Association for Student Conduct Administration

The Preponderance of Evidence Standard: Use In Higher Education Campus Conduct Processes

By Chris Loschiavo, JD and Jennifer L. Waller, PhD

During the past several years, higher education has been under tremendous scrutiny regarding their student conduct processes, specifically surrounding the issue of sexual assault. Many individuals expect campuses to duplicate or emulate criminal justice proceedings, however, the role and purpose of the campus conduct process is to determine if a policy or the code of conduct for that institution has been violated and if so, to determine the appropriate outcome. Historically in legal proceedings, varying standards of proof have been applied as measures of guilt or responsibility for an offense.

With the evolving nature of higher education, as well as American society in general, and rejection of in *loco parentis via St John Dixon et al. v. Alabama State Board of Education et al.* (1961), it became increasingly necessary for institutions of higher education to evaluate the most appropriate standard to be applied in the educational student conduct environment. There are three levels of standard of proof that are generally recognized in legal proceedings. The *preponderance of evidence standard*, used in civil cases, is defined as "the proof need only show that the facts are more likely to be than not so" (Long, 1985, p. 74). The *clear and convincing standard* is defined as "that proof which results in reasonable certainty of the truth" (Black & Garner, 2004, p. 172). The *beyond a reasonable doubt standard* specifies that "facts proven must, by virtue of their probative force, establish guilt" (Black & Garner, 2004, p. 111); this standard is used in criminal proceedings, where the result of the process could mean deprivation of an individual's freedom.

In recent months, several organizations have suggested that colleges and universities should be required to use a standard of proof in student conduct proceedings that is higher than the preponderance of evidence standard. The Association for Student Conduct Administration (ASCA), the professional organization dedicated to providing networking and development for campus administrators, does not support this position. Based on a review of research and legal precedent, this paper advocates application of the *preponderance of evidence standard* in all student conduct proceedings.

History and Context

Since *St. John Dixon et al. v. Alabama State Board of Education et al.* (1961), public institutions of higher education have been required to provide students who may be suspended or expelled with minimal due process, including adequate notice and an opportunity to be heard (Young, 1974). This process was detailed by the American Association of University Professors (1967) in its *Joint Statement on Rights and Freedoms of Students* which stated,

In all situations, procedural fair play requires that the student be informed of the nature of the charges

against him, that he be given a fair opportunity to refute them, that the institution not be arbitrary in its actions, and that there be provision for appeal of a decision. (p. 416)

In 1968, the *General Order on Judicial Standards of Procedure and Substance in Review of Student Discipline in Tax Supported Institutions of Higher Education* was issued by a group of federal judges from the Western District of Missouri. In part, the order states,

The nature and procedures of the disciplinary process in such cases should not be required to conform to federal processes of criminal law, which are far from perfect and designed for circumstances and ends unrelated to the academic community. By judicial mandate to impose upon the academic community in student discipline the intricate, time-consuming, sophisticated procedures, rules and safeguards of criminal law would frustrate the teaching process and render the institutional control impotent. (p. 142)

The *General Order* also outlines components of fundamental fairness, including notice in writing of the charges, an opportunity for a hearing, and specification that "no disciplinary action be taken on grounds which are not supported by any **substantial evidence**" (p. 147, emphasis added). Institutions of higher education are not bound to the rules and regulations that are specified for criminal proceedings. Both the *General Order* and the *Joint Statement* make clear that colleges and universities have a duty and obligation to protect the educational mission of their institutions. However, in doing so, they must ensure that the concept and practice of fundamental due process be applied throughout the student conduct proceeding, no matter what the alleged violation may have been. In higher education, fundamental fairness is commonly considered a notice of a possible violation of the code of conduct and an opportunity to be heard. There are several court cases that also address the issue of fundamental fairness in campus disciplinary proceedings. For example, in *Esteban v. Central Missouri State College* (1969), the court stated, "School regulations are not to be measured by the standards which prevail for criminal law and for criminal procedure" (p. 1090). Then, in *Mathews v. Eldridge* (1976), the U.S. Supreme Court laid out a three-part due process balancing test, weighing the private interest that will be affected by action taken, the risk of error and the value of additional protection, and what additional burdens would entail for governmental interest. In the case of a campus' response to sexual assault allegations, campus safety is the primary governmental interest without which student's will not learn. Finally, in *Board of Curators of the University of Missouri v. Horowitz* (1978), the Supreme Court applied the *Mathews* due process balancing test to institutions of higher education. According to Saurack (1995), discussing *Horowitz*, "A university, therefore, must have greater flexibility in fulfilling the dictates of due process than a court or administrative agency" (p. 792).

In 1990, Ed Stoner, a prominent higher education attorney, published a Model Disciplinary Code for institutions of higher education. In discussing the standard of proof to be used, he stated,

Courts generally examine whether there was enough evidence at the hearing to demonstrate that it was "more likely than not" that the accused student violated the Student Code, or whether a "preponderance of the evidence" demonstrated such violation—the same standard applied in most civil cases. (Stoner & Cerminara, 1990, p. 113)

In further rationale for use of the preponderance standard, Stoner posited that the beyond a reasonable doubt standard was too demanding for college disciplinary hearings. Institutions of higher education do not have the same authority as courts of law. For example, they do not have the ability to subpoena, summon or compel witnesses to participate in a student conduct process.

