A PREPONDERANCE OF THE EVIDENCE: THE APPROPRIATE STANDARD IN TITLE IX SEXUAL HARASSMENT PROCEEDINGS

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INTRODUCTION

"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 . . . ."[1] This one sentence, taken from Title IX of the Education Amendments of 1972 (Title IX), has protected against sexual discrimination, including sexual harassment—as well as garnered controversy—for almost fifty years. Title IX's history covers discrimination among a wide range of settings, from collegiate athletic programs to high school classrooms.[2] Most recently, it gathered attention due to the Department of Education's (DOE's)

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1. 20 U.S.C. § 1681(a) (2018).

2. U.S. DEP'T OF JUST., EQUAL ACCESS TO EDUCATION: FORTY YEARS OF TITLE IX 1, 3–4 (2012), https://www.justice.gov/sites/default/files/crt/legacy/2012/06/20/titleixreport.pdf.

Final Rule, which both modifies and adds to DOE's interpretation of Title IX, and went into effect on August 14, 2020.[3]

According to DOE's Office for Civil Rights (OCR), the purpose of the Final Rule is "to better align the Department's Title IX regulations with the text and purpose of Title IX, the U.S. Constitution, Supreme Court precedent and other case law, and to address the practical challenges facing students, employees, and recipients with respect to sexual harassment allegations in education programs and activities."[4] DOE guidance uses the term "recipients" interchangeably with "schools" to refer to all public and private educational institutions that receive federal funds.[5] While most can agree that DOE has a worthy purpose, there is significant debate over whether the proposed means fit the desired end.[6]

Title IX proceedings play an important role in combatting sexual harassment by providing students with a forum to address these claims. A significant procedural element in any adjudication, including those under Title IX, is the standard of evidence. Until 2017, the majority of universities followed DOE's 2011 Dear Colleague Letter.[7] This interpretive guidance

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3. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

4. *Id.* at 30,030.

5. OFF. FOR C.R., U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES 2 (2001) [hereinafter 2001 GUIDANCE], https://www2.ed.gov/about/offices/list/ocr/docs/shguide.pdf.

6. *See, e.g.*, Erica L. Green, *Sex Assault Rules Under DeVos Bolster Defendants' Rights and Ease College Liability*, N.Y. TIMES (Nov. 16, 2018), https://nyti.ms/2zfrBFY (referring to critics' view of proposed regulations as an "overly aggressive rollback of the steps taken by the previous administration to combat sexual assault on campus"); *see also* Victoria Yuen & Osub Ahmed, *4 Ways Secretary DeVos' Proposed Title IX Rule Will Fail Survivors of Campus Sexual Assault*, CTR. FOR AM. PROGRESS (Nov. 16, 2018, 3:12 PM), https://www.americanprogress.org/issues/education-postsecondary/news/2018/11/16/461181/4-ways-secretary-devos-proposed-title-ix-rule-will-fail-survivors-campus-sexual-assault/ (stating that proposed regulations will "undermine sexual assault survivors' rights").

7. *See* U.S. Dep't of Educ., Off. for C.R., Dear Colleague Letter: Sexual Violence 10–11 (Apr. 4, 2011), https://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf [hereinafter 2011 Dear Colleague Letter] (outlining the requirements of Title IX and the efforts that schools can take to prevent sexual harassment against their students); *cf.* Sarah Brown, *What Does the End of Obama's Title IX Guidance Mean for Colleges?*, CHRON. OF HIGHER EDUC. (Sept. 22, 2017), https://www.chronicle.com/article/what-does-the-end-of-obamas-title-ix-guidance-mean-for-colleges/(noting that some state laws had "already codified many of the 2011 letter's key provisions," including California, which requires a preponderance of the evidence as the standard in Title IX proceedings).

advised recipients to employ a preponderance of the evidence standard[8] in Title IX proceedings in order to be consistent with the statute.[9] However, DOE rescinded the 2011 Dear Colleague Letter in 2017 and proposed new regulations in its place.[10] DOE published the Final Rule on May 19, 2020, after making changes based on the notice-and-comment process,[11] and the Final Rule went into effect on August 14, 2020.[12] The changes to existing Title IX requirements include new standardized guidelines for how a recipient should conduct grievance proceedings following a formal complaint of sexual harassment.[13] According to DOE, these guidelines "[e]stablish procedural due process protections that must be incorporated into a recipient's grievance process to ensure a fair and reliable factual determination when a recipient investigates and adjudicates a formal complaint of sexual harassment."[14]

Regarding the standard of evidence, the Final Rule states that a recipient may choose between using a preponderance of the evidence standard or the higher clear and convincing standard.[15] Originally, the proposed regulations allowed a recipient to use a preponderance of the evidence standard only if the recipient used that standard for other code of conduct violations with the

8. *See Preponderance of the Evidence*, BLACK'S LAW DICTIONARY (11th ed. 2019) (defining a preponderance of the evidence standard as "evidence that has the most convincing force; superior evidentiary weight that, though not sufficient to free the mind wholly from all reasonable doubt, is still sufficient to incline a fair and impartial mind to one side of the issue rather than the other"); *see also* 2011 Dear Colleague Letter, *supra* note 7, at 11 (defining a preponderance of the evidence as "more likely than not that sexual violence occurred").

9. 2011 Dear Colleague Letter, *supra* note 7, at 11.

10. *See* OFF. FOR C.R., U.S. DEP'T OF EDUC., Q&A ON CAMPUS SEXUAL MISCONDUCT 7 (2017) [hereinafter 2017 QUESTIONS AND ANSWERS], https://www2.ed.gov/about/offices/list/ocr/docs/qa-title-ix-201709.pdf.

11. The Notice of Proposed Rulemaking (NPRM) received 124,000 comments. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,055 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

12. *Id.* at 30,026.

13. *Id.* at 30,053–54.

14. *Id.* at 30,030.

15. *Id.* at 30,055 ("Similarly, § 106.45(b)(1)(vii) and § 106.45(b)(7)(i) permit each recipient to select between one of two standards of evidence to use in resolving formal complaints of sexual harassment."); *see also Evidence*, BLACK'S LAW DICTIONARY, *supra* note 8 (defining clear and convincing evidence as "[e]vidence indicating that the thing to be proved is highly probable or reasonably certain").

same maximum sanctions.[16] However, due to critical commenters,[17] DOE altered the Final Rule to remove this requirement.[18] Additionally, the Final Rule states that a recipient must use the same standard of evidence in proceedings against students as in those against employees.[19] DOE's main concern in modifying recipients' grievance procedures, including the required standard of evidence, is to add procedural due process protections.[20] While allowing a higher standard of evidence may ensure fewer wrongful findings of liability,[21] it creates extreme difficulties for a complainant to

16. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

17. Some commenters raised concerns that this requirement undermined recipients' ability to choose between evidentiary standards because it allowed them to use the higher clear and convincing standard in sexual harassment proceedings and the lower standard in other cases, but not the other way around. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,374 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106). Not only would this disadvantage complainants in sexual harassment cases, it would also go beyond the Department of Education's (DOE's) authority under Title IX, which does not allow regulation of non-Title IX disciplinary proceedings. *Id.*

18. However, many universities require a higher evidentiary standard than a preponderance of the evidence. *See* Jason J. Bach, *Students Have Rights, Too: The Drafting of Student Conduct Codes*, 1 BYU EDUC. & L.J. 1, 29 (2003). Additionally, those universities that use a higher standard in other misconduct proceedings would be forced either to lower the standard used in those other proceedings or to use that higher standard in Title IX of the Education Amendments of 1972 (Title IX) proceedings. *See* Ted Mitchell, Am. Council on Educ., Comment Letter on Proposed Rulemaking Amending Regulations Implementing Title IX of the Education Amendments of 1972 (Jan. 30, 2019) https://www.acenet.edu/news-room/Documents/Comments-to-Education-Department-on-Proposed-Rule-Amending-Title-IX-Regulations.pdf. Therefore, this proposal effectively mandates the use of the clear and convincing standard across all disciplinary proceedings, even those not brought under Title IX. *Id.*

19. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,375–76 (recognizing the challenge facing Title IX recipients in deciding whether to raise the standard of evidence for students or lower the standard of evidence for employees to come into conformity with the regulation).

20. *Id.* at 30,047 ("Title IX cannot be interpreted in a manner that denies any person due process of law under the U.S. Constitution.").

