



EDUCATION

MYTHBUSTING: TITLE IX AND SEXUAL ASSAULT

Myth: President Obama invented the idea that Title IX covers sexual assault.

Fact: Courts have long recognized that Title IX of the 1972 Education Amendment's prohibition on sex discrimination requires schools to respond to reports of sexual harassment, including sexual assault. The Supreme Court has agreed in a number of cases, starting in 1992 with its opinion in *Franklin v. Gwinnett County Public School*.¹ Courts confirmed that this obligation includes sexual harassment committed by students by the mid-1990s.² Any lingering doubts about Title IX's application to student-on-student sexual harassment ended in 1999, when the Supreme Court endorsed this principle.³ The Department of Education had also long told schools they must respond to sexual assault, including in 1997 and 2001 guidance.⁴ In 2011, the Department of Education released a letter, known as the "Dear Colleague Letter," that summarized and clarified these existing responsibilities.

Myth: Schools do not have the capacity or expertise to handle these kinds of serious claims.

Fact: Schools have long handled all kinds of disciplinary violations that threaten their students' safety. In fact, universities even handle murder investigations: a criminal trial can take years, and they need to protect their students before any conviction that might come down.⁵ To single out sexual assault claims for different treatment is discriminatory and suggests that survivors are less worthy of being believed.

Myth: Sexual violence is uncommon in schools.

Fact: We wish this myth were true. Unfortunately, studies have repeatedly shown that a disturbingly high proportion of students are sexually assaulted. A 2016 survey by the U.S. Department of Justice found that 24% of transgender and gender nonconforming students, 23% of cisgender female students, and 6% of cisgender male students report

experiencing sexual misconduct during their time in college.⁶ When 27 top universities surveyed their student bodies, a fifth of women reported that they had been sexually victimized.⁷ And the problem starts well before college. A recent national survey by NWLC found that one in five girls ages 14-18 has been kissed or touched without her consent.⁸ Lesbian, gay, bisexual, and transgender girls report these forms of sexual assault at even higher rates, as do Latina, Black, and Native American girls.⁹

While statistics are helpful to understand the scope of the problem, at the end of the day, one is too many.

Myth: The Dear Colleague Letter ("DCL") required schools to use an unusually low standard of evidence.

Fact: The DCL simply made clear what the Department of Education had long required: schools must use the "preponderance of the evidence" ("POE") standard in investigations of sexual harassment, including sexual violence. That means the school must find in favor of the complaining student if most of the evidence supports such a finding. While some schools pretended to be surprised, the Department had required POE since at least 1995, throughout both Democratic and Republican presidencies.

Despite what news media sometimes report, POE is the standard favored by schools for all disciplinary hearings. Even before the DCL, most schools that identified a standard of evidence used POE.¹⁰ And student conduct professionals have long endorsed using the preponderance standard for all student misconduct, including sexual assault, and continue to do so.¹¹

Preponderance of the evidence is also the standard used in almost all civil trials – that is, court proceedings where the possible consequences do not include incarceration. That means if a rape victim sues his or her assailant in court, the court will use the POE standard, whether or not a prosecutor is also pursuing criminal charges.

Resolving sexual harassment reports using the POE standard is necessary to assure fairness and equality. Only that standard



places both parties on a level playing field, acknowledging that both students' educations are equally important and that both sides are equally credible.¹² A standard that equally values both parties is particularly necessary in the case of disciplinary proceedings that implicate students' civil rights – rights that demand universities protect and value those students systemically unprotected and undervalued, those historically excluded from education and public life.

By contrast, a heightened standard of evidence prioritizes accused students over alleged victims and creates too much room for the very biases, including credibility-robbing rape myths, that Title IX is intended to address.¹³ A higher standard, such as “clear and convincing,” would do the most harm to the students whose credibility is most likely to be doubted, including and especially LGBT people and women of color.¹⁴ A clear and convincing standard would render findings of responsibility much, much less likely, especially where the university is uniquely invested in protecting an accused student like a varsity athlete or child of alumni. Without a doubt, complainants would be less likely to come forward.

Myth: The Dear Colleague Letter and Title IX require schools to violate the due process rights of accused students.

Fact: All student parties to a disciplinary proceeding, regardless of the issues involved, must be treated fairly. Some courts have found that schools have mistreated students accused of disciplinary violations, including sexual misconduct. However, none of these violations were because of Title IX¹⁵ – and in many cases schools' actions violated the civil rights law. The answer is not to undermine Title IX but to enforce it.

Central to the letter and spirit of Title IX is the need to value the educations of both student victims and students accused of sexual misconduct. Agency regulations,¹⁶ guidance,¹⁷ and enforcement¹⁸ make clear that both parties are entitled to a fair and transparent disciplinary process that treats the two sides equally. Any right or opportunity provided to one party must be provided to the other.¹⁹ Thanks to specific procedural protections required by Title IX and emphasized by the DCL, students accused of sexual violence have greater protections than classmates accused of other disciplinary infractions such as simple assault.²⁰ Importantly, the Supreme Court has noted that school disciplinary processes need not and should not look like criminal trials to be fair.²¹

Myth: Recent Department of Education guidance documents and enforcement agreements set up a new standard that would allow a student to be punished for asking someone on a date or giving someone a valentine.

