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## NOTES

### PEER REVIEW: EXPANDING PROCEDURAL DUE PROCESS TO REQUIRE STUDENTS AS MEMBERS OF UNIVERSITY SEXUAL MISCONDUCT HEARING BOARDS

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#### INTRODUCTION

Peter Lake once remarked, “From a safety point of view, the business of higher education is more challenging than running a theme park, cruise ship, casino, or even an assisted living facility.”<sup>1</sup> Schools face many risk management problems often reported on by the media, including criminal attacks, student injuries, Greek life incidents, and alcohol problems.<sup>2</sup> This media coverage can lead to negative exposure that can ultimately affect the school’s retention rates, its academic success, and perhaps most importantly, its reputation.<sup>3</sup> One of the greatest issues for many colleges is campus rape and sexual assault and the negative publicity it brings.<sup>4</sup>

In 2007, the U.S. Department of Justice reported that one in five women will experience sexual assault over the course of their college careers.<sup>5</sup> While some refute the study as simplistic and the number as inaccurate,<sup>6</sup> the issue still remains

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1. PETER F. LAKE, *THE RIGHTS AND RESPONSIBILITIES OF THE MODERN UNIVERSITY: THE RISE OF THE FACILITATOR UNIVERSITY* 4 (2d ed. 2013). (Peter Lake is a Professor of Law and the Director of the Center for Excellence in Higher Education Law & Policy at Stetson University College of Law.)

2. *Id.* at 2.

3. *Id.*

4. *See* THE HUNTING GROUND (Chain Camera Pictures 2015).

5. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY XVIII* (U.S. Dept. of Justice 2007), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf> [<https://perma.cc/8LMV-SH3R>].

6. Christopher Krebs & Christine Lindquist, *Setting the Record Straight on ‘1 in 5,’* TIME (Dec. 15, 2014), <http://time.com/3633903/campus-rape-1-in-5-sexual-assault-setting-record->

at the forefront for universities that want to maintain a safe environment for students.<sup>7</sup> In an effort to combat campus rape and sexual assault, the Office for Civil Rights in the Department of Education, the lead agency for enforcing Title IX,<sup>8</sup> issued a “Dear Colleague” letter informing schools of issues they need to address in order to comply with Title IX.<sup>9</sup> Citing sexual harassment and violence as a form of discrimination disrupting the educational environment,<sup>10</sup> the letter informs schools that the Department of Education may withdraw a school’s federal funding for failing to comply with the enumerated requirements.<sup>11</sup> Four years later, the Department of Education issued another “Dear Colleague” letter, this time requiring schools to hire a Title IX Coordinator to hear complaints related to the law and carry out the necessary procedures to enforce the law, even if the complaint was not directly sent to the Coordinator.<sup>12</sup> This created a “Sex Bureaucracy,” which turned college administrators into federal bureaucrats responsible for defining healthy sex and disciplining deviations from those supposed norms.<sup>13</sup>

Many have criticized the Department of Education’s mandates, claiming that the new directives have created a “presumption of guilt” against those accused.<sup>14</sup> Some critics even propose that the heightened awareness of statistics consistently published by the Department of Education pushes schools to find cases against the accused.<sup>15</sup> Schools have a vested interest in their reputation and can face criticism if the public perceives that they have reached an incorrect result in sexual assault cases.<sup>16</sup> This came to light when a writer for *Rolling Stone* published a story based on a University of Virginia student’s claim that she was

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straight/ [https://perma.cc/P9UG-ANBW].

7. *Rape Culture*, MARSHALL UNIV., <http://www.marshall.edu/wcenter/sexual-assault/rape-culture/> [https://perma.cc/AC8G-C2X5] (last visited Feb. 2, 2018).

8. See generally Jacob Gersen & Jeannie Suk Gersen, *The College Sex Bureaucracy*, 63 CHRON. HIGHER EDUC. (2017).

9. See Letter from Russlynn Ali, Assistant Sec’y for Civil Rights, U.S. Dep’t of Educ., to Dear Colleague (Apr. 4, 2011), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.pdf> [https://perma.cc/4YRF-SZ4W] [hereinafter Ali Letter].

10. *Id.* at 3.

11. *Id.* at 16.

12. See generally Letter from Catherine E. Lhamon, Assistant Sec’y. for Civil Rights, U.S. Dep’t. of Educ., to Dear Colleague (Apr. 24, 2015), available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201504-title-ix-coordinators.pdf> [https://perma.cc/PAV9-4U77] [hereinafter Lhamon Letter].

13. See generally Gersen & Gerson, *supra* note 8.

14. Peter Berkowitz, *College Rape Accusations and the Presumption of Male Guilt*, WALL ST. J. (Aug. 20, 2011), <https://www.wsj.com/articles/SB10001424053111903596904576516232905230642> [https://perma.cc/HA7G-N3D7].

15. *Id.*; Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49, 59 (2013).

16. ROBERT L. SHIBLEY, TWISTING TITLE IX 35 (Encounter Broadside No. 49 2016); see THE HUNTING GROUND, *supra* note 4.

gang raped by a group of fraternity members.<sup>17</sup> The story, titled “A Rape on Campus,” gained national attention and led to public outcry against the University of Virginia for the way it handled complaints by students.<sup>18</sup> The school almost immediately released a statement condemning the acts and suspending all fraternities and associated parties.<sup>19</sup> However, the allegations turned out to be false.<sup>20</sup> More research revealed that *Rolling Stone* published the story without ensuring the validity of the claims.<sup>21</sup>

Unfortunately, stories like the University of Virginia case have become more common as the changes made to school disciplinary procedures following the “Dear Colleague” letters have led to a growing number of contested rulings of school sexual misconduct in the past five years.<sup>22</sup> Still, others claim that the Department of Education’s collection of campus crime data encourages schools to not address sexual assault cases to keep the number of reported cases low.<sup>23</sup> The existing government-imposed system results in second-class justice that fails the accused, sexual assault victims, and institutions of higher education.<sup>24</sup> Clearly, a change is needed to address the faults of the current system.

The Office for Civil Rights in the Department of Education addressed this issue by repealing the 2011 “Dear Colleague” letter on September 22, 2017.<sup>25</sup> The 2017 “Dear Colleague” letter described the results of the prior guidance documents as leading to the deprivation of rights as those accused were denied fair process while victims were denied an adequate resolution of their complaints.<sup>26</sup> In addition to withdrawing the 2011 “Dear Colleague” letter, the 2017 letter declares an intention to develop a new approach that seeks to meet the needs of all students affected by university disciplinary proceedings.<sup>27</sup>

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17. Jason Silverstein, *Rolling Stone* writer: When UVA rape story became her ‘nightmare’, N.Y. DAILY NEWS (July 4, 2016, 1:43 PM), <http://www.nydailynews.com/news/national/rolling-stone-writer-uva-rape-story-nightmare-article-1.2698465> [https://perma.cc/YNU5-HNVB].

18. Ralph Ellis, *UVA suspends fraternities after report on gang rape allegation*, CNN (Nov. 25, 2014, 4:42 PM), <http://www.cnn.com/2014/11/22/us/university-of-virginia-sexual-assault-allegations/index.html> [https://perma.cc/CT57-DQQS].

19. *Id.*

20. Silverstein, *supra* note 17.

21. *Id.*

22. GINA LAUTERIO ET AL., LAWSUITS AGAINST UNIVERSITIES FOR ALLEGED MISHANDLING OF SEXUAL MISCONDUCT CASES 1 (SAVE Servs. 2016), available at <http://www.saveservices.org/wp-content/uploads/Sexual-Misconduct-Lawsuits-Report2.pdf> [https://perma.cc/9TXW-8WVL] [hereinafter LAWSUITS REPORT].

23. THE HUNTING GROUND, *supra* note 4.

24. LAWSUITS REPORT, *supra* note 22, at 22.

25. See generally Letter from Candice Jackson, Assistant Sec’y. for Civil Rights, U.S. Dep’t. of Educ., to Dear Colleague (Sept. 22, 2017), available at <https://www2.ed.gov/about/offices/list/ocr/letters/colleague-title-ix-201709.pdf> [https://perma.cc/A2LJ-GZ8X] [hereinafter Jackson Letter].

