

## TO THE LEGISLATORS OF ALL FIFTY STATES

We, the undersigned, are attorneys who share a deep commitment to gender equality, fairness and due process of law. We write in response to an open letter from NASPA (Student Affairs Administrators in Higher Education) in February 2015, which, along with other organizations, opposes proposed legislation in state legislatures nationwide that would provide students accused of sexual misconduct with the right to active representation by counsel during disciplinary hearings and/or to obtain judicial review of erroneous decisions. NASPA's letter deceptively misstates applicable law to serve their efforts to chill reform. We write to correct the record, and we urge you to support bills that protect students accused of sexual misconduct.

NASPA argues that alleged victims are beneficiaries of rights under the Clery Act, Title IX, the Violence Against Women Reauthorization Act of 2013, and the sub-regulatory mandates in the OCR's "Dear Colleague" Letter in 2011 that make on-campus adjudication of sexual assault uniquely tailored to the alleged victim's special circumstances. They oppose the pending legislation because they fear it will level the playing field by giving rights to the accused that will interfere with or somehow deplete the rights already granted to the accusers, usually female. However, NASPA is advocating for dangerous and backward-looking procedures for the protection of the accuser, unheard of outside of the special measures to protect children in litigation such as assigning handlers, closing courtrooms and limiting examination.

This bias impacts disastrously on students who face the full weight of punitive consequences: suspension and/or expulsion from their college or university and the life-altering stigma of having been disciplined for sexual misconduct. Such students, like their accusers, are often still in their teens and fulfilling life ambitions with funds that may have taken their families their whole lives to accumulate. The accusations are sometimes for activities that are not defined by the Department of Justice as criminal, and would be considered *de minimus* in a civil litigation. Yet, what happens during an on-campus sexual assault investigation and hearing could forever hamper the accused student's future academic and employment prospects. As NASPA would have it, such accused students must stand alone to defend themselves in front of panelists that may include deans, professors with advanced degrees, or faculty from the university's law school, all without the active participation of professional counsel. NASPA opposes counsel for the accused, even if the student is also facing a criminal investigation, a situation rife with significant issues relating to self incrimination that are even difficult for the most experienced counsel to navigate. Despite such a stacked deck and even if the investigation is mishandled and leads to a wrongful conclusion, NASPA also seeks to prohibit the accused student from judicial review.

NASPA's assertion that right to an attorney and/or judicial review legislation will unfairly favor the accused is baseless as accusers would benefit from the same privileges. Nevertheless, NASPA constructs a series of straw men arguments and misleading impressions. Most notably, NASPA claims that bills giving accused students more meaningful rights of review in state court will overwhelm state courts. This is simply false. New York has provided students at both public and private colleges with the right to judicial review of adverse university disciplinary decisions for decades, and the state's court system has not suffered.

Similarly, NASPA claims that bills giving accused students the right to active attorney representation in disciplinary hearings will somehow distort the disciplinary process. This is not true. North Carolina now provides all accused students with the right to have an attorney participate in disciplinary proceedings, and colleges within the state are still able to provide a safe and effective learning environment.

NASPA also falsely claims that allowing lawyers to actively participate in disciplinary proceedings would upset a “balance” struck during negotiations surrounding the implementation of the Clery Act. Notwithstanding that such negotiations included no representative of any kind for accused students, the plain text of the law actually does not require lawyers to be silent, yet the purposeful misreading of this term is perpetuated in campus procedures throughout the country.

NASPA asserts its bias for alleged victims in the name of violence and the trauma it causes. However, such dire acts warrant the most advocacy, transparency and oversight for the accuser and the accused, not less. Law Professors from some of the country’s most distinguished universities, including Harvard Law School and the University of Pennsylvania Law School, have written to denounce the inherent biases and imbalances of the procedures used against students accused of sexual misconduct.<sup>1</sup> They speak of a toxic environment, and NASPA’s act of co-authoring its letter alongside victim rights advocacy groups speaks volumes about the current state of institutionalized bias against the accused students in a disciplinary proceeding.

As colleges and universities grant a single, central office with powers to investigate, prosecute, and judge sexual assault allegations, neutrality should supersede any other consideration. Instead, NASPA is openly announcing its unique role to advocate on behalf of the accuser. Even the government’s powerful mandate to prosecute crime and incarcerate perpetrators is insufficient to supersede NASPA’s exceptional role on behalf of “the harm to the victim.”

NASPA explains that the problem with the criminal justice system is that the prosecutor represents the “state not the victim.” What NASPA sees as the problem, we see as the solution hard won through hundreds of years of developing a justice system by testing and vetting theory and practice. A system focused on the victim alone, as NASPA would have it, betrays the balance we have struck in our judicial system between the rights of the alleged victim and those of the accused. A system focused solely on the unimpeachable harm to the victim is not a system that can be trusted with a transparent and fair tribunal for the accused.

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<sup>1</sup> Open Letter From Members of the Penn Law School Faculty Sexual Assault Complaints: Protecting Complainants and the Accused Students at Universities dated February 18, 2015 <http://media.philly.com/documents/OpenLetter.pdf>; and the statement of 28 Harvard Law School Professors, October 2014: <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassmentpolicy/HFDDiZN7nU2UwuUuWMnqbM/story.html>

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We urge you not to be swayed by NASPA. NASPA wants to stack the deck against accused students and has no credibility to influence legislation that will make discipline fair, reliable and impartial.

Respectfully Submitted,

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