Title IX and Evidentiary Standards[1]

Purpose

This document serves as a guideline for evidentiary standards of proof for Title IX cases. Multiple standards of proof[2] exist in legal proceedings, all of which involve somewhat amorphous concepts. Unfortunately, as facts and evidence available vary by case, there is no precise amount[3] or type of physical or circumstantial evidence each complainant/plaintiff/prosecutor must provide in a legal proceeding to meet a specific standard. As such, this document operates to illustrate each standard proof, highlighting when each standard may be satisfied, and advocates for the preponderance of the evidence standard to be utilized in Title IX hearings.

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What are evidentiary standards?

Evidentiary standards describe how a court or other decision maker (such as a student conduct panel) decides what facts are "true", and how evidence is admitted. Evidentiary standards are an integral part of ensuring each parties' due process rights are respected. The judicial system uses multiple varying evidentiary standards, the application of which depends on the type of case and the rights involved.[4] Persons involved in Title IX proceedings have likely heard the terms "burden of proof" and "beyond a reasonable doubt", through popular culture or in everyday life. As campuses adjust to new administrative standards, it is critical that Title IX panels fully understand applicable evidentiary standards. The three standards of evidence discussed herein are Beyond a Reasonable Doubt, Clear and Convincing Evidence, and Preponderance of the Evidence.

Related Terms

As attorneys become increasingly involved in on-campus processes, they will likely bring legal terms into interviews, investigations, hearings, and appeals. The following terms are likely to come up:

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[1] This document was prepared for OAESV by Isaac Bleich, J.D. anticipated, Cleveland Marshall College of Law.
[2] Note that the term "burden of proof" is used somewhat interchangeably by courts and legal practitioners with the concepts of "burden of production", and "burden of persuasion. As attorneys become more involved in Title IX processes, they may bring these terms into conversation despite their lack of presence in administrative guidelines.
[3] For example, a prosecutor cannot demand a jury automatically convict in a murder case because the prosecutor brought into evidence a weapon containing the defendant's finger prints. The jury still must evaluate based on all other evidence, including testimony, admitted during trial.
[4] There are also evidentiary standards utilized by appellate courts when conducting a review of the evidence on appeal.

Term	Definition & Context
Sufficiency of the Evidence	In the criminal and civil justice systems, the phrase "sufficiency of the evidence" describes the legal standard applied to determine whether the case may go to the jury or whether the evidence is legally sufficient as a matter of law to support the jury verdict.[5] Sufficiency of the evidence is typically reviewed on appeal, and asks whether evidence is legally sufficient to sustain a verdict as a question of law, not fact.[6]
Weight of the Evidence	"Weight of the evidence" addresses the evidence's effect of inducing belief.[7] Evidence is given greater weight when the decision maker finds it credible and believable. The concept is inextricable from the "burden of persuasion", described below, where a manifest weight of the evidence challenge in a criminal appeal questions whether the state in a criminal trial met its burden of persuasion.[8]
Evidentiary Burdens	An evidentiary burden describes which party has the responsibility of producing evidence or, in the case of the burden of persuasion, persuading the fact finder how evidence should be interpreted. Evidentiary burdens are often labeled simply as the "burden of proof", encompassing all of the separate evidentiary burdens described below. Generally speaking, the burden of proof is placed with the party bringing the complaint. Once a party has satisfied the burden of proof, the burden may transfer to the opposing party to respond.
Burden of Proof	The phrase "burden of proof" is the responsibility held by a party of affirmatively establishing a fact by the required degree of proof.[9] A party to a case has an obligation to meet the requirements that a fact be proven by one of three evidentiary standards; "preponderance of the evidence", "clear and convincing evidence", or "beyond a reasonable doubt".[10] Each standard carries with it a minimum degree of evidence by which a party will have satisfied the burden of proof sufficiently to show that a fact is proven. Failure to meet the burden of proof may lead to judgement against the party who failed to satisfy this requirement.
Burden of Production	The phrase "burden of production" describes the necessity of presenting evidence sufficient to permit a fact finder to act on the issue presented.[11] The burden of production has nothing to do with whether the evidence should be believed or the credibility of the evidence, but is concerned merely with a showing that, if believed, the evidence would establish a valid claim. The burden of production is solely the "obligation to make a prima facie case",[12] and must be satisfied before a case may be brought before a court. The phrase "prima facie" describes evidence which, if proven credible, would be sufficient to establish a fact as true.[13] A prima facie case is one which would, unless discredited by the opposing party's evidence, be

