FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE

Executive Summary

Earlier this year, the United States Department of Education's Office for Civil Rights (OCR) mandated[1] that virtually all of our nation's colleges and universities utilize our judiciary's lowest standard of proof, the "preponderance of the evidence" standard, in adjudicating allegations of sexual harassment and sexual assault. Confronted by the threat of losing federal funding for failure to comply with OCR's new directive, colleges and universities nationwide have scrambled to revise their policies to comport with OCR's April 4, 2011, "Dear Colleague" letter.

Research conducted by the Foundation for Individual Rights in Education (FIRE; thefire.org) demonstrates the depth and breadth of the damage done to student due process rights and university independence. The data confirm two main points. First, the OCR letter disproportionately affects higher-ranked[2] schools. Second, numerous schools would not have otherwise changed their standards of proof.[3]

The following are some of the major trends highlighted by FIRE's research:

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[1] "Dear Colleague" Letter, Office of the Assistant Secretary, Office for Civil Rights, Department of Education, April 4, 2011, *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html.

[2] Rankings according to the 2011 *U.S. News & World Report* "National University Rankings" of U.S. colleges.

[3] The College of William & Mary and the University of Virginia are the most obvious examples, as the policies of both schools state explicitly: "The Department of Education's Office of Civil Rights [sic] has interpreted Title IX to require schools to evaluate reports of alleged sexual misconduct under a 'preponderance of the evidence' standard and that is the standard adopted by this Policy." *See* William & Mary "Sexual Misconduct Policy and Procedure," *available at* http://www.wm.edu/offices/deanofstudents/services/studentconduct/studenthandbook/sexual_misconduct_policy/index.php; University of Virginia "Policy and Procedures for Student Sexual Misconduct Complaints," *available at* http://www.virginia.edu/sexualviolence/documents/sexual_misconduct_policy070811.pdf.

- 39 colleges ranked in the top 100 have already changed or will be required to change their standard of evidence to comply with the OCR mandate.[4]
- Nine colleges ranked in the top 10 did not use the OCR-mandated "preponderance" standard prior to the OCR letter.[5]
- 17 of the top 100 colleges previously used a "clear and convincing evidence" or "beyond a reasonable doubt" standard.
    - After the OCR letter, four of these colleges quickly changed to the OCR-mandated standard.
- Only one school[6] out of the top 100 colleges previously used a standard clearly lower than "preponderance of the evidence."

OCR's New Requirements

OCR now mandates that every college or university receiving federal funds use the "preponderance of the evidence" standard in adjudicating allegations of sexual harassment or violence. This means that any accused student will be found guilty if the college determines that it is "more likely than not" the student is guilty. Expressed mathematically, the preponderance of the evidence standard requires only 50.01% certainty that the accused is guilty of the charge. This is our judiciary's lowest standard of proof, and its incorporation means that if a factfinder is even a scintilla more persuaded that a student is guilty rather than innocent, the student will be convicted.

The preponderance of the evidence standard does not sufficiently protect an accused person's right to due process. While this standard is acceptable for lawsuits regarding money, allegations of sexual violence or sexual harassment are far more serious than disputes that can be resolved by transferring money from one individual to another. It is difficult to overstate the harm caused to a student who is falsely convicted of sexual violence. Since claims of sexual violence often involve alcohol and drug use, few or no witnesses, and other complicating factors, the risk of error introduced by using the lowest possible standard is severe. Further, using the lower standard of evidence for such serious accusations is at odds with our national principles of justice, which hold that those accused of crimes are innocent until proven guilty.

