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United States Senate

COMMITTEE ON
HOMELAND SECURITY AND GOVERNMENTAL AFFAIRS
WASHINGTON, DC 20510–6250

March 4, 2016

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

Dear Dr. King,

On January 7, 2016, I wrote to you with concerns about two Dear Colleague letters issued by the Department of Education's Office for Civil Rights (OCR): 2010's letter on harassment and bullying,[1] and 2011's letter on sexual violence.[2] As Chairman of the Subcommittee on Regulatory Affairs and Federal Management, I oversee agencies' adherence to procedures governing the federal regulatory process to ensure that the public is heard and the process produces the best possible policy outcomes. This line of oversight is part of an effort to address what is a government-wide problem—using guidance in lieu of rulemaking. Accordingly, I was troubled that the 2010 and 2011 letters issued by the Department of Education appeared to advance substantive policies in circumvention of the Administrative Procedure Act's rulemaking requirements.[3] In my letter, I asked that you clarify the specific regulatory authority underpinning the policies outlined in each of the Dear Colleague letters, and for those policies that were not plain interpretations of existing law I asked that you clarify that they would not be the basis for inquiry, investigation, adverse finding, rescission of federal funding, or any other enforcement action.

Today I write in response to your February 17, 2016 reply, which failed to assuage my concerns that OCR has issued guidance documents, including the 2010 and 2011 letters, which purport to merely interpret Title IX of the Education Amendments of 1972 (Title IX) but in fact advance policies not found within the pages of its statutory and regulatory texts. We agree that students must be able to enjoy a safe educational environment regardless of sex, and that sexual harassment and violence as a form of sex discrimination must not be tolerated. To that end, I appreciate your desire to inform regulated parties of the proper application of Title IX to accomplish our shared goals of school safety and gender equality in schools across the country. However, instead of merely interpreting statements of existing law, the 2010 and 2011 Dear

[1] U.S. Dept. of Edu., Office for Civil Rights, Dear Colleague (Oct. 26, 2010).
[2] U.S. Dept. of Edu., Office for Civil Rights, Dear Colleague (Apr. 4, 2011).
[3] 5 U.S.C. § 553, *et seq.*

Colleague letters create uncertainty surrounding policies proscribing conduct and advancing requirements required neither by Title IX nor its implementing regulations. I focused on two particular policies as emblematic of the expansion of Title IX liability for schools in the 2010 and 2011 letters. Specifically, I am left unpersuaded that the 2010 letter, which likely imperils speech protected by the First Amendment, is required by Title IX or its implementing regulations; and that Title IX requires a preponderance of the evidence standard in school disciplinary proceedings, as outlined in the 2011 letter.

In my letter, I asked you to provide me with the statutory or regulatory language that the 2010 Dear Colleague letter on sexual harassment and bullying purports to interpret in cataloguing potentially prohibited conduct. Far from providing clarity, the 2010 letter obfuscates conduct constituting actionable sexual harassment under Title IX by including examples that "can" violate Title IX.[4] In support of the letter's catalogue of examples including "conduct such as touching of a sexual nature; making sexual comments, jokes, or gestures; writing graffiti or displaying or distributing sexually explicit drawings, pictures, or written materials; calling students sexually charged names; spreading sexual rumors; rating students on sexual activity or performance; or circulating, showing, or creating emails or Web sites of a sexual nature," you cite three prior guidance documents.[5] Most significantly, you point to 2006's *Sexual Harassment: It's Not Academic* guidance pamphlet as developing the "same examples" as the 2010 Dear Colleague letter. This is misleading, since the 2006 pamphlet made clear that such examples could not rise to an actionable Title IX violation without the presence of additional elements.[6] But more importantly, regardless of however well-developed these citations to previous guidance documents are, they, as you note, do not have the force and effect of law, and therefore cannot provide sufficient support to answer the question I posed in my January 7 letter:

[4] 2010 Dear Colleague letter, *supra* note 1, at 6.

[5] 1997's sexual harassment guidance did not develop the examples used in the 2010 guidance, but instead articulated the test for a hostile work environment. 62 Fed. Reg. 12,041 (1997). In explaining the "sufficiently severe, persistent, and pervasive" standard, OCR offered considerably more concrete examples that included not just offensive conduct, but how the test's factors applied in a host of scenarios (*e.g.*, "[I]f a young woman is taunted by one or more young men about her breasts or genital area or both, OCR may find that a hostile environment has been created, particularly if the conduct has gone on for some time, takes place throughout the school, or if the taunts are made by a number of students… if the conduct is more severe, e.g., attempts to grab a female student's breasts, genital area, or buttocks, it need not be as persistent or pervasive in order to create a hostile environment."). *Id.* OCR's 2001 guidance on sexual harassment tracks the 1997 sexual harassment guidance closely, departing from the 1997 guidance only in clarifying standards applicable to private litigation in light of recently developed Supreme Court case law. Dept. of Edu., Office for Civil Rights, *Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties* i (Jan. 2001).

[6] U.S. Dept. of Edu., Office for Civil Rights, *Sexual Harassment: It's Not Academic* (Sept. 2008). The 2006 pamphlet cited the same conduct as examples of sexual conduct as one element of a three-part test for sexual harassment. To constitute sexual harassment, the pamphlet made very clear that the sexual conduct, including examples such as "displaying or distributing sexually explicit drawings, pictures, or written materials," "telling sexual or dirty jokes," and "circulating or showing e-mails or Web sites of a sexual nature" must also be unwelcome and "deny or limit a student's ability to participate in or benefit from a school's education program," either through unwelcome sexual conduct by a teacher or other school employee, or through the creation of a hostile environment. *Id.* at 3. In contrast, the 2010 Dear Colleague letter catalogs such conduct as sexual harassment (defined as "unwelcome conduct of a sexual nature") that "can" be "prohibited by Title IX," without explaining how to apply the equally important considerations of welcomeness or whether the offended student was denied or limited in his or her ability to participate or benefit from the school's education programs.