[5] State v. MacDonald, 2002-Ohio-3066, ¶37 (Ohio Ct. App. 2002); *see also* State v. Howard, 146 Ohio App.3d 335, 343 (2001).
[6] *Id.*
[7] State v. Perrien, 2020-Ohio-798, ¶14 (Ohio Ct. App. 2020).
[8] *See* State v. Metz, 146 N.#.3d 1190, 1204 (Ohio Ct. App. 2019).
[9] *See* 31A C.J.S. Evidence § 188 (June 2020 Update) (describing burdens of proof, persuasion, and production generally); *see also* Palenkas v. Beaumont Hosp., 432 Mich. 527, 550 (1989) (defining "burden of proof" as the duty of affirmatively proving a fact or facts in dispute on an issue raised between the parties in a case).
[10] For a in depth explanation of these standards, *see* Evidentiary Standards, *below*
[11] *See* 31A C.J.S. Evidence § 189 (June 2020 Update) (describing burden of production and its definition); *see also* Schuttler v. Ruark, 255 Ill.App.3d 678, 840 (1992) (describing burden of proof as containing the burden of persuasion and the burden of production, the latter of which is presenting sufficient evidence to establish a prima facie claim).
[12] *Id.*
[13] Cumulus Media, Inc. v. Clear Channel Communications, Inc., 304 F.3d 1167, 1176 (11th Cir. 2002).

	sufficient to merit a ruling in favor of the party bringing the case. Failure to meet the burden of production may lead to dismissal of any claims.
Burden of Persuasion	The phrase "burden of persuasion" describes the obligation to introduce evidence that actually persuades or convinces the fact finder that a particular proposition of fact is true.[14] Simply stated, "burden of persuasion" describes the degree to which a party must convince the finder of fact that evidence is true. "Burden of persuasion" is typically the phrase courts use to communicate to jurors the degree of certainty they should "feel" before returning a verdict.[15] Additionally, the burden of persuasion is the notion that if evidence is evenly balanced, the party which bears the burden of persuasion must lose.[16]
Evidentiary Standards	Evidentiary standards describe the level of "proof" required to satisfy an evidentiary burden. The separate standards exist because the consequences of a finding of guilty or liability vary – in a criminal matter, the defendant may be incarcerated, in a civil matter, the defendant may have to give up parental rights or pay a large sum of money. Evidentiary standards are used by the fact finder, sometimes a judge, a panel, or a jury, to determine whether the evidence presented is sufficient to find liability.

Standards of Proof

I. "Beyond a Reasonable Doubt"

Proof beyond a reasonable doubt is the highest standard, and the most difficult to surmount. Proof beyond a reasonable doubt is primarily applied in criminal cases, reflecting the high degree of certainty required to deprive a person of liberty (incarceration).[17] Proof beyond a reasonable doubt requires near certainty of the facts indicating guilt on behalf of the party accused of a crime. If a juror in a criminal case has *reasonable* doubts as to the facts indicating guilt, such as evidence submitted which could reasonably refute evidence of guilt, the party must be acquitted.

Proof beyond a reasonable doubt is not used in civil cases, and the Department of Education does not permit its use in Title IX sexual misconduct proceedings.[18] In civil cases, there is generally not a risk to the parties of loss of life or liberty and the stakes for both parties are generally equal, lending civil cases to a lower standard of evidence.

II. "Clear and Convincing Evidence"

Clear and convincing evidence is the intermediate standard of evidence; higher than preponderance of the evidence, but lower than proof beyond a reasonable doubt. In civil cases, preponderance of the evidence is generally used – courts heighten to clear and convincing evidence in cases where fundamental[19] rights are involved and the legal and social ramifications of the civil proceeding are serious, clear and convincing evidence may be used.[20] Some examples of civil cases where clear and convincing evidence is the standard are fraud or undue influence, willful and wrongful acts, or gross negligence.[21]

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[14] *See* 31A C.J.S. Evidence § 190 (June 2020 Update) (describing burden of persuasion and its definition).
[15] *Id.*
[16] *Id.*
[17] See 32A C.J.S. Evidence § 1626 (June 2020 Update) (describing proof beyond a reasonable doubt and its application).
[18] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30263 (May 19, 2020) (to be codified at 34 C.F.R. 106).
[19] "Fundamental rights" in this context means rights guaranteed under the United States Constitution, such as the right to life and liberty, which may not be deprived without sufficient due process procedures. Fundamental rights do *not* include the right to post-secondary education or the right to be on a college campus.
[20] *See* 32A C.J.S. Evidence § 1624 (June 2020 Update) (explaining the clear and convincing evidence standard).
[21] *Id.*

