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Sent by U.S. Mail and Facsimile (202-453-6012)

Dear Assistant Secretary Ali:

As you can see from the list of our Directors and Board of Advisors, the Foundation for Individual Rights in Education (FIRE) unites civil rights and civil liberties leaders, scholars, journalists, and public intellectuals from across the political and ideological spectrum on behalf of freedom of speech, due process, freedom of assembly, legal equality, freedom of conscience, and academic freedom on America's college campuses. Our website, thefire.org, will give you a greater sense of our mission and activities.

FIRE writes to voice our deep concerns regarding the Office for Civil Rights' (OCR's) "Dear Colleague" letter of April 4, 2011, and the deleterious impact the letter's guidance to colleges and universities will have on student rights. Specifically, FIRE is troubled by the letter's failure to explicitly instruct administrators that public universities may not violate the First Amendment rights of students and that private universities must honor their promises of freedom of expression to students. Given OCR's past sensitivity to the unequivocal importance of freedom of expression to higher education, this is a disappointing development.

FIRE is still more worried about the impact of OCR's guidance on students' right to due process. Indeed, the letter has already prompted several institutions to curtail the procedural due process rights afforded students accused of sexual harassment or sexual violence; given OCR's regulatory authority and influence, all institutions of higher education accepting federal funding are likely to follow. While it is of course necessary for colleges and universities to address allegations of sexual harassment and sexual violence with all requisite purpose, seriousness, and speed, the rights of those accused cannot be sacrificed simply as a function of the accusation itself.

I will detail each of FIRE's concerns in turn.

I. Freedom of Expression

In discussing the legal obligations borne by colleges and universities under Title IX to respond to both sexual harassment and sexual violence committed against students, OCR fails to explicitly recognize that public universities may not violate the First Amendment rights of their students and that private universities must honor their promises of freedom of expression to students. The April 4 letter fails to include any discussion of the free expression considerations involved when evaluating or investigating allegedly harassing behavior. Nor does the letter reference or cite for further guidance OCR's 2003 "Dear Colleague" letter regarding the intersection of freedom of expression and harassment policies.[1] The 2003 letter was necessitated by a steady stream of lawsuits and controversies regarding the punishment of offensive, unpopular, or "politically incorrect" (but protected) speech on campus as instances of harassment. In the letter, former Assistant Secretary Gerald A. Reynolds addressed confusion regarding the role of OCR regulation with regard to campus speech, noting that "some colleges and universities have interpreted OCR's prohibition of 'harassment' as encompassing all offensive speech regarding sex, disability, race or other classifications." Assistant Secretary Reynolds made clear that "OCR's regulations and policies do not require or prescribe speech, conduct or harassment codes that impair the exercise of rights protected under the First Amendment." Assistant Secretary Reynolds further noted that "OCR is committed to the full, fair and effective enforcement of these statutes *consistent with the requirements of the First Amendment*." (Emphasis added.)

Worryingly, by failing to recognize the freedom of expression concerns implicated in investigating and punishing protected speech, the April 4 letter does not replicate the speech-protective understandings of hostile environment sexual harassment contained in previous OCR guidance letters, including both OCR's 2001 *Revised Sexual Harassment Guidance* (*2001 Guidance*) and the 2003 "Dear Colleague" letter. In the *2001 Guidance*, OCR emphasized that in determining whether a hostile environment has been created, the severity, pervasiveness, and both objective and subjective impact of the behavior in question must be considered.[2] OCR explicitly noted that its understanding of hostile

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[1] The 2003 letter is available on OCR's website at http://www2.ed.gov/about/offices/list/ocr/firstamend.html.

[2] The *2001 Guidance* noted:

> OCR considers a variety of related factors to determine if a hostile environment has been created, i.e., if sexually harassing conduct by an employee, another student, or a third party is sufficiently serious that it denies or limits a student's ability to participate in or benefit from the school's program based on sex.[] OCR considers the conduct from both a *subjective* and *objective* perspective. In evaluating the *severity* and *pervasiveness* of the conduct, OCR considers all relevant circumstances, i.e., "the constellation of surrounding circumstances, expectations, and relationships." (Emphasis added; internal citations omitted.)

