



Student Affairs Administrators
in Higher Education

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AN OPEN LETTER TO ELECTED LEADERS OF THE 50 UNITED STATES

Dear State Elected Official:

We write as a coalition of national higher education professional associations, state coalitions working to combat sexual violence in communities throughout the country, and national women's and victims' rights organizations, to express deep concern about several bills pending before multiple state legislatures. The first group of bills require school officials to mandatorily refer all reports of sexual violence that they receive to law enforcement. The second group gives students and student organizations accused of misconduct a right that it does not also provide to student victims of misconduct: the right to seek judicial review of student disciplinary or other institutional proceedings and to obtain monetary damages if a court finds in favor of the accused student.

While we applaud these legislatures' desire to assist institutions of higher education ("IHEs") in improving their responses to sexual and other forms of gender-based violence that victimize their students, both groups of bills would actually have the opposite effect from the one intended and make it *more* difficult for campuses to end this violence and its devastating effects on victims' lives. First, the "mandatory referral" bills will create at least one direct conflict with federal law that will make it impossible for IHEs to comply with both federal and state laws, thus causing IHEs to waste resources on resolving such conflicts when those resources would be better devoted to improving campus responses to and prevention of this violence. Second, both groups of bills will impede fulfillment of the purposes of federal laws with regard to this violence. Finally, the bills creating rights only for accused students and not student victims will enable outside interference at an unprecedented level into internal IHE administrative proceedings and do so in a manner that is against best practices and likely to quickly overwhelm state courts.

Creating Conflicts with Federal Law

The mandatory referral bills pending in multiple state legislatures conflict with a specific provision of the Violence Against Women Reauthorization Act of 2013 ("VAWA") amendments to the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act ("Clery"). 20 U.S.C. §1092(f)(8)(B)(iii)(III) states that IHEs that receive federal funds must inform student victims of sexual assault, dating violence, domestic violence, and stalking of their rights to "decline to notify" law enforcement about being victimized, as well as of students' rights to notify and to receive help from the IHE in making that notification. If IHEs were mandated by state law to refer all reports they receive to law enforcement, this mandate would negate the student's right to decline to notify law enforcement of their report. Such a conflict would mean that IHEs in applicable states could not comply with both federal and state law.

Obstructing Federal Legal Aims to Increase Equal Educational Opportunities

These mandatory referral bills also obstruct the aims of federal laws like Title IX of the Educational Amendments of 1972 ("Title IX"), the Clery Act and VAWA, by turning a report to a victim's school into an indirect report to law enforcement. Each of these laws seek in whole or in part to protect victims' equal educational opportunities and prevent discrimination against victims, including by increasing the number and diversity of reporting options for students who have experienced gender-based violence and trauma. Restricting victims' options by turning all reports into a report to law enforcement perpetuates stereotypical and discriminatory attitudes towards victims, as well as

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making it likely that victims who do not want to report to law enforcement will not report to anyone and thereby be unable to access the rights that Title IX, the Clery Act, and VAWA provide.

Creating Barriers to Accessing Unique Title IX and Clery Act Rights Not Available Under Criminal Laws

Turning all gender-based violence victims' reports into reports to law enforcement makes it more difficult for victims to access the many legal rights that Title IX, the Clery Act, and VAWA give them that *do not exist* under criminal laws. Likewise, mandatory referral and bills allowing students and student organizations accused of misconduct, but not student victims, the right to seek judicial review of IHE disciplinary proceedings inhibits IHEs abilities to use these statutes and recognized student conduct best practices to address gender-based violence.

