



September 10, 2015

Chairwoman Virginia Foxx
U.S. House Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Training
2181 Rayburn House Office Building
Washington, D.C. 20515

Ranking Member Ruben Hinojosa
U.S. House Committee on Education and the Workforce
Subcommittee on Higher Education and Workforce Training
2181 Rayburn House Office Building
Washington, D.C. 20515

Re: Preventing and Responding to Sexual Assault on Campus

Dear Chairwoman Foxx, Ranking Member Hinojosa, and honorable members of the Committee:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending student and faculty rights on America's college and university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity.

FIRE thanks the Committee for dedicating the time to address the issue of sexual assault on campus. To supplement the oral testimony I provided at today's hearing, below please find a detailed overview of FIRE's concerns regarding the adjudication of allegations of sexual assault on campus and our analysis of relevant legislation pending in Congress.

I. Solutions Must Take the Rights of All Students Into Account

As we explained in our Comment to the White House Task Force to Protect Students From Sexual Assault ("Task Force"), due process rights are one of FIRE's core concerns. *See* Attachment A. While there is no doubt that institutions of higher education are both legally and morally obligated to effectively respond to known instances of sexual assault, public institutions are also required by the Constitution to provide meaningful due process to the accused. *Goss v. Lopez*, 419 U.S. 565, 584 (1975); *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). FIRE has long maintained that these two responsibilities need not be in tension.

As I am sure each of the members of the Committee would agree, access to higher education is critical—especially in today’s economy, where a college degree is so often a requirement for career advancement. Given the high stakes for both the accusers and the accused in campus sexual assault disciplinary hearings, it should be beyond question that neither student’s educational opportunities should be cut short unjustly. Just as it is morally wrong and unlawful for a college to sweep allegations of sexual assault under the carpet, it is also inexcusable both ethically and legally to expel an accused student after a hearing that provides inadequate procedural safeguards. As recent news reports have demonstrated all too well, both of these regrettable outcomes occur at campuses across the country with alarming frequency. *See* Attachment B.

Institutions adjudicating guilt or innocence in sexual assault cases must do so in a fair and impartial manner that is reasonably calculated to reach the truth. This should be self-evident. Indeed, in the April 4, 2011, “Dear Colleague” letter issued by the Department of Education’s Office for Civil Rights (OCR), the agency acknowledged that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.”

Disappointingly, however, OCR’s own rhetoric and actions have been decidedly one-sided, emphasizing the rights of the complainant while paying insufficient attention to the rights of the accused. For example, OCR has mandated that institutions utilize our judiciary’s lowest burden of proof, the “preponderance of the evidence” standard, despite the absence of any of the fundamental procedural safeguards found in the civil courts of law from which that standard comes. Without the basic procedural protections that courts use (like rules of evidence, discovery, trained legal advocates, the right to cross-examine witnesses, and so forth), campus tribunals are making life-altering findings using a low evidentiary threshold that amounts to little more than a hunch that one side is right. This mandate is not just unfair to the accused—it reduces the accuracy and reliability of the findings and compromises the integrity of the system as a whole.

Perhaps predictably, OCR’s lopsided focus has had negative consequences for the rights of accused students in sexual assault adjudications conducted in recent years. As the partners of the National Center for Higher Education Risk Management (NCHERM) stated in a May 2014 open letter: “We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence — or the lack thereof — because they think they are supposed to, and that doing so is what OCR wants.” *See* Attachment C. NCHERM’s statement was remarkable not only because of the organization’s extensive client list—per the group’s website, it currently provides legal services to over 65 colleges and universities and consulting services to thousands of clients—but also because Brett Sokolow, NCHERM’s founder, President, and Chief Executive Officer, has been an outspoken proponent of federal involvement in campus sexual assault adjudication, describing himself as an “activist” for victims’ rights. In other words, OCR’s mandates have had such a negative effect on campus justice that even outspoken proponents of those mandates are voicing serious concern.

Critics may have legitimate grievances with the way campus tribunals have often treated accusers. But exchanging institutional disregard for accusers for an institutional disregard for the accused is not an acceptable outcome and does not advance justice. FIRE is hopeful that the Education and Workforce Committee will tackle this important issue in a way that addresses the needs of all students.

II. Concerns about Institutional Competency

Thus far, a great deal of the discussion about how to best address sexual assaults on college campuses has accepted the premise that university administrators are qualified to serve as fact-finders and adjudicators. But if there is one thing that all sides of this issue agree on, it is this: Few, if any, schools have demonstrated the competence necessary to capably respond to the problem of sexual assault on campus. Too many campus administrators inject their biases into the process, while the rest, despite often trying their best, simply lack the necessary expertise or proper tools. This is the reality of the current system. It is very difficult to craft legislative remedies to the basic problems presented by entrusting the adjudication of allegations of serious criminal misconduct to a campus judicial system that was not intended to handle serious crimes and which will never have the appropriate tools or resources to do so. The current arrangement benefits no one, and its readily apparent failures should lead us all to question the wisdom of doubling down on this broken system.

FIRE is not alone in our assessment that campus judiciaries are ill-equipped to adjudicate sexual assault cases. This concern was expressed eloquently by the Rape, Abuse and Incest National Network (RAINN) in its comment submitted to the White House Task Force:

It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.

See Attachment D, p. 9.

University of California system President Janet Napolitano recently expressed a similar sentiment in an article published in the *Yale Law & Policy Review*. She cautioned, “the federal government’s expectations, especially related to investigations and adjudication, seem better-suited to a law enforcement model rather than the complex, diversely populated community found on a modern American campus.”¹ On this point, she is right.

Campus disciplinary boards lack the ability to collect, hold, and interpret forensic evidence. They lack the ability to subpoena witnesses and evidence or even put under oath those who appear voluntarily. The parties typically lack the representation of experienced, qualified

¹ Janet Napolitano, “Only Yes Means Yes”: *An Essay on University Policies Regarding Sexual Violence and Sexual Assault*, 33 *YALE L. & POL’Y REV.* 387, 398-99 (2015).

legal counsel, and they do not have the right to discovery. These proceedings are not governed by the rules of evidence and often disregard the right to confront adverse witnesses. The fact-finder—often a single investigator—decides whether there was a sexual assault under the low “preponderance of the evidence” standard. Put simply, expecting these tribunals to reach reliable, impartial, and just results is unrealistic.

Training requirements for the campus administrators (and sometimes even students and faculty) handling these cases are unlikely to sufficiently fix the core disjunction between the competencies of institutions of higher education and the grave responsibilities inherent in the adjudication of sexual assault allegations. Sexual assault allegations are often nuanced and complex, which is one of the reasons why they present challenges to even the trained professionals employed by our criminal justice system. As the NCHERM partners observed: “[T]he public and the media need to understand that campus [sexual assault] complaints are not as clear-cut as the survivors at [victims’ advocacy group] Know Your IX would have everyone believe.” *See* Attachment C.

Victims of sexual assault deserve justice. Justice can only be served by competent professionals. Instead of creating a parallel justice system staffed by inexperienced, partial, and unqualified campus administrators to adjudicate campus sexual assault, policymakers should instead take this opportunity to improve and expand the effectiveness and efficiency of our criminal justice system to ensure that it provides an appropriately thorough, prompt, and fair response to allegations of campus sexual assault. Professional law enforcement and courts have the benefit of years of expertise, forensics, and legal tools like subpoenas and sworn testimony that are not available to campus adjudicators. These resources should be brought to bear on campus.

The hurried rush to find the accused guilty described by NCHERM in its open letter was inevitable in the current legal environment, where the federal government has mandated low evidentiary standards, called into doubt accused students’ right to cross-examine their accusers, interchangeably used the terms “victims” and “complainants” in pre-hearing contexts, and actually instructed institutions that in some instances they may take “disciplinary action against the harasser” even “prior to the completion of the Title IX and Title IV investigation/resolution”—in other words, before anyone has actually been found responsible for the offense. The inescapable perception of a top-down federal bias against the accused is solidified by the fact that to the best of FIRE’s knowledge, OCR has yet to take corrective measures against any institution for lack of impartiality against the accused or to intervene on an accused student’s behalf in any of the civil rights lawsuits they have filed, despite numerous examples of colleges punishing accused students with little if any evidence and after using embarrassingly minimal procedural safeguards.

Again, the perception of bias on the part of OCR is having a real effect on the reliability of campus adjudication across the country. After all, when deciding a case under the preponderance of the evidence, even a light thumb on the scales of justice can affect the outcome. One disturbing example comes from Occidental College, where the institution expelled a male student after finding that the female student was incapacitated, despite a 24-minute-long text message conversation showing the complainant taking deliberate steps to sneak away from her friends and into the young man’s dorm room for the express purpose of having sex. In one text she asks him, “do you have a condom,” and then she messaged a friend, “I’mgoingtohave sex now” [sic]. It cannot be a coincidence that this

result arrived on the heels of OCR launching a Title IX investigation into Occidental's handling of sexual assault claims, demonstrating the real harm caused when institutions feel pressured to reach guilty findings. Indeed, FIRE's involvement in this issue was spurred by a case in which an accused college student, Caleb Warner, was found responsible for sexual assault by the University of North Dakota despite evidence that not only did not support his guilt, but that was sufficiently in Warner's favor as to cause local law enforcement to pursue his *accuser* for filing a false police report. *See* Attachment E.

Leaving the investigation and adjudication of sexual assault allegations to law enforcement professionals and our courts of law would reduce or eliminate the involvement of self-interested universities, thus producing a more fundamentally fair process for all involved. Campus adjudicators with real or perceived interests in securing certain judicial outcomes undermine the reliability of the process. Indeed, the importance of disinterested judicial review was emphasized by Senators Gillibrand and McCaskill in their efforts to transfer sexual assault hearings from the jurisdiction of military tribunals, which boast far more protective procedures than campus tribunals, to civilian courts.

Finally, college tribunals are an inadequate forum for addressing serious felonies. If complainants are reluctant to go to law enforcement, that problem must be addressed directly by working with law enforcement. Diverting sexual assault cases from the criminal justice system to campus courts is dangerous. The harshest sanction a university can impose on a rapist is expulsion. Campus courts are unequipped to provide either the necessary process due the accused or the punishment justice demands for the victim and society if the accused is found guilty. We must stop pretending that campus tribunals are adequate alternatives to criminal justice and prioritize referring complainants to law enforcement professionals, so we have the chance to remove dangerous criminals from our communities. We must stop circumventing the criminal justice system. Continuing to do so is dangerous.

III. Analysis of Pending Legislation

A. The Campus Accountability and Safety Act

The Campus Accountability and Safety Act (CASA) would continue to rely on campus judiciaries to reach factual determinations and punish those deemed responsible for committing these heinous crimes. While the bill will not alleviate the risk of unjust findings caused by assigning ill-equipped campus administrators the responsibility of adjudicating these important cases, it does offer some improvements over the status quo. CASA contains some provisions FIRE supports: It requires that institutions enter into agreements with local law enforcement agencies, and prohibits institutions from adjudicating cases against student athletes in special proceedings. Other provisions, however, require amendment.

Neutral Language

CASA treats the problem of addressing sexual assault on campus as a one-sided issue of supporting "victims," instead of protecting the rights of both complainants and the accused. The bill presumes the guilt of all accused students, referring to accusers as "victims" throughout the legislation, even when referring to them in the pre-adjudication context.

Failure to use neutral language that refers to accusers as “complainants” prior to adjudication signals to institutions that Congress does not value impartiality.

Unequal Assignment of University Resources

CASA would institutionalize inequality within sexual assault proceedings by providing substantial resources to complainants—for example, a “confidential advisor”—without providing similar resources to the accused. This imbalance is at odds with regulations implementing the reauthorization of the Violence Against Women Act (VAWA), which require colleges to provide “the accuser and the accused with the same opportunities to have others present during any institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by the advisor of their choice.”² Additionally, OCR has interpreted Title IX’s implementing regulations to require that colleges allowing advisors to participate “at any stage of the proceedings ... must do so equally for both parties.”³ As OCR observes, “[a] balanced and fair process that provides the same opportunities to both parties will lead to sound and supportable decisions.” FIRE supports CASA’s determination to provide resources to help complainants navigate the system, but urges Congress to provide similar resources to the accused.

Trauma-Informed Training for Fact-Finders

Adding to the imbalance, CASA mandates that university employees responsible for “resolving complaints of reported sex offenses or sexual misconduct policy violations” must receive training on “the effects of trauma, including the neurobiology of trauma.” While trauma-informed training may be appropriate for first responders and those conducting initial interviews, providing that training to campus adjudicators undermines the impartiality of the process. The bill should be amended to make clear that such training is not to be provided to fact-finders, who are supposed to be impartial.

Penalty Provision

CASA’s penalty provision allows colleges to be fined 1 percent of their operating budgets per violation. While we presume this provision was intended to provide a more realistically enforceable penalty than the current penalty structure under Title IX—which subjects institutions to a loss of all federal funding—this provision potentially *increases* penalties. Federal dollars are only one source of funding for institutions. So, for example, if the Department of Education finds more than 15 violations at an institution that receives 15 percent of its operating budget via federal funds, the potential penalty will be greater than it is under the current system. Indeed, OCR claimed to have found over 40 unique violations at the University of Montana in 2013.⁴ The penalty provision must be capped.