Among other factors, the *2001 Guidance* highlighted the importance of the "type, frequency, and duration of the conduct"; whether the conduct was welcome; the age and sex of both the accuser and the accused; and the "degree to which the conduct affected one or more students[']education." In sum, the *2001*

environment harassment was informed by and consistent with the Supreme Court of the United States' decision in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999).[3] In *Davis*, the Court found that behavior constitutes hostile environment sexual harassment when it is "so severe, pervasive, and objectively offensive, and . . . so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities," and that institutions displaying deliberate indifference to actual knowledge of such behavior could be found liable for monetary damages.[4] This exacting, speech-protective definition ensures an appropriate balance between freedom of expression on campus and the importance of establishing an educational environment free from harassment. Illustrating this balance, Assistant Secretary Reynolds made clear in the 2003 "Dear Colleague" letter that "OCR has recognized that the offensiveness of a particular expression, standing alone, is not a legally sufficient basis to establish a hostile environment under the statutes enforced by OCR."

Given this well-established recognition of speech-related concerns, it is thus deeply troubling that the April 4 letter does not acknowledge OCR's previous statements on freedom of expression. While referring recipients to the *2001 Guidance* generally, the new letter does not itself reiterate or reaffirm these more speech-protective conceptions of hostile environment sexual harassment. As a result of this deficiency, FIRE worries that schools seeking to comply with OCR's increased emphasis on sexual harassment education and prevention will fail to promulgate and disseminate sexual harassment policies that provide sufficient protection for student speech. This result would contradict previous OCR guidance, longstanding legal precedent,[5] and the normative conception of the primacy of freedom of expression in higher education.

Guidance asked recipient institutions to consider "the totality of the circumstances in which the behavior occurs," noting that it is "always important to use common sense and reasonable judgement in determining whether a sexually hostile environment has been created."

[3] Specifically, the *2001 Guidance* stated:

> [T]he definition of hostile environment sexual harassment used by the Court in *Davis* is consistent with the definition found in the proposed guidance. Although the terms used by the Court in *Davis* are in some ways different from the words used to define hostile environment harassment in the 1997 guidance (see, e.g., 62 FR 12041, "conduct of a sexual nature is sufficiently severe, persistent, or pervasive to limit a student's ability to participate in or benefit from the education program, or to create a hostile or abusive educational environment"), the definitions are consistent.

[4] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

[5] That the First Amendment's protections fully extend to public universities is settled law. *See Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[W]e have recognized that the university is a traditional sphere of free expression so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment"); *see also Widmar v. Vincent*, 454 U.S. 263, 268–69 (1981) ("With respect to persons entitled to be there, our cases leave no doubt that the First Amendment rights of speech and association extend to the campuses of state universities"); *Healy v. James*, 408 U.S. 169, 180 (1972) ("[T]he precedents of this Court leave no room for the view that, because of the acknowledged need for order, First Amendment protections should apply with less force on college campuses than in the community at large. Quite to the contrary, 'the vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools.'") (citation omitted).

While concerns about free speech may seem unrelated to the thorough discussion of sexual violence emphasized in the April 4 letter, overly broad or vaguely constructed definitions of sexual harassment have served as a consistent justification for abuses of student free speech rights for more than two decades. FIRE's experience over the past dozen years shows that unless hostile environment harassment is properly defined, overly broad or vague regulations are all too often used to justify the punishment of protected speech. For example, a Muslim student at William Paterson University in New Jersey was charged with sexual harassment for privately replying to an email from a professor that promoted a film about a lesbian relationship.[6] In another case, a student-employee at Indiana University–Purdue University Indianapolis was found guilty of harassment merely for publicly reading the book *Notre Dame vs. the Klan: How the Fighting Irish Defeated the Ku Klux Klan*, an account of the Klan's defeat in a 1924 street fight with University of Notre Dame students.[7] Elsewhere, a student at the University of New Hampshire was found guilty of "harassment" for posting flyers in his dormitory jokingly suggesting that women could lose the "freshman 15" by taking the stairs instead of the elevators when going only one or two floors.[8] Further, overbroad and vague harassment policies have consistently been invalidated by federal courts on constitutional grounds;[9] indeed, the United States Court of Appeals for the Third Circuit has twice in the span of three years found university harassment policies to be in violation of students' First Amendment rights.

