

Institutional Challenges in Responding to Sexual Violence
On College Campuses

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Thank you for the opportunity to before the U.S. House Subcommittee on Higher Education and Workforce Training. I come here today as a higher education senior administrator deeply committed to the education of our nation's students in safe and supportive environments. I serve as campus counsel to a wonderful institution, Dickinson College; and I have both the privilege and benefit of longstanding and deep collaboration with general counsels from scores of our nation's colleges and universities of all types and sizes. In recent years, my collaboration with them – a dedicated, experienced and incredibly informed group – has been heavily skewed toward discussions of sexual violence. In 2013-2014, I had the privilege of serving as a negotiator in the rulemaking process to implement the amendments to the Violence Against Women Act and the Clery Act.

My higher education colleagues and I have thought long and hard about campus policies and procedures that may help achieve compliance with the fast growing array of laws, regulations and guidance presented to us as our institutions and the nation as a whole tackles a deeply concerning issue. Thus, being invited to discuss with this subcommittee the issue of sexual violence is a conversation I am prepared to have. The views I represent today are my own and do not necessarily represent the views of the trustees or the administration of Dickinson College.

Unfortunately, over my long career, I have been involved in numerous student legal and disciplinary matters involving issues of sexual violence. My heartfelt wish is that there will come a day when there will be no more need for that on the part of my successor. I know that everyone in this room has the same wish for every campus across the country, large and small, public and private. I know, too, that that this wish is shared by everyone in the Department of Education, its Office for Civil Rights, the Department of Justice and the White House. Indeed, it is a wish shared by our entire society.

No one, though, has the perfect solution for how to get this done. That's why we are here today, and it is my hope that we will have occasions in the future to be together again. Because there is no quick fix. We need to be in this for the long haul. I know my fellow counsel across the country are; I know my colleagues at Dickinson are.

Sexual violence is a societal problem; not just a college problem. While colleges can assist, we must recognize that conduct and cultural norms emanate from the greater community. While FBI statistics indicate that the rate of sexual assault was higher for nonstudents than for students, colleges and universities can and must do our part to address this most serious societal issue.¹

¹ U.S. Department of Justice, *Rape and Sexual Assault Victimization Among College –Age Females, 1995-2013* (December 2014)

Over the last four and a half years, Congress and the Administration have focused additional and much needed light on the issue of sexual violence, including dating and domestic violence and stalking. There has been a great deal of guidance coming from the Department of Education's Office for Civil Rights and from amendments to laws, including the Violence Against Women Act, and new regulations implementing those laws. There are additional bills pending, such as the Campus Safety and Accountability Act (CASA), the Hold Accountable and Lend Transparency Act (HALT), and the Safe Campus Act (SCA). Many states have also begun to enact legislation and regulations aimed at addressing sexual assault and interpersonal violence on college campuses. All of these laws and guidance are aimed at improving the climate and culture on the campuses of our nation's colleges and universities and we as leaders on our campuses are willing and eager partners in undertaking additional steps to combat this most serious problem.

Combating sexual assault and interpersonal violence requires institutions of higher learning to be both proactive and reactive, in meaningful and effective ways. That last phrase is critically important. None of us should want our colleges and universities to just "do something." We want them to do something that works. Something that really works. Indeed, given the national conversation about the high costs of a college education, the last thing Congress should want is to saddle institutions with obligations to undertake, and pay for, programs and initiatives that do not yield meaningful results. There is great hope that education and prevention programs, such as bystander intervention and healthy relationship workshops, will help to reduce sexual assault and interpersonal violence. But do we know what we need to know about the efficacy of these programs? We don't-not yet.

Our colleges and universities are great places for finding solutions to problems. Colleges and universities across the country are actively engaged in the research and evidence based inquiry that can and will lead to better sexual assault and interpersonal violence prevention and response programs. But our institutions must have the freedom to explore a wide range of potentially effective solutions that may work on particular campuses based on their particular characteristics – not have solutions dictated to them that assume all campuses are the same. We must recognize that one size does not fit all and not all institutions have the resources necessary to engage in this kind of research. Congress and the U.S. Department of Education can and should play an important role in funding research regarding successful prevention and response programs and in making those programs available as possible tools to be used by colleges and universities throughout the country. Give our institutions of higher education the means, space and resources to do what we do best: research, test efficacy, and share what we learn to the betterment of students everywhere and society as a whole.

