



Court rules that preponderance is improper standard for sexual misconduct disciplinary cases

By Steven M. Richard

As we have reported in recent alerts, judicial rulings are scrutinizing the constitutional due process of sexual misconduct disciplinary proceedings conducted by public universities and colleges. Consistent with this trend of stronger judicial oversight, on September 20, Judge James O. Browning of the United States District Court for the District of New Mexico issued a significant order that due process mandates a higher level of evidentiary proof to adjudicate a student's responsibility than a preponderance of the evidence.

In *J. Lee v. The University of New Mexico*, No. CIV. 17-1230 JB\LF, a graduate student filed Title IX, due process and contractual challenges to his expulsion by the University of New Mexico ("UNM"), which the university challenged in a motion to dismiss. While the Title IX and contractual claims were dismissed, Judge Browning allowed Lee's due process claims to survive in part based upon the following pronouncement:

[T]he Court concludes that preponderance of the evidence is not the proper standard for disciplinary investigations such as the one that led to Lee's expulsion, given the significant consequences of having a permanent notation such as the one UNM placed on Lee's transcript.

This ruling is the first to hold explicitly that the preponderance standard is constitutionally improper. Judge Browning also held that Lee pled plausible due process concerns because UNM does not provide an evidentiary hearing in sexual misconduct cases, while doing so in other disciplinary matters. Further, Lee did not receive notice that he faced sanctions for alleged underage drinking until his sanctions hearing, when it was too late for him to prepare an adequate defense. Judge Browning issued his rulings in a summary order, subject to further explanation in an upcoming memorandum opinion, which should garner significant attention upon its issuance.

Federal case law regarding the due process propriety of the preponderance standard has been unsettled. In an unpublished opinion, the United States Court of Appeals for the Sixth Circuit found no due process violation with a university's application of the evidentiary standard. *Doe v. Cummins*, 662 F. App'x 437, 449 (6th Cir. 2016). Elsewhere, a strongly worded dissenting opinion in the Fifth Circuit's divided ruling in *Plummer v. Univ. of Houston*, 860 F.3d 767 (5th Cir. 2017),

described disciplinary hearings in sexual misconduct cases as “quasi criminal” with long-lasting impacts on the accused. The majority decision in *Plummer* did not address the issue finding it to have been waived on appeal, but the dissent advocated for a higher standard of review, noting that “[e]levating the standard of proof to clear and convincing, a rung below the criminal burden, would maximize the accuracy of the fact finding.” *Id.* at 782 & n.11. At the federal district court level, trial judges in Mississippi and Colorado have recently allowed due process challenges to survive dismissal by questioning the constitutionality of disciplinary adjudications by a preponderance of the evidence. See *Doe v. Univ. of Mississippi*, Civ. A. No. 3:16-cv-63-DPJ-FKB, 2017 WL 3570229, at *11-12 (N.D. Miss. 7/24/18); *Doe v. DiStefano*, Civ. A. No. 16-cv-1789-WJM-KLM, 2018 WL 2096347, at *6-8 (D. Colo. 5/7/18). Judge Browning’s ruling will further intensify the ongoing judicial debate about whether the preponderance standard comports with due process.

Against this evolving judicial backdrop, the Office for Civil Rights’ September 2017 Q&A on *Campus Sexual Misconduct*, issued as part of the withdrawal the Obama-era April 2011 *Dear Colleague Letter* and April 2014 *Questions and Answers on Title IX and Sexual Violence*, stated that findings and conclusions in a sexual misconduct disciplinary process “should be reached by applying either a preponderance of the evidence standard or a clear and convincing evidence standard.” Recently publicized drafts of OCR’s impending proposed Title IX regulations indicate that schools will retain the right to select between the two evidentiary standards.

Since the issuance of OCR’s Q&A last year, most colleges and universities continue to apply the preponderance standard in their sexual misconduct disciplinary processes. While OCR will apparently permit schools to retain this lower evidentiary standard, colleges and universities, particularly public institutions, must watch and analyze federal judicial rulings in their jurisdiction. While acting in compliance with OCR’s administrative requirements, schools will still run the risk of having their disciplinary proceedings judicially enjoined or vacated where courts question the propriety of the preponderance standard or find it to violate constitutional due process. We expect this issue to become even more of a focal and contentious point in lawsuits, as courts analyze and reconcile whether and how OCR’s Title IX’s administrative allowance of the preponderance standard ensures the due process rights of an accused student.

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