

November 21, 2013
Catherine Lhamon
Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Assistant Secretary Lhamon:

On behalf of the National Women's Law Center, which has worked since 1972 to combat sex discrimination in education, we write to express support for the Office for Civil Rights' approach to enforcement of Title IX with respect to sexual harassment and violence in education. Sexual harassment and violence is pervasive in our nation's schools, depriving students of the ability to reap the full benefits of their educational experiences and inflicting damaging consequences on survivors. The Center urges OCR not only to continue its investment of resources to combat sexual harassment and violence but also to expand its efforts to root out this pernicious form of sex discrimination.

I. Too Many Schools Are Failing to Live Up to Their Legal Obligations to Address Sexual Harassment and Violence, with Severe Consequences for Students.

Over 40 years after Title IX was passed, sexual harassment and violence continue to plague schools and colleges across the country. In a national survey of nearly 2,000 seventh- through twelfth-graders conducted in 2011, nearly half of all students surveyed reported experiencing some form of sexual harassment in the 2010-11 school year.¹ The facts of recent Title IX lawsuits provide a window into some of the harassment that goes unaddressed in schools. In June 2012, for example, a girl's parents filed a Title IX suit in federal court claiming that a Georgia middle school failed to create a safe educational environment for their daughter, who faced repeated unchecked sexual assaults and harassment from other students at the school.² In April 2013, a high school student represented by NWLC filed a Title IX complaint in federal court against a Michigan school district alleging that the school was deliberately indifferent when the student informed school officials of an on-campus sexual assault and subsequent cyber-bullying and harassment.³ Moreover, the costs to students who experience sexual harassment and violence are significant. For example, the Michigan student lost class time, suffered academically, quit the soccer team and cheerleading squad, and eventually transferred to a new school to escape her attacker.⁴ Sadly, some other students have even committed suicide in the face of

¹ AMERICAN ASSOC. OF UNIV. WOMEN, CROSSING THE LINE: SEXUAL HARASSMENT AT SCHOOL (2011), Executive Summary at 2, available at <http://www.aauw.org/files/2013/02/crossing-the-line-sexual-harassment-at-school-executive-summary.pdf>.

² *S.D. ex rel. Davis v. Houston Cnty. Sch. Dist.*, 5:12-CV-228 MTT, 2013 WL 4505897 (M.D. Ga. Aug. 22, 2013).

³ Complaint, *Doe v. Forest Hills School District*, 1:13-CV-00428 (W.D. Mich. Apr. 18, 2013), available at http://www.nwlc.org/sites/default/files/pdfs/doe_v_forest_hills_complaint_no._13-428.pdf.

⁴ *NWLC Joins Title IX Lawsuit Against Michigan Public School for Failing To Address Student's Sexual Assault*, NATIONAL WOMEN'S LAW CENTER (Apr. 18, 2013), available at <http://www.nwlc.org/press-release/nwlc-joins-title-ix-lawsuit-against-michigan-public-school-failing-address-students-se>.

sexual harassment and violence. One recent example is Audrie Pott, a 15-year old who took her own life last year after an alleged sexual assault and sexual bullying.⁵

The failure of colleges and universities to properly address sexual harassment and assault has also received recent important attention. The data on sexual assaults among undergraduate students illustrate the prevalence of the problem. In a 2009 study, 19% of undergraduate women surveyed reported that they experienced sexual assault or attempted sexual assault while enrolled in college.⁶ Another study found that 13.7% of undergraduate women were victims of at least one completed sexual assault during their time in college.⁷ Examples abound of complaints that schools failed to properly respond to reports of sexual violence. Occidental College recently settled a lawsuit with at least 37 students who claimed it failed to handle their complaints of sexual violence properly, discouraged reporting, and intimidated faculty who criticized the college.⁸ A University of Southern California student complained that she reported a rape to her university and played authorities a tape of her rapist admitting to the assault, but the school dismissed her case for lack of evidence.⁹ An Amherst College student published an article about her sexual assault and the school's sexual assault counselor, who advised her to "forgive and forget" instead of filing a report.¹⁰ Swarthmore students charged that the college violated the Clery Act by failing to report sexual assaults on campus, and they filed a Title IX complaint alleging that the school's apathy created a hostile environment.¹¹ The growing concern about institutions' failure to appropriately address sexual violence cases led a group of female sexual assault survivors to form "Know Your IX"—a student-led campaign to educate students about Title IX and help them learn about ways to enforce their rights.¹²

The stakes could not be higher for students at all levels of education; reports of assaults and schools' failure to address them are widespread. Thus, the role of OCR in ensuring that schools prevent and address sexual harassment and violence is critical.

