

# When Do We Believe Survivors?

Emily J. Martin  
Vice President for Education & Workplace  
Justice  
National Women's Law Center

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## 2011 Dear Colleague Letter

- Discouraged (but did not prohibit) cross examination
- Required accommodations for survivors
- Required equal treatment of complainants and respondents
- Including use of “preponderance of evidence” standard

# When Did We Believe Survivors Historically?

- Prompt complaint requirement
- Corroboration requirement
- Cautionary instruction

“It must be remembered that [rape] is an accusation easily to be made and hard to be proved, and harder to be defended by the party accused, though never so innocent.”

--17<sup>th</sup> Century Jurist Matthew Hale

“There’s not even an accusation that these accused students overrode the will of a young woman. Rather, the accusations — 90 percent of them — fall into the category of ‘we were both drunk,’ ‘we broke up, and six months later I found myself under a Title IX investigation because she just decided that our last sleeping together was not quite right.’”

---Candace Jackson, Department of Education  
Office of Civil Rights

# Presumption of no responsibility

A recipient's grievance process must “include a presumption that the respondent is not responsible for the alleged conduct.”

*34 C.F.R. sec. 106.45(b)(1)(iv).*

# Cross Examination

“Such cross-examination at the live hearing must be conducted directly, orally, and in real time by the party's advisor of choice and never by a party personally, notwithstanding the discretion of the recipient under paragraph (b)(5)(iv) of this section to otherwise restrict the extent to which advisors may participate in the proceedings.”

*34 C.F.R. sec. 106.45(b)(6)(i).*

## Exclusionary Rule

“If a party or witness does not submit to cross-examination at the live hearing, the decision-maker(s) must not rely on any statement of that party or witness in reaching a determination regarding responsibility; provided, however, that the decision-maker(s) cannot draw an inference about the determination regarding responsibility based solely on a party's or witness's absence from the live hearing or refusal to answer cross-examination or other questions.”

*34 C.F.R. sec. 106.45(b)(6)(i).*



# Standard for Grievance Process

A recipient's grievance process must “state whether the standard of evidence to be used to determine responsibility is the preponderance of the evidence standard or the clear and convincing evidence standard, 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.”

# When Do Police Believe Survivors?

More than half of police officers surveyed stated that ten to fifty percent of sexual assault complainants lie about being assaulted.

*Amy Dellinger Page, Gateway to Reform? Policy Implications of Police Officers' Attitudes Toward Rape, 33 AM. J. CRIM. JUST. 44, 55 (2008).*

# When Do Police Believe Survivors?

More than half of police detectives interviewed believed that forty to eighty percent of sexual assault complaints are false.

MARTIN D. SCHWARTZ, NATIONAL INSTITUTE OF JUSTICE VISITING FELLOWSHIP: POLICE INVESTIGATION OF RAPE—ROADBLOCKS AND SOLUTIONS 28 (Dec. 2010).

# Which Survivors Do We Believe?

Victims are less likely to be found credible if they had had previous sex partners, if they were dressed for clubbing, if they were assaulted at a party, if they knew the assailant.

Schwarz, S., Baum, M.A. & Cohen, D.K. (Sex) Crime and Punishment in the #MeToo Era: How the Public Views Rape. *Polit Behav* (2020).

<https://doi.org/10.1007/s11109-020-09610-9>

# Which Survivors Do We Believe?

Black victims are found less believable and more responsible for the harm they suffered.

R.A. Donovan, To Blame or Not to Blame:  
Influence of Race and Observer Sex on Rape  
Blame Attributions, 22 J. INTERPERSONAL VIOL.  
722 (2007).

## What Can Schools Do?

Schools can and should clarify in their policies, in their trainings, and to the investigators and parties that the “presumption of non responsibility” requirement should not be interpreted as an assumption that the complainant is lying.

# What Can Schools Do?

Schools can support survivors—

- Prohibit some categories of questions as per se irrelevant
- Make clear that evidence of prior sexual behavior with the respondent is given limited weight to show consent
- Prohibit abusive or repetitive questions
- Train on impact of trauma

# What Can Schools Do?

Schools should take all steps necessary to use the preponderance of evidence standard.



# What Can Schools Do?

Schools should make clear to students and employees which off-campus and online contexts it believes it has “substantial control” over, such as student off-campus housing; or teacher and student interactions off campus and out of class time.

# What Can Schools Do?

Accept complaints from students who

- Are on a leave of absence
- Have dropped out but want to re-enroll if the harassment is addressed
- Have graduated from one program but want to apply to a different program
- Have graduated but want to participate in alumni activities

# What Can Schools Do?

Explore adopting “non Title IX” policies and responses to harassment.