From: William Kidder
Sent: Fri, 11 Jun 2021 13:56:21 -0700
To: T9PublicHearing
Subject: Written Comment: Title IX Public Hearing (preponderance of evidence standard lessens cumulative error)
Attachments: Kidder_William EO 12866 phone meeting comments on ED proposed Title IX reg on Standard of Proof 12 5 2019.pdf

Dear U.S. Department of Education officials:

I recommend that the Department of Education require that colleges and K-12 schools require the "preponderance of evidence" standard in campus Title IX proceedings to determine responsibility for sexual harassment and other forms of sex-based misconduct where one or both parties are a student. On 1/22/19 I submitted a 27-page report on this topic in response to the prior administration's notice of proposed rule-making regarding Title IX. The information and findings in my public comment report were developed into the following peer-reviewed journal article:

Kidder, William C. (2020). "(En) Forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings." *Journal of College & University Law,* 45:1-48. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3323982

In addition, I signed up for a 30-minute phone comment session with OMB and DOE/OCR under the prior administration that occured on 12/5/19. My PPT slides from this phone comment session are attached as additional background information. In my journal article (and public comment report) I show that the consensus of empirical and evidence law scholars is that a shift from the preponderance standard to the clear and convincing evidence standard is likely, other things being equal, to result in *higher cumulative error* across large numbers of cases, in addition to shifting the ratio of "false negative" and "false positive" errors in the direction of disproportionately harming sexual misconduct survivors. *See* Kidder, at pages 9-16. In addition, the preponderance of evidence standard is used in civil rights litigation, in OCR's in case processing manual (all editions I am aware of stretching back to the 1980s), in federal research misconduct cases linked to federal grants and in other high-stakes administrative proceedings including federal anti-fraud cases and (in 3/4 of the states) physician license revocation/misconduct cases. *See* Kidder, at pages 23-38.

The above points were not competently considered by the Department of Education in the prior administration's process of issuing Title IX regulations last year, and are only elliptically referenced at 85 Fed. Reg. 30026, 30383 (2020). Rather, the Department essentially retreated to its prior policy preferences without seriously attempting to evaluate claims about cumulative scholarly research. For example. the Department's commentary on the final regulation noted that "Other commenters pointed to a study explaining that use of the preponderance of the evidence standard increases false positive errors." 85 Fed. Reg. at 30383 n. 1462 (citing Villasenor, 2016). A notable problem is that the Villasenor article cited by the DeVos era Department of Education simply does not make any empirical modeling claims about the relationship between

cumulative error and its recommendation for a higher standard of evidence in Title IX cases (i.e., Villasenor focuses narrowly on change in "false positive" errors rather than jointly modeling changes to "false positive" and "false negative" errors in the same adjudicative system).

For all of the above reasons, I recommend that the Department adopt the preponderance of evidence standard in Title IX cases, consistent with fundamental civil rights values and a commitment to evidence-based policy reforms. Thank you for your consideration.

Sincerely,

William C. Kidder

(b)(6)

(representing my own research conclusions, not the University of California administration)

Public comment to OIRA/OMB
EO 12866 phone meeting (RIN 1870-AA14)
December 5, 2019 4pm EST