II. OCR's Guidance and Resolution Agreements Are Necessary Tools to Help Address the Pervasive Problem of Sexual Harassment and Violence in Schools.

⁵ Christina Sterbenz, *Heartbreaking Details Revealed About 15-Year-Old Who Killed Herself After Alleged Sexual Assault*, BUS. INSIDER (Sept. 20, 2013, 2:30 PM), available at <http://www.businessinsider.com/details-on-audrie-potts-suicide-2013-9>.

⁶ C.P. Krebs et al., *College Women's Experiences with Physically Forced, Alcohol- or Other Drug-Enabled, and Drug-Facilitated Sexual Assault Before and Since Entering College*, 57 J. AM. C. HEALTH 639 (2009).

⁷ C.P. Krebs et al., *The Campus Sexual Assault (CSA) Study, Final Report: January 2005 through December 2007*, at vii (2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

⁸ Tyler Kingkade, *Occidental College Settles Lawsuit with Sexual Assault Victims*, HUFFINGTON POST (Sept. 19, 2013, 2:18 PM), http://www.huffingtonpost.com/2013/09/19/occidental-lawsuit-sexual-assault_n_3950830.html.

⁹ Claire Groden, *Campus Rape Victims Find a Voice*, TIME (Aug. 08, 2013), available at <http://nation.time.com/2013/08/08/campus-rape-victims-find-a-voice/?iid=tsmodule>.

¹⁰ Angie Epifano, *An Account of Sexual Assault at Amherst College*, THE AMHERST STUDENT (Oct. 17, 2012), <http://amherststudent.amherst.edu/?q=article%2F2012%2F10%2F17%2Faccount-sexual-assault-amherst-college>

¹¹ Emma Jacobs, *Swarthmore Students File Title IX Complaint over Alleged Inaction on Sexual Assault*, NEWSWORKS (Apr. 26, 2013), <http://www.newsworks.org/index.php/local/item/54084>.

¹² See KNOW YOUR IX, <http://knowyourix.org/> (last visited Sept. 26, 2013).

OCR's guidance and resolutions addressing sexual harassment and violence are essential tools to help combat this serious problem plaguing our nation's schools. The April 4, 2011 Dear Colleague Letter's emphasis on prevention and specific procedures and remedies that schools should use in sexual violence cases, including the preponderance of the evidence standard of proof for sexual harassment investigations, was absolutely necessary to remind schools of their duties under Title IX. And the May 9, 2013 University of Montana joint OCR/DOJ resolution ("Montana Resolution") was a model of the holistic approach required to ensure that sexual violence reports are being handled properly by all parts of a school system. This is precisely the type of vigorous enforcement that can prompt reforms to reduce the prevalence of sexual violence in educational institutions.

These and other steps taken by OCR are crucial to tackling the problem of sexual violence. We urge OCR to build upon this work to ensure that schools are fulfilling their Title IX obligations. To begin with, increasing the number of compliance reviews is vital to root out this discrimination. Schools currently face no real threat for noncompliance and need to understand that there are consequences for their failure to follow the law. Proactive efforts, such as the recent State University of New York and West Contra Costa Unified School District agreements, prompt schools to affirmatively evaluate their programs and assess their compliance, and also provide comprehensive steps that schools can take to address violence and harassment.

Second, in response to individual complaints, we believe there are a number of steps OCR could take to ensure that it is better meeting the needs of students who have experienced sexual violence. For example, OCR should ensure that complainants are an integral part of the processing of their complaints. Involving complainants, especially in the development of resolutions, would help to foster transparency of the administrative process and would result in resolutions that address complainants' particular concerns. We further urge you to prioritize the prompt resolution of administrative complaints. Too many students are dropping out of school or transferring schools due to unchecked harassment and violence. And too often, investigations drag on and resolutions take years, leaving victims without appropriate remedies and allowing hostile environments to fester. Students are in school for a relatively short period of time, and promptly resolving complaints is essential to allow them to gain the maximum benefits from their educational experiences. Finally, we believe that comprehensive remedies are also necessary to attempt to put students back in the position they would have been absent the harassment or violence – we urge OCR to use its authority to achieve robust individual remedies for students. For example, sexual harassment and assault victims often require long-term counseling in addition to other make-whole remedies, and schools should have to pay for such services when they have not complied with the law. Likewise, the costs to students who have been pushed into new schools may be steep, requiring families to relocate or pay for private school tuition.