In general, this standard requires more than mere substantial evidence; suspicion and speculation do not meet the clear and convincing standard. Evidence is "clear" if it is certain, unambiguous, and plain to the understanding, and it is "convincing" if it is reasonable and persuasive enough to cause a trier of fact to believe it.[22] For example, witness memories while in a drugged state would not meet the clear and convincing evidence standard. The clear and convincing evidence standard will be satisfied if the truth of the factual argument is highly probable, producing a firm belief or conviction that the allegations sought to be established are true, but does not mean clear and unequivocal.[23]

III. "Preponderance of the Evidence"

Preponderance of the evidence is the most widely used standard of evidence for civil cases. The preponderance of the evidence standard requires that the factfinder determine whether a fact sought to be proved is more probable than not.[24] Put simply, the preponderance of the evidence standard will be satisfied if a fact is shown to be true with a certainty of "at least 50%, plus a feather". Preponderance does not mean a greater volume of evidence or witnesses which speak to a fact, but merely as to the fact's likely existence as truth. Evidence such as witness testimony may carry more weight under the preponderance of the evidence standard. The number of witnesses may be a factor and may be weighed in light of the nature of the issue of fact.[25] In a civil action, the burden of proof is generally on the plaintiff to establish their case by a preponderance of the evidence.[26]

Evidentiary Standard	**Use in legal system**	**Evidence to meet standard**	Failure to Meet Burden	**Consequence**
Proof beyond a reasonable doubt	Criminal Cases – potential loss of life and/or liberty	Evidence must show to a near moral certainty the truth of a party's guilt	Any doubt as to the truth of guilt which may be reasonably inferred from the evidence will fail to meet the standard	Potential for: jail time or death penalty, restitution, and/or permanent record of criminal activity
Clear and Convincing Evidence	Civil Cases – serious harms, such as fraud, undue influence, gross negligence	Unambiguous, clear, and reasonable evidence which shows a high probability of truth will meet the standard	Substantial or circumstantial evidence, suspicion, and speculative evidence will fail to meet the standard	Potential for: sanctions, injunctions, financial penalties, or loss of property

[22] *Id.*
[23] *See* Commonwealth v. Allen, 269 Va. 262, 275 (2005).
[24] *See* 32A C.J.S. Evidence § 1627 (June 2020 Update) (explaining preponderance of the evidence and its definition).
[25] *See* 32A C.J.S. Evidence § 1628 (June 2020 Update) (explaining what constitutes preponderance).
[26] Nashua Housing Authority v. Wilson, 162 N.H. 358, 361 (2011).

Preponderance of the Evidence	Civil Cases – majority of civil cases, balanced stakes on both sides	Evidence which shows a fact as more probable than not will meet the standard: "50% plus a feather"	Evidence which shows a fact is less probable than not will fail to meet the standard	Potential for: financial penalties, court orders, etc.

Preponderance of the Evidence Should be the Standard for Civil Sexual Misconduct

Prior the 2020 Title IX Regulations Final Rule, preponderance of the evidence was the applicable evidentiary standard for university disciplinary proceedings concerning sexual misconduct.[27] According to the Office for Civil Rights in the 2011 "Dear Colleague Letter", the preponderance of the evidence standard is necessary to ensure an equitable disciplinary proceeding and is consistent with other civil rights laws, such as Title VII.[28] The new regulations allow for disciplinary proceedings to use either the preponderance of the evidence standard or the clear and convincing evidence standard. Schools must apply the same standard of evidence for formal complaints against students as for formal complaints against employees, including faculty, and apply the same standard of evidence to all formal complaints of sexual harassment.[29]

Due process is a fundamental freedom in the United States, and it is an essential function of the legal system to protect due process rights. As explained above, what due process looks like has a great deal to do with the stakes invovled and the type of case, whether it be a criminal or a civil proceeding. Where loss of life or liberty is a potential outcome, such as in a criminal case, due process demands the highest evidentiary standard available. In a case where the stakes are lower, such as a civil proceeding, evidentiary standards are reduced to reflect the change of circumstances.

