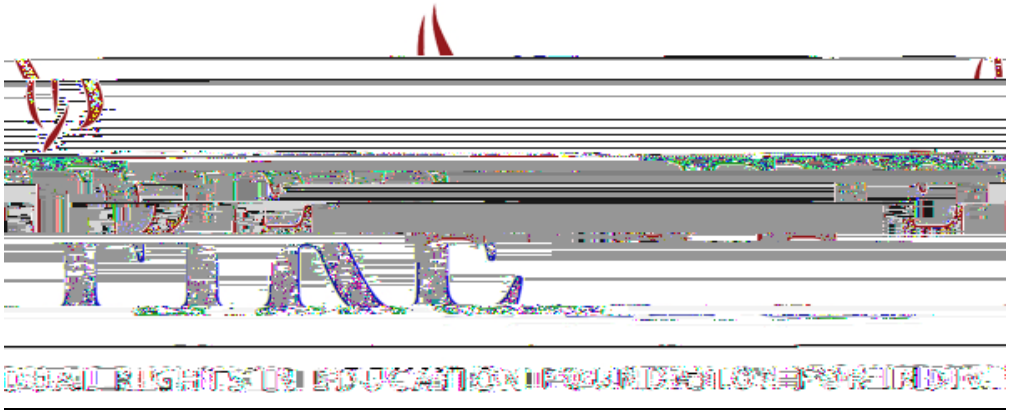

Frequently Asked Questions:
OCR's April 4 "Dear Colleague" Guidance Letter

What is OCR?

"OCR" is the federal Department of Education's Office for Civil Rights. It is responsible for enforcing the federal civil rights laws that prohibit discrimination in educational programs or activities that receive federal funding from the Department of Education. This includes every college that receives any federal funding (nearly all colleges, public and private), as well as K–12 schools.

What does OCR do?

OCR enforces various federal laws prohibiting discrimination on the basis of race, color, national origin, sex, disability, or age by an educational institution (including colleges and universities) that receives federal funding. One of the most prominent of these laws is Title IX of the Education Amendments of 1972, which forbids discrimination on the basis of sex.

OCR investigates complaints filed by anyone who believes that such discrimination has occurred. Complaints must be filed within 180 days of the alleged discrimination, but the person filing the complaint does not have to be the alleged victim. Discrimination under these statutes includes "harassment" on the basis of any of the protected categories, including sexual harassment or racial harassment.

If a school does not voluntarily comply with the federal laws and regulations that OCR enforces, OCR may formally find a school in violation and begin action to withdraw the school's Department of Education funding or ask the federal Department of Justice to begin judicial proceedings.

What are the implications of a formal finding of violation by OCR?

Losing federal funding would be disastrous for virtually all colleges and universities, both public and private. For example, Yale University received nearly $510.4 million

dollars in federal funding for research and training initiatives in the 2009–2010 academic year, and the University of California at Berkeley received a comparable amount. Federal educational grant funding for all colleges totaled $41.3 billion for the

protected speech. Public universities may not violate First Amendment rights, and private universities must honor their promises of freedom of expression. Previous OCR letters on this subject were clear about this, but this most recent letter is not.

The reason this lack of clarity is so important (and so disappointing) is that many colleges already enforce vague and overly broad sexual harassment policies, and often confuse speech protected by the First Amendment with speech or conduct that is actually punishable as harassment. With its lack of guidance on this issue, OCR's April 4 letter compounds these problems. Under OCR's new mandate regarding the standard of proof, students falsely charged with sexual harassment need only be found "more likely than not" to have violated a poorly written harassment policy to suffer disciplinary action.

Why are colleges and universities involved in investigating and punishing criminal behavior at all? What about local law enforcement?

Since OCR defines sexual violence as a form of sex discrimination prohibited by Title IX, colleges are legally required to address and prevent the occurrence of sexual violence on their campuses, and colleges' responses to allegations of such behavior are subject to OCR's regulatory oversight. OCR's April 4 letter instructs college administrators to establish working relationships with local law enforcement officials and states that "a law enforcement investigation does not relieve the school of its independent Title IX obligation to investigate the conduct." Specifically, OCR states that because the criminal code and Title IX are different, conduct that is not sufficient evidence of a criminal violation may still qualify as sexual harassment under Title IX. As a result, OCR requires schools to begin their own Title IX investigations without regard to the status of any criminal investigation that may also be underway.

What's wrong with mandating a "preponderance of the evidence" standard for adjudicating sexual harassment and sexual violence claims?

The preponderance of the evidence standard (roughly 50.01% certainty) is **our judiciary's lowest standard of proof,** and does not sufficiently protect an accused person's right to due process. While this standard is acceptable for lawsuits over money, allegations of sexual violence or sexual harassment are far more serious than disputes that can be resolved by transferring money from one individual to another. It is difficult to overstate the harm caused to a student who is falsely convicted of sexual violence. And since claims of sexual violence often involve alcohol and drug use, few or no witnesses, and other complicating factors, the **risk of error** caused by using the lowest possible standard is quite severe.

Further, using the lower standard of evidence for such serious accusations is at odds with our national principles of justice, which hold that those accused of crimes are innocent until proven guilty. Instead, OCR seems to believe that due process is an impediment to the pursuit of justice in a free society, rather than a crucial component of it. Teaching students that due process stands in the way of justice sets a frightening precedent for us all.

Mandating use of the preponderance of the evidence standard also **takes away the right of colleges** to determine the proper due process protections afforded to students accused of such serious misconduct. OCR has in the past told *individual* colleges that the "preponderance of the evidence" standard is necessary under Title IX (going as far back as 1994), but until now has never required *all* schools receiving federal funding to adopt this low standard. In fact, prior to the April 4 OCR letter announcing the new mandate, Stanford University, Harvard Law School, Princeton University, Columbia University, Yale University, the University of Pennsylvania, Duke University, and Cornell University, among others, all employed a higher standard of proof—typically, the "clear and convincing evidence" standard, an intermediate standard between "beyond a reasonable doubt" and "preponderance of the evidence."

All of these institutions now must substitute OCR's judgment for their own, and some already have done so. In fact, Stanford University implemented the "preponderance of the evidence" standard *in the middle of a student's sexual assault case.* FIRE has asked both Yale University and the University of Virginia to stand up for student due process and free expression rights by challenging the new OCR mandate, but we believe it is unlikely that any university will prove willing to take on OCR.

What's wrong with allowing the accuser to appeal?

Forcing students who have been found innocent of charges of sexual harassment or sexual assault to submit to yet another he

its own appeals process, and the resulting variability makes a blanket rule regarding dual appeals more dangerous. For example, some campuses put a single person in charge of hearing appeals. In these situations, the risk of injustice sharply increases, as that person may be empowered to rehear the case with no procedural oversight.

Appeals for the Fifth Circuit's landmark decision in *Dixon v. Alabama State Board of Education*, 294 F.2d 150 (5th Cir. 1961), established that students must receive—at a bare minimum—notice and a fair hearing prior to expulsion from a public university for misconduct.

Following *Dixon*, courts have generally held that due process requires that students receive formal notice of the charges against them and a fair and impartial hearing. The Supreme Court issued another important decision for student due process rights in *Goss v. Lopez*, 419 U.S. 565 (1975), holding that due process in the educational context requires "precautions against unfair or mistaken findings of misconduct and arbitrary exclusion from school." College students are