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CAMPUS INSECURITY: DUE PROCESS, PROOF, AND PROCEDURE IN CAMPUS SEXUAL ASSAULT INVESTIGATIONS

Travis J. Nemmer

INTRODUCTION

At one in the morning on July 7, 2012 Xavier University basketball star Dezmine “Dez” Wells had engaged in a game of “Truth or Dare” in his on campus dormitory with a number of his friends.¹ The game quickly became sexual in nature. One of the participants in the game was Wells’ resident advisor, Kristen Powers. Over the course of the game, Powers removed her pants for Wells, exposed her breasts to him, and finally performed a lap dance for him, all while kissing him several times.²

Eventually, Rogers and Wells retired to Rogers’ room at her invitation, where she asked Wells if he had a condom.³ Rogers and Wells then engaged in sexual intercourse. At 5:15 AM Rogers and Wells then returned to Wells’ room to retrieve Wells’ phone. All witnesses reported that both Wells’ and Rogers’s demeanors and reactions were “completely normal.”⁴

The next morning, Rogers went to campus police and accused Wells of raping her the prior night. Rogers was taken to the local hospital, where it was found that she had not suffered any of the physiological trauma consistent with rape.⁵ Wells’s case was later investigated by the head of the Hamilton County District Attorney’s Criminal Division, and brought before the grand jury. The Grand Jury refused to indict Wells, with Hamilton County District Attorney later commenting that “It wasn’t even close.”⁶

Wells’s troubles didn’t end there. Despite the direct objections of the Hamilton County District Attorney to the President of Xavier University, the University proceeded with an internal investigation of Wells and his actions before the police and the District Attorney’s office had completed their investigation.⁷ Wells was brought before a tribunal known as the University Conduct Board, which was conducting its own investigation. During this hearing, in order to “preserve fundamental fairness,” Wells was denied his right to present character evidence,⁸ the right to have counsel present at his hearing,⁹ and was forced to prove that his sex was consensual, rather than have the burden placed on his accuser to prove that Wells had in fact raped her.¹⁰

Xavier’s University Conduct Board was comprised of four administrators, eight faculty members, and ten students that were tasked with examining the evidence regarding the

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¹ See Wells v. Xavier University, 7 F. Supp. 3d. 746, 747 (S.D. Ohio 2014).
² See id.
³ See id., Compl. at ¶ 21, 22.
⁴ See id. at ¶24.
⁵ See Wells supra n. 1, at 747.
⁷ See Wells, Compl. at ¶ 84.
⁸ See id. at ¶ a33(e).
⁹ See id. at ¶ 33(b).
¹⁰ See id. at ¶ 49.
rape claim that Wells was faced with. None of the persons ruling on Xavier University’s board had any actual training in examining sexual assault evidence,\(^{11}\) and did not provide anybody who was actually trained in the interpretation of sexual assault evidence.\(^{12}\) An undergraduate student that examined the rape kit (that both police and prosecutors found to be evidence that no sexual assault had actually occurred),\(^{13}\) reported in a confused manner, “I don’t know what I’m looking at.”\(^{14}\) This was compounded by the fact that Wells was not permitted to cross examine, or even question any of the witnesses that had been arraigned against him.\(^{15}\)

Less than two hours after the Grand Jury had cleared Wells’ name, the Xavier University Conduct Board held that Wells was “responsible” for the rape of Kristen Rogers, and he was expelled from the University.\(^{16}\) Xavier released a statement, boldly claiming that the University Conduct Board heard evidence that “may or may not have been heard by the Grand Jury.”\(^{17}\) Wells’s case was sharply criticized almost immediately by the Hamilton County District Attorney’s Office, with the prosecuting attorneys holding that Xavier University’s handling of the matter was “seriously flawed.”\(^{18}\)

Wells went on to sue Xavier University for defamation and gender-based discrimination. Xavier settled after a federal court refused to dismiss his case, holding that the University Conduct Board was “well equipped to handle cheating cases but was . . . over their head [sic]” in relation to a sexual assault case.\(^{19}\) After Wells was expelled, Rogers reportedly recanted her accusation.\(^{20}\)

Dezmine Wells’s case is not an isolated incident. There has been a troubling trend of students being expelled from their schools based on spurious, or even nonexistent evidence against them.

