



FOUNDATION FOR INDIVIDUAL RIGHTS IN EDUCATION

Frequently Asked Questions: OCR’s April 4 “Dear Colleague” Guidance Letter

What is OCR?

“OCR” is the federal Department of Education’s Office for Civil Rights. It is responsible for enforcing the federal civil rights laws that prohibit discrimination in educational programs or activities that receive federal funding from the Department of Education. This includes every college that receives any federal funding (nearly all colleges, public and private), as well as K–12 schools.

What does OCR do?

OCR enforces various federal laws prohibiting discrimination on the basis of race, color, national origin, sex, disability, or age by an educational institution (including colleges and universities) that receives federal funding. One of the most prominent of these laws is Title IX of the Education Amendments of 1972, which forbids discrimination on the basis of sex.

OCR investigates complaints filed by anyone who believes that such discrimination has occurred. Complaints must be filed within 180 days of the alleged discrimination, but the person filing the complaint does not have to be the alleged victim. Discrimination under these statutes includes “harassment” on the basis of any of the protected categories, including sexual harassment or racial harassment.

If a school does not voluntarily comply with the federal laws and regulations that OCR enforces, OCR may formally find a school in violation and begin action to withdraw the school’s Department of Education funding or ask the federal Department of Justice to begin judicial proceedings.

What are the implications of a formal finding of violation by OCR?

Losing federal funding would be disastrous for virtually all colleges and universities, both public and private. For example, Yale University received nearly \$510.4 million

dollars in federal funding for research and training initiatives in the 2009–2010 academic year, and the University of California at Berkeley received a comparable amount. Federal educational grant funding for all colleges totaled \$41.3 billion for the 2009–2010 academic year.

Because the stakes are so high and the possibility of negative publicity is so great, colleges are terrified of the prospect of an OCR investigation. Therefore, universities comply with OCR’s requirements rather than risk an investigation and loss of federal funding.

Why is FIRE so concerned about OCR’s letter of April 4, 2011?

OCR’s April 4 “Dear Colleague” letter (so called because these letters traditionally begin with “Dear Colleague,”), sent to every federally funded college and university in the country, specifies the various obligations colleges and universities bear under Title IX with regard to responding to allegations of sexual harassment or sexual violence. The letter reminds colleges and universities of previously announced requirements and introduces new ones. While several provisions of the OCR letter are unobjectionable or even welcome, others present a significant threat to student rights—specifically, to due process (which generally means having and following fair rules and procedures) and freedom of expression.

With regard to **due process**, OCR’s April 4 letter requires colleges and universities investigating and hearing allegations of sexual harassment and sexual violence on campus to use a “preponderance of the evidence” standard to determine if someone is guilty. This standard merely requires that it is “more likely than not” that someone is responsible for what they are accused of, and it is our judiciary’s lowest standard of proof. This is because whoever is serving as the “jury” in such a case need only be 50.01% certain that the accused person is at fault.

Given the seriousness of allegations of sexual misconduct—which range from sexual harassment to rape—FIRE believes that requiring universities to find accused students guilty based on this “more likely than not” standard does not sufficiently protect the accused person’s right to due process. For comparison, if you are tried in a real court for any crime, no matter how minor, the more familiar “beyond a reasonable doubt” standard must be used, which means that the judge or jury must be virtually certain of your guilt.

In another threat to due process rights, OCR is mandating that if a university judicial process allows the accused student to appeal a verdict, it must also allow the accusing student the right to appeal as well. As explained below, this requirement means that a student found innocent in a hearing may be retried, even if the charges against him or her have already been proven baseless.

With regard to **freedom of expression**, the April 4 letter fails to explicitly acknowledge that colleges owe free speech rights to their students. It also fails to recognize the fact that truly harassing conduct (as defined by the law) is distinct from

protected speech. Public universities may not violate First Amendment rights, and private universities must honor their promises of freedom of expression. Previous OCR letters on this subject were clear about this, but this most recent letter is not.

The reason this lack of clarity is so important (and so disappointing) is that many colleges already enforce vague and overly broad sexual harassment policies, and often confuse speech protected by the First Amendment with speech or conduct that is actually punishable as harassment. With its lack of guidance on this issue, OCR's April 4 letter compounds these problems. Under OCR's new mandate regarding the standard of proof, students falsely charged with sexual harassment need only be found "more likely than not" to have violated a poorly written harassment policy to suffer disciplinary action.

Why are colleges and universities involved in investigating and punishing criminal behavior at all? What about local law enforcement?

Since OCR defines sexual violence as a form of sex discrimination prohibited by Title IX, colleges are legally required to address and prevent the occurrence of sexual violence on their campuses, and colleges' responses to allegations of such behavior are subject to OCR's regulatory oversight. OCR's April 4 letter instructs college administrators to establish working relationships with local law enforcement officials and states that "a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct." Specifically, OCR states that because the criminal code and Title IX are different, conduct that is not sufficient evidence of a criminal violation may still qualify as sexual harassment under Title IX. As a result, OCR requires schools to begin their own Title IX investigations without regard to the status of any criminal investigation that may also be underway.

