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Committee on Health, Education, Labor and Pensions

Hearing on Reauthorizing HEA:
Addressing Sexual Assault and Ensuring Student Safety and Rights

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Chairman Alexander, Ranking Member Murray, and Members of the Committee, I am Jeannie Suk Gersen, the John H. Watson, Jr. Professor of Law at Harvard Law School. I have taught courses on Criminal Law, Criminal Adjudication, Constitutional Law, and Regulating Sex on Campus. My research and writing have considered the problems of equality and fairness in legal and institutional responses to sexual assault and harassment, including in the context of Title IX and campus discipline.[1] As an attorney, I have represented multiple students and faculty who have been parties in campus cases about sexual assault, sexual harassment, and sex discrimination. I was a signatory to the statement of twenty-eight Harvard Law School professors who, in October 2014, criticized Harvard University's then newly adopted sexual misconduct policy as "unfairly stacked against the accused," and "in no way required by Title IX law or regulation."[2] I serve on the American Law Institute's Project on the Model Penal Code: Sexual Assault and Related Offenses, as an Advisor, and on the organization's Project on Sexual and

[1] *See, e.g.*, Jacob E. Gersen & Jeannie Suk, *The Sex Bureaucracy*, 104 Cal. L. Rev. 881 (2016), adapted in Jacob Gersen & Jeannie Suk Gersen, *The College Sex Bureaucracy*, Chron. Higher Educ., Jan. 17, 2017; Jeannie Suk Gersen, *The Socratic Method in the Age of Trauma*, 130 Harv. L. Rev. 2320 (2017); Jacob E. Gersen & Jeannie Suk, *Timing of Consent*, *in* The Timing of Lawmaking 149 (Frank Fagan & Saul Levmore eds., 2017). I have also written the following analyses on campus sexual misconduct discipline, in The New Yorker: *Assessing Betsy DeVos's Proposed Rules on Title IX and Sexual Assault*, Feb. 1, 2019, https://www.newyorker.com/news/our-columnists/assessing-betsy-devos-proposed-rules-on-title-ix-and-sexual-assault; *Deborah Ramirez's Allegation Against Brett Kavanaugh Raises Classic Questions of Campus Assault Cases*, Sept. 25, 2018, https://www.newyorker.com/news/our-columnists/deborah-ramirezs-allegation-against-brett-kavanaugh-raises-classic-questions-of-campus-assault-cases; *The Transformation of Sexual Harassment Law Will Be Double-Faced*, Dec. 20, 2017, https://www.newyorker.com/news/news-desk/the-transformation-of-sexual-harassment-law-will-be-double-faced; *Betsy DeVos, Title IX, and the "Both Sides" Approach to Sexual Assault*, Sept. 8, 2017, https://www.newyorker.com/news/news-desk/betsy-devos-title-ix-and-the-both-sides-approach-to-sexual-assault; *The Trump Administration's Fraught Attempt to Address Campus Sexual Assault*, July 15, 2017, https://www.newyorker.com/news/news-desk/the-trump-administrations-fraught-attempt-to-address-campus-sexual-assault; *College Students Go To Court Over Sexual Assault*, Aug. 5, 2016, https://www.newyorker.com/news/news-desk/colleges-go-to-court-over-sexual-assault.

[2] Elizabeth Bartholet *et al*., *Rethink Harvard's Sexual Harassment Policy*, Bos. Globe, Oct. 15, 2014, https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html.

Gender-Based Misconduct on Campus: Procedural Frameworks and Analysis, as part of the Members' Consultative Group.

Thank you for the opportunity to testify about the response to sexual assault on college campuses. In addition to my own research, my testimony today draws on past public comments, submitted to the Department of Education, that I co-authored with my Harvard colleagues, Elizabeth Bartholet, Nancy Gertner, and Janet Halley, as feminist law professors who have been concerned about fairness in campus discipline processes.[3]

In the past decade, we have seen many colleges and universities recognize their past approaches to sexual misconduct to be inadequate, and undertake to adopt new policies and procedures, inspired by pressure from the federal government. In the same period, we have also seen the rise of an unfortunately common notion that effectively addressing sexual assault and advocating for due process are politically opposed sides of a debate. I appreciate that a premise of this hearing is to reject that false choice in the endeavor to understand what fairness for all parties would look like in rigorous and legitimate measures to address sexual assault.

The two broad questions in campus sexual assault discipline are how prohibited conduct should be defined, and what elements are essential to a fair process of investigation and adjudication. I will address them in turn.