While defenders of the new standard argue that civil courts rely on the preponderance of the evidence standard in certain circumstances, this comparison ignores the fact that the range of due process protections afforded parties in civil court are often unavailable in campus hearings. Civil trials are governed by longstanding procedural rules that carefully balance access to judicial remedies with protections against frivolous claims and ensure

[4] Because of ties, *U.S. News & World Report*'s top 100 colleges include 103 institutions.
[5] Because of a tie, *U.S. News & World Report*'s top 10 colleges include 11 institutions.
[6] Brown University permitted a sexual assault conviction where there was simply a "reasonable basis." This operates effectively as "guilty until proven innocent," because the onus is on the accused to demonstrate that there is "no reasonable basis for believing that the alleged violation occurred." *See* Brown University "Sexual Harassment Policy," *available at* http://www.brown.edu/Administration/diversity/documents/SexualHarassmentPolicy.pdf.

that relevant evidence is heard and evaluated, that an accurate verdict is reached, and that decisions are impartial and final. Campus tribunals, on the other hand, do not guarantee this same basic fairness; indeed, as Professor KC Johnson has observed, "Campus disciplinary procedures already are heavily tilted in favor of the accuser and against the due process rights of the accused."[7] OCR magnifies these deficiencies by requiring our judiciary's lowest standard of evidence for allegations of sexual assault and inverts our normative judicial understanding that the more serious the alleged crime, the greater due process protections for the accused.

OCR's new regulations also mandate that if a university's judicial process allows an accused student the right to an appeals process, the university must allow the accuser the ability to appeal as well. This stands in contrast to the basic rules of fairness of our criminal justice system and resembles a violation of a criminal law defense called "double jeopardy," whereby someone accused of a crime cannot be tried for the same charges again once the original hearing has properly ended in either acquittal or conviction. For the same reasons of fundamental fairness that our criminal justice system does not allow those accused of crimes to face "double jeopardy," colleges and universities should not force their students to face a second hearing for the same charge after they have been cleared. Because accused students are already subjected to an inappropriately low standard of proof, allowing accusers to appeal a finding of innocence only amplifies the due process problems introduced by OCR's "preponderance of the evidence" mandate. Further, since appeals are often handled by a lone administrator, this appeal-by-prosecutor will often serve to obviate any due process protections afforded to the accused in the initial hearing, as that administrator may be empowered to rehear the case with no procedural oversight.

Prior to the "Dear Colleague" letter, colleges were allowed discretion in crafting their disciplinary procedures, taking into consideration their own concerns, unique circumstances, and level of respect for the rights of the accused. In 2001, for example, OCR issued guidance to schools granting them considerable autonomy in their investigations, noting that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience."[8]

The April 4, 2011, letter is a clear deviation from prior OCR practice. While OCR has previously issued guidance documents to assist universities in understanding the different *kinds* and the *relevance* of evidence,[9] the "Dear Colleague" letter represents the first time

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[7] KC Johnson, *The Star Chamber Comes to a Campus Near You*, MINDING THE CAMPUS: REFORMING OUR UNIVERSITIES, June 9, 2011, *available at* http://www.mindingthecampus.com/forum/2011/06/the_starr_chamber_comes_to_a_c.html. Professor Johnson's comments react to the new OCR rules in light of the falsely accused Duke lacrosse team.

[8] Revised Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, January 2001, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

[9] *See, e.g.*, OCR 1997 Guidance, *available at* http://www2.ed.gov/legislation/FedRegister/announcements/1997-1/031397b.html; OCR 2001 Guidance, *available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

OCR has told all universities that "preponderance of the evidence" is the only standard that complies with Title IX.[10]

Survey Findings: Colleges and Universities Set Their Own Standards

To gauge the impact of OCR's new evidentiary standard mandate, FIRE surveyed the top 100 colleges and universities in the country, as defined by the 2011 *U.S. News & World Report* rankings.

Nine of the colleges ranked in the top 10 used a standard other than preponderance of the evidence.[11] Stanford University, for example, took a cue from our criminal justice system and required that allegations of sexual misconduct be proved "beyond a reasonable doubt."

Not all colleges went as far as Stanford. In total, 39 of the nation's top 100 schools, most of them in the top 50, required that allegations of sexual misconduct be proved by a standard other than "more likely than not." Of these 39, 15 schools did not specify any standard of proof. Brown University, the outlier, required a lower standard, only a "reasonable basis."

In general, the higher a school's *U.S. News* ranking, the more likely that school would protect accused students with a higher standard than the OCR-mandated 50.01% standard.

Because of OCR's new regulations, colleges are no longer permitted to determine for themselves the appropriate level of due process protections granted to students accused of some of society's most heinous crimes, and instead must apply the same low standard of proof regardless of the totality of their relevant policies for ensuring fair and equitable hearings.

