

STUDENT-ON-STUDENT SEXUAL ASSAULT POLICY: HOW A VICTIM-CENTERED APPROACH HARMS MEN

A Close-up on Notre Dame's Changes to Its Student Handbook

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INTRODUCTION

The University of Notre Dame's academic year had a tragic beginning in the fall semester of 2010. Nineteen-year-old Lizzy Seeberg, a student at Saint Mary's College, filed a police report alleging that a Notre Dame football player had sexually assaulted her on August 31, 2010.¹ A little

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1. "The male student grabbed her face and kissed her, pulled down her tank top, touched and squeezed her bare breasts, and held her down in his lap, all while she was

over a week later, Seeberg committed suicide.² At that point police had not yet interviewed the accused and did not do so until September 15.³ Seeberg's death triggered a media frenzy as the public learned of the circumstances surrounding her tragic suicide.

Notre Dame, along with other prestigious colleges and universities,⁴ has had to deal with an onslaught of criticism, most notably coming from the Office of Civil Rights (OCR), part of the Department of Education (DOE). Under Title IX of the Education Amendment of 1972, educational institutions that receive money from the federal government are required to "prohibit discrimination on the basis of sex in [their] federally funded education program[s] or activit[ies]."⁵ The national attention Notre Dame received due to the Seeberg investigation created concern at the OCR that the University was allowing a "hostile environment"⁶ to exist—thereby violating the students' Title IX right to education. Subsequently, Notre Dame allowed OCR officials to come onto campus and conduct a seven-

rying and scared for her safety, Seeberg wrote in a Sept. 5, 2010 typed statement for police." Margaret Fosmoe, *Part I: Notre Dame Changes Sex Assault Investigation Procedures*, SOUTH BEND TRIB., Sept. 16, 2011, http://articles.southbendtribune.com/2011-09-16/news/30167668_1_elizabeth-lizzy-seeberg-sexual-harassment-sexual-assault.

2. Press Release, St. Joseph County Prosecutor's Office, Elizabeth Seeberg Allegations, (Nov. 22, 2010) (on file with author).

3. Fosmoe, *supra* note 1.

4. Many other colleges and universities have had sexual assault scandals in the recent past, promoting skepticism that administrators are more concerned with their school's reputation than protection of individuals. For instance, at Yale University male fraternity students shouted aggressive sexual obscenities at female students. *Yale suspends embattled frat for sexist chants*, USA TODAY May 18, 2011, http://usatoday30.usatoday.com/news/education/2011-05-18-yale-fraternity-suspension_n.htm. See also Nina Bernstein, *On Campus, a Law Enforcement System to Itself*, N.Y. TIMES, Nov. 11, 2011, http://www.nytimes.com/2011/11/12/us/on-college-campuses-athletes-often-get-off-easy.html?_r=1&hp (remarking on the number of sexual assault cases that have implicated university football programs, and were swept under the rug or only superficially investigated). Note also that the OCR specifically addressed this concern in the most recent Dear Colleague letter, in which the Office stated: "These procedures must apply to all students, including athletes. If a complaint of sexual violence involves a student athlete, the school must follow its standard procedures for resolving sexual violence complaints. Such complaints must not be addressed solely by athletics department procedures." Letter from Russlynn Ali, Assistant Secretary, Office of Civil Rights, Department of Education, to University Administrators ("Colleagues") (2011) 8, n. 22 [hereinafter Dear Colleague Letter].

5. OFFICE FOR CIVIL RIGHTS, U.S. DEPT. OF EDUC., DEAR COLLEAGUE LETTER: SEXUAL VIOLENCE BACKGROUND, SUMMARY, AND FAST FACTS (2011).

6. "As explained in OCR's 2001 *Guidance*, when a student sexually harasses another student, the harassing conduct creates a hostile environment if the conduct is sufficiently serious that it interferes with or limits a student's ability to participate in or benefit from the school's program Indeed, a single or isolated incident of sexual harassment may create a hostile environment if the incident is sufficiently severe." Dear Colleague Letter, *supra* note 4, at 3.

month investigation into the University's practices.⁷ The results, detailed in the University's student handbook, *Du Lac*,⁸ sought to clarify Notre Dame's approach to sexual assault on campus, promote procedural equality between the complainant and the accused, and educate the students, faculty, and staff about sexual assault.⁹

This note will focus on disciplinary hearings that address allegations of student-on-student sexual assault perpetrated against female students by male students¹⁰ at colleges and universities that receive federal funding. In particular, this note will concentrate on the burden of proof standard mandated in the OCR's Dear Colleague letter released April 4, 2011, which establishes that during disciplinary proceedings that take place when a student is accused of sexual assault, a preponderance of the evidence standard should be utilized.¹¹ This change reflects the OCR's overarching policy of encouraging procedures that are meant to protect the complainant's ability to report sexual assault, as well as her physical and mental well-being leading up to and during the disciplinary hearing.

This note will argue that, because the victim-friendly procedural safeguards are granted at the expense of the male student accused of sexual assault, they tilt the balance of the disciplinary hearing in favor of the complainant. Students found responsible for sexual assault in disciplinary proceedings face irreparable damage to their reputations and employability, especially in light of the uncertainty surrounding the application and scope of Family Educational Rights and Privacy Act (FERPA), the federal statute regulating disclosure of students' education records.¹² The course of their lives may be redirected, as they are stigmatized and turned down by employers, graduate schools, and women whom they would like to date.

7. Fosmoe, *supra* note 1.

8. *Du Lac: A Guide to Student Life*, UNIVERSITY OF NOTRE DAME, available at <http://dulac.nd.edu> (last visited Apr. 10, 2013).

9. In this note, I use "sexual assault" just as the OCR uses that phrase. In its April 4, 2011, Dear Colleague Letter, the OCR explains that sexual violence:

[R]efers to physical sexual acts perpetrated against a person's will or where a person is incapable of giving consent due to the victim's use of drugs or alcohol. An individual also may be unable to give consent due to an intellectual or other disability. A number of different acts fall into the category of sexual violence, including rape, sexual assault, sexual battery, and sexual coercion. All such acts of sexual violence are forms of sexual harassment covered under Title IX.

Dear Colleague Letter, *supra* note 4, at 1–2.

10. Due to the limited scope of this note, analysis has been narrowed to exclude sexual assault occurring at primary and high schools, sexual assault occurring off-campus by non-students, and sexual assault perpetrated against boys and men. This decision was not meant to diminish the significance of these issues. For more information, *see id.* at 2.

11. *Id.* at 10.

12. Clery Act, 20 U.S.C. § 1232g (2011); 34 C.F.R. § 99 (2003).

Furthermore, students unjustly expelled, suspended, or slandered have no viable remedy outside of the college or university. While arguments have been made that apply contract or tort law as a means for finding the colleges and universities liable to the wrongly accused student, these attempts have been unsuccessful. Because these consequences are so detrimental to the future of a student found culpable of sexual assault, and because he has no means of being made whole if the disciplinary committee reaches the wrong result, he deserves adequate protection during the disciplinary hearing.

