

## **Law Professors' Open Letter Regarding Campus Free Speech and Sexual Assault**

The undersigned professors of law from institutions throughout the United States write to protest a series of directives and enforcement actions by the U.S. Department of Education's Office for Civil Rights (OCR).<sup>1</sup> These directives were issued pursuant to Title IX of the Education Amendments of 1972,<sup>2</sup> which was enacted with the purpose of prohibiting federally-funded educational institutions from discriminating on the basis of sex.

We recognize that sexual harassment represents unacceptable conduct, and those found responsible should be appropriately sanctioned. Some of us have witnessed the injustices resulting from institutions that downplay or ignore sexual harassment on their campuses, and we commend OCR for taking a proactive approach to this problem. In pursuing its objectives, however, OCR has unlawfully expanded the nature and scope of institutions' responsibility to address sexual harassment, thereby compelling institutions to choose between fundamental fairness for students and their continued acceptance of federal funding.<sup>3</sup>

In 1997, OCR issued its Sexual Harassment Guidance, which interpreted sex discrimination to include sexual harassment.<sup>4</sup> Through a series of subsequent directives and enforcement actions, OCR has steadily expanded the definition of sexual harassment and imposed a growing range of responsibilities on colleges to curb such conduct. As a result, free speech and due process on campus are now imperiled.

### ***Constitutional basis for free speech rights and due process protections***

Although both public and private institutions accepting federal assistance are required to comply with Title IX, only *public* institutions of higher education are required to assure free speech under the First Amendment or due process protections under the Fourteenth Amendment.<sup>5</sup> These due process protections generally include notice of the "specific charges"<sup>6</sup> and the opportunities to be heard<sup>7</sup> and present evidence on one's behalf.<sup>8</sup> Courts will not interfere with public university policies or sanctions as long as those policies and sanctions are supported by "some reasonable and constitutional ground."<sup>9</sup>

Courts have routinely refused to hold free speech or due process requirements binding on private institutions, in the absence of specific state law provisions granting their students such rights.<sup>10</sup> Instead, courts evaluate an institution's actions in the context of an institution's express or implied contractual relationship with its students, the terms of which are interpreted to require compliance with the institution's rules and procedures.<sup>11</sup> As a result, courts allow private institutions broad discretion in their disciplinary procedures and decisions,<sup>12</sup> limiting review to whether the decision-making was "arbitrary and capricious."<sup>13</sup>

## ***OCR directives and enforcement actions***

Over the years, OCR has issued a succession of directives on the topic of campus sexual harassment. OCR characterizes these directives as “guidance” documents, which by definition consist of policy recommendations and suggested actions. Guidances do not constitute “administrative regulation,” nor do they possess “the status of law.”<sup>14</sup> The majority of these directives did not undergo notice and comment procedures, which the Administrative Procedure Act (APA) requires for all proposed regulations.<sup>15</sup>

But a cursory examination of these OCR documents reveals they frequently incorporate language such as “must,” “require,” and “obligation,” without citing any regulatory or statutory basis. Furthermore, the OCR has instituted numerous compliance investigations<sup>16</sup> against universities, compelling institutions to implement the policies and procedures prescribed in these documents.<sup>17</sup>

Several of these directives and enforcement actions have effectively nullified a landmark high court definition. In *Davis v. Monroe*, the U.S. Supreme Court defined “sexual harassment” under Title IX as limited to conduct that is “severe, pervasive, and objectively offensive” (emphasis added).<sup>18</sup> Through a series of directives and compliance enforcement actions, OCR has dramatically expanded the *Davis v. Monroe* definition of sexual harassment, thereby exerting a direct and deleterious effect on campus free speech and due process:<sup>19</sup>

