UNITED STATES DEPARTMENT OF EDUCATION

OFFICE FOR CIVIL RIGHTS

THE ASSISTANT SECRETARY

August 23, 2013

Mr. William Creeley
Director of Legal and Public Advocacy
Mr. Joseph Cohn
Legislative & Policy Director
Foundation for Individual Rights in Education
601 Walnut Street, Suite 510
Philadelphia, Pennsylvania 19106

Dear Messrs. Creeley & Cohn:

Thank you for your letters to the Office for Civil Rights (OCR), including your letters to me of December 6, 2012, and February 25, 2013, addressing a number of issues regarding OCR's guidance on sexual violence under Title IX of the Education Amendments of 1972. I previously wrote to address the concerns you raised related to free speech and am writing now to address your due process concerns.

I write to affirm the view that OCR has consistently expressed in its guidance documents and applied in its administrative enforcement: colleges and universities can and should meet their obligations to prevent and respond to sexual harassment and violence in a manner that is consistent with constitutional due process protections.

You express concern about the provision of "meaningful due process protections to accused students." As stated in OCR's 2001 Revised Sexual Harassment Guidance (2001 Guidance), Title IX must be interpreted in a way that is consistent with federally protected due-process rights.[1] The 2011 Dear Colleague letter on sexual violence (2011 Letter) also reminds schools that they should be mindful of all their legal responsibilities to students, including students accused of sexual harassment or violence as well as those who are victims of that conduct.[2] Procedures that respect the complainant's Title IX rights, while at the same time accord due process to both parties, will lead to sound and supportable decisions.[3]

You call particular attention to the 2011 Letter's requirement that schools use a preponderance-of-the-evidence standard in school grievance procedures to determine whether sexual harassment or violence has occurred under Title IX. Use of the preponderance-of-the-evidence standard has long been recognized as meeting due process requirements for adjudications of civil rights and many

[1] 2001 Guidance 22.
[2] 2011 Letter 12.
[3] 2001 Guidance 22.

other types of issues,[4] including issues involving sexual violence.[5] I am not aware of any case that has held that the Due Process Clause requires a higher standard be used when such issues arise in the educational discipline context, nor have you pointed me to any such case.

You also contend that the preponderance-of-the-evidence standard is inappropriate in light of the consequences for a student found to have committed an act of sexual violence. The Supreme Court has explained that while due process requires clear and convincing evidence in civil proceedings "where particularly important individual interests or rights are at stake," such as termination of parental rights, involuntary civil commitment, or deportation, "imposition of even severe civil sanctions that do not implicate such interests has been permitted after proof by a preponderance of the evidence."[6] This is so even when the accused "face[s] the risk of opprobrium that may result from a finding."[7] The Supreme Court has thus held that a preponderance of evidence suffices in civil suits where the defendant faces, for example, "an order permanently barring [him] from practicing his profession," or even expatriation (*i.e.*, permanent loss of U.S. citizenship).[8]

Further, while it is true that an accused student has a strong interest in the outcome of a sexual violence complaint, one cannot ignore the significant interests for a victim, and all members of the campus community, in that outcome as well. They have a right to study and live in a safe and nondiscriminatory environment where incidents of sexual violence are addressed and not allowed to create a permanent hostile environment for any student. The preponderance-of-the-evidence standard represents an appropriate balancing of the important interests of both the complainant and the accused and, in the Department's view, is equitable to both parties; as the Supreme Court has said, "any other standard expresses a preference for one side's interests."[9]

Not only is the preponderance-of-the-evidence standard in Title IX grievance procedures consistent with students' judicially-recognized due-process rights, it is the standard most colleges and universities used prior to the issuance of the 2011 Letter, as FIRE itself has helped document. A 2002 study submitted to the National Institute of Justice found that approximately 80% (149 of 183) of institutions that identified a particular evidentiary standard for sexual-assault disciplinary proceedings employed the preponderance-of-the-evidence standard.[10] More recently, in 2011,

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[4] *See, e.g.*, *Herman & Maclean v. Huddleston, et al.*, 459 U.S. 375, 390 (1983) (In weighing the balance of interests for each party, the "interests of the defendants in a securities case do not differ quantitatively from the interests of defendants sued for violations of other federal statutes such as antitrust or civil rights laws, for which proof by a preponderance of the evidence suffices."); *Desert Palace v. Costa*, 539 U.S. 90, 99 (2003) (noting that under the "conventional rule of civil litigation," the preponderance-of-the-evidence standard applies in cases under Title VII).