This note will argue for an amendment to Title IX that would clarify which evidentiary standard may be applied in disciplinary hearings when a student is accused of sexual assault. The Title IX amendment would include language that explains that nothing in the statute should be interpreted to mean that Congress *requires* a preponderance of the evidence standard in sexual assault disciplinary hearings. Furthermore, it would establish that college and universities are permitted to use either a clear and convincing standard or a beyond a reasonable doubt standard when conducting sexual assault disciplinary hearings.¹³ This amendment would constrain the DOE and OCR's ability put forth regulations and interpretative letters that mandate anything lower than a clear and convincing standard of evidence.

This note will begin by discussing one prominent contemporary scholar's position on sexual assault policy, as her work is representative of the general school of thought that disciplinary hearings should be treated as fundamentally different from criminal trials, where a beyond a reasonable doubt standard of evidence is used, most importantly because the punishments are categorically different.¹⁴ Criminal trials present the possibility of incarceration, whereas the worst that can come of a disciplinary hearing is expulsion. Thus, according to her argument, students are not entitled to the same procedural safeguards that criminal defendants receive, and women who allege sexual assault should expect to have more rights than they would otherwise have as complaining witnesses at the trial of their alleged victimizer.

Next, the OCR's recent Dear Colleague letter will be examined in light of these victim-centered policy arguments. Specifically, the explicit limitations placed on the accused will be contrasted with the advantages given to the complainant.

13. While other procedural changes in the April 4, 2011 Dear Colleague letter deserve attention, such as the inability of the accused student to confront his accuser, this development is beyond the scope of this note.

14. Nancy Cantalupo, "*Decriminalizing*" *Campus Institutional Responses to Peer Sexual Violence*, 38 J.C. & U.L. 481 (2012), Amy Chmielewski, Note, *Defending the Preponderance of the Evidence Standard in College Adjudications of Sexual Assault*, B.Y.U. EDUC. & L.J. 143 (2013)

The note will then observe how Notre Dame has reacted to the OCR investigation and to the Dear Colleague letter. This section will address the areas of Notre Dame's policy that the OCR approved and disapproved, indicating how these changes have tilted the balance in favor of the victim. Following will be an overview of alternatives that male students found culpable of sexual assault at colleges or universities may consider arguing in court if they believe that they were unjustly treated leading up to or during their disciplinary hearing. This note argues that because these avenues to finding the college or university liable are untested or unsuccessful, the student wrongly found to have sexually assaulted a fellow student is remediless, and therefore, in need of more protection than the preponderance of evidence standard of proof offers. The solution advocated by this note is an amendment to Title IX establishing clear and convincing as the minimum evidentiary standard that may be used in sexual assault disciplinary hearings.

Finally, this note will present the moral reasons why colleges and universities, and Notre Dame in particular, should promote equality on campus through their fair treatment of the accused in sexual misconduct proceedings.

I. THE ARGUMENTS IN FAVOR OF A VICTIM-FRIENDLY APPROACH

Assistant Dean for Clinical Programs at Georgetown University Law Center, Nancy Chi Cantalupo, believes colleges and universities should have victim-centered rules and procedures for reporting and punishing student-on-student sexual assault.¹⁵ Cantalupo's argument is motivated by multiple studies that suggest that female students are frequently the victims of sexual assault, but infrequently report these incidents.¹⁶ She ultimately concludes that colleges and universities should not treat students who have been accused of sexual assault as if they were criminal defendants, or treat the disciplinary hearing as a criminal trial.¹⁷ Rather, the focus should be on protecting the female student body and on promoting the reporting of sexual assault by providing certain procedural advantages to the alleged victim.¹⁸

Cantalupo believes that, after receiving a sexual assault complaint from

15. See Nancy Chi Cantalupo, *How Should Colleges and Universities Respond to Peer Sexual Violence on Campus? What the Current Legal Environment Tells Us*, 3 *NASPA J. ABOUT WOMEN HIGHER EDUC.* 49 (2010).

16. See *id.*; Brenda J. Benson et al., *College Women and Sexual Assault: The Role of Sex-related Alcohol Expectancies*, 22 *J. FAM. VIOLENCE* 341 (2007); C. BOHMER & A. PARROT, *SEXUAL ASSAULT ON CAMPUS: THE PROBLEM AND THE SOLUTION* (Lexington Books 1993).

17. Nancy Chi Cantalupo, *Campus Violence: Understanding the Extraordinary Through the Ordinary*, 35 *J.C. & U.L.* 613, 672 (2009).

18. *Id.* at 681–82.

a student, the college or university should guarantee that the alleged victim feels safe and secure. In order to do so, Cantalupo recommends “interim measures” that the college or university should take after an accusation has been made, but before any disciplinary hearing has begun.¹⁹ “These measures include such methods as changing class schedules and living arrangements, issuing stay-away orders, and swiftly responding to any retaliation or further harassment that may be directed at a survivor after a report.”²⁰

Cantalupo argues that at the disciplinary hearing stage the alleged victim should receive procedural safeguards as well. Specifically, the procedures afforded the accused at a disciplinary hearing should not be conflated with procedural protections to which a criminal defendant would be entitled by virtue of the Due Process Clause of the Fourteenth Amendment.²¹ She argues that because the accused is not threatened with incarceration or monetary damages, there is less at stake during a disciplinary hearing than there is at a criminal trial.²² She maintains that the victim remains in a fragile position that can be worsened by a traumatizing hearing where she must face the accused. Cantalupo believes that because the repercussions are not as severe as those that ordinarily follow the conviction for a felony, the procedural safeguards that protect the defendant’s potential innocence at trial must give way in order to protect the victim from experiencing additional trauma.

Additionally, Cantalupo argues that a victim-centered approach is in a college or university’s best interest from a pragmatic point of view, because it limits the college or university’s liability. By setting up processes that prioritize the complainant’s interests, she says, a college or university may limit its exposure to private actions brought against it by alleged victims of sexual assault because of its failure to take precautionary measures that resulted in the complainant’s re-victimization.²³ Thus, even if the woman had been sexually assaulted, the college or university may be able to point to its victim-friendly protocol as a defense against liability. Cantalupo explains that courts have allowed alleged victims of sexual assault to sue their college or university if it fails this four-part test:

1. the school is a recipient of federal funding,
2. the sexual harassment was so severe, pervasive, and objectively offensive that it could be said to deprive the plaintiff of access to the educational opportunities or benefits

19. Cantalupo, *supra* note 15, at 73. Cantalupo also reports that private actions by victims are on the rise, and frequently successful. *Id.* at 57.

20. *Id.* at 73.

21. Cantalupo, *supra* note 17, at 663.

22. *Id.* at 679–80.

