

To: Higher Education and Employment Advancement Committee
Subject: Raised House Bill #5376, “An Act Concerning Affirmative Consent”
From: William J. O’Sullivan, Esq.
Date: February 26, 2016

My name is William O’Sullivan, and I am a litigation attorney who has practiced law in Connecticut since 1990. This written testimony is about a proposed bill regarding college disciplinary proceedings that involve allegations of sexual misconduct. As I understand it, the bill would require proof that the complaining witness had given “affirmative consent” to the sexual contact at issue, as defined in the bill, in order to exonerate the accused.

The question arises whether or not this type of provision would effectively – and unfairly – shift the burden of proof upon the accused to establish innocence. At least for public colleges and universities, constitutional principles, under the Due Process Clause, apply to the issue of who has the burden of proof, and to what level. For purposes of your deliberations, I wish to briefly summarize those principles.

Everyone knows that in a criminal case, the government must prove its case “beyond a reasonable doubt.” The scales are tipped this way because the stakes for the defendant — possible incarceration, other restrictions on liberty, and the stigma of a criminal conviction — are so severe.

At the lower end of the spectrum is the standard of proof in most civil actions between private parties, lawsuits such as personal injury cases, contract cases and property disputes. In those cases, the plaintiff must prove his case by a “preponderance of the evidence.” This means, in effect, “more likely than not,” or 51% likelihood.

In between is an intermediate standard of proof, called proof by “clear and convincing evidence.” This standard is considered roughly the midpoint between “beyond reasonable doubt” and “preponderance of the evidence.”

The Supreme Court has held that this standard is required by the Constitution “in government-initiated proceedings that threaten the individual involved with a significant deprivation of liberty or stigma.” Santosky v. Kramer, 455 U.S. 745, 755 (1982). Examples include cases in which a defendant faces the termination of parental rights (Santosky); involuntary civil commitment (Addington v. Texas, 441 U.S. 418 (1979)); deportation (Woodby v. INS, 385 U.S. 276 (1966)) or loss of citizenship (Schneiderman v. U.S., 320 U.S. 118 (1943)). To the best of my knowledge, no court has squarely addressed the issue of what standard of proof applies to college disciplinary proceedings based on allegations of sexual misconduct.

Consider the liberty interests that are at stake in proceedings of this type. The range of possible penalties includes suspension and expulsion. That means being temporarily, and perhaps permanently, barred from the student’s on-campus home; loss of access to campus facilities and activities; forced separation from friends and faculty; and the enormous stigma of having suffered these deprivations due to sexual misconduct.

Sanctions of this type are not comparable to incarceration, and so it would not be reasonable to compare college disciplinary proceedings to criminal cases that require proof of guilt beyond a reasonable doubt. But neither can they be compared to the typical lawsuit in which the defendant is at risk for only a money judgment. When a person is at risk of being adjudicated a sex offender, uprooted and barred from his college campus, that implicates the kind of “significant deprivation of liberty or stigma” that I believe requires the college administration to prove guilt by clear and convincing evidence.

I just learned that a few years ago, the legislature passed a bill (codified at C.G.S. § 10a-55m), that requires college administrators to use the lower “preponderance of the evidence” standard in disciplinary proceedings involving allegations of sexual misconduct. (This, I assume, was prompted by the U.S. Department of Education, Office for Civil Rights (“OCR”)'s 2011 “Dear Colleague” letter to college leaders notifying them that the OCR interprets Title IX as requiring that standard.)

Contrary to the OCR’s position on this, I believe the “preponderance” standard, as applied to proceedings of this type, is unconstitutional, for the reasons stated above. (That position is shared by many legal scholars and commentators. *See* the attached letter from the American Association of University Professors to the OCR, voicing the same position on the application of this standard to college professors.) I therefore think it highly likely that, if this part of C.G.S. § 10a-55m were challenged on constitutional grounds, it would be overturned.

Constitutionally suspect as the existing statute is, any amendment that would take the further step of shifting the burden of proof entirely, requiring the accused to affirmatively disprove his guilt, would be even more so. I urge all committee members to keep these principles in mind when you consider the issue of “affirmative consent.”

William J. O'Sullivan, Esq.
83 Lavender Lane
Rocky Hill, CT 06067
860-258-1993 (w)



August 18, 2011

Ms. Russlynn Ali
Assistant Secretary for Civil Rights
Office for Civil Rights
United States Department of Education
Lyndon Baines Johnson Department of Education Building
400 Maryland Ave SW
Washington, DC 20202-1100

Dear Assistant Secretary Ali:

We write in reference to the “Dear Colleague” letter of April 4, 2011, and to applaud your efforts to address systemic gender inequalities in the US educational system. By instructing educational institutions to develop clear procedures to address sexual harassment and violence, the Office of Civil Rights is helping to create a more equitable environment for women. As an organization, the AAUP has long sought to address gender inequity in the profession, and we see “Dear Colleague” as a positive step in this work.