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[6] *See* "William Paterson University: Punishment on Harassment Charges for Response to Mass E-Mail," http://thefire.org/case/682.html; *see also* Wayne Parry, *'Harassment' reprimand dropped against college worker*, ASSOC. PRESS, Dec. 7, 2005, *available at* http://thefire.org/article/6555.html.

[7] *See* "Indiana University - Purdue University Indianapolis: Student Employee Found Guilty of 'Racial Harassment' for Reading a Book," http://thefire.org/case/760; *see also* Deanna Martin, *IUPUI says sorry to janitor scolded over KKK book*, ASSOC. PRESS, July 14, 2008, *available at* http://www.huffingtonpost.com/huff-wires/20080714/kkk-book-apology.

[8] *See* "University of New Hampshire: Eviction of Student for Posting Flier," http://thefire.org/case/651.html; *see also* Scot Lehigh, *Humor vs. Free Speech at UNH*, BOSTON GLOBE, Nov. 17, 2004, http://www.boston.com/news/globe/editorial_opinion/oped/articles/2004/11/17/humor_vs_free_speech_at_unh; *UNH Student Back – in New Dorm*, UNION LEADER, Nov. 16, 2004, at B1.

[9] *McCauley v. Univ. of the V.I.*, 618 F.3d 232 (3d Cir. 2010) (upholding district court's invalidation of university harassment policy on First Amendment grounds); *DeJohn v. Temple Univ.*, 537 F.3d 301, 319 (3d Cir. 2008) (striking down former sexual harassment policy on First Amendment grounds and holding that because policy failed to require that speech in question "objectively" created a hostile environment, it provided "no shelter for core protected speech"); *Dambrot v. Cent. Mich. Univ.*, 55 F.3d 1177 (6th Cir. 1995) (declaring university discriminatory harassment policy facially unconstitutional); *Roberts v. Haragan*, 346 F. Supp. 2d 853 (N.D. Tex. 2004) (finding university sexual harassment policy unconstitutionally overbroad); *Bair v. Shippensburg Univ.*, 280 F. Supp. 2d 357 (M.D. Pa. 2003) (enjoining enforcement of university harassment policy due to overbreadth); *Booher v. Bd. of Regents*, 1998 U.S. Dist. LEXIS 11404 (E.D. Ky. Jul. 21, 1998) (finding university sexual harassment policy void for vagueness and overbreadth); *Corry v. Leland Stanford Junior Univ.*, No. 740309 (Cal. Super. Ct. Feb. 27, 1995) (slip op.) (declaring "harassment by personal vilification" policy unconstitutional); *UWM Post, Inc. v. Bd. of Regents of the Univ. of Wis. Sys.*, 774 F. Supp. 1163 (E.D. Wis. 1991) (declaring university racial and discriminatory harassment policy facially unconstitutional); *Doe v. Univ. of Mich.*, 721 F. Supp. 852 (E.D. Mich. 1989) (enjoining enforcement of university discriminatory harassment policy due to unconstitutionality).

Colleges and universities are both legally and morally obligated to address sexual harassment and sexual violence on campus. The vast majority are also legally and morally obligated to protect freedom of expression. As OCR's previous guidance has made clear, these responsibilities need not be in tension. FIRE asks that OCR again make clear to college and university administrators that their obligation to respond to student-on-student sexual harassment does not obviate or lessen their obligation to respect freedom of expression. We further ask that OCR clarify that while sexual harassment may include "sexual advances, requests for sexual factors, and other verbal, nonverbal, or physical conduct of a sexual nature," expression protected by the First Amendment becomes actionable sexual harassment only if it is (1) unwelcome; (2) of a sexual nature or (3) discriminatory on the basis of gender; (4) directed at an individual; and (5) "so severe, pervasive, and objectively offensive, and that so undermines and detracts from the victims' educational experience, that the victim-students are effectively denied equal access to an institution's resources and opportunities."[10] Were OCR to mandate that colleges and universities implement no more and no less than the above standard, OCR would considerably lessen confusion with regard to the applicable legal standard as well as with regard to recipient institutions' obligations both to address hostile environment harassment and to protect student speech. The resulting clarity and certainty would allow institutions to comply with OCR regulations intended to protect students from sexual assault and harassment while protecting student speech and insulating themselves against the possibility of First Amendment litigation.