Xialou Yu was dismissed from Vassar University following a complaint of sexual assault. During Yu’s hearing, Vassar University ignored evidence that the victim had emailed him following the event saying that she “had a wonderful time,” and that she was “really sorry” that she had led him on in thinking that her and Yu could have a continuing relationship.\(^{21}\)

Caleb Warner was expelled on charges of sexual assault from the University of North Dakota following his tribunal. Warner’s tribunal had been completed before the District Attorney’s office and the Grand Jury had refused to indict. Not only did the District Attorney’s office not pursue charges against Warner, they pursued a warrant against Warner’s accuser for filing a false claim.\(^{22}\) In response to the new information relating to his case, Warner requested an appeal of his expulsion. Not only did the University refuse to overturn Warner’s expulsion, it refused to grant him a new hearing based on the new information, holding that the District Attorney’s development did not consti-

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11 See id. at ¶ 55
12 See id.
13 See id. at ¶ 56.
14 See Winerip, supra n. 6.
15 See Wells, 7 F. Supp at 749.
16 See id. at 748.
18 See id.
19 See Wells, 7 F. Supp 3d at 749.
21 See id.
tute “substantial new evidence.”23 Furthermore, the University held that the hearings conducted by its campus proceedings were not “legal, but educational in nature.”24

The dereliction of due process as it relates to campus sexual assault investigations has proven to be a pervasive problem throughout campuses in the United States. This issue can – most recently – be traced to a unilateral and unequivocal order from the Department of Education to stymie the rights of the accused in sexual assault cases issued in 2011. A “Dear Colleague” memorandum was drafted by the Department of Education’s Office of Civil Rights in response to an “epidemic” of sexual assaults that have been allegedly committed or attempted against one in five women on college campuses.

This paper holds that the Dear Colleague memo represents a basic departure from the Due Process rights of students accused of sexual assault. The Dear Colleague memo admonishes schools to complete their investigations before the police or the District Attorney’s Office have come to their own, professional conclusions.25 It further proscribes a preponderance of the evidence standard to be employed through a sexual assault hearing,26 restricts a student’s right to have counsel present at their hearing,27 and holds that a student accused of sexual assault is not permitted to cross-examine witnesses against him, so as not to create an environment that is “traumatic or intimidating” for the victim.28

This whole new schema is based on the false premise that one-in-five female students will suffer sexual assault during their undergraduate careers. Part I of this paper intends to investigate the unsound methodology that went into creating this flawed premise, and emphasize a more accurate and much lower rate of sexual assault as it occurs in colleges. Part II of this paper takes a look at the Dear Colleague memo, the specific circumvention of Due Process that takes place in the proscribed methods emphasized by the Department of Education. The conclusion explores acceptable alternatives to the existing schema brought forth in the Dear Colleague letter, and strikes an acceptable balance between victim protection and Due Process rights for the accused.

I. THE PERVASIVE MYTH OF “ONE-IN-FIVE”

It has been said many times and by so many people that doubting it has become near verboten in higher education. None other than President Barack Obama29 and Vice President Joe Biden30 have come out and claimed that one in five female students will be sexually assaulted during their time at college.31 Nearly every law review article addressing campus sexual assault parrots the statistic as well.32 Activist

23 See id.
24 See id.
26 Id. at pg. 11.
27 Id. at pg. 12.
28 Id.

30 Id.
31 See Tessa Berenson, 1 in 5: Debating the Most Controversial Sexual Assault Statistic, Time Magazine (Jun. 27, 2014), http://time.com/2934500/1-in-5%E2%80%82campus-sexual-assault-statistic/.
groups have also been known to cite even more alarming statistics, with the National Rape, Abuse and Incest National Network holds that women in college are three times more likely than women in general to suffer from sexual assault.  

The one-in-five statistic should be called into question for just how dangerous it alleges our college campuses to be. Those who believe that one in five women will be sexually assaulted at an undergraduate institution are saying that a woman attending college in Tenleytown, College Park, or New Haven is just as – if not more likely – to be raped than a woman in civil-war torn Congo, where rape is regularly used as a weapon of war, and human rights activists maintain that four women are raped every five minutes.  

A. The 2007 CSA Study – Selection Bias, Unrepresentative Sampling and Fuzzy Language

So what study does the actual statistic come from? One of the most widely cited studies is the Department of Justice’s Campus Sexual Assault Study (Hereafter “the CSA Study”)

The CSA study involved sending a blanket email out to all undergraduate students at just two unnamed universities, one in the South, and another in the Midwest. Students were offered an Amazon gift card in exchange for their participation, and results were gathered anonymously. Despite this, less than half of the students who responded to the original blanket email filled out the actual survey. The low response rate has opened the study to criticism by feminist scholars. Christina Hoff Sommers raises the concern of selection bias, claiming that “[t]he people who feel the most strongly about the survey, for whatever reason, are most likely to respond.”

