A rush to judgment and a denial of due process

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ABSTRACT

This article highlights the present state of peer sexual assaults on campus and the impact of the April 4, 2011 "Dear Colleague letter" ("DCL") issued by the office for Civil Rights of the Department of Education to address this problem. This article then discusses the Title IX standards, Family Education Right to Privacy Act ("FERPA") and the intersection of procedural due process rights for the accused in campus sexual assault cases. The author argues that the DCL impairs the procedural due process rights of those students accused of sexual assault and suggests that reforms for procedural safeguards call for 1.) a trained disciplinary panel designated solely to hear sexual misconduct cases, 2.) the appointment of a third party trained investigator and 3.) a two track system of adjudication. The investigator would determine whether the matter would be adjudicated before the university panel or be recommended to local law enforcement. If the campus adjudication takes place, the parties should have equal rights to counsel and cross examination as recommended by the DCL (OCR, 2011). These measures safeguard the procedural due process rights of the accused, the complainant and protects the institution from ensuing liability.

Keywords: Title IX, dear colleague letter, campus sexual assault, due process rights, fundamental fairness

INTRODUCTION

Sexual violence against women is a pervasive problem on college campuses today. As the data revealed that 1 out of 5 women report being victims of campus sexual assault[1] and a seemingly tolerant culture of rape on campuses across the United States existed,[2] the U.S. government hastened to craft an administrative response to address these issues (Fisher, Cullen, & Turner, 2000; Krebs, 2007; Sampson, 2002). Accordingly, on April 4, 2011, the Office of Civil Rights (OCR) of the Department of Education (DOE) issued a new "Dear Colleague Letter" (DCL) outlining the procedures that institutions [3] should follow to remain in compliance with Title IX, the federal statute that prohibits sex discrimination in education.

Under the DCL (OCR, 2011), schools are required to develop and distribute policies regarding sexual harassment, designate a Title IX coordinator to oversee the school's duties, train staff and students in sexual harassment and violence issues, and establish an investigation procedure and an adjudication process. Many critics argue that the letter is inartfully written (Henrick, 2013; Triplett 2012) and impairs the procedural due process rights of those students accused of sexual harassment and sexual violence and calls into question the basic fairness of the disciplinary proceedings (Creeley, 2011). They argue that colleges, in their efforts to comply with Title IX and to avoid suspension of federal funding, are incentivized to find the accused guilty of sexual assault with utter disregard for the accused student's fundamental due process rights (Bader, 2012; Henrick 2013; Grossman, 2013; Kramer, 2014; Shulevitz, 2014; Triplett, 2013).

This article will first discuss the Title IX standards, Family Education Right to Privacy Act ("FERPA") and the intersection of procedural due process in campus sexual assault cases and will also review the present state of sexual assault adjudication on campus. Next, the article will analyze how the new mandates of the OCR violate the fundamental fairness requirement rights of the accused student. After highlighting the lack of fundamental fairness in campus sexual adjudications, this article recommends proposed reforms to the process to safeguard due process and is mindful of the universities obligations under Title IX. The reforms suggest an approach that calls for 1.) a properly trained disciplinary panel that includes members outside of the University designated solely to hear sexual misconduct cases, 2.) the appointment of a third party trained investigator and 3.) a two track system of adjudication. The investigator would determine whether the matter would be adjudicated before the university's sexual misconduct panel or be recommended to local law enforcement (for a parallel investigation). In a criminal prosecution, the accused has a right to counsel and to confront their accuser through cross –examination. Similarly it can be argued that a campus adjudication also carries grave consequences and therefore, both parties should have equal rights to counsel and cross examination pursuant to the DCL (OCR, 2011). These measures will safeguard the due process rights of the accused and the

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[1]Although the term "sexual assault" includes a wide range of behavior, this article focuses on the severest form of assault and as completed or attempted rape. The term sexual assault is used throughout this article to reference such conduct and is limited to student on student sexual assault.

[2] Many have cited this data as inaccurate and over inflated and in December 2014 the Bureau of Justice statistics a division in DOJ found that rather than one in five female college students becoming victims of sexual assault, the actual rate is 6.1 per 1,000 students.

[3] The article uses the terms colleges, universities, schools and institutions interchangeably to reference post-secondary institutions.

complainant and the institution is protected from ensuing liability. The author concludes that justice is met when the rights of both victim and accused are protected within the due process of the law.

INTERSECTION OF TITLE IX, FERPA AND DUE PROCESS

Rape is a human rights violation creating long-term, physical and mental health problems for the victim (Krebs, 2007; Sampson, 2002). According to research findings,[4] college women are at a higher risk for rape than women of a comparable age group in the general population highlighting the high rate of sexual violence on college campuses (Fisher et.al. 2000; Krebs, 2007; Sampson, 2002). Studies have discovered multiple risk factors that put women in college in danger of sexual assault. First, young women come into contact with young men in a variety of places on college campuses in different situations without adult supervision thus creating opportunity for the assaults to happen (Fisher, et.al 2000; Krebs, 2007; Sampson, 2002). Moreover, these situations often involve alcohol or other substances that can lead to incapacitation (Fisher et.al. 2000; Krebs, 2007; Sampson, 2002). In an effort to address and curb sexual violence on campus, the government has looked to use Title IX as a remedial and enforcement measure.