• *Victims' Rights to Obtain Supportive and Protective Measures from an IHE*

As a civil rights law with a focus on protecting students' rights to equal educational opportunity, Title IX aims to stop the negative effects of experiencing violence and trauma, a purpose not included in the criminal law. For instance, because victims of sexual violence often experience severe negative health and educational consequences from trauma that make it difficult for them to continue or succeed in their educations, Title IX both requires and provides tools to IHEs to assist victims in restoring normalcy to all the aspects of their lives that are disrupted by violence and trauma. These include providing supportive and protective measures such as stay-away orders, changes in classes or housing to increase victim safety on campus, and initiating various prevention and educational programs. To a significant extent, the Clery Act, as amended by VAWA, has also incorporated similar tools into its text and regulations. This approach acknowledges that for most gender-based violence victims, justice means more than punishment of the perpetrator, which is the primary—often the only—remedy that the criminal system can provide.

• *Victims' Rights to Prompt and Equitable Investigations/Grievance Proceedings Provided by Their IHE*

By forcing victims to either report (directly or indirectly) to law enforcement or not report at all, mandatory referral also seriously diminishes victims' access to the prompt, fair, and equitable procedures for investigating and resolving reports of violence that are required by Title IX and Clery. Similarly, mandatory referral acts as a barrier to well-recognized IHE best practices for handling student misconduct, which are consistent with both Title IX and the goals of IHEs to create good living and learning environments for their students. The purposes of Title IX and IHE best practices therefore differ widely from criminal procedural goals that are designed to safeguard defendants' liberty against the government's immense power to punish.

As required by Title IX's equality mandate, procedures enforcing Title IX must give equal rights to both victims and those accused of misconduct—a significant difference from the criminal law. That is, criminal rights focus on defendants, granting victims only minimal rights, if any at all. Victims are not parties to criminal cases and have no legal representation because the prosecutor represents the state, not the victim. They face unequal access to evidence and unequal privacy protections, and the state's evidence must meet a "beyond a reasonable doubt" standard of evidence. No part of a criminal proceeding is focused, as Title IX and the Clery Act are, on the harm to the victim.

By dissuading student victims from using Title IX's procedurally equal process, mandatory referral deprives victims of multiple specific rights available under Title IX, the Clery Act, or both, but *not* available under criminal law. These include equal rights to protect their privacy, to access evidence, and to be represented by an attorney or other adviser and advocate. This deprivation would also include the loss of a procedurally equal evidentiary standard, the "preponderance of the evidence" standard. Required by Title IX, other civil rights statutes, and the civil court system generally, the preponderance standard requires just over 50 percent evidentiary weight in favor of the victim. Thus, it operationalizes a key civil rights assumption: that the basic equality of all people precludes giving procedural presumptions for or against any one person's account. Indeed, states that compel sexual violence victims through mandatory referral to use criminal evidentiary standards that are significantly *unequal* will give fewer rights to victims of sex discrimination than to other populations facing discrimination based on race, disability, even Boy Scout membership. Because IHE best practices have also long favored use of the preponderance standard, depriving victims of a procedurally equal process also undercuts tried-and-true methods of fulfilling the IHE goal of creating and maintaining the best environments for learning.

Discriminating Against Gender-Based Violence Victims

Mandatory referral proposals also enable discriminatory attitudes towards gender-based violence victims in direct contrast to the purpose of Title IX, which prohibits sex discrimination, including sexual violence, in federally funded educational activities. Such proposals do so by treating student victims who experience gender-based violence, most of whom are women and girls, differently from similarly-situated adult students, non-student adults, and adult victims of non-gender-based violence. This is true because state "mandatory reporting" laws are overwhelmingly directed at protecting children, although they sometimes also require various professionals to report knowledge of violence perpetrated against persons with disabilities and/or the elderly. In contrast to these groups, college and university students are adults without the legal dependencies of these other groups. Student gender-based violence victims are as capable of reporting experiences with violence to law enforcement as any other adult state resident, including, for instance, an adult male student who experiences a violent mugging or a non-student adult victim of sexual violence, neither of whose report would be mandatorily referred to law enforcement. Mandatory referral thus singles out an entire sub-group of adult violence victims from other adults with the same abilities and treats them legally as children. The fact that those infantilized in this manner are mainly women and girls makes these bills particularly contrary to Title IX's purposes.