Furthermore, many of the CSA’s questions were vaguely worded, and the absence of a trained interviewer led respondents to be unable to clarify the vagaries contained therein. The CSA study, for example, defines “grabbing, fondling, or . . . rubbing up against someone in a sexual way” as sexual assault.” The study ties these instances, where there is no sense in denying that they are dependent on the interpretation of the person they are inflicted on, alongside with “oral sex, anal sex, sexual intercourse, and sexual penetration with a finger or foreign object” in the catch all definition of “sexual assault.” The first question simply offers a Yes/No binary, without allowing for clarification until “Yes” had already been selected. As a result, nineteen percent of respondents stated that they had suffered sexual assault — but only thirteen percent said it had been completed, and twelve percent said that it had been attempted. This methodology has been roundly criticized even by sexual assault victim advocates. Most notably, John Foubert, President of the advocacy group One in Four, has stated that “When we throw ‘unwanted sexual contact’ into the mix, we risk equating a forced

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36 See id. at 3-5, 3-6.
37 See id. at 3-2.
38 See Berenson supra n. 31.
40 See Id.
kiss (which is a bad thing obviously) with rape (which is a fundamentally different act).”¹⁴ Foubert has gone on to claim that the Obama Administration “probably got some bad advice about which stat to trust,” and the proliferation of the one in five statistic, “drives him nuts.”¹⁵

These already spurious numbers are compounded by the fact that “consent” is never actually defined at any point in the questionnaire. There is no clarification of whether explicit verbal consent should be required, creating discordant results amongst survey takers. This creates issues further in the study, when the issue of intoxication is addressed. Without a level of explicitness required for consent, the study concludes that sexual contact with any person who is intoxicated is “unacceptable.”¹⁶

Seven years after the study was released, its lead author sat down with Slate Magazine and sharply criticized his own study, saying that the one-in-five statistic that his study is in part responsible for proliferating is “in no way a nationally representative statistic” due to the fact that his study only investigated two actual universities.¹⁷

**B. The 2014 Barnard University Study – Serious Selection Bias and Misleading Questions**

In 2014, Barnard College released a new study that would soon also be quoted as confirming the one in five statistic. The Barnard study came to the truly alarming conclusion that twenty percent of their students would suffer a sexual assault during just twelve months at Barnard.¹⁸ The Barnard study suffers from many of the same methodological shortcomings as the CSA study, and then some. The Barnard study employed the same methodologies as the CSA Study – a blanket email is sent out to the student body, and respondents fill out an anonymous survey. Respondents are asked a list of questions about their experiences, and if they answer affirmatively for any of the questions posed, they are registered as a positive response in the catch-all pool of “reporting sexual assault.”

The response rate for the Barnard study was even more anemic than the already suspect turnout in the CSA study: Only thirty-four percent of all students responded to the survey.¹⁹ Needless to say, this raises the same issues of selection bias discussed supra.

Furthermore, the questions employed in Barnard’s study are even more spurious and misleading than those utilized in the CSA study. For starters, eight percent of respondents answered affirmatively to Barnard’s first question, whether the respondent had “sexual intercourse when you didn’t want to because you were pressured, forced, or otherwise did not provide consent.”²⁰ The language here poses a stark and troubling semantic problem. Attorney David French clarifies that there is a differ-

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¹⁶ See CSA supra note 35 at 6-5.


¹⁸ See Barnard Campus Climate Survey Results, Spring 2014, 3.

¹⁹ See id. at 2.

²⁰ See id. at 7.
ence between “unwanted,” and “without consent.” “Unwanted” sexual contact, according to French, can constitute a number of situations, including mutual misunderstanding created by the silence of one party, and legal (although immoral), emotional manipulation.\footnote{See David French, The Post’s New Poll on Campus Sexual Assault is Bogus, National Review, (Jun 12, 2015), http://www.nationalreview.com/article/419716/posts-new-poll-campus-sexual-assault-bogus-david-french.} Obviously, in cases where a respondent was pressured or forced to have sex, that constitutes \textit{bona fide} rape. But the Barnard study makes no effort to distinguish between cases where consent was denied, versus not explicitly given, or with a person unable to give consent. Since there is no way of distinguishing between these cases the Barnard study’s very first question opens itself up to criticism.

The Barnard Study only becomes more problematic from that point onwards, with the sixth question asking respondents whether they “gave into sexual play, (fondling, kissing, and touching, but not intercourse), when you didn’t want to because you because you were overwhelmed by the person’s pressure or argument.”\footnote{See Barnard supra n. 4445 at 7.} The sixth question, which factors into the catch-all category of “sexual assault,” presumably includes scenarios where, due to a person’s \textit{verbal argument}, the respondent actually gave consent to engage in non-intercourse sexual conduct. In the grand total of affirmative responses, these events are considered the same for counting “instances of sexual assault” as the forcible rape outlined in the first question.\footnote{See id. at 8.}

The conclusion page tallies up all of the affirmative responses, calls them all “sexual assault” and holds that, of the third of the students that responded to the survey, twenty percent have been subjected to the above, extraordinarily liberal definition of sexual assault.