Title IX in pertinent part states that "no person in the United States shall on the basis of sex be excluded from participation in, be denied the benefits or be subjected to discrimination under an education program or activity receiving federal financial assistance". As a matter of law, sexual harassment under Title IX is defined as an "unwelcome conduct of a sexual nature" and the behavior must be serious enough to impact the survivor's access to educational opportunities by creating a hostile environment. The definition encompasses a wide array of behavior including "sexual advances, sexual favors and other verbal, nonverbal, or physical conduct of a sexual nature". At its most extreme, sexual harassment also encompasses the allegations of rape (Cantalupo, 2011).

Rape is considered a severe form of sexual harassment under Title IX. Under the legal framework of Title IX, schools are required to conduct prompt, thorough and impartial investigation into any allegations of rape or sexual assault reported on campus. If the school finds that harassment occurred, it must stop the behavior, prevent reoccurrence and remedy the effect. If an institution fails to adhere to the guidelines, it is considered evidence of sex discrimination and may be subject to both federal penalties and civil liability (OCR, 2011).

Along with Title IX, FERPA also comes into play in the adjudication of sexual assaults. Although FERPA is not a primary regulator of student sexual proceedings, it complicates sexual assault proceedings by restricting the amount of information made available in the adjudicating process of sexual assault cases. Under the guidelines of FERPA, any document that is classified as an educational record is considered confidential. This includes information directly related to a student that is maintained by an educational agency or institution or by a person acting for such agency or institution (FERPA, 2006). Thus, in sexual assault cases, relevant and pertinent information relating to the assault in question or to one of the parties past may be protected from disclosure. As the DCL (OCR, 2011) acknowledges, both the victim and the accused have similar and timely access to information that will be used at the judicial hearing but FERPA

[4] As previously stated, this data has been used to support the DCL mandates (OCR, 2011) however critics argue that this data is inaccurate. The recent December 2014 study by the DOJ contradicts this data and finds that College students are *less* likely to be victimized than women in the general population.

limits access where there is a right to privacy. Although the statute provides some limited exceptions to allow for some disclosure, no such exception exists for campus sexual adjudicatory proceedings. Consequently, both the victim and student may be denied access to vital and relevant information relating to the alleged assault.

The methods and procedures of the campus adjudicatory systems vary across institutions and are usually tailored to the institutions where they operate. Generally, all institutions are bound by their policies and procedures and by constitutional due process mandates, state contract law and federal education law. Generally, a complaint of sexual assault is initiated through the office of student affairs. Specifically, according to the DCL (OCR, 2011), schools must comply with the following grievance procedures for cases involving sexual violence: 1.) Provide notice to students of procedures and outcomes, 2.) Perform adequate and impartial investigation of complaints, 3.) Develop an equitable process where parties have equal opportunity to speak, present evidence and have a representative present, 4.) Ensure that proceedings are facilitated by individuals who receive annual training on sexual violence issues and reasonably prompt resolution in remedial measures to prevent reoccurrence. Other than these broad general guidelines, OCR fails to provide greater specificity as to how these mandates should be carried out. As a result, there is a widespread difference in how schools carry out disciplinary hearings (Henrick, 2013; Triplett, 2012).

The university disciplinary panels are commonly comprised of both students and faculty members and they are responsible for rendering a decision on the alleged misconduct as well as the appropriate sanction. The panel hears arguments, reviews evidence, makes a factual finding and assigns sanctions. There is a board chair who plays a similar role to a judge in a jury trial (Reardon, 2005). There is also available an appellate review which is the last stage of the process within the institution. Some institutions allow the student or student's parent to petition a senior administrator for relief. Students who are dissatisfied with the outcome of the institution's adjudication must resort to the state or federal judicial systems.

There are some that argue that the DCL (OCR, 2011), through its accompanying regulations and guidance documents, sets forth procedural requirements that require schools to treat the victim and accused students equitably in the process and affords procedural safeguards to complaining students and balances the safeguards provided to accused students under the due process notion of fairness. Victim advocates argue that complainant and accused have parallel rights and the very guidelines of the investigation and adjudication under Title IX, meets all the requirements of due process in being "impartial, prompt, and equitable" (Bickford et al, 2011; NCHERM, 2011).

However, contrary to this view, many civil rights advocates believe that the DCL (OCR, 2011) reform mandates are unfairly skewed towards the complainant and creates unfair presumption of guilt vis-à-vis the accused (Berkowitz, 2012; Greeley 2011; Henrick 2012; Triplett, 2013). In a charged and highly politicized environment and rising concern of sexual violence, the DCL (OCR, 2011) left many unanswered questions as to the due process procedural safeguards (Henrick, 2013; Triplett, 2012). Many argue that the well-intentioned DCL (OCR, 2011) provided to colleges was drafted to assist colleges and universities in navigating the issues of victim's rights and the rights of the accused in the adjudication process, but it had the net effect of eroding due process procedural safeguards in sexual misconduct cases (Henrick, 2013; Triplett, 2012).