1. A 2010 OCR Dear Colleague Letter (DCL) on bullying stated that “harassment does not have to . . . involve repeated incidents” to be actionable. This Letter had the effect of voiding the Supreme Court’s requirement that conduct must be “pervasive” in order to be considered as harassment.<sup>20</sup>
2. In 2011 OCR issued a Dear Colleague Letter on campus sexual assault, which the OCR considers to be a form of sexual harassment. This 2011 DCL curtailed a number of due process protections for students accused of sexual assault. Among other changes, the 2011 DCL mandated that college tribunals lower their standard of proof to preponderance,<sup>21</sup> even though the Supreme Court has recognized that a low standard of proof is inappropriate in situations involving damage to one’s reputation.<sup>22</sup>

The Task Force on Federal Regulation of Higher Education later singled out the 2011 DCL, noting that, “While OCR strenuously maintains that the letter does not add requirements to applicable law, the reality is these standards impose serious additional responsibilities and break new policy ground.”<sup>23</sup>

3. In a 2013 Letter of Findings to the University of Montana<sup>24</sup> OCR mandated that the University define sexual harassment broadly to include “any unwelcome conduct of a sexual nature.” “Any unwelcome conduct” can include verbal comments as well as physical actions. This broadened definition had the effect of requiring the university to disregard the *Davis v. Monroe* “objectively offensive” standard.<sup>25</sup>

The cover letter that accompanied the Montana Letter of Findings described the agreement as a “blueprint for colleges and universities throughout the country to protect students from sexual harassment and assault.” As a result, numerous universities across the country altered their policies to incorporate the Letter’s expansive definition of sexual harassment.<sup>26</sup>

4. In a 2014 Resolution Agreement with Harvard Law School, OCR mandated that “the University has an obligation to consider the effects of off-campus conduct.”<sup>27</sup> This Agreement was considered to be the legal basis for a subsequent probe by Northwestern University of a faculty member who had published an article in the *Chronicle of Higher Education* criticizing her university’s sexual harassment policy, an investigation the professor later termed, “My Title IX Inquisition.”<sup>28</sup>
5. OCR has initiated a series of high-profile compliance investigations. Currently, 228 investigations have been initiated at 181 universities across the nation.<sup>29</sup> To this date, OCR continues its investigations, demanding that campus tribunals comply with OCR’s directives.

### ***Detrimental effects of OCR overreach***

#### **1. Free speech**

In the wake of these directives and enforcement actions, many universities feel obligated to investigate virtually any allegation of harassment, regardless of its objective merit. These complaints are often cloaked in language such as “micro-aggressions” or a “lack of safe space.” By virtue of their vague and subjective nature, these allegations are not amenable to being disproven in any legal sense. In an attempt to forestall such complaints, many colleges have established so-called “free speech zones” and implemented speech codes banning words presumed to be offensive.<sup>30</sup>

Expanding upon this dubious logic, some campus advocates are now seeking immunity from criticism of their unlawful actions. The “demands made by these advocates frequently include calls for limitations on expression criticizing or disagreeing with the protesters,” notes the Foundation for Individual Rights in Education.<sup>31</sup> These developments were the focus of a historic June 2, 2015 hearing of the House Judiciary Subcommittee on the Constitution and Civil Justice.<sup>32</sup>

#### **2. Disciplinary procedures**

In addition to requiring institutions to lower the threshold by which a student’s culpability is determined to preponderance of the evidence (more likely than not),<sup>33</sup> OCR has required campuses to allow complainants to appeal decisions<sup>34</sup> (in contravention of OCR’s previous practice),<sup>35</sup> disallow cross examination,<sup>36</sup> restrict the role of legal counsel,<sup>37</sup> and to adopt broad definitions of sexual harassment.<sup>38</sup>

Unfortunately, OCR's relentless pressure on institutions to respond aggressively to sexual assault allegations has undermined the neutrality of many campus investigators and adjudicators by forcing them to consider the broader financial impact of their actions. In an effort to preclude a costly Title IX investigation, some institutions interrogate accused students before informing them of the specific conduct code they are alleged to have violated<sup>39</sup> and many deny them access to witnesses or potentially exculpatory evidence.<sup>40</sup> In the aftermath, innocent suspended and expelled students have become mired "in academic and professional limbo,"<sup>41</sup> impairing or destroying their access to a college education, thereby relegating them to a lifetime of diminished income and social stigmatization as sexual offenders.<sup>42</sup>