² Advisor of Choice (§ 668.46(k)(2)(iii) and (iv)), 79 Fed. Reg. 62773 (Oct. 20, 2014).

³ DEPARTMENT OF EDUCATION OFFICE FOR CIVIL RIGHTS QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE, <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.

⁴ Joseph Cohn, *Legislative Rush on Campus Sexual Assault Threatens Student Rights*, THE TORCH (Sept. 29, 2014), <https://www.thefire.org/legislative-rush-campus-sexual-assault-threatens-student-rights/>.

B. Safe Campus Act and Fair Campus Act

Introduced in July, the Safe Campus Act and the Fair Campus Act offer alternative approaches to combating campus sexual assault. Unlike CASA, both bills include meaningful due process protections. While substantially similar, the bills differ in one key way: Under the Safe Campus Act, an institution is precluded from conducting disciplinary hearings regarding allegations of sexual assault unless the complainant reports the allegation to law enforcement. The Fair Campus Act does not include this provision.

Both bills provide accusing and accused students with the right to hire lawyers to actively represent them in the campus hearings and the right to examine witnesses, and both bills require institutions to make inculpatory and exculpatory evidence available to all parties—a requirement that is shockingly absent from many campus disciplinary procedures. The bills reduce conflicts of interest by prohibiting individuals from playing multiple roles in the investigatory and adjudicatory process—preventing, for example, an investigator from serving as an adjudicator. If campuses are to continue to adjudicate sexual assaults, these provisions are obvious and necessary improvements that FIRE supports.

Both bills provide a safe harbor to students who either report or are witnesses to allegations of sexual assault made in good faith, so that they could not be disciplined by their institution for non-violent violations of the student code discovered as a result of investigations into the allegations. This provision will help students come forward with information, to everyone's benefit.

In addition to these important provisions, both bills would repeal the Department of Education's Office for Civil Rights' (OCR) misguided and unlawfully imposed mandate to colleges to use the preponderance of the evidence standard. Doing so would return the decision as to which standard of proof to employ in sexual misconduct hearings to individual states, campus systems, or individual campuses, many of which previously used higher, more appropriate standards such as that of "clear and convincing evidence."

The Safe Campus Act allows the complainant to make the decision as to whether sexual assault allegations should be reported to law enforcement. (FIRE's preference is to require all allegations to be reported.) To encourage more complainants to report allegations to the proper authorities, the bill prohibits institutions from taking action on the complaints unless they choose to report the allegation to law enforcement.

FIRE agrees with the bill's sponsors that punitive interim measures should be waived if a complainant does not report the accusation to law enforcement for investigation. FIRE does recommend, however, that non-punitive interim measures and accommodations be made available regardless of the student's decision to report. While colleges have unsurprisingly proved incapable of competently determining the truth or falsity of felony allegations, they are well-equipped to secure counseling for alleged victims, provide academic and housing accommodations, secure necessary medical attention, and provide general guidance for students who navigate the criminal justice system. Institutions should perform those functions regardless of a complainant's decision to report the incident.

IV. Recommendations

The current approach to campus sexual assault adjudication has failed. Legislation may not be able to bridge the vast competency gap between the capabilities of educational institutions and courts coordinating with law enforcement, but it can prioritize linking complainants with the proper authorities and medical professionals; help reduce bias; provide ample resources for education, prevention efforts and counseling services; set forth a framework for providing students with housing and academic accommodations; give institutions the tools to protect their campuses on an interim basis while the wheels of justice turn; and provide all affected parties with meaningful rights that will help them protect their own interests.

If Congress determines that campus tribunals must continue adjudicating these cases, there are steps that can be taken to improve their effectiveness and fairness. First and foremost, our public policy should encourage reporting allegations to law enforcement authorities and give them the space to conduct their professional investigations without interference.

The government should drop its insistence that institutions use the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. More importantly, the use of this low standard, particularly when decoupled from meaningful due process protections, is unjust. Instead, the government should be encouraging institutions to use the “clear and convincing” standard of evidence, which requires more than just a “50%-plus-a-feather” level of confidence that the evidence supports one side over the other, but less certainty than the criminal courts’ “beyond a reasonable doubt” standard. The government should also encourage institutions that continue to use the preponderance of the evidence standard to add additional due process protections—for example, to provide accused students with a meaningful opportunity for cross-examination in cases where credibility is an issue.

Congress may also improve the reliability and fairness of campus disciplinary hearings by requiring institutions to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant’s interests by bringing and prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function, but this right is typically not extended to student respondents. Notably, the recent passage of the Violence Against Women Reauthorization Act of 2013 included a provision that “the accuser and the accused are entitled to the same opportunities to have others present during an institutional disciplinary proceeding, including the opportunity to be accompanied to any related meeting or proceeding by an advisor of their choice.”⁵ The Department of Education has (correctly) interpreted this to include the right to have a lawyer present.⁶ But for this measure to truly make a difference, Congress must make clear

⁵ Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, 127 Stat. 54.

⁶ Violence Against Women Act, 79 Fed. Reg. 62,751 (Oct. 20, 2014).

that the advisor may actively participate in the process. Right to counsel legislation making this change passed with overwhelming bipartisan support in North Carolina and North Dakota. *See* Attachments F and G. Allowing both students to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner.

Congress should also note that statements made by students during on-campus proceedings or in meetings with campus officials are admissible against them in criminal court. By participating without a lawyer, accused students have essentially waived their Fifth Amendment rights. Accused students lucky enough even to recognize this problem are still forced to choose between defending themselves on campus or defending themselves in criminal courts. An example of this dilemma is the case of Ben Casper, a former student at The College of William & Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him at trial, but has been refused the opportunity to return to William & Mary.

Further, there are disturbing signs that university administrators are actively exploiting this issue in order to undermine the Fifth Amendment. In July, Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin–Madison, was quoted bragging to the International Association of College Law Enforcement Administrators that she was able to circumvent due process protections and secure a criminal conviction of a student by using the statements he made during the campus procedures against him in his criminal trial. Speaking candidly, she told her audience, “It’s Title IX, not Miranda. Use what you can.” *See* Attachment H. Requiring institutions to allow legal advocacy in the campus tribunal will go a long way towards fixing this problem.

Participation of legal counsel will also help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the authors of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Congress could also improve campus procedures by prohibiting institutions from allowing individuals to perform multiple roles during the adjudicatory process. Campus advocates should not serve as investigators. Investigators should not serve as adjudicators, and adjudicators should not hear appeals. Preventing the commingling of these responsibilities is an important check that reduces the risk of one person’s bias permeating the entire process. The Safe Campus Act and the Fair Campus Act include provisions to this effect.

Another step Congress may take to ensure that campus tribunals are more effective and fair is to require institutions to include sexual contact with an incapacitated person in their definitions of sexual assault and rape, and to provide an appropriately precise definition of incapacitation. “Incapacitation” is qualitatively different from mere “intoxication.” This is a distinction with a real difference. If one is “incapacitated,” one has moved far beyond mere intoxication; indeed, one can no longer effectively function and thus cannot consent. Courts have recognized that simple intoxication does not necessarily equal incapacitation, and

therefore does not necessarily foreclose consent.⁷ College policies must recognize this distinction, as well, perhaps by mirroring state definitions of incapacitation.

V. Conclusion

Sexual assault is one of the most heinous crimes a person can commit. Those found guilty should be punished to the fullest extent allowed by law. But precisely because sexual assault is such a serious crime, ensuring that each case is referred to law enforcement and providing those accused with due process is absolutely vital. As FIRE President Greg Lukianoff has observed: “Due process is more than a system for protecting the rights of the accused; it’s a set of procedures intended to ensure that findings of guilt or innocence are accurate, fair, and reliable.”⁸

FIRE is under no illusion that there is a simple solution to the problem of sexual assault on campus. But by lowering the bar for finding guilt, eliminating precious due process protections, and entrusting unqualified campus employees and students to safeguard the interests of all involved, we are creating a system that is impossible for colleges to administer, and one that will be even less fair, reliable, and accurate than before. Congress can help reverse this trend by taking all students’ interests into account. To accomplish that, Congress should include the best aspects of each pending bill in a comprehensive, balanced bill.

Thank you for addressing this important issue and for considering FIRE’s input. We are deeply appreciative of this opportunity to share our perspective and offer our assistance to you as you move forward. Please do not hesitate to contact us if FIRE may be of further assistance.

Respectfully submitted,



Joseph Cohn
Legislative & Policy Director
Foundation for Individual Rights in Education

⁷ See, e.g., *Commw. v. Leblanc*, 900 NE.2d 127, 133 (Mass. App. Ct. 2009).

⁸ FIRE RESPONDS TO WHITE HOUSE TASK FORCE’S FIRST REPORT ON CAMPUS SEXUAL ASSAULT, Apr. 29, 2014, <https://www.thefire.org/fire-responds-to-white-house-task-forces-first-report-on-campus-sexual-assault/>.

ATTACHMENT A



February 28, 2014

White House Task Force to Protect Students from Sexual Assault
VIA email to OVW.SATaskForce@usdoj.gov

Dear White House Task Force to Protect Students from Sexual Assault:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending core constitutional rights on our nation's university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. Every day, FIRE receives requests for assistance from students and professors who have found themselves victims of administrative censorship or unjust punishments.

We thank you for soliciting public input on how the federal government can best assist institutions of higher education in meeting their obligations under Title IX and the Jeanne Clery Act and for allowing us the opportunity to supplement the spoken comments we provided on February 19, 2014.

One of the core constitutional rights that FIRE defends is due process. There is no doubt that universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence. Public universities are also bound by the Constitution to provide meaningful due process to accused students. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These obligations need not be in tension.

Today, access to higher education is critical for Americans. Indeed, the White House website calls it “a prerequisite for the growing jobs of the new economy.” The White House, *Higher Education*, available at <http://www.whitehouse.gov/issues/education/higher-education> (last visited Feb. 28, 2014). The stakes are therefore extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student's ability to receive an education is curtailed unjustly. When a university dismisses an accusation of a sexual assault without adequate investigation, it has both broken the law and failed to fulfill its moral duty. Recent headlines indicate that far too many schools have taken this path. Similarly, when a college expels an accused student after a hearing that

includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well.

When a student is suspended or expelled from college without due process protections, the consequences can be profound. In many of those instances, expulsions—particularly for one of society’s most heinous crimes—have the effect of ending educations and permanently altering career prospects. See attachment A.

When an expulsion follows a hearing that includes meaningful due process, there is no problem; justice has been served. But an objective look at the disciplinary procedures maintained by colleges nationwide demonstrates that most institutions fall woefully short of that standard. See attachment B. Sexual assault hearings are complex adjudications of allegations of behavior that constitutes a felony, and the campus judiciary is simply ill-equipped to handle these matters. Without access to the resources, technology, and experience that law enforcement and criminal courts possess, institutions are being asked to determine who is guilty and who is not in these very challenging cases. If there is one thing that people on all sides of this issue agree on, it is this: Few if any schools are capably responding to the problem of sexual assault on campus. Even the best-intentioned campus administrators, of which there are certainly many, simply lack the necessary expertise.

While the law properly forbids institutions from merely referring these cases to law enforcement and washing their hands of them, institutions can and should do many things that stop short of determining innocence or guilt, but which will still go a long way towards ensuring that campuses are safe. Regardless of whether an accusation is later proven true or false, a college can advise students about where to turn to ensure that evidence is preserved. It can help them report accusations properly to law enforcement. It can provide counseling services. It can separate students by changing course schedules and dorm assignments. All of these options, and many more, help ensure that the campus remains a safe place for all students to learn without leaving ultimate decisions of guilt or innocence to campus tribunals, which have proven to be inadequate, ill-prepared forums for adjudicating these cases.

Unfortunately, the federal government, and the Department of Education’s Office for Civil Rights (OCR) in particular, has placed the emphasis on advancing the rights of the complainant, while it has paid insufficient attention to the rights of the accused. OCR has demanded that institutions utilize the judiciary’s lowest burden of proof, the “preponderance of the evidence” standard. So long as campus tribunals have few, if any, of the fundamental procedural safeguards found in civil courts, using this low standard diminishes the reliability of the outcomes of these hearings. Instead of utilizing a low evidentiary standard that diminishes the accuracy of the on-campus findings, colleges should take meaningful measures to ensure that their tribunals are more fair and more reliable for all parties.