PRESENT STATE OF UNIVERSITY ADJUDICATIONS OF SEXUAL ASSAULTS COMPLAINTS

In the midst of heightened awareness of campus sexual assaults and increasing government pressure, schools find themselves balancing the competing interests of protecting their public image (i.e., guarding against negative publicity) while attempting to investigate and adjudicate these complaints fairly and efficiently. In many cases, schools have not been successful in the fair adjudication of these claims and as a result both the accused or complainant have sued their schools for failing to provide sufficient due process safeguards in the process. (*Wells v. Xavier, 2014; Doe v, Swarthmore, 2014; Doe v. Virginia Wesleyan College, 2014).* Although most of these lawsuits have come from women, as colleges and universities try to impose the raw mandates of the DCL (OCR, 2011), there has been an increased number of male litigants raising the issues of unfairness and calling attention to a system that favors the complainant *(Benjamin King v. DePauw University, 2014; Brian Harris v. St. Joe's University et. al.2014; Dezmine Wells v. Xavier University, 2014; James Haidak v. University of Massachussets, 2014; John Doe v. Swarthmore, 2014; John Doe v. University of Colorado-Boulder, 2014; John Doe v. University of Columbia and Trustees of Columbia University, 2014; John Doe v. Wesleyan University, 2014; Keifer Johnson vs. Western State Colorado University, 2014).*

A review of these cases reveal that the adjudication process of campus sexual assault complaints are often arbitrary and capricious resulting in a system that fails to ensure due process safeguards for the accused (Grossman, 2013; Ristik, 2014; Shulevitz, 2014). When a false accusation and an erroneous expulsion can have devastating consequences on the life of the student which could result in the inability to transfer to another school or the inability to attend graduate school, a damaged reputation and possibly limited job opportunities, there should be a greater onus on the school to ensure that the process is fair (Henrick, 2013; Picozzi, 1987; Tenerowicz, 1987). Although schools have a vested interest and a moral obligation to protect the rights of the victim, it also has an equally important right to protect the rights of the accused. These rights are not mutually exclusive. (Bader, 2012; Henrick 2012; Triplett, 2013)

DUE PROCESS AND A RUSH TO JUDGEMENT

Due Process is a central concept in American jurisprudence, rooted in the U.S. Constitution. In sum, the phrase "due process" means "fairness" and it is found in the Fifth and Fourteenth Amendments to the U. S. Constitution, which requires that the federal and state governments (respectively) provide citizens with substantive fairness and certain procedures or "process" before depriving them of life, liberty, or property interests. In higher education, a property right may encompass the right to pursue an education. Before revoking such "property" rights, institutional officials in higher education must afford students adequate due process. (*Goss v. Lopez, 1975)* Due process helps to ensure student rights are not violated or abridged during the judicial process (Wood & Wood, 1996). Similarly, if students' liberty interests are threatened, they are entitled to due process. In the context of higher education, students possess certain liberty rights, to pursue opportunities for continued education and to protect their good names or reputations (*Dixon v. Alabama State Board of Education 1961; Goss v. Lopez, 1975;Gorman v. University of Rhode Island, 1988).*

An institutions' due process obligations to accused students depends on whether the

school is private or public, what state laws apply and what kind of disciplinary action is contemplated. Courts have recognized that college students at public universities possess certain procedural rights under the U.S. Constitution, (*Dixon v. Alabama State Board of Education 1961; Goss v. Lopez, 1975*) while due process rights for students at private institutions are enforceable through contract claims (*Cloud v. Trustees of Boston University,1983).* Unlike public institutions, private institutions are not part of the government and are not required to provide students constitutional due process. Private schools are contractually bound by their policies and procedures found in student's handbooks regarding student discipline, which constitute the "contract" with the student *(Fellheimer v. Middlebury Coll., 1994; Schaer v. Brandeis, 1999). Co*nsequently, students at private institutions are only protected by constitutional due process requirements when the procedures are fundamentally unfair or where the universities appeared to have acted in an arbitrary or capricious manner (*Abbariao v. Hamline Univ. Sch. of Law, 1977; Ahlum v. Administrators of Tulane Educ.Fund, 1993; Coveney v. President & Trustees of Holy Cross College 1983; Rollins v. Cardinal Stritch Univ., 2001).*

In the landmark case of *Dixon v. Alabama State Board of Education (1961)* the courts held that public colleges are the arms of the government and students have a liberty and property interest in their education that are protected by the fourteenth amendment thus students could only be expelled from a state colleges after receiving some due process (e.g. notice and a hearing). However, the courts have been reluctant historically to interfere in the discipline decisions of private colleges where the relationship between the parties are considered contractual *(Cloud v. Trustees of Boston University, 1983; Psi Upsilon v. University of Pa., 1991).* Nonetheless, both public and private institution's disciplinary process must meet two judicially imposed requirements: first, it must be fundamentally fair, and second, it must be consistent and generally observe the rules and guidelines they have adopted (*Boehm v. Univ.of Pa. Sch. of Veterinary Med. 1999)*

With the real threat of losing federal funding and with 85 colleges and universities (as of October 2014) under investigation by the DOE for alleged mishandling of sexual assaults complaints, schools have overhauled their policies and procedures eager to comply with Title IX to safeguard their funding (Kramer, 2014; Shulevitz, 2014). Some have even gone beyond the DOE requirements and while victim advocates support these changes it has created an environment that is inherently biased against the accused male student and violates fundamental notions of fairness depriving students the most common elements of due process such as notice of the charges, notice of the evidence and an unbiased hearing. Around the country, students who believe they have been falsely accused of sexual assaults are alleging the following violations of their due process. 1.) Lack of adequate notice of the charges and hearing dates 2.) Lack of impartiality with one individual serving in multiple roles as the initial investigator, advisor, and advocate for "victims" of alleged sexual assault 3.) The accused is not afforded the same opportunity to have a trained advisor/advocate, as does the accuser 4.) Investigators fail to adhere to standards of due process, including an accused student's right against self-incrimination, the right to advice of counsel throughout the investigation and through the disciplinary process.
5.) Denied the right to effectively cross- examine, even through a third party advocate. 6.) The use of unreliable hearsay evidence against the accused 7.) The use of the higher standard of preponderance of the evidence and 8.) Double jeopardy, if the accuser chooses to appeal the determination. These practices are contrary to the long established standards in *Goss v. Lopez* (1975) that held that students in campus adjudications must be afforded the following minimum rights: (1) notice of the charges against them (2) explanation of the charges against them and an opportunity to be heard and thus as a result accused males are looking to the courts for redress.