When an assault is reported, we must support the victim/survivor with a wide array of services and resources while, at the same time, ensuring that our college and university disciplinary 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 effects on the individual and the community. Colleges and universities are expected to serve in a variety of roles – as advocates for victims/survivors, trained investigators, and impartial decision makers that provide an equitable process for the accuser and the accused - in short all things to all people involved. Even when we do these things well and, I believe, many institutions are doing them well; either the accused or the accuser (and sometimes both) feel profoundly aggrieved by the process and the outcome. In many instances this spawns complaints to OCR or litigation (or both) which results in agency or judicial review and criticism of institutional processes and procedures.

It is about these particular challenges that I wish to speak to you today. There are several things that have proved particularly problematic in meeting all of the enhanced expectations for the handling of sexual misconduct on our campuses -- all of which colleges and universities are endeavoring to address in accordance with regulatory and agency guidance. My list of concerns is by no means exhaustive but I believe that by sharing and discussing even some of the challenges we face as a result of the legislative and administrative expectations, we can improve the way forward as Congress and administrative agencies continue to work with higher education to make our campuses safer, empower and inform our students about issues which are at the core of prevention such as consent and create a climate of respect to which all are entitled and which all can enjoy.

Unfortunately, the legal requirements imposed on institutions for responding to and resolving reports of sexual assault over the last four years have created challenges for colleges and universities in meeting our obligation to be fair and impartial in our dealings with all of our students, including accusers and those accused. Both parties involved in a sexual encounter are members of the same university community. While providing support to a victim/survivor – and encouraging others to come forward -- is a critical first step in effectively dealing with an assault situation, a number of the requirements for on-campus resolution of such complaints challenge our commitment to fairness and equity to both students involved.

1. The context of sexual assault claims that colleges and universities are expected to resolve are neither clear cut nor easy.

We know that children grow up in a world where exposure to sex and sexualized behavior is everywhere – on TV, on billboards, in movie theaters and throughout the on-line world. This reality is unlikely to change. By the time children have become young adults and arrived on our campuses, they know or at least believe they know a lot about sex. According to CDC statistics from 2013, 47% of high school students have already had sexual intercourse before even starting college. That's a fact worth talking about, and worth keeping in mind as we consider what's to be done about eliminating sexual violence on our campuses. It's highly questionable whether most students arriving on our campuses know or understand what a healthy sexual encounter or sexual relationship is regardless of whether they have experienced sex.

There's another trend that seems unlikely to change anytime soon. Among young adults today, sex has become more casual. A sexual encounter between college students or between two people who meet online or in a bar often occurs between casual acquaintances who have not gone out on a single date or who may have just met, and the parties may have no expectation of meeting a second time.

Another significant issue: generally, one or both partners has been consuming alcohol and each has expectations in his or her mind about what comes next. According to a study of claims made over a three year period to United Educators, a larger insurer of institutions of higher education, alcohol is involved in 78% of sexual assaults, and this number includes consumption by the accused, the victim/survivor or both. Alcohol and sex, particularly casual sex, are quite frankly a recipe for disaster.

2. Colleges and universities are best at education and are not suited for being proxies for courts of law.

There is no question that the national culture around sex is a fundamental reason this issue is justly receiving so much attention. Colleges and universities have always been a place where cultural

norms have been tested and shifted - whether around civil rights or our country's role in war. As educators, we recognize our leadership role in educating our students about their rights and responsibilities, the consequences of their choices and their rights to feel and be safe in whatever situation they find themselves. This includes education around the issue of sexual and interpersonal violence. Because this is what we do well. We educate.

Conducting education and providing information is an area where college officials have vast experience. We must redouble our education efforts on sexual assault, and institutions are moving aggressively to do this. But performing investigations and resolving cases is a far more difficult and murky challenge. We are not courts of law. We do not have the authority to subpoena witnesses, and control evidence. Our disciplinary and grievance procedures were designed to provide appropriate resolution of institutional standards for student conduct, they were never meant to adjudicate misdemeanors, let alone felonies.