23. Cantalupo, *supra* note 15, at 73.

- provided by the school,
3.the school has actual knowledge/notice of the harassment,
4.the school was deliberately indifferent to the harassment.²⁴

The first two requirements typically are easy to satisfy:

So many schools receive federal funds of some kind that the first prong is generally not in controversy. In addition, most cases of peer sexual violence such as sexual assault are accepted as being “severe, pervasive, and objectively offensive” enough to “deprive the plaintiff of access to the educational opportunities or benefits provided by the school” even if they happen only once.²⁵

The main issue becomes whether the college or university had actual knowledge of the sexual assault and was deliberately indifferent to it.²⁶ Indifference ends up being established through an examination of the college or university’s response to the harassment once it was made aware of its alleged occurrence—both in the interim, between the assault and the disciplinary hearing, and also, during the disciplinary process itself if one takes place. On the other hand, a violation of the accused’s rights, especially at a private institution, is harder to establish because those rights lack a firm legal foothold (such as the Constitution or Title IX). Cantalupo argues that it is pragmatic to favor the alleged victim because ensuring that victim-centered procedural protections are in place will inhibit her ability to prove that the college or university was “deliberately indifferent” to the offending conduct if the accused student is found, at the hearing, not to have engaged in the conduct of which the alleged victim had accused him.²⁷ On the other hand, men who believe that they were wrongly found responsible for sexual assault after being accused of sexual assault have a low rate of success.

In sum, Cantalupo believes that while the accused’s circumstances do not warrant additional protection, the alleged victim’s position certainly does. The disturbing studies that found that nearly a quarter of college and university women have been sexually assaulted²⁸ and that men who

24. *Id.* at 59 (citing *S.S. v. Alexander*, 177 P. 3d 724, 726 (Wash. Ct. App. 2008)).

25. *Id.*

26. *Id.* at 60.

27. Cantalupo writes:

In the past, colleges and universities have been concerned about incurring . . . costs as a result of lawsuits by students accused of peer sexual violence who have been disciplined and feel they have been mistreated by the institution [T]he high unlikelihood of their winning a lawsuit means that they will not be successful in forcing schools to [settle].

Id. at 71.

28. National Institute of Justice reports that 1/5 of women on college and university campuses are sexually assaulted. *Sexual Assault on Campus: What Colleges and Universities Are Doing About It*, NAT’L INST. JUST., (Dec. 2005),

commit sexual assault once are often serial assailants²⁹ warrant, she says, a policy that increases the chances that the alleged victim is not dissuaded from reporting crimes, is protected in the interim, and is not re-traumatized during the hearing.

Cantalupo's well-intentioned reasoning and recommendations, and her legitimate concern for protection of the victim, is commendable. Unfortunately, Cantalupo's line of reasoning is *premised* on the assumption that the consequences faced by the accused at a disciplinary hearing are fundamentally different from those resulting from a criminal trial. This argument relies on a line of reasoning that is too narrow. Of course a college or university lacks the power to incarcerate a student who has been found to have committed sexual assault in a disciplinary hearing. It is overly simplistic, though, to draw a conclusion that the consequences faced by the student could not have many of the same implications as a criminal conviction when considering his future. Analyzing a criminal trial and disciplinary hearing at a higher level of generality reveals that the two have more in common than Cantalupo allows. For instance, in addition to the literal denial of liberty, incarceration has a lasting impact on the individual in the form of a criminal record. Colleges and universities also maintain accounts of their students' disciplinary records, and the law with regard to whether or not these documents may be produced for third parties is conflicting and unclear.

I. DAMAGE CONTROL: FERPA & THE INTERNET

Under FERPA, colleges and universities that accept financial assistance from the federal government may not disclose a student's educational records without the consent of the student, if he or she is over eighteen years old, or, if the student is a minor, without the consent of his or her parent.³⁰ What constitutes an education record is outlined in the statute as well as in the DOE's administrative rules: "those records, files, documents, and other materials which—(i) contain information directly related to a student; and (ii) are maintained by an educational agency or institution or by a person acting for such agency or institution."³¹

The simplest way a student's disciplinary record can be revealed is if the individual consents.³² This might occur if the student is applying to a

<https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>.

29. Research has found that sexual predators are usually serial assailants. David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE AND VICTIMS 73, 73–84 (2002).

30. Clery Act, 20 U.S.C. § 1232g (2011).

31. *Id.* § 1232g(a)((4)(A) (2011).

32. "FERPA gives parents certain rights with respect to their children's education records. These rights transfer to the student when he or she reaches the age of 18 or attends a school beyond the high school level. Students to whom the rights have

graduate program or for a professional degree. For instance, a law school application will typically ask the student to divulge any disciplinary action taken against the applicant at any level of schooling.³³ And, while the student retains the right to refuse, it is probable that admissions departments would be suspicious of this applicant. If the student acknowledges that disciplinary action has been taken against him, the admissions office would follow up by requesting an explanation and potentially seeking the applicant's consent to have his prior educational institution disclose the relevant information.³⁴

In addition, historically, there has been confusion regarding the overlap of FERPA and Title IX. Initially, colleges and universities interpreted FERPA as a prohibition against disclosing the outcome of a hearing to the victim or at least qualified that the victim could only learn the outcome if she agreed to keep the information confidential.³⁵ But such measures were harshly criticized as “gag-rules” and perceived as counterproductive to the victim's recovery.³⁶ The DOE subsequently declared that requiring the victim's silence is “inconsistent with the letter and spirit of the Clery Act,”³⁷ a federal statute that applies to all colleges and universities that receive federal funding and that requires them to report crimes that occur on and around campus.³⁸

The Dear Colleague letter attempts to clarify the relationship between FERPA and Title IX: the DOE believes that “FERPA continues to apply in the context of Title IX enforcement” but the DOE also believes that Title IX requirements supersede FERPA if they conflict³⁹—thus, “FERPA permits a school to disclose to the harassed student information about the sanction imposed upon a student who was found to have engaged in harassment when the sanction directly relates to the harassed student.”⁴⁰ Furthermore, “a postsecondary institution may disclose to anyone—not just the alleged victim—the final results of a disciplinary proceeding if it determines that the student is an alleged perpetrator of a crime of violence or a non-forcible sex offense, and, with respect to the allegations made, the student has committed a violation of the institution's rules or policies.”⁴¹

transferred are ‘eligible students.’” FERPA Overview, U.S. DEPT OF EDU., <http://www.ed.gov/policy/gen/guid/fpco/ferpa/index.html> (last visited Apr. 10, 2013).

33. Melissa Fruscione, Director of Admissions and Financial Aid, Notre Dame Law School.

34. *Id.*

35. Cantalupo, *supra* note 17, at 630–40.

36. *Id.* at 640.

37. *Id.*

38. Clery Act, 20 U.S.C. § 1092(f).

39. Dear Colleague Letter, *supra* note 4, at 13 n. 32.

40. *Id.* at 13.

41. *Id.* at 14.

If a college or university discloses to “anyone” other than the victim that the individual was held responsible for sexual assault, there is no supplementary requirement to additionally say that the hearing was conducted with a lower standard of proof or without the defendant’s having the ability to cross-examine the complainant. Employers and graduate institutions that have access to the academic records of a student found responsible for sexual assault are likely to treat the student as a serious wrongdoer. The results may even be as negative as having a criminal record. These negative consequences will apply even if the student was later acquitted in a criminal court.⁴² Thus, students face the possibility of succeeding in a criminal court, but being expelled from school as a sexual predator.