Definitions of Prohibited Sexual Conduct

Title IX prohibits schools that receive federal funding from discriminating on the basis of sex, and in the past decades, it has become clear in court decisions and agency rules that sex discrimination includes sexual harassment, which in turn includes sexual assault. Schools therefore understand that they are legally obligated to take measures to address, remedy, and prevent sex discrimination, sexual harassment, and sexual assault in their communities. But they often face uncertainty and contention about the exact contours of the conduct that they ought to prohibit, both as a matter of their responsibilities under federal law, and as a matter of values and norms they would wish to promote in their communities. The problem of definitions is especially challenging at a time when sexual norms and ideas of acceptable behavior are rapidly changing, especially among young people who are the beating heart of college campuses.

Discipline that affects any party's access to education can be fair only if definitions of prohibited conduct are clear, understandable, and not excessively under-inclusive or over-inclusive. Standard legal definitions of sexual harassment include both quid-pro-quo sexual harassment and hostile-environment sexual harassment. The standard definition of hostile-environment sexual harassment comes from the Supreme Court in *Meritor Savings Bank v. Vinson*: unwelcome conduct of a sexual nature that is sufficiently severe or pervasive that it impairs a person's access

[3] Elizabeth Bartholet, Nancy Gertner, Janet Halley & Jeannie Suk Gersen, *Fairness for All Students Under Title IX*, Aug. 21, 2017, https://dash.harvard.edu/bitstream/handle/1/33789434/Fairness%20for%20All%20Students.pdf?sequence=1; Jeannie Suk Gersen, Nancy Gertner & Janet Halley, *Comment on Proposed Title IX Rulemaking*, Jan. 30, 2019, https://perma.cc/3F9K-PZSB.

to a protected activity.[4] According to the Court, the elements of a hostile environment must be not only subjectively experienced but also objectively reasonable. The definition allows consideration of the complainant's subjective experience, while also providing a reasonableness check against arbitrary accusations. The definition is clear, and when used in the context of schools, has a nexus to equal access to educational opportunity.

But some schools currently use overbroad definitions of prohibited conduct that go far beyond legal definitions of sexual harassment. They may simply prohibit unwelcome conduct, even if it does not create a hostile environment, and even if a reasonable person would not have reason to know that the conduct was unwelcome. At many schools, sexual conduct is considered unwelcome or non-consensual if either party did not provide verbal consent to each act within a sexual encounter. Even those who are proponents of verbal affirmative consent standards must admit that, realistically, the definition effectively renders most subjectively and mutually desired sex that occurs a technical violation of the campus rules. While perhaps appealing as an aspirational norm or a way to avoid misunderstanding during sex, verbal affirmative consent definitions are overbroad for the distinct purpose of campus discipline. They classify almost all sexual conduct as a violation of the rules. Therefore they are unhelpful for clearly distinguishing wrongful conduct from conduct that is mutually wanted and voluntary on both sides. If almost everyone is technically violating an overly broad rule that covers most sex that is voluntarily engaged in, the accusations that arise under the rule may be arbitrary. That is unfair to all parties and erodes the legitimacy of efforts to combat sexual assault.

Federal efforts to guide schools in defining prohibited conduct should be anchored to the Supreme Court's definition of hostile-environment sexual harassment in *Meritor*. The definition should prohibit unwelcome conduct of a sexual nature that is so severe or pervasive as to impair equal access to education, and it should require that hostile environment claims be objectively reasonable.

The Department of Education's current Proposed Title IX Rule, however, defines hostile-environment sexual harassment more narrowly, as unwelcome conduct that is "so severe, pervasive, *and* objectively offensive that it effectively denies a person equal access to [a school's] educational program or activity."[5] That definition is too narrow and under-inclusive, because it would not cover conduct that is severe but not pervasive (such as a single act of rape), or pervasive but not severe (such as multiple, repeated, unwelcome comments on someone's appearance). Both of these types of conduct are important for schools to address in order to preserve equal access to education.

