NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

February 8, 2012

The Honorable Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
Department of Education
400 Maryland Avenue, SW
Washington, DC 20202

Dear Assistant Secretary Ali:

The National Women's Law Center (NWLC) supports the April 4, 2011 comprehensive guidance to help schools, colleges, and universities more effectively prevent and respond to sexual harassment and violence on their campuses, as required by Title IX, the federal law that prohibits sex discrimination in federally funded schools. NWLC has worked since 1972 to advance and protect women's legal rights in a variety of areas, including work to ensure that girls and women are able to learn in an environment free from discrimination, degradation, and fear. Unfortunately, in too many instances college and school officials have failed to protect their students from sexual harassment, including sexual violence, and to promptly and effectively address it when it occurs. Therefore, NWLC especially welcomes the Office for Civil Rights' (OCR) emphasis on prevention and its provision of specific procedures and remedies schools should use to combat this very serious problem, including OCR's recognition that Title IX requires schools to use the preponderance of the evidence standard of proof for sexual harassment investigations. The purpose of this letter is to focus, particularly, on the appropriateness of the preponderance of the evidence standard.

OCR's April 4 Dear Colleague Letter outlined the requirements for campus sexual harassment (including violence) grievance procedures to be consistent with Title IX. Among other things, the Dear Colleague Letter stated:

> in order for a school's grievance procedures to be consistent with Title IX standards, the school must use a preponderance of the evidence standard (*i.e.*, it is more likely than not that the sexual harassment or violence occurred). The "clear and convincing" standard (*i.e.*, it is highly probable or reasonably certain that the sexual harassment or violence occurred), currently used by some schools, is a higher standard of proof. Grievance procedures that use this higher standard are inconsistent with the standard of proof established for violations of the civil rights laws, and are thus not equitable under Title IX. Therefore, preponderance of the

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evidence is the appropriate standard for investigating allegations of sexual harassment or violence.[1]

We support OCR's guidance on this issue and its articulation of the standard required under Title IX. It aligns schools' treatment of sexual violence complaints with other adjudications under Title IX and similar civil rights statutes, as well as courts' handling of civil cases more generally. Additionally, in the case of public institutions, the Due Process Clause does not require a higher standard. Further, the requirement that schools employ the preponderance of the evidence standard is neither new nor onerous; in fact, OCR's guidance on this point merely reiterated its earlier policy, with which many schools already comply. Finally, use of a higher standard in these types of cases would be inequitable because of the well-documented biases faced by those who report sexual harassment, including violence.

I. To be consistent with Title IX, schools must use a preponderance of the evidence standard.

The preponderance of the evidence standard is the appropriate standard of proof for all violations of civil rights laws, including Title IX. A Title IX inquiry deals with a classic civil rights question—whether a student has "be[en] excluded from participation in, [or] denied the benefits of . . . [an] education program or activity" "on the basis of sex."[2] As such, OCR's resolution of discrimination complaints against recipients of federal funds under a preponderance of the evidence standard is to be expected.[3] OCR's Dear Colleague Letter merely reinforces the need for all proceedings related to sexual harassment and violence to proceed under the same standard.

For example, the preponderance standard is used in the litigation of claims under Title VI of the Civil Rights Act of 1964, which prohibits discrimination on the basis of race, color, or national origin under any program or activity that receives federal funds.[4] And as the Supreme Court observed in *Cannon v. University of Chicago*, "[t]he drafters of Title IX explicitly assumed that it would be interpreted and applied as Title VI had been" because Title IX was modeled after Title VI and the two statutes have nearly identical language.[5] Therefore, in adjudicating federal lawsuits under Title IX, courts employ the preponderance of the evidence standard.[6] In addition,

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[1] U.S. Dep't of Educ., Office for Civil Rights, Dear Colleague Letter, at 11 (Apr. 4, 2011), *available at* http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf.