The most common claims of sexual assault we encounter on our campuses are not the clear cut physical force or stranger rape cases. They are claims arising from behavior occurring behind closed doors between two students acquainted with each other but who do not know each other well and both of whom may be under the influence of alcohol. While there is no doubt that regrettably sexual assaults can and do occur under these conditions, it is the question of whether consent was given, withdrawn or possible that frames the central issue in the majority of situations we review.

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, yet our on-campus disciplinary processes are not proxies for the criminal justice system, nor should they be. Nonetheless, the expectations set by VAWA and OCR have converted campus restorative justice systems into quasi-court systems. We are expected to move forward with resolution of criminal cases of sexual assaults in part because the criminal justice system has been found wanting by victims/survivors and many public officials. The vast majority of fact patterns in an on-campus sexual assault are cases that the police and district attorneys around the country decline to prosecute. Constitutional protections afforded to criminal defendants and ambiguous fact patterns make successful prosecution elusive. In a typical campus sexual assault case, colleges must navigate between conflicting word-on-word accounts where there are no eye witnesses, little or no physical evidence, and judgments and memories impaired by alcohol or drugs. Most often, the fact of intercourse is not at issue. It is about consent. The challenges we face in resolving these cases are compounded by the impact of trauma, which may result in reporting delays, wavering levels of participation with campus procedures, and a reluctance to seek law enforcement action through the criminal justice system.

3. **Vague, unclear, complex and inconsistent language creates uncertainty; it is difficult to explain and nearly impossible to understand.**

American colleges and universities look at the laws, regulations and guidance surrounding sexual violence as a package. Over the last four and a half years, the Department of Education's Office for Civil Rights has issued multiple letters providing guidance on how it expects colleges and universities to address sexual violence. This guidance, which has not been subjected to any kind of notice or comment period, is binding. There have been amendments to the Violence Against Women Act and Clery and their related regulations. The White House itself has begun setting expectations and offering assistance. We are dealing with a very complex set of mandates and expectations, attempting to better address education and response, improve support for victims/survivors, increase accountability for offenders and keep and maintain safe and secure environments in which

to educate our students. Yet, the real work of college faculty, staff, administrators, coaches, counselors and security officers occurs in the trenches, and in the moment. Campus lawyers are on a daily basis trying to reconcile differences between language related to Title IX, VAWA, Clery and potentially CASA, HALT and/or SCA, and explain it in clear, simple ways that will be recalled and appropriately applied when the need arises. Addressing the multitude of varying laws and other requirements is one of the most significant challenges we face. We want to get it right in order to serve the needs of our students, but doing so is becoming increasingly complex; even when we make our best possible efforts that are responsive to laws, regulations and guidance. It seems we are never doing quite enough and yet before the effectiveness of our efforts can be assessed, another layer of complexity is added.

One example: Title IX designates a category of college employees as “responsible employees” with a specific set of responsibilities for reporting sexual violence. Clery designates certain employees, but not the same group of employees as designated under Title IX, as “Campus Security Authorities” with a set of reporting responsibilities that differs from Title IX. It’s either not easy or sometimes near impossible to reconcile the complexities of law and agency mandates.

As a second example, under Title IX, colleges and universities are required to advise victims/survivors of their rights to report an incident of sexual assault to outside law enforcement authorities while Clery requires that we advise victims/survivors of their right not to report. It is unclear what distinction was intended. It’s quite possible that advising a victim/survivor of the right not to report to law enforcement (under the theory of allowing the victim/survivor to control the situation) could put institutions in some states at odds with their students because of the institutions’ own duties under state law to report all felonies to law enforcement authorities. We also know that advising victims/survivors of their right not to report has been used as evidence against institutions to support claims that we are sweeping sexual assault “under the rug.” Please make no mistake; our strong belief collectively is that law enforcement should be involved. But if, when and how to notify law enforcement, especially when the victim/survivor does not want to involve law enforcement, is a virtually impossible legal landscape to navigate.