While hostile-environment sexual harassment is supposed to encompass sexual assault, the term "sexual assault" refers to so many different and conflicting kinds of criminal, civil, and colloquial standards that its use currently causes tremendous ambiguity and uncertainty about

[4] 477 U.S. 57, 67 (1986) ("For sexual harassment to be actionable, it must be sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.'").
[5] This language is taken from the Title IX case, *Davis v. Monroe County Board of Education*, 526 U.S. 629, 650-2 (1999), in which the Supreme Court created a narrowing definition of sexual harassment for the specific purpose of limiting private parties' access to civil lawsuits against school boards for money damages. Citing *Meritor*, the Court in *Davis* recognized that the standard legal definition of sexual harassment is broader than the one it was adopting for that specific purpose. *Id.* at 651.

what is prohibited and permitted. Someone may use "sexual assault" to refer to an unwelcome touching of an arm or a shoulder, while another may mean a digital penetration without affirmative verbal permission, and yet another may believe it means nothing short of a forcible act of rape. Similarly, the term "consent" can mean anything from explicit verbal permission for each act within a sexual encounter, to willing acquiescence, to absence of physical resistance.

It would be beneficial for the federal government to provide a definition of sexual assault that guides schools for the purposes of campus discipline, so they may give clear and fair notice to all parties about the line between prohibited and permitted sexual activity. I propose the following definition, as it includes the most important elements:

> Sexual assault is the penetration or touching of another's genitalia, buttocks, anus, breasts, or mouth without consent.
>
> A person acts without consent when, in the context of all the circumstances, he or she should reasonably be aware of a substantial risk that the other person is not voluntarily and willingly engaging in the conduct at the time of the conduct.

This definition clearly specifies the relevant body parts as sexual, and what constitutes consent in a way that accords with most legal and conventional understandings of sexually wrongful conduct. It gives clear notice to parties about what conduct is prohibited, it sets realistic expectations, and it is administrable.

The federal government should define prohibited sexual conduct for the purpose of campus discipline in a manner that is grounded in law and tethered to access to educational opportunity. In sum, the prohibited conduct consists of sexual harassment of three kinds: quid-pro-quo sexual harassment; hostile-environment sexual harassment (defined in keeping with the Supreme Court's definition in *Meritor*); and sexual assault (defined as proposed above) that effectively denies a person equal access to education.

A school's responsibilities to address the prohibited conduct should be tied to the impact of the conduct on equal access to the school's educational programs and activities. That means that its responsibilities to address a violation should extend to off-campus conduct that is not connected to any official program or activity of the school, if the effects of the violation produce a discriminatory impact on a victim's access to education, such as when both the victim and the perpetrator are both enrolled at the school. The focus should be on access to education, and that turns on concrete impairment to educational access due to the discriminatory conduct of the school's students, staff, or faculty.

Finally, schools should be considered in violation of Title IX if they behave unreasonably – that is, when they should have known of a substantial risk of sexual misconduct and failed to act to address it. The Department of Education's current Proposed Title IX Rule instead would hold schools responsible only if they knew of sexual-misconduct allegations and were deliberately indifferent to them. That standard sets an inappropriately low expectation for schools. It should be enough to show that a school reacted unreasonably.

Discipline Procedures for Sexual Misconduct

While sexual misconduct on campus may sometimes overlap with criminal conduct, campus disciplinary processes are not criminal processes. While serious, the stakes, deprivation of access to education rather than criminal penalties, are different and less severe. Criminal investigation and adjudication processes with all of their protections of defendants' rights are not the precise benchmark for campus discipline processes. But basic elements of fair process must be present, to ensure integrity, accuracy, and lack of bias. When a complaint of sexual misconduct is made, both the complainant and the accused must be treated fairly and equally in the process of investigation and adjudication of the complaint. The elements of fair process in this context should include the following requirements:

Notice. Parties should be provided the written complaint and informed of the factual basis of the complaint.

Evidence. Parties should be given equal and full access to all of the evidence gathered that is directly related to the allegations, and to the identities and statements of all the witnesses.

Division of Roles Among Neutral and Independent Decisionmakers. Schools should separate the functions of investigator, adjudicator, and appellate body, rather than combining any of those roles. Decisionmakers at different stages of the process should be independent of each other and not structurally invested in reinforcing the outcomes of previous stages. The separation provides accountability and checks, and discourages bias and error. The role of advocate or counseling, for complainant or respondent, should be divided completely from the roles of investigation and adjudication of the complaint. The role of Title IX Coordinator should be limited to coordinating the process and separated from the neutral and independent investigation and adjudication. The Title IX Coordinator should not be placed in the roles of conducting investigations, making factual findings, deciding on responsibility, assigns sanctions, or hearing appeals.

