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THE PROCESS THAT IS DUE: PREPONDERANCE OF THE EVIDENCE AS THE STANDARD OF PROOF FOR UNIVERSITY ADJUDICATIONS OF STUDENT-ON-STUDENT SEXUAL ASSAULT COMPLAINTS

Abstract: In April 2011, the U.S. Department of Education Office for Civil Rights issued a “Dear Colleague Letter” to colleges and universities clarifying their obligation, as a condition of the receipt of federal funding under Title IX, to respond promptly and effectively to complaints of student-on-student sexual assault. The Letter explained that schools must, among other requirements, use the “preponderance of the evidence” standard of proof in campus disciplinary proceedings for student sexual assault complaints. Commentators quickly criticized the use of the preponderance of the evidence standard as violating accused students’ due process rights. This Note examines the history of the due process rights of public school students and applies the Supreme Court’s *Mathews v. Eldridge* procedural due process balancing test to demonstrate that the preponderance of the evidence standard adequately protects accused students’ rights. When the accused students’ individual interests are balanced against a realistic assessment of the risk of erroneous findings and the significant competing interests of colleges and universities in the particular context of student-on-student sexual assault, it becomes clear that schools may comply with Title IX without jeopardizing the rights of accused students.

INTRODUCTION

Sexual violence, including rape and other forms of sexual assault, is a pervasive problem facing colleges and universities across the United States.¹ As many as one in every five women is likely to be raped or sexually assaulted during her college years, most often by someone she

¹ See HEATHER M. KARJANE ET AL., NAT’L INST. OF JUSTICE, SEXUAL ASSAULT ON CAMPUS: WHAT COLLEGES AND UNIVERSITIES ARE DOING ABOUT IT 2 (2005), available at <https://www.ncjrs.gov/pdffiles1/nij/205521.pdf>; Lexie Kuznick & Megan Ryan, Introduction to *Changing Social Norms? Title IX and Legal Activism: Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 367, 374 (2008).

knows.² In fact, women who attend college face a greater risk of being raped than other women in the same age group who do not attend college.³ Additionally, the physical, mental, and emotional consequences of rape can be devastating for the victim.⁴ College-student victims struggle to maintain their grades and attendance and are likely to drop out of school.⁵ Moreover, rape victims are six times more likely to attempt suicide than are victims of other crimes.⁶ Compounding the rapes and sexual assaults many young women suffer is the equally troubling reality that many victims feel re-victimized by the responses of their schools.⁷ Yet schools also struggle with the appropriate response to student-on-student sexual harassment and assault.⁸ Administrators

² KARJANE ET AL., *supra* note 1, at 2 (indicating that in eighty to ninety percent of campus rapes and sexual assaults, the victim and the perpetrator know each other); Kathryn M. Reardon, *Acquaintance Rape at Private Colleges and Universities: Providing for Victims' Educational and Civil Rights*, 38 SUFFOLK U. L. REV. 395, 397 (2005). Additionally, six percent of college men will experience attempted or completed sexual assault. CHRISTOPHER P. KREBS ET AL., *THE CAMPUS SEXUAL ASSAULT (CSA) STUDY: FINAL REPORT 5-5* (2007) (unpublished report submitted to the National Institute of Justice), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/221153.pdf>.

³ KARJANE ET AL., *supra* note 1, at ii.

⁴ See KREBS ET AL., *supra* note 2, at viii; RANA SAMPSON, *ACQUAINTANCE RAPE OF COLLEGE STUDENTS* 8 (2002), available at <http://www.cops.usdoj.gov/pdf/e03021472.pdf> (describing victims of acquaintance rape as suffering similar psychological harms as victims of stranger rape, including "shock, humiliation, anxiety, depression, substance abuse, suicidal thoughts, loss of self-esteem, social isolation, anger, distrust of others, fear of AIDS, guilt, and sexual dysfunction"); Reardon, *supra* note 2, at 398.

⁵ SAMPSON, *supra* note 4, at 8 (noting that college student victims may be likely to leave school for fear of encountering the perpetrator in shared classes, dining halls, or dormitories); Reardon, *supra* note 2, at 399.

⁶ KREBS ET AL., *supra* note 2, at viii.

⁷ See *Simpson v. Univ. of Colo. Boulder*, 500 F.3d 1170, 1180, 1184 (10th Cir. 2007); *Brzonkala v. Va. Polytechnic Inst. & State Univ.*, 132 F.3d 949, 952, 955 (4th Cir. 1997), *vacated en banc*, 169 F.3d 820 (4th Cir. 1999), *aff'd sub nom.* *United States v. Morrison*, 529 U.S. 598 (2000). Consider the experience of Lisa Simpson and Anne Gilmore. See *Simpson*, 500 F.3d at 1184. Simpson and Gilmore were both students at the University of Colorado-Boulder in December 2001 when, asleep in their shared bedroom following a party, they awoke to find themselves surrounded by a group of men, including members of the football team and high school recruits visiting campus. *Id.* at 1172, 1180. Ms. Simpson was raped both orally and vaginally by multiple assailants while Ms. Gilmore was assaulted by three other men in the same room at the same time. *Id.* at 1180. After Ms. Simpson reported the incident to the police, the university revoked the spring-semester scholarships of four football players who were allegedly involved, but did not deny the players' eligibility to participate in the January 2002 Fiesta Bowl. *Id.* And despite "overwhelming" evidence that a particular recruit participated in the gang rapes, the school's football coach continued to support the recruit's admission to the university. *Id.*

⁸ See Wendy J. Murphy, *Using Title IX's "Prompt and Equitable" Hearing Requirements to Force Schools to Provide Fair Judicial Proceedings to Redress Sexual Assault on Campus*, 40 NEW

seeking to implement policies and procedures that are fair to both accused and victimized students often face criticism from both sides.⁹

Congress and the U.S. Department of Education have sought to address the problem of sexual assault in the nation's schools through legislation such as Title IX of the Education Amendments of 1972.¹⁰ Most commonly known for promoting equality in sports participation, Title IX prohibits discrimination based on sex in any educational program or activity that receives federal funds.¹¹ Under Title IX, discrimination includes conduct which denies or limits a student's ability to benefit from a school's programs or activities on the basis of that stu-

ENG. L. REV. 1007, 1008, 1010 (2006) (describing student outrage when Harvard College announced a new policy requiring complaints of sexual assault to be accompanied by "sufficient independent corroboration" before the school would undertake an investigation of the complaint); Lisa Tenerowicz, Note, *Student Misconduct at Private Colleges and Universities: A Roadmap for "Fundamental Fairness" in Disciplinary Proceedings*, 42 B.C. L. REV. 653, 653-54 (2001) (describing a "firestorm" of controversy ignited by the Columbia University Senate's effort to enact a new sexual misconduct policy furthering a "non-adversarial approach" to sexual assault disciplinary proceedings); Kristen Lombardi, *A Lack of Consequences for Sexual Assault*, CTR. FOR PUB. INTEGRITY (Feb. 24, 2010, 12:00 PM), <http://www.publicintegrity.org/2010/02/24/4360/lack-consequences-sexual-assault-0> (explaining that student victims of sexual assault often expect punishment from campus disciplinary proceedings whereas colleges often view discipline as an opportunity to educate, not to punish, accused students).

⁹ See Tenerowicz, *supra* note 8, at 658-60 (describing pressure on college administrators beginning in the early 1990s to establish disciplinary procedures that were more solicitous of victims of sexual assault and describing critics' assertions that such policy shifts resulted in campus "Star Chambers").

¹⁰ See Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006); OFFICE FOR CIVIL RIGHTS, U.S. DEP'T OF EDUC., REVISED SEXUAL HARASSMENT GUIDANCE: HARASSMENT OF STUDENTS BY SCHOOL EMPLOYEES, OTHER STUDENTS, OR THIRD PARTIES i (2001) [hereinafter 2001 GUIDANCE], available at <http://www2.ed.gov/about/offices/list/ocf/docs/shguide.html>; Elizabeth Jewell, ed., *Athletics and Title IX of the 1972 Education Amendments*, 11 GEO. J. GENDER & L. 245, 246-47 (2010); see also Megan Ryan, ed., *Comments from the Spring 2007 Harvard Journal of Law & Gender Conference*, 31 HARV. J.L. & GENDER 378, 381 & n.14 (2008) (describing the Jeanne Clery Disclosure of Campus Security Policy and Campus Crime Statistics Act, a statute that requires colleges and universities to compile and disclose annual campus crime statistics, as another congressional response to sexual violence on college campuses).

¹¹ See 20 U.S.C. § 1681. Title IX therefore applies to both public and private schools as a condition on their receipt of federal funding. See 34 C.F.R. § 106.4 (2011); 2001 GUIDANCE, *supra* note 10, at 2. Because Title IX also applies to schools that benefit from federal funding indirectly by virtue of their students' receipt of federal financial aid, almost every college and university in the United States, public or private, must comply with Title IX. See *Grove City Coll. v. Bell*, 687 F.2d 684, 693 (3d Cir. 1982); Thomas N. Sweeney, Comment, *Closing the Campus Gates—Keeping Criminals Away from the University—The Story of Student-Athlete Violence and Avoiding Institutional Liability for the Good of All*, 9 SETON HALL J. SPORT L. 226, 244 & n.99 (1999).

dent's sex.¹² Courts and the Department of Education recognize sexual harassment as conduct that is so severe or pervasive that it creates a hostile learning environment, thereby limiting a student's ability to access the full benefits of a school's program.¹³ Even a single incident of sexual assault can create a hostile environment and constitute sexual harassment.¹⁴ Consequently, Title IX requires schools to respond "prompt[ly] and effective[ly]" to student-on-student sexual harassment and assault to mitigate the effects of the hostile learning environment and to safeguard all students' right to an education free from sex-based discrimination and violence.¹⁵

In April 2011, Vice President Joseph Biden and U.S. Secretary of Education Arne Duncan announced that the Department of Education Office for Civil Rights (OCR), the agency charged with enforcing Title IX, was issuing a "Dear Colleague Letter" focusing on sexual assault on college campuses and schools' Title IX obligations to respond.¹⁶ The Department of Education designated the Dear Colleague Letter a "significant guidance document," meaning that it sets forth statements of general policy and interpretive rules of broad, prospective applicability on regulatory and statutory issues.¹⁷ The Dear Colleague Letter does

¹² See 34 C.F.R. § 106.31(a) (2011); 2001 GUIDANCE, *supra* note 10, at 4.

¹³ 2001 GUIDANCE, *supra* note 10, at 2, 3, 5, 29 n.37 (citing *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 650 (1999)).

¹⁴ See *Jennings v. Univ. of N.C.*, 444 F.3d 255, 273 & n.12 (4th Cir. 2006) (acknowledging that a single incident of sexual assault or rape could be sufficient to raise the possibility of a hostile learning environment, but holding that a college soccer coach's remarks and innuendo did not rise to that level), *aff'd in part, vacated in part en banc*, 482 F.3d 686, 691 (4th Cir. 2007) (holding that soccer coach's persistent, sexually-charged comments were so severe and pervasive that, if proven, would constitute hostile learning environment sexual harassment); *Vance v. Spencer Cnty. Pub. Sch. Dist.*, 231 F.3d 253, 259 & n.4 (6th Cir. 2000) (observing that under Title IX a hostile environment could arise from a single incident); U.S. DEP'T OF EDUC., OFFICE FOR CIVIL RIGHTS, DEAR COLLEAGUE LETTER 3 (Apr. 4, 2011) [hereinafter DEAR COLLEAGUE LETTER], available at <http://www2.ed.gov/about/offices/list/ocr/letters/colleague-201104.html>.

¹⁵ See 2001 GUIDANCE, *supra* note 10, at 4, 12; Holly Hogan, *The Real Choice in a Perceived "Catch-22": Providing Fairness to Both the Accused and Complaining Students in College Sexual Assault Disciplinary Proceedings*, 38 J.L. & EDUC. 277, 280 (2009).

¹⁶ Press Release, The White House, Vice President Biden Announces New Administration Effort to Help Nation's Schools Address Sexual Violence (Apr. 4, 2011), available at <http://www.whitehouse.gov/the-press-office/2011/04/04/vice-president-biden-announces-new-administration-effort-help-nation-s-s>; see DEAR COLLEAGUE LETTER, *supra* note 14, at 2.

¹⁷ See DEAR COLLEAGUE LETTER, *supra* note 14, at 1 n.1; Office of Mgmt. & Budget, Exec. Office of the President, Final Bulletin for Agency Good Guidance Practices, 72 Fed. Reg. 3432, 3434, 3439 (Jan. 25, 2007) [hereinafter OMB Bulletin]; see also William Funk, *A Primer on Nonlegislative Rules*, 53 ADMIN. L. REV. 1321, 1322-23 (2001) (describing agencies' use of interpretive guidance documents, such as opinion letters, agency memoranda, and guidelines, to clarify agencies' views of their enabling statutes for regulated entities).

not add substantive requirements to Title IX or its implementing regulations; rather it clarifies OCR's interpretation of Title IX and its accompanying regulations in the specific context of sexual violence in the college and university setting.¹⁸

One significant component of the Dear Colleague Letter is its specification of the standard of proof schools must use in campus disciplinary proceedings for sexual assault complaints.¹⁹ Prior to the Dear Colleague Letter, OCR had not specified that Title IX requires schools to use a particular standard of proof in disciplinary proceedings addressing student-on-student sexual assault.²⁰ According to the Letter, however, for a school's disciplinary procedures to comply with Title IX, the school must utilize the "preponderance of the evidence" standard in adjudications for sexual harassment and assault.²¹ Thus, a school's use of a higher standard, such as "clear and convincing evidence," would constitute a violation of Title IX.²² According to OCR, the preponderance of the evidence standard is necessary to ensure an equitable disciplinary proceeding because it is consistent with other civil rights laws and is the evidentiary standard used by OCR itself when investigating a school's alleged failure to comply with Title IX.²³

¹⁸ See DEAR COLLEAGUE LETTER, *supra* note 14, at 1 n.1; OMB Bulletin, *supra* note 17, at 3434, 3439. Although interpretive guidance documents such as the Dear Colleague Letter have been the subject of some scrutiny in the context of an agency's authority to issue such documents without formal notice and comment, this Note focuses on the constitutional due process implications of the Dear Colleague Letter's substantive policy statements. See *Appalachian Power Co. v. EPA*, 208 F.3d 1015, 1020, 1024, 1028 (D.C. Cir. 2000); see also Thomas J. Fraser, Note, *Interpretive Rules: Can the Amount of Deference Accorded Them Offer Insight into the Procedural Inquiry?*, 90 B.U. L. REV. 1303, 1309 (2010) (describing the criticism that agencies' informal policy statements circumvent notice-and-comment procedures); *infra* notes 190–280 and accompanying text.

¹⁹ See DEAR COLLEAGUE LETTER, *supra* note 14, at 10–11.