According to the website A Voice for Male Students, since the Dear Colleague Letter (OCR) was issued in 2011 and up until October 2014, over 40 male students have filed lawsuits alleging that universities have violated their due process rights in the adjudication of these complaints and are failing to adhere to even the minimum requirements of due process under *Goss.* A review of the court filed complaints show glaring similarities from the profile of the students, to the alleged act of rape, to the university's response. This data is consistent with the research done by Fisher, et.al., Krebs and Sampson in revealing that in most of these cases of campus sexual assault the parties were known to each other and in some cases had been dating, in other cases alcohol was involved, and the female student failed to report the incident several months to a year later. Another common thread in these cases is that most of the accused male students are suing under the Due Process Clause, fundamental fairness, contractual theories, or negligence and are challenging the preponderance of the evidence standard mandated by the DCL (OCR, 2011). Notably, a number of the males accused are taking a novel legal approach, relying on the landmark case of *Yusuf v. Vassar (1993) a*s precedent they are also suing the schools for sexual discrimination under Title IX which historically has been used to protect the rights of female students. *(Benjamin King v. DePauw University, 2014; Brian Harris v. St. Joe's University, et. al.2014; Dezmine Wells v. Xavier University, 2014: James Haidak v. University of Massachussets, 2014; John Doe v. Swarthmore, 2014 John Doe v. University of Colorado Boulder, 2014; John Doe v. University of Columbia and Trustees of Columbia University, 2014; John Doe v. Wesleyan University, 2014; Keifer Johnson vs. Western State Colorado University, 2014)*

In the case of *Yusuf v. Vassar (1993)* a Title IX lawsuit was filed against Vassar College by a male student accused of sexual assault. Among his claims, the student alleged discrimination under Title IX. The appeals court ruled in favor of the Plaintiff and concluded "we may safely say that Title IX bars the imposition of university discipline where gender is a motivating factor in the decision to discipline." (*Yusuf,* p. 26, 1993) Pursuant to the ruling an accused student bringing a Title IX claim must allege two elements to survive a motion to dismiss: (1) his or her discipline was erroneous, and (2) particular circumstances suggesting that gender bias was a motivating factor behind the erroneous finding. The court found that *Yusuf's* Title IX claim stood because there was a causal connection between the flawed proceedings and the allegation of gender bias (1993). The *Yusuf c*ase was a victory for the male student wrongly accused of sexual assault and held the promise of supporting future litigation under this precedent.

In two recent cases, one against Xavier University (*Dezmine Wells v. Xavier University,* 2014) and the other against Swarthmore (*John Doe v. Swarthmore, 2014),* the plaintiff amongst several causes of action brought a Title IX lawsuit against the schools. In the case against Xavier University, basketball player Dez Wells sued the college for violating his Title IX rights after they pressed forward with a sexual assault charge despite his accuser's refusal to press charges. In the instant case, the university's motion to dismiss plaintiff's case was denied and the Court found that the president of the university made Wells "into a scapegoat so as to demonstrate a better response to sexual assault" (*Dezmine Wells v. Xavier University,* 2014). The Prosecutor's office had cleared Wells of any wrongdoing and found Xavier's handling of the incident "fundamentally unfair." The parties settled the case via a confidential statement. In the case against Swarthmore, John Doe claimed a similar charge "of being used as an example" where the institution's decision to charge him came after the school was subjected to unrelated federal investigations by the Department of Education. (*John Doe v. Swarthmore2014).* Notably, Swarthmore as a private college was bound under contract law by the provisions found in the Swarthmore Handbook (2012-2013) and the university had an obligationto carry out its policies consistent with that contract. In this case, the accuser came forward to report an incident 19 months after the alleged incident occurred.

After an initial investigation, the school closed the case. However, John Doe alleges that the university re-opened the case after federal complaints were lodged against the school and in an effort to avoid more negative publicity the university "rushed to judgment" and found him guilty of sexual assault and ordered him expelled. John Doe alleges that his due process rights were violated during the investigation and the judiciary hearing process.

