



January 12, 2017

VIA FIRST CLASS MAIL

The Honorable Lamar Alexander
Chairman
U.S. Senate Committee on Health, Education, Labor & Pensions
428 Senate Dirksen Office Building
Washington, DC 20510

Re: Support of Foundation for Individual Rights in Education (FIRE)

Dear Chairman Alexander,

I write on behalf of Cause of Action Institute (“CoA Institute”), a nonprofit strategic oversight group committed to ensuring that government decision-making is open, honest, and fair.¹ In carrying out its mission, CoA Institute uses various investigative and legal tools to educate the public about the importance of government transparency and accountability. To that end, CoA Institute is contacting you to express our support of the Foundation for Individual Rights in Education’s (“FIRE”) mission to “defend and sustain individual rights at America’s colleges and universities.”²

CoA Institute supports FIRE’s wide-ranging mission, which seeks to preserve the individual liberties vital to a just and free society. FIRE specifically seeks to protect freedom of speech, legal equality, due process, religious liberty and sanctity of conscience on America’s college campuses.³ FIRE accomplishes its goals by providing educational resources to students and professors who face disciplinary actions by their universities.⁴ Additionally, FIRE accepts case submissions in order to provide students and professors with outside support and, in some cases, advocacy.⁵

Democrats and women's groups have recently unfairly criticized Secretary of Education nominee Betsy DeVos for donating a total of \$10,000 to FIRE in 2012 and 2013.⁶ The criticism stems from a belief that Ms. DeVos would make it “more difficult for campus sexual assault

¹ See CAUSE OF ACTION INSTITUTE, *About*, www.causeofaction.org/about/ (last visited January 11, 2017).

² See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *Mission*, www.thefire.org/about-us/mission/ (last visited January 11, 2017).

³ *Id.*

⁴ See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *FIRE Statement on Nomination Hearings for Secretary of Education*, www.thefire.org/fire-statement-on-nomination-hearings-for-secretary-of-education/ (last visited January 11, 2017) [hereinafter *FIRE Statement*].

⁵ See FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., *Submit a Case*, www.thefire.org/resources/submit-a-case/ (last visited January 11, 2017).

⁶ See Benjamin Wermund, *DeVos' donations spark questions about her stance on campus sexual assault*, POLITICO (Jan. 9, 2017), <http://www.politico.com/story/2017/01/betsy-devos-education-sexual-assault-233376>.

victims to receive justice.”⁷ In 2011, the Department of Education’s Office of Civil Rights (“OCR”) issued a “Dear Colleague” letter (“DCL”) discussing the applicability of Title IX to sexual assault cases, and mandating schools use the “preponderance of the evidence” standard of proof.⁸ This standard of proof is the lowest standard available to determine culpability and means essentially that the accused is held liable if there is as little as a 50.1% likelihood that a violation occurred. Based on FIRE’s opposition to OCR’s DCL, critics of Ms. DeVos seem to believe that her donations to FIRE suggest that she will not take sexual assault seriously and that she will raise the standard of proof mandated by the 2011 Dear Colleague Letter.⁹

As explained above, advocating for sufficient due process protections during Title IX adjudications is only one dimension of FIRE’s mission. Suggesting, without evidence, that Ms. DeVos wants to make it “more difficult for campus sexual assault victims to receive justice” because of her donations to FIRE, is a gross mischaracterization. No one would suggest, for instance, that all donors to the American Civil Liberties Union (“ACLU”) agree with and promote the anti-gay rhetoric of the Westboro Baptist Church defended by them. Furthermore, the donations were made in the years before FIRE received national attention for its Title IX stance.

Secondly, critics of FIRE’s advocacy for sufficient due process protections for all students—both accusers and accused—fail to acknowledge traditional notions of justice. Justice is not served if adjudications are overwhelmingly stacked against the accused due to their inability to defend themselves from false accusations. FIRE merely fights for the adoption of due process protections Americans often take for granted in other proceedings: “the right to the active participation of counsel; the right to see the evidence in one’s case and to meaningfully question witnesses; and the right to an impartial tribunal, among others.”¹⁰ Furthermore, the DCL has faced bipartisan criticism from members of Congress, academics, and even campus legal experts due to its erosion of even the most basic due process requirements.¹¹ Consequently, critics of Betsy DeVos’s support of FIRE are the ones making it more difficult for victims of sexual assault to get impartial, genuine justice.

CoA Institute thus supports FIRE’s efforts to repeal the 2011 DCL’s guidance while finding a common sense solution that provides justice to victims of sexual assault. Preventing

⁷ *Id.* (statement of Sen. Bob Casey, Member, S. Comm. on Health, Educ., Labor, & Pensions).

⁸ See RUSSLYNN ALI, U.S. DEP’T OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE 11 (April 4, 2011) [hereinafter 2011 DCL] available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.

⁹ Wermund, *supra* note 6.

¹⁰ See *FIRE Statement*, *supra* note 4.

¹¹ Opinion, *Rethink Harvard’s Sexual Harassment Policy*, THE BOSTON GLOBE (Oct. 15, 2014), available at <https://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZN7nU2UwuUuWMnqbM/story.html>; see also Letter from National Assn. of Scholars to Members of Congress, *Rein in the DoED’s Office for Civil Rights* (Mar. 4, 2015), available at https://www.nas.org/articles/letter_to_senators_dont_expand_the_does_office_for_civil_rights; *Law Professors’ Open Letter Regarding Campus Free Speech and Sexual Assault* (May 16, 2016), available at <http://online.wsj.com/public/resources/documents/Law-Professor-Open-Letter-May-16-2016.pdf>; see generally Senate HELP Committee Press Release: “Bipartisan Group of Senators Announces Report on Simplifying Federal Regulations for America’s 6,000 Colleges and Universities; Chairman Alexander announces Feb. 24 hearing on report recommendations to streamline and reduce federal regulations, while protecting students and taxpayers,” (February 12, 2015), available at <http://www.help.senate.gov/newsroom/press/release/?id=c82d8c2e-36eb-4b32-89f4-5c32c3f2dd68&groups=Chair>.

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government overreach is central to CoA Institute's mission and the Department of Education's threats to use the DCL as a basis for enforcement actions against universities grossly overreaches. In addition to the concerns noted above, the DCL has no legally binding effect and should not be used to coerce universities into accepting the policy goals of the current Department of Education's OCR. Furthermore, the policies advocated for in the DCL are subject to specific rulemaking procedures under the Administrative Procedure Act ("APA"). Guidance documents (i.e., the DCL) should not be used as an end run around the statutory requirements of the APA. To that end, we support FIRE and its legal challenge to the DCL's mandates under the APA. The APA's procedural requirements are vital for promoting transparency and limiting agencies' ability to impose mandates on the American public. CoA Institute asks the committee to take the foregoing into consideration during the nomination hearings for Betsy DeVos.

Respectfully submitted,



Henry Kerner
Assistant Vice President

cc: The Honorable Patty Murray
Ranking Member
Senate Committee on Health, Education,
Labor, and Pensions

The Honorable Bob Casey
Member
Senate Committee on Health, Education,
Labor, and Pensions