### ***Criticisms of OCR***

Criticism of OCR's enforcement of its directives has come from a broad range of stakeholders, including law professors, civil libertarians, and others. This is a sampling:

- Twenty-eight Harvard Law professors protested that OCR's directives "lack the most basic elements of fairness and due process, are overwhelmingly stacked against the accused, and are in no way required by Title IX law or regulation."<sup>43</sup>
- University of Pennsylvania law professors expressed "outrage" at the fact that campus sexual assault has become "a justification for shortcuts in our adjudicatory processes," criticizing the practice as "unwise" and contradicting "our principles."<sup>44</sup>
- Members of the U.S. Commission on Civil Rights noted OCR's "disturbing pattern of disregard for the rule of law" in addressing campus sexual violence and observed that "nowhere in the text of Title IX, which has been used to justify the school's need to adjudicate outside the justice system, or in earlier Office for Civil Rights regulations does it state such a low burden be used."<sup>45</sup>
- Elizabeth Bartholet, a Harvard professor of civil rights, has described OCR's policies restricting the due process provided to accused students as "madness."<sup>46</sup>
- Cornell University professor Cynthia Bowman reported "general agreement among faculty at the Law School that the procedures being proposed are Orwellian."<sup>47</sup>

Professional organizations have expressed concerns, as well:

- The American Association of University Professors warned OCR that use of the lower standard of proof would "erode the due process protections for academic freedom."<sup>48</sup>
- The National Association of Scholars has urged Congress to "[r]ein in education administration on 'unlawful' bullying, sexual assault policies;"<sup>49</sup>

Members of the U.S. Senate Health, Education, Labor and Pensions (HELP) Committee likewise charged OCR "stagnulate[s]" colleges and universities with a "tidal wave" of regulatory and sub-regulatory guidance.<sup>50</sup> And nearly 900 editorials were published in 2015 decrying the abrogation of free speech and due process on campus.<sup>51</sup>

## ***Recommendations for countering the detrimental effects of OCR overreach***

The following recommendations are directed to state and federal lawmakers, college administrators, and officials at the Department of Education Office for Civil Rights:

### ***1. Clarify the legal status of OCR directives***

OCR needs to clarify which directives it considers to be guidance documents vs. regulations. Directives that are guidance documents need to be revised to eliminate provisions containing obligatory wording, unless these provisions are expressly supported by prior legislation or regulation.

Directives that are deemed to be regulations need to be brought into compliance with requirements of the Administrative Procedure Act, including review and comment procedures. This review should be conducted in compliance with Executive Order 13563 Section 6, which addresses the retrospective analysis of existing rules.<sup>52</sup>

### ***2. Reinvigorate free speech***

Lawmakers should enact legislation to replace the Education Department's overly broad harassment definition with a narrower formulation. For example, it could codify the more limited definition found in the *Davis v. Monroe* decision, defining sexual harassment as unwelcome conduct aimed at victims based on their sex that is "severe, pervasive, and objectively offensive" enough to interfere with access to an education.<sup>53</sup>

College administrators do not need to wait for such legislation to be enacted. They should move to revamp campus speech codes and sexual harassment policies so they are grounded in the *Davis v. Monroe* definition.

### ***3. Restore due process***

Institutions should be permitted to retain the discretion to implement disciplinary policies and procedures appropriate to the particular circumstances, especially in matters for which they possess a particular expertise, such as academic violations like plagiarism, or in situations involving minor conduct code violations.

These disciplinary policies must afford due process protections that are appropriate to the particular circumstances, considering the harm it has caused to other students, the degree to which the conduct has interfered with other students' access to educational benefits, and the severity of potential sanctions. These due process protections include informing students of the specific conduct at issue, providing them with access to all evidence, assuring students enjoy the assistance of an independent advocate, affording them the right to cross-examination, and utilizing the appropriate standard of proof.