C. The BJS Study – Different Methodology, Different Results

The most comprehensive and in depth study of campus sexual assault was published in December of 2014 by the Department of Justice’s Bureau of Justice Statistics. Titled \textit{Rape and Sexual Assault Among College-Age Females, 1995-2013} (but referred to hereafter as “the BJS Study”), it concluded differently than CAS or the Barnard study. This is likely due to the fact that the BJS study used a radically different methodology than the prior studies’ blanket emails and web forums. The BJS study relied on a series of in person and telephone interviews handled by trained screeners, and had a response rate of over eighty-eight percent of all respondents, more than twice the response rate found in the CAS study.\footnote{See Lynn Langton and Sofi Sinozich, Rape and Sexual Assault Victimization Among College-Age Females, 1995-2013, 15:16, Bureau of Justice Statistics, Dec. 2014.} It’s also important to note that the BJS study examined students nationally, polling over a quarter million female respondents a year.\footnote{Id. at 19.}

Furthermore, the BJS study was the first study to treat campus sexual assault as a criminal justice issue, rather than a public health issue.\footnote{Id. at 2.} Accordingly, only events that would rise to a level of criminal prosecution are considered sexual assault, and vague events about unwanted contact are not considered in the same category as actual sexual assault.\footnote{Id.} This was established by having trained interviewers ask respondents behaviorally specific questions.
about their attacker’s behavior, rather than compelling the respondent to fill in their own blanks by filling out a web survey.\textsuperscript{55}

The differences in the results are staggering. The BJS study found that not only was the total rate of sexual assault in colleges substantially lower than the prior studies have found, but also that students were at a lower risk of sexual assault than their peers who did not attend college.\textsuperscript{56} Furthermore, sexual assault, far from being an “epidemic” on college campuses, had actually been declining over the sixteen-year period than had been covered in the BJS study.\textsuperscript{57}

The BJS study found that the rate of sexual assaults on campuses broke down as follows: Of every thousand female undergraduate students, two female students suffered a completed rape, 1.5 suffered attempted rape, 1.9 would be sexually assaulted in a manner that did not include intercourse, and 0.7 were under serious threat of rape or sexual assault.\textsuperscript{58} When combined, the actual prevalence of sexual assault on campus came out to be 6.1 for every thousand students.\textsuperscript{59}

The country’s most wide-ranging, comprehensive, and representative study on sexual assault on campus found that one in 164 one in students will be sexually assaulted during their college years, not one in five.

Despite the findings of the BJS study, “one in five” continues to be a rallying cry for campus activists and politicians. New York Senator Kirsten Gillibrand (D) has used the one in five statistic to push a bill that would institute a uniform disciplinary standard for universities across the country, federalizing student discipline, which has, for centuries, been within the purview of schools.\textsuperscript{60} Missouri Senator Claire McCaskill (D), who has also criticized lawsuits like Dez Wells’ as “an incredible display of entitlement, the same entitlement that drove [them] to rape,”\textsuperscript{61} has attacked a congressional bill that ensured the right to counsel at sexual assault hearings as “disturbing.”\textsuperscript{62}

“One in five” has served as the rallying cry for those looking to implement the changes present in the Department of Education’s “Dear Colleague” letter that laid the foundation for campuses implementing policies that have led to what civil rights activists and feminist scholars refer to as “The College Rape Overcorrection.”\textsuperscript{63} The flawed statistic can be found on the second page of the Dear Colleague Letter, and is a part of the essential foundation for the Department of Education’s new and troubling procedural rules.

\textsuperscript{55} Id. at 3.
\textsuperscript{56} Id. at 4.
\textsuperscript{57} Id. at 3.
\textsuperscript{58} Id. at 4.
\textsuperscript{59} Id.
II. The "Dear Colleague" Cudgel – Proscribed Methods of Investigating Sexual Assault and Federal School Funding

In 2011, the Department of Education’s Office of Civil Rights released its Dear Colleague letter to universities receiving federal funding. “Dear Colleague” letters are used by officials in the Executive Branch to communicate updates, changes, and notices to persons who will be affected by changes in the existing administrative law schemas. Generally, the release of these letters is a mundane exercise—a rather rote and routine listing of regulatory law. Very rarely is the release of a Dear Colleague letter the subject of joint statements by the Secretary of Education and the Vice President of the United States. Even though the letter claimed that it “did not add requirements to applicable laws” or do anything other than “provide information and examples” for schools covered by the umbrella of the Department of Education, it was lauded as a “historic event.”

There were three major proscriptions made by the letter. The first was that the letter proscribed that all schools should conduct their sexual assault investigations under a preponderance of the evidence standard. Second, it informed schools that they are not to wait for a criminal investigation be completed, or even started before the schools initiate their own investigations or procedures. Third, the letter gives the school complete authority to dictate which students are permitted to have legal counsel present during their hearing, as well as suppresses accused students’ rights to cross examine their accusers and witnesses against them. Finally, there is an unwieldy and self-contradictory system of appeal proscribed by the letter which can substantially impact even students that have been cleared by the tribunal of any wrongdoing.

