



Why A "Preponderance" Standard Makes Sense for Fair Campus Investigations of Sexual Misconduct Allegations

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In September 2017, Secretary of Education, Betsy DeVos, rescinded previous guidance from the administration of President Barack Obama on how institutions of higher education should address campus sexual misconduct. The Obama guidance issued in 2011 by the Department of Education's Office of Civil Rights was meant to deal with troubling research findings that one in five female students is subjected to sexual misconduct in her college years. The change made by DeVos is controversial in part because it withdraws the prior instructions telling colleges and universities to use a "preponderance of evidence" standard when adjudicating allegations of sexual misconduct. Currently, the exact standard to be used is unclear. Unless and until the Department issues further guidance, it is now up to individual institutions to decide on the standard of evidence to use in such proceedings.

In U.S. criminal and civil justice proceedings, there are several standards used to establish proof. "Preponderance of evidence" is the normal standard used in civil cases, in contrast to the higher criminal standard of proof "beyond a reasonable doubt." DeVos has now opened the door for colleges and universities to raise the standard of proof when resolving cases of alleged sexual misconduct – a step which would make it harder for complainants to prevail. But there are important reasons why they should not do so.

The Preponderance Standard Was the Status Quo for Good Reason

Professionals charged with handling issues of student misconduct have long used the preponderance of evidence standard for sexual misconduct cases because that standard – more effectively than higher standards of proof – recognizes that complainants and accused students have equal stakes in the outcome. The 2011 Obama administration guidance essentially confirmed the status quo, because at the time about two-thirds of U.S. colleges and universities already specified preponderance of evidence as their standard for handling sexual assault accusations. All along, some critics have argued that the preponderance standard risks eroding the rights of the accused. However, proving sexual assault by a preponderance of evidence is already difficult. Data from campus cases decided after 2011 guidance show that a majority of accused students are found not responsible for sexual misconduct, meaning that the evidence was inconclusive or insufficient to prove that the accused student "more likely than not" violated student conduct rules.

A Tougher Standard Would Tilt Scales Toward the Accused

Colleges and universities arguably have incentives to clear accused students, so a heightened standard of proof like "clear and convincing" could favor "not responsible" findings that protect the institution's ability to claim that sexual assault "doesn't happen here." Moreover, colleges face greater risks of being sued by students disciplined for sexual assault than they do from being sued by complainants following a full investigation that finds the accused not responsible.

What is more, some accused students have institutional clout that tilts the scales further against finding them responsible. Athletes, in particular, are often protected for their value to the university. A study for the U.S. Senate found that 20% of university athletic departments still investigate allegations of sexual misconduct in-house, even after explicit federal guidance in 2011 prohibited such internal investigations.

Flawed Arguments for Raising the Proof Standard

A variety of arguments and assumptions fuel calls to raise proof standards in campus sexual misconduct cases, but all of them have flaws:

- Proponents of higher proof standards often imply that campus sexual assault allegations are overblown. But all available evidence shows that the rate of false accusations for sexual assault is very low, and no higher than for any other crime or serious misconduct. The proof standard should not be set based on hyped-up fears of false allegations.
- Calls for heightened proof standards often express the view that accused students have higher stakes in the outcome of the disciplinary proceedings than the students who complain about sexual misconduct. In the criminal law, where a defendant's very liberty or life may be at stake, this is an inappropriate assumption. But in campus processes, both students have important educational interests on the line.
- Some critics of the preponderance standard worry that more men of color might be disciplined. Raising the proof standard in campus proceedings, however, is as likely to exacerbate as to ameliorate racial and class biases against accused students. That is because a higher standard increases the discretion of decision-makers who may consciously or unconsciously be more likely to find white men of privilege "not responsible." Such men have extra clout and are presumed not to fit stereotypes about "real" predators.

We should take notice that worries about race tend to focus on accused men of color, with little attention to the precarious position of women of color who bring accusations in student misconduct proceedings. Women of color have the most to lose from a rule that resets baseline credibility judgments and presumptions of harm, as they are already especially unlikely to report sexual assault to persons in authority. Raising the proof standard would make many of them even less likely to complain. A higher proof standard might also mean that many women of color who do complain would suffer questions about their credibility grounded in racial and gender stereotypes.

Sexual misconduct on campuses is a serious problem, and fairness in campuses proceedings is important for all parties as college leaders look for ways to combat this malady. Any new guidance from the federal government should avoid enshrining standards that presume accused students are more worthy of protection than those who bring complaints. In the meantime, in the absence of contrary guidance from the Department of Education, institutions of higher education should continue to use the preponderance standard to ensure an equitable process for all.

Read more in Deborah L. Brake, "Fighting the Rape Culture Wars Through the Preponderance of the Evidence Standard," *Montana Law Review*, 78, no. 1, (2017): 109-53.