February 28, 2014

White House Task Force to Protect Students from Sexual Assault
VIA email to OVW.SATaskForce@usdoj.gov

Dear White House Task Force to Protect Students from Sexual Assault:

The Foundation for Individual Rights in Education (FIRE; thefire.org) is a nonpartisan, nonprofit organization dedicated to defending core constitutional rights on our nation's university campuses. These rights include freedom of speech, freedom of assembly, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. Every day, FIRE receives requests for assistance from students and professors who have found themselves victims of administrative censorship or unjust punishments.

We thank you for soliciting public input on how the federal government can best assist institutions of higher education in meeting their obligations under Title IX and the Jeanne Clery Act and for allowing us the opportunity to supplement the spoken comments we provided on February 19, 2014.

One of the core constitutional rights that FIRE defends is due process. There is no doubt that universities are both morally and legally obligated to respond to known instances of sexual assault in a manner reasonably calculated to prevent its recurrence. Public universities are also bound by the Constitution to provide meaningful due process to accused students. *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961). These obligations need not be in tension.

Today, access to higher education is critical for Americans. Indeed, the White House website calls it "a prerequisite for the growing jobs of the new economy." The White House, *Higher Education, available at* http://www.whitehouse.gov/issues/education/higher-education (last visited Feb. 28, 2014). The stakes are therefore extremely high for both the student complainant and the accused student in campus disciplinary proceedings, and it is essential that neither student's ability to receive an education is curtailed unjustly. When a university dismisses an accusation of a sexual assault without adequate investigation, it has both broken the law and failed to fulfill its moral duty. Recent headlines indicate that far too many schools have taken this path. Similarly, when a college expels an accused student after a hearing that

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includes few, if any, meaningful procedural safeguards, it too has failed to fulfill its legal and moral obligations. Far too many schools have taken this path as well.

When a student is suspended or expelled from college without due process protections, the consequences can be profound. In many of those instances, expulsions—particularly for one of society's most heinous crimes—have the effect of ending educations and permanently altering career prospects. See attachment A.

When an expulsion follows a hearing that includes meaningful due process, there is no problem; justice has been served. But an objective look at the disciplinary procedures maintained by colleges nationwide demonstrates that most institutions fall woefully short of that standard. See attachment B. Sexual assault hearings are complex adjudications of allegations of behavior that constitutes a felony, and the campus judiciary is simply ill-equipped to handle these matters. Without access to the resources, technology, and experience that law enforcement and criminal courts possess, institutions are being asked to determine who is guilty and who is not in these very challenging cases. If there is one thing that people on all sides of this issue agree on, it is this: Few if any schools are capably responding to the problem of sexual assault on campus. Even the best-intentioned campus administrators, of which there are certainly many, simply lack the necessary expertise.

While the law properly forbids institutions from merely referring these cases to law enforcement and washing their hands of them, institutions can and should do many things that stop short of determining innocence or guilt, but which will still go a long way towards ensuring that campuses are safe. Regardless of whether an accusation is later proven true or false, a college can advise students about where to turn to ensure that evidence is preserved. It can help them report accusations properly to law enforcement. It can provide counseling services. It can separate students by changing course schedules and dorm assignments. All of these options, and many more, help ensure that the campus remains a safe place for all students to learn without leaving ultimate decisions of guilt or innocence to campus tribunals, which have proven to be inadequate, ill-prepared forums for adjudicating these cases.

Unfortunately, the federal government, and the Department of Education's Office for Civil Rights (OCR) in particular, has placed the emphasis on advancing the rights of the complainant, while it has paid insufficient attention to the rights of the accused. OCR has demanded that institutions utilize the judiciary's lowest burden of proof, the "preponderance of the evidence" standard. So long as campus tribunals have few, if any, of the fundamental procedural safeguards found in civil courts, using this low standard diminishes the reliability of the outcomes of these hearings. Instead of utilizing a low evidentiary standard that diminishes the accuracy of the on-campus findings, colleges should take meaningful measures to ensure that their tribunals are more fair and more reliable for all parties.

Fair, impartial tribunals should be a self-evident necessity. In OCR's April 4, 2011 "Dear

Colleague" letter, the agency acknowledged that "a school's investigation and hearing processes cannot be equitable unless they are impartial." While FIRE wholeheartedly agrees with this sentiment, we have yet to see a single instance in which the Department has taken action against an institution for lack of impartiality against the accused. This is true despite numerous examples in which colleges punished accused students with scant if any evidence, using embarrassingly minimal procedural safeguards. We have even seen repeated instances in which colleges expel students despite the fact that juries have found those students not guilty in real criminal trials covering the same accusations. In some cases, the evidence not only was insufficient to support guilty verdicts under criminal law evidentiary standards but also dispositively proved the innocence of the accused. Caleb Warner's case from the University of North Dakota is illustrative. See attachment C. We point this case out not to argue that false accusations are the norm, but rather to emphasize that justice requires that individualized determinations are based upon the known facts of each case, not upon statistical assumptions.

In FIRE's view, colleges and universities can take a number of steps to improve access to campus tribunals and increase their reliability and fundamental fairness. To start, universities should ensure that all students know where to register their complaints. Universities should publicize this information clearly, and make sure that all campus personnel are familiar with this information as well.