These proscriptions shall be addressed in turn, but it is also worth noting a serious administrative flaw with the creation of the letter. The Department of Education’s Dear Colleague Letter was announced and released without going through any of the usual notice and comment procedures that are mandated under the 1946 Administrative Procedure Act. Notice and Comment is not required when the rule is not “substantive.” However, the line between what is and is not “substantive” in the view of the Court has been muddled and murky over the years. The only common thread is that those rules that affect “individual rights and obligations” are found to be substantive. The Foundation for Individual Rights in Education compellingly argues that creating a rule affecting individual rights and obligations is exactly what the Dear Colleague letter does, as this is the first time that the Department of Education has specified that a university conduct its hearings with a preponderance of the evidence standard. Indeed, the invitation for notice and/or comment appeared after

67 See Ali supra n. 25 at 1 n. 1.
68 See Kate Harding, Asking for It: The Alarming Rise of Rape Culture and What We Can Do About It, 213 (2015)
69 See Ali supra n. 25 at 10.
70 See id.
71 See id. at 12.
72 See id. at 12, 18.
74 See id.
the letter was first released, the means of providing comment was hidden in a footnote, and invited persons looking to comment to email or send a letter to the Department of Education. To date, no action has been taken on any sort of comment that was made, and no formal comment has been posted by the Department of Education. Schools across the country have also changed their review standards to reflect the new “voluntary” standards.

The manner in which the changes were implemented at schools has also been met with criticism. Most notably, a group of law faculty at Harvard University including Alan Dershowitz and noted feminist legal scholar Janet Halley, have attacked Harvard’s post-Dear Colleague letter. In an open letter, they stated that the University “deferred to federal administrative officials, rather than exercise independent judgment,” and, even more concerning, failed to consult the law faculty of the school when implementing its policy. Their specific criticisms of the policy mirror those made by this paper – that the Dear Colleague procriptions leave the accused bereft “of any adequate opportunity to discover the facts charged, to confront witnesses, and present a defense at an adversary hearing.”

Certainly, the most controversial proscription from the Department of Education has been that Universities must implement a preponderance of the evidence standard when investigating alleged sexual assaults on campus. The Dear Colleague Letter states, in no uncertain terms, that a school that fails to adhere to this standard runs the risk of losing its federal funding. This is the lowest possible standard of proof required in any administrative or judicial hearing. Accordingly, it has been criticized by the American Association of University Professors on the grounds that it infringed on the due process rights afforded to tenured professors. The Association held that the adoption of a national preponderance of the evidence standard would erode the due process rights of tenured professors, who can face dismissal following sexual harassment complaints. It raised the specter of false accusations, and the deleterious effect that it could have on an accused professor’s future career and academic freedom. While the rights of tenured professors are not the focus of this paper, the fact that the Dear Colleague Letter does not do anything to distinguish between students and faculty is telling.

This is compounded by the fact that Congress has demonstrated its legislative intent against this manner of regulation by repeatedly voting down bills that would have

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25 See Ali supra n. 25 at n. 1.
29 See Ali supra n. 25 at 16
31 See id.
enshrined a national preponderance of the evidence standard for campus investigations of sexual assault.\textsuperscript{82} Repeatedly, Congress has allowed bills proscribing a preponderance of the evidence standard to either die in committee, or, as in the case of the Leahy Amendment that would have added the standard to the 2011 Violence Against Women Reauthorization Act, specifically withdrew the Amendment from the bill under sharp criticism.\textsuperscript{83}

This also runs counter to the body of legal scholarship that has advised that the clear and convincing evidence standard is the appropriate standard to employ in all student misconduct cases prior to the announcement of the Dear Colleague Letter.\textsuperscript{84}

The next disturbing facet of the Dear Colleague Letter is that schools are advised to begin their investigations of sexual assault even if the police have not completed, or even begun an investigation of a possible sexual assault. The Dear Colleague letter states that police investigations may be “useful for fact gathering but . . . conduct may constitute sexual harassment under Title IX even if the police do not have evidence of a criminal violation.”\textsuperscript{85} This is concerning for a number of reasons, not least of which is the failure by many schools to train their investigators, which generally include a mix of students, faculty, and administrators in how to handle a sexual assault case.\textsuperscript{86} The Dear Colleague letter holds that “the fact finders and the decision-makers should have adequate training.”\textsuperscript{87} It, however, offers no guidance on how to schools are supposed to find, or furnish this training. Indeed, the only example, aid, or clarification that the Dear Colleague Letter provides is crammed in a footnote stating simply that “forensic evidence should be reviewed by a trained forensic examiner.”\textsuperscript{88}