Sexual harassment and sexual violence are not only women’s issues. Too often addressing sexual harassment is seen only as a means of protecting women. As professors, we are concerned with addressing systemic gender inequities by educating both men and women about fairness and justice. By educating men and women on our campuses about sexual harassment and sexual violence, and by educating every member of our campus communities—from the Board of Trustees to students—we will create a level playing field for all. “Dear Colleague” is a necessary and welcome step forward in this process. In particular, the assertions that all parties be notified of the outcome of a complaint and that institutional action be “reasonably prompt” are crucial to addressing gender inequity.

While we strongly support the bulk of “Dear Colleague,” share your commitment to “providing all students with an educational environment freed from discrimination,” and agree that “the sexual harassment of students, including sexual violence, interferes with students’ right to receive an education,” we are concerned about two areas where academic freedom may potentially be violated. The first concern is the “preponderance of evidence” standard, and the second is the potential violation of academic freedom for those who teach courses with sexuality or sexual content.

Given the seriousness of accusations of harassment and sexual violence and the potential for accusations, even false ones, to ruin a faculty member’s career, we believe that the

“clear and convincing” standard of evidence is more appropriate than the “preponderance of evidence” standard. Our colleague Gregory Scholtz, Associate Secretary and Director of AAUP’s Department of Academic Freedom, Tenure, and Governance, articulated this to you in his June 27th, 2011, letter:

Since charges of sexual harassment against faculty members often lead to disciplinary sanctions, including dismissal, a preponderance of the evidence standard could result in a faculty member’s being dismissed for cause based on a lower standard of proof than what we consider necessary to protect academic freedom and tenure. We believe that the widespread adoption of the preponderance of evidence standard for dismissal in cases involving charges of sexual harassment would tend to erode the due-process protections for academic freedom.

We echo his concerns. While clear policy statements and timely responses are key for both the complainant and the accused, preserving a higher standard of proof is vital in achieving fair and just treatment for all. We urge you to reconsider “the preponderance of evidence” standard.

We strongly agree with and support the statements from “Dear Colleague” that “schools need to ensure that their employees are trained so that they know to report harassment to appropriate school officials, and so that employees with the authority to address harassment know how to identify and report sexual harassment and violence” (6). However, the AAUP’s “Sexual Harassment: Suggested Policy and Procedures for Handling Complaints” (1995, copy enclosed) provides the following guidelines:

Such speech or conduct is reasonably regarded as offensive and substantially impairs the academic or work opportunity of students, colleagues, or co-workers. If it takes place in the teaching context, it must also be persistent, pervasive, and not germane to the subject matter. The academic setting is distinct from the workplace in that wide latitude is required for professional judgment in determining the appropriate content and presentation of academic material.

Effective training must differentiate between appropriate course content and harassment. No policy should inhibit intellectual inquiry. Courses like “The Literature of HIV/AIDS,” “Human Sexuality,” and gender studies courses that directly address sex and sexuality can make some students uncomfortable. Even a first-year writing class that discusses a topic like female genital mutilation or other controversial topic can create discomfort. Any training for faculty, staff, and students should explain the differences between educational content, harassment, and “hostile environments,” and a faculty member’s professional

judgment must be protected. Women's studies and gender studies programs have long worked to improve campus culture by teaching about issues of systemic gender inequity, sex, and sexuality. "Dear Colleague" should encourage discussion of topics like sexual harassment both in and outside of the curriculum, but acknowledge that what might be offensive or uncomfortable to some students may also be necessary for their education.

Addressing sexual harassment, discrimination, and violence on our campuses is essential in creating a safe environment for all. By promoting equity and justice on college campuses, "Dear Colleague" contributes to a long conversation on gender equity that extends from classrooms to playing fields, from dorms to faculty offices. We hope that the Office of Civil Rights continues this dialogue in order to create equity for all in our lifetime.

Sincerely,

A handwritten signature in black ink, appearing to read "Ann E. Green". The signature is fluid and cursive, with a long horizontal stroke at the end.

Ann E. Green
Chair
Committee on Women in the Academic Profession
American Association of University Professors

A handwritten signature in black ink, appearing to read "Cary Nelson". The signature is cursive and somewhat stylized, with a long horizontal stroke at the end.

Cary Nelson
President
American Association of University Professors