[2] 20 U.S.C. § 1681. Some states have passed analogous statutes providing a civil rights cause of action for rape or sexual assault; these causes of action exist alongside existing tort remedies and Title IX. Claire Bushey, *Why Don't More Women Sue Their Rapists?*, SLATE, May 26, 2010, *at* http://www.slate.com/articles/double_x/doublex/2010/05/why_dont_more_women_sue_their_rapists.html (observing that Illinois, California, and New York have civil rights causes of action for sexual assault or rape).

[3] *See* Dear Colleague Letter, *supra* note 1, at 11.

[4] *See, e.g.*, *Elston v. Talladega Cnty. Bd. of Educ.*, 997 F.2d 1394, 1407 (11th Cir. 1993) ("To establish liability under the Title VI regulations disparate impact scheme, a plaintiff must first demonstrate by a preponderance of the evidence that a facially neutral practice has a disproportionate adverse effect on a group protected by Title VI.").

[5] *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.").

[6] *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

the Supreme Court has explained that in the context of Title VII of the Civil Rights Act of 1964, regarding sex discrimination in employment, a plaintiff "need not prove discrimination with scientific certainty; rather, his or her burden is to prove discrimination by a preponderance of the evidence. . . . [A]s long as the court may fairly conclude, in light of all the evidence, that it is more likely than not that impermissible discrimination exists, the plaintiff is entitled to prevail."[7] Thus, the preponderance of the evidence standard is the correct one for allegations of sexual harassment, including violence.

II. The preponderance of the evidence standard is the most commonly used standard of proof and is employed in a variety of civil cases.

The preponderance of the evidence standard is employed in many types of cases outside of the civil rights context. It is the standard used in civil proceedings between two private parties, where—like a campus grievance proceeding for a complaint of sexual harassment—each of the parties involved "has an extremely important, but nevertheless relatively equal, interest in the outcome."[8]

The preponderance of the evidence standard is also used in civil proceedings arising out of conduct that can also be criminal—for example, tort actions for civil battery, robbery, or murder. And like a civil tort action for battery, campus sexual violence proceedings have no authority to impose criminal sanctions. 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.[9] Any government prosecution for assault, rape, or any potentially criminal conduct would have to go forward in a criminal proceeding under the "beyond a reasonable doubt" standard applicable to criminal cases.

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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 . . .").

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

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

[9] *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.

The Supreme Court has recognized that "[i]n a number of settings, conduct that can be punished as criminal only upon proof beyond a reasonable doubt will support civil sanctions under a preponderance standard."[10] For example, the Court has held permissible a civil, remedial forfeiture proceeding, using a preponderance of the evidence standard, initiated after an acquittal on related criminal charges.[11] And in a well-known example, O.J. Simpson was found liable for the wrongful deaths of Nicole Brown Simpson and Ron Goldman after being acquitted of criminal charges for their murders.[12] The preponderance of the evidence standard, used in a wide variety of civil contexts, is also appropriate for campus sexual harassment and violence proceedings.

III. Due process does not require a higher standard of proof.

Use of the preponderance of the evidence standard in Title IX grievance procedings is consistent with constitutional due process requirements. The Due Process Clause may be implicated when students are disciplined by public institutions,[13] but that does not answer the question of what process is due even for these institutions since the most that may be at stake is expulsion of the perpetrator. Of course, also at stake is the possible inability of the student being harassed to stay in school because of the harassment.

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 in the context of a sexual violence grievance proceeding. The Court has sanctioned the preponderance of the evidence standard in suits to determine paternity,[14] competency proceedings,[15] the application of sentencing enhancements,[16] and civil commitment proceedings for individuals acquitted of criminal charges by virtue of the insanity defense.[17] Similarly, some lower courts have held that clear and convincing evidence is *not* required in disciplinary proceedings to suspend or revoke an individual's medical[18] or law license,[19] which would deprive an individual of the ability to practice her chosen profession.

