A Failed Defense of Campus Kangaroo Courts

A college president recently promoted fallacies about the law in order to justify federal micromanagement of school discipline. Writing in the *Washington Post*, Brooklyn College's Michelle Anderson defended a 2011 letter from the Education Department's Office for Civil Rights (OCR) dictating "the standard of proof in campus disciplinary proceedings." It told colleges that had been using the "clear and convincing" evidence standard to instead use a mere "preponderance of the evidence" standard, if the allegation involves sexual harassment or assault (rather than a non-sexual offense).

For an unelected federal bureaucrat to dictate the burden of proof at colleges across the country is disturbing. But Anderson defended OCR's action, claiming that "Preponderance is the standard of proof that applies throughout our justice system, except when life or liberty is at stake."

This is an inaccurate claim. The civil justice system uses the clear-and-convincing evidence standard for many matters. I don't know how Ms. Anderson could have taught law (as she did for years) without learning this basic legal reality.

One common example of the legal system using the clear-and-convincing evidence standard is given by Connecticut's Office of Legislative Research. As it notes, "Most states require clear and convincing evidence" before punitive damages can be awarded, requiring "a high probability or a reasonable certainty that the plaintiff's version is" true. This is not the only type of court case in which such clear proof is required. As I pointed out in the *Wall Street Journal* in 2014, "The clear and convincing evidence standard is often used for cases such as license suspensions and many issues involving fraud, punitive damages, wills or family decisions."

Anderson believes that if the court system applies a preponderance standard, so, too, must campus disciplinary proceedings. But this belief has no logical or historical basis. Colleges used a higher standard in campus disciplinary proceedings for many years, without any objection from the courts. As James Picozzi noted in 1987 in the *Yale Law Journal*, "Courts, universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of 'clear and convincing' evidence." (*University Disciplinary Process: What's Fair, What's Due, and What You Don't Get*, 96 Yale L. J. 2132, 2159 n. 17 (1987)).

A federal appellate judge, Jose Cabranes, continued to advocate the use of the clear-and-convincing standard in campus disciplinary proceedings in a January 2017 op-ed in the *Washington Post*, which also noted that "the American Association of University Professors has described [it] as essential in any fair proceeding."

Although colleges stopped using the clear-and-convincing standard for sexual harassment and assault allegations after the Education Department ordered them to in 2011, many of them (such as Duke University, or the University of Virginia's Honor System) still use that higher standard of proof for other types of allegations, such as vandalism, non-sexual assaults, or honor code violations.

The April 4, 2011 "Dear Colleague" letter that Anderson defends also contains more disturbing forms of federal micromanagement, as noted earlier, along with bad legal advice for colleges. It encouraged colleges to restrict cross-examination by the accused, even though the Supreme Court called cross-examination the "greatest legal engine ever invented for the discovery of truth" in its decision in *Lilly v. Virginia*, 527 U.S. 116, 124 (1999) – and campus cross-examination is also a specifically protected right under some state Administrative Procedure Acts. In a departure from

longstanding Education Department policy, it also demanded that colleges regulate off-campus conduct (which led to people being investigated for sexual harassment for off-campus speech about sexual issues, such as an essay criticizing campus "sexual paranoia" in the *Chronicle of Higher Education*). And it ignored past agency rulings by demanding that colleges allow complainants to appeal not-guilty verdicts unless the accused is barred from appealing (which critics viewed as akin to double jeopardy).

Anderson is not troubled by any of this federal overreaching. Although she doesn't explain why the standard of proof should be the same in campus disciplinary proceedings as in civil litigation, the Education Department tried to justify this position in its April 4, 2011 letter. It reasoned that the lower "preponderance" standard was "the standard of proof established for violations of civil-rights laws" in lawsuits brought in federal court. Therefore, it claimed, preponderance must also be "the appropriate standard for" schools to use in "investigating allegations of sexual harassment or violence.'"

But as discussed earlier, that is a red herring, since the mere existence of harassment or assault by a student (as proven by a preponderance of evidence) doesn't give rise to liability on the part of the school; only the school's faulty response to it can. Liability under Title IX is based on whether the school mishandled sexual harassment or assault allegations, not whether students engaged in harassment. Students cannot violate Title IX; only schools can be sued under Title IX, not individuals. (*See, e.g., Smith v. Metropolitan School District* (1997).) Moreover, Students "are not agents of the school," so their actions don't count as the actions of the school. (*See UWM Post v. Bd. of Regents* (1991)).

As the Education Department admitted in its 1997 "Sexual Harassment Guidance," "Title IX does not make a school responsible for the actions of harassing students, but rather

for its own discrimination in failing to remedy it once the school has notice." (62 FR 12034 (1997)). So to violate Title IX, an institution's own actions must be proven culpable under a "preponderance" standard – not the mere occurrence of harassment.

Since an institution itself must behave in a culpable fashion, not just the accused harasser, federal courts have held that there is no violation of the civil rights laws even if harassment occurs, as long as the institution investigates in good faith in response to the allegation of harassment. That's true even if the institution ultimately refuses to discipline a harasser based on the reasonable belief that he is innocent, after applying a firm presumption of innocence (such as demanding corroborating evidence, *see* *Knabe v. Boury Corp.*, 114 F.3d 407 (3rd Cir. 1997)).

For example, a federal appeals court reversed a jury verdict that awarded a worker $85,000 against the U.S. Postal Service for sexual harassment, even though harassment did occur, since the Postal Service had, after investigating the worker's sexual harassment complaint, reasonably, but erroneously, failed to credit plaintiff's allegations. As the court explained, "a good faith investigation of alleged harassment may satisfy the 'prompt and appropriate response' standard, even if the investigation turns up no evidence of harassment. . .[and] a jury later concludes that in fact harassment occurred." *See* *Swenson v. Potter*, 271 F.3d 1184, 1196 (9th Cir. 2001), *quoting Harris v. L & L Wings*, 132 F.3d 978, 984 (4th Cir. 1997).

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