Fair, impartial tribunals should be a self-evident necessity. In OCR’s April 4, 2011 “Dear

Colleague” letter, the agency acknowledged that “a school’s investigation and hearing processes cannot be equitable unless they are impartial.” While FIRE wholeheartedly agrees with this sentiment, we have yet to see a single instance in which the Department has taken action against an institution for lack of impartiality against the accused. This is true despite numerous examples in which colleges punished accused students with scant if any evidence, using embarrassingly minimal procedural safeguards. We have even seen repeated instances in which colleges expel students despite the fact that juries have found those students not guilty in real criminal trials covering the same accusations. In some cases, the evidence not only was insufficient to support guilty verdicts under criminal law evidentiary standards but also dispositively proved the innocence of the accused. Caleb Warner’s case from the University of North Dakota is illustrative. See attachment C. We point this case out not to argue that false accusations are the norm, but rather to emphasize that justice requires that individualized determinations are based upon the known facts of each case, not upon statistical assumptions.

In FIRE’s view, colleges and universities can take a number of steps to improve access to campus tribunals and increase their reliability and fundamental fairness. To start, universities should ensure that all students know where to register their complaints. Universities should publicize this information clearly, and make sure that all campus personnel are familiar with this information as well.

As for ensuring that campus tribunals operate fairly, it is first necessary to recognize that the *status quo* is unacceptable. Again, we emphasize that FIRE and others are growing increasingly skeptical of the campus judiciary’s ability to fairly analyze and adjudicate cases of serious felonies like sexual assault, but we offer the following suggestions which we believe will make the process fairer than it is today.

First and foremost, FIRE believes that OCR should drop its mandate that these tribunals decide cases under the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. See attachments D, E, and F. Instead, OCR should encourage institutions to use the “clear and convincing” standard of evidence, which requires more than just a “50%-plus-a-feather” level of confidence that the evidence supports one side over the other. OCR should also encourage institutions using the preponderance standard to set forth substantive protections for the accused to balance out the low evidentiary threshold. For example, institutions should ensure that there is some mechanism for the accused to cross-examine his or her accuser.

One of the most important things that the federal government can do to improve the reliability and fairness of campus disciplinary hearings is to require schools to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant’s interests by bringing and

prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function. Providing student complainants with a matching right to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner rather than giving into the temptation to act in a manner that protects its own interest in avoiding liability.

It is also important to keep in mind that anything a student says during an on-campus proceeding is admissible against him or her in criminal court. Without a lawyer, accused students are effectively waiving their Fifth Amendment rights. Some are forced to choose between defending themselves on campus or defending themselves in criminal courts. One such example is Ben Casper, a former student at The College of William and Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him in court, but has been refused the opportunity to return to school. Allowing legal advocacy in the campus tribunal will go a long way towards solving this problem. At the same time, it will likely help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the Framers of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Throughout the listening sessions, participants offered two suggestions in particular that FIRE would like to address. One suggestion that was offered repeatedly was that institutions should be required to subject their students to mandatory surveys to gauge campus climate and obtain more detailed information about sexual assault on campus. While FIRE appreciates this desire to have better information, we nevertheless believe there are serious civil liberties implications to compelling students—or anyone for that matter—to answer sensitive questions about their sexual activities. This information is very personal, and compelling individuals to share this information with the government is deeply troubling. Surveys, if they are conducted, should be voluntary, and appropriate measures should be taken to ensure that the anonymity of the participants is protected.

Another suggestion offered during the listening sessions was that the government should use the “affirmative consent” standard when collecting data about sexual assault and require institutions to use that standard in their disciplinary hearings. The affirmative consent standard is a confusing and legally unworkable standard for consent to sexual activity.

Affirmative consent posits that sexual activity is sexual assault unless the non-initiating party’s consent is “expressed either by words or clear, unambiguous actions.” Should proving “affirmative consent” become law, there will be no practical, fair, or consistent way for colleges to ensure that these newly mandated prerequisites for sexual intercourse are

followed. It is impracticable for the government to require students to obtain affirmative consent at each stage of a physical encounter and to later prove that attainment in a campus hearing. Under this mandate, a student could be found guilty of sexual assault and deemed a rapist simply by being unable to prove she or he obtained explicit verbal consent to every sexual activity throughout a sexual encounter. In reality, requiring students prove they obtained affirmative consent would render a great deal of legal sexual activity “sexual assault” and imperil the futures of all students across the country.

We note that the concept of affirmative consent was first brought to national attention when it was adopted by Ohio’s historic Antioch College in the early 1990s. When news of the college’s policy became public in 1993, the practical difficulty of adhering to the policy prompted national ridicule so widespread that it was lampooned on *Saturday Night Live*. Indeed, the fallout from the policy’s adoption has been cited as a factor in the college’s decline and eventual closing in 2007. See attachment G. It has since reopened. The awkwardness of enforcing “affirmative consent” rules upon the reality of human sexual behavior has continued to be a popular subject for comedy by television shows such as *Chappelle’s Show* and *New Girl*. The humor found in the profound disconnect between the policy’s bureaucratic requirements for sexual interaction and human sexuality as a lived and varied experience underscores the serious difficulty that requiring the standard would present to campus administrators across the nation.

Thank you very much for addressing this important issue and for considering FIRE’s input. We are deeply appreciative of this opportunity to share our perspective, and offer our assistance to you as you move forward. Please do not hesitate to contact us if we can be of any assistance.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Joseph Cohn". The signature is fluid and cursive, with a long horizontal stroke at the end.

Joseph Cohn
Legislative and Policy Director

ATTACHMENT B

The New York Times

The Best Way to Address Campus Rape

Judith Shulevitz – February 7th, 2015

THE campus rape debate took another hairpin turn last week when The Daily Beast published an interview with Paul Nungesser, the Columbia student accused of raping a fellow student, Emma Sulkowicz. She has been carrying a mattress around the campus to raise awareness about sexual assault and to protest the school's failure to expel Mr. Nungesser, who was cleared by a campus tribunal.

The article raised questions about her story; among other things, it included screen shots from Mr. Nungesser's Facebook account showing that he and Ms. Sulkowicz had traded mutually affectionate messages for weeks after the incident in question.

In response, the Columbia Daily Spectator published two columns wondering whether the paper had been too quick to assume Mr. Nungesser's guilt. Ms. Sulkowicz's supporters and some bloggers denounced The Daily Beast for conducting a trial by media and for posting the Facebook pages, which they said added nothing to the story unless you believed that a rape survivor who didn't behave like the perfect victim had to be a liar.

But the media has reason to retry the case. Ms. Sulkowicz herself sought out the media when Columbia exonerated Mr. Nungesser. And the media made Ms. Sulkowicz so well known as a rape survivor that Senator Kirsten E. Gillibrand, Democrat of New York, invited her to the State of the Union address and publicly declared that she had received "no justice." Very few people, and almost no one in the media, thought to question that assertion, because everyone knows, just knows, that you can't trust a campus sexual assault proceeding.

What explains the nearly universal lack of confidence in these proceedings? Universities share some of the blame, but there's another culprit too: the United States government. People often wonder why college administrators try to adjudicate these fiendishly difficult cases, rather than putting them in the hands of the criminal justice system.

The reason is that the Department of Education has very forcefully told schools to handle sexual grievances themselves and given them very detailed instructions about how to do so. A report last year from a White House task force on campus sexual assault underscored the importance to a university of following that advice. Even though the D.O.E.'s instructions are presented as recommendations rather than law, its Office for Civil Rights can put any school that fails to follow them on the list of colleges under investigation and even take away its federal funding.

There's no doubt that on many occasions colleges have not treated sexual-assault accusations as seriously as they should have. Nor did they do enough to ensure that women felt completely safe on campus. But in the past half-decade, the civil rights office has tried so hard to correct that problem that it is now forcing schools to go too far in the other direction, which has made campus procedures seem even less credible. Schools are being told to disregard what most Americans think of as the basic civil rights of a person accused of a heinous act.

Among other things, schools have to determine guilt on the basis of a "preponderance of" rather than "clear and convincing" evidence — that is, on a 51 percent likelihood that the man did it, rather than a 75 percent one. (In these cases, the accused is almost always a man, although the accuser is by no means always a woman.) Neither party is allowed to cross-examine the other, lest direct questioning re-traumatize a victim. Schools must resolve cases swiftly — the original requirement was 60 days, though the latest guidelines leave out the number and simply stress the need for a prompt resolution — even if a criminal investigation is going forward at a slower pace.

That puts a student who wants to defend himself at risk of saying things that could later be used against him in court — and at many schools, he's not even allowed to let a lawyer speak for him. At least 30 male students, some of whom were suspended or expelled for sexual misconduct, have filed suits against their universities, claiming that the process was unfair.

What should universities do to convince the world that they're fit to deal with campus rape? First, they should band together and demand that the government rethink its guidelines, especially those that flout the key tenets of due process. Second, they should ask the Office for Civil Rights to clarify its notion of sexual misconduct, now left to each school to define. Is it rape if a man fails to get affirmative consent at every stage of a sexual interaction, or only if he ignores a spoken objection? If a man and a woman are equally drunk, should he be found guilty of assaulting her because she was too intoxicated to agree to sex, even though he himself may have been too drunk to know that? (Right now, at most schools, he would be considered guilty.)

Third, universities should insist that determinations of guilt or innocence rely on a "reasonable-person test," according to which the accused is only culpable if a reasonable person would have considered his actions to be wrong. Without that standard, his fate may rest on her subjective judgment — if she feels that he imposed unwanted sexual contact on her, no matter what he actually did, then he can be found to have harassed or raped her. (Harvard's controversial new policy leaves out the reasonable-person standard, which is partly why 28 of its law professors have publicly objected to it.)

The fourth step, however, may be the most important. Though schools have the right to uphold their own standards of conduct, the government is currently scaring them into creating big, expensive bureaucracies and designing unduly cumbersome policies. Meanwhile, there are many more 18- to 25-year-old rape victims outside the walls of colleges than inside them. The smarter and more public-spirited thing for schools to do would be to divert at least some of their time and energy to forming partnerships with local law enforcement agencies.

It is widely believed that the police are insensitive to rape victims. Universities, on the whole, have a great deal of clout in their communities; they also possess considerable intellectual resources. They could be helping policemen and prosecutors do a better job with sexual violence cases instead of squandering money and good will on their own all-too-easily second-guessed shadow justice systems.

ATTACHMENT C

The NCHERM Group, LLC

Systems-level solutions for safer schools and campuses

An Open Letter to Higher Education about Sexual Violence from Brett A. Sokolow, Esq. and The NCHERM Group Partners

May 27th, 2014

Our goal is to help higher education embrace and empower gender equity through fair processes, which we all should share as a goal. Who we are and what we do is important to the message of this letter, because of the unique vantage point and perspective we have. We run The NCHERM Group, the largest higher education-specific law practice in the country, doing the legal work of more than 50 campuses. We consult with more than 300 campuses each year, in addition to those we represent as attorneys. We've had more than 3,000 higher education clients since 2000. We have a special expertise in Title IX law, and our law firm frequently represents campuses being investigated by the Department of Education's Office for Civil Rights (OCR), though we prefer to try to keep them from being investigated in the first place.

We are the founders of ATIXA, a membership association of more than 1,400 campus Title IX coordinators and investigators who both look to OCR for guidance and occasionally curse Washington for their workload. We have victim's advocate training, and our experience suggests victims tell the truth. We are all investigators who have done countless campus sexual misconduct investigations, which require a very different approach than victim advocacy. We are expert witnesses and litigation strategists in Title IX cases, both for and against campuses and schools. We represent both victims and accused students in campus hearings, though obviously never at the same time. We don't help rapists to get away with it. We wish campus attorneys and conduct officers would stop treating attorneys representing students in the conduct process as if it is an adversarial role. After all, we share the goal of protecting student rights, and assuring the equal dignity of all students.

It upsets some individuals in higher education that we are not always on the side of colleges in these cases, but that would just make us hired guns for money, not experts. Sometimes, campuses do this wrong; sometimes, they do it right. Our firm's record of success in cases suggests we rarely lose, and that is because we choose clients based on principle, and we choose based on who we believe has the right legal argument. We have trained thousands of campus civil-rights investigators and Title IX coordinators. As change-agents, we understand that we can be polarizing. We don't have just one job or

one role. We won't pick a side. Our loyalty is only to civil rights equity, and we see it from a unique 360° vantage point. This is what we see...

Colleges and universities struggled to fully embrace gender equity until April 4th, 2011. When OCR issued its April 4, 2011 Dear Colleague Letter (DCL), it changed higher education forever. For whatever reason, that day was simply a tipping point for the field. The broad strokes of that letter painted a clear picture, and sincere and earnest commitment followed. The details could have been better-defined, but credit for genuine change needs to be given to OCR and the White House. We have never seen higher education move, at once and in concert, in the same direction on a single issue with such dramatic fervor. Students sensed it, too, and reporting has dramatically increased as a result on almost every campus that has made serious changes to policies and procedures. On many, reporting has doubled. This is not a doubling of incidents, but a doubling of the willingness of victims to come forward. Thank you for trusting your campuses with your stories.

But, the pace of change is still too slow for groups like Know Your IX and Ed Act Now, as well as the President of the United States, and perhaps even for the OCR. It has been three years since the DCL was published, and some campuses still have not fully realized the changes that are needed. In the midst of the slow but steady progress campuses have been making, Congress compounded the compliance challenge with passage of the Campus SaVE provisions in the VAWA reauthorization in March of 2013. OCR has kept the pressure on by investigating an unprecedented number of campus complaints -- ninety at last count -- many catalyzed by the grassroots, decentralized, social network-based activism of groups like Know Your IX.

