

July 13, 2016

The Honorable John B. King, Jr.  
Secretary  
U.S. Department of Education  
400 Maryland Avenue, SW  
Washington, D.C. 20202

Dear Secretary King,

On behalf of the National Women's Law Center and over 80 undersigned organizations, we write in support of the U.S. Department of Education's efforts to address sex discrimination in our nation's schools. Specifically, the 2010 Dear Colleague Letter on Bullying and Harassment, the 2011 Dear Colleague Letter on Sexual Violence and accompanying 2014 Questions and Answers on Title IX and Sexual Violence, and the 2016 Dear Colleague Letter on Transgender Students have provided much needed clarification of what Title IX requires schools to do to prevent and address sex discrimination in educational programs. These guidance documents and increased enforcement of Title IX by the Office for Civil Rights have spurred schools to address cultures that for too long have contributed to hostile environments which deprive many students of equal educational opportunities.

Unfortunately, the Department is facing unwarranted criticism for doing its job. Some advocacy organizations, law professors, and legislators claim that the Department violated the Administrative Procedure Act (APA) by issuing the above guidance documents without going through a formal notice and comment process. They also allege that grievance procedures outlined in the 2011 sexual violence guidance violate due process rights of students accused of sexual assault. Both of these arguments are without merit.

First, despite what detractors claim, the guidance letters under attack are not new rules but simply clarifications of existing rights under Title IX.<sup>1</sup> As such, they were not required to go through the notice and comment process.<sup>2</sup> As recently as 2015, the Supreme Court has reaffirmed that the APA allows federal agencies to issue "interpretive rules" that explain how the agency construes the laws and regulations it enforces.<sup>3</sup> Interpretive rules do not require notice and comment.<sup>4</sup> Because the guidance documents set forth above are interpretive rules clarifying the Department's construction of Title IX, the Department did not violate the APA in issuing them.

Nor does the 2011 sexual violence guidance deprive accused students of due process. Since the Title IX regulations were issued in 1975, educational programs have been required to create "grievance procedures providing for prompt and *equitable* resolution" of complaints (emphasis added).<sup>5</sup> The 2011 guidance

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<sup>1</sup> Furthermore, the 2011 guidance clarified a 2001 guidance document on sexual harassment that did go through an elective notice and comment period.

<sup>2</sup> *Perez v. Mortgage Bankers Ass'n*, 135 S. Ct. 1199, 1204 (2015); 5 U.S.C. § 553(b)(A).

<sup>3</sup> *Id.*, 135 S. Ct. at 1204; *Shalala v. Guernsey Memorial Hospital*, 514 U.S. 87, 99 (1995); *Lincoln v. Vigil*, 508 U.S. 182, 196-97 (1993); *Chrysler Corp. v. Brown*, 441 U.S. 281, 302, n. 31 (1979); *United States v. Florida East Coast Railway Co.*, 410 U.S. 224, 240-41 (1972); 5 U.S.C. § 553(b)(A).

<sup>4</sup> *Perez*, 135 S. Ct. at 1204.

<sup>5</sup> 34 C.F.R. §106.8(b).

further clarified what constitutes an *equitable* grievance procedure. Namely, the Department reminded schools that both the complainant and the respondent should have the same rights in any grievance procedure—e.g., the same right to review documents, the same right to counsel, the same right to present witnesses and evidence, and the same right to an appeal.

Moreover, the Department clarified that an equitable grievance procedure means that both the complainant and respondent bear the same burden of proof—i.e., that schools should use the preponderance of the evidence standard. This standard is used in cases alleging discrimination under other civil rights laws,<sup>6</sup> in civil lawsuits between two private parties (including suits related to possibly criminal conduct such as tort actions for battery or murder/wrongful death), and in 80 percent of schools according to a 2002 report issued well before the 2011 guidance. In fact, by demanding equitable treatment of both the respondent and complainant, the Department’s interpretation of Title IX provides students accused of sexual assault with procedural protections beyond those the Supreme Court has said are guaranteed under the U.S. Constitution.<sup>7</sup>

The Department’s Title IX guidance letters and enforcement have been vital in the effort to ensure that students are not discriminated against based on sex in school. Yet, as advocates for civil rights, women’s rights, disability rights, LGBTQ rights, immigrants’ rights, racial justice, economic justice, education, and youth, we know that such discrimination continues to deny students equal access to education at all levels. We urge the Department to continue helping schools understand their legal obligations—for example, by providing materials and guidance focused on sexual violence in elementary and secondary schools—which affects a significant portion of the children we represent.