Search engines, like Google, and social media websites only exacerbate a person’s struggle to prevent the outcome of the hearing from dictating one’s future. But, “[t]he modern application of the negligent hiring theory imposes liability on an employer when it ‘places an unfit person in an employment situation that entails an unreasonable risk of harm to others.’ Ultimately, it is a theory that imposes upon an employer an obligation to hire ‘safe employees.’”⁴³ A student found to have sexually assaulted another student will be considered a liability at work. This same rationale may be adopted by a graduate institution that must decide whether or not to accept a student who was found to have sexually assaulted another student earlier in his academic career. The litigious nature of our society will cause employers and admissions departments to hesitate before knowingly accepting a man who was found to have committed sexual assault during his academic career.

Furthermore, while the student is still attending the college or university where the alleged transgression occurred, the student’s peers will learn of the situation and may discuss the events online. For example, students may observe the accused being switched out of classes and assume his guilt. Even if the student is acquitted in court, if the disciplinary committee on campus finds that he committed sexual assault and word travels, regardless of the college or university imposed punishment, he may get a negative reputation as a predator that will harm his social, and potentially his

42. The Dear Colleague letter specifically explains:

Police investigations may be useful for fact-gathering; but because the standards for criminal investigations are different, police investigations or reports are not determinative of whether sexual harassment or violence violates Title IX. Conduct may constitute unlawful sexual harassment under Title IX even if the police do not have sufficient evidence of a criminal violation.

Id. at 10.

43. Robert Sprague, *Googling Job Applicants: Incorporating Personal Information into Hiring Decisions*, 23 LAB. LAW. 19, 23 (2008).

professional, life. Information travels faster than ever and confidential information may not simply be revealed, but it may become public and permanent. The damage that may be done to a reputation is aggravated by the fact that it is extremely challenging to erase something once it appears on the Internet, something young adults with Facebook, MySpace, Twitter, and blogs, are beginning to realize.⁴⁴ The DOE's interpretation of FERPA, coupled with college or university policy that centers around the alleged victim, means that the accused has a better chance of defending himself and his reputation in state court than he does at his college or university.

II. THE APRIL 4, 2011 DEAR COLLEAGUE LETTER

Dear Colleague letters are periodically published by the OCR in order to remind colleges and universities that receive federal funding that they must comply with the OCR's mandates regarding Title IX enforcement. Failure to follow these directives may result in a complaint, independent investigation, and loss of federal funding.⁴⁵ This section will provide an overview of the content of the April 4, 2011 Dear Colleague letter that is the subject of this note.

A. Making a Complaint

One of the primary objectives of the Dear Colleague letter was to increase education on and awareness of sexual violence that occurs on college and university campuses. As Russlynn Ali, the author of the letter, said near its outset:

44. In a comprehensive *New York Times* web article entitled "The Web Means the End of Forgetting," Professor Jeffrey Rosen explained how the increased use of the Internet has prompted employers to search various social media sites when reviewing applications for job openings, provoking controversy over how to protect people's privacy and reputations in this new era. See Jeffrey Rosen, *The Web Means the End of Forgetting*, N.Y. TIMES July 21, 2010, <http://www.nytimes.com/2010/07/25/magazine/25privacy-t2.html?pagewanted=all&r=0>. Additionally, reviewing a recent book written by Viktor Mayer-Schönberger on the importance of "social forgetting," Professor Rosen relates Mayer-Schönberger's argument:

By "erasing external memories," he says in the book, "our society accepts that human beings evolve over time, that we have the capacity to learn from past experiences and adjust our behavior." In traditional societies, where missteps are observed but not necessarily recorded, the limits of human memory ensure that people's sins are eventually forgotten. By contrast, Mayer-Schönberger notes, a society in which everything is recorded "will forever tether us to all our past actions, making it impossible, in practice, to escape them." He concludes that "without some form of forgetting, forgiving becomes a difficult undertaking."

Id. (quoting Viktor Mayer-Schönberger, *Delete: The Virtue of Forgetting in the Digital Age* (Princeton University Press 2009)).

45. 34 C.F.R. § 106.4(a) (2003).

Recipients of Federal financial assistance must comply with the procedural requirements outlined in the Title IX regulations. Specifically, a recipient must: (A) Disseminate a notice of nondiscrimination; (B) Designate at least one employee to coordinate its efforts to comply with and carry out its responsibilities under Title IX; (C) Adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee sex discrimination complaints.⁴⁶

Notice must be published around the college or university and online, announcing the college or university's Title IX coordinator and the school's "specific" policy on sexual violence.⁴⁷ Furthermore, notice "should be written in language appropriate to the age of the school's students, easily understood, easily located, and widely distributed."⁴⁸

The letter requires that colleges and universities expand their educational programs to include "information aimed at encouraging students to report incidents of sexual violence," despite the potential involvement of drugs or alcohol.⁴⁹ Rather than "chill" student reporting, schools should "inform students that the schools' primary concern is student safety, that any other rules violations will be addressed separately from the sexual violence allegation, and that use of alcohol or drugs never makes the victim at fault for sexual violence."⁵⁰

The letter goes on to say that once a complaint has been made, the school may be required by Title IX to take interim measures to protect the complainant. Specifically, "[t]he school should notify the complainant of his or her options to avoid contact with the alleged perpetrator and allow students to change academic or living situations as appropriate."⁵¹ These special arrangements are *exclusively* granted to the complainant: "When taking steps to separate the complainant and alleged perpetrator, a school should minimize the burden on the complainant, and thus should not, as a matter of course, remove complainants from classes or housing while allowing alleged perpetrators to remain."⁵²

If the OCR does not believe that the college or university has taken appropriate measures, it may "initiate proceedings to withdraw Federal funding by the Department or refer the case to the U.S. Department of

46. Dear Colleague Letter, *supra* note 4, at 6 (footnotes omitted).

47. *Id.* at 6–7.

48. *Id.* at 9.

49. *Id.* at 15. While certain changes disseminated in the Dear Colleague letter *must* be adhered to, such as the preponderance of the evidence standard, others are suggestions designed to bring the college's or university's policy in line with OCR policy and reduce the likelihood of OCR revision and sanction down the line.

50. *Id.*

51. Dear Colleague Letter, *supra* note 4, at 15.

52. *Id.* at 15–16.