Ed Act Now wants OCR to put some teeth and transparency into its enforcement. OCR wants to transform campuses rather than punish them, and feels the heat of imperatives from the Vice President, the President and Congress, as well as push-back from higher education that they've gone too fast, and from organizations like the Foundation for Individual Rights in Education (FIRE) that they have gone too far. Campuses complain that OCR is creating change by slapping one campus at a time, rather than providing wider and more frequent guidance. Campuses are confused by varying messages from different OCR offices, and from the inconsistent enforcement actions being undertaken and publicized. It seems that OCR takes criticism from every side. So does higher education, and we hope OCR can see that, too.

Victims go to the media, file OCR complaints, and Title IX lawsuits. They've figured out they can put more teeth in their grievances by filing class-action complaints to the Departments of Education and Justice, complaining of Title IX, Title IV and Clery Act violations. Two historic fines for Clery Act violations are expected to be leveled any day now. Accused perpetrators have revived the "erroneous outcome" claim and are suing campuses and victims in increasing numbers, too, and using Title IX to do it. At least ten such suits are winding through the federal courts right now. Campuses flooded OCR

with 1,400 questions last year when it announced it was going to provide an FAQ on the DCL. OCR released it just last month as a 53-page document adding even more clarification to Title IX, and more work for colleges. And, as if that wasn't complicating enough, impact litigator Wendy Murphy recently filed a federal lawsuit to enjoin enforcement of the Campus SaVE Act as unconstitutional, and is telling campus presidents that the SaVE Act has compromised Title IX's efficacy, a claim that is widely debated in campus legal circles.

The Huffington Post now maintains a dedicated sub-site focused on campus sexual violence, *Breaking the Silence*, and rarely lacks for content. Less savvy media outlets still attack campuses for meddling in what is otherwise criminal behavior, and wonder why campuses are involved in rape cases at all? Many administrators may wonder similarly, but they understand what the public largely does not: campuses are mandated by Title IX to resolve and remedy all forms of sex and gender discrimination, which includes all acts of campus sexual violence. They also understand that the courts are virtually useless at prosecuting known-offender assaults on campuses where alcohol is often the key factor and recollections are anything but clear. In short, campuses have no choice, and consigning campus victims to the criminal justice process is often consigning them to no remedy at all. Campuses regularly address other "crimes" that students commit through administrative discipline processes. What would it look like if campuses addressed assault, drug dealing, weapons, arson, theft, etc., but not sexual assault? They would be accused of dodging the issue.

Caught in the middle of all this is the campus Title IX Coordinator (TIXC) who receives a complaint from a victim who is in pain. The TIXC pursues the complaint with diligent investigation within the requisite +/- 60 days, and then calls us in puzzlement over why they have now found text messages from the complainant both before and after the incident, describing it as consensual. It's easy for media outlets to paint uncaring campuses as the bad guys over and over again, but reality is often far more complex than that. Worse, FERPA – the federal student privacy law – leaves colleges unable to explain and defend the backstory to the cases they process.

Our generation and generations before us fought from our very cores for the right of victims to be believed, to be treated with respect, and to receive acknowledgment of their basic dignity from seemingly callous educational institutions that championed male privilege by merely slapping rapists on the wrists, if they punished them at all. We've been instrumental in seeing hundreds, if not thousands, of victims vindicated through campus resolution processes, which is why we're so pained that while the last twenty years has brought transformation, we've now arrived at the destination only to find that today's students have wholly redefined sexual experience – as every generation does – without reference to the rules we wrote. How can we demand respect for a generation that at times seems not demand it from themselves, or at least demands it on very different terms than we did? To illustrate what we mean, we can use just some of the

recent cases where our firm was asked to assist. Please note this **trigger warning** for graphic and rape-related content in what follows:

- A female student interviewed recently during an investigation had spread rumors by social media that she had been raped by a male student. When the rumors got back to the male student, he approached her about it, and she offered him a lengthy apology, and then put it in writing. We had to investigate nevertheless, and she told us that they'd had a drunken hook-up that she consented to. She was fine with what happened. We asked her why she called it a rape then, and she said, "you know, because we were drunk. It wasn't rape, it was just rapey rape." We asked her if she was aware of what spreading such an accusation might do to the young man's reputation, and her response was "everyone knows it wasn't really a rape, we just call it that when we're drunk or high." By the way, whomever popularized the term "rapey" deserves a special place in purgatory. For more on the drunk sex issue, click [here](#).
- A female student alleged a campus sexual assault based on non-consensual oral intercourse. Her texts both before and after the incident with the alleged perpetrator state that she enjoys swallowing and "dirty boys who cum in her mouth," all in reference to her actions with him. In her complaint that the oral sex was non-consensual, she informed the campus that she was appalled that he did not wear a condom. He insists it was consensual. We don't know that we'll ever know what happened, but we do know what can and can't be proven.
- A female student was caught by her boyfriend while cheating on him with another male student. She then filed a complaint that she had been assaulted by the male student with whom she had been caught cheating. The campus investigated, and the accused student produced a text message thread from the morning after the alleged assault. It read:
 - Him: How do I compare with your boyfriend?
 - Her: You were great
 - Him: So you got off?
 - Her: Yes, especially when I was on top
 - Him: We should do it again, soon
 - Her: Hehe
- A female student claimed multiple instances of sexual aggression, assault and coercion by her boyfriend over more than a year, but after making the complaint, she could not recall or provide ANY specifics of each instance in terms of location, time, or salient details. His corroborative evidence showed cooperation and even initiation by the complainant.
- A female student claimed a male student performed oral sex on her without her permission on October 3rd. He did so again on October 11th. On October 13th, they had consensual sexual intercourse. On November 2nd, he again performed oral sex on her without her consent. She complained about the three non-consensual acts, but not the consensual intercourse. The campus processed this

complaint to a fair outcome based on the October 13th violation, but it demonstrates how little black and white exists in some of these cases.

- A male student performed demeaning, degrading and abusive sexual acts on a female non-student. They engaged in BDSM, and he ignored her protests throughout the entire sexual episode, despite her screaming in obvious pain and trying to get away from him. She filed a grievance with the campus, and we soon discovered instant messages in which she consented just before the incident to exactly these acts, and agreed to forgo the use of a “safe word” common in BDSM relationships.
- A female student accused a male student of sexual assault. When her complaint of sexual assault was heard by a campus panel, there was literally no evidence to support her complaint. He was found not responsible and decided not to press a complaint against her for a false allegation out of sensitivity to her serious mental health issues. Then, she went around campus telling anyone and everyone that he had raped her. The male student then filed a complaint against the female student for harassment. The female student then filed a complaint with the college for processing his complaint as an act of retaliation against her.
- In another recent case, a long-term relationship between two students involved many consensual sexual acts. The couple broke up. The male student started dating another student on campus, at which point the former girlfriend filed a complaint that there were non-consensual acts amongst many prior and subsequent consensual acts that they engaged in. Perhaps, but the timing is suspicious, and there is no evidence to suggest any concern about the behaviors during the time they were dating. Again, there is often a chasm between what is alleged and what evidence is able to prove.

We could go on and on with a litany of these complicated and conflicting cases. We hate that some of them provoke tired old victim-blaming tropes, such as the woman scorned and the cover-up of cheating. We hate even more that in a lot of these cases, the campus is holding the male accountable in spite of the evidence – or the lack thereof – because they think they are supposed to, and that doing so is what OCR wants. If you work on a college campus, we don’t have to point out the complexity of the complaints we receive. But, the public and the media need to understand that campus complaints are not as clear-cut as the survivors at Know Your IX would have everyone believe.

Sexual assault is rampant on campuses, no matter what study you read. Debating prevalence is futile, because one victim is one too many. But, not every complaint can be resolved, and not every allegation can be proved. We don’t see victims making many false complaints¹, but just as the OCR-mandated preponderance standard (what is more likely than not?) should be making it easier to determine what violates a policy, Millennial sexual mores are clouding the evidence. We see complainants who genuinely believe they have been assaulted, despite overwhelming proof that it did not happen.

¹ A malicious or false complaint made by someone knowing it to be untrue.

We fear for the mental health issues impacting many students, but in particular for those whose reality contact issues manifest in sexual situations they can't handle and campuses can't remedy. We hate even more that another victim-blaming trope – victim mental health – continues to have legs, but how do you not question the reality contact where case-after-case involves sincere victims who believe something has happened to them that evidence shows absolutely did not? How do campus and community mental health resources help someone who is suffering from real trauma resulting from an unreal episode?

It's futile, we know, to wish that this generation of students would stop inviting ambiguity into so many of their sexual interactions². But, we can tell them that the great majority of administrators we work with daily encourage reporting, and will receive their reports with open-mindedness, compassion and empathy. We know it may be a vain hope, but students, we really wish you would help us help you. We wish you would say yes when you mean yes, no when you mean no, and text in a way that reinforces what you said or did, rather than contradicts the allegations you have made. In a remarkable shift, the field is now finally sympathetic to victims, and societal victim-blaming tendencies are ebbing, but we fear the tide will shift again, against believing victims. None of our hopes above takes away from the fact the college messaging also needs to tell potential perpetrators to get consent, to stop raping, to avoid sex with those who have been drinking, and to intervene in potentially harmful situations, not as patriarchal protectors, but as empathic beings in inter-dependent communities.

We fear that other activists and the victim advocacy community will see this letter as anti-victim. Instead, we hope that the field will reject a victim-blaming analysis in favor of deeper exploration of the challenges we all are facing. Any person has the right to their autonomy, and the self-determination to claim it if they have been victimized. We cannot give that to them, and we cannot take it away. But, a victim's self-labeling does not make the person they are accusing a perpetrator. Only a campus resolution process, conducted under equitable rules in compliance with Title IX, can determine that an accused student violated campus policy (which doesn't make them a rapist, in a criminal sense). And, every campus owes services, resources and supports to every victim, regardless of whether a campus process is able to uphold their complaint or not.

The President of the United States wants us to solve the campus sexual assault problem. So we have some thoughts about how we all can be more effective stakeholders in the solution. Here's a suggestion for each of us:

- **President Obama.** Please continue to give your task force on campus sexual violence a true mandate for prevention. Empower it to advocate for the

² And, we don't like to label a rape as an "interaction," but neutral terms work best in these circumstances, because we can't assume an accused student is a perpetrator, either.

resources that campuses need to fully embrace the compliance and prevention missions that the law imposes.

- **Campus Presidents.** Allocate at least \$250k annually to a prevention budget. You'll make it up in the long run through loss prevention. Really. Additionally, we beseech you to streamline your policy-making process. OCR and the courts are averaging at least two pronouncements each year that require revisions to campus policy. Your campus policymaking process needs to be agile enough to keep up with this new pace of change, and on most campuses, that process is woefully unable to do so.
- **Chief Student Affairs Officers.** Campus SaVE Act Compliance (VAWA Section 304) is largely going to fall on your division, and it is time to get ready. Prevention must be professionalized under your division, with something like a Campus Prevention Services Office or Campus Prevention Committee that is well-staffed and well-resourced.
- **Orientation and First Year Experience Professionals.** Please lead conversations on your campuses for how to mandate educational and prevention programming beyond the first year and work with faculty to develop cross-curricular programming in these and related areas.
- **Deans of Students.** Devise a points system or other effective mechanism to get student butts in the seats, so that they attend the presentations you provide. No one will benefit from campus prevention efforts if those efforts are not delivered to the audience who needs to hear them. Conduct regular campus climate surveys with a three-year action plan to address the survey findings and remedy any hostile climate issues that are evident.
- **Campus investigators.** Do more than attend the two-day ATIXA training. We've done investigations for more than fifteen years to learn what we know how to do. With two days of training, you've made a start, but to do right by all of our campus constituents, and to do justice to the complexity of these cases, you must invest in your own professional development with diligence and hard work. If you make training a continual task, excellence will follow.
- **Title IX Coordinators.** Make sure your president and trustees understand the enormity of your role. Yours is a full-time, dedicated role, whether your position is or not. Fight for your authority to be the final say on Title IX on your campus. You need a budget, a direct or dotted line to your president, and the authority to effectuate the changes compliance requires. Oh, and in your spare time, help your campus Public Safety and Student Affairs professionals to meet the prevention, education and training mandates of the SaVE Act. They're big.
- **FIRE.** Live up to your name. Don't just fight for the rights of accused students. Fight for the individual rights of all students. If a campus puts a gag order on a victim, where is your voice in favor of her rights to share her story?
- **Student Conduct professionals.** You can't be too hot or too cold, you need to get it just right. Some of you are too hot, meaning that you hold men accountable for drunken hook ups that shouldn't violate campus policies.