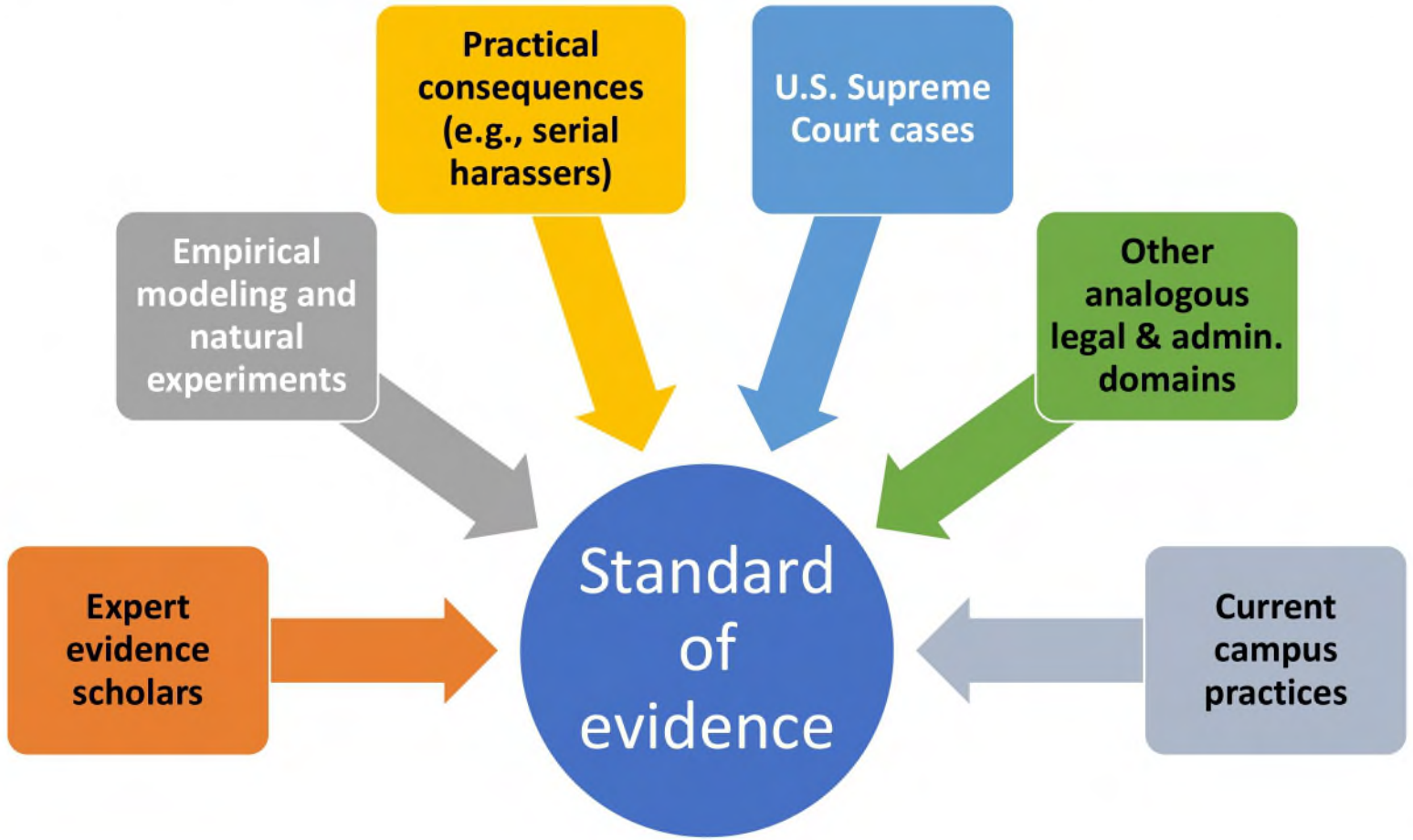
Recommending retraction/rejection of OCR's proposed regulation on the standard of proof in Title IX proceedings (§ 106.45(b)(4)(i))

Comments of William C. Kidder (b)(6)

These comments reflect my individual research views (not the views of the public university where I am an administrator) and are based on my peer-reviewed article:

William C. Kidder, *(En)forcing a Foolish Consistency?: A Critique and Comparative Analysis of the Trump Administration's Proposed Standard of Evidence Regulation for Campus Title IX Proceedings*, 45 JOURNAL OF COLLEGE & UNIVERSITY LAW __ (forthcoming 2019-20), available at https://ssrn.com/abstract=3323982 or https://jcul.law.rutgers.edu/2019/08/559/

Analytical approaches in my JCUL article to address the standard of evidence question (POE versus C&C)



Kidder, Journal of College & University Law (2019)

OCR's proposed regulation would impose a greater burden on campuses choosing the POE standard