II. Right to Due Process

OCR's April 4 letter mandates that recipient institutions implement certain procedures governing responses to allegations of sexual harassment and sexual violence. While some of these newly announced requirements are beyond the scope of FIRE's mission, others implicate due process rights and call into question the basic fairness of disciplinary proceedings against those students accused of sexual harassment and sexual violence. Given the extreme gravity of such accusations and the potential impact of a guilty finding, FIRE is deeply concerned that OCR's new requirements erode necessary due process protections.

A. Standard of Proof

OCR's April 4 letter mandates that colleges and universities receiving federal assistance must employ a "preponderance of the evidence" standard within their grievance procedures governing sexual harassment and sexual violence in order to satisfy their legal obligations under Title IX. Specifically, the April 4 letter dictates:

> [I]n 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 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),

[10] *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 651 (1999).

> 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 evidence is the appropriate standard for investigating allegations of sexual harassment or violence.

The letter makes clear that schools maintaining a higher evidentiary standard—such as the "clear and convincing" standard—for disciplinary procedures involving allegations of sexual harassment and sexual violence will be subject to OCR review. As the letter states: "In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints."

In mandating that schools adopt a preponderance of the evidence standard in their grievance procedures governing sexual harassment and sexual violence allegations, OCR has broken significant—and troubling—new ground. In contrast to the April 4 mandate, the *2001 Guidance* is silent with regard to the standard of proof required of schools' grievance procedures. While the *2001 Guidance* stated that recipient institutions must maintain "grievance procedures providing for prompt and equitable resolution of complaints of discrimination on the basis of sex," it did not specify that a specific burden of proof must be employed in university grievance procedures. Indeed, the *2001 Guidance* granted schools considerable autonomy in determining the particular protocols to be utilized on their campuses, noting that "[p]rocedures adopted by schools will vary considerably in detail, specificity, and components, reflecting differences in audiences, school sizes and administrative structures, State or local legal requirements, and past experience." However, the April 4 letter's mandate revokes this discretion—and with it, schools' ability to grant students due process protections that are appropriate for the gravity of the offenses of which they are accused.

In support of lessening the burden of proof required during grievance procedures addressing sexual harassment and sexual violence, OCR invokes several arguments. None is convincing, and none supports OCR's dramatic new erosion of due process protections for those students accused of committing sexual harassment or sexual violence.

First, OCR argues that the lower evidentiary standard is not just permissible, but in fact required because "[t]he Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq.* Like Title IX, Title VII prohibits discrimination on the basis of sex." Of course, much civil litigation (including civil litigation concerning allegations of discrimination on the basis of protected class status) incorporates a preponderance of the evidence standard. As the Supreme Court has observed, however, the reliance on the preponderance of the evidence standard in civil litigation is due in significant part to the fact that "[t]he typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the

outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion."[11]

Indeed, the Supreme Court has recognized that "adopting a 'standard of proof is more than an empty semantic exercise.'"[12] That is, "[t]he function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding, is to 'instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication.'"[13] "[M]indful that the function of legal process is to minimize the risk of erroneous decisions," the Court has noted that an intermediate standard of proof (*e.g.*, the "clear and convincing" standard) may be employed "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant," because the "interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof."[14] In cases where "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively slight," the Court has held that use of the preponderance of the evidence standard is "inconsistent with due process."[15] The Court itself has utilized the "'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases."[16]

In the educational context, the Supreme Court has further held that when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school."[17] The Court made these observations about due process protections at the elementary and secondary school level, finding at least minimal requirements of due process necessary because disciplinary action "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment."[18] Given the increased likelihood of much further-reaching negative consequences for a college student found guilty of sexual harassment or sexual violence in a campus judicial proceeding, greater protections are required, not lesser.[19]

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[11] *Addington* v. *Texas*, 441 U.S. 418, 423 (1979).
[12] *Id.* at 425 (*quoting Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part), *cert. dismissed sub nom*. *Murel v. Balt. City Criminal Court*, 407 U.S. 355 (1972)).
[13] *Id.* at 423 (*quoting In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).
[14] *Id.* at 424, 425.
[15] *Santosky v. Kramer*, 455 U.S. 745, 758 (1982).
[16] *Addington*, 441 U.S. at 424.
[17] *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)).
[18] *Id.* at 575.
[19] Even if the preponderance of the evidence standard is appropriate in some instances for the campus judiciary, accusations of sexual violence should be treated differently than sexual harassment when determining the appropriate standard of proof, at the very least, given the implication of criminal activity.