What's wrong with mandating a "preponderance of the evidence" standard for adjudicating sexual harassment and sexual violence claims?

The preponderance of the evidence standard (roughly 50.01% certainty) is **our judiciary's lowest standard of proof**, and does not sufficiently protect an accused person's right to due process. While this standard is acceptable for lawsuits over money, allegations of sexual violence or sexual harassment are far more serious than disputes that can be resolved by transferring money from one individual to another. It is difficult to overstate the harm caused to a student who is falsely convicted of sexual violence. And since claims of sexual violence often involve alcohol and drug use, few or no witnesses, and other complicating factors, the **risk of error** caused by using the lowest possible standard is quite severe.

Further, using the lower standard of evidence for such serious accusations is at odds with our national principles of justice, which hold that those accused of crimes are innocent until proven guilty. Instead, OCR seems to believe that due process is an impediment to the pursuit of justice in a free society, rather than a crucial component of it. Teaching students that due process stands in the way of justice sets a frightening precedent for us all.

Mandating use of the preponderance of the evidence standard also **takes away the right of colleges** to determine the proper due process protections afforded to students accused of such serious misconduct. OCR has in the past told *individual* colleges that the “preponderance of the evidence” standard is necessary under Title IX (going as far back as 1994), but until now has never required *all* schools receiving federal funding to adopt this low standard. In fact, prior to the April 4 OCR letter announcing the new mandate, Stanford University, Harvard Law School, Princeton University, Columbia University, Yale University, the University of Pennsylvania, Duke University, and Cornell University, among others, all employed a higher standard of proof—typically, the “clear and convincing evidence” standard, an intermediate standard between “beyond a reasonable doubt” and “preponderance of the evidence.”

All of these institutions now must substitute OCR’s judgment for their own, and some already have done so. In fact, Stanford University implemented the “preponderance of the evidence” standard *in the middle of a student’s sexual assault case*. FIRE has asked both Yale University and the University of Virginia to stand up for student due process and free expression rights by challenging the new OCR mandate, but we believe it is unlikely that any university will prove willing to take on OCR.

What’s wrong with allowing the accuser to appeal?

Forcing students who have been found innocent of charges of sexual harassment or sexual assault to submit to yet another hearing undermines due process protections for several reasons. After all, there’s a reason that accusers aren’t allowed to appeal in the criminal justice system.

First, students who have proven the charges against them to be baseless may now effectively be tried all over again, at a great cost of time, energy, and money. Dragging students already found innocent through the process again is neither “prompt” nor “equitable,” contrary to OCR’s requirements for grievance procedures under Title IX. In fact, it resembles a violation of a criminal law defense called “double jeopardy,” whereby someone accused of a crime cannot be tried for the same charges again once the original hearing has properly ended in either acquittal or conviction. For the same reasons of fundamental fairness that our criminal justice system does not allow those accused of crimes to face “double jeopardy,” colleges and universities should not force their students to face a second hearing for the same charge.

Second, under OCR’s April guidance, accused students are already subjected to an inappropriately low standard of proof. Allowing accusers to appeal a finding of innocence only amplifies the due process problems introduced by OCR’s “preponderance of the evidence” mandate.

Finally, given the publicity and emotion that often surround complaints of sexual harassment and sexual assault, the panel or administrator hearing the appeal often will be under significant pressure to return a “correct” verdict—guilty. As a result, it is far from certain that accused students who have already been cleared once will be able to receive the impartial hearing they deserve. What’s more, each college and university has

its own appeals process, and the resulting variability makes a blanket rule regarding dual appeals more dangerous. For example, some campuses put a single person in charge of hearing appeals. In these situations, the risk of injustice sharply increases, as that person may be empowered to rehear the case with no procedural oversight.

How does the OCR letter affect freedom of speech on campus?

As FIRE well knows from our 12 years of defending student and faculty speech, anti-harassment codes have long been the most frequently used weapon on campus for silencing dissenting, unwanted, or merely inconvenient speech. Indeed, most campus speech codes are based on misinterpretations of sexual harassment law.

Despite decades of legal precedent striking down unconstitutional harassment policies, many colleges still maintain similar policies today. For example, at California State University–Monterey Bay, sexual harassment includes “sexual innuendoes made at inappropriate times, perhaps in the guise of humor,” and Alabama State University identifies “behavior that causes discomfort, embarrassment or emotional distress” as harassment. FIRE’s most recent annual study of university speech policies found that 67% of 390 top colleges surveyed in 2010 maintain policies that are unconstitutional under First Amendment standards.

In a “Dear Colleague” letter sent to colleges and universities nationwide in 2003, OCR made clear that while schools had a duty to address discriminatory harassment, doing so did not require them to implement policies that prohibited speech protected under the First Amendment. Indeed, OCR informed schools that there was “no conflict between the civil rights laws that this Office enforces and the civil liberties guaranteed by the First Amendment.” Unfortunately, recent OCR guidance letters to colleges and universities essentially ignore student free speech rights.