III. FIRE's Attacks on OCR's Policy Documents Are Inconsistent with the Law and Based on Distorted Interpretations of those Documents.

Given the pervasiveness of sexual harassment and violence and the need for greater enforcement of students' rights to learn in environments free from sexual violence, we have been disappointed to see repeated attacks by the Foundation for Individual Rights in Education (FIRE) on OCR's guidance and

resolution agreements. FIRE's arguments are inconsistent with the law and based on distorted interpretations of OCR's documents. Sadly, FIRE's criticism seems to ignore the real experiences of students subjected to sexual harassment and violence and the hurdles they face when seeking justice. We address the points raised by FIRE in its September 12, 2013 letter to you below.

A. OCR's Definition of Sexual Harassment is Consistent with Longstanding Judicial and Regulatory Interpretations.

FIRE erroneously claims that the Montana Resolution establishes a new definition of sexual harassment. But in fact the Montana Resolution simply restates the longstanding definition of harassment as "unwelcome conduct of a sexual nature."¹³ And contrary to FIRE's assertion, OCR has repeatedly made it clear that conduct must be unwelcome to constitute sexual harassment. FIRE acknowledges as much in its criticism of the Montana Resolution. On page 4 of its September 12 letter, FIRE cites OCR's definition of sexual harassment as "any *unwelcome* conduct of a sexual nature" and argues that it is too broad.¹⁴ However, on page 13 of the very same letter, FIRE argues that "OCR's proffered definition of hostile environment harassment . . . fails to specify that the conduct must be unwelcome."¹⁵ FIRE's arguments are not only inconsistent but also fail to recognize that hostile environment harassment is a subset of sexual harassment; thus, it necessarily must meet OCR's definition, which requires conduct to be unwelcome to support a Title IX claim of sexual harassment.¹⁶

Relatedly, FIRE also contends that OCR has conflated hostile environment harassment and sexual harassment, but that is simply wrong. Rather, OCR has consistently stated that hostile environment harassment is a type of sexual harassment and that, in order to be actionable, harassment must be sufficiently severe or pervasive to interfere with a student's ability to benefit from the educational program. The Montana Resolution therefore correctly explains that sexual harassment and "hostile environment" are not the same. Sexual harassment can exist apart from the creation of a hostile environment. Limiting the definition of sexual harassment to hostile environment, as the University of Montana had done, would fail to encompass actions such as quid pro quo harassment, for example. These are not new concepts or definitions; rather, they are fully consistent with well-established law.¹⁷

¹³ See *2001 Revised Sexual Harassment Guidance* at 2 [hereinafter *2001 Guidance*]; see also *Dawn L. v. Greater Johnstown Sch. Dist.*, 586 F. Supp. 2d 332, 367 (W.D. Pa. 2008) (finding that unwelcome "physical contact of a sexual nature or any notes . . . seeking such contact . . . constituted harassment"); *Chancellor v. Pottsgrove Sch. Dist.*, 501 F. Supp. 2d 695, 705 n.10 (E.D. Pa. 2007) (explaining that "[t]he proper inquiry for sexual harassment purposes is . . . welcomeness"); *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 905 (1st Cir. 1988) (explaining that allegations of "repeated and unwelcome sexual advances" supported "a prima facie case of hostile environment harassment").

¹⁴ Letter from Greg Lukianoff, President, Found. for Individual Rights in Educ. (FIRE), to Catherine Lhamon, Ass't Sec'y for Civil Rights, (Sept. 12, 2013), at 5, available at <http://thefire.org/public/pdfs/fd7f4d3d0a8a0f314f9b7c35e8203878.pdf?direct> [hereinafter FIRE letter].

¹⁵ *Id.* at 13.

¹⁶ See *2001 Guidance*, *supra* note 13, at 2.

