings compared to the protections of due process afforded the accused in criminal justice matters.[15]

At the same time, schools *must* act to protect students from discrimination, harassment, criminal victimization and other types of harm.[16] In certain circumstances, schools are even obligated to take action *prior* to affording an accused individual notice and an opportunity to be heard, as when a "student's presence endangers persons or … threatens disruption of the academic process…"[17]

Equity does not mean applying exactly the same rules to victims as accused students. For example, it is inappropriate for schools automatically to issue mutual "no-contact" orders between victims and offenders as this restrains a victim's freedom of movement and access to campus facilities without justification. Likewise, a victim should not be made to adjust her living conditions and/or be ordered to stay away from the offender on the grounds that requiring the accused individual to adjust his

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[13] *See also,* Wendy Murphy, "Using Title IX's 'Prompt and Equitable' Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redres Sexual Assault on Campus", 40 New England Law Review, No. 4, pp. 1007-10222 (2006).

[14] *Goss v. Lopez, 419 U.S. 565 (1975),* "Due process requires, in connection with a suspension of 10 days or less, that the student be given oral or written notice of the charges against him and, if he denies them, an explanation of the evidence the authorities have and an opportunity to present his version. Generally, notice and hearing should precede the student's removal from school, since the hearing may almost immediately follow the misconduct, but if prior notice and hearing are not feasible, as where the student's presence endangers persons or property or threatens disruption of the academic process, thus justifying immediate removal from school, the necessary notice and hearing should follow as soon as practicable." Pp. 577-584.

[15] *Goss, supra, "*We stop short of construing the Due Process Clause to require, countrywide, that hearings in connection with short suspensions must afford the student the opportunity to secure counsel, to confront and cross-examine witnesses supporting the charge, or to call his own witnesses to verify his version of the incident. Brief disciplinary suspensions are almost countless. To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process." Pp. 583.

[16] *See e.g., Gebser v. Lago Vista Indep. Sch. Dist.,* 524 U.S. 274 (1998), *Davis v. Monroe County Bd. of Ed.,* 119 S.Ct 1661 (1999).

[17] Goss, *supra*, note 14 and 15.

circumstances will violate his due process rights. The DCL makes clear that imposing any such burdens on a victim is inequitable and may constitute new harm under Title IX because the victim may endure additional suffering that interferes with her ability to participate in educational programs.

Finally, equity requires schools to consider allegations that an accused offender has committed multiple similar offenses. In criminal proceedings, this so-called "pattern evidence" can be excluded because judges are duty bound to apply criminal Constitutional rights that are not applicable in school-based proceedings. The special nature of a school community renders "pattern evidence" far more relevant because schools can be held liable to victims if they are "deliberately indifferent" to known risks of harm on campus, or fail to meet the duty of reasonable care for foreseeable harm. Likewise, consideration of "pattern evidence" is relevant to a proper assessment of whether class-based harm has occurred. This is an especially important factor in sexual assault cases because 90% of campus assaults are committed by repeat offenders.[18] Indeed, failure to consider such evidence could inhibit or prevent equitable consideration of specific cases and interfere with a school's duty to redress discrimination directed at protected classes on campus.[19]

Other Issues

DOES THE DCL SATISFY THE ADMINISTRATIVE PROCEDURES ACT?

A question was raised as to whether the DCL violates the Administrative Procedures Act (APA), which requires government agencies to propose new regulations before implementing them, and provide for a period of public commentary. This objection is inapt as the DCL is not a "new regulation"[20] and the OCR has always had authority to enforce Title IX. The DCL is not a regulatory scheme, but rather, serves as a clear statement of the OCR's established positions on issues of promptness, equity, effective redress, risk management and legal consistency.[21]

WHAT DOES "PROMPTNESS" MEAN?

While there is no fixed period of time within which complaints must be finally resolved, the DCL is clear that "promptness" is not satisfied if a school delays conducting an investigation and/or holds off convening a hearing until the criminal justice system has run its course. In fact, a school will be found to have violated Title IX's promptness mandate if it declines to act because it is awaiting either the completion of a criminal investigation, prosecutorial decision as to whether charges will be filed and/or a final judgment by judge or jury. The DCL requires promptness as to the initial investigation and hearing process, as well as to post-decision appeals, rehearings and requests for reconsideration. In short, promptness means prompt as to the ***final*** resolution, including all appeals and post-decision "motions," and the DCL indicates that a school should reach its full and final resolution within a 60-day timeframe.

[18] Lisak, D. & Miller, P. M. (2002). Repeat rape and multiple offending among undetected rapists. *Violence and Victims*, 17, 73-84.

[19] Some campus procedural rules, such as those set out in the Pennsylvania State System of Higher Education and the Wisconsin System, forbid consideration of past violations at the finding stage of a hearing. The DCL clarifies that Title IX's equity mandate will be applied to resolve conflicts on these issues.

[20] *Supra*, note 6.

[21] *Supra*, notes 4 and 5.

HOW DOES THE DCL APPLY TO ATHLETICS SPECIFICALLY?

The DCL requires that athletes accused of sexual violence be subject to the school's regular Title IX disciplinary process, without preferential treatment, softer sanctions or tracking of misconduct and disciplinary action solely through the athletics department, as is the policy on some campuses. In addition, the DCL singles out athletes and athletics departments as audiences worth targeting for preventive education programs, and recommends that schools develop specific sexual violence materials within student-athlete handbooks. Such material should include the schools' policies, rules, and resources for students, faculty, coaches, and administrators. The materials also should include resources for student-victims looking for help, including specific information about their rights and the responsibilities of teammates and employees of athletics departments regarding reporting and other obligations when sexual assaults are reported or reasonably known.

THE CAMPUS SaVE ACT

We believe the April 4th, 2011 Dear Colleague Letter advances the inherent societal good that gender equity represents. The DCL offers uniformity and clarity on many important issues related to Title IX, and promises to improve student access to equal educational opportunities. To the extent that the recently proposed Campus SaVE Act[22] seeks to codify certain provisions of the DCL, such as mandated use of the preponderance standard, we are supportive.

We agree with the aims of gender equity in education under Title IX. Towards that end, we are supportive of the powerful message expressed in the DCL and the ideas expressed in this statement.

Signed,

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[22] *See*, http://www.securityoncampus.org/pdf/SaVEsummary.pdf

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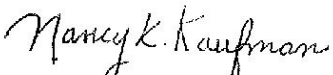
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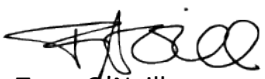
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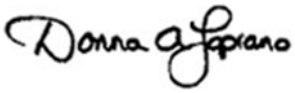

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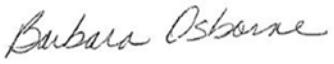

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