Charging only the male if both parties are drunk (not incapacitated) is gender discrimination. In some cases where you find a preponderance, some of you have your thumbs on the scales of justice. A tie must go to the accused student. In other cases, you're too cold, and you don't ensure that victims get their due, and that perpetrators are kicked out. The just right bowl of porridge is neither too hot nor too cold, and the equal dignity we owe to all of our students requires that we get it right, every time. We also ask you to become more effective gatekeepers on the process. Not every complaint deserves a hearing. Many complaints can be resolved through investigation, and when the investigation shows that no misconduct took place, bring the gate down and stop the process. It can be victimizing to all parties to continue the process beyond that point. Please reconsider imposing gag orders on the parties to a complaint. Title IX requires *you* to maintain the confidentiality of an investigation. It does not give you the right to deprive students of their right to talk about their experiences and tell their stories. We also suggest you get used to welcoming attorneys as advisors in your processes. We're coming sooner or later (now that the SaVE Act is in effect), and we can't imagine many students involved in sexual misconduct complaints navigating the campus process very well without us, to be blunt.

- **Public Safety.** Continue to train officers to believe victims and not to blame them. You're not the ultimate deciders of fact, and don't need to take sides. Consider that higher crime statistics mean safer campuses, not the other way around. Assist campus civil rights investigations, and partner with the Title IX Coordinator and Student Affairs to deliver the training and prevention content the law requires.
- **Know Your IX, Ed Act Now, End Rape on Campus and other student voices.** Continue to push higher education and OCR to do better, partner with us where you can, teach us about your expectations, and be open to the possibility that some of the cases you believe in are harder to prove than you think, and in some cases, may not constitute a violation of policy.
- **OCR.** Go further to make your case decisions open and transparent. Publish regular, consistent guidance. Higher education is hungry for it. Open a technical assistance department staffed just as well as your enforcement division. If you do, you might slowly realize you'll need your enforcers less, and that compliance will improve.
- **Faculty.** Please be open to changing your privileged discipline processes, because you are the only ones who can. Equity is an inherent good for all of us, and complex, drawn-out discipline processes, multiple layers of appeal, grievance processes and tenure revocation systems all impede equitable resolution of sex and gender discrimination complaints involving faculty. We must protect our faculty members who are accused, but we must equally protect those who accuse them.
- **Human Resources.** It is no longer acceptable to be unaware that Title IX applies to employees in any situation where Title VII also applies to address sex/gender discrimination on a college campus. Many of the mandates for prevention and

- training in Title IX and the Campus SaVE Act apply to employees. They are breathtakingly broad and your institution is going to need more than the same animated online tutorial on sexual harassment every year to address them.
- **Campus LGBTQI Resources.** We shouldn't need this reminder, but please keep institutions focused on the ways that Title IX covers gender identity discrimination, transgender individuals, those in transition, and those who are gender nonconforming, and make sure we continue to acknowledge that not every case of sexual violence is male-on-female or occurs in exclusively heterosexual contexts.
 - **Campus Victim Advocates.** Victims need at least one human being who believes them 100%. It may not be their parents, friends, or loved ones. Be there for them unequivocally, but please understand that institutions are obligated to protect not just the victim you are helping, but future victims as well. Campuses try to honor each victim's wishes, but if they pursue a complaint against the wishes of the victim, it is not to harm him or her, but to protect others from the same harm. If the campus does not uphold your victim's complaint, it may not be that they don't believe him or her. It may be that they don't have the evidence to show a violation. But, campuses still need to provide services, supports and remedies no matter what.
 - **Athletics.** Strive for equity of facilities, participation, scholarships, uniforms, coaching, and athletics opportunities. Report what you hear to the Title IX Coordinator, and never forget that your athletes are, first and foremost, our students. Their status as athletes doesn't change the fact that they are protected by campus policies and subject to campus rules. Special training for athletes and coaches is needed to address the circumstances inherent in closed campus athletic communities.
 - **Counselors and Health Services.** You know more about campus victimization rates than anyone else. But, many of you do not report statistics on sexual violence (and soon, dating violence, domestic violence, and stalking). I ask you to voluntarily invert the Clery Act reporting paradigm. At present, counselors may volunteer statistics when they choose to. We suggest that reporting anonymous, non-personally-identifiable, statistical information should be the standard for you. But, you can make discretionary decisions not to report if you believe it would harm your client or patient to do so. Will you help us understand our climate and the extent of campus crime if it won't harm your clients in any way?
 - **Students.** A community is a place where the members look out for one another. When you are a bystander to the safety of the community, you fail to contribute to making your campus a socially just community. Engage, intervene and look after each other. You won't always make the best choices, but a safety net can help to ensure you don't always suffer for them.
 - **Victims.** If anyone has sexual contact with you by force, without your clear consent by word or by action, or where they know or should know that you are physically incapacitated (often by alcohol or other drugs), you have the right to

- have your college remedy the effects of what has happened to you. You can make a confidential report, or a formal complaint, and/or report to police. Title IX also protects you if you are stalked, if you experience intimate partner violence, sexual harassment, or other forms of sex/gender discrimination.
- **Sexual Aggressors.** Take no for an answer. Ask for a yes. Don't make assumptions. You're not entitled to sex, and if you take it without permission, you're going to get kicked out of college.
 - **Registrars.** And, the institution is going to note it on your transcript. It's the ethical thing to do.
 - **The NCHERM Group.** We will continue to support all of you as you work earnestly to achieve compliance. This summer, we'll release our strategic prevention curriculum, to provide you with the content you need to comply with the education and training mandates of Title IX and the Campus SaVE Act. We have an online suite of trainings already available for mandated reporters, hearing boards and appeals officers. More online trainings are scheduled throughout 2014-2015 on the topics you need to assure gender equity within your campus communities.

Thank you for your dedication and determination.

Sincerely,

Brett A. Sokolow, Esq.

President & CEO, The NCHERM Group, LLC

W. Scott Lewis, J.D.

W. Scott Lewis, Partner, The NCHERM Group, LLC

Saundra K. Schuster, Esq.

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ATTACHMENT D



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February 28, 2014

White House Task Force to
Protect Students from Sexual Assault
United States Department of Justice
Office on Violence Against Women
145 N Street NE
Suite 10W.121
Washington, DC 20530

Dear Members of the Task Force:

On behalf of RAINN, I write to offer comments and recommendations to the White House Task Force to Protect Students from Sexual Assault.

RAINN is the nation's largest anti-sexual violence organization. RAINN operates the National Sexual Assault Hotline (800.656.HOPE and online.rainn.org), which has helped more than 1.9 million people since its creation in 1994 (the telephone hotline is run in partnership with more than 1,000 local sexual assault service providers). RAINN also operates the DoD Safe Helpline on behalf of the Department of Defense. Additionally, RAINN carries out programs to prevent sexual assault, help victims, and ensure that rapists are brought to justice. We are encouraged by the renewed national focus on issues of campus sexual assault and are pleased to offer our perspective, which is based on our experience working on prevention on hundreds of college campuses and helping thousands of college students recover from their attack.

One out of every six women and one out of every 33 men are victims of sexual assaultⁱ – 20 million Americans in all. Those of college age are more likely to be victimized than any other age group. According to the Department of Justice, on a campus of 10,000 students, as many as 350 women may be victims of sexual assault each year. And alarmingly, the Department of Justice (DOJ) estimates that just 12% of college victims report their assault to law enforcement officials.ⁱⁱ This is far below the rate of the general population, where about 40% of all sexual attacks are reported to police, according to DOJ.

RAINN's Work on Issues of Campus Sexual Assault

For two decades, RAINN has led efforts to prevent and better respond to on-campus crimes of sexual assault. On the public policy front, we supported passage of the Campus



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SaVE Act and look forward to the implementation of its requirement that campuses, by October 1, 2014, establish a comprehensive policy and plan for tackling these issues in their communities.

In addition to advancing policy reforms, RAINN works hand-in-hand with college students and officials. RAINN coordinates an annual day of action ("RAINN Day") to educate students about preventing and recovering from sexual violence on college campuses. For the most recent RAINN Day, in September 2013, RAINN partnered with MTV and nearly 300 college campuses across the country. In the last 10 years, the program has educated millions of college students and administrators across the country.

Perpetrators of Campus Sexual Assault: What We Know

In the last few years, there has been an unfortunate trend towards blaming "rape culture" for the extensive problem of sexual violence on campuses. While it is helpful to point out the systemic barriers to addressing the problem, it is important to not lose sight of a simple fact: Rape is caused not by cultural factors but by the conscious decisions, of a small percentage of the community, to commit a violent crime.

While that may seem an obvious point, it has tended to get lost in recent debates. This has led to an inclination to focus on particular segments of the student population (e.g., athletes), particular aspects of campus culture (e.g., the Greek system), or traits that are common in many millions of law-abiding Americans (e.g., "masculinity"), rather than on the subpopulation at fault: those who choose to commit rape. This trend has the paradoxical effect of making it harder to stop sexual violence, since it removes the focus from the individual at fault, and seemingly mitigates personal responsibility for his or her own actions.

By the time they reach college, most students have been exposed to 18 years of prevention messages, in one form or another. Thanks to repeated messages from parents, religious leaders, teachers, coaches, the media and, yes, the culture at large, the overwhelming majority of these young adults have learned right from wrong, and enter college knowing that rape falls squarely in the latter category.

Research supports the view that to focus solely on certain social groups or "types" of students in the effort to end campus sexual violence is a mistake. Dr. David Lisak estimates that three percent of college men are responsible for more than 90% of rapes.ⁱⁱⁱ Other studies suggest that between 3-7% of college men have committed an act of sexual violence or would consider doing so. It is this relatively small percentage of the population, which has proven itself immune to years of prevention messages, that we must address in other ways. (Unfortunately, we are not aware of reliable research on female college perpetrators.)



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Consider, as well, the findings of another study^{iv} by Dr. Lisak and colleagues, which surveyed 1,882 male college students and determined that 120 of them were rapists. Of those determined to be rapists, the majority — 63% — were repeat offenders who admitted to committing multiple sexual assaults.^v Overall, they found that each offender committed an average of 5.8 sexual assaults.^{vi} Again, this research supports the fact that more than 90% of college-age males do not, and are unlikely to ever, rape. In fact, we have found that they're ready and eager to be engaged on these issues. It's the other guys (and, sometimes, women) who are the problem.

Preventing Sexual Assault on College Campuses

The federal government has, with this task force, an unprecedented platform to deliver a national message of zero tolerance for sexual violence on college campuses and to push for the spread of prevention programs. But we urge the task force not to hurriedly endorse a single message or marketing campaign or rush to create a new one. The fact is, there is a real dearth of reliable data on what works. Because of this, the role of the federal government should be to encourage innovation and sponsor rigorous evaluation, rather than force the adoption of specific programs.

There is no shortage of campaigns designed to deliver anti-sexual violence awareness and prevention to college-aged students and other members of the community. While many of these programs seem promising, research to date is insufficient to allow us to know how effective they are or to identify best-in-class programs. There is also insufficient research to know if one-size messages work, or if (and how) they should be tailored for audiences such as male or LGBT survivors or those with disabilities.

The federal government should seize this opportunity to conduct a meaningful evaluation of existing campaigns and a research-informed assessment of what messages have been most effective toward the ultimate goal of stopping rape before it occurs and keeping these serial criminals off our streets and college campuses. These evaluations should focus on the true end goal, reducing rape, not intermediate goals such as changing attitudes (despite the fact that these intermediate goals are vastly easier to measure).

Perhaps counter-intuitively, we recommend not focusing prevention messaging towards potential perpetrators (with one exception, described below). Importantly, research has shown that prevention efforts that focus solely on men and "redefining masculinity," as some programs have termed it, are unlikely to be effective. As Dr. Lisak has noted,^{vii} we can benefit from decades' of sex offender treatment work, which supports that it is all but impossible to reprogram a serial offender with a simple prevention message.



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There is one other area in which the federal government can play a productive role: using its research expertise to conduct frequent anonymous surveys on a variety of campuses, in order to measure the rate of sexual violence and the impact of individual campus prevention programs. As a bipartisan group of 39 legislators said in a letter^{viii} to the Department of Education, such surveys can help us obtain a more accurate understanding of the extent of sexual violence on campuses. Leadership from the federal government, to ensure that the surveys yield uniform and constructive data, would be very valuable.

RAINN recommends a three-tiered approach when it comes to preventing sexual violence on college campuses. A prevention campaign should include the following elements:

1. Bystander intervention education: empowering community members to act in response to acts of sexual violence.
2. Risk-reduction messaging: empowering members of the community to take steps to increase their personal safety.
3. General education to promote understanding of the law, particularly as it relates to the ability to consent.

You may note that we have not used the term “primary prevention,” which is widely used in the field. That is because we have a different definition of primary prevention than many. We believe that the most effective — the primary — way to prevent sexual violence is to use the criminal justice system to take more rapists off the streets. Stopping a rapist early in his or her career can prevent countless future rapes. Because increasing reporting and vigorous prosecution are better addressed in the context of response to sexual assault, we discuss this further in the crime section below. This approach should, of course, continue to be complemented by education and outreach campaigns targeted towards younger, more malleable populations.