26. *Id.* at 1-3.

27. *Id.*

In order to further the interests of equality and university discipline, this Note argues that students' due process rights should be broadened to guarantee a hearing with a board consisting, at least in part, of students without a preexisting bias toward either party. Part I focuses on the history of Title IX and growth of the stigma of "rape culture" that led to the passage and subsequent repeal of the Office for Civil Rights's 2011 "Dear Colleague" letter, changing the landscape of university discipline forever. Part II will examine how due process became a right for college students, the case law that has created the current standards for procedural due process with which all schools are required to comply, and the ways in which courts decide the necessary procedures for non-judicial hearings. Finally, Part III discusses how the community response to the "Dear Colleague" letters has created a greater risk for loss of liberty for those accused of sexual assault or misconduct while in school that ultimately require an expansion of due process for students. This Note then examines the effects of the current Administration's repeal of the "Dear Colleague" letters and ultimately argues that requiring a hearing board that includes one's peers is the best way to expand due process for students in the interest of fairness while still maintaining the ultimate goals of the universities and the U.S. Department of Education.

## I. THE NEW STANDARDS FOR SCHOOL ADJUDICATION

### *A. The History of Title IX*

As the women's civil rights movement grew in the late 1960's and early 1970's, sex bias and discrimination in schools became a major public policy concern.<sup>28</sup> Advocacy organizations complained of an industry-wide pattern of bias against women in colleges and universities.<sup>29</sup> This led Congress to focus on the issue of sex bias in education during the summer of 1970.<sup>30</sup> After a series of hearings, Representative Edith Green of Oregon unsuccessfully attempted to add a prohibition of sex discrimination to the Education Amendments of 1971.<sup>31</sup> One year later, Indiana Senator Birch Bayh proposed a similar amendment aiming to combat "the continuation of corrosive and unjustified discrimination against women in the American educational system."<sup>32</sup> Bayh also emphasized the negative economic impact suffered by women as a result of educational inequities.<sup>33</sup> After several months of revisions in House and Senate committees, Richard Nixon signed into law Title IX of the Education Amendments of 1972.<sup>34</sup>

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28. U.S. DEP'T OF JUSTICE, TITLE IX LEGAL MANUAL, at 16-17 (2001), *available at* <https://www.justice.gov/sites/default/files/crt/legacy/2010/12/14/ixlegal.pdf> [<https://perma.cc/T7MH-8RVD>] [hereinafter TITLE IX MANUAL].

29. *Id.*

30. *Id.*

31. *Id.* at 17.

32. *Id.* (quoting 118 Cong. Rec. 5803 (1972)).

33. *Id.*

34. *Id.* at 19.

In short, the law provides that “[n]o person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance.”<sup>35</sup>

Title IX applies to any operations of an educational institution that receives federal funding, essentially creating a contract between the federal government and colleges to comply with the statute or lose federal money.<sup>36</sup> Federal funding includes grants to schools or school districts as well as student-direct funds such as Pell grants and Stafford loans.<sup>37</sup> While this clearly applies to public schools, any private school that accepts federal student loans is taking federal funding and therefore must comply with Title IX regulations.<sup>38</sup> Only a small group of private universities do not accept any form of federal funding.<sup>39</sup> Schools like Hillsdale College in Michigan refuse to take federal funding because of the duties imposed by federal regulations, including Title IV, Title IX, and other laws, like a requirement to publish a breakdown of the student population by race or income.<sup>40</sup>

Title IX has been the driving force behind creating more opportunities for women to achieve greater equality in a variety of areas.<sup>41</sup> Initially, Title IX made headlines in the context of college athletics.<sup>42</sup> In 1974, the statute was amended to direct the Department of Health Education and Welfare to publish regulations that consider the nature of intercollegiate athletics in assessing Title IX violations.<sup>43</sup> The amendment effectively required schools to provide athletic scholarships for men and women proportionately to their percentage of the student body.<sup>44</sup> This means if fifty-seven percent of the school is female, fifty-seven percent of the scholarships must go to female athletes.<sup>45</sup> This led to a steady rise in female participation in athletics over the next forty years.<sup>46</sup> In 2006, nearly three million girls competed in high school sports as compared to just under three

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35. 20 U.S.C. § 1681(a) (2012).

36. See TITLE IX MANUAL, *supra* note 28.

37. See SHIBLEY, *supra* note 16, at 5.

38. *Id.*

39. *Id.*

40. Ibbey Caputo & Jon Marcus, *The Controversial Reason Some Religious Colleges Forgo Federal Funding*, ATLANTIC (July 7, 2016), <http://www.theatlantic.com/education/archive/2016/07/the-controversial-reason-some-religious-colleges-forgo-federal-funding/490253/> [<https://perma.cc/W9DV-9ZG6>].

41. TITLE IX AT 35: BEYOND THE HEADLINES, at 1 (Nat’l Coal. for Women & Girls in Educ. 2008), available at <http://www.ncwge.org/PDF/TitleIXat35.pdf> [<https://perma.cc/CG3P-DL69>] [hereinafter BEYOND THE HEADLINES].

42. SHIBLEY, *supra* note 16, at 5.

43. TITLE IX MANUAL, *supra* note 28, at 19.

44. SHIBLEY, *supra* note 16, at 6.

45. *Id.*

46. BEYOND THE HEADLINES, *supra* note 41, at 8.

hundred thousand before Title IX passed.<sup>47</sup> The law has also had a positive impact on women in education in general, particularly in expanding women's involvement in science, technology, engineering, and math ("STEM") fields.<sup>48</sup>

In addition to expanding opportunities in education for women, Title IX also protects against sexual harassment.<sup>49</sup> Shortly after the law passed, the Supreme Court held that sexual harassment violates Title IX, and students could seek monetary damages if they were harassed by a teacher.<sup>50</sup> The law can also put schools at fault for not addressing student-on-student sexual assault or harassment.<sup>51</sup> Creating an environment free from sexual harassment or assault has become an increasing concern for the higher education community as it has become more cognizant of sexual misconduct on campus.<sup>52</sup> While the U.S. Department of Justice reported that between twenty and twenty-five percent of women will be sexually assaulted or raped over the course of their college careers,<sup>53</sup> school disciplinary rulings did not reflect these numbers.<sup>54</sup> Many schools, required by the Department of Education to report rape and sexual assault statistics, reported little to no long-term suspensions or expulsions due to sexual misconduct.<sup>55</sup> This led many to criticize that colleges have a "rape culture," where sexual harassment is tolerated and almost encouraged.<sup>56</sup> If a college does not have effective policies in place to address harassing conduct severe enough to create a hostile environment, it is considered discrimination on the basis of sex and a violation of Title IX.<sup>57</sup> Thus, "rape culture" became a Title IX issue. Vice President Joe Biden, a long-time advocate for legislative change for violence against women, stated, "[s]tudents across the country deserve the safest possible environment in which to learn. That's why we're taking new steps to . . . end the cycle of sexual violence on campus."<sup>58</sup>

#### *B. Department of Education's "Guidance"*

In response to concerns of sexual violence at universities, the U.S. Department of Education's Office of Civil Rights passed a "Dear Colleague" letter on April 4, 2011, addressing Title IX and how it relates to campus

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47. *Id.*

48. *Id.* at 15-17.

49. *Id.* at 33-37.

50. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 76 (1992); BEYOND THE HEADLINES, *supra* note 41, at 33.

51. BEYOND THE HEADLINES, *supra* note 41, at 33.

52. *Id.* at 35.

53. KREBS ET AL., *supra* note 5, at 2-1.

54. THE HUNTING GROUND, *supra* note 4.

55. *Id.*

56. *Id.*

57. *See generally* Gersen & Gersen, *supra* note 8.