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[10] *Sedima, S.P.R.L. v. Imrex Co., Inc.*, 473 U.S. 479, 491 (1985) (discussing criminal and civil RICO provisions).
[11] *See United States v. One Assortment of 89 Firearms*, 465 U.S. 354, 361 (1984) ("[T]he jury verdict in the criminal action did not negate the possibility that a preponderance of the evidence could show that Mulcahey was engaged in an unlicensed firearms business."); *see also Helvering v. Mitchell*, 303 U.S. 391, 397-98 (1938) (upholding a tax deficiency assessment after acquittal for tax fraud).
[12] *See* B. Drummond Ayres, Jr., *Jury Decides Simpson Must Pay $25 Million in Punitive Award*, N.Y. TIMES, Feb. 11, 1997, *available at* http://www.nytimes.com/1997/02/11/us/jury-decides-simpson-must-pay-25-million-in-punitive-award.html.
[13] *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.
[14] *Rivera*, 483 U.S. at 581.
[15] *Cooper v. Oklahoma*, 517 U.S. 348, 368 (1996).
[16] *McMillan v. Pennsylvania*, 477 U.S. 79, 91-92 (1986).
[17] *Jones v. United States*, 463 U.S. 354, 368 (1983).
[18] *See, e.g., 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).
[19] *See 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.").

Additionally, 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."[20] The deprivations at issue in those cases are more severe than expulsion, the most drastic possible outcome of a sexual violence grievance proceeding. To illustrate, the Court has required a heightened standard of proof in proceedings terminating parental rights,[21] civil commitment for mental illness,[22] deportation,[23] denaturalization,[24] and government-initiated proceedings to determine juvenile delinquency, which exposes an individual up "to the possibility of institutional confinement."[25]

In these few cases for which the Supreme Court has required a higher standard of proof than a preponderance of the evidence, "the contestants . . . are the State and an individual."[26] "Because the State has superior resources, and because an adverse ruling in a criminal, civil commitment, or [parental] termination proceeding has especially severe consequences for the individuals affected, it is appropriate for society to impose upon itself a disproportionate share of the risk of error in such proceedings" and require a higher standard of proof in order to reach an adverse result.[27] In campus sexual harassment proceedings, by contrast, 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, while the school investigating and adjudicating the grievance plays the role of the "court." 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.

IV. The preponderance of the evidence standard is not new; it has been and is the standard with which many schools already comply.

The Dear Colleague Letter provides excellent guidance to schools nationwide and builds on OCR's earlier case-specific instructions for remedying non-compliance with Title IX. For example, in a May 2004 letter to Georgetown University to notify it of the disposition of a Title IX complaint, OCR identified the problem that "complaints of sexual harassment were resolved using a clear and convincing evidence standard, a higher standard than the preponderance of the evidence standard, *which is the appropriate standard under Title IX for sex discrimination complaints*, including those alleging sexual harassment."[28] The Georgetown letter more than

[20] *Addington v. Texas*, 441 U.S. 418, 424 (1979) (civil commitment).
[21] *Santosky v. Kramer*, 455 U.S. 745, 758 (1982) (requiring something more than "fair preponderance of the evidence").
[22] *Addington*, 441 U.S. at 432 (requiring a higher standard than the preponderance of the evidence).
[23] *Woodby v. INS*, 385 U.S. 276, 286 (1966) (requiring "clear, unequivocal, and convincing evidence").
[24] *Chaunt v. United States*, 364 U.S. 350, 353 (1960) (same); *Schneiderman v. United States*, 320 U.S. 118, 125 (1943) (same).
[25] *In re Winship*, 397 U.S. 358, 367-68 (1970) (requiring proof beyond a reasonable doubt).
[26] *Rivera*, 483 U.S. at 581.
[27] *Id.*
[28] U.S. Dep't of Educ., Office for Civil Rights, Letter from Sheralyn Goldbecker, Team Leader, to Dr. John J. DeGioia, President, Georgetown University (May 5, 2004), at 3, *available at* http://www.securityoncampus.org/pdf/ocr11032017.pdf (emphasis added); *see also* U.S. Dep't of Educ., Office for Civil Rights, Letter from Howard Kallem, Chief Attorney, D.C. Enforcement Office, to Jane E. Genster, Vice President and General Counsel, Georgetown University (October 16, 2003), at 1, *available at*

