IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIAN HARRIS,	)	
	)	
Plaintiff,	)	
	)	
v.	)	**No. 2:13-cv-3937-LFR**
	)	
SAINT JOSEPH'S UNIVERSITY, et al.,	)	
	)	
Defendants.	)	
	)	

BRIEF *AMICUS CURIAE* OF
FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION
IN SUPPORT OF PLAINTIFF

William A. Bonner (Pa. I.D. No. 10263)
Attorney for *Amicus Curiae*
12 Veterans Square, P.O. Box 259
Media, Pennsylvania 19063
610-566-2703

Samantha Harris (Pa. I.D. No. 90268)
FOUNDATION FOR INDIVIDUAL
RIGHTS IN EDUCATION
170 S. Independence Mall W., Suite 510
Philadelphia, Pennsylvania 19106
215-717-3473

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INTEREST OF AMICUS CURIAE[1]

The Foundation for Individual Rights in Education ("FIRE") is a non-partisan, nonprofit, tax-exempt education and civil liberties organization pursuant to Section 501(c)(3) of the Internal Revenue Code. FIRE's mission is to defend and sustain individual rights at America's colleges and universities. These rights include freedom of speech, legal equality, due process, religious liberty, and sanctity of conscience—the essential qualities of individual liberty and dignity. FIRE has effectively and decisively defended constitutional liberties on behalf of thousands of students and faculty, and FIRE advocates for the thousands of students, faculty, parents, alumni, and concerned citizens across the nation who desire to see due process rights in college disciplinary procedures protected, not curtailed.

This case is of significant concern to *amicus* FIRE because the University bases an argument in its Memorandum of Law in Support of Motion to Dismiss Plaintiff's Amended Complaint on the 2011 "Dear Colleague" letter ("DCL") issued by the Office for Civil Rights of the Department of Education. This letter has been a focal point of FIRE's recent advocacy; FIRE has corresponded directly with OCR regarding the DCL and has commented on it extensively in numerous national media outlets. Thus, FIRE and

[1] Counsel for *amicus* states that no counsel for a party authored this brief in whole or in part and no person, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. Plaintiff consents to the filing of this brief; Defendants do not consent to the filing of this brief. *Amicus* has filed a motion accompanying this brief seeking leave from this Court to file.

the thousands of citizens for whom FIRE advocates have a particular interest in the outcome of this case.

SUMMARY OF ARGUMENT

In this case, Defendant Saint Joseph's University argues that the April 2011 "Dear Colleague" letter[2] from the U.S. Department of Education's Office for Civil Rights (OCR) mandates two of the university practices central to Plaintiff Brian Harris' complaint. The University contends that pursuant to *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), this Court must defer to OCR's letter as a binding interpretation of Title IX of the Education Amendments of 1972 because "[a] federal agency's guidance document is entitled to substantial deference in interpreting federal regulations and statutes." Defendants' Motion to Dismiss Plaintiff's Amended Complaint at 6 n.2.[3]

The University is incorrect for three reasons. First, the Dear Colleague letter announces substantive rules promulgated without formal notice and comment rulemaking. As such, these rules violate the Administrative Procedure Act and are invalid, let alone entitled to *Chevron* deference. Second, even presuming their validity as "interpretative rules," the provisions of the Dear Colleague letter are not due deference because informal interpretative rulemaking is generally not entitled to *Chevron* deference. Third, the Dear Colleague letter is not due even the limited deference accorded to informal agency pronouncements under *Skidmore v. Swift & Co.*, 323 U.S. 134 (1944), given its superficial consideration of existing law, its invalid reasoning, its departure from

[2] *See* Office for Civil Rights, *Dear Colleague Letter: Sexual Violence* (Apr. 4, 2011) [hereinafter Dear Colleague letter].