58. LAKE, *supra* note 1, at 162.

adjudication of sexual misconduct.<sup>59</sup> A “Dear Colleague” letter acts as a significant guidance document to convey an agency’s expectations in following rules promulgated and administered by that agency.<sup>60</sup> Guidance documents have typically been used to clarify current laws and regulations on a specific subject.<sup>61</sup> However, due to the Administrative Procedure Act’s (“APA”) broad interpretation of the term “rule,” guidance documents that interpret or prescribe law or policy can qualify as a rule and subject a person or entity to penalties as if the document were legally binding.<sup>62</sup> Thus, a “Dear Colleague” letter can have a binding effect on those subject to the directives established in the letter.<sup>63</sup> Unlike standard rules for administrative agencies, the guidance document does not have to follow the notice-and-comment process required by the APA, allowing the Department of Education to issue the letter without the chance for public input.<sup>64</sup>

The 2011 “Dear Colleague” letter established ways in which the schools should address sexual harassment and assault to better comply with the anti-discrimination mandates of Title IX.<sup>65</sup> Prior to 2011, the Office of Civil Rights had inconsistent opinions on college requirements for sexual misconduct policies, sometimes even telling schools to defer to local law enforcement.<sup>66</sup> Schools would often handle these cases in the manner in which they felt best.<sup>67</sup> However, the Office of Civil Rights used the “Dear Colleague” letter to create mandatory policies dictated by the office’s interpretations of Title IX.<sup>68</sup> Schools now had an obligation to model their policies after the mandates of the 2011 letter.<sup>69</sup> These policies include requiring schools to adjudicate any allegation of sexual assault, allowance for either party to appeal an adverse decision, and notification to complainants of their legal rights, although the letter makes no mention of the same rights to the accused.<sup>70</sup> However, the most notable of these requirements is the mandate that the preponderance of the evidence standard be used for all sexual misconduct hearings at universities.<sup>71</sup>

The standard of proof is the evidentiary standard by which a complaint is

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59. See Ali Letter, *supra* note 9, at 1-3.

60. Matthew R. Triplett, *Sexual Assault on College Campuses: Seeking the Appropriate Balance Between Due Process and Victim Protection*, 62 DUKE L.J. 487, 507 (2012).

61. SHIBLEY, *supra* note 16, at 31.

62. William Funk, *Interpretive Rules Symposium: A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322.

63. See *id.*

64. SHIBLEY, *supra* note 16, at 31-33.

65. See Ali Letter, *supra* note 9, at 2.

66. See generally Gersen & Gersen, *supra* note 8.

67. *Id.*

68. *Id.*

69. Ali Letter, *supra* note 9, at 6.

70. LAWSUITS REPORT, *supra* note 22, at 1.

71. Ali Letter, *supra* note 9, at 10.

decided.<sup>72</sup> Three standards exist at common law: (1) preponderance of the evidence, (2) clear and convincing evidence, and (3) beyond a reasonable doubt.<sup>73</sup> Preponderance of the evidence, most often used for issues in civil cases,<sup>74</sup> determines what is more likely than not to have occurred (50.001% certainty of guilt).<sup>75</sup> Beyond a reasonable doubt is constitutionally required for a criminal conviction and is the most difficult to prove.<sup>76</sup> This is the standard that a court of law would use in a rape or sexual assault case. Finally, clear and convincing evidence represents an intermediate standard between preponderance of the evidence and beyond a reasonable doubt.<sup>77</sup> This standard is often referred to as “highly probable” or “reasonably certain” that the conduct occurred.<sup>78</sup>

The National Center for Higher Education Risk Management (“NCHERM”) recommended to schools in 2001 that they use the preponderance of the evidence standard in sexual misconduct hearings.<sup>79</sup> The NCHERM criticized the clear and convincing evidence standard for acting as a structural impediment for alleged victims.<sup>80</sup> A structural impediment exists when “some aspect(s) of a college’s sexual assault policies, procedures, or protocol [are] non user-friendly.”<sup>81</sup> The NCHERM further advocated that hearing boards would be able to better understand the preponderance of the evidence standard as opposed to the clear and convincing standard because it is easier to define, train on, and more likely to be applied correctly by a hearing board.<sup>82</sup>

Although clear and convincing was used by most schools prior to 2011, the Office of Civil Rights determined that this standard is inconsistent with civil rights laws and therefore not equitable under Title IX.<sup>83</sup> The Office of Civil Rights uses the preponderance of the evidence in a variety of their other hearings and asserted that this should become the standard for school sexual assault proceedings.<sup>84</sup> The 2011 “Dear Colleague” letter emphasized that refusing to follow this standard would result in the Department of Education withholding federal funding from the university.<sup>85</sup>

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72. BRETT A. SOKOLOW, COMPREHENSIVE SEXUAL MISCONDUCT JUDICIAL PROCEDURES 20 (NCHERM 2001), available at [https://www.ncherp.org/pdfs/COMPREHENSIVE\\_CAMPUS\\_SEXUAL\\_MISCONDUCT\\_JUDICIAL\\_PROCEDURES.pdf](https://www.ncherp.org/pdfs/COMPREHENSIVE_CAMPUS_SEXUAL_MISCONDUCT_JUDICIAL_PROCEDURES.pdf) [<https://perma.cc/B2Z7-JDZ6>].

73. David L. Schwartz & Christopher B. Seaman, *Standards of Proof in Civil Litigation: An Experiment from Patent Law*, 26 HARV. J. LAW & TECH. 429, 435-36 (2013).

74. *Id.*

75. SHIBLEY, *supra* note 16, at 34.

76. Schwartz & Seaman, *supra* note 73, at 435-36.

77. *Id.* at 435-37.

78. Ali Letter, *supra* note 9, at 11.

79. See generally SOKOLOW, *supra* note 72.

80. *Id.* at 21-22.

81. *Id.* at 6.

82. *Id.* at 20-21.

83. Ali Letter, *supra* note 9, at 11.

84. *Id.*

85. *Id.* at 16.



While the 2011 “Dear Colleague” letter also mandated that schools hire a Title IX Coordinator to oversee the efforts of the law at the universities,<sup>86</sup> a second “Dear Colleague” letter issued by the Office of Civil Rights in 2015 re-enforced this requirement for a Title IX Coordinator and established the essential duties for the position.<sup>87</sup> The 2015 “Dear Colleague” letter was accompanied by a Resource Guide detailing the job responsibilities in helping to ensure the school’s compliance with Title IX’s administrative requirements.<sup>88</sup> This includes having knowledge of university policies and procedures on sex discrimination, including sexual harassment, as well as helping to draft and revise the school’s policies to ensure compliance.<sup>89</sup> Coordinators should educate the school community on Title IX and ways to file complaints as well as assess the effects on the campus climate.<sup>90</sup> This includes prevention programs aimed at identifying risk factors for sexual violence.<sup>91</sup> The regulatory requirement imposed by the 2015 “Dear Colleague” letter has forced schools to increase Title IX operations, leading some to even enact a surcharge added to student tuition to pay for the expanded duties.<sup>92</sup> As a result of the “Dear Colleague” letters, colleges have now become deeply involved in the business of providing advice on sex and relationships.<sup>93</sup>

### *C. The Landscape Created by the “Dear Colleague” Letters*

The “Dear Colleague” letters created a “watershed event in expanding and re-defining the role of colleges and universities in the adjudication of allegations of sexual misconduct.”<sup>94</sup> From 2006 to 2010, schools received a total of 262 claims of student-perpetrated sexual assault, an average of just over fifty-two per year.<sup>95</sup> Student sexual assault cases heard at universities rose dramatically following the 2011 “Dear Colleague” letter, increasing every year after it was passed and reaching an all-time high of 154 in 2013.<sup>96</sup> This could imply that the goal of inhibiting the “structural impediments” of adjudication for victims was reached.

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86. *Id.* at 7.

87. *See generally* Lhamon Letter, *supra* note 12.

88. U.S. DEP’T OF EDUC., TITLE IX RESOURCE GUIDE (Apr. 2015), *available at* <http://www2.ed.gov/about/offices/list/ocr/docs/dcl-title-ix-coordinators-guide-201504.pdf> [<https://perma.cc/5RCE-V2PT>].

89. *See generally id.*

90. *Id.* at 2-8, 16-17.