Closely related to this second example are the challenges we have faced over the last few years in how to reconcile the vast array of conflicting laws and agency guidance. Colleges and universities are very concerned that despite their best efforts to follow all applicable laws and guidance, simultaneously achieving full compliance with all federal and state laws and administrative guidance is not possible, is resource intensive and exposes us in nearly every case to legal issues from victims/survivors, respondents, and OCR, and undermines public confidence in our educational institutions. The creation of safe harbors for where colleges are making good faith efforts to meet the requirements of conflicting provisions would be a welcome relief.

4. **A number of expectations established over the last four years appear to fail to recognize the diversity and variety of U.S colleges and universities, complicating the compliance efforts of institutions.**

A number of the requirements established by OCR and recent regulations related to prevention, education and responding to sexual violence appear to make the assumption that all college students attend large, four-year residential institutions. In fact, only approximately 20% of college undergraduates reside on campus. In addition, many students attend smaller institutions that are unlikely to have the administrative resources of their larger counterparts—nearly 2,000 degree-granting institutions in this country enroll fewer than 1,000 students. And increasingly, students are

taking their coursework online rather than attending classes in person, so their interaction with others on an actual campus may be very limited. Expectations for training and prevention education clearly are different depending on the character of an institution.

Complicating the compliance efforts further is the fact that 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, fewer than 60% of colleges have general counsels on staff, and almost none have independent investigatory arms. The training requirements for investigators and outcome decision-makers -- the adequacy of which have not been clarified by OCR or the Department of Education -- have forced many institutions to turn to costly outsourcing arrangements such as retaining the services of former prosecuting attorneys as investigators, former judges and lawyers as decision-makers, and high-priced consultants to develop training and response programs. The hope is that such measures might improve compliance with the expectations of laws and guidance where our duties following an assault arise but there is a tradeoff. We have diluted, if not lost, the responsibility for the integrity of our own campuses. Ownership of decision-making has been moved outside our campus communities. Moreover, the use of funds in these ways diverts them from enhanced education and prevention programming, the kind of work in changing culture that we as educators do best, and the kind of the work that will have longer reaching impact if successful.

One-size-fits-all mandates that fail to account for these differences undermine the valuable goals that the regulations and guidance are intended to achieve. There are several provisions in guidance and regulations that are irrelevant or unworkable for institutions without a residential population and, even more, for institutions without a campus. How, for example, could training on-line students who never set foot on a campus meet the objectives of the laws? Can institutions define students differently? Does an adult learner who takes one continuing education class but does not live on a residential campus require the training that traditional 18 year old students in residence halls do? Can we use data from past experience to determine whether these subpopulations pose a threat to the safety and well-being of others?

5. Students are now permitted to bring “advisors of their choice” to meetings and hearings related to the resolution of claims of sexual violence, changing the dynamic considerably.

College discipline processes have historically had vastly different objectives from those of the criminal justice system. They have existed to establish and maintain community standards of conduct; not to substitute for the criminal and civil courts. In fact, many institutions have not allowed non-members of their communities to participate in discipline matters preferring instead to require responding students to address their conduct in a decidedly non-legal manner where the goal was recognizing one’s responsibility for misconduct, accepting accountability (where appropriate) and learning from the experience. In some cases of sexual assault, this teachable moment has often involved separation from the institution. With the introduction of advisors of choice to our sexual misconduct resolution processes, several dynamics have changed. First and foremost, there is now the potential that one student may have the assistance of an attorney in working his or her way through the resolution process and the other will not, potentially resulting in real inequities between the parties. This can have the unintended consequence of intimidating an unrepresented victim/survivor, for example. Colleges and universities recognize and understand

this potential for unfairness but we cannot afford to shoulder the burden of balancing this issue no matter how much we might want to. Second, the traditional hearing board model where community members (faculty, staff, students) review situations and potentially hold one of their own accountable is a far less appealing responsibility to community members who now have to confront lawyers in the process. In requiring that attorneys be allowed into our hearings, how can institutions without counsel be prepared to deal with the specialized expertise such individuals bring on behalf of their clients?