Injecting Inequality into Campus Disciplinary Proceedings

A final obstruction to the aims of federal laws is created by bills which give students and student organizations accused of misconduct, but not student victims, the right to be represented by attorneys, to seek judicial review of IHE student disciplinary or other institutional proceedings, and/or to obtain monetary damages if a court finds in favor of the accused student. Providing this right to judicial review and monetary damages to accused students alone gives an unfair advantage to accused students, who become the only students that may get state courts to overrule the decisions of IHEs based on the IHEs' own policies in their own internal disciplinary proceedings. Such inequality and unfairness runs counter to the central purpose of Title IX, as well as to some of the purposes of the Clery Act and VAWA.

In addition, these bills inject inequality into campus disciplinary proceedings by requiring IHEs to allow accused students to be represented in them by attorneys who may "fully participate" in any proceeding. This provision seeks to expand rights—solely for accused students—already guaranteed to all students under the regulations negotiated and finalized by the U.S. Department of Education

under Clery/VAWA. Whereas the federal regulations allow schools to structure the participation of such attorneys or advisors, the “fully participate” requirement of these state bills would contradict this approach in a manner already explicitly rejected by the federal lawmakers and campus violence experts from across the country who negotiated the Clery/VAWA rules. The rulemakers negotiated the current compromise to allow students to have a full range of choice in advisors but, recognizing that the rules could perpetuate inequality between students based on who can afford an attorney, the rules also allow schools to limit advisors’ participation as a method of maintaining equality and fairness as much as possible. Bills giving accused students a right to an attorney who “fully participates” upset this balance.

Enabling Counterproductive Interference into IHE Violence Prevention Efforts

In addition to obstructing the equality and fairness purposes of federal law, the judicial review bills will also thwart IHE efforts to prevent and end sexual and gender-based violence against their students. By enabling accused students to seek judicial review of internal IHE disciplinary proceedings, this bill will make it difficult if not impossible to remove from campus students who are subjecting other students to violence. Lengthy judicial review processes could last beyond an accused student’s normal time on campus. Therefore, depending on whether the school can expel or suspend a student while a court completes its review, the school could functionally be unable to expel or suspend a student even if it has found the student responsible for victimizing another student. This would seriously diminish a school’s ability not only to protect the rights of student victims but also to prevent violence by sending clear messages to the campus community about the consequences of engaging in violence.

Giving a right to accused students but not to student victims also ignores at least 15 years of higher education best practices for addressing student misconduct, including sexual and gender-based violence. Indeed, these bills would authorize state courts with no particular expertise in IHE policy or higher education best practices to trump the decisions of experts in both policies and practices. In doing so, it will also authorize any accused student or student organization unhappy with the *result* of a disciplinary proceeding to invite a court to review the *substance* of the IHE’s decision, an unprecedented intrusion into IHE decision-making and field of expertise that also promises to overwhelm state courts with deciding requests by every accused student or student organization that is unhappy with the way that an IHE has disciplined him/her/it.

Finally, this approach ignores the balance set by the U.S. Supreme Court regarding the scope of accused students’ due process rights under the U.S. Constitution, as well as practices followed by non-education industries with regard to member and/or employee misconduct. Dozens of cases on accused students’ administrative due process rights confirm schools’ rights to discipline, even expel, students for a wide range of misconduct, including smoking and drinking beer on one end and participating in a failed conspiracy to shoot several students and school officials on the other. In addition, non-education laws allow entities such as employers to regularly investigate and resolve cases of employee misconduct, without any employee right to invite judicial review of every employment decision that an employee does not like, even if criminal charges might be or have been filed.

Conclusion

For the foregoing reasons, as you deliberate on any bill requiring mandatory referral of student victims’ reports or giving rights of judicial review only to accused students/organizations, we hope you will also consider the concerns outlined here. We also encourage you to contact the persons

identified as representatives of members of our coalition if you have any questions regarding this letter and its contents.

Sincerely,

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