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Massachusetts General Court Joint Committee
On Higher Education
24 Beacon St.
Room 109B
Boston MA, 02133

Attention: Senator Michael O. Moore and Representative John W. Scibak

Re: An Act relative to sexual violence on college campuses
S.706, H.632, and S.697

Dear Chairman Moore, Chairman Scibak, and members of the Joint Committee:

I am writing in favor of the adoption of S.697, and to urge against the adoption of S.706 and H.632.

If the legislature votes in favor of S.706 and H.632, it would exacerbate an already tense and difficult situation on our college campuses by attempting to micro-manage campus disciplinary hearings, and would seriously compromise the individual rights of accused students through the imposition of a mere "preponderance of the evidence" standard and through limits to the participation of private attorneys and to their ability to cross-examine complainants and witnesses.

S.697, by contrast, is powerful in its relative simplicity. In creating a more robust right to legal representation for students involved in college disciplinary proceedings, this bill increases the fairness with which both complainants and the accused are treated. It enhances the fundamental rights of all students while avoiding the kind of procedural micromanagement contained in both S.706 and H.632. In other words, S.697 would

provide a professional voice at hearings, without imposing detailed rules that would strait-jacket schools into a one-size-fits-all mold.

What is needed more than just about anything else in college disciplinary proceedings these days is elemental wisdom, emanating from each campus on the basis of each school's culture, experience and requirements. What is not needed are diktats from on high that instruct each school, in a one-size-fits-all manner, as to how it should handle gender relationships among students.

I am an attorney, an author, a civil libertarian, and an activist in the fields of criminal defense and student disciplinary law. Very early in the development of the current campus crisis in the area of sexual relations among students, I co-authored a book entitled *The Shadow University: The Betrayal of Liberty on America's Campuses* (Free Press imprint of Simon & Schuster, 1998). The following year I co-founded The Foundation for Individual Rights in Education (www.thefire.org) (FIRE) that militates in favor of free speech and due process of law for students and faculty in colleges and universities. (In this letter, I speak for myself, not for FIRE.)

I have since 1967 represented hundreds of students, and some faculty members, in connection with allegations of misconduct, including sexual assault and other sexual misconduct. Hence, the current campus "sexual assault crisis," as it is widely portrayed, has engaged me in areas in which I have studied and written, and in which I have practiced law. This range and length of experience has given me, I believe, an unusually acute perspective on how colleges and universities handle these allegations and cases involving student sexual assault. Many lives – of accusers and accused – have been wrecked by unwise procedures.

Campus sexual assault is at a point such that it is already fraught with a plethora of unwise regulatory initiatives – consisting largely of destructive edicts from the U.S. Department of Education's Office for Civil Rights (OCR). The OCR has issued a series of "guidance" letters seeking to micromanage the procedures for campus disciplinary hearings. This guidance often conflicts with the requirements of federal law, both procedurally and substantively, and has caused considerable confusion. It likewise often conflicts with the ways in which campuses have approached, in varying ways, their own investigative and disciplinary procedures.

Meanwhile, in an increasing number of cases, federal and state courts, including here in Massachusetts, have vacated or otherwise reversed findings by campus disciplinary tribunals that have found accused students – usually young men – responsible for sexual assault and other forms of gender-based harassment. In order to try

to keep up with the exploding number of sexual assault accusations brought under the current chaotic procedural situation created by the OCR, colleges have had to hire an unprecedented number of administrators to investigate and hear the massive number of complaints. (This vast increase in student life bureaucracies has had the ill effect – among many ill effects – of causing increases in administrative operating costs at public and private colleges and universities throughout the Commonwealth. This has resulted, in many cases, in budgetary deficits leading to unsustainable and unaffordable tuition increases. We are on a trajectory likely to place college out of reach for many financially struggling families and students.)

In short, this is the time when wisdom would dictate that the General Court not take any action that would disempower the decision-making processes of each campus. Insisting on a legislatively-imposed standard likely to result in an increased number of complaints, including false complaints, and a plethora of unfair convictions, hardly helps bank the fires of the current campus crisis.

In the course of my long experience dealing with student disciplinary cases, I have had numerous private discussions with administrators and the general counsels of both private and public colleges and universities. Often I have heard the same refrain, reflecting frustration with federal statutory and regulatory requirements that have largely deprived the schools from using long-gained experience and common sense, as well as their accumulated knowledge of each campus's particular history and culture, concerning student relations and behavioral issues. While, naturally, schools are obligated to follow applicable state constitutional and statutory laws of general application, and while the Commonwealth and our courts have a duty to guarantee fundamental fairness, the General Court should not enact more laws than are absolutely necessary.

What is needed now is less, not more legislative interference in the procedural minutiae of each college and university. This does not mean that the state, and its courts, should refrain from being heard when the issue is ensuring fairness and individual rights in campus disciplinary tribunals. As mentioned, providing students the right to legal counsel (as would be required under S.697) ensures that students can be protected and guided through disciplinary proceedings which are often life-altering for accusers and the accused.

It is time to allow each campus to retrieve and follow – or in some cases to create – its own culture. To a hammer, it is said, everything looks like a nail. This is a good time to withdraw the hammers – federal as well as state – from our campuses, and allow our colleges and universities to return to the task of educating young adults without unnecessary and destructive levels of outside micromanagement. If a particular campus

administration wanders so far from the bounds of fairness and rationality that intervention is required, such intervention should be left to our courts that have proven over the centuries to be fully capable of resolving the occasional disputes that arise.

Respectfully,

Harvey A. Silverglate