[3] ("In light of the Dear Colleague Letter, the University's implementation of a preponderance of the evidence standard and its policy limiting an accused's right to cross examine his or her accuser simply cannot form the basis for a Title IX claim" because they are "mandated" by OCR.)

prior OCR interpretation, and its lack of persuasive power. Indeed, because of these deficiencies, the Dear Colleague letter is an immensely controversial document that has been criticized by law professors, lawyers, educators, journalists, civil liberties groups, and a former OCR lawyer.[4]

For all these reasons, the University's contention that the Dear Colleague letter is due *Chevron* deference must fail. This defense must be rejected and Plaintiff's claims

[4] *See, e.g.*, Harvey Silverglate, Op-Ed., *Yes Means Yes—Except on Campus*, WALL ST. J., July 15, 2011, *available at* http://thefire.org/article/13389.html (former Massachusetts ACLU president criticizing OCR's 2011 Dear Colleague letter); Michael Linhorst, *Rights Advocates Spar Over Policy On Sexual Assault*, CORNELL SUN, Apr. 4, 2012, *available at* http://cornellsun.com/section/news/content/2012/04/04/rights-advocates-spar-over-policy-sexual-assault (quoting Cornell University Law School professor Cynthia Bowman); Jennifer C. Braceras, *Civil Rights Wronged on Campus*, BOSTON HERALD, Aug. 29, 2011, *available at* http://bostonherald.com/news_opinion/opinion/op_ed/2011/08/civil_rights_wronged_campus (critical editorial by lawyer and former Commissioner, U.S. Commission for Civil Rights); Cathy Young, *The Politics of Campus Sexual Assault*, REALCLEARPOLITICS, Nov. 6, 2011, http://www.realclearpolitics.com/articles/2011/11/06/the_politics_of_campus_sexual_assault_111968.html; Richard Epstein, *Title IX or Bust*, DEFINING IDEAS, Feb. 7, 2012, http://www.hoover.org/publications/defining-ideas/article/107626 (law professor and former dean stating that "[t]he Department of Education is on a collision course with the Bill of Rights"); Wendy Kaminer, *What's Wrong With the Violence Against Women Act*, THE ATLANTIC, Mar. 19, 2012, http://www.theatlantic.com/national/archive/2012/03/whats-wrong-with-the-violence-against-women-act/254678/ (critical editorial by lawyer and former member of national Board of Directors of ACLU); Caroline May, *American Association of University Professors Expresses Concern over Dept. of Education's New Mandates,* THE DAILY CALLER, Aug. 18, 2011, http://dailycaller.com/2011/08/18/the-american-association-of-university-professors-expresses-concern-over-dept-of-educations-new-mandates (faculty union objecting to OCR's "new [preponderance] standard"); Ilya Shapiro, *Due Process Stops at the Campus Gates?*, CATO INSTITUTE, June 2, 2011, http://www.cato.org/blog/due-process-stops-campus-gates; Michael Barone, *Feds crack down on campus flirting and sex jokes*, WASH. EXAMINER, June 21, 2010, *available at* http://washingtonexaminer.com/article/115379; Jeffrey Hadden, *The Feds' Campus Keystone Kops*, DETROIT NEWS, May 31, 2011, *available at* http://thefire.org/article/13249.html; Hans Bader, *Falsely accused teachers and students will be harmed by new Education Department policy*, WASH. EXAMINER, May 16, 2011, *available at* http://washingtonexaminer.com/article/145202 (former OCR lawyer criticizes new policy). FIRE thanks Hans Bader for his ideas and input on this brief.

about the procedural deficiencies of the University's policies must be evaluated on their merits.

ARGUMENT

I. The Promulgation of the Substantive Rules Announced in the Dear Colleague Letter Violated the Administrative Procedure Act, Rendering the Rules Invalid.

A. Substantive Rules Require Public Notice and Comment

The Administrative Procedure Act (APA) governs formal rulemaking by federal agencies like the Department of Education's Office for Civil Rights. Under the APA, a "rule" is defined as "the whole or a part of an agency statement of general or particular applicability and future effect designed to implement, interpret, or prescribe law or policy or describing the organization, procedure, or practice requirements of an agency." 5 U.S.C. § 551(4).