91. Gersen & Gersen, *supra* note 8.

92. Evan Koslof, *UMD student government proposes mandatory fee against sexual misconduct*, WUSA (Oct. 13, 2016, 6:46 PM), <http://www.wusa9.com/news/local/college-park/umd-student-government-proposes-mandatory-fee-against-sexual-misconduct/335843797> [<https://perma.cc/FA2L-2NNL>].

93. Gersen & Gersen, *supra* note 8.

94. LAWSUITS REPORT, *supra* note 22, at 1.

95. *Id.* at 1-2.

96. *Id.* at 2.

However, the new guidelines issued by the Office of Civil Rights also led to more contested rulings by students accused of sexual misconduct.<sup>97</sup> Of the Title IX cases filed in courts in 2014-2015, seventy-eight percent were filed by accused students.<sup>98</sup> Some have attributed this increase in contested claims by the accused to the pressure faced by schools from the Department of Education, leading to many disciplinary procedures that could be seen as unfair to those accused.<sup>99</sup> The number of lawsuits filed by accused students in federal court tripled from 2013 to 2014.<sup>100</sup> A total of ten cases were filed in 2013, thirty-four cases in 2014, fifty-three cases in 2015, and twenty-four cases were reported during 2016 as of July 15.<sup>101</sup> Thirty cases filed by a student accused of sexual misconduct in 2012 or later were found, at least in part, for the plaintiff.<sup>102</sup>

Two schools in Indiana, DePauw University and Indiana University, have faced lawsuits filed by accused students after 2011.<sup>103</sup> In *King v. DePauw Univ.*, DePauw University found a male student in a fraternity, King, responsible for sexual assault.<sup>104</sup> The hearing board consisted of three members from a seven-member Sexual Misconduct Hearing Board made up of the school's administrators.<sup>105</sup> King sought to reverse the Board's decision through the school's appeals procedure, citing issues such as a failure to consider the conflict of interest between the representative for the complaint's advisor and the Title IX Coordinator, who were married, the fact that a relative of the complainant had recently made a substantial donation to the school, and the overall lack of evidence supporting the Board's decision.<sup>106</sup> The appeal was denied and King filed for a preliminary injunction to permit him to resume his studies.<sup>107</sup> The court granted the injunction, concluding that DePauw acted in bad faith in its treatment of King.<sup>108</sup>

A former student at Indiana University accused of sexual assault recently filed a case in the Southern District of Indiana alleging the school discriminated against him based on his gender.<sup>109</sup> Although the Monroe County Prosecutor

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97. *Id.*

98. *Id.*

99. See Jessica Denis, *Title IX and College Rape: A Series of Injustice Part 1*, HUFFPOST (June 27, 2016, 2:43 PM), [http://www.huffingtonpost.com/jessica-denis/title-ix-and-college-rape\\_b\\_10637346.html? \[https://perma.cc/JT22-PQML\]](http://www.huffingtonpost.com/jessica-denis/title-ix-and-college-rape_b_10637346.html? [https://perma.cc/JT22-PQML]).

100. LAWSUITS REPORT, *supra* note 22, at 1-2.

101. *Id.* at 2.

102. *Id.*

103. *Id.* at 3.

104. 2014 U.S. Dist. LEXIS 117075, 21 (S.D. Ind. 2014).

105. *Id.* at 11.

106. *Id.* at 23-24.

107. *Id.* at 25.

108. *Id.* at 31.

109. Fatima Hussein, *Former IU student accused of rape sues school, accuser for defamation*, INDYSTAR (Dec. 26, 2016, 5:04 AM), [https://www.indystar.com/story/news/2016/12/26/former-iu-student-accused-rape-sues-school-accuser-defamation/95649160/ \[https://perma.cc/4LRA-E47K\]](https://www.indystar.com/story/news/2016/12/26/former-iu-student-accused-rape-sues-school-accuser-defamation/95649160/ [https://perma.cc/4LRA-E47K]).

chose not to file sexual assault charges against him, the University still found him responsible under the school code of conduct and dismissed him in the Fall of 2015.<sup>110</sup> The lawsuit against the school alleged that the school took the accusations as truth before any process began in an attempt to protect the accuser and protect the University from negative publicity.<sup>111</sup>

The role of the Title IX Coordinator created by the 2015 “Dear Colleague” letter has required schools to take a proactive approach to sexual misconduct, attempting to discipline conduct before it becomes unlawful.<sup>112</sup> The educational campaigns have essentially lead schools to create “how-to’s for sexual arousal, proposition, and seduction.”<sup>113</sup> This model of prevention attempts to identify risk-factors that lead to sexual violence such as “hyper-masculinity,” “poverty,” or “lack of institutional support from [the] police or judicial system.”<sup>114</sup> However, this has the potential to lead to profiles of perpetrators. When the federal government tells the campus community that students who fit the above risk factors are more likely to commit sexual violence, it is not hard to imagine those individuals being perceived as guilty before an investigation has been conducted.<sup>115</sup>

Many groups, such as the Foundation for Individual Rights in Education (“FIRE”), have pushed back against the Department of Education’s letter, claiming the recommendations do not allow for due process in university proceedings.<sup>116</sup> The Organization heavily criticized the decision to use the preponderance of the evidence standard stating, “the preponderance of the evidence standard fails to sufficiently protect the accused’s rights and is thus inadequate and inappropriate.”<sup>117</sup> On September 22, 2017, Education Secretary Betsy DeVos, using another “Dear Colleague” letter, rescinded the 2011 “Dear Colleague” letter along with a 2014 Questions and Answers on Title IX issued by the Department of Education.<sup>118</sup> In the 2017 letter, the Department of Education reiterated the concerns brought forward by FIRE and other commentators, stating that the prior guidelines created procedures that lacked the most basic elements of fairness and due process.<sup>119</sup> The letter further criticizes the 2011 letter by

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110. *Id.*

111. *Id.*

112. Gersen & Gersen, *supra* note 8.

113. *Id.*

114. *Id.*

115. *Id.*

116. See Letter from Will Creeley, Dir. of Legal and Pub. Advocacy, Found. for Individual Rights in Educ., to Russlynn Ali, Assistant Sec’y of Civil Rights, U.S. Dep’t of Educ. (May 5, 2011), *available at* <https://www.thefire.org/fire-letter-to-office-for-civil-rights-assistant-secretary-for-civil-rights-russlynn-ali-may-5-2011/> [<https://perma.cc/U83N-PRP9>].

117. *Id.*

118. Stephanie Saul & Katie Taylor, *Betsy DeVos Reverses Obama-era Policy on Campus Sexual Assault Investigations*, N.Y. TIMES (Sept. 22, 2017), <https://www.nytimes.com/2017/09/22/us/devos-colleges-sex-assault.html> [<https://perma.cc/Z4L5-R728>].

119. See Jackson Letter, *supra* note 25, at 1.

forcing schools to face “a confusing and counterproductive set of regulatory mandates” that displaced the goals of Title IX.<sup>120</sup> The letter does not provide any other regulations and only rescinds prior mandates, although Betsy DeVos has indicated that new rules will be put in place following a public comment period.<sup>121</sup> Until then, schools will have the choice to maintain the same standards as required by the 2011 letter but may choose to amend their policies as they see fit.<sup>122</sup>

## II. FEDERAL COURT RULINGS ON DUE PROCESS AND UNIVERSITY HEARINGS

### A. *The University and Student Rights*

The relationship between the university and its students has experienced drastic changes over the last fifty years.<sup>123</sup> Prior to 1960, schools would act *in loco parentis* – in the place of the parent – by maintaining strict control of student life and affairs.<sup>124</sup> At that time, students had no specific legal rights.<sup>125</sup> Students rarely had the opportunity to sue the university based on the generally non-justiciable nature of the student/university relationship.<sup>126</sup> The university had the freedom to exercise disciplinary power and manage its student population with wide discretion and little concern for litigation.<sup>127</sup> Even when cases against universities did arise, courts would typically affirm the power of the university to exercise authority over its students.<sup>128</sup> However, as American society shifted during the 1960s and 1970s, student freedom ascended over university authority and control.<sup>129</sup> Students during that time became activists for social issues such as civil rights and abuses of government power.<sup>130</sup> Students began to sue universities under civil rights and/or breach of contract suits.<sup>131</sup> The first cases raised demands for basic constitutional rights.<sup>132</sup> This led to the landmark decision *Dixon v Alabama State Board of Education*, which created a new landscape of university law and student rights.<sup>133</sup>

In *Dixon*, six black students were expelled for participating in a

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120. *Id.* at 2.