²⁰ See 2001 GUIDANCE, *supra* note 10, at 20; Letter from Will Creeley, Dir. of Legal & Pub. Advocacy, Found. for Individual Rights in Educ. (FIRE), to Russlynn Ali, Assistant Sec'y for Civil Rights, Office for Civil Rights, Dep't of Educ. 6 (May 5, 2011) [hereinafter FIRE Letter], available at <http://thefire.org/public/pdfs/48934710c977d689391d03a1da867dc7.pdf?direct>.

²¹ DEAR COLLEAGUE LETTER, *supra* note 14, at 10–11.

²² *Id.* Schools that fail to comply with Title IX may be subject to enforcement actions by OCR. 20 U.S.C. § 1682 (2006). Title IX authorizes the withdrawal of a school's federal funds for failure to comply voluntarily with OCR. *Id.* Additionally, the Supreme Court has recognized an implied private right of action under Title IX that enables students to sue their schools for money damages or injunctive relief if the school fails to respond properly to incidents of sexual violence on campus. See *Davis*, 526 U.S. at 648; *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979).

²³ DEAR COLLEAGUE LETTER, *supra* note 14, at 11.

In response to the Dear Colleague Letter, critics have argued that the use of the preponderance of the evidence standard in school disciplinary proceedings may jeopardize or even violate the due process rights of accused students.²⁴ Commentators argue that because of the significant individual interests at stake for the accused student in a campus disciplinary proceeding that could result in suspension or expulsion, the higher clear and convincing evidence standard is required to guard against the risk of error in schools' proceedings.²⁵

This Note examines the constitutional due process rights of public college and university students and argues that the preponderance of the evidence standard is a sufficient minimum standard to ensure due process protections for accused students in campus disciplinary proceedings for sexual assault.²⁶ Part I of this Note describes the due process rights of students at public colleges and universities and presents the three-part balancing test that courts use to determine the specific procedures required when due process applies.²⁷ Part II examines three evidentiary standards that federal courts have addressed in assessing the procedures necessary to safeguard students' due process rights in disciplinary proceedings: (1) substantial evidence, (2) preponderance of the evidence, and (3) clear and convincing evidence.²⁸ By applying the Supreme Court's due process balancing test, Part III then demonstrates that the preponderance of the evidence standard, more so than the higher, clear and convincing evidence standard, strikes the appropriate due process balance between accused students and their schools in adjudications of student-on-student sexual assault com-

²⁴ See, e.g., FIRE Letter, *supra* note 20, at 10. Due process protections apply only to public school students because public schools, but not private schools, are "state actors" under the Due Process Clause of the Fourteenth Amendment. See Walter Saurack, Note, *Protecting the Student: A Critique of the Procedural Protection Afforded to American and English Students in University Disciplinary Hearings*, 21 J.C. & U.L. 785, 787 (1995).

²⁵ See Nicholas Trott Long, *The Standard of Proof in Student Disciplinary Cases*, 12 J.C. & U.L. 71, 80–81; FIRE Letter, *supra* note 20, at 10.

²⁶ See *infra* notes 31–96, 191–280 and accompanying text. Because due process protections under the Fourteenth Amendment apply only to public school students, this Note's analysis of the standard of proof necessary to ensure procedural due process in disciplinary proceedings applies only to public, tax-supported institutions. See Saurack, *supra* note 24, at 786–87; *infra* notes 191–280 and accompanying text. This Note remains relevant, however, for private institutions wishing to ensure that their disciplinary policies comport with due process values as they implement procedures required by Title IX. See *Grove City Coll.*, 687 F.2d at 693; 34 C.F.R. § 106.4 (2011); Hogan, *supra* note 15, at 278 n.2 (observing that private institutions frequently choose to craft procedures that conform to due process requirements).

²⁷ See *infra* notes 31–96 and accompanying text.

²⁸ See *infra* notes 97–190 and accompanying text.

plaints.²⁹ This Note thus asserts that all schools bound to follow Title IX may rest assured that by complying with the Dear Colleague Letter and implementing the preponderance of the evidence standard, schools will continue to protect accused students' due process rights.³⁰

I. THE DUE PROCESS RIGHTS OF ACCUSED STUDENTS AND THE OBLIGATIONS OF PUBLIC COLLEGES AND UNIVERSITIES

This Part describes courts' application of the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution to public school students.³¹ Because public schools are considered state actors under the Fourteenth Amendment, due process is required in disciplinary proceedings if those proceedings threaten to deprive the student of an interest that falls within the meaning of "life, liberty, or property."³² Section A of this Part explains courts' rationales for holding that the Due Process Clause applies to public school students.³³ Section B then be-

²⁹ See *infra* notes 191–280 and accompanying text.

³⁰ See *infra* notes 212–280 and accompanying text. By complying with Title IX, schools will also be protecting the rights of victimized students. See 20 U.S.C. § 1681 (2006); 34 C.F.R. § 106.31(a)–(b) (2011); 2001 GUIDANCE, *supra* note 10, at 12; Hogan, *supra* note 15, at 277. Generally, procedural due process requirements and Title IX's statutory and regulatory requirements are complementary. See Hogan, *supra* note 15, at 277. The Fourteenth Amendment creates a right to due process prior to the state's deprivation of an individual's life, liberty, or property. U.S. CONST. amend. XIV, § 1. Title IX creates a statutory right to an education free from sex-based discrimination and violence. 20 U.S.C. § 1681; 34 C.F.R. § 106.31(a)–(b). Thus, under the U.S. Constitution, school disciplinary proceedings must adhere to procedural requirements that ensure due process for the accused student, and under Title IX, school disciplinary proceedings must adhere to procedural requirements that ensure a school's prompt and equitable response to complaints of sexual assault to ensure an education free from discrimination for the victimized student. See *Goss v. Lopez*, 419 U.S. 565, 576 (1975); 34 C.F.R. § 106.31(a); Hogan, *supra* note 15, at 277.

³¹ See *infra* notes 32–96 and accompanying text.

³² See U.S. CONST. amend. XIV, § 1; *Goss*, 419 U.S. at 576; *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 155 (5th Cir. 1961). When a state action threatens the recognized interests of an individual, the state must provide both substantive and procedural due process. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES & POLICIES 557 (4th ed. 2011). Substantive due process looks to whether the state had adequate justification for its decision to deprive an individual of life, liberty, or property and whether the action was "arbitrary and capricious." See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 217 (1985); CHEMERINSKY, *supra*, at 558. Procedural due process refers to the procedures the government must utilize before depriving an individual of a recognized interest. CHEMERINSKY, *supra*, at 557. The Supreme Court has treated the standard of proof as an element of procedural due process. See *Santosky v. Kramer*, 455 U.S. 745, 758 (1982); *Addington v. Texas*, 441 U.S. 418, 425 (1979). This Part thus focuses on the procedural due process requirements for public school disciplinary proceedings. See *infra* notes 56–96 and accompanying text.

³³ See *infra* notes 36–55 and accompanying text.

gins by describing the three-part balancing test set forth by the Supreme Court for determining the procedural safeguards required to ensure due process.³⁴ Section B continues by surveying the minimum procedural due process protections currently required by federal courts for public school disciplinary proceedings, and Section B concludes by highlighting the overlap between Title IX's procedural requirements and those of the Due Process Clause.³⁵

A. *Liberty and Property: Applying the Due Process Clause of the Fourteenth Amendment to Students*

This Section sets forth courts' rationales for holding that the Due Process Clause of the Fourteenth Amendment applies to public school students because of students' property and liberty interests in their education.³⁶ Due process jurisprudence asks two basic questions: (1) Does due process apply?, and if so, (2) What process is due?³⁷ To answer the first question, courts look to whether a state action threatens to deprive an individual of a "property," "liberty," or "life" interest within the meaning of the Due Process Clause.³⁸ If the state's action threatens a recognized interest, the state must afford due process before depriving the individual of that interest.³⁹

Specific liberty and property interests need not be enumerated in the Constitution to demand due process protections.⁴⁰ In 1972, in *Board of Regents of State Colleges v. Roth*, the U.S. Supreme Court held that both "property" and "liberty" may be broadly construed in determining whether the Due Process Clause applies to restrain a state's action against an individual.⁴¹ The *Roth* Court defined a property interest as a "legitimate claim of entitlement" originating in "existing rules or understandings" created by sources other than the Constitution, such as state law.⁴² The Court defined a liberty interest as the freedom to "enjoy those privileges long recognized . . . as essential to the orderly pur-

³⁴ See *infra* notes 56–69 and accompanying text.

³⁵ See *infra* notes 70–96 and accompanying text.

³⁶ See *infra* notes 37–55 and accompanying text.

³⁷ *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972).

³⁸ *Bd. of Regents of State Colls. v. Roth*, 408 U.S. 564, 569–70 (1972); *Morrissey*, 408 U.S. at 481.

³⁹ See *Goss*, 419 U.S. at 572–73.

⁴⁰ See *id.* at 572–73; *Roth*, 408 U.S. at 577.

⁴¹ 408 U.S. at 572, 577.

⁴² *Id.* at 577.

suit of happiness by free men,” such as the freedom to contract, to marry, or to pursue one’s chosen occupation.⁴³

In 1974, in *Goss v. Lopez*, the U.S. Supreme Court held that under the Due Process Clause of the Fourteenth Amendment, primary and secondary school students have both a property and a liberty interest in their education.⁴⁴ In *Goss*, nine public high school students sued the Columbus Public School System alleging that an Ohio state law permitting a school principal to suspend a student for up to ten days without a hearing of any kind violated the students’ right to procedural due process.⁴⁵ The Court determined that the student plaintiffs had a property interest in their education because Ohio state law had created a “legitimate claim of entitlement” to a public school education both by establishing a public school system and by requiring children to attend.⁴⁶ The *Goss* Court also concluded that public school students face the deprivation of a liberty interest in school disciplinary proceedings because disciplinary charges could damage students’ reputations among their peers and teachers and harm future educational or employment opportunities.⁴⁷ Thus, under *Goss*, the Due Process Clause applies to public school students because disciplinary proceedings implicate both their property and liberty interests.⁴⁸

⁴³ *Id.* at 572 (quoting *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923)).

⁴⁴ 419 U.S. at 576. The 1961 decision of the U.S. Court of Appeals for the Fifth Circuit in *Dixon v. Alabama State Board of Education* laid the foundation for the Supreme Court’s ruling in *Goss*. *Goss*, 419 U.S. at 576 n.8; see *Dixon*, 294 F.2d at 158; Charles Alan Wright, *The Constitution on the Campus*, 22 VAND. L. REV. 1027, 1031 (1969) (referring to *Dixon* as a “path-breaking” decision that caused due process law in the public school context to “turn[] 180 degrees”). In considering the due process rights of public university students, the Fifth Circuit in *Dixon* held that a student’s right to continued education at a public institution of higher learning at which that student is already enrolled is an interest that ought to be protected by the Due Process Clause of the Fourteenth Amendment. 294 F.2d at 157, 158. In *Dixon*, Alabama State College had summarily expelled nine black students, including the six plaintiffs, who had participated in a peaceful protest by entering a segregated lunch counter located in the basement of the County Courthouse in Montgomery, Alabama. *Id.* at 152 & n.3, 154. The university president expelled each of the six plaintiffs by letter, affording them no opportunity for a hearing, and identifying the only grounds for expulsion as “this problem of Alabama State College.” *Id.* at 152, 154. In response, the Fifth Circuit deemed it unacceptable that a public university failed to afford students the same basic procedures enjoyed by “a pickpocket” in a court of law. *Id.* at 158 (quoting Warren A. Seavey, *Dismissal of Students: “Due Process,”* 70 HARV. L. REV. 1406, 1407 (1957)).

⁴⁵ 419 U.S. at 568–69.

⁴⁶ *Id.* at 573–74.

⁴⁷ See *id.* at 574–75. In 1971, in *Wisconsin v. Constantineau*, the Supreme Court held that a person’s “good name, reputation, honor, [and] integrity” are liberty interests requiring protection under the Due Process Clause. 400 U.S. 433, 437 (1971).

⁴⁸ 419 U.S. at 576. Generally, when the individual liberty interest at stake is reputational, the Supreme Court requires that a property interest also be in jeopardy for due

Although the Supreme Court's holding in *Goss* was limited to primary and secondary school students, lower federal courts have extended the Court's reasoning to students of public colleges and universities.⁴⁹ In so doing, some lower federal courts have emphasized the heightened significance of the property and liberty interests at issue for post-secondary school students.⁵⁰ For example, in 1975, in *Gaspar v. Bruton*, the U.S. Court of Appeals for the Tenth Circuit held that it had "no difficulty" extending *Goss* to recognize an adult nursing student's property interest in her education.⁵¹ And the court observed that the plaintiff may have a stronger claim of entitlement to her continued education than the high school students in *Goss* because the plaintiff in *Gaspar* paid a fee to attend the state-run nursing program.⁵² Similarly, in *Smyth v. Lubbers*, also decided in 1975, the U.S. District Court for the Western District of Michigan held that the Due Process Clause "plainly

process protections to apply. See *Siegert v. Gilley*, 500 U.S. 228, 233, 234 (1991) (holding that a supervisor's negative recommendation of a former government employee did not constitute a deprivation of the plaintiff's liberty interest because the reputational harm to the former employee was not accompanied by any other tangible deprivation, such as the termination of employment); *Paul v. Davis*, 424 U.S. 693, 711–12 (1976) (holding that the Kentucky police's publication of the plaintiff's name and photograph on a flyer warning local businesses of "active shoplifters" may have harmed the plaintiff's reputation, but did not constitute a deprivation within the meaning of the due process clause because the reputational harm was not accompanied by the deprivation of an entitlement extended by state law); see also *Tigrett v. Rectors & Visitors of the Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002) (holding that the Due Process Clause did not apply to two University of Virginia students who were subjected to disciplinary proceedings but not actually suspended or expelled because the proceedings, though potentially harmful to the students' reputations, did not infringe on their property interests in a continued education).

⁴⁹ See *Goss*, 419 U.S. at 576; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 9, 12 (1st Cir. 1988) (holding that it is "not questioned" that public post-secondary students have a constitutionally-protected liberty and property interest in their education); *Hart v. Ferris State Coll.*, 557 F. Supp. 1379, 1380, 1382 (W.D. Mich. 1983) (finding it "undisputed" that disciplinary sanctions, such as suspension or expulsion, implicate a post-secondary students' liberty and property interests); *Saurack*, *supra* note 24, at 790–91. Since its decision in *Goss*, the Supreme Court has had another occasion to consider whether the Due Process Clause of the Fourteenth Amendment applies to public university students, but the Court declined to reach this question, holding only that *if* the Due Process Clause applied to the university student plaintiff, the university's actions would not constitute a violation of the student's substantive due process rights. See *Ewing*, 474 U.S. at 215, 222–23 (addressing whether a university's dismissal of a student for inadequate academic performance in a six-year undergraduate-medical degree program could constitute a violation of the student's due process rights).

⁵⁰ See *Gaspar v. Bruton*, 513 F.2d 843, 850 (10th Cir. 1975); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 16 (D. Me. 2005); *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 622 (D.P.R. 1974).

