

**October 2, 2014**

The Honorable Claire McCaskill  
The Honorable Dean Heller  
The Honorable Richard Blumenthal  
The Honorable Charles Grassley  
The Honorable Kirsten Gillibrand  
The Honorable Kelly Ayotte  
The Honorable Mark Warner  
The Honorable Marco Rubio

The Honorable Barbara Boxer  
The Honorable Lindsey Graham  
The Honorable Jack Reed  
The Honorable Lisa Murkowski  
The Honorable Roy Blunt  
The Honorable Sheldon Whitehouse  
The Honorable Mark Begich

**RE: The Campus Accountability and Safety Act (S. 2692)**

Dear Senators:

We are a group of attorneys with specific experience in cases that involve students who have been accused of a campus sexual assault.

There is little doubt that sexual assault on the nation's college campuses is a significant problem and, in general, is poorly handled by the colleges. As lawyers with direct experience regarding this issue, we want to take this opportunity to commend you for your leadership in the search for a solution.

We are concerned that the complexity of the problem and the momentum to find a solution to the manner in which colleges handle these matters will overwhelm any effort to ensure fair treatment to and protect the rights of the accused – particularly with respect to due process, impartiality, and the collection of evidence.

Senator McCaskill's hearings and report, "Sexual Violence on Campus," followed by the proposed "Campus Accountability and Safety Act," while appropriately focused on institutional reporting of sexual assaults, fail to adequately address the rights of the accused with respect to the adjudication of sexual assault allegations. We observed that the subhead to Senator McCaskill's report reads, "How too many institutions of higher education are failing to protect students." We agree that the college adjudication process is indeed failing to "protect students." However, the report and proposed legislation are not focused on protecting *all* students, but only those students who allege that they are "victims" of sexual assault. The proposed legislation refers to "victim" or "victims" 34 times, and to the "accused" just once. Tellingly, the proposed legislation never once uses the term "alleged" victim, or victim of "alleged" sexual assault, or "accuser." By presuming that all accusers are in fact "victims" prior to any investigation or adjudication, the proposed legislation does a grave disservice to those accused of serious sexual offenses by ignoring a concept at the core of due process, innocent until proven guilty.

This is a significant omission. Those who have been accused of sexual assault face potentially life-altering consequences from an adverse decision by their schools.<sup>1</sup> As lawyers, our goal is to

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<sup>1</sup> We recommend that you review recent reporting on the issue by NPR ("Some Accused of Sexual Assault Say the System Works Against Them," September 3, 2014,

impress upon you the necessity to ensure not only that accusers' complaints are appropriately investigated and, where warranted, adjudicated, but also that the accused are treated fairly and equitably, consistent with the U.S. Constitution and principles of equality under the law embodied in Title IX. No person should have to give up his or her right to a fair and equitable process involving accusations of serious sexual misconduct just because he or she happens to be a college student.

## **TOWARD BALANCED LEGISLATION**

We have several observations and recommendations to make regarding the proposed legislation to ensure a more balanced process for all involved.

### **When to Involve Law Enforcement**

We commend the proposed legislation's inclusion of a provision requiring colleges to formalize their relationship with local law enforcement, but the legislation needs to go further. There is broad consensus that colleges are ill equipped to investigate and adjudicate sexual assault accusations. Accordingly, we believe that matters involving alleged sexual assault are best handled by law enforcement and, as such, colleges ideally should be required by your legislation to refer such matters to local law enforcement.

At a minimum, schools should be required to defer any investigation or adjudication of allegations of sexual assault until law enforcement has completed its investigation. This deferral would permit law enforcement to complete an investigation without the risk of undue interference and protects students' Fifth Amendment right to remain silent (as schools may require a student to provide a statement during an internal investigation or at an adjudicatory hearing).

We realize that Congress is unlikely to require that local law enforcement officials bear sole responsibility for investigating or adjudicating all campus sexual assault cases, whether the alleged incident occurred on or off campus. Consequently, we believe strongly that basic principles of fairness and due process with respect to the rights of the accused will need to be adhered to if an objective and equitable college-based process is to emerge successfully from your efforts. To that end, we make the following recommendations:

### **College Processes and Procedures**

#### **Investigation**

- We share the concern expressed by many commentators about the proposed

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<http://www.npr.org/2014/09/03/345312997/some-accused-of-campus-assault-say-the-system-works-against-them>), and The Chronicle of Higher Education ("Presumed Guilty," September 1, 2014, <http://chronicle.com/article/Presumed-Guilty/148529/>), both of which describe the devastating, deep and long-lasting impact on those wrongly accused of sexual assault who are denied fair and equitable treatment by their colleges in investigating and adjudicating alleged sexual misconduct.

legislation's requirement that colleges hire a confidential advisor who may serve in multiple roles as the initial investigator, advisor, and advocate for "victims" of alleged sexual assault. We strongly recommend that these conflicting functions not be assigned to the same individual. To ensure fairness, the advisor/advocate must be separate from, and independent of, the investigation.