[5] *See, e.g.*, *Jordan v. McKenna*, 573 So. 2d 1371, 1376 (Miss. 1990) (in civil action for rape, plaintiff's burden is "but by a preponderance of the evidence"); *Dean v. Raplee*, 39 N.E. 952, 954 (N.Y. 1895) (preponderance of evidence is sufficient in civil case alleging sexual assault); *Ashmore v. Hilton*, 834 So. 2d 1131, 1134 (La. Ct. App. 2002) (preponderance of evidence sufficient in civil rape case).

[6] *Herman & Maclean v. Huddleston*, 459 U.S. at 389-90.

[7] *Id.* at 390.

[8] *Id.* at 390; *see also, e.g.*, *Vance v. Terrazas*, 444 U.S. 252, 262-67 (1980) (upholding application of preponderance-of-the-evidence standard in expatriation proceedings).

[9] *Herman & Maclean v. Huddleston*, 459 U.S. at 390.

[10] *See* HEATHER KARJANE, ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 122 (Nat'l Criminal Justice reference Serv., Oct. 2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf.

FIRE's own Standard of Evidence Survey again found that before the 2011 letter was issued approximately 80% (135 of 168) of institutions that specified an evidentiary standard for adjudicating allegations of sexual harassment and sexual assault used the preponderance-of-the-evidence standard or lower.[11] It thus appears that the vast majority of colleges and universities do not share your view that use of the preponderance-of-the-evidence standard undermines "the reliability, integrity, and basic fairness of disciplinary proceedings."[12]

The purpose and effect of the Title IX procedures outlined in the 2011 Letter and past OCR guidance are to protect the rights of both complainants and accused students. We appreciate FIRE's praise for "OCR's specific and explicit emphasis on the necessity of equal treatment for both the complainant and the accused student."[13] As FIRE acknowledged, the 2011 Letter outlines numerous protections for both parties, including, among other things, ensuring equal access to information to be used at the hearing, equal access to counsel and participation of counsel, and equal opportunities to present witnesses and evidence. The letter also calls on institutions to provide impartial investigations and hearings, to disclose any actual or potential conflicts of interest between the fact-finder or decision-maker and the parties, and to maintain documentation of all proceedings. In addition, the 2011 Letter notes that all persons involved in implementing the procedures (*e.g.*, Title IX coordinators, investigators, and adjudicators) must have training or experience handling complaints of sexual harassment and sexual violence, as well as employing the school's grievance procedures more generally. These affirmative protections, of which the standard of proof is one component, compose a system to ensure that proceedings are unbiased and equitable for the two parties, and that they result in decisions that are supported by fair consideration of all the evidence.

I appreciate your sharing your views with us. OCR will continue to ensure that recipients of federal funds provide a safe and nondiscriminatory educational environment with respect to sex, among other bases, without impinging on the due process rights guaranteed by the Constitution.

Sincerely,

Seth Galanter
Acting Assistant Secretary
Office for Civil Rights
U.S. Department of Education

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[11] *See* Standard of Evidence Survey: Colleges and Universities Response to OCR's New Mandate (October 28, 2011), *available at* http://thefire.org/public/pdfs/f17fa5caafd96ccdf8523abe56442215.pdf?direct and http://thefire.org/public/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf?direct.

[12] Letter from Joseph Cohn, Legislative and Policy Director, FIRE, to Assistant Secretary Russlynn Ali, May 7, 2012 at 2.

[13] Letter from Will Creely, Director of Legal and Public Advocacy, FIRE, to Assistant Secretary Russlynn Ali, May 5, 2011 at 11.