21. *See* Louis Kaplow, *Burden of Proof*, 121 YALE L.J. 738, 759 (2012) (stating that a higher evidence threshold will result in fewer benign acts mistakenly being found liable, as well as fewer harmful acts correctly being found liable). *Id.* In other words, a higher evidence threshold results in fewer false convictions but more mistaken exonerations. *Id.*

successfully prove a sexual harassment claim.[22] The Final Rule incites much controversy regarding the appropriate balance between protecting the accused and creating effective proceedings.

This Comment argues that a preponderance of the evidence is the appropriate evidentiary standard to use in Title IX sexual harassment grievance proceedings. Part I of this Comment addresses statistics illustrating the need for Title IX protections. It also outlines the history of Title IX guidance, including the Final Rule. Part II compares Title IX grievance procedures to general civil rights litigation to demonstrate that a preponderance of the evidence is the appropriate standard for Title IX sexual harassment cases. Finally, Part III recommends challenges to the Final Rule through judicial review, as well as the creation by DOE of a new rule, with the appropriate standard of evidence, through the informal rulemaking process of the Administrative Procedure Act (APA).

I. BACKGROUND

A. Sexual Harassment at Title IX Recipient Institutions

Sexual harassment—a term which includes sexual violence—is a pervasive issue at educational institutions.[23] Sexual violence alone affects

22. *See* Matthew R. Triplett, Note, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 517 (2012) (discussing the factual record in sexual assault proceedings, which often exclusively consists of testimony from the involved parties, and arguing that the special nature of these proceedings calls for a lower standard of evidence to avoid an "insurmountable obstacle for victims with meritorious claims").

23. The 1997 guidance's definition of the term "sexual harassment," which the DOE based on Title VII case law, is "conduct of a sexual nature [that] 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." Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,041 (Mar. 13, 1997). The 2001 guidance defined sexual harassment more broadly as "unwelcome conduct of a sexual nature." 2001 GUIDANCE, *supra* note 5, at 8. The 2011 Dear Colleague Letter included the latter definition, and it also clarified that under Title IX, sexual harassment includes sexual violence. 2011 Dear Colleague Letter, *supra* note 7, at 1. Sexual violence refers to "physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent." *Id.* DOE now intends to give sexual harassment a more specific definition. Under the new regulations, sexual harassment must include an employee conditioning an aid, benefit, or service on unwelcome sexual conduct; or unwelcome conduct on the basis of sex that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity." Nondiscrimination on the Basis of Sex in

23.1% of females and 5.4% of males enrolled in undergraduate programs.[24] Furthermore, 21% of transgender, genderqueer, nonconforming (TGQN) students in college experienced sexual assault.[25] However, only 20% of female college students who survived sexual assault reported the assault to law enforcement.[26] Only 4% of the 80% of students that did not go to law enforcement reported the incident to another organization.[27] These statistics illustrate that sexual harassment is a massive problem among college students, even with Title IX protections in place.[28]

Skepticism often surrounds sexual harassment complaints.[29] This uncertainty results from harmful myths that pervade the discussion around

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Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,033 n.57. The new definition also includes "sexual assault," as defined by the Clery Act, and "dating violence," "domestic violence," or "stalking," as defined by the Violence Against Women Act. *See id.*; *see also* 20 U.S.C. § 1092(f)(6)(A)(v); 34 U.S.C. § 12291(a)(8), (10), (30).

24. *Campus Sexual Violence: Statistics*, RAINN, https://www.rainn.org/statistics/campus-sexual-violence (citing BUREAU OF JUST. STATS, DEP'T OF JUST, RAPE AND SEXUAL VICTIMIZATION AMONG COLLEGE-AGED FEMALES, 1995-2013 (2014)). Sexual violence, as it is used here, includes "rape or sexual assault through physical force, violence, or incapacitation." *Id.*

25. *Id.*

26. *Id.*

27. *Id.* Other reasons students gave for not reporting an assault included the belief that it was a personal matter (26%), the fear of reprisal (20%), the belief that the assault was not important enough to report (12%), the fear of getting the perpetrator into trouble (10%), and the belief that the police would not or could not do anything to help (9%). *Id.*

28. *See* KATHARINE K. BAKER ET AL., TITLE IX & THE PREPONDERANCE OF THE EVIDENCE: A WHITE PAPER 1–3 (2016), https://www.feministlawprofessors.com/wp-content/uploads/2016/11/Title-IX-Preponderance-White-Paper-signed-11.29.16.pdf (listing thirty different consequences of sexual harassment, including educational harms, health consequences, and economic costs).

29. *See Why We Often Don't Believe Women Who Report Sexual Assault*, PBS NEWSHOUR (June 28, 2019, 6:30 pm), https://www.pbs.org/newshour/show/why-we-often-dont-believe-women-who-report-sexual-assault (examining E. Jean Carroll's sexual assault allegations against President Trump and the response by the general public). Soraya Chemaly of the Women's Media Center Speech Project explains the common rape myth that women exaggerate and fabricate sexual assault claims. *Id.* She discusses the cultural practice of disbelieving women who report sexual assault, rather than considering their testimony valid or giving them the benefit of the doubt. *Id. See also* BAKER ET AL., *supra* note 28, at 4–5 ("The law's traditional approach to sexualized violence treated women as inherently untrustworthy and men as not only presumptively innocent, but especially in need of protection from false allegations." (citing Lynne Henderson, *Rape and Responsibility*, 11 LAW & PHIL. 127 (1992))).

sexual violence.[30] Victims of sexual harassment are frequently accused of lying about the harassment to get revenge on a partner or to garner attention at the expense of star student athletes.[31] Others are blamed for their own assault or called offensive names.[32] These myths and stereotypes exemplify the need for prompt and equitable grievance procedures to protect victims who report incidents of sexual harassment.

B. The History of Title IX

Since its passage in 1972, Title IX has prompted a 20% increase in women obtaining college degrees.[33] Title IX also provides women with other benefits, such as higher participation in the work force and better earnings.[34] DOE ensures the continuation of these benefits through a series of guidance documents that direct recipients on how to interpret Title IX.

DOE issued the first of these guidance documents in 1997 after a public notice-and-comment period.[35] The first guidance required that each

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30. *See Myths and Facts about Sexual Violence*, GEO. L., https://www.law.georgetown.edu/your-life-career/health-fitness/sexual-assault-relationship-violence-services/myths-and-facts-about-sexual-violence/ (last visited Dec. 18, 2020) (listing eleven common myths surrounding sexual violence).

31. In 2016, Stanford "swimming champion" Brock Turner was convicted of three counts of sexual assault, punishable by up to fourteen years in prison; Turner served three months of a six-month sentence. *See* Lynn Neary, *Victim of Brock Turner Sexual Assault Reveals Her Identity*, NPR (Sept. 4, 2019, 4:44 PM), https://www.npr.org/2019/09/04/757626939/victim-of-brock-turner-sexual-assault-reveals-her-identity ("Turner was a first-time offender, promising student[,] and swimming champion. The judge said a tougher sentence 'would have had a severe impact on him' . . . ."). *See also* Marc Tracy, *Jameis Winston and Woman Who Accused Him of Rape Settle Lawsuits*, N.Y. TIMES (Dec. 15, 2016), https://nyti.ms/2hQb7Zx (discussing former Florida State quarterback Jameis Winston's countersuit against alleged rape victim Erica Kinsman, in which Winston accused Kinsman of greed after he had signed a $23 million deal with the Tampa Bay Buccaneers).

32. *See* Jon Krakauer & Laura L. Dunn, Opinion, *Don't Weaken Title IX Campus Sex Assault Policies*, N.Y. TIMES (Aug. 3, 2017), https://nyti.ms/2hsboXv (describing the "soul-crushing trauma that is a byproduct of sexual violence" and asserting that rape occurs much more frequently than false accusations of rape).

33. U.S. DEP'T OF JUST., *supra* note 2.

34. U.S. DEP'T OF COM. ET AL., WOMEN IN AMERICA: INDICATORS OF SOCIAL AND ECONOMIC WELL-BEING 32 (2011), https://www2.census.gov/library/publications/2011/demo/womeninamerica.pdf ("Earnings of full-time female workers have risen by 31 percent since 1979 . . . In addition, earnings for women with college degrees rose by 33 percent since 1979 . . . .").

35. Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,035 (Mar. 13, 1997).

recipient have grievance procedures in place to provide for the "prompt and equitable" resolution of sexual harassment complaints.[36] It also outlined several necessary elements for prompt and equitable procedures, including the "adequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence."[37] Further, the 1997 guidance addressed the importance of due process rights for both parties to an investigation.[38] However, the guidance also emphasized the protective purpose of Title IX by adding that a recipient's efforts to afford due process rights must not "restrict or unnecessarily delay" protections given to the complainant.[39]

In 2001, after another notice-and-comment period, DOE released the REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES, which both affirmed and amended parts of the 1997 guidance.[40] It recognized several important Supreme Court cases that were decided after DOE issued its 1997 guidance. Those cases, *Gebser v. Lago Vista Independent School District*,[41] and *Davis v. Monroe County Board of Education*,[42] addressed situations in which a recipient can be held liable for monetary damages for a violation of Title IX. The 2001 guidance clarified that the Supreme Court explicitly limited the

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36. *Id.* at 12,040.

37. *Id.* at 12,044. The Office for Civil Rights (OCR) identified six elements to determine whether a recipient's grievance procedures are prompt and equitable. Those elements include:

> (1) [n]otice to students, parents of elementary and secondary students, and employees of the procedure, including where complaints may be filed; (2) [a]pplication of the procedure to complaints alleging harassment carried out by employees, other students, or third parties; (3) [a]dequate, reliable, and impartial investigation of complaints, including the opportunity to present witnesses and other evidence; (4) [d]esignated and reasonably prompt timeframes for the major stages of the complaint process; (5) [n]otice to the parties of the outcome of the complaint; and (6) [a]n assurance that the school will take steps to prevent recurrence of any harassment and to correct its discriminatory effects on the complainant and others, if appropriate.

Id.

38. *Id.* at 12,045 ("Indeed, procedures that ensure the Title IX rights of the complainant while at the same time according due process to both parties involved will lead to sound and supportable decisions.").

39. *Id.* ("Schools should ensure that steps to accord due process rights do not restrict or unnecessarily delay the protections provided by Title IX to the complainant.").

40. *See* 2001 GUIDANCE, *supra* note 5, at i–viii ("[The revised guidance] replaces the 1997 document . . . [and] reaffirms the compliance standards that OCR applies in investigations and administrative enforcement of Title IX . . . .").

41. 524 U.S. 274 (1998).

42. 526 U.S. 629 (1999).

liability standard it established in those cases to private actions for monetary damages, and that DOE retained the power to "promulgate and enforce requirements that effectuate [Title IX's] nondiscrimination mandate."[43] The 2001 guidance also reiterated the importance of the prompt and equitable resolution of complaints, as well as the provision of due process rights that do not interfere with the protection of the complainant.[44] Among those due process rights is the confidentiality of the involved parties, particularly the accused.[45] The guidance recognized the damage that can result from a false accusation of sexual harassment and instructed recipients to evaluate that issue—among other factors—to create a safe environment for all.[46]

DOE later issued a Dear Colleague Letter in 2011 to supplement the 2001 guidance.[47] The Letter did not undergo a notice-and-comment period and described itself as a significant guidance document, which did not add to the law but rather provided information for recipients on the existing requirements of Title IX.[48] As in previous guidance, the Letter differentiated between the standards involved in a Title IX investigation and a law enforcement investigation.[49] It emphasized again that a Title IX investigation "must in all cases be prompt, thorough, and impartial."[50] In describing the necessary elements of a prompt and equitable investigation, the Letter was the first guidance to specifically discuss the standard of evidence.[51] First, it equated Title IX investigations with civil litigation under Title VII, in which the U.S. Supreme Court uses a preponderance of the evidence standard.[52] It then listed

43. 2001 GUIDANCE, *supra* note 5, at ii (quoting *Gebser*, 524 U.S. at 292).

44. *See generally id.* at 19–22.

45. *See generally id.* at 17–18, 22.

46. *See id.* at 17–18. The 2001 guidance lists several factors that a school should consider to provide a safe and nondiscriminatory environment. Those factors include the seriousness of the alleged harassment, the age of the complainant, other reports, if any exist, of harassment against the accused, and the accused person's right to information about the complainant and possible sanctions. *Id.*

47. 2011 Dear Colleague Letter, *supra* note 7, at 2.

48. *See id.* at 1 n.1 ("OCR issues this and other policy guidance to provide recipients with information to assist them in meeting their obligations, and to provide members of the public with information about their rights, under the civil rights laws and implementing regulations that we enforce.").

49. *See id.* at 4 (noting that Title IX investigations are different from law enforcement investigations and that law enforcement investigations do not relieve the recipient of its obligation to conduct a Title IX investigation).

50. *Id.* at 5.

51. *See id.* at 10 (stating that OCR will review a recipient's grievance procedures to ensure it is using a preponderance of the evidence standard).

52. *Id.* at 10–11.

other areas where DOE uses this standard.[53] Finally, the Letter stated that recipients must use a preponderance of the evidence standard to comply with Title IX, and that use of the clear and convincing standard does not meet the equitable requirement because it is inconsistent with other civil rights laws.[54]

To further clarify recipients' legal responsibilities, DOE released the next guidance related to Title IX sexual harassment investigations in 2014, in the form of a "Questions and Answers" document.[55] Like the 2011 Dear Colleague Letter, the 2014 document identified a preponderance of the evidence standard as the appropriate standard to use in resolving Title IX complaints in a prompt and equitable manner.[56] In 2017, DOE rescinded the 2011 Dear Colleague Letter and the 2014 Questions and Answers, and replaced them with another Questions and Answers document.[57] This new guidance acted as an interim measure to announce the upcoming changes to Title IX, which DOE intended to implement through the APA's informal rulemaking process.[58]

C. New Rule Under Title IX

In November 2018, DOE issued proposed regulations for sexual harassment proceedings under Title IX to take effect after a public

53. *See id.* at 11 (noting that OCR uses a preponderance of the evidence standard when resolving complaints against recipients and in its fund termination administrative hearings).

54. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,044 (Mar. 13, 1997) (listing the elements OCR uses to determine whether a recipient's grievance procedures are equitable).

55. *See generally* OFF. FOR C.R., U.S. DEP'T OF EDUC., QUESTIONS AND ANSWERS ON TITLE IX AND SEXUAL VIOLENCE (2014) [hereinafter 2014 QUESTIONS AND ANSWERS], https://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf.

56. *Id.* at 13.

57. *See generally* 2017 QUESTIONS AND ANSWERS, *supra* note 10 (readdressing confusion in Title IX requirements).

58. *Id.* at 1; *see also* Administrative Procedure Act, 5 U.S.C. § 553. To create binding regulations through notice-and-comment rulemaking, an agency must first publish notice of the proposed regulations in the Federal Register. 5 U.S.C. § 553(b). The notice must include the time, place, and nature of the rulemaking proceedings; the legal authority under which the agency proposed the regulations; and the terms or substance of the proposed regulations or the involved subjects and issues. 5 U.S.C. § 553(b)(1)–(3). Next, the agency must allow a period of time for interested parties to submit comments on the proposed regulations. 5 U.S.C. § 553(c). After consideration of the comments, the agency incorporates a "concise general statement of their basis and purpose." *Id.* Finally, the agency must publish the Final Rule in the Federal Register, to become effective no less than thirty days after publication. 5 U.S.C. § 553(d).

notice-and-comment period.[59] Specifically, DOE planned to modify the requirements relating to constitutional protections, religious exemptions, the designation of a Title IX coordinator, the dissemination of Title IX policy, and remedies for Title IX violations.[60] DOE also intended to alter the definition of "sexual harassment," to revise the standard by which a recipient may be found liable for a Title IX violation, and to outline amended grievance procedures for Title IX complaints.[61] On May 19, 2020, DOE published the Final Rule to the Federal Register and announced that the Rule would become effective on August 14, 2020.[62] The Final Rule implements almost all of the proposed changes.[63] For instance, it changes the definition of actionable sexual harassment to conduct that is "so severe, pervasive, and objectively offensive that it effectively denies a person equal access to education."[64] It also incorporates the definitions of sexual assault, dating violence, domestic violence, and stalking found in the Clery Act and the Violence Against Women Act (VAWA).[65] Additionally, to find a recipient liable for discrimination under Title IX, the Final Rule applies the Supreme Court standard in *Gebser* and *Davis*, requiring actual knowledge of actionable sexual harassment and deliberate indifference toward that misconduct.[66] With regard to grievance proceedings for sexual harassment complaints, the

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59. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106).