Further, OCR contends that the use of the preponderance of the evidence standard by schools adjudicating complaints of sexual harassment or sexual violence is required because of the standard's use by courts in adjudicating workplace sexual discrimination cases arising under Title VII. To support this argument, OCR cites the Supreme Court's approval of the preponderance of the evidence standard in the context of Title VII litigation in *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 99 (2003) and *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252–55 (1989). However, both *Desert Palace* and *Price Waterhouse* involve claims for monetary damages brought by employees against their employers as a result of workplace sexual discrimination. As such, these cases concern precisely the type of "monetary dispute between private parties" that the Supreme Court has identified as properly the province of the preponderance of the evidence standard.[20] In contrast, OCR's April 4 letter mandates that this lesser standard of proof be used in hearings that will dictate a student's guilt or innocence with regard to allegations of potentially criminal misconduct.[21]

In an attempt to add further support to the claim that the use of the preponderance of the evidence standard in Title VII case law mandates its use by recipient institutions under Title IX, OCR also cites its *2001 Guidance*. In the *2001 Guidance*, OCR correctly noted that "the *Davis* Court also indicated, through its specific references to Title VII caselaw, that Title VII remains relevant in determining what constitutes hostile environment sexual harassment under Title IX." But while Title VII caselaw aided the *Davis* Court in identifying the contours of hostile environment sexual harassment in the educational context, the *Davis* Court was entirely silent as to whether evidentiary standards used to adjudicate claims for monetary damages arising under Title VII are thus mandated by Title IX for schools adjudicating claims of sexual harassment and sexual violence, as

[20] *See Addington* v. *Texas*, 441 U.S. 418, 423 (1979).

[21] Moreover, in citing the use of the lower burden of proof approved by the Court in *Desert Palace* and *Price Waterhouse*, OCR disregards a fundamental difference between workplaces governed by Title VII and colleges and universities governed by Title IX: While a private employer is subject to Title VII liability for a private action for damages when a plaintiff proves that "discrimination based on sex has created a hostile or abusive work environment," *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986), a college or university is only subject to a private action for damages under Title IX liability when its "deliberate indifference 'subjects' its students to harassment." *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 644 (1999) (noting that Title IX's "plain language confines the scope of prohibited conduct based on the recipient's degree of control over the harasser and the environment in which the harassment occurs."). In other words, while an employee suing for damages under Title VII must demonstrate only that Title VII's protections were violated, a student seeking similar relief under Title IX must prove that Title IX's protections were violated *and* that the institution was "deliberately indifferent" to such violations. But, even given the more stringent liability attached to private employers with regard to hostile environment harassment, courts have held that employer investigations into harassing conduct need not be "perfect" to avoid liability, only that the employer response be "reasonably calculated to prevent further harassment." *Knabe v. Boury Corp.*, 114 F.3d 407, 412 (3d Cir. 1997) (internal citations omitted); *see also Harris v. L & L Wings*, 132 F.3d 978, 984 (4th Cir. 1998) ("the legal standard of 'prompt and adequate remedial action' in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser."). Further, courts have noted that in the context of private actions for damages under Title IX, the "deliberate indifference standard is a high one." *Doe ex rel. Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380, 384 (5th Cir. 2000) (holding that even an "ineffective" investigation did not constitute "deliberate indifference"). Given these holdings and OCR's reliance on Title VII case law, OCR's contention that Title IX demands a lower standard of proof for all judicial hearings in order to be sufficiently "prompt and equitable" is without merit.

OCR now claims. Nor does OCR's citation of the United States Court of Appeals for the Fourth Circuit's observation in *Jennings v. University of North Carolina*, 482 F.3d 686, 695 (4th Cir. 2007) that the Fourth Circuit "look[s] to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX" provide significant support for OCR's new mandate. Simply put, the fact that courts have reviewed Title VII caselaw to inform their analysis of Title IX claims does not justify—far less necessitate—OCR's new determination that "equitable grievance procedures" under Title IX require colleges and universities to institute a lower burden of proof in hearings adjudicating allegations of sexual harassment and sexual violence.