⁵¹ 513 F.2d at 843, 850.

⁵² *Id.* at 850.

applie[d]” to the two plaintiff-college students who were suspended following the discovery of marijuana in their dormitory rooms.⁵³ The *Smyth* court emphasized that the students’ liberty interest in their good reputation was particularly strong where the charged disciplinary infractions also met the definitions for state law crimes because a guilty verdict in the school disciplinary proceeding could pose a significant threat to the students’ future educational and career opportunities.⁵⁴ Since *Goss*, lower federal courts have routinely held that the Due Process Clause applies to post-secondary school students when disciplinary proceedings implicate their property and liberty interests.⁵⁵

B. Due Process Applies, So What Process Is Due?

Once a court has determined that an individual’s liberty and property interests are implicated by a state action, the court must then determine the nature of the process the state must afford prior to depriving an individual of those interests.⁵⁶ This Section first presents the three-part balancing test set forth by the U.S. Supreme Court in 1976 to determine the specific procedural safeguards required when a state action implicates an individual’s procedural due process rights.⁵⁷ This Section then describes the due process procedures courts most commonly require of disciplinary proceedings at public colleges and universities.⁵⁸ Finally, this Section concludes by describing the overlap between Title IX’s procedural requirements for disciplinary hearings and those of the Due Process Clause in the context of campus sexual assault.⁵⁹

⁵³ 398 F. Supp. 777, 781, 796 (W.D. Mich. 1975).

⁵⁴ *Id.* at 796–97. The two students were charged with “disorderly conduct and possession of narcotic drugs in violation of both State of Michigan laws and/or Grand Valley State Colleges regulations.” *Id.* at 796.

⁵⁵ See *Gorman*, 837 F.2d at 12; *Gaspar*, 513 F.2d at 850; *Siblerud v. Colo. State Bd. of Agric.*, 896 F. Supp. 1506, 1512–13 (D. Colo. 1995); *Jaksa v. Regents of the Univ. of Mich.*, 597 F. Supp. 1245, 1247–48 (E.D. Mich. 1984); *Edwards v. Bd. of Regents of Nw. Mo. State Univ.*, 397 F. Supp. 822, 827 (W.D. Mo. 1975). Whereas all public school students have property and liberty interests in their education, the protections of the Due Process Clause likely only apply to students who are defending against disciplinary charges. See *Therault v. Univ. of S. Me.*, 353 F. Supp. 2d 1, 5, 7–8 (D. Me. 2004) (finding that the Due Process Clause did not apply to a student-victim of sexual assault because the disciplinary proceedings directed against the alleged perpetrator did not directly threaten to deprive the victim of a property interest in her education).

⁵⁶ *Goss*, 419 U.S. at 577; *Morrissey*, 408 U.S. at 481.

⁵⁷ See *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *infra* notes 60–69 and accompanying text.

⁵⁸ See *infra* notes 70–85 and accompanying text.

⁵⁹ See *infra* notes 85–96 and accompanying text.

1. The Due Process Balancing Test: How Courts Decide What Process Is Due

When a student accused of misconduct files suit against a school alleging that the school's disciplinary proceedings violated the student's procedural due process rights, courts evaluate the school's procedures under the Supreme Court's due process balancing test.⁶⁰ In 1976, in *Mathews v. Eldridge*, the U.S. Supreme Court held that procedural due process requires, at minimum, notice and the fair opportunity to be heard; the Court further held that the sufficiency of the procedures utilized by a government actor, such as an administrative body, should be assessed under a three-part test.⁶¹ The test weighs (1) the individual private interest that will be affected by the state action, and (2) the risk of erroneous deprivation of that private interest, against (3) the public interests implicated, including the substantive social costs and the administrative burdens that would arise from the implementation of more procedure.⁶² The test originated in part from the Court's view that due process is a flexible standard that does not mandate a uniform, technical procedure, but instead requires consideration of the competing interests at stake in a particular type of proceeding.⁶³ The Court recognized that the formal procedural rules that evolved for adjudications in courts of law may not always be appropriate for adminis-

⁶⁰ See, e.g., *Osteen v. Henley*, 13 F.3d 221, 226 (7th Cir. 1993); *Gorman*, 837 F.2d at 14–15. Since the Supreme Court first recognized students' due process rights in *Goss*, two distinct trends have emerged in courts' review of school disciplinary procedures. See *Bd. of Curators of the Univ. of Mo. v. Horowitz*, 435 U.S. 78, 87 (1978); Lisa L. Swem, Note, *Due Process Rights in Student Disciplinary Matters*, 14 J.C. & U.L. 359, 361 (1987). In cases of unsatisfactory academic performance, such as a student failing multiple courses in a graduate program, courts defer to schools' procedures by reviewing academic decisions only to ensure they are not arbitrary or capricious and afford substantive due process. See *Ewing*, 474 U.S. at 215–16, 222–23; *Horowitz*, 435 U.S. at 81–82, 91–92; Swem, *supra*, at 361–62. By contrast, courts will closely scrutinize schools' policies and procedures in response to students' non-academic misconduct, such as possession of drugs or violence against another student. See, e.g., *Gomes*, 365 F. Supp. 2d at 16–17; *Smyth*, 398 F. Supp. at 796–97. The increased risk of erroneous fact-finding in disciplinary proceedings justifies courts' scrutiny of school disciplinary proceedings under the procedural due process rubric. See *Goss*, 419 U.S. at 580. Disciplinary misconduct often call for procedures resembling administrative or judicial hearings because facts of the misconduct must be adduced and competing versions of events evaluated; whereas in academic proceedings, school officials will have ready access to a student's grades, test scores, and other performance evaluations necessary to make an informed and fair decision. See *Dixon*, 294 F.2d at 158–59.

⁶¹ 424 U.S. at 335. In *Mathews*, the Court considered the proper procedures for the Social Security Administration to use in its initial termination of an individual's benefits. *Id.* at 348.

⁶² *Id.*

⁶³ See *id.* at 334.

trative agencies and other government bodies and concluded that the procedures utilized by state and government actors should be tailored to the circumstances of the decision to be made and the private interests in jeopardy.⁶⁴

Since *Mathews*, courts have routinely applied the three-part test in evaluating a broad range of procedures utilized by state agencies and other state actors, including public schools.⁶⁵ When applying *Mathews* in the context of college and university disciplinary proceedings, courts have upheld *Mathews*' general principles that due process is a flexible standard and that particular procedures should be evaluated in light of the interests of the student on one side and the school on the other.⁶⁶ Courts have also emphasized that school disciplinary proceedings need not mirror criminal trials or entail "full-dress" judicial proceedings.⁶⁷ Yet in light of the interests at stake for the individual students, including their continued enrollment in school and the reputational costs of disciplinary sanctions, school disciplinary procedures must adequately protect students' due process rights.⁶⁸ Courts' application of the *Mathews* balancing test thus seeks to ensure that schools utilize fundamentally fair procedures that afford students the opportunity to respond to the charges against them without imposing highly technical or unwieldy procedures on schools.⁶⁹

⁶⁴ See *id.* at 348–49 (quoting Justice Felix Frankfurter's observation in *FCC v. Pottsville Broad. Co.*, 309 U.S. 134, 143 (1940), that the differences between administrative agencies and the courts, in terms of their respective origins and purposes, caution against "wholesale transplantation" of procedural rules that have evolved in the specific context of courts of law).

⁶⁵ See *Osteen*, 13 F.3d at 223, 226 (applying the *Mathews* test to a public university's disciplinary proceedings to determine the extent of procedures required to satisfy the accused student's due process rights); *Gorman*, 837 F.2d at 9, 14–15 (same); *Gomes*, 365 F. Supp. 2d at 15–17 (same); see also *Santosky*, 455 U.S. at 758 (applying the *Mathews* test to determine the burden of proof necessary to satisfy due process in civil proceedings for the permanent termination of parental rights); *Kuck v. Danaher*, 600 F.3d 159, 161, 163 (2d Cir. 2010) (applying the *Mathews* test to determine whether a state's eighteen-month delay in providing a hearing for an appeal from a state board's firearm license renewal decision could constitute a violation of procedural due process); *Coleman v. Anne Arundel Cnty. Police Dep't*, 797 A.2d 770, 772, 774, 791 (Md. 2002) (applying the *Mathews* test to determine the burden of proof necessary to satisfy due process in a county police department's disciplinary action against a police officer).

⁶⁶ See *Gorman*, 837 F.2d at 12, 14; *Gomes*, 365 F. Supp. 2d at 16.

⁶⁷ See *Gorman*, 837 F.2d at 14; *Jaksa*, 597 F. Supp. at 1249.

⁶⁸ See *Gorman*, 837 F.2d at 12, 14; *Gomes*, 365 F. Supp. 2d at 16.

⁶⁹ See *Gorman*, 837 F.2d at 12, 14; *Hart*, 557 F. Supp. at 1387–88.

2. Procedural Requirements for School Disciplinary Proceedings

Currently, notice and the opportunity to be heard represent the basic requirements mandated by courts reviewing the procedural due process entitlements of college and university students in school disciplinary proceedings.⁷⁰ In 1961, in *Dixon v. Alabama State Board of Education*, the U.S. Court of Appeals for the Fifth Circuit set forth the first suggestion of the specific procedural safeguards to which college and university students may be entitled prior to expulsion.⁷¹ The *Dixon* court indicated that due process would likely be satisfied by two basic procedural safeguards: (1) notice to students of the specific charges against them and the grounds for those charges in the school's disciplinary code, and (2) a hearing embodying a basic adversarial process.⁷² The *Dixon* court emphasized, though, that disciplinary proceedings need not be full-fledged adjudications with every procedural formality of a criminal trial; rather they must simply ensure the rudiments of a fair procedure and adversarial process.⁷³

Federal courts have generally upheld the *Dixon* court's approach to balancing basic procedural safeguards against the school's need for flexible, informal procedures.⁷⁴ And some federal courts have extended *Dixon* to require four fundamental procedural safeguards.⁷⁵ According to these courts, schools must (1) inform students of the charges against them, (2) advise students of the nature of the evidence supporting those charges, (3) afford students the opportunity to be heard in their own defense, and (4) sanction students based only on "substantial evidence."⁷⁶ Yet even among courts that have adopted these four procedural requirements, these courts have continued to emphasize that schools' procedures may be tailored to the realities of

⁷⁰ See *Gorman*, 837 F.2d at 13; *Siblerud*, 896 F. Supp. at 1516; *Marin*, 377 F. Supp. at 623.

⁷¹ 294 F.2d at 158–59. The *Dixon* court expressly held only that the Due Process Clause applies to public university students, but in dicta the court proffered some suggestions for specific procedures that may be necessary to safeguard students' due process rights. *Id.*

⁷² *Id.* at 158.

⁷³ *Id.* at 159.

⁷⁴ *Gorman*, 837 F.2d at 16; *Jones v. Snead*, 431 F.2d 1115, 1117 (8th Cir. 1970); *Jaksa*, 597 F. Supp. at 1249.

⁷⁵ See *Gomes*, 365 F. Supp. 2d at 16; *Bistrick v. Univ. of S.C.*, 324 F. Supp. 942, 950 (D.S.C. 1971); *Keene v. Rodgers*, 316 F. Supp. 217, 221 (D. Me. 1970). The four-prong requirement appears to have originated in Charles Alan Wright's 1969 article, *The Constitution on Campus*. Wright, *supra* note 44, at 1071–72 (describing "general agreement" that schools provide four procedural safeguards in any hearing that may lead to a serious penalty).

⁷⁶ *Gomes*, 365 F. Supp. 2d at 16; *Bistrick*, 324 F. Supp. at 950; *Keene*, 316 F. Supp. at 221; Wright, *supra* note 44, at 1071–72.

schools' limited resources and their need for flexibility in responding to various forms of misconduct.⁷⁷

Beyond the fundamental safeguards provided by notice of the charges and a full and fair opportunity to be heard, federal courts vary in their interpretation of the additional procedural safeguards required by the Due Process Clause in college and university hearings.⁷⁸ For example, some courts have held that due process requires that the accused student be allowed to secure representation by counsel either to serve as an advisor when criminal charges are also pending or in cases in which the university itself uses an attorney at the hearing.⁷⁹ Other courts have found, however, that the right to counsel in a disciplinary hearing is not absolute because such a requirement could lead to the costly "judicializing" of school disciplinary proceedings.⁸⁰ Additionally, some courts have recognized an accused student's right to a list of the witnesses the university intends to call.⁸¹ Federal courts remain split, however, as to the accused student's right to cross-examine witnesses.⁸² Courts have also required disciplinary hearing boards to be impartial and free to exercise judgment independent of university officials.⁸³ But courts do not always require that hearing committee members recuse themselves if they have prior familiarity with the accused student or the

⁷⁷ See, e.g., *Furey v. Temple Univ.*, 730 F. Supp. 2d 380, 399 (E.D. Pa. 2010); *Gomes*, 365 F. Supp. 2d at 16–17; *Carey v. Me. Sch. Admin. Dist. #17*, 754 F. Supp. 906, 918 (D. Me. 1990).

⁷⁸ See *Swem*, *supra* note 60, at 375, 376–77 (describing federal courts' splits as to (1) whether representation by legal counsel is required to satisfy due process in disciplinary proceedings, and (2) whether accused students should have the right to cross examine witnesses).

⁷⁹ See *Gabrilowitz v. Newman*, 582 F.2d 100, 107 (1st Cir. 1978); *Black Coal. v. Portland Sch. Dist. No. 1*, 484 F.2d 1040, 1045 (9th Cir. 1973).

⁸⁰ See *Osteen*, 13 F.3d at 225; *Newsome v. Batavia Local Sch. Dist.*, 842 F.2d 920, 925–26 (6th Cir. 1988); *Jaksa*, 597 F. Supp. at 1252.

⁸¹ See *Dixon*, 294 F.2d at 159; *Herman v. Univ. of S.C.*, 341 F. Supp. 226, 230 (D.S.C. 1971), *aff'd*, 457 F.2d 902, 902 (4th Cir. 1972). Where the accuser is another student, rather than a university official, however, some courts have recognized that universities may maintain the anonymity of the accusing student in order to protect that student from reprisals. See *Jaksa*, 597 F. Supp. at 1253; *Dillon v. Pulaski Cnty. Special Sch. Dist.*, 468 F. Supp. 54, 58 (E.D. Ark. 1978), *aff'd*, 594 F.2d 699, 700 (8th Cir. 1979); *Graham v. Knutzen*, 351 F. Supp. 642, 666 (D. Neb. 1972).

⁸² Compare *Winnick v. Manning*, 460 F.2d 545, 549 (2d Cir. 1972) (holding that a college student's right to cross-examine witnesses was not an essential due process requirement), with *Dillon*, 468 F. Supp. at 58 (holding that due process "demanded" the opportunity for cross-examination where witness testimony was essential to the committee's findings and the identity of the accusing school official was known to the student).

