



ATIXA GUIDE TO CHOOSING BETWEEN PREPONDERANCE OF THE EVIDENCE V. CLEAR AND CONVINCING EVIDENCE

By: Brett A. Sokolow, Esq.

Executive Director, ATIXA (The Association for Title IX Administrators) www.atixa.org

A debate is raging about what standard of proof colleges¹ should apply to determine whether a violation of campus sexual misconduct policy has occurred. The Office for Civil Rights (OCR) has long-contended, and courts have consistently affirmed, that the appropriate standard is preponderance of the evidence (POTE). Now, OCR has walked back previous guidance and colleges have more liberty to set their own standards. OCR interim guidance issued September 22nd, 2017, indicates that a school can use either POTE or clear and convincing evidence (C&C) as long as the standard used is consistent across all student misconduct cases. Will your college continue to use POTE or raise the standard to C&C? That may be determined by the standard used for other misconduct under your code of student conduct, but let's pit POTE against C&C with a wide range of arguments to help you choose which standard to use.

This guide starts with a bulleted list of reasons, both practical and legal, to retain the POTE standard. Then, this guide explores the arguments made in support of C&C and provides counterarguments. Now that the Department of Education leaves it up to colleges to decide which standard to apply, this can be your guide to evaluating the benefits and drawbacks of each standard.

Preponderance of the Evidence (POTE)

- ATIXA is pro-POTE, meaning that we believe that colleges are best served by applying the POTE standard rather than any other. This position is based on two arguments: 1) POTE is the only equitable standard of proof (and Title IX mandates equity), and 2) POTE is the legal standard consistently used in adjudicating civil rights claims in America.²
- POTE, as noted above, is the only equitable standard. It is important to have a level playing field for students and employees who become involved in Title IX resolution

¹ Assume all references to "colleges" here also include universities and any schools (preK-12) to which Title IX applies.

² See, e.g., *Bazemore v. Friday*, 478 U.S. 38, 400 (1986).

processes. There is no reason to skew the playing field to make it harder for one side or the other to push the ball uphill. Better protection for accused parties would result if C&C were implemented, but the shift in standard would also result in worse protection for reporting parties. Moving the standard is a zero-sum game, where one party benefits at the other's expense, contrary to one of the central mandates of Title IX: Equity.

- Opponents of POTE have argued that it is the lowest standard of proof used in the American system of jurisprudence, but this is not even close to true. Substantial evidence, reasonable suspicion, and probable cause are all lower standards than POTE, and a mere scintilla is the lowest.
- Many opponents of POTE also use the rhetoric that OCR lowered the standard of proof to POTE in 2011, but this is demonstrably false. OCR simply formalized its long-held position that POTE is the applicable legal standard for Title IX (and all civil rights) proceedings. Far more than 2011, OCR's September 22nd, 2017 interim guidance is a reversal of previous OCR guidance dating back twenty years.
- Colleges did not change their standards of proof across-the-board in 2011 because of the OCR's guidance. Eighty percent of colleges that included a standard of proof in their codes were using POTE prior to the 2011 guidance, for all types of conduct violations, including sexual misconduct.³ A small group of elite colleges used C&C and some colleges had no clear standard. Currently, and for 60 years, courts across the country have upheld campus-imposed discipline on students where POTE was the standard utilized.
- POTE is the accepted standard (and has been for over 40 years) for disciplinary decisions involving employment discrimination for all employers.⁴
- No judge has ever held that applying POTE to a campus sexual misconduct decision (barring a state Administrative Procedures Act rule to the contrary) was unfair or violated due process. Even the American Association of University Professors (AAUP), which insists its members apply the C&C standard to faculty discipline, has been unsuccessful in convincing a court to agree that a higher standard is appropriate.
- While ATIXA believes that due process protections for accused students should be enhanced, our position is that strengthening procedures is the most effective path to protecting the rights of students. Additional substantive due process protections, such as changing the standard of proof, will be less effective than: providing clear notice; ensuring access to a useful advisor (including an attorney); affording the right to know and the opportunity to challenge all evidence prior to or during a hearing; affording the right to identify and question witnesses and the other party (directly or indirectly); and

³ A 2002 study submitted to the National Institute of Justice found that approximately 81.4% (149 of 183) of institutions that identified a specific evidentiary standard for sexual assault disciplinary proceedings utilized the preponderance of the evidence standard. See Karjane, H.K., Fisher, B.S., & Cullen, F.T. (2002). *Campus Sexual Assault: How America's Institutions of Higher Education Respond*. Final Report, NIJ Grant # 1999-WA-VX-0008, available at <https://www.ncjrs.gov/pdffiles1/nij/grants/196676.pdf>.