6. Removing students from hearing boards fails to recognize the value of peer accountability.

Recent OCR guidance has strongly discouraged colleges and universities from including students in their resolution proceedings. As recognized by a number of student government presidents from numerous colleges and universities, this is a genuine loss of a valuable perspective. In all my years of representing institutions of higher education, I have not seen a student representative on a hearing board breach the confidentiality of the process or do anything other than take his or her responsibility very seriously. I have also watched as students held their peers to higher standards of conduct than faculty and staff were initially inclined to do. This is so because the accused and the student hearing board member live in the same community. The student panelist is more familiar with student community norms than faculty and staff. In today's climate where our students are better educated and better trained about the institution's and the law's expectations around sexual assault, student hearing officers would be even better ambassadors for what is acceptable and not acceptable on our campuses. Regrettably, colleges and universities have been discouraged from utilizing this valuable resource.

7. Required use of preponderance of the evidence as the standard for determining responsibility.

Colleges and universities have historically used their conduct resolution processes to resolve violations in an educative manner. We establish internal behavioral norms for our communities and hold one another accountable for violations of community standards. Resolving violations of these norms is not the resolution of criminal charges although much of the conduct with which we deal might also violate state laws, such as underage consumption, destruction of property, and assault. We hope to encourage student accountability and use the experience as a growth opportunity for the individual involved. We know that some violations of our accepted standards of conduct, such as sexual assault, mean that a student cannot remain in our community. The most serious sanction we can impose is separation - whether for a period of time (suspension) or permanently (expulsion). Given the significance of ending someone's relationship with his or her college, many institutions prefer to use a higher burden of proof, such as by clear and convincing evidence, before they are confident that separation is the appropriate remedy. Other schools believe that given the nature and character of their communities and their resolution systems, the preponderance standard is better suited to their objectives. While the VAWA/Clery regulations do not dictate what standard an institution must use before determining responsibility, OCR has clearly indicated that the preponderance measure must be used. There are genuine concerns being expressed by some schools about whether this preponderance standard is appropriate and whether using it might violate the duty of those institutions to treat their students fairly. In short, there are strong arguments to make for using either standard and rather than dictating to a campus community from among at least two responsible choices, colleges and universities need the flexibility to decide which standard best serves the needs of their distinct communities. At a minimum, no standard for such an important issue should be established before a notice and comment period that allows all parties on all sides to express their points of view.

8. Clarity is needed about the purpose of changes to college disciplinary processes.

The requirements of VAWA, Clery and Title IX have changed the character of college disciplinary systems. In some respects, our internal resolution proceedings now look more like criminal proceedings -- accusers and those who are accused may now have counsel; we are discouraged from having students serve as decision-makers in our processes presumably in favor of more experienced individuals. High standards have been set for the training requirements of investigators and decision-makers that are difficult for many institutions to meet. Detailed new rules dictate how notice of meetings and hearings must be given, how our disciplinary hearings and appeals are to be conducted and the manner in which outcomes must be communicated. Interim measures to keep an accused and an accuser away from one another must be put into place; not unlike restraining orders.

Colleges and universities are straining to understand what role Congress, the Administration and OCR believe institutions should legitimately fill. If it is to provide an alternative to the criminal justice system, we strongly urge reconsideration. We are not equipped for such responsibility and this is not what we are. Our resolution systems are comprised of educators, not lawyers. Many of those who participate in the resolution of conduct violations are “volunteers” whose primary roles at our institutions are as faculty and administrators. Meeting the training requirements established under the sexual violence laws has caused many schools to outsource the investigative and resolution functions to trained lawyers and judges. The sense of accountability to one’s peers and the institution that comes from an internal review of conduct is being substantially diminished.

We are the colleges and universities for all of our students – men and women, accuseds and accusers – and we are committed to processes that are fundamentally fair, unbiased and balanced for all. Historically, our processes have run parallel to the criminal justice system; not replaced it. There has always been a separate responsibility for colleges and universities to act to protect the members of our communities on our campuses regardless of what happened in the criminal justice system; not to supersede it. We have done so using educative and restorative justice models. Simply put, we are good at education and at using our conduct systems for educative outcomes. We are not nearly as good at adjudicating crimes and doing so is not at the core of our mission. Only the police, the prosecutors and the courts have the training to handle sexual assaults from a criminal perspective. We need clarity from lawmakers about the role we are now being asked to fill or to be relieved of the responsibility in favor of the workings of the justice system.