⁸³ See *Winnick*, 460 F.2d at 548 (observing that an impartial decisionmaker is a fundamental due process requirement); *Wasson v. Trowbridge*, 382 F.2d 807, 813 (2d Cir. 1967) (same).

conduct at issue.⁸⁴ Despite these variations, two core principles of procedural due process emerge: (1) an accused student must be afforded notice and a hearing, and (2) college disciplinary proceedings need not be as formal as proceedings in a court of law.⁸⁵

3. The Intersection of Due Process and Title IX Procedural Requirements

In addition to the procedural requirements imposed on public school disciplinary proceedings under the Due Process Clause, Title IX, through its accompanying regulations and guidance documents, also sets forth procedural requirements that schools must follow in response to sexual assault on campus.⁸⁶ By requiring schools to treat the victimized and accused students equitably in disciplinary actions, Title IX helps to ensure that schools' responses to sexual assault mitigate the effects of the hostile learning environment created by student-on-student sexual assault.⁸⁷ Title IX's procedural requirements are especially im-

⁸⁴ See *Gorman*, 837 F.2d at 15 (holding that prior contact between disciplinary board members and hearing participants in the university setting does not indicate bias “*per se*”); *Hillman v. Elliott*, 436 F. Supp. 812, 816 (W.D. Va. 1977) (finding that the sort of prejudice necessitating recusal requires more than knowledge of the events at issue).

⁸⁵ See *Gorman*, 837 F.2d at 13, 14; *Jaksa*, 597 F. Supp. at 1249, 1250; Ctr. for Participant Educ. v. Marshall, 337 F. Supp. 126, 136 (N.D. Fla. 1972).

⁸⁶ See Title IX, Education Amendments of 1972, 20 U.S.C. §§ 1681–1688 (2006); 34 C.F.R. § 106.31(b) (2011); DEAR COLLEAGUE LETTER, *supra* note 14, at 10–12; 2001 GUIDANCE, *supra* note 10, at 12, 20; see also *supra* notes 70–85 and accompanying text (discussing the procedural requirements imposed on public schools under the Due Process Clause of the Fourteenth Amendment).

⁸⁷ See 34 C.F.R. § 106.31(a)–(b); 2001 GUIDANCE, *supra* note 10, at 12, 14, 20. For example, under Title IX schools must provide both complaining and accused students with “similar and timely” access to materials and information that will be used by the parties at a disciplinary hearing. DEAR COLLEAGUE LETTER, *supra* note 14, at 11. Similarly, if a school allows the accused student to appeal either a finding or a penalty, it must also allow the complaining student to appeal. *Id.* at 12. Finally, both the complaining and accused students must be apprised of the outcome of any disciplinary proceeding, ideally at the same time. *Id.* at 13.

Although the Family Education and Right to Privacy Act (FERPA) does not, under most circumstances, permit disclosure of information in a student's educational records, such as disciplinary penalties, schools are permitted to disclose to a complaining student aspects of any penalties that directly relate to the complaining student (e.g., whether the perpetrator will be suspended from school for a period of time or made to switch dormitories). See Family Education and Right to Privacy Act, 20 U.S.C. § 1232g(b)(1)(5)–(6) (2006 & Supp. IV 2010); DEAR COLLEAGUE LETTER, *supra* note 14, at 11. Additionally, when a student's conduct involves a crime of violence, including forcible or non-forcible sexual assault, a post-secondary institution may, under FERPA, disclose to the victim any violations found to have been committed and any sanction imposed on the perpetrating student. See 20 U.S.C. § 1232g(b)(1)(5)–(6); DEAR COLLEAGUE LETTER, *supra* note 14, at 13–14.

portant in safeguarding victimized students' rights because the Due Process Clause of the Fourteenth Amendment likely does not apply to student victims of sexual assault who are complaining witnesses in school disciplinary proceedings.⁸⁸ Title IX thus ensures that disciplinary proceedings for complaints of student-on-student sexual assault afford procedural safeguards to complaining students that balance the safeguards provided to accused students under the Due Process Clause.⁸⁹

Accordingly, Title IX's procedural requirements largely complement the due process requirements that protect the accused student.⁹⁰ For example, if a federal court has interpreted the Due Process Clause to require that a public university provide the accused student with a list of witnesses it intends to call, Title IX requires simply that the complaining student be provided with the same list.⁹¹ Similarly, if a federal court interprets the Due Process Clause to require that an accused student be permitted to retain legal counsel, whether for advice or to participate in the proceeding, Title IX requires that the complaining student be permitted to obtain the assistance of counsel for the same purposes.⁹² Moreover, administrative guidance interpreting Title IX expressly requires that schools develop and implement procedures that protect the due process rights of accused students.⁹³

Yet despite largely parallel protections, the procedural requirements of Title IX and the Due Process Clause occasionally appear to conflict—as is evident in the response to OCR's recent clarification that Title IX requires schools to use the preponderance of the evidence standard in disciplinary proceedings for student-on-student sexual assault.⁹⁴ Whereas the Dear Colleague Letter indicates that the preponderance of the evidence standard is a necessary component of schools'

⁸⁸ See *Theriault*, 353 F. Supp. 2d at 7–8 (observing that the plaintiff had cited no case law, and the court had found none, in which the student seeking due process protections was the complaining student, not the defending student, in a school disciplinary proceeding); *supra* note 55.

⁸⁹ See 34 C.F.R. § 106.31(a)–(b); 2001 GUIDANCE, *supra* note 10, at 12, 20; *supra* note 30.

⁹⁰ See Hogan, *supra* note 15, at 277–78.

⁹¹ See, e.g., *Dixon*, 294 F.2d at 159; DEAR COLLEAGUE LETTER, *supra* note 14, at 11.

⁹² See, e.g., *Black Coal*, 484 F.2d at 1045; DEAR COLLEAGUE LETTER, *supra* note 14, at 12.

⁹³ 2001 GUIDANCE, *supra* note 10, at 22.

⁹⁴ See DEAR COLLEAGUE LETTER, *supra* note 14, at 10–11; FIRE Letter, *supra* note 20, at 10–11. Potential conflicts between the Due Process Clause of the Fourteenth Amendment and Title IX are of great concern to public schools because they are obligated by law to comply with both. See, e.g., *Goss*, 419 U.S. at 576 (requiring public schools to afford due process protections to students in disciplinary proceedings); 2001 GUIDANCE, *supra* note 10, at 2, 22 (describing the Title IX obligation of any school receiving federal funds to respond adequately to sexual harassment and assault).

equitable response to sexual assault on campus, commentators assert that the preponderance of the evidence standard is too low to safeguard accused students' due process rights.⁹⁵ This apparent conflict is reconcilable, however, because, as the remainder of this Note demonstrates, among the standards of proof available for school disciplinary proceedings, the preponderance of the evidence standard adequately safeguards accused students' liberty and property interests in their education while accommodating the equally weighty interests of their schools.⁹⁶

II. COMPETING EVIDENTIARY STANDARDS IN COLLEGE AND UNIVERSITY DISCIPLINARY PROCEEDINGS

Federal courts have examined three possible standards of proof in student lawsuits alleging due process violations in school disciplinary proceedings.⁹⁷ Unlike other procedural safeguards, such as representation by counsel, the standard of proof in school disciplinary proceedings has garnered relatively little attention.⁹⁸ This Part examines the various evidentiary standards that federal courts have considered in reviewing school disciplinary proceedings.⁹⁹ Section A describes the theoretical and practical significance of assigning a particular standard of proof to a particular class of cases.¹⁰⁰ Section B presents the standard of proof known as "substantial evidence," which has been upheld by many of the federal courts that have addressed the standard of proof necessary for school disciplinary hearings.¹⁰¹ Finally, Section C describes two alternative standards of proof explored by federal courts in the context of school disciplinary proceedings: "preponderance of the evidence," upheld by a minority of courts, and "clear and convincing evidence," suggested, but not yet required, by any federal court.¹⁰²

⁹⁵ See DEAR COLLEAGUE LETTER, *supra* note 14, at 10–11; FIRE Letter, *supra* note 20, at 10–11.

⁹⁶ See *infra* notes 97–280 and accompanying text.

⁹⁷ See *Butler v. Oak Creek-Franklin Sch. Dist.*, 172 F. Supp. 2d 1102, 1119 (E.D. Wis. 2001) (observing that the standard of proof in public school disciplinary proceedings could be no lower than preponderance of the evidence); *Smyth v. Lubbers*, 398 F. Supp. 777, 799 (W.D. Mich. 1975) (suggesting that the clear and convincing standard of proof may be most appropriate for college and university disciplinary proceedings); *Marin v. Univ. of P.R.*, 377 F. Supp. 613, 623 (D.P.R. 1974) (finding that procedural due process required university disciplinary proceedings to be based on "substantial evidence").

⁹⁸ See Long, *supra* note 25, at 73.

⁹⁹ See *infra* notes 103–190 and accompanying text.

¹⁰⁰ See *infra* notes 103–122 and accompanying text.

¹⁰¹ See *infra* notes 123–148 and accompanying text.

¹⁰² See *infra* notes 149–190 and accompanying text.

A. *Why Standards of Proof Matter: The Theoretical and Practical Significance of Selecting a Standard of Proof*

The standard of proof applied in a given proceeding is important for theoretical and practical reasons.¹⁰³ On the theoretical side, the standard of proof imposed in a particular class of cases reflects the value society places on the rights that are in jeopardy.¹⁰⁴ This is because standards of proof signal to the fact-finder the level of certainty society requires before the state may act to impair an individual's rights.¹⁰⁵ Additionally, articulating a specific standard of proof for a particular type of hearing, no matter the particular standard selected, helps to ensure the meaningfulness of the hearing's other procedural safeguards.¹⁰⁶ Whereas many procedures focus on whether and how evidence is presented to the fact-finder (e.g., by prescribing whether counsel may speak for a party, whether cross-examination will be allowed, or whether written statements will be admitted), the standard of proof is one of the few procedures informing the fact-finder's response to the evidence itself.¹⁰⁷ The standard of proof tells the fact-finder that findings must be made within the confines of the persuasive force of the evidence presented.¹⁰⁸ If the fact-finder is not told to what degree the evidence must influence the finding of the facts, he or she may ultimately be persuaded by tangential prejudices or policy concerns, regardless of the weight of the evidence presented.¹⁰⁹ Thus the fact-finder must be told *how* to weigh the evidence in order to ensure the meaningfulness of a hearing's other evidentiary procedures.¹¹⁰

The standard of proof is also significant for its practical implications regarding the risk of error.¹¹¹ The consistent application of a particular standard notifies each party in advance of the risk of error and how each party will share the burden of that risk.¹¹² Additionally, standards of proof are thought to allocate the risk of erroneous findings of fact according to the "comparative social disutility" of different types of

¹⁰³ *Addington v. Texas*, 441 U.S. 418, 426 (1979).

¹⁰⁴ *Id.* at 425.

¹⁰⁵ *Id.* at 423 (citing *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

¹⁰⁶ *See Smyth*, 398 F. Supp. at 797.

¹⁰⁷ *See id.*

¹⁰⁸ *See id.*; Louis L. Jaffe, *Administrative Law: Burden of Proof and Scope of Review*, 79 HARV. L. REV. 914, 915 (1966).

¹⁰⁹ *Smyth*, 398 F. Supp. at 797.

¹¹⁰ *See id.*

¹¹¹ *See Addington*, 441 U.S. at 427.

¹¹² *See id.* at 423.

erroneous outcomes.¹¹³ The application of a particular standard of proof to a class of cases will influence the likelihood of erroneous factual conclusions in one of two directions.¹¹⁴ Higher standards of proof produce fewer erroneous conclusions that result in a false finding of guilt yet comparatively more erroneous conclusions in which a guilty person goes free.¹¹⁵ Society accepts this result in cases in which a false finding of guilt would result in a particularly egregious deprivation of individual rights, such as in criminal trials.¹¹⁶ Hence, the highest evidentiary standard, “beyond a reasonable doubt,” is reserved for criminal proceedings.¹¹⁷ Lower evidentiary standards, such as the common civil standard of preponderance of the evidence, are applied in cases in which the relative harm to society of an erroneous finding is approximately equal no matter whether the error favors the plaintiff or the defendant.¹¹⁸ For example, in a civil suit for money damages, if the fact-finder erroneously finds in favor of the defendant, society is left with one party, the plaintiff, suffering an uncompensated harm.¹¹⁹ If, by contrast, the fact-finder erroneously finds in favor of the plaintiff, society is still left with one party, now the defendant, wrongfully required to pay a judgment the defendant does not owe.¹²⁰ Accordingly, the harm to society in the event of error is essentially equal, so the standard of proof requires only that the finding be “more likely than not.”¹²¹ Thus, the selection of a particular standard of proof is “more than an empty semantic exercise” as the standard of proof guards against erroneous outcomes in proportion to the harm faced not simply by each party, but also by society at large.¹²²

¹¹³ See *Winship*, 397 U.S. at 371, 372 (Harlan, J., concurring).

¹¹⁴ See *id.* at 370.

¹¹⁵ See *id.* at 370–71.

¹¹⁶ See *id.* at 372. One may be reminded here of English jurist William Blackstone’s famous adage: It is “better that ten guilty persons escape, than that one innocent suffer.” See Alexander Volokh, n *Guilty Men*, 146 U. PA. L. REV. 173, 174 (1997).

¹¹⁷ See *Addington*, 441 U.S. at 428; *Winship*, 397 U.S. at 372 (Harlan, J., concurring).

¹¹⁸ See *Winship*, 397 U.S. at 371–72 (Harlan, J., concurring).

¹¹⁹ See *id.*

¹²⁰ See *id.*

¹²¹ See *id.*

¹²² *Addington*, 441 U.S. at 425 (quoting *Tippett v. Maryland*, 436 F.2d 1153, 1166 (4th Cir. 1971) (Sobeloff, J., concurring in part and dissenting in part)); see *Winship*, 397 U.S. at 371–72 (Harlan, J., concurring).

B. *The Prevailing Standard: Substantial Evidence*

In determining the evidentiary standard necessary to satisfy due process in school disciplinary proceedings, courts have considered three standards of proof: substantial evidence, preponderance of the evidence, and clear and convincing evidence.¹²³ This Section describes the substantial evidence standard and presents criticism stating that substantial evidence is inappropriate to ensure procedural due process in school disciplinary proceedings.¹²⁴ Section C then presents both the preponderance of the evidence and clear and convincing evidence standards as two alternative standards of proof addressed by federal courts in the context of due process protections in school disciplinary proceedings.¹²⁵

Although few courts have directly addressed the constitutionally-required evidentiary standard for school disciplinary proceedings, of those courts, the majority have held that due process requires disciplinary decisions to be based on “substantial evidence.”¹²⁶ Substantial evidence is defined as enough relevant evidence that a reasonable person would support the fact-finder’s conclusion.¹²⁷ And the substantiality of the evidence must be based on the record as a whole; that is, the fact-finder’s conclusion must be based on evidence that is substantial in light of the evidence in the record that both bolsters and detracts from that conclusion.¹²⁸

¹²³ See *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799; *Marin*, 377 F. Supp. at 623. No court has required a school to use the beyond a reasonable doubt standard because the Supreme Court has reserved that standard almost exclusively for criminal trials. See *Addington*, 441 U.S. at 419–20, 428 (describing application of the beyond a reasonable doubt standard in criminal cases as a central component of the “moral force of the criminal law” and holding that in the case of involuntary commitment in a mental institution for an indefinite period of time, the evidentiary standard of clear and convincing evidence was sufficient to satisfy due process (quoting *Winship*, 397 U.S. at 364)); Swem, *supra* note 60, at 380 (explaining that courts do not require schools to employ the beyond a reasonable doubt standard even when the misconduct at issue meets the definition of a state law crime).