Thank you for your vigilance in ensuring that schools live up to their obligations under federal civil rights laws and for fighting discrimination in the classroom and on campus. If you have any questions, please contact Neena Chaudhry ([nchaudhry@nwlc.org](mailto:nchaudhry@nwlc.org)) or Adaku Onyeka-Crawford ([aocrawford@nwlc.org](mailto:aocrawford@nwlc.org)) at the National Women’s Law Center at 202.588.5180.

Sincerely,

National Women’s Law Center, joined by:

Alliance for Girls  
American Association of University Women (AAUW)  
AAUW-San Francisco  
American Federation of Teachers (AFT)  
American-Arab Anti-Discrimination Committee  
Anti-Defamation League  
The Arc  
Asian Pacific American Labor Alliance, AFL-CIO (APALA)

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<sup>6</sup> See, e.g., *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993); *Lynch v. Belden & Co.*, 882 F.2d 262, 267, 269 (7th Cir. 1989); 42 U.S.C. § 20001 (2006).

<sup>7</sup> See *Goss v. Lopez*, 419 U.S. 565, 579 & 583 (1975) (“[S]tudents facing suspension [in public educational institutions] must be given some kind of notice and afforded some kind of hearing. . . . 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.”).

Association of University Centers on Disabilities  
Bay Area Girls Rock Camp  
BLMNYC/EBG  
The Body Positive  
Breaking the Silence Philly (BTSPHL)  
Brockport Social Work Association  
Campus Pride  
Casa de Esperanza: National Latin@ Network  
Center for Women Policy Studies  
Champion Women  
Clearinghouse on Women's Issues  
Education Law Center-PA  
End Rape On Campus (EROC)  
FAIR Girls  
Feminist Majority Foundation  
FISA Foundation  
Freedom Network USA  
Futures Without Violence  
Georgetown Law Center on Poverty and Inequality  
Girls for Gender Equity  
Girls Inc.  
Girls On the Run International  
GLSEN  
GO! Athletes  
Healthy Teen Network  
Human Rights Campaign  
In Our Own Voices, Inc.  
It's Time Network  
Know Your IX  
The Leadership Conference on Civil and Human Rights  
League of United Latin American Citizens  
Legal Momentum  
MALDEF  
The Maryland Women's Heritage Center  
Mosaic Family Services  
NAACP  
National Alliance for Partners in Equity (NAPE)  
National Alliance to End Sexual Violence  
National Asian Pacific American Women's Forum (NAPAWF)  
National Center for Lesbian Rights  
National Center for Transgender Equality  
National Coalition Against Domestic Violence  
National Council of Jewish Women  
National Council of Juvenile and Family Court Judges (NCJFCJ)  
National Council of La Raza

The National Crittenton Foundation  
National Disability Rights Network  
National Domestic Violence Hotline  
National Education Association  
National Organization for Women  
National Women's Political Caucus  
National Women's Political Caucus of Calif.  
National Women's Political Caucus of Fresno, Inc.  
National Women's Political Caucus, Sacramento  
NWPC Silicon Valley  
PAVE: Promoting Awareness, Victim Empowerment  
Peers Envisioning and Engaging in Recovery Services (PEERS)  
The Red Web Foundation  
Rights4Girls  
Robert F. Kennedy Children Action Corps.  
San Francisco Girls Chorus  
Southeast Asia Resource Action Center  
Stop Sexual Assault in Schools (SSAIS.org)  
SurvJustice Inc.  
Title IX and Clery Act Consulting, LLC  
TransAthlete.com  
Turning Heads  
Waddell Consulting Services  
Willpowered Woman  
Women's Law Project  
Women's Sports Foundation  
Xinachtli Rites of Passage  
Young Women's Freedom Center