Fact: In order for sexual harassment to rise to the level of a “hostile environment”—which would require a college to take steps calculated to stop the harassment—it must be “unwelcome conduct of a sexual nature” that is “severe” or “pervasive” enough to “deprive a student of her access to education.”²² Certainly a valentine or asking someone out on a date would not rise to this standard. These legal interpretations, which the Department of Education consistently relies on in its guidance documents and resolutions, have been used by the Department for decades.²³

Myth: Department of Education guidance stifles students' right to free speech.

Fact: Sexual assault and harassment are not protected speech.²⁴ But even if a student were to claim that they were, the expression must rise to the level of unwelcome sexual conduct that is “severe” or “pervasive” in order to constitute a hostile environment.²⁵ That high standard excludes the free exchange of ideas so important to campus communities. Accordingly, federal courts have held that policies narrowly tailored to address harassment or prevent similar disruptions in the classroom are consistent with the First Amendment in both secondary²⁶ and post-secondary institutions.²⁷

Myth: Survivors would all be better off if they just reported to the police.

Fact: Currently, survivors can choose whether and how to report to the police—and some do choose to involve law enforcement. However, there are many reasons a survivor may choose to do otherwise.

For starters, prosecutors rarely bring charges and juries rarely convict in rape cases.²⁸ Some survivors may decide that being involved in a criminal trial is not worth the emotional and educational toll given the low chance of a conviction. Plus, most survivors know their assailants, and may fear retaliation or may not necessarily want to see their assailants go to prison. Among some communities of color and LGBTQ communities, there is a deep mistrust of law enforcement stemming from a history of police violence and harassment and officers' frequent skepticism of rape survivors. International or undocumented students may fear that being involved in a criminal investigation could jeopardize their visa status or expose them or their families to threats of deportation.

It's not surprising, then, that in a March 2015 survey conducted by Know Your IX and the National Alliance to End Sexual Violence, 88% of survivors said that if schools were forced to report sexual assaults to the police against the victim's wishes, fewer students would report incidents to their schools.²⁹