¹²⁴ See *infra* notes 126–148 and accompanying text.

¹²⁵ See *infra* notes 149–190 and accompanying text.

¹²⁶ See *Slaughter v. Brigham Young Univ.*, 514 F.2d 622, 625 (10th Cir. 1975); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 15–16 (D. Me. 2005); *Givens v. Poe*, 346 F. Supp. 202, 209 (W.D.N.C. 1972); Swem, *supra* note 60, at 379 (describing the substantial evidence standard as “the norm” among federal courts ruling on school disciplinary proceedings).

¹²⁷ *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951).

¹²⁸ *Id.* at 487–88.

As early as the 1960s, federal district courts applied the substantial evidence requirement to school disciplinary proceedings.¹²⁹ Since then, one federal court of appeals has upheld the substantial evidence standard as the appropriate minimum standard to ensure procedural due process protections in school disciplinary proceedings.¹³⁰ In 1975, in *Slaughter v. Brigham Young University*, the U.S. Court of Appeals for the Tenth Circuit held that the university's disciplinary proceedings met the constitutional requirements of due process in part because the disciplinary committee's findings were based on substantial evidence.¹³¹ The *Slaughter* court reasoned that the disciplinary committee's procedures satisfied due process because its findings were based on substantial evidence and the fact-finding procedures were adequate as a whole.¹³² Since *Slaughter*, courts have continued to uphold the substantial evidence standard as sufficient to safeguard public university students' due process rights.¹³³

Courts and commentators have criticized the substantial evidence standard, however, as insufficient to satisfy due process for at least three reasons.¹³⁴ First, some courts have criticized substantial evidence as too low to ensure procedural due process.¹³⁵ In 1975, in *Smyth v. Lubbers*, the U.S. District Court for the Western District of Michigan held that in a university disciplinary proceeding in which an adult student was charged by a college for conduct that also constituted a crime, due process required that the college formally adopt a standard of proof.¹³⁶ The *Smyth* court did not reach the question of the required standard of proof, but it did state in dicta its certainty that the standard could not

¹²⁹ See, e.g., *Marin*, 377 F. Supp. at 623; *Scoggin v. Lincoln Univ.*, 291 F. Supp. 161, 169, 171 (W.D. Mo. 1968); *Esteban v. Cent. Mo. State Coll.*, 290 F. Supp. 622, 631 (W.D. Mo. 1968).

¹³⁰ *Slaughter*, 514 F.2d at 625. Two other federal appeals courts have also upheld the substantial evidence standard, but as a requirement for substantive, rather than procedural, due process. See *Flaim v. Med. Coll. of Ohio*, 418 F.3d 629, 643 (6th Cir. 2005); *Nash v. Auburn Univ.*, 812 F.2d 655, 667-68 (11th Cir. 1987).

¹³¹ 514 F.2d at 625. Although the plaintiff's claim in *Slaughter* was based in contract theory, as Brigham Young University is a private institution, the court nevertheless examined the procedures utilized by the university through the lens of procedural due process as applied to public universities. *Id.*

¹³² *Id.*

¹³³ See *Gomes*, 365 F. Supp. 2d at 16; *Edwards v. Bd. of Regents of Nw. Mo. State Univ.*, 397 F. Supp. 822, 831 (W.D. Mo. 1975); *Gagne v. Trs. of Ind. Univ.*, 692 N.E.2d 489, 493 (Ind. Ct. App. 1998).

¹³⁴ See *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799; *Jaffe*, *supra* note 108, at 915; *Long*, *supra* note 25, at 79.

¹³⁵ See *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799.

¹³⁶ 398 F. Supp. at 797.

be lower than preponderance of the evidence.¹³⁷ The *Smyth* court criticized the substantial evidence standard as unfair to the defendant because the standard requires only some reasonable quantity of evidence to support the fact-finder's conclusion.¹³⁸ Therefore, the standard provides no guidance for the fact-finder as to the relative quantity of evidence necessary to resolve conflicting interpretations of the evidence in the record.¹³⁹ Such a result, according to the *Smyth* court, leaves the fact-finder "adrift" to be persuaded by individual prejudices rather than by the weight of the evidence presented.¹⁴⁰

Second, one commentator has suggested that courts' rulings regarding substantial evidence may have been misconstrued as requiring substantial evidence to serve as the standard of proof in school disciplinary proceedings.¹⁴¹ Rather, courts may simply have intended their requirement of findings based on substantial evidence to ensure substantive due process by serving as "an admonishment against arbitrariness."¹⁴² Indeed, some courts have found that a disciplinary proceeding satisfies due process only when the school follows the dictates of procedural due process *and* the decision is based on substantial evidence.¹⁴³ Courts' treatment of procedural due process and substantial evidence as separate requirements thus supports the inference that the substantial evidence requirement does not impose a specific standard of proof as a procedural requirement but simply seeks to ensure that schools' disciplinary decisions satisfy the substantive due process requirement that decisions be justified by the evidence presented.¹⁴⁴

¹³⁷ *Id.* at 799. Whereas substantial evidence requires only that the conclusion of the fact-finder be based on enough evidence to be objectively reasonable in light of the record as a whole, preponderance of the evidence requires that the evidence support a conclusion that is more likely than not. See *Winship*, 397 U.S. at 371–72 (Harlan, J., concurring) (defining preponderance of the evidence); *Universal Camera*, 340 U.S. at 477 (defining substantial evidence).

¹³⁸ See 398 F. Supp. at 798.

¹³⁹ See *id.*

¹⁴⁰ See *id.* at 797.

¹⁴¹ See Long, *supra* note 25, at 79.

¹⁴² See *id.* Substantive due process guards against state decisions that are "arbitrary" or "capricious" by requiring that state actors have adequate justification for decisions that deprive an individual of a protected interest. See *Regents of Univ. of Mich. v. Ewing*, 474 U.S. 214, 217 (1985); CHEMERINSKY, *supra* note 32, at 558.

¹⁴³ See *Slaughter*, 514 F.2d at 625; *Hartman v. Bd. of Trs. of Univ. of Ala.*, 436 So. 2d 837, 840 (Ala. 1983).

¹⁴⁴ See *Slaughter*, 514 F.2d at 625; *Hartman*, 436 So. 2d at 840; Long, *supra* note 25, at 79. The U.S. Supreme Court has traditionally treated standards of proof as elements of procedure. See *supra* note 32 and accompanying text.

Finally, some critics have opined that substantial evidence may in fact be a standard of *review*, not a standard of proof.¹⁴⁵ The substantial evidence test evolved in administrative law jurisprudence as the standard courts apply when reviewing the fairness of an administrative tribunal's original decision on appeal.¹⁴⁶ Therefore, the substantial evidence standard may merely set forth the quantity of evidence a reviewing court must find to uphold the fact-finder's decision, rather than the degree of persuasion by which the original fact-finder must be convinced that a fact is true.¹⁴⁷ Yet despite these criticisms, courts continue to uphold substantial evidence as one of the fundamental procedural due process requirements for school disciplinary proceedings—perhaps to ensure schools' flexibility in establishing disciplinary procedures tailored to the needs of their communities.¹⁴⁸

C. *Two Alternative Standards: Preponderance of the Evidence and Clear and Convincing Evidence*

Not all federal courts agree that the substantial evidence standard adequately safeguards students' due process rights.¹⁴⁹ Indeed, some have concluded that preponderance of the evidence, or the even higher standard of clear and convincing evidence, may be required.¹⁵⁰

I. Preponderance of the Evidence

At least two federal courts have found that due process requires schools to apply the preponderance of the evidence standard in school disciplinary proceedings.¹⁵¹ The preponderance of the evidence stan-

¹⁴⁵ See *Smyth*, 398 F. Supp. at 798; Jaffe, *supra* note 108, at 915.

¹⁴⁶ See *McDonald v. Bd. of Trs. of Univ. of Ill.*, 375 F. Supp. 95, 103 (N.D. Ill. 1974).

¹⁴⁷ See *Smyth*, 398 F. Supp. at 798 (describing the substantial evidence standard as sufficient to assess whether there was a "minimal rational basis" for the tribunal's finding but not sufficient to establish the measure of persuasion necessary for the original fact-finder); Jaffe, *supra* note 108, at 915 (describing the appropriate role of the fact-finder as actually believing a fact to be true, not merely objectively weighing the probability of the truth of a contested fact).

¹⁴⁸ See *Gomes*, 365 F. Supp. 2d at 16; *Edwards*, 397 F. Supp. at 831 (acknowledging the doubts of other federal courts as to the applicability of the substantial evidence test but nevertheless applying the standard); *Gagne*, 692 N.E.2d at 493; Swem, *supra* note 60, at 379–80.

¹⁴⁹ See *Smyth*, 398 F. Supp. at 799 (recommending that schools use the clear and convincing evidence standard, especially in cases in which an adult student is charged with misconduct that is also a crime, but holding that due process would not permit a standard lower than preponderance of the evidence).

¹⁵⁰ *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799.

¹⁵¹ *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799.

dard is commonly used in civil actions between private parties for money damages.¹⁵² It requires that the evidence presented to the fact-finder render the truth of a contested fact more likely than not.¹⁵³ Courts requiring a preponderance of the evidence standard in school disciplinary proceedings have discarded the substantial evidence standard because it is too low of a standard of proof to protect students' due process rights.¹⁵⁴ For example, in 2001, in *Butler v. Oak Creek-Franklin School District*, the U.S. District Court for the Eastern District of Wisconsin held that the decision of a high school "Coaches' Council" to suspend a player from athletics participation violated the student's due process rights because the Council's decision was based on insufficient evidence.¹⁵⁵ The court held that, in the first instance, the Council must apply a standard no lower than preponderance of the evidence.¹⁵⁶ According to the court, because the preponderance of the evidence standard requires the fact-finder to find facts to be true to the degree of more likely than not, any lower standard could yield the illogical result of allowing a fact-finder to find a fact to be "true" even if *less* likely than not.¹⁵⁷ Similarly, in 1975, in *Smyth*, the U.S. District Court for the Western District of Michigan stated that the appropriate standard of proof could not be any lower than preponderance of the evidence because a lower standard, such as substantial evidence, would essentially shift the burden to accused students to prove their innocence.¹⁵⁸ Such a shift, according to the court, would be "fundamentally unfair" to the accused, rendering the substantial evidence standard insufficient to ensure due process.¹⁵⁹ Thus courts have required schools to utilize the preponderance of the evidence standard primarily to ensure that schools do not

¹⁵² See *Addington*, 441 U.S. at 423.

¹⁵³ *Winship*, 397 U.S. at 371–72 (Harlan, J., concurring) (defining the preponderance of the evidence standard).

¹⁵⁴ See *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799.

¹⁵⁵ See 172 F. Supp. 2d at 1119, 1121. The *Butler* court assumed without holding that suspension from participation in high school sports constituted a deprivation of a property interest within the meaning of the Due Process Clause of the Fourteenth Amendment. See *id.* at 1110–11. Although the plaintiff in *Butler* was a high school student, the court's ruling is instructive for college disciplinary proceedings because, as in the case of college students punished by their school for perpetration of sexual assault, *Butler* was suspended for conduct that would have constituted a crime under state law. See *id.* at 1108 (listing *Butler*'s offenses as "unlawful possession of intoxicants . . . and . . . fireworks").

¹⁵⁶ *Id.* at 1119–21.

¹⁵⁷ *Id.*

¹⁵⁸ See 398 F. Supp. at 799.

¹⁵⁹ See *id.*

sanction students based on facts found to be anything less than probable.¹⁶⁰

Additionally, many colleges and universities have voluntarily adopted the preponderance of the evidence standard for use in their disciplinary proceedings.¹⁶¹ Scholars supporting schools' use of preponderance of the evidence have asserted that the standard is the most appropriate for school disciplinary proceedings because it accommodates the interests of the accused student, the victimized student, and the campus community.¹⁶² Preponderance of the evidence acknowledges the gravity of the interests at stake for the accused student through application of a standard commonly applied in courts of law.¹⁶³ But the preponderance of the evidence standard also enables schools to ensure that the interests of the victimized student and the school community are properly weighed against the interests of the accused.¹⁶⁴

Although widely accepted as a standard of proof in civil law, preponderance of the evidence has faced challenges in certain civil contexts on the ground that it is not adequate as a procedural safeguard when particularly significant liberty interests are at stake.¹⁶⁵ For example, in 1979, in *Addington v. Texas*, the U.S. Supreme Court held that the preponderance of the evidence standard was insufficient to satisfy due process in cases in which a state sought to commit an individual to

¹⁶⁰ See *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799.

¹⁶¹ See Michelle J. Anderson, *The Legacy of the Prompt Complaint Requirement, Corroboration Requirement, and Cautionary Instructions on Campus Sexual Assault*, 84 B.U. L. REV. 945, 1000 & n.331 (2004) (citing a study by the National Institute of Justice reporting that of the colleges and universities that had articulated a standard of proof for disciplinary proceedings, eighty percent had chosen preponderance of the evidence); Edward N. Stoner II & John Wesley Lowery, *Navigating Past the "Spirit of Insubordination": A Twenty-First Century Model Student Conduct Code with a Model Hearing Script*, 31 J.C. & U.L. 1, 48 n.146 (2004) (referencing a study by the Association for Student Judicial Affairs finding that the preponderance of the evidence standard is the most common standard used by colleges and universities in sexual assault adjudications).

¹⁶² See Anderson, *supra* note 161, at 1015–16; Stoner & Lowery, *supra* note 161, at 48–49.

¹⁶³ See Stoner & Lowery, *supra* note 161, at 48.

¹⁶⁴ See Anderson, *supra* note 161, at 1016 (advocating for schools' use of the preponderance of the evidence standard to ensure that victimized students are free to lodge complaints of sexual assault even if the only evidence they have is their account of the assault); Stoner & Lowery, *supra* note 161, at 48–49 (encouraging schools to use the preponderance of the evidence standard because it treats the interests of the accused student, the victimized student, and the entire student body as equally important).