Students, Faculty, and Administrators Prefer a Higher Standard of Proof

Colleges and universities quickly scrambled to comply with the new OCR rules. Several of these schools have explicitly noted that the only reason they have changed their policies is the new OCR mandate.[12] Without the OCR mandate, it is unlikely any of these schools would have changed their standards of proof.

[10] As discussed below, this new mandate raises legal questions pertaining to the Administrative Procedures Act.

[11] Dartmouth College and Massachusetts Institute of Technology were the only top-ten schools to use a "preponderance of the evidence" standard.

[12] As stated earlier, The College of William & Mary and the University of Virginia both have explicitly noted *in their policies* that "[t]he Department of Education's Office of Civil Rights [sic] has interpreted Title IX to require schools to evaluate reports of alleged sexual misconduct under a 'preponderance of the evidence' standard and that is the standard adopted by this Policy."

Prior to the DOE mandate, many universities had discussed, *and rejected*, the lower standard of proof. At Cornell University, for example, public comments showed strong support for the "clear and convincing evidence" standard. As one student commenter pointed out:

> The stakes in some cases may be too high for preponderance to be an appropriate standard. For example, as a student, I would consider expulsion from school the scholastic death penalty. I'm sure many others feel the same way. If a parking ticket is in dispute, the preponderance standard is acceptable. But, if a student's future livelihood is in the balance, the "clear and convincing" standard is by far more appropriate than preponderance.[13]

Another commenter noted:

> American law uses "beyond a reasonable doubt." My former high school uses "more likely than not." Why would Cornell try to become more like a high school … ?

Similarly, when Stanford University considered lowering its standard of proof from "beyond a reasonable doubt" to "clear and convincing evidence" in 1991, a coalition of liberal and conservative students and professors opposed the measure.[14] A group of Stanford professors noted that "[t]here is no doubt in our minds that the proposed changes are a fundamental attack on legitimate student rights to a fair hearing." *The Stanford Daily* student newspaper wrote an editorial criticizing the changes as well:

> It is not plausible that the chance of convicting innocent students would not increase if the probability of convicting the guilty increased … Consider the obvious equation: If more people are convicted of wrongdoing, the chances of miscarried justice also increase.

These fears were realized years later, when, in response to OCR's "Dear Colleague" letter, Stanford University switched from requiring proof "beyond a reasonable doubt" to the "more likely than not" standard *in the middle of a student's sexual misconduct case*. A survey of the jurors afterward indicated that at least one would have voted "not guilty" had Stanford retained the "beyond a reasonable doubt" standard of proof. While the majority of colleges with higher standards of proof have yet to comply with OCR's mandate, future changes will likely lead to further injustices.

American university professors are also concerned about requiring colleges to adjudicate disciplinary proceedings at a lower standard of proof. The problems identified by students have been confirmed by the American Association of University Professors

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[13] Cornell UA Codes and Judicial Committee, *Sufficiency of Evidence, available at* http://assembly.cornell.edu/CJCComments/SufficiencyOfEvidence.

[14] Stanford University News Service, *Unlikely allies oppose change in standard of proof,* Nov. 19, 1991, *available at* http://news.stanford.edu/pr/91/911119Arc1050.html.

(AAUP). The AAUP issued a response to the OCR "Dear Colleague" letter on August 18, 2011.[15] In this letter, the AAUP took a clear stance against the new rules:

> Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member's career, we believe that the "clear and convincing" standard of evidence is more appropriate than the "preponderance of evidence" standard.

As noted in another letter from the AAUP to OCR, the AAUP has recommended this standard since 1957.[16]

At least one university's general counsel publicly suggested that OCR has no business setting such standards in the first place. Princeton University's general counsel noted in March of 2010:

> We are unaware of any controlling judicial authority, or any applicable federal or state statute, that requires the University to adopt a "preponderance of the evidence" standard for student disciplinary matters involving allegations of sexual assault or harassment.[17]

These strong words were spoken before the OCR letter, however. Now that universities are threatened with the loss of federal funding, they are not speaking out.