Justice for litigation.”⁵³ Thus, the OCR puts enormous pressure on the school to maintain a victim-friendly environment, which can end up creating an environment that is less sympathetic to the accused and tilted in favor of the alleged victim. If a male student feels threatened or uncomfortable because he has been falsely accused of sexual assault, he does not possess the right to interim measures that would separate him from the complainant. He cannot ask to have his schedule changed, only the alleged victim has this option. Still, the OCR describes its procedures as “equitable.”⁵⁴

B. Disciplinary Hearing

Once the disciplinary proceeding is underway, according to the Dear Colleague letter, “preponderance of the evidence is the appropriate standard for investigating allegations of sexual harassment or violence.”⁵⁵ The OCR reaches this conclusion by interpreting the regulations promulgated under the authority granted in Title IX, which require a college or university that receives federal funding to “adopt and publish grievance procedures providing for prompt and equitable resolution of student and employee complaints alleging any action which would be prohibited by [Title IX].”⁵⁶ The OCR supports its decision to read “equitable grievance procedures” to mean that a college or university should adopt a preponderance of the evidence standard,⁵⁷ by first analogizing Title IX to Title VII of the Civil Rights Act of 1964, which also “prohibits discrimination on the basis of sex.”⁵⁸ The letter then goes on to explain that “OCR’s Case Processing Manual requires that a noncompliance determination be supported by the preponderance of the evidence when resolving allegations of discrimination under all the statutes enforced by OCR, including Title IX. OCR also uses a preponderance of the evidence standard in its fund termination administrative hearings.”⁵⁹ These three instances, according the OCR, require colleges and universities to apply the preponderance of evidence standard “in order for a [college or university’s] grievance procedures to be consistent with Title IX standards Grievance procedures that use [a] higher standard are inconsistent with the standard of proof established for violations of the civil

53. *Id.* at 16.

54. *Id.* at 6.

55. *Id.* at 11. The OCR justifies use of this lower standard because “[t]he Supreme Court has applied a preponderance of the evidence standard in civil litigation involving discrimination under Title VII of the Civil Rights Act of 1964 . . . [which] prohibits discrimination on the basis of sex.” *Id.* at 10–11.

56. 34 C.F.R. § 106.8(b) (2003).

57. Dear Colleague Letter, *supra* note 4, at 10.

58. *Id.* at 11.

59. *Id.*

rights laws, and are thus not equitable under Title IX.”⁶⁰

In addition to insisting on the lowest evidentiary standard, the letter makes other procedural qualifications that favor the alleged victim at the expense of the accused. While in certain instances the letter seems to advocate a level playing field during the hearing,⁶¹ the OCR removes crucial procedural safeguards that would exist during a criminal trial. Most significantly, the OCR “strongly discourages schools from allowing the parties to cross-examine each other”⁶² during the proceedings. The OCR reasons that, “[a]llowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”⁶³ Additionally, any contact between the two parties prior to the hearing is prohibited by the Dear Colleague letter.⁶⁴

The OCR does recommend that the school allow for appeals and “maintain documentation of all proceedings.” But, the benefits of the appeal process are minimized by the overarching lack of procedural safeguards afforded the accused during the original hearing. The letter barely touches on this subject, simply mentioning that “[p]ublic and state-supported schools must provide due process to the alleged perpetrator. However, schools should ensure that steps taken to accord due process rights to the alleged perpetrator do not restrict or unnecessarily delay the Title IX protections for the complainant.”⁶⁵ The complete lack of attention the accused receives is indicative of the weakness of this victim-centered approach.

III. THE OCR’S FINDINGS AND NOTRE DAME’S CHANGES

July 1, 2011 OCR announced that it had entered into a settlement agreement with Notre Dame, concluding the office’s investigation into the University’s student-on-student sexual assault policies. As noted at the outset of this note, the agency-initiated investigation was prompted by the negative attention Notre Dame received during the school’s investigation

60. *Id.*

61. For instance, the letter explains: “Throughout a school’s Title IX investigation, including at any hearing, the parties must have an equal opportunity to present relevant witnesses and other evidence. The complainant and the alleged perpetrator must be afforded similar and timely access to any information that will be used at the hearing.” *Id.* at 11.

62. *Id.* at 12.

63. *Id.*

64. *Id.* at 12. “OCR strongly discourages schools from allowing the parties personally to question or cross-examine each other during the hearing. Allowing an alleged perpetrator to question an alleged victim directly may be traumatic or intimidating, thereby possibly escalating or perpetuating a hostile environment.”

65. *Id.*

into Lizzy Seeberg's suicide.⁶⁶

The agreement laid out the four objectives the agreement aspired to address:

(1) it furthers the goals of OCR and the university to have in place procedures and practices that are designed to prevent a sexually hostile environment from occurring on campus; (2) assures that students feel comfortable and safe complaining about sexual harassment, including incidents of sexual violence; (3) assures that sexual harassment complaints will be quickly and equitably resolved and that appropriate discipline will be taken against the harasser; and, (4) assures that victims of sexual harassment will be given appropriate and necessary counseling services and academic support.⁶⁷

Overall, the OCR was pleased with the level of cooperation exhibited by the University, and while it was concerned with certain aspects of the existing policy, it commended specific practices as well. Notre Dame embraced the OCR's suggestions and requirements, striving to create a campus environment that was more victim-friendly.⁶⁸

A. Room for Improvement

The circumstances surrounding the OCR's investigation into Notre Dame's sexual assault policy on campus were far from ideal. Having been accused of complacency in light of a young woman's suicide and possible sexual assault, the University was under close scrutiny to bring its policy in line with OCR policy, which emphasizes the importance of dissemination of information regarding reporting procedures and the University's student handbook.⁶⁹ Additionally, the OCR promotes education and training of students and all personnel that may come in contact with a victim of sexual assault.⁷⁰ Finally, the OCR seeks to make campuses safer and friendlier to women who allege that another student has sexually assaulted them by requiring certain measures to be taken to protect the alleged victim in the interim and during the disciplinary hearing.⁷¹

In line with these overarching goals, the OCR initially recommended that Notre Dame make its policy more clear. "OCR's investigation found

66. Civil Rights Office Announces Settlement Agreement on Discrimination Investigation at Notre Dame, U.S. DEPARTMENT OF EDUCATION, (July 1, 2011), <http://www.ed.gov/news/press-releases/civil-rights-office-announces-settlement-agreement-discrimination-investigation-> (last visited Apr. 10, 2013).

67. *Id.*

68. *Id.*

69. Dear Colleague Letter, *supra* note 4, at 6-13.

70. *Id.* at 7.

71. Those measures have been described in Part II of this Note.

that students and University staff were not always clearly instructed as to the processes that would be followed after a report of sexual misconduct or sexual assault was made to the University.”⁷² This was partly the result of the policy being written “somewhat inconsistent[ly]” in different sources around the school.⁷³ Furthermore, the policy did not specify the evidentiary standard that would be used during a disciplinary hearing. The OCR noted this, and also, that the University should use the preponderance of the evidence standard.⁷⁴ This lower standard is contrasted with the clear and convincing standard many colleges and universities had previously been using.⁷⁵ Notre Dame had in fact been using the lower standard, but the OCR wanted to formalize this fact in *Du Lac*, the University’s student handbook.⁷⁶

The OCR also required the University to:

Clearly delineate the options available to students who report sexual harassment, the specific steps the University will take in its investigation, the interim and permanent steps the University will take to stop and/or remedy the harassment, prevent its recurrence and minimize the burden to the complainant’s educational program, the resources and services available to complainants, accused students and witnesses, and the provision to both parties of the equivalent opportunity to provide evidence, and equivalent notice of the process, access to peer support, information about the procedures and written notice of the outcome.⁷⁷

With regard to the actual disciplinary hearing, the Agreement required the University to “conclude [any of] its Title IX sexual harassment investigations within sixty (60) calendar days, except in extraordinary circumstances.”⁷⁸ The OCR also required the University “to provide for alternative arrangements for complainants who do not want to be present in the same room as the accused during the disciplinary hearing, and to allow the complainant to appeal a disciplinary decision on the same grounds as

72. Letter from Debbie Osgood, Director, Office of Civil Rights, Department of Education, to Reverend John I. Jenkins, C.S.C., President, University of Notre Dame, *Re: OCR Sexual Harassment Investigation, 2* (Jun. 30, 2011) (on file with author) [hereinafter Letter to Rev. Jenkins].