¹⁶⁵ See Stoner & Lowery, *supra* note 161, at 48; *infra* notes 166–172 and accompanying text.

a mental institution for an indefinite period of time.¹⁶⁶ In *Addington*, the Court determined that the individual interest at stake, the loss of physical liberty for an indefinite period, was so significant that preponderance of the evidence should not apply because it asked the individual to “share equally with society the risk of error.”¹⁶⁷ Therefore, due process required the use of the higher clear and convincing evidence standard to guard against the risk of error and to signal to the factfinder the significance of the individual interests in jeopardy.¹⁶⁸ Similarly in 1982, in *Santosky v. Kramer*, the U.S. Supreme Court held that the Due Process Clause required the New York State Family Court to utilize the clear and convincing evidence standard in proceedings for the permanent termination of parental rights.¹⁶⁹ The Court emphasized the particularly unique liberty interest at stake for parents facing the irrevocable deprivation of their right to parent their natural children.¹⁷⁰ In such cases, the Court concluded, the preponderance of the evidence standard is insufficient because the risk of harm in the event of error is much greater for the individual than for the state.¹⁷¹ Thus, the preponderance of the evidence standard has been deemed constitutionally insufficient in certain classes of cases, but it remains the most common standard of proof applied to civil claims.¹⁷²

2. Clear and Convincing Evidence

In the context of school disciplinary proceedings, some courts and commentators have proposed that the higher clear and convincing standard may be required to safeguard students’ constitutional rights.¹⁷³ The clear and convincing standard falls between preponderance of the evidence and beyond a reasonable doubt in the certainty it requires of

¹⁶⁶ *Addington*, 441 U.S. at 425, 431.

¹⁶⁷ *See id.* at 425–26, 427.

¹⁶⁸ *See id.* at 427, 431–32.

¹⁶⁹ 455 U.S. at 747–48.

¹⁷⁰ *Id.* at 759.

¹⁷¹ *See id.* The Court emphasized that preponderance of the evidence was insufficient because of the lack of double jeopardy protections in parental rights proceedings, which meant that an error in favor of the state would result in the permanent termination of the parental rights of an otherwise fit parent, whereas an error favoring the unfit parent would simply mean that the state could bring another charge as soon as it amassed new evidence. *See id.* at 764.

¹⁷² *See id.* at 768; *Addington*, 441 U.S. at 423, 431; *see also* Stoner & Lowery, *supra* note 161, at 48 (describing the preponderance of the evidence standard as “normal in important civil judicial proceedings”).

¹⁷³ *See Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799; Long, *supra* note 25, at 80; FIRE Letter, *supra* note 20, at 10.

the fact-finder.¹⁷⁴ Courts apply the clear and convincing standard to civil actions in which the individual interest at stake is deemed extremely important, including cases of involuntary civil commitment, permanent termination of parental rights, or denaturalization.¹⁷⁵

Because accused students face the deprivation of a property interest in their continued education as well as the reputational harm that a disciplinary penalty could rend on their educational and career goals, commentators and one federal court have suggested that the clear and convincing evidence standard may be necessary to ensure adequate protection of the accused student's right to procedural due process.¹⁷⁶ In 1975, in *Smyth*, the U.S. District Court for the Western District of Michigan suggested, but did not hold, that the clear and convincing evidence standard may be required in disciplinary proceedings in which an adult student is charged with misconduct that would constitute a crime under state law.¹⁷⁷ In support of the clear and convincing evidence standard, the court cited the serious consequences of a guilty finding by the college, including the potentially negative impact on the student's future educational and employment prospects as well as the student's reputation.¹⁷⁸ In a "highly competitive society," the court observed, an individual's educational and career advancement could be seriously hindered by a disciplinary finding of misconduct such as the possession of narcotics alleged in *Smyth*.¹⁷⁹ Such a finding is much more significant, the court observed, than "spiking the punch at an after-school meeting."¹⁸⁰ Consequently, the higher standard of clear and convincing evidence may be necessary to guard against the risk of error when a school disciplinary proceeding seeks to deprive a post-

¹⁷⁴ See *Addington*, 441 U.S. at 423–24.

¹⁷⁵ See *Santosky*, 455 U.S. at 747–48, 756–57; *Addington*, 441 U.S. at 431–32; *Schneiderman v. United States*, 320 U.S. 118, 125 (1943).

¹⁷⁶ See *Smyth*, 398 F. Supp. at 797, 799; Long, *supra* note 25, at 80 (asserting that the clear and convincing evidence standard is most appropriate because it weighs in favor of the accused student and acknowledges that "rights once conferred should not be lightly revoked" (quoting *Schneiderman*, 320 U.S. at 125)); FIRE Letter, *supra* note 20, at 7.

¹⁷⁷ See 398 F. Supp. at 799 (stating that the standard of proof for school disciplinary proceedings could be no lower than preponderance of the evidence and suggesting that in disciplinary proceedings for post-secondary students charged with serious infractions, the clear and convincing standard may be required).

¹⁷⁸ See *id.* at 797. The *Smyth* court specifically discussed the plaintiff's attempts to apply to law school and the request by a majority of application forms that the plaintiff disclose any disciplinary record. *Id.*

¹⁷⁹ *Id.* at 796–97.

¹⁸⁰ *Id.* at 797.

secondary student of significant interests in reputation and career advancement.¹⁸¹

Despite proposals that schools utilize the clear and convincing standard in disciplinary proceedings, no court has found clear and convincing evidence necessary to protect students' due process rights.¹⁸² Such restraint may be explained by courts' consistent cautions that school disciplinary proceedings need not be as formal as judicial proceedings in a court of law, as well as courts' efforts to avoid imposing rigid or highly-technical procedures on public schools.¹⁸³ Courts have long afforded schools the flexibility to tailor disciplinary proceedings to meet the needs of their particular school communities.¹⁸⁴ Moreover, courts recognize that, like any other procedural safeguard, the appropriate standard of proof to satisfy due process should be assessed through an application of the *Mathews* balancing test, which weighs the interests of the accused student against those of the school.¹⁸⁵

Thus, at least three possible standards of proof remain available for courts' consideration when called upon to determine the minimum standard of proof required to satisfy accused students' due process rights.¹⁸⁶ Among the federal courts that have addressed the necessary evidentiary standard for university disciplinary proceedings, substantial evidence remains the most commonly upheld.¹⁸⁷ At least two federal courts, however, have found that procedural due process requires a standard no lower than preponderance of the evidence, and many public colleges and universities have chosen to adopt the preponderance of the evidence standard in their disciplinary policies.¹⁸⁸ One federal court has also suggested that schools must use the even higher standard

¹⁸¹ See *Addington*, 441 U.S. at 424; *Smyth*, 398 F. Supp. at 797, 799.

¹⁸² See Swem, *supra* note 60, at 379–80.

¹⁸³ See, e.g., *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988); *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 159 (5th Cir. 1961).

¹⁸⁴ See *Goss v. Lopez*, 419 U.S. 565, 583 (1975); *Gorman*, 837 F.2d at 14; *Dixon*, 294 F.2d at 159.

¹⁸⁵ See *Butler*, 172 F. Supp. 2d at 1119; see also *Osteen v. Henley*, 13 F.3d 221, 226 (7th Cir. 1993) (applying *Mathews* to determine whether the accused student was entitled to the right of participation of counsel in a disciplinary hearing); *Gorman*, 837 F.2d at 14–15 (applying *Mathews* to determine whether a student was entitled to “full-scale adversarial proceedings”).

¹⁸⁶ See *supra* note 97 and accompanying text.

¹⁸⁷ See Swem, *supra* note 60, at 379 (describing the substantial evidence standard as “the norm” among federal courts); *supra* note 133 and accompanying text (collecting cases).

¹⁸⁸ *Butler*, 172 F. Supp. 2d at 1119; *Smyth*, 398 F. Supp. at 799; *Anderson*, *supra* note 161, at 1000; *Stoner & Lowery*, *supra* note 161, at 48 n.146.

of clear and convincing evidence to safeguard accused students' due process rights, and some commentators agree that clear and convincing evidence may be necessary to accommodate the significant liberty and property interests at stake for accused students.¹⁸⁹ Although the standard of proof necessary to ensure due process for accused students in college and university disciplinary proceedings has drawn little scrutiny from scholars or the courts, the Office for Civil Rights' recent Dear Colleague Letter may well bring this issue to the fore.¹⁹⁰

III. PREPONDERANCE OF THE EVIDENCE IS THE FAIREST STANDARD OF PROOF FOR UNIVERSITY DISCIPLINARY PROCEEDINGS

This Part argues that preponderance of the evidence is the most appropriate standard of proof for university adjudications of sexual assault complaints because it adequately safeguards accused students' due process rights while accommodating the significant competing concerns of their schools.¹⁹¹ According to OCR's interpretation of Title IX and its accompanying regulations, schools that receive federal funds must utilize the preponderance of the evidence standard in disciplinary proceedings arising from sexual assault complaints in order to comply with Title IX's "prompt[] and equitabl[e]" response requirement.¹⁹² Public-university students accused of misconduct may challenge the implementation of the preponderance of the evidence standard as not sufficient to protect their due process rights in disciplinary proceedings.¹⁹³

As a practical matter, schools may be more likely to face constitutional challenges for moving from the higher clear and convincing evidence standard to the lower preponderance of the evidence standard than for moving from the lower substantial evidence standard to the

¹⁸⁹ See *Smyth*, 398 F. Supp. at 799; Long, *supra* note 25, at 80; FIRE Letter, *supra* note 20, at 7.

¹⁹⁰ See Long, *supra* note 25, at 73. For example, only one month after the release of the Dear Colleague Letter, the Foundation for Individual Rights in Education (FIRE), a non-profit organization dedicated to defending the civil liberties and freedom of speech of students and faculty on college campuses, issued an open letter to OCR's Assistant Secretary for Civil Rights voicing its "deep concerns" that the Dear Colleague Letter would cause institutions to "curtail the procedural due process rights" of accused students. See FIRE Letter, *supra* note 20, at 1; FIRE, <http://thefire.org/about/mission> (last visited Aug. 28, 2012).

¹⁹¹ See *infra* notes 212–280 and accompanying text.

¹⁹² DEAR COLLEAGUE LETTER, *supra* note 14, at 10–11.

¹⁹³ See, e.g., *Smyth v. Lubbers*, 398 F. Supp. 777, 795 (W.D. Mich. 1975).

higher preponderance of the evidence standard.¹⁹⁴ Students accused of misconduct will prefer a higher standard of proof because higher standards of proof place a greater evidentiary burden on the party bringing the charges and reduce the possibility of an erroneous finding against the accused student.¹⁹⁵ Additionally, complaining students, who may prefer a lower standard of proof, cannot raise due process claims against their school.¹⁹⁶ Due process protects only the accused student because in a disciplinary proceeding only the accused student faces the state's direct deprivation of liberty and property interests in education.¹⁹⁷

Consequently, this Part briefly addresses the benefits of preponderance of the evidence as compared to the lower substantial evidence standard, but it focuses on whether the preponderance of the evidence standard is sufficient to protect accused students' due process rights or whether the higher standard of clear and convincing evidence is required.¹⁹⁸ Section A of this Part asserts that the use of the preponderance of the evidence standard, rather than the lower substantial evidence standard, will benefit schools, accused students, and perhaps all students, by lending greater legitimacy and uniformity to school disciplinary proceedings.¹⁹⁹ Section B then argues that the preponderance of the evidence standard is adequate to safeguard the procedural due process rights of accused students as compared to the higher clear and convincing evidence standard.²⁰⁰ By applying the due process balancing test first set forth by the U.S. Supreme Court in 1976 in *Mathews v. Eldridge*, Section B demonstrates that the preponderance of the evi-

¹⁹⁴ See *In re Winship*, 397 U.S. 358, 371 (1970) (Harlan, J., concurring) (explaining that higher standards of proof reduce the risk of erroneous convictions, whereas lower standards of proof allocate the risk of error equally between the parties). Although it is also possible that students who had been previously sanctioned by a disciplinary committee using the substantial evidence standard could assert claims seeking a new hearing under the higher preponderance of the evidence standard, the scope of this Note is limited to an analysis of the preponderance of the evidence standard in light of OCR's clarification that Title IX requires schools to use preponderance of the evidence, and not clear and convincing evidence, in sexual assault adjudications. See DEAR COLLEAGUE LETTER, *supra* note 14, at 11; *infra* notes 212–280 and accompanying text.

¹⁹⁵ See *Winship*, 397 U.S. at 371 (Harlan, J., concurring).

¹⁹⁶ See *Therault v. Univ. of S. Me.*, 353 F. Supp. 2d 1, 8 (D. Me. 2004) (finding that victimized students may not assert due process claims against their schools regarding disciplinary proceedings in which they are a complaining witness, not the defending party).

¹⁹⁷ See *id.*; *supra* notes 55, 88 and accompanying text.

¹⁹⁸ See *infra* notes 202–280 and accompanying text.

¹⁹⁹ See *infra* notes 202–211 and accompanying text.

²⁰⁰ See *infra* notes 212–280 and accompanying text.

dence standard best accommodates the competing interests of accused students and their schools.²⁰¹

A. *The Benefits of Raising the Bar: Preponderance of the Evidence Promotes the Legitimacy and Uniformity of School Disciplinary Proceedings*

The Dear Colleague Letter's requirement that schools apply the preponderance of the evidence standard will lend legitimacy and uniformity to school disciplinary proceedings, benefitting both students and their schools.²⁰² First, schools' use of the preponderance of the evidence standard will afford students the opportunity to participate meaningfully in a process that takes seriously the interests at stake for both parties.²⁰³ The application of the preponderance of the evidence standard will thereby enhance the legitimacy of school disciplinary proceedings in the eyes of students.²⁰⁴ The enhanced legitimacy of the proceedings will in turn serve to promote basic democratic values among the student body.²⁰⁵ Many post-secondary institutions see school disciplinary policies and procedures as influential in shaping students' values.²⁰⁶ And as the Fifth Circuit observed in 1961, a disciplinary procedure that fails to adhere to fundamental principles of fairness and justice could "break the spirits" of accused students and other students familiar with the unjust process.²⁰⁷ Thus, if students have faith in the integrity of their school's disciplinary proceedings, those proceedings will serve as a positive example of the larger societal values the school seeks to uphold—that accused individuals are innocent until proven guilty, and that, if guilty, they will be sanctioned accordingly.²⁰⁸

²⁰¹ See 424 U.S. 319, 335 (1976); *infra* notes 212–280 and accompanying text.

²⁰² See DEAR COLLEAGUE LETTER, *supra* note 14, at 11; Long, *supra* note 25, at 81; Saurack, *supra* note 24, at 786.

²⁰³ See Stoner & Lowery, *supra* note 161, at 48–49 (describing the preponderance of the evidence standard as the standard that correctly treats accused students, complaining students, and the campus community at large as having equally important interests at stake in disciplinary proceedings).

²⁰⁴ See Saurack, *supra* note 24, at 785–86 (noting that disciplinary proceedings with adequate procedural safeguards promote students' sense that "justice has been done").

²⁰⁵ See *id.*

²⁰⁶ See Curtis J. Berger & Vivian Berger, *Academic Discipline: A Guide to Fair Process for the University Student*, 99 COLUM. L. REV. 289, 353 (1999) ("But what lessons are 'convicted students'—guilty or innocent—taught, if the process producing the outcome was unjust? That might makes right? . . . That fair ends justify foul means?"); Saurack, *supra* note 24, at 785–86.