Violation of the Administrative Procedures Act

Ironically, the "Dear Colleague" letter may not itself be legally sound, and colleges may be changing their rules under an invalid mandate. As noted above, prior to this guidance, colleges were permitted to take institutional norms into account when crafting their guidelines for investigating and resolving sexual misconduct claims. It has been nearly 40 years since Title IX passed, and only the April 4, 2011, letter gives any indication that colleges must comply with a "one size fits all" system for resolving allegations of sexual misconduct.

To introduce a new agency rule, OCR is obligated under the federal Administrative Procedures Act (APA) to publish a notice of its proposed rules change and must allow a period for public comment. OCR must also fully respond to issues and data raised by the

[15] Letter from Cary Nelson, President of the American Ass'n of University Professors to Russlynn Ali, Assistant Secretary for Civil Rights, Office for Civil Rights, U.S. Dep't of Ed. (Aug. 18, 2011), *available at* http://thefire.org/public/pdfs/be5df1a71d0eae6b7b840a2ecdb01bb9.pdf.
[16] Letter from Gregory F. Scholtz, Associate Secretary and Director, American Ass'n of University Professors Dep't of Academic Freedom, Tenure, and Governance to Russlynn Ali (June 27, 2011), *available at* http://thefire.org/public/pdfs/7ea041e49156306ba76cb62a4f8c6c65.pdf.
[17] Jason Jung, "University undergoing Title IX investigation," *Daily Princetonian*, April 19, 2011, *available at* http://www.dailyprincetonian.com/2011/04/19/28314/.

public in any final rule.[18] When agencies such as OCR do not follow the APA's notice-and-comment requirements, they effectively change the law without any democratic accountability, blindsiding citizens with new rules.

In fact, that is exactly what OCR did here. On April 4, 2011, colleges across America received a letter telling them that they had to change their rules or face losing federal funding. No previous notice had been given, and no comments were taken on the proposed change in law. As a result, colleges have been forced to provide lower levels of due process protection for accused students, even going so far as to switch standards of proof in the middle of disciplinary hearings in the name of compliance.

One way to overturn OCR's unlawful action would be for a college or university to refuse to comply. Then, when the Department of Education seeks to withdraw federal funding, such as by refusing to provide student loans for the university's students, the university could sue in federal court, where a judge would likely throw out the new OCR rules for being in violation of the APA, and reinstate the old rules permitting institutional autonomy.

This scenario is unlikely, however, because the loss of federal funding is such a huge threat to universities that they are unlikely to choose to stand up for principle, even if they are supported by broader organizations such as the AAUP or the American Council on Education. Students' due process protections, meanwhile, will continue to suffer.

Conclusion

Colleges and universities did not consent to OCR's mandate, nor have many of their students, faculty members, and administrators. The concerns voiced by FIRE and the AAUP have yet to receive an answer from OCR. Unfortunately, much damage from OCR's April 4 letter has already been done. While universities such as Harvard University, Princeton University, and Yale University have not yet lowered their protections for the accused, a number of schools have, such as Columbia University, the University of Chicago, and the University of Notre Dame.[19] Because it is time-consuming and costly to review and change these policies, colleges may not reinstate their previous, more protective policies, even if OCR's new mandate is later found to have violated the APA. Under OCR's new requirement to use the lowest standard of evidence, due process protections in the judicial systems of nearly every college and university in the United States have been forced to their lowest levels yet.

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[18] *See* 5 U.S.C. §553. An agency regulation or new interpretation of a regulation that does not satisfy the notice-and-comment requirements of the Administrative Procedures Act is rendered invalid, and the prior regulation is reinstated until the agency promulgates valid alternative regulation. *See Abington Memorial Hospital v. Heckler*, 750 F.2d 242 (3rd Cir. 1984); *Paralyzed Veterans of Am. v. D.C. Arena L.P.*, 117 F.3d 579, 586 (D.C. Cir. 1997).

[19] As of August 2011, schools ranked in the top 100 that had changed their standard to "preponderance of the evidence" since April 4, 2011, included Columbia University, Stanford University, the University of Chicago, the University of Notre Dame, Carnegie Mellon University, the University of Virginia, Pennsylvania State University, and the University of California, San Diego.