Regarding allegations of criminal sexual assault, law enforcement should be informed of criminal violence so that, at a minimum, they may investigate, collect, and preserve evidence for potential future use. Whether the matter is prosecuted criminally should be a joint decision by the institution, complainant and criminal justice authorities, recognizing that the criminal justice system possesses greater investigative authority and expertise, can impose meaningful sanctions on perpetrators of felony-level crimes, and is less susceptible to bias than campus disciplinarians.<sup>54</sup>

### ***Pervasive and Severe Infringements***

The federal Office for Civil Rights has ignored constitutional law,<sup>55</sup> judicial precedent<sup>56</sup> and Administrative Procedure Act requirements by issuing numerous directives, and then enforcing these directives by means of onerous investigations and accompanying threats to withhold federal funding. OCR has brazenly nullified the Supreme Court definition of campus sexual harassment. These unlawful actions have led to pervasive and severe infringements of free speech rights and due process protections at colleges and universities across the country.

In defense of the principle of fundamental fairness, the undersigned law professors hereby call on state and federal lawmakers, college administrators, and OCR officials to move expeditiously to implement the recommendations enumerated above.

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<sup>1</sup> Unless otherwise specified, the term “directive” may refer individually or collectively to the following advisory documents issued by OCR, listed here in chronological order: 1997 Sexual Harassment Guidance (<http://www2.ed.gov/about/offices/list/ocr/docs/sexhar01.html>); January 19, 2001 Revised OCR Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third parties; January 25, 2006, Dear Colleague letter\*; 2008 Sexual Harassment: It's Not Academic (Webpage and Pamphlet)\*; October 26, 2010, Dear Colleague letter\*; April 4, 2011, Dear Colleague letter (2011 DCL) \*; April 4, 2011, Know Your Rights\*; April 29, 2014, Questions and Answers on Title IX and Sexual Violence\*; April 29, 2014, Know Your Rights about Title IX and Sexual Violence\*; and October 2015, Frequently Asked Questions about Sexual Harassment, Including Sexual Violence\*. \*Source: OCR's "Sexual Harassment Resources," <http://www2.ed.gov/about/offices/list/ocr/sexharassresources.html>.

<sup>2</sup> Title IX, 20 U.S.C. §1681-1688, added 1972 by amendment to the Higher Education Act of 1965 (HEA): “No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving federal financial assistance.” Title IX was amended in 1992 to require rights and protections for victims of campus sexual assault, again in 1998 to expand colleges’ reporting requirements, and in March 2013 campus reporting requirements were expanded to demand annual disclosure of sexual violence statistics. See “History of the Violence Against Women Act,” *Legal Momentum*, <https://www.legalmomentum.org/history-vawa>; “Summary of the Jeanne Clery Act,” *Clery Center for Security on Campus*, <http://clerycenter.org/summary-jeanne-clery-act>; Violence Against Women Reauthorization Act of 2013, Pub. L. No. 113-4, sec. 304, §1092(f), 127 Stat. 54, 89-92 (codified as amended at 20 U.S.C. §1092(f)).

<sup>3</sup> Halley, Janet, Commentary, “Trading the Megaphone for the Gavel in Title IX Enforcement; Backing off the Hype in Title IX Enforcement,” *Harvard Law Review*, Vol. 128:103 (2015), <http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/> (Indeed, there is significant “pressure on schools to hold students responsible for serious harm even when — precisely when — there can be no certainty about who is to blame for it. Such calls are core to every witch hunt.”)

<sup>4</sup> 1997 Sexual Harassment Guidance, *supra* note 1 (“Sexual harassment of students is a form of prohibited sex discrimination under the circumstances described in the Guidance.”)

<sup>5</sup> *Goss v. Lopez*, 419 U.S. 565, 576, 581, 95 S. Ct. 729, 42 L. Ed. 2d 725 (1975).

<sup>6</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d 150, 158 (5th Cir. 1961) (“effective notice of the specific charges and grounds which, if proven, would justify expulsion.”)

<sup>7</sup> *Goss v. Lopez*, 419 U.S. at 583.