Figure 1: OCR's Proposed "ratchet up discretion" Standard of Evidence Regulation

Other spheres of campus misconduct:	**If use POE for student Title IX proceedings**	**If use C&C for student Title IX proceedings**
Serious non-Title IX student misconduct?	Must use same POE standard	May choose POE or C&C standard
Faculty Title IX misconduct?	Must use same POE standard	Must use C&C standard
Serious Faculty non-Title IX misconduct?	Must use same POE standard*[18]	May choose POE or C&C standard

Kidder, Journal of College & University Law (2019)

I will show that OCR's stated rationale (below) of promoting accuracy/reliability is a strong reason to reject § 106.45(b)(4)(i)

- "With regard to sexual harassment, the proposed regulations would…: Establish procedural safeguards that must be incorporated into a recipient's grievance procedures to ensure a **fair and reliable** factual determination when a recipient investigates and adjudicates a sexual harassment complaint."
- "Where a reporting complainant elects to file a formal complaint triggering the school's grievance process, the proposed regulations require the school's investigation to be fair and impartial, applying mandatory procedural checks and balances, thus **producing more reliable factual outcomes**…"
- Quoting *Doe v. Univ. of Cincinnati*, 872 F.3d 393, 404 (6th Cir. 2017) (the complainant "deserves a **reliable, accurate outcome** as much as" the respondent)

https://www.govinfo.gov/content/pkg/FR-2018-11-29/html/2018-25314.htm

Strong consensus among evidence law scholars: Preponderance of evidence (POE) results in higher cumulative accuracy

- Clermont (2018): "I accept the dominant view that the standards aim at the appropriate error distribution. In particular, the civil standard of preponderance aims at minimizing errors and error costs through the pursuit of accuracy."
- Sherwin (2002): "Under any standard of proof, there will be a certain number of inaccurate estimates of probability…Some of the erroneous estimates of probability under a clear and convincing standard … will now produce correct outcomes from the standpoint of truth. But the number of outcomes that fit this description will be overshadowed by the number of wrong outcomes that result from the skewed standard."
- Sherwin (2002): "A preponderance standard produces the greatest number of correct decisions, within the limits of the court's factfinding abilities. In contrast, a clear and convincing standard forces courts to make a set of incorrect decisions that they would not make under a preponderance standard….").
- Clermont (2009): "Instead, requiring high confidence will greatly increase the number of false negatives, even if that strategy limits false positives; actually, low confidence, as long as the found fact is more likely than not, will minimize the expected number of errors."

Kidder, Journal of College & University Law (2019)

Strong consensus among evidence law scholars cont…

- Allen and Stein (2013): "The general proof requirement for civil cases–preponderance of the evidence–performs an important role in enforcing the law. Under certain conditions, this requirement allows courts to maximize the total number of correctly decided cases…. Other standards of proof are not calibrated to achieve this accuracy–maximizing and welfare-improving consequence."

