United States Senate

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

January 7, 2016

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

Dear Mr. King:

I write today to express my continued alarm regarding the Department of Education's Office for Civil Rights (OCR) Dear Colleague letters on harassment and bullying (issued October 23, 2010)[1] and sexual violence (issued April 4, 2011)[2] (hereafter referred to as the 2010 and 2011 Dear Colleague letters, respectively). As guidance, both letters purport to merely interpret statements of existing law; however, while both broadly cite to Title IX of the Education Amendments of 1972 (Title IX), the letters fail to point to precise governing statutory or regulatory language that support their sweeping policy changes.

Based on a robust record of congressional testimony I have heard as Chairman of the Homeland Security and Governmental Affairs Subcommittee on Regulatory Affairs and Federal Management (RAFM), I condemn all types of sex-based discrimination, including sexual violence and harassment, in the strongest possible terms, but believe that the Dear Colleague letters advance substantive and binding regulatory policies that are effectively regulations. As such, the letters should have been promulgated subject to notice-and-comment procedures—procedures that ensure that agencies hear from affected parties to create the best possible regulatory outcomes for all stakeholders. Accordingly, I ask that you provide a thorough justification as to the interpretive nature of the letters by providing the precise statutory and/or regulatory authority under Title IX for each policy that the letters purport to interpret. For those policies that cannot be reasonably said to merely construe statutory or regulatory language, and are therefore not mere interpretations of existing law, please clarify, in no uncertain terms, that failure to adhere to the policies will not be grounds for inquiry, investigation, adverse finding, or rescission of federal funding.

Before promulgating regulatory policy, the Administrative Procedure Act (APA) requires agencies to provide notice of a proposed rule and solicit public comment on the proposal.[3] The APA exempts from the requirements of notice-and-comment rulemaking "interpretative rules or general statements of policy," also referred to as guidance.[4] Recently, the Supreme Court

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[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] Administrative Procedure Act, 5 U.S.C. § 553.
[4] 5 U.S.C. § 553(b)(A).

described "the critical feature of interpretive rules" as those that are "issued by an agency to advise the public of the agency's construction of the statutes and rules it administers" that otherwise "do not have the force and effect of law."[5] If a policy statement does more than bind regulated parties to an agency's interpretation of a governing statute or rule, it would be properly characterized as substantive, subject to APA rulemaking procedures.

What language does OCR purport to construe in its 2010 and 2011 Dear Colleague letters? The Dear Colleague letters cite Title IX at-large as authority for the letters' policies on sexual harassment and sexual violence. Yet, OCR fails to cite to specific statutory or regulatory authority that the letters purport to "interpret." For example, the 2010 Dear Colleague letter declares that Title IX "prohibit[s]" "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."[6] But the letter provides no citation to underlying statutory or regulatory language used to arrive at the conclusion that Title IX, on its own terms, prohibits such conduct. Regulated parties deserve a more precise legal justification than an "*et seq.*" citation to a 3,400-odd-word law and corresponding chapter in the Code of Federal Regulations.

The 2011 Dear Colleague letter goes so far as to assert that "Title IX regulation requires schools to provide equitable grievance procedures, [in which] OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints."[7] Assuming that here, OCR is citing to 34 C.F.R. § 106.8(b), requiring schools to "adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by this part," the regulation does not contemplate any standard of proof; instead, OCR goes on to justify its requirement of the preponderance of the evidence standard by cataloguing other grievance procedures for which it uses the standard. From this, it is not unreasonable to conclude that the basis for the inclusion of the preponderance of the evidence standard, as articulated in the Dear Colleague letter, seems not to be required by §106.8(b) or broader Title IX principles, but merely reflects a preferred OCR convention. Requiring an evidentiary standard justified only by prior agency practice cannot be said to be merely interpretive of existing legal authority. Instead, the policy more closely resembles the quintessential substantive rule, and accordingly, is precisely the type of policy that must be subjected to the APA's notice-and-comment procedures.

I am perplexed as to why OCR would prefer to issue guidance citing exceedingly broad and attenuated Title IX authority instead of engaging in APA-required rulemaking procedures. Perhaps OCR sought to avoid notice-and-comment procedures, fearing that education officials and other interested groups would have voiced substantive objections to the letters' policies if

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[5] Perez v. Mortgage Bankers Ass'n, 135 S.Ct. 1199, 1204 (2015).
[6] 2010 Dear Colleague letter, *supra* note 1, at 6.
[7] 2011 Dear Colleague letter, *supra* note 2, at 10.

given an opportunity. If so, this fear would have been well-placed: legal scholars and academics across the political spectrum have decried the Dear Colleague letters as offensive to First and Fourth Amendment protections—protections that Title IX and its implementing regulations alone have never been said to imperil.