Live Hearing. Schools should provide a live hearing before the decisionmaker, during which the parties can have the opportunity to be heard, hear testimony of witnesses in real time, and offer amendments, interpretations, and challenges to the evidence and to the witnesses' accounts.

Counsel. Parties should be permitted to bring counsel to any interviews and hearings, and counsel should be allowed to speak to assert the parties' rights.

Asking Questions. Parties should be allowed to ask questions of other parties and witnesses in a meaningful way. This does not require cross-examination. It is sufficient, perhaps even optimal, to have parties instead submit questions to the presiding decision-maker, who should then ask all questions submitted unless they are irrelevant, excluded by a rule of evidence clearly adopted in advance, harassing, or duplicative. This submitted-questions procedure, if administered fairly to serve the truth-seeking function, provides ample opportunity for parties to probe each other's and witnesses' credibility and consistency such that direct cross-examination is not needed.

Presumption of Innocence. Any accused individual in a campus disciplinary matter concerning any kind of allegation should have a presumption of innocence. The rise of "trauma-informed training" for investigators and adjudicators can lead to biased process insofar as it induces a working presumption that problems in the evidence such as inconsistencies in the complainant's account supports the conclusion that the complainant has been traumatized by the accused party. This circular approach to evaluating evidence is inconsistent with the presumption of innocence and, more fundamentally, is incompatible with basic fair process.

Burdens of Proof and of Production. The school should bear the burdens of proof and of production, and should not place them on either complainant or respondent.

Standard of Evidence. The "preponderance of evidence" standard is now the commonly used standard of evidence in campus sexual misconduct discipline, because it was described as mandatory under the Obama Administration's Title IX guidance. When combined with other fair procedures that treat the parties equally and fairly, the preponderance standard is a fair standard. Any higher evidentiary standard is tilted in favor of the accused. But the higher "clear and convincing evidence" standard is also plausibly appropriate and not unfair, because it may reflect the possible seriousness of the sanction of the accused. Schools should have discretion to use the preponderance or the clear and convincing evidence standard, assuming that the other surrounding processes are fair and equal. But if a school chooses preponderance for sexual misconduct, it should adopt the same standard for non-sexual misconduct as well, because there is no good justification for using a lower or higher evidentiary standard for sexual harassment than, for example, racial harassment.

Written Reports. Parties should be provided copies of written reports that detail the evidence gathered by investigators and explain the reasoning and conclusions reached by decisionmakers.

Informal Resolution Methods. Schools should be permitted to offer mediation or restorative justice approaches to accusations of sexual misconduct, in addition to the formal process of investigation and adjudication. An exclusively disciplinary or punitive approach needlessly deprives victims of options that they may believe will benefit them in the pursuit of equal educational opportunity. Some complainants desire a process focused on having the other party understand the harm caused, but may not pursue a complaint if they know that the only option is a full formal process leading to possibly severe punishment for the respondent. Some respondents may be prepared to confess, apologize, and take responsibility, but may be deterred from recognizing their harmful actions, because the formal and punitive-seeming framework pushes them to adopt an adversarial posture of denial. If both parties wish to explore alternatives to formal adjudication, schools should not be prohibited from providing the option of a structured and guided means for parties to settle the conflict, through an informal process that is less adversarial than the formal investigation and adjudication process.

Racial Impact. The Department of Education's Office for Civil Rights has acknowledged a serious risk of race discrimination in general student discipline in elementary and secondary schools, noting that African-American students "are more than three times as likely as their white peers" to be expelled or suspended, and those substantial racial disparities "are not explained by more frequent or more serious misbehavior by students of color." The race of the

parties in sexual-misconduct cases is not included in existing federal reporting requirements, so the issue is difficult to study and understand. Schools may interpret their obligations under student privacy rules as preventing the release of such data, if they even compile such data. But among administrators, lawyers, and faculty members involved in sexual misconduct cases, stories and experiences of disproportionate racial impact are common. It is important for colleges and universities to study and address the potential for race discrimination in sexual-assault allegations, affecting either respondents or complainants. That risk must be transparently analyzed as part of the project of enforcing sex discrimination law. And concerns about fair procedures that afford equal treatment complainants and respondents as outlined in this section are all the more important where there is a risk of racially disproportionate impact. Schools should include questions about racial and other demographic information in the sexual climate surveys they administer to the student body. The federal government should promote the rigorous gathering of knowledge about the racial impact, on both complainants and respondents in the campus disciplinary process.

Thank you for the opportunity to discuss these issues with the Committee.