Specifically, John Doe alleges that Swarthmore breached its contract with him by failing to adhere to their policies and procedure found in the Swarthmore Handbook (Swarthmore, 2012-2013) resulting in a fundamentally unfair investigation and hearing. John Doe alleged several material due process violations; failure to give John Doe adequate notice of his hearing, failure to give him access to the evidence and failure to exclude from evidence, references to John Doe's alleged sexual history. At the hearing they provided him an advisor who was the same person who advocated having the charges brought against him. They allowed the Title IX coordinator to support and testify on behalf of the complainant while telling John Doe that the Title IX coordinator could not be his supporter because it would be "inappropriate." The hearing was scheduled at a time when school was not in session making it nearly impossible for John Doe to have access to witnesses. Jane Doe was allowed to leave the hearing in the midst of John Doe's testimony, demonstrating clear bias and also depriving John Doe of his due process rights to confront the witness. Compounding these procedural violations, John Doe alleges bias and prejudice in Swarthmore's policies and proceedings. Specifically, John Doe asserts that "because female students at Swarthmore rarely (if ever) face charges of sexual misconduct, they are not disadvantaged by the College's sexual misconduct policies that place onerous burdens on the accused students and deny them rudimentary due process safeguards." (Doe, 2014). John Doe alleged that as the "accused (male) is disproportionately affected" by the sexual misconduct proceedings, the net effect of the policies "disproportionately and adversely affect the male students" (Doe, 2014)

The college initially filed a motion to dismiss John Doe's action and while the motion to dismiss was still pending, Swarthmore entered into a confidential agreement to settle the case. The joint motion to dismiss reveals that Swarthmore acknowledged that the panel that heard John Doe's case lacked impartiality, and the lack of fairness in the hearing warrants vacating the panel's finding and sanction against John Doe (Doe, 2014).

The above cases cited represent a growing trend of Title IX lawsuits filed by male students accused of sexual assault by their institutions. Since many of these cases are in the early stages of litigation it remains to be seen whether the plaintiffs will be able to meet the *Yusuf* threshold and show that gender was a motivating factor in the disciplinary findings. Interestingly, the case of Dez Wells at Xavier and John Doe at Swarthnore reveal that colleges are acknowledging that they have rushed to judgment and are offering to settle with the accused.

DCL ESTABLSIHES A NEW BURDEN OF PROOF

In the Criminal Justice system, Due Process rights provide a number of protective and affirmative rights including the right to counsel, right to cross examine witnesses, right to subpoena witnesses and the right to be tried by a jury of one's peer (U.S. Co. amd. V & VI). The individual accused of a crime also benefits from a presumption of innocence and the highest standard of proof, which is proof beyond a reasonable doubt (*Addington v. Texas, 1979*). In contrast, students facing sexual assault charges are not afforded the right to counsel, the right to confront witnesses or the right to subpoena witnesses and review all evidence. Historically, in the higher education context, students have never been afforded such expansive rights. *(Valente v. Univ. of Dayton Sch. of Law, 2008).* The courts have consistently ruled that the college grievance

process is an administrative hearing and it is not expected that the same rights applied in courts would apply at the hearings. Nonetheless, those accused of sexual assaults argue that these hearings are quasi-judicial criminal procedures that carry severe penalties and are often explicitly in lieu of formal charges and as such it is to be expected that they will adhere to traditional notions of due process fairness and justice. According to *Morrissey,* in a public university case, all accused students have some due process rights; the variation is in "what process is due" (*Morrissey v, Brewer, 1972*).

Notably, only two sentences out of the nineteen pages of the DC addresses due process (OCR, 2011). The DCL (OCR, 2011) language implies that the rights of the accused student at public universities did not merit lengthy discussion and suggested that constitutional due process rights do not protect students at a private university. The letter further states that schools should ensure that steps taken to afford due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant (OCR, 2011). OCR suggests that schools should focus more on victim advocacy. Consequently, the net effect, of the DCL mandates create a presumption that all accused students are guilty and the lower burden of proof of preponderance of the evidence further increases the risk for an erroneous finding of guilt (Bader, 2012; Creeley, 2011, Kramer 2014).

The preponderance of the evidence standard is commonly used in civil actions between private parties for money damages (*Addington v. Texas, 1979*). It requires that the evidence presented to the fact-finder render the truth of a contested fact more likely than not. Advocates for this standard argue that the preponderance standard acknowledges the gravity of the interests at stake for the accused student through application of a standard commonly applied in courts of law while enabling schools to ensure the interests of the victimized student, and the interest of the community weighed against the interests of the accused (Bader, 2012.) The OCR reasoning for imposing a low preponderance standard on school disciplinary proceedings was that this is the standard of proof established for violations of civil rights laws in lawsuits brought in federal court. Therefore, it believes the preponderance standard must also be the appropriate standard for schools to use in investigating allegations of sexual harassment or violence by students.

The DCL requires schools to adopt a relatively low burden of proof of preponderance of the evidence which means "more likely than not" in cases of sexual misconduct (OCR, p.10-11). Prior to the DCL, several colleges had been using a "clear and convincing" standard and some, including Stanford University, had been using a proof beyond a reasonable doubt standard, both of which require a high level of certainty. According to the DCL, in order for a school's disciplinary procedures to comply with Title IX, the school must utilize the preponderance of the evidence standard in adjudications for sexual harassment and assault. (OCR, p.10-11) The OCR believes that this standard is necessary to ensure an equitable disciplinary proceeding.