Due process may be a flexible standard, depending on the format and requirements of the case at hand. A common test for due process requirements is illustrated in *Mathews v. Eldridge*, a Supreme Court case which describes the factors a court should consider. There, the court held that there are three distinct factors at play:

- the private interest that will be affected by the official action,
- the risk of an erroneous deprivation of such interest through the procedures used, and
- the Government's interest and burdens that the procedural requirement would entail.[30]

Courts have generally interpreted *Matthews* to describe a flexible standard for due process, recognizing that the formal procedural rules for a criminal trial may not always be appropriate for administrative agencies or other state and government actors.[31] University misconduct hearings fall under the type of administrative procedures which are described by the court in *Matthews* and to which due process is a flexible standard.

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[27] U.S. Dep't of Educ, Office for Civil Rights, Dear Colleague Letter 3 (Apr. 4, 2011) [hereinafter Dear Colleague Letter], *available at* vhttps://obamawhitehouse.archives.gov/sites/default/files/dear_colleague_sexual_violence.pdf.

[28] Lavinia M. Weizel, The Process that is Due: Preponderance of the Evidence as the Standard of Proof for University Adjudications of Student-on-Student Sexual Assault Complaints, 53 B.C. L. Rev. 1613, 1618 (2012) [hereinafter The Process that is Due].

[29] Nondiscrimination on the Basis of Sex in Education Programs or Activities Receiving Federal Financial Assistance, 85 Fed. Reg. 30026, 30275 (May 19, 2020) (to be codified at 34 C.F.R. 106).

[30] Mathews v. Eldridge, 424 U.S. 319, 335 (1976); *see also* The Process that is Due at 1624.

[31] The Process that is Due at 1624, 1625; *see also* Gorman v. University of Rhode Island 837 F.2d 7, 14 (1988) (holding due process grants students the right to some notice and some kind of hearing, and that a "full dress judicial hearing, with the right to cross-examine witnesses" is not required in a charge of misconduct).

While there has been considerable debate over the appropriate evidentiary standard for university disciplinary hearings, no federal court has found the preponderance of the evidence standard to be lacking or in violation of due process.

School disciplinary proceedings are not criminal trials, and evidentiary standards greater than preponderance of the evidence are not required in such a civil proceeding.[32] According to the strong interest universities have in reaching the correct conclusion in reviewing sexual misconduct claims, and the relatively few long-term consequences, the preponderance of the evidence standard is sufficient to satisfy due process in sexual misconduct proceedings.[33]

Thus far, the argument in favor of a clear and convincing evidentiary standard in sexual misconduct proceedings is restricted to law review articles – as no federal court has concluded that students accused of sexual misconduct are entitled to a standard of proof higher than preponderance of the evidence in campus disciplinary proceedings.

When evaluating how evidentiary standards will impact students in educational processes, campuses must engage with many considerations beyond legal rulings and ramifications of evidentiary standards. While holding a nonculpable respondent liable for sexual misconduct is harmful, so too is failing to find a culpable respondent liable.[34] Many of the harms which may impact nonculpable respondents may too affect survivors, such as deprivation of educational opportunities, fear on campus, and traumatization.[35]

Beyond the social and psychological harms involved, and as illustrated throughout this document, schools have a limited capacity to punish students found liable for sexual misconduct. As discussed above, attending a post-secondary educational institution is not a fundamental right protected by law. Attending an educational institution requires a student to accept certain responsibilities, such as adhering to the institutional code of conduct, which if violated may result in expulsion. The worst punishment available to an educational institution is expulsion, a harm much less than that of a criminal finding of liability. The expulsion of a student for violation of university misconduct codes does not deprive the student of fundamental rights, as would be the case in a criminal finding of liability. Requiring the clear and convincing evidence standard would risk barring evidence which would otherwise be sufficient to demonstrate a misconduct violation, such as the usually available primary forms of evidence found in witness testimony from an impaired witness or drug and alcohol impaired memories of witnesses. Raising the evidentiary standard to a clear and convincing evidence standard will only serve to skew the proceedings and Title IX hearings against survivors of sexual assault, by limiting their ability to submit actionable evidence and subjecting survivors to a potentially harmful hearing process.[36]

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[32] *Id.* (citing Doe v. Univ. of Ark-Fayetteville, 2019 WL 1493701, at *10 (D. W.D. Ark. Apr. 3, 2019)).
[33] *Id.* at *39.
[34] Ramya Sekaran, The Preponderance of the Evidence Standard and Realizing Title IX's Promise: An Educational Environment Free from Sexual Violence, 19 Geo. J. Gender & L. 643, 657 (2018).
[35] *Id.*
[36] *Id.*