¹⁷ See, e.g., *Vaughan v. Vermont Law Sch., Inc.*, 489 F. App'x 505, 506 (2d Cir. 2012) (citing the *2001 Guidance* to clarify that "post-secondary institutions have an independent duty to investigate and end harassment"); *T.Z. v. City of New York*, 634 F. Supp. 2d 263, 271 (E.D.N.Y. 2009) (citing the *2001 Guidance*'s explanation that a single sexual harassment incident can create a hostile environment); *Pottsgrove*, 501 F. Supp. 2d at 706 (citing the *2001 Guidance* to explain that unwelcome conduct constitutes harassment); *Riccio v. New Haven Bd. of Educ.*, 467 F. Supp. 2d 219, 226 (D. Conn. 2006) (citing the

FIRE also misrepresents OCR's standard by ignoring the Montana Resolution's clear statements regarding the objective and subjective nature of harassment. The resolution properly incorporated both the objective and subjective standards for determining whether sexual harassment is actionable.¹⁸ As it explained, sexual harassment is "unwelcome conduct of a sexual nature" and, therefore, must be subjectively offensive to the victim.¹⁹ To be classified as actionable "hostile environment" sexual harassment, harassment must also be objectively offensive.²⁰ This, too, is consistent with prior statements of the law defining sexual harassment as both subjectively and objectively offensive.²¹

B. OCR Correctly Recognizes that the Legal Standards Set Forth in *Davis v. Monroe County Board of Education* Are Limited to Cases Seeking Monetary Damages.

Understanding the real threat that sexual harassment poses for students in an educational environment, OCR has long stated that institutions have obligations to promptly and effectively address sexual harassment if they know or should know about it, and that schools should take steps to train the community about harassment and prevent it before it can occur.²² FIRE argues that the controlling standard for what constitutes hostile environment sexual harassment is limited to the Supreme Court's standard from *Davis v. Monroe County Board of Education*. But the Supreme Court made clear in *Davis* that its focus was "whether a district's failure to respond to student-on-student harassment in its schools can support a private suit for money damages."²³ The Court ultimately held that the contractual nature of Spending Clause legislation requires that "private damages actions are available only where recipients of federal funding had adequate notice that they could be liable for the conduct at issue" and that schools are monetarily liable only if they are deliberately indifferent to known harassment.²⁴ Thus, the *Davis* standard by its own terms is limited to cases involving money damages. Nor should OCR impose a more demanding standard for administrative enforcement, given that the *Davis* standard provides fewer protections from harassment for students in school than for employees in the workplace.

2001 Guidance to define gender discrimination to include language "with sexual orientation overtones"); *King v. Bd. of Control of E. Michigan Univ.*, 221 F. Supp. 2d 783, 790 (E.D. Mich. 2002) (citing the 2001 Guidance to support its ruling that Title IX protections extend to all school programs, even those that take place abroad).

¹⁸ Letter from Anurima Bhargava, Chief, U.S. Dep't of Justice, Civil Rights Div., and Gary Jackson, Reg'l Dir., U.S. Dep't of Justice, Civil Rights Div., to Royce Engstrom, President, Univ. of Mont., and Lucy France, Univ. of Mont. Counsel (May 9, 2013), at 5, available at <http://thefire.org/article/15580.html>.

¹⁹ *Id.* at 4.

²⁰ *Id.* at 9; see also *Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 81 (1998) (emphasizing "that the objective severity of harassment should be judged from the perspective of a reasonable person in the [victim's] position, considering 'all the circumstances'").

²¹ See 2001 Guidance, *supra* note 13, at 5; see also *Davis*, 526 U.S. at 650; *Papelino v. Albany Coll. of Pharmacy of Union Univ.*, 633 F.3d 81, 89 (2d Cir. 2011); *Pottsgrove*, 529 F. Supp. 2d at 573; *Jennings*, 340 F. Supp. 2d at 675.

²² 2001 Guidance, *supra* note 13, at 12; see also *Vaughan*, 489 F. App'x at 506 ("[P]ost-secondary institutions have an independent duty to investigate and end harassment 'whether or not the student who was harassed makes a complaint or otherwise asks the school to take action.'" (quoting 2001 Guidance)).

²³ *Davis v. Monroe County Board of Education*, 526 U.S. 629, 639 (1999)

²⁴ *Id.* at 639-43.

For these same reasons, FIRE's claim that *Davis* requires harassment to be "severe, pervasive and objectively offensive" must also be rejected. While the severity and frequency of conduct will affect a determination of whether conduct rises to the level of actionable sexual harassment, the definition of sexual harassment is not and should not be limited to conduct that is severe, pervasive, and objectively offensive such that it denies access to equal education. Instead, as OCR has long stated, sufficiently serious isolated events can rise to the level of actionable sexual harassment.²⁵ Moreover, FIRE's reliance on the Third Circuit's decision invalidating Temple University's sexual harassment policy is misplaced.²⁶ The Third Circuit did not require that Temple's policy cover only harassment that is *both* severe and pervasive.²⁷ Instead, the court explained that schools had a "compelling interest in preventing harassment" as long as their sexual harassment policies were "qualified with a standard akin to a severe *or* pervasive requirement."²⁸

