

June 25, 2014

The Honorable Tom Harkin
The Honorable Lamar Alexander
Committee on Health, Education, Labor & Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

Dear Senator Harkin and Senator Alexander:

Thank you for holding this hearing on campus sexual assault. Sadly, sexual assault is a too common problem in society and on college campuses.

As a former president of the University of North Carolina, I believe that safe campuses are a prerequisite for an effective learning environment. Colleges and universities are committed to providing such settings. Over the last year, I have had a large number of conversations about this issue with college leaders from all types of institutions. These discussions have convinced me that colleges and universities are undertaking significant efforts to enhance their educational programs to prevent sexual assaults and to ensure a prompt, supportive and equitable response when they do occur.

Allegations of sexual assault can be exceptionally challenging to resolve, even for those with significant expertise and training. Colleges must often navigate between conflicting word-on-word accounts where there are no eye witnesses, little or no physical evidence, impaired judgments and memories affected by alcohol or drugs. This challenge is compounded by the impact of trauma, which may result in a delay in reporting, wavering levels of participation with campus procedures and a reluctance to seek law enforcement action through the criminal justice system. In too many instances, local law enforcement authorities are unable or unwilling to investigate with the vigor and promptness that institutions and students desire.

Combating sexual assault requires us to be both proactive and reactive. We must provide education and prevention programs, such as bystander intervention and healthy relationship workshops, in order to prevent sexual assault. When an assault is reported, we must support the victim/survivor with a wide array of services and resources while, at the same time, ensure that our systems and procedures are fair to all involved. We must provide reporting options; a fair and impartial investigation; prompt and equitable resolution; and appropriate sanctions and remedies that eliminate a hostile environment, prevent its recurrence and address its effect on the individual and community. In short, college administrators are often asked to be all things to all people. This is in stark contrast to the criminal justice system, where roles and responsibilities are clearly delineated and actors operate with legal protections when conducting themselves lawfully in good faith.

Conducting education and providing information is an area where college officials have vast experience. We must redouble our education efforts on sexual assault, and as I noted earlier, institutions are moving aggressively to do this. But performing investigations and adjudicating cases is a far more difficult challenge. We lack the authority to subpoena witnesses, control evidence and impose legal standards. Our disciplinary and grievance procedures were designed to provide appropriate resolution of institutional standards for student conduct, especially with respect to academic matters. They were never meant for misdemeanors, let alone felonies. While we take our obligations to the victims/survivors of sexual assault very seriously and are fully aware of our responsibilities with respect to sexual assaults, our on-campus disciplinary processes are not proxies for the criminal justice system, nor should they be.

Complicating this further, colleges and universities vary greatly in their administrative sophistication. The array of institutions that comprise American higher education, from major research universities to small liberal arts colleges to community colleges to for-profit schools, differ enormously in their levels of expertise and resources available to fulfill their obligations. Notably, relatively few colleges have general counsels on staff, and almost none have independent investigatory arms.

In addition to the efforts underway at institutions, I believe there are some things Congress can do to help us reduce the incidents of sexual assault and make our campuses safer:

1. Congress should support funding for research into sexual assault education and prevention training programs. I also believe that funding should be increased for the U.S. Department of Justice's (DOJ) Office on Violence Against Women's campus grant program, which aims to strengthen the response of institutions to the crimes of sexual assault, domestic violence, dating violence and stalking on campuses and enhances collaboration among campuses, local law enforcement, and victim advocacy organizations. We also need more information about best practices and models that have proven successful in a variety of contexts (urban, rural, residential and non-residential) and an expansion of efforts to disseminate them. For example, the DOJ campus grant program provides funding to roughly 25 colleges and universities each year. At that rate, it will take years to assist the some 5,000 higher education institutions nationwide.
2. Campuses need clarity and consistency with respect to federal expectations, requirements and enforcement. Several different federal laws—the Clery Act, Title IX, and the Violence Against Women Act—address sexual assault on campus, and our institutions must comply with multiple and often duplicative provisions. For instance, differences between the Clery Act and the U.S. Department of Education's Office for Civil Rights (OCR) guidance cause bewilderment for victims and campus officials alike when it comes to knowing which administrators are legally obligated to report a sexual assault and who is able to provide confidential support.