seven years ago focused many schools' attention on the need to use the preponderance of the evidence standard in order to comply with Title IX in the context of sexual harassment.[29]

But even long before 2004, the preponderance of the evidence was the most widely used standard of proof: a 2002 report found that of schools that discuss the standard of proof in material on sexual assault grievance procedures, a full 8 in 10 already used the preponderance of the evidence standard.[30] And in 2009 a handful of campus sexual assault policies were highlighted by SAFER (Students Active For Ending Rape) as models for schools—all four used a preponderance of the evidence standard.[31] Thus, the Dear Colleague Letter's articulation that the preponderance of the evidence standard of proof is required was neither new nor surprising, and, as discussed above, in fact reflects Title IX standards more broadly.[32]

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http://www.ncherm.org/documents/202-GeorgetownUniversity--110302017Genster.pdf ("[I]n order for a recipient's sexual harassment grievance procedure to be consistent with Title IX standards, the recipient must draw conclusions about whether the particular conduct rises to the level of sexual harassment using a preponderance of the evidence standard."); U.S. Dep't of Educ., Office for Civil Rights, Letter from Gary Jackson, Regional Civil Rights Director, Region X, to Jane Jervis, President, The Evergreen State College (Apr. 4, 1995), at 8, *available at* http://www2.ed.gov/policy/gen/leg/foia/misc-docs/ed_ehd_1995.pdf (noting that "[t]he evidentiary standard of proof applied to Title IX actions is that of a 'preponderance of the evidence'" and concluding that the recipient's use of the clear and convincing evidence standard violated Title IX).

[29] *See* Lauren Sieben, *Education Dept. Issues New Guidance for Sexual-Assault Investigations*, THE CHRONICLE OF HIGHER EDUCATION, Apr. 4, 2011, *available at* http://chronicle.com/article/Education-Dept-Issues-New/127004/ (quoting Vanderbilt University dean, who stated that the university began using the preponderance of the evidence standard in 2007 after learning of the Georgetown letter); *cf.* Letter from S. Daniel Carter, Senior Vice President, Security on Campus, Inc., to Dr. Lampin, Vice President, University of Virginia (Feb. 1, 2005), *available at* http://www.uvavictimsofrape.com/Suggestions.htm (letter sent to University of Virginia Vice President referencing the Georgetown letter's discussion of the standard of proof).

[30] *See* HEATHER M. KARJANE ET AL., CAMPUS SEXUAL ASSAULT: HOW AMERICA'S INSTITUTIONS OF HIGHER EDUCATION RESPOND 120 (2002), *available at* https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf; *see also* Stacy Teicher Khadaroo, *Feds Warn Colleges: Handle Sexual Assault Reports Properly*, CHRISTIAN SCI. MONITOR, Sept. 2, 2011, *available at* http://www.msnbc.msn.com/id/44376767/ns/us_news-christian_science_monitor/t/feds-warn-colleges-handle-sexual-assault-reports-properly/#.TxbgZIHGC-U (reporting Assistant Secretary for Civil Rights Russlynn Ali estimated that 80% of colleges already used the preponderance of the evidence standard).