121. *See* Saul & Taylor, *supra* note 118.

122. *Id.*

123. *See generally* Lake, *supra* note 1.

124. *Id.* at 6-7.

125. *Id.* at 17.

126. *Id.* at 24.

127. *Id.* at 18.

128. *Id.*

129. *See id.* at 7.

130. *Id.* at 36.

131. *Id.*

132. *Id.* at 37.

133. *See id.* at 37-38.

demonstration to desegregate lunch counters at Alabama State University.<sup>134</sup> The school issued a notice of expulsion with references to vague rules such as “Conduct Prejudicial to the School” and “Conduct Unbecoming of a Student.”<sup>135</sup> The students had no opportunity to defend themselves or tell their side of the story.<sup>136</sup> The students filed suit against the school alleging that they had a right to procedural due process and a guarantee of notice and some opportunity to be heard.<sup>137</sup> The court found in favor of the students, ending the *in loco parentis* nature of the university/student relationship and ushering in an era of student constitutional rights.<sup>138</sup> Most importantly, the court held that students have a right to procedural due process in cases of expulsion for misconduct.<sup>139</sup>

### *B. Due Process and Universities*

The Fourteenth Amendment to the U.S. Constitution provides that no state shall “deprive any person of life, liberty, or property, without due process of law.”<sup>140</sup> This right to due process provides procedural safeguards to protect individual interests (procedural due process) and the substantive aspects of liberty that the government cannot restrict (substantive due process).<sup>141</sup> Substantive due process applies to the liberty interests that have been found as fundamental and deeply rooted in the nation’s history and tradition.<sup>142</sup> Under the Fourteenth Amendment, this right to substantive due process includes the right to remain free from state and local government interference with certain constitutionally recognized fundamental rights.<sup>143</sup> These rights include, for example, those specifically enumerated in the First Amendment in the context of freedom from government interference.<sup>144</sup> Courts have upheld a substantive due process right in students who have been disciplined for sexual misconduct in limited circumstances.<sup>145</sup> Disciplinary dismissals by universities only violate substantive due process when there is no rational basis for the university’s decision, such that it was arbitrary and capricious or shocks the conscience of the court.<sup>146</sup> While an argument could be made to broaden substantive due process rights for students, this Note will focus on the procedural due process of students in university

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134. *Id.* at 37.

135. *Id.*

136. *Id.*

137. *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 151 (5th Cir. 1961).

138. *See Lake, supra* note 1, at 39.

139. *Dixon*, 294 F.2d at 158.

140. U.S. CONST. amend. XIV § 1.

141. 16B AM. JUR. 2D, *Constitutional Law* § 964 (2d ed. 2017).

142. *Id.*

143. *Id.*

144. *Phillips v. Borough of Keyport*, 107 F.3d 164, 180 (3rd Cir. 1997).

145. *See Fern L. Kletter, School’s Violation of Student’s Substantive Due Process Rights by Suspending or Expelling Student*, 90 A.L.R.6th 235 § 17 (2013).

146. *Id.* § 2.

hearings.

“Procedural due process imposes constraints on governmental decisions which deprive individuals of ‘liberty’ or ‘property’ interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment.”<sup>147</sup> A property interest exists in a benefit to which a person has legitimate claim of entitlement and upon which he or she relies upon in daily life.<sup>148</sup> Procedural due process acts as a safeguard to protect these property interests granted to individuals and allows them to defend their rights from loss without cause.<sup>149</sup> A property interest is not created by the Fourteenth Amendment itself but rather created or defined by an independent source, such as state law.<sup>150</sup> For example, a state law guaranteeing children a public education creates a property interest in that right to an education.<sup>151</sup> Welfare recipients also enjoy procedural due process before their eligibility is revoked.<sup>152</sup>

A liberty interest consists of the right to the privileges essential to the orderly pursuit of happiness by free people.<sup>153</sup> This may not be interfered with by arbitrary legislation or without reasonable relation to some purpose.<sup>154</sup> Especially important to the American society is education and the acquisition of knowledge, which should always be diligently promoted.<sup>155</sup> The Supreme Court held that injury to the reputation of an individual is not alone a liberty interest protected under the Fourteenth Amendment.<sup>156</sup> The Court establishes a “stigma plus” test, where the plaintiff asserting a reputational liberty interest must show (i) a loss of reputation inflicted by a state official and (ii) the deprivation of a legal right or status.<sup>157</sup> Meeting this test implicates a protected liberty interest that requires procedural due process.<sup>158</sup>

Court opinions remain split on the existence of a property interest in post-secondary education that guarantees procedural due process for students.<sup>159</sup> Some courts have held that the payment of tuition creates an entitlement to an education based on an implied contract between the two parties;<sup>160</sup> however, other courts have rejected this notion, noting that the Supreme Court has not decided the

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147. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976).

148. *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 577 (1972).

149. *Id.* at 576.

150. *Id.* at 577.

151. *See Goss v. Lopez*, 419 U.S. 565, 574 (1975).

152. *Goldberg v. Kelly*, 397 U.S. 254 (1970).

153. *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

154. *Id.* at 399-400.

155. *Id.* at 400.

156. *Paul v. Davis*, 424 U.S. 693, 701 (1976).

157. *Id.* at 710-11.

158. *See Doe v. Rector & Visitors of George Mason Univ.*, 132 F. Supp. 3d 712, 722 (E.D. Va. 2015).

159. *See id.* at 720-721.

160. *See Branum v. Clark*, 927 F.2d 698, 705 (2d Cir. 1991); *see Harris v. Blake*, 798 F.2d 419, 422-23 (10th Cir. 1986).

issue.<sup>161</sup> Courts have avoided addressing the issue of constitutionally insufficient process when a plaintiff has not claimed a property interest that requires process.<sup>162</sup>

While courts have not conclusively held a student's property interest in education, a clear liberty interest exists that fulfills the stigma plus test discussed above.<sup>163</sup> Expulsion from a school clearly constitutes a deprivation or change in "legal status" addressed in the stigma plus test.<sup>164</sup> Meanwhile, misconduct charges can seriously damage students' reputation with their fellow peers and faculty, which could interfere with future academic and employment opportunities.<sup>165</sup> The consequences of expulsion are comparable to the termination from employment in terms of leaving a mark on a person's reputation that impacts subsequent opportunities.<sup>166</sup> This is especially true in cases of sexual assault, where charges can be devastating and life-altering, forever associating the party found responsible with the stigmatization of committing a sexual crime.<sup>167</sup> Thus, students have a protectable liberty interest in education that requires procedural due process in university hearings.<sup>168</sup>

When a person's liberty or property interest is implicated, procedural due process grants him or her the right to notice and some opportunity to be heard.<sup>169</sup> While these make up the minimum standards, procedural due process is a flexible concept that calls for varying requirements based on the circumstances.<sup>170</sup> For university hearings, students have a specific variation of these rights.<sup>171</sup> Notice must include the specific charges and grounds upon which, if proven, would justify expulsion.<sup>172</sup> The nature of the hearings should depend on the severity of the case, requiring greater procedural protections for cases of misconduct over failing to meet academic standards.<sup>173</sup> To protect the rights of all parties involved, the university hearing board must be able to hear both sides of the story.<sup>174</sup> Finally, the student facing expulsion should have the opportunity to present his or her own defense, including the ability to produce either oral or written testimony from witnesses on their behalf.<sup>175</sup>

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161. *Hamil v. Vertrees*, 2001 U.S. Dist. LEXIS 1634, at \*29 (M.D. Ala. 2001).

162. *Doe*, 132 F. Supp. 3d at 721.

163. *Id.* at 722.