60. *See id.* at 61,480–82 (summarizing the parts of Title IX that DOE intends to amend).

61. *Id.* at 61,466 ("We propose definitions for 'sexual harassment' and 'actual knowledge' in § 106.30."); *see also* Yuen & Ahmed, *supra* note 6 (addressing concerns regarding DOE's proposal to narrow the definition of sexual harassment to "unwelcome conduct on the basis of sex that is so severe, pervasive, and objectively offensive that it effectively denies a person equal access to the recipient's education program or activity").

62. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

63. *Id.*

64. *Id.* at 30,036 (citing Davis v. Monroe Cty. Bd. of Educ., 526 U.S. 629, 633 (1999)).

65. *Id.* at 30,033 (outlining the new definition for sexual harassment).

66. *Id.* at 30,032 (making it more difficult to successfully find a recipient liable for discrimination under Title IX). DOE opines that "[n]othing in *Gebser* or *Davis* purports to restrict the *Gebser/Davis* framework only to private lawsuits for money damages," a statement which directly contrasts with DOE's previous 2001 guidance. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg at 30,033; *see also* 2001 GUIDANCE, *supra* note 5, at ii ("The Court was explicit in *Gebser* and *Davis* that the liability standards established in those cases are limited to private actions for monetary damages.").

Final Rule provides more standardized requirements that all recipients must have in place. Recipients will now have to adopt procedural due process protections that more closely resemble a judicial proceeding.[67] For example, each party has the opportunity to choose an advisor, who may or may not be an attorney, to help them through the process.[68] Additionally, the Final Rule requires post-secondary institutions to hold a live hearing in which each party's advisor must conduct cross-examinations.[69] There is a presumption that the respondent is not responsible throughout the grievance process.[70] A decisionmaker, who is not the Title IX coordinator or the investigator, will then determine responsibility.[71]

Among the changes are revisions to the standard of evidence that recipients are required to use in Title IX grievance.[72] Rather than require recipients to use a preponderance of the evidence standard, DOE gives recipients a choice between continuing to use that standard or switching to the higher clear and convincing standard.[73] However, the recipient must choose the same standard of evidence for all complaints, whether the respondent is a student, employee, or faculty member.[74] DOE reasons that, given the strong procedural rights added to the grievance process, either standard will lead to a fair and accurate determination of responsibility.[75]

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67. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,053–54 (summarizing the new procedures recipients must implement after receiving a formal complaint).

68. *Id.* at 30,053.

69. *Id.* at 30,053–54.

70. *Id.* at 30,053.

71. *Id.* at 30,054.

72. *Id.* at 30,275, 30,372–74 (describing changes to §§ 106.45(b)(1)(vii) and (b)(7)(i)).

73. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106). DOE addresses its belief that a preponderance of the evidence is an inappropriate standard for sexual harassment grievance procedures, given that they lack certain safeguards that are included in civil litigation. *Id.* However, DOE also states that the due process and reliability protections it affords under the proposed regulations may make a lower evidentiary standard more reasonable. *Id.* Therefore, DOE intends to give recipients the flexibility to choose between the preponderance of the evidence standard and the clear and convincing evidence standard. *Id.*

74. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,375–79 ("[T]he Department's concern in these final regulations is ensuring that a recipient uses *a single, selected standard of evidence* for Title IX sexual harassment cases so that complainants alleging sexual harassment face a predictable grievance process regardless of whether the complainant has alleged sexual harassment by a student, employee, or faculty member.") (emphasis added).

75. *Id.* at 30,374.

II. TITLE IX AND CIVIL LITIGATION

A. Title IX as a Civil Rights Statute

First and foremost, Title IX is a civil rights statute.[76] It shares a close relationship with Title VI and Title VII of the Civil Rights Act of 1964, as evidenced by the statutes' similar language.[77] In fact, Congress modeled Title IX after Title VI, and specifically incorporated Title VI's procedural elements into Title IX.[78] As Justice Stevens opined in *Smith v. City of Jackson*,[79] "when Congress uses the same language in two statutes having similar purposes, particularly when one is enacted shortly after the other, it is appropriate to presume that Congress intended that text to have the same meaning in both statutes."[80] Courts frequently cite Title VI and Title VII while deciding Title IX cases, "and vice versa."[81] The statutes are directly

76. *See, e.g.*, *id.* at 30,062 ("The Department is committed to the rule of law and robust enforcement of Title IX's non-discrimination mandate for the benefit of individuals in protected classes designated by Congress in Federal civil rights laws such as Title IX.").

77. *See* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance."); *see also* 42 U.S.C. § 2000e-2 (prohibiting discrimination in employment based on race, color, religion, sex, and national origin).

78. *See* 34 C.F.R. § 106.71 (2019) ("The procedural provisions applicable to Title VI of the Civil Rights Act of 1964 are hereby adopted and incorporated herein by reference[]"); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 286 (1998) (stating that Title IX was modeled after Title VI, and therefore the two statutes operate in the same way; each is comparable to a contract between the Government and a recipient, conditioning federal funding on non-discrimination by the recipient).

79. 544 U.S. 228 (2005).

80. *Id.* at 233; *see also* Ramya Sekaran, Note, *The Preponderance of the Evidence Standard and Realizing Title IX's Promise: An Educational Environment Free from Sexual Violence*, 19 GEO. J. GENDER & L. 643, 649 (2018) ("When Congress or an administrative agency expressly incorporates provisions or language of one statute into another statute, this is a clear indication that the legislature intended for the two statutes to be read together.").

81. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) ("We look to case law interpreting Title VII of the Civil Rights Act of 1964 for guidance in evaluating a claim brought under Title IX[]"); *see also* Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) ("Congress based Title IX on Title VI; therefore, the Court's analysis of what constitutes intentional sexual discrimination under Title IX directly informs our analysis of what constitutes intentional racial discrimination under Title VI (and vice versa).").

comparable because they share similar purposes and sanctions.[82] All three civil rights statutes share the purpose of preventing discrimination on the basis of some immutable characteristic.[83] More specifically, Title IX and Title VI purport to avoid federal financial support of discriminatory practices, as well as to prevent those practices from occurring.[84]

Significantly, the standard of evidence used in most civil litigation, including Title VI and Title VII cases, is a preponderance of the evidence.[85] In *Desert Palace, Inc. v. Costa*,[86] the U.S. Supreme Court compared Title VII to other statutes that specifically require a higher standard of evidence.[87] The Court concluded that Title VII's silence in that respect indicated Congress's intention that courts use a preponderance of the evidence standard—the typical standard of civil litigation—for Title VII cases.[88] On the other hand, the Supreme Court interprets Title IX and Title VII differently when there are specific differences in the language of the statutes.[89] In *Gebser*, the Court declined to apply agency principles of *respondeat superior* to a private action for

82. *See* Sekaran, *supra* note 80, at 652–53; *see also* Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, 2013 BYU EDUC. & L.J. 143, 153 ("OCR calls upon schools to adjudicate these cases not in order to assess the criminality of an alleged act, but to consider whether one student's actions have had a discriminatory effect upon another student that may impede the latter's access to educational opportunities.").

83. *Compare* 42 U.S.C. § 2000d ("No person in the United States shall, on the ground of race, color, or national origin, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any program or activity receiving Federal financial assistance[]"), *with* 42 U.S.C. § 2000e ("It shall be an unlawful employment practice for an employer to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . ."), *and* 20 U.S.C. § 1681(a) ("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 . . . .").

84. *See* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (listing Congress's similar purposes in enacting Title IX and Title VI as: (1) avoiding "the use of federal resources to support discriminatory practices"; and (2) providing protection for citizens against discriminatory practices).

85. *See* Desert Palace, Inc. v. Costa, 539 U.S. 90, 101 (2003) (holding that a plaintiff must present evidence that allows a jury to conclude by a preponderance of the evidence that discrimination was a motivating factor in an employment act).

86. 539 U.S. 90 (2003).

87. *Id.* at 99 ("Congress has been unequivocal when imposing heightened proof requirements in other circumstances, including in other provisions of Title 42.").