For me, these concerns are about more than policy disagreements: *they are evidence that OCR's Dear Colleague letters are not merely interpretive, but alter the regulatory and legal landscape in fundamental ways.* For example, after Harvard University acquiesced to OCR's policies by establishing an Office for Sexual and Gender-Based Dispute Resolution, 28 Harvard Law School faculty penned an op-ed criticizing the Office's sexual harassment policy as "inconsistent with many of the most basic principles we teach."[8] The op-ed outlined eight specific due process concerns, concluding that the resulting sexual harassment policy "departs dramatically from legal principles [developed by the Supreme Court and lower federal courts], jettisoning balance and fairness in the rush to appease certain federal administrative officials."[9] An open letter from 16 University of Pennsylvania Law School faculty, published in the *Wall Street Journal*, similarly noted that "[a]s law teachers who instruct students on the basic principles of due process of law, proper administrative procedures, and rules of evidence designed to ensure reliable judgments, we are deeply concerned by these developments…"[10] Where the governing statute and regulations have long been understood to be proper exercises of legislative and administrative authority, there cannot be an interpretive rule that purports to construe the law in such a way as to imperil fundamental constitutional rights—such a rule, by definition, would be substantive (and likely ill-conceived on its merits).

Commissioners Gail Heriot and Peter Kirsanow of the U.S. Commission on Civil Rights articulated their concerns in a February 26, 2015 letter to Congress.[11] Specifically, the Commissioners argued that OCR significantly and substantively expanded Title IX's provisions by ignoring Supreme Court precedent; broadly defining "sexual harassment," which "can easily cover speech protected by the First Amendment"; expanding the scope of liability for schools in dealing with bullying; and relaxing the burden of proof in sexual harassment and assault proceedings.[12] On November 15, 2015, Ms. Nadine Strossen, former president of the American Civil Liberties Union, delivered a lecture arguing that OCR's policies constitute an "overbroad, unjustified concept of illegal sexual harassment as extending to speech with any sexual content that anyone finds offensive," and "OCR's distorted concept of sexual harassment actually does

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[8] *Rethink Harvard's Sexual Harassment Policy*, BOSTON GLOBE (Oct. 15, 2014), https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

[9] *Id.*

[10] *See* Jacob Gershman, *Penn Law Professors Blast University's Sexual-Misconduct Policy*, WALL ST. J. LAWBLOG (Feb. 18, 2015), http://blogs.wsj.com/law/2015/02/18/penn-professors-blast-universitys-sexual-misconduct-policy/; http://online.wsj.com/public/resources/documents/2015_0218_upenn.pdf.

[11] Letter from Gail Heriot & Peter Kirsanow, Comm'rs, U.S. Comm'n on Civil Rights, to Sen. Thad Cochran, Sen. Roy Blunt, Rep. Hal Rogers, and Rep. Tom Cole (Feb. 26, 2015).

[12] *Id.*

more harm than good to gender justice, not to mention free speech."[13] Notwithstanding the characterization of the content of the Dear Colleague letters as interpretative or substantive, for policies that bear on issues so fundamental to education and "implicate[] competing values, including privacy, safety, and functioning of the academic community, and the integrity of the educational process for both the victim and the accused, as well as the fundamental fairness of the disciplinary process,"[14] OCR should have extended to the academic and educational communities the opportunity to comment to arrive at the best regulatory outcome possible.

In addition to expanding the scope of Title IX to infringe on constitutionally-protected behaviors and practices, I am concerned that the Dear Colleague letters improperly bind regulated parties. To alleviate these concerns, my colleagues and I have repeatedly asked Department officials to explain the legal obligations posed by OCR's guidance: at a HELP committee hearing, Assistant Secretary for Civil Rights Catherine Lhamon testified that "we do" expect institutions to comply with Title IX guidance documents,[15] while at two subsequent hearings, Department officials denied that the guidance bound regulated parties.[16] Yet, there is overwhelming consensus in the academic and legal communities that OCR treats the policies outlined in the Dear Colleague letters as legally binding—specifically through threats of investigation and rescission of federal funding.

Multiple universities have reportedly been subject to OCR's coercive "voluntary resolution agreements" practices. For example, according to *Inside Higher Ed*, the Department found that Tufts University's handling of sexual assault and harassment complaints raised Title IX compliance concerns.[17] To address these concerns, Tufts signed a voluntary resolution agreement to remedy its practices, while admitting no fault for failure to comply with federal law. However, after the agreement was signed, OCR informed Tufts that they would be retroactively adding a finding of noncompliance with Title IX. As a result, Tufts revoked its signature from the agreement; then, Department officials on April 28, 2014 announced that "they may seek to terminate the university's federal funding because it breached the agreement"—an agreement that was purportedly voluntary, the terms of which were materially changed after its

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[13] Ms. Nadine Strossen, Prof., New York Law School, Harv. Kennedy School Shorenstein Ctr., 2015 Richard S. Salent Lecture on Freedom of the Press (Nov. 5, 2015), http://shorensteincenter.org/nadine-strossen-free-expression-an-endangered-species-on-campus-transcript/.

[14] Univ. of Pennsylvania open letter, *supra* note 10, at 2.

[15] *Sexual Assault on Campus, Working to Ensure Student Safety: Hearing Before the Health, Education, Labor & Pensions Committee*, 114TH CONG. (June 26, 2014)(testimony of Ms. Lhamon).