⁴ See, e.g., Dori Meinert, *How to Conduct a Workplace Investigation*, Society for Human Resource Management (1969), available at <https://www.shrm.org/hr-today/news/hr-magazine/pages/1214-workplace-investigations.aspx>; David I. Weissman, *Proper Workplace Investigations*, Society for Human Resource Management (2011), available at <https://www.shrm.org/hr-today/news/hr-magazine/Pages/0511legal.aspx>.

providing a clear rationale for the outcome, for example. The Foundation for Individual Rights in Education and others have argued for a heightened standard in the absence of other procedural protections, but why assume that the important procedural protections mentioned above cannot be enhanced? They can, and they should.

- Opponents of POTE think that campus decisions would change if the standard was raised to C&C, thereby enhancing due process and the overall fairness of decisions. I disagree. I suspect that the vast majority of decisions would actually remain the same if the standard changed, both because of the amount of evidence available in many cases (many decisions are already based on evidence that exceeds POTE) and because many college decision-makers are administering reasonable findings regardless of the standard of proof elaborated by policy. In other words, many hearing officers and panelists aren't rigidly formalistic about applying the preponderance standard now, they simply reach reasonable conclusions based on the available evidence.⁵ Thus, they may not be rigid in applying a higher standard in the future, either.
- POTE-based decisions are being litigated at a feverish pace against colleges right now. One good reason to raise the standard, from the perspective of colleges, would be to render fairer decisions that are less likely to subject the college to litigation. But, that is wishful thinking. Disciplinary decisions inherently determine a winner and a loser. No one wants to lose, and the loser always has the ability to challenge the decision in court, regardless of whether it is based on POTE or C&C. Responding parties disciplined for sexual misconduct have always been litigious, and there is no reason to think they would be less litigious under a higher standard. Since courts are generally deferential to college disciplinary decisions, courts will defer to both POTE-based and C&C-based decisions. While there is the theoretical argument that courts might be even more deferential to C&C-based decisions, that is only theoretical, and while using C&C might decrease lawsuits by accused parties, it might also increase lawsuits by reporting parties. Again, net gain = zero. We must recognize that we are explicitly admitting in this bullet point that changing the standard *will* make it harder for reporting parties to prove they have been victimized. Isn't it hard enough already? As I wrote back in 2012 in an op-ed to the Chronicle of Higher Education (and it's still a good question today), why should it be harder for a woman to prove she has been victimized than for a man to prove he didn't victimize her?⁶ That's the crux of why POTE is equitable. It inherently advantages neither party over the other, as opposed to all other standards of proof.
- Moving away from POTE *will* provoke lawsuits. On almost all college campuses, the vast majority of those who will benefit from the shift to C&C will be men. Lawyers planning to sue colleges which raise the standard of proof to C&C tell me they also plan to file federal suits on the basis of due process and equal protection claims as well as seeking personal liability under Section 1983. While Section 1983 claims may be remote possibilities, the Constitutional Equal Protection argument has legs, at least against

⁵ Recently and explicitly recognized by the ABA Task Force on Due Process and Victim Protections, available at: https://www.americanbar.org/groups/criminal_justice/committees/campus.html.

⁶ <http://www.chronicle.com/article/Setting-a-Realistic-Standard/135084>.

public universities, because of the systematic disadvantage to women that changing to C&C will likely cause.