164. *Id.*

165. *Goss v. Lopez*, 419 U.S. 565, 574-75 (1975).

166. *Doe*, 132 F. Supp. 3d at 722.

167. *Id.*

168. *Id.* at 724.

169. 16B AM. JUR. 2D *Constitutional Law* § 958 (2d ed. 2017).

170. *See Mathews v. Eldridge*, 424 U.S. 319, 334 (1976).

171. *See Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 158-59 (5th Cir. 1961).

172. *Id.* at 158.

173. *Id.*

174. *Id.*

175. *Id.*

*C. Standard for Expanding Due Process*

The Supreme Court in *Mathews v. Eldridge* established the analytical framework to evaluate procedural due process in non-judicial proceedings and how to assess potential expansions of that process.<sup>176</sup> Eldridge, a Social Security recipient, completed a questionnaire to continue receiving his benefits based on a disability.<sup>177</sup> After consulting Eldridge's physicians, the Social Security Administration made the determination he no longer had a disability and terminated his benefits.<sup>178</sup> Eldridge disputed the characterization of his medical condition, but the agency made its final determination that he was no longer disabled.<sup>179</sup> Eldridge challenged the constitutional validity of the administrative procedures by asserting he had a right to an evidentiary hearing.<sup>180</sup>

The Court described three factors to consider when determining the scope of due process necessary in non-judicial proceedings: (1) the private interest that will be affected by the action taken; (2) the risk of an erroneous deprivation of such interest through the procedures used and the probable value of additional procedural safeguards; and (3) the Government's interest in imposing the additional safeguards weighed against the burdens of imposing those safeguards.<sup>181</sup> Further, in balancing the Government's interest with the burdens, financial cost alone cannot act as a sufficient burden to outweigh the benefit of additional procedural protections granted to the individual.<sup>182</sup> After addressing all three standards, the Court concluded an evidentiary hearing was not required prior to the termination of disability benefits.<sup>183</sup> The court established that this test should ultimately determine the extent to which judicial-type proceedings should be imposed on administrative actions to assure fairness.<sup>184</sup> This three-factor test will serve as the basis for analyzing the recommendation to include students on hearing boards.

### III. EXPANDING DUE PROCESS FOR STUDENT HEARINGS

*A. Students on Hearing Boards as the Best Expansion of Due Process*

The Fifth Circuit in *Dixon v. Alabama State Board of Education* established the minimum standards for due process for students accused of misconduct at universities in 1961.<sup>185</sup> Since then, a college education has become even more important as an education delivers higher earnings and a greater chance at

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176. 424 U.S. 319 (1976).

177. *Id.* at 323-24.

178. *Id.* at 324.

179. *Id.*

180. *Id.*

181. *Id.* at 335.

182. *Id.* at 348.

183. *Id.* at 349.

184. *Id.* at 348.

185. 294 F.2d 150, 158-59 (5th Cir. 1961).



employment.<sup>186</sup> Meanwhile, the cost of a college education continues to rise, averaging \$28,000 per year at public schools and \$59,000 per year at private schools.<sup>187</sup> In spite of all this, the due process rights afforded to students have largely remained the same.<sup>188</sup> Students facing expulsion have more to lose than students fifty years ago and should thus have greater due process protections to reflect these higher stakes.

The most recent action by the U.S. Department of Education to repeal the 2011 “Dear Colleague” letter does not effectively reflect the need for additional due process safeguards. As it stands right now, the 2017 “Dear Colleague” letter simply gives schools the freedom to set their own policies that may not have been allowed under the previous guidelines.<sup>189</sup> While Education Secretary Betsy DeVos has set a goal to provide new policy guidelines, this could take several months.<sup>190</sup> During that waiting period, it is hard to imagine colleges making costly wholesale changes to an adjudication system that requires considerable resources to create.<sup>191</sup> Thus, an additional procedural safeguard is necessary to combat the unintended consequences of the letters.

Some have brought forth arguments that schools should not handle sexual misconduct at all, instead relying on law enforcement and civil or criminal courts.<sup>192</sup> The fact that lawsuits against colleges continue to increase could exemplify a lack of expertise in the current system;<sup>193</sup> however, early regulations implementing Title IX required colleges to establish their own internal grievance procedures.<sup>194</sup> Also, the slow pace of lawsuits could delay a resolution for long periods of time.<sup>195</sup> Students would want a timely resolution to continue with their studies that sometimes the court of law cannot provide. Thus, a procedural change would have the greatest chance to bring about a positive result.

Students serving on hearing boards represent a small, simple adjustment that could improve the process with limited burdens on colleges and universities. Requiring student members of sexual assault hearing boards would provide more

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186. Bureau of Labor Statistics, *Unemployment rates and earnings by educational attainment, 2017*, U.S. DEP’T OF LABOR (Mar. 15, 2016), [http://www.bls.gov/emp/ep\\_chart\\_001.htm](http://www.bls.gov/emp/ep_chart_001.htm) [<https://perma.cc/C9A5-SYWY>].

187. Troy Onink, *College Costs Could Total As Much As \$334,000 In Four Years*, FORBES (Jan. 31, 2015, 11:59 PM), <http://www.forbes.com/sites/troyonink/2015/01/31/college-could-cost-as-much-as-334000-total-in-four-years/#6e5558b0679f> [<https://perma.cc/G46Q-2VGX>].

188. See *Dixon*, 294 F.2d at 158-59.

189. See Jackson Letter, *supra* note 25.

190. Saul & Taylor, *supra* note 118.

191. *Id.*

192. See generally Stephen Henrick, *A Hostile Environment for Student Defendants: Title IX and Sexual Assault on College Campuses*, 40 N. KY. L. REV. 49 (2013) (The author posits that jurisdiction over allegations of sexual misconduct is the “exclusive province of the police and the office of the district attorney.”).

193. LAWSUITS REPORT, *supra* note 22, at 22.

194. Gersen & Gersen, *supra* note 8.

195. SHIBLEY, *supra* note 16, at 40.

procedural due process safeguards for students at school adjudications. Including students on hearing boards satisfies the three factors laid out in *Mathews v. Eldridge* for assessing an expansion of due process.<sup>196</sup>

*B. Students on Hearing Boards Under the ‘Mathews’ Test*

*1. The Private Interest That Will Be Affected by the Official Action.*—Students have a clear interest in completing a college education and the results of school disciplinary findings can affect a student’s future for years.<sup>197</sup> Schools often retain disciplinary records even after the student no longer attends the school, making the records available to other institutions upon request.<sup>198</sup> Students must disclose transcripts from prior schools when transferring to a new school, which could include disciplinary actions against the student or a Dean’s certification regarding past conduct.<sup>199</sup> An expulsion from school following a responsible verdict may make it impossible for the student to erase the stigma associated with the finding, especially with other universities or future employers.<sup>200</sup> This could ultimately affect the student’s ability to attend college again, permanently branding a student with a “scarlet letter” on their transcript warning other schools not to admit the student.<sup>201</sup> Even open enrollment institutions may inhibit the student’s ability to attend certain classes or occupy certain areas of campus.<sup>202</sup>

Not completing a college education can result in a significant disparity in career earnings.<sup>203</sup> The Bureau of Labor Statistics reports that people who earn a bachelor’s degree earn almost \$500 more per week than those who only have a high school diploma.<sup>204</sup> A college degree can also lead to greater job security; the unemployment rate for those with a bachelor’s degree is 2.8% nationally, substantially lower than the 5.4% rate for those with a high school diploma.<sup>205</sup>

Even if a student is not found responsible for a charged offense by a university hearing board, they will likely have a difficult time escaping the notoriety of the sexual assault allegations, potentially making it untenable for the

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196. 424 U.S. 319, 348 (1976).

197. See *King v. DePauw Univ.*, 2014 U.S. Dist. LEXIS 117075, at \*42 (S.D. Ind. 2014).

198. See ASS’N FOR STUDENT CONDUCT ADMIN., STUDENT CONDUCT ADMINISTRATION & TRANSCRIPT NOTATION: ISSUES AND PRACTICES 2 (July 2014), available at <http://www.theasca.org/files/Best%20Practices/Transcript%20Notation%20-%20Final%20Report.pdf> [<https://perma.cc/D9T2-U8WU>].