However, a number of civil right advocates argue that this presumption is erroneous arguing that the preponderance standard applies to whether the school violated Title IX by failing to meet its obligations and duties, not whether students committed acts of sexual violence or harassment. (Bader, 2012; Creeley, 2011; Henrick, 2013). It well established law that students cannot violate Title IX; only schools can and only schools can be sued under Title IX not students (*Smith v. Metropolitan School District (1997).*

Although preponderance of the evidence is widely accepted as a standard of proof in civil law, civil libertarians including The Foundation for Individual Rights in Education (FIRE), a civil liberties watchdog, further contend that this standard is inappropriate for campus sexual adjudication particularly where the adjudication system is seriously flawed and where significant liberty interests are at stake. (Creeley, 2011) Both victims' rights advocates and civil rights advocates argue, "college judicial tribunals have a history for being kangaroo courts" (Ristik, 2011). The use of the preponderance standard in school disciplinary proceedings makes it easier to find guilt or jeopardize or even violate the due process rights of accused students when a fact finder is asked to decide only if it is more likely than not that a sexual assault occurred (Bader. 2012, Creeley, 2011; Henrick, 2013). In sum under a preponderance of the evidence standard a student will be disciplined with little as a 51% chance of guilt.

In the cases where the accused filed a Title IX claim they also challenged as well the preponderance of the evidence standard. In *John Doe v. Swarthmore*, (2014) John Doe argues, that the standard is unfair given "the fact that they face felony-type charges with the most serious potential penalties," such as expulsion. He claimed that "this low evidentiary standard unfairly skewed the proceedings and resulted in a virtually pre-determined finding in favor of Jane Doe" (the pseudonym used for John's accuser). (Doe, p.5, 2014.)The lawsuit goes on to claim that the college's application of that standard "violated due process principles" by "requiring the accused to bear the burden of proving innocence." (Doe,p.34, 2014)

Those who oppose the preponderance standard argues that it calls for a presumption of guilt for the accused. (Bader, 2012; Creeley, 2011) If a disciplinary hearing board determines that it is more likely than not that the accused committed the offense a student likely will be expelled, or suspended for a lengthy period of time. They further maintain that because of the significant individual interests at stake for the accused student in a campus disciplinary proceeding that could result in suspension or expulsion, the higher clear and convincing evidence standard better serves to safeguard against the risk of error (*Addington v. Texas, 1979;* Bader, 2012; Creeley, 2011).

Civil Libertarians further reason, while this low burden of proof is used in most civil cases, the margin for error is offset by a number of due process procedural safeguards to ensure fairness such as an impartial, unbiased educated judge, representation by counsel and a mandatory "discovery" process that requires all relevant evidence to be shared. Moreover, all witness testimonies are given under oath subject to perjury if a witness lies. Thus, the comparison of the campus sexual adjudication to a civil case is not a fair comparison (Cohn, 2012; Creeley, 2011). These safeguards to name a few are nowhere to be found in a campus sexual adjudicatory process. According to Harvard Law School Professor Janet Halley speaking in reference to the process implemented at Harvard after it came under investigation by the Department of Education for Title IX violations, the Title IX enforcement office acts as cop, prosecutor, judge, and jury and also hears the appeals. These procedures are "fundamentally not due process" (Schulevitz, 2014).

Harvard University in this sense is not alone, while most college handbooks reference fairness and impartiality in their investigation/hearing process and though this may be the case in the campus adjudication of such cases as plagiarism, vandalism or violations of drinking policies, this is not the case for campus sexual assault cases. Even when procedural safeguards are included in colleges and universities handbook they fail to adhere to them in the processing of campus sexual assault cases. Many of the board members lack impartiality and have vested interest in a guilty finding for the accused; From the untenured professor sitting on the board to the administrator who is mindful of the negative publicity that may be garnered or even worse a cut in federal funding (Henrick, 2011). Moreover, in many instances these cases take place in highly politicized, pressured environment froth with underlying biases of guilt towards the male accused

and mistakes have been made. In one case at the University of North Dakota, a student adjudicated under the preponderance standard was suspended for three years from the institution for sexual assault despite the fact that the Grand Forks police refused to charge him with a crime and instead charged his accuser in making a false claim (Thompson, 2012). The university, after significant public pressure, eventually reversed its ruling.

While many on both sides of this argument will disagree on the investigation and adjudication process, all will agree that rape is a serious crime with serious consequences and as such merits a process that allows for fairness and justice for all parties. It is well settled law that students are not afforded expansive due process protections in campus adjudications. *(Valente v. Univ. of Dayton Sch. of Law, 2008).* Nonetheless, as Prof. Janet Haley of Harvard law school stated "we need to take into account our obligation of due process not because we are soft on rapist and other exploiters of women but because the "danger of holding an innocent person responsible is real" (Schulevitz, 2014).

The above stated realities of the flawed campus adjudication process and the low burden of proof now mandated by the DCL (2011) strongly merits that institutions critically review their processes and aim to afford accused students greater procedural protections (Triplett, 2012). While many civil libertarians and counsels for the accused work towards effectuating legislative changes through Congress to revise the OCR mandates, colleges should resist the pressure to rush to judgment and with deliberate and weighted judgment should strive to address these cases with fairness and equity. Though the disciplinary process need not provide all the procedural formalities of a criminal trial it must ensure the basic elements of fairness.

PROPOSED REFORMS

A University Hearing Panel Designated Solely for Sexual Misconduct Cases

Over the years there has been several approaches to handling student misconduct in higher education from the *loco in parentis era* which allowed universities to act in the place of parents to the second era of the 1960s and 1970s which saw a rise in student activism and gave way to recognizing students as adults and protecting their procedural due process rights *(Dixon v. Alabama State Board of Education, 1961).* From the 1980s to the present, colleges and universities struggle to balance institutional authority with the procedural rights of the accused made even more complex by the mandates of Title IX.