88. *Id.*

89. *See* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 283 (1998) (noting that unlike Title IX, Title VII explicitly provides for a cause of action and monetary damages).

damages under Title IX.[90] The Court reasoned that Title VII, which prohibits an employer from discriminating against an employee based on sex, "explicitly defines 'employer' to include 'any agent.'"[91] In contrast, "Title IX contains no comparable reference to an educational institution's 'agents,' and so does not expressly call for application of agency principles."[92] This interpretation implies that a court should read the statutes in the same manner except where specific differences are explicitly stated.[93] Each statute is silent on the appropriate standard of evidence; therefore, as stated in *Desert Palace*, a court may interpret them consistently as requiring a preponderance of the evidence.[94] Moreover, it is essential that Title IX proceedings require a preponderance of the evidence standard because to do otherwise would be to treat victims of sexual harassment differently from any other victim of discrimination, a practice that is discriminatory in and of itself.[95]

Further, in Justice Stevens's dissent in *Gebser*, he states the importance of looking to the text of Title IX and to legal precedent for guidance, rather than to the Court's views on policy.[96] The text of Title IX directly prohibits discrimination on the basis of sex; it does not mention, expressly or otherwise, the due process rights of the accused.[97] Additionally, legal precedent points to a preponderance of the evidence as the appropriate standard for Title IX

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90. *Id.*; *see also Respondeat Superior*, BLACK'S LAW DICTIONARY, *supra* note 8 (defining respondeat superior as "[t]he doctrine holding an employer or principal liable for the employee's or agent's wrongful acts committed within the scope of the employment or agency").

91. *Gebser*, 524 U.S. at 283.

92. *Id.*

93. *See id.* ("*Meritor*'s rationale for concluding that agency principles guide the liability inquiry under Title VII rests on an aspect of that statute not found in Title IX . . . .").

94. *See Desert Palace*, 539 U.S. at 101 ("Absent some congressional indication to the contrary, we decline to give the same term in the same Act a different meaning depending on whether the rights of the plaintiff or the defendant are at issue.").

95. BAKER ET AL., *supra* note 28, at 4.

96. *See Gebser*, 524 U.S. at 296 (Stevens, J., dissenting) ("We should therefore seek guidance from the text of the statute and settled legal principles rather than from our views about sound policy."). Justice Stevens dissents from the Court's decision not to hold a school district liable in damages for a violation of Title IX because it did not have actual notice of the misconduct. *Id.* at 293. He argues that the Court must follow constructions of Title IX that Congress has accepted in the same way as if Congress had explicitly authorized them. *Id.* at 296. Justice Stevens also states his concern that the Court's rule allows schools to insulate themselves from knowledge of sexual misconduct, and suggests that "the Court bears the burden of justifying its rather dramatic departure from settled law, and to explain why its opinion fails to shoulder that burden." *Id.* at 300–01.

97. 20 U.S.C. § 1681(a) (1976).

proceedings.[98] Therefore, using Justice Stevens's reasoning, the requirement that recipients use a preponderance of the evidence standard to resolve complaints of discrimination supersedes policy considerations such as the reputation of the accused.

B. Possible Sanctions Under Title IX

The possible sanctions imposed under each civil rights statute are comparable precisely because of their shared purposes. Unlike criminal investigations, Title IX sanctions include loss of federal funding (after administrative enforcement) and expulsion of the accused student.[99] In the Final Rule, DOE states its belief that either evidentiary standard, coupled with the added procedural protections, creates a fair and accurate process.[100] In response to many commenters' assertions that most civil litigation utilizes a preponderance of the evidence standard, DOE points out that some civil cases use the clear and convincing standard.[101] The Final Rule cites *Addington v. Texas*,[102] in which the Supreme Court held that civil commitment proceedings required the clear and convincing standard. In that case, the Supreme Court lists examples of particularly important interests that warrant this higher evidentiary standard, including deportation and denaturalization.[103] The Court states that a preponderance of the evidence is inadequate to protect rights, such as indefinite commitment, deportation,

98. *See* Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (comparing Title VII and Title IX); *see also* Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (comparing Title VI and Title IX).

99. However, sexual harassment proceedings under Title IX rarely lead to expulsion. BAKER ET AL., *supra* note 28, at 6.

100. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,381–82 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) ("The Department disagrees that the preponderance of the evidence standard means that complainants and respondents are treated 'equally' or placed 'on a level playing field.' Where the evidence in a case is 'equal' or 'level' or 'in equipoise,' the preponderance of the evidence standard results in a finding that the respondent is not responsible.").

101. *See id.* ("[A] clear and convincing evidence standard is applied in some civil litigation issues."); *see also id.* at 30,381 n.1447 (quoting California *ex rel.* Cooper v. Mitchell Bros.' Santa Ana Theater, 454 U.S. 90, 92–93 (1981)) ("Three standards of proof are generally recognized, ranging from the preponderance of the evidence standard employed in most civil cases, to the clear and convincing evidence standard reserved to protect particularly important interests in a limited number of civil cases, to the requirement that guilty be proved beyond a reasonable doubt in a criminal prosecution.").

102. 441 U.S. 418, 424 (1979).

103. *Id.*

and denaturalization, because "[t]he individual should not be asked to share equally with society the risk of error when the possible injury to the individual is significantly greater than any possible harm to the state."[104] DOE, quoting that opinion, provides that the clear and convincing standard is "sometimes used in civil cases 'involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant' where 'the interests at stake are deemed to be more substantial than mere loss of money' justifying reduction of 'the risk to the defendant of having his [or her] reputation tarnished erroneously.'"[105]

However, the comparison of Title IX grievance procedures to civil cases such as *Addington* is unjust. The severity of the possible consequences, as well as the power imbalance between the respondent and the State in *Addington*, necessitate a higher evidentiary standard. In contrast, Title IX sexual assault proceedings, like Title VI and VII cases, involve an uneven playing field for the complainant.[106] Further, DOE's reasoning that some cases recognize the use of a higher evidentiary standard under circumstances where there are grave potential consequences for a respondent's reputation and ability to pursue a career does not justify a recipient choosing that standard.[107] DOE equates potential reputational harm with the harm experienced by survivors of sexual assault by stating that "both parties face potentially life-altering consequences from the outcome" of the Title IX grievance process.[108] However, recipients rarely issue grave sanctions for a finding of sexual

104. *Id.* at 427.

105. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,373 n.1412 (quoting *Cooper*, 454 U.S. at 92–93).

106. Jane H. Aiken, *Leveling the Playing Field: Federal Rules of Evidence 412 & 415: Evidence Class as a Platform for Larger (More Important) Lessons*, 21 QUINNIPIAC L. REV. 927 (2003).

107. *Compare* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (citing Nguyen v. Washington Dept' of Health, 144 Wash. 2d 516 (2001)) ("[R]equiring clear and convincing evidence in sexual misconduct case in a professional disciplinary proceeding for a medical doctor as a way of protecting due process[]"), *with* Disciplinary Couns. v. Bunstine, 995 N.E.2d 184, 189 (Ohio 2013) ("[T]he more vulnerable a client is 'the heavier is the obligation upon the attorney not to exploit the situation for his own advantage.'" (quoting Disciplinary Couns. v. Booher, 664 N.E.2d 522 (Ohio 1996))). *See also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,373 n.1412 (discussing *Addington*, 441 U.S. at 424, and the comparisons between criminal evidentiary standards and civil evidentiary standards with high civil consequences).

108. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,381.

misconduct.[109] In contrast, the consequences of sexual harassment for the victim are significant and often devastating.[110] Since Title IX shares a comparable purpose and similar sanctions with those of Title VI and Title VII, it follows that the statutes, including Title IX, should use the same evidentiary standard in their proceedings.

III. RECOMMENDATION

A. Judicial Review of the Final Rule

The first step in restoring the prompt and equitable procedures Title IX requires is to challenge DOE's Final Rule through judicial review. Under the APA, parties who have suffered a legal wrong or who have been adversely affected or aggrieved by agency action may seek review of that action.[111] One such challenge alleges that the agency action was "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law."[112] For a court to find an agency action—including the rescission of a regulation—arbitrary and capricious, there must be no "rational connection between the facts found and the choice made."[113] The agency's stated explanation for its action must consider the relevant factors so that it is not a "clear error of judgment."[114]

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109. *See* Nick Anderson, *Colleges Often Reluctant to Expel for Sexual Violence—with U-Va. a Prime Example*, WASH. POST (Dec. 15, 2014), https://www.washingtonpost.com/local/education/colleges-often-reluctant-to-expel-for-sexual-violence--with-u-va-a-prime-example/2014/12/15/307c5648-7b4e-11e4-b821-503cc7efed9e_story.html?utm_term=.c0b5a649c036 (discussing federal data on disciplinary procedures, which shows that recipients often issue sanctions such as counseling, reprimands, or suspensions, rather than expulsion, for students found responsible for sexual harassment).