199. *Id.* at 4.

200. See *King*, 2014 U.S. Dist. LEXIS 117075 at \*42.

201. Tovia Smith, *Push Grows For A ‘Scarlet Letter’ On Transcripts Of Campus Sexual Offenders*, NPR (May 11, 2016, 4:27 PM), <http://www.npr.org/2016/05/11/477656378/push-grows-for-a-scarlet-letter-on-transcripts-of-campus-sexual-offenders> [<https://perma.cc/DJG6-NXR9>].

202. ASS’N FOR STUDENT CONDUCT ADMIN., *supra* note 198, at 5.

203. Bureau of Labor Statistics, *supra* note 186.

204. *Id.*

205. *Id.*

student to remain at the school.<sup>206</sup> In the age of Google and social media, nothing is forgotten.<sup>207</sup> Schools do have the option to keep the hearing confidential, and the students involved may also have been given the same option, but those decisions may prove powerless in preventing the eventual release of the student's name.<sup>208</sup> Although Columbia University found a male student innocent of charges of sexual assault, the girl who brought the charges continued to present herself as a victim through her art piece, "Carry That Weight," where she would carry a twin bed mattress everywhere with her on campus.<sup>209</sup> This led to students harassing the male student cleared of the charge, publishing his name in the school newspaper.<sup>210</sup> He found himself "shunned" on campus and had a difficult time completing his education.<sup>211</sup> No matter the result, a campus adjudication hearing will have a substantial effect on the student's future.<sup>212</sup> Clearly, a private interest in completing an education will be affected by an action related to sexual assault taken by a university against a student.

2. *The Risk of an Erroneous Deprivation of Such Interest Through the Procedures Used and the Probable Value of Additional Procedural Safeguards.*—The rise in Title IX claims against schools following 2011 has indicated that standards imposed by the 2011 "Dear Colleague" letter has created a greater chance to have an erroneous result.<sup>213</sup> Many have criticized the new landscape of college adjudication as unfair to those accused, creating an "assumption of guilt" amongst those who have been accused of sexual assault.<sup>214</sup> Meanwhile, some still claim schools do not do enough to hear reports from students bringing accusations, denying potential victims a chance to have their case heard.<sup>215</sup> No matter the outcome, the lives of both the complainant and accused can be seriously altered by the findings from the college.<sup>216</sup> When both sides have provided arguments that the process is not fair to them, it should be worth examining if the process is indeed the best procedure available.

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206. SHIBLEY, *supra* note 16, at 37.

207. *Id.*

208. THE HUNTING GROUND, *supra* note 4.

209. David Ng, *Mattress Girl at Columbia: Victim art turns everyone into a critic*, L.A. TIMES (May 22, 2015, 11:00 AM), <http://www.latimes.com/entertainment/arts/culture/la-et-cm-mattress-girl-columbia-victim-art-20150521-story.html> [https://perma.cc/MEV8-MM6A].

210. Emily Bazelon, *Have We Learned Anything from the Columbia Rape Case?*, N.Y. TIMES (May 29, 2015), <http://www.nytimes.com/2015/05/29/magazine/have-we-learned-anything-from-the-columbia-rape-case.html> [https://perma.cc/YW8F-HJ7S].

211. *Id.*

212. *See* SHIBLEY, *supra* note 16, at 37.

213. LAWSUITS REPORT, *supra* note 22, at 1.

214. Berkowitz, *supra* note 14.

215. *See* Bruce Tomaso, *A quick, complete guide to the Baylor football sex-assault scandal*, DALL. MORNING NEWS (June 1, 2016, 1:20 PM), <http://www.dallasnews.com/news/crime/2016/04/14/how-a-sexual-assault-scandal-engulfed-baylors-football-program> [https://perma.cc/5HXM-M6BR].

216. *See generally* Gersen & Gersen, *supra* note 8.

The potential for bias is an important aspect of procedural fairness that could erode the public's trust in institutions.<sup>217</sup> Most college hearing boards include administrators, whose employment may depend in part on reaching a verdict most convenient for the school rather than the individuals involved.<sup>218</sup> This could be attributed to the school's fear of losing funding for not being strict enough on those accused—creating a bias against those students before the hearing even begins.<sup>219</sup> A loss of funding could be considered a “death penalty” for a school, forcing schools to operate in fear of the federal government's power over the school's functions.<sup>220</sup> The Office for Civil Rights uses this as a bargaining tool to enter into “resolution agreements” with schools that the Office announces as being under investigation.<sup>221</sup> This allows the Office for Civil Rights to impose extensive obligations on the schools that fit with the agency's goals of resolving investigations and avoid public relations nightmares.<sup>222</sup> In addition to funding, universities also face liability and the potential for monetary damages for student-on-student sexual assaults on campus.<sup>223</sup> This could influence an administrator's rulings on a case, especially in instances where administrators make up the entire hearing board.<sup>224</sup>

The documentary *The Hunting Ground* makes a similar argument but asserts that the system erroneously deprives the complainant's rights.<sup>225</sup> The film raised the issue of campus rape and sexual assault, adding the national spotlight to the country's critical view of rape on college campuses.<sup>226</sup> Schools are portrayed negatively as not doing enough to protect the interests of victims.<sup>227</sup> This point is made by showing specific instances where schools did not take student complaints seriously and often did not follow through with a hearing to determine the validity of a claim.<sup>228</sup> The film attributes the schools' actions to a desire to keep the number of reported rapes on campus low to portray a safer environment.<sup>229</sup> Students, particularly those considered Millennials, have a higher expectation of safety after being raised in a culture that emphasized safety and

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217. Doe v. The Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 619, n.19 (E.D. Va. 2016).

218. SHIBLEY, *supra* note 16, at 35; THE HUNTING GROUND, *supra* note 4.

219. Berkowitz, *supra* note 14.

220. SHIBLEY, *supra* note 16, at 39-40.

221. Gersen & Gersen, *supra* note 9.

222. *Id.*

223. SHIBLEY, *supra* note 16, at 19.

224. *Id.*

225. See generally THE HUNTING GROUND, *supra* note 4.

226. See generally *id.*; Emily Yoffe, *The Hunting Ground: The failures of a new documentary about rape on college campuses*, SLATE (Feb. 27, 2015, 4:15 PM), [http://www.slate.com/articles/double\\_x/doublex/2015/02/the\\_hunting\\_ground\\_a\\_campus\\_rape\\_documentary\\_that\\_fails\\_to\\_provide\\_a\\_full.html](http://www.slate.com/articles/double_x/doublex/2015/02/the_hunting_ground_a_campus_rape_documentary_that_fails_to_provide_a_full.html) [https://perma.cc/Q6UB-JKNG].

227. Yoffe, *supra* note 226.

228. THE HUNTING GROUND, *supra* note 4.

229. *Id.*

security almost to an extreme.<sup>230</sup> Schools are required to report statistics of crimes on campus to the Department of Education, which publishes the results.<sup>231</sup> A desire to keep the illusion of safety keeps administrators from wanting to follow through with reported rapes, according to the film.<sup>232</sup> The potential for negative publicity, combined with the potential loss of funding from the Department of Education,<sup>233</sup> creates an incentive for schools to adjudicate these cases in a manner that limits public backlash rather than promotes fairness.

Including students on hearing boards in sexual misconduct hearings could have the added value of increasing the perceived fairness of the hearing process.<sup>234</sup> Campus protests and advocacy groups have shown that a distrust exists between students and the administrators that run the adjudication process.<sup>235</sup> Students may fear the omnipotence of a single adjudicator, where the opinion of one person will determine the hearing's outcome without the input of additional adjudicators.<sup>236</sup> Students also provide a valuable perspective as peers, relating to the student experience directly and providing insight during questioning and discussion that faculty and staff cannot.<sup>237</sup> They also do not have to worry about the potential liability faced by the school following the hearing and can instead focus solely on finding the correct ruling for the parties involved. As hearing members, students would have a vested interest in the fairness of the procedure because of their understanding that they are potentially subject to that same procedure.