Finally, OCR argues that the preponderance of the evidence standard is warranted because OCR itself "also uses a preponderance of the evidence standard when it resolves complaints against recipients." The April 4 letter explains:

> For instance, OCR's Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings. Thus, 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 sexual harassment or violence occurred).

But the comparison between the standard OCR uses in determining whether recipient institutions are in compliance with Title IX requirements and the standard the recipient institution itself uses when determining whether a student has committed sexual harassment or sexual assault is inapposite. In determining compliance, OCR is engaged in a matter of administrative review; at stake is federal funding, not an individual's continued matriculation, reputation, and employment prospects. As such, OCR's own use of a lower standard of evidence may be justified. In contrast, when determining whether a student has in fact committed sexual harassment or sexual violence against another student, the college or university judicial body conducting the proceeding is engaged in precisely the "quasi-criminal" adjudication[22] for which the Supreme Court has deemed the "clear and convincing" standard to be appropriate.[23] The stakes for the accused are extremely high; the permanent, severely negative consequences of a guilty finding will follow the student for the rest of his or her life. As a result, a campus judicial hearing charged with deciding between guilt or innocence much more closely resembles a criminal proceeding than OCR's determinations of institutional compliance. Given the substantial differences between OCR's own noncompliance and fund termination hearings and the campus judicial proceedings against a student accused of sexual harassment or sexual violence, the fact that OCR itself employs the preponderance of the

[22] As described in the April 4 letter, schools "generally conduct investigations and hearings to determine whether sexual harassment or violence occurred."

[23] *Addington*, 441 U.S. at 424 (discussing use of intermediate "clear and convincing" standard of proof in civil cases involving "quasi-criminal wrongdoing by the defendant").

evidence standard in no way supports the conclusion that schools must also employ this standard in their own grievance procedures as a necessary condition of providing prompt and equitable resolutions as required by Title IX.

In cases involving allegations of criminal misconduct such as acts of sexual violence, the preponderance of the evidence standard fails to sufficiently protect the accused's rights and is thus inadequate and inappropriate. Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, OCR's insistence that schools reduce procedural protections for those students accused of sexual harassment and sexual violence is deeply troubling. Because of the seriousness of these charges, virtually all institutions will punish those students found guilty with lengthy suspensions, if not immediate expulsion. The interest held by both the accused student and society at large[24] in ensuring a correct and just result is therefore far greater than that implicated by a simple "monetary dispute," and a higher standard of proof is demanded. It is unconscionable, given the prospect of life-altering punishment, to require only that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question.[25]

Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual violence. Rather, the lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Insisting that the preponderance of the evidence standard be used in hearing sexual violence claims turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and

[24] The Supreme Court has recognized the crucial importance of higher education to the functioning of our modern liberal democracy. *See Grutter v. Bollinger*, 539 U.S. 306, 331 (2003) (*quoting Plyler* v. *Doe*, 457 U.S. 202, 221 (1982)) ("We have repeatedly acknowledged the overriding importance of preparing students for work and citizenship, describing education as pivotal to 'sustaining our political and cultural heritage' with a fundamental role in maintaining the fabric of society."); *see also Sweezy v. New Hampshire*, 354 U.S. 234, 250 (1957) ("To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation.").

[25] The problems presented by mandating a lower standard of proof for complaints involving sexual harassment are further exacerbated by the fact that many recipient institutions maintain expansive definitions of sexual harassment, prohibiting protected speech that does not rise to the level of actionable sexual harassment. *See* FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, SPOTLIGHT ON SPEECH CODES 2011: THE STATE OF FREE SPEECH ON OUR NATION'S CAMPUSES, *available at* http://thefire.org/public/pdfs/312bde37d07b913b47b63e275a5713f4.pdf (report detailing that of 286 public institutions of higher education surveyed, more than two-thirds maintain policies explicitly prohibiting protected speech). Additionally, some universities maintain inexact definitions of sexual assault, further compounding the problems introduced by requiring a lower standard of proof. *See, e.g.*, Robert Shibley, *Unwitting rapists and their oblivious victims*, WASHINGTON TIMES, Apr. 15, 2010, *available at* http://www.washingtontimes.com/news/2010/apr/15/unwitting-rapists-and-their-oblivious-victims; Cathy Young, *Duke's sexist sexual misconduct policy*, BOSTON GLOBE, Apr. 14, 2010, *available at* http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/04/14/dukes_sexist_sexual_misconduct_policy.

the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to OCR and recipient institutions.