Bystander Intervention

Bystander intervention messaging is an unproven, but promising, approach, and we recommend expanding its use in the context of combatting sexual violence on campuses. Changing social norm so that students feel a responsibility to watch out for friends, and intervene before a friend becomes a victim or perpetrator, should be encouraged and supported by the federal government. The task force should also encourage the use of technology to disseminate bystander education, which needs to be repeated and specific to be useful.



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Risk Reduction

As anyone who has worked on rape prevention knows, risk-reduction messaging is a sensitive topic. Even the most well-intentioned risk-reduction message can be misunderstood to suggest that, by not following the tips, a victim is somehow to blame for his or her own attack. Recent survivors of sexual violence are particularly sensitive to these messages, and we owe it to them to use them cautiously.

Still, they are an important part of a rape prevention program. To be very clear, RAINN in no way condones or advocates victim blaming. Sexual assault is a violent crime and those who commit these crimes are solely responsible for their actions. That said, we believe that it is important to educate members of a campus community on actions they can take to increase their personal safety. In fact, we believe it's irresponsible not to do so.

Over decades, it has been shown that risk-reduction messaging is an important component of crime prevention overall. This approach has significantly contributed to reducing the number of violent and property crimes. It has a similar value in sexual violence prevention.

Many institutions incorporate risk-reduction tips into their awareness messaging and we encourage the federal government to support this type of messaging.^{ix} Many respondents — survivors, faculty, and others — to our survey on the issue of campus sexual assault (see Appendix) endorsed this view as well. This recommendation is intended to impart tools of empowerment, not victim blaming.

Promoting Understanding of the Law

Notwithstanding our point above about the futility of directing prevention messages to potential college perpetrators, there is one area in which such messages can have a salutary effect. In our public education work, we consistently encounter confusion about the definition of consent, particularly in cases in which one or both parties have consumed alcohol or drugs. Students receive a tremendous amount of conflicting (and often erroneous) information about where "the consent line" is.

Some campaigns and websites claim that the ingestion of even a single drink renders someone unable to legally consent, while conversely others explain that anyone short of unconscious can consent (in fact, the standard varies by state; most common is an "incapacitation" standard, which itself is not always well defined in law). Still others giving advice to students use imprecise, and therefore unhelpful, words such as "buzzed" to describe the line.



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It's no wonder that many students are confused — and would benefit from clearer education. (For a similar reason, education should avoid terms that have no real legal meaning, such as "date rape.") This is one area in which technology can play a big role. Videos, interactive apps and websites should be utilized to explain, and demonstrate, the educational information much needed by students.

Responding to Sexual Assault on College Campuses

Despite the best prevention efforts, we know that these crimes will continue to occur on America's college campuses. Below, we offer recommendations for improvements to the response to these crimes, in furtherance of the overall goal of preventing future crimes and taking serial criminals off the streets.

Establish and Disseminate Clear, Concrete, Campus-Specific Policies and Procedures

Students and other members of the campus community need to know — *before* an event occurs — what to expect in the wake of a crime of sexual assault. To whom should these crimes be reported? What will occur in the wake of such a report? What medical and mental health supports are available (on campus and off)? What role will law enforcement have? Which members of the campus community are mandated reporters? What are the victim's rights in the process?

A handful of federal laws and guidance documents have created a murky landscape of protocols, procedures and punishments for these crimes. Discussing this with college administrators working to navigate this system, it is exceedingly clear that even the most highly informed and best intentioned are confused. Similarly, students, particularly survivors, find the entire process confusing and difficult to navigate in the wake of their trauma. Both have expressed confusion about community notification and Clery Act compliance; about who needs to report what and when; about who will investigate and what that process looks like; about how victims' requests for confidentiality can and should be honored. They are also confused about what punishments are (or should be) in place for offenders and what accommodations can be made available for those who report being attacked. They are confused about the value of the criminal justice response, the available reporting options, and likely outcomes in the event there are charges filed.

All this confusion discourages victims from coming forward to take the brave step of reporting this crime. If we expect victims to come forward and work with us to hold perpetrators accountable, then we need to demonstrate that their claims will be taken seriously, that these incidents will be treated as the crimes they are and their perpetrators



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as the serial criminals that, by and large, they are, and that clear systems and procedures will be in place to support them through the process.

Federal law requires nearly every college campus to, by this October 1, formalize a comprehensive sexual assault policy and establish training curricula for all members of the campus community. The law requires these policies to include information about reporting procedures, what to do and expect after a report is made, victims' rights, and many of the other topics we've noted are the source of ongoing confusion. We encourage the federal government to ensure that the promise of this law is fulfilled.

While we remain hopeful that school administrators and officials will dedicate significant thought to this process, RAINN is concerned by reports that some schools have taken a haphazard approach in this area. For example, while preparing to file a Clery complaint against her alma mater, the University of Ohio, Akron, a 2011 graduate discovered that the school's sexual assault policy appeared to be little more than a plagiarized conglomeration of other schools' policies. Some of the provisions, disturbingly, cited policies or practices that were inapplicable to her school and campus.^x

There are, no doubt, other examples like this. We therefore encourage the federal government to strictly enforce the requirements of the Campus SaVE Act and establish a mechanism for reviewing schools' policies and publicly sharing best practices so that other campuses can benefit from what's working well for their counterparts.

Enhancing Victims' Access to Support and Care Services

Critical to this effort are steps to ensure that students and other members of the campus community who experience sexual violence are met with comprehensive services.

Expanded Options for Care and Information

We must ensure there are multiple channels through which victims can come forward to get information and recovery help. The likelihood of a victim reporting the crime (and, thereby, potentially setting off a chain reaction of support services and potential prosecution) stands to increase in direct proportion to their awareness of and the availability of opportunities for help.

The federal government should require campuses to share, with all members of the campus population, information about on-campus resources, those such as rape crisis centers in the surrounding community, and national resources such as the National Sexual Assault Hotline (800-656-HOPE) and National Sexual Assault Online Hotline (online.rainn.org).



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The federal government should also, in keeping with recommendations published in the Justice Department's recent *Vision 21 Report*,^{xi} support innovative technology designed to reach college-aged students (38% of whom, in a recent survey, said they couldn't go more than 10 minutes without checking their smartphones or other electronic devices).^{xii} This presents a key opportunity: the federal government must encourage and support programs that utilize technology and social media to deliver education, prevention, and support around campus sexual violence.

Access to Medical Care and Sexual Assault Specialists

Access to comprehensive medical care and services in the immediate aftermath of sexual assault is vitally important. Each victim of an on-campus sexual assault should be educated on where care can be accessed (at any time of day) and should be encouraged to undergo a sexual assault forensic examination (and educated on why that can be important to holding their rapist accountable). If a sexual assault nurse examiner is not available on campus, victims should be offered free transportation to a hospital or facility that does offer these services (whether in person or through telemedicine), if available.

Enhanced Victim Support Systems

Victims of campus sexual assault need support systems when they come forward to report the crime. Victims can benefit from trained volunteers or staff who can help them navigate the minefield that a report of sexual assault can expose. We would encourage campuses to appoint a victim services coordinator (and support staff) to work directly with victims, help them understand their options and rights, accompany them to medical and legal proceedings, and help them cope with the aftermath of their assault (while ensuring that such staff have similar training, and enjoy similar confidentiality privilege protections, as other sexual assault service providers). This point person could help ensure that the student knows about any accommodations the university may make for them (for instance, options regarding housing transfers or class schedule adjustments). In the absence of a specific on-staff point person (or persons), schools should establish a system for training volunteers, R.A.'s, existing faculty members, or others to serve in this capacity.

Treating this as a Crime: Encouraging Reporting and Enhancing Partnerships and Coordination with Law Enforcement

Rape is all too often a crime without consequences. In America, out of every 100 rapes, only 40 are reported to police, and only three rapists will ever spend a day behind bars. On college campuses, the situation is even worse: according to the Justice Department, one in



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every five women will be sexually assaulted while in college, yet just 12% report the assault to law enforcement.

This disturbingly low reporting rate amounts to a massive missed opportunity in the fight against campus sexual assault. When these crimes aren't reported, not only do victims often fail to receive the vitally important services and supports they need (as they are more likely to suffer a host of long-term health effects),^{xiii} but serial criminals are left unpunished and free to strike again. And the message this sends to the broader community and future offenders? You can rape with impunity; that's just what happens in college.

We can, and must, do better if we ever hope to make real progress combatting this problem. The task force can and should advance this goal by supporting partnerships between colleges and universities and local law enforcement.

Formalizing the role and responsibility of law enforcement in the response to on-campus sexual violence isn't simple, particularly as college police forces vary widely in their powers and responsibilities and relationship to surrounding law enforcement agencies. It raises legitimate concerns that must be thoughtfully addressed, such as how to handle victims' desire to remain anonymous or to decline prosecution. There are also very real, practical resource constraints. But in the end, until we find a way to engage and partner with law enforcement, to bring these crimes out of the shadows of dorm rooms and administrators' offices, and to treat them as the felonies that they are, we will not make the progress we hope.

De-emphasize Internal Judicial Boards

The FBI, for purposes of its Uniform Crime Reports, has a hierarchy of crimes — a ranking of violent crimes in order of seriousness. Murder, of course, ranks first. Second is rape. It would never occur to anyone to leave the adjudication of a murder in the hands of a school's internal judicial process. Why, then, is it not only common, but expected, for them to do so when it comes to sexual assault? We need to get to a point where it seems just as inappropriate to treat rape so lightly.

While we respect the seriousness with which many schools treat such internal processes, and the good intentions and good faith of many who devote their time to participating in such processes, the simple fact is that these internal boards were designed to adjudicate charges like plagiarism, not violent felonies. The crime of rape just does not fit the capabilities of such boards. They often offer the worst of both worlds: they lack protections for the accused while often tormenting victims.



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We urge the federal government to explore ways to ensure that college and universities treat allegations of sexual assault as they would murder and other violent felonies. The fact that the criminal justice process is difficult and imperfect, while true, is not sufficient justification for bypassing it in favor of an internal system that will never be up to the challenge.

While there are undoubtedly university officials wholeheartedly committed to treating these claims with seriousness, and examples of campuses independently doing the “right thing” in the wake of claims of sexual violence, stories abound of the mishandling of such cases. In just recent months, reports of mishandled cases at USC, Dartmouth College, Swarthmore College, University of Montana, Vanderbilt University, Occidental College, Penn State University, the University of Connecticut, the University of North Carolina, and Berkeley have flooded the Department of Education.^{xiv} In fact, in 2013 alone, the department’s Office on Civil Rights received 30 complaints against colleges and universities around these issues – a 76% increase over the prior year, when 17 complaints were filed. The complaints say the schools violated students’ civil rights by not thoroughly investigating sexual assaults, and failed to obey Clery Act mandates around tracking and disclosure of these crimes. And while significant fines have been levied against a handful of institutions (notably a \$165,000 fine imposed on Yale University), enforcement of Clery Act requirements and response to on-campus claims of sexual assault has been uneven.

It is, therefore, imperative that colleges and universities partner with local law enforcement around these crimes – from the time of report to resolution. In practical terms, this means ensuring that campus protocols and policies explicitly spell out what that partnership looks like – who is responsible for reporting an alleged crime to law enforcement? When must that occur and how will a victim be involved in that process (to address legitimate concerns around confidentiality, maintaining control over decision-making, etc.)? What procedures will on-campus health officials utilize to ensure, whenever possible, evidence collection occurs in the wake of a sexual assault? The answers to these questions will vary from campus-to-campus, jurisdiction-to-jurisdiction.

We urge the federal government to establish best practices in the area of law enforcement/campus partnerships to address incidents of sexual violence, and to support efforts to institutionalize such partnerships. We also urge the task force to consider the adoption of a system similar to the Defense Department’s, which allows for “restricted” reports that enjoy a level of confidentiality, in addition to standard reports. Given the overall importance of informed decision making by victims of sexual assault, we also refer you to DoD’s process of a trained advocate walking a victim through a form^{xv} outlining the victim’s rights, options, etc., before a report is filed.



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Additional Recommendations and Comments From the Community

When this Task Force was announced, RAINN issued a survey to 100,000 supporters, requesting input from the community on this issue. We received an overwhelming number of responses from survivors, victim advocates, law enforcement personnel, campus officials and faculty members, prosecutors, and others. For your consideration, we have summarized some of the most common and most powerful suggestions in the appendix to this letter. Many responses echo our own recommendations above.

Conclusion

To summarize some of our key points:

Colleges and universities must:

- Take the crime of sexual assault seriously and impose meaningful, public sanctions when wrongdoing is found and crimes are substantiated.
- Investigate every claim of sexual assault reported.
- Partner with local law enforcement on each investigation, starting immediately after a crime is reported.
- Ensure victims have access to comprehensive support systems (campus, local and national) and forensic medical exams.
- Ensure that campus policies and procedures are comprehensive and campus-specific.
- Educate the campus community on their rights and roles in the wake of sexual violence, including information about bystander intervention and risk-reduction.
- Educate all members of the campus community on the school's policies and procedures in the wake of a claim of sexual assault, and communicate, from the top down, a zero-tolerance policy of sexual violence.