- The accused should be afforded the same opportunity to have a trained advisor/advocate as does the accuser, also independent of the investigation.
- Investigations must be conducted by trained, professional investigators. If these investigators are not official law enforcement personnel, they probably should have law enforcement experience. They must be sufficiently trained to conduct a thorough initial inquiry so that the college has an impartial factual foundation to determine whether a criminal referral is warranted, whether safety issues exist, or whether the investigation should continue to be conducted by the college on the basis of a possible violation of the school's code of student conduct. Investigators should be required to adhere to standards of due process, including an accused student's right against self-incrimination, and the processes that are established must not trammel that right or impair an accused's ability to defend him or herself while remaining silent.

### **Adjudication**

If colleges are going to continue to be required or expected to adjudicate sexual assault allegations, then they must accord students accused of sexual assault basic due process rights, as well as provide a fair and equitable process for all involved, including but not necessarily limited to the following:

- The right to advice of counsel (for both parties) throughout the investigation and through the disciplinary process, even if at the disciplinary hearing the attorneys are not allowed to speak.
- The right to effectively cross-examine, perhaps through a third party advocate. We are mindful of the concerns raised by many regarding a direct confrontation by either party of the other; however, as lawyers, we are also concerned about the abandonment of the traditional role of cross-examination in the truth-finding process.
- Timely access to written complaints and evidence. In our experience, it is not unusual for colleges to permit access to written complaints, witness lists, investigation reports, and evidence to be presented to the hearing panel as little as 48 hours before the disciplinary hearing. Both parties need adequate time to review all relevant materials – with advice of counsel – sufficiently in advance of the hearing in order to have a meaningful opportunity to prepare his or her case and defenses.

- Timely and adequate notice of the actual charges against the accused. Oftentimes, in the cases we have handled, the parties are not notified of the charges until several days before the hearing. That sort of practice is unfair to both the accuser and the accused.
- Elimination of gag orders or confidentiality provisions impeding the ability of either party to talk to witnesses and gather evidence.
- The exclusion of blatantly unreliable hearsay evidence. We are not suggesting that school hearing panels should be required to adhere to the rules of evidence, like courts. But the panels have an obligation to assure that all evidence presented contains sufficient indicia of reliability.
- Hearing panels composed of thoroughly trained personnel and excluding students or others who may have a prior history suggesting a potential lack of impartiality.<sup>2</sup>

If the accused is found not responsible for the alleged sexual assault, there should be no option for the accuser to appeal the determination, as that involves double jeopardy in the college adjudication process.

### **Training**

We agree that disciplinary hearing panels must be composed of well-trained personnel, but we are concerned about the training they will receive. For example, there have been reports in the media that some advocates in the sexual assault survivor community believe hearing panel members should be instructed to distrust an accused student who testifies logically and rationally about the events at issue, or that “victims” of sexual assault never make false accusations. Such biased standards have no place on any college disciplinary panel. Panel members should be trained regarding the paramount importance of impartiality, evidence, and due process rights. The training of hearing panel members must be completely transparent; the materials they are given, the lectures and seminars they attend, the written and oral instructions they are given, and the standards they are told to use must be published by the colleges with their sexual assault policies and procedures, and must be made available to the accused and accuser.

### **Standard of Proof**

We believe that college disciplinary proceedings involving allegations of sexual assault should apply a clear and convincing standard to the evidence rather than the preponderance of the evidence standard advocated in the 2011 “Dear Colleague” letter (which, as administrative agency “guidance,” does not have the force of law). We are heartened that your proposed legislation does not mandate any standard of proof and believe that colleges should be able to use a higher standard. However, we

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<sup>2</sup> The proposed legislation already includes a provision with which we agree recommending that students not be permitted to participate on college disciplinary panels.

realize that the majority of the schools do and may continue to apply the lowest standard pursuant to the Dear Colleague letter.

## CONCLUSION

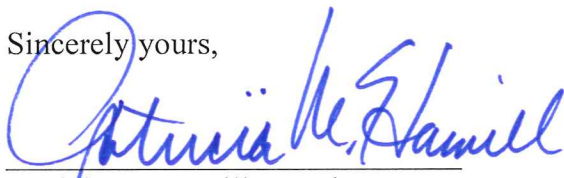
In an op-ed published in the Wall Street Journal last year<sup>3</sup>, mother, attorney and self-described feminist Judith Grossman recounted the ordeal her son and family went through when he was falsely accused of sexual assault, and a blatantly biased adjudication process was foisted upon him.

There was no preliminary inquiry on the part of anyone at the school into these accusations about behavior alleged to have taken place a few years earlier, no consideration of the possibility that jealousy or revenge might be motivating a spurned young ex-lover to lash out. Worst of all, my son would not be afforded a presumption of innocence. Who knew that American college students are required to surrender the Bill of Rights at the campus gates?