110. *See* BAKER ET AL., *supra* note 28, at 1–3 (illustrating the "downward spiral of damaging health, educational, and economic effects" that victims of sexual violence frequently experience).

111. 5 U.S.C. § 702.

112. 5 U.S.C. § 706(2)(A). Other possible challenges under this statute include agency action that is:

> (B) contrary to constitutional right, power, privilege or immunity; (C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right; (D) without observance of procedure required by law; (E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or (F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

5 U.S.C. § 706(2)(B)–(F).

113. Motor Vehicle Mfr. Ass'n v. State Farm Mut. Auto. Ins. Co., 463 U.S. 29, 43 (1983) (citing Burlington Truck Lines, Inc. v. United States, 371 U.S. 156, 168 (1962)).

114. *Id.* at 43 (citing Bowman Transp., Inc. v. Ark.-Best Freight Sys., Inc., 419 U.S. 281, 285 (1974)).

DOE's explanation for rescinding the 2011 and 2014 guidance and creating the Final Rule is to increase due process rights, particularly for students accused of sexual harassment.[115] In the section entitled "Purpose of this Regulatory Action," the Final Rule states that the existing guidance "has created confusion and uncertainty among recipients, and has not adequately advised recipients as to how to uphold Title IX's non-discrimination mandate while at the same time meeting requirements of constitutional due process and fundamental fairness."[116] According to Secretary of Education Betsy DeVos, the Final Rule is part of the effort to dismantle "the previous administration's staggering overreach on Title IX," under which "[t]oo many cases involve students and faculty who faced investigation and punishment for only speaking their minds or teaching their classes," and "[a]ny perceived offense can become a full-blown Title IX investigation."[117]

After considering the relevant factors, there is no rational connection between the aforementioned explanation and DOE's choice to contradict existing regulations that specifically prohibit increasing due process rights to the extent that they "restrict or unnecessarily delay the protections provided by Title IX to the complainant."[118] In fact, DOE's Final Rule, including its provision regarding the standard of evidence, will strongly interfere with the protections Title IX intends to create.[119] Sexual harassment cases differ from others in that there is almost always little to no concrete evidence of the alleged misconduct.[120] A reasonable evidentiary standard is therefore crucial in such

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115. *See* Secretary Betsy DeVos, U.S. Dep't of Educ., Prepared Remarks at the George Mason University (Sept. 7, 2017) [hereinafter DeVos Remarks at George Mason University], https://www.ed.gov/news/speeches/secretary-devos-prepared-remarks-title-ix-enforcement ("The notion that a school must diminish due process rights to better serve the 'victim' only creates more victims.").

116. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,030 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

117. Secretary Betsy DeVos, U.S. Dep't of Educ., Prepared Remarks at the Independent Women's Forum Annual Awards Gala (Nov. 13, 2019), https://www.ed.gov/news/speeches/prepared-remarks-secretary-devos-independent-womens-forum-annual-awards-gala.

118. *See* 2001 GUIDANCE, *supra* note 5, at 22 (explaining that schools have discretion to take steps to accord rights to the accused, as long as those steps do not "restrict or unnecessarily delay" protections for the complainant).

119. *See* Green, *supra* note 6 (describing victims' advocates' concerns that the new regulations will undermine the intent of Title IX, which is to prevent discrimination based on sex and to establish sexual harassment as a method of limiting access to education).

120. *See* BAKER ET AL., *supra* note 28, at 5 (stating that an appreciation for the difficulty of both parties to establish clearly what occurred suggests the need for a balance in Title IX

cases to ensure victims' adequate protection.[121] By requiring proof that it is more likely than not that sexual harassment occurred, a preponderance of the evidence standard creates a level playing field for both the complainant and the accused.[122] The Final Rule mischaracterizes this statement in its response to commenters, asserting that, given a level playing field, a preponderance of the evidence standard results in a finding for the respondent.[123] An even playing field does not, however, refer to a case where the evidence for the complainant and the respondent is equal. Rather, it means creating circumstances in which "the trier of fact . . . focus[es] on the behavior of the alleged perpetrator, rather than indulging in stereotypical beliefs that women cannot be believed when making claims of sexual misconduct."[124] The disparity between the extremely high occurrence of sexual assault on college campuses and the number of criminal convictions obtained highlights the obstacles victims experience when faced with a higher standard of evidence.[125] In criminal trials, there is an obvious need that justifies these strict procedural safeguards because the defendant faces severe sanctions, such as

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proceedings between protecting the accused to the detriment of the victims and providing the accused with important due process rights); *see also* Alice Herman, *The Department of Education has Moved to Increase the Burden of Proof Required in Assault Cases*, PROGRESSIVE (Nov. 19, 2018), https://progressive.org/dispatches/DOE-moves-to-increase-burden-of-proof-1881119/. Sexual assault attorney Jennifer Davis criticizes the notion that sexual assault cases are impossible to adjudicate based on their "he-said-she-said" nature. *Id.* Davis explains that it is possible to analyze word-on-word evidence accurately to consider each story's plausibility. *Id.* Due to the frequent lack of physical evidence in sexual assault cases, this word-on-word testimony is especially important.

121. *See* Herman, *supra* note 120 (noting the importance of arriving at accurate findings). Allowing a higher standard of evidence in Title IX cases would provide less protection to victims of sexual harassment than to victims of other types of discrimination.

122. Krakauer & Dunn, *supra* note 32.

123. Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,081–82 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106).

124. *See* Aiken, *supra* note 106, at 931 ("The result is a powerful tool to combat long-held stereotypes that have infected sexual misconduct cases, including that the victim either invited the treatment, or deserved it, or is not to be believed without sufficient corroboration.").

125. Studies find that up to one in four women experience sexual assault while in college; however, 80% of campus sexual assaults are not reported to the police. *See* Tyler Kingkade, *There's No More Denying Campus Rape is a Problem. This Study Proves It*, HUFFPOST, https://www.huffpost.com/entry/college-sexual-assault-study_n_569e928be4b0cd99679b9ada (Feb. 2, 2017) (citing sexual assault and reporting statistics); *see also* Krakauer & Dunn, *supra* note 32 (citing reporting statistics).

imprisonment.[126] In contrast, the worst sanction a respondent can receive in a Title IX investigation is expulsion—which rarely occurs.[127]

DOE's concerns for the respondent's reputation are valid; a false allegation of sexual harassment can be damaging.[128] However, the rate of false reporting a sexual assault is estimated to occur 2–10% of the time.[129] Even such a small percentage could be inflated due to law enforcement agency practice of labeling claims as false when there is not enough evidence to prosecute.[130] On the other hand, sexual harassment itself can have damaging health, educational, and economic effects on a victim.[131] For the foregoing reasons, the process of reporting and investigating sexual harassment is already skewed against the complainant; therefore, a lower

126. *See* BAKER ET AL., *supra* note 28, at 6–7 (justifying the criminal law's use of a higher standard of evidence by highlighting the higher possible sanctions in those cases, as well as the need to protect against abuse by the state).

127. *See* Anderson, *supra* note 109 (citing sexual assault sanction statistics). Out of 478 sexual assault sanctions across 100 universities, only 12% were expulsions, while 28% were suspensions. *Id.* Other sanctions included reprimands, counseling, and community service. *Id.* Additionally, 237 cases were dismissed based on insufficient evidence or other reasons, and 44 resulted in an acquittal. *Id.*

128. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,477 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) (highlighting some of the consequences of being accused of sexual assault).

129. *See* Holly Yan & Nicole Chavez, *Trump Says It's a 'Scary Time' for Men. Here Are the Stats on False Sexual Assault Claims*, CNN (Oct. 3, 2018), https://www.cnn.com/2018/10/03/health/sexual-assault-false-reports/index.html (citing the National Sexual Violence Resource Center).

