



Apr 3

## Defending Title IX's Burden of Proof

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After Secretary Betsy DeVos' 51-50 confirmation vote in the Senate, controversial changes came quickly to the Department of Education, especially to its Office of Civil Rights, which provides guidance to universities on how to be in compliance with federal Title IX requirements. On April 4, 2011, the Obama administration's Office of Civil Rights issued a "Dear Colleague" letter, which informed universities that using an evidence standard other than the preponderance of the evidence was not equitable and violated Title IX. This standard only requires that the accused be found to be 51 percent likely to have committed the violation, versus 49 percent likely not to have committed the violation. The Trump administration's Office of Civil Rights, under the supervision of Betsy DeVos, issued its own "Dear Colleague" letter, rescinding the 2011 one. It stated that universities that use the "clear and convincing" evidence standard would be in compliance with the requirements of Title IX if they used the same evidence standard for all conduct violations. This standard requires the accused to be found substantially more likely than not to have committed the violation. I am a strong fan of our common law system, where past decisions serve as precedent for future ones. Precedent requires us to use the preponderance of the evidence standard in Title IX cases.

Although the preponderance of the evidence standard seems low, most important legal decisions are based on that standard, and universities have no cause to deviate from it. The famous standard in criminal cases, beyond a reasonable doubt, applies due to the extremely serious consequences that a criminal conviction can bring, up to and including execution. Virtually everything else operates on the preponderance of the evidence



claims against the government, cases seeking economic damages from rapists, and wrongful death cases. Famously, a jury found O.J. Simpson liable in a civil case over the murders of Nicole Simpson and Ronald Goldman, but not guilty in his criminal case.

Only extraordinary circumstances outside the criminal justice system, such as involuntary commitment of patients, punitive damages beyond what is necessary to make the plaintiff whole, or terminating a parent's parental rights, use the clear and convincing standard. Even administrative hearings that can result in serious consequences use the preponderance of the evidence standard. In Texas, your driver's license can and will be administratively suspended for up to one year if you are found by a preponderance of the evidence to have driven while intoxicated, and up to two years if you are found by a preponderance of the evidence to have refused to consent to a breathalyzer. In Texas, many occupational licenses, such as a license to practice law, can be suspended based on a preponderance of the evidence showing misconduct. By no longer being able to work, people's livelihoods are taken away. By no longer being able to drive, it is difficult to find any job. Yet, these issues, and more, are decided based on the preponderance of the evidence.

Circling back to Title IX cases, the most serious resulting consequence is expulsion. This pales in comparison with execution, the most serious consequence in criminal cases, and involuntary commitment, both of which require higher evidence standards. Expulsion also pales in comparison to the unlimited sum of money that one can be held liable for in civil cases, and occupational license revocation, both of which can destroy lives, yet use the same preponderance of the evidence standard that Title IX cases use. There is no coming back from disbarment if you are an attorney, and it takes many, many years to come back from bankruptcy. Expelled students have numerous options: attending another university, joining the military, learning a trade. Seventy percent of Americans do not have a college degree. Expelled students can continue with their lives just fine. The social stigma of expulsion is at least equivalent to the social stigma of losing a civil case for rape or murder.

I was once in favor of increasing the burden of proof for all university discipline cases, but the complete lack of precedent to do so has changed my mind. In Title IX cases especially, where there is a victim in contrast to other violations of university rules, increasing the burden of proof would benefit the accused while hurting the victim, making it a zero-sum game and attacking the core principle of Title IX — equity.

*Law*

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