B. Due Process More Generally

The April 4 letter provides useful clarity regarding several aspects of the hearing process OCR expects recipient institutions to administer. FIRE welcomes OCR's specific and explicit emphasis on the necessity of equal treatment for both the complainant and the accused student with regard to many aspects of the hearing process, including but not limited to access to information to be used in the hearing, access to counsel and participation of counsel, the ability to review the other party's statements, access to pre-hearing meetings, and equal opportunities to present witnesses and evidence.

Additionally, FIRE is pleased that OCR recommends that recipient institutions provide accused students with a procedure for appeal and instructs recipient institutions to "maintain documentation of all proceedings, which may include written findings of facts, transcripts, or audio recordings." These recommendations will help ensure that decisions unsupported by available evidence will not stand. FIRE is concerned, however, by OCR's insistence that "[i]f a school provides for appeal of the findings or remedy, it must do so for both parties." Given that accused students will now face an inappropriately low standard of proof, FIRE fears that allowing the accusing student to appeal a finding or remedy in favor of the accused tilts the scale still further toward the accusing student. We worry that because of the publicity that often surrounds claims of this nature and the resulting pressure on judiciary panelists to return a guilty verdict, such appeals would often essentially be reheard *de novo*.

Further, despite the welcome clarity OCR has provided with regard to several aspects of the hearing process, FIRE is concerned that OCR's letter nevertheless may leave recipient institutions uncertain as to their obligation to provide due process protections more generally. Specifically, OCR's April 4 letter states:

> Public and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.

This language is unnecessarily opaque and deeply troubling. By failing to make clear that all recipient institutions, both public and private, have both a legal and a moral duty to ensure that those students accused of sexual harassment and sexual violence be accorded at least a minimum level of due process protection, OCR invites the potential for abuse. FIRE's experience defending student rights for more than a decade demonstrates that colleges and universities will quickly dispense with due process protections for those

students accused of misconduct if they believe they may do so with impunity, or if they believe that OCR has sanctioned them to do so.[26]

Affording ample due process protections to those students accused of sexual harassment and sexual violence is of paramount importance and may not be sacrificed for purposes of expediency or compliance with OCR's administrative interpretations of Title IX requirements. As other commentators have noted, "OCR knows—and should state clearly—that no court will allow any set of administrative regulations to trump the United States Constitution."[27]

III. Conclusion

OCR's "Dear Colleague" letter of April 4 raises serious concerns about OCR's continuing recognition of the central importance of freedom of expression on campus, as it fails to replicate or reference OCR's previous statements regarding freedom of expression. Even more worryingly, OCR's letter mandates a dramatic reduction of due process protections for students accused of sexual harassment or sexual violence—particularly, by requiring a lower standard of proof in grievance procedures. OCR's justifications for this new mandate are unsatisfactory, and its effects are likely to be far-reaching. Further, given OCR's overwhelming influence on college and university policies nationwide, it is important that OCR recognize that some recipient institutions will inevitably push too far in attempts to comply. FIRE's experience shows that colleges and universities will cite OCR's most recent guidance, in ways both genuine and disingenuous, as justification for curtailing student rights to freedom of expression and due process.

Indeed, OCR's April 4 letter has already begun to erode due process protections previously afforded those students accused of misconduct. As colleges and universities across the country scramble to comply with OCR's new requirements, FIRE has received reports from accused students who have found grievance procedures changed despite the fact that their hearings are already in progress. Further, parties entirely unconnected with a given institution have nevertheless filed OCR complaints alleging non-compliance,[28] and colleges and universities have rushed hastily written policies into effect in an

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[26] One ready example is Valdosta State University's treatment of former student Thomas Hayden Barnes. Barnes was unilaterally expelled without being accorded a hearing following posts made on Facebook.com. The expulsion is now the subject of a federal civil rights lawsuit. *Barnes v. Zaccari*, No. 1:08-CV-0077-CAP (N.D. Ga. Sept. 3, 2010) (finding former Valdosta State University president liable for violating student's right to due process), *appeal docketed*, No. 10–14622 (11th Cir. Oct. 5, 2010).