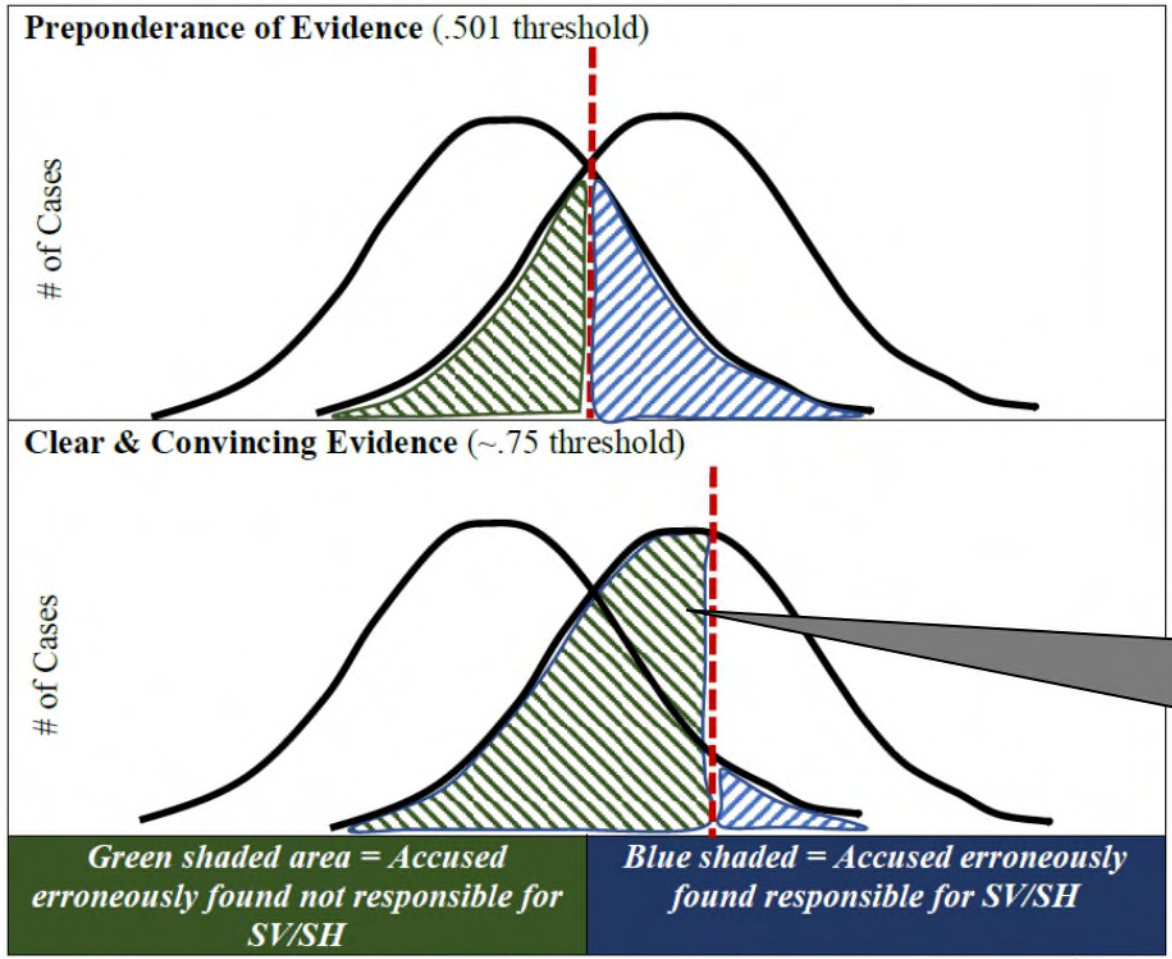
- (Kaye 1999) "The use of the more-probable-than-not standard is but one of many legal policies or procedures designed to lower the risk of factually erroneous verdicts. [T]he more-probable-than-not rule in the two-party civil case minimizes the expected number of erroneous verdicts…"

- Pardo (2009): "[T]he 'preponderance' rule in civil cases expresses a choice to treat parties roughly equally with regard to the risk of error and to attempt to minimize total errors. The 'beyond a reasonable doubt' decision rule in criminal cases—and to a lesser extent the "clear and convincing" rule in civil cases—expresses a choice to allocate more of the risk of error (or expected losses) away from defendants."

Mathematical model illustrating consensus of evidence scholars re superior cumulative accuracy of the POE standard

POE

False negative errors in GREEN



False positive errors in BLUE

C&C

C&C standard increases the #/% of total errors, in addition to shifting more of the costs of errors to complainants