73. *Id.* at 6.

74. *Id.*

75. William Creeley, *Standard of Evidence Survey: Colleges and Universities Respond to OCR’s New Mandate*, THE LANTERN, (2011), available at <http://www.thefirelantern.org/standard-of-evidence-survey-colleges-and-universities-respond-to-ocrs-new-mandate/>.

76. *Id.*

77. *Id.* at 7.

78. Letter to Rev. Jenkins, *supra* note 72, at 7.

provided for the accused.”⁷⁹

B. Changes Made by Notre Dame⁸⁰

One of the unique and successful changes that Notre Dame made was the introduction of a Sexual Assault Resource Coordinator (SARC), an employee whose job is to “take a much more hands-on and personal approach”⁸¹ to complaints of sexual assault on campus, while “providing support to both a complainant and an accused student throughout the process.”⁸² The SARC program has been praised by University officials as being a successful and innovative way to get information to the students⁸³—thereby fulfilling one of the Dear Colleague letter’s goals of notice. It also, theoretically, promotes equality. Since neither the accused nor the alleged victim is allowed an attorney at a disciplinary hearing regarding a sexual assault claim, the SARC personnel are required to help the students manage the process, but they are also required not to give either party an advantage.

Notre Dame also clarified its definition of sexual harassment by writing it in student-friendly language and including sex-based cyber-harassment under the sexual misconduct umbrella.⁸⁴ Thus, Notre Dame’s definition of sexual misconduct includes non-consensual sexual intercourse, non-consensual sexual contact, and other forms of sexual wrongdoing including: indecent exposure, sexual exhibitionism, sex-based cyber-harassment, prostitution or the solicitation of a prostitute, peeping or other voyeurism, and going beyond the boundaries of consent, e.g., by allowing others to view consensual sex or the non-consensual video or audiotaping of sexual activity.⁸⁵

79. *Id.*

80. For a list of the changes that Notre Dame has made to *Du Lac*, see Fosmoe, *supra* note 1.

81. Laura Kraegel, *Policy: can you spot the changes?*, SCHOLASTIC: UNIVERSITY OF NOTRE DAME’S STUDENT MAGAZINE, Sept, 15, 2011, at 22. (quoting Ann Firth, Associate Vice President for Student Affairs (Mission & Integration) and Deputy Title IX Coordinator).

82. *Id.*

83. *Id.*

84. Fosmoe, *supra* note 1.

85. Committee on Sexual Assault Prevention, *Sexual Misconduct and Sexual Assault*, UNIVERSITY OF NOTRE DAME, <http://csap.nd.edu/policy/> (last visited Apr. 9, 2013). *See also* Notre Dame’s definition of consent and intoxication:

Consent means informed, freely given agreement, communicated by clearly understandable words or actions, to participate in each form of sexual activity. Consent cannot be inferred from silence, passivity, or lack of active resistance. A current or previous dating or sexual relationship is not sufficient to constitute consent, and consent to one form of sexual activity does not imply consent to other forms of sexual activity. By definition, there is no consent when there is a threat of force or violence or any other form of

If a student believes that she has been the victim of sexual assault, she is encouraged by Notre Dame to make a complaint to the University and is also free to report the incident to law enforcement. "To further encourage reporting, the University's procedures provide that students who report sexual misconduct and/or sexual assault will not be subjected to disciplinary action for violating other provisions of the disciplinary code (e.g., alcohol violations) or be subjected to questioning concerning past unrelated sexual relationships."⁸⁶ Furthermore, the University is obligated to take action if it believes sexual misconduct is occurring, even if there has not been a complaint.⁸⁷ Previously, the University would wait until an issue was brought to its attention through the reporting system.

Finally, the University agreed that the complainant would not be forced to face the accused during the hearing, nor would she be precluded from appealing the result if it is unfavorable to her claim. The University's endorsement of the Dear Colleague letter,⁸⁸ indicates that Notre Dame has embraced the victim-centered approach to sexual misconduct that was advocated by scholars such as Nancy Cantalupo and adopted by the OCR.

IV. WHAT IF A STUDENT IS UNJUSTLY FOUND TO HAVE COMMITTED SEXUAL ASSAULT?

Some scholars have recognized the precarious position that male students accused of sexual assault are placed in, and have sought to find ways to remedy the unjust treatment these students may experience during disciplinary hearings.⁸⁹ This next section will outline some of the arguments that academics have presented; but will conclude by arguing that these attempts have been unsuccessful. Instead, what these legal acrobatics demonstrate is the difficulty of establishing a cause of action that a male student, unjustly accused of sexual assault, can cling to in his efforts to be made whole. The disciplinary hearing becomes, then, the only venue for establishing his innocence and preserving his reputation. Consequently, procedural protections, in particular the evidentiary

coercion or intimidation, physical or psychological. A person who is the object of sexual aggression is not required to physically or otherwise resist the aggressor; the lack of informed, freely given consent to sexual contact constitutes sexual misconduct. [I]ntoxication is not an excuse for failure to obtain consent. A person incapacitated by alcohol or drug consumption, or who is unconscious or asleep or otherwise physically impaired, is incapable of giving consent.

Id.

86. Letter to Rev. Jenkins, *supra* note 72, at 5.

87. *Id.* at 2.

88. "The University specifically expressed interest in ensuring that its policies and procedures comport with OCR's 2011 Dear Colleague letter on Sexual Violence." *Id.* at 6 (footnote omitted).

89. See *infra* note 91 and accompanying text.

standard, need to be stronger in order prevent wrongful condemnations that will negatively impact the rest of the wrongly accused student's life.