130. *See* NAT'L SEXUAL VIOLENCE RSCH. CTR., FALSE REPORTING: OVERVIEW (2012), https://www.nsvrc.org/sites/default/files/2012-03/Publications_NSVRC_Overview_False-Reporting.pdf. Under the FBI's Uniform Crime Report, an unfounded report can result from either a false report or a baseless report. A false report is a claim that a law enforcement agency has investigated and proven to be factually untrue. *Id.* A baseless report, on the other hand, is a claim that an agency presumes truthful but that does not meet all the legal criteria of the crime of rape. *Id.* Due to factors, such as insufficient training and inconsistent definitions, many law enforcement agencies mistakenly label baseless reports as false, especially when certain factors are present. *Id.* Those factors, which are common in sexual assault cases, include "delayed reporting, victim indifference to injuries, vagueness, or victim's attempt to steer away from unsafe details, suspect description, or location of offense." *Id.*

131. *See* BAKER ET AL., *supra* note 28, at 1 (citing Ilene Seidman & Susan Vickers, *The Second Wave: An Agenda for the Next Thirty Years of Rape Law Reform*, 38 SUFFOLK U.L. REV. 467, 471–72 (2005); *see also* Gebser v. Lago Vista Indep. Sch. Dist., 524 U.S. 274, 292 (1998) (acknowledging that sexual harassment is a common part of the educational experience and that it can cause extraordinary harm).

standard of evidence is necessary to restore balance.[132] Tightening the burden on students to prove that sexual misconduct occurred would cause detriment to victims, rather than create equal treatment of complainants and respondents, given the widespread challenges faced by students who report or attempt to report incidents of sexual harassment.[133] Given that the relevant purpose of Title IX is to adjudicate sexual harassment claims promptly and equitably, and the facts show that requiring a higher standard of evidence will interfere with that purpose, it is difficult to understand the connection between the facts and DOE's decision.[134]

On May 14, 2020, the American Civil Liberties Union (ACLU) and Stroock & Stroock & Lavan LLP filed a lawsuit on behalf of plaintiffs Know Your IX, the Council of Parent Attorneys and Advocates, Girls for Gender Equity, and Stop Sexual Assault in Schools, to block certain provisions of the Final Rule that are "contrary to law, arbitrary and capricious, and an abuse of discretion . . . ."[135] This lawsuit is one of several brought recently to challenge the Final Rule. Additionally, the Attorneys General of eighteen states sued Secretary DeVos and DOE to prevent the Final Rule from taking effect.[136] The State of New York also filed a separate lawsuit against Secretary DeVos and DOE.[137] The National Women's Law Center also sued Secretary DeVos, Assistant Secretary for Civil Rights Kenneth Marcus, and DOE on behalf of several victims' advocate organizations and seven individual students.[138] Finally, the American Council on Education and twenty-four other higher education organizations filed an amicus brief in support of the Attorneys General suit requesting a preliminary injunction.[139]

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132. *See* Krakauer & Dunn, *supra* note 32 (stating that use of higher evidentiary standards "skew[s] the disciplinary process sharply in favor of the accused").

133. *See* Yuen & Ahmed, *supra* note 6 (addressing concerns that the clear and convincing standard creates bias against the complainant by setting an "unreasonably high bar for evidence," and stating that allowing recipients to use that standard will discourage students from reporting).

134. *See* Triplett, *supra* note 22, at 517 (explaining that due to the special nature of sexual assault cases, a higher standard of evidence is an "insurmountable obstacle").

135. Complaint for Declaratory & Injunctive Relief at 43–44, Know Your IX v. DeVos, No. 1:20-cv-01224-RDB (D. Md. May 14, 2020).

136. Complaint for Declaratory & Injunctive Relief at 3, Pennsylvania v. DeVos, No. 1:20-cv-01468 (D.D.C. June 4, 2020).

137. Complaint for Declaratory & Injunctive Relief, New York v. Dep't of Educ., No. 1:20-cv-04260 (S.D.N.Y. June 4, 2020).

138. Amended Complaint for Declaratory & Injunctive Relief, Victim Rts. L. Ctr. v. DeVos, No. 1:20-cv-11104 (D. Mass. July 6, 2020).

139. Brief of the American Council on Education et al. as Amici Curiae in Support of Plaintiff's Motion for Preliminary Injunction, *Pennsylvania*, No. 1:20-cv-01468 (June 24, 2020).

The lawsuits allege the Final Rule violates the APA, claiming DOE's action to be: (1) not in accordance with law; (2) arbitrary and capricious; (3) in excess of statutory authority; and (4) taken without observance of procedure required by law.[140] The National Women's Law Center also claims the Final Rule violates the Fifth Amendment Equal Protection Clause.[141] The lawsuits' many arguments emphasize concerns regarding the Final Rule's harmful effects on victims, as well as the Rule's poor timing.[142] Many recipients worried they would not be able to implement such broad changes by the August 14, 2020 deadline, especially during a global pandemic.[143]

The ACLU Complaint names several provisions of the Final Rule as invalid.[144] The invalid provisions include those defining "sexual harassment," those requiring "actual knowledge" and "deliberate indifference" for a finding of recipient liability, and those allowing a recipient to choose the "clear and convincing evidentiary standard."[145] Plaintiffs argue that, along with being arbitrary, capricious, and contrary to Title IX, the new Rule: (1) significantly departs from DOE's previous guidance; (2) creates a double standard in which recipients may take cases of sexual harassment less seriously than cases of harassment based on race, national origin, and disability; and (3) fails to consider important evidence that is contrary to DOE's justifications.[146] Specifically, concerning the standard of evidence provision, the Complaint makes several arguments. First, clear and convincing evidence is a stricter standard than the standard used in other civil rights cases, including Title IX actions for private monetary damages.[147] This means that students alleging sexual harassment will have a higher burden than those alleging other forms of harassment.[148] Second, the Final Rule requires recipients to use the same standard of

140. 5 U.S.C. § 706(2)(A), (C)–(D); Complaint for Declaratory & Injunctive Relief, *supra* note 135, at 43–44; Complaint for Declaratory & Injunctive Relief, *supra* note 136, at 106–112; Complaint for Declaratory & Injunctive Relief, *supra* note 137, at 6; Amended Complaint for Declaratory & Injunctive Relief, *supra* note 138, at 12–13.

141. Amended Complaint for Declaratory & Injunctive Relief, *supra* note 138, at 107–08.

142. *See* Erica L. Green, *Lawsuits Aim to Block DeVos's New Sexual Misconduct Rules*, N.Y. TIMES (July 9, 2020), https://nyti.ms/2DuSOcR (outlining the several lawsuits filed recently against Secretary DeVos and DOE).

143. *See id.* (discussing support of the lawsuit and stating that education groups find the deadline unreasonable as schools attempt to reopen during the COVID-19 pandemic).

144. Complaint for Declaratory & Injunctive Relief, *supra* note 135, at 44–45.

145. *Id.*

146. *Id.* at 20.

147. *Id.* at 32.

148. *Id.*

evidence for cases against students, employees, and faculty.[149] For many recipients, this means requiring a clear and convincing standard for all cases because that is the standard already required for faculty disciplinary proceedings under employment contracts and collective bargaining agreements.[150] Third, the plaintiffs argue that the use of the clear and convincing evidence standard is inconsistent with other provisions of the Final Rule that require the "equitable resolution" of complaints, which OCR has interpreted to require the lower evidentiary standard.[151] Finally, the plaintiffs assert that DOE fails to provide good reasons for its "dramatic shift" from "twenty years of prior policy."[152]

Those who have and will be harmed by the changes, particularly the change in the standard of evidence, should bring similar claims against DOE. Impacted individuals should allege that DOE acted arbitrarily and capriciously when it rescinded the 2011 Dear Colleague Letter and the 2014 Questions and Answers and promulgated the Final Rule. A consideration of the relevant factors highlights the disparity between DOE's stated purpose—the need for increased due process rights of the accused—and its choice to invoke an inappropriately high standard of evidence.[153] Accordingly, DOE's reasons for changing the evidentiary standard are inadequate, and there is no rational relationship between the facts and the choice made.[154]

B. Informal Rulemaking Under the Administrative Procedure Act

In its Notice of Proposed Rulemaking (NPRM), and in the Final Rule, DOE describes the confusion recipients felt concerning the binding status of DOE's previous Title IX guidance.[155] Secretary DeVos cited this uncertainty

149. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,074 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (requiring the same evidentiary standard in student and faculty cases).

150. Complaint for Declaratory & Injunctive Relief, *supra* note 135, at 33.

151. *Id.*

152. *Id.*

153. *See* Krakauer & Dunn, *supra* note 32 ("But the preponderance standard doesn't curtail due process. There is nothing inappropriate or unusual about schools' using it.").