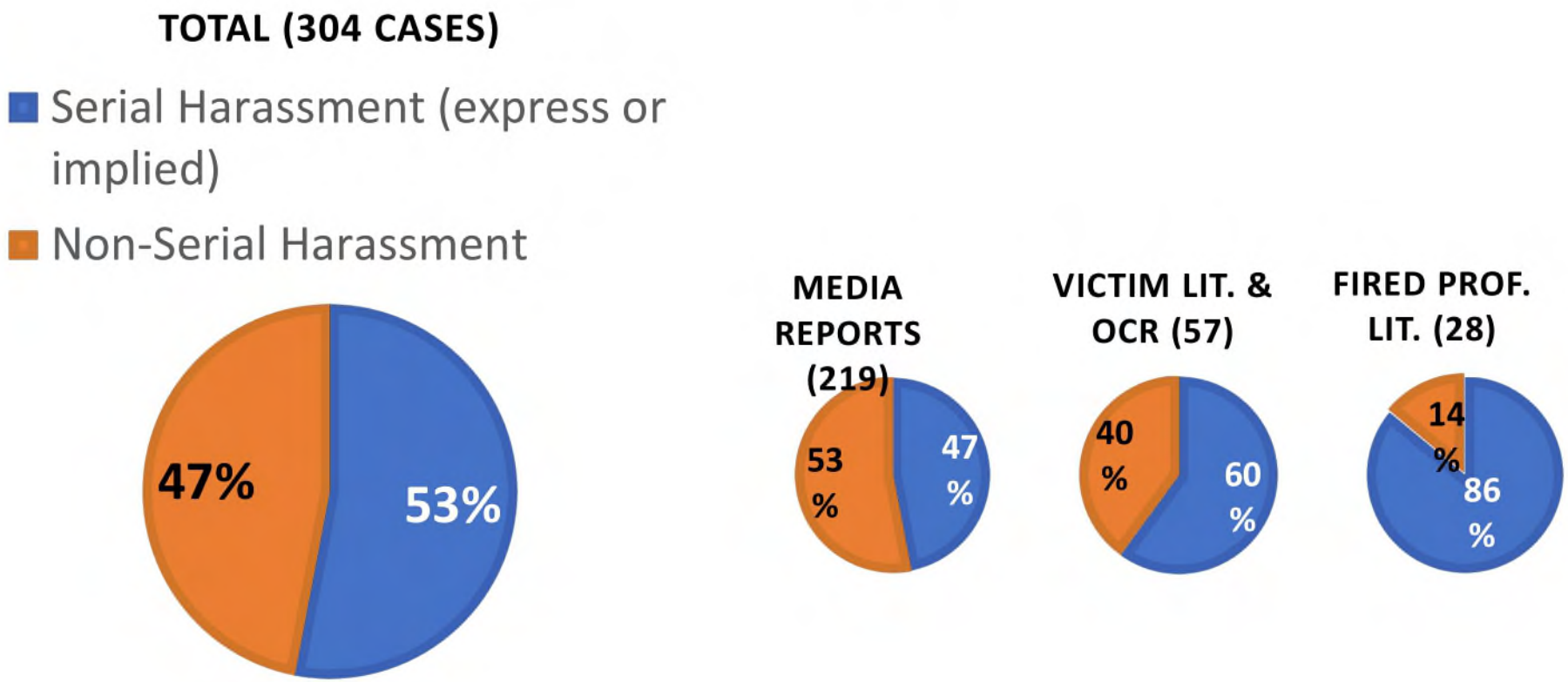
Adapted with permission from Allen et al., An Analytical Approach to Evidence (6th ed., 2016)

Kidder, Journal of College & University Law (2019)

Human costs of lower accuracy under the C&C? … Repeat sexual misconduct among college males

- Zinzow (2015): 68% of men who reported committing sexual coercion and assault were repeat offenders (42% were twice, 22% 3 times, 14% 4 times, 23% 5+ times)
- Swartout et al. (2015) *lower end estimate*, 27% of male college rapists committed rapes over multiple academic years
- Lisak & Miller (2002) *higher end estimate,* among college rapists 63% reported multiple rapes/attempts (average of 5.8)
- Greathouse/RAND (2015)
- Hanson & Morton-Bourgon (2005)

Costs of lower accuracy under C&C in the context of faculty-student sexual harassment: Makes it more difficult for colleges to sanction serial sexual harassers



Cantalupo & Kidder, Utah Law Review (2018)