- ¹ 503 U.S. 60 (1992).
- ² *E.g.* Bosley v. Kearney R-1 Sch. Dist., 904 F. Supp. 1006, 1025 (W.D. Mo. 1995), *aff'd*, 140 F.3d 776 (8th Cir. 1998); Doe By & Through Doe v. Petaluma City Sch. Dist., 830 F. Supp. 1560, 1576 (N.D. Cal. 1993).
- ³ Davis Next Friend LaShonda D. v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 646-47 (1999).
- ⁴ Office for Civil Rights, Revised Sexual Harassment Guidance, Dept. of Educ. 2, 6 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- ⁵ Michelle Anderson, *I'm a college president. Betsy DeVos should help me deal with campus sexual assault*, Washington Post (July 13, 2017), https://www.washingtonpost.com/news/posteverything/wp/2017/07/13/im-a-college-president-devos-shouldnt-stop-me-from-dealing-with-sexual-assault/?utm_term=.0cb88a3d96b6.
- ⁶ Christopher Krebs, et al., U.S. Department of Justice, *Bureau of Justice Statistics, Campus Climate Survey Validity Study Final Technical Report* (2016), <https://www.bjs.gov/content/pub/pdf/ccsvsfr.pdf>.
- ⁷ See Nick Anderson and Susan Svrluga, *What a massive sexual assault survey found at 27 top universities*, The Washington Post (Sept. 21, 2015), https://www.washingtonpost.com/news/gradpoint/wp/2015/09/21/what-a-massive-sexual-assault-survey-showed-about-27-top-universities/?utm_term=.07c97b1f0c90.
- ⁸ See Kayla Patrick and Neena Chaudhry, National Women's Law Center, *Let Her Learn: Stopping School Pushout for Girls Who Have Suffered Harassment and Sexual Violence 1* (2017), https://nwlc.org/wpcontent/uploads/2017/04/final_nwlc_Gates_HarassmentViolence.pdf.
- ⁹ *Id.* at 3.
- ¹⁰ Michelle J. Anderson, *Campus Sexual Assault Adjudication and Resistance to Reform*, 125 Yale L.J. 1940, 198688 (2016); FIRE: Foundation for Individual Rights in Education, APPENDIX, available at <http://www.thefire.org/pdfs/8d799cc3bcca596e58e0c2998e6b2ce4.pdf>; Angela F. Amar, et al., *Administrators' Perceptions of College Campus Protocols, Response, and Student Prevention Efforts for Campus Sexual Assault*, 29 (4) *Violence and Victims* 579, 584-85 (2014); Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 (2004); Heather M. Karjane et al., *Campus Sexual Assault: How America's Institutions of Higher Education Respond* 122 tbl.6.12 (2002), available at <http://www.hhd.org/sites/hhd.org/files/mso44.pdf>; Title IX & the preponderance of the evidence: a white paper 7-8 (Aug. 7, 2016), available at <http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf>.
- ¹¹ Deborah L. Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 Mont. L. Rev. 109, 128 (2017) (discussing an influential Model Student Conduct Code published in 2004); Chris Loschiavo & Jennifer L. Waller, Association for Student Conduct Administration, *The Preponderance of the Evidence Standard: Use in Higher Education Campus Conduct Processes*, <http://www.theasca.org/files/The%20Preponderance%20of%20Evidence%20Standard.pdf>.
- ¹² Brake, *Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard*, 78 Mont. L. Rev. at 133-37 (arguing that only the preponderance of the evidence standard holds in equipoise the credibility of the parties and the relative interests at stake).
- ¹³ *Id.* at 131.
- ¹⁴ *Id.* at 137-39.
- ¹⁵ Erin E. Buzuvis, *Title IX and Procedural Fairness: Why Disciplined-Student Litigation Does Not Undermine the Role of Title IX in Campus Sexual Assault*, 78 Mont. L. Rev. 71 (2017).
- ¹⁶ 34 C.F.R. § 106.8(b).
- ¹⁷ *E.g.* Office for Civil Rights, *Dear Colleague Letter*, Dep't of Educ. 8-14 (Apr. 4, 2011), <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf>.
- ¹⁸ In the fall of 2016, the Department of Education's Office for Civil Rights (OCR) announced that Wesley College had violated Title IX when, among other violations, it denied a student accused of livestreaming sex without the victim's consent proper notice of his hearing. Letter to Robert E. Clark II from Beth Gelman-Beer (Oct. 12, 2016), <https://www2.ed.gov/about/offices/list/ocr/docs/investigations/more/O3152329-a.pdf>.
- ¹⁹ *E.g.* Office for Civil Rights, *Questions and Answers on Title IX and Sexual Violence*, Dep't of Edu., 26 (Apr. 29, 2014), <http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf>.
- ²⁰ Alexandra Brodsky, *A Rising Tide: Learning about Fair Disciplinary Process from Title IX*, 77 *Journal of Legal Education* (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3012818.
- ²¹ *E.g.* Goss v. Lopez, 419 U.S. 565, 583 (1975) ("To impose in each such case even truncated trial-type procedures might well overwhelm administrative facilities in many places and, by diverting resources, cost more than it would save in educational effectiveness. Moreover, further formalizing the suspension process and escalating its formality and adversary nature may not only make it too costly as a regular disciplinary tool but also destroy its effectiveness as part of the teaching process."); see also *Nash v. Auburn Univ.*, 812 F.2d 655, 664 (11th Cir. 1987) (holding that accused students' rights in a disciplinary hearing "are not co-extensive with the rights of litigants in a civil trial or with those of defendants in a criminal trial"); *Brewer by Dreyfus v. Austin Indep. Sch. Dist.*, 779 F.2d 260, 263 (5th Cir. 1985) (urging parties not to "confuse[] two quite distinct processes: school disciplinary actions and criminal sentencing proceedings").
- ²² Office for Civil Rights, Revised Sexual Harassment Guidance, Dept. of Educ. 2, 6 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- ²³ See, e.g., *id.*
- ²⁴ *E.g.* *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 206 (3d Cir. 2001); see also *Wisconsin v. Mitchell*, 508 U.S. 476, 484 (1993) ("[A] physical assault is not by any stretch of the imagination expressive conduct protected by the First Amendment.").
- ²⁵ Office for Civil Rights, Revised Sexual Harassment Guidance, Dept. of Educ. 6 (Jan. 19, 2001), <https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf>.
- ²⁶ *E.g.*, *Barr v. Lafon*, 538 F.3d 554, 569 (6th Cir. 2008); *West v. Derby Unified Sch. Dist. No. 260*, 206 F.3d 1358, 1365 (10th Cir. 2000).
- ²⁷ *E.g.*, *Koepfel v. Romano*, No. 6:15-cv-1800-Orl-40KRS, 2017 WL 2226681, *9 (M.D. Fla. May 11, 2017); *Marshall v. Ohio University*, No. 2:15-cv-775, 2015 WL 1179955, *5-*7 (S.D. Ohio 2015).
- ²⁸ Reporting Rates, Rape, Abuse, & Incest National Network, <https://rainn.org/get-information/statistics/reporting-rates> (aggregating data from U.S. Dep't of Justice, Bureau of Justice Statistics, National Crime Victimization Surveys from 2008-2012, Fed. Bureau of Investigation, Uniform Crime Reports from 2006-2010; and U.S. Dep't of Justice, Felony Defendants in Large Urban Counties from 2002-2006).
- ²⁹ Resisting State-Level Mandatory Police Referral Efforts, Know Your IX, <http://knowyourix.org/ask-survivors>.