In some cases, such as Wells, this can lead to untrained students ignoring an exculpatory rape kit. In other cases, the results can be more prejudicial and odious. At Stanford University, shortly after the announcement of the Dear Colleague letter, training manuals passed to student jurors state that if accused, an abuser will try to act “persuasive[ly] and logical[ly],” and that “to remain neutral is to collude with the abusive man, whether or not that is your goal.”\textsuperscript{89}

Professor Robert Shibley, writing for the Duke Law Review, has identified over eight hundred schools that rely on the benign-sounding National Center for Higher Education Risk Management. The organization was founded by a self-described “sexual assault activist” who has stated that he “wants to see more students expelled.”\textsuperscript{90} The model that NCHERM employs says that schools can stay “abreast of liability”

\textsuperscript{82} Stephen Henrick, A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses, 40 N. Ky. L. Rev. 49, 62 (2013).


\textsuperscript{85} See Ali supra n. 25 at 9-10.

\textsuperscript{86} See Triplett supra n. 64 at 493.

\textsuperscript{87} See Ali supra n. 25 at 12.

\textsuperscript{88} See id. at n. 30.


by mandating that fact finders employ an affirmative consent model – which mandates that a male looking to initiate sexual contact must ask permission for each advancing stage of sexual contact. The burden of proof, according to NCHERM, should be that the accused must prove that he asked for affirmative consent – thus placing the burden on the accused to demonstrate his innocence in a matter far out-pacing that even placed by the Dear Colleague Letter. As of writing, the methods employed by NCHERM have not been condemned or clarified to any degree by the Department of Education.

Finally, the Dear Colleague Letter sharply curtails the rights of the accused to have counsel present at their hearings, or to cross-examine their accusers. The Dear Colleague Letter “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.” This creates situations where, if the accuser does not feel as though it is necessary to retain her own attorney, the school is not obligated to permit the accused to obtain his own counsel.

Even more concerning is the approach that the Dear Colleague Letter proscribes with regard to cross-examination. The Department of Education “strongly discourages” permitting students to cross-examine each other – which begs the question of how actual cross-examination is performed without lawyers – due to the fact that cross-examination “may be traumatic or intimidating and . . . possibly escalating or perpetuating a hostile environment.”

Due process rights for students have not been extensively examined in court. There are two seminal cases in this matter. The first is Dixon v. Alabama Bd. of Ed. Dixon, a Fifth Circuit case that held students who were expelled for their role in a lunchroom sit-in. The majority in Dixon held that it was indisputable that education was “vital, and indeed, basic to a civilized society.” It then went on to hold that if the students were expelled from their universities it “may well prejudice the student in completing his education at any other institution.”

To this end, the Dixon court held that schools do not have the authority to remove students without holding a hearing. While hearings did not have to be “full-dressed judicial proceeding[s], with the right to cross-examine witnesses,” the university has an obligation to hear “both sides in considerable detail . . . best suited to protect the rights of all involved.” Even though cross-examination is not specifically mandated by the Dixon court in these hearings, “the rudiments of an adversarial process may be preserved without encroaching on the interests of the college.”

The holding in Dixon was lauded as “landmark” by the Supreme Court in Goss v. Lopez. Goss held that schools are bound to “recognize a student’s right to . . . education as a property interest that is protected by the Due Process Clause.”

This right has been expanded even further in the Northern District of New York where a federal court held in Donahue v. Lopez that
Despite the “sensitivity” of the proceedings, the accused student has a right to cross-examine witnesses against him is one based on the credibility of his accuser. The Donahue court, however, held that the accused does not have a right to counsel at his hearing. This has been disputed by a holding in the Eastern District of Pennsylvania in Furey v. Temple University, where a federal court held a student facing expulsion has a right to have counsel at his hearing. This right was also held by the court to be particularly important when a witnesses’ credibility is a critical factor in determining the outcome of the hearing. As of writing this, the Department of Education has provided no guidance on how schools are supposed to manage this patchwork of competing rulings.

The Department of Education justifies many of its policies by holdings, including the restriction of due process and the preponderance of the evidence standard by stating that this is the standard generally employed in all other administrative law hearings. Even if the diminishing of sexual assault investigations to mere “administrative hearings” was not reducive in and of itself, it is a thin cloak to deny the accused the right to counsel or cross examination. In the Duke Law Review, Professor Matthew Tripplet noted that in similar administrative law hearings, such as those under the Administrative Protection Act, or those regarding military members that are facing involuntary discharge, the right to counsel and cross examination are protected.