- There is also an argument to be made that by raising the standard of proof, a school may trigger a wave of lawsuits by accused parties who have been previously found in violation of college policies for sexual misconduct under the POTE standard. While a breach of contract claim is unlikely to succeed and statutes of limitation will prevent many such suits, claims relating to due process, equal protection, essential fairness, the covenant of good faith and fair dealing, and discipline standards applying to arbitrary and capricious punishment, may be successful. Changing standards after six years might strike some judges and juries as arbitrary, even if the Department of Education approves the change (the Department's decision itself may be arbitrary).
- Moving away from POTE will result in activism, protests, and potentially riots. While some institutions do not have activist students and faculty, many do. A retreat from Title IX protections, generally, and from POTE in particular, could inspire, or increase, such activism. Before implementing a change in the standard of proof, administrators should carefully consider the effect such student and faculty activism may have, the impact it may have on reporting (potential chilling effects), the allegations of the creation of a hostile environment toward women and/or victims that will result, the public relations impact on admissions and planned-giving, and the long-term value of rolling back protections. A Democratic administration will take office in Washington again. Perhaps as soon as within three years, but eventually, for sure. With that may come a resurgence of emphasis on Title IX in the executive branch. And, as soon as Democrats control Congress again, they will likely act to enshrine Title IX guidance as law to assure that it cannot be contravened every four years. Those with a long-term perspective know this and are preparing accordingly.

Clear and Convincing Evidence

Perhaps the most legally articulate case ever made in favor of the C&C standard came in the form of a blog post by Hans Bader, entitled, *A Failed Defense of Federal Meddling in College Discipline*,⁷ shared on the Competitive Enterprise Institute's website on July 17, 2017. Bader is a lawyer, a former OCR staff attorney, and a frequent critic of the overreach of Obama-era Title IX guidance. Given the arguments Bader has made regarding C&C, I thought I would excerpt his most compelling points and offer rebuttal in the bullets below.

Bader wrote: 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

⁷ <https://cei.org/blog/failed-defense-federal-meddling-college-discipline>.

decisions.”

- You would think that Bader would cite a litany of state standards and case law to support his point, but instead he cites to a 2003 Connecticut Office of Legislative Research study of punitive damages awards. Why punitive damages awards would be analogous to Title IX administrative discipline is left unexplained, but so is the fact that at the time of this study, 12 states awarded punitive damages based on POTE; POTE was clearly sufficient to support punitive damages in certain jurisdictions. Still, the implied (and questionable) analogy is the problem. College discipline isn’t held to civil or criminal standards. It is held to administrative and agency law standards, which are lower than those applied to civil litigation and criminal prosecution. A similar study of administrative law standards shows that almost all states apply POTE to administrative decisions and actions under state administrative procedures acts (leaving aside for the moment that most APAs don’t even apply to private colleges at all).⁸ Oh, and the use of this standard is enshrined in federal law. Bader neglected to cite to 20 CFR § 416.1453, which states, in part:

(a) General. The administrative law judge shall issue a written decision which gives the findings of fact and the reasons for the decision. The administrative law judge must base the decision on the preponderance of the evidence offered at the hearing or otherwise included in the record.

- Further, as Bader chose to cite a Connecticut agency study that is 14 years old, let me cite a Supreme Court case from 1980, as it might offer more solid legal ground. In its *Steadman v. SEC* decision,⁹ the Supreme Court affirmed the right of the U.S. Securities and Exchange Commission (SEC) to impose fraud findings in violation of securities laws, and to impose sanctions accordingly, on the basis of POTE, despite the petitioner’s challenge that a higher standard, C&C, should be applied. As a result of his fraudulent conduct, the SEC permanently barred Steadman from associating with any investment adviser or affiliating with any registered investment company, and suspended him for one year from associating with any broker or dealer in securities. In other words, he was expelled and suspended on the basis of POTE, just like students who violate college sexual misconduct policies. If POTE is enough to sustain SEC fraud actions, can it really be argued (successfully) that college discipline should be held to a higher standard, and on what basis? I’m banking that the Supreme Court isn’t going to reverse itself on that anytime soon.

Bader states: 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

⁸ Melvin G. Dakin, *Revised Model State Administrative Procedures Act – Critique and Commentary*, 25 La. L. Rev. 799 (1965), available at: <http://digitalcommons.law.lsu.edu/cgi/viewcontent.cgi?article=3699&context=lalrev>.

