FIRE

Foundation for Individual Rights in Education

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April 10, 2012

President David J. Skorton
Cornell University
Office of the President
300 Day Hall
Ithaca, New York 14853

Sent via U.S. Mail and Facsimile (607-255-9924)

Dear President Skorton:

As you know, the Foundation for Individual Rights in Education (FIRE) unites leaders in the fields of civil rights and civil liberties, scholars, journalists, and public intellectuals across the political and ideological spectrum on behalf of liberty, legal equality, academic freedom, due process, freedom of speech, and freedom of conscience on our nation's college campuses. Our website, thefire.org, will give you a greater sense of our identity and activities.

I write today to express FIRE's concern about the threat to student due process rights presented by Cornell University's consideration of a policy change that would implement the "preponderance of the evidence" burden of proof for campus hearings involving allegations of sexual assault. FIRE understands that in late February, Cornell's Codes and Judicial Committee (CJC) passed a resolution containing two alternate policy options for the university, subject to the approval of both you and the University Assembly. The first option would institute the "clear and convincing evidence" standard for student sexual assault allegations and would keep those cases within Cornell's Campus Code of Conduct. The second option, which mirrors a proposal rejected by CJC last fall, would implement the preponderance of the evidence standard for student sexual assault allegations. It would also move those cases within the purview of Cornell's University Policy 6.4, which currently governs accusations against faculty or staff.

Cornell's adoption of the preponderance of the evidence standard would be inappropriate for several reasons.

First, the preponderance of evidence standard—our judiciary's lowest—fails to adequately protect the due process rights of students accused of such serious misconduct. Students found guilty of sexual assault likely face lengthy suspensions, if not immediate expulsion. Given the gravity of the charges and the

accompanying prospect of life-altering punishment, it is unconscionable to require that those accused of such serious violations be found merely "more likely than not" to have committed the offense in question.

Second, utilizing the lower standard of proof to adjudicate sexual assault cases serves to undermine the integrity, accuracy, reliability, and basic fairness of the judicial process. Implementing the preponderance of the evidence standard in hearings for sexual assault allegations turns the fundamental tenet of due process on its head, requiring that those accused of society's vilest crimes be afforded the scant protection of our judiciary's least certain standard. Under the preponderance of the evidence standard, the burden of proof may be satisfied by little more than a hunch. Accordingly, no matter the result reached by the campus judiciary, both the accuser and the accused are denied the necessary comfort of knowing that the verdict reached is accurate, trustworthy, and fair. The lack of faith in the judicial process that such uncertainty will likely engender should be of great concern to Cornell, and should convince the university to reject the lower standard in favor of the more appropriate clear and convincing evidence standard. Given the unequivocal value of a college education to an individual's prospects for personal achievement and intellectual, professional, and social growth, *reducing* procedural protections for those students accused of sexual assault is deeply troubling.

In the educational context, the Supreme Court of the United States has made clear that when "a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him," due process requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." *Goss v. Lopez*, 419 U.S. 565, 574, 580 (1975) (*quoting Wisconsin v. Constantineau*, 400 U.S. 433, 437 (1971)). The Court made these observations about due process protections at the elementary and secondary school level, finding at least minimal requirements of due process necessary because disciplinary action "could seriously damage the students' standing with their fellow pupils and their teachers as well as interfere with later opportunities for higher education and employment." *Id.* at 575. The increased likelihood of much further-reaching negative consequences for a college student found guilty of sexual assault in a campus judicial proceeding means that *greater* protections are required, not lesser.

The Court has further observed that the use of the preponderance of the evidence standard in civil litigation is due in significant part to the fact that "[t]he typical civil case involv[es] a monetary dispute between private parties. Since society has a minimal concern with the outcome of such private suits, plaintiff's burden of proof is a mere preponderance of the evidence. The litigants thus share the risk of error in roughly equal fashion." *Addington v. Texas*, 441 U.S. 418, 423 (1979). "[M]indful that the function of legal process is to minimize the risk of erroneous decisions," the Court has noted that an intermediate standard of proof (*e.g.*, the clear and convincing evidence standard) may be employed "in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant," because the "interests at stake in those cases are deemed to be more substantial than mere loss of money and some jurisdictions accordingly reduce the risk to the defendant of having his reputation tarnished erroneously by increasing the plaintiff's burden of proof." *Id.* at 424, 425. Therefore, in cases where "the private interest affected is commanding; the risk of error from using a preponderance standard is substantial; and the countervailing governmental interest favoring that standard is comparatively

slight," the Court has held that use of the preponderance of the evidence standard is "inconsistent with due process." *Santosky v. Kramer*, 455 U.S. 745, 758 (1982). Additionally, the Court has utilized the "'clear, unequivocal and convincing' standard of proof to protect particularly important individual interests in various civil cases." *Addington*, 441 U.S. at 424.

Given Cornell's uniquely hybrid status as a part-private, part-public institution, FIRE strongly believes that these rulings and others by the Court should guide Cornell's considerations in this matter. Per your response to Student Assembly Resolution 44 in April 2010, we know that you agree. As you stated then:

> Private corporations and universities—and Cornell University is both—are not compelled by law to recognize or extend constitutional rights to individuals or organizations. However, many private universities, including Cornell, typically have chosen to do so as a matter of policy. When considering the basis and boundaries of such rights, private universities typically look to clearly established constitutional law (as developed by the courts) for guidance.

Consistent with your understanding of Cornell's status and the role of normative judicial conceptions of constitutional rights in considering college policy, we ask that you look to the above guidance provided by rulings of the Supreme Court in determining the due process rights to be afforded to Cornell students accused of sexual assault.

Proponents of using the preponderance of the evidence standard in college judicial hearings often point to the standard's use in civil trials as justification for its use in campus hearings. However, this comparison ignores the vast differences between civil courts and campus hearings. Indeed, campus hearings fail to offer accused students anywhere near the protections afforded defendants in civil court. Civil trials are governed by an intricate process that balances a plaintiff's need for access to justice with the burden on a defendant of dealing with frivolous, erroneous, or malicious claims. Both the Constitution and state and federal rules of civil procedure seek to ensure that all relevant evidence is heard, that a just and accurate verdict is reached, and that decisions, once delivered, are final.

In stark contrast, accused students in campus judicial hearings may not be allowed counsel. Allegations against accused students are heard by campus administrators or other students, not an impartial judge. Accused students cannot compel discovery. Accused students may not be allowed to cross-examine witnesses. The inexact analogy between civil courts and campus courts provides vivid illustration of the fact that in many instances, the most important substantive procedural protection accused students may receive is the fact that their innocence is presumed until the accuser is able to satisfy their evidentiary burden under the standard of proof. Rendering this crucial standard simply "more likely than not," then, leaves many accused students all but guilty before the proceedings begin.

For these reasons, FIRE asks that Cornell reject the implementation of the preponderance of the evidence standard for student sexual assault allegations, and instead adopt the more robust and equitable standard of clear and convincing evidence. The clear and convincing evidence standard

is the appropriate standard for student sexual assault allegations. We ask for a response by April 30, 2012.

Thank you for your attention and sensitivity to these important concerns. I look forward to hearing from you.

Sincerely,

Will Creeley
Director of Legal and Public Advocacy

Encl.

cc:
Susan H. Murphy, Vice President for Student and Academic Services
Kent L. Hubbell, Robert W. and Elizabeth C. Staley Dean of Students
Nelson Roth, Deputy University Counsel