These publications and case law have provided a foundation that institutions of higher education have utilized to develop student conduct processes that conform to the principles of fundamental fairness. These practices continue to guide the daily work of student conduct professionals.

Comparison to the Criminal Justice System

Recently, a newspaper headline referred to the campus conduct process as a trial when reporting about a lawsuit filed against the University of California – San Diego (Watanbe, 2015). However, it is important to articulate that campus conduct process are not courts of law or legal institutions, nor do they have the same authority to act as the legal system or desire to replace the criminal justice system. For example, federal, state and local courts have the ability to issue warrants for arrest, subpoena witnesses, and change venues. They

have rules for the admission of evidence and discovery. Institutions of higher education have none of these powers. A college or university campus conduct process is not endowed with the authority to do any of these things. They cannot compel or subpoena a witness to participate in the campus conduct process. They have no rules of evidence. According to Lake (2011), "Litigation and education are very dissimilar in their goals and structure, and are often populated by very different professional personalities" (p. 19). Additionally, campuses have a responsibility to respond to the allegations, determine what happened, if a violation of institutional policy occurred, and put in place any appropriate sanctions, if applicable. The goal is to protect the academic environment.

Current Issues Relating to Sexual Assault

On April 4, 2011, the U.S. Department of Education's Office of Civil Rights (OCR) issued a "Dear Colleague Letter" (DCL; Ali, 2011). Among the more debated notions stated in the letter was the concept that "preponderance of the evidence" was the appropriate standard for adjudicating Title IX and other issues relating to sexual violence in the campus environment. The purpose of Title IX of the Educational Amendments of 1972 is to prohibit discrimination on the basis is sex for all institutions receiving federal monies. The DCL stated, "In addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints" (p. 10). The DCL noted that the Supreme Court has applied the preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964, the model for Title IX. According to Chmielewski (2013),

For nearly all civil cases, the significantly lower "preponderance of the evidence" standard is used, whereby a defendant will be held liable if fact finders believe that the defendant has more likely than not engaged in the conduct giving rise to liability. (p. 150)

Federal courts have cited several instances where preponderance is used when resolving complaints against educational institutions (Chmielewski, 2013). The DCL concluded, "Thus, in order for a school's grievance procedures to be consistent with Title IX standards, the school **must** use a preponderance of the evidence standard" (p. 11, emphasis added). The DCL stated at least three more times that preponderance is the correct standard and that clear and convincing is not the correct standard because it is a higher standard than is appropriate in student conduct cases.

Since the DCL was issued in April 2011, the OCR has provided further guidance via its Frequently Asked Questions document. Additionally, the White House Task Force Report to Stop Sexual Assault on College Campuses via the Not Alone Report and various forms of proposed state and federal legislation on the topic have also given institutions of higher education additional guidance that is for the most part consistent with OCR. All of these guidelines have been consistent in specifying the use of this preponderance standard in student conduct hearings. According to Young (1974), "The courts have consistently declared student disciplinary proceedings to be civil and not criminal proceedings and, therefore, do not necessarily require all of the judicial safeguards and rights accorded to criminal proceedings" (p. 62). The most severe sanction a campus can impose is expulsion from that institution. While this is certainly a serious consequence it is not comparable to loss of life, liberty or property that is what the criminal justice system protects. Given the lower risk of consequence, the preponderance standard is the suitable and equitable standard by which to weigh a complaint.

Application to Sexual Assault Allegations

This standard applies particularly in cases of sexual assault, where the stakes are high for both the alleged perpetrator and the alleged victim/survivor. An accused student who is determined to have committed sexual assault, as specified in the college or university code of conduct, is likely to be suspended or expelled from the institution. The decision by the victim/survivor of sexual assault to leave the institution or to remain likely turns on what happens to the accused student. Many victims of sexual assault will not feel safe attending classes on a campus where the person that victimized them is able to move about freely and attend the same classes and participate in the same activities. Even if they did remain at the institution, it would be very difficult to be the most successful they could be as they often will not feel safe.

Considering the serious potential consequences for all parties in these cases, it is clear that preponderance is the appropriate standard by which to reach a decision, since it is the only standard that treats all parties equitably. To use any other standard says to the victim/survivor, "Your word is not worth as much to the institution as the word of accused" or, even worse, that the institution prefers that the accused student remain a member of the campus community over the complainant. Such messages do not contribute to a culture that encourages victims to report sexual assault. When both students have so much to lose, depending on the outcome of the hearing, preponderance is the appropriate standard. Much is often made of the life-changing consequence of being found responsible for sexual assault or sexual misconduct and being expelled from an institution of higher learning. However, the expelled student can make a new beginning at another institution. It is also important to keep in mind the life-changing consequences for the victim of sexual assault. In examining the role of rape in posttraumatic stress disorder (PTSD) and major depression among college women, Zinzow et al. (2010) found that incidents of rape "were positively associated with mental health outcomes" (p. 712), including PTSD and depression. Recovery and healing can take a lifetime.