The federal government should:

- Spearhead and invest in rigorous, continuing research to assess what messaging is (and is not) working to further the overall goal of decreasing sexual violence on campus and taking rapists off our college campuses and streets.
- Impose meaningful sanctions for violations of federal law, including the Clery Act and Campus SaVE Act.
- Support innovative approaches and technologies to ensure that there is transparency around this issue, and to enhance schools' ability to respond to and prevent sexual violence.



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- Require all colleges and universities to disseminate to all members of the campus community the phone number and URL for the National Sexual Assault Hotline in addition to campus and local resources.

Thank you for the opportunity to provide perspective and recommendations on this critical issue. Please do not hesitate to contact me with questions. I look forward to continuing to work with you towards our shared goal of eliminating sexual violence on campuses.

Sincerely,

Scott Berkowitz
President

Rebecca O'Connor
Vice President for Public Policy

ⁱ National Institute of Justice & Centers for Disease Control & Prevention. *Prevalence, Incidence and Consequences of Violence Against Women Survey*. 1998.

ⁱⁱ White House Council on Women and Girls, *Rape and sexual Assault: A Renewed Call to Action*, January 2014, at 15, citing Kilpatrick, D.G., Resnick, H.S., Ruggiero, K.J., Conoscenti, L. M., & McCauley, J. (2007). *Drug facilitated, incapacitated, and forcible rape: a national study* (NCJ 219181). Charleston, SC: Medical University of South Carolina, National Crime Victims Research and Treatment Center.

ⁱⁱⁱ Greenfield, L.A. *Sex Offenses and Offenders: An Analysis of Data on Rape and Sexual Assault*, Washington, D.C.: U.S. Department of Justice, Bureau of Justice Statistics, 1997.

^{iv} Lisak, D. & Miller, P.M., 2002. "Repeat Rape and Multiple Offending Among Undetected Rapists." *Violence and Victims* 17(1), 73-84.

^v *Id.*

^{vi} *Supra.*

^{vii} See, Lisak, D., *Understanding the Predatory Nature of Sexual Violence*, at 8. Available at:

<http://www.middlebury.edu/media/view/240951/original/>

^{viii} Text available at: <http://www.scribd.com/doc/203276038/Campus-Sexual-Assault-Letter-Speier-Mahoney>

^{ix} See, e.g., Oregon State University ([http://oregonstate.edu/dept/security/sexual-And assault-risk-reduction](http://oregonstate.edu/dept/security/sexual-And%20assault-risk-reduction)); and the University of Chicago (<http://csl.uchicago.edu/get-help/resources-sexual-violence-prevention>)

^x Baker, Katie J.M., "Does it Matter If Colleges Plagiarize their Sexual Assault Policies?" *Newsweek*, February 5, 2014. Available here: www.newsweek.com/does-it-matter-if-colleges-plagiarize-their-sexual-assault-policies-228086.

^{xi} Available here: <http://ovc.ncjrs.gov/vision21/outcome.html>

^{xii} See, <http://mashable.com/2012/05/06/tech-college-infographic/>

^{xiii} Survivors of sexual violence are at an increased risk for depression, PTSD, substance abuse, suicide, and sleep disorders. For additional information, see: <https://www.rainn.org/get-information/effects-of-sexual-assault>

^{xiv} The following Universities have had a federal complaint filed against them: Penn State University, Dartmouth College, Harvard Law School, Princeton University, University of North Carolina at Chapel Hill, Amherst College, Vanderbilt University, University of California, Berkeley, University of Southern California, Occidental College, University of Colorado, Boulder, Swarthmore College, Hanover College, University of Connecticut, Cedarville University, Emerson College, University of Virginia, Carnegie Mellon University, University of Akron, University of Texas-Pan American, Hobart and William Smith Colleges, University of Chicago, University of Montana, Yale University, University of Notre Dame, University of Missouri, Oklahoma State University, University of Indianapolis, Florida State University, Columbia University.

^{xv} See, e.g., DD 2910 form at <http://www.sapr.mil/public/docs/miscellaneous/toolkit/dd2910.pdf>

APPENDIX COMMENTS TO THE WHITE HOUSE TASK FORCE TO PROTECT STUDENTS FROM SEXUAL ASSAULT February 28, 2014

Methodology

Between January and February 2014, RAINN conducted an online survey of members of the sexual assault community, requesting their responses to the following questions:

1. What should colleges do differently to prevent sexual violence?
2. How should colleges improve the way they handle or investigate a reported sexual assault?
3. How can colleges improve the way they treat victims of sexual assault?

Respondents were invited to identify themselves as a student, survivor, faculty/administration member, and/or other, or to remain anonymous.

Summary of Responses

The most common themes in the comments we received were:

- Take this issue and each and every claim of sexual violence seriously.
- Do not handle investigations in-house. Involve local law enforcement and other system actors.
- Believe victims when they come forward, and establish systems of support throughout the process that unfolds.
- Assess what's working (and what isn't). Bring in third parties to audit this.
- A zero tolerance message is essential, but will only work if it comes from the top (university presidents) and if it has teeth (imposition of meaningful sanctions).
- Training and education is important – there can never be too much on this topic, and it has to start early.
- Make the system transparent: tell people who should and can report and how, and where help (both on-campus and off) is available.

Select responses are summarized and provided below, grouped by general topic of remark.

Take and treat this issue seriously.

Overwhelmingly, the top response to our survey was the sentiment that colleges and universities need to treat sexual violence as a serious crime. Over and over again, survey respondents said that if anything is going to change, schools must take each and every allegation of sexual violence seriously.

"We faculty teach students throughout the semester how serious plagiarism is. Why not do the same for rape?"

- *faculty member*

"Don't say things like 'boys will be boys' or 'he lacks emotional intelligence.'"

- *student and survivor*

"We need support from the top. College administrators should directly engage with campus communities on sexual assault. We need to hear about this from the highest level."

- *faculty member*

Investigate each and every claim; involve law enforcement.

Multiple respondents lamented the practice of colleges and universities handling claims of sexual violence and subsequent investigations and proceedings "in house."

"Unless there are more convictions, these crimes will continue to go unreported. In my situation, those who attacked me were not only aware of the conviction rate – they told me what it was. This must be changed."

- *college administrator*

"Handle incidents of sexual crime through municipal law enforcement rather than through college channels which only try to keep the school's name out of the press."

- *alumnus; friend of multiple survivors*

"College administrators should not be replacing the criminal justice system."

- *mother of survivor*

"External, independent investigations [are] the only way to assure an unbiased investigation."

- *survivor*

Impose meaningful, not ceremonial punishments.

Another common refrain was the need to go beyond telling the campus community that these crimes are taken seriously – respondents cited the need to demonstrate that through meaningful, not ceremonial, punishments and sanctions.

"Stop the culture of impunity for rapists. If rapists on campus faced the same penalties for rape as rapists off campus, there would be considerably less rape. Light sanctions only give a green light to rape, and make a campus a 'free-rape zone' instead of a 'rape-free zone.'"

- *faculty member*

"If we don't expel students for rape, what do we expel them for?"

- *faculty member*

"The offender should be [upon conviction] permanently removed from campus. Too often the victim transfers to another university when the offender is permitted to come back and resume classes."

- *student and survivor*

"Mandate suspension or expulsion for students that are legally convicted of rape or sexual assault from the university. Punish students that harass survivors for reporting rape or attempting to intimidate them..."

- *student and survivor*

External Assessment

More than one respondent suggested that the federal government mandate third-party audits of schools' sexual assault policies and procedures.

"Institute independent, third party audits of protocols."

- *faculty member/administrator*

Coordinated Community Response

"Colleges should be included in the local SART (sexual assault response team) in the community. If they don't have one, one should be formed. This should include campus police, as well as law enforcement in the community, the district attorney's office, sexual assault advocates and SANEs, and others."

- *Sexual assault service provider in a college town*

Enhanced Support and Accommodations for Alleged Victims

"Colleges should perhaps have two counselors on staff – one male, one female – who are educated psychologists (or other professionals) specifically trained to deal solely with issues of sexual assault (either on or off-campus)."

- *student and survivor*

"Make policy clear that students' health and safety come before getting in trouble for underage drinking/drug use. The student needs to feel that their school is a safe place to talk about sexual assault and a good resource for related services."

- *student and survivor*

"Trained and effective counselor, trained big brothers/sisters style support [for victims]."

- *student and survivor*

"Living quarters changes [for the alleged victim], zero-cost option to take an absence from classes, the option to resume a class at the same point with the same accumulated grade point the next semester."

- *student and survivor*

"Immediate options for administrative support such as changing the victim's or the accused's class schedule."

- *student and survivor*

"Information about where I could have gotten help and reported things online would have been huge."

- *survivor*

Increased Security Measures

"Increased campus security presence (and training so that they know how to help and respond to these types of crimes)."

- *student*

"An app or other service that lets you call for help on campus with just a push of a button on your cell phone."

- *student and survivor*

ATTACHMENT E

THE WALL STREET JOURNAL.

Yes Means Yes—Except on Campus

The feds tip the scales against due process in sexual misconduct cases.

By HARVEY A. SILVERGLATE

For a glimpse into the treacherous territory of sexual relationships on college campuses, consider the case of Caleb Warner.

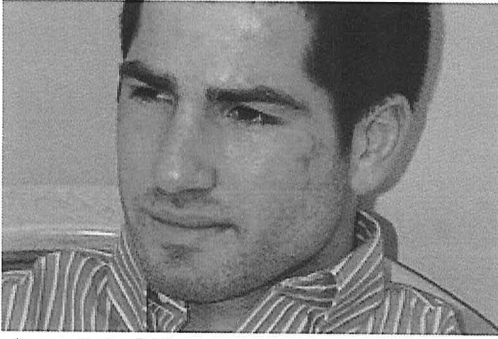
On Jan. 27, 2010, Mr. Warner learned he was accused of sexual assault by another student at the University of North Dakota. Mr. Warner insisted that the episode, which occurred the month prior, was entirely consensual. No matter to the university: He was charged with violating the student code and suspended for three years. Three months later, state police lodged criminal charges against his accuser for filing a false police report. A warrant for her arrest remains outstanding.

Among several reasons the police gave for crediting Mr. Warner's claim of innocence was evidence of a text message sent to him by the woman indicating that she wanted to have intercourse with him. This invitation, combined with other evidence that police believe indicates her untruthfulness, has obvious implications for her charge of rape.

Nevertheless, university officials have refused to allow Mr. Warner a re-hearing—much less a reversal of their guilty verdict. When the Foundation for Individual Rights in Education (FIRE), a civil liberties group of which I am board chairman, wrote to University President Robert O. Kelley to protest, the school's counsel, Julie Ann Evans, responded. She wrote that the university didn't believe that the fact that Mr. Warner's accuser was charged with lying to police, and has not answered her arrest warrant, represented "substantial new information." In any event, she argued, the campus proceeding "was not a legal process but an educational one."

Six weeks before FIRE received this letter, Russlynn Ali, assistant secretary for the Office for Civil Rights in the Department of Education, sent her own letter to every college and university in the country that accepts federal money (virtually all of them). In it, she essentially ordered them to scrap fundamental fairness in campus disciplinary procedures for adjudicating claims of sexual assault or harassment.

Ms. Ali's April 4 letter states that "in order for a school's grievance procedures to be consistent with the standards in Title IX [which prohibit discrimination on the basis of sex in any educational institution receiving federal funds], the school must use a preponderance of the evidence standard (i.e., it is more likely than not that sexual harassment or violence occurred)." This institutionalizes a low standard previously eschewed by most of the nation's top schools. It also sends the message that results—not facts—matter most. Such a standard would never hold up in a criminal trial.



Associated Press
Caleb Warner

Following this outrageous diktat, Cornell University lowered its evidentiary burden in sexual assault cases. Now, determining whether an incident constitutes sexual violence is based on the "preponderance of the evidence" standard, instead of the school's prior "clear and convincing evidence" test. Stanford followed suit—in the middle of one student's sexual misconduct hearing. He was promptly found guilty and suspended for two years.

When Yale administrators received the government's letter, the university was under federal investigation for permitting gender discrimination on campus. The next month, on May 17, Yale announced that it would institute a five-year suspension of a fraternity that had engaged in a puerile but harmless initiation. Parading around campus, blindfolded pledges were told to shout tasteless slogans like "No means yes, yes means anal."

The university deemed this a sufficiently serious species of gender-based discrimination to justify official censorship. This, despite its "paramount obligation"—Yale's words—to uphold freedom of expression. And Yale, too, lowered its previous, higher evidentiary standard in sexual assault cases to the bottom rung.

Codes banning "offensive" speech in the name of protecting the sensibilities of what are commonly designated historically disadvantaged groups—and the campus kangaroo courts that enforce them—have long threatened free expression and academic freedom. While real-world courts have invalidated many of these codes, the federal government has now put its thumb decisively on the scale against fairness on issues of sexual harassment and assault.