<sup>8</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d at 159.

<sup>9</sup> *Dixon v. Alabama State Board of Education*, 294 F.2d at 157.

<sup>10</sup> Although courts have yet to address the legality of OCR’s compulsory “guidance,” there is a strong argument that OCR directives, such as those that demand private institutions lower the threshold of proof necessary to determine culpability or expand the range of proscribed behavior, constitute “state action” because they have a direct impact on campus disciplinary outcomes. “[W]hen the government forces a private institution to do something that would violate due process if done by a government institution, that does violate the due process clause,” Bader, Hans, “No, OCR’s April 4, 2011 Dear Colleague letter is not entitled to deference,” *Examiner.com*, August 17, 2013, <http://www.examiner.com/article/no-ocr-s-april-4-2011-dear-colleague-letter-is-not-entitled-to-deference>.

<sup>11</sup> See *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 724-725 (1<sup>st</sup> Cir. 1983); *Fellheimer v. Middlebury College*, 869 F.Supp. 238, 243 (D. Vt. 1999); *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 378, 432 Mass. 474, 478 (Mass. 2000).

<sup>12</sup> See *Coveney v. Pres. of Coll. of the Holy Cross*, 388 Mass. 16, 19-20, 445 N.E.2d 136 (Mass. 1983) (“broad discretion”); *Schulman v. Franklin & Marshall College*, 538 A.2d 49, 52, 371 Pa. Superior Ct. 345, 351 (Pa. Super. Ct. 1988) (“college ... must be self-governing and the courts should not become involved in that process.”)

<sup>13</sup> *Schaer v. Brandeis Univ.*, 735 N.E.2d 373, 432 Mass. 474, 481 (Mass. 2000); see also, *Fellheimer v. Middlebury College*, 869 F. Supp. 238, 244 (D. Vt. 1999) (fundamental fairness); *Ahlum v. Adm'rs of the Tulane Educ. Fund*, 617 So.2d 96, 98-99 (La. Ct. App. 1993) (“arbitrary and capricious”); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1<sup>st</sup> Cir. 1983) (“basic fairness”).



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*College*, 869 F. Supp. 238, 244 (D. Vt. 1999) (fundamental fairness); *Ahlum v. Adm'rs of the Tulane Educ. Fund*, 617 So.2d 96, 98-99 (La. Ct. App. 1993) ("arbitrary and capricious"); *Cloud v. Trustees of Boston Univ.*, 720 F.2d 721, 725 (1<sup>st</sup> Cir. 1983) ("basic fairness").

<sup>14</sup> Cohn, Joseph, "Second Department of Education Official in Eight Days tells Congress Guidance is not Binding," *FIRE*, October 2, 2015, <https://www.thefire.org/second-department-of-education-official-in-eight-days-tells-congress-guidance-is-not-binding/>.

<sup>15</sup> Of all OCR's guidance documents listed in note 1, *supra*, OCR complied with the APA notice and comment procedures only for its 1997 Sexual Harassment Guidance and 2001 Revised Sexual Harassment Guidance. The APA requires OCR to permit "interested persons a reasonable and meaningful opportunity to participate in the rulemaking process." (Administrative Procedure Act, 5 U.S.C. § 553, requirements for informal rulemaking process.) As Cornell law professor Cynthia Bowman has observed, OCR's guidance is "not an administrative regulation, has not been subjected to notice and comment, and thus does not have the status of law." Linhorst, Michael, "Rights Advocates Spar Over Policy on Sexual Assault," *Cornell Daily Sun*, April 4, 2012, <http://www.cornellsun.com/section/news/content/2012/04/04/rights-advocates-spar-over-policy-sexual-assault>.

<sup>16</sup> Nozicka, Luke, "SIY under U.S. Department of Education Investigation for handling of sexual assault cases," *Daily Egyptian*, May 8, 2016, [http://www.dailyegyptian.com/news/article\\_a4e00818-1562-11e6-acad-47c2439d2217.html](http://www.dailyegyptian.com/news/article_a4e00818-1562-11e6-acad-47c2439d2217.html).