In order to preserve legislative prerogatives and to allow affected parties to participate in the rulemaking process, the APA requires agencies to provide the public with notice and the opportunity to comment before promulgating final rules. 5 U.S.C. § 553. The requirement for notice and comment is "designed to assure fairness and mature consideration of rules of general application." *NLRB v. Wyman-Gordon Co.*, 394 U.S. 759, 764 (1969). Solicitation of public input for new regulations is more than a bureaucratic courtesy; it ensures that the rulemaking process remains in harmony with the basic tenets of representative government. *Chamber of Commerce v. Occupational Safety & Health Admin.*, 636 F.2d 464, 470 (D.C. Cir. 1980) (warning that the "Assistant

Secretary should not treat the procedural obligations under the APA as meaningless ritual").[5]

However, the APA exempts "interpretative rules, general statements of policy, [and] rules of agency organization, procedure, or practice" from its notice and comment requirement. This exemption recognizes that, in theory, such rules do not impose new obligations but affect only the agency itself or serve simply to clarify existing agency interpretations. 5 U.S.C. § 553(a)(A). Accordingly, distinguishing between substantive (or "legislative") and interpretative rules is of crucial importance. "If a court mistakenly gives an agency interpretation the force of law, 'an especially odious frustration is visited upon the affected private parties: they are bound by a proposition they had no opportunity to help shape and will have no meaningful opportunity to challenge when it is applied to them.'" *Northwest Tissue Center v. Shalala*, 1 F.3d 522, 536 (7th Cir. 1993) (internal citations omitted).

To determine whether an agency action is a substantive rule, requiring notice and comment, or simply an interpretative rule, the Supreme Court has looked to the impact of the rule on "individual rights and obligations." *See Chrysler Corp. v. Brown*, 441 U.S. 281, 301–02 (1979). Similarly, the U.S. Court of Appeals for the D.C. Circuit has stated that "if a statement has a present-day binding effect," it is a substantive rule and thus must be subject to APA notice and comment. *Community Nutrition Institute v. Young*,

[5] The Third Circuit has had little opportunity to consider challenges to government regulations under the APA. *Hagans v. Comm'r of Soc. Sec.*, 694 F.3d 287, 300 n.14 (3d Cir. 2012) ("We have infrequently applied the rules set forth in *Christensen*, *Mead*, and *Barnhart.*")

818 F.2d 943, 946 n.4 (D.C. Cir. 1987). In determining whether a rule has "binding effect" and imposes new legal obligations, courts review the language of the agency statement for imperative language such as "must" and "will." *Id.* (citing *American Bus Ass'n v. United States*, 627 F.2d 525, 532 (D.C. Cir. 1980)).

Courts also assess an agency's intention to bind its own decision-making moving forward as evidence of a substantive rule. "[A] critical test of whether a rule is a general statement of policy is its practical effect in a subsequent administrative proceeding"; if an agency statement establishes a "binding norm," it has engaged in substantive rulemaking. *Guardian Federal Savings & Loan Ass'n v. Federal Savings & Loan Insurance Corp.*, 589 F.2d 658, 666 (D.C. Cir. 1978) (quoting *Pacific Gas & Electric Co. v. FPC*, 506 F.2d 33, 38 (1974)). In contrast, interpretative rules "merely clarify or explain existing law or regulations." *Powderly v. Schweiker*, 704 F.2d 1092, 1098 (9th Cir. 1983). As the Fourth Circuit has observed, "courts are in general agreement that interpretative rules simply state what the administrative agency thinks the statute means, and only 'remind' affected parties of existing duties." *Jerri's Ceramic Arts, Inc. v. Consumer Product Safety Comm'n*, 874 F.2d 205, 207 (4th Cir. 1989). Because interpretative rules "do not themselves shift the rights or interests of the parties" affected, and instead "seek only to interpret language already in properly issued regulations," they are exempt from APA notice and comment requirements. *Chao v. Rothermel*, 327 F.3d 223, 227 (3d Cir. 2003).