Justice Felix Frankfurter wrote over 50 years ago in *McNabb v. United States (1943)*, and this still holds true today, "The history of liberty has largely been the history of observance of procedural safeguards" (*McNabb,*p. 332, 1943). American jurisprudence is grounded in the principles of fairness and equity even for those who are accused of the worst transgressions. The accused in campus sexual misconduct situations should be no exception. The DCL specifically mandates fairness and impartiality in the investigation and adjudication process of campus sexual assault cases (OCR, 2011).

This pressure is further augmented by the DCL (OCR, 2011) which threatens institutions with cutting their federal funding if they fail to respond to incidences of sexual assaults. Sexual assault cases by their nature are unduly complicated and under the confluence of these circumstances, institutions find it even more difficult to exercise fundamental fairness.

Campus rape allegations often hinge on disputed allegations of the consensual nature of the act and contributing to the lack of clarity of the incident is usually the intoxication of both parties at the time with no available physical evidence or third party witnesses (Bader, 2012; Krebs, 2007). As an educational institution, colleges and universities have to walk that delicate balance of supporting college students involved in a stressful and life altering matter, while also ensuring that justice is served, due process rights are protected and that predators are rooted out of the campus environment. One possible approach to accomplishing these objectives is to create a university disciplinary panel well trained in sexual assault designated to only handle allegations of sexual misconducts. Given the serious nature of these allegations, campus sexual assault cases should not be adjudicated alongside allegations of conduct and academic infractions.

The disciplinary panels at most universities commonly comprise of all or some student members however in cases of campus sexual assault these panels should not include student members. Many students lack the emotional maturity to preside over these cases, the panel should therefore comprise of faculty, administrators and include one or two individuals outside the university invited to join. The aim in including an outside member(s) is to bring added impartiality, fairness and objectivity to the processes. The panel would be trained in the areas of sexual assault and victim trauma. The well-trained specialized panel with outside participants brings impartiality and expertise to the process allowing for consistency and uniformity in the adjudication of theses cases. Trained in sexual assault and victim trauma the specialized panel can bring greater sensitivity to the process for the victim as well as greater awareness of the procedural due process rights of the accused.

A Third Party Investigator and a Two-Track System of Adjudication

The institution should retain a third party outside investigator properly trained in addressing sexual assault. According to the DOE, a well-trained investigator is one who has significant training in interviewing techniques, understands the meaning of consent in sexual assault cases, and how trauma can affect the victim. Utilizing such an investigator to conduct the investigation will bring expertise to the process, and bring added objectivity and impartiality to the process. As is often the case despite a school's best effort to be fair, it becomes almost impossible for a school to remain impartial if the accuser files a Title IX complaint with the federal government and the school is threatened with lost of funding.

Therefore, introducing an independent investigator to the processes removes a certain amount of bias and removes the burden from the college administrators and places it on a neutral third party. Though one can argue that the investigator has a vested interest as a " paid contractor" for the university however since the investigator's reputation will hinge on his objectivity he will incentivize to be fair. Furthermore, a third party investigation in sum total is still more impartial then one conducted by the university. In addition, the creation of a two-track system of adjudication allows for a much-needed distinction between a felony sexual assault which necessitates law enforcement involvement and a violation cause of action rising to bad judgment which can be handled by a campus adjudication. .

The process would operate as follows: 1.) once an allegation of sexual assault is reported to university administration, an outside third party investigator trained under DOE standards would be hired by the university to gather the evidence, interview the parties and witnesses. 2.) After a review of the evidence, the investigator would determine whether there is a legitimate question of consent and of a felonious sexual assault giving rise to a prosecutorial claim. If so, the case would then be turned over to local enforcement agencies. Nonetheless, the university will remain obligated under Title IX to continue to investigate the conduct and take necessary measures to protect the complainant in the educational setting. Since universities are ill equipped to handle these more serious charges, it is better left to law enforcement who have the resources, the training and the subpoena power to investigate and adjudicate these matters. While the Criminal Justice system has a long history of being unfriendly to rape victims, the university has not fared any better. Therefore, both parties in the case of a felony sexual assault are better served in a system that has checks and balances and where fairness, due process and impartiality are an integral part of the process. 3.) If the investigator determines that the allegations involve a lesser offense of a sexual nature then the matter will be processed through the university sexual misconduct panel and the additional recommendations of counsel and third party cross examination (OCR, 2011) included in the process will improve the fairness of the process and protect the rights of both parties.

Cross Examination/Confrontation By A Third Party

OCR does not require that a school allow cross-examination of the witnesses, including the parties, if they testify at the hearing. The OCR strongly discourages schools from allowing the parties personally to "question or cross examine each other during the hearing." The OCR nonetheless permits cross-examination through a third party. According to the OCR, students' accused of harassment should not be allowed to confront (or directly question) their accusers because cross-examination of a complainant "may be traumatic or intimidating." While victim advocates view cross examination as re-traumatizing the victim and support the DCL rule, advocates of the accused view this rule as a barrier to arriving at the truth.

Most college sexual adjudication cases center on a disciplinary committee's assessment of the credibility of the complainant and accused student and without cross-examination it is difficult to make such an assessment (Bader, 2012; Tenerowicz, 1987; Triplett, 2013). Campus sexual assault accusations are riddled with "he said" and "she said" allegations, therefore the opportunity for the parties to cross-examine each other would prove instrumental in arriving at the truth, even if the cross examination is done through a third party advocate. The Supreme Court has described cross-examination as the "greatest legal engine ever invented for the discovery of truth" (*Lilly v. Virginia*, 1999). Of course, the best course of action would be to allow the parties to engage in direct cross examination but since the DCL does not allow that then in the spirit of *Lilly* the third party cross examination is a better option then no cross examination at all.