<sup>17</sup> As an example of campuses' reaction to OCR guidance, Cornell administrators and counsel both argued that the DCL "required the University to make immediate changes to its process for dealing with sexual assault accusations in order to remain in compliance with Title IX ... If Cornell did not make the changes quickly, the administrators said, the University would be "out of compliance" and could be sanctioned by the Education Department." Linhorst, Michael, *supra*, note 15. Also see Halley, Janet, Commentary, "Trading the Megaphone for the Gavel in Title IX Enforcement; Backing off the hype in Title IX enforcement," *Harvard Law Review Forum*, February 18, 2015, *Harvard Law Review*, Vol. 128:103 (2015), <http://harvardlawreview.org/2015/02/trading-the-megaphone-for-the-gavel-in-title-ix-enforcement-2/> (Indeed, there is significant "pressure on schools to hold students responsible for serious harm even when — precisely when — there can be no certainty about who is to blame for it. Such calls are core to every witch hunt.")

<sup>18</sup> *Davis v Monroe County Bd. Of Ed.*, 526 U.S. 629, 651-653 (1999.)

<sup>19</sup> OCR's May 9, 2013 settlement agreement with the University of Montana (Montana Agreement), <http://www.justice.gov/sites/default/files/opa/legacy/2013/05/09/um-ltr-findings.pdf>, (characterized by OCR as a "blueprint" for all schools.)

<sup>20</sup> October 26, 2010 Dear Colleague letter, *supra*, note 1 at p. 2.

<sup>21</sup> April 4, 2011 Dear Colleague Letter, <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

<sup>22</sup> *Addington v. Texas*, 441 U.S. 418, 424 (1979).

<sup>23</sup> "Recalibrating Regulations of Colleges and Universities; Report of the Task Force on Federal Regulation of Higher Education" (HELP Report), February 2015, [http://www.help.senate.gov/imo/media/Regulations\\_Task\\_Force\\_Report\\_2015\\_FINAL.pdf](http://www.help.senate.gov/imo/media/Regulations_Task_Force_Report_2015_FINAL.pdf).

<sup>24</sup> May 9, 2013 Montana Agreement, *supra*, note 19.

<sup>25</sup> Kaminer, Wendy, "No Sex Talk Allowed; What's wrong with the Obama administration's definition of sexual harassment," *The Atlantic*, May 15, 2013, <http://www.theatlantic.com/sexes/archive/2013/05/no-sex-talk-allowed/275782/> (Discussing May 9, 2013 Montana Agreement, *supra*, note 19, professing to be a "blueprint" for other schools. Kaminer called it "a mindlessly broad policy" and warned "If a student feels harassed, she may be harassed, regardless of the reasonableness of her feelings, and school administrators may be legally required to discipline her 'harasser.'")

<sup>26</sup> Written testimony of Greg Lukianoff to the U.S. House of Representatives Committee on the Judiciary, June 2, 2015, <http://judiciary.house.gov/cache/files/cb2a2b82-2c21-4fa3-8a94-896c108c6b47/06022015-lukianoff-testimony.pdf>

<sup>27</sup> Resolution Agreement between OCR and Harvard Law School signed on December 23, 2014, [www2.ed.gov/documents/press-releases/harvard-law-letter.pdf](http://www2.ed.gov/documents/press-releases/harvard-law-letter.pdf)

<sup>28</sup> Kipnis, Laura, "My Title IX Inquisition," *The Chronical Review*, *The Chronical of Higher Education*, May 29, 2015, <http://laurakipnis.com/wp-content/uploads/2010/08/My-Title-IX-Inquisition-The-Chronicle-Review-.pdf>.

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<sup>29</sup> Nozicka, Luke, *supra*, note 16.

<sup>30</sup> Written testimony of Wendy Kaminer to the U.S. House of Representatives Committee on the Judiciary, June 2, 2015, <http://judiciary.house.gov/cache/files/4c527c6c-e7aa-4187-bc62-8c473216eed/06022015-kaminer-testimony.pdf>.