⁹ 450 U.S. 91 (1981).

standard of proof in student disciplinary cases is one of ‘clear and convincing’ evidence.”¹⁰

- While anyone can write anything in a law journal, that’s an article, not a study. It is also not an historically accurate statement. The broadest study of the standard in use by schools, published in 2002, shows that 80% of colleges which included a standard of proof in their codes were using POTE at that time.¹¹

Bader then wrote: 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.”

- Cabranes only advocated for C&C to apply to faculty discipline, as the AAUP long has. Bader makes it seem as if Cabranes was making a larger argument about Title IX, yet Cabranes’ op-ed wasn’t about Title IX at all, but about free expression. Not to mention that Cabranes is just one judge out of 3,294 sitting federal judges.

Bader wrote: 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.

- Only a handful of colleges changed their standard from C&C to POTE after 2011. Almost all who did change were elite institutions, begging an interesting question of why that is.

Bader next wrote: [T]he 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...So to violate Title IX, an institution’s own actions must be proven culpable under a “preponderance” standard — not the mere occurrence of harassment.

- Bader seems to want his readers to believe that a deliberate indifference claim is the

¹⁰ James Picozzi, *University Disciplinary Process: What’s Fair, What’s Due, and What You Don’t Get*, 96 Yale L. J. 2132, 2159 n. 117 (1987) (citing Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J. College & U.L. 71 (1985).

¹¹ Karjane et al., *supra* note 3.

only path to liability under Title IX. It isn't. Deliberate indifference claims are generally based on the "after" theory of liability under Title IX, meaning that the institutional response after the discrimination occurred was insufficient and contributed to an ongoing hostile environment on the basis of sex/gender. However, many courts (including federal appeals courts) have recognized that there is a "before" theory of deliberate indifference, where a school may create or allow to persist an ongoing hostile environment that creates the danger to which the plaintiff then becomes exposed.

If we follow Bader's own logic, it is obvious that the "before" theory claims – whether the school created or permitted the hostile environment – would be determined using POTE. Thus, a funding recipient would need to assess the underlying claims on the basis of POTE, or risk failing to remedy, thus leading to liability. Put another way, if using C&C for an institutional standard of proof, an institution might fail to find that it created a hostile environment. But a court, on the same facts, could find a hostile environment was created or allowed to persist using POTE, thus creating liability for the institution's failure to remedy *before* the discrimination occurred. The same exact thing can happen on Title IX claims of erroneous outcome, archaic assumptions, and/or selective enforcement. A court could find any of these exist, if using POTE, when an institution's own internal investigation might reach a different determination, if using C&C. This same line of logic applies to Bader's underlying arguments about deliberate indifference claims. While courts may not look to the validity of the underlying claim in most deliberate indifference actions, neither do they often consider the facts in a vacuum of Title IX. Courts also look at breach of contract claims, negligence claims, defamation claims, and other adjunct causes of action at the same time. Thus, the underlying facts often do become part of the substance of the court's inquiry, and are all measured by the POTE, even when deliberate indifference is the only Title IX claim in a civil action.

This becomes clearer in the context of an erroneous outcome claim. The only way to prove erroneous outcome is to show that the institutional decision was wrong, and that the wrong decision was motivated, at least in part, by sex and/or gender. To revisit whether the decision was wrong, courts have to use the POTE. Thus, any institution that fails to use the POTE to assess the underlying claim may fail to remedy it because of, and for no other reason than, its use of a higher C&C standard.

Lastly, C&C is a nebulous standard that can be hard to explain, train on, and put into practice. We know that POTE is 50.01% and above, but what quantitative value of evidence does C&C correspond to? 66%? 75%? What is clear to one person may not be so clear to another. What convinces me may not convince you, especially if the threshold is amorphous. It's not an inherently unfair standard, but it will be more difficult for schools to provide satisfactory rationales as to how the standard was or was not reached.

For all of the foregoing reasons, ATIXA is pro-POTE. Having said that, we need institutions to respect POTE steadfastly. If there is 49.9% evidence of a violation of policy, that is not enough to discipline the accused party. Even 50% is not enough. When the greater weight of the

evidence shows a violation, then and only then, is there sufficient evidence to impose discipline. Just because you have the ability to choose a standard other than POTE doesn't mean you should, and we've just given you seven pages of reasons why.

September 22, 2017