Equal Access to Counsel

The DCL states: "While OCR does not require schools to permit parties to have lawyers at any stage of the proceedings, if a school chooses to allow the parties to have their lawyers participate in the proceedings, it must do so equally for both parties" (2011, p. 12). In sum, the

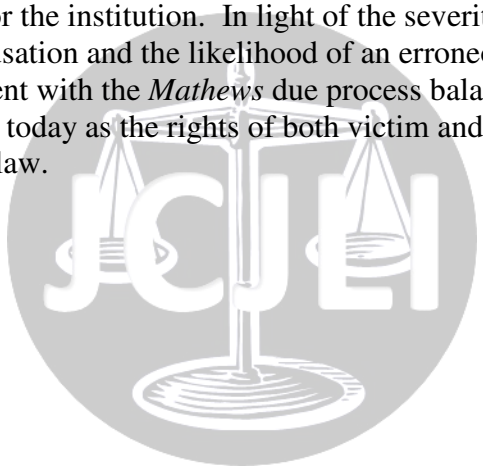
OCR has deferred to the institutions on deciding whether students are allowed access and advice of counsel in the hearings. The court in *Gomes v. University of Maine System* (2005) held that students facing criminal charges should be able to have legal representatives present at a disciplinary hearing. This case spoke to the obligation of the public university in contrast to a private institutions that is not governed by the Constitution and has no obligation to provide students access to counsel. At present, private universities vary in their policies on attorneys, some institutions allow students access to counsel though they are not obligated by law. Access and advice of counsel in the adjudication process would greatly ensure that the accused receive due process. This is especially significant since the accused faces serious sanctions and possible criminal prosecution (*Gabrilowitz v. Newman, 1999; Gomes v. University of Maine System, 2005*). Similarly, complainants also stand to benefit from access to counsel; counsel would aim to protect the complainants' due process rights, for justice and redress.

Access to an attorney during a campus sexual misconduct hearing does not equate to active attorney representation (e.g. cross examine witness or speak on behalf of the student). Generally, the attorney is not allowed to speak, however there is still much to be gained in having attorneys play a role though it may be "advisory ". Both complainant and accused will benefit from the advice of counsel (even if it's through a whisper or note); The parties will feel more comfortable in having an attorney represent their interest and support them in the process; The presence of an attorney will add transparency to the process; The attorney can protect the accused from self-incrimination; The attorney can protect the complaint from having to play the role of "prosecutor" in their own case and the attorney can be instrumental in directing members of the committee to adhere to the college's own rules of due process procedures. Furthermore, in an effort to address the concern of those who fear that the process may be hijacked by attorneys and become unduly legal, the colleges should provide written guidelines explaining the role of attorneys in the hearing so it does not become overly "legalistic and technical" in nature to the non lawyers.

In 2013, North Carolina became the first state to guarantee students at state institutions the right to full "legal" representation during the judicial process (with an exception to academic charges) and the right to counsel became the law at public institutions in North Carolina. (NC General Statute, § 116-40.11 (2014).) The new law allows at the student's expense "full legal" representation in judicial hearings. However, there are some colleges like Columbia University in New York City that provides free legal counsel if asked to both the complainant and respondent. A major concern for universities is the cost of covering such legal representation. To address this issue, universities should explore establishing relationships with Victim Advocacy groups or law school clinics that may be able to represent the victim and conversely for the accused assistance should be sought from defense advocacy groups. Thus, sparing colleges and universities the additional cost of legal representation for the students. Allowing students access to counsel is a small administrative burden to the universities and colleges compared to the vital interest at stake for both complainant and the accused. It also comes with the added benefit of protecting the university from potential liability. Furthermore, since the university proceeds with the benefit of counsel, it is reasoned logic to allow the other parties also to have access to counsel.

CONCLUSION

When the OCR issued the DCL (OCR, 2011) it was intended to assist universities and colleges in addressing the rising tide of campus sexual assaults. However, the DCL (OCR, 2011) has incentivized colleges to err on the side of finding male students guilty of assault because failure to comply with these mandates places the university at risks of losing federal funding. This scale is further weighted against the accused by the new requirement that colleges determine guilt by the lowest possible standard of preponderance of the evidence. American universities must find a way to balance the justice needs of the victim and ensure the due process rights of the accused. Institutions should utilize an independent well-trained third party investigator to gather the evidence for a determination on whether the case should be adjudicated on campus or passed on to local law enforcement agencies. If a campus hearing is determined as the correct course of action then allow both parties access to counsel and cross examination through a third party advocate. The Supreme Court in *Mathews v. Eldrige* (1976) held that the courts must consider three factors when considering what particular "processes are due"; first the court must consider what is at stake for the person, 2. The likelihood of an error in the findings based on the existing processes, and the cost of implementing safeguard measures to the government or the institution. In light of the severity of the sanctions and the stigma attached to a rape accusation and the likelihood of an erroneous finding, these recommendations are consistent with the *Mathews* due process balancing test and provides for a fairer system then what exists today as the rights of both victim and accused are protected within the due process of the law.



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