²⁰⁷ *Dixon v. Ala. State Bd. of Educ.*, 294 F.2d 150, 157 (5th Cir. 1961).

²⁰⁸ See Saurack, *supra* note 24, at 785–86.

Second, the uniform use of the preponderance of the evidence standard will benefit accused students by standardizing an important procedural protection among public and private schools.²⁰⁹ Whereas only state actors, and therefore only public schools, must ensure constitutional due process in their disciplinary proceedings, all schools receiving federal funds, both public and private, must comply with Title IX.²¹⁰ Therefore, as schools implement the preponderance of the evidence standard, as required by the Dear Colleague Letter, all students, no matter the type of school they attend, will be afforded the same standard if accused of perpetrating sexual assault.²¹¹

B. *Preponderance of the Evidence Meets the Mark: Applying the Mathews Balancing Test*

This Section applies the *Mathews v. Eldridge* balancing test to college and university disciplinary proceedings and demonstrates that the preponderance of the evidence standard provides sufficient due process protection to accused students.²¹² The Supreme Court has stated that in determining whether a particular standard of proof satisfies due process in a particular class of cases, the Court does not favor any one standard over another but simply applies the three-part due process balancing test it first set forth in *Mathews*.²¹³ Accordingly, this Section argues that a balancing of the three *Mathews* factors in the specific context of campus sexual assault demonstrates that preponderance of the evidence is a sufficient minimum due process standard.²¹⁴ Preponderance of the evidence adequately accommodates the significant private interests at stake for the accused student, more properly allocates the risk of error between the accused student and the school, and better accounts for the school's countervailing interests than the higher standard of clear and convincing evidence.²¹⁵

²⁰⁹ See *Santosky v. Kramer*, 455 U.S. 745, 757 (1982) (noting that applying a uniform evidentiary standard within a class of cases promotes fundamental fairness); 34 C.F.R. § 106.4 (2011) (requiring all schools to comply with Title IX as a condition on the receipt of federal funding); DEAR COLLEAGUE LETTER, *supra* note 14, at 11.

²¹⁰ See *Goss v. Lopez*, 419 U.S. 565, 576 (1975); 34 C.F.R. § 106.4.

²¹¹ See DEAR COLLEAGUE LETTER, *supra* note 14, at 11.

²¹² See *infra* notes 213–280 and accompanying text.

²¹³ See *Santosky*, 455 U.S. at 754; see *Mathews*, 424 U.S. at 335 (setting forth the three-part balancing test).

²¹⁴ See *infra* notes 216–280 and accompanying text.

²¹⁵ See *infra* notes 216–280 and accompanying text.

1. *Mathews* Factor One: Accused Students' Interests in Continued Education

The first *Mathews* factor looks to the individual or “private” interests that will be affected by the state action at issue.²¹⁶ In the case of school disciplinary proceedings for sexual assault, the *Mathews* balance considers only the individual interests of the accused student²¹⁷—even though significant individual interests may also be at stake for a victimized student who is the complaining witness in the disciplinary proceeding.²¹⁸ The *Mathews* analysis does not seek to balance the interests of the accused against the interests of the victim because only the accused student is subject to direct state action in the disciplinary proceeding.²¹⁹ Accordingly, a proper conception of the first *Mathews* factor in analyzing school disciplinary proceedings focuses on the accused student’s property and liberty interests in continued enrollment in a university program.²²⁰

In disciplinary proceedings for sexual assault complaints, the private interests at stake for an accused student are indeed significant.²²¹ A student’s reputation, career goals, educational advancement, and relationships with faculty and peers may all be affected by disciplinary proceed-

²¹⁶ 424 U.S. at 335.

²¹⁷ See *Osteen v. Henley*, 13 F.3d 221, 223, 226 (7th Cir. 1993) (limiting the *Mathews* analysis under the first prong to the private interests of the accused student in a disciplinary proceeding regarding a physical altercation with two other students); *Gomes v. Univ. of Me. Sys.*, 365 F. Supp. 2d 6, 10, 16 (D. Me. 2005) (limiting the *Mathews* analysis under the first prong to the private interests of two students accused of sexually assaulting a peer).

²¹⁸ See *SAMPSON*, *supra* note 4, at 8 (acknowledging that if an accused perpetrator is not sanctioned, a victimized student may decide to transfer or drop out of school for fear of encountering the perpetrator on campus). Reputational harm could also accrue to a victim who is seen as lodging a false accusation against a peer. See *Reardon*, *supra* note 2, at 396 (noting frequent skepticism toward students’ sexual assault complaints).

²¹⁹ See *Theriault*, 353 F. Supp. 2d at 8. In an analogous context, in 1982 the U.S. Supreme Court in *Santosky v. Kramer* explained that in assessing the due process rights of parents in parental rights termination proceedings arising from accusations of persistent neglect, the interests of the child could not be considered. See 455 U.S. at 759. The Court acknowledged that the child was certainly “deeply interested” in a “normal family home” but ruled that in an assessment of the adequacy of the fact-finding procedures, the focus must “emphatically” be on the parents because the state and the parents, not the child and the parents, are directly adverse in the proceeding. *Id.* at 759–60; see *supra* notes 55, 88. Additionally, the victimized student does not likely possess a constitutional right to due process in the proceeding against the alleged perpetrator, so the *Mathews* test will not apply. See *id.*

²²⁰ See, e.g., *Osteen*, 13 F.3d at 226; *Gorman v. Univ. of R.I.*, 837 F.2d 7, 14 (1st Cir. 1988).

²²¹ See *Gomes*, 365 F. Supp. 2d at 16; *Saurack*, *supra* note 24, at 785.

ings that could result in sanctions, such as suspension or expulsion.²²² Such significant private interests would appear to demand a concomitantly high standard of proof in any state action seeking to infringe upon those interests.²²³ Indeed, the Supreme Court has indicated that the clear and convincing evidence standard is intended for those circumstances in which particularly important rights are at stake, beyond the mere financial loss associated with the typical civil lawsuit.²²⁴ College students confronting disciplinary action may indeed face more than mere financial loss because their reputation may also be harmed.²²⁵

Yet the Supreme Court has typically reserved the clear and convincing evidence standard for cases in which fundamental liberty interests are foreclosed.²²⁶ For example, the Court has described the interests at stake for parents facing permanent termination of their parental rights as a “unique kind of deprivation” in which the state seeks permanent termination of an interest “far more precious than property”—a parent’s legal relationship to his or her natural children.²²⁷ Likewise, involuntary civil commitment for an indefinite period constitutes a perhaps permanent deprivation of an individual’s physical liberty.²²⁸ College and university students in disciplinary proceedings have a liberty interest in their reputation and the freedom a good reputation affords in pursuing further educational and career goals.²²⁹ As compared to permanent civil commitment or the irrevocable termination of one’s parental rights, the reputational interest is not quite so fundamental.²³⁰

²²² See *Gomes*, 365 F. Supp. 2d at 16 (acknowledging that disciplinary penalties for campus sexual assault could have a “major immediate and life-long impact on [the students’] personal life, education, employment, and public engagement”); *Smyth*, 398 F. Supp. at 797 (describing the power of disciplinary sanctions to “shatter career goals”). Specific penalties for a finding of sexual assault vary from school to school. See Anderson, *supra* note 161, at 988 (describing the broad range of sanctions usually available under college and university disciplinary codes, including “fines, reprimands, negative notations on one’s record, probation, suspension, or expulsion”). Although acts of sexual assault can lead to expulsion under school disciplinary codes, it is disputed how often they actually do. See Lombardi, *supra* note 8 (describing an examination of a database maintained by the U.S. Department of Justice, Office of Violence Against Women tracking sexual assault proceedings at colleges and universities across the country and finding that colleges had expelled only ten to twenty-five percent of students found guilty of sexual assault).

²²³ See *Winship*, 397 U.S. at 371 (Harlan, J., concurring).

²²⁴ See, e.g., *Santosky*, 455 U.S. at 747–48; *Addington v. Texas*, 441 U.S. 418, 424 (1979).

²²⁵ See *Gomes*, 365 F. Supp. 2d at 16; *Smyth*, 398 F. Supp. at 797.

²²⁶ See *Santosky*, 455 U.S. at 747–48; *Addington*, 441 U.S. 427.

²²⁷ *Santosky*, 455 U.S. at 758–59.

²²⁸ See *Addington*, 441 U.S. at 425–26.

²²⁹ See *Goss*, 419 U.S. at 576; *Smyth*, 398 F. Supp. at 797.

²³⁰ See *Santosky*, 455 U.S. at 758–59; *Addington*, 441 U.S. 425–26; cf. *Tigrett v. Rectors & Visitors of the Univ. of Va.*, 290 F.3d 620, 628 (4th Cir. 2002) (holding that a disciplinary

Indeed, the Supreme Court has held that a state's deprivation of an individual's interest in reputation alone is not sufficient even to require due process protections unless a property interest is also in jeopardy.²³¹ Public school students are entitled to due process protections because *both* liberty *and* property interests are implicated in school disciplinary proceedings.²³² If, under the due process framework, the property interest is actually the more significant interest at risk of deprivation for public school students, the preponderance of the evidence standard may be sufficient to safeguard that interest.²³³ Furthermore, even if the individual student interests are afforded significant weight, approaching the interests of the natural parents in *Santosky* or the individual facing involuntary civil commitment in *Addington*, the other two *Mathews* factors weigh against the application of the higher clear and convincing evidence standard.²³⁴

2. *Mathews* Factor Two: The Risk of Erroneous Deprivation of the Student's Interests

The second consideration in the *Mathews* balance is the risk of erroneous deprivation of a student's private interest in continued education.²³⁵ In *Mathews*, the Court described the second factor as an inquiry into the "fairness and reliability" of the existing procedures, and the "probable value, if any, of additional procedural safeguards."²³⁶ The second *Mathews* factor accordingly considers the risk that an erroneous deprivation of the individual's private interest will result from the use of a particular procedure and whether an alternative procedure would reduce that risk.²³⁷

Certainly, the risk of erroneous deprivation of the accused student's private interests should be minimized.²³⁸ In the context of cam-

proceeding's potential reputational harm to students, without an accompanying deprivation of a property interest, did not warrant due process protections).

²³¹ See *Siegert v. Gilley*, 500 U.S. 226, 233–34 (1991); *Paul v. Davis*, 424 U.S. 693, 711–12 (1976); see also *Tigrett*, 290 F.3d at 628.

²³² See *Goss*, 419 U.S. 576; *Tigrett*, 290 F.3d at 628; *supra* notes 36–55 and accompanying text.

²³³ See *Siegert*, 500 U.S. at 233; *Addington*, 441 U.S. at 423 (describing the preponderance of the evidence standard as most often applied in civil suits in which losses are remediable with money damages).

²³⁴ See *Santosky*, 455 U.S. at 747–48; *Addington*, 441 U.S. at 424; *supra* notes 226–229 and accompanying text; *infra* notes 235–280 and accompanying text.

²³⁵ 424 U.S. at 335; see *Gomes*, 365 F. Supp. 2d at 16.

²³⁶ 424 U.S. at 343.

²³⁷ See *Santosky*, 455 U.S. at 761; *Mathews*, 424 U.S. at 343.

²³⁸ See *Saurack*, *supra* note 24, at 785.

pus sexual assault, however, the preponderance of the evidence standard does not present an impermissibly high risk of the erroneous sanctioning of innocent students because of the limited evidence typically available in sexual assault adjudications.²³⁹ Sexual assaults on college campuses are most often committed by someone the victim knows and are often perpetrated in private, in the context of a date or other social setting, so the existence of corroborating eyewitness accounts is unlikely.²⁴⁰ Additionally, perpetrators of acquaintance- or date-rape will often rely on alcohol or other drugs, rather than physical force or a weapon, to subdue the victim, so obvious physical injuries to the victim are not common.²⁴¹ Furthermore, an individual's typical emotional reactions to sexual assault—including shame, shock, and fear of retaliation, may prevent timely reporting of the assault or collection of physical evidence of sexual contact.²⁴² And in cases in which the primary issue is consent, evidence of sexual contact will not even be determinative.²⁴³ Most college sexual assault adjudications thus center on a disciplinary committee's assessment of the relative credibility of the complaining and accused student.²⁴⁴ One commentator has also opined that college disciplinary committees are often so attuned to the interests at stake for the accused student that many committees may unwittingly require clear and convincing evidence to justify a finding of fault, regardless of the stated standard of proof.²⁴⁵ Thus, in most college sex-

²³⁹ See Tenerowicz, *supra* note 8, at 661 (describing evidentiary limitations in campus sexual assault cases).

²⁴⁰ See KARJANE ET AL., *supra* note 1, at 2; Reardon, *supra* note 2, at 396; Tenerowicz, *supra* note 8, at 661.

²⁴¹ Reardon, *supra* note 2, at 397–98; Tenerowicz, *supra* note 8, at 661.

²⁴² See SAMPSON, *supra* note 4, at 8; Reardon, *supra* note 2, at 398.

²⁴³ Tenerowicz, *supra* note 8, at 661.

²⁴⁴ See *id.*

²⁴⁵ Long, *supra* note 25, at 81. Such over-identification with the interest of the accused student may be especially likely in cases in which the committee doubts that a sexual assault has actually occurred, such as when consent, not the identity of the perpetrator, is the primary issue. See Reardon, *supra* note 2, at 396. In such situations, concerns for the interests of the accused student will not be off-set by concerns for the interests of the victimized student because the complaining witness will not be seen as a victim of sexual assault at all. See *id.* Another scholar has expressed concern that historical biases encouraging skepticism of sexual assault complaints may cause disciplinary committees to impose a higher standard of proof for sexual assault proceedings than other types of cases. See Anderson, *supra* note 161, at 1015–16. Such bias concerns are premised on the law's long tradition of doubting the claims of female victims of sexual assault. See, e.g., 3 JOHN HENRY WIGMORE, A TREATISE OF THE ANGLO-AMERICAN SYSTEM OF EVIDENCE IN TRIALS AT COMMON LAW § 924a (3d ed. 1940), excerpted in GEORGE FISHER, EVIDENCE 311 (2d ed. 2008) (quoting the American Bar Association Committee on the Improvement of the Law of Evidence's 1937–1938 unanimous recommendation that any woman complainant alleging a crime of

ual assault adjudications, the risk is not that the accused student will be found responsible based on *too little* evidence.²⁴⁶ Rather, because disciplinary committees expect more physical or testimonial evidence than could ever likely be produced in a case of acquaintance- or date-based sexual assault, a higher evidentiary standard is more likely to result in too few guilty students being held accountable.²⁴⁷

Furthermore, when the risk of error of a particular procedure is analyzed under the second *Mathews* prong, additional analysis is required when the procedure at issue is the standard of proof itself.²⁴⁸ Further inquiry is required because inherent in a standard of proof is the acknowledgement that some risk of error always exists in a tribunal's fact-finding process.²⁴⁹ Consequently, a standard of proof will be deemed to "reduce" the risk of error under the second *Mathews* prong if the risk of error is properly allocated between the two parties.²⁵⁰ Thus, in the case of school disciplinary proceedings, one must ask whether the particular standard of proof at issue, here preponderance of the evidence, adequately guards against the risk of error by properly allocating that risk between the student and the school.²⁵¹

In the context of disciplinary proceedings for a charge of sexual assault, an error can occur in either direction, with grave consequences for either the individual or the institution.²⁵² On one hand, an erroneous conclusion by the disciplinary board could result in sanctioning an innocent student for the perpetration of a sexual assault.²⁵³ Such sanctions could impair a student's property interest in continuing education, and the stigma that could stem from a finding of guilt would likely harm the student's emotional well-being and reputation in the com-

sexual assault be examined by an experienced psychiatrist in order to ensure the woman did not suffer from "a mental or moral delusion"); Anderson, *supra* note 161, at 948–49 (describing the Model Penal Code's cautionary instruction for juries in sexual assault cases as codifying seventeenth century English jurist Matthew Hale's view that rape is an accusation requiring special caution in trials because it is sometimes brought by "malicious and false witnesses").