Even under the *Davis* standards for damages liability, FIRE's arguments about what constitutes harassment are erroneous. So despite FIRE's assertion, there is no requirement that sexual harassment be targeted at a particular individual to create an actionable hostile environment.²⁹ The Court in *Davis* merely states that the plaintiff in that case experienced a "prolonged pattern of sexual harassment" by a classmate.³⁰ Nothing in the opinion indicates that such targeted discrimination is a necessary element of a sexual harassment claim. In fact, courts have held just the opposite—that an individual has a valid claim of hostile environment sexual harassment even if she was not the primary target of the words and actions that created the hostile environment, if the harassment "effectively deprived" her of "educational opportunities or benefits."³¹ Finally, FIRE's speculative arguments that untargeted harassment could result in charges of hostile environment from students who read a controversial op-ed in the school newspaper or hear a controversial question in class are far-fetched and ignore the reality of harassment faced by students in school.³² FIRE ignores the longstanding Title IX requirements that actionable sexual harassment be both objectively and subjectively offensive and be severe or pervasive enough to essentially deprive the victim of the ability to benefit from the school's programs.³³ Those requirements would prevent the kinds of infringements on free speech that FIRE imagines.

C. OCR's Sexual Harassment Definition Satisfies the First Amendment and There Is No Evidence that Schools Are Routinely Overreaching in Response to OCR's Guidance.

FIRE's arguments that there should be separate standards for sexual harassment and sexual assault because sexual harassment standards infringe on protected speech are unpersuasive. As FIRE

²⁵ See *2001 Guidance*, *supra* note 13, at 6; see also *T.Z.*, 634 F. Supp. 2d at 271 (holding that a "sufficiently serious one-time sexual assault" can even satisfy *Davis*'s pervasiveness standard).

²⁶ FIRE letter, *supra* note 14, at 14.

²⁷ *DeJohn v. Temple University*, 537 F.3d 301 (3d Cir. 2008).

²⁸ *Id.* at 320 (emphasis added).

²⁹ FIRE letter, *supra* note 14, at 11.

³⁰ *Davis*, 526 U.S. at 633.

³¹ See, e.g., *Jennings v. University of North Carolina*, 482 F.3d 686, 696 (2007).

³² FIRE letter, *supra* note 14, at 11.

³³ See *2001 Guidance*, *supra* note 13, at 29.

acknowledges in its September 12 letter to OCR, “both sexual harassment and sexual assault constitute gender-based discrimination under Title IX.”³⁴ Given that sexual assault is an extreme form of sexual harassment and courts have imposed similar standards for both forms of discrimination, OCR is right to address them together.³⁵ FIRE’s concern about the sexual harassment standards infringing on protected speech is already addressed by the fact that conduct, verbal or otherwise, does not constitute actionable sexual harassment unless it rises to a level that interferes with a student’s ability to benefit from his or her education. Any conduct rising to that level would necessarily meet the standard for school speech that the Supreme Court defined in *Tinker v. Des Moines Indep. Cmty. Sch. Dist.*, 393 U.S. 503 (1969). In *Tinker*, the Court explained that, while students retain First Amendment rights at school, those rights are balanced by “the comprehensive authority of the States and of school officials . . . to prescribe and control conduct in the schools.”³⁶ Schools may therefore restrict student speech when the speech would “substantially interfere with the work of the school or impinge upon the rights of other students.”³⁷

The examples FIRE cites to support its argument that the longstanding sexual harassment standards will infringe on speech are merely accounts of schools disciplining faculty and students for failing to follow internal school policies, which often included much more than sexual harassment policies. For example, the University of Denver professor FIRE cites was fired for violating university policies including *but not limited to* sexual harassment policies.³⁸ The Appalachian State University professor was disciplined for a list of actions that included making negative comments about the school and its athletes in addition to commenting on a campus protest regarding sexual assault allegations and showing a documentary on pornography.³⁹ And the University of New Hampshire student mentioned by FIRE was simply moved by the university from one dormitory to another to prevent the creation of a perceived hostile environment after he posted fliers instructing women in the building to take the stairs so that they would be “easier on the eyes.”⁴⁰ None of these anecdotes support FIRE’s argument that OCR’s guidance and resolutions in any way infringe on constitutionally protected speech.

D. The “Preponderance of the Evidence” Standard is Appropriate for Campus Sexual Assault Proceedings.

³⁴ FIRE letter, *supra* note 14, at 9.