A. The Other Areas of the Law That Have Been (Unsuccessfully)
Explored: Contract and Tort Law

Some scholars argue that students at private colleges and universities have rights that find their source in contract law, which requires good faith and fair dealing.⁹⁰ According to these scholars, contract law is the “contractual equivalent of ‘due process,’ protecting the student against unfair or arbitrary enforcement of school rules.”⁹¹ A core principle of contract formation, they argue, is that “an agreement [should be] ‘reached by two parties of equal bargaining power by a process of free negotiation.’”⁹² As some scholars point out,⁹³ though, students have no ability to negotiate the conditions of the contract—they must either take it or leave it.⁹⁴ The adhesionary nature of these contracts is reinforced when considered in light of the student's circumstances, primarily his or her lack of sophistication relative to the college or university⁹⁵ as well the student's limited alternatives.⁹⁶

Berger and Berger further argue that contract law requires that a college or university consider the student's reasonable expectations⁹⁷ when

90. See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289 (1999) (arguing contract law's requirement of good faith and fair dealing should be read into the contract between a student and a college or university); Johanna Matloff, *The New Star Chamber: An Illusion of Due Process Standards at Private University Disciplinary Hearings*, 35 SUFFOLK U. L. REV. 169 (2001) (arguing that students are subjected to adhesionary contracts put forth by colleges and universities). See also Restatement (Second) of Contracts § 205 (1981).

91. Berger & Berger, *supra* note 90, at 292 (footnote omitted).

92. *Id.* at 319 (footnote omitted).

93. *Id.* at 294.

94. *Id.* at 330.

95. Berger and Berger explain the convoluted structure of the contract: “[U]ncertainty about the precise terms of the student-university contract constitutes the first distinction between this contract and most standard commercial (that is, money for goods and services) exchanges . . .” *Id.* at 321. See also Berger and Berger's discussion of the college or university as a commodity and the potential applicability of the U.C.C. to the student-university contract. Specifically, if there are ambiguous terms, the authors argue that courts should interpret the “trade usage” in favor of the weaker party, meaning the students. *Id.* at 336 n. 251.

96. *Id.* at 322.

97. The student's reasonable expectations should be determined by considering:

[W]hat the average student might expect regarding those [disciplinary] rules, if he could imagine himself ‘on trial’ for academic wrongdoing, the Restatement [(Second) of Contracts] gives courts a tool for aligning a school's procedures with their students' (presumed) expectations. And how do we believe students would answer the inquiry? Much as we propose: in a

conducting disciplinary hearings.⁹⁸ And, if the potential punishment is severe, procedural safeguards commensurate with the punishment should be available.⁹⁹ In support of their argument, Berger and Berger note that the Restatement (Second) of Contracts § 211 “permits courts, in construing a standardized agreement, to nullify any portion of the contract that falls outside the ‘reasonable expectations’ of the weaker party and to substitute fairer language for it.”¹⁰⁰

These contract causes of action have yet to be successful, and likely never will be. Even if a plaintiff demonstrated that a standard form or adhesion contract existed between himself and his college or university, contract law in this area is becoming *more*, rather than less, permissive.¹⁰¹ The result is that a student unjustly convicted of sexual assault will not be successful in arguing that he is entitled to damages resulting from the unconscionability or breach of his contract.

Under tort law, the three potential injuries that may be inflicted upon a student that has been expelled after a hearing that was not characterized by adequate procedural safeguards are: intentional infliction of emotional distress (IIED); interference with prospective economic interest; and defamation.¹⁰² Unfortunately, with each injury, an element of the tort is unlikely to be satisfied. For instance, with IIED the plaintiff must show that the college or university’s “conduct was ‘extreme and outrageous’ falling ‘beyond all possible bounds of decency’ and was ‘utterly intolerable in a civilized community.’”¹⁰³ While the college or university may favor the victim relative to the accused in a sexual assault hearing, only the most unlikely set of facts could ever warrant the assertion that it had acted maliciously. High standards, such as the previous one, will rarely be satisfied.

B. One Shot to Prove His Innocence

Students accused of sexual assault realistically have a single opportunity to prove their innocence, and it is at the disciplinary hearing. This note

manner consistent with the conception of good faith and fair dealing
Id. at 331.

98. *Id.* at 335.

99. Berger and Berger explain: “This means, where the charges are the academic equivalent of criminal fraud, that the process should contain most of the safeguards provided by the Constitution for persons charged with ordinary crime.” *Id.* (footnote omitted).

100. *Id.* at 294.

101. See generally *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011).

102. Ryan J. Hayward, *With Liberty and Justice for All . . . Even Students at Private Colleges and Universities*, 8 *HOLY CROSS J.L. & PUB. POL’Y* 37, 48–50 (2004).

103. *Id.* at 48 (quoting *Tynecki v. Tufts Univ. Sch. of Dental Med.*, 875 F. Supp. 26, 34 (D. Mass. 1994) (citations omitted)).

began by reviewing Professor Cantalupo's scholarship and OCR policy, outlined in its Dear Colleague letter, both of which support a victim-friendly approach to student-on-student sexual assault at colleges and universities. A key feature of Cantalupo's argument is that criminal adjudication is fundamentally different than a college or university's disciplinary hearing, a fact that warrants different procedural protections. An examination of FERPA and the nature of the Internet, however, demonstrate that the reputational damage to a student accused of sexual assault might end up being similar to the consequences that face a criminal defendant if the student's record is disclosed or his alleged misconduct is preserved online.

If an innocent student is wrongly found to have committed sexual assault by a disciplinary committee, his avenues of redress are severely limited, if any exist at all. This predicament is not addressed in the Dear Colleague letter, which advocates several procedural changes that advantage the complainant at the expense of the alleged assailant. Unfortunately, addressing each concerning aspect of the letter is beyond the scope of this note. Instead, attention will be directed to the change that the letter made to the applicable evidentiary standard at sexual assault disciplinary hearings.

In the Dear Colleague letter, OCR explains that "[i]n addressing complaints filed with OCR under Title IX, OCR reviews a school's procedures to determine whether the school is using a preponderance of the evidence standard to evaluate complaints."¹⁰⁴ The failure of a college or university to use this standard may result in OCR holding that the college or university is in violation of Title IX and ineligible for federal funding.¹⁰⁵ Prior to the publication of this letter, many colleges and universities required evidentiary standards higher than a preponderance of the evidence.¹⁰⁶ A survey of the top 100 colleges and universities¹⁰⁷ conducted

104. Dear Colleague Letter, *supra* note 4, at 10.

105. The federal regulations expounding Title IX require assurance that:

Every application for Federal financial assistance shall as condition of its approval contain or be accompanied by an assurance from the applicant or recipient, satisfactory to the Assistant Secretary, that the education program or activity operated by the applicant or recipient and to which this part applies will be operated in compliance with this part. An assurance of compliance with this part shall not be satisfactory to the Assistant Secretary if the applicant or recipient to whom such assurance applies fails to commit itself to take whatever remedial action is necessary in accordance with § 106.3(a) to eliminate existing discrimination on the basis of sex or to eliminate the effects of past discrimination whether occurring prior or subsequent to the submission to the Assistant Secretary of such assurance.