Campus disciplinary systems are not meant to replace criminal processes. As a group of law faculty pointed out in "Title IX and The Preponderance of the Evidence: A White Paper," the preponderance standard is used in ALL civil rights cases (Baker, Brake & Cantalupo, 2016). As such it is irresponsible to designate that sex/gender discrimination cases utilize a different standard than racial or other types of discrimination.
All evidence suggests that the best way to change the culture, not only on campuses but in society, is to educate everyone and to hold offenders accountable. This will happen only if victims/survivors are confident enough in the system to report their experience. According to the Rape, Abuse & Incest National Network (RAINN), "The majority of sexual assault are not reported to the police (an average of 68% of assaults in the last five years were not reported)" (2015). An appropriate and effective campus discipline process should increase confidence in students to report possible assaults. If victims experience some success with the campus process, they may be more empowered to pursue criminal charges.

Using the preponderance standard for campus disciplinary decisions is one way in which higher education institutions can send the message to victims/survivors that their experience and voice are important. Any other standard creates a roadblock to reporting which does nothing to make campuses or society safer. If we, in the higher education community, are serious about addressing the issue of sexual assault on our college campuses, then we must use preponderance of the evidence as the standard.

Conclusion

While governmental guidance and case law assert the preponderance of the evidence standard is the most appropriate for student conduct proceedings, ASCA recommends it because it is the only standard that reflects the integrity of equitable student conduct processes which treat all students with respect and fundamental fairness.

References

Ali, R. (2011). *Dear colleague letter*. Washington, DC: Office of Civil Rights.

American Association of University Professors. (1967). *Joint statement on rights and freedoms of students.* Washington, DC:

Baker, K.K., Brake, D. L., & Cantalupo, N.C. (2016). *Title IX & the preponderance of the evidence: A white paper.* Retrieved from http://www.feministlawprofessors.com/wp-content/uploads/2016/08/Title-IX-Preponderance-White-Paper-signed-8.7.16.pdf

Black, H. C., & Garner, B. A. (2004). *Black's law dictionary* (8th ed.). St. Paul, MN: Thomson/West.

Board of Curators of the University of Missouri v. Horowitz, 435 U.S. 78 (1978).

Chmielewski, A. (2013). Defending the preponderance of the evidence standard in college adjudications of sexual assault. *B.Y.U. Education and Law Journal, 143,* 150-158.

Esteban v. Central Missouri State College, 415 F.2d 1077 (1969).

General order on judicial standards of procedure and substance in review of student discipline in tax supported institutions of higher education, 45 F.R. D133 C.F.R. (1968).

Lake, P.F. (2011). *Foundations of higher education law and policy: Basic legal rules, concepts, and principles for student affairs.* Washington, D.C.: NASPA-Student Affairs Administrators in Higher Education.

Long, N. T. (1985). The standard of proof in student disciplinary cases. *Journal of College and University Law, 12*(1), 71-78.

Mathews, Secretary of Health, Education and Welfare v. Eldridge, 424 U.S. 319 (1976).

Rape, Abuse, & Incest National Network (RAINN). (2015). *Reporting rates.* Retrieved from https://www.rainn.org/get-information/statistics/reporting-rates

Saurack, W. (1995). Protecting the student: A critique of the procedural protection afforded to American and English students in university disciplinary hearings. *Journal of College and University Law, 21*(4), 785.

St. John Dixon et al. v. Alabama State Board of Education et al., 294 F.2d 150 (1961).

Stoner, E. N. II, & Cerminara, K. L. (1990). Harnessing the "spirit of insubordination": A model student disciplinary code. *Journal of College and University Law, 17*(2), 89-114.

U.S. Department of Education, Office of Civil Rights. (2014). Questions and Answers on Title IX and Sexual Violence. Retrieved from http://www2.ed.gov/about/offices/list/ocr/docs/qa-201404-title-ix.pdf

Watanbe, T. (July 14, 2015). UC San Diego didn't give male student fair trial in sex case, judge rules, Los Angeles Times (http://www.latimes.com/local/lanow/la-me-ln-ucsd-sexual-misconduct-20150713-story.html).

White House Task Force to Protect Students From Sexual Assault. (2014) Not alone: The first report of the White House Task Force to Protect Students from Sexual Assault. Retrieved from https://www.notalone.gov/assets/report.pdf

Young, D. P. (1974). Student rights and discipline in higher education. *Peabody Journal of Education, 52*(1), 58.

Zinzow, H. M, Resnick, H. S., McCauley, J. L., Amstadter, A. B., Regiero, K. J., & Kilpatrick, D. G. (2010) The role of rape tactics in risk for posttraumatic stress disorder and major depression: Results from a national sample of college women. *Depression and Anxiety, 27*, 708-714.