³⁵ *Compare T.Z.*, 634 F. Supp. 2d at 273 (holding that sexual assault allegations support a hostile environment sexual harassment claim under Title IX if “the negative effects of the assault resulted in a deprivation of access to educational opportunities and resources”), and *Dawn L.*, 614 F. Supp. 2d at 569 (same), with *Davis*, 526 U.S. at 650 (applying the same deprivation of “educational opportunities or benefits provided by the school” to determine whether sexual harassment allegations support a hostile environment sexual harassment claim under Title IX), and *Patterson v. Hudson Area Sch.*, 551 F.3d 438, 444 (6th Cir. 2009) (same).

³⁶ *Tinker*, 393 U.S. at 507.

³⁷ *Id.* at 510.

³⁸ Letter from Christopher Hill, Dean of Josef Korbel School of Int’l Studies, Univ. of Denver, to Art Gilbert, Assoc. Professor (Apr. 6, 2011), available at <http://thefire.org/public/pdfs/ee6393390ec3a4b5ba79ed98ee17f1bc.pdf?direct>.

³⁹ Letter from Anthony Gene Carey, Vice Provost for Faculty Affairs, Appalachian Univ., to Jammie Price, Professor (Mar. 16, 2012), available at <http://thefire.org/article/15580.html>.

⁴⁰ *University of New Hampshire: Eviction of Student for Posting Flier*, FIRE: FOUND. FOR INDIVIDUAL RIGHTS IN EDUC., <http://thefire.org/case/651.html>.

Given that Title IX was modeled after Title VI,⁴¹ and preponderance of the evidence is the standard used in claims brought under Title VI, it is also the standard that applies to Title IX claims.⁴² The preponderance standard is also used in litigation of claims under Title VII of the Civil Rights Act of 1964, regarding sex discrimination in employment.⁴³ Thus, it is the correct standard for allegations of sexual harassment, including violence. OCR's April 4, 2011 "Dear Colleague" Letter and the Montana Resolution merely reinforce the need for all proceedings related to sexual harassment and violence to use this established standard.

The preponderance of the evidence standard is appropriate even in cases where there could be criminal sanctions for the defendant's actions. For example, it is used in civil proceedings between two private parties, where—like a campus grievance proceeding for a complaint of sexual harassment—each party “has an extremely important, but nevertheless relatively equal, interest in the outcome.”⁴⁴ This includes civil proceedings arising out of conduct that can also be criminal, but where there is no authority to impose criminal sanctions, such as a civil tort action for battery, robbery, or murder.⁴⁵ The purpose of a sexual misconduct proceeding is to establish whether sexual harassment, including violence, has occurred in violation of school policies and procedures, not to determine the accused's guilt or innocence for purposes of criminal liability.⁴⁶ Preponderance of the evidence is therefore the appropriate standard for campus sexual harassment and violence proceedings.

Use of the preponderance of the evidence standard in Title IX grievance proceedings is also consistent with constitutional due process requirements. The Due Process Clause may be implicated

⁴¹ See *Cannon v. Univ. of Chi.*, 441 U.S. 677, 694-98 & n.16 (1979) (“Except for the substitution of the word ‘sex’ in Title IX to replace the words ‘race, color, or national origin’ in Title VI, the two statutes use identical language.”).

⁴² See, e.g., *Williams ex. rel. Hart v. Paint Valley Local Sch. Dist.*, 400 F.3d 360, 363 (6th Cir. 2005) (stating school district “may be liable for the sexual abuse of a student if the [p]laintiff demonstrates by a preponderance of the evidence each of the [necessary] elements”); *Bostic v. Smyrna Sch. Dist.*, 418 F.3d 355, 360 (3d Cir. 2005) (noting plaintiff “has the burden of proving by a preponderance of the evidence that a school official with the power to take action to correct the discrimination had actual notice of the discrimination”); *McConaughy v. Univ. of Cincinnati*, 2011 WL 1459292, at *8, No. 1:08-cv-320-HJW (S.D. Oh. Apr. 15, 2011) (“To establish a prima facie violation of Title IX, plaintiff must show [all elements] by a preponderance of the evidence . . .”).

⁴³ *Bazemore v. Friday*, 478 U.S. 385, 400-01 (1986).

⁴⁴ *Rivera v. Minnich*, 483 U.S. 574, 581 (1987) (holding preponderance of the evidence standard is appropriate in paternity suits).