*3. The Government's Interest in Imposing the Additional Safeguards Weighed Against the Burdens of Imposing Those Safeguards.*—As shown by the Department of Education's mandates requiring college adjudication reform, the Government has established that it has a clear interest in attempting to create the best method possible for trying student sexual assault cases.<sup>238</sup> However, with an increase in Title IX claims brought by accused students in federal courts, the Department of Education should recognize that the current procedures may not be the best practice to address campus sexual assault adjudication.<sup>239</sup> Schools also may want to limit their liability by ensuring that cases reach correct conclusions, therefore limiting their chance for lawsuits.<sup>240</sup> Imposing additional safeguards in

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230. Lake, *supra* note 1, at 4.

231. THE HUNTING GROUND, *supra* note 4.

232. *Id.*

233. Ali Letter, *supra* note 9, at 16.

234. Letter from Celia Wright et al., Former Student Body President, The Ohio State Univ., to Arne Duncan, Sec'y of Educ., U.S. Dep't of Educ. (Feb. 23, 2015), *available at* <http://www.chronicle.com/blogs/ticker/files/2015/02/Open-Letter-to-ED-FINAL-COPY1.pdf> [<https://perma.cc/YSE3-NQ62>] [hereinafter Wright Letter].

235. THE HUNTING GROUND, *supra* note 4.

236. SOKOLOW, *supra* note 72, at 16-17.

237. Wright Letter, *supra* note 234.

238. *See* Ali Letter, *supra* note 9, at 1-3.

239. LAWSUITS REPORT, *supra* note 22, at 1.

240. *See* SOKOLOW, *supra* note 72, at 3-4.

university sexual misconduct hearings could reduce the docket in federal courts as well as limit the liability of schools adjudicating these cases.

The changing landscape of higher education law shows the interest in including students in hearing boards. The concept of the “Facilitator University” has begun to emerge as a way to conceptualize the relationship between universities and students to strike the correct balance between authority and individual freedom.<sup>241</sup> Most importantly in the concept is the idea that the college and students share responsibility between one another.<sup>242</sup> Under the facilitator model, the students take more responsibility while the school manages the parameters under which the choices are made.<sup>243</sup> This means that students take responsibility for the safety of themselves and other students on campus.<sup>244</sup> In a shared governance structure sought by many schools, it would be consistent to permit students to contribute as part of the college community.<sup>245</sup> By serving on hearing boards, students will have the opportunity to share responsibility with the administration to determine the best way to create a safe environment.

Adding students to hearing boards would represent a limited burden to the federal government, as students would receive the same amount of training provided to faculty and staff sitting on the boards.<sup>246</sup> Current recommendations from the NCHERM for hearing board members provides a good framework for how to prepare students for membership on hearing boards.<sup>247</sup> A minimum competence of two days for judicial decision-makers each semester with a focus on questioning and deliberation techniques can reduce risk to the school.<sup>248</sup> In order to maintain faith in the procedure and impartiality, students should have the chance to challenge the participation of a board member for a potential conflict of interest.<sup>249</sup> A list of potential board members should be given to both the complainant and accused to allow them to strike the names of those they fear may have a bias against them.<sup>250</sup>

Although the NCHERM recommended that schools institute an odd-numbered board with a panel of three to nine members with a majority vote required,<sup>251</sup> three would be too few to attempt to include students. Instead, five to nine with at least two students would be a better approach. Few colleges have

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241. Lake, *supra* note 1, at 14.

242. *Id.*

243. *Id.*

244. *Id.* at 284.

245. Wright Letter, *supra* note 234.

246. *Id.*

247. SOKOLOW, *supra* note 72, at 17.

248. *Id.*

249. *Id.*

250. Adam Liptak, *Should Students Sit on Sexual Assault Panels?*, N.Y. TIMES (Apr. 10, 2015), <https://www.nytimes.com/2015/04/12/education/edlife/12edl-12forum.html> [<https://perma.cc/3XKB-RVVA>].

251. SOKOLOW, *supra* note 72, at 17.

a sufficient pool of resources to create a board greater than nine.<sup>252</sup> Any greater number can have the complainant fear having to recount her experience to so many people, creating a structural impediment against the alleged victim.<sup>253</sup> Students should still have the right to challenge the participation of any member for a conflict of interest with good cause,<sup>254</sup> as prior knowledge could create a perception of bias that defeats the purpose of including students in the first place. Although including students may create a burden, at most schools by expanding the size of hearing boards and spending more time on training, the additional safeguard of preventing bias outweighs this potential cost.

### *C. Arguments Against Students on Hearing Boards*

Two main arguments have been made against including students on panels.<sup>255</sup> First, students may lack the experience needed to make decisions that could have lifelong consequences.<sup>256</sup> This is a strong reason why panels should not consist entirely of students but instead allow faculty and staff with more experience to help facilitate the procedure. However, the youth of the students could serve as an advantage to the board. Students could bridge the “generational gap” between the faculty or staff and the students involved in the case.<sup>257</sup> Instances that involve social media can be particularly difficult for older members of the school community while students could help translate that culture to the faculty and staff.<sup>258</sup> In addition, jury trials in both civil and criminal courts include eighteen-year-olds who receive significantly less training than members of school conduct boards.<sup>259</sup> Student representatives on assault boards would also consist of volunteers as opposed to the random selection process of jury duty, meaning student representatives would likely be more active and interested in the process.

Second, students may not maintain the confidentiality of the sensitive information involved in sexual assault cases.<sup>260</sup> Small colleges carry a greater risk that the rumors will spread and destroy the confidentiality sought by the parties.<sup>261</sup> While this cannot be entirely prevented, measures can be taken such as signing confidentiality agreements, acknowledging a duty to not discuss issues outside of the hearing procedure, and disciplinary charges for breaching that duty.<sup>262</sup> Training for hearing board members could also include issues of confidentiality and knowing when it is appropriate to maintain secrecy. While some concerns

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252. *Id.*

253. *Id.* at 16.

254. *Id.*

255. *See* Liptak, *supra* note 250.

256. *Id.*

257. Wright Letter, *supra* note 234.

258. Liptak, *supra* note 250.

259. Letter from Celia Wright, *supra* note 234.

260. Liptak, *supra* note 250.

261. SOKOLOW, *supra* note 72, at 17.

262. Liptak, *supra* note 250.

remain for including students on sexual assault hearing boards, the additional safeguards created by their involvement mitigate those concerns.

#### CONCLUSION

The 2011 “Dear Colleague” letter states that all students should feel safe at universities and have the full opportunity to receive the benefits of school programs and activities.<sup>263</sup> This should also include the fundamental concept of fairness in procedural due process that these schools need to provide.<sup>264</sup> As long as schools have a legal responsibility to combat sexual assault on campus,<sup>265</sup> maintaining equality in procedure should remain a top priority. As recent trends in federal lawsuits have shown,<sup>266</sup> schools have had a difficult time balancing the interests of the Department of Education with the rights of students. With the latest “Dear Colleague” letter leaving school procedure ambiguous, a change is still needed to find the right balance. In an effort to combat this and to eliminate bias among hearing boards, the rights of procedural due process at university hearings should be expanded. However, this must be done in a way that still allows for those who feel they have been assaulted to bring forward a valid case and avoid structural impediments.<sup>267</sup> The best way to reconcile these goals is to include students as members of sexual misconduct disciplinary hearing boards. Not only would having students address the issue of bias, but incorporating students would meet the standards for expanding procedural due process under the test in *Mathews*.<sup>268</sup> Having a student perspective on student issues could prove invaluable to a hearing in determining the truth and necessary consequences.

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263. Ali Letter, *supra* note 9, at 19.

264. Doe v. The Rector & Visitors of George Mason Univ., 149 F. Supp. 3d 602, 619, n.19 (E.D. Va. 2016).

265. SOKOLOW, *supra* note 72, at 3.

266. LAWSUITS REPORT, *supra* note 22, at 1.

267. SOKOLOW, *supra* note 72, at 3.

268. *Mathews v. Eldridge*, 424 U.S. 319, 334-35 (1976).