[27] Gary Pavela & John Wesley Lowery, *The April 4, 2011 OCR "Dear Colleague" letter on sexual violence*, ASSOCIATION OF STUDENT CONDUCT ADMINISTRATION LAW AND POLICY REPORT, Apr. 14, 2011.

[28] Caroline M. McKay, *Law School Challenged Under Title IX*, HARVARD CRIMSON, Apr. 22, 2011, *available at* http://www.thecrimson.com/article/2011/4/22/harvard-law-school-title-ix-wendy-murphy (detailing current OCR investigation of Harvard Law School following complaint filed by New England School of Law professor; the complaint focused in part on Harvard Law School's "clear and convincing" standard).

apparent effort to avoid OCR investigation.[29] It is certain that more will follow, at a very high cost to due process protections on campus.

Many commentators have voiced concerns about OCR's April 4 letter.[30] FIRE shares these concerns. We ask that OCR address the issues we have outlined above, reaffirm the importance of freedom of expression on campus, rescind its imposition of a preponderance of the evidence standard, and make clear to recipient institutions that the due process rights of all students must be respected.

We appreciate your attention to our concerns, and we look forward to hearing from you.

Sincerely,

Will Creeley
Director of Legal and Public Advocacy

[29] *See, e.g.*, Allie Grasgreen, *Rules Shifts After Federal Push*, INSIDE HIGHER ED, May 2, 2011, *available at* http://www.insidehighered.com/news/2011/05/02/ocr_title_ix_letter_prompts_universities_to_change_sexual_assault_procedures (discussing universities putting policy revisions on "the fast track" following OCR letter); Samantha Harris, *Student Rights in Jeopardy as University of Massachusetts Considers New Speech Codes*, THE TORCH, Apr. 26, 2011, *available at* http://thefire.org/article/13123.html (discussing constitutional problems with new "relationship violence" policy); Jon Ostrowsky, *New federal guidance on univ sexual assault: Brandeis follows Biden lead on Title IX*, BRANDEIS HOOT, Apr. 8, 2011, *available at* http://thebrandeishoot.com/articles/10159 (discussing changes in Brandeis University's standard of proof for internal hearings); Elizabeth Titus, *Stanford Lowers Standard of Proof for Sexual Assault*, STANFORD DAILY, Apr. 12, 2011, *available at* http://www.stanforddaily.com/2011/04/12/stanford-lowers-standard-of-proof-for-sexual-assault (discussing changes in Stanford University's standard of proof for sexual assault cases).

[30] *See, e.g.*, Mike Armstrong and Daniel Barton, *A Thumb on the Scales of Justice*, STANFORD DAILY, Apr. 2011, *available at* http://www.stanforddaily.com/2011/04/29/op-ed-a-thumb-on-the-scale-of-justice (criticizing Stanford's change in evidentiary standards); Peter Berkowitz, *Is Yale University Sexist?*, WALL STREET JOURNAL, Apr. 16, 2011, *available at* http://online.wsj.com/article/SB10001424052748704529204576257121944716258.html (detailing concerns about OCR investigation of Yale University); Wendy Kaminer, *The SaVE Act: Trading Liberty for Security on Campus*, THE ATLANTIC, Apr. 25, 2011, *available at* http://www.theatlantic.com/national/archive/2011/04/the-save-act-trading-liberty-for-security-on-campus/237833 (discussing "disregard for the rights of students accused of misconduct" contained in April 4, 2011, OCR "Dear Colleague" letter); Harvey Silverglate, *Liability Reigns Supreme at the Corporate University*, FORBES, Apr. 22, 2011, *available at* http://blogs.forbes.com/harveysilverglate/2011/04/22/liability-reigns-supreme-at-the-corporate-university (detailing concerns about April 4, 2011, OCR "Dear Colleague" letter); Cathy Young, *Sexual Assault on Campus—Is It Exaggerated?*, MINDING THE CAMPUS, Apr. 18, 2011, *available at* http://www.mindingthecampus.com/originals/2011/04/_by_cathy_young_1.html (criticizing new OCR requirements and questioning statistics cited by OCR in support of new guidance).