We support your efforts to develop a fair solution to the problem of campus sexual assault. While your legislation is a start, as it stands now it falls short of ensuring objective, fair treatment for all involved. But we see a way forward. We realize that the legislative process is evolutionary and developmental in nature. If there is any way any of us can lend our expertise to assist you as you refine your Bill, we are ready to do so. If you have any thoughts or questions please feel free to contact Patricia Hamill at the law firm of Conrad O'Brien, 215.864.8071, or [phamill@conradobrien.com](mailto:phamill@conradobrien.com), Michael Allen at Michael K. Allen & Associates, 513.321.5297, or [mike@mkallenlaw.com](mailto:mike@mkallenlaw.com), or any of the other undersigned attorneys.

Thank you.

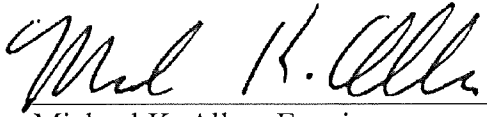
Sincerely yours,



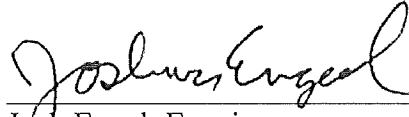
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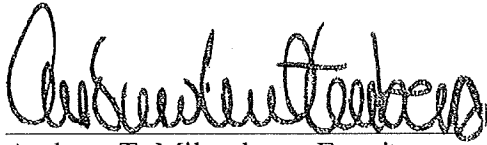
<sup>3</sup> Grossman, Judith E. (2013, April 16) Judith Grossman: A Mother, a Feminist, Aghast. *The Wall Street Journal*.  
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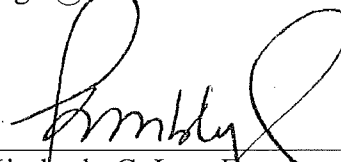
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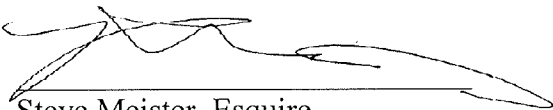
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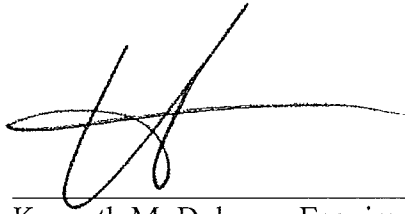
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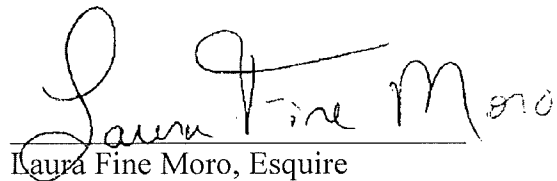


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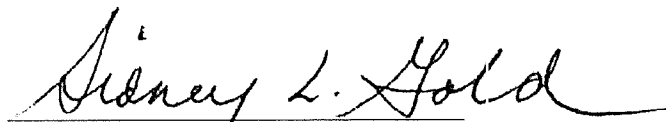
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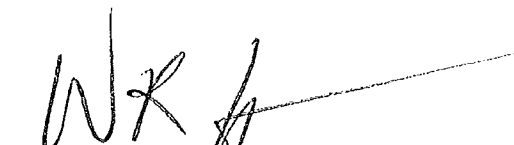
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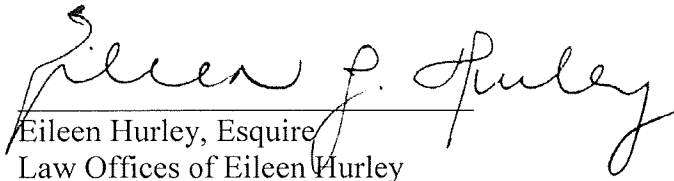
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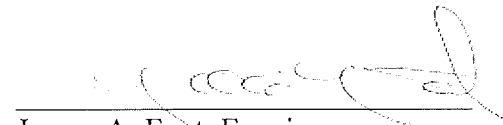


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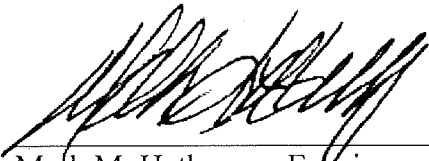
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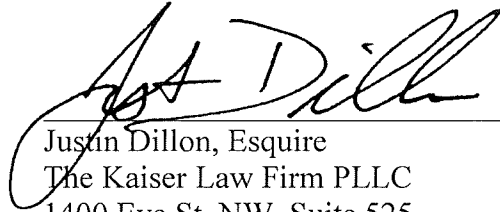


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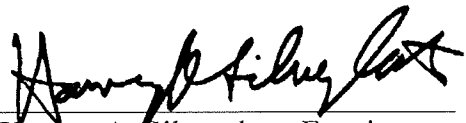
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