Schools may also attempt to justify their restrictions on due process by stating that these hearings are intended to be educational in nature, rather than punitive. This was the case in the University of North Dakota’s decision to not grant a student-defendant a new hearing despite the fact that his accuser both recanted, and was facing charges for filing a false complaint. Since there was no precipitous deprivation of liberty at stake in a campus adjudication, the university should not be compelled to establish an adversarial process. This is a patently disingenuous and unreasonable excuse. There is a whole bevy of due process rights available for defendants in civil suits that also face no deprivation of liberty, but only the taking of property. The Supreme Court addressed this issue in Addington v. Texas, where it held that the standard of review in civil cases alleging “fraud, or any other kind of quasi-criminal wrongdoing” should have a clear, unequivocal and convincing standard of proof due to the fact that there are interests at stake beyond the mere “loss of money.” There should not be any dispute that an adjudication that a person is “responsible” for the sexual assault of another is responsible for a “quasi-criminal” wrongdoing. As stated in Dixon, an expulsion from a school can have a seriously deleterious and prejudicial effect on a student’s ability to achieve matriculation at another university. This also begs the question of what possible educational value there is in punishing a student for an act that he is not clearly and convincingly guilty of.
This is all to say nothing of the fact that a student’s investment in his higher education represents a substantial property interest that he should not be relieved of without Due Process, as held in Goss. The Goss court was correct to recognize a student’s interest in his education as a property right, and that case concerned the rights of students in compulsory pre-tertiary educations, where the students presumably have invested none of their own.\(^9\)

This is compounded by two factors. The first, especially at state-run public institutions that the State’s role in providing for the education of its citizens is “perhaps the most important role of state and local governments.”\(^1\) The interest in these colleges should be in providing education, rather than acting as amateur police officers or prosecutors on matters in which they lack the training of those designated by the State to perform those duties. The second is that education represents a far more substantial property interest now than it did in 1975, when the Supreme Court decided Goss. Since 1975, the average cost of a year at a four-year college has nearly tripled, from $7,833 to $19,548. At private colleges, it has more than tripled, going from $10,088 to $32,405.\(^1\)

Also, the lackadaisical attitude that the Dear Colleague Letter takes towards any kind of appellate process is troubling. The only mention that it makes of it in the nineteen pages of the document is that “if the school provides for appeal of the findings or remedy, it must do so for both parties.”\(^1\)

The Dear Colleague letter makes no reference as to what persons should review this appeal, what sort of procedures should be in place, or what standard of review shall be used in the midst of the appellate process. The only proscription is that an appeal should be “available to both sides,” and that any tribunal that the accused faces shall be furnished with a means of reviewing the content of the meeting. This may be in the form of audio recordings or transcripts, or even something as anemic as a “written finding of fact” from the tribunal.\(^2\) Again, this creates the same complex patchwork of cases that is created by the disparate rulings regarding the rights of students to counsel and their rights to cross examination. In New York, even private universities are subject to a judicial review of their tribunal’s decisions.\(^3\) In Arizona, all students enrolled in public colleges enjoy a statutory right to judicial review of hearings at the university level.\(^4\) However, students in Nevada can only have their decisions reviewed by the Dean of Students, who enjoys the right to impose an even greater sanction than those imposed by the university tribunal.\(^5\) As mirrored by their silence on the rights to counsel and cross examination, the Department of Education offers neither students nor schools guidance on how to navigate this patchwork.

The Dear Colleague letter then contradicts itself six pages later by stating that an accuser is given the exclusive opportunity to

\(^9\) See Goss supra n. 96 at 576.
\(^1\) See Ali supra n. 25 at 12.
\(^1\) See id.
\(^1\) See Henrick supra n. 81 at 80 (citing Gertler v. Goodgold, 487 N.Y.S.2d 565 (N.Y. App. Div. 1st Dep’t 1985))
meet with the school’s Title IX coordinator to seek a remedy that is outside of the jurisdiction of the investigative tribunal. The letter goes on to clarify that an accuser may not wish to be in the same classes or dorm rooms their alleged attacker, and the Title IX coordinator at the school is graced with the powers to grant the accuser remedies. Under the authority of a Title IX coordinator, “remedies” can presumably include barring the accuser’s alleged attacker from certain dormitories or classes if an accuser feels uncomfortable around the person that they accused. Even a student who has been adjudicated non-responsible, and cleared of wrongdoing may be forced to incur substantial monetary costs if he is forced to move buildings, or remain on campus for an extra semester because he has been barred from a class due to the actions of an unaccountable Title IX coordinator. At no point in the Dear Colleague letter is it mentioned how an accused student would be able to seek redress from the Title IX coordinator, or provide for any manner of appeal for the Title IX coordinator’s decision.