[16] Testimony includes: "Our guidance does not hold the force of law and our recommendations [are] illustrations of the ways in which we are interpreting the statute and the regulations" (*A Review of Education and Student Achievement: Hearing Before the Comm. on Homeland Security & Gov't Affairs*, 114TH CONG. (Sept. 30, 2015)(testimony of Dr. Theodore Mitchell, Undersec'y, U.S. Dept. of Edu.)); "Guidance under Title IX is not binding" (*Examining the Use of Agency Regulatory Guidance: Hearing Before the Comm. on Homeland Security & Gov't Affairs Subcomm. on Regulatory Affairs & Fed. Mgmt.*, 114TH CONG. (Sept. 23, 2015) (testimony of Ms. Amy MacIntosh, Dep. Ass't Sec'y Delegated Duties of Ass't Sec'y, U.S. Dept. of Edu.)).

[17] Michael Stratford, *Standoff on Sexual Assaults*, INSIDE HIGHER ED (Apr. 29, 2014), https://www.insidehighered.com/news/2014/04/29/us-finds-tufts-violating-rules-sexual-assault-amid-larger-crackdown.

implementation. Terry Hartle of the American Council on Education characterized the Tufts "scuffle" with OCR as emblematic of the office's interactions with many colleges and universities, who "have found themselves in a conflict with OCR [and] believe that this agency does not act in good faith and that it's little more than a bully with enforcement powers."[18]

Harvard Law School faculty agree that OCR compels compliance with its Dear Colleague letters. The professors "recognize[d] that large amounts of federal funding may ultimately be at stake," and suggested that the university was uniquely positioned to contest the letters "in the face of funding threats."[19] Ms. Strossen opined that "OCR has *forced* schools, even well-endowed schools such as Harvard, to adopt sexual misconduct policies that violate many civil liberties," "by threatening to pull federal funds."[20] The Commissioners argued that the threat of investigation and accompanying expense and reputational harm provide schools with "no alternative but to accept" an administrative settlement "in lieu of going to court… [where] OCR is almost never seriously challenged."[21] The University of Pennsylvania law faculty acknowledged that "OCR has used threats of investigation and loss of federal funding to intimidate universities into going further than even the guidance requires."[22] Because regulatory guidance itself cannot bind regulated parties, I ask that you publish and make readily available a clarification explicitly stating that a regulated party's failure to adhere to any provision in either the 2010 or 2011 letter that does not merely interpret existing statutory or regulatory language will not be grounds for investigation, adverse finding, or rescission of federal aid.

Colleges and universities across the nation, in addition to prestigious legal scholars, government officials, and members of the U.S. Congress view the Dear Colleague letters as improperly issued guidance that require constitutionally questionable and ill-conceived policies—policies that fail to accomplish our common regulatory goals of school safety and gender equality in education as required by Title IX. Here, I present to you an opportunity to correct the muddled

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[18] *Id.* Other high-profile voluntary resolution agreements involve the University of Virginia, Southern Methodist University, Harvard College, the University of Montana, Yale University, and the University of New Mexico, among others.

[19] *Rethink Harvard's Sexual Harassment Policy, supra* note 8.

[20] 2015 Richard S. Salent Lecture on Freedom of the Press, *supra* note 13 (emphasis added).

[21] Heriot & Kirsanow, *supra* note 11.

[22] Univ. of Pennsylvania open letter, *supra* note 10, at 2. The University of Pennsylvania law faculty also echoes our grave concern that Dear Colleague letters were improperly issued as guidance by noting:

> [T]he federal government has sidestepped the usual procedures for making law. Congress has passed no statute requiring universities to reform their campus disciplinary procedures. OCR has not gone through the notice-and-comment rulemaking required to promulgate new regulation. Instead, OCR has issued several guidance letters whose legal status is questionable… this lawmaking process has sacrificed the traditional safeguards that accompany traditional lawmaking procedures. Both the legislative process and notice-and-comment rulemaking are transparent, participatory processes that afford the opportunity for input from a diversity of viewpoints…. Formal lawmaking would have required the federal government, as in other areas of regulatory policy, to consider explicitly the costs of its proposed policies as well as the benefits. In addition, adherence to a rule-of-law standard would have resulted in procedures with greater legitimacy and buy-in from the universities subject to the resulting rules.

Id at 2-3.

record. For each policy mandated by the 2010 and 2011 Dear Colleague letters, please clarify the regulatory authority, citing to specific statutory and/or regulatory language that, in your view, the letters interpret or construe. For those policies that cannot be reasonably construed from existing statutory or regulatory language, and therefore constitute substantive requirements that, to be binding, must be subjected to APA notice-and-comment procedures, please clarify, in no uncertain terms, that failure to adhere to the policies will not be grounds for inquiry, investigation, adverse finding, or rescission of federal funding.

Please provide a complete response to this request no later than February 4, 2016. If you have any questions, please contact RAFM staff at (202) 224-2862.

Sincerely,

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

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