²⁴⁶ See Reardon, *supra* note 2, at 396; Tenerowicz, *supra* note 8, at 661.

²⁴⁷ See Long, *supra* note 25, at 81; Tenerowicz, *supra* note 8, at 661. Similarly, prosecutors are often reluctant to pursue cases of acquaintance-based sexual assault out of concern that the jury will expect more evidence of injury or a struggle than would likely exist in such a case. See Anderson, *supra* note 161, at 989 & n.263.

²⁴⁸ See *Santosky*, 455 U.S. at 761; *Winship*, 397 U.S. at 370 (Harlan, J., concurring).

²⁴⁹ See *Santosky*, 455 U.S. at 761; *Winship*, 397 U.S. at 370 (Harlan, J., concurring).

²⁵⁰ See *Santosky*, 455 U.S. at 761.

²⁵¹ See *id.*

²⁵² See *Winship*, 397 U.S. at 370–71 (Harlan, J., concurring).

²⁵³ See *id.*

munity.²⁵⁴ On the other hand, an error in the opposite direction could allow a student who had in fact sexually assaulted a peer to remain in the campus community unpunished.²⁵⁵ Such a result could harm the school and its educational mission by exposing other students to the risk of harm by a perpetrator who is not deterred from committing future acts of sexual assault and by allowing a hostile environment to persist for the victim.²⁵⁶ Because the interests at stake are significant for both the accused student and the school in the event of an erroneous finding of fact, the preponderance of the evidence standard is most appropriate under the second *Mathews* factor because it allocates the risk of error equally between the accused student and the school.²⁵⁷

3. *Mathews* Factor Three: Schools' Interest in Responding to Sexual Assault on Campus

The third *Mathews* factor looks to the "public interests" that would be affected by requiring alternative or additional procedures in a particular state action.²⁵⁸ Public interests under the third *Mathews* prong include both substantive and administrative costs.²⁵⁹ In a due process

²⁵⁴ See *Gomes*, 365 F. Supp. 2d at 16; Saurack, *supra* note 24, at 785.

²⁵⁵ See *Winship*, 397 U.S. at 370 (Harlan, J., concurring); SAMPSON, *supra* note 4, at 8.

²⁵⁶ See SAMPSON, *supra* note 4, at 8 (noting the likelihood that student victims will leave school out of fear of encountering the perpetrator on campus in shared classes, dining halls, or dormitories); David Lisak & Paul M. Miller, *Repeat Rape and Multiple Offending Among Undetected Rapists*, 17 VIOLENCE & VICTIMS 73, 73, 80 (2002) (assessing a sample of men who had never been involved with the criminal justice system whose self-reported acts met legal definitions of rape and finding that two-thirds of the men had perpetrated multiple rapes and more than half had perpetrated other acts of interpersonal violence).

²⁵⁷ See *Addington*, 441 U.S. at 423. If a higher standard of proof were used, such as clear and convincing evidence, the likelihood of erroneous findings in favor of guilty students would be greater than the likelihood of erroneous findings wrongfully punishing innocent students. See *Winship*, 397 U.S. at 370–71 (Harlan, J., concurring). Thus the school would face a higher risk of harm from erroneous conclusions in disciplinary proceedings. See *id.* In light of the value society places on ensuring safe and effective learning environments for all students, such asymmetrical risk of harm to the school would not likely be tolerable. See, e.g., Title IX, Education Amendments of 1972 § 901, 20 U.S.C. § 1681 (2006); cf. *Winship*, 397 U.S. at 372 (Harlan, J., concurring) (describing society's willingness to accept an asymmetrical risk of error in the criminal context because the harm of punishing an innocent person with criminal sanctions is seen as much greater than the harm to society of allowing a guilty person to go unpunished); *supra* notes 111–122 and accompanying text (describing society's toleration for a higher risk of false findings favoring guilty persons in criminal trials because of the fear of depriving otherwise innocent persons of their personal liberty).

²⁵⁸ *Mathews*, 424 U.S. at 347.

²⁵⁹ See *id.* at 348. For example, in *Santosky*, the Supreme Court identified the state's substantive interest in parental rights termination proceedings as the "*parens patriae*" interest

analysis of school disciplinary proceedings, courts interpret the third *Mathews* factor as accounting for the interests at stake for the school in departing from existing procedures.²⁶⁰ Substantively, schools have an interest in promoting their educational mission by embodying fundamental democratic values in their disciplinary proceedings and ensuring a safe learning environment for all students.²⁶¹ Administratively, schools have an interest in preserving their limited resources through disciplinary proceedings that are not highly formalistic or difficult to implement.²⁶²

A school's interest in promoting and protecting its educational mission weighs heavily against the use of the clear and convincing standard.²⁶³ Schools have a substantive interest in utilizing disciplinary procedures that promote fundamental fairness and teach students that misconduct will result in proportional sanctions.²⁶⁴ If a school sanctions a disproportionate number of innocent students, the student body's faith that the school's procedures are fair will diminish and the educational value of the school's procedures will be extinguished.²⁶⁵ Conversely, if the disciplinary procedures permit a disproportionate number of perpetrators of sexual assault to remain on campus unsanctioned, the school's failure to punish guilty students will send a message to the campus community that acts of sexual assault are not taken seriously.²⁶⁶ The preponderance of the evidence standard thus best accommodates a school's concern for erroneous findings in either direction because the standard allocates the risk of error equally between

in the welfare of children. See 455 U.S. at 766. The Court identified the state's administrative interest as preventing an increase in the cost and burden of such proceedings. *Id.*

²⁶⁰ See *Gorman*, 837 F.2d at 14–15; *Gomes*, 365 F. Supp. 2d at 16–17.

²⁶¹ See *Goss*, 419 U.S. at 580; Saurack, *supra* note 24, at 785–86 (describing the “intrinsic” values associated with school disciplinary proceedings such as the sense of autonomy and self-respect provided to a student who is able to participate meaningfully in a fair process); see also 34 C.F.R. § 106.31(a) (2011) (describing schools' obligation to ensure a safe and non-discriminatory learning environment under Title IX); Paul E. Rosenthal, Note, *Speak Now: The Accused Student's Right to Remain Silent in Public University Disciplinary Proceedings*, 97 COLUM. L. REV. 1241, 1247 (1997) (“Sexual assault, if unchecked, severely undermines the institution's central mission to educate its students.”).

²⁶² See *Goss*, 419 U.S. at 583; *Gorman*, 837 F.2d at 15.

²⁶³ See Berger & Berger, *supra* note 206, at 353.

²⁶⁴ See *Goss*, 419 U.S. at 580; Berger & Berger, *supra* note 206, at 353.

²⁶⁵ See Berger & Berger, *supra* note 206, at 353; Saurack, *supra* note 24, at 786.

²⁶⁶ See Berger & Berger, *supra* note 206, at 353; Saurack, *supra* note 24, at 786. In light of the limited evidence typically available in campus sexual assault cases, the use of the clear and convincing standard could produce exactly this result. See Tenerowicz, *supra* note 8, at 661.

the parties.²⁶⁷ Furthermore, schools have a substantive interest in promoting a learning environment free from discrimination and violence.²⁶⁸ A school that fails to sanction students for acts of sexual assault faces the risk that those students who are not punished will commit further acts of violence on campus.²⁶⁹ Such a result could endanger other students and perpetuate a discriminatory and hostile learning environment.²⁷⁰ Thus, by guarding against not only those erroneous outcomes that wrongfully punish innocent students, but also those that exonerate guilty students, the preponderance of the evidence standard accommodates schools' substantive interest in promoting a safe and non-discriminatory learning environment.²⁷¹

Additionally, the clear and convincing evidence standard could impose costly administrative burdens on colleges and universities by promoting increasingly formalistic campus disciplinary proceedings.²⁷² In one sense, when a hearing procedure is already in place, the imposition of a new standard of proof would not seem to impose a significant additional burden on a tribunal.²⁷³ Courts have consistently emphasized, however, that schools should not be required to provide a "full-dress judicial hearing" or to administer highly technical proceedings whose

²⁶⁷ See *Addington*, 441 U.S. at 423; *supra* notes 118–122 and accompanying text (describing the preponderance of the evidence standard as the standard of proof applied to cases in which the comparative social harm of an erroneous outcome favoring either party is approximately equal).

²⁶⁸ See Hogan, *supra* note 15, at 280, 283; Rosenthal, *supra* note 261, at 1247 & n.29.

²⁶⁹ See Lisak & Miller, *supra* note 256, at 73, 80 (reporting a rate of recidivism over sixty percent among a sample of male commuter-university students who had committed acts meeting legal definitions of sexual assault but had never been criminally sanctioned).

²⁷⁰ See 2001 GUIDANCE, *supra* note 10, at 12; Lisak & Miller, *supra* note 256, at 80.

²⁷¹ See 20 U.S.C. § 1682 (2006); *Addington*, 441 U.S. at 423; Berger & Berger, *supra* note 206, at 353.

²⁷² See *Gorman*, 837 F.2d at 15; Hogan, *supra* note 15, at 282–83. Schools also have a fiscal interest in complying with the Dear Colleague Letter, for schools that fail to respond adequately and swiftly to sexual assault on campus could face legal and monetary liability through enforcement actions by OCR, lawsuits by victimized students, and significant public scrutiny. See 20 U.S.C. § 1682; *Davis v. Monroe Cnty. Bd. of Educ.*, 526 U.S. 629, 643 (1999) (extending the implied private right of action under Title IX to enable students to sue their schools for money damages for failure to respond adequately to peer-on-peer sexual harassment or assault); *Franklin v. Gwinnett Cnty. Pub. Sch.*, 503 U.S. 60, 76 (1992); *Cannon v. Univ. of Chi.*, 441 U.S. 677, 709 (1979); 34 C.F.R. § 106.4(a) (2011); 2001 GUIDANCE, *supra* note 10, at 4, 12; Jordi Gassó, *DOE's Office for Civil Rights to Investigate Yale for "Hostile Sexual Environment,"* YALE DAILY NEWS (Mar. 31, 2011), www.yaledailynews.com/news/2011/mar/31/breaking-does-office-civil-rights-investigate-yale/ (providing an example of negative press attention following a complaint filed with OCR by sixteen Yale University students and alumni alleging that the school had failed to respond adequately to incidents of sexual assault and harassment on campus).

²⁷³ See *Santosky*, 455 U.S. at 767.

costs outweigh their benefits.²⁷⁴ A clear and convincing evidence requirement could burden a school's limited investigatory and adjudicatory resources by requiring a school to present evidence of significant quantity and quality in order to meet its burden.²⁷⁵ Schools may then feel obligated to employ counsel to marshal and present the necessary evidence to the disciplinary committee.²⁷⁶ A heightened standard of proof could also open a university to challenges to other evidentiary procedures utilized by the disciplinary committee.²⁷⁷ Given that most disciplinary committees are made up of lay fact-finders who must serve as both judge and jury in a given proceeding, courts are extremely reluctant to require schools to utilize formal rules of evidence.²⁷⁸ Indeed, the implementation of such complex rules could overwhelm the already limited resources of most public colleges and universities.²⁷⁹ Thus, under the third *Mathews* prong as well, the preponderance of the evidence standard better accommodates schools' substantive and administrative interests in the context of student-on-student sexual assault adjudications than would the higher standard of clear and convincing evidence.²⁸⁰

CONCLUSION

The pervasiveness of sexual assault on college campuses across the United States is of significant concern for university officials and students alike. Title IX seeks to ameliorate this problem by requiring both public and private colleges to respond promptly and equitably to student-on-student sexual assault. The Department of Education Office for Civil Rights recently clarified that Title IX requires all colleges to apply the preponderance of the evidence standard of proof in disciplinary hearings for sexual assault complaints in order to safeguard victimized students' right to an education free from sex-based discrimination and violence. This clarification raises the question whether public colleges may comply with this requirement while also accommodating

²⁷⁴ See *Goss*, 419 U.S. at 583; *Dixon*, 294 F.2d at 159; *Gomes*, 365 F. Supp. 2d at 16–17.

²⁷⁵ See *Gorman*, 837 F.2d at 15; Long, *supra* note 25, at 80.

²⁷⁶ See Stoner & Lowery, *supra* note 161, at 47 (describing university counsels' participation in student disciplinary proceedings as "rare").

²⁷⁷ See, e.g., *Henson v. Honor Comm. of Univ. of Va.*, 719 F.2d 69, 73 (4th Cir. 1983) (addressing law student's due process claim against his school for failure to provide disciplinary proceedings adhering to formal rules of evidence).

²⁷⁸ See *Smyth*, 398 F. Supp. at 800; Saurack, *supra* note 24, at 798.

²⁷⁹ See *Gorman*, 837 F.2d at 15; *Gomes*, 365 F. Supp. 2d at 16.

²⁸⁰ See *Gorman*, 837 F.2d at 15; Berger & Berger, *supra* note 206, at 353; Hogan, *supra* note 15, at 278; Rosenthal, *supra* note 261, at 1247.

accused students' right to procedural due process under the Fourteenth Amendment of the U.S. Constitution. By applying the *Mathews v. Eldridge* due process balancing test, this Note demonstrates that the preponderance of the evidence standard, more so than the higher clear and convincing evidence standard, best accommodates procedural due process in public school adjudications of sexual assault complaints. The preponderance of the evidence standard properly balances the accused student's interests in reputation and continued education with the school's equally weighty concerns for promoting just proceedings and a safe learning environment along with preserving scarce administrative resources. The preponderance of the evidence standard also best allocates the risk of error between the accused student and the school in light of the limited evidence commonly available in campus sexual assault cases. Thus, by complying with Title IX and implementing the preponderance of the evidence standard, colleges and universities will adequately safeguard the rights of both accused and victimized students in the difficult context of sexual assault on campus.

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