What statutory or regulatory authority do you construe to arrive at the conclusion that Title IX requires that this proscribed conduct "can" be prohibited?

My second concern highlighted the 2011 Dear Colleague letter on sexual violence prescribing procedures for disciplining students accused of sexual harassment and sexual violence. Among these procedures, you maintain that school disciplinary proceedings resolving claims of sexual harassment and violence must use the preponderance of the evidence standard in order to satisfy the requirements of Title IX.[7] In making this assertion, you rely on regulatory language calling for the "equitable resolution" of complaints.[8] You cite two letters of findings as evidence that the Dear Colleague letter merely reflected precedent.[9] This support is unpersuasive, as letters of findings carry no precedential value themselves and are a poor vehicle to alert regulated entities of new requirements, if that was the intent of the Department. Further, the letters of findings to which you cite demonstrate that you have penalized those you regulate by enforcing standards never articulated by the Department and for which I question your authority.

You then turn to case law finding the preponderance of the evidence standard "sufficient for civil rights cases" and State civil claims of sexual assault, and conclude that it is therefore the only standard of proof that is "equitable."[10] A more rigorous standard of proof, such as clear and convincing evidence, you argue, would be "inconsistent with the standard of proof established for violations of civil rights laws, and are thus not equitable under Title IX."[11] But school disciplinary proceedings, no matter how well-intentioned, are not courts of law and are therefore not as well equipped to ensure the fundamental due process protections that produce the "equitable resolution" of civil disputes. Indeed, on its own terms, the Dear Colleague letter does not provide for many essential protections defendants in a court of law enjoy.[12] OCR's silence

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[7] 2011 Dear Colleague letter, *supra* note 2, at 10-11.

[8] 34 C.F.R. §106.8(b).

[9] Letter from Catherine Lhamon, Assistant Sec'y for Civil Rights, Dept. of Edu., to Sen. James Lankford 3 n. 17 (Feb. 17, 2016).

[10] *Id.* at 4 n. 18. This argument may be more persuasive if Title IX imposed strict liability on institutions to prevent any conduct that would violate Title IX. If Title IX so imposed liability—which is to say, if a school could be found in violation of Title IX upon the occurrence of an act of sexual harassment or sexual violence, regardless of the institution's response—then a preponderance of the evidence standard imposed vis-à-vis individual students accused of the prohibited conduct may be more appropriate. Of course, Title IX does not impose strict liability on institutions for the conduct of its students—only "for its own discrimination in failing to remedy [such harassment] once the school has notice." 62 Fed. Reg. 12,034 (1997).

[11] 2011 Dear Colleague letter, *supra* note 2, at 11.

[12] Most notably, "OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing." *Id.* at 12. Cross-examination is crucial to the accused's due process rights, most especially when proving the elements of sexual harassment, which often entail establishing subjective findings of fact, including the effect on the complainant and the existence of a subjectively hostile environment. Further, OCR prohibits schools from allowing defendants to appeal findings of guilt unless the complainant is allowed an analogous appeal right, in conflict with many formal disciplinary systems, including the federal criminal appellate process. *Id.* OCR does not require, or even encourage, full legal representation for the accused, who would otherwise have to represent himself or herself in an adversarial setting in front of the fact-finder and decision-maker. *Id.* And for their parts, the letter encourages only that the fact-finder and decision-maker to be well-versed in the nature of sexual violence, leaving open the possibility that one person may assume both roles, and though the letter calls for an impartial decision-maker, it merely encourages disclosure of any perceived or actual conflicts of interest. *Id.*

on important due process considerations, coupled with the requirement of a lower standard of proof, indisputably tips the playing field against the accused, making the disciplinary process anything but "equitable." In light of this, I remain unconvinced that the preponderance of the evidence standard is a well-advised construction of "equitable resolution," much less that it is a necessary interpretation that should have circumvented notice-and-comment rulemaking.

I am acutely dismayed that, on the one hand, you are unable to cite to governing statutory or regulatory authority requiring the policies outlined in the 2010 and 2011 Dear Colleague letters—indeed, your letter includes only two excerpts of statutory text—while, on the other hand, you maintain that the only function of OCR's guidance is to "advise the public of its construction of the statutes and regulations it administers and enforces."[13] What text are you construing to so advise the public? Prior guidance documents and letters of findings are not adequate legal authority on which to justify policies such as those outlined in the 2010 and 2011 letters.

Congressional oversight of agency action is a cornerstone to the checks and balances ensured by our Constitution. I will continue to push back against agencies' improper use of guidance documents that, while purporting to merely interpret existing law, fundamentally alters the regulatory landscape. Congress enacted the Administrative Procedure Act to safeguard against precisely these threats of administrative fiat, and agencies that spurn such procedures do so contrary to congressional design and at the expense of the American people. Accordingly, I again call on you personally to clarify that these policies are not required by Title IX, but reflect only one of various ways schools may choose to develop and implement policies for the prevention and remedy of sexual harassment and sexual violence that best meet the needs of their students and are compliant with federal law. I further ask that you immediately rein in the regulatory abuses within the Department of Education and take measures to ensure that all existing and future guidance documents issued by your agency are clearly and firmly rooted in statutory authority.

Sincerely,

James Lankford
Chairman
Subcommittee on Regulatory Affairs
and Federal Management, U.S. Senate
Committee on Homeland Security and
Governmental Affairs

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[13] Letter from Catherine Lhamon, *supra* note 9, at 2.

cc: The Honorable Heidi Heitkamp
Ranking Minority Member
Subcommittee on Regulatory Affairs and Federal Management