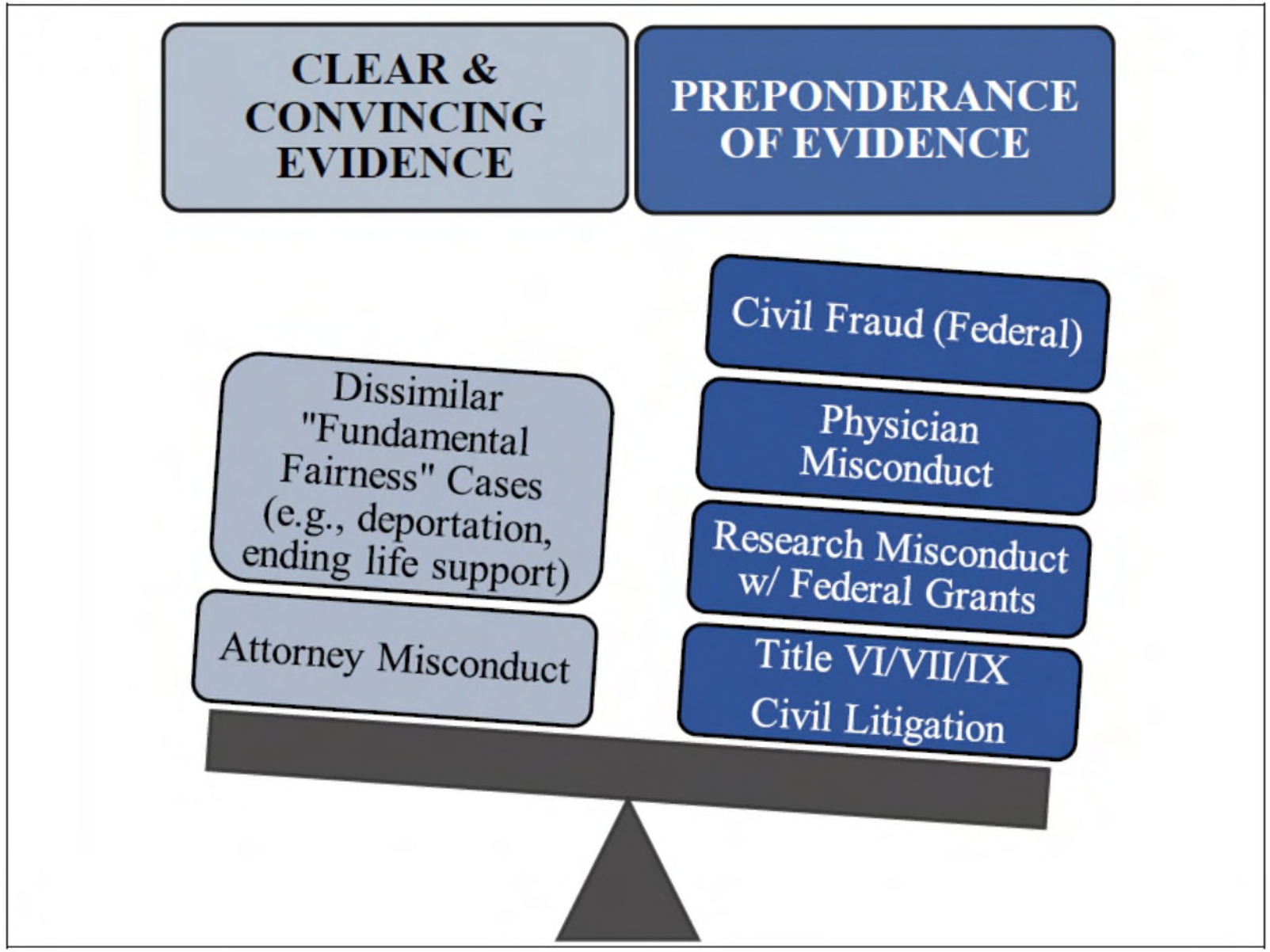
I will show that OCR's stated rationale (below) cherry picks relevant case law and that civil litigation features are not (and should not) be required to use POE in administrative proceedings

"Title IX grievance processes are also analogous to various kinds of civil administrative proceedings, which often employ a clear and convincing evidence standard. See, e.g., Nguyen v. Washington Dept. of Health, 144 Wash. 2d 516 (2001); Disciplinary Counsel v. Bunstine, 136 Ohio St. 3d 276 (2013)… These cases recognize that, where a finding of responsibility carries particularly **grave consequences for a respondent's reputation** and ability to pursue a profession or career, a higher standard of proof can be warranted."