⁴⁵ *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 (1985) (discussing criminal and civil RICO provisions) (“[C]onduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard.”).

⁴⁶ See U.S. Dep’t of Justice Office of Justice Programs Nat’l Institute of Justice, *SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 14* (Dec. 2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>. The Clery Act requires colleges and universities to disclose campus statistics and daily crime logs for certain categories of crimes to students and report these statistics to the Department of Education. These records must include reported offenses, such as complaints and investigations. But the Act does not require automatic reporting of sexual violence violations to law enforcement. And unless personal information is required to be released in an emergency situation, FERPA’s privacy provisions would preclude the reporting of confidential information under the Clery Act. However, FERPA does not trump the requirement that both the accuser and the accused must be informed of the outcome of any institutional proceeding that is brought alleging a sex offense. See U.S. Dep’t of Educ., *THE HANDBOOK FOR CAMPUS SAFETY AND SECURITY REPORTING* (Feb. 2011), available at <http://www2.ed.gov/admins/lead/safety/handbook-2.pdf>.

when students are disciplined by public institutions,⁴⁷ but the Supreme Court has upheld applications of the preponderance of the evidence standard where the individual interests are even stronger and the deprivations more severe than they are in sexual violence grievance proceedings where students risk, at most, expulsion.⁴⁸ And the Supreme Court has held that due process requires the higher “clear and convincing” evidence standard only in a narrow handful of civil cases “to protect particularly important individual interests,” which do not include school expulsion.⁴⁹

The preponderance of the evidence standard is not new; it has been and is the standard that many schools already use,⁵⁰ and builds on OCR’s earlier case-specific instructions for remedying non-compliance with Title IX. A more stringent standard would be particularly inappropriate because of the unique barriers that sexual harassment and violence complainants face. Courts and juries often fail to understand the seriousness of harassment or are biased against plaintiffs in lawsuits.⁵¹ Campus sexual

⁴⁷ See *Goss v. Lopez*, 419 U.S. 565, 576 (1975). The Due Process Clause only applies to state-run institutions; Title IX applies more broadly to all schools that receive federal funding.

⁴⁸ These include suits to determine paternity, *Rivera*, 483 U.S. at 581; competency proceedings, *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996); the application of sentencing enhancements, *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986); and civil commitment proceedings for individuals acquitted of criminal charges by virtue of the insanity defense, *Jones v. United States*, 463 U.S. 354, 368 (1983). Similarly, some lower courts have held that clear and convincing evidence is *not* required in disciplinary proceedings to suspend or revoke an individual’s law or medical license, which would deprive an individual of the ability to practice her chosen profession. See, e.g., *In re Barach*, 540 F.3d 82, 85 (1st Cir. 2008) (“After all, many types of important property rights typically rest, in contested proceedings, on proof of preponderant evidence.”); *Granek v. Texas State Bd. of Med. Examiners*, 172 S.W.3d 761, 777 (Tex. Ct. App. 2005) (noting split, collecting cases, and holding preponderance of the evidence is the proper standard of proof).

⁴⁹ *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment). To illustrate, the Court has required a heightened standard of proof in proceedings terminating parental rights, *Santosky v. Kramer*, 455 U.S. 745, 758 (1982); civil commitment for mental illness, *Addington*, 441 U.S. at 432; deportation, *Woodby v. INS*, 385 U.S. 276, 286 (1966); denaturalization, *Chaunt v. United States*, 364 U.S. 350, 353 (1960); and government-initiated proceedings to determine juvenile delinquency, which exposes an individual up “to the possibility of institutional confinement.” *In re Winship*, 397 U.S. 358, 367-68 (1970). In all of these cases, the parties were the defendant and the state. *Rivera*, 483 U.S. at 581. The higher standard leveled the field between the defendant and the state’s superior resources and protected the defendant from the harsh and lasting consequences of criminal conviction. *Id.* The same concerns do not apply in campus sexual harassment proceedings, where the individuals sharing the risk of error are the student complaining of sexual harassment or assault and the alleged perpetrator, both of whom have much at stake. Therefore, it is appropriate for the standard of proof to be a preponderance of the evidence, which distributes the risk of error evenly between the two parties most affected by the proceedings.