Under OCR’s new mandate, students charged with sexual harassment for engaging in protected speech will now face the prospect of being found guilty under a mere “more likely than not” standard. OCR’s reduction in due process protections, combined with vague and overbroad harassment policies, creates a “perfect storm” for censoring and punishing protected speech on campus. As colleges rush to comply with OCR’s new regulations, FIRE fears that many institutions will revert back to overly cautious risk-management positions with regard to student speech—a hallmark of the heyday of “political correctness” in the 1990s—in attempts to avoid OCR investigation. Colleges may now claim that the federal government is requiring them to police student speech in ways that it previously did not. When this development is coupled with an administrative impulse towards censorship prevalent on too many campuses, the threat to student speech at our nation’s colleges and universities is liable to become far worse.

What have courts said about due process rights for students?

While courts have not specified precise procedural requirements for college students accused of campus misconduct, they have established a baseline level of due process rights that public schools must provide. Most significantly, the United States Court of

Appeals for the Fifth Circuit’s landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), established that students must receive—at a bare minimum—notice and a fair hearing prior to expulsion from a public university for misconduct.

Following *Dixon*, courts have generally held that due process requires that students receive formal notice of the charges against them and a fair and impartial hearing. The Supreme Court issued another important decision for student due process rights in *Goss v. Lopez*, 419 U.S. 565 (1975), holding that due process in the educational context requires “precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school.” College students are generally afforded more rights than high school students, both as adults and as a function of the difference between the missions of high schools and colleges. So *Goss* is properly understood as establishing a minimum level of due process rights for college students—serving as a floor, not a ceiling.

Some courts have also held that a written opinion and a right to appeal are required. The requirement of an impartial hearing is another key issue in the enforcement of campus speech codes and sexual misconduct policies. Impartiality and lack of bias are also important in the campus judiciary training materials that colleges frequently use in the areas of sexual harassment and sexual assault.

How does OCR justify what it is doing?

OCR has increased its emphasis on combating sexual assault of college students. Assistant Secretary for Civil Rights Russlynn H. Ali states in the April 4 letter that OCR is “committed to ensuring that all students feel safe in their school.”

While this concern is commendable, OCR’s chosen means to pursue this end are not.

It is not reasonable to conclude that lowering the standard of evidence employed in sexual harassment and sexual violence adjudications will result in either a reduction in instances of sexual assault or more just outcomes. Instead, students facing such charges will be deprived of a fair, just hearing and the due process rights to which they are entitled. OCR’s action will likely produce more guilty findings—of not just the guilty, but also the innocent. When verdicts are wrong, the cause of justice on campus is ill-served.

What should the standard for sexual harassment on campus be?

OCR’s April 4 letter defines sexual harassment as “unwelcome conduct of a sexual nature,” including “unwelcome sexual advances, requests for sexual favors, and other verbal, nonverbal, or physical conduct of a sexual nature.” This definition is functionally equivalent to the federal Equal Employment Opportunity Commission’s standard regarding workplace discrimination, but as courts have recognized for decades, the workplace and the college campus are *not* functionally equivalent, and thus different definitions of discriminatory harassment are appropriate for these different settings.

The college campus has been described by the Supreme Court as being a particular “marketplace of ideas,” where the search for truth is of paramount importance. A workplace, in contrast, is a far different setting, where efficient production and accomplishment of specific tasks are the central concerns. Because of this key difference, certain sensitive discussions that are appropriate on college campuses are unwelcome distractions in the workplace, as courts have recognized. While students at a public university retain robust First Amendment rights (and students at private universities promising free speech are entitled to exercise that right), public and private employees normally enjoy far less speech protection. Further, because college students are not employees of a university, the university cannot exert the same amount of control over student speech as an employer may exert over employee speech, nor should it expect to.

In light of the clear differences between the workplace and educational contexts, the Supreme Court held in *Davis v. Monroe County Board of Education*, 526 U.S. 629 (1999)—the only case in which the Supreme Court has considered student-on-student hostile environment harassment—that behavior constitutes hostile environment sexual harassment in the educational setting only when it is “so severe, pervasive, and objectively offensive, and ... so undermines and detracts from the victims’ educational experience, that the victim-students are effectively denied equal access to an institution’s resources and opportunities,” and that institutions displaying “deliberate indifference” to actual knowledge of such behavior could be found liable for monetary damages. The exacting, speech-protective definition of student-on-student sexual harassment set forth in *Davis* ensures an appropriate balance between freedom of expression on campus and the need to maintain an educational environment free from harassment.

Prior to the April 4 letter, OCR had explicitly noted in other guidance to universities that its understanding of hostile environment harassment was informed by and consistent with the Supreme Court’s decision in *Davis*. OCR did not do so in the April 4 letter, however, leaving students’ free speech rights in jeopardy.