[31] *See* SAFER 2009 Policy Database Report, *available at* http://safercampus.org/sites/default/files/file/safer_policy_report_022210_bleed_lores.pdf; *see also* Ithaca College Policy Manual, *available at* http://www.ithaca.edu/attorney/policies/vol7/Volume_7-70102.htm; Columbia University, Judicial Affairs and Community Standards, Frequently Asked Questions, *available at* http://www.studentaffairs.columbia.edu/judicialaffairs/faqs; Case Western Reserve Univ., Case Student Handbook Judicial Procedures, *available at* http://studentaffairs.case.edu/handbook/judicial/university/; Sarah Lawrence College, Procedures for Filing and Addressing Sexual Harassment and Sexual Assault Complaints Against Faculty, Staff or Student Employees, *available at* http://www.slc.edu/offices-services/human-resources/policies-procedures/Sexual_Assault_Reporting_Procedures.html.

[32] 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, THE 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*, THE MICHIGAN DAILY, Oct. 6, 2011, available at http://www.michigandaily.com/news/u-creates-interim-policy-sexual-misconduct

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V. A more stringent standard would be particularly inappropriate because of unique barriers that sexual harassment and violence complainants face.

Scholars have long recognized that courts and juries can fail to understand the seriousness of harassment or even be biased against complainants in lawsuits based on sexual harassment and violence. For example, with respect to Title VII employment litigation, both appellate courts[33] and commentators have identified evidence of judicial bias against hostile work environment claims.[34]

In campus sexual violence proceedings, "[t]he experience of dealing with the school can be traumatizing," as victims may encounter unsympathetic and intimidating processes that lack support for complainants.[35] And both subtle and blatant pressures work on victims: a recent investigation included reports of college or university deans expressing disbelief in victims' accounts and suggesting victims receive counseling or take a semester off.[36]

(regarding "interim" policy); Jeff Zalesin, *Pomona Changes Evidentiary Standards for Sexual Misconduct*, THE 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.

[33] *See, e.g.*, *Gallagher v. Delaney*, 139 F.3d 338, 343 (2d Cir. 1998) ("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 gender bias by trial judge in sexual harassment cases were meritorious and reversing judgment on that basis).

[34] For example, commentators have observed that trial courts tend to dispose of plaintiffs' cases through an aggressive use of summary judgment. *See, e.g.*, 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). Further, in those claims that reach trial, judges often exclude expert testimony about sexual harassment, even though such testimony could serve to correct jurors' misconceptions about sexual harassment and sex discrimination more generally. *See* 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). Juries incorporate their own biases and belief in "rape myths" into their resolution of sexual assault cases. *See* 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); 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."). And studies have shown that an assault victim's alcohol use decreased her credibility in the eyes of a jury, which also perceived her as "being more to blame." Destin & Stewart, *supra*, at 865. Finally, some have suggested that fact finders may view sexual harassment and assault victims as less credible because of their speaking style in testimony. *See* Susan Deller Ross, *Proving Sexual Harassment: The Hurdles*, 65 S. CAL. L. REV. 1451, 1455 (1992).

[35] *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/.

[36] *See id.*

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Under these circumstances, to suggest that schools' resolutions of such allegations should require a higher burden of proof than a preponderance of the evidence would be particularly inappropriate and unfair for complainants, leading to continued discrimination and very unfortunate consequences for the targets of violence and other forms of harassment.

* * *

OCR's April 4 Dear Colleague Letter provides schools with necessary guidance for Title IX compliance and represents a step forward in the effort to ensure that schools create safe educational environments for all students. The preponderance of the evidence is the correct standard for the resolution of school sexual assault and violence claims, because that is the standard required for Title IX and other civil rights claims, as well as most civil court cases. It is not new; OCR deemed it to be the appropriate standard long ago, and many schools have been using it for years. The Due Process Clause does not require a higher standard, which the Supreme Court has mandated in only a few discrete circumstances unlike the proceedings at issue here. And requiring the use of a higher standard of proof would be inequitable given the hurdles already faced by victims of sexual harassment and violence.

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

Sincerely,

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cc. Sunil Mansukhani, Deputy Assistant Secretary for Policy
Jacqueline Michaels, Title IX Team Leader