154. *Id.*

155. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. 61,462, 61,464 (proposed Nov. 29, 2018) (to be codified at 34 C.F.R. pt. 106) ("The Department learned that schools and colleges were uncertain about whether the Department's guidance was or was not legally binding."); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30,026, 30,030 (May 19, 2020) (to be codified at 34 C.F.R. pt. 106) (finding current guidance "insufficient to provide clear direction on this subject . . . .").

and the need for clarity and consistency among grievance proceedings as one of the main reasons for introducing the Final Rule.[156] This is an important goal; however, it is essential that it does not infringe upon Title IX's purpose—to protect students from discrimination on the basis of sex.[157]

The majority of recipients already used the preponderance of the evidence standard for sexual harassment proceedings even before the 2011 Dear Colleague Letter.[158] However, the legal effect of the 2011 Dear Colleague Letter and the 2014 Questions and Answers—both of which explicitly named a preponderance of the evidence as the appropriate evidentiary standard—remained somewhat unclear.[159] In its effort to reduce confusion, DOE rescinded the 2011 Dear Colleague Letter and the 2014 Questions and Answers, and replaced them with the Final Rule that, although legally binding, is no clearer in its instruction on the appropriate evidentiary standard.[160] Rather than require one uniform standard across all institutions,

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156. *See* DeVos Remarks at George Mason University, *supra* note 115 (accusing the previous administration of imposing "policy by political letter" without consulting knowledgeable parties and announcing DOE's intention to "launch a transparent notice-and-comment process"); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,030 ("Based on extensive review of the critical issues addressed in this rulemaking, the Department has determined that current regulations do not provide clear direction for how recipients must respond to allegations of sexual harassment . . . ."); *see also* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 83 Fed. Reg. at 61,462 ("In addition to providing recipients with clear legal obligations, the transparency of the proposed regulations will help empower students to hold their schools accountable for failure to meet those obligations.").

157. 20 U.S.C. § 1681(a) (1972); *see also* Cannon v. Univ. of Chi., 441 U.S. 677, 704 (1979) (highlighting that preventing discrimination in women's access to education and educational programs is a key part of Title IX).

158. *See* Herman, *supra* note 120 (citing a report by the Department of Justice that found that, by 2002, over 80% of higher education institutions used a preponderance of the evidence standard for Title IX proceedings).

159. *See, e.g.*, BAKER ET AL., *supra* note 28, at 11. According to a report by United Educators, from 2005–2010, $10 million out of the $36 million schools spent on sexual assault claims went to "victim-driven litigation." From 2011 to 2013, that number increased to $14.3 million, or 84%, of $17 million. *Id.* The authors of this white paper cite these studies to illustrate that thousands of sexual harassment victims take action in the OCR each year due to the mishandling of their complaints by universities. *Id.* at 12. It is therefore necessary for those universities to receive more guidance on how to handle Title IX complaints. *Id.*

160. *See* Brown, *supra* note 7 (quoting University of Denver Title IX coordinator as saying that, "[w]hile there were certainly areas in which the [2011 and 2014] guidance could have been fine-tuned or clarified, this could have been achieved without retracting these documents altogether").

the Final Rule allows recipients a choice between two different standards.[161] It may seem appealing for recipients to have this choice; however, some commenters pointed out that the Final Rule may create a conflict for recipients because they must apply the standard they choose consistently to complaints against students, faculty, and employees.[162] Additionally, prospective students should not have to base their decision of which school to attend on whether that school has adopted an equitable evidentiary standard in Title IX proceedings.

Instead of issuing guidance that is merely advisory, or creating a binding rule that is unclear and likely to disadvantage those Title IX intends to protect, DOE should promulgate a new Final Rule through the informal rulemaking process of the APA that clearly requires recipients to employ a preponderance of the evidence standard in resolving Title IX complaints. Following this Comment's recommendation would clarify obligations under Title IX without taking away important equitable measures for victims of sexual harassment.

CONCLUSION

Recipients of federal funding under Title IX should be required to employ a preponderance of the evidence standard in the resolution of sexual harassment complaints. Raising the evidentiary standard to clear and convincing evidence impedes the statute's ability to protect victims of sexual harassment.[163] While it is important to consider the due process

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161. *See* Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. at 30,053 ("[T]he standard of evidence applied by the recipient to all formal complaints of sexual harassment under Title IX (which must be either the preponderance of the evidence standard, or the clear and convincing evidence standard) . . . .").

162. *Id.* at 30,375. For example, recipients that currently require the clear and convincing standard in cases against faculty will have to choose between making it easier to dismiss faculty or making it more difficult to prove allegations against any respondent. *Id.* Other commenters, along with the plaintiffs in the ACLU lawsuit against DOE, identified a further conflict that arises when recipients are required, under collective bargaining agreements or other employment contracts, to use the clear and convincing standard in cases against faculty members; those recipients will have an even more difficult time choosing the preponderance of the evidence standard against any respondent. *Id.* at 30,376; *see also* Complaint at 33, Know Your IX v. DeVos, No. 1:20-cv-01224-RDB, 2020 WL 2513668 (D. Md. May 14, 2020) ("Many institutions are required to use the clear and convincing standard for faculty disciplinary proceedings under collective bargaining agreements or other employment contracts.").

163. *See* Green, *supra* note 6 (examining the view of some victims' rights advocates that DOE proposed the new regulations to deter reporting and lessen the number of Title IX investigations, rather than to protect students from sexual harassment).

rights of all parties, particularly the respondent, doing so should not overpower the party that Title IX intends to protect.[164] To ensure that all victims of sexual harassment receive prompt and equitable resolution of their complaints, the standard of evidence in Title IX proceedings must be consistent with the standard used in the majority of civil litigation, particularly in civil rights litigation.[165]

Like all other civil rights statutes, the purpose of Title IX is to address and prevent discrimination on the basis of an irreversible characteristic.[166] By altering the evidentiary requirements of Title IX to allow recipients the choice to use the clear and convincing standard, DOE creates guidelines that are inconsistent with civil rights litigation.[167] This inconsistency in the treatment of Title IX complainants, compared to Title VI and Title VII complainants, is discriminatory.[168] More importantly, it creates the risk of substantial harm to victims of sexual harassment.[169] Professor Jane Aiken states, "[t]he notion that 'playing fields are level' often leads [people] toward a blind insistence on symmetry in all rules. Asymmetry is treated as synonymous with unfairness."[170] DOE seems to take this approach in its Final Rule. However, to ensure that Title IX fulfills its anti-discriminatory purpose, Title IX complainants must have the same procedural safeguards as complainants

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164. *See* Sexual Harassment Guidance: Harassment of Students by School Employees, Other Students, or Third Parties, 62 Fed. Reg. 12,034, 12,044 (Mar. 13, 1997) (indicating that improper sexual conduct can be detrimental to victims and must be addressed to protect victims).

165. *See, e.g.*, Jennings v. Univ. of N.C., 482 F.3d 686, 695 (4th Cir. 2007) (stating that a court should look at interpretations of Title VII to address Title IX claims); *see also* Bryant v. Indep. Sch. Dist. No. I-38, 334 F.3d 928, 934 (10th Cir. 2003) (stating that Congress based Title IX on Title VI, and therefore courts should determine what constitutes sexual discrimination under each statute in the same manner).

166. 20 U.S.C. § 1681(a) (1972) ("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 . . . .").

167. *See* discussion *supra* Part II.A (discussing Title IX as a civil rights statute and the use of a preponderance of the evidence as the appropriate standard in civil rights litigation).

168. *See* BAKER ET AL., *supra* note 28, at 6 ("Tolerating a different standard from the preponderance standard in cases involving sexual violence or other forms of gender-based harassment would allow schools to provide less legal protection to student victims of sexual harassment than the vast majority of comparable populations involved in civil, civil rights[,] and student disciplinary proceedings . . . .").

169. *See* Herman, *supra* note 120 (describing the harm that results from the failure to sanction a student for sexual misconduct, including the psychological and physical threat to a victim of seeing the attacker on campus, as well as the potential for repeat offenses by the same individual).

170. Aiken, *supra* note 106, at 930.

under Title VI and VII.[171] Those safeguards require that recipients use a preponderance of the evidence standard in sexual harassment proceedings. For the foregoing reasons, DOE's changes to the standard of evidence violate the purpose of Title IX to prevent discrimination of students based on sex.

171. *See* 34 C.F.R. § 106.71 (1975) (incorporating the procedural elements of Title VI into Title IX).