Are there solutions?

Higher education is committed to addressing effectively the issue of sexual violence on college campuses. We acknowledge and support the efforts by a variety of constituencies – victim/survivors, advocacy groups, the U.S. government, state governments, this committee, and our own institutions – to come together to confront the problem. As educators, we are committed to enhancing the education and training of our students and employees, supporting the active engagement of our community members on one another’s behalf in stopping sexual misconduct before it happens, supporting victims/survivors when something does happen and holding those responsible accountable. We believe that emphasizing training and education is the most effective strategy for addressing this problem. Finding solutions to some of the challenges addressed in this testimony that would allow us to allocate our energy and resources to the prevention side rather than the discipline side would enhance this effort.

Right now, colleges and universities are struggling to address a number of complexities and challenges presented by Title IX and VAWA/Clery. VAWA and Clery have been amended and updated through legislation and the negotiated rulemaking process. The negotiated rulemaking process brought together individuals of various perspectives and backgrounds with the Department of Education. That group carefully and thoughtfully considered and proposed regulations to enact the amendments to the statute. Currently, however, there are no comparable regulations under Title IX. All of the standards and expectations that have been set over the last four years are the result of subregulatory guidance issued in letters to the higher education community. Our efforts to seek clarity and transparency from OCR have gone largely unanswered.

In the reauthorization of the Higher Education Act, I urge Congress to consider requiring that the negotiated rulemaking process be used to develop Title IX regulations pertaining to issues of sexual assault. A part of that rulemaking process should be the consideration of changes that could align Title IX with VAWA and Clery—a step that would greatly facilitate compliance on college campuses. Bring together representatives of the various stakeholders in this fight to change culture around sexual violence and to draft regulations that can effectively implement changes to Title IX.

Some of the points that merit consideration during the reauthorization process might include the following:

1. Clarifying the goals and purposes of the resolution requirements imposed by VAWA, Clery and Title IX;
2. Aligning training, education and prevention requirements to compatible standards that recognize the flexibility that schools of various sizes and character need in educating their students on issues like consent and capacity;
3. Creating clear, transparent expectations for OCR investigations, including published standards that are used by the agency in campus investigations, the deference OCR should give to the decisions of campuses on sexual assault determinations when based on acceptable evidence and done in compliance with stated standards, and by establishing a timeframe within which OCR must complete its investigation. (Currently, campuses are expected to complete investigations of allegations of sexual assault in as close to 60 days as we can but OCR has kept investigations at some schools open for up to four years);
4. Creating a safe harbor under Title IX and VAWA/Clery that will provide colleges and universities support when they are addressing the requirements of conflicting state and federal laws simultaneously by creating a presumption that institutions are acting in good faith in their compliance efforts;
5. Clarifying that students can participate in conduct proceedings;
6. Undertaking to address the significant role that drugs and alcohol play in sexual assault.
7. Recognizing the diversity of higher education institutions and acknowledging there are multiple pathways for effective education, prevention and response to sexual assault.

We are aware that there is new legislation pending in both the House and the Senate that seeks to further support victims/survivors, address perpetrator behavior and hold colleges accountable if they fail to do so. We should be held accountable if we aren't effectively responding to sexual violence. But our efforts to meet the expectations of Congress, the Department of Education and the White House will be enhanced with recognition of our commitment to doing so in a climate that is fair and unbiased for all of our students and with greater flexibility that will make a substantial difference in the safety of our campus communities. Let's take the time to assess the effectiveness of the changes that have occurred over the last four years before we add more compliance requirements to the mix. And let's try to consolidate what we already have into a process that is simpler and more likely to meet the needs of our students.

The presidents, boards and administrations of colleges and universities across the country are deeply committed to ensuring a safe, supporting and responsive culture around the issue of sexual assault, as well as the other myriad issues that affect our students and our campuses. But changing culture will not happen overnight. It is a journey that will be most effective if we move toward it collaboratively rather than reactively. Higher education would welcome a place in future discussions about these important issues.