34 C.F.R. § 106.4 (a) (2003).

106. Creeley, *supra* note 75, at 1.

107. *Id.* The rankings are based on the *National University Rankings: Best*

to gauge changes in their policies in response to the Dear Colleague letter, found that “39 of the nation’s top 100 schools, most of them in the top 50, required that allegations of sexual misconduct be proved by a standard other than ‘more likely than not.’ Of these 39, 15 schools did not specify any standard of proof.”¹⁰⁸

Today, colleges and universities, such as Notre Dame, that are the subject of an OCR investigation, must publish in their student handbooks that the standard that will be used at sexual assault disciplinary hearings is a preponderance of the evidence. Otherwise, OCR could withhold federal funding to the college or university.¹⁰⁹ As the survey above noted, many colleges and universities are acting preemptively by changing their policies in order to conform to the Dear Colleague letter and avoid trouble with OCR. The implication is that proof of student’s guilt only needs to be .01% above a 50-50 chance, despite the *certainty* that the repercussions he will face will be devastating if he is found responsible for sexual assault in the hearing.

C. Finding a Remedy

Neither Title IX nor the federal regulations promulgated by the OCR under that act explicitly require the use of a preponderance of the evidence standard in sexual assault disciplinary hearings. The Dear Colleague letter makes a large interpretative leap from 34 C.F.R. § 106.8(b), created under the authority granted to the DOE in 20 U.S.C. §§ 1681 & 1682, which requires “equitable” grievance procedures,¹¹⁰ to application of the lowest evidentiary standard. This interpretation is not justified by the preponderance of the evidence standard’s application in Title VII adjudication or its internal use by OCR, as the Dear Colleague letter implies.¹¹¹ Furthermore, OCR requirement that colleges and universities establish the preponderance of the evidence standard in order to comply

Colleges, U.S. NEWS & WORLD REPORT (2011 ed.).

108. *Id.* See also Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 73, 80 (1985–1986) (noting that courts, colleges and universities, and student defendants all seem to agree that the appropriate standard of proof in student disciplinary cases is one of “clear and convincing” evidence).

109. The Dear Colleague letter’s has been attacked by opponents of the preponderance of the evidence standard as violating the Administrative Procedures Act, which requires administrative rulemaking to go through an extensive three-step process before becoming effective. Creeley, *supra* note 75, at 3. The letter arguably circumvents the rulemaking process by making an aggressive interpretation of the relevant regulations, which do not include language promoting or requiring a preponderance of the evidence standard. By requiring colleges and universities to use this particular standard, the OCR is, the argument goes, for all practical purposes creating a rule. *Id.* This argument has yet to be tested.

110. Dear Colleague Letter, *supra* note 4, at 10; and 34 C.F.R. § 106.8(b).

111. Dear Colleague Letter, *supra* note 4, at 10.

with OCR policy and avoid punishment, arguably violates the Administrative Procedures Act.¹¹² The mandate effectively acts as a rule even though OCR did not comply with the three-step rulemaking process, whereby the agency must notify the public, allow for comments regarding the proposed rule, and publish the final rule.¹¹³

Enacting an amendment to Title IX could pull the rug out from under the Dear Colleague letter by clarifying that OCR does not have the authority to create new regulations, or construe already existing rules, to require a preponderance of the evidence standard in sexual assault disciplinary hearings. Rather, it would establish clear and convincing as the lowest evidentiary standard that a college or university could apply and it would also allow colleges and universities to apply a higher standard of beyond a reasonable doubt. This amendment would mitigate the powerless position students wrongly found to have committed sexual assault are placed in, by striving to ensure, *ex ante*, that students are not incorrectly found responsible.

Because the language used in Title IX is does not specifically address evidentiary standards in this context, leaving the door open for the DOE and OCR to read in a standard, the proposed amendment would eliminate this leeway. Namely, by illuminating Congress's intent regarding the lowest standard of proof that may be applied in a disciplinary hearing for sexual assault, the proposed amendment would clarify that "equitable grievance procedures" in the context of student on student sexual assault disciplinary hearings should not be interpreted as allowing for a standard of proof lower than clear and convincing. The implication is that Congress would be signaling to the DOE that the preponderance of the evidence standard in this context is inherently inequitable.

Support for establishing the clear and convincing standard of evidence as the floor in sexual assault disciplinary hearings can be found in the American Association of University Professors' (AAUP) own letter in which it said: "Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member's career, we believe that the 'clear and convincing' standard of evidence is more appropriate than the 'preponderance of evidence' standard."¹¹⁴ AAUP similarly relied on the repercussions to an individual's reputation and emphasized the importance of safeguarding this asset.

112. 5 U.S.C. § 553 (2006); Creeley, *supra* note 70, at 3.

113. Creeley, *supra* note 75, at 3.

114. Letter from Cary Nelson, President, American Association of University Professors, to Russlynn Ali, Assistant Secretary for Civil Rights, Office of Civil Rights, Department of Education, 1-2 (Aug. 18, 2011), <http://thefire.org/public/pdfs/be5df1a71d0eae6b7b840a2ecdb01bb9.pdf> (cited in Creeley, *supra* note 75).

CONCLUSION

After the tragic death of Lizzy Seeberg, Notre Dame was forced into the spotlight by the media and the OCR. After its investigation, OCR required Notre Dame to formally conform to OCR's victim-friendly policies outlined in its April 4, 2011 Dear Colleague letter. Notre Dame's conformity to the OCR's Dear Colleague letter means that the rights of the accused during sexual assault disciplinary proceedings are required to come second to the rights of the complainant. The explanation that OCR and Notre Dame gave for adopting this approach presents the consequences of a disciplinary hearing as fundamentally different from a criminal trial, and conclude that students do not need the same level of procedural safeguards in the former as they need in the latter. This is an overly simplistic argument that does not adequately consider how analogous the repercussions may be for a student found culpable of sexual assault at a disciplinary hearing and a student found responsible for sexual assault in a courthouse. While a college or university may not imprison the student who has been found responsible for sexual assault, this young man may lose his ability to pursue his career plans because his next step academically or professionally will be unfavorably colored by his past. It is unrealistic to assume that society will seriously take account of the differences that exists at a disciplinary hearing for sexual assault and a criminal trial if the student is ultimately found responsible in that hearing; but the result—diminution in opportunity—will be fundamentally the same.

The creativity demonstrated by scholars in their efforts to advocate for rights of the accused during disciplinary hearings demonstrates concern that male students accused of sexual assault lack adequate protection. These attempts to find causes of actions against colleges and universities that have mistakenly found students to be responsible for sexual assault have been, and will likely continue to be, unsuccessful. They demonstrate, however, the importance of the disciplinary hearing for the student accused of sexual assault, because it is his one and only shot at preserving his innocence and reputation.

In order to mitigate the precarious position male students accused of sexual assault are placed in, this Note proposes an amendment to Title IX that would limit the DOE's scope of authority when interpreting the appropriate evidentiary standard applicable in student on student sexual assault disciplinary hearings. Specifically, this amendment would create a floor – the clear and convincing standard of evidence – rather than permitting students to be found responsible for sexual assault based on a mere preponderance of the evidence.

The objective of this Note is to stress the implications that a negative result at disciplinary may have on a male student's life. Establishing a clear and convincing standard of evidence will not detract from the trauma an alleged victim has faced. It will however, ensure that the male student's

responsibility is more thoroughly established before punishing him, and lead to disciplinary hearings that do not excessively favor the alleged victim at the expense of the alleged assailant.