Caleb Warner now goes without a diploma and carries with him the stigma of a sexual predator. Unfortunately, the government's policy ensures that his will not be a unique case.

Mr. Silverglate, a lawyer, is the author of "Three Felonies a Day: How the Feds Target the Innocent" (Encounter Books, 2009). He is also the chairman of the board of directors of the Foundation for Individual Rights in Education.

ATTACHMENT F

1 **SECTION 5.(e)** This section is effective when it becomes law and applies to
2 contracts entered on or after that date.

3
4 **EQUAL TREATMENT FOR FRATERNITIES AND SORORITIES BY LOCAL**
5 **GOVERNMENT**

6 **SECTION 6.(a)** G.S. 153A-340 is amended by adding a new subsection to read:

7 "**(k)** A zoning or unified development ordinance may not differentiate in terms of the
8 regulations applicable to fraternities or sororities between those fraternities or sororities that are
9 approved or recognized by a college or university and those that are not."

10 **SECTION 6.(b)** G.S. 160A-381 is amended by adding a new subsection to read:

11 "**(g)** A zoning or unified development ordinance may not differentiate in terms of the
12 regulations applicable to fraternities or sororities between those fraternities or sororities that are
13 approved or recognized by a college or university and those that are not."

14 **SECTION 6.(c)** Part 3 of Article 1 of Chapter 116 of the General Statutes is
15 amended by adding a new section to read:

16 **"§ 116-40.11. Disciplinary proceedings; right to counsel for students and organizations.**

17 **(a)** Any student enrolled at a constituent institution who is accused of a violation of the
18 disciplinary or conduct rules of the constituent institution shall have the right to be represented,
19 at the student's expense, by a licensed attorney or nonattorney advocate who may fully
20 participate during any disciplinary procedure or other procedure adopted and used by the
21 constituent institution regarding the alleged violation. However, a student shall not have the
22 right to be represented by a licensed attorney or nonattorney advocate in either of the following
23 circumstances:

24 **(1)** If the constituent institution has implemented a "Student Honor Court"
25 which is fully staffed by students to address such violations.

26 **(2)** For any allegation of "academic dishonesty" as defined by the constituent
27 institution.

28 **(b)** Any student organization officially recognized by a constituent institution that is
29 accused of a violation of the disciplinary or conduct rules of the constituent institution shall
30 have the right to be represented, at the organization's expense, by a licensed attorney or
31 nonattorney advocate who may fully participate during any disciplinary procedure or other
32 procedure adopted and used by the constituent institution regarding the alleged violation.
33 However, a student organization shall not have the right to be represented by a licensed
34 attorney or nonattorney advocate if the constituent institution has implemented a "Student
35 Honor Court" which is fully staffed by students to address such violations.

36 **(c)** Nothing in this section shall be construed to create a right to be represented at a
37 disciplinary proceeding at public expense."

38 **SECTION 6.(d)** Each constituent institution shall track the number and type of
39 disciplinary proceedings impacted by this section, as well as the number of cases in which a
40 student or student organization is represented by an attorney or nonattorney advocate. The
41 constituent institutions shall report their findings to the Board of Governors of The University
42 of North Carolina, and the Board of Governors shall submit a combined report to the Joint
43 Legislative Education Oversight Committee and the House and Senate Education
44 Appropriations Subcommittees by May 1, 2014.

45 **SECTION 6.(e)** Subsection (c) of this section is effective when it becomes law and
46 applies to all allegations of violations beginning on or after that date.

47
48 **AMEND PRIVATE CLUB DEFINITION**

49 **SECTION 7.** G.S. 130A-247 reads as rewritten:

50 **"§ 130A-247. Definitions.**

51 The following definitions shall apply throughout this Part:

ATTACHMENT G

**Sixty-fourth Legislative Assembly of North Dakota
In Regular Session Commencing Tuesday, January 6, 2015**

SENATE BILL NO. 2150
(Senators Holmberg, Armstrong, Casper)
(Representatives Delmore, M. Johnson, Larson)

AN ACT to create and enact a new section to chapter 15-10 of the North Dakota Century Code, relating to student and student organization disciplinary proceedings at institutions under the control of the state board of higher education; to provide for the development of a uniform policy; and to provide for a report to the legislative management.

BE IT ENACTED BY THE LEGISLATIVE ASSEMBLY OF NORTH DAKOTA:

SECTION 1. A new section to chapter 15-10 of the North Dakota Century Code is created and enacted as follows:

Disciplinary proceedings - Right to counsel for students and organizations - Appeals.

1. Any student enrolled at an institution under the control of the state board of higher education has the right to be represented, at the student's expense, by the student's choice of either an attorney or a nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by that institution to address an alleged violation of the institution's rules or policies. This right applies to both the student who has been accused of the alleged violation and to the student who is the accuser or victim. This right only applies if the disciplinary proceeding involves a violation that could result in a suspension or expulsion from the institution. This right does not apply to matters involving academic misconduct. Before the disciplinary proceeding is scheduled, the institution shall inform the students in writing of the students' rights under this section.
2. Any student organization officially recognized by an institution under the control of the state board of higher education has the right to be represented, at the student organization's expense, by the student organization's choice of either an attorney or nonattorney advocate, who may fully participate during any disciplinary proceeding or during any other procedure adopted and used by the institution to address an alleged violation of the institution's rules or policies. This right only applies if the disciplinary proceeding involves a violation that could result in the suspension or the removal of the student organization from the institution. This right applies to both the student organization that has been accused of the alleged violation and to the accuser or victim.
3.
 - a. Any student who is suspended or expelled from an institution under the control of the state board of higher education for a violation of the rules or policies of that institution and any student organization that is found to be in violation of the rules or policies of that institution must be afforded an opportunity to appeal the institution's initial decision to an institutional administrator or body that did not make the initial decision for a period of one year after receiving final notice of the institution's decision. The right to appeal the result of the institution's disciplinary proceeding also applies to the student who is the accuser or victim.
 - b. The right of the student or the student organization under subsection 1 or 2 to be represented, at the student's or the student organization's expense, by the student's or the student organization's choice of either an attorney or a nonattorney advocate, also applies to the appeal.
 - c. The issues that may be raised on appeal include new evidence, contradictory evidence, and evidence that the student or student organization was not afforded due process. The

institutional body considering the appeal may consider police reports, transcripts, and the outcome of any civil or criminal proceeding directly related to the appeal.

4. Upon consideration of the evidence, the institutional body considering the appeal may grant the appeal, deny the appeal, order a new hearing, or reduce or modify the suspension or expulsion. If the appeal results in the reversal of the decision or a lessening of the sanction, the institution may reimburse the student for any tuition and fees paid to the institution for the period of suspension or expulsion which had not been previously refunded.
5. For purposes of this section, "fully participate" includes the opportunity to make opening and closing statements, to examine and cross-examine witnesses, and to provide the accuser or accused with support, guidance, and advice. This section does not require an institution to use formal rules of evidence in institutional disciplinary proceedings. The institution, however, shall make good faith efforts to include relevant evidence and exclude evidence which is neither relevant or probative.
6. This section does not affect the obligation of an institution to provide equivalent rights to a student who is the accuser or victim in the disciplinary proceeding under this section, including equivalent opportunities to have others present during any institutional disciplinary proceeding, to not limit the choice of attorney or nonattorney advocate in any meeting or institutional disciplinary proceeding, and to provide simultaneous notification of the institution's procedures for the accused and the accuser or victim to appeal the result of the institutional disciplinary proceeding.

SECTION 2. STATE BOARD OF HIGHER EDUCATION TO DEVELOP POLICY - REPORT TO LEGISLATIVE MANAGEMENT. The state board of higher education shall develop and implement a procedure for student and student organization disciplinary proceedings which is applied uniformly to all institutions under the control of the state board of higher education. Before July 1, 2016, the state board of higher education shall report to the legislative management on the status of the implementation of the uniform procedure.

President of the Senate

Speaker of the House

Secretary of the Senate

Chief Clerk of the House

This certifies that the within bill originated in the Senate of the Sixty-fourth Legislative Assembly of North Dakota and is known on the records of that body as Senate Bill No. 2150.

Senate Vote: Yeas 44 Nays 1 Absent 2

House Vote: Yeas 92 Nays 0 Absent 2

Secretary of the Senate

Received by the Governor at _____ M. on _____, 2015.

Approved at _____ M. on _____, 2015.

Governor

Filed in this office this _____ day of _____, 2015,

at _____ o'clock _____ M.

Secretary of State

ATTACHMENT H

INSIDE HIGHER ED

Making Title IX Work By Jake New July 6, 2015

NASHVILLE, Tenn. -- The intersection of campus police investigations and college disciplinary investigations into sexual assault is still a confusing mix at many institutions, but Susan Riseling, the chief of police and associate vice chancellor at the University of Wisconsin at Madison, has a few ideas about how make the relationship work.

Speaking at the annual meeting of the International Association of College Law Enforcement Administrators here on Wednesday, Riseling offered a number of suggestions to not only help campus police better meet the requirements of Title IX of the Education Amendments of 1972 and the Clery Act, but to use those requirements to help inform their own investigations.

Her presentation was based on two recent white papers about the topic, which were the result of two summits she helped organize over the last year studying the issue.

A common theme at the institutions the summits studied was a lack of communication between the various parties that are required by law to handle allegations of campus sexual assault. Not everyone on campus is required to report a sexual assault to police if a student comes to them for help, and colleges are required by the U.S. Department of Education to do their own investigation, separate from that of the police. Campus police officers -- who are in some cases both sworn law enforcement officers and members of a college's staff -- can find themselves straddling both kinds of investigations at once.

In states like Wisconsin, state laws and federal laws over who must report cases of sexual assault differ, creating more confusion. At the University of Wisconsin, there are 5 detectives with the campus police department, 20 counselors with health services and 10 staff members with the dean of students' office, all of whom are meant to be potential points of contact for students who have been sexually assaulted.

“We have to figure out how we’re all going to tell each other,” Riseling said. “We’re all chasing our tails.”

The channels available to students for reporting an assault should be easily found on a college’s website -- no more than four clicks from the home page, the summits' working group concluded -- and every faculty and staff member on campus should be aware of whom they should report a sexual assault to. While staff members should help students learn about all the resources available to them, Riseling said, they should always encourage students to talk to the police.

Both campus police and Title IX investigators should all be familiar with research on how to interview trauma victims, Riseling said, getting basic details at first, but then returning to the specific questions over the next couple of days.

“All of us who have been in officer-involved shootings know that an officer is given one if not two cycles of sleeping before being interviewed,” Riseling said. “We do that for cops. It’s the same type of psychology for sexual assault victims.”

Police must do a better job of interacting with victims of sexual assault in other ways, too, she said, and campuses should find ways to build up trust between students and police officers. She told the police chiefs in the audience to buy a copy of Jon Krakauer’s book *Missoula*, and to require their officers to read it so that they can understand why sexual assault victims often distrust the legal system. The book details how the University of Montana and the city's prosecutors mishandled cases of sexual assault on campus.

“You could have cropped out Missoula, Montana, and put Madison, Wisconsin, in there,” Riseling said.

The University of Wisconsin's police department has indeed made some missteps when interacting with students regarding sexual assault prevention. In October, a list of safety tips published on the department's blog was widely criticized for appearing to blame victims of campus crimes, especially victims of sexual assault. The post, renamed "Tools You Can Use," was originally titled "Shedding the Victim Persona: Staying Safe on Campus." That title, as well as a passage telling students to "make yourself a hard target" prompted a harsh backlash on blogs and social media.

Last year, the university launched a campaign designed to encourage more students to turn to police when they have been sexually assaulted. Called "You Can Tell Us," the campaign included a series of posters and a website telling students what resources were available to them and explaining that victims are never to blame and that they are "in control of the investigation." Riseling said the university hoped to increase reporting by 50 percent.

Instead, the number of reports to campus police increased by 400 percent, to 70 cases last year. By patiently interviewing victims in a way that acknowledged their trauma, she said, police were able to identify every alleged attacker in those cases. The district attorney moved forward with all but two of the cases.

Convincing district attorneys to prosecute more cases of campus sexual assault is crucial, Riseling said, and that can only be done if the cases are being investigated fully by trained police officers, not just Title IX investigators, who have to meet a much lower standard of evidence than a prosecutor would.

That doesn't mean detectives and Title IX investigators can't work together, however, she said, and it may be more comfortable for the victim if the two kinds of investigations are happening in tandem. Rather than interviewing the victim twice, Riseling said a Title IX investigator should watch the police's interview through a television feed, and prompt the detective to ask any additional questions.

She also described a case at Wisconsin, in which the Title IX investigation was the only reason police were able to arrest a student accused of raping his roommate's girlfriend.

The accused student denied the charges when interviewed by police, Riseling said. In his disciplinary hearing, however, he changed his story in an apparent attempt to receive a lesser punishment by admitting he regretted what had occurred. That version of events was “in direct conflict with what he told police,” Riseling said. Police subpoenaed the Title IX records of the hearing and were able to use that as evidence against the student. “It’s Title IX, not Miranda,” Riseling said. “Use what you can.”