<sup>31</sup> Foundation for Individual Rights in Education, FIRE Statement on Fall 2015 Campus Protests, Nov. 25, 2015, <https://www.thefire.org/fire-statement-on-fall-2015-campus-protests/>

<sup>32</sup> House of Representatives Judiciary Committee, Hearing: First Amendment Protections on Public College and University Campuses, June 2, 2015, <http://judiciary.house.gov/index.cfm/hearings?ID=C256F82E-1F4E-4F60-B702-78A58B81E4F8>.

<sup>33</sup> 2011 Dear Colleague Letter, *supra*, note 1 at p. 11 (“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”), and April 29, 2014, *Questions and Answers on Title IX and Sexual Violence*, *supra*, note 1.

<sup>34</sup> 2011 Dear Colleague Letter, *supra*, note 1 at p. 12.

<sup>35</sup> Henrick, Stephen, “A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses,” *Northern Kentucky Law Review* Vol. 40, No. 1. (2013), <http://www.saveservices.org/wp-content/uploads/2013/Final-Law-Review-Article.pdf>.

<sup>36</sup> Bader, Hans, “No, OCR’s April 4, 2011 Dear Colleague letter is not entitled to deference,” *supra*, note 10.

<sup>37</sup> April 29, 2011 *Questions and Answers on Title IX and Sexual Violence*, *supra*, note 1 at p. 26. (“If the school permits one party to have lawyers or other advisors at any stage of the proceedings, it must do so equally for both parties. Any school-imposed restrictions on the ability of lawyers or other advisors to speak or otherwise participate in the proceedings must also apply equally.”)

<sup>38</sup> 2011 Dear Colleague Letter, *supra*, note 1 at p. 3 (“Sexual harassment is unwelcome conduct of a sexual nature. It includes unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.”) and at p. 3, n. 9 (“Title IX also prohibits gender-based harassment, which may include acts of verbal, nonverbal, or physical aggression, intimidation, or hostility based on sex or sex-stereotyping, even if those acts do not involve conduct of a sexual nature.”)

<sup>39</sup> Emmett, Shelby, “FIRE Briefs Congressional Staffers on Due Process,” *FIRE*, October 20, 2015, <https://www.thefire.org/fire-briefs-congressional-staffers-on-due-process/>.

<sup>40</sup> Kruth, Susan, “Esquire Details Egregious Failures of Occidental Sexual Assault Case,” *FIRE*, March 27, 2015. <https://www.thefire.org/esquire-details-egregious-failures-of-occidental-sexual-assault-case/>

<sup>41</sup> Robinson, Walter V., “Expelled under new policy, ex-Amherst student files suit,” *The Boston Globe*, May 29, 2015, <http://www.bostonglobe.com/metro/2015/05/29/amherst/4t6JtKmaz7vYsRqk5NDyJ/story.html>.

<sup>42</sup> Harris, Samantha, “Campus Judiciaries on Trial: An Update from the Courts,” Heritage Legal Memorandum #165, *The Heritage Foundation*, October 6, 2015, <http://www.heritage.org/research/reports/2015/10/campus-judiciaries-on-trial-an-update-from-the-courts>.

<sup>43</sup> Opinion, “Rethink Harvard’s sexual harassment policy,” *The Boston Globe*, October 15, 2014, <http://www.bostonglobe.com/opinion/2014/10/14/rethink-harvard-sexual-harassment-policy/HFDDiZn7nU2UwuUuWMnqBM/story.html>.

<sup>44</sup> Schow, Ashe, “UPenn law professors speak out against new campus sexual assault policy,” *Washington Examiner*, February 18, 2015, <http://www.washingtonexaminer.com/upenn-law-professors-speak-out-against-new-campus-sexual-assault-policy/article/2560365>.