B. The Dear Colleague Letter Contains Substantive Rules

OCR's Dear Colleague letter contains substantive rules that bind colleges and universities governed by OCR's interpretation of Title IX and "establish[es] a standard of

conduct which has the force of law." *Pacific Gas & Electric Co.*, 506 F.2d at 38–39. Although OCR designated the Dear Colleague letter as interpretative, this characterization is not "conclusive; rather it is what the agency does in fact." *National Family Planning & Reproductive Health Ass'n v. Sullivan*, 979 F.2d 227, 237–38 (D.C. Cir. 1992) (citations and quotations omitted). Because it contains substantive rules implemented without notice and comment rulemaking, the Dear Colleague letter's provisions are invalid and due no deference.

First, the Dear Colleague letter purports to impose procedural requirements upon institutions bound by Title IX. These requirements include the use of the "preponderance of the evidence" standard in campus hearings adjudicating allegations of student sexual misconduct, one of two provisions at issue in the instant case. The Dear Colleague letter states:

> [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), 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.** [Emphasis added.]

OCR makes plain that compliance with Title IX hereafter *requires* that recipient institutions adopt a particular standard for use in campus adjudications, using imperative language to establish a binding norm for both colleges and universities and OCR itself. The Dear Colleague letter uses the word "must," which is the kind of "mandatory,

definitive language [that] is a powerful, even potentially dispositive, factor suggesting … substantive rules." *Community Nutrition Inst.*, 818 F.2d at 947.

The Dear Colleague letter's mandatory requirements are new and break with past OCR formal rulemaking subject to notice and comment, a strong indication that they are not "interpretative." *Jerri's Ceramic Arts, Inc.*, 874 F.2d at 208 (stating that if "'interpretation' is a process of 'reminding' one of existing duties, a decision to modify former duties demands close scrutiny by a reviewing court"). While some regional OCR offices had recommended that individual institutions adopt the "preponderance of the evidence" standard during individual compliance assessments prior to the Dear Colleague letter's issuance, OCR had declined to mandate an evidentiary standard for use in student disciplinary proceedings as a general rule for all institutions. Indeed, recognizing the benefit of institutional autonomy, OCR previously provided colleges and universities with wide latitude, 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." Department of Education, *Revised Sexual Harassment Guidance* at 19–20 (Jan. 19, 2001).[6] In identifying six elements OCR uses to evaluate whether an institution's grievance procedures are "equitable," none concern the standard of proof—a stark contrast from the Dear Colleague letter. *Id.* at 20.

[6] *Available at* http://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf; *see also* 65 Fed. Reg. 66092, 66105 (Nov. 2, 2000); Department of Education, *Sexual Harassment Guidance*, 62 Fed. Reg. 12034, 12044–45 (Mar. 13, 1997). The 1997 *Guidance* invited public comment, and the 2001 Guidance was issued following public notice and comment.

C. The Dear Colleague Letter's Substantive Rules Are Invalid

There can be no doubt that the Dear Colleague letter establishes substantive rules. Indeed, the University's defense is premised on the theory that its requirements are "mandated" by OCR. Substantive rulemaking requires public notice and comment. 5 U.S.C. § 553. Substantive rules enacted without public notice and comment are invalid. *See, e.g.*, *United States v. Picciotto*, 875 F.2d 345, 346 (D.C. Cir. 1989) ("A rule which is subject to the APA's procedural requirements, but was adopted without them, is invalid."); *Abington Memorial Hospital v. Heckler*, 750 F.2d 242, 244 (3d Cir. 1984) (stating that the Administrative Procedure Act "envisions the vacation of unlawfully promulgated regulations"); *Hoctor v. United States Dep't of Agriculture.*, 82 F.3d 165, 167 (7th Cir. 1996) ("A rule promulgated by an agency that is subject to the Administrative Procedure Act is invalid unless the agency first issues a public notice of proposed rulemaking, describing the substance of the proposed rule, and gives the public an opportunity to submit written comments; and if after receiving the comments it decides to promulgate the rule it must set forth the basis and purpose of the rule in a public statement."). Because OCR enacted the substantive rules contained in the Dear Colleague letter without adhering to the APA's notice and comment requirement, the rules are invalid.

When an agency issues a substantive rule without proper notice and comment rulemaking, courts simply vacate it. *Natural Resources Defense Council v. Environmental Protection Agency*, 643 F.3d 311 (D.C. Cir. 2011). A court should not comment on the merits of the rule in any way that would prejudge the notice and comment rulemaking process. *Id.* at 321. While the validity of the Dear Colleague letter

under the APA is not before this Court, the university is asking this Court to rule that the procedures of which Harris complains were mandated by the Dear Colleague letter. As a matter of logic, an invalid rule cannot be "mandatory." Whatever merits OCR's policy might have can and should be identified in the rulemaking process, not in *dicta*. Therefore, the University's argument that OCR required it to treat Harris as it did has no merit and this Court should reject it.

II. Even as "Interpretative Rules," the Provisions of the Dear Colleague Letter Are Not Due Deference Because Interpretative Rulemaking Is Generally Not Entitled to *Chevron* Deference.

Even assuming that the Dear Colleague letter's provisions were valid under the APA as "interpretative" rather than substantive rules, this Court has no reason to defer to them and must not do so.

In *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 844 (1984), the Supreme Court held that courts must grant deference to an agency's reasonable interpretation of an ambiguous statute, noting that "a court may not substitute its own construction of a statutory provision" unless the agency's interpretations "are arbitrary, capricious, or manifestly contrary to the statute." However, the Court has subsequently limited this deference to substantial rules, holding that "[i]nterpretations such as those in opinion letters — like interpretations contained in policy statements, agency manuals, and enforcement guidelines, all of which lack the force of law — do not warrant *Chevron*-style deference." *Christensen v. Harris County*, 529 U.S. 576, 587 (2000). Because the opinion letter at issue in *Christensen* was not "arrived at after, for

example, a formal adjudication or notice-and-comment rulemaking," it did not qualify for the deference otherwise accorded agency determinations under *Chevron*. *Id*.

While the Court observed a year later that it has "sometimes found reasons for *Chevron* deference even when no such administrative formality was required and none was afforded," it nevertheless held that interpretative rules "enjoy no *Chevron* status as a class." *U.S. v. Mead Corp.*, 533 U.S. 218, 232 (2001). The Court concluded that the classification letter in question in *Mead*, like the opinion letter in *Christensen*, was "beyond the *Chevron* pale." *Id.* at 234. In reaching this determination, the Court looked to a variety of factors, including whether the classification letter was the product of notice and comment rulemaking. Federal appellate courts have followed this approach, declining to extend *Chevron* deference to interpretative rules promulgated without notice and comment—like the Dear Colleague letter at issue here. *See, e.g.*, *Tablada v. Thomas*, 533 F.3d 800, 806 (9th Cir. 2008) (noting that *Chevron* deference is "reserved for legislative rules … characteristically promulgated only after notice and comment"). Therefore, even assuming that the rules contained in the Dear Colleague letter are not invalid under the APA, but are instead interpretative rules, as OCR contends, they are not due *Chevron* deference.

III. The Dear Colleague Letter Is Not Due Even the Limited Deference Accorded to Interpretative Rules Under *Skidmore*.

Interpretative rules may be entitled to so-called *Skidmore* deference—a lesser form of judicial deference that regards an agency's decision not as binding, but merely worthy of consideration, and thus to be followed only if "persuasive." *See Skidmore v.*

Swift & Co., 323 U.S. 134, 140 (1944); *University of Texas Southwestern Medical Center v. Nassar*, 133 S. Ct. 2517, 2533 (2013) (holding that a civil-rights agency manual was not entitled to *Skidmore* deference since its "explanations lack the persuasive force that is a necessary precondition to deference under *Skidmore*").

To justify *Skidmore* deference to an agency position, courts look to "the thoroughness evident in its consideration, the validity of its reasoning, its consistency with earlier and later pronouncements, and all those factors which give it power to persuade, if lacking power to control." *Gonzales v. Oregon*, 546 U.S. 243, 268 (2006) (quoting *Skidmore*, 323 U.S. at 140); *Hagans v. Commissioner of Social Security*, 694 F.3d 287, 295 (3d Cir. 2012). For the reasons explained below, the Dear Colleague letter does not meet any of these criteria.

A. Ignorance of Existing Law

Courts must not defer to an agency's interpretation when the agency's position raises potential constitutional problems. *See Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*, 485 U.S. 568, 575 (1988) (rejecting agency interpretation of statute and refusing to apply *Chevron* deference because "where an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress"); *see also* 5 U.S.C. § 706(2) (a reviewing court shall set aside agency action, findings, and conclusions found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."). The Dear Colleague letter poses constitutional problems and fails to account for existing law.

For instance, OCR states that it "strongly discourages" colleges and universities from permitting cross-examination in campus disciplinary proceedings adjudicating allegations of sexual harassment or sexual assault. OCR's across-the-board disapproval of cross-examination raises constitutional questions under the Due Process Clause.[7] OCR's advice ignores the importance of cross-examination, declared by the Supreme Court to be the "greatest legal engine ever invented for the discovery of truth." *California v. Green*, 399 U.S. 149, 158 (1970) (internal citation omitted).

Although the Supreme Court has not found cross-examination to be a general procedural requirement for college discipline cases, courts have found that cross-examination in campus proceedings may be "essential to a fair hearing" in cases that involve "a problem of credibility." *Winnick v. Manning*, 460 F.2d 545, 550 (2d Cir. 1972). Because students have a right to a procedure that is fundamentally fair, the Eleventh Circuit has found that "[d]ue process requires that appellants have the right to respond" to accusing witnesses and to ask those witnesses questions through the official presiding over the hearing. *Nash v. Auburn University*, 812 F.2d 655, 664 (11th Cir. 1987).

[7] While private colleges like Saint Joseph's are not directly bound by the Due Process Clause, "[c]onduct that is formally 'private' may become so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." *Evans v. Newton*, 382 U.S. 296, 299 (1966). "[T]he acts of a private party are fairly attributable to the state on certain occasions when the private party acted in concert with state actors." *Rendell-Baker v. Kohn*, 457 U.S. 830, 838 n.6 (1982). Here, the University effectively argues that OCR's Dear Colleague letter is "responsible for a private decision" because OCR "has exercised coercive power or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State." *Blum v. Yaretsky*, 457 U.S. 991, 1004 (1982). Indeed, the University states that the policies at issue here "are mandated by" OCR's interpretation of federal law. Accordingly, OCR's restriction on cross-examination implicates constitutional questions even when it applies to private colleges like the Defendant.

Less than a year ago, this Court stated that because the "purpose of cross-examination is to ensure that issues of credibility and truthfulness are made clear to the decision makers" in a college hearing where credibility is of critical importance, "due process require[s] that the plaintiff be able to cross-examine witnesses." *Furey v. Temple University*, 884 F. Supp. 2d 223, 252 (E.D. Pa. 2012); *see also Donohue v. Baker*, 976 F. Supp. 136, 147 (N.D.N.Y. 1997) (finding that "due process required" that student accused of sexual assault be allowed to "direct questions to his accuser").

Because the Dear Colleague letter fails to account for this precedent and raises constitutional problems, it is evident that OCR has not thoroughly considered its decision to "strongly discourage" affording students the fundamental right of cross-examination. As a result, the letter is not entitled to *Skidmore* deference.

B. Invalid Reasoning

The Dear Colleague letter is not entitled to *Skidmore* deference because its legal reasoning is incorrect.

First, OCR contends that the use of the preponderance of the evidence standard by colleges and universities 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, *Desert Palace* and *Price Waterhouse* dealt with the burden of proving that an employer itself had unlawfully discriminated in making employment decisions—acts for which an employer is automatically liable. In contrast, colleges and universities are not automatically liable for sexual harassment committed by employees or students. *See, e.g.*, *Gebser v. Lago Vista Independent School District*, 524 U.S. 274, 288–93 (1998) (finding no "vicarious liability" for harassment under Title IX in administrative or judicial proceedings and declining to "hold a school district liable in damages under Title IX for a teacher's sexual harassment of a student absent actual notice and deliberate indifference").

To violate Title IX, an institution's *own actions* in response to harassment of which it has notice—not the alleged harasser's actions—must be proven unreasonable. As the Supreme Court stated in *Davis v. Monroe County Board of Education*, 526 U.S. 629, 648–49 (1999): "We stress that our conclusion here … does not mean that recipients can avoid liability only by purging their schools of actionable peer harassment or that administrators must engage in particular disciplinary action. … [School administrators] must merely respond to known peer harassment in a manner that is not clearly unreasonable."[8] A college's decision to employ the intermediate "clear and convincing" evidentiary standard is not a "clearly unreasonable" response to allegations of sexual misconduct. Indeed, this standard had long been in use in campus hearings;[9] prior to the

[8] *See also Doe v. Dallas Indep. Sch. Dist.*, 220 F.3d 380 (5th Cir. 2000) (affirming summary judgment in favor of the defendant school on Title IX claims because school administrators did not show "deliberate indifference" to allegations of sexual misconduct, even though they did not discipline the accused student based on a perceived lack of proof).

[9] *See* James M. Piccozzi, *University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 YALE L. J. 2132, 2159 n.17 (1987) ("Courts, universities, and

Dear Colleague letter's issuance, four of the ten top ranked institutions in the 2011 *U.S. News & World Report* "National University Rankings" of U.S. colleges employed it.[10]

When presented with conflicting evidence, discipline—or lowering the standard used in disciplinary proceedings—is not necessary to render an institutional response to an allegation of sexual harassment "reasonable," and OCR's imposition of the preponderance of the evidence standard misreads workplace sexual harassment jurisprudence. In the employment context—where an employer's response is assessed more demandingly—discipline is not necessarily required in response to allegations of sexual harassment that are not clearly proven. Rather, the Third Circuit has held that an employer's decision not to discipline an employee accused of sexual harassment does not give rise to liability under Title VII, provided that the employer's non-disciplinary response is "reasonably calculated to prevent future instances of harassment." *Knabe v. Boury Corp.*, 114 F.3d 407, 414 (3d Cir. 1997). The Third Circuit reached this conclusion while viewing the facts in the light most favorable to the plaintiff, granting the employer—who mistakenly believed "she could not make a finding that an employee had engaged in sexual harassment without corroborating testimony"—summary judgment despite assuming that the alleged harassment had taken place. *Id.* at 409. Indeed, the Third Circuit noted the possibility of employer liability for "tak[ing] punitive action without ensuring that adequate grounds exist for the action." *Id.* at 414 n.12.

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student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of 'clear and convincing' evidence. *See* [Nicholas Trott] Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71 (1985).")

[10] FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION, STANDARD OF EVIDENCE SURVEY: COLLEGES AND UNIVERSITIES RESPOND TO OCR'S NEW MANDATE (2011), http://thefire.org/article/13796.html.

Other circuits have also found that discipline is not necessarily required in response to allegations of sexual harassment where evidence supporting the allegation is uncertain. In *Swenson v. Potter*, 271 F.3d 1184, 1196 (9th Cir. 2001), the Ninth Circuit reversed a jury verdict awarding a Postal Service employee $85,000, finding that the Postal Service's conclusion that "it had insufficient evidence to sustain a charge of harassment" was "an entirely legitimate reason for declining to discipline Feiner and resorting to other methods of remedying the situation." Noting that courts "should be wary of tempting employers to conduct investigations that are less than fully objective and fair" and that "Title VII 'in no way requires an employer to dispense with fair procedures for those accused or to discharge every alleged harasser,'" the Ninth Circuit held that a "good faith investigation" satisfies Title VII's "prompt and adequate" standard. *Id.* at 1196–97 (quoting *Harris v. L & L Wings, Inc.*, 132 F.3d 978, 984 (4th Cir. 1997)). This is so even if "a jury later concludes that in fact harassment occurred" in a civil trial. *Id.* at 1196 (quoting *Harris*, 132 F.3d at 984).[11]