Having a single, clear set of federal requirements would greatly aid our efforts in this area. Many of the differences are fairly technical, but they should be clarified in any

legislation you consider. These ambiguities and overlap should be clarified so institutions are completely aware of the expectations and responsibilities, and complainants and accused students have a clearer understanding of their rights.

3. Because colleges and universities may lack the expertise and resources needed in these areas, we believe it is essential to work closely with local law enforcement agencies when sexual assault cases arise. Unfortunately, current federal policy can undermine our ability to do this. OCR requires that campuses resolve sexual assault reports within 60 days. But such a hard and fast deadline is often incompatible with the timetable used by local law enforcement agencies.

For example, in one recent case, highly relevant forensic evidence will not be available in time to inform campus disciplinary proceedings. In another, a prosecutor instructed an institution not to say or do anything about a reported sexual assault, lest it undermine the prosecutor's ongoing investigation. This put the institution in an untenable situation—anxious to comply with a request from the local prosecutor but at risk of violating the deadlines imposed by OCR.

The current regulatory framework does not adequately reconcile the real conflicts that exist between federal requirements for prompt and equitable responses and appropriate deference to law enforcement. Parallel school and criminal investigations also highlight the differences in the resources available to law enforcement investigations compared to campus proceedings.

4. In recent years, OCR has issued “significant guidance documents” which it enforces against institutions without having subjected that guidance to the notice and comment provisions of the Administrative Procedure Act. This means no affected party—advocacy groups, colleges and universities, civil liberties organizations, the public, policy makers, students and parents— has the opportunity to raise questions or ask for clarifications.

For example, in April 2011, OCR issued what it terms “significant guidance” announcing campus obligations to address sexual assault under Title IX, including the imposition of the “preponderance of evidence” standard without seeking public comment. Questions about this document quickly emerged, but it took OCR more than three years to issue further clarification. In the interim, campuses were forced to intuit what OCR wanted them to do. OCR has continued this trend. While the agency contends that the “guidance does not add requirements to applicable law,” it is clear from recent resolution agreements with OCR that these guidance documents contain new policy positions which are being treated as compliance requirements under the law.

The notice and comment provisions of the Administrative Procedure Act give any interested individuals or groups a chance to offer observations or seek clarification before a legal standard is promulgated. When this process is not followed, those who must comply with the law are far less likely to understand what they are expected to

do, and key questions go unanswered. Equally important, this leaves accusers and accused students confused about the process to be followed. This serves no one's interest.

5. OCR should resolve complaints against institutions in a timely fashion and do so in a fair manner. While institutions must resolve sexual assault cases in 60 days, it is not uncommon for OCR to take years to resolve a single complaint against an institution—a result that leaves both complainants and institutions in limbo too long. In addition, colleges and universities should be provided with appropriate notice to be able to respond effectively to complaints filed with OCR. This means sharing the specific allegations with the institution once an investigation is launched. It also means that a college or university should not be expected to sign a voluntary resolution agreement without first seeing the findings that OCR intends to issue publicly in the case. Transparency and openness will benefit all and provide for collaboration and partnership when resolving complaints.
6. Finally, while we agree that institutions must be held accountable when violations are identified, OCR's practice of publishing the names of institutions under investigation, based on an allegation and before a formal investigation is launched, is premature. In the light of Family Educational Rights and Privacy Act restrictions governing how an institution may respond publicly, this practice may have the unintended consequence of publicizing incomplete or inaccurate information. Moreover, this practice is not consistent with the practices of other civil rights agencies.

These suggestions are not meant to defend institutions that fail to respond properly to sexual assaults. To the contrary, we believe that clarity in expectations and requirements without the imposition of an inappropriate, one-size-fits-all policy will greatly facilitate our efforts to address this problem and will provide clearer information to complainants and the accused.

Once again, I want to express my appreciation for the work of this committee and for holding a hearing examining how to move forward in dealing with this vital and important issue. Ultimately, campuses want clear, implementable requirements that will enable us to protect the victim and be fair to both parties.

We look forward to working with you to address this problem and to achieve our common goal of a safe and welcoming environment for all students.

Sincerely,



Molly Corbett Broad
President