As for ensuring that campus tribunals operate fairly, it is first necessary to recognize that the *status quo* is unacceptable. Again, we emphasize that FIRE and others are growing increasingly skeptical of the campus judiciary's ability to fairly analyze and adjudicate cases of serious felonies like sexual assault, but we offer the following suggestions which we believe will make the process fairer than it is today.

First and foremost, FIRE believes that OCR should drop its mandate that these tribunals decide cases under the preponderance of the evidence standard. The legal argument that the preponderance standard is the only acceptable standard under Title IX is incorrect, as FIRE has catalogued in our prior correspondences with the Office for Civil Rights. See attachments D, E, and F. Instead, OCR should encourage institutions to use the "clear and convincing" standard of evidence, which requires more than just a "50%-plus-a-feather" level of confidence that the evidence supports one side over the other. OCR should also encourage institutions using the preponderance standard to set forth substantive protections for the accused to balance out the low evidentiary threshold. For example, institutions should ensure that there is some mechanism for the accused to cross-examine his or her accuser.

One of the most important things that the federal government can do to improve the reliability and fairness of campus disciplinary hearings is to require schools to allow student complainants and accused students to have legal representation actively participate in those proceedings. Typically, the university represents the complainant's interests by bringing and

prosecuting the charges against the accused party. Universities are free to employ lawyers to conduct this function. Providing student complainants with a matching right to have their own counsel actively participate in the process will serve as an important check to ensure that a college proceeds in a just manner rather than giving into the temptation to act in a manner that protects its own interest in avoiding liability.

It is also important to keep in mind that anything a student says during an on-campus proceeding is admissible against him or her in criminal court. Without a lawyer, accused students are effectively waiving their Fifth Amendment rights. Some are forced to choose between defending themselves on campus or defending themselves in criminal courts. One such example is Ben Casper, a former student at The College of William and Mary, who on the advice of his criminal defense lawyer did not participate in his campus disciplinary proceeding, instead defending himself in his criminal trial. Ben was found not guilty of all the charges against him in court, but has been refused the opportunity to return to school. Allowing legal advocacy in the campus tribunal will go a long way towards solving this problem. At the same time, it will likely help the process itself; the example of criminal and civil courts amply demonstrates that hearings proceed much more smoothly when both sides are represented by counsel than when *pro se* litigants are forced to navigate a process with which they are unfamiliar. As the Framers of the Sixth Amendment recognized, hearings with the assistance of legal professionals are far more likely to lead to just results than those without.

Throughout the listening sessions, participants offered two suggestions in particular that FIRE would like to address. One suggestion that was offered repeatedly was that institutions should be required to subject their students to mandatory surveys to gauge campus climate and obtain more detailed information about sexual assault on campus. While FIRE appreciates this desire to have better information, we nevertheless believe there are serious civil liberties implications to compelling students—or anyone for that matter—to answer sensitive questions about their sexual activities. This information is very personal, and compelling individuals to share this information with the government is deeply troubling. Surveys, if they are conducted, should be voluntary, and appropriate measures should be taken to ensure that the anonymity of the participants is protected.

Another suggestion offered during the listening sessions was that the government should use the "affirmative consent" standard when collecting data about sexual assault and require institutions to use that standard in their disciplinary hearings. The affirmative consent standard is a confusing and legally unworkable standard for consent to sexual activity.

Affirmative consent posits that sexual activity is sexual assault unless the non-initiating party's consent is "expressed either by words or clear, unambiguous actions." Should proving "affirmative consent" become law, there will be no practical, fair, or consistent way for colleges to ensure that these newly mandated prerequisites for sexual intercourse are

followed. It is impracticable for the government to require students to obtain affirmative consent at each stage of a physical encounter and to later prove that attainment in a campus hearing. Under this mandate, a student could be found guilty of sexual assault and deemed a rapist simply by being unable to prove she or he obtained explicit verbal consent to every sexual activity throughout a sexual encounter. In reality, requiring students prove they obtained affirmative consent would render a great deal of legal sexual activity "sexual assault" and imperil the futures of all students across the country.

We note that the concept of affirmative consent was first brought to national attention when it was adopted by Ohio's historic Antioch College in the early 1990s. When news of the college's policy became public in 1993, the practical difficulty of adhering to the policy prompted national ridicule so widespread that it was lampooned on *Saturday Night Live*. Indeed, the fallout from the policy's adoption has been cited as a factor in the college's decline and eventual closing in 2007. See attachment G. It has since reopened. The awkwardness of enforcing "affirmative consent" rules upon the reality of human sexual behavior has continued to be a popular subject for comedy by television shows such as *Chappelle's Show* and *New Girl*. The humor found in the profound disconnect between the policy's bureaucratic requirements for sexual interaction and human sexuality as a lived and varied experience underscores the serious difficulty that requiring the standard would present to campus administrators across the nation.

Thank you very much for addressing this important issue and for considering FIRE's input. We are deeply appreciative of this opportunity to share our perspective, and offer our assistance to you as you move forward. Please do not hesitate to contact us if we can be of any assistance.

Respectfully submitted,

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