⁵⁰ Nor is it even disruptive, since a number of schools not already using this correct standard have since changed to adopt it. See, e.g., Michael Linhorst, *Cornell Debates Rules for Sexual Assault Cases*, CORNELL DAILY SUN, Nov. 17, 2011, available at <http://www.cornellsun.com/section/news/content/2011/11/17/cornell-debates-rules-sexual-assault-cases>; W. Raymond Ollwerther, *Sexual-Misconduct Policy Revised*, PRINCETON ALUMNI WEEKLY, Nov. 16, 2011, available at <http://paw.princeton.edu/issues/2011/11/16/pages/4526/index.xml> (quoting Princeton’s Provost as characterizing OCR’s April 4 Guidance as having “added new urgency to reforms that were already being discussed on our campus”); Haley Goldberg, “U” Instates New Policy for Sexual Misconduct, MICH. DAILY, Oct. 6, 2011, available at <http://www.michigandaily.com/news/u-creates-interim-policy-sexual-misconduct> (regarding “interim” policy); Jeff Zalesin, *Pomona Changes Evidentiary Standards for Sexual Misconduct*, STUDENT LIFE, Sept. 30, 2011, available at <http://tsl.pomona.edu/articles/2011/9/30/news/413-pomona-changes-evidentiary-standards-for-sexual-misconduct>. It could, in fact, be more disruptive to adopt a higher standard.

⁵¹ For example, with respect to Title VII employment litigation, appellate courts and commentators have identified evidence of judicial bias against hostile work environment claims. See, e.g., *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998)

violence proceedings can be traumatic, as victims regularly encounter unsympathetic and intimidating processes that lack support for complainants.⁵² Requiring a higher burden of proof would only impose additional burdens on complainants and result in more discrimination going unchecked.

* * *

OCR's April 4, 2011 Letter and Montana Resolution provide schools with necessary guidance for Title IX compliance and represent an important step forward in the effort to ensure that schools appropriately address sexual harassment and violence. The longstanding Title IX legal standards governing sexual harassment claims do not infringe on students' constitutionally protected speech, and backing down from these standards would leave many students vulnerable to more sexual harassment and violence. We urge OCR to continue to step up its enforcement of Title IX in this area and to resolve complaints promptly with comprehensive and individually-tailored remedies.

If you have any questions, please feel free to contact us at (202) 588-5180.

Sincerely,



Fatima Goss Graves
Vice President of Education and Employment

("The dangers of robust use of summary judgment to clear trial dockets are particularly acute in current sex discrimination cases."); *Catchpole v. Brannon*, 36 Cal. App. 4th 237 (1995) (holding allegations of trial judge gender bias in sexual harassment cases were meritorious and reversing judgment on that basis); Harriet M. Antczak, *Problems at Daubert: Expert Testimony in Title VII Sex Discrimination and Sexual Harassment Litigation*, 19 BUFF. J. OF GENDER, LAW & SOC. POL'Y 33, 34 (2011); Benjamin F. Barrett, Jr., *Bias in Sexual Assault Cases*, in 2 ASS'N OF TRIAL LAWS. OF AM., ANNUAL CONVENTION REFERENCE MATERIALS (2006) (providing an overview of the five major jury biases at play in sexual assault cases); Theresa M. Beiner, *The Misuse of Summary Judgment in Hostile Environment Cases*, 34 WAKE FOREST L. REV. 71, 91 (1999); M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgment*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 311 (1999); Thomas A. Mitchell, *We're Only Fooling Ourselves: A Critical Analysis of the Biases Inherent in the Legal System's Treatment of Rape Victims*, 18 BUFF. J. OF GENDER, LAW & SOC. POL'Y 73, 77 (2009-10) ("The general public accepts 'rape myths' as fact and has been influenced by Hollywood and the mass media to blame or not believe a woman who reports she has been sexually assaulted."); Destin N. Stewart & Kristine M. Jacquin, *Juror Perceptions in a Rape Trial: Examining the Complainant's Ingestion of Chemical Substances Prior to Sexual Assault*, J. OF AGGRESSION, MALTREATMENT & TRAUMA 853, 854-56 (2010) (discussing rape myths); Clifton Wilcox, *BIAS: THE UNCONSCIOUS DECEIVER* 95 (2011) ("Attitudes toward rape is a good predictor of the verdict in a rape case.").

⁵² See Kristin Jones, *BARRIERS CURB REPORTING ON CAMPUS SEXUAL ASSAULT* (Dec. 2, 2009), available at http://www.publicintegrity.org/investigations/campus_assault/articles/entry/1822/. Both subtle and blatant pressures also work on victims: that study also included reports of college or university deans expressing disbelief in victims' accounts and suggesting victims receive counseling or take a semester off. *See id.*



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