"The Department does **not believe it would be appropriate to impose a preponderance requirement in the absence of all of the features of civil litigation** that are designed to promote reliability and fairness."

https://www.govinfo.gov/content/pkg/FR-2018-11-29/html/2018-25314.htm

Other areas where C&C or POE standards are used



Kidder, Journal of College & University Law (2019)

Very little case law supports C&C as a legal requirement in Title IX contexts

- *Doe v. Brandeis University*, 177 F. Supp. 3d 561, 607 (D. Mass. 2016) (in dicta)
- *Lee v. University of New Mexico*, (D. N.M. Sept. 20, 2018), unpublished ruling

  * paragraph later retracted by Judge Browning in this case in May 2019
- *Plummer v. University of Houston*, 860 F. 3d 767, 783 (5th Cir. 2017) (Jones, J., dissenting)

The Supreme Court's "fundamental fairness" (C&C) cases: very different stakes than campus Title IX cases

- **Parental rights termination** proceedings -- *Santosky v. Kramer,* 455 U.S. 745 (1982)
- **Involuntary civil (i.e., psychiatric) commitment** for an indefinite period -- *Addington v. Texas,* 441 U.S. 418 (1979)
- **Deportation** proceedings -- *Woodby v. INS*, 385 U.S. 276 (1966)
- **Ending medical life support** for a patient in a vegetative state -- *Cruzan v. Director, Mo. Dep't of Health,* 497 U.S. 261 (1990)

POE used in civil rights litigation and by OCR, etc.

- Title IX litigation
- Title VI litigation
- Title VII litigation
- Civil cases alleging rape/sexual assault
- "Erroneous outcome" challenges to a campus Title IX finding
- DOE **OCR Case Processing Manual** §303 (Nov. 2018)… consistent in earlier versions and guidance going back to ~1980
- Other federal agencies: EPA Case Resolution Manual (2017), USDA discrimination complaints, etc…

Kidder, Journal of College & University Law (2019)

POE is required in U.S. research misconduct regs covering federal grants… which went through formal notice-and-comment (2000)

- "While much is at stake for a researcher accused of research misconduct, even more is at stake for the public when a researcher commits research misconduct. **Since 'preponderance of the evidence' is the uniform standard of proof for establishing culpability in most civil fraud cases and many federal administrative proceedings, including debarment, there is no basis for raising the bar for proof**..."

  -- Final Federal Policy on Research Misconduct, 65 Fed. Reg. 76262 (2000)

- Gov't public list of debarred researchers (stigma risk akin to getting fired or expelled)
- Legal challenges to this POE rule in research misconduct are unsuccessful (*Brodie v. U.S. Dept. H.H.S.*, 796 F.Supp.2d 145, 157 (D.D.C. 2011); *Textor v. Cheney,* 757 F. Supp. 51, 57 n. 4 (D.D.C. 1991)

POE used in federal anti-fraud proceedings (False Claim Act)

- *Steadman v. S.E.C.*, 450 U.S. 91, 101 (1981) (SEC discipline case, the Court rejected petitioner's argument that the C&C standard was constitutionally required in an area where Congress endorsed the POE standard);
- *Herman & MacLean v. Huddleston*, 459 U.S. 375, 389 (1983) (civil enforcement of antifraud provisions of securities law);
- Since 1986 law, no successful legal challenges to POE
- Used to bar or suspend federal contractors (stigma)

Kidder, Journal of College & University Law (2019)

3/4 of states use POE in physician misconduct/license cases

Preponderance of Evidence	Clear & Convincing Evidence	Difficult to Categorize
AK, AZ*, AR, CO, CT, DE, DC, GA, GU, HI, IN, IA, KS, KY, ME, MD, MA, MI, MN, MS, MO, NV, NH, NJ, NM, NY, NC, ND*, OH, OR, PA, RI, SC, TN, TX, VT, VI, WI	CA, FL, ID, IL, LA, NE, OK, SD, VA, WA*, WV*, WY	AL, MP, MT, PR, UT

OCR's citation to case law *Nguyen v. Washington State Dept. Health* (2001) represents the minority rule

Kidder, Journal of College & University Law (2019)