As it stands, the “historic” and “clarifying” Dear Colleague Letter has offered little in the way of clarification of how to address due process concerns for students accused of sexual assault, and stands to strip many potentially innocent students of their educations and their future. The current framework provided by the Department of Education is one that allows for the presumption of guilt, does not take into account the due process rights of students or faculty, and will, in all likelihood, lead to a rash of senseless expulsions on spurious grounds. This is all to say nothing of the fact that it is badly worded, contradictory to its goal of “equal representation” of both the accused and the accuser – which may have been prevented had the Dear Colleague letter been subjected to the usual notice and comment procedures.

Conclusion – Proposed Solutions for Addressing Both Due Process Rights and Victim Protection

Despite the seeming inflexibility created by the Department of Education and the “Dear Colleague” letter, there is reason to believe that due process rights and victim protection are not, and should not be mutually exclusive. The most important thing to bear in mind is that, regardless of the amount and the quality of training that school administrators and those who sit on university tribunals undergo, they will, in almost all cases, be less equipped to handle cases of sexual assault than trained professionals in police or prosecutor’s offices. As the court noted in Wells, campus tribunals are certainly more equipped to handle instances of academic dishonesty, rather than the complex, trying and traumatic practice of adjudicating sexual assault allegations. These investigations have been blessed by the government on an illusory foundation of faulty sociology and statistics, promulgated by an overly zealous, if well-meaning Department of Education, and clumsily implemented by schools administrators in fear of activist backlash or loss of federal funding.

This is not to suggest, as Professor Hendrick does, that campuses should get out of the business of investigating assaults that happen on their campuses entirely. There is certainly a compelling interest in schools to keep their campuses free and safe from sexual assaults committed. There is also the very real concern

117 See Ali supra n. 25 at 18.
118 See id. at n. 45.
119 See Wells supra n. 1 at 749.
120 See Hendrick supra n. 81 at 80-81.
that the nature of sexual assault investigations is one that often is overlooked by law enforce-
ment.121

Addressing this issue is one that requires the joint focus of school administrators, law enforcement, politicians and activists alike. In short, the current state of campus safety would not be legally or morally bereft by inject-
ing a degree of nuance into their adjudications that would currently run contrary to the pro-
scriptions of the Dear Colleague letter. Bearing in mind the substantial property inter-
est that students invest in their education, the quasi-criminal nature of a finding that they are “responsible” for sexual assault, and the ease with which schools can promulgate information — including black marks on a student’s transcript, students accused of sexual assault on campus should be afforded a full measure of due process rights, including their right to counsel, and the rights to cross examine wit-
tesses, including their accuser. If schools truly wish to embrace the mantle of law enforce-
ment within the confines of their own campuses, they should divest themselves of the flimsy notion that their adjudicative proceedings are “coop-
erative,” or “educational” in nature.122

To reflect the gravity of the situation that both students and schools face, proceed-
ings that could potentially result in expulsion, or suspension for more than a semester, adju-
dication proceedings should be conducted to a clear and compelling evidence standard. It is not unreasonable to adjudicate lesser offenses that don’t bear the possibility of expulsion and
permanent censure to a preponderance of the evidence standard.

Most importantly though, school ad-
judicators and administrators should look to train their juries and other triers of fact on how to actually rule impartially and efficaciously on how to examine evidence in a sexual assault investigation. The Department of Education should mandate, rather than suggest, that all persons looking to adjudicate sexual assault accusations should enter intensive training on how to treat witnesses, the accused parties and evidence. This training should come from local professionals, rather than ideologically driven groups like NCHERM. If there is forensic evi-
dence present at the adjudication, it should be presented and explained by professionals, to prevent untrained undergraduate students from discarding exculpatory forensic evidence because they “don’t know what they’re looking at.”

The fight to stop sexual assault on cam-
puses is an admirable one, and there should be no argument that one sexual assault at an institution of higher learning is one too many. But overeager bureaucrats and activists are en-
abling feckless administrators to bring about an environment where individual rights are sac-
ificed on the altar of grand social correction. This never has, and never should be a hallmark of any American justice system, from the Su-
preme Court on down to the Xavier University Conduct Board. Avoiding that is how you not
only avoid more victims like Dez Wells in the country, but achieve real and lasting justice for all.

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122 See Silvergate supra n. 105.
ABOUT THE AUTHOR

Travis Nemmer graduated from the State University of New York at Buffalo with degrees in History and Political Science in 2013 and by print time will (hopefully) have graduated from American University’s Washington College of Law in 2016. During his time at American University, he has worked at the Baltimore State’s Attorney’s Office’s Juvenile Division, the Brooklyn District Attorney’s Office’s Special Victims Unit, and a prominent Defense firm in Maryland. He was elected to be the 2014 President of the Washington College of Law’s Criminal Law Society, the Head Writer of the 2016 Law Revue production, and was a co-recipient of Best Brief and Runner-up Awards at the Catholic University of America’s Immigration Moot Court.