Finally, OCR argues that mandating use of the preponderance of the evidence standard is justified because the agency itself "also uses a preponderance of the evidence standard in its fund termination administrative proceedings," wherein a "noncompliance determination" against a school must "be supported by a preponderance of the evidence." *See* Dear Colleague letter at 11. But this usage is irrelevant; it concerns whether a college unreasonably responded to harassment, not to whether the harassment happened or

[11] *See also Adler v. Wal-Mart Stores*, 144 F.3d 664, 677–78 (10th Cir. 1998) (dismissing Title VII suit, despite assuming truth of allegations, and concluding employer's decision to counsel rather than discipline alleged harasser was "reasonable" because requiring discipline on uncertain evidence would be "callous towards" the accused's rights and could lead to "violations of due process rights").

whether the accused student was guilty. Again, as OCR itself has explained, a school is deemed to be in noncompliance under Title IX not because of "the actions of harassing students, but rather for its own discrimination in failing to" respond to harassment. *See* Department of Education, *Sexual Harassment Guidance*, 62 Fed. Reg. 12034 (Mar. 13, 1997). Only institutions—not individuals—can be found in noncompliance with Title IX, which holds schools—not individuals—liable. *Smith v. Metropolitan School District Perry Township*, 128 F.3d 1014, 1019 (7th Cir. 1997).

OCR's attempt to justify the interpretation presented in the Dear Colleague letter is unpersuasive and poorly reasoned. OCR wrongly concluded that use of the preponderance of the evidence standard in individual adjudications of allegations of student sexual misconduct was compelled by inapposite precedents from the employment context and by its own use of the standard in enforcement hearings. Its reasoning is invalid and demonstrates a lack of thorough consideration, and courts need not grant it deference.

C. Departure from Prior OCR Interpretation

The Supreme Court has held that an agency interpretation "which conflicts with the agency's earlier interpretation is 'entitled to considerably less deference' than a consistently held agency view." *INS v. Cardoza-Fonseca*, 480 U.S. 421, 446 n.30 (1987) (quoting *Watt v. Alaska*, 451 U.S. 259, 273 (1981)). As discussed in Section I.B. *supra*, the Dear Colleague letter departs from past OCR rulemaking that repeatedly declined to impose a preponderance standard in student disciplinary proceedings. The Dear Colleague letter is the first time that OCR has bound all institutions under its jurisdiction to the preponderance of the evidence standard, making plain that use of any other

standard will be deemed to violate Title IX. This is a significant break with its position of several decades, and one made without public input. As such, it is not due *Skidmore* deference.

D. Lack of Persuasive Power

Finally, OCR's rationale for mandating use of the preponderance of the evidence standard is unpersuasive. Requiring a lower standard of proof does not provide for the "prompt and equitable" resolution of complaints regarding sexual harassment and sexual violence, and it is not reasonable to conclude that lowering the standard of evidence employed in sexual harassment and sexual violence adjudications will result in either a reduction in instances of sexual assault or more just outcomes.

Instead, students facing such charges will be deprived of a fair, just hearing. *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (requiring "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school"). The lower standard of proof serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. When verdicts are wrong, the cause of justice on campus is ill-served. 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. Accordingly, no matter the result reached by the campus judiciary, both the accuser and the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. As a matter of law and

policy, OCR's mandate to lower the standard of proof is deeply flawed and its justifications unpersuasive.

IV. Conclusion

For all the reasons stated above, this Court should reject Defendant's argument that the "Dear Colleague" letter is due *Chevron* deference and instead evaluate Plaintiff's claims on their merits.

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Respectfully submitted,

By: _____

William A. Bonner (Pa. I.D. No. 10263)
Attorney for *Amicus Curiae*
12 Veterans Square, P.O. Box 259
Media, Pennsylvania 19063
610-566-2703