<sup>45</sup> Schow, Ashe, “Members of civil rights commission oppose ‘disregard for rule of law’ over campus sexual assault rules,” *Washington Examiner*, March 2, 2014, <http://m.washingtonexaminer.com/members-of-civil-rights-commission-oppose-disregard-for-rule-of-law-over-campus-sexual-assault-rules/article/2560906>.

<sup>46</sup> Palazzolo, Joe, “Harvard Law Professor: Feds’ Position on Sexual-Assault Policies Is ‘Madness,’” *Wall Street Journal*, December 31, 2014, <http://blogs.wsj.com/law/2014/12/31/harvard-law-professor-feds-position-on-sexual-assault-policies-is-madness/>.

<sup>47</sup> Linhorst, Michael, *supra*, note 15 (quoting Professor Cynthia Bowman.)

<sup>48</sup> Ann E. Green, Chair of the Committee on Women in the Academic Profession American Association of University Professors, August 18, 2011 letter to Russlynn Ali, OCR’s Assistant Secretary for Civil Rights, (quoting Gregory Scholtz, Associate Secretary and Director of AAUP’s Department of Academic Freedom, Tenure, and Governance,

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in a June 27, 2011, letter to Ali), <https://portfolio.du.edu/downloadItem/192847>; May, Caroline, "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").

<sup>49</sup> National Assn. of Scholars Letter to Members of Congress: "Rein in the DoED's Office for Civil Rights," March 4, 2015, discussed in Richardson, Valerie, "Civil rights commissioners: Rein in education administration on 'unlawful' bullying, sexual assault policies," *The Washington Times*, March 4, 2015, <http://www.washingtontimes.com/news/2015/mar/4/civil-rights-commissioners-rein-admin-unlawful-bul/?page=all>.

<sup>50</sup> Senate HELP Committee Press Release: "Bipartisan Group of Senators Announces Report on Simplifying Federal Regulations for America's 6,000 Colleges and Universities; Chairman Alexander announces Feb. 24 hearing on report recommendations to streamline and reduce federal regulations, while protecting students and taxpayers," February 12, 2015, <http://www.help.senate.gov/newsroom/press/release/?id=c82d8c2e-36eb-4b32-89f4-5c32c3f2dd68&groups=Chair>; see also HELP February 24, 2015 Hearing on report recommendations to streamline and reduce federal regulations, <http://www.c-span.org/video/?323149-1/hearing-sexual-assault-college-campuses>. The HELP Report found that annually, these institutions must comply with thousands of pages of statutory and sub-regulatory requirements, including hundreds of "Dear Colleague letters," which have been estimated to cost some universities up to \$150 million each year.

<sup>51</sup> SAVE, 2015 Editorials, <http://www.saveservices.org/sexual-assault/editorials/2015-2/>.

<sup>52</sup> Executive Order 13563, Improving Regulation and Regulatory Review, January 18, 2011, <https://www.whitehouse.gov/the-press-office/2011/01/18/executive-order-13563-improving-regulation-and-regulatory-review>.

<sup>53</sup> Testimony of Hans Bader to the House of Representatives Committee on the Judiciary, June 2, 2015, <http://docs.house.gov/meetings/JU/JU10/20150602/103548/HHRG-114-JU10-20150602-SD003.pdf>.

<sup>54</sup> Henrick, Stephen, *supra*, note 35, at page 54.

<sup>55</sup> Epstein, Richard, "Title IX or Bust," *Defining Ideas*, February 7, 2012, <http://www.hoover.org/research/title-ix-or-bust> ("[t]he Department of Education is on a collision course with the Bill of Rights."); Bader, Hans, "No, OCR's April 4, 2011 Dear Colleague letter is not entitled to deference," *supra*, note 10 (OCR's "suggestion that cross-examination not be allowed ... should not be deferred to because it raises serious constitutional questions under the due process clause.")

<sup>56</sup> Bader, Hans, "Dept. of Ed's Sexual Harassment Guidance Radically Expands Harassment Liability," *CNSNews.com*, March 2, 2015, <http://www.cnsnews.com/commentary/hans-bader/